Fitzroy Legal Service

Community driven justice.

Fitzroy Legal Service Submission to the Parliamentary Inquiry into Victoria's Criminal Justice System

24 September 2021

Fitzroy Legal Service acknowledges that we work on the land of the Kulin Nations. We pay our respects to the Traditional Custodians of the land, and Elders past and present.

We are grateful to our clients, colleagues and community for trusting us with their stories and for granting us permission to use and share their experiences in this document.

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Contents

1 About Fitzroy Legal Service

Fitzroy Legal Service ('FLS') was established in 1972 and is one of the oldest community legal centres in Australia. In 2019 we merged with the Darebin Community Legal Centre and now operate from three offices across Fitzroy, Reservoir and the Neighbourhood Justice Centre in Collingwood. We also deliver legal services through a range of outreaches including alcohol and other drug services, needle and syringe programs and the Medically Supervised Injecting Room, specialist youth, mental health and LGBTIQ services, a state-wide prison advice line. FLS also provides duty lawyer services at the Neighbourhood Justice Centre in Collingwood and the Heidelberg Magistrates Court.

FLS provides criminal, family, family violence and generalist legal services to socially and economically disadvantaged clients. Our focus is on people who are stigmatised and criminalised due to poverty, homelessness, childhood abuse, family violence, trauma, drug use, psycho-social disability, contact with the criminal justice system and incarceration. FLS also operates a free legal advice service on weekday evenings, which provides legal advice and limited representation regarding a range of issues including employment, tenancy, debts and infringements.

This submission, as with all of our work, draws on the experiences of our clients. It is also heavily influenced by the expert advice and experiences of the Women's Leadership Group (WLG), who are a group of women with experience of incarceration and/or criminalisation who are employed at FLS to inform and drive FLS's advocacy regarding the laws and systems that affect criminalised women. The advocacy of the WLG focuses in particular on the increasing incarceration of women, including the rise in women on remand following changes to Victoria's bail laws in 2018, as well as broadening understandings of women's experiences of incarceration and other aspects of the criminal justice system.[1] While FLS's submission has been heavily informed by the WLG, the **WLG have also made their own submission to the Inquiry. FLS endorses this submission.**

2 About this submission

Drawing on FLS's extensive experience working with criminalised and incarcerated people, this submission focuses on the terms of reference of the Inquiry:

> *(1) an analysis of factors influencing Victoria's growing remand and prison populations;*
>
> *(2) strategies to reduce rates of criminal recidivism;*
>
> *(3) an examination of how to ensure that judges and magistrates have appropriate knowledge and expertise when sentencing and dealing with offenders, including an understanding of recidivism and the causes of crime.*

2.1 Focus and structure of this submission

The Inquiry's terms of reference are very broad. Using data and client experiences as evidence, this submission focuses on the dominant trend in Victoria's criminal legal system: the significant and increasing number of people spending short periods of time in prison for charges that are connected to social problems like poverty, homelessness and family violence, and health problems like drug dependence.

Drawing on our experience, this submission describes how criminalisation and incarceration harms our clients and their families and undermines the safety of our community, and makes recommendations to address the drivers of criminalisation and incarceration. In keeping with this focus, the recommendations in this submission are directed towards:

- reducing our reliance on policing and the criminalisation of social and health problems
- building public housing not prisons
- expanding the availability of community-based and integrated services
- diverting people from contact with the criminal legal system and incarceration

[1] The WLG receives funding from the Victorian Legal Services Board and has received grants from the Inner North Community Foundation.

- reforming punitive bail laws and enhancing community-based sentencing.

Accordingly, our submission is set out as follows:

- Part 4 presents information about how the criminal legal system is currently working - caught in a cycle of carceral churn
- Part 5 outlines the impact of the current system - damaging trends of disruption and disconnection
- Part 6 examines the drivers of Victoria's crisis of incarceration and makes recommendations for reform.

2.2 Language used in this submission

This submission uses the terms 'people who experience criminalisation' and 'people who experience incarceration' (and variations on these terms). A key reason for this is to avoid entrenching a binary understanding of 'victims' as being one cohort of people and 'offenders' being another. The statistics presented in this paper, alongside the experiences of our clients, highlight that many people engaged in the criminal legal system as 'offenders' have experienced significant victimisation. These binaries can have significantly adverse consequences. For example, the *Victims of Crime Assistance Act* 1996 (Vic) which requires the Victims of Crime Assistance Tribunal to have regard to 'past criminal activity' of people seeking compensation.[2] This means that people's access to compensation for victimisation can be impacted by their history as an 'offender.

We use the term psycho-social disability, consistent with the language used in the *United Nations Convention on the Rights of Persons with Disabilities*, to describe the experience of people living with restrictions or impairments related to a broad spectrum of mental illness or health conditions. We include in this broad spectrum the experiences of people who suffer from trauma related to violence or intergenerational experience of institutional harm.

We use the terms people who use drugs and people who experience drug dependence on the basis that this is currently considered among the less stigmatising descriptors. We note that people from communities who are marginalised and criminalised because of their drug use may prefer other terms to describe themselves.

3 List of recommendations

1. That the Victorian Government amend the Residential Tenancies Act to prevent landlords evicting tenants for illegal purposes if the person has not yet been convicted or sentenced to a term of actual imprisonment.

2. That the Victorian Government review the operation of the 'spent convictions scheme' within three to five years to determine whether exceptions to the scheme are undermining its effectiveness. This review should include consideration of the 'conviction-free period' and restrictions on who can access the scheme.

3. That the Victorian Government:

- ***urgently implement recommendations in the Royal Commission into Victoria's Mental Health system to ensure there are adequate specialists in addiction medicine to treat the prison population***
- ***ensure there are no barriers to addiction specialists treating patients in prison***
- ***transfer responsibility for the administration healthcare of people in prison from the Department of Justice to the Department of Health***

[2] *Victims of Crime Assistance Act 1996* (Vic) s 54 *Matters to which the Tribunal must have regard*

- ***advocate to the Commonwealth Government so that people in prison have access to Pharmaceutical Benefits Scheme (PBS) and Medicare.***

4. ***The Victorian Government:***

   - ***legislate to ban solitary confinement.***

   - ***legislate to require that managing COVID-19 in prisons be achieved through the least restrictive means, including surveillance testing of staff and reducing the number of people in prison***

   - ***urgently address staffing and other operational issues to ensure no one is subjected to solitary confinement for these reasons.***

5. ***That the Victorian Government legislate to:***

   - ***prohibit routine strip searching***

   - ***require that the least restrictive measures be used to detect drugs and other contraband.***

6. ***That the Victorian Government:***

   - ***urgently establish and adequately resource an independent agency (or agencies) to perform the functions of a National Preventative Mechanism to oversee conditions and the treatment of people in prisons as part of implementing their obligations pursuant to OPCAT. In doing so, the Victorian Parliament must engage with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations.***

   - ***provide sustained and adequate funding to community-based organisations, including community legal centres and Aboriginal controlled organisations, to conduct advocacy and provide legal representation to people in prison with respect to their treatment in and conditions of detention.***

7. ***That the Victorian Government urgently implement recommendation 10 of the Royal Commission into Victoria's Mental Health System requiring that 'wherever possible, emergency services' responses to people experiencing time-critical mental health crises are led by health professionals rather than police'.***

   As part of implementing this recommendation, mental health crises must be considered to include health episodes relating to drug use or dependence.

8. ***That the Victorian Government, in implementing any protocol that governs interactions between police and people experiencing homelessness, ensures that outreach-based support services are to be the first responders to people experiencing homelessness who need assistance, with police attendance an absolute last resort.***

9. ***That the:***

   - ***Victorian Government repeal the offence of begging from the Summary Offences Act 1966 (Vic)***

   - ***City of Melbourne repeal local laws that penalise and overly regulate the lives of people who are homeless.***

10. ***That the Victorian Government fund community-based support services to develop and deliver family violence call-out services, including as part of co-responder models alongside Victoria Police in necessary circumstances. This should be complemented by an extensive public awareness campaign about the availability of these services.***

11. ***That the Victorian Government legislate to ensure that:***

    - ***monitoring compliance with COVID-19-restrictions, particularly stay at home directions, be led by people trained in public health, with expertise to meaningfully assess risk of infection***
    - ***when police have stopped someone in relation to public health rules, they should not be permitted to:***
        - ***execute outstanding warrants***
        - ***question them about unrelated matters, or***
        - ***conduct a search.***

12. ***That the Victorian Government legislate that police not be permitted to arrest or charge people for offences connected to the possession, use or supply of drugs for personal use within a certain distance from the Medical Supervised Injecting Room***

13. ***That the Victorian Government:***

    - ***decriminalise the use, possession and low-level trafficking of illicit drugs***
    - ***consider legalisation frameworks to regulate drug use, following an investigation of what works in other jurisdictions***
    - ***urgently redirect resources allocated to policing and enforcing the criminalisation of drug use and dependence to respond to peoples' drug-related health issues***

14. ***That the Victorian Government:***

    - ***redirect all funding currently allocated for the expansion of prisons and policing to increasing the public housing stock in Victoria***
    - ***expand the availability public housing stock in Victoria to meet demand.***

15. ***That the Victorian Government build on the work of the Royal Commission into Victoria's Mental Health System and the Parliamentary Inquiry into Homelessness in Victoria, by conducting demand modelling to ensure that there are adequate services available to address the drivers of criminalisation and incarceration.***

16. ***That the Victorian Government ensure future spending on services to address the drivers of criminalisation and incarceration goes toward services that:***

    - ***are voluntary and functionally separate from the courts and corrections***
    - ***include the provision of outreach-based case management***
    - ***are integrated with the legal assistance sector.***

17. ***That the Victorian Government enact a legislated scheme for police diversion that:***

- ***requires police to consider diversion in all eligible cases***
- ***specifies the matters to which police are not to have regard when offering diversion***
- ***requires police to record demographic information about people offered/not offered diversion which can be publicly reported.***

18. ***That the Victorian Government amend section 59 of the Criminal Procedure Act to remove the requirement that the prosecution must consent to diversion.***

19. ***That the Victorian Government legislates to ensure the eligibility requirements for drug diversion programs are flexible and reflect the evidence about addressing the health needs of people experiencing drug dependence. This should include, at a minimum removing the limits on the number of times a person can access diversion.***

20. ***That the Victorian Government reallocate funding for prisons to diversion programs in order to increase the number of diversion programs available throughout Victoria.***

21. ***That, in line with the Victorian Government's commitment to community safety, the Victorian Government amend the Bail Act 1977 (Vic) so that bail is only refused when the prosecution can show an accused's pattern of violent offending and the risk of that continuing. At a minimum, this amendment should include:***

- ***an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.***
- ***repeal of the reverse-onus provisions in the Bail Act 1977 (Vic)***
- ***repeal of the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.***

22. ***That the Victorian Government support the development of guidelines on the application of section 3A of the Bail Act.***

23. ***That the Victorian Government improve the capacity of community corrections orders to be genuinely rehabilitative and tailored to a person's individual needs, including by allowing people to identify and pursue their own priorities and engage with programs, support and treatment through a broad range of service providers.***

4 How is the system currently working? Caught in a cycle of carceral churn

The Committee's terms of reference correctly acknowledge that Victoria's prison population, and in particular the population of people on remand, is growing.

Analysis of publicly available data and our clients' experiences point to an even more concerning trend – that of a criminal legal system in which a growing number of unsentenced people are churning through prisons, a trend that is particularly pronounced for women and Aboriginal people.

4.1 A growing prison population, driven by a growing remand population

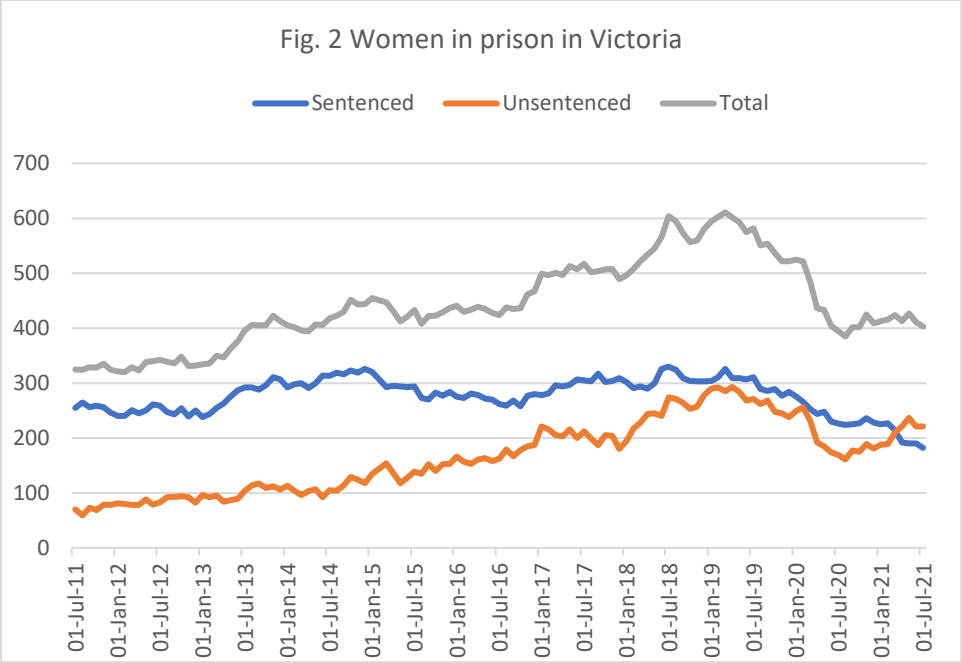
As the Committee would be well aware, the last 10 years' have coincided with significant growth in Victoria's prison population. In the last 10 years, the number of people in prison has grown by 51 per cent, and the number of people entering prison each month has grown by nearly 80 per cent.

But these statistics are far from the full story.

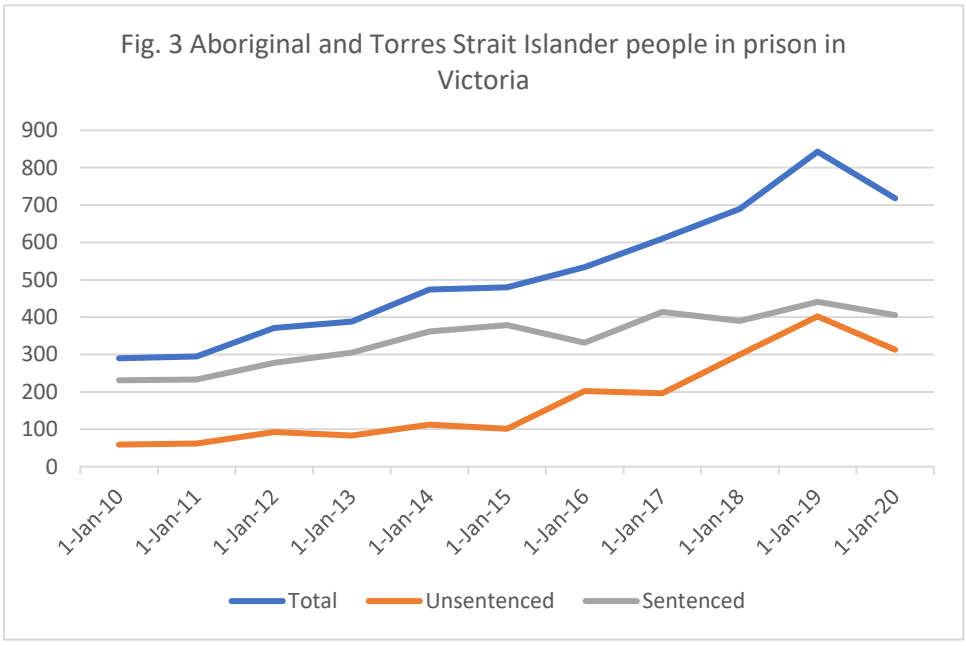
The increase in the number of people in prison has been overwhelmingly driven by people on remand and a significant decrease in the number of people in prison who have been sentenced. In fact, in the last 10 years the number of sentenced people in prison has decreased by 7 per cent, while the number of unsentenced people in prison has increased by 256 per cent (see figure 1, below).[3]

More troubling still, the number of sentenced women in prison has **decreased by 24 per cent**, while the number of unsentenced women has increased 196 per cent. In other words, there are fewer sentenced women in prison today than there were 10 years ago (see figure 2, below).[4]

[3] Corrections Victoria, *Monthly time series prisoner and offender data* (published July 2021) Table 1, online < https://www.corrections.vic.gov.au/monthly-time-series-prisoner-and-offender-data> (accessed 7 September 2021).
[4] Corrections Victoria, *Monthly time series prisoner and offender data* (published July 2021) Table 1, online < https://www.corrections.vic.gov.au/monthly-time-series-prisoner-and-offender-data> (accessed 7 September 2021)



Aboriginal people are disproportionately represented in the growing prison population. Between 30 June 2010 and 30 June 2020, the number of Aboriginal people in prison grew by 148 per cent, with a 430 per cent increase in unsentenced Aboriginal people in prison (see figure 3, below).[5]



COVID-19 has played a role in prison numbers. Figures 1, 2 and 3 all show sharp declines in the number of people in prison coinciding with the response to COVID-19. This reduction in our prison population has not been sustained, with figures 1 and 2 also show that the number of people in prison started to rise again in about August 2020 at a rate comparable to, if not faster than before. COVID-19

[5] Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 (2020) Tables 1.4 and 1.9, online < https://www.corrections.vic.gov.au/prisons/prisoner-and-offender-statistics>

4.2 Increased churn – shorter periods in custody, particularly for women

A significant proportion of people who go to prison are not there for long, indicating a high degree of churn through the prison system in relation to offending which does not warrant a term of imprisonment.

In 2019-20, 27.6 per cent of all people leaving prison spent less than 1 month in custody, up from 22.7 per cent in 2009-10. This increase was most pronounced for women. In 2009-10, 27.7 per cent of women left prison after spending less than 1 month in custody. By 2019-20, this proportion had increased to nearly half (44.5 per cent).[6]

Corrections Victoria close analysis of 2017 data related to women entering prison shows similar trends. It indicates that:

- 83 per cent of women who are remanded do not serve further imprisonment, beyond their incarceration on remand and
- 65 per cent of women spent less than 1 month in custody on remand.

This suggests that a significant proportion of women are spending just weeks in custody on remand for offences that do not attract a term of imprisonment. [7]

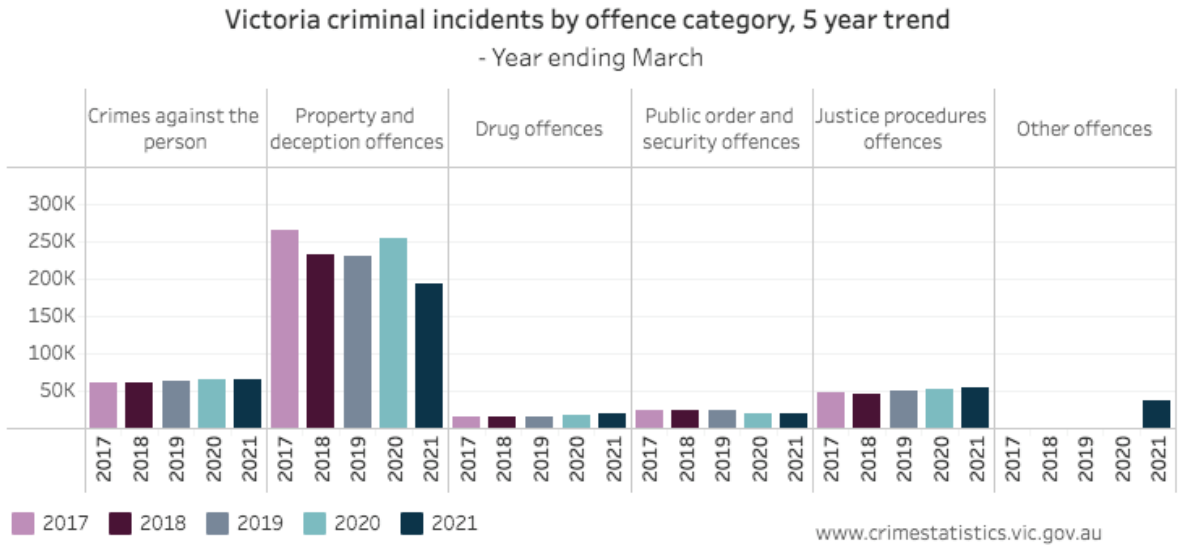
4.3 No evidence of more crime or more serious offending

There is no evidence that the significant increase in Victoria's prison and remand population is correlated with a marked increase in the incidence of crime or seriousness of offending.

