

— Leaving custody behind:

Foundations for safer
communities &
gender-informed criminal
justice systems

Issues Paper

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In addition, the CIJ acknowledges the devastating and ongoing impacts of colonisation on Aboriginal communities, impacts which have a direct and continuing relationship with the vastly disproportionate rate at which Aboriginal people have contact with the criminal justice system, as well as their experiences of racism and discrimination once this contact occurs. These impacts are also directly related to the very specific and multiple impacts of intergenerational trauma which Aboriginal communities experience.

We recognise the extraordinary strength and resilience of Aboriginal communities and emphasise that any discussion of 'needs' throughout this paper in relation to Aboriginal women in contact with the criminal justice system is not in any way intended to equate to a discussion of 'deficits' but instead refers to needs created and compounded by structural inequality.

Further, the CIJ also acknowledges the principles outlined in the *Warawarni-gu Guma Statement*¹ and the importance of researchers not comparing Aboriginal-specific statistics with whole of population data or that of specific cultural groups. While we have attempted to describe the very particular and acute experiences of Aboriginal women throughout this paper, therefore, we have also attempted to limit comparisons between outcomes for Aboriginal and non-Aboriginal people, except where this supports recommendations for Aboriginal-specific interventions.

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¹The Warawarni-gu Guma (Healing Together) Statement, provides an Aboriginal and Torres Strait Islander perspective on domestic and family violence and was released in 2018 at the ANROWS 2nd National Research Conference on Violence against Women. It includes the assertion that "It is not ok to continue to compare us and our data to the data from non-Indigenous people. A more valid way to use our data is to track our progress, to tell the story of our journey over time". ANROWS, (2018) 'Warawarni-gu Guma Statement. Healing together in Ngunin Ngarluma' (Web Page, 17 May 2018) <https://www.anrows.org.au/news/warawarni-gu-guma-statement/>

Glossary of terms

Bail	The conditional release from custody under s 5AAA of the <i>Bail Act 1977</i> (Vic) of a person who has been arrested and charged with a criminal offence. During criminal proceedings, a person released on charge and summons is simply required to attend court as directed. A person released on bail is usually required to comply with additional conditions, such as abiding by a curfew; not associating with certain people; or not residing at a certain address.
Community-based sentences	Non-custodial sentences ordered by the court and administered by state and territory adult corrective services. Examples of community-based sentences include restricted movement orders; reparations (for example fines or being ordered to undertake community service); supervision in the community; parole; sentenced probation orders; and post-sentence supervision orders. In all jurisdictions except Victoria and Tasmania, community-based sentences also include breached and suspended orders.
Community Corrections Order (CCO)	A specific community-based sentencing option commonly involving conditions, supervision and access to treatment or other rehabilitative support. In Victoria, a court can order a CCO as a stand-alone penalty or in addition to imprisonment or a fine.
Criminalisation	The process by which behaviours or individuals become characterised as criminal. This can occur via the enactment of laws; targeting by police; or other systemic or environmental factors that result in individuals or communities becoming increasingly involved in the criminal justice system.
Criminogenic	Factors or influences tending to cause crime, criminality and involvement with the criminal justice system. These are commonly structural elements in a person's life or environment that increase the likelihood that they will offend or reoffend.
Decarceration	The policy of moving away from imprisonment as the main sanction for criminal offences, with greater emphasis on diversion and community-based sentencing.
Diversion	Formal or informal interventions aimed at avoiding an individual's further involvement in the criminal justice system, generally available to young people and first-time offenders facing less serious charges. Diversion can occur at the policing or court stage and can include conditions intended to address factors behind offending.
Justice reinvestment	A data-driven approach to improving criminal justice outcomes and ultimately reducing criminal justice expenditure. Justice reinvestment strategies involve evidence-based understandings of local contexts, circumstances and needs that impact on involvement in the justice system.
Mandatory sentencing	A fixed penalty for committing a criminal offence, proscribed in legislation. While a mandatory sentence can theoretically involve any type of sentence, typically it refers to a mandatory sentence of imprisonment.
Recidivism	A return to offending behaviour by an individual after having been sanctioned for a similar offence.
Remand	The period of detention of a person pending the outcome of their court hearing e.g., before the trial (where they are unconvicted); before sentencing after the trial has concluded (convicted and remanded for sentencing); or remanded pending appeal. Remand prisoners (also known as unsentenced prisoners), can include people who have not applied for bail; those who have been refused bail; or those who have

	been granted bail but are unable to meet the conditions of bail. In Victoria, persons held in an adult prison pending deportation are also included in this category.
Sentenced	A sentenced prisoner is someone who has pleaded guilty or who has been found guilty by the court, has been sentenced to a term of imprisonment and is in custody serving that sentence.
Summons	A direction to attend court on a particular date to answer a charge.
Suspended sentence	The suspension of all or part of a sentence of imprisonment for a specified period, during which the offender is free to live in the community on the condition that they do not commit a further offence punishable by imprisonment. Where this condition is breached, in addition to being sentenced for the new offence, the suspended prison sentence will be activated unless there are exceptional circumstances. Suspended sentences were introduced in Victoria in 1985 and abolished in 2012.
Time served	A 'time served' sentence is a sentence of imprisonment where the length of imprisonment is equal to the amount of time that the accused person has spent in custody on remand. 'Time served' may be made up of a prison sentence alone or it may be combined with a Community Correction Order (CCO). Section 18(1) of the <i>Sentencing Act 1991</i> (Vic) requires courts to include time spent in custody on remand in any custodial sentence imposed.
Unsentenced	An unsentenced prisoner is a person held in custody on remand pending the resolution of their criminal proceedings. They are innocent until proven guilty and, as such, are treated differently from sentenced prisoners.

Acronyms

ABI	Acquired brain injury
ABS	Australian Bureau of Statistics
ACCHO	Aboriginal Community Controlled Health Organisation
ACSO	Australian Community Services Organisation
AIC	Australian Institute of Criminology
AIHW	Australian Institute of Health and Welfare
AJA	Aboriginal Justice Agreement, Victoria
AOD	Alcohol and Other Drug(s)
ALRC	Australian Law Reform Commission
ARC	Assessment and Referral Court
CALD	Culturally and linguistically diverse
CCI	Center for Court Innovation
CCO	Community Corrections Order
CCV	County Court of Victoria
CEDAW	Convention on the Elimination of All Forms of Violence Against Women
CIJ	Centre for Innovative Justice
CISP	Court Integrated Services Program
CSP	Court Support Program (part of the Women Transforming Justice project)
DJCS	Victorian Department of Justice and Community Safety (also referred to in this paper by the previous names of the Department of Justice and the Department of Justice and Regulation)
FLS	Fitzroy Legal Service
ICCPR	International Covenant on Civil and Political Rights
JRO	Justice Reform Office
KJU	Koori Justice Unit
LACW	Law and Advocacy Centre for Women
LGBTIQ+	Lesbian, Gay, Bi-sexual, Transgender, Intersex and Queer
MCV	Magistrates' Court of Victoria
NDIS	National Disability Insurance Scheme
NYC	New York City
OPCAT	Optional Protocol to the Convention Against Torture and Other Cruel Inhuman or Degrading Punishment or Treatment
PACPAFV	Police and Aboriginal Community Protocols Against Family Violence
QPC	Queensland Productivity Commission
RCFV	Royal Commission into Family Violence
RCIADIC	Royal Commission into Aboriginal Deaths in Custody
RMIT	Royal Melbourne Institute of Technology
SAC	Sentencing Advisory Council

SEWB	Social and emotional wellbeing
TGD	Transgender and gender diverse
TWP	Together Women Project
UN	United Nations
VACCA	Victorian Aboriginal Child Care Agency
VACRO	Victorian Association for the Care and Resettlement of Offenders
WAM	Women and Mentoring
WTJ	Women Transforming Justice

Introduction

Background and context

The purpose of this paper is to highlight the rising rates of women's incarceration in Victoria and to build foundations for an alternative trajectory. Doing so does not involve raising a new concern. Advocates across the legal and service system have long warned of the growing number of women in prison, especially over the last decade, as systemic drivers quickened the acceleration.

The CIJ has drawn upon the expertise and experience of these advocates, as well as a growing body of research, to bring attention to:

- the gendered factors – including almost universal experiences of trauma and victimisation - which drive women into contact with the criminal justice system;
- the relatively low level of offending in which women become involved and the short periods in custody to which they are repeatedly sentenced as a result; and
- the disproportionate levels of harm which women experience when they are placed in custody and separated from community, children and service supports.

Many advocates, practitioners, researchers and, most importantly, women with lived experience of the criminal justice system, question the role of women's prisons when earlier intervention in the experience of victimisation and the development of non-custodial alternatives can provide a more constructive response.

Indeed, this paper had its inception in a scoping project conducted in 2018 in which two RMIT Social Work Masters students,² supervised by the CIJ, consulted with service providers working with criminalised women. All of the practitioners consulted described the multiple and profoundly damaging impacts which even short periods in custody can have on their clients, as well as the profound lack of service support which clients had received throughout their lives.

The international community has similarly acknowledged that women charged with criminal offences have invariably experienced multiple types of harm for which they require *support*, rather than incarceration. Accordingly, in 2010, the United Nations General Assembly adopted the United Nations Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (the Bangkok Rules).³ The Rules highlight the importance of providing gender-specific, *non-custodial* measures and penalties for women. Yet a recent international report on prisons worldwide found that the Rules remain largely unimplemented, as growing numbers of women continue to be received into prisons “designed for a homogenous male population.”⁴

² The CIJ would like to thank Alex Johnson and Crystal Lee, the RMIT Social Work students who laid the foundations for this paper.

³ United Nations Office on Drugs and Crime (UNODC), (2010) 'United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (The Bangkok Rules).'

⁴ Human Rights Watch (2018) '*I needed help, instead I was punished: Abuse and neglect of prisoners with disabilities in Australia.* https://www.hrw.org/sites/default/files/report_pdf/australia0218_web.pdf

Victoria's challenge

As is the case in the United States, the United Kingdom and New Zealand,⁵ women - and particularly Aboriginal women - feature disproportionately in Australia's escalating incarceration rate. Awareness of this has been growing across Australian government and legal circles for some time, with a range of policies and programs implemented in response. Recognising the value of differentiated responses for women, Victoria established the *Better Pathways Strategy*⁶ in 2005, which involved initiatives and infrastructure improvements aimed at reducing women's contact with the criminal justice system. Further reviews informed a policy framework and women's service delivery model developed in 2017. The purpose of this model, *Strengthening Connections*, is to provide "an evidence-based framework for addressing the particular issues and offending pathways for women in the corrections system".⁷

Victoria's approach to gender responsive policy is further discussed later in this paper. What is clear, however, is that our policy efforts have been constrained by an assumption that custody is still an appropriate solution for many of the women who come into contact with the criminal justice system. In some cases, an assumption also appears to persist that custody is a *preferable* solution - not because of the severity of women's offending, but because of the lack of supports available in the community. This sees Victoria's correctional system function as a proxy or substitute for affordable housing; adequate physical and mental health care and alcohol and other drug (AOD) rehabilitation; family supports; and even protection from gendered violence – a reality which would likely surprise many in the state's population.

The effectiveness of Victoria's gendered correctional policy has also been undermined by wider criminal justice reforms enacted following very public episodes of violent male offending, which prompted strong responses from government. Combined, they have restricted access to parole and, most acutely, to bail, as well as limited the availability of community-based sentences.

These reforms were intended to help Victorians feel safer by curbing the potential for high-risk offenders to be in the community. What is not well understood, however, is that serious violent offenders comprise a very small proportion of the state's prison population, yet the reforms enacted in response to their behaviour are catching a large proportion of people in contact with the criminal justice system, most of whom do not fit this profile. This has resulted in people who commit low level offences being pushed into higher thresholds for bail, up the sentencing hierarchy and into custody at an alarming rate. Given that women predominantly commit low level offences, it is not hard to see how this perfect storm of systemic levers is driving women into custody at unprecedented levels – with women carrying the burden of reforms intended to address the violent offending of men.

⁵ Jeffries, S. and Newbold, G. (2016) 'Analysing trends in the imprisonment of women in Australia and New Zealand' 23(2) *Psychiatry, Psychology and Law*, 184-206; Ooi, E. (2018) *Recent Trends in the NSW Female Prison Population*. Sydney: Bureau of Crime Statistics and Research; Walmsley, R. (2017) 'World female imprisonment list'. *World Prison Brief*, Institute for Criminal Policy Research.

⁶ Victorian Government (2005) *Better Pathways: An integrated response to women's offending and reoffending*, Department of Justice <<https://www.corrections.vic.gov.au/better-pathways-integrated-response-to-womens-offending-and-reoffending>>

⁷ Victorian Government (2017) *Strengthening Connections: Women's Policy for the Victorian Corrections System* Department of Justice and Regulation, 4 <<https://www.corrections.vic.gov.au/strengthening-connections-womens-policy-for-the-victorian-corrections-system>>

In the 10 years to June 2018, the number of women in prison in Victoria increased by close to 138%, compared to an 81% increase in the male prison population over the same period.

Because of these converging factors, Victoria approached the ten-year anniversary of the Bangkok Rules in 2020 with women's prison numbers skyrocketing, rather than reducing. As at June 2018, women's prison numbers had increased by 137.82 per cent over the previous decade, compared with an 81 per cent increase in male prison numbers.

Further, as at 30 June 2019, the proportion of women entering custody who identified as Aboriginal or Torres Strait Islander was also close to 14 per cent,⁸ with over a three-fold increase between 2012 and 2018.⁹ This occurred at a disproportionate rate compared

with the Victorian Aboriginal population;¹⁰ non-Indigenous women; and all men in prison, including Aboriginal men¹¹ - thus widening the justice gap for Aboriginal women.

The objective of community safety

Many in the community understandably assume that 'tough on crime' approaches - where bail and parole is harder to get and sentences are increasingly punitive - will make the community safer. Accordingly, governments are quick to respond with criminal justice reforms that ostensibly meet the objective of protecting the community.¹²

Not widely understood, however, is the criminogenic effect that custody has on people charged with low level offending. Put simply, prison is not an appropriate environment for rehabilitation. Rather, by severing access to housing, to mental health or other supports, to medication and to family, incarceration can *increase* the likelihood that someone will commit a further criminal offence, rather than decrease it in the way that the community would expect. In fact, the assessment tools used by Corrections Victoria to measure the service needs and criminogenic risk (risk of reoffending) of people received into prisons are explicit in citing time in custody as increasing this risk.¹³

Custody also exposes people to further harm, violence and control while in prison, resulting in them often leaving custody more damaged than when they arrived. Extending the use of incarceration for people who commit relatively low-level offences may therefore be *escalating the risk of offending to the community, rather than reducing it* – far from the purpose for which these recent reforms were designed.

⁸ Corrections Victoria (2020a), *Table 1.2 – Overview of female prisoners at 30 June* (December 2020) <<https://www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20>>

⁹ Walker, S., Sutherland, P. & Millstead, M. (2019), *Characteristics and offending of women in prison in Victoria 2012-2018* (Crime Statistics Agency, Melbourne), 15. A breakdown of legal status on entry shows significant increases in the numbers of sentenced Aboriginal women, increasing from 10 per cent in 2012 to 24 per cent in 2018, while increases in Aboriginal women entering prison on remand increased from 14 per cent to 17 per cent.

¹⁰ Victorian Aboriginal people constitute 0.8 per cent of the state's general population. Australian Bureau of Statistics (ABS), (2017) *Census of Population and Housing: Nature and Content, Australia, 2016* (Catalogue No 2901.0).

¹¹ As at 30 June 2019, the proportion of the male prison population that identified as Aboriginal was 10 per cent. Corrections Victoria (2020a) above n 8.

¹² Sentencing Advisory Council (2012a) *Community attitudes to offence seriousness* (SAC, Melbourne); Gill, D. (2014) *Citizen Judges* (SAC); Ramirez, M. (2013), 'Punitive sentiment' *Criminology* 51(2) 329–364; Wozniak, K. (2016) 'Public opinion and the politics of criminal justice policy making: reasons for optimism, pessimism, and uncertainty' *Criminology & public policy* 15(1) 179–186.

¹³ See the Level of Service/Risk, Need, Responsivity (LS/RNR), one of a suite of assessment tools used in prisons.

Further, the use of custody as a proxy for care and support for women who have multiple and interrelated needs means that Victoria is inadvertently positioning itself for further demands on the service system down the track. This includes where children have been separated from their mothers and placed in out of home care – a well-recognised pathway to the youth justice system and a lifetime of dependence on the justice and social service systems more broadly.¹⁴

A window for change

Victoria finds itself in a policy tangle which it must unravel if we are to meet international expectations; the needs of individual women; and community safety overall. Acknowledgment that custody is not appropriate for the majority of women who are charged with criminal offences is a good place to start. Related to this is recognition that community safety can actually be *improved* when women and children who have experienced significant harm - and who have multiple, interrelating needs as a result - are supported in the community, instead of being locked away.

The current moment offers the chance to set a clear and unequivocal direction: to bring together the Ministerial portfolios of Corrections, Crime Prevention, Youth Justice & Victim Support; Family Violence Prevention, Women and Aboriginal Affairs; Police; and the Attorney-General respectively – with involvement of the divisions of Child Protection and Housing (Department of Families, Fairness and Housing), and Mental Health and AOD services (Department of Health) – in a combined strategy to halt the trajectory from victimisation to repeat incarceration. With these major portfolios all currently headed by women, Victoria can leverage a unique moment to develop an evidence-based, ‘systems logic’ which can turn this damaging trajectory around.

The current context also offers an opportunity to draw lessons from changes in the criminal justice system which occurred during 2020. In what some have referred to as a ‘moment of decarceration’,¹⁵ courts acknowledged the risk of contracting COVID-19 in closed environments, with prison numbers fluctuating as a result, and women’s prison numbers temporarily reducing by 32 per cent, without any discernible impact on community safety.¹⁶

The CIJ therefore sees a chance not only to reset the discussion, but also to fuel its momentum. We can do this with a newfound resolve and confidence that using evidence and adopting strong leadership can glean significant and positive results for the community as a whole.

While the pandemic will clearly continue to have significant fiscal impacts on government resources, these impacts are also likely to entrench disadvantage for vulnerable cohorts, such as women interacting with the justice system. Reform that prioritises long-term outcomes through investment in early, community-based interventions; increased social support; and more therapeutic responses therefore represent an opportunity to reduce the significant costs of incarceration and its damaging impacts over the longer term.

¹⁴ Children who were the subject of attention from statutory child protection services are at least nine times more likely than other young people to offend and come under the supervision of youth justice services. Sentencing Advisory Council, (2019a) ‘Crossover Kids’: *Vulnerable Children in the Youth Justice System Report 1: Children who are known to child protection among sentenced and diverted children in the Victorian Children’s Court*. See also: Victoria Legal Aid, (2016) *Care not custody. A new approach to keep kids in residential care out of the criminal justice system*; Australian Institute of Health and Welfare, (2018) *Child Protection Australia 2016–17*, Child Welfare Series no. 68, AIHW.

¹⁵ This phrase is attributed to Emma Russell in the webinar, hosted by the Fitzroy Legal Service on 10 July 2020, launching the ‘Constellation of circumstances’ report. See Russell, E., Carlton, B., Tyson, D., Zhou, H., Pearce, M. & Faulkner, J. (2020) *A constellation of circumstances: The drivers of women’s increasing rates of remand in Victoria* Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society, Melbourne.

¹⁶ Caruana, C., (8 May 2020) *COVID-19 and incarcerated women: a call to action in two parts – Part Two* Centre for Innovative Justice, <<https://cij.org.au/news-and-views/covid-19-and-incarcerated-women-a-call-to-action-in-two-parts-part-two/>>.

Wider conversations

An urgent conversation about the costs and benefits of incarceration strategies overall is clearly needed in Victoria – a state that has gone from having one of the lowest general incarceration rates in the world in 1992 to one of the highest in 2018, comparable to Zambia, Jamaica and Algeria.¹⁷ It is a tough conversation to have, given that the majority of the population is not exposed to the complexities involved in sentencing considerations, nor to the evidence concerning the causes of crime, making fully informed public opinion difficult to gauge.¹⁸ This conversation should be had nonetheless, with Victorians asked to consider our collective comfort levels with the reality that so many people in our prisons:

- experience significant mental illness;
- have an Acquired Brain Injury (ABI) or other cognitive impairment;
- come from specific and highly disadvantaged postcodes;
- have experienced childhood sexual abuse; and
- live with intergenerational trauma, racism and discrimination from the ongoing impacts of colonisation on First Nations people.

Rather than recognising the principle that the state should exercise its power to deprive people of their liberty *as a measure of last resort* - or perhaps because the concept of 'last resort', remains undefined and subjective - Victoria's prisons are increasingly functioning as a substitute for social and community infrastructure. This means that Victoria is locking away its challenges, instead of addressing them – a damaging approach, which is counterproductive, now and in the longer term.

Given that women, particularly Aboriginal and Torres Strait Islander women, are the fastest growing cohort being locked away – and with a relative absence of focus on women in a system designed predominantly for men – this paper focuses primarily on women's experiences. It does so while acknowledging the intersections of a wide range of issues which bring women into contact with the criminal justice system, including at an early age, as well as the damaging impacts that this contact can have.

Rather than imprisonment being used as a measure of last resort, Victoria's prisons are increasingly functioning as a substitute for social and community infrastructure.

Further, a focus on women as a sub-set of the Victorian prison population provides an opportunity to implement change in a targeted way; and to measure the impacts of this reform so that it can potentially be applied more broadly across the Victorian criminal justice landscape. This means that a focus on the 'decarceration' of women – a concerted and purposeful attempt to reverse the use of incarceration as a response to contact with the criminal justice system – may offer a range of wider lessons in which we can reduce crime and make the community safer, not by increasing rates of custody, but by leaving custody behind.