Crime Statistics Agency data shows that in the 10 years until 31 December 2019 the rate of criminal incidents (per 100,000 of the Victorian population) increased by only 2.4 per cent.[8]

Moreover, detailed analysis by the Crime Statistics Agency of the 'characteristics and offending' of women in prison concluded that 'the volume of women entering prison in Victoria is not due to an increase in the number of women recorded for very serious crimes',[9] and that 'there was no specific evidence to suggest that the type of offending related to unsentenced prisoner receptions was increasing in seriousness'.[10]

[6] Corrections Victoria, Annual Prisoner Statistical profile 2009-10 – 2019-20, Table 3.9, online: < https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20)> (accessed 19 May 2021).
[7] Corrections Victoria, *Women in the Victorian prison system* (January 2019) 14-15.
[8] Crime Statistics Agency, *Historical crime data – website content, year ending December 2019*, 3, online < https://www.crimestatistics.vic.gov.au/index.php/crime-statistics/historical-crime-data/download-data-0> (accessed 19 May 2021). (While 2020 data is available it has been omitted due to the anomalous conditions of COVID-19 and the high number of fines issued for breaches of COVID-19 restrictions).
[9] Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012-2018* (November 2019) 5.
[10] Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012-2018* (November 2019) 32.



Source.[11]

4.4 Criminalised and incarcerated people experience marginalisation, stigma and barriers to equality

It is well-established that people who are criminalised and incarcerated experience significant and systemic barriers to equality in almost every part of their life. As outlined in more detail below, people who are criminalised and particularly people who are incarcerated are significantly more likely than the general community to experience financial and housing instability, barriers to employment and education. They are also more likely to have had experiences of victimisation and gendered violence and often related experiences of psycho-social disability, mental ill-health and drug use and dependence.

It is our view, which is based on decades of experience and overwhelmingly supported by the academic research, that these experiences cause, perpetuate and exacerbate our clients' criminalisation and incarceration. While we set out the general statistics below, this submission returns to these factors repeatedly – they are relevant to policing, to the existence of laws that criminalise drug dependence, homelessness and poverty, and to bail and sentencing decisions.

4.4.1 Colonisation, racism and intergenerational trauma

The rates of Aboriginal over-incarceration in Australia are a profound disgrace and reflect current and historical impacts of colonisation on Aboriginal people. These impacts are connected to intergenerational trauma that the Australian Law Reform Commission has described as contributing 'significantly to the disproportionate experience of social and economic factors that are recognised as determinants of incarceration among Aboriginal and Torres Strait Islander communities'.[12]

4.4.2 Housing instability and economic opportunity

Housing instability is common among people in prison. Recent studies suggest that one quarter of women entering prison in Victoria were homeless immediately prior to entering custody,[13] with

[11] Crime Statistics Agency, *Recorded Criminal Incidents*, online < https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-criminal-incidents-2> (accessed 24 September 2021)
[12] Australian Law Reform Commission, Pathways to Justice –An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples: Final Report(ALRC Report No 133, December 2017) 79–81. See also Vanessa Edwige and Dr Paul Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation*, report commissioned by the Bugmy Bar Book (2021)
[13] Corrections Victoria, *Women in the Victorian Prison System*, Department of Justice and Community Safety (January 2019) 9.

Aboriginal women more likely than non-Aboriginal women to be in unstable housing or homeless.[14] Australian Institute of Health and Welfare (AIHW) data similarly suggests that about one third of people entering custody were homelessness in the month prior, with Aboriginal people again more likely to be homeless or in unstable housing.[15]

Similarly, education and employment opportunity within the prison population is below the general community. According to data collected by AIHW, for one in three people going to prison, the highest level of completed schooling was Year 9 or under. In Victoria, only 24 per cent of people going to prison had completed grade 12, and only 12 per cent of Aboriginal people entering prison had finished grade 12.[16]

Despite 31 per cent of the general population aged between 20 and 64 attaining a bachelor degree or higher, only 4.4 per cent of people in prison nationally had attained a diploma, and 1.5 per cent had attained a bachelor degree. The majority (56 per cent) of people entering prison had no formal education other than schooling.

The proportion of people in prison who are unemployed is also much higher than the general population: nearly two-thirds (65 per cent) of people entering Victorian prisons were unemployed or unable to work in the 30 days prior to entering prison. [17]

4.4.3 Experiences of victimisation and gender-based violence

People who are criminalised and incarcerated are significantly more likely to have been victimised in their childhood and adult life, and this is more pronounced for women and particularly Aboriginal women.

A 2015 survey of people in prison in Victoria shows that 65 per cent of women and 52 per cent of men reported having experienced family violence at some point in their lives.[18] Similarly, Crime Statistics Agency analysis shows that about half of all women entering prison are recorded as the victim of an offence in the 2 years prior to entering prison (which about 30 per cent of women being recorded as the victim of family violence).[19]

These statistics are highly likely to reflect under-reporting, including those that rely on people reporting their victimisation to police in light of the low-levels of trust by communities who are over-policed and under-protected. Other research suggests that up to 90 per cent of women in prison have been the victims of sexual abuse or other forms of violence in childhood.[20] This is consistent with observations made by the Royal Commission into Family Violence that a 'substantial majority' of the women they consulted with in prison had experienced family violence.[21]

It is also consistent with findings from our Women Transforming Justice project,[22] which indicated that approximately 60 per cent of women referred to the project for legal representation and social support regarding criminal charges identified family violence and trauma as current needs.

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[14] Corrections Victoria, *Women in the Victorian Prison System*, Department of Justice and Community Safety (January 2019) 9.
[15] Australian Institute of Health and Welfare, The health of Australia's prisoners 2018 (2019) 22-23.
[16] Australian Institute of Health and Welfare, The health of Australia's prisoners 2018 (2019), Data tables: 02 – Socioeconomic factors – National
[17] Australian Institute of Health and Welfare, The health of Australia's prisoners 2018 (2019), Data tables: 02 – Socioeconomic factors – States & Territories
[18] Corrections Victoria, *Women in the Victorian prison system* (January 2019) 12 (with 52 per cent of women reporting experiences of victimisation in childhood and adulthood compared with 26 per cent of men).
[19] Crime Statistics Agency, *Characteristics and offending of women in prison* (November 2019) 19-20.
[20] It is difficult to be certain about these figures given routine underreporting and delays in reporting: see also Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, Final report: Volume 2, Nature and causes (2017) 10, 67-68 (noting the significant barriers to understanding the prevalence of child sexual abuse in institutional contexts, including under-reporting and delays with reporting).
[21] Victoria, Royal Commission into Family Violence, *Report and recommendations* (2016) vol 5, 239.
[22] Women Transforming Justice was a pilot project run in 2019 and 2020 managed by Fitzroy Legal Service in partnership with Flat Out and the Law and Advocacy Centre for Women. Women Transforming Justice provided integrated legal representation and assertive outreach case

The rates of victimisation among criminalised and incarcerated people can be contrasted with 2017 survey data regarding the prevalence of family violence victimisation in the general population, which shows that 5.4 per cent of adults in Victoria (4.2 per cent of men and 6.6 per cent of women) had experienced family violence in the 2 years prior to being surveyed.[23] Like the prison population, family violence in the broader population is experienced disproportionately by women.

4.4.4 Psycho-social disability, mental illness and drug use or dependence

People who are criminalised and incarcerated disproportionately experience psycho-social disability and mental ill-health. Nationally about 65 per cent of women and 35 per cent of men in prison report a history of mental health problems.[24] Victoria's Royal Commission into Victoria's Mental Health System stated that people in prison are two to three times more likely than the general population to have a mental illness, and 10 to 15 times more likely to experience a psychotic disorder than someone in the community.[25]

For the majority of people in prison, mental ill-health occurs alongside drug use, drug dependence and/or substance use disorder. According to the Royal Commission into Mental Health, 'co-occurring experiences of mental illness and substance use are so common that international experts suggest that services should consider this to be 'an expectation, not an exception'.[26]

A 2015 study found that nearly two thirds of women entering Australian prisons reported previous drug use. An earlier 2011 study of Victorian prisoners found that at least 83 per cent of women prisoners reported illicit drug use (compared to 75 per cent of men).[27] Research conducted in 2013 shows that nearly 93 per cent of Aboriginal women in Victorian prisons had a 'substance misuse disorder', which almost always co-occurred with mental illness.[28]

People in prison are more likely than the general population to have an acquired brain injury, cognitive impairment or intellectual disability. It is estimated that in Victorian prisons, 33 per cent of women and 42 per cent of men have an acquired brain injury compared with 2 per cent in general Australian population.[29]

5 What is the impact of the current system?

5.1 Criminalisation and incarceration cause damage and disruption

Addressing criminalisation and incarceration involves ensuring people can maintain their connection to family and community, as well as access to community-based supports, housing, employment and healthcare. Instead, we have a criminal legal system that promotes periods of incarceration that disrupt those connections. This is despite the established evidence-base proving that imprisonment, particularly short periods of incarceration, is more likely to lead to re-offending than providing people opportunities to remain in the community. For example, a recent *Inquiry into imprisonment and recidivism* by the Queensland Productivity Commission found that 'community-based rehabilitation is likely to be more effective than prison-based rehabilitation', and recommended increasing the use of sentencing options other than imprisonment.[30]

management to women on remand, with the goal of enhancing their prospects of bail and supporting them in the community. Women Transforming Justice is described in more detail on in section 6.4.2.

[23] Victorian Agency for Health Information, *Findings from the Victorian Population Health Survey 2017* (November 2020) 14.

[24] Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (May 2019) 27.

[25] Victoria, Royal Commission into Victoria's Mental Health System

[26] Reference.

[27] Acquired Brain Injury in the Victorian Prison System, Corrections Research Paper Series, (2011) No. 4,17.

[28] James Ogloff, et al. *Koori Prisoner Mental Health and Cognitive Function Study* (Department of Justice Victoria, February 2013) 13.

[29] Centre for Innovative Justice & Jesuit Social Services, *Recognition Respect and Support: Enabling Justice for People with an Acquired Brain Injury* (September 2017) 2.

[30] Queensland Productivity Commission, *Inquiry into imprisonment and recidivism* (August 2019) 157. See also Joanna Wang and Suzanne Poynton, 'Intensive correction orders versus short prison sentences: A comparison of re-offending' (October 2017) *NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin: Contemporary Issues in Crime and Justice*, No. 207, 10.

This is hardly surprising as it is entirely consistent with our client's experiences, which show that short periods of incarceration significantly disrupt their lives and their connection to supports in the community, employment and housing. Ultimately, contact with the criminal legal system, and particularly incarceration, dramatically undermines peoples' capacity to achieve that very system's purported rehabilitative objectives. In other words, the current criminal legal system functionally targets the most marginalised and stigmatised people in our community and then compounds and intensifies that marginalisation and stigma. This is unjustifiable

The case study below clearly illustrates the disruption to our client's connection with community-based supports caused by short periods of incarceration. This case study is typical.

> ***Case study: Ari***
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> *Ari is a man in his mid-30s who arrived in Australia as a refugee in his teens. He has been using drugs since his late teens and has a range of mental health problems connected to his traumatic history, as well as severe pain connected to a bad car accident. Ari was on bail for drug-related offending and was regularly attending counselling and other court-directed supports. He had also recently been diagnosed with a disability and was about to access financial support through the NDIS. While on bail, Ari was charged with further minor drug offences and remanded in custody for about 2 weeks. All the progress Ari had made stopped in the two weeks he spent in custody before his FLS lawyer could get him bail. It took months for Ari to get back to the place of progress and hope he had been in before he went to prison*.

Criminalisation and incarceration can also result in people losing their homes—if they have one. For the overwhelming majority of people, incarceration means you can't pay rent. The *Residential Tenancies Act* 1977 (Vic) allows landlords to evict a tenant if they have been in arrears for 14 days.[31] While public housing tenants may be able to maintain their tenancies by paying reduced rent for the period of their incarceration, provided this period is less than 6 months,[32] the same protections do not apply to people in community housing who are subject to the policies of the particular community housing provider. People in private rentals are even further disadvantaged. When a person goes to prison, they lose their Centrelink payments and/or their income. This leads to the accumulation of rental arrears and often eviction. This risk is especially present for people who have minimal social and community support to assist them and their families while in custody.

Even if rent is paid, criminalisation and incarceration can still result in eviction. The *Residential Tenancies Act* allows landlords to evict tenants who have used the property for an illegal purpose.[33] A recent peer reviewed study conducted by the Australian Housing and Urban Research Institute found that:

> *public housing landlords have adopted a particularly active and uncompromising attitude to drug offences, typically taking illegal use termination proceedings wherever charges are laid against an occupier…In particular, in cases where the criminal justice system had seen fit to deal with an offence through a suspended sentence, good behaviour bond or a community service order that allowed a person to remain in the community, the tenancy legal system ordered the household to leave their housing.*[34]

The case study below shows how someone being charged with offences can result in their eviction.

> ***Case study: Anne***
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> *Anne is a 60-year-old woman with no criminal history. Anne's son, who has a drug addiction, was staying with her and selling drugs from Anne's home. Both Anne and*

[31] *Residential Tenancies Act 1997* (Vic) s 91ZM.
[32] Temporary Absence Operational Guidelines were introduced by the Department of Health and Human Services in September 2018: https://providers.dffh.vic.gov.au/tenancy-management-manual-temporary-absence-operational-guidelines-word
[33] *Residential Tenancies Act 1997* (Vic) ss 250-250B
[34] Chris Martin et al, *Social housing legal responses to crime and anti-social behaviour: impacts on vulnerable families*, Australian Housing and Urban Research Institute (2019) 60.

her son were charged with trafficking, although there is no evidence Anne knew about this and her son admitted to the offences.

As a result of these charges, the Office of Housing has applied to evict Anne for illegal use of the property. She has now spent 6 weeks in custody. If she loses her public housing, it will be even harder for Anne to get bail. If she is released, it will be into homelessness. This situation will exacerbate her chronic health issues and significantly impact her mental health.

It should not be possible for landlords to evict people if a court has decided they can remain in the community. Housing is absolutely crucial to achieving one of the stated objectives of our criminal legal system—rehabilitation. We recommend that the *Residential Tenancies Act* be amended to prevent landlords evicting tenants for illegal purposes if the person has not yet been convicted or sentenced to a term of actual imprisonment.

Recommendation

1. That the Victorian Government amend the Residential Tenancies Act to prevent landlords evicting tenants for illegal purposes if the person has not yet been convicted or sentenced to a term of actual imprisonment.

Private landlords are permitted to request criminal histories with rental applications and have, in effect, total discretion to refuse to rent to someone who has been convicted of or incarcerated for an offence. Gaps in rental histories, such as periods of incarceration or when a person has no fixed address, also lower the chances of successful applications. It is often virtually impossible for people who have been criminalised or incarcerated to access the private rental market. It is absolutely imperative that Victoria invest in more public housing. This issue and related recommendations are discussed in more detail in section 6.3 *Build public housing not prisons.*

Criminalisation and incarceration also have significant impacts on employment. There is incontrovertible evidence that paid and volunteer work prevents people from reoffending. Perversely, criminalisation and incarceration create significant barriers to people accessing work. This happens because:

- being taken into custody, for any length of time, can put a person's existing employment at risk
- the stress and time involved in dealing with criminal proceedings can be a barrier to finding or maintaining work
- people are excluded from jobs because of their criminal record
- extended periods in custody create noticeable gaps in employment history and reduces a person's opportunities for education and skills development;
- education and skills programs available in prisons are inconsistent; and
- there is enormous stigma associated with having a criminal history and particularly being incarcerated.

These barriers operate as a double punishment – being unable to find work constitutes economic and psychological punishment after serving a sentence.

We commend the Victorian Government for introducing Victoria's first 'spent convictions scheme' in 2021.[35] This scheme sets out when people need to disclose their criminal history to in a range of contexts, including to employers. Convictions that have resulted in a sentence of 30 months or less will be 'spent' after 10 years for adults and 5 years for children.

We acknowledge this is a significant step forward in ensuring people who have committed a crime and served their sentence can move on with their lives. However, we remain concerned about the breadth of exceptions to the scheme – particularly in relation to Working with Children Checks (WwCC) – which we consider could undermine its effectiveness. We have had a number of clients whose convictions would be spent but must be disclosed as part of a WwCC application. This has created an insurmountable barrier to them gaining employment in their chosen field and has been a crushing blow to their plans to rebuild their life.

[35] *Spent Convictions Act 2021* (Vic).

Recommendation

2. That the Victorian Government review the operation of the 'spent convictions scheme' within three to five years to determine whether exceptions to the scheme are undermining its effectiveness. This review should include consideration of the 'conviction-free period' and restrictions on who can access the scheme.

5.2 Harm caused by incarceration

Not only does prison disrupt our client's connection with community supports, family, employment and housing, incarceration can exacerbate the conditions underpinning someone's criminalisation.

5.2.1 Impact of incarceration on health care for drug dependence and mental health

Our experience is that people in prison tend to experience poorer medical care than in the community. This is particularly the case for people experiencing the health condition of drug dependence, which is the prevailing health issue in prisons in Victoria.

In February 2021, Coroner Hawkins published findings about Shae Paszkiewicz's death from drug overdose five days following his release from prison.[36] Evidence before Coroner Hawkins showed that:

- drug treatment programs in prison are inadequate to meet demand and there are restrictions on accessing these programs, particularly for people on remand.[37]
- people who when in the community were engaged with opioid substitution therapy – which is proven to reduce overdose risk and other drug related harms among people who use opioids - experience difficulty and delays in accessing or continuing this treatment in prison, and can have their treatment interrupted or terminated without their consent.[38]

These findings confirmed observations made in a 2015 report by the Victorian Ombudsman, which noted substantial delays and inadequacies in the provision of health care and support to people in prison who experience drug dependence.[39]

These findings are consistent with the experiences of our clients, many of whom report that they are not able to access in prison the medical treatment they need to manage their drug dependence. Most commonly, our clients report that they are forced to go 'cold turkey' when first taken into custody. We have also heard extremely concerning reports from clients having their pharmacotherapy treatment terminated without their consent and for disciplinary reasons. Both these scenarios are medically dangerous. Where a person is experiencing drug dependence, the unsupervised and immediate withdrawal of the substance that they are dependent on—including alcohol and prescribed substances—poses significant risks to their health and can be fatal.[40] This is particularly true in circumstances where a person reports a history of regular poly-substance use, which many of our clients do. The immediate cessation of pharmacotherapy treatment also contravenes the National Medical Guidelines, which call for a tapered and medically supervised approach to pharmacotherapy

[36] Coroners Court of Victoria, *Finding into death without inquest – Shae Harry Paszkiewicz*, 24 February 2021 (COR 2017 6235)
[37] Coroners Court of Victoria, *Finding into death without inquest – Shae Harry Paszkiewicz*, 24 February 2021 (COR 2017 6235) 12.
[38] Coroners Court of Victoria, *Finding into death without inquest – Shae Harry Paszkiewicz*, 24 February 2021 (COR 2017 6235) 13-14.
[39] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015) 56-60
[40] Paul Haber, Nicholas Lintzeris, Elizabeth Proud & Olga Lopatko, Guidelines for the Treatment of Alcohol Problems, prepared for the Commonwealth of Australia, 2009, online < https://www.health.gov.au/sites/default/files/guidelines-for-the-treatment-of-alcohol-problems_0.pdf> (accessed 14 Aug 2021).

cessation.[41] It is also incredibly painful and distressing and could amount to a violation of their right to protection from torture and cruel, inhuman or degrading treatment.[42]

In our view, failing to meet the health needs of the large portion of people in prison who experience drug dependence drives recidivism. This is because it significantly increases the likelihood that someone will use drugs in an unsafe way following release from prison. Within the current prohibitionist approach to drug use, this increases the risk of a person being charged with further drug-related offences. Alternatives to the prohibition model are discussed in more detail below at *section 6.2 Promote a genuine public health approach* to drug use and dependence. This failure also substantially increases the risk that people will die following their release from custody and their chances of experiencing other drug-related harms.[43]

People in prison who experience drug dependence deserve specialist medical treatment. We note that the Royal Commission into Victoria's Mental Health System highlighted the troubling lack of addiction specialists in Victoria.[44] We agree with recommendations made in that report about increasing the number of addiction specialists working in Victoria. Given the high proportion of people experiencing drug dependence in prison, it is imperative that those specialists be able to readily patients in prison.

We also strongly agree with the Australian Medical Association that health care in prison should be provided by public health authorities,[45] rather than Corrections Victoria, and that people in prison retain their entitlement to Medicare and the Pharmaceutical Benefits Scheme.[46] This would significantly promote links between people in prison and community-based healthcare providers and in turn improve throughcare, which is widely recognised as 'a best practice approach to working with [people in prison] to reduce recidivism, improve health outcomes, and assist community integration'.[47] It would also mean that the system that criminalises drug use—the corrections system—is not also responsible for treating the very health condition for which it administers punishment.