¹⁷ O'Neill, D., Sands, V., and Hodge, G. 'Victoria's prison system: rising costs and population, little accountability' (Blog Post, 28 June 2019) <<https://lens.monash.edu/@politics-society/2019/06/28/1375605/victorias-prison-system-rising-costs-and-population-little-accountability>>

¹⁸ Indermaur, D., Roberts, L., Spiranovic, C., Mackenzie, G., and Gelb, K. (2012) 'A matter of judgement: The effect of information and deliberation on public attitudes to punishment' *Punishment & Society* 14(2).

Applying a human rights lens

Bangkok Rules

- Gender-specific options for diversion from the criminal justice system and non-custodial pre-trial and sentencing options for women, shall be developed (Rule 57).
- Women offenders shall not be separated from their families and communities without due consideration of their backgrounds and family ties (Rule 58).
- Non-custodial sentences for pregnant women and women with dependent children should be preferred where possible and appropriate (Rule 64).

Reversing women's incarceration rates may pose significant challenges, but Victorian advocates, practitioners, researchers and women with lived experience are not the sole voices calling for change. Right around the world, policymakers and subject matter experts have acknowledged the need for a differentiated response for women – and have done so for the many years that it takes to develop and then formalise international agreement.

In fact, it is crucial to situate Victoria's response within an international context - acknowledging that all jurisdictions face similar challenges which make particular cohorts vulnerable to criminal justice system contact and yet respond to these challenges in very different ways.

Treaties and conventions

The primary international instruments which impose obligations on Australian governments are:

- the *International Covenant on Civil and Political Rights* (ICCPR), ratified by Australia in November 1980;
- the United Nations *Basic Principles for the Treatment of Prisoners*, a resolution passed by the United Nations (UN) General Assembly in December 1990; and
- the Optional Protocol to the Convention against Torture and Other Cruel Inhuman or Degrading Punishment or Treatment (or OPCAT, ratified by Australia December 2017).¹⁹

The ICCPR outlines a broad range of civil and political rights that apply to people in prison.²⁰ Articles 7 and 10 specifically establish prisoners' rights to be treated with humanity, dignity and respect, with the 'essential aim' of custody described as 'reformation and social rehabilitation'.²¹

¹⁹ Other international instruments such as the *Convention on the Elimination of All Forms of Violence Against Women* (ratified by Australia August 1983); the *Convention on the Rights of Persons with Disabilities* (ratified March 2007); and the UN *Declaration of the Rights of Indigenous Peoples*, a non-legally binding resolution passed by the UN in 2007 and supported by Australia, also contain provisions relevant to criminalised women.

²⁰ See General Comment No. 21: Humane Treatment of Persons Deprived of their Liberty. It is important to note, however, that in Australia, people sentenced to more than three years cannot vote in federal elections while serving a sentence, yet those serving a sentence of less than five years are entitled to enrol and vote in Victorian elections. This anomaly creates a category of people serving sentences of between three and five years who can vote in state but not federal elections.

²¹ See Article 10.3 ICCPR. Article 10 also includes the requirement that people on remand be held separately from those who are sentenced.

The Victorian *Charter of Human Rights and Responsibilities Act* 2006 echoes the provisions in the ICCPR relating to prisoners, including rights to protection from torture and cruel, inhuman or degrading treatment (s 10), and humane treatment when deprived of liberty (s 22).²²

Criminalised women's high rates of victimisation also relate to other rights under human rights laws. Rights to fair treatment, access to justice, assistance to manage the impacts of crime, compensation and restitution are recognised in the UN General Assembly's *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. In Victoria, victims' rights are enshrined in the Victims' Charter, which establishes principles for how the criminal justice system and victim support agencies should respond to victims of crime.²³

Principles and Rules

Building on the obligations enshrined in international treaties and conventions, the UN has developed specific guidelines on the treatment of those in prison, summarised below.

United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)

The Mandela Rules,²⁴ proclaimed in 1990 and updated in 2015, provide that incarcerated people retain all rights and freedoms set out in the Universal Declaration of Human Rights, the ICCPR and the International Covenant on Economic, Social and Cultural Rights - excluding those curtailed by having their liberty restricted. The Rules also contain specific provisions relating to:

- the abolition of solitary confinement;
- the right to engage in meaningful employment;
- the right to access the health services available in the country without discrimination; and
- the right to be assisted to reintegrate in the community.

United Nations Standard Minimum Rules for Noncustodial Measures (the Tokyo Rules)

The Mandela Rules are complemented by the *United Nations Standard Minimum Rules for Noncustodial Measures* (the Tokyo Rules), also adopted in 1990. As suggested by their title, the Tokyo Rules promote the use of community-based treatment and other non-custodial measures to address prison overcrowding and to reduce recidivism by way of better rehabilitation.

Apart from rules relating to the need to detain women separately from men, however, as well as to make provision for pre- and post-natal care for prisoners who are pregnant, the Mandela Rules and Tokyo Rules make little mention of the specific needs of imprisoned women.

United Nations Rules for the Treatment of Women Prisoners and Noncustodial Measures for Women Offenders (the Bangkok Rules)

The growing global focus on the need for gendered responses to criminalised women led to the adoption by the UN General Assembly of the Bangkok Rules in 2010.²⁵ The Rules supplement the Mandela Rules by setting standards for the treatment of women in custody, providing guidance to legislators, policy makers, sentencing authorities and prison staff. The Bangkok Rules highlight the importance of providing gender-specific, non-custodial measures and penalties.²⁶

²² These obligations extend to private companies managing prisons. Young, M. (2015) *From commitment to culture. The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*

<<https://www.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights-and-responsibilities-act-2006>>

²³ The Victim's Charter (Web Page) <<https://www.victimsofcrimecommissioner.vic.gov.au/about/the-victims-charter>>

²⁴ United Nations Office on Drugs and Crime (UNODC), (2015) *The United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Mandela Rules).

²⁵ UNODC 2010, above n 3.

²⁶ The need for rules specific to women in prison is illustrated by the pragmatic reality that, while the provision of shaving toiletries has been enshrined in international prison standards since 1955, the requirement to provide sanitary products was not recognised until 2010. Huber, A. (2016) 'Women in criminal justice systems and the

A significant focus of the Bangkok Rules, particularly when read in conjunction with the Tokyo Rules, is the imperative to find non-custodial alternatives to prison for women. Ten of the 70 rules relate to this objective, emphasising the need:

- to avoid detention on remand of women who are primary carers of children;
- for treatment programs to address the underlying conditions with which women present and to reduce re-offending;
- to maximise use of post-sentencing supports to assist re-entry into the community; and
- to consider the use of restorative approaches.

Rights in action

Holding governments to account for human rights obligations as they relate to prisoners can be achieved in a range of ways. This includes via reporting obligations under conventions, as well as action taken under human rights and anti-discrimination legislation. Australia's ratification of the Optional Protocol to the Convention Against Torture (OPCAT) in 2017 and the recent announcement that the Commonwealth Ombudsman will coordinate the local inspection bodies, known as 'National Preventative Mechanisms', to monitor the treatment of people deprived of their liberty, will strengthen expectations and accountability for Victoria's Corrections system when the full impacts of OPCAT ratification come into force.

Like all signatory countries, the Australian government is required to submit periodic reports to ensure compliance with most treaties and conventions relevant to prisoners. These are reviewed by UN committees²⁷ established under various conventions, with evidence also sought from 'shadow reports' featuring contributions from human rights agencies, non-government organisations and professional and academic groups. In some circumstances, individual complaints can also be made to convention committees.

For example, concerns relating to the treatment of Aboriginal and Torres Strait Islander people have been raised in a series of recent UN reports and reviews, including the UN High Commissioner for Human Rights and the Committee on the Rights of the Child. In its 2019 country review of Australia's compliance with the *Convention on the Elimination of All Forms of Violence Against Women* (or CEDAW), the CEDAW committee urged the government to respond to the 2017 inquiry by the Australian Law Reform Commission (ALRC) into Indigenous incarceration,²⁸ as well as the Aboriginal and Torres Strait Islander Social Justice Commissioner's report on issues impacting on Aboriginal women, *Wiyi Yani U Thangani* (Women's Voices).²⁹

Anti-discrimination laws at the state and federal level, and the agencies established to promote compliance with human rights obligations, have also been used to bring attention to the experience of women in prison in Australia. These obligations at international law mean that Victoria will not be alone in recognising the need for a better approach, as well as building one which will be genuinely effective. For this reason, elements of the Bangkok Rules or references to the Rules are included at relevant parts in this paper to highlight the international community's recognition of criminalised women's experiences, as well as the imperative for a differentiated response.

added value of the UN Bangkok Rules,' in H. Kury et al (ed), *Women and Children as Victims and Offenders: Background, Prevention, Reintegration*, Springer International Publishing 145 – 171.

²⁷ Many committees can also initiate country inquiries to investigate serious violations of convention obligations.

²⁸ Australian Law Reform Commission, (2017) *Pathways to Justice—Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Summary Report No 133.

²⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner (2020) *Wiyi Yani U Thangani*, Retrieved 21 January 2021: <<https://wiyiyaniuthangani.humanrights.gov.au/wiyi-yani-u-thangani-womens-voices/project>>

Scope and structure of this paper

The differentiated response referred to above will require:

- recognition of the factors which lead women into contact with the criminal justice system, including almost universal experiences of victimisation;
- understanding of how systemic drivers accelerate this contact; and
- a committed, coordinated approach which seeks to reverse and, ultimately, to prevent it.

Part One of this paper therefore provides an overview of factors associated with women's criminal justice system contact, and the ways in which these factors, as well as the profile of criminalised women, differs from that of men. In particular, it highlights the specific challenges faced by Aboriginal and Torres Strait Islander women in light of ongoing structural and systemic inequality.

Part Two then focuses on Victoria and the systemic factors that are pushing women into custodial settings at an increasingly rapid rate, with an emphasis on policing, bail and sentencing.

Part Three discusses opportunities to build foundations for a cross-government approach to reduce women's incarceration rates over the longer term – potentially laying a path for a more evidence-based criminal justice system and a safer community as a result. Reform Foundations have been identified in five priority areas:

- Foundation One: Commit, coordinate, invest
- Foundation Two: Address systemic drivers
- Foundation Three: Support, rehabilitate, integrate
- Foundation Four: Community-led design
- Foundation Five: Research, evaluate, share

While this paper does not purport to be a research paper or to contain an exhaustive list of solutions, it does aim to be a useful resource and a platform for further discussion. Compiled during the course of concurrent projects relevant to criminalised women, this paper draws on the CIJ's program of work,³⁰ as well as our ongoing engagement with the practitioners, policymakers, academic and community advocates who have called for change for so long.

The paper's aim is to synthesise the substantial evidence and to start to inform a strategy for an achievable program of reform. By committing to a considered strategy, the CIJ hopes that Victoria will be in a very different position when the next significant anniversary of the Bangkok Rules comes to pass.

A note on terminology

Decarceration

The term 'decarceration' is referred to at various points in this paper. 'Decarceration' is the policy of moving away from imprisonment as the main sanction for criminal offences.³¹ The CIJ adopts a 'women's decarceration agenda' because we believe that incarceration, or the deprivation of liberty, should always be a last resort, rather than a default response and one that is especially questionable as a response in most cases of women's contact with the criminal justice system.

³⁰ Campbell, E., Macmillan, L., Caruana, C. (2020) *Women Transforming Justice: Final Evaluation Report*, Centre for Innovative Justice, RMIT University. The CIJ is also working with Djirra, and PricewaterhouseCooper's Indigenous Consulting (PIC), on a feasibility study relating to a residential program for Aboriginal women in contact with the criminal justice system.

³¹ *A dictionary of law enforcement* (second ed, 2015) 'decarceration'. See also <https://www.sistersinside.com.au/about-debbie-kilroy-oam/>

Criminal justice system

Many increasingly resist the terminology of ‘criminal justice systems’ in recognition that this system is experienced as anything but ‘just’ by the majority of people who come into contact with it. For this reason, some advocates refer to it as the ‘criminal punishment system’,³² while others refer simply to the ‘criminal legal system’ to use a more neutral term. Equally, critics highlight that the range of different agencies which respond to the commission of criminal offences are far from a ‘system’ but are, at best, interrelated.³³

The CIJ agrees that the ‘criminal justice system’ falls severely short of the ambitions of this label. We are retaining use of the description, however, because our reform aim is that we reach a stage in Victoria where the agencies responding to crime are genuinely a system and the response which they deliver is genuinely just. This includes ensuring that people from whom the community does not need protection are diverted and that the system prevents, rather than causes, further harm.

‘Criminalised women’

The CIJ describes the women who are the subject of this paper alternately as ‘criminalised women’, ‘women in prison’, ‘women involved in the justice system’, or ‘women in contact with the criminal justice system’, rather than as ‘offenders’ or ‘prisoners.’ In doing so we seek to avoid reducing people to their status in the justice system, and also to recognise that many people held in Victorian prisons have not yet been convicted of the offence for which they have been charged.

Just as relevantly, the reasons propelling women into contact with the justice system are closely associated with their previous experiences of trauma and victimisation. This signals that Victoria’s capacity to prevent and respond effectively to women’s experiences of gendered violence is also directly and inextricably linked to questions of women’s incarceration rates.

‘Risk’ vs ‘needs’

The concept of ‘risk’ is prevalent throughout criminal justice literature and programming.³⁴ As application of this concept has become more widespread, however, it has increasingly moved from considerations of risk to community safety to risk of an individual committing further offences. Given that the majority of people in contact with the criminal justice system are ‘at risk’ of committing further offences simply because they have multiple needs which are not currently met in the community, this is of growing concern.

In the CIJ’s view, women who have experienced extensive trauma; who do not have safe accommodation, whose children have been removed and who have mental health or substance dependence support needs should not be deemed as ‘at risk’ of committing further offences and therefore remanded to custody, but instead should be assessed as ‘in need’ of wider service system support.

‘Women’

The CIJ also notes that the term ‘women’ is used to include gender diverse people who either identify as women, or who may be resident in prisons designated for women. While sexually and gender diverse people face discrimination and violence in all aspects of civic life, there are few places more delineated by gender than prison environments, while trans and non-binary people experience contact with the criminal justice system more broadly in specific, discriminatory and often particularly violent ways.

³² The Vision Project, (14 July 2020) <<https://lawmagazine.bc.edu/2020/07/the-criminal-punishment-system/>>

³³ Daly, K., & Sarre, R. (2017) ‘Criminal justice system: Aims and processes’, in Palmer et al., (eds) *Crime and Justice: A Guide to Criminology* (5th edition) Sydney Lawbook Co.

³⁴ The ‘Risk-Need-Responsivity’ model is commonly used in correctional systems, including in Victoria, to determine who should receive rehabilitative services, what needs should be targeted and strategies to reducing criminal behaviour. See Andrews, D., & Bonta, J. (2010) ‘Rehabilitating criminal justice policy and practice’ 16(1) *Psychology, Public Policy, and Law*, 39-55.

While the CIJ seeks to adopt an inclusive approach, we do not intend to subsume the experiences of trans or gender diverse within other descriptions. Just as this may include descriptions of cis-gendered women's experiences, it also includes descriptions of broader 'LGBTQI+ communities', which are clearly widely divergent and diverse in themselves. A summary of the literature available on trans women and gender diverse people's experiences of the criminal justice system is therefore included in Part One of this paper but is not intended to suggest that these experiences occur independent of other aspects or intersections of a person's identity.

Intersectionality & 'cohorts'

To this end, the CIJ emphasises the vital importance of an intersectional approach to any analysis of women's criminalisation – acknowledging that women have contact with the criminal justice system in many ways that are related to the different components of their life experience and socioeconomic, cultural and gender identity. Many of these components compound their experience of trauma and victimisation in multiple and varied ways.

Part One of this paper explores women's needs and experiences under the headings of certain issues or 'cohorts' as these are identified in the literature and does so as a way of highlighting the multiple support needs which relevant reforms need to consider and coordinate. We stress, however, the importance of understanding that women rarely experience these needs in isolation from each other; that they do not fall into neat and discreet categories; and that they should not be defined by certain aspects of their identity, rather than as whole human beings.

Agencies participating in the scoping project consultations

The CIJ would like to acknowledge and thank practitioners from the following organisations who participated in the 2018 scoping project which preceded this Issues Paper.

In recognition of the considerable demands facing these organisations during 2020 and since, the CIJ has not sought further input from all these organisations as originally intended. Any omissions or errors are therefore the CIJ's own.

- Australian Community Services Organisation (ACSO)
- Court Integrated Support Program (CISP)
- Fitzroy Legal Service (incorporating Darebin Community Legal Centre)
- First Step Legal
- Flat Out Inc.
- Good Shepherd, Women's Research Advocacy and Policy Centre
- Inside Access, Mental Health Legal Service
- Jesuit Social Services (JSS)
- Justice Connect
- Law and Advocacy Centre for Women (LACW)
- RhED (Resource Health & Education), Star Health
- Sisters Inside
- Victorian Aboriginal Legal Service (VALS)
- Victoria Legal Aid (VLA)
- Western Region Centre Against Sexual Assault (WestCASA)
- Women and Mentoring (WAM)
- Women's Legal Service Victoria (WLSV)
- Youthlaw

1. Part One: Gender and criminalisation

While some of the drivers of women's contact with the criminal justice system are also relevant to men – including socio-economic disadvantage, low educational status and racism³⁵ – many disproportionately impact on, or are specific to, women.

In particular, in its 2010 study of gender difference in sentencing outcomes, the Sentencing Advisory Council (SAC) referenced research suggesting that increased rates of women's criminal justice system contact could be partially explained by economic marginalisation - with wage inequality and sole parenting responsibilities all putting many women at higher risk of contact with the criminal justice system than single men and couples.³⁶ Combined with experiences of trauma, discussed further below, commentators have labelled this a "feminisation of poverty"³⁷ which sees women sent to prison for offences that are a direct result of socioeconomic marginalisation or need.

Evidence certainly indicates that pathways into criminalisation are gendered,³⁸ although some authors have cautioned against framing women's contact with the criminal justice system in individualised 'pathway' terms, rather than as the result of structural inequality.³⁹ Nevertheless, studies show that, when compared with men, incarcerated women "demonstrate higher levels of previous victimisation, poor mental health and serious mental illness, [and] substance misuse"⁴⁰ as well as high rates of insecure housing and chronic, often untreated, ill-health.⁴¹ The nature of these experiences and structural inequities mean that, overall, women:

- are imprisoned for less serious offences than men;⁴²
- present with higher rates of physical and psychological ill-health than their male counterparts, due in part to their experiences of victimisation from gendered violence;⁴³
- are disproportionately impacted by homelessness;⁴⁴
- are much more likely to be the primary carer of children;⁴⁵ and
- experience short, repeat and damaging periods of incarceration.

Some of these interrelated factors are briefly summarised below – noting, as acknowledged above, that women's lives are not delineated by separate aspects of their experiences or identity, but that all intersect with each other – sometimes to compound structural and social disadvantage.

³⁵ Indig, D., McIntyre, E., Page, J., & Ross, B. (2010) *2009 NSW Inmate Health Survey: Key Findings Report* Justice Health.

³⁶ Sentencing Advisory Council (2010) *Gender differences in sentencing outcomes*, Victorian Government; Heimer, K. (2000) 'Changes in the Gender Gap in Crime and Women's Economic Marginalization' 427(1) *Criminal Justice*.

³⁷ Belknap, J. (2007) *The invisible woman: Gender, Crime and justice*, Thomson Wadsworth.

³⁸ Salisbury, E., & van Voorhis, P. (2009) 'Gendered pathways: A quantitative investigation of women probationers' paths to incarceration' 36(6) *Criminal Justice and Behaviour* 541-566.

³⁹ Moore, L., Scruton, P., & Wahidin, A. (ed) (2017) *Women's imprisonment and the case for abolition: Critical reflections on Corston ten years* on Routledge.

⁴⁰ Stathopoulos, M., Quadara, A., Fileborn, B., & Clark, C. (2012) *Addressing women's victimisation histories in custodial settings*, No 13, Australian Centre for the Study of Sexual Assault, 6-7.

⁴¹ This research evidence led the SAC to conclude that the constellation of vulnerabilities evident in the biographies of women facing criminal charges – which provide legitimate reasons for mitigation – combined with gender difference in offending, are the primary reasons for disparities in sentencing outcomes for men and women. SAC, 2010, above n 36.

⁴² Swavola, E., Riley, K., & Subramanian, R. (2016) *Overlooked: Women and jails in an era of reform*, Vera Institute of Justice; Department of Justice and Community Safety (2019) *Women in the Victorian Prison System*, State of Victoria: DJCS.

⁴³ Australian Institute of Health and Welfare, (2019a) *The health of Australia's prisoners 2019*. Australian Government: AIHW

⁴⁴ DJCS, above n 42.

⁴⁵ Walker et al., above n 9.

We also note that Aboriginal and Torres Strait Islander women's experiences are compounded by the continuing impacts of colonisation. Accordingly, we highlight the available evidence regarding Aboriginal women's particular experience of the various issues described, as well as in a dedicated section (section 1.8). In doing so, the CIJ again acknowledges the resilience and strength of Aboriginal communities in the face of these impacts, including the ongoing failure of governments to respond adequately to calls for meaningful criminal justice reform.

While the profile of women involved in the criminal justice system remained relatively stable for many years, there is evidence that this is changing. These changes include evidence of increasing identification of substance dependence and substance related offending;⁴⁶ greater likelihood of prior experiences of custody;⁴⁷ more women held for short, repeat periods on remand;⁴⁸ a greater proportion of women reporting crime victimisation and recorded by police as having experiences of family violence (recorded as both victims and perpetrators);⁴⁹ and a reduction in the proportion who are primary caregivers for children.⁵⁰

These changes signal the multiplicity of women's needs which are not being met by the existing system, as well as the way in which periods of detention act to compound disadvantage and disconnections from family and community, rather than to address the factors which lead to justice system contact.

Compared with men, women:

- are imprisoned for less serious offences;
- have higher rates of physical and psychological ill-health and experiences of trauma;
- spend short, disruptive periods in prison; and
- are more likely to be the primary carer of dependent children.

1.1 Trauma and abuse

Bangkok Rules

- In view of women prisoners' disproportionate experience of domestic violence, they shall be properly consulted as to who, including which family member, is allowed to visit them (Rule 44).
- Suitable alternatives should combine non-custodial measures with interventions to address the most common issues leading to women's contact with the criminal justice system. These include therapeutic courses and counselling for victims of domestic violence and sexual abuse (Rule 60).
- The provision of gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the community and women's access to such treatment shall be improved, for crime prevention as well as for diversion and alternative sentencing purposes (Rule 62).

⁴⁶ Ibid, 17.

⁴⁷ Ibid, 16.

⁴⁸ Ibid, 16; Corrections Victoria, (2020b) *Monthly time series prisoner and offender data*.

⁴⁹ Between 2012 and 2018, the proportion of women on remand who had been a victim of crime in the 24 months prior to entering prison increased from 48 per cent to 51 per cent, with a greater increase in the proportion recorded by police to be the victim of family violence (up from 38 per cent to 43 per cent). Walker et al., above n 9, 32.

⁵⁰ Ibid, 15.

Social and financial exclusion often directly interact with women's experiences of trauma to fuel women's contact with the criminal justice system. These experiences of trauma are explicitly recognised by the Bangkok Rules and therefore by the international community.

Certainly the broader link between offending and victimisation has a strong empirical association,⁵¹ with an Australian study examining the trajectories of victim/survivors of child sexual abuse over multiple decades finding them to be "almost five times more likely to be charged with an offence than their peers in the general population".⁵²

This link is even more pronounced for women than for men, including high rates of histories of childhood victimisation (particularly sexual abuse) and associated contact with child protective services; as well as subsequent victimisation as adolescents and adults (including sexual assault and family violence).⁵³

While studies vary, authors suggest that "exposure to traumatic events is nearly universal among incarcerated women, with studies showing ranges of trauma exposure to be between 77 per cent and 90 per cent".⁵⁴

A 2004 Australian Institute of Criminology study found that 87 per cent of incarcerated women were victims of sexual, physical or emotional abuse, either in their childhood (63 per cent) or in their adulthood (78 per cent).⁵⁵

Research indicates that exposure to traumatic events is nearly universal among women in prison, with an estimated 77% to 90% having prior trauma exposure

The evidence base regarding incarcerated women's experiences of trauma makes clear that, overwhelmingly, women in prison are victims of crime and, specifically, of male offending. This has previously led the CIJ to observe:

⁵¹ Jennings, W., Piquero, A., & Reingle, J. (2012) 'On the overlap between victimization and offending: A review of the literature.' 17(1) *Aggression and violent offending*, 16-26. See also the Law Australia Wide Survey by the Law and Justice Foundation of NSW. For example, overall, 1.7 per cent of all respondents to the Legal Australia-Wide Survey reported that they had been alleged to have recently committed a crime during the 12-month reference period. However, this percentage increased to 5.2 per cent of the sub-group of respondents who reported having been a victim of crime. Conversely, while 13.3 per cent of all respondents reported having experienced a crime, the proportion was much higher (41.1 per cent) for those respondents who were also alleged to have committed a crime during the survey reference period. Coumarelos, C., Macourt, D., People, J., McDonald, H.M., Wei, Z., Iriana, R. & Ramsay, S. (2012) *Legal Australia-wide survey. Legal need in Australia* Law and Justice Foundation of NSW.

⁵² Ogloff, J., Cutajar, M., Mann, E., & Mullen, P. (2012) 'Child sexual abuse and subsequent offending and victimisation: A 45-year follow-up study' *Trends and Issues in Criminal Justice*, No. 440 Australian Institute of Criminology.

⁵³ Stathopoulos, M., & Quadara, A. (2014) *Women as offenders, women as victims: The role of Corrections in supporting women with histories of sexual abuse*, Corrective Services NSW; Prison Reform Trust, (2017) *There's a reason we're in trouble: Domestic abuse as a driver to women's offending*, United Kingdom; Wright, E. M., Voorhis, P. V., Salisbury, E. J., & Bauman, A. (2012) 'Gender-responsive Lessons and Policy Implications for Women in Prison: A Review' 39 (12) *Criminal Justice and Behaviour*; Stone, U. B., (2013) 'I'm still your Mum: Mothering inside and outside prison', Master of Arts thesis, RMIT University; Australian Institute of Health and Welfare (2015) *The health of Australia's prisoners 2015* Canberra; Swavola et al., above n 42; Segrave, M., & Carlton, B., '(2010) Women, Trauma, Criminalisation and Imprisonment.' *Current Issues in Criminal Justice* 22 (2), 287-305; Loxley, W. & Adams, K. (2009) *Women, drug use and crime: Findings from the drug use monitoring in Australia program*, Research and public policy series, No. 99, Australian Institute of Criminology; Salisbury & van Voorhis, above n 38; Bartels, L., Easta, P. & Westgate, R. (2020) 'Understanding women's Imprisonment in Australia' 30 (3) *Women and Criminal Justice*, 204-219; Day, A., Casey, S., Gerace, A., Oster, C., & O'Kane, D. (2018) *The forgotten victims: Prisoner experience of victimisation and engagement with the criminal justice system* (Research report, 01/2018). Sydney, NSW: ANROWS.

⁵⁴ Green, B., Jeanne, M., Daroowalla, A., & Siddique, J. (2005) 'Trauma exposure, mental health functioning and program needs of women in jail', 51 (1) *Crime & Delinquency* 133-151, 134.

⁵⁵ Johnson, H. (2004), 'Drugs and crime: A study of incarcerated female offenders' AIC: Research and public policy series, xiv.



...male family violence is a direct contributor not only to the increasing population of Victoria's male prisons, but it's female prisons as well. Provocative though it may be, the question then becomes to what extent Victoria would need a women's prison were it not for its epidemic of family violence.⁵⁶

Evidence indicates that victimisation from gendered violence can lead women to commit criminal offences in a variety of ways,⁵⁷ including through self-medicating; being forced into sexual exploitation; resisting violence through physical force (and being misidentified by police as the predominant aggressor as a result); experiencing systems abuse; or through associated poverty, often entrenched through financial abuse by a partner.⁵⁸ Advocates have noted that:



People are either victims or offenders and the possibility that women can be both of these challenges this core dichotomy, [as well as] society's response... The division between criminalisation and victimisation fails to capture [the] complex interplay of violence and vulnerability and might go some way to explain the absence of literature, policies and services for women in the criminal justice system that experience domestic violence.⁵⁹

Researchers have described a “triumvirate of gendered needs” stemming from victimisation and resulting substance abuse and mental illness.⁶⁰ This convergence is recognised in Victoria's Women's Correctional Services Framework, as well as in Corrections Victoria's *Standards for the Management of Women Prisoners in Victoria*.⁶¹ Overall the convergence means that incarcerated women are more likely to experience suicide attempts and substance overdoses,⁶² as well as face an increased risk of harm and premature unnatural death following their release from prison.⁶³

Less widely acknowledged, this “constellation of circumstances”⁶⁴ can often mean that traumatised women who have resulting substance dependence or mental health needs are not only pushed into contact with the criminal justice system, but are seen as ‘high risk’ or ‘complex’ and therefore commonly face barriers to accessing mainstream services which can respond to their victimisation.

This was a concern shared by many of the service providers consulted for the 2018 scoping project which preceded this paper. It is similarly reflected in the findings of the CIJ's evaluation of the *Women Transforming Justice* (WTJ) project, in which legal and support practitioners working with criminalised women described the way in which prohibitive eligibility requirements of many services excluded their clients from support or deemed their clients as having needs too acute for the service to address.

⁵⁶ Centre for Innovative Justice & Mental Health Legal Centre (2015) *Submission to the Family Violence Royal Commission*, RMIT University, Melbourne, 17.

⁵⁷ Salisbury & van Voorhis, above n 38; Richie, B.E. (1996) *Compelled to crime: The gender entrapment of battered black women*, Routledge.

⁵⁸ Day et al., above n 53; Gilfus, M. (2002) *Women's experiences of abuse as a risk factor for incarceration*, Applied Research Forum, National Online Resource Center on Violence Against Women.

⁵⁹ Women in Prison Advocacy Network, (2012) *The long road to freedom: women affected by domestic violence and the criminal justice system*. Broadway, NSW, 11.

⁶⁰ Stathopoulos et al., above n 40; Bartels et al., 2020, above n 53.

⁶¹ Victorian Government, 2017, above n 7; Corrections Victoria, (2014) *Standards for the Management of Women Prisoners in Victoria*, 10.

⁶² Stone, above n 53; Wright, et al., above n 53; Segrave & Carlton, above n 53.

⁶³ Davies, S., & Cook, S. (2000) ‘Dying out, dying outside: Women, imprisonment and post-release mortality’ Conference Paper, Women in Corrections: Staff and Clients Conference convened by the Australian Institute of Criminology in conjunction with the Department for Correctional Services SA, 31 October – 1 November 2000.

⁶⁴ Russell et al., above n 15.

For example, women charged with violent offences or who had been identified by police as a 'perpetrator' of family violence were described as often being excluded under refugee eligibility criteria.⁶⁵

Important to note, the Royal Commission into Family Violence (RCFV) made recommendations to improve supports within prison for women who had experienced family violence. The Corrections Victoria website⁶⁶ suggests that there has been full implementation in the following areas:

- Review and amendment of prison reception and pre-release assessment tools and processes to better identify female offenders at risk of or with a history of family violence and to respond with support services, therapeutic interventions and education programs (Recommendations 183 and 185);
- Ensuring that therapeutic interventions are available for all women in prison (Recommendation 184); and
- Corrections Victoria involvement as a proscribed Information Sharing Entity under the Family Violence Information Sharing Scheme (Recommendation 5).

Family violence support services delivered in Victoria's two women's prisons include a program to work with women identified by police as using family violence. Recent COVID-19 restrictions limited access to these supports and the CIJ's engagement with services suggests that, at the time of writing, only some services have been able to recommence, albeit on a very limited basis.

Crucial as services within custodial environments will continue to be, it is not a stretch to conclude that earlier and more effective intervention *in the community* would mean less demand for support in these settings in the first place. Further, more nuanced responses to family violence – as well as a greater understanding of the way in which trauma can drive women's mental health issues and substance dependence – would reduce the rate at which women are identified by police as predominant aggressors. This would help prevent women being pushed into escalating contact with a system from which, as victims of gendered violence, they should reasonably expect protection.

⁶⁵ Campbell et al., 2020 above n 30.

⁶⁶ Corrections Victoria, (2020c) *Family Violence. Information regarding the initiatives Corrections Victoria is driving as a result of the Royal Commission into Family Violence (2015)* Victorian Government <<https://www.corrections.vic.gov.au/family-violence>>

1.2 Parenting status

Bangkok Rules

- Non-custodial sentences preferred for pregnant women and those who are the primary caregiver of children (Rule 64).
- Punishment by close confinement or segregation shall not be applied to pregnant women, women with infants and breastfeeding mothers in prison (Rule 22).
- Suspension of family visits, especially of children, should never be imposed as a disciplinary sanction (Rule 23).
- Instruments of restraint shall never be used on women during labour or immediately after birth (Rule 24).
- Contact of a woman with family and children should be encouraged and facilitated by all reasonable means (Rule 26).
- Visits involving children shall take place in a child-friendly environment, allowing open contact between mother and extended contact where possible (Rule 28).
- Appropriate programs should be provided for pregnant women, nursing mothers and women with children in prison and childcare facilities should be provided (Rule 42).
- Children in custody with their mother are never to be treated as prisoners (Rule 49).
- Women whose children are in prison with them shall be provided with the maximum possible opportunities to spend time with their children (Rule 50).
- Decisions about separating a child in prison from their mother are to be made with consideration of the best interests of the child, where alternative arrangements have been made for the child and undertaken with sensitivity. Women separated from their children are to be given the maximum opportunity to maintain contact (Rule 52).

Also crucial to understanding many women's experiences of criminal justice system contact is their status as parents. This includes the way in which women come into contact with the criminal justice system in the first place, as well as the devastating impacts that this contact ultimately has on their capacity to maintain contact with, and care for, their children.

In 2018, around 65 per cent of un-sentenced women and 70 per cent of sentenced women reported having children.⁶⁷ The proportion of women in custody who had primary responsibility for dependent children dropped from 26 per cent of un-sentenced women in 2012, to 12 per cent in 2018, and from 34 per cent of sentenced women to 25 per cent over the same timeframe.⁶⁸ This potentially points to the increasing rates of child removal experienced in Aboriginal communities over this period, as well as the introduction of time limited restrictions on women regaining custody of their children once statutory authorities intervene.⁶⁹

⁶⁷ Walker et al., above n 9, 1.

⁶⁸ Ibid.

⁶⁹ O'Donnell, M., Taplin S., Marriott, R., Lima, F., & Stanley, F. (2019). 'Infant removals: The need to address the over-representation of Aboriginal infants and community concerns of another 'stolen generation'', 90 *Child Abuse & Neglect*, 88-98.

Regardless of whether they were primary carers of children when entering custody, incarceration clearly disrupts opportunities to maintain contact with children. Concerns about children's wellbeing feature strongly amongst incarcerated women,⁷⁰ concerns which are likely to be heightened where children are in the care of the state or an estranged or violent partner.⁷¹

In fact, a Victorian study found that women who had been separated from their children were more likely to return to custody than women whose connection with their children had been supported.⁷²

Women who have been separated from their children are more likely to return to commit further offences and return to custody than women whose connection with their children has been supported.

Other studies have shown that even short periods of separation can have profoundly devastating impacts on the mother-child bond,⁷³ with custody functioning as a "double punishment".⁷⁴ When in prison, women who have lost custody of their children are usually at higher risk of self-harm.⁷⁵ Further, custody offers little opportunity for mothers to prepare for re-entry back into a family environment.⁷⁶

The literature relating to the impact of imprisonment on women also points to the

wider effects on families and communities when mothers are separated from their children because of incarceration. In 2018, the Prison Reform Trust estimated that 17,240 children are separated from their mothers as a result of incarceration every year in the UK.⁷⁷ In one US study, 88 per cent of fathers in US state prisons reported that at least one of their children was in the care of the child's mother, while only 37 per cent of mothers reported that the father was their child's current caregiver.⁷⁸

This brings with it increased risk that the children of incarcerated women will be taken into state care. Given women's wider caring responsibilities, including Aboriginal women's cultural responsibility for the care of non-biological children, the incarceration of women clearly has significant down-stream implications for child welfare and family cohesion.

⁷⁰ Goulding, D. (2004) *Severed connections: An exploration of the impact of imprisonment on women's familial and social connectedness*, Centre for Social and Community Research, Murdoch University.

⁷¹ Stone, above n 53.

⁷² Shlonsky A., Rose, D., Harris, J., Albers, B., Mildon, R., Wilson, S., Norvell, J., & Kissinger, L. (2016) *Literature review of prison-based mothers and children programs: Final report*.

⁷³ Women's Centre for Health Matters (2019) *The stories of ACT women in prison: 10 years after the opening of the AMC*, Canberra, ACT.

⁷⁴ Moloney, K.P., & Moller, L.F. (2009) 'Good Practice for Mental Health programming for women in prison: Reframing the parameters,' 123 (6) *Journal of Public Health* 431-433.

⁷⁵ Mitchell, B.K., & Howells, K. (2002) 'The Psychological needs of women prisoners: Implications for rehabilitation and management' 9 (1) *Psychiatry, Psychology and Law* 34-43; Hooper, C.A. (2003) 'Abuse, interventions and women in prison: A literature review', London: HM Prison Service, Women's Estate Policy Unit.

⁷⁶ Easta, P. (2001) 'Women in Australian prisons: Cycles of abuse and dysfunctional environments', 81 (1) *The Prison Journal*, 87; Kilroy, D. (2005) 'The Prison Merry-go-Round: No Way Off', 6 (13) *Indigenous Law Bulletin* 25; Wybron, D. & Dicker, K. (2009) *Invisible Bars: The Stories behind the Stats* Women's Centre for Health Matters, Canberra; Richie, B.E., (2001) 'Challenges incarcerated women face as they return to their communities: Findings from life history interviews' 47 (3) *Crime and Delinquency* 368-389.

⁷⁷ Beresford, S. (2018) *What about me? The impact on children when mothers are involved in the criminal justice system*, Prison Reform Trust: United Kingdom.

⁷⁸ Glaze, L. E., & Maruschak, L. M. (2008). *Parents in prison and their minor children*. (NCJ 222984). U.S.: Bureau of Justice Statistics Retrieved from <<http://www.bjs.gov/content/pub/pdf/pptmc.pdf>>

1.3 Gender diversity

While not reflected in the Mandela Rules, the Bangkok Rules,⁷⁹ or in many international contexts,⁸⁰ the needs of transgender and gender diverse people (TGD)⁸¹ in carceral settings are outlined, to varying degrees, in correctional policies and protocols.⁸²

In Victoria, the Commissioners Requirements⁸³ set out guidelines on the management of “prisoners who are Trans, Gender Diverse or Intersex,”⁸⁴ requiring that they be treated with “the same respect and dignity accorded to any other prisoner.”

A 2017 review of Australian prison protocols found that some jurisdictions either had no policies on housing TGD people, or policies were not publicly available.⁸⁵ This is despite Principle 9 of the Yogyakarta Principles requiring that “all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity.”⁸⁶

Despite research being described as “scarce, mostly dated and limited in its policy relevance”,⁸⁷ evidence indicates that the discrimination which TGD people experience in the community is linked to criminalisation.⁸⁸

⁷⁹ The only reference to considerations relevant to transgender and gender diverse people in the Mandela Rules is in Rule 7, which requires prison authorities to record precise information about the identity of each prisoner, while “respecting his or her self-perceived gender”. UNODC, 2015, above n 24.

⁸⁰ A recent report indicated that the majority of European Union member states still lack specific measures for the protection of trans and gender diverse people in prison. Penal Reform International (2020) *Global prison trends 2020*, (Penal Reform Initiative and the Thailand Institute of Justice).

⁸¹ The term ‘transgender and gender diverse’ is used as an umbrella term that includes “anyone whose gender identity or expression is different from that which was assigned at birth or is expected of them by society. This includes those who identify as trans; transgender; transsexual; genderqueer; non-binary; cross-dressers; Sistergirls, Brotherboys, and other culturally specific identities; as well as a variety of other gender labels”, whether or not they have undergone medical transition. Terminology Glossary, (2018) Transgender Victoria.

https://uploads-ssl.webflow.com/5f3c97a8bba3c916ae4c1402/5f912d4d81647a3632cb4876_TGD-Glossary.pdf

⁸² Determining the number of TGD people in the prison system is problematic due to the lack of institutional data, as well as limited disclosures. In Australia, estimates have ranged from 0.01 per cent to 1 per cent. Butler, T., Richters, J., Yap, L., Papanastasiou, C., Richards, A., Schneider, K., Grant, L., Smith, A., & Donovan, B. (2010) *Sexual Health and Behaviour of Queensland Prisoners: Queensland and New South Wales Comparisons*, National Drug Research Institute, Curtin University, and School of Public Health and Community Medicine, University of New South Wales; Richters, J., Butler, T., Yap, L., Kirkwood, K., Grant, L., Smith, A., Schneider, K. and Donovan, B. (2008) *Sexual Health and Behaviour of New South Wales Prisoners*, School of Public Health and Community Medicine, University of New South Wales; Corrective Services New South Wales (2013) *Statistical Profile: Characteristics of NSW inmate receptions*, Corrections Research, Evaluations and Statistics; Australian Institute of Health and Welfare, 2015, above n 53.

⁸³ This outlines the policy that all Correctional staff must follow in particular operational matters.

⁸⁴ See Commissioner’s Requirements 2.4.1. Accessed from <<https://www.corrections.vic.gov.au/commissioners-requirements-part-2>>

⁸⁵ Rodgers, J., Asquith, N., and Dwyer, A (2017), ‘Cisnormativity, criminalisation, vulnerability: Transgender people in prisons,’ *TILES Briefing Paper No. 12*, Tasmanian Institute of Law Enforcement Studies (TILES), University of Tasmania.

⁸⁶ International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity, (2007) *The Yogyakarta Principles. Principles on the application of international law in relation to sexual orientation and gender identity*, 16.

⁸⁷ Rodgers et al., above n 85.

⁸⁸ Lenning, E and Buist, C. (2012) ‘Social, psychological, and economic challenges faced by transgender individuals and their significant others: Gaining insight through personal narratives’ 15 (1) *Journal of Culture, Health, and Sexuality*, 45-57.

Disproportionate experiences of poor mental health, substance dependence, homelessness and unemployment increase the likelihood of contact with the justice system.⁸⁹ Profiling by police;⁹⁰ perceived fraudulent behaviour associated with legal documentation;⁹¹ and the push to criminalise transgender people's use of public toilets, are all evident in research from the US.⁹² One study, for example, estimated that 21 per cent of transgender women in the US reported a history of imprisonment, compared with 5 per cent of people in the general population.⁹³

Incarceration in highly institutionalised settings can be especially damaging for TGD people due to transphobic stigma, discrimination and assault.⁹⁴ The literature also identifies a greater risk of suicide and self-harm, as well as mental health and substance dependence issues than cisgender people in prison.⁹⁵ Lynch and Bartels have noted that sistergirls and brotherboys from Aboriginal communities face additional hardships not experienced by non-Indigenous TGD people in prison.⁹⁶

Assigning transgender people to an appropriate facility is described as posing challenges for prisons, requiring a balance of perceived risks to safety for others; the individual's own wishes; and measures to address transphobic violence and abuse.⁹⁷ Being detained in a prison that reinforces "systemic misgendering"⁹⁸ is also likely to impact severely on an individual's wellbeing.⁹⁹

⁸⁹ Couch, M., Pitts, M., Mulcare, H., Croy, S., Mitchell, A., & Patel, S. (2007) *Tranznation: A report on the health and wellbeing of transgender people in Australia and New Zealand*. Australian Research Centre for Sex, Health and Society, La Trobe University; Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J. & Mitchell, A. (2010) *Writing Themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, Australian Research Centre in Sex, Health & Society, La Trobe University; Spade, D. (2011) *Normal life: administrative violence, critical trans politics, and the limits of law*, South End Press; Grant, J. M., Mottet, L. A., Tanis, J., Harrison, J., Herman, J. L. & Kiesling, M. (2011) *Injustice at every turn: A report on the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, Washington.