Recommendation

3. That the Victorian Government:

- ***urgently implement recommendations in the Royal Commission into Victoria's Mental Health system to ensure there are adequate specialists in addiction medicine to treat the prison population***
- ***ensure there are no barriers to addiction specialists treating patients in prison***
- ***transfer responsibility for the administration healthcare of people in prison from the Department of Justice to the Department of Health***
- ***advocate to the Commonwealth Government so that people in prison have access to Pharmaceutical Benefits Scheme (PBS) and Medicare.***

As noted above, people in prison who experience drug dependence typically experience co-occurring mental illness. For many people, time in prison exacerbates mental health problems that are deeply connected to patterns of substance use. This is because for some people it is harder to get access to

[41] Commonwealth of Australia, National Guidelines for Medication-Assisted Treatment of Opioid Dependence (April, 2014), 43.
[42] *Charter of Human Rights and Responsibilities 2006* (Vic) s 10.
[43] Simon Forsyth, Megan Carroll, Nicholas Lennox, Stuart Kinner, 'Incidence and risk factors for mortality after release from prison in Australia: a prospective cohort study' (2018) *Addiction* 113(5) 937-945.
[44] *Royal Commission into Victoria's Mental Health System: Final Report* Volume 3 (2021), 286.
[45] Reference https://www.ama.com.au/position-statement/health-and-criminal-justice-system-2012
[46] Justice Health, online < https://www.corrections.vic.gov.au/justice-health>
[47] Australian Medical Association, Position Statement: Health and the Criminal Justice System – 2012 (August 2012) online https://www.ama.com.au/position-statement/health-and-criminal-justice-system-2012 (accessed 18 September 2021).

adequate mental health services in prison. Moreover, the restrictive and punitive context of custodial settings further compounds mental illness for people already experiencing it.[48]

That said, the Royal Commission into Victoria's Mental Health System recently observed that for some people, entering prison is the first time they will access mental health treatment and support. This was understood by the Royal Commission as a product of people being excluded from community-based mental health services rather than an asset of the criminal justice system. When our clients do experience improvements to their mental health and/or drug use while in custody, any gains are almost always lost when they are released into the community. The disruption caused by their incarceration and the lack of any continuity of mental health care typically leads to further criminalisation and incarceration. This trajectory, which is common for our clients, was also widely observed by a range of experts providing evidence to the Royal Commission into Victoria's Mental Health System.[49] We agree with this assessment and fully support the Royal Commission's emphasis on adequate resourcing of crisis, emergency and community-based mental health services so that the corrections system is 'no longer the mental health provider of last resort'.[50]

5.2.2 Inhumane and degrading practices

There are numerous practices in prisons that degrade and traumatise people, thereby increasing the likelihood of their criminalisation once released into the community. In this section we discuss some particular practices we hear about through our prison advocacy program and recommend those practices be abolished in legislation.

5.2.2.1 Solitary confinement

One of the most common and damaging practices in Victorian prisons is the widespread use of solitary confinement. Not only is solitary confinement cruel, but the harm it causes to individuals risks undermining community safety when people who have been in solitary confinement are released into the community. This is particularly concerning given solitary confinement is a key component of the 'management regimes' of Victorian prisons and, more concerning still, the primary component of managing the risk of COVID-19 entering prisons.

Often also described as 'separation, seclusion, isolation or segregation', solitary confinement occurs when a person is locked in a cell for 22 or more hours each day without meaningful human contact.[51] Prolonged solitary confinement occurs when a person is in solitary confinement for more than 15 days.[52]

Swathes of research and the experiences of our clients establish beyond a doubt that solitary confinement is extraordinarily damaging to a person's health, both mental and physical.[53] These impacts can emerge early in any period of confinement, can be long-lasting and are likely to worsen the longer a person is in solitary confinement.[54] These impacts can include: anxiety, depression, paranoia, psychosis, post-traumatic stress disorder and a significantly higher risk of self-harm and suicide.[55]

Solitary confinement is particularly harmful for people who have a pre-existing mental illness or cognitive impairment. This drives a damaging cycle: there is evidence that people experiencing mental illness or

[48] Victoria, *Royal Commission into Victoria's Mental Health System* (2021) vol 3, ch 23, 359.
[49] Victoria, *Royal Commission into Victoria's Mental Health System* (2021) vol 3, ch 23, 381.
[50] Victoria, *Royal Commission into Victoria's Mental Health System* (2021) vol 3, ch 23, 358 (see in particularly evidence of Dr Emma Cassar).
[51] *United Nations Minimum Standards for the Treatment of Prisoners* (Nelson Mandela Rules) rule 44.
[52] *United Nations Minimum Standards for the Treatment of Prisoners* (Nelson Mandela Rules) rule 44.
[53] Kayla James and Elena Vanko, *The Impacts of Solitary Confinement*, Vera Institute Evidence Brief, April 2021 2, online < https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf> (accessed 14 August 2021).
[54] Kayla James and Elena Vanko, *The Impacts of Solitary Confinement*, Vera Institute Evidence Brief, April 2021 2, online < https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf> (accessed 14 August 2021).
[55] Kayla James and Elena Vanko, *The Impacts of Solitary Confinement*, Vera Institute Evidence Brief, April 2021 2, online < https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf> (accessed 14 August 2021).

with a disability are also far more likely to have their 'behaviour managed' using solitary confinement, which is in turn likely to be more harmful for this cohort of people.[56]

It is well-recognised that the damages of solitary confinement are further compounded for women, who are more likely to have dependent children and with whom they cannot maintain contact with children while in solitary.

There are additional layers of harm caused by solitary confinement for Aboriginal people, who are denied connection with their culture and community during periods in solitary confinement. The Royal Commission into Aboriginal Deaths in Custody noted that solitary confinement is particularly detrimental for Aboriginal people in prison and can precipitate self-harm.[57]

Despite the overwhelming evidence about the damage caused by solitary confinement, it remains a common practice in Victorian prisons, typically as part of 'managing' the behaviour of people in prison and more recently as part of the response to the COVID-19 pandemic. In Victoria, amendments to the Corrections Act at the start of COVID-19 authorised a 14-day 'quarantine' period for all people received into prison.[58] We have heard reports of people getting no more than 15 minutes of time out of their cell. We have also been made aware through our prison advocacy program of heavy and regular reliance on prison-wide lockdowns as part of managing the risk of COVID-19.[59] Lockdowns have a huge impact on people in prison and their families – they generate enormous uncertainty for people detained and their loved ones, they result in routines being disrupted and reduced, if any, access to programs.

We are aware that our colleagues at the Human Rights Law Centre and Victorian Aboriginal Legal Service have repeatedly requested access to the health advice that justifies the overwhelming reliance on protective quarantine and lockdowns (both of which can and do amount to solitary confinement) as the primary means to respond to the risk of COVID-19 in prisons. To date we are not aware of any information that justifies why these practices have been consistently preferred over less restrictive approaches, including surveillance testing or staff and concerted efforts to reduce the prison population. This was particularly true during the sustained periods in which Victoria had no community transmission, and yet everyone incarcerated in prison was still subject to 14 days protective quarantine. We consider this begs significant questions about whether the Victorian Government's response to managing the risk of COVID-19 in prisons is consistent with the Victorian Charter, which requires that restrictions on human rights be proportionate and least restrictive.

Recommendation

4. The Victorian Government:

- ***legislate to ban solitary confinement.***
- ***legislate to require that managing COVID-19 in prisons be achieved through the least restrictive means, including surveillance testing of staff and reducing the number of people in prison***
- ***urgently address staffing and other operational issues to ensure no one is subjected to solitary confinement for these reasons.***

[56] See for example, Human Rights Watch, "In needed help, instead I was punished": Abuse and Neglect of Prisoners with Disabilities in Australia" (2018) 40; Andreea Laschz and Monique Hurley, 'Why practices that could amount to torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons' (2021) *Current Issues in Criminal Justice* 33(1) 54, 56

[57] *Royal Commission into Aboriginal Deaths in Custody* (1991) [25.7.12].

[58] *Corrections Act 1986* (Vic) ss 112K, 112M.

[59] See also Andreea Laschz and Monique Hurley, 'Why practices that could amount to torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons' (2021) *Current Issues in Criminal Justice* 33(1) 54, 60.

5.2.2.2 Strip searching

Strip searching is a routine practice in Victorian prisons, although the approach differs between prisons designated for men and the two prisons designated for women. The Corrections Act allows strip searches to occur if the prison management believes on reasonable grounds it is necessary for the 'security or good order' of the prison.[60] Most relevantly for people who contact our prison advocacy program, strip search occurs before and after contact visits, before and after a person is placed in solitary,[61] and before drug testing (which can be routine or targeted).[62]

We understand that the practice of routinely strip-searching people in Victoria's women's prisons changed following a damning report by the Victorian Ombudsman, which found that the routine strip searching of women before and after contact visits:

- failed to effectively detect contraband brought in through the visits centre – only one item seized was a drug (half a blood pressure tablet).[63]
- breached women's Charter rights to privacy, to protection from cruel, inhuman or degrading treatment and to humane treatment while deprived of liberty.[64]

The Ombudsman recommended that the practice of routinely strip-searching people at DPFC before and after contact visits and external appointments immediately cease and be replaced by a 'Charter-compliant practice of strip searching based on intelligence and risk assessment'.[65]

There is no recent publicly available information about how many strip searches are conducted in Victorian prisons, but we are aware through our prison advocacy program that for some people searches are a very regular occurrence, particularly if they are in a maximum security prison or if they have a history of injecting drugs.

A recent Victorian Supreme Court case held that strip searching is an 'inherently demeaning' and undermines peoples' humanity and dignity in prison.[66] But it is even more so given that a significant proportion of men and women in prison have experienced sexual assault and abuse in their childhood and adult lives. Subjecting anyone, and particularly people with histories of trauma and abuse, to strip searching is cruel, profoundly harm and re-traumatising. Moreover, there is no evidence that routine strip searching is effective in minimising the use of drugs or prohibited goods in prison.

Recommendation

5. That the Victorian Government legislate to:

- ***prohibit routine strip searching***
- ***require that the least restrictive measures be used to detect drugs and other contraband.***

5.2.3 Impact of incarceration on victim survivors of family violence

Incarceration has particular impacts on people who are victim survivors of family violence. As noted above, a high proportion of people in prison have experienced family violence in their childhood or adult lives. Vickie Roach – an Aboriginal woman, author and advocate for the rights of Aboriginal women and girls – describes being in prison as like family violence:

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[60] *Corrections Act 1986* (Vic) s 45(1)(b), *Corrections Regulations 2019* (Vic) reg 87.
[61] Described as 'an observation cell or management unit' in the Corrections Regulations.
[62] *Corrections Regulations 2019* (Vic) reg 87.
[63] Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (November 2017) 59-60.
[64] Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (November 2017) 5, 10, 59-60.
[65] Victorian Ombudsman, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre* (November 2017) recommendation 5.
[66] *Monigue v Thompson* [2021] VSC 56 (16 February 2021) [87].

- you are told what you can do, who you can see
- you are isolated from family and friends
- you can't see your kids
- you are told that 'your behaviour is the problem' and that if only you behaved better we wouldn't have to do this to you.[67]

Prisons are by their very nature controlling environments, a key component of the state's coercive apparatus and designed to achieve almost complete social exclusion. That they are characterised 'coercion', 'control' and exclusion – also key features of family violence – ensures they risk being inherently triggering environments for victim survivors of family violence. This is likely to further traumatise people and drive behaviours, including drug use, which result in criminalisation.

5.2.4 Disconnection from family and community

Incarceration causes disconnection from family and friends. This has profound, damaging and long-lasting impacts on the positive connections in people's lives. When these relationships are damaged, this can lead to or entrench patterns of behaviour that are criminalised and lead to further offending and incarceration.

We have represented and worked with numerous people, particularly women, whose incarceration has resulted in their children being removed. FLS's prison advocacy program lawyer reports that maintaining contact with children is a huge challenge for every woman with children who contacts her from prison. The impact of this has universally been described as devastating and often precipitates a spiral of shame, trauma and drug use that is invariably criminalised. It often takes people years for people to regain care of their children and typically involves protracted legal intervention by child protection.

The following quote from a lawyer interviewed as part of a research project conducted by La Trobe University, Deakin University and FLS summarises a common trajectory:

> *The brutality of the separation of mothers from their children is pretty stark. That impact isn't just felt during the duration of the remand. The consequences of children being removed from their mothers while in remand in custody keeps going and has long, long, long remedy times attached to it. Or wildly significant interventions that are required to try and claw back the children. What that means is there's hopelessness that sets in, and when there's hopelessness there's self-medication. There's self-medication, there's drug and alcohol. When there's drug and alcohol, there's homelessness and fracture and offending and we go back in. It's an absolute disaster.*[68]

There is very little publicly available information on the number of children who are removed from their parents, particularly their mothers, due to parental incarceration. In a 2020 study of women's bail applications conducted by FLS in partnership with La Trobe and Deakin universities, 20 per cent (a total of 6 out of 29) of the bail applications we observed involved specific reference to a woman being the primary carer for children.[69] Two of these women were remanded in custody.

Other data paints a picture of the significant impact of incarceration on women and families. In particular, the proportion of women in prison who report being primary carers for their children has fallen, from 37 per cent in 2012 to 21 per cent in 2017.[70] The experience of our clients aligns with analysis conducted

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[67] Vickie Roach, Panel event: *Domestic Violence, Police Accountability and Women's Criminalisation*, 22 June 2021 (notes on file with submission author).

[68] Emma Russell et al, *Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria*, published by La Trobe University, Deakin University and Fitzroy Legal Service (July 2020) 26.

[69] Emma Russell et al, *Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria*, published by La Trobe University, Deakin University and Fitzroy Legal Service (July 2020) 26.

[70] Corrections Victoria, *Women in the Victorian Prison System* (January 2019) 8. See also Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria 2012-2018* (November 2019) 15 (noting that the proportion of unsentenced women who reported they were the primary carer for their children decreased 26 per cent in 2012 to 12 per cent in 2018, and the proportion of

by Crime Statistics Agency which found that 'the fact that remanded women in this study were progressively more likely to have a history of spending time in custody and that they were decreasingly likely to report being the primary carer for their children may be indicative of the impact of cumulative imprisonment on their family structures'.[71]

Incarcerating parents also has significant impacts on their children and perpetuates intergenerational cycles of criminalisation and incarceration. This is hardly surprising given the emotional, developmental and psychological harm caused by taking parents away from their children through incarceration.[72]

These impacts are particularly pronounced for Aboriginal families and communities. Aboriginal families and communities are strong, resilient and the most important source of support for Aboriginal children.[73] It is no surprise then that the current alarming rates of Aboriginal incarceration is having widespread, long-lasting and intergenerational impacts on Aboriginal families and children. A recent inquiry led by the Victorian Commissioner for Aboriginal Children and Young People into the experiences of Aboriginal children and young people in contact with the youth justice system found that over 60 per cent of children and young people had a parent, sibling or extended family member with criminal justice system involvement, and 25 per cent of children in custody had a sibling or parent with current or previous experiences of criminalisation.[74]

In its Pathways to Justice report, the Australian Law Reform Commission described the impact of incarcerating Aboriginal women as creating a 'massive crisis, affecting a range of dependents, principally children' because of the pivotal role that Aboriginal women play in 'maintaining the health and wellbeing of families' and communities.[75]

Avoiding the significant impacts of disconnection urgently requires us to divert people from prison. This can only be achieved by addressing the drivers of people's incarceration and diverting them from the criminal legal system. Strategies to achieve this are discussed in more detail in part 6 of this submission.

5.2.5 Minimising harmful and poor practices and cruel, inhuman and degrading treatment in prisons

Incarceration is harmful. Reducing the harms caused by incarceration is best achieved through decarceration. This should be the urgent focus of the Victorian Government and underpins the focus and recommendations of this submission. Nevertheless, there are likely to remain people in prison and reducing recidivism also means finding ways of minimising mistreatment and avoidable harms. This is particularly true during COVID-19, which has made conditions in prison harsher. While Corrections Victoria has committed to finding alternative models of service delivery, in reality there has been an enormous impact on people's access to out of cell time, access to phones to contact their family members and loved ones, access to programs and supports to ensure their health and welfare. Moreover, what efforts have been made tend to rely on internet-based alternatives. This is pointless for many families who don't have ready access to a computer or smart phone.

Improving conditions in detention and eliminating harmful, degrading and abusive practices in prisons requires independent oversight of the conduct of prison authorities. This was recently recognised by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, which stated regarding institutions including prisons that 'with a decrease in oversight comes an increase in the risk of violence, abuse, neglect and exploitation'.[76]

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sentenced women who reported being the primary carer of their children over the same time period decreased from 34 per cent to 25 per cent).

[71] Crime Statistics Agency, Characteristics and offending of women in prison in Victoria 2012-2018 (November 2019) 34.

[72] See generally, for example, Adele Jones et al, *Children of Prisoners: Interventions and mitigations to strengthen mental health*, published by the University of Huddersfield (2013).

[73] See for example, Victoria, Commission for Children and Young People, *Our Youth, Our Way* (May 2021) 243.

[74] Victoria, Commission for Children and Young People, *Our Youth, Our Way* (May 2021) 274.

[75] Australian Law Reform Commission, *Pathways to Justice* (2017) [2.104].

[76] Commonwealth, *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (March 26, 2020) Statement of concern: The response to the COVID-19 pandemic for

In Victoria, independent oversight of prison conditions could be achieved through implementing the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT). OPCAT aims to 'establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment'.[77] The Australian Government ratified OPCAT in 2017, and committed to implementing its obligations by January 2022. In June 2020, the Australian Human Rights Commission stated that some progress towards implementing OPCAT had been made, but that 'progress towards implementation of OPCAT to date has been too slow' and 'many critical questions…are only partially resolved'.[78]

OPCAT alone isn't enough. FLS knows first-hand the importance of civil society playing a role in advocating for the rights of people in prison and ensuring they are not mistreated. Problems often arise that require urgent attention – for example, a person's health condition is not being property treated, or they have been inappropriately placed in solitary. Our prison advocacy program is the only service in Victoria dedicated to prison conditions and the treatment of people in prison. We receive an enormous number of enquiries and know that we can't and don't reach most people who need our assistance. Any oversight mechanism must be accompanied by sustained and adequate investment in community-based, non-government services, including community legal centres and Aboriginal controlled organisations, to conduct advocacy on behalf of people in prison.

Recommendation

6. That the Victorian Government:

- ***urgently establish and adequately resource an independent agency (or agencies) to perform the functions of a National Preventative Mechanism to oversee conditions and the treatment of people in prisons as part of implementing their obligations pursuant to OPCAT. In doing so, the Victorian Parliament must engage with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations.***

- ***provide sustained and adequate funding to community-based organisations, including community legal centres and Aboriginal controlled organisations, to conduct advocacy and provide legal representation to people in prison with respect to their treatment in and conditions of detention.***

6 How do we break the cycle? Addressing the drivers of Victoria's crisis of criminalisation and incarceration

We know from our extensive experience that people do not end up in the criminal legal system simply because they have committed a crime.

Criminalisation and incarceration happen when a number of systemic drivers intersect: experiences of trauma and victimisation, mental illness and drug use and/or dependence, poverty and unstable housing and for Aboriginal people in particular, racism and colonisation. Focusing our policy responses to crime and offending on the criminal legal system leaves the drivers of criminalisation unaddressed and all but guarantees people will return to prison.

people with disability, online < https://disability.royalcommission.gov.au/publications/statement-concern-response-covid-19-pandemic-people-disability>

[77] *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (adopted 18 December 2002, entered into force 22 June 2006) 2375 UNTS 237, art 1.

[78] Australian Human Rights Commission, *Implementing OPCAT in Australia (2020)* online < https://humanrights.gov.au/our-work/rights-and-freedoms/publications/implementing-opcat-australia-2020>

With particular reference to issues we see regularly in our legal practice, this part of our submission makes recommendations to address the key drivers of our clients' criminalisation and incarceration and divert more people from contact with the criminal courts and prison.

6.1 Alternatives to a police response to health and social problems

Police are the primary entry point into the criminal legal system. Many of our clients are criminalised when police are relied on to respond to social and health problems, particularly homelessness, the health condition of drug dependence and mental health crises. Similarly, the reliance on police to respond to family violence has resulted in the criminalisation of people – often women – who are in fact victim survivors of family violence and not perpetrators.

In our experience, police are regularly called to assist in situations where help is needed, but police powers are not. Police are not specialist trained mental health workers, family violence workers, social workers, housing workers, addiction specialists, or disability support workers. But they are often expected to be.

Over-reliance on police in these situations also results in criminalisation. People end up charged and sometimes incarcerated when police are not equipped to respond to complex situations, when they fail to properly exercise their discretion or when police interactions with our clients escalate. This is particularly true for people from racialised or stigmatised communities, including Aboriginal people, people who use drugs or experience psycho-social disability, people in mental health crisis or those who are homeless.

This risk of criminalisation must also be considered in the context of significant spending on police. In the five financial years between 2015-16 and 2019 – 20, Victoria's spending on police per person increased by an average of about 6 per cent, more than any other state and territory. In absolute terms, spending on Victoria Police nearly doubled from just over $2 billion in 2011-12 to just under $3.8 billion in 2020-21.[79] By way of comparison, spending on alcohol and drug treatment services remained at less than one tenth of police spending, increasing from $1.43 million to $3.3 million over the same time period.

Specific case examples from our practice confirm findings made in a number of recent inquiries and highlight the urgent need for a reallocation of spending on police to alternatives to police as first responders in a range of situations.

6.1.1 Policing and mental health crisis

The recent Royal Commission into Victoria's Mental Health System presented evidence from a range of stakeholders, including FLS, that '[b]ecause of a lack of other services, Victoria Police are too often first responders when people are experiencing mental health issues'.[80]

When police attend a call-out involving a mental health crisis, they have a range of discretionary options available to them including resolving the issues informally, calling emergency mental health services for assistance, taking the person to hospital, or arrest and charge. Arrest and charge should never form part of responding to a person in crisis. Nevertheless, many of our clients end up charged following interactions with police in this context and a health issue is transformed into a criminal legal one. We note in particular the submission made by the Magistrates' Court of Victoria to the Royal Commission, in which the court stated that the very fact of police contact increases the probability of criminal charges and the likelihood that someone will enter custody where they are much less likely to get access the healthcare they need.[81] This submission closely aligns with our clients' experiences, recent research and the findings of the Royal Commission into Victoria's Mental Health System.

Since the publication of the Royal Commission's report, a number of our clients have been charged as a result of contact with police during a mental health crisis. An example of this is set out below.

[79] Victorian Budget Paper 3: Service Delivery (financial years 2011-12 to 2020-21).
[80] Victoria, *Royal Commission into Victoria's Mental Health System* (2021) vol 3, p360.
[81] Victoria, *Royal Commission into Victoria's Mental Health System* (2021) vol 3, 360.

Case study: Leila

Leila is an Indian woman in her mid-50s with no criminal history. She has been diagnosed with schizophrenia in adulthood and after a period of not taking her medication, she experienced an episode of psychosis with paranoid delusions. One of her children called an ambulance, who attended accompanied by police. Leila hit the police officer while being placed in the ambulance to go to the hospital. She was charged with assaulting a police officer. The charges were ultimately withdrawn after significant advocacy by our office. In the absence of this advocacy, our client was facing a term of incarceration due to the seriousness of the charge.

Given this, we strongly support the urgent implementation of recommendation 10 of the Royal Commission into Victoria's Mental Health System that 'wherever possible, emergency services' responses to people experiencing time-critical mental health crises are led by health professionals rather than police'.[82] This recommendation must apply to situations where police are responding to mental health crises involving drug use or dependence.

Recommendation

7. That the Victorian Government urgently implement recommendation 10 of the Royal Commission into Victoria's Mental Health System requiring that 'wherever possible, emergency services' responses to people experiencing time-critical mental health crises are led by health professionals rather than police'.

As part of implementing this recommendation, mental health crises must be considered to include health episodes relating to drug use or dependence.

6.1.2 Policing and homelessness

We note that the recent Parliamentary Inquiry into Homelessness in Victoria highlighted evidence that people who are homeless, particularly people sleeping rough, are subject to a greater degree of public scrutiny than people with private accommodation.[83] This means that members of the public are more likely to contact police if they see a person who is rough sleeping who needs assistance, and it also means people who sleep in public places are significantly more likely to be charged with 'public order offences' particularly begging.

There are also laws that indirectly criminalise people experiencing homelessness. These are laws that appear neutral but have a disproportionate impact people experiencing homelessness, such as public urination, sexual exposure (when getting dressed in public view), using offensive language, public nuisance. Indirect criminalisation also flows from offences directly linked to poverty. These offences are often termed 'survival crime' and can include:

- stealing food, clothing, medical and personal hygiene products
- trespass when squatting or seeking shelter or privacy
- possession of illicit substances for self-medication or untreated health needs and substance use disorders
- public transport fines.

Reducing the criminalisation and incarceration of people experiencing homelessness requires a number of approaches, including:

- eliminating to the greatest extent possible the contact that homeless people have with police – this was recently considered by the Inquiry into Homelessness in Victoria and is discussed in more detail immediately below.
- providing people experiencing homelessness with housing – recommendations about this are made in section *6.3 Build public housing not prisons.*

[82] Victoria, *Royal Commission into Victoria's Mental Health System* (2021) vol 1, ch 9, 507 (recommendation 10).
[83] Victoria, Legal and Social Issues Committee, *Inquiry into homelessness in Victoria: Final report* (March 2021) 189.

- diverting people experiencing homelessness who end up charged from the criminal legal system – this is discussed in more detail in section *6.5 Diverting more people from prison .*

The Inquiry into Homelessness in Victoria recommended an expansion of an existing protocol between City of Melbourne and Victoria Police, which requires people experiencing homelessness to be referred to services and Victoria Police to exercise discretion when charging people with public order offences. According to Victoria Police, this protocol is implemented by Victoria Police and outreach teams from the Salvation Army and City of Melbourne and involves a 'joint enforcement but services-connected approach'.[84]

It is important to note that while this protocol has a focus on service connection it also puts a number of restrictions on people sleeping rough in the City of Melbourne including the number of people allowed to sleep near one another, the number of bags of possessions a person is allowed to have, and where people are permitted to sleep and effectively broadens the scope for police and other authorised officer interference in the day-to-day lives of people sleeping rough.

We support the underlying objective of the Inquiry into Homelessness in Victoria that a protocol be established that helps to:

- avoid unnecessary, enforcement-based interactions with people experiencing homelessness
- ensure that where interactions do occur, they are appropriate and respectful
- support enforcement officers to use their discretion and consider alternative options to fines and charges when interacting with people experiencing homelessness
- train and equip enforcement officers to make referrals to appropriate services as an alternative to fines and charges.

However, we do not consider these objectives can be achieved at the same time as laws exist that directly or indirectly penalise homelessness and in turn increase opportunities for interactions with police. Where police powers are not required to respond to someone's need then they should not be in attendance. It is telling that there are no homeless persons' representative groups as party to this protocol agreement.

To be effective, we note that any protocol must clearly:

- prioritise outreach-based support services as the first responders to people experience homelessness who need assistance
- be supported by properly resourced Aboriginal community controlled organisations and other outreach-based support services (section also section 6.4 Expand the availability of community-based support services)
- mandate that police are an absolute last resort
- be accompanied by the decriminalisation of public order offences and survival crime.

As explained in our submission to the Inquiry into Homelessness in Victoria, laws that expressly criminalise people experiencing homelessness include the state offence of begging alms and the local laws of the City of Melbourne that put limits on the number of people allowed to sleep near one another, the number of bags of possessions a person is allowed to have, and where people are permitted to sleep. These laws are completely ineffective and should be abolished immediately.

Recommendations

8. That the Victorian Government, in implementing any protocol that governs interactions between police and people experiencing homelessness, ensures that outreach-based support services are to be the first responders to people experiencing homelessness who need assistance, with police attendance an absolute last resort.

[84] Victoria, Legal and Social Issues Committee, *Inquiry into homelessness in Victoria: Final report* (March 2021) 189.

9. That the:

- ***Victorian Government repeal the offence of begging from the Summary Offences Act 1966 (Vic)***

- ***City of Melbourne repeal local laws that penalise and overly regulate the lives of people who are homeless.***

6.1.3 Policing and family violence

Family violence is one of our society's most pervasive and intractable social problems and family violence call-outs make up a substantial proportion of police work. According to the Crime Statistics Agency one in five offences attended by Victoria Police in the year ending 31 March 2021 were family-violence related, marking a 20 per cent increase in recorded family-violence related incidents over the last 5 years.[85]

FLS's experience, which is supported by contemporary research, shows that police attendance at family violence incidents can result in people being wrongly or unnecessarily criminalised and sometimes incarcerated. This happens in three main ways:

- The victim survivor is misidentified as the 'primary aggressor' and listed as a respondent in the application for a family violence intervention order. These orders often contain conditions excluding people from their home or from contacting their partner or children. When breached, these conditions result in criminal charges and sometimes incarceration.
- The victim survivor is misidentified as the primary aggressor and charged with criminal offences relating to the reason police were called. This typically occurs when victim survivors use physical force or verbal threats as a form of resistance of defence to patterns of coercion, control and violence.
- Police attend and instead of rendering assistance to the victim survivor, they charge this person with unrelated offences that flow from, for example, a search of a person's house, an outstanding warrant or an escalation in the interaction with police.

Not only does misidentification by police drive subsequent criminalisation and incarceration, it can also lead to children being removed from their parents and homelessness. These consequences, in turn, perpetuate cycles of criminalisation.

It is clear from our practice experience that victim survivors are more likely to be misidentified when they are members of stigmatised, marginalised or over-policed communities, for example illicit drugs or alcohol dependent, newly arrived, or Aboriginal. The case study set out below illustrates a common scenario for our clients.

Case study: Sue

Sue is a woman in her mid-50s. Throughout her adult life Sue had experienced significant trauma and homelessness, which had resulted in ongoing mental health issues and a debilitating alcohol dependency.

Sue and her partner had been drinking on night when they got into an argument, during which he held her to the ground and hit her. Sue struggled free and called the police for help. When police arrived, they spoke with Sue and her partner separately. Sue's partner spoke calmly and told police she had assaulted him. Sue admitted to being drunk and told police repeatedly that he had hit her. She became increasingly distressed and upset as she could see the police didn't believe her. As her agitation increased, police directed Sue to come down to the station. Sue was interviewed and charged with assaulting her partner.

Sue was adamant that she did not commit the offence she had been charged with. She had never been in trouble with the law before and had taken out an intervention

[85] Crime Statistics Agency, 'Family Incidents' 31 March 2021, online <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/family-incidents-2>

order against her partner in the past. After significant advocacy by her FLS lawyer, the prosecution agreed to drop the charges against Sue.

Our practice experience is strongly supported by recent quantitative and qualitative research. In 2018, Women's Legal Service Victoria conducted a systematic analysis of about 600 files from duty lawyer services provided at the Melbourne Magistrates Court between January and May 2018. This analysis showed that at least 10 per cent of women named by police as respondents in family violence intervention order proceedings had been incorrectly identified.[86] The study's authors noted this due to constraints on the level of detail extracted through the study, this was likely an under-estimation. The study also found that of the women who were misidentified approximately:

- 60 per cent had been subject to abuse during the incident that resulted in the intervention order being sought
- 50 per cent had suffered historical abuse from the other party
- 25 per cent were living with mental illness, and
- 37 per cent were at risk of homelessness.[87]

2019 research by No To Violence (NTV) confirmed that misidentification remains a relatively frequent problem for people referred to legal assistance services.[88] Case studies analysed by NTV identified 'extremely spurious reasons' as contributing to the misidentification, for example, the victim survivor was: alcohol or drug affected; not the first person to contact the police, or interacted negatively with police who attended.[89]

It is well-established that accurate risk assessment is complex and challenging, particularly in 'situationally ambiguous circumstances', which can arise when there are, for example, conflicting descriptions of what happened, or gaps in the narrative due to substance, trauma or disability, indications of injuries to both parties, language barriers and police officer prejudice.[90]

Given the highly complex nature of family violence incidents and the importance of appropriate assessment from the first attendance, we strongly recommend that the Victorian Government invest in alternative services and co-responder models in which police are accompanied by properly trained specialist family violence workers when attending family violence incidents. This would in turn:

- reduce the family-violence related workload of police,
- improve the accuracy of risk assessment thereby improving the safety of victims,
- improve the quality of service delivery to victim-survivors and perpetrators, and
- most importantly for the purposes of this Inquiry, reduce the criminalisation and incarceration of victim survivors of family violence that flows from misidentification.[91]

[86] Madeleine Ulbrick and Marianne Jago, '"Officer she's psychotic and I need protection": Police misidentification of the 'primary aggressor' in family violence incidents in Victoria', Police Paper 1, Women's Legal Service Victoria (July 2018) 1.
[87] Madeleine Ulbrick and Marianne Jago, '"Officer she's psychotic and I need protection": Police misidentification of the 'primary aggressor' in family violence incidents in Victoria', Police Paper 1, Women's Legal Service Victoria (July 2018) 2.
[88] See generally, No to Violence, *Predominant Aggressor Identification and Victim Misidentification*, Discussion Paper (November 2019).
[89] No to Violence, *Predominant Aggressor Identification and Victim Misidentification*, Discussion Paper (November 2019) 9. This problem is not confined to Victoria. For example, a 2014 study by Women's Legal Service NSW found that only 39 per cent of women named as respondents in intervention order proceedings had final orders made against them. Of that 39 per cent, 'nearly all' orders were by consent: Julia Mansour, *Women Defendants to AVOs: What is their experience of the justice system?* Women's Legal Service Victoria (March 2014) 15.
[90] No to Violence, *Predominant Aggressor Identification and Victim Misidentification*, Discussion Paper (November 2019) 5.
[91] See generally Heather Nancarrow, et al. *Accurately identifying the "person most in need of protection" in domestic and family violence law*, ANROWS Research report, Issue 23 (November 2020) 31.

The Centre for Innovative Justice examined multidisciplinary response models in a 2016 report for the Southern Melbourne Integrated Family Violence Partnership.[92] That report canvassed various co-responder models internationally and in Australia, including Victoria, and recommended in that particular location police call-outs for family violence be co-triaged with Victoria Police, specialist family violence services, other support services and Integrated Family Services. It was hoped this approach would reduce police the need for police attendance at family violence incidents, better divert families out of crisis and improve families' willingness to seek help from and build relationships with services.[93] The Centre for Innovative Justice emphasised that the appropriateness of particular co-responder models depends on the needs and circumstances of families and communities in individual locations.

Not only will better responses to family violence reduce misidentification and related criminalisation and incarceration, but it will also improve safety. A woman who calls for help but is instead criminalised herself is significantly less likely to call for help again. Additionally, victim-survivors often report fear of retaliation from perpetrators from any criminal charges resulting from police attendance. While victim-survivors want violence to stop, they do not necessarily want the perpetrator to be criminalised and thus may not call police for help to avoid these risks.

Choice is a critical aspect to assisting and empowering victim-survivors. There should always be an option to call police. Rather, the Victorian Government should invest in alternative services and promote those services within the community. This will reduce people being wrongly criminalised and even incarcerated, while also increasing the numbers of people seeking help, reduce pressure on police and increase effective service delivery.

Recommendation

10. That the Victorian Government fund community-based support services to develop and deliver family violence call-out services, including as part of co-responder models alongside Victoria Police in necessary circumstances. This should be complemented by an extensive public awareness campaign about the availability of these services.

6.1.4 Policing a pandemic – response to COVID 19

The Victorian Government response to COVID-19 exemplifies risks associated with police playing a leading role in responding to a public health emergency.

We recognise that the COVID-19 pandemic is an unprecedented crisis for Victoria and coordinating and delivering a state response is an extraordinarily difficult task. While there have been tremendous achievements in limiting infections in Victoria, these have come alongside significant burdens created through the criminal legal response.

Inappropriate fines

From the beginning of 2020 there has been a focus on police enforcing offences in the *Public Health and Wellbeing Act* (PHWA) as the primary means to interact and communicate with the community. We are aware through documents accessed through Freedom of Information that Victoria Police were explicitly encouraged on a number of occasions to use their discretion and to reserve issuing fines for cases of 'blatant, deliberate and obvious breaches'.[94] This was consistent with public statements by Victoria Police early in the pandemic. Nevertheless, our experience and that of our colleagues in the community legal sector is that a significant proportion of people have been fined for unintentional or technical breaches, or fined when they have been complying but not been able to explain their circumstances to police. An example of our clients' experiences is set out below.

[92] Centre for Innovative Justice, *Multidisciplinary Response Models: Report to the Southern Melbourne Integrated Family Violence Partnership* (September 2016) 9-15.
[93] Centre for Innovative Justice, *Multidisciplinary Response Models: Report to the Southern Melbourne Integrated Family Violence Partnership* (September 2016) 44.
[94] Victoria Police documents obtained through Freedom of Information (on file with FLS).

Case study: Ahmed

Ahmed is a young man in his late teens of African background. He lives in public housing with two other young African men. Early in the first lockdown, Ahmed and his housemates went to the supermarket to buy groceries, and then decided to get KFC. While they were driving to the KFC, they were stopped by police and fined for being in the same car together, despite the fact that, as members of the same household, they were not breaching the restrictions. We applied to the Traffic Camera Office to have the fine withdrawn, as contrary to law, which was refused without reasons being given. Ahmed now has to take his fine to court, and risk getting a criminal record, or pay more than $1600, which he cannot afford.

Quantifying the potential impacts that the health orders have on certain communities is difficult due to a limited amount of data. Most offences were dealt with by way of hand-written penalty infringement notices, resulting in data relating to country of birth or Aboriginality being recorded in only 18 per cent of 'COVID-only' offences. However, this data was collected for 92 per cent of people who received a COVID-19 fined who had previously been recorded for other types of offending. For people in this situation, almost 3 in 4 (73 per cent) were born in Australia. The second most common country of birth was Sudan (4 per cent) followed by New Zealand (2 per cent). Just under 6 per cent of people issued COVID-19 fines were recorded as Aboriginal, which is significantly disproportionate compared the Aboriginal population of Victoria.[95]

The financial cost to the community is staggering. With just under 39,000 fines issued as of August 2021,[96] each ranging from $200 to about $5,000, its can reasonably be estimated that the Victorian community is currently burdened with about $60 million dollars in fines. Nearly three-quarters of these fines remain unpaid.[97] This financial burden must be viewed in light of the massive job losses, the functional and ethical crisis of the infringement system,[98] and the end of both the eviction moratorium and increased income support.

Further criminalisation of stigmatised and marginalised people

We work with communities who are at greater risk of both contracting COVID-19 and experiencing particularly adverse outcomes (including death) and being criminalised through police enforcement of COVID-19 restrictions. This is particularly true for our clients who are Aboriginal or from a refugee or migrant background, who have a mental illness or psycho-social disability, who experience drug dependence, who are homeless or live in extreme poverty. Many of our clients are deeply reliant on regular access to frontline services, not only for health services but for social connection in a society where many feel they have been – at best – forgotten or rejected.[99]

We have often heard from our clients and other services that support them of feelings of increased visibility to police, targeting by police and significant uncertainty about the precise nature of the restrictions and what that means for them. The impact of COVID-19 has also amplified the drivers of criminalisation and incarceration, such drug or alcohol dependence, psycho-social disabilities, housing instability, social exclusion and vulnerability to violence.

[95] Saul Gare, Sarah Bright, Lauren Barnaba, Beverley Phillips and Melanie Millsteed, 'Police-recorded crime trends in Victoria during the COVID-19 pandemic: update to end of September' *In Brief: Number 11* (December 2020) 21.
[96] Denham Sadler, Almost all Covid-19 fines remain unpaid, *The Saturday Paper*, 7 – 13 August 2021, online: <https://www.thesaturdaypaper.com.au/news/economy/2021/08/07/almost-all-covid-19-fines-remain-unpaid/162825840012223>.
[97] Denham Sadler, Almost all Covid-19 fines remain unpaid, *The Saturday Paper*, 7 – 13 August 2021, online: <https://www.thesaturdaypaper.com.au/news/economy/2021/08/07/almost-all-covid-19-fines-remain-unpaid/162825840012223>.
[98] For more information on the problems with Victoria's fines system see Infringements Working Group Briefing Paper, *Fairer fines outcomes for vulnerable Victorians during COVID-19 and the recovery phase* (July 2020)
[99] For more detail please see Fitzroy Legal Service's submission to the Inquiry into the Victorian Government's Response to the COVID-19 Pandemic (October 2020).

The confluence of these factors is heightened policing and the unnecessary criminalisation of already stigmatised and marginalised communities. The following case studies were included in our submission to the Inquiry into the Victorian Government response to COVID-19 and included here for completeness.

> *X had attended the MSIR from Frankston. X is an intermittent user and therefore at risk of overdose.*
>
> *X attends the MSIR as a safety measure and to access dental services. At the time of X's attendance, the directives in place permitted …. X was approached by PSOs who were concerned he was showing signs of having the COVID-19 virus. X explained he had been at the MSIR and had used heroin.*
>
> *X was arrested and an ambulance was called. He was transported to hospital. On the way to the hospital he was sedated as he was agitated. He awoke in the hospital in a special unit and was released. The introduction of sedation into his system would have increased his risk of overdose.*
>
> *L was issued with a COVID-19 infringement fine on departure of the MSIR. The fine was issued because he had travelled in excess of 5 km to access the service.*
>
> *N was issued with three infringements in the space of two days. N does not have stable housing (temporary emergency COVID-19 housing & long term homeless) and is drug dependent. N had been in the vicinity of a primary health service that is his primary source of social support and medical support.*
>
> *F was stopped by police on three occasions for not wearing a mask. F has a diagnosis of severe schizophrenia. On the third occasion F's bail was revoked and he was remanded.*
>
> *R was stopped by police for being in the central business district. He told police and workers he was going to a cheap supermarket because that is where he used to be homeless and he knows what to buy. He was issued with an infringement. The infringement noted he 'looked like a drug dealer'. R knows this was racial profiling.*
>
> *M had just been released from Port Phillip Prison. M was still in possession of a garbage bag of belongings, and is unlikely to have had any significant orientation on release (as the pandemic period had just commenced, front line services were closed, and even those in the social services sector had little knowledge on how to make effective referrals). M was standing on a corner near our service and police questioned him. He was issued with a COVID-19 infringement fine for breaching directives. The matter was reported by a concerned citizen.*
>
> *G attended the CBD to visit the pharmacist from whom he receives daily medication. G also attended a primary health service in the city which is one of his primary support services as a result of long-term homelessness. G was asked by police to move on the city when he stopped to check in with some other homeless people. He did so. A little later he checked in on a homeless person who was nodding off to see if they were ok. He was issued with a fine. G is an elder in his community, and has social duties and humanitarian duties that accompany that status.*
>
> *B attended the train station to meet a friend who had just been released from custody. He went to assist his friend to find his way home. He was issued with a COVID infringement.*
>
> *N has an acquired brain injury. He suffered a fall and has no recollection of how or why he received a COVID-19 infringement.*
>
> *P attended the central business district to attend the primary health service where he obtains support (social, psychological and material). Was issued with an infringement for being outside the 5 km radius. Has been placed in temporary accommodation but his established support services are outside the vicinity.*

F has a significant mental illness. He is unable to recall how and why he received a COVID-19 infringement.