⁹⁰ US research reveals that trans women are commonly presumed by police to be engaged in sex work, resulting in heightened surveillance, arrests, invasive searches, and prosecutions. Sylvia Rivera Law Project. (2007) *'It's war in here': A report on the treatment of transgender and intersex people in New York State men's prisons*, New York. See also Moran, L. & Sharpe, A. (2004) 'Violence, identity and policing: The case of violence against transgender people'. 4 (4) *Criminal Justice*, 395-417; Carpenter, L., & Barrett Marshall, R. (2017) 'Walking while trans: Profiling of transgender women by law enforcement, and the problem of proof' 24 (1) *William & Mary Journal of Race, Gender, and Social Justice*.

⁹¹ Wang, S. (online 9 October 2016) 'Indiana voter ID law may pose obstacle for transgender people' *USA Today*, <<http://www.usatoday.com/story/news/politics/elections/2016/10/08/indiana-voter-id-law-may-pose-obstacle-transgender-people/91779722/>>

⁹² Redden, M. (online 26 May 2016) 'Eleven states sue US government over transgender bathroom policy', *The Guardian* (online, 26 May, 2016) <<https://www.theguardian.com/us-news/2016/may/25/eleven-states-sue-us-government-transgender-bathroom-laws>>

⁹³ Movement Advancement Project (MAP) and Center for American Progress. (2016) *Unjust: How the Broken Criminal Justice System Fails Transgender People*. <<https://www.lgbtmap.org/policy-and-issue-analysis/criminal-justice-trans>> (15 March 2021). <<https://www.lgbtmap.org/criminal-justice-trans>>

⁹⁴ Ministry of Justice, (2016) *Review of the care and management of transgender offenders*, United Kingdom.

⁹⁵ GLBTI Health & Wellbeing Ministerial Advisory Committee (2014), *Transgender and gender diverse health and wellbeing*, Victorian Government. See also: Edney, R. (2004) 'To keep me safe from harm? Transgender prisoners and the experience of imprisonment' 9 (2) *Deakin Law Review* 327, 336; Australian Human Rights Commission (2015) *Resilient Individuals: Sexual Orientation Gender Identity & Intersex Rights: National Consultation Report*.

⁹⁶ Lynch, S., & Bartels, L. (2017) 'Transgender prisoners in Australia: An examination of the issues, law and policy' 19 (2) *Flinders Law Journal*, 185-231, 207.

⁹⁷ See the case of Maddison Hall, a trans female convicted of murder who, while housed in women's facility, is alleged to have raped her cellmate. Lynch & Bartels, above n 96.

⁹⁸ Jenness, V. (2010) 'From policy to prisoners to people: A "soft mixed methods" approach to studying transgender prisoners' 39 (5) *Journal of Contemporary Ethnography*, 517-553, 519.

⁹⁹ Broadus, K. W. (2008-09) 'The criminal justice system and trans people', 18 (2) *Temple Political and Civil Rights Law Review*, 561-572; Grant et al., above n 89; Scott, S. (2012-2013) "One is not born, but becomes a woman": A Fourteenth Amendment argument in support of housing male-to-female transgender inmates in female facilities', 15 *University of Pennsylvania Journal of Constitutional Law*, 1259-1298; Sumner, J. & Jenness, V. (2013) 'Gender integration in sex-segregated US prisons' in Peterson, D. and Panfil, V.R. (eds), *Handbook of LGBT Communities, Crime, and Justice*, (Springer, Dordrecht) 229-259.

Studies have estimated that between 15 and 59 percent of TGD people are sexually assaulted in prison,¹⁰⁰ compared with 4.4 per cent in the general prison population,¹⁰¹ and that the prevalence is likely to be underreported.¹⁰² Similarly, an Australian study highlighted TGD people's daily experiences of sexual coercion and psychological distress.¹⁰³ The ongoing vulnerability of TGD people to sexual assault in prison has been characterised as a serious breach of duty of care by correctional services,¹⁰⁴ bringing into question the legitimacy of imprisonment as a sanction for this cohort.¹⁰⁵

An issue of particular concern is the tendency for measures designed for the *protection* of TGD people to pathologise and isolate them instead, with the imposition of 'protective' segregation in single cells or separate units likened to solitary confinement.¹⁰⁶ Researchers note that this "institutionalised vulnerability"¹⁰⁷ can be just as harmful as being housed within the general prison population¹⁰⁸ and can increase the risk of abuse by others who are segregated, or by prison staff.¹⁰⁹

Being housed separately may also impede access to vocational, transition and rehabilitation services,¹¹⁰ or gender reassignment treatment where applicable. Lack of access to health care,¹¹¹ or provision of treatment without support,¹¹² can result in profound negative impacts on physical and mental health.¹¹³ Research indicates that the denial of access to treatment relevant to their gender identity can be experienced as an additional form of punishment by TGD people.¹¹⁴

¹⁰⁰ See Grant et al., above n 89 and Jenness, V., Maxson, C., Matsuda, K., & Sumner, J. (2007) *Violence in California correctional facilities: An empirical examination of sexual assault* Centre for Evidence-Based Corrections, University of California.

¹⁰¹ Jenness et al., above n 100.

¹⁰² Robinson, R. (2011) 'Masculinity as prison: Sexual identity, race, and incarceration' 99 *California Law Review*, 1309-1408; Sylvia Rivera Law Project, above n 90.

¹⁰³ Simpson, P.L., Wilson, M., Butler, T., Richters, J., Yap, L., Grant, L., Richards, A., & Donovan, B. (2013), 'You're a woman, a convenience, a cat, a poof, a thing, an it?: Transgender women negotiating sexual coercion in NSW male prisons' (Conference Paper, Australasian Sexual Health Conference, 23-25 October, 2013).

¹⁰⁴ Lynch & Bartels, above n 96.

¹⁰⁵ Edney, above n 95.

¹⁰⁶ Sylvia Rivera Law Project, above n 90; Sumner & Jenness, above n 99. However, researchers note that trans people's experiences of segregation has been identified as a research gap. Rodgers et al., above n 85.

¹⁰⁷ Asquith, L., Bartkowiak-Théron, I., & Roberts, K. (2016) 'Vulnerability and the criminal justice system' 2 (3) *Journal of Criminological Research, Policy and Practice*, 161-163.

¹⁰⁸ Arkles, G. (2008-9) 'Safety and solidarity across gender lines: Rethinking segregation of transgender people in detention', 18(2) *Temple Political & Civil Rights Law Review*, 515-560; Scott, above n 99; Sylvia Rivera Law Project, above n 90.

¹⁰⁹ Sylvia Rivera Law Project, above n 90.

¹¹⁰ Arkles, above n 108.

¹¹¹ Grant et al., above n 89; Scott, above n 99. In the US, many prison systems deny access to hormone treatment and people in prisons are almost universally denied access to gender reassignment surgery. Pemberton, S. (2013) 'Enforcing Gender: The Constitution of Sex and Gender in Prison Regimes' 39 (1), *Women, Gender and Prison: National and Global Perspectives*.

¹¹² Edney, above n 95.

¹¹³ Sumner & Jenness, above n 99; Rodgers et al., above n 85.

¹¹⁴ McNeil, J., Bailey, L., Ellis, S., Morton, J. & Regan, M. (2012) *Trans Mental Health Study 2012*, (Scotland Transgender Alliance, Edinburgh).

1.4 Housing

Bangkok Rules

While there are no specific rules relating to housing support, the commentary in the Rules recognises this as a practical support need for women that should be addressed in pre- and post-release reintegration programs to promote effective transition back into the community (Rules 45-47) particularly for Indigenous women and women from other minority groups (Rule 55).

Although the Bangkok Rules refer to housing as just one of women's needs post-release, the availability of safe housing is arguably the most central component in women's reunification with their children, as well as being central to avoiding further contact with the criminal justice system.

UK research has noted that stable accommodation could reduce the risk of re-offending by 20 per cent,¹¹⁵ while a Victorian Parliamentary Inquiry found that the lack of adequate housing options for women in contact with the criminal justice system was "the most overwhelming problem" it identified. This included acknowledgment by the Committee that women were being placed on remand or having release postponed *purely* due to lack of available housing.¹¹⁶

As is evident from recent Victorian research, homelessness amongst women is one of a "constellation of circumstances" that can prevent women from securing bail and from avoiding pre-trial detention.¹¹⁷ Meanwhile, women who do have access to safe and stable housing *prior* to entering custody, even those spending short periods on remand, can lose it by the time that they return to the community – with a criminal record, multiple support needs and a lack of sufficient record of stable housing making accommodation difficult to find and maintain.¹¹⁸

Corrections data also shows that women who experienced homelessness or housing insecurity before entering prison were more likely to report daily substance use (70 per cent) than those with stable accommodation (58 per cent).¹¹⁹ This suggests that substance use puts women at risk of losing housing or may result from experiences of homelessness.¹²⁰

Specific research comparing the post-release needs of women and men indicates that housing, finances and substance abuse remain the top post-release priorities for women.¹²¹ Research across the UK, USA and Canada continues to highlight that accommodation is the foundation for successful transition from prison into the community¹²² and is critical for women to re-establish connection and access to their children, who may have been placed in care during their incarceration.

¹¹⁵ Social Exclusion Unit, Office of the Deputy Prime Minister, (2002) *Reducing re-offending by ex-prisoners*, UK; Stathopoulos et al., above n 40.

¹¹⁶ Drug and Crime Prevention Committee, Parliament of Victoria, (2010) *Inquiry into the Impact of Drug-Related Offending on Female Prisoner Numbers*, Parliamentary Paper No 371.

¹¹⁷ Russell et al., above n 15, 21.

¹¹⁸ Flat Out Inc. & the Centre for the Human Rights of Imprisoned People. (2010) Submission to the Drugs and Crime Prevention Committee, *Inquiry into the Impact of Drug-Related Offending on Female Prisoner Numbers*, Melbourne.

¹¹⁹ DJCS, above n 42, 11.

¹²⁰ Ibid.

¹²¹ Worrall, A., & Gelsthorpe, L. (2009) 'What works' with women offenders: The past 30 years' 56(4) *Probation Journal* 329; Sheehan, R. (2013) 'Justice and Community for Women in Transition in Victoria, Australia', in Malloch, M. and McIvor, G. (eds) *Women, Punishment and Social Justice: Human Rights and Social Work* Routledge.

¹²² Sheehan 2013, above n 121.

Studies in the UK indicate that even resource-intensive housing support costs less than the expense stemming from imprisonment and associated harms, yet one fifth of women leaving prison had neither an address to go to, nor the means to pay a housing deposit and rent.¹²³

A Legal Aid NSW study of women leaving Silverwater Prison in NSW over a 12-month period found that only 12 per cent believed that they had access to stable housing on release from prison.¹²⁴

Research has also highlighted that lack of housing options can lead to women returning to high risk settings and relationships.¹²⁵ As boarding houses and domestic/family violence shelters often have stringent requirements, this can create barriers to access for women released from prison who have multiple and interrelated needs.¹²⁶ For example, strict rules regarding substance use may preclude women who are grappling with substance dependence, particularly given that residential drug rehabilitation places are so severely limited. Some residential programs may be unable to accommodate women with children, while others which do accommodate children are likely to exclude women who have been charged with violent offending.

Overall, women in prison indicate that early support to find housing would have prevented them from offending or reoffending.¹²⁷ Yet Victoria currently has the lowest proportion of social housing stock in Australia, sitting at 3.2 per cent of all housing stock – one per cent less than the national average.¹²⁸

In a recent discussion paper relating to Victoria's 10 year Strategy for Social and Affordable Housing, the Victorian Government indicated that there are over 48,000 households currently registered for social housing, many of whom have been on waiting lists for years.¹²⁹ While the \$5.3 billion investment in social housing announced under the strategy¹³⁰ will go some way to address the current housing crisis for disadvantaged people, there is no indication that specific provision has been made for post-release public housing or housing targeted at criminalised women, including those who may have caring duties.

The extensive consultations with service providers for the scoping project conducted in 2018, as well as the CIJ's ongoing advocacy and engagement, indicate the challenges of linking criminalised women with safe and secure housing which can prevent reoffending. A clear need therefore exists for targeted housing options that are responsive to women's homelessness and their multiple support needs. Failure to do so further entrenches their involvement in a system which is currently functioning as a proxy for adequate social infrastructure and support.

¹²³ Ibid.

¹²⁴ Legal Aid NSW, (2015) *Aboriginal Women Leaving Custody: Report into Barriers to Housing* 4.

¹²⁵ Sheehan 2013, above n 121; Worrall & Gelsthorpe, above n 121; Trotter, C., & Flynn, C. (2016) 'Literature Review: Best practice with women offenders,' Monash University Criminal Justice Research Consortium; Day et al., above n 53.

¹²⁶ Sheehan, R., & Trotter, C. (2019) 'Policy Developments in Victoria: The Better Pathways Strategy' in *Women's Traditions from Prisons: Post-Release Experiences* (eds.) Sheehan & Trotter (Taylor and Francis Group); Kilroy, 2005, above n 76.

¹²⁷ Prison Reform Trust & Soroptomist International, (2014) *Transforming lives. Reducing Women's imprisonment*.

¹²⁸ Topsfield, J. & Millar, R. (15 November 2020). '\$5.3b blitz on new public housing to 'change lives' *The Age* (online)

¹²⁹ Victorian Government (2021) *Establishing a 10-Year Strategy for Social and Affordable Housing. A discussion paper prepared for sector stakeholders and partners by the Victorian Government*. Sector consultation paper.

¹³⁰ Victorian Government, 'Victoria's big housing build'. (Media Release, 15 November, 2020b).

<<https://www.premier.vic.gov.au/victorias-big-housing-build>>

1.5 Disability

Although the Bangkok Rules do not mention the issue of disability beyond women's experiences of what is referred to as 'mental disability', the CIJ's work in this area¹³¹ has highlighted the way in which social and economic marginalisation, as well as experiences of victimisation and trauma, can increase contact with criminal justice systems for people with disabilities overall.

According to the Australian Institute of Health and Welfare (AIHW), almost a third of people in prison report having a long-term health condition or disability, with women slightly more likely to report this than men.¹³² While around 18 per cent of the general population has a disability, for young people aged 18 to 24 years entering prison, that percentage is as high as 50 percent.¹³³ Results vary across studies, but research also suggests that close to a third of people in prison have an intellectual disability,¹³⁴ compared with an estimated 2.9 per cent of the total population.¹³⁵ A 2011 Victorian study found that 33 per cent of women in custody (and 42 per cent of men) had an ABI,¹³⁶ with recent research also pointing to the high association between ABI and family violence victimisation.¹³⁷

Some researchers suggest that criminal justice systems are used to 'manage' behaviours related to disability, including through forced treatment, seclusion and restrictive practices.¹³⁸ This is a particular risk for people with cognitive and/or psychosocial disability,¹³⁹ including where this is undiagnosed. Recent inquiries have also highlighted concerns about rules governing fitness to plead and the indefinite detention of people with disability without conviction which can result.¹⁴⁰

Limited availability of therapeutic support in the community and the lack of secure therapeutic facilities can mean that women experiencing psycho-social conditions may be held in detention for long periods.¹⁴¹ Services consulted during the evolution of this paper spoke about the barriers faced by criminalised women in accessing services under the National Disability Insurance Scheme (NDIS). This was due both to it being logistically difficult for women to apply for support and to access services while in custody, and because of the kinds of disability that the scheme covers. Limited conceptions of mental illness under the scheme, which exclude AOD issues, fail to accommodate the interrelated and sometimes episodic conditions with which women in the justice system present. To compound this further, a lack of clarity exists between state and commonwealth governments as to funding for disability services when the NDIS is not an option.

¹³¹ Winford, S., Howard, A., & Richter, J. (2018) *Recognition, respect and support. Enabling justice for people with an acquired brain injury*, Centre for Innovative Justice, RMIT University, Melbourne. See also the CIJ's *Supporting Justice* project at <<https://supportingjustice.net/>>

¹³² AIHW, 2019a, above n 43.

¹³³ Human Rights Watch, above n 4.

¹³⁴ Hellenbach, M., Karatzias, T. & Brown, M. (2017) 'Intellectual disabilities among prisoners: prevalence and mental and physical comorbidities', 30 (2) *Journal of Applied Research in Intellectual Disabilities*, 230–41.

¹³⁵ Australian Bureau of Statistics (ABS), (2012) *Intellectual Disability Australia, 2012* (Catalogue No 4433.0.55.003).

¹³⁶ Jackson, M., Hardy, G., Persson, P., & Holland, S. (2011) *Acquired Brain Injury in the Victorian Prison System*, Research Paper Series No 04, Corrections Victoria, 6.

¹³⁷ Ibid; Brain Injury Australia, (2018) *The Prevalence of Acquired Brain Injury Among Victims and Perpetrators of Family Violence*.

¹³⁸ Baldry, E. (2014) 'Disability at the margins: limits of the law' 23 (3) *Griffith Law Review* 370, 383.

¹³⁹ Law Council of Australia, (2018) 'People with Disability, The Justice Project Final Report – Part 1'.

¹⁴⁰ ALRC, 2017, above n 28; McSherry, B., Baldry, E., Arstein-Kerslake, A., Gooding, P. McCausland, R. & Arabena, K. (2017) 'Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities', Melbourne Social Equity Institute, University of Melbourne; Australian Human Rights Commission, (2014) *Equal Before the Law – Towards disability justice strategies*, Sydney; Australia OPCAT Network (2020), Submission to the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the United Nations Working Group on Arbitrary Detention, *The implementation of OPCAT in Australia*; Australian Human Rights Commission, (2016) *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, Submission to the Senate Community Affairs References Committee; Baldry 2014, above n 138.

¹⁴¹ Victorian Ombudsman, (2018) *Investigation into the imprisonment of a woman found unfit to stand trial*. (Melbourne: Victorian Government, 2018).

The absence of a coordinated response within the criminal justice system which can link people with a disability to the supports that they need was brought into sharp relief by the CIJ's Supporting Justice Project¹⁴² and further emphasised in evidence presented to the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (the Disability Royal Commission) by Dorothy Armstrong,¹⁴³ a peer adviser employed by the CIJ.

1.6 Physical and mental health

Bangkok Rules

- Prisons are to conduct comprehensive screening of women received into custody to determine physical and mental health needs relating to: primary healthcare; mental health-care, the presence of and risk of suicide and self-harm; reproductive health history; drug dependency; sexual abuse and other forms of violence suffered prior to admission (Rule 6).
- Member states to provide alternatives to imprisonment for women charged with or convicted of drug offences and diversion to gender-appropriate treatment programs (Preamble).
- Trauma-informed, women-only substance abuse treatment programs to be provided in prisons and in the community for crime prevention, diversion and sentencing purposes (Rules 15 & 62).

According to the AIHW, 45 per cent of women in Australian prisons have a chronic physical health condition, compared with 28 per cent of men entering custody. Yet women are significantly less likely than men in prison to have consulted a doctor in the previous 12 months, and, given that they are in custody for shorter periods, are less likely to access necessary treatment and support while in prison.¹⁴⁴ The AIHW also reports that 1 in 50 women going into custody are pregnant.¹⁴⁵

As the AIHW report offers data in relation to categories of “male” and “female” and “Indigenous” and “non-Indigenous”, this tends to obscure Aboriginal women’s experiences as the minority in both categories. Participants in a study with Aboriginal women in custody, however, reported high rates of reproductive health problems, many of which were associated with gendered violence.¹⁴⁶ Aboriginal women in custody report an average age of just over 18 at their first pregnancy.¹⁴⁷ Aboriginal women are also likely to experience other health issues, including diabetes, heart attack and stroke.¹⁴⁸

45% of women in Australian prisons have a chronic physical health condition, compared with 28% of men.

¹⁴² The Centre for Innovative Justice, Supporting Justice System Map, retrieved 23 February 2021 from <<https://cij.org.au/research-projects/supporting-justice-system-map/>>

¹⁴³ Evidence of Dorothy Armstrong, Transcript of proceedings, Tuesday 23 February 2021. Day 6. Accessed 18 March 2021 from <<https://disability.royalcommission.gov.au/system/files/2021-02/Transcript%20Day%206%20-%20Public%20hearing%2011%2C%20Brisbane.pdf>>.

¹⁴⁴ AIHW 2019a, above n 43.

¹⁴⁵ Ibid.

¹⁴⁶ Kendall, S., Lighton, S., Sherwood, J., Baldry, E. & Sullivan, E. (2019), ‘Holistic Conceptualizations of Health by Incarcerated Aboriginal Women in New South Wales, Australia’ 29 (11) Qualitative Health Research, 1549-1565, 1557.

¹⁴⁷ AIHW 2019a, above n 43.

¹⁴⁸ Meehan, T., Jones, D., Stedman, T., Johnson, D., Suetani, S., Foreman, E. (2017) ‘The physical health of Indigenous and non-Indigenous patients participating in residential rehabilitation programs: a comparison study’ 25(2) *Australasian Psychiatry*, 164-167.