Alternative approaches

We, alongside our legal sector colleagues, have advocated from the beginning of this pandemic for an educative and support focused approach. In light of the evidence that COVID-zero is unachievable, this is as important now as it was at the beginning of the pandemic. Vaccination targets are unlikely to be reached until November at the earliest, and even then our expectation is that restrictions will be necessary to support public health objectives.

We submit that the current criminal enforcement focus is in conflict with the objectives and purposes of the PHWA, the *Charter of Human Rights and Responsibilities.* Approaches that are the least restrictive and the least punitive are in line with the objectives and purpose of PHWA and the *Charter* and could occur in harmony with police protocols and other strategies currently employed to respond to the covid crisis.

11. That the Victorian Government legislate to ensure that:

- ***monitoring compliance with COVID-19-restrictions, particularly stay at home directions, be led by people trained in public health, with expertise to meaningfully assess risk of infection***
- ***when police have stopped someone in relation to public health rules, they should not be permitted to:***
    - ***execute outstanding warrants***
    - ***question them about unrelated matters, or***
    - ***conduct a search.***

6.1.5 The reality of policing and public health approaches—the MSIR

Another common problem for clients of FLS is the inappropriate use of police discretion near the Medically Supervised Injecting Room (MSIR) in Richmond. Clients of the MSIR attend this health service to safely use drugs in a supervised environment and to access the support services available through the MSIR. Given the context, many people are necessarily in possession of small quantities of drugs, which would otherwise be illegal, in the vicinity of the MSIR.[100]

The *Drugs, Poisons and Controlled Substances Act 1981* (Vic) provides that police can exercise their discretion not to charge a person travelling to and from the MSIR or being in the vicinity of the MSIR.[101] The Victoria Police Manual, *Drugs programs and services procedures and guidelines* require police to ensure that:

- People are not patrolled, searched or surveilled within the 'immediate vicinity' of the MSIR unless 'there is no alternative' and with the authority of a superior officer.
- The vicinity of the MSIR is not targeted solely for the purposes of enforcing drug use or possession laws.

Despite the legislation and guidance to police, the case studies set out below show how our clients are often approached, searched and charged on their way to and from the MSIR. The failure on the part of police to exercise their discretion in accordance with the Victoria Police Manual has also resulted in our clients being taken into custody, interrupting their health care and supports in the community. The significant damage caused by periods of incarceration is set out in more detail above.

[100] *Drugs Poisons and Controlled Substances Act 1981* (Vic) ss 55K – 55L
[101] *Drugs Poisons and Controlled Substances Act 1981* (Vic) s 55M.

Case study: Ted

Ted migrated to Australia in his childhood. He is now in his late 50s. Ted has been using heroin for a few decades and has been diagnosed with severe substance use disorder. Ted has tried valiantly to address his drug dependence, through assessments and support, counselling and pharmacotherapy. Ted's ability to access these supports has been heavily impacted by COVID-19, but he continued to go to the MSIR as a means of safely responding to their drug dependence issues and accessing social support.

Ted was looking for a carpark when he was approached by police, less than 100 metres from the MSIR. When asked, Ted admitted to having heroin in his car. Police searched his car and charged him with several drug related charges, including possession and trafficking. Have spent time in prison in the past, Ted was very worried he would go to prison again. Ted experienced several physical health issues during the time of legal proceedings, which added additional stress to their life.

Ted ultimately received a community corrections order for these charges, which includes many conditions – including regular urine screenings – despite the court's awareness of his longstanding dependence. To our knowledge, Ted has not breached the order, but he does, he is likely to go to prison which would be extremely detrimental to his health and general wellbeing.

Case study: Charlie

Charlie is an Aboriginal person in their late 30s. Charlie sporadically uses heroin, uses cannabis daily and is on the methadone program. Charlie uses drugs to cope with their longstanding mental and physical health issues. Charlie has engaged with alcohol and drug support services consistently throughout their life, and was accessing the MSIR to safely use heroin.

Charlie was intercepted by police 100 metres from the facility. Charlie was charged with possession of heroin and cannabis. Charlie was granted bail, but with a condition that they not be in Richmond, despite being a regular client of North Richmond Community Health for health services and social support.

Our lawyers supported Charlie to amend their bail conditions. For a time, however, Charlie was not legally allowed to access health and social support services that were pivotal to their health and wellbeing. Charlie was eventually granted an adjourned undertaking with good behaviour and an attached condition to attend a drug service for support, which – notably – Charlie was in fact doing when they were charged.

Some of our clients' files also contain body worn camera footage that suggests police do in fact target our clients in the vicinity of the MSIR. This a blatant disregard for harm minimisation principles and the explicit guidance of the Victoria Police Manual. Despite this, there are limits on our capacity to access a remedy for our clients. We regularly request that police withdraw these charges but these requests are often refused.

Given this, we strongly support the establishment of an independent and properly resourced body to oversee police duty failures and police misconduct. We note that police oversight is currently the subject of a review being led by the Department of Justice and Community Safety. We strongly support our colleagues calls for a police oversight and complaints body that is genuinely independent, properly resourced, transparent, responsive, capable of conducting adequate investigations and victim-centred.

We also consider that policing near the MSIR should not be left to police discretion. Victoria Police's approach to harm reduction in the vicinity of the MSIR should be enshrined in legislation.

Recommendation

12. That the Victorian Government legislate that police not be permitted to arrest or charge people for offences connected to the possession, use or supply of

drugs for personal use within a certain distance from the Medical Supervised Injecting Room

6.2 Promote a genuine public health approach to drug use and dependence

The strong connection between our clients' criminalisation and their drug use is a consistent theme in our work and this submission. Through our work at FLS, we see that the criminalisation of drug-related behaviour both increases the risk of drug-related harm, and often precludes our clients from receiving support when they need it. This section of our submission considers these harms in more detail and calls for a radical shift away from the criminalisation of drug use and dependence in Victoria.

6.2.1 The inequitable impact of criminalising drug use

A majority of people who use drugs do so without experiencing any health issues, nor being criminalised on account of their use. Just over 17 per cent of Victorians reported having used an illicit substance between 2018-2019, and 43 per cent of Australians reported having used an illicit substance in their lifetime.[102] Drug use may be viewed along a continuum, ranging from experimental and social use, to problematic or dependent use. Research suggests that the majority of people who use illicit drugs will not experience problematic or dependent drug use patterns,[103] nor are they likely to experience drug-related health issues or be criminalised on account of their use.

This can be contrasted to the experience of our clients, many of whom describe problematic or dependent drug use patterns, which are exacerbated by their frequent and repetitive criminalisation. In a recently conducted file review, we analysed a large sample of our summary offence files to conclude that approximately 60 per cent of our clients were either charged with a minor drug-related offence (for example, low-level trafficking or possession) or reported their drug use as being a contributing factor to their offending. This is consistent to data provided by prisons, whereby two-thirds of people entering prison in 2018 reported having used drugs illicitly in the past 12 months.[104] The overwhelming experience of our clients is that criminalisation reinforces systemic inequalities and adds significant barriers that prevent them from receiving the support when they need it.

6.2.2 The financial costs of criminalising drug use

Using cannabis alone as an example, the cost of utilising a criminal response for a health problem is staggering. The June 2020 report of the National Drug Research Institute titled 'Quantifying the Social Costs of Cannabis Use to Australia in 2015/16' calculates $4.5 billion in social costs. Of that, over half ($2.4 billion) were allocated to costs to the community of the criminalisation processes (police, courts, lawyers, corrections, imprisonment, victims of crime). Of this $2.4 billion, the division of costs is:

- 1.1 billion imprisonment
- 475 million police
- 407 million personal crime victim
- 257 million household crime
- 62 million court
- 52 million legal aid prosecution
- 25 million community corrections.

[102] Australian Institute of Health & Welfare. (2020). *National Drug Strategy Survey 2019.* Retrieved from https://www.aihw.gov.au/reports/illicit-use-of-drugs/national-drug-strategy-household-survey-2019/contents/summary

[103] Anne Schlag, 'Percentages of problem drug use and their implications for policy making: A review of the literature', (2020) 6 *Drug Science, Policy and Law*.

[104] Australian Institute of Health & Welfare. (2021). *Alcohol, tobacco & other drugs.* https://www.aihw.gov.au/reports/phe/221/alcohol-tobacco-other-drugs-australia/contents/population-groups-of-interest/people-in-contact-with-the-criminal-justice-system

By a significant margin, the largest investment nationally in addressing cannabis use is not only in criminalisation, but specifically in imprisonment. The vital question to be answered is, what public health outcomes are served by this spending?

5.2.3 The harms caused by criminalising drug use

Victoria's current approach to drug policy increases the likelihood of harm for all people who use drugs. For our clients – and other people who are already marginalised or experience disadvantage for another reason – the punitive approach has particularly harmful impacts.

As discussed in section *5.2.1 Impact of incarceration on health care for drug dependence and mental health*, prisons–and the criminal legal system–are ill-equipped to provide comprehensive support to people experiencing drug-related health issues. In *section 6.1.5 The reality of policing and public health approaches—the MSIR*, we highlighted the way in which policing practices exclude people from accessing the safe injecting room. These examples illustrate just some of the ways in which criminalising drug use undermines the delivery of social and health supports. Unfortunately, these are not isolated examples.

Every day we see how the criminalisation of drug use and dependence contravenes harm reduction, causes drug-related harm and reinforces the underlying conditions that drive problematic, risky or harmful drug-related behaviour. Indeed, a punitive approach is antithetical to an evidence-based, public health approach. In our work, we see that this approach to drug use *increases* drug-related harms in several ways.

First, an irregulated and illegal drug market increases the likelihood of drug-related harm associated with using unknown and potentially adulterated substances (for example, fentanyl).[105] In the absence of drug-testing initiatives and the expansion of pharmacotherapy programs to allow for the prescription of drugs currently deemed 'illicit' (for example, prescribed heroin),[106] this means that our clients who are dependent on drugs experience significant personal risk when they use. This is particularly true in instances where policing occurs around the MSIR or our clients have bail conditions precluding them from using this service. This compels our clients to use drugs alone or in unsafe environments, increasing their risk of harm.

Second, the punitive approach to drug use is inherently discriminatory – it contributes to and reinforces deeply rooted stigmatisation and negative stereotyping of people who use or are dependent on drugs. On a fundamental level, this lacks compassion and understanding for other peoples' experiences. Our clients, and other people who use drugs, are compelled to 'hide' their drug use to protect themselves, with significant negative consequences for their mental and physical wellbeing. In addition, it is well-established that drug dependence is the most stigmatised health condition or personal attribute a person can have. Criminalisation processes underpin and reinforce that stigmatising framing and experience.

Relatedly, there are many implications of a social, political and legal culture that heavily discriminates against people who are dependent on drugs. These are difficult to quantify, but include: psychological harm, social isolation, fear of punishment, feelings of shame, riskier drug use practices (increased risk of blood-borne virus transmission and other physical health conditions) and death.[107] In 2019, illicit drug-related fatalities in Australia were the second leading cause of death for people in their 30s, and the third leading cause of death for people in their 20s and 40s.[108]

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[105] Joanne Csete, et al., 'Public health and International Drug Police', (2016), 387(10026) *Lancet*, 1427–1480.

[106] For example, despite its success in other countries, medically-prescribed heroin as treatment for heroin dependence is not an option in Australia. See systemic review here: Michael Farrell and Wayne Hall. 'Heroin-assisted treatment: has a controversial treatment come of age?', (2015), 207(1) *The British Journal of Psychiatry : the Journal of Mental Science,* 3–4.

[107] Joanne Csete, et al., 'Public health and International Drug Police', (2016), 387(10026) *Lancet*, 1427–1480.

[108] Pennington Institute. (2021) 'Australia's Annual Overdose Report 2021'. Accessed at < https://www.penington.org.au/>.

The harms listed above are disproportionately experienced by our clients and their communities, who already experience intersecting systemic inequalities. Rates of fatal drug overdose, for example, are significantly higher in First Nation populations;[109] and women face unique challenges relating to the stigmatisation of their drug use, including an increased likelihood of surveillance and child removal.[110] Drug-related harms – including the loss of life – and the impacts that this has on our clients and their communities are preventable, and entirely unjustifiable.

6.2.3 Criminalisation can exacerbate drug dependence

The punitive approach reinforces conditions and systemic issues, which in turn, increases the likelihood of a person engaging in problematic drug use. Drug use does not exist in a vacuum. The literature suggests that a person's drug use patterns – and the harms that arise from them – is intimately tied to their social context.[111] Social determinants of health, including education, colonisation, trauma, employment, gendered violence and social-demographic factors are highly influence in determining whether a person will develop problematic drug use patterns or experience drug-related harm.[112]

Our clients describe their drug use as an important part of dealing with conditions tied to the broader social and legal context in which they live. Drug use is consistently described as a pivotal coping mechanism in managing with emotional or physical pain, a history of trauma, challenging work conditions (for example, sex work), or lack of employment. Many of our clients begin using drugs at a very young age and report a familial history of problematic drug use, both of which significantly increase a person's likelihood of experiencing drug dependence.[113]

> ***Case study: O***
>
> *O is a person of migrant refugee background in their 40s, who experiences severe mental health issues and homelessness. O began using drugs as a teenager, and was exposed to their parent's drug use from an early age. O has been supported by the FLS drug outreach lawyer program in relation to several matters over a long period of time. Omar's offending has been limited to low-level offending, that is always related to their drug use.*
>
> *O is worked with drug treatment and support and mental health services over the years, and has also been supported by a pharmacotherapy program. However, O has faced enormous challenges managing their daily heroin use, as it is a means of self-medicating in response to a traumatic life event. At the time of their most recent offending, O had experienced three periods of imprisonment, which resulted in serious mental health issues and subsequently, increased their heroin use.*
>
> *Our drug outreach lawyer program supported O in receiving a good legal outcome for their most recent matters, but noted the significant strain that legal proceedings had on O's mental health and wellbeing.*

As reflected by the case studies listed above, the realities of our clients' drug use highlight the need to radically shift our approach to drug policy. First, where a person is experiencing drug dependence, we need to respond with support and collective care, rather than punishment, policing and imprisonment. Second, we must address the underlying systemic inequities that increase the risk of a person

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[109] Pennington Institute. (2021) 'Australia's Annual Overdose Report 2021'. Accessed at < https://www.penington.org.au/>.
[110] Rebecca Stone, 'Pregnant women and substance use: fear, stigma, and barriers to care.' (2015) 3(2) *Health & Justice*.
[111] Alison Ritter, Trevor and Nicole Lee. (2017). *Drug use in Australian society* (Second edition.) 39.
[112] Cara Settipani,et al., 'Social Determinants of Health among Youth Seeking Substance Use and Mental Health Treatment' (2018) 27(4) *Journal of the Canadian Academy of Child and Adolescent Psychiatry*, 213 – 221; Ju Park, et al., 'Situating the Continuum of Overdose Risk in the Social Determinants of Health: A New Conceptual Framework' (2020) 98(3), *The Milbank Quarterly*, 700–746; Sana Shahram, 'The social determinants of substance use for aboriginal women: A systematic review.' (2016) 56(2) *Women & Health*,157–176.
[113] Leah Richmond-Rakerd, Wendy Slutske and Phillip Wood, 'Age of initiation and substance use progression: A multivariate latent growth analysis' (2017) 31(6*) Psychology of Addictive Behaviours : Journal of the Society of Psychologists in Addictive Behaviours*, 664–675.

developing problematic drug use patterns, rather than utilising drug use as a means of reinforcing systems of oppression.

6.2.4 Harm minimisation and health-based approaches

Our experiences in supporting people who use drugs suggest that the current, punitive approach to illicit drug use fails in significant and damaging ways. The harm minimisation approach to drug use provides an alternative paradigm, which is grounded in a public health framework and attempts to reduce the harms of drug use without seeking to completely eliminate peoples' participation in drug use.[114]

Harm minimisation is well supported by a strong evidence base, as reflected by the national commitment to this approach to drug policy (as per the National Drug Strategy 2017 – 2026).[115] The National Drug Strategy reiterates its commitment to 'harm reduction', which aims to reduce 'health, social and economic consequences' of drug use to people who use drugs and their communities.[116] To some extent, the Victorian Government demonstrates a commitment to harm minimisation. This is reflected by Victoria's *Ice Action Plan*, *Drug Rehabilitation Plan*, the funding of the MSIR and other alcohol and other drug treatment and support initiatives.[117]

We note that both state and national government policy approaches refer to three pillars of harm minimisation: demand reduction, supply reduction and harm reduction.[118] A harm minimisation approach is a step in the right direction (that is, it acknowledges that drug use is inevitable and that a prohibitionist approach is counterintuitive), and the 'harm reduction' principle should be fully endorsed by all levels of governmental policy. The Victorian Government is to be commenced for their funding of the MSIR, and their commitment to improving the resourcing of harm reduction initiatives in alcohol and other drug sector at large.

Issues with the current adoption of harm minimisation

Genuine efforts to reduce harm and improve drug-related public health issues are currently superseded by an overwhelming emphasis on law enforcement and policing. This emphasis on 'supply reduction' often conflicts with 'harm reduction'. In our work, we see a consistent trend of 'supply reduction' being utilised to justify the over-policing of marginalised communities and targeting of low-level drug offences (for example, possession, and small-scale trafficking that occurs to support drug dependence).

The disproportionate emphasis on 'demand reduction' and 'supply reduction' is very concerning. This trend is reflected by the insurmountable differences in funding allocation, where the majority of drug policy funding is siphoned toward policing and law enforcement. This is particularly problematic, as it translates to an approach to drug policy that reinforces the current, punitive measures scheme under the guise of 'harm minimisation' and 'public health'. What we see in our work – and what the evidence suggests – is that criminalising our clients' drug-related behaviour reinforces the conditions the create drug-related harm, which stands in direct contradiction to the public health approach.

Decriminalisation necessary to improve public health

In 2019 the Queensland Productivity Commission produced an extensive report on imprisonment and recidivism. In it they detail the harms and failings of the current criminal approach to drugs and the evidence-based expected outcomes of drug decriminalisation, including:

- there would be a net benefit to Queensland of $850 million
- use of drugs would not increase;

[114] Mary Hawk et al. 'Harm reduction principles for healthcare settings' (2017) 14(1) *Harm Reduction Journal,* 70.
[115] Commonwealth of Australia (Department of Health). (2017). *National Drug Strategy 2017 – 2026).* Accessed at < https://www.health.gov.au/sites/default/files/national-drug-strategy-2017-2026.pdf>.
[116] Commonwealth of Australia (Department of Health). (2017). *National Drug Strategy 2017 – 2026).* Accessed at < https://www.health.gov.au/sites/default/files/national-drug-strategy-2017-2026.pdf>.
[117] See Department of Health and Human Services, *Alcohol and Drugs*, online <https://www.dhhs.vic.gov.au/alcohol-and-drugs>
[118] Paul Haber & Caroline Day, 'Overview of substance use and treatment from Australia' (2014) 35(3) *Substance Abuse,* 304 – 308.

- a health-based drug approach would have an expected net benefit of $2 billion to the Queensland community;
- legalisation would further result in net financial benefits and reduce the illegal drug trade markets; and, most importantly
- a refocus and increased investment on the provision of health support and drug treatment services.

We have decades of experience representing people criminalised on account of their drug use and dependence. Based on this experience, we believe that a genuine reduction in the harms relating to drug use and dependence can only occur with a radical shift in our current approach to drug policy. We acknowledge that the regulation of drugs is complex, but point to the vast body of literature both domestically and abroad that highlight the success of – and the need for – decriminalisation and legalisation schemes.