Importantly, numerous studies also indicate that women involved in the criminal justice system have higher rates of mental health issues than their male counterparts,¹⁴⁹ with one study showing that women in UK prisons have five times the rate of self-harm as men.¹⁵⁰ In 2010, the NSW Inmate Health Study found that rates of mental illness were higher for women in prison (54 per cent), than men in prison (47 per cent), noting again the established link with prior experience of trauma and victimisation.¹⁵¹ In particular, women are more likely to have experienced a mental illness if they have been sexually victimised; are survivors of trauma, or have histories of substance dependence. In turn, these factors correlated directly to criminal justice system contact.¹⁵²

Mental health has been recognised as a critical factor in Aboriginal criminal justice system involvement since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) reported in 1991.¹⁵³ Recent research suggests that, four decades on, little has changed in this regard and

92.3% of Aboriginal women in Victorian prisons present with a form of mental ill health.

that Aboriginal women carry a particularly heavy mental ill-health burden.¹⁵⁴ Research with Aboriginal women in Victorian prisons indicates that 92.3 per cent of participants presented with a form of mental illness, and 46 per cent of Aboriginal women participating in the study met

one criterion of Post-Traumatic Stress Disorder, compared with 14.7 per cent among Aboriginal men.¹⁵⁵ These findings align with studies in other states.¹⁵⁶

Directly linked with these experiences of trauma and mental ill health, research identifies high rates of substance dependency amongst justice-involved women, including in the lead up to and during offending; at time of arrest; and subsequent to incarceration.¹⁵⁷ The proportion of women whose imprisonment is associated with a drug-related offence increased from nearly 15 per cent in 2008 to 24.4 per cent in 2018 and linked to increased use of crystal methamphetamine, or 'ice'.¹⁵⁸

¹⁴⁹ Bartels, L., & Easteal, P. (2016) 'Women prisoners' sexual victimisation: ongoing vulnerabilities and possible responses', 2 (3) *Journal of Criminological Research, Policy and Practice*, 206-216; Day et al., above n 53; Goulding, above n 70; AIHW 2019a, above n 43; Stathopoulos et al., above n 40.

¹⁵⁰ Ministry of Justice, United Kingdom. (2018a) *Female Offender Strategy*.

¹⁵¹ Indig, et al., above n 35; Jackson et al., above n 136.

¹⁵² Bartels & Easteal, above n 149; Swavola et al., above n 42; Fuentes, C.M. (2014) 'Nobody's child: The role of trauma and interpersonal violence in women's pathways to incarceration and resultant service needs' 28 (1) *Medical Anthropology Quarterly*, 84-104; Wright, et al., above n 53.

¹⁵³ Commonwealth of Australia (1991) *Royal Commission into Aboriginal Deaths in Custody. Final Report*, Vol 1-5.

¹⁵⁴ Heffernan, E., Anderson, K., McEntyre, E., & Kinner, S. (2014) 'Mental Disorder and Cognitive Disability in the Criminal Justice System' in Dudgeon, P., Milroy, H. & Walker, R. (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, Commonwealth of Australia 165.

¹⁵⁵ Ogloff, J., Patterson, J., Cutajar, M., Adams, K., Thomas, S. & Halacas, C. (2013) *Koori Prisoner Mental Health and Cognitive Function Study: Final report*, Department of Justice, Victoria.

¹⁵⁶ McEntyre, E. (2019) 'But-ton kidn doon-ga: Black women know - Re-presenting the lived realities of Australian Aboriginal women with mental and cognitive disabilities in the criminal justice system' 19 (2) *Australian Indigenous Health Bulletin*; Baldry, E., McCausland, R., Dowse, L. & McEntyre, E. (2015) *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system* UNSW Sydney; Heffernan et al., above n 154.

¹⁵⁷ Bartels & Easteal, above n 149; Day et al., above n 53; Prison Reform Trust 2017, above n 53; Johnson, above n 55.

¹⁵⁸ Prisoner Profile (date unknown). Retrieved 10 June 2020 from:

<https://www.corrections.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/aa/114d40f57/infocv_prisoner_profile2019.PDF>

An AIC study revealed that 71 per cent of imprisoned women had used illegal substances in the month prior to their imprisonment and that the majority of this group were in turn identified as “drug dependent”.¹⁵⁹

Evidence further suggests that women are more likely to have committed their offence while under the influence of substances or to support their substance dependence and, of women serving a second or subsequent sentence, 90 per cent of their offences have been found to be related to substance dependence.¹⁶⁰

Studies also indicate that women who come into repeated contact with the criminal justice system have been introduced to substance misuse from an earlier age than people without repeated criminal justice system contact and have higher rates of dependence.¹⁶¹

The link between substance dependence and criminal justice system contact appears especially strong for Aboriginal and Torres Strait Islander women, with a 2013 Victorian study with Aboriginal women in prison classifying 93.9 per cent as having a current substance dependence issue.¹⁶² A 2018 study identified rising rates of methamphetamine use to be particularly associated with contact with the criminal justice system, alongside very high prevalence (88 per cent) of serious mental ill health.¹⁶³

Again, the literature identifies a significant co-occurrence between childhood sexual abuse and substance dependence – suggesting that substance dependence may be one step on the path from victimisation to offending, rather than a “cause” of offending itself.¹⁶⁴ Substance dependence can interact with trauma, mental ill health and lack of housing to keep women in contact with the criminal justice system. Services consulted by the CIJ explain that this includes:

- women using substances just to keep awake and maintain their safety while sleeping on the streets;
- women using substances to self-medicate from the ongoing effects of trauma; or
- women kept in dependence as part of the cycle of abuse; and
- women feeling reluctant to engage with AOD services where this contact risks child protection involvement and the removal of their children.

For these reasons, the Bangkok Rules identify the need for gender-sensitive treatment and rehabilitation programs and stress the importance of access to these services in the community, both to improve crime prevention, as well as to provide options that divert women from imprisonment. This recognises the reality that rehabilitation within a justice or correctional setting is less likely to be effective if the underlying causes of the substance use, as discussed above, remain unaddressed.

Commentators also emphasise the need for culturally appropriate AOD and healing programs which can address experiences of violence and substance dependence simultaneously.¹⁶⁵

The challenge for an overcrowded Victorian prison system is ensuring access to these programs upon entering custody, particularly for women on remand. Of particular concern to agencies

¹⁵⁹ Forsythe, L. & Adams, K. (2009) ‘Mental health, abuse, drug use and crime: does gender matter?’ *Trends & issues in crime and criminal justice* Canberra: Australian Institute of Criminology, 384.

¹⁶⁰ Drug and Crime Prevention Committee, above n 116.

¹⁶¹ Johnson, above n 55; Loxley & Adams, above n 53; Forsythe & Adams, above n 159.

¹⁶² Ogloff, J., Pfeifer, J., Shepherd, S. & Ciorciari, J. (2017) ‘Assessing the mental health, substance abuse, cognitive functioning, and social/emotional well-being needs of Aboriginal prisoners in Australia’ 23 (4) *Journal of Correctional Health Care* 398, (although we note that the numbers in the study were small).

¹⁶³ Goutzamanis, S., Higgs, P., Richardson, M., & Maclean, S. (2018) ‘Increasing amphetamine use and forensic involvement among clients of three residential Indigenous alcohol and other drug services in Victoria, Australia,’ 37 *Drug Alcohol Review*, 671-675, 673; AIHW 2019a, above n 43.

¹⁶⁴ Stathopoulos et al., above n 40; Day et al., above n 53.

¹⁶⁵ Lawrie, R. (2003) ‘Speak Out Speak Strong – Researching the Needs of Aboriginal Women in Custody.’ 8 *Australian Indigenous Law Report*, 81– 4.

supporting criminalised women is the fact that programs to help manage withdrawal are not available to women until some weeks into their stay. This creates additional risks for women with alcohol or other substance dependencies experiencing sudden withdrawal.¹⁶⁶

Just as important is access to appropriate services in the community. Many of these may already have eligibility requirements which function as prohibitive for criminalised women but are increasingly less accessible as a result of COVID-19 restrictions. Physical distancing requirements effectively halved occupancy rates, resulting in wait lists of three to six months during 2020.

The recently released report by the *Royal Commission into Victoria's Mental Health System* noted that capacity constraints, combined with poor coordination at the "interface between the criminal justice system and the mental health system" means that people living with mental health issues are not able to access the services they need at the time they need them. This results in the justice system, and more specifically prisons, becoming 'last resort' providers of mental health services.¹⁶⁷

In addition to expanding and improving mental health services, including acute services, in the community, the Royal Commission made a number of suggestions to meet the need of justice-involved people more effectively. These include:

- broadening the reach of the Assessment and Referral Court to meet demand;
- the establishment of a specialist behaviour response team;
- the development of transition programs to link people in prison with mainstream mental health and wellbeing support in the community; and
- expanded, state-wide specialist youth forensic mental health programs.¹⁶⁸

1.7 Gambling harm

Directly related to experiences of mental ill health are 'gambling harm', 'problem gambling', and "gambling disorder".¹⁶⁹ Studies have suggested that criminal justice system contact should be considered a form of gambling harm in terms of the multiple ways in which it can drive people towards, or back into, offending.¹⁷⁰ This includes offending directly linked to attempts to fund gambling; offences linked with breach of a Community Corrections Order (CCO) and parole conditions; and in indirect ways, by driving social and economic disadvantage.¹⁷¹

People in prison have one of the highest rates of problem gambling,¹⁷² with studies indicating rates up to 20 times than those found in the general population.¹⁷³ An Australian study of 127 women in prison found that 64 per cent exhibited lifetime prevalence of problem gambling. Largely linked to

¹⁶⁶ Gleeson, H. (18 January 2020) 'Veronica Nelson Walker's family laid her to rest not knowing how she died in custody' *The Age* (online).

¹⁶⁷ State of Victoria (2021) *Royal Commission into Victoria's Mental Health System. Final report. Summary and recommendations*. 23

¹⁶⁸ See recommendation 37, *Ibid.*, 74.

¹⁶⁹ In purely medical terms, gambling addiction has been recognised as a 'disorder' in various iterations by the Diagnostic and Statistical Manual of Mental Disorders. The fifth and most recent edition of this manual ('DSM-5') described gambling disorder as 'a non-substance behavioural addiction characterised by repeated patterns of excessive gambling expenditure'. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders V* (5th edition, 2013). This characterisation of 'gambling disorder' has moved away from conventional community perceptions of problem gambling as an individual's moral failing and instead recognised it as a clinically diagnosed condition requiring treatment and focused attention.

¹⁷⁰ Campbell, E., Vivian, A., & Wulfsohn, L. (2017) *Compulsion, convergence or crime? Criminal justice system contact as a form of gambling harm* Centre for Innovative Justice, RMIT University, Melbourne.

¹⁷¹ *Ibid*; Drug and Crime Prevention Committee, above n 116.

¹⁷² Williams, R., Royston, J. & Hagen, B. (2005) 'Gambling and problem gambling within forensic populations' 32 *Criminal Justice and Behaviour* 665; Abbott, M. & McKenna, B. (2005) 'Gambling and Problem Gambling Among Recently Sentenced Women in New Zealand Prisons,' 21 (4) *Journal of Gambling Studies*, 559-581.

¹⁷³ Riley, B. & Oakes, J. (2014), 'Problem gambling among a group of male prisoners: Lifetime prevalence and association with incarceration' 48(1) *Australian & New Zealand Journal of Criminology* 73-81.

the proliferation of electronic gambling machines (EGMs), this study suggests that rates of gambling issues may now be higher among women in prison than their male counterparts.¹⁷⁴

The link between family violence and gambling harm is also increasingly acknowledged. Research indicates that 38.1 per cent of people who engage in gambling report being victim/survivors and 36.5 per cent were identified as perpetrators.¹⁷⁵ A study in 2016 also found a statistically significant correlation between electronic gaming machine density and police-recorded family violence rates among postcodes.¹⁷⁶

Submissions to the RCFV suggested that victim/survivors may seek respite in gaming venues, in turn developing problem gambling behaviours,¹⁷⁷ while gambling by a perpetrator may coerce a victim into assuming responsibility for debt, increasing their risk of criminalisation.¹⁷⁸ R-Coo Tran's analysis of "diasporic trauma and escape gambling" also highlighted the complex and nuanced relationship between gambling and criminal justice system contact in certain migrant communities which are disproportionately represented in Victoria's prisons.¹⁷⁹

1.8 Aboriginal and Torres Strait Islander communities

Bangkok Rules

- Prison authorities should design and deliver culturally relevant programs that meet the gender-specific, spiritual, religious and cultural needs of Indigenous women and women from minority groups. Women should not be indirectly discriminated against in consideration for early release due to the unavailability of appropriate programs. In designing programs, prison authorities should recognise the particular importance of maintaining community contact, and the impact of past oppression and child removal policies on Indigenous women, children and communities (Rule 54).
- Pre- and post-release services should be reviewed to ensure that they are appropriate and accessible to Indigenous women and women from minority groups, in consultation with the relevant groups (Rule 55).

As noted above, at 30 June 2019, 14 per cent of all women entering custody in Victoria identified as Aboriginal or Torres Strait Islander,¹⁸⁰ with over a three-fold increase from 2012 to 2018.¹⁸¹ This occurred at a significantly disproportionate rate compared with the Victorian Aboriginal

¹⁷⁴ Riley, B., Larsen, A., Battersby, M. & Harvey, P. (2017) 'Problem gambling among female prisoners: Lifetime prevalence, help-seeking behaviour and association with incarceration' 17(3) *International Gambling Studies*, 401-411. The CIJ's Financial Counselling Pilot delivered in the Dame Phyllis Frost Centre found that 39 per cent of clients identified that they had experienced gambling harm. Centre for Innovative Justice (2020) *Unstacking the Odds: Towards Positive Interventions at the Intersection of Gambling and Crime. Issues Paper*, RMIT University.

¹⁷⁵ Dowling, N., Suomi, A., Jackson, A., Lavis, T., Patford, J., Cockman, S., Thomas, S., Bellringer, M., Koziol-McLain, J., Battersby, M., Harvey, P., & Abbott M. (2016) 'Problem Gambling and Intimate Partner Violence: A Systematic Review and Meta-Analysis'. 17(1) *Trauma Violence Abuse*, 43-61.

¹⁷⁶ Brown, H. (2018) *A review of gambling-related issues* City of Greater Dandenong, 21.

¹⁷⁷ Campbell et al., 2017, above n 170.

¹⁷⁸ Ibid.

¹⁷⁹ Tran, R-Coo & Spivakovsky, C. (2019) 'Criminalised Vietnamese Women, "Problem Gambling" and Experiential Rifts: Towards a Criminology of Diversity' *Theoretical Criminology*; See also Le, R. & Gilding, M. (2016) 'Gambling and drugs: The role of gambling among Vietnamese women incarcerated for drug crimes in Australia' 49 (1) *Australian & New Zealand Journal of Criminology* 134-151.

¹⁸⁰ Corrections Victoria, 2020a above n 8.

¹⁸¹ Walker et al., above n 9, 15. A breakdown of legal status on entry shows significant increases in the numbers of sentenced Aboriginal women, increasing from 10 per cent in 2012 to 24 per cent in 2018, while increases in Aboriginal women entering prison on remand increased from 14 per cent to 17 per cent.

population;¹⁸² non-Indigenous incarcerated women; and all men in prison, including Aboriginal men.¹⁸³ Such a dramatic increase does not appear to be driven by a rise in offending by Aboriginal women, but by systemic drivers which have particular impacts on Aboriginal women's lives.¹⁸⁴

In addition to increased policing and tightened bail laws, discussed in Part Two below, overrepresentation of Aboriginal women in criminal justice systems is inextricably linked to individual and collective trauma from "dispossession of land, disruption of culture and kinship systems, removal of children, racism, social exclusion, institutionalisation and entrenched poverty."¹⁸⁵ This is overlaid with personal, as well as intergenerational, trauma.¹⁸⁶ Aboriginal women are more likely than non-Indigenous women to have been removed from their families and to have grown up in state care,¹⁸⁷ as well as to have experienced serious family violence and sexual abuse.¹⁸⁸

Aboriginal women in custody also disproportionately sustain physical injuries from violence¹⁸⁹ and are more likely than men in prison to have an ABI, in part related to family violence.¹⁹⁰ Research with Aboriginal women in custody also indicates that a significant majority will be biological mothers with care of children prior to their experience of incarceration.¹⁹¹ In addition, Aboriginal cultural foundations involve caring for children in extended family and kinship structures.¹⁹² This means that a majority of Aboriginal women in custody are not only likely to have biological children, but to have caring responsibilities for additional children as well.

As noted at 1.2, evidence also indicates that Aboriginal women in custody are likely to have experienced removal from their own families as children.¹⁹³ It is therefore unsurprising that they describe removal of children as the most significant injury to their health and social and emotional wellbeing, as it reinforces pre-existing, as well as introducing new trauma.¹⁹⁴

¹⁸² Victorian Aboriginal people constitute 0.8 per cent of the state's general population. See ABS, 2017, above n 9.

¹⁸³ As at 30 June 2019, the proportion of the male prison population that identifies as Aboriginal was 10 per cent. Corrections Victoria, 2020a above n 8.

¹⁸⁴ Victorian Government, *Victorian Government Aboriginal Affairs Report 2019* (2019), Table 15.2.1 (see caveats regarding this data).

¹⁸⁵ Victorian Government, (2018) *Burra Lotjpa Dunguludja*. Victorian Aboriginal Justice Agreement: Phase 4. A partnership between the Victorian Government and Aboriginal community, 18; See also Parker, R. & Milroy, H. (2014) 'Aboriginal and Torres Strait Islander Mental Health: An Overview' in Dudgeon, P., Milroy H., & Walker, R. (eds) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* Commonwealth Government.

¹⁸⁶ Crime Research Centre (2007) *Low Risk - High Needs: Indigenous Women and the Corrective Services System*, University of Western Australia; Lawrie, above n 165; Sullivan, E., Kendall, S., Chang, S., Baldry, E., Zeki, R., Gilles, M., Wilson, M., Butler, T., Levy, M., Wayland, S., Cullen, P., Jones, M. & Sherwood, J. (2019) 'Aboriginal mothers in prison in Australia: a study of social, emotional and physical wellbeing' 43 (3) *Australian and New Zealand Journal of Public Health* 241-247; Wilson, M., Jones, M., Butler, T., Simpson, P., Gilles, M., Baldry, E., Levy, M., & Sullivan, E. (2017) 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia' 7 (1) *SAGE Open*, 1-16.

¹⁸⁷ Recent research with mothers in custody in NSW found that 60 per cent of Aboriginal women in custody participating in the study reported being removed from their families as children. Sullivan et al. above n 186.

¹⁸⁸ Lawrie, above n 165; Stubbs, J. & Tolmie J., (2008) 'Battered women charged with homicide: advancing the interests of Indigenous women' 41 (1) *Australian & New Zealand Journal of Criminology* 138-161; Blagg, H., Morgan, N., Cunneen, C. & Ferrante, A. (2005) *Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System*, Equal Opportunity Commission of Victoria; Jackson et al., above n 136, 6; Kendall et al., above n 146; Parker & Milroy, above n 185.

¹⁸⁹ Jackson et al., above n 136; Kendall et al., above n 146.

¹⁹⁰ Jackson et al., above n 136.

¹⁹¹ Bartels, L. (2010) 'Indigenous women's offending patterns: A literature review', Australian Institute of Criminology; Lawrie, above n 165.

¹⁹² Jones, J., Wilson, M., Sullivan, E., Atkinson, L., Gilles, M., Simpson, P.L., Baldry, E. & Butler, T (2018a), 'Australian Aboriginal Women Prisoners' Experiences of Being a Mother: A Review' 14 (4) *International Journal of Prisoner Health* 221.

¹⁹³ Sullivan et al., above n 186.

¹⁹⁴ Kendall et al., above n 146.

Referred to at 1.6, research with Aboriginal women in custody notes the clear link which women themselves draw between experiences of abuse and substance dependence, and then substance dependence and imprisonment.¹⁹⁵

Systemic failures within correctional services and a lack of responsiveness to the gendered and cultural needs of First Nations women have also been identified as reinforcing criminalisation.¹⁹⁶ Further, increases in the number of Aboriginal women in prison have been attributed to a lack of investment in prevention and diversion options,¹⁹⁷ as well as failures to address long-term needs upon release.¹⁹⁸ Central to this is the concept of Aboriginal social and emotional wellbeing (SEWB), with programs addressing cultural needs identified as a foundation for SEWB to be maintained.¹⁹⁹ This fundamental concept is discussed in detail in Part Three of this paper.

1.9 Culturally and linguistically diverse (CALD) communities

Across Australian jurisdictions, Victoria has the largest proportion of people who were born overseas in custody.²⁰⁰ In particular, the number of women in prison who were born in Vietnam almost doubled during the period from June 2008 to June 2009²⁰¹ with Vietnamese-born women consistently the largest CALD population of women in custody since 2012.²⁰²

Women from a range of CALD backgrounds can have particularly punitive experiences of prison.²⁰³ Linguistic and cultural barriers can result in increased marginalisation and discrimination, with isolation from communities functioning as a further barrier to support.²⁰⁴ Where language is a barrier, a 2010 study revealed that translators are often only used as a “last resort”, with attempts to call interpreters sometimes denied.²⁰⁵ This can result in women from different language backgrounds being unaware of prison rules, leading in turn to accidental breaches of these rules.

¹⁹⁵ Lawrie, above n 165, 82; Kendall et al., above n 146; Sullivan et al., above n 186; Bartels, L. (2012a) ‘Violent Offending by and against Indigenous Women’ 8 (1) *Indigenous Law Bulletin*, 19-22; Abbott P., Lloyd, J. Joshi, C., Malera-Bandjolan, K., Baldry, E., McEntyre, E., Sherwood, J., Reath, J., Indig D & Harris, M. (2018) ‘Do Programs for Aboriginal and Torres Strait Islander People Leaving Prison Meet Their Health and Social Support Needs?’ 26 (1) *Australian Journal of Rural Health*, 6-13; Baldry, E. & Cunneen, C. (2014) ‘Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy’ 47 (2) *Australian & New Zealand Journal of Criminology*, 276; Baldry, E., Ruddock, J. & Taylor, J. (2008) *Aboriginal Women with Dependent Children Leaving Prison Project: Needs Analysis Report*, Indigenous Justice Clearinghouse, Homelessness NSW; Jones et al., 2018a, above n 192; MacGillivray, P. & Baldry, E. (2015) *Australian Indigenous Women’s Offending Patterns*. 19 *Indigenous Justice Clearinghouse*, 1-12; Ogloff, et al. 2017 above n 162.

¹⁹⁶ Crime Research Centre, above n 186.

¹⁹⁷ Victorian Equal Opportunity and Human Rights Commission (2013) *Unfinished Business, Koori Women and the Justice System*, 3.

¹⁹⁸ Haswell, M., Williams, M., Blignault, I., Grand Ortega, M., & Jackson Pulver, L. (2014) ‘Returning home, back to community from custodial care: Learnings from the first-year pilot project evaluation of three sites around Australia’. (School of Public Health and Community Medicine, University of New South Wales, 2014), 73.

¹⁹⁹ Sullivan et al., above n 186, 246; Day et al., above n 53, 47-48; Ogloff et al., 2013, above n 155; Bourke, S., Wright, A., & Guthrie, J. (2018) ‘Evidence review of Indigenous culture for health and wellbeing’ 8 (4) *The International Journal of Health, Wellness, and Society*, 12-27; Salmon, M., Doery, K., Dance, P., Chapman, J., Gilbert, R., Williams, R. & Lovett, R. (2019) ‘Defining the indefinable: descriptors of Aboriginal and Torres Strait Islander people’s culture and their links to health and wellbeing: A literature review’, Aboriginal and Torres Strait Islander Health Team, Research School of Population Health, The Australian National University.

²⁰⁰ Australian Bureau of Statistics (ABS), (2019 a) *Prisoners in Australia, 2019* (Catalogue No 4517.0, 2019).

²⁰¹ Flat Out Inc. & the Centre for the Human Rights of Imprisoned People, above n 118, 1.

²⁰² Victorian Government, 2017, above n 7.

²⁰³ Flat Out Inc. & the Centre for the Human Rights of Imprisoned People, above n 118; Armstrong, K., Chartrand, V. & Baldry, E. (2005) Submission to New South Wales Anti-discrimination Commissioner, *Beyond Bars – Inquiry into treatment of women*; Cerveri P. K., Colvin, K., Dias, M., George, A., Hanna, J., Jubb, G., Vidyasagar, A. & Weigall, C. (2015) *Request for a systemic review of discrimination against women*, Victorian prisons, Federation of Community Legal Centres and Victorian Council of Social Services.

²⁰⁴ Flat Out Inc. & the Centre for the Human Rights of Imprisoned People, above n 118.

²⁰⁵ Ibid.

Language barriers can also result in women being reluctant to ask for help or being unaware of medical and support services available.²⁰⁶ Prison systems can also be alienating due to the lack of consideration for different religious beliefs.²⁰⁷ Studies additionally note the threat of deportation for women who are foreign nationals convicted while on various form of visa.²⁰⁸ This may include where women have lived in Australia since childhood and have no connections with their country of origin – yet who may face deportation and devastating separation from their children. It is also a form of family violence perpetration, in which coercive and controlling male partners threaten to report their female partner to immigration departments or to have their children removed.²⁰⁹

1.12 Conclusion to Part One

Part One has briefly summarised some of the factors which put women at risk of incarceration. It is just as crucial to note, however, the compounding effect on these domains of disadvantage that even short periods in custody can cause.²¹⁰ Custody can replicate the dynamics of control common to gendered violence,²¹¹ including through the use of restraints and practices such as strip searching.²¹² Similarly, it can exacerbate existing mental health issues, substance dependence housing and economic insecurity, as well separation from children, family²¹³ and community.

As the Law and Advocacy Centre for Women recently noted, “even one day in prison can derail a woman’s life – she may lose her house, her job, her children, [and] her connections to support services.”²¹⁴ Lack of housing and financial stressors, mental health issues, safety risks and substance dependence can also limit women’s access to support once released and can force women to return to abusive situations or unlawful sources of income.²¹⁵

Existing barriers to services which can help women to prepare for release, combined with restricted access to support and housing *in the community*, means that women are increasingly likely to be released from remand or sentence without the opportunity to address the factors that have contributed to their offending. These highly gendered factors both propel women into contact with the criminal justice system and heighten the damaging impact of this interaction with a system that is designed primarily for men.

The drivers of women’s criminalisation discussed in this section are not unique to the Victorian or Australian context, as the international community recognised when the UN adopted the Bangkok Rules. There are, however, additional local factors that can accelerate the risk of incarceration for women. It is to these Victorian specific factors that this paper now turns.

²⁰⁶ Armstrong et al., above n 203.

²⁰⁷ Flat Out Inc. & the Centre for the Human Rights of Imprisoned People, above n 118.

²⁰⁸ Goulding, above n 70.

²⁰⁹ Campbell et al, 2017, above n 170.

²¹⁰ Edgar, K. (2004) *Lacking Conviction: The Rise of the Women’s Remand Population*, Prison Reform Trust; Victorian Equal Opportunity & Human Rights Commission, above n 197.

²¹¹ Miller, S.L. (2005) *Victims as offenders: The paradox of women’s violence in relationships*, Rutgers University.

²¹² Stathopoulos et al., above n 40. The use of this practice has been reduced in Victoria since an investigation by the Victorian Ombudsman. See Victorian Ombudsman (2017) ‘Implementing OPCAT in Victoria: Report and Inspection of the Dame Phyllis Frost Centre’ (Melbourne: Victorian Government).

²¹³ Sheehan, R. & Levine, G. (2007), ‘Parents as prisoners: Maintaining the parent-child relationship’ (Criminology Research Council Project Grant; Swavola et al., above n 42).

²¹⁴ Gleeson, H., (3 February 2020) *Jamming the Revolving Door of Women in Prison, Jill Prior is putting a new spin on Lady Justice* ABC Online News < <https://www.abc.net.au/news/2020-02-02/jill-prior-lacw-legal-centre-women-prison/11803104>>

²¹⁵ Day et al., above n 53.

2. Part Two: Systemic drivers – the Victorian context

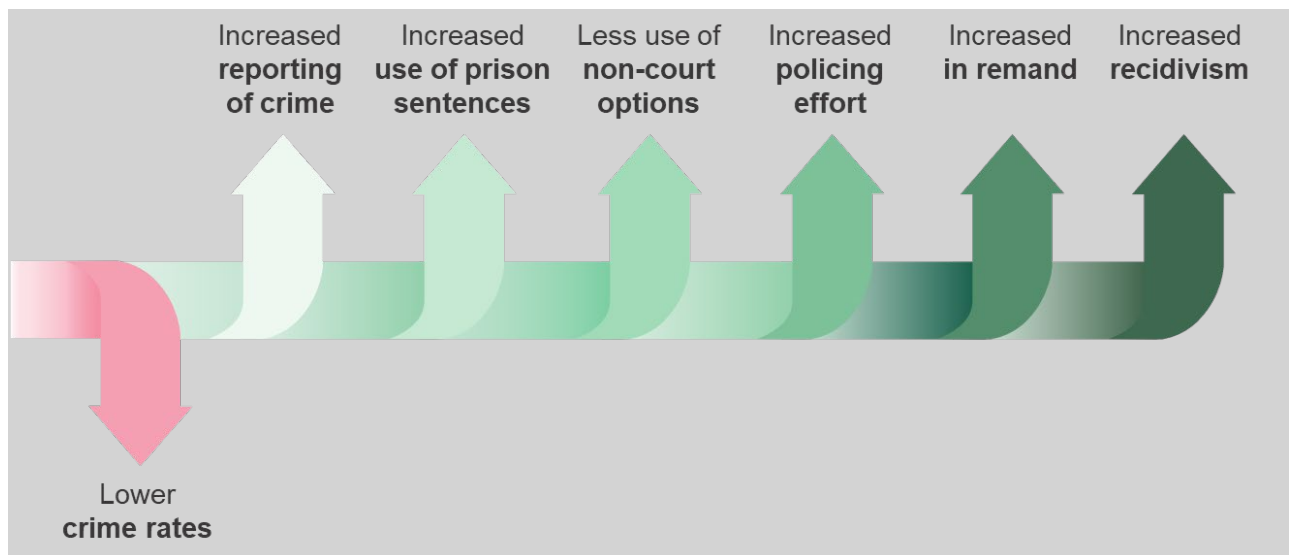
Part One briefly described some of the factors which bring women into contact with the criminal justice system. Prevalent amongst these are the ongoing and multiple effects of marginalisation, victimisation and trauma – whether from gendered violence or the continuing impacts of colonisation – which can make women vulnerable to committing offences.

The types of offences committed by women and the rate at which they are committed, however, are not the only factors pushing women into custodial settings. Contact with the criminal justice system is just as heavily influenced by the legislative and policy settings which:

- impact on the reporting of crime;
- drive policing practices;
- determine which penalties attach to specific offences;
- remand people into custody rather than granting them bail;
- make them more likely to receive a custodial sentence; and
- determine the level of support, supervision and rehabilitation provided to prevent their return to a custodial environment.

These kinds of drivers are illustrated in Figure 2 below, modified from a recent report by the Queensland Productivity Commission (QPC) which signals the significant number of factors impacting increases in prison numbers. Some of these drivers reflect wider trends across Australia and/or internationally, while some are especially acute in the Victorian context. These are briefly described below, focussing on the Victorian-specific drivers in relation to bail and sentencing reforms.

Figure 2: Systems drivers of the increase in the imprisonment rate



Source: Modified version of diagram from QPC Summary Report, 2019b (Figure 13, p.12)

2.1 Policing

In addition to the considerations in relation to bail and sentencing which are currently pressing in Victoria, a front-end factor driving women into contact with the criminal justice system is the way in which certain offences are investigated and policed. Studies increasingly point to crime and policing policy, and in particular to a 'tougher' police response, which does not always account for the context of the alleged offending behaviour, as having a strong influence on prison numbers.²¹⁶ A NSW study showed that a 10 per cent increase in female arrests resulted in a 3.7 per cent increase in the number of full-time female prisoners.²¹⁷ Combined with the reliance on using police as first responders, as well as the mandatory sentences attaching to assaults on emergency workers and police, introduced in 2018, this places marginalised women dealing with multiple vulnerabilities, at greater risk of justice involvement, rather than them receiving the public health response they need.

Aboriginal people face disproportionate rates of prosecution for minor offences – 80% of Aboriginal people arrested for small amounts of cannabis in NSW are prosecuted, compared with just 52% of non-Aboriginal people arrested for the same offence.

More specific to Victoria, concerns are growing that reforms resulting from RCFV recommendations for improved family violence policing practices²¹⁸ may be having a *counterproductive* effect in some contexts. For example, Women's Legal Service Victoria has reported that, in a sample of client case files involving women who were initially named as perpetrators on police applications for Family Violence Intervention Orders (FVIOs), 57 per cent were found to be victim/survivors.²¹⁹

Women may already be less inclined to report violence for fear of having their children removed or to avoid punishment from a partner.²²⁰ The prospect of being misidentified as the perpetrator of that violence is therefore likely to leave women even more at risk – pushed into criminalisation by proactive policing measures which were intended to keep them safe instead.

Where women are already in contact with the criminal justice system for unrelated matters, they may be at even greater risk of further criminalisation when seeking police assistance in the context of their own experiences of violence. As discussed in Part One, where women's combined experiences of trauma, substance dependence and mental health issues mean that they are perceived as hostile to police intervention, they can be arrested while simply seeking safety.²²¹

Similarly women with multiple needs who attempt to engage with services that are not trauma-informed or well versed in de-escalation techniques, risk being characterised as 'too complex', or worse, face police involvement when services call for police to 'manage' challenging behaviours. As pointed out by one service provider consulted for this paper, tools such as the Family Violence Multi-Agency Risk Assessment and Management tool (the MARAM) includes a prompt for an assessor to call police.

²¹⁶ Wan, W. (2011). *The relationship between police arrests and correctional workload*. Crime and Justice Bulletin, 150. NSW Bureau of Crime Statistics and Research; Russell et al., above n 15; Weatherburn, D. (2020). 'Is Tougher Sentencing and Bail Policy the Cause of Rising Imprisonment Rates? A NSW Case Study.' 53 (4) *Australian & New Zealand Journal of Criminology*, 563–584.

²¹⁷ Weatherburn, *ibid*.

²¹⁸ See recommendations 41 to 59, State of Victoria, above n 167.

²¹⁹ Ulbrick, M. & Jago, M. (2018) '*Officer, she's psychotic and I need protection*': police misidentification of the 'primary aggressor' in family violence incidents in Victoria. Women's Legal Service Victoria, Monash University.

²²⁰ Flynn, C. (2011) 'Responding to the Children of women in prison: Making the invisible visible', *Family Relationships Quarterly* 19, Australian Institute of Family Studies; Hannon, T. (2006) 'Children: Unintended victims of legal process - A review of policies and legislation affecting children with incarcerated parents'. Discussion Paper, Flat Out Inc. & the Victorian Association for the Care & Resettlement of Offenders, Melbourne.

²²¹ Russell et al., above n 15; Campbell, 2017 above n 170.

Vital to note, of course, is the disproportionate use of prosecution against Aboriginal people in Australia. A recent study found that over 80 per cent of Aboriginal people arrested for possession of small amounts of cannabis were prosecuted, compared with just over 52 per cent of non-Aboriginal people arrested for the same offence.²²² Similarly, Aboriginal women face imprisonment for more minor offences such as disorderly conduct; minor property and traffic offences; and breach of court orders.²²³ A global report using data from 2013 to 2017 found that First Nations women were more likely to receive harsher prison sentences for substance possession offences.²²⁴

2.2 Charges

Globally, women are generally charged with low-level, mostly non-violent offences, which tend to result in shorter sentences when compared with male offenders.²²⁵ Offences with which women are charged are predominantly property or economic crimes and low-level substance-related offences.²²⁶ Some studies suggest that this is partially related to the relative ease of prosecuting less serious substance-related offences, resulting in a gender disparity in the “war on drugs”.²²⁷ Studies also suggest that most violent offences committed by women are isolated incidents, including relating to their resistance or response to trauma.²²⁸

Research in Australia relating to the offences with which women are charged is limited, with little evidence to suggest that increasing incarceration rates of women are associated with women committing more serious or more violent crimes than in previous years.²²⁹ Analysis of Victorian data relating to the offence categories linked to women on remand in fact shows the opposite. For example, from 2012 to 2018 there was a *decrease* of 7 per cent in the proportion of unsentenced receptions linked to at least one ‘crime against the person’.²³⁰ Similarly, as a proxy measure of offence seriousness, Australian court data indicates that the vast majority of convicted women are dealt with in the lower courts, where predominately lower-level matters are heard.²³¹

In Victoria, Corrections data illustrates how the type of charges associated with women’s entry into prison differ from those of men and how these charges have changed since 2008.

²²² McGowan, M. & Knaus, C. (10 June 2020) ‘NSW police pursue 80% of Indigenous people caught with cannabis through courts’ *The Guardian* <<https://www.theguardian.com/australia-news/2020/jun/10/nsw-police-pursue-80-of-indigenous-people-caught-with-cannabis-through-courts>>.

²²³ MacGillivray & Baldry, above n 195; Anthony, T. & Blagg, H. (2013) ‘STOP in the Name of Who’s Law? Driving and the Regulation of Contested Space in Central Australia’ 22 (1) *Social and Legal Studies*, 43; Cunneen, C. & Tauri, H (2016). *Indigenous Criminology*, Bristol, United Kingdom, Policy Press; Purdy, J. (1996) ‘Postcolonialism: the emperor’s new clothes’ 5 (3) *Social and Legal Studies* 405; Heffernan, E., Anderson, K & Dev, A. (2012) *Inside Out—The Mental Health of Aboriginal and Torres Strait Islander People in Custody*, Queensland Government; Finnane, M. & McGuire, J. (2001) ‘The uses of punishment and exile: Aborigines in colonial Australia’ 3 (2) *Punishment and Society*, 279.

²²⁴ Linklaters LLP and Penal Reform International, (2020) *Sentencing of women convicted of drug-related offences: A multi-jurisdictional study by Linklaters LLP for Penal Reform International* <https://cdn.penalreform.org/wp-content/uploads/2020/02/LinklatersPRI_Sentencing-of-women-convicted-of-drug-related-offences_WEB.pdf>.

²²⁵ Belknap, above n 37; Wright et al., above n 53; Swavola et al., above n 42; DJCS, above n 42.

²²⁶ Wright, et al., above n 53.

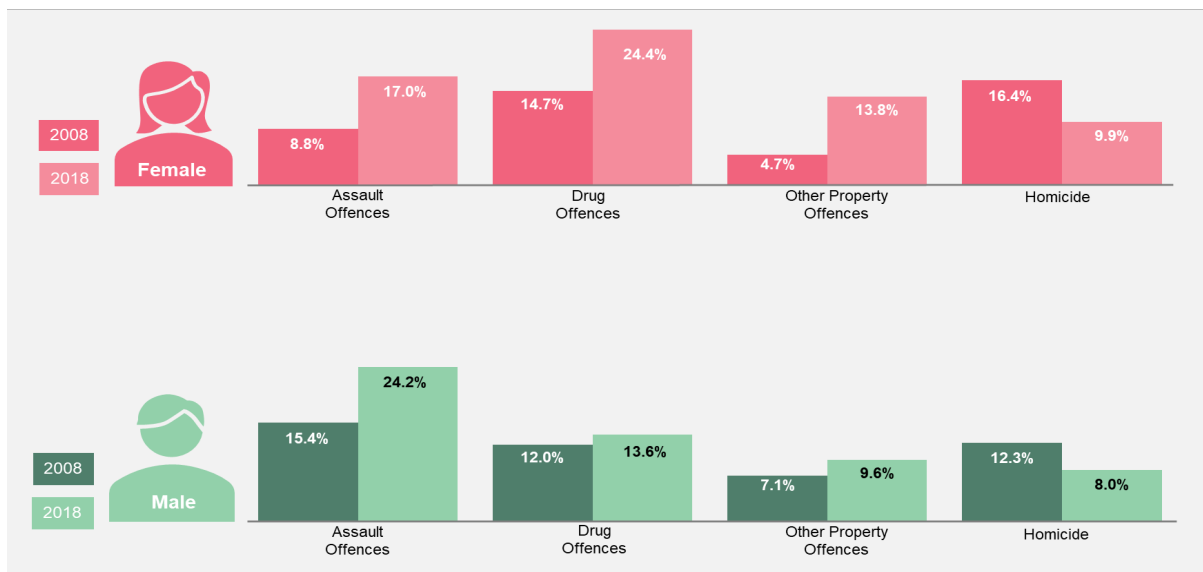
²²⁷ Huber, above n 26.

²²⁸ Stathopoulos et al., above n 40, 7-8.

²²⁹ Walker et al., above n 9, 3. Note, however, research conducted by Gelb who found increases in the proportion of female prisoners sentenced for violent offending. Gelb, K. (2003) ‘Women in prison: Why is the rate of incarceration increasing?’ Paper presented at Evaluation in Crime and Justice: Trends and Methods, (Australian Institute of Criminology, 2003).

²³⁰ Walker et al., above n 9.

²³¹ Jeffries and Newbold, above n 5.

Figure 3: Comparison of most serious charge for male and female prisoners 2008 and 2018

Source: Corrections Victoria infographic²³²

The growing numbers of women imprisoned is not due to women committing more serious or violent crimes. Lack of access to housing and services impacts on women's ability to get bail and comply with bail conditions, driving up remand rates.

As is evident from Figure 3, the greatest increases in the most serious charge recorded relate to drug and property offences, with a significant drop in homicide offences. The proportion of women whose imprisonment was associated with a substance related offence increased from nearly 15 per cent in 2008 to 24.4 per cent in 2018.

Although it is apparent from the above diagram that the gap between men and

women in the rate of offences against the person has narrowed, some researchers conclude from Australia-wide data that this reflects a decrease in male violent offending, while women's violent offending has stayed relatively stable.²³³

Most markedly, however, researchers have noted the prevalence of charges relating to relatively recent "breach bail" offences.²³⁴ In 2018, 66 per cent of un-sentenced women were linked to a "breach bail" charge, compared with only 21 per cent six years previously. A similar increase occurred in relation to sentenced women, from 11 per cent in 2012 to 51 per cent in 2018.²³⁵ Overall, there was a 630 per cent increase in the number of women facing breach of order charges, most commonly breach of bail and breach of Family Violence Intervention Order, as the most serious charge between 2012 and 2017.²³⁶

²³² Prisoner Profile (date unknown). Retrieved 10 June 2020 from: https://www.corrections.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/06/aa/114d40f57/infocv_prisoner_profile2019.PDF

²³³ Beaton, T., Kidd, M.P. & Machin, S. (2018) 'Gender crime convergence over twenty years: Evidence from Australia' 109 *European Economic Review*, 275-288.

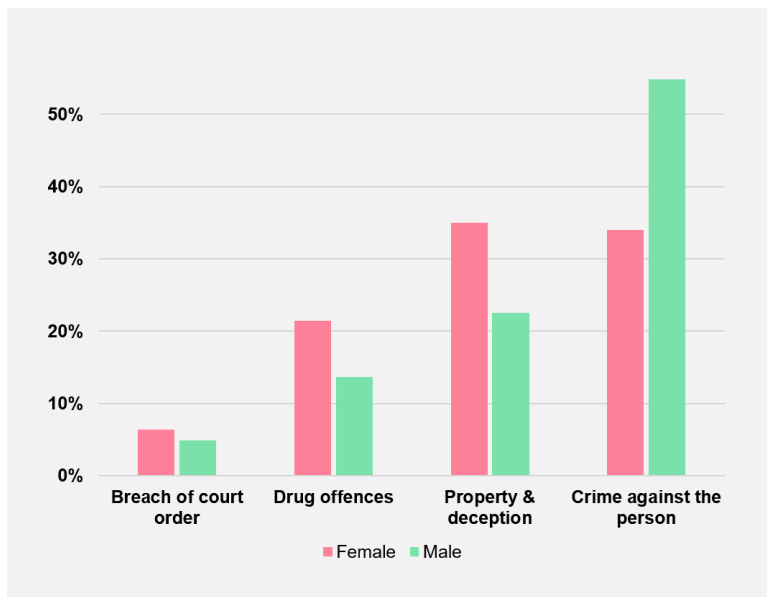
²³⁴ i.e., the offences of *Contravene a conduct condition of bail* and *Commit indictable offence while on bail*, introduced in 2013. Walker et al., above n 9, 23.