Our clients' experiences overwhelmingly support this perspective: decriminalisation of drug use, possession and low-level trafficking will remarkably improve our clients' lives. It would also stem the flow of people into prison and stop cycles of offending. Additionally, to further minimise drug-related harm, decriminalisation should be accompanied by a broader legalisation scheme that regulates the drug market.

Recommendation

13. That the Victorian Government:

- ***decriminalise the use, possession and low-level trafficking of illicit drugs***
- ***consider legalisation frameworks to regulate drug use, following an investigation of what works in other jurisdictions***
- ***urgently redirect resources allocated to policing and enforcing the criminalisation of drug use and dependence to respond to peoples' drug-related health issues***

6.3 Build public housing not prisons

6.3.1 Connection between housing, criminalisation and incarceration

There is a clear evidence-base that a lack of safe and stable housing is closely linked to criminalisation, incarceration and re-offending.[119] Australian studies suggest that people in unstable accommodation after leaving prison were 3 times more likely to return to prison within 9 months of release. Similarly, a UK-based study found that nearly 80 per cent of people who had been homelessness before their incarceration reoffended within 12 months of release, compared to less than half of those with stable housing at the time of their incarceration.[120]

This is hardly surprising. Stable and safe housing is the bedrock of physical and psychological safety, without which our society cannot expect people to address the underlying causes of their contact with the criminal justice system. According to a very recent AHURI study,

> *secure, affordable public housing is a steady 'hook for change' that a person exiting prison can hold onto as they make changes in their circumstances, and in themselves,*

[119] Matthew Willis (2018) *Supported Housing for Prisoners Returning to the Community: a review of the literature*, Australian Institute of Criminology for State of Victoria, Corrections Victoria, 11; Bethany Growns et al, 'A Systematic Review of Supported Accommodation Programs for People Released From Custody' (2018) 62(8) *International Journal of Offender Therapy and Comparative Criminology* 2174, 2175-6.
[120] Matthew Willis (2018) *Supported Housing for Prisoners Returning to the Community: a review of the literature*, Australian Institute of Criminology for State of Victoria, Corrections Victoria, 7-8.

to desist from offending. It is also a stable base from which to receive and engage with support services'.[121]

Our clients' experiences strongly support this assessment. For example, we know that addressing drug dependence – which features in so much criminalisation – often requires intensive counselling to heal complex trauma. It is unrealistic and unfair to expect someone to meaningfully engage in this kind of difficult and long-term psychological work while living in precarious accommodation, such as a rooming house. Similarly, we know that employment and financial security is important to breaking cycles of incarceration. It is unrealistic and unfair to expect someone sleeping on a friend's couch to find and keep a job.

And yet our criminal legal system routinely requires this of people. As noted above at *4.4.2 Housing instability and economic opportunity*, people in prison are disproportionately likely to experience homelessness or housing instability when compared to the general population. About 25 per cent of people entering prison report being homeless in the four weeks prior. Consistent with the disruption caused by incarceration, about 50 per cent of people leaving prison expect to be homeless on release.[122] These proportions are up from previous years – it is extremely concerning that the number of people exiting custody into homelessness in Victoria has increased by 148 per cent since 2011-12.[123]

The case study below highlights how unstable housing and criminalisation intersect, and how housing can provide a platform from which people can address the drivers of their offending.

Case study: Layla

Layla became homeless in early 2020 in the context of family violence. Unable to access secure accommodation as the COVID-19 pandemic began, she couch-surfed for months in an area close to her children before identifying a nearby house where nobody had been residing. Layla and her partner moved into the premises, connecting utilities and taking care of the house for several weeks before police attended in numbers, arrested and charged her with trespass and related offences. The matter took more than a year to finalise. Only after Layla was able to leave the violent relationship and secure her own stable accommodation could she stabilise, and has not committed any further offences since. What Layla required was support, not criminalisation.

6.3.2 Homelessness and bail

Not only does housing instability undermine our clients' capacity to address the drivers of their criminalisation, it also makes it much harder to get bail therefore increasing the likelihood that someone will go to prison in the first place.

While the *Bail Act 1977* (Vic) does not expressly provide that unstable housing is a barrier to granting bail, it is the experience of our lawyers that Magistrates strongly prefer to bail someone to a specific address and that a person's 'home environment' forms part of an accused person's 'surrounding circumstances' to which bail decision makers must have regard'.[124] For our clients without housing, this becomes an insurmountable barrier to getting bail. Research conducted in 2020 into the drivers of women's increasing remand in Victoria also consistently highlighted a lack of housing as one of the

[121] Chris Martin et al, (2021) *Exiting prison with complex support needs: the role of housing assistance*, AHURI Final Report No. 361, Australian Housing and Urban Research Institute Limited, Melbourne, 86.
[122] Australian Institute of Health and Welfare, The health of Australia's prisoners 2018 (2019)
[123] Australian Institute of Health and Welfare, Specialist Homelessness Services annual report 2018-19 (December 2019) online <https://www.aihw.gov.au/reports/homelessness-services/shs-annual-report-18-19/data> (accessed 22 September 2021).
[124] *Bail Act 1977* (Vic) ss 4E(3)(a), 4A(3), 4C(3).

most significant barriers to women being granted bail.[125] Research in NSW has also found that people experiencing homelessness are less likely to be granted bail.[126]

This issue was considered by the recent Parliamentary Inquiry into Homelessness, which received multiple submissions highlighting this problem. The Committee agreed that specific supported accommodation would assist people to access bail and reduce the number of people on remand and recommended

> *That the Victorian Government investigate whether greater access to supported accommodation is required for people seeking bail and whether this would lead to a reduction of individuals on remand.*[127]

We strongly agree that greater access to accommodation would improve our clients' prospects of being granted bail. We note that to be effective, supported accommodation must be based on housing first principles and not recreate forms of surveillance and monitoring that will set people up to fail.

We ultimately consider that the only solution is to build more homes not prisons. This recommendation is set out in more detail below at *6.3 Build public housing not prisons.* Our recommendations regarding bail are also discussed in more detail below in section *6.6 Reform Victoria's bail laws.*

6.3.3 Homelessness as a barrier to being released from prison

In our submission to the Inquiry into homelessness in Victoria, we highlighted the paucity of housing available to people leaving prison. A recent AHURI study described the capacity of housing available to people leaving prison as 'tiny'.[128] The evidence presented in that report suggest that basically nothing has changed since the Victorian Ombudsman's 2015 *Investigation into the rehabilitation and reintegration of prisoners in Victoria* which found that:

- 1.7 per cent of people leaving prison had access to housing through two publicly funded programs specifically for people leaving prison

- 22 per cent of people leaving men's prison and 44 per cent of people leaving women's prisons were still homeless even after a period of supported accommodation on release.[129]

The findings of the AHURI study are entirely consistent with the experience of our prison advocacy program, which often works with people seeking housing in order to access parole. In addition to there being extraordinarily limited post-release housing places, there is very little information publicly available about the availability of, and eligibility criteria for, post-release housing. Our clients also report it is very difficult to access information from inside prison about post-release housing options.

The ways that people who have criminalised or incarcerated are barred from accessing the private rental market are set out in more detail above at 5.1. Nor is there adequate community or public housing to house people leaving prison. This problem is even more pronounced for women, who often seek housing that will enable them to reunite with their children. What happens in practice is that housing support agencies contracted to provide transitional support to people leaving prison use limited

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[125] Emma Russell et al, *Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria*, published by La Trobe University, Deakin University and Fitzroy Legal Service (July 2020)
[126] Susan Ayres, Kyleigh Heggie, and Abillio e Almeida Neto, '*Bail Refusal and Homelessness Affecting Remandees in New South Wales*' Corrective Services N.S.W, July 2010
[127] Victoria, Parliamentary Inquiry into Homelessness (March 2021) 181 (recommendation 23).
[128] Chris Martin et al, (2021) *Exiting prison with complex support needs: the role of housing assistance*, AHURI Final Report No. 361, Australian Housing and Urban Research Institute Limited, Melbourne, 33.
[129] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria,* Melbourne, 2015. https://www.ombudsman.vic.gov.au/getattachment/5188692a-35b6-411f-907e-3e7704f45e17 (accessed 10/2/20)

brokerage funds to access very short-term crisis accommodation–motels, private rooming house or backpackers hostel.[130] In practice this leaves many of our clients with no options.

Case study: Edward

Edward is in his mid-70s and has been in prison for the last 10 years. After his parole eligibility date had passed, Edward contacted us for assistance with his parole application. Edward had been told he was suitable for parole because there was a very low risk of him reoffending. But the Adult Parole Board would not consider his application until he could nominate a suitable permanent address for vetting by Community Corrections. Edward had no housing on the outside and no family or friends able to provide permanent accommodation. Edward had applied for public housing more than a year before his parole eligibility date and was placed on the Victorian Housing Register but was told he could not be placed on the "priority" list for social housing (waiting list 2-3 years) because he was accommodated in prison and therefore not currently 'homeless'.

Edward asked to be considered for the Corrections Victoria Housing Program (specialist housing for prisoners on parole) but was advised that the program was not available at his prison. Edward spoke to a charitable organisation contracted to provide reintegration housing services at the prison. He was told they could only assist prisoners to find housing at their "full time" release date, not for parole. This is because the organisation has no housing stock and can only provide temporary accommodation. They confirmed the Adult Parole Board required an applicant to nominate permanent housing and would not grant parole to a rooming house. The organisation was therefore only able to assist prisoners with housing at the completion of their full sentence, not on parole. Edward would have to remain in prison for a further four years and they may be able to refer him to a rooming house or other crisis accommodation at that time.

6.3.4 Build public housing not prisons

Despite the overwhelming evidence that safe and stable housing is a necessary and crucial component in breaking the cycle of criminalisation and incarceration, Victoria consistently spent the least of all states and territories on social housing.[131] While we welcome the Victorian Government's Big Housing Build announcement, consistent underspending on social housing in Victoria means the homes built through this spending will fail dismally to meet the demand for affordable housing in Victoria. According to the recent Parliamentary Inquiry into Homelessness in Victoria, there are currently nearly 80,000 new applicants for social housing on the Victorian Housing Register.[132]

Moreover, all of the $5.3 billion dollars will go towards 'community' and 'affordable' housing, run by private providers. There will be no increase in the availability of *public* housing. For criminalised people, and particularly criminalised women and their children, there are significant barriers to accessing community and 'affordable' private housing, including:

- Community housing providers often make decisions about their preferred tenants in ways that excludes tenants with criminal histories, drug dependence and mental illness.
- Community housing tenancies are less secure, with much higher eviction rates for households struggling with extreme poverty, family violence, alcohol and other drugs and poor mental health.
- Community housing providers are not under the same obligations as government to give priority access to applicants who are homeless or at risk of homelessness.

[130] See Crisis in Crisis report; Chris Martin et al, (2021) *Exiting prison with complex support needs: the role of housing assistance*, AHURI Final Report No. 361, Australian Housing and Urban Research Institute Limited, Melbourne, 42.
[131] See Luke Henrique-Gomes, 'Victoria spends less than half the national average on social housing, report shows' (22 January 2019) The Guardian, online < https://www.theguardian.com/australia-news/2019/jan/22/victoria-spends-less-than-half-what-nsw-does-on-social-housing-report-shows> (accessed 22 September 2021).
[132] Victoria, Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria* (March 2021) 272, table 6.9.

We strongly urge the Victorian Government to redirect all funding currently allocated for the expansion of prisons and policing to increasing the public housing stock in Victoria. The provision of adequate public housing to meet demand must be a central component of any efforts by the Victorian Government to stem the flow of people into prisons.

Recommendation

14. That the Victorian Government:

- ***redirect all funding currently allocated for the expansion of prisons and policing to increasing the public housing stock in Victoria***
- ***expand the availability public housing stock in Victoria to meet demand.***

6.4 Expand the availability of community-based support services

Throughout this submission we have pointed to research and client experiences that show that criminalisation and incarceration do not address the drivers of crime, and repeatedly highlighted the importance of people remaining connected to supports in the community. This section of our submission emphasises the importance of adequate services to address the drivers of criminalisation and outlines what FLS considers should be some of the key features of those services.

6.4.1 No barriers to access

We note there have recently been a number of important inquiries relevant to the service system, most notably the Inquiry into Homelessness in Victoria and the Inquiry into the Use of Cannabis, and the Royal Commission into Victoria's Mental Health System. These inquiries have canvassed gaps in supports available to people experiencing homelessness, mental health and drug dependence and make recommendations to improve the availability of supports. We strongly support the urgent implementation of the recommendations of these inquiries that aim to address the drivers of criminalisation through more:

- housing and homelessness support,[133] including for people living with mental illness.[134]
- community-based mental health services, and in particular those recommendations aimed at promoting integration between the alcohol and other drug sector and the mental health sector and the flow on effects of genuine integration for community-based mental health and well-being services, bed-based services and crisis and emergency services.[135]
- services to support people who are criminalised on account of their mental health and/or drug use or dependence.[136]

We would like to add some updated information sourced through our health justice partnerships that focuses on alcohol and drug services in light of the dominance of that particular health issue on our clients' lives and in the prison and corrections system.

Anecdotal evidence from our health justice partnerships–which is echoed by the experience of our clients and our lawyers–suggest that the demand for alcohol and other drug counselling, inpatient withdrawal, detox and rehabilitation programs far exceeds service availability. This is a longstanding issue that has been exacerbated by the demands of COVID-19. The increase in demand is reflected in a recent survey of Australian treatment providers, which revealed that 70 per cent of providers have experienced an increase in demand of 40 per cent or more.[137] Across the sector, wait times for alcohol

[133] See Victoria, Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria* (March 2021) including but not limited to recommendations 3–6, 7-8, 11, 13–14, 36–37, 39 and 46.
[134] Victoria, Royal Commission into Victoria's Mental Health System (2021) vol 1, recommendation 24.
[135] See in particular Victoria, Royal Commission into Victoria's Mental Health System (2021) vol 3, 283-284 (recommendations 35 and 36).
[136] See in particular Victoria, Legal and Social Issues Committee, *Inquiry into Use of Cannabis in Victoria* (June 2021) recommendations 3 and 4;
[137] State and Territory Alcohol and Other Drugs Peak Network, *Impact of Covid-19 Pandemic on Alcohol and Other Drugs Service Delivery,* July 2020, accessed online on 26 Aug 21

and other drug services are substantial: alcohol and drug counselling (6-8 weeks), inpatient withdrawal/detox (approx. 8 weeks), long term rehabilitation programs (4-12 months).[138]

Moreover, the impact of COVID-19 has significantly reduced capacity limits of already stretched AOD services. Withdrawal/detox and rehabilitation programs have been particularly affected, with some services closed to new referrals or operating at reduced capacity. It should be noted that engagement with alcohol and other drug support services can be multifaceted and complex, even without the added difficulty of navigating a system where demand far exceeds capacity. While the alcohol and other drug sector emphasises an integrative and holistic service model, the reality of engaging with alcohol and other drug services is often dominated by disjointed service delivery, where a person needs to navigate several processes and assessments across different organisations.[139] For example, it is likely that a person will need to engage in alcohol and other drug counselling and potentially detox/withdrawal prior to being added to a waitlist for residential rehabilitation. Many of our clients who experience drug related health issues are even less likely to have their needs met in this particularly difficult time.

The cultural appropriateness of many mainstream alcohol and other drug healthcare providers is questionable and some Aboriginal peoples engaging in support services may not feel culturally safe.[140] Concerns regarding the appropriateness of services can be extended to include the appropriateness of services in supporting women and non-binary folk, where the majority of alcohol and other drug services, have been developed in the absence of a gender lens. Therefore, people who use drugs and who are also marginalised for some other reason, are much less likely to have their health needs met if they are seeking support pertaining their drug use. This is on account of factors that are well beyond their control.

Based on our experience providing legal services to communities who are criminalised and incarcerated, we consider that the following key features are vital to providing meaningful support

6.4.2 Key features of supports

6.4.2.1 Community-based and voluntary

It is our firm view that government investment in services aimed at reducing incarceration and criminalisation must be directed at organisations and programs that are genuinely voluntary and functionally separate from Victoria's court and corrections architecture.

FLS does not provide therapeutic or social support services. However, we work closely with organisations that do and most clients of our criminal law practice have sought support from a wide range of support services. Based on this experience, we consider that open, trusting and genuinely therapeutic relationships are most likely to be established when services are physically and philosophically separate from courts and corrections. For most people, addressing the drivers of criminalisation and incarceration is not a linear process and people will experience barriers to safety and stability, and therefore a life free of criminalisation, that are beyond their control. These challenges and setbacks often present in the form of drug use, job losses, relationship stress and housing instability. When getting support for these issues is tied up with a person's criminal legal outcome, this can lead to our clients' electing not to seek support and the issue going unaddressed. This does nothing to address the drivers of criminalisation and incarceration in Victoria.

Of course, in the current system there is clearly a role for case management services delivered through the courts and corrections. In our experience, it can be enormously effective when our clients who are expected to engaged with Court Integrated Services Program (CISP) or community corrections workers can be supported by voluntary services that provide case management, outreach and advocacy. An example of how this model can work in practice is set out in the case study below, which describes the

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at <https://qnada.org.au/wp-content/uploads/2020/10/Fin_20200728_Covid-Impact-Survey-Summary-Report.pdf>

[138] As reported to use by partnered organisations in late August, 2021

[139] Savic, Michael, Best, David, Manning, Victoria, & Lubman, Dan I. (2017). Strategies to facilitate integrated care for people with alcohol and other drug problems: A systematic review. *Substance Abuse Treatment, Prevention and Policy*, 12(1), 19–19. https://doi.org/10.1186/s13011-017-0104-7

[140] Taylor, Kate P, Bessarab, Dawn, Hunter, Lorna, & Thompson, Sandra C. (2013). Aboriginal-mainstream partnerships: Exploring the challenges and enhancers of a collaborative service arrangement for Aboriginal clients with substance use issues. BMC Health Services Research, 13(1), 12–12. https://doi.org/10.1186/1472-6963-13-12

Women Transforming Justice pilot project managed by FLS in partnership with the Law and Advocacy Centre for Women and Flat Out.

Case study: Women Transforming Justice pilot project – integrated support to enhance bail outcomes

Women Transforming Justice was a two-year pilot project to establish a women-specific and community-based response for women in custody on remand. Funded through the Victorian Legal Services Board and delivered as a partnership between Flat Out, the Law and Advocacy Centre for Women and Fitzroy Legal Service, Women Transforming Justice provided a specialised program that aimed to enhance women's prospects of bail and support them to live safely and stably in the community.

This objective was achieved by providing women on remand with skilled, integrated and women-specific legal representation and intensive outreach support so they can obtain bail and address the drivers of their incarceration while living in the community.

Once referred to the project, women were met by a lawyer from the Law and Advocacy Centre for Women (LACW) who would link in an intensive outreach worker from Flat Out as soon as possible. The lawyer and intensive outreach worker helped the woman identify and meet her legal and non-legal needs, including:

- *applying for bail and legal representation for her criminal proceedings*
- *transport and support for court, and meetings with CISP case managers or corrections workers*
- *referrals and advocacy in order to access housing, mental health and counselling, drug and alcohol support and family violence services*
- *promoting connections with children, family and community*
- *assistance with employment and education.*

An evaluation of the pilot by the Centre for Innovative Justice found that:

- *"but for" LACW's support through the project, women (who would otherwise not have had legal representation) were provided with representation; and*
- *"but for" Flat Out's support in court through the project, women who would otherwise not have been successful in being granted bail were successful.*

The elements of the pilot project design that contributed to this success included:

- *<u>A highly responsive and flexible referral process</u> – making a referral involved simply a phone call or email with some basic details.*
- *<u>Rapid response within a woman-centred assertive outreach framework</u> – a community-based outreach worker would walk alongside a woman (often literally) as she navigated the complex and sometimes hostile criminal legal system.*

  In practice this involved the dedicated worker regularly attending court and conducting assessments – sometimes within an hour of a referral being received – driving women to appointments and accommodation, quickly arranging emergency housing using dedicated brokerage, providing material aid and generally advocating for clients in all their interactions.

- *<u>Skilled legal representation</u> closely integrated with the assertive outreach support.*

6.4.2.2 The importance of outreach

Outreach is a style of providing social support that involves meeting people in a location that is chosen by and accessible to them. It can involve workers going to where people live, or near where they work, or generally meeting them in a location such as park or café that is convenient to them. Ideally, outreach will also involve the ability to transport people to appointments and court and to help them meet their basic needs through helping them shop and buy clothes.