²³⁵ Ibid, p 23.

²³⁶ DJCS, above n 42, 8.

The contrast between the offending profiles of men and women, and the disproportionate rate at which women face charges for breach of orders, is more starkly evident when offence types are consolidated.

Figure 4: Comparison of most serious charge for male and female prisoners at June 2019



Source: CIJ analysis of prison data.²³⁷

Given the low-level nature of women's offending, the predominance of "breach bail" and "breach order" offences is likely to be adding disproportionately to the list of charges that women face upon contact and re-contact with the criminal justice system.²³⁸ This, in turn, is impacting on women's ability to be released on bail, contributing to the increasingly closed loop of women moving through the justice system. Concerning as these statistics are, they also clearly signal the potential for urgently needed systems reform to reduce the number of women entering prison to a significant extent.

Also notable is the fact that women are facing more *numerous* charges.²³⁹ For women on remand, the proportion facing only one charge dropped from 10 per cent in 2012 to 3 per cent in 2018, and the proportion of those with more than five charges increased from 46 per cent to 54 per cent.²⁴⁰

²³⁷ Corrections Victoria, 2020a, above n 8. See Table 1.11.

²³⁸ Russell et al., above n 15. There is less likelihood that women will be charged with breaches of parole given limited use of parole. Willingham, R., & Oaten, J. (22 May 2018) 'Law and order Overhaul Announced by Andrews Government.' Australian Broadcasting Commission.

²³⁹ Walker et al., above n 9, 21.

²⁴⁰ Ibid.

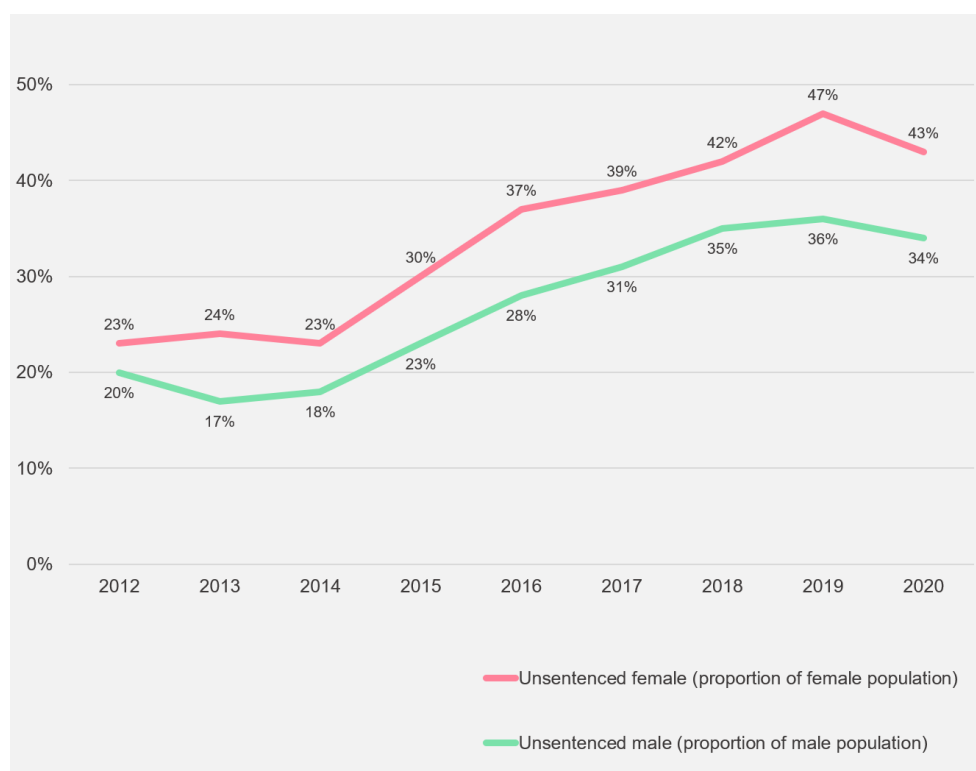
2.3 Bail

Bangkok Rules

- Gender-specific, pre-trial and sentencing alternatives to imprisonment must be provided where possible, taking into account women's histories of victimisation and the importance of women not being separated from their families and communities (Rules 57 & 58).
- Prison admission procedures must take into account the particular vulnerability of women when first received into prison ensure the safety of women awaiting trial (Rules 2 & 56).
- The **Mandela Rules** also outline the 'special regime' for the detention of people who are in prison un-sentenced, which includes for them to be held separately from convicted prisoners (Rule 112), housed in single rooms (Rule 113); have access to their own food, clothes and medical treatment at their own expense, where possible (Rules 114, 115 and 117); and to be exempt from work requirements (Rule 116).

The rise in 'breach bail' charges reflects just one component of reforms which have arguably had the most dramatic effect on women's prison numbers.²⁴¹ That said, studies have noted increasing rates of remand populations for some time²⁴² and, as indicated in Figure 4, the proportion of women held on remand has consistently been higher than that for men.

Figure 5: Total unsentenced male and female prison population 30 June 2012 to 2020



Source: Updated version of Figure 1, DJCS, 2019, p.5.

²⁴¹ Sentencing Advisory Council, (2016) *Victoria's Prison Population 2005 to 2016* Victoria.

²⁴² Bamford, D., King, S. & Sarre, R. (1999) *Factors affecting remand in custody: a study of bail practices in Victoria, South Australia and Western Australia*, Australian Institute of Criminology; Kilroy, D. (2016) 'Women in prison in Australia' Conference Paper, Current Issues in Sentencing Conference, Australian National University.

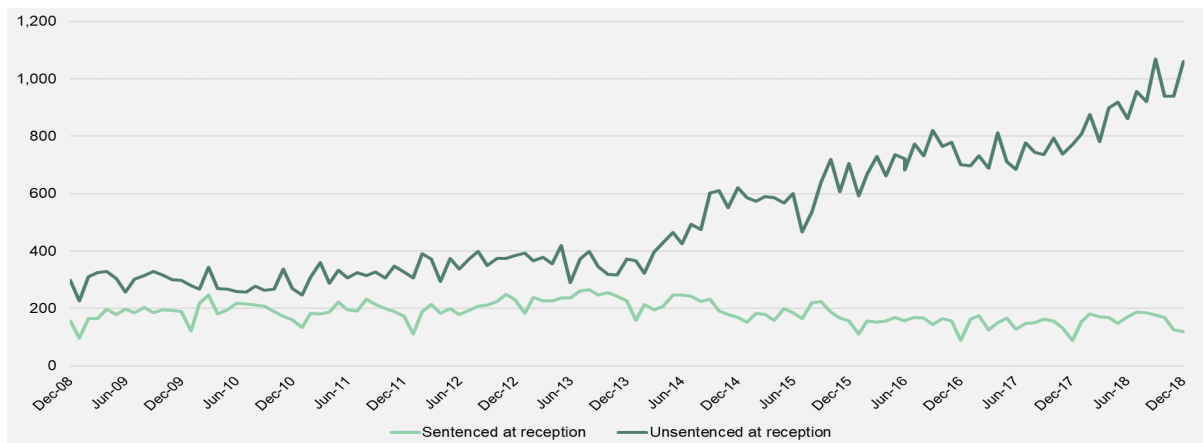
A lack of housing and support services has been identified as a particular barrier to women being granted bail in Victoria,²⁴³ with women's broader disadvantage increasingly being used to justify refusal of bail – substituting correctional settings for social supports in the community.²⁴⁴ A 2004 UK study similarly found that a lack of available alternatives to remand influenced judicial decision making.²⁴⁵

Laws that make it harder to get bail have contributed to escalating numbers of women held on remand. Close to 90% of all women received into Victorian prisons have had no charges proven against them.

More specifically, studies point to restrictions on the legislative entitlement to bail as driving growth in incarceration rates around Australia.²⁴⁶ Nowhere is the numerical shift more apparent than in relation to women in Victoria.²⁴⁷ For example, while the number of women received into prison under sentence has remained relatively stable,²⁴⁸ the number of un-sentenced women rose from 241 to 719 between 2012 and 2018, accounting

for 87 per cent of all female receptions in 2018²⁴⁹ and 42.4 per cent of all women in custody, up from 24.8 per cent in 2008.²⁵⁰

Figure 6: Monthly female prison reception by legal status



Source: Walker et al., 2019, Figure 2, p 5.

This significant growth correlates with multiple amendments to Victoria's *Bail Act 1977* during this time. As noted above, in 2013 two offences were introduced which related to people's conduct while on bail and which required an accused to 'show cause' as to why further bail should be granted. The introduction of these offences was followed by a spike in the number of "breach bail" offences recorded, which rose 173 per cent overall in the 10 years up to 2018.²⁵¹

²⁴³ Sheehan & Trotter, above n 126.

²⁴⁴ Bumiller, K. (2008) *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence*, Duke University Press; Bumiller, K. (2013) 'Incarceration, welfare state and labour market nexus: The significance of gender in the prison system' in Carlton, B & Segrave, M. (ed) *Women Exiting Prison* Routledge, 13-33.

²⁴⁵ Edgar, above n 210.

²⁴⁶ Yeong, S. & Poynton, S. (2018) 'Did the 2013 Bail Act increase the risk of bail refusal?' *Crime and Justice Bulletin*, No. 212, NSW Bureau of Crime Statistics and Research.

²⁴⁷ ABS, 2019, above n 200.

²⁴⁸ Walker et al., above n 9.

²⁴⁹ Ibid, 14.

²⁵⁰ Ibid; Jeffries & Newbold, above n 5; Ooi, above n 5.

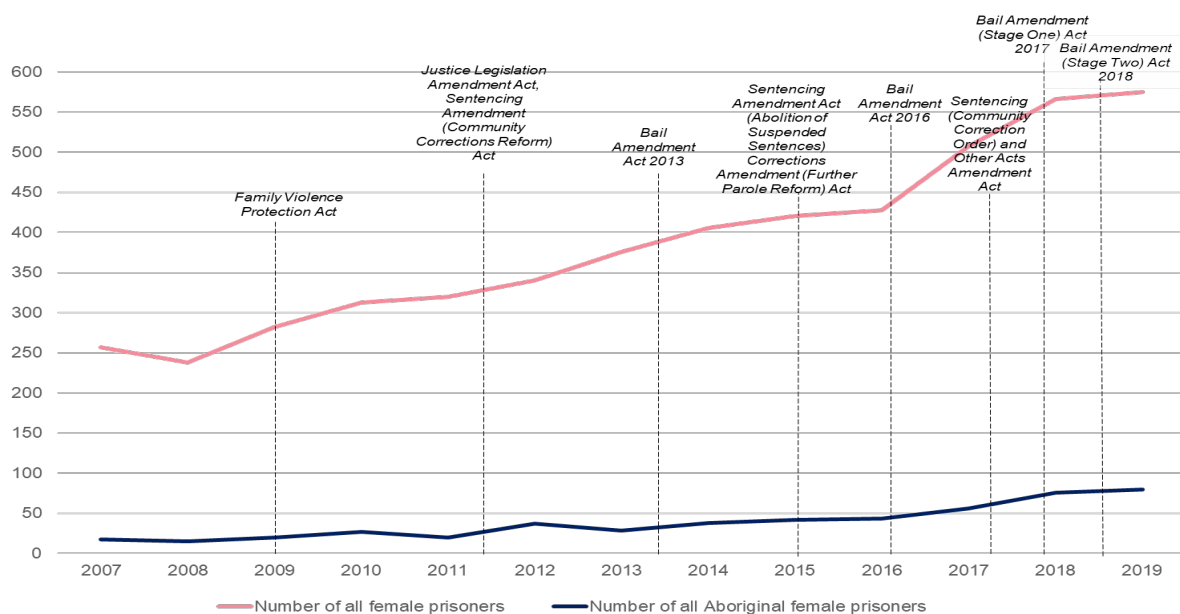
²⁵¹ Crime Statistics Agency, (2018) *Spotlight: Breaches of orders – The impact of legislative changes* (Web Page. Reviewed 12 June 2020) <<https://www.crimestatistics.vic.gov.au/media-centre/news/spotlight-breaches-of-orders-the-impact-of-legislative-changes>>

A review of the *Bail Act* in 2017 then prompted further reforms which resulted in a wider range of offences attracting a “reverse onus” in relation to the presumption of bail. These offences were included under Schedule 1, requiring an accused to show ‘exceptional circumstances’, and Schedule 2, requiring an accused to show ‘compelling reason’ why they should be granted bail.

The “show compelling reason” test is more difficult to meet than the “show cause” test, with the “exceptional circumstances” test more difficult again. The Schedules set out specific offences in relation to which the presumption in favour of bail is displaced by these reverse-onus tests. The following diagram tracks the upward trend in women's incarceration against key legislative reform relating to bail and sentencing in Victoria.

There was a 630% increase in the number of women facing charges for breaching an order such as bail or a Family Violence Intervention Order between 2012 and 2017.

Figure 7: Number of women prisoners 2007-2019 and legislative reform



Source: CIJ analysis, based on modified version of Figure 9 from the Victorian Aboriginal Justice agreement

In addition to the specific offences that attract the reverse-onus test, the amended bail legislation sets out other circumstances in which the particular offending which is alleged places the accused person in a reverse onus position. These include where the offence is alleged to have been committed while on parole²⁵² or on bail for an indictable offence; involved the use of a weapon; or was committed in the context of family violence.

When women have been misidentified as predominant aggressors in family violence matters, as noted above, proactive policing can therefore converge with bail reforms to put women at even greater risk of incarceration. This is particularly the case when women's own experiences of family violence are not taken into account in bail decisions.²⁵³

Recent studies have pointed to the disproportionate impact that these reforms have had on women, with stringent requirements meaning that women may not even apply for bail or are frequently unsuccessful when they do.²⁵⁴

²⁵² Here we again note the restrictions on access to parole.

²⁵³ Russell et al., above n 15.

²⁵⁴ Ibid.

One Victorian study indicates that, during 2015-2016, 51 per cent of women on remand had not applied for bail.²⁵⁵ A more recent study involving observations of women's appearances in the Bail and Remand Court during 2019 suggests that this trend was continuing,²⁵⁶ (at least prior to the COVID-19 pandemic, following which judicial officers took into account the more onerous nature of custody under lockdown and the considerable delays in court lists) .

Studies have also highlighted the privileging of "risk" and "community protection" as increasingly used to promote crime prevention in decisions relating to bail, rather than to assess whether an accused will attend court when their matter is heard.²⁵⁷ This has seen a shift in focus by legislators and bail decision-makers from "serious risk to public safety" to "risk of committing another crime" – with women experiencing the greatest social needs in turn perceived as most "at risk".²⁵⁸

Edgar similarly noted a trend in the UK for assessments of the risk of further offending to be conducted through the lens of an accused's needs or vulnerability.²⁵⁹ In Australia, Stathopoulos has also outlined the way in which remand means fewer opportunities for rehabilitation, leading to an increase of women released into the community with their support structures ruptured and co-occurring issues unaddressed and, in turn, more likely to reoffend.²⁶⁰

2.4 Sentencing

Bangkok Rules

- Courts are to consider mitigating factors such as lack of criminal history, relative non-severity and nature of criminal conduct and women's caretaking responsibilities when sentencing (Rule 61).
- Women-only non-custodial measures should be combined with therapeutic interventions aimed at addressing the needs of women and taking into account the need to care for children (Rule 60).
- Non-custodial sentences for pregnant women and women with dependent children should be preferred where possible and appropriate (Rule 64).

In addition to the number of women on remand, evidence suggests an increase in the use of custodial sentences for women. A study into trends in the imprisonment of women in Australia and New Zealand found an increase of approximately 13 per cent in the number of women receiving a sentence of imprisonment in Australia between 2005 and 2012.²⁶¹ Similarly, the SAC has previously reported both an "increase in the proportion of women being sentenced to imprisonment and an increase in the average length of imprisonment terms".²⁶²

²⁵⁵ DJCS, above n 42.

²⁵⁶ Russell et al., above n 15.

²⁵⁷ McMahon, M. (2019) 'No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention', Research Paper No 3, Parliamentary Library.

²⁵⁸ Carlen, P. (2002) *Women and punishment: The struggle for justice*, Willan Publishing.

²⁵⁹ Edgar, K, above n 210, utilising Morgan, P.M. & Henderson, P.F. (1998) *Remand decisions and offending on bail: evaluation of the Bail Process Project*, Home Office Research Study 184, London. Home Office.

²⁶⁰ Stathopoulos et al., above n 40.

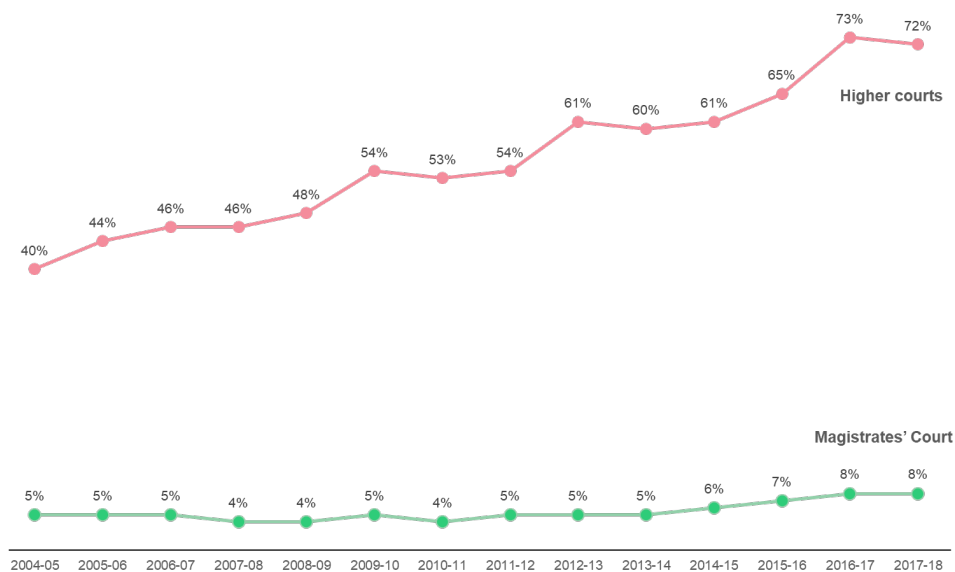
²⁶¹ Jeffries & Newbold, above n 5, 199. The researchers were unable to explore the types of offences associated with this trend, due to incomplete data. Note that a decrease of 21 per cent in the number of women subject to a sentence of imprisonment in New Zealand occurred over a similar timeframe

²⁶² SAC 2010, above n 36, 13.

In its 2010 study, the SAC found that, although sentenced women tend to serve shorter sentences than men, the gap was narrowing. Data from the period between 1998 and 2004 demonstrated an increase in the average length of sentences served by women and that this increase was occurring at a faster rate than that of men.²⁶³

These findings reflect evidence of greater use of incarceration in Australia in the last decade, compared with a decrease in the use of custodial terms in other countries.²⁶⁴ Recent Victorian court data shows an increase in the proportion of sentences imposed in the higher courts (on both men and women), from 40 per cent to 72 per cent in the 14 years from 2004-05 to 2017-18, with a smaller increase in the Magistrates' Court of Victoria (MCV) over the same period.²⁶⁵

Figure 8: Proportion of sentences imposed in Victoria that involved a term of imprisonment, all adult courts, 2004-05 to 2017-18.



Source: SAC 2020b (Figure 4, p4)

There is also support for the view that a narrowing of sentencing options has contributed to the increased use of imprisonment for women.²⁶⁶ Former Deputy Chief Magistrate Popovic has previously noted that women “provide sentencing dilemmas for Magistrates” because the multiple needs which women are experiencing which are not addressed by appropriate support make fines or community based orders less viable, yet “detention for the sake of imposing a form of punishment on persons whose crimes are generated by need...is not appropriate”.²⁶⁷ This is an observation echoed by multiple other authors.²⁶⁸

²⁶³ Ibid., 90.

²⁶⁴ QSAC, 2019.

²⁶⁵ SAC, 2020, 4.

²⁶⁶ Drug and Crime Prevention Committee, n 116.

²⁶⁷ Ibid.

²⁶⁸ Segrave & Carlton, above n 53; Kilroy D., Barton, P., Quixley, S., George, A. & Russell, E. (2013) ‘Decentering the Prison: Abolitionist approaches to working with criminalised women’ in Carlton, B. & Seagrave, M. (eds) *Women Exiting Prison* Routledge, 156-180.

Further, although the abolition of suspended sentences²⁶⁹ may have been anticipated to propel a rise in community-based sentences, by March 2019 Victoria's rate of community-based sentences stood at the lowest rate in Australia.²⁷⁰ Between 2017 and 2020, the number of female clients of Community Correctional Services dropped by 36 per cent, with the greatest reductions occurring in the number of women on supervised court orders (26 per cent) and reparation orders (65 per cent).²⁷¹ This trend is occurring despite indications that community-based sentences cost a tenth of a custodial sentence, with successful completion more likely to lead to a reduction in reoffending than custodial responses.²⁷²

The Bangkok Rules note that community-based orders are far more appropriate for women because their offences are commonly low-level and because prison stays, regardless of length, can be intensely damaging. Emerging evidence in Australia and overseas, however, suggests that community order conditions and supervision approaches that do not take into account women's specific needs can set them up to fail.²⁷³ For example, while SAC's 2017 examination of CCOs did not include analysis of women's gender-specific needs or risks, data upon which it relied suggests that women are more likely to breach a CCO through non-compliance than men.²⁷⁴

Echoing the concerns in relation to bail assessments, authors suggest that supervision practices and the tools used to assess risk are based on the behaviours, risks and needs of men, with little regard for the caring responsibilities and socioeconomic marginalisation unique to women's lives.²⁷⁵ This may result in women spending time in custody for breach of orders that were originally in place for low-level offences and would not otherwise warrant a custodial sentence.²⁷⁶

Even the current construction of CCOs, introduced in Victoria in 2012 and described in the *Sentencing Act 1991* as "having regard to and addressing the circumstances of the offender",²⁷⁷ has not improved completion rates. Victoria has been found to have the lowest completion rate of CCOs in Australia, at just 54 per cent in 2018-19.²⁷⁸ This is said to be due in part to the increasingly complex needs of people ordered to undertake CCOs, as well as delays in implementation.²⁷⁹

²⁶⁹ *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).

²⁷⁰ Sentencing Advisory Council, (2020a) *Community-Based Sentences*, Victoria <<https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/community-based-sentences>> This reduction may be due to the recent exclusion of certain types of violent offences from accessing CCOs. Green, R., Hopkins, D., and Roach, G. (2020) 'Exploring the lived experiences of people on Community Correction Orders in Victoria, Australia: Is the opportunity for rehabilitation being realised?'. *Australian and New Zealand Journal of Criminology*, (2020) 0(0) 1-21.

²⁷¹ Corrections Victoria (date unknown) *Profile of people in Community Correctional Services (CCS)*. Infographic. <https://www.corrections.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2020/12/5c/649ca0f30/Infographic_Offender_ProfileCCS_2020.pdf>

²⁷² Picard, S., Tallon, J. & Kralstein, D. (2019) 'Court-Ordered Community Service: A National Perspective', Center for Court Innovation, <<https://www.courtinnovation.org/publications/community-service>>; Andrews & Bonta, above n 34.

²⁷³ Swavola et al., above n 42; Kendall, above n 189; Turnbull, S., & Hannah-Moffat, K. (2009) "Under these conditions: Gender, Parole and the Governance of Reintegration", 49(4) *British Journal of Criminology* 532-51; Hannah-Moffat, K. (2010) 'Sacrosanct or Flawed: Risk, Accountability and Gender- Responsive Penal Politics' (22)2 *Current Issues in Criminal Justice: Beyond Prison: Women, Incarceration and Justice?* 193-215.

²⁷⁴ Sentencing Advisory Council, (2017) *Contravention of Community Correction Orders*, Victoria, 46-8.

²⁷⁵ Swavola et al., above n 42, 32; Sheehan, R., McIvor, G. & Trotter, C. (2010) *Working with Women Offenders in the Community*, Taylor and Francis; Kendall, above n 189, 41.

²⁷⁶ Russell et al., above n 15.

²⁷⁷ *Sentencing Act 1991* (Vic) s 36.

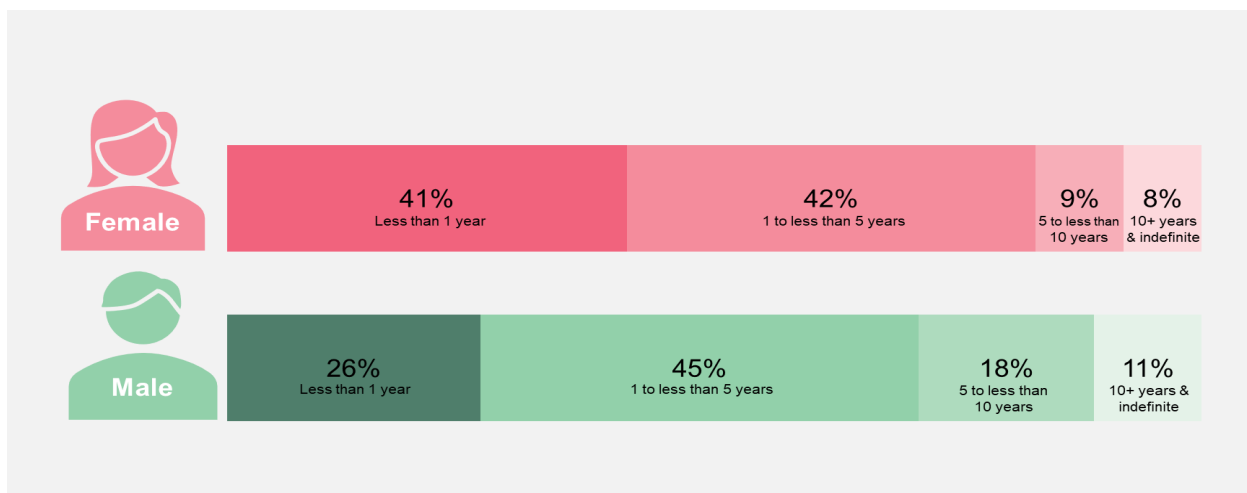
²⁷⁸ Productivity Commission (2020a). *Report on Government services, 2020* (Steering Committee for the Review of Government Service Provision).

²⁷⁹ Green et al., 2020, above n 270.

In addition, it appears that the promise of greater flexibility under these orders does not extend to orders for lower-level offending. Rather, the reconfigured community orders and subsequent amendments that have further restricted judicial discretion in the conditions imposed²⁸⁰ are likely to have increased the onerous nature of CCOs for people facing less serious charges. In particular, the fact that contravention of a CCO is now a discrete offence - punishable by imprisonment for up to three months, regardless of whether the conduct involved in the breach was criminal in nature - increases the risk of imprisonment for women. Section 3.2.4 contains discussion of how improved approaches to community-based sentences could help reduce the female imprisonment rate.

Regardless of this challenge, Victoria's low rate of CCOs, coupled with comparatively high numbers of women sentenced to short periods of imprisonment, suggests that short sentences are being imposed in place of CCOs for criminalised women²⁸¹. For example, as at 30 June 2018, around 40 per cent of sentenced women had an effective sentence length of less than 12 months, compared with only around a quarter of men in prison.²⁸²

Figure 9: Effective sentence length (sentenced) as at 30 June 2018



Source: Modified version of Figure 2, Department of Justice and Community Safety (DJCS), 2019, 6. Note: Percentages may not add to 100 per cent due to rounding.

As discussed above, the greater numbers of women held on remand - often involving sentences of only a few months - has heightened this gendered difference. In the 12-month period to 30 June 2018, 47.2 per cent of women discharged from prison spent less than one month, and 86 per cent spent less than 6 months, in custody.²⁸³

²⁸⁰ The more restrictive nature of the Victorian Community Corrections Order (CCO) scheme is evident when compared to Community Corrections Orders in NSW. Both schemes require that certain mandatory conditions attach to a CCO, but the Victorian legislation includes seven such conditions, with a requirement that at least one other non-mandatory condition be imposed (which can include electronic monitoring and judicial supervision). NSW only requires two mandatory conditions. The Victorian CCO can be combined with a term of imprisonment, whereas in NSW, a CCO cannot. Similarly, the Victorian scheme is more proscriptive about the offences for which a CCO can be imposed, and the maximum terms for which a CCO can be ordered, while there are no excluded offences under the NSW law and the maximum period for which a CCO can be imposed is shorter in NSW than in Victoria. Finally, breaching a CCO is now characterised as a separate offence in Victoria, punishable by imprisonment, whereas breach of a CCO is not an additional offence in NSW. Bernhaut, M., & Ashby, N. (2018) *Community Correction Orders in Victoria* NSW Legal Aid.

²⁸¹ Sentencing Advisory Council (2020b) *Time served prison sentences in Victoria*, Victoria.

²⁸² 'Effective sentence length' is the period of imprisonment to be served by a sentenced prisoner in the current episode, calculated as the period between the date of reception into prison custody and the earliest date of release. DJCS, above n 42.

²⁸³ Corrections Victoria, 2020a above n 8, Table 3.9.

Almost 40% of unsentenced women received no custodial sentence or were sentenced to ‘time already served’, once their matter was heard in court.

For a significant proportion of women incarcerated in Victoria, extended time on remand is also equal to, or greater than, the sentence they eventually receive if convicted. In fact, only 62 per cent of unsentenced women in 2018 were sentenced to imprisonment for at least one of their reception charges, with the remainder either sentenced to “time served” or receiving no

sentence at all.²⁸⁴ This is in line with findings from the SAC that ‘time served’ sentences in Victoria increased overall from five to 20 per cent over the seven financial years to 30 June 2018. The increase was even greater for Aboriginal women, with 61.4 per cent discharged from an unsentenced period in detention in 2018-19.²⁸⁵

As is the case with men, significant changes have occurred over the last decade in terms of the circumstances in which women, whether sentenced or un-sentenced, are discharged from prison, including in whether people on sentence are discharged on parole.²⁸⁶ Legislative changes that mandate imprisonment; impose statutory minimum sentences;²⁸⁷ or set minimum non-parole periods are also likely to have contributed to the size of the prison population.

Rising rates of recidivism suggest that, regardless of the principles guiding sentencing, current approaches are not working. Data from the ABS National Prisoner Census indicates that, as at 30 June 2019, close to 38 per cent of all women in adult prisons in Victoria (sentenced and un-sentenced), and approximately 49 per cent of Aboriginal women, had a prior experience of custody.²⁸⁸ In Victoria, 43.7 per cent of all people in custody (male and female) released during the 2015 -16 financial year returned to prison within two years.²⁸⁹ More broadly, the QPC found that the proportion of people returning to prison for a new sentence within two years of release was increasing, rising from 29 per cent in 2007 to 40 per cent in 2017.²⁹⁰

2.5 Conclusion to Part Two

With a growing number of offences attracting a reverse onus in relation to bail, and women increasingly receiving a custodial sentence for more minor offences,²⁹¹ it is clear that systemic factors are interacting with the gendered drivers of criminalisation discussed in Part One to entrench women’s contact with the criminal justice system. It is also clear that the growing use of imprisonment against women has done little to reduce future justice involvement.

These specific systemic drivers must be immediately reversed if women’s incarceration rates are to be slowed and, ultimately, stemmed. It is crucial, however, that foundations are also put in place which can prevent further isolated reforms from having such devastating and unintended consequences, as well as ensure that the wider structural inequalities which make women vulnerable to criminal justice system contact can be addressed.

Part Three of this paper offers the CIJ’s proposals for how these foundations can begin to be laid.

²⁸⁴ Walker et al., above n 9, 3.

²⁸⁵ Corrections Victoria 2020a, above n 8.

²⁸⁶ Ibid., Table 3.10.

²⁸⁷ Subjecting women to mandatory sentencing is contrary to Rule 61 of the Bangkok Rules.

²⁸⁸ ABS 2019, above n 200, Table 29.

²⁸⁹ Productivity Commission 2020a, above n 278, Table CA.4.

²⁹⁰ Queensland Productivity Commission (QPC), (2019a) *Inquiry into Imprisonment and Recidivism. Final report*, Queensland Government.

²⁹¹ Russell et al., above n 15.

3. Part Three: Foundations for Reform

In drawing together existing knowledge on women's incarceration, the CIJ was struck by the consistency of findings in the international literature. The picture that emerges of incarcerated women in comparable jurisdictions – the factors which propel them into contact with the criminal justice system; the nature of the offences with which they are charged; and the damaging impact of imprisonment on women and their children – suggests a common and enduring challenge.

Consistency also pervades the proposed recommendations for responding to women's justice system involvement emerging from the numerous reviews and inquiries conducted in Australia and overseas over the last twenty years. As different jurisdictions have begun to recognise the factors which drive women into contact with the criminal justice system, a range of policy and programming approaches – both those specific to women and those with a broader agenda to reduce the general prison population – are emerging in Australia and overseas.

Victoria's current approach to gender responsive Correctional policy

Noted in the Introduction to this paper, Victoria recognised the need for a differentiated response for criminalised women by establishing the *Better Pathways Strategy*²⁹² (2005-2009, with phase two extended to 2014). This strategy involved a suite of initiatives and infrastructure improvements aimed at reducing women's contact with the criminal justice system, including:

- transitional housing for women on bail;²⁹³
- sexual assault counselling;
- cultural liaison;
- child-care and transport assistance for women on Community Corrections Orders (CCOs);
- improved support for the children of imprisoned women; and
- a limited financial counselling service.

The strategy also involved infrastructure improvements at the Dame Phyllis Frost Centre, the most significant of which was the creation of a 20-bed mental health unit, as well as upgrades to the Visits, Medical and Education Centres. *Better Pathways* was adapted and further developed in the succeeding *Targeted Women's Correctional Response*. Funding was made ongoing from 2015.

A review of women's services across prisons and Community Corrections then informed the development of a new policy framework and women's service delivery model, *Strengthening Connections*,²⁹⁴ launched in 2017. The purpose of the policy is described as providing "an evidence-based framework for addressing the particular issues and offending pathways for women in the corrections system".²⁹⁵ The policy applies to Corrections Victoria, Justice Health²⁹⁶ and "key partners involved in delivering services and programs to women offenders."

According to Corrections Victoria, investment under the current strategy has involved \$14.5 million for expanded services and programs, including:

²⁹² Victorian Government, 2005, above n 6.

²⁹³ The Atrium Housing and Support Program, a Corrections Victoria pilot service providing transitional housing and support for women on bail in Victoria, announced in November 2020 that it was closing due to a lack of ongoing funding. The service was not evaluated.

²⁹⁴ Victorian Government, 2017, above n 7.

²⁹⁵ Victorian Government, 2017, above n 7, 4. See <<https://www.corrections.vic.gov.au/strengthening-connections-womens-policy-for-the-victorian-corrections-system>> and <<https://www.corrections.vic.gov.au/reducing-womens-reoffending>> retrieved February 18, 2020.

²⁹⁶ Justice Health is the business unit in the Department of Justice and Community Services responsible for the delivery of health, mental health and alcohol and other drug (AOD) services in Victorian prisons.

- \$5.8 million on employment and family reconnection;
- \$2.7 million to improve access to housing and the appointment of additional housing workers to provide planning and support for women returning to the community; and
- \$2.3 million for expanded legal and housing support for Aboriginal women.²⁹⁷

The government has also committed under Goal 2.3 of *Burra Lotjpa Dunguludja (Fewer Aboriginal people progress through the criminal justice system)* to “explore the feasibility of a women’s residential diversion and transition program similar to Wulgunggo Ngalu Learning Place to provide cultural and gender-specific supports for Aboriginal women involved in the corrections system”.²⁹⁸

A 2009 evaluation found that the *Better Pathways Strategy* had improved the gender responsiveness of the Victorian Corrections system and contributed to reducing rates of imprisonment for women. This included significant reductions in:

- the number of women in Victorian prisons (15.3 per cent);
- the number of sentenced women received into prison (19.3 per cent);
- the rate of women’s imprisonment (20 per cent);
- the rate of remand receptions (7.3 per cent); and
- the number of women on parole (18.3 per cent).

No findings about links between the strategy and reduced recidivism were possible, given the short period from implementation.²⁹⁹

While these outcomes were positive, any of the apparent gains were short-lived, with growth in remand numbers contributing to an increase in the women’s prison population of 19 per cent in the 12 months from 30 June 2008 to 30 June 2009.³⁰⁰ Fast forward a decade and any early gains had been diluted further. This is because, although women account for a small proportion of all people in prison in Victoria (7.1 per cent³⁰¹ in 2019) and are incarcerated at a much lower *per capita* rate than men,³⁰² the rate at which they were incarcerated overall grew rapidly over this time.

As referred to earlier, as at 30 June 2018, there were 566 women in Victorian prisons, representing a 137 per cent increase in the female prison population over a ten-year period, compared with an 81 per cent increase in male prison populations.³⁰³

Even more dramatic was the increase in incarceration of Aboriginal women, with over a three-fold increase between 2012 and 2018.³⁰⁴ This occurred at a significantly disproportionate rate compared with the Victorian Aboriginal population;³⁰⁵ non-Indigenous incarcerated women; and all men in prison, including Aboriginal men.³⁰⁶

²⁹⁷ Corrections Victoria (date unknown) *Reducing women’s reoffending* (Web page. Reviewed 25 August 2020) <<https://www.corrections.vic.gov.au/reducing-womens-reoffending>> Victorian Government

²⁹⁸ Victorian Government, above n 185. This project is being undertaken by the CIJ in partnership with Djirra and Pricewaterhouse Coopers Indigenous Consulting.

²⁹⁹ Pricewaterhouse Coopers (2009) *Evaluation of the Better Pathways strategy, Corrections Victoria. Executive Summary*.

³⁰⁰ Corrections Victoria, 2020a, above n 8.

³⁰¹ Ibid.

³⁰² In 2019, the female incarceration rate in Victoria was 22 women per 100,000 adult women, compared with 297 men per 100,000 adult men. This represented a doubling of the rate of women’s imprisonment since 2008. Ibid.

³⁰³ Ibid.

³⁰⁴ Walker et al., above n 9, 15. A breakdown of legal status on entry shows significant increases in the numbers of sentenced Aboriginal women, increasing from 10 per cent in 2012 to 24 per cent in 2018, while increases in Aboriginal women entering prison on remand increased from 14 per cent to 17 per cent.

³⁰⁵ Victorian Aboriginal people constitute 0.8 per cent of the state’s general population. ABS 2017, above n 10.

³⁰⁶ As at 30 June 2019, the proportion of the male prison population that identifies as Aboriginal was 10 per cent. Corrections Victoria 2020a, above n 8.

While the number of women in prison dropped by 32 per cent during the COVID-19 pandemic,³⁰⁷ reports from service providers suggest that this decline was already reversing by the second half of 2020,³⁰⁸ in part because of the lengthy period during which clients were remaining on bail without access to vital supports. It is clear, therefore, that the existence of a formal 'gender responsive' policy framework has not been capable of stemming the rise in the number of women in Victoria's prison system by itself.

There were 3 times as many Aboriginal women imprisoned in Victoria in 2018 than in 2012.

Rather than a consequence of the frequency or severity of women's offending,³⁰⁹ the inability of Victoria's existing approach to halt or reverse the acceleration in women's incarceration rates has occurred in the context of legal and policy settings which were designed primarily for men³¹⁰ and which disadvantage women in specific ways as a result.³¹¹

Further, growing evidence suggests that, although well-intentioned, a 'gender responsive' approach may have been used to justify the process of *remanding women into custody*, given the absence of relevant supports and safety in the community.³¹² The challenge, therefore, not only involves understanding the factors which drive women into contact with the criminal justice system in the first place, but the systemic drivers which accelerate this contact into repeated experiences of incarceration.

Meeting this challenge requires more than portfolio-specific approaches which address women's experiences once they reach the criminal justice system. Action to reduce growing female incarceration in a meaningful way demands a much broader, multi-faceted approach. It requires strong leadership to drive bi-partisan, cross-government support for prison reduction targets and commitment to long-term, evidence-based and investment-driven ways of meeting these.

Just as importantly, it requires the development of an overarching **systems logic** which ensures that women have greater visibility in the system and receive tailored, evidence-based responses. The challenge facing Victoria is therefore to move from a portfolio-focused approach to coordinated investment and reform.

Justice reinvestment approaches

Characterised broadly as 'justice reinvestment',³¹³ an investment approach to rising incarceration rates has increasingly become a feature of justice reform in many overseas jurisdictions. Emerging in the early 2000s, justice reinvestment is well established in over half of all US states,³¹⁴ primarily as a strategy to reduce spending on prisons without compromising community safety. With evidence suggesting a direct impact on prison closures,³¹⁵ justice reinvestment is a way to incentivise jurisdictions to pursue decarceration.

³⁰⁷ i.e., in the 12 months from 31 July 2019 to 31 July 2020. Corrections Victoria, 2020b, above n 48.

³⁰⁸ As at 30 April 2021, there were 413 women in Victorian prisons, representing a 21% decrease from the previous 12 months. Ibid.

³⁰⁹ Walker et al., above n 9.

³¹⁰ The Bangkok Rules stress the importance of gender-specific prisons and programs. UNODC 2010, above n 3.

³¹¹ Russell et al., above n 15; McMahon, above n 257; UK Government Home Office, (2002) *Statistics on Women and the Criminal Justice System: A Home Office Publication under Section 95 of the Criminal Justice Act 1991*; SAC, 2010, above n 36.

³¹² Campbell et al., 2020, above n 30.

³¹³ See section 4.1.3 and Appendix A for a discussion about justice reinvestment in Australia.

³¹⁴ Willis, M., & Kapira, M. (2018) 'Justice reinvestment in Australia: A review of the literature' *Research Report No 9*, Australian Institute of Criminology, vii.

³¹⁵ Fabelo, T. (2010) 'Texas Justice Reinvestment: Be More Like Texas?' 12 (1) *Justice Research and Policy*, 113-131; Maruna, S. (2011) 'Lessons for Justice Reinvestment from Restorative Justice and the Justice Model Experience' 10 (3) *Criminology & Public Policy*, 661.

Justice reinvestment programs in Texas illustrate how this approach can reduce prison populations, while aligning a reduction in prison numbers with conservative political mandates.³¹⁶ The Texas model involved investment in a broad range of supports including:

- mental health pre-trial diversion, with treatment provided as an alternative to remand;
- in-prison and post-release substance abuse treatment, including residential and transitional treatment centres in the community, and outpatient counselling;
- parole half-way houses; and
- intermediate facilities for people breaching supervision conditions.

The strategy also involved changes to enhance parole and probation services by:

- capping the caseload of parole officers to ensure adequate supervision;
- expanding drug and other speciality courts with treatment programs for people who pose a low-risk; and
- funding grants available for counties providing innovative sanction models for probation violations to reduce the number of revocations.

Over the life of the program, Texas saw recidivism from parole programs reduce from 10,000 to 6,000 in eight years, and the closure of three prisons.³¹⁷

While the primary focus of justice