People who have been criminalised or incarcerated often have a range of overlapping needs that are not well met by the current service system. In practice, a woman on a corrections order might be required to attend drug treatment and support, a housing service for housing support, a pharmacy to access pharmacotherapy as well as a specialist family violence service to address her safety needs. In addition, she may need to complete drug tests for child protection and have to navigate rigid and supervised times to see her children, if they are in care. This is logistically and practically complicated, particularly for people without a car and who might also be trying to re-establish relationships with family and financial security through work. If she doesn't do all these things without fail she risks being breached on her corrections order and losing access to her children. Outreach, particularly when it involves providing transport, is enormously helpful for people having to navigate these competing priorities.[141]

The benefits of outreach for people involved in criminal legal proceedings was highlighted in the recent Women Transforming Justice pilot project described above. In that context, the outreach worker was able to drive women to their accommodation, help them buy necessities, visit children, attend appointments and generally meet them in locations that were convenient to the client. Organisations and individuals who work with criminalised women consulted during the program design phase of the Women Transforming Justice pilot project consistently emphasised the enormous value of outreach support for people caught up in the criminal legal system

6.4.2.3 Integration and partnership with legal services

Reducing the harms associated with criminalisation and incarceration – and therefore reducing recidivism – also requires legal support. For people who have been charged with offences, legal representation helps reduce the stress people experience from their criminal law proceedings and aims to ensure the best outcome, including the withdrawal of inappropriate charges or avoiding incarceration. FLS provides many of its legal services through partnerships with organisations in the health, housing and family violence sectors.

A well-established example of this kind of integrated service delivery model is our drug outreach lawyer program, which we have operated for over 20 years. The drug outreach lawyer program provides specialist legal services for Victorians whose engagement with the legal system is underpinned by drug use. This program provides health/ social support and improved access to justice for highly marginalised community members through partnerships with YSAS, Uniting Care Regen, North Richmond Community Health, Living Room, Co-health, Odyssey House and Quinn House. The drug outreach lawyer program has been found to produce better life outcomes for people who use drugs, including by reducing their stress and obtaining legal outcomes that were either in range or exceptional.

Recommendation

15. That the Victorian Government build on the work of the Royal Commission into Victoria's Mental Health System and the Parliamentary Inquiry into Homelessness in Victoria, by conducting demand modelling to ensure that there are adequate services available to address the drivers of criminalisation and incarceration.

16. That the Victorian Government ensure future spending on services to address the drivers of criminalisation and incarceration goes toward services that:

- ***are voluntary and functionally separate from the courts and corrections***
- ***include the provision of outreach-based case management***
- ***are integrated with the legal assistance sector.***

[141] See Centre for Innovative Justice, Women Transforming Justice: Final Evaluation Report (December 2020) online, < https://cij.org.au/research-projects/women-transforming-justice/>

6.5 Diverting more people from prison

A key strategy to reduce criminalisation and incarceration in Victoria is to expand the availability of options that divert as many people as possible from the criminal legal system. In Victoria these options involve police diversion (in the form of warnings, cautions and police diversion) and court diversion.

Generally speaking, police and court diversion has a number of benefits:

- it allows people to avoid a criminal record, which in turn reduces any barriers they might face obtaining employment and housing
- it aims to centre a therapeutic rather than a punitive approach, by assisting the accused person to access community supports
- it has been found to reduce recidivism and provide economic benefits to the community.[142]

We strongly support the expansion of eligibility for and access to police and court diversion programs in Victoria, supported by adequately resourced and culturally appropriate community-based diversion programs where these are not currently available. Set out below are the current police and court diversion schemes in Victoria, our concerns about the way those schemes operate in practice and our recommendations.

6.5.1 Police and court diversion schemes in Victoria

People charged with the use or possession of a non-trafficable amount of illicit drugs are eligible for Victoria Police's Cannabis Cautioning Program or Drug Diversion Program, provided they:

- are over 18
- admit to the charge
- consent to being cautioned
- have received no more than one previous drug cautioning notice
- have not been charged with any other offence.[143]

Courts can order diversion for adults, with some exceptions, provided that:

- the accused acknowledges to the Magistrates' Court responsibility for the offence
- the Magistrates' Court considers diversion is appropriate
- both the prosecution and the accused consent.[144]

When these conditions are met, Magistrates can adjourn a matter for up to 12 months while the person charged completes a diversion program. If at the end of that period, the Magistrate is satisfied the person charged has successfully completed the program they must discharge that person without a finding of guilt.[145]

While there are no automatic exclusions to the Children's Court ordering diversion for a young person. The Children's Court will consider the young person's personal circumstances, the circumstances in which the offence is alleged to have occurred and the views of the young person's family or carer, lawyer and Victoria Police.[146]

In this submission we highlight the two main concerns for our clients.

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[142] Rights Advocacy Project, *Justice Diverted? Prosecutorial discretion and the use of diversion schemes in Victoria* (May 2018) Liberty Victoria, 6.
[143] Victoria, Legal and Social Issues Committee, *Inquiry into the Use of Cannabis in Victoria: Final Report* (August 2021) 127.
[144] *Criminal Procedure Act 2009* (Vic) s 59.
[145] *Criminal Procedure Act 2009* (Vic) s 59(4).
[146] See Department of Justice and Community Safety, Children's Court Youth Diversion Service < https://www.justice.vic.gov.au/justice-system/childrens-court-youth-diversion-service> (accessed 14 September 2021).

6.5.2 Diversion is at the discretion of police

Both police diversion and court diversion rely on police discretion – either to deal with a person charged with an offence by way of police diversion or to provide their consent in court diversion. As has been raised repeatedly throughout this submission, any processes that rely on police discretion are open to stigma, prejudice and discrimination.

We note in particular New South Wales data that shows that over 82 per cent of Aboriginal people found with a small about of cannabis were prosecuted in the court system, compared to just over 52 per cent of non-Aboriginal people, and that non-Aboriginal people were 4 times more likely to receive a caution.[147] This data sits alongside Victorian data which shows there has been a decline in the use of police diversion, and evidence that police are not offering diversion in appropriate cases.[148] The recent Inquiry into the Use of Cannabis in Victoria also found that the Victoria Police cannabis cautioning program is too discretionary in how it is used by police, with cautions being unequally used between precincts and officers.[149] These findings are entirely consistent with our clients' experiences and reflect institutional discrimination and stigma within Victoria Police.

There are some advantages to police diversion, including that it avoids the need for a person to go to court, which can reduce the stress associated with that process and has advantages for the administration of justice most notably that it does not add to court delays. However, in its current form, police diversion is used in ways that are ad hoc, inconsistent and not transparent. We agree with Victoria Legal Aid's submission to the Inquiry into the Use of Cannabis that the Victorian Government should enact a legislated scheme to govern police diversion.[150]

Recommendation

17. That the Victorian Government enact a legislated scheme for police diversion that:

- ***requires police to consider diversion in all eligible cases***
- ***specifies the matters to which police are not to have regard when offering diversion***
- ***requires police to record demographic information about people offered/not offered diversion which can be publicly reported.***

Similarly, our lawyers have numerous examples of police prosecutors refusing to consent to diversion in circumstances where it would have been appropriate. One recent example involves a client who was refused diversion due prior criminal history of low-level offending, despite that history being over 10 years old.

This is consistent with research conducted in 2018 by Liberty Victoria's Rights Advocacy Project, which highlighted the limited guidance available to police prosecutors when deciding whether to consent and

[147] Michael McGowan and Christopher Knaus, 'NSW police pursue 80 per cent of Indigenous people caught with cannabis through courts' (20 June 2020) *The Guardian,* < https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>

[148] Victoria, Legal and Social Issues Committee, *Inquiry into the Use of Cannabis in Victoria: Final Report* (August 2021) 129-130. Victoria Legal Aid, *Submission to the Inquiry into the Use of Cannabis in Victoria* (No 1373, August 2020) 9.

[149] Victoria, Legal and Social Issues Committee, *Inquiry into the Use of Cannabis in Victoria: Final Report* (August 2021) 128. See also Rights Advocacy Project, *Justice Diverted? Prosecutorial discretion and the use of diversion schemes in Victoria* (May 2018) Liberty Victoria, 22.

[150] Victoria Legal Aid, *Submission to the Inquiry into the Use of Cannabis in Victoria* (No 1373, August 2020) 8.

inconsistent outcomes that depend on the view and practices of the informant, court before which the charges are heard and the prosecutor who picks up the file on the day.[151]

Numerous reviews and reports have recommended the removal of the requirement that police consent to diversion, most notably the recent Inquiry into the Use of Cannabis in Victoria. This builds on recommendations by the Magistrates' Court of Victoria in 2015:

> The Committee reinforced its longstanding view that the Chief Magistrate recommend to the Attorney-General that the granting of the diversion program should be a matter for the discretion of the magistrate and not be subject to veto by the prosecution.[152]

Recommendation

18. That the Victorian Government amend section 59 of the Criminal Procedure Act to remove the requirement that the prosecution must consent to diversion.

6.5.3 Diversion is a one-time offer

When available, diversion can be very effective. According to the Rights Advocacy Project report, outcomes for people who are accepted into a diversion program can be very positive:

> In a sample of 100 [diversion program] participants, only 0-7% would be convicted of a subsequent offence in the 12 months following their commencement in the program.[153]

In practice, a major barrier to our clients getting diversion is that there are limits on how many times it can be accessed. People can only access police diversion for possession and use offences twice before they are no longer eligible. The court diversion criteria in the Criminal Procedure Act 2009 do not stipulate how many times diversion is available, but most of our clients have only been able to access it once. This conflicts with the clear evidence base that addressing drug-related health issues takes time and involves a non-linear trajectory in which most people will go through periods where they use drugs. This is particularly the case when those health issues are connected to complex and intersecting disadvantages that contribute to a person's contact with police and interaction with the criminal legal system.

We are setting people up to fail if we are expecting them to engage with one program once and then to never make a mistake again. A functional justice system is one that is fault tolerant – that does not rule with an iron fist, that allows for relapses, that is realistic and evidence-based. Given the massive benefits to the individual and the community, diversion should be available to a person as many times as possible and appropriate.

Recommendation

19. That the Victorian Government legislates to ensure the eligibility requirements for drug diversion programs are flexible and reflect the evidence about addressing the health needs of people experiencing drug dependence. This should include, at a minimum removing the limits on the number of times a person can access diversion.

6.5.4 Reallocate funding from prison and police to drug diversion programs

The Royal Commission into Victoria's Mental Health System noted that the total budget allocation for diversion programs is equivalent to 3.6 per cent of the [money spent] on prisons.[154] The Inquiry into the Use of Cannabis in Victoria also recommended that 'the Victorian Government provides further funding

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[151] Rights Advocacy Project, *Justice Diverted? Prosecutorial discretion and the use of diversion schemes in Victoria* (May 2018) Liberty Victoria, 17.
[152] Magistrates' Court of Victoria, *Annual Report 2015-16* (September 2016) 14.
[153] Rights Advocacy Project, *Justice Diverted? Prosecutorial discretion and the use of diversion schemes in Victoria* (May 2018) Liberty Victoria, 8.
[154] Victoria, *Royal Commission into Victoria's Mental Health System* (March 2021) vol 3, ch 23, 358.

to expand drug diversion programs, particularly in regional Victoria'.[155] We support these recommendations.

Recommendation

20. That the Victorian Government reallocate funding for prisons to diversion programs in order to increase the number of diversion programs available throughout Victoria.

6.6 Reform Victoria's bail laws

6.6.1 Context and nature of changes to the bail laws

In May and July 2018, significant changes to Victoria's bail laws took effect. These changes established Victoria's bail laws as the strictest in Australia and were introduced in response to a tragic and deadly incident in Melbourne's city in which James Gargasoulas killed 6 people and seriously injured 27 others.[156] Gargasoulas was on bail at the time of this offending.[157]

This context, in addition to an apparent public perception that violent offences were being committed while people were on bail, prompted the Victorian Government to initiate the *Bail Review: review into Victoria's bail system focused on legislative and practical reforms to manage risk and maximise community safety* (Bail Review).[158] The Bail Review was undertaken by the Hon. Paul Coghlan QC who recommended a range of changes to Victoria's Bail Act and the operation of its bail system.[159]

As a result of the Bail Review recommendations, the Victorian Government enacted reforms that expanded the circumstances in which Magistrate *must refuse bail* unless satisfied that:

- 'a compelling reason exists that justifies the grant of bail' (the show compelling reasons test).[160]
- 'exceptional circumstances exist justify the grant of bail' (the exceptional circumstances test).[161]

Most notably, prior to the bail law reforms, the exceptional circumstances test applied to people charged with a small number of very serious offences – murder, treason, trafficking or cultivation of commercial quantities of drugs of dependence and terrorism offences. These reforms significantly expanded the circumstances in which people have to demonstrate either exceptional circumstances or a compelling reason why they should get bail. There is now a presumption against bail for over 100 offences and for any charged with an indictable offence while on bail.[162] It is noteworthy that, 'while some of the reforms may have prevented Gargasoulas from obtaining bail (had they been in place when the decision was made), many changes went beyond the scope of his particular circumstances'.[163]

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[155] Victoria, Victoria, Legal and Social Issues Committee, *Inquiry into the Use of Cannabis in Victoria: Final Report* (August 2021) 131 (recommendation 7).
[156] Hon. Paul Coghlan QC, Bail Review: The review into Victoria's bail system focused on legislative and practical reforms to manage risk and maximise community safety (First Advice, 3 April 2017) [2.5-2.7] (Bail Review, First Advice). See also *DPP v Gargasoulas* [2019] VSC 87 (22 February 2019) [1]. See also *Inquest into the deaths of Matthew Poh Chuan Si, Thalia Hakin, Yosuke Kanno, Jess Mudie, Zachary Matthew Bryant, Bhavita Patel*, Coroners Court of Victoria (Coroner Jacqui Hawkins, 19 November 2020).
[157] Bourke Street Inquest Findings, part 3; DPP v Gargasoulas [74, 166].
[158] Hon. Paul Coghlan QC, Bail Review: The review into Victoria's bail system focused on legislative and practical reforms to manage risk and maximise community safety (First Advice, 3 April 2017) [2.5-2.7] (Bail Review, First Advice).
[159] Bail Review, First Advice; Hon. Paul Coghlan QC, Bail Review: The review into Victoria's bail system focused on legislative and practical reforms to manage risk and maximise community safety (Second Advice, 1 May 2017)
[160] *Bail Act 1977* (Vic) s 4C(1A).
[161] *Bail Act 1977* (Vic) s 4A(1A).
[162] McMahon, M. (2019) *No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention*, Library Fellowship Paper No 3, 17.
[163] Lachlan Auld and Julia Quilter, 'Changing the Rules on Bail: An Analysis of Recent Legislative Reforms in Three Australian Jurisdictions' (2020) 43(2) University of New South Wales Law Journal 642, 652.

These reforms built on changes made in 2013 that made it an offence to contravene a bail condition or to commit an indictable offence while on bail. The 2013 reforms were introduced despite the Victorian Law Reform Commission recommendation against such a step on the basis that was likely to have a disproportionate effect on people who experience disadvantage or marginalisation, particularly people with psycho-social disabilities, people who are homeless and young people.[164]

6.6.2 Impact of changes to the bail laws

As we noted in our submission to the Inquiry into the Use of Cannabis in Victoria, the stated purpose of the amendments to the Bail Act was to remove opportunities for violent offenders to commit further acts of violence and harm to others whilst on bail.[165] However, the significant expansion of the circumstances in which a person charged is subject to a reverse onus test has resulted in a 'net-widening' that is incarcerating Victorians caught in patterns of low-level, non-violent offending – such as drug possession, theft, Bail Act or property offences – that is connected to psychosocial-disability and poverty.[166]

Our clients' experiences

Of most relevance to our clients, the changes to the Bail Act mean that people who commit an offence while on bail must show compelling reasons, and people who get bail and commit any further offences, will be subject to the exceptional circumstances test. This process of 'double uplift' can occur rapidly, particularly for people navigating drug dependence, mental health problems, housing and financial stability and those who are members of over-policed communities.

As we described in our submission to the Inquiry into the Use of Cannabis in Victoria:

> *A scenario that can play out is that a person is arrested for stealing an item worth a small amount of money from a service station. This person is arrested and placed on bail. The person, whilst on the police bail, is then found by police with a small quantity of cannabis for personal use. This is an indictable offence whilst on bail (an offence against the Bail Act) and compelling reasons now need to be shown in order for the person to be granted bail. Compelling reasons is a higher test than the old bail legislation of 'showing cause' and may be a too difficult a hurdle to jump. There may be other issues such as homelessness and lack of supports that mean the client is not able to show compelling reasons.*
>
> *In the event that the police or the Court grant them a further bail, and they are then found again with cannabis, they are now in a position of having to show exceptional circumstances to justify the granting of bail which is an even harder test than showing compelling circumstances.*[167]

The above scenario is really common for our clients. Anecdotal evidence overwhelmingly confirms that a significant proportion of people are not getting bail despite being charged with offences that do not warrant a term of imprisonment. An internal review of a sample of FLS's criminal law files revealed that many of our clients are spending between 7 and 30 days in custody for charges that result in community-based dispositions, including fines, adjourned undertakings and community corrections orders.

The following two case studies exemplify the experiences of our clients:

> ***Case study: Edward***
>
> *Edward is an Aboriginal man in his mid-40s. By 13, Edward was on the streets having escaped a violent family home and had also left school. Edwards's substance use*

[164] Victorian Law Reform Commission. *Review of the Bail Act Final Report* (2007) 46.
[165] Second Reading Speech Bail Amendment (Stage One) Bill, Hansard, Legislative Assembly, 25 May 2017. Parliament of Victoria Parliamentary Debates (Hansard) Second Reading & debate Bail Amendment (Stage Two) Bill, Thursday, 22 February 2018 pp 512 – 527, 537 – 564
[166] This point was made in FLS's submission to the *Inquiry into the Use of Cannabis in Victoria* (September 2020) 11 < https://fls.org.au/app/uploads/2021/03/Cannabis-inquiry-14-September-2020.pdf>.
[167] FLS's submission to the *Inquiry into the Use of Cannabis in Victoria* (September 2020) 11 < https://fls.org.au/app/uploads/2021/03/Cannabis-inquiry-14-September-2020.pdf>.

issues with heroin started around this time and he reports being in and out of prisons from the age of 14. Edward spent much of his childhood in as a ward of the state and in youth detention. He was the victim of significant institutional abuse. The majority of Edward's adult life has involved imprisonment for low level offending linked to his drug use issues and homelessness.

Last year, Edward was placed on bail for further offending. He made the decision to break the cycle of use and prison. He began to address a 30-year habit through drug rehabilitation counselling, successfully finishing a voluntary program of rehabilitation and stabilising on opiate replacement therapy. He reconnected with family for the first time in many years and is looking at renting his own house. After nine months, Edward had a minor relapse and was found by police with a small portion of cannabis. Edward was remanded for committing an indictable offence on bail, and all the progress he made has been jeopardised.

Case study: Cam

Cam is a 41-year-old Vietnamese man with criminal history comprised entirely of drug-related offences. Cam's mental health deteriorated significantly when his family separated in the late 1990s, at which point he started using drugs. While he has experienced lengthy periods of abstinence, the death in 2018 of his father–with whom he was very close–precipitated a marked decline in his health and a return to drug use. His mental health has required voluntary and involuntary hospitalisation and he is currently homeless and being supported by a number of services through the Neighbourhood Justice Centre.

At the time of the bail application, Cam was on bail for drug possession and failing to attend court while on bail. Cam was remanded because he breached his bail by attending his regular health service in Richmond, a location his bail conditions excluded him from. These circumstances placed Cam in exceptional circumstances – he was charged with a Schedule 2 offence (breach of a bail condition) while on bail for an indictable offence (possession of drugs).

Despite his extensive vulnerabilities, Cam was unable to demonstrate exceptional circumstances. He spent 10 days in custody and ultimately pleaded guilty to the charges for which he received a fine

Other examples from our practice include:

- A client with significant mental health problems and an intellectual disability, who spent two weeks in custody for minor theft and fraud offences. Was linked in with disability services in the community but this support lost during period of incarceration.

- A client who spent 27 days in custody for committing offences relating to drug dependence, unlicensed driving and shop theft while on bail for similar offences. Our client experiences drug dependence, and has navigated unstable housing, insecure employment alongside a history of grief and trauma. After spending 27 days in custody, our client was sentenced to a fine.

- A client with a history of drug dependence spent 20 days in custody. Our client was charged with possession of drugs while on two counts of bail for other possession charges. He was ultimately placed on community corrections order.

What the data shows

Our clients' experiences are reflected in publicly available data, which paints a picture of:

- growing number of people in prison on remand
- significant increases in the number of people in prison who were subject to one of the reverse onus tests
- more people spending short periods of time in custody for offences that do not ultimately warrant a term of imprisonment.

<u>More people on remand</u>

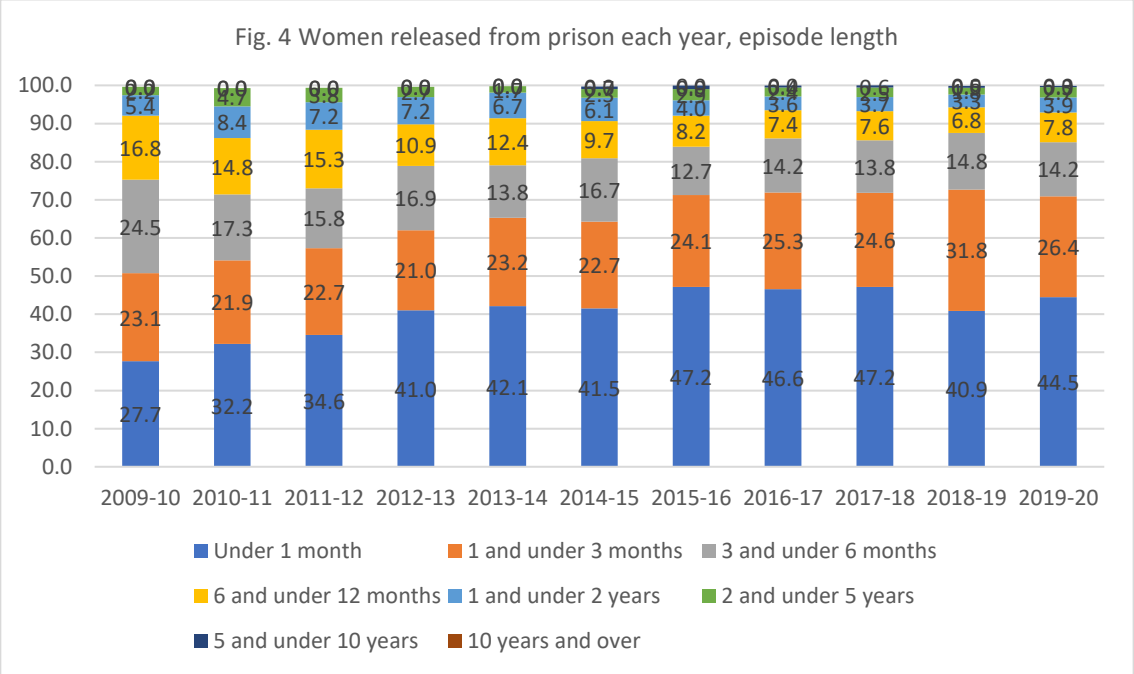
As noted in section 4.1 of this submission, there has been sharp increase in the number of people in prison, driven entirely by more people in prison on remand. Between 30 June 2010 and 30 June 2020 there has been a 209 per cent increase in the number of people in prison on remand, while the number of sentenced people in prison has increased by a much more modest 25 per cent.[168] The number of women in prison on remand has increased by 152 per cent, while the number of sentenced women in prison has fallen by 6 per cent. In the same time period, the number of Aboriginal people in prison on remand increased by a shocking 431 per cent, while the number of Aboriginal women in prison on remand grew by 138 per cent. [169]

More people being refused bail

A Crime Statistics Agency study found that between 2012 and 2018, the proportion of women on remand who were subject to a reverse onus bail test grew from 37 per cent to 79 per cent of women on remand.[170] Unfortunately, comparable data is not publicly available for people in male prisons or the general prison population.

Short periods of time in custody for offending that does not warrant a term of imprisonment

As noted above in section 4.2, there has been a significant increase in the proportion of people spending short periods of time in custody. In 2019-20, 27.6 per cent of all people leaving prison spent less than 1 month in custody, up from 22.7 per cent in 2009-10. As figure 4 shows, this increase was most pronounced for women. In 2009-10, 27.7 per cent of women left prison after spending less than 1 month in custody. By 2019-20, this proportion had increased to nearly half (44.5 per cent).[171] Nearly three-



[168] Corrections Victoria, Annual Prisoner Statistical profile 2009-10 – 2019-20, Table 1.3, online < https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20> (accessed 16 September 2021).
[169] These figures reflect the relatively steep drop in the number of people in custody following the onset of the COVID-19 response. Corrections Victoria, Annual Prisoner Statistical profile 2009-10 – 2019-20, Table 1.3, online < https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20> (accessed 16 September 2021).
[170] McMahon, M. (2019) *No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention*, Library Fellowship Paper no. 3, 28
[171] Corrections Victoria, Annual Prisoner Statistical profile 2009-10 – 2019-20, Table 3.9, online: < https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20)> (accessed 19 May 2021).

quarters of women released from prison in 2019-20 had spent less than 3 months in custody, up from about 50 per cent 10 years prior.[172]

The numbers are more striking for people on remand – in 2019-20, nearly 40 per cent of men and 60 per cent of women released from prison unsentenced had spent less than 1 month in prison.

Analysis from the Sentencing Advisory Council of people sentenced to 'time-served' sentences also sheds light on the impact of bail reforms. Examining data from 2011-12 to 2017-18 the Sentencing Advisory Council found that 'time served' sentences increased from 11 per cent in 2011-12 to nearly 30 per cent in 2017-18. The overwhelming majority – 97 per cent – of these sentences were less than 6 months, with the average length being about 2 months.[173] The Sentencing Advisory Council concludes from this analysis that

> 'the increase in Victoria's remand population is having an indirect effect on sentencing outcomes. Offenders who **may have otherwise received a non-custodial sentence might instead receive a time served prison sentence**…because they have, in effect, already been punished for their offending' (emphasis added).[174]

6.6.3 Undoing the damage – a targeted bail system for community safety

As is clear from the evidence presented in this submission, the drivers of criminalisation and incarceration are myriad and intersecting. Nevertheless, Victoria's punitive bail laws are a significant contributing factor. A 2020 study conducted by FLS in partnership with La Trobe and Deakin universities analysing the drivers of women's increasing rates of remand found that:

> *The observations and experiences of criminal and duty lawyers indicate that recent reforms to the Bail Act are reshaping and reorienting policing away from discretion to bail and towards remanding women for minor and non-violent administrative and other offences (such as breach of bail and shop theft).*[175]

The combined effect of increasing numbers of people on remand and shorter periods in custody is a level of churn through the prison system that risks undermining the safety of our community, not enhancing it. The available evidence in Australian and international contexts suggests that spending time in custody on remand increases the likelihood that someone will re-offend.[176]

Moreover, restrictive and punitive bail laws are having a snow-balling effect. By influencing an increase in 'time-served' sentences, the bail laws promote sentence creep and establish a precedent of imprisonment for the kinds of offences that are not generally a concern to community safety.

Undoing the damage caused by these reforms requires a return to some of the key principles of bail. First, the onus should be the prosecution to prove that an accused person should be refused bail in the overwhelming majority of cases. The reality for many people applying for bail is that they have been arrested, taken before a Magistrate after briefly seeing a lawyer, outside of business hours and with no capacity to contact any of the supports or connections in the life that could support a bail application. It is deeply unfair that our current bail laws require that people in these circumstances *'must show'* that they have exceptional circumstances or a compelling reason to be released on bail.

Second, remand should be reserved for people who pose a genuine risk of continuing patterns of violence. Such a focus amounts to a more genuine commitment to community safety that the current

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[172] Corrections Victoria, Annual Prisoner Statistical profile 2009-10 – 2019-20, Table 3.9, online: < https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20)> (accessed 19 May 2021).
[173] Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (2020) 7, 10.
[174] Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (2020) 10.
[175] Russell, E. et al., *Constellations of Circumstances: the Drivers of Women's Increasing Rates of Remand in Victoria* (July 2020) 43.
[176] McMahon, M. (2019) *No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention*, Library Fellowship Paper No 3, 22 (referencing a 2012 New South Wales Law Reform Commission report, and controlled studies from Texas and Florida and Pennsylvania).

practice of remanding people who experience disadvantage and vulnerability that manifest as risk factors for the purposes of bail.

Recommendation

21. That, in line with the Victorian Government's commitment to community safety, the Victorian Government amend the Bail Act 1977 (Vic) so that bail is only refused when the prosecution can show an accused's pattern of violent offending and the risk of that continuing. At a minimum, this amendment should include:

- ***an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.***
- ***repeal of the reverse-onus provisions in the Bail Act 1977 (Vic)***
- ***repeal of the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.***

6.6.4 Meaningful consideration of Aboriginality in bail decision-making

As noted in section 4.1, Aboriginal people are grossly over-represented in Victoria's prison population. In the last 10 years, there have been particularly steep increases in the number of Aboriginal people on remand, with the number of Aboriginal people on remand increasing by just over 430 per cent. These increases have occurred despite the overwhelming evidence of the harms caused to Aboriginal people and communities by incarceration.

The Bail Act contains some mechanisms to address this over-representation. In particular, section 3A of Victoria's Bail Act requires bail decision-makers to '*take into account…any issues that arise due to the person's Aboriginality, including –*

(a) the person's cultural background, including the person's ties to extended family or place; and

(b) any other relevant cultural issue or obligation.

Anecdotally, this provision is not widely applied in bail applications, and there has been relatively limited judicial consideration of how it should work in practice. In light of this, FLS recently commenced a research project, alongside the Victorian Aboriginal Legal Service and a number of other key stakeholders to better understand what consideration has been given to Aboriginality in the context of bail applications and provide the basis for more detailed guidance for lawyers and Magistrates. Our objective is to generate a practical resource that comprehensively incorporates existing Australian case law and which has been informed by the views and experiences of Aboriginal Elders that can then be readily used by lawyers and judicial officers involved in bail applications. Our expectation is the consistent, comprehensive and meaningful consideration of Aboriginality in bail decision making will lead to more Aboriginal people being granted bail.

Recommendation

22. That the Victorian Government support the development of guidelines on the application of section 3A of the Bail Act.

6.7 A more nuanced approach to community-based sentences

According to the Australian Law Reform Commission, Victoria has the fewest community-based sentencing options of all states and territories in Australia.[177]

[177] See Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018) ch 7, table 7.1.

Table 7.1: Community-based sentencing options in each state and territory (December 2017).

Jurisdiction	Orders						
ACT[8]	Good Behaviour Order	Non-Association and Place Restriction Order		Intensive Correction Order		Suspended Sentence	
NSW[9]	Good Behaviour Bond	Community Service Order	Non-Association and Place Restriction Order	Intensive Correction Order	Compulsory Drug Treatment Order	Home Detention Order	Suspended Sentence
NSW from 2018[10]	Community Correction Order			Intensive Correction Order			
NT[11]	Community Based Order	Community Work Order		Community Custody Order		Home Detention Order	Suspended Sentence
QLD[12]	Probation Order	Community Service Order		Intensive Correction Order		Suspended Sentence	
SA[13]	Bond	Community Service Order				Home Detention Order	Suspended Sentence
TAS[14]	Probation Order	Community Service Order			Drug Treatment Order	Suspended Sentence	
VIC[15]	Community Correction Order						
WA[16]	Community Based Order			Intensive Supervision Order		Suspended Sentence	

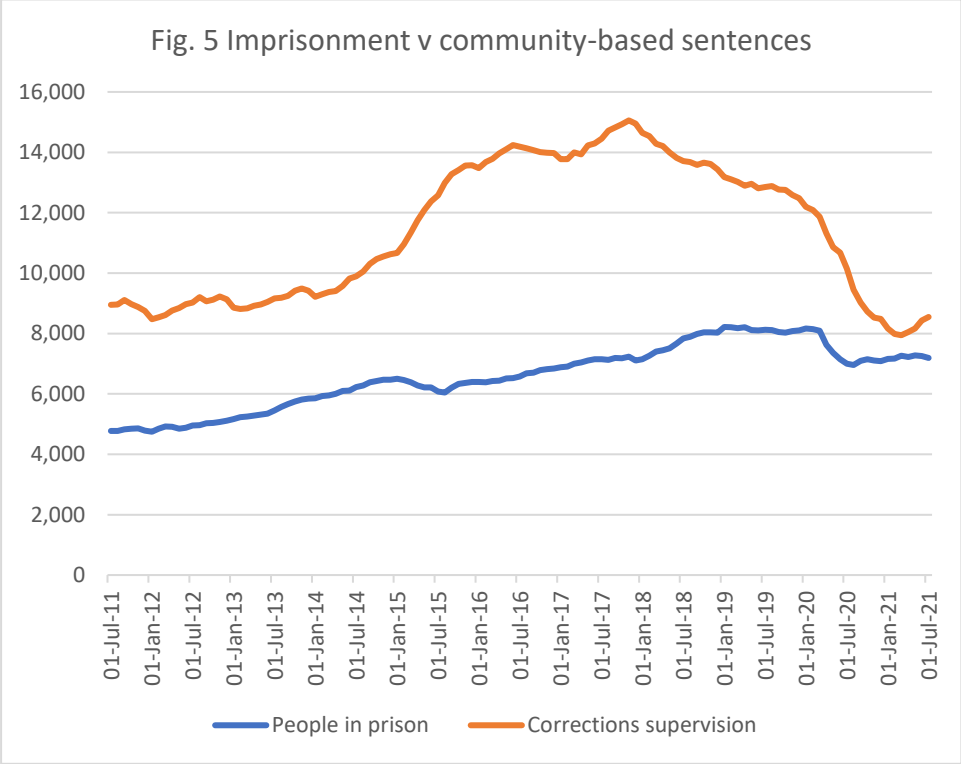
Consistent with this, Victoria has the lowest rate of people on community-based sentences in Australia – 162.5 people per 100,000.[178] This is dramatically lower than the national average of 390.6 people per 100,000.[179] In absolute numbers, there were 8,543 people serving a community-based sentence in Victoria as at 31 December 2020. This is strikingly lower than the 35,872 people serving a community-based sentence in New South Wales.[180] This significant difference between Victoria and New South Wales cannot be explained by population size or the incidence of crime.

It is also worth noting that there has been a relatively dramatic decline in the number of people serving sentences in the community, at the same time as there has been an increase in the prison population. As shown in figure 5 below:[181]

- There are fewer people serving a community-based sentence today than there were 10 years ago.
- In the same time period, there has been a 50 per cent increase in the prison population.

[178] Sentencing Advisory Council, *Sentencing Statistics, General Trends for Imprisonment and Community Orders – Community Based Sentences* (updated April 2021) < https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/community-based-sentences> (accessed 19 September 2021).
[179] Sentencing Advisory Council, *Sentencing Statistics, General Trends for Imprisonment and Community Orders – Community Based Sentences* (updated April 2021) < https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/community-based-sentences> (accessed 19 September 2021).
[180] Sentencing Advisory Council, *Sentencing Statistics, General Trends for Imprisonment and Community Orders – Community Based Sentences* (updated April 2021) < https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/community-based-sentences> (accessed 19 September 2021).
[181] See Corrections Victoria, Monthly time series prisoner and offender data, online < https://www.corrections.vic.gov.au/monthly-time-series-prisoner-and-offender-data> accessed 22 September 2021.

- The number of people serving a community-based sentence peaked in December 2017 at 15,056. Since then, there has been a 43 per cent decrease in people serving community-based sentences.



The decline in the use of community-based sentences coupled with a rise in the prison population is deeply troubling. We consider that Victoria's sentencing regime should encourage the use of community-based sentences instead imprisonment wherever possible. This is because, most relevantly to this Inquiry's terms of reference, there is clear evidence that community-based sentences are more likely to reduce reoffending and in turn the prison population. Community-bases sentences have been described as:

- 'more effective in reducing recidivism than are terms of imprisonment. This is especially the case for those community sentences which involve best-practice treatment programs'.[182]
- 'more effective in reducing re-offending than a short term of imprisonment'.[183]
- effective at 'deterring offending behaviour' and more effective than prison at interrupting cycles of criminalisation and incarceration.[184]

Accordingly, community-based sentences are 'the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender'.[185]

Community-based orders have been repeatedly recommended as a vastly more appropriate alternative than imprisonment for Aboriginal people, provided they are accompanied by adequately resourced, properly available and culturally appropriate programs.

We consider that increasing the use and effectiveness of community-based sentences requires:

- bail law reform – to reduce people sentenced to 'time served'

[182] Dr Karen Gelb, *The Perfect Storm? The Impacts of Abolishing Suspended Sentences in Victoria* (December 2013) vii.
[183] See Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, March 2018) ch 7, [7.10].
[184] Queensland Productivity Commission, *Inquiry into imprisonment and recidivism* (August 2019) 283.
[185] See *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [114]–[115]

- a greater focus on rehabilitation and treatment – to increase people's prospects of completing a community-based sentence.

6.7.1 Reforming bail to increase access to community-based sentencing

Without bail law reform, we will continue to see people remanded in custody for weeks or months for offences before they are sentenced. When these people are ultimately sentenced, it is typical to dispose of the matter by imposing a time-served sentence, even if the charges would do not warrant a term of imprisonment. In this way Victoria's bail and sentencing regimes are inextricably linked. Improving sentencing options that offer alternatives to incarceration is virtually pointless in the context of a bail system that routinely results in incarceration for low-level offending. Our recommendations in relation to bail law are set out above at *6.6.3 Undoing the damage – a targeted bail system for community safety.*

6.7.2 A greater focus on rehabilitation and treatment

The primary community-based sentencing option in Victoria is a community corrections order. In the current sentencing hierarchy, there is a steep jump from community corrections orders to imprisonment. In practice we see clients charged with criminal offences quickly 'progress' through the available sentencing dispositions from adjourned undertaking, to fine (noting that fines can be imposed in addition to other sentencing options or as a stand-alone option), to community corrections order. The current hierarchy means that if the court wants someone to remain in the community and benefit from supervision, the only order available is the step below imprisonment.

This also means that in the event of breaching a community corrections order, most people are at very real risk of imprisonment. Approximately 50 per cent of people placed on community corrections orders contravene these orders. Analysis conducted by the Sentencing Advisory Council shows that in the event of a contravention 56 per cent of community corrections orders made by the Magistrates' Court are cancelled and the person resentenced for the original offence. In 31 per cent of these cases, the court sentenced the person to imprisonment.[186]

Community corrections orders have been described by the Court of Appeal as offering flexibility and a suite of conditions that can be tailored to a person's individual needs and the circumstances of their offending. While this is true in theory, our practice experience has been that community corrections orders can operate in prescriptive and inflexible ways that fall short of the kind of therapeutic approaches that are proven to support rehabilitation. People on community corrections orders can only access treatment, support or programs available through particular providers. This can become a particular problem for those clients who are already engaged with a particular drug treatment provider, for example. In our experience, if the approach mandated by Corrections Victoria isn't suitable, there is very little that can be done to provide a more tailored program of supervision and support.

This approach goes against the weight of the evidence, which shows that community-based sentences are most effective when they involve:

- a strong focus on rehabilitation and support, as opposed to supervision and compliance[187]
- treatment programs that are tailored to needs of particular cohort mostly effective – including gender-informed treatment programs for women
- for women in particular, practical help with health, housing, childcare and employment
- community service or work components.[188]

Crucially, programs have only limited effect when people are mandated or coerced into treatment.[189] Given that a community corrections order is an inherently mandatory process, we encourage

[186] Sentencing Advisory Council, Contravention of Community Corrections Orders (July 2017) xv.
[187] Karen Gelb et al., *Community-based sentencing orders and parole: A review of literature and evaluations across jurisdictions* (prepared for the Queensland Sentencing Advisory Council, April 2019) xii.
[188] Karen Gelb et al., *Community-based sentencing orders and parole: A review of literature and evaluations across jurisdictions* (prepared for the Queensland Sentencing Advisory Council, April 2019) xiv – xv.
[189] Karen Gelb et al., *Community-based sentencing orders and parole: A review of literature and evaluations across jurisdictions* (prepared for the Queensland Sentencing Advisory Council, April

Corrections Victoria to consider how a greater measure of agency and voluntariness could be incorporated into the current community corrections scheme.

The current measure of success in compliance with community corrections order often appears to have quantitative rather than qualitative focus. This fails to understand the nature of the rehabilitation process, and may serve to undermine it. In practice, community corrections order compliance could be measured by individual-set goals which change over time rather than number of sessions attended. One practical example involves 'staggering' the goals a person must achieve while subject to the community corrections order. This reduces the likelihood that someone will be unable to meet their numerous obligations – for example, to see counsellor for drug treatment, to see a general practitioner, to find a therapist and to stabilise their housing situation – all in the first few weeks after sentencing. It also allows the person subject to the community corrections order to exercise a measure of agency and to nominate their own priorities according to their needs. In our experience this is particularly important for criminalised women who tend to have a wider range of needs that are difficult to attend to simultaneously and may also be navigating care giving obligations and child protection involvement. Tailoring community corrections orders to an individual's own assessment of priorities and goals for rehabilitation should promote therapeutic outcomes and in turn increase compliance.[190]

Recommendation

23. That the Victorian Government improve the capacity of community corrections orders to be genuinely rehabilitative and tailored to a person's individual needs, including by allowing people to identify and pursue their own priorities and engage with programs, support and treatment through a broad range of service providers.

2019) xv. See also Stefanie Klag et al, 'The Use of Legal Coercion in the Treatment of Substance Abusers: An Overview and Critical Analysis of Thirty Years of Research' (2005) 40 *Substance use & misuse* 1778.

[190] For some discussion on factors that promote positive experiences by people subject to community corrections orders, see Rachel Green, et al., 'Exploring the lived experiences of people on Community Corrections Orders in Victoria, Australia: Is the opportunity for rehabilitation being realised' (2020) 53(4) *Australia and New Zealand Journal of Criminology*, 585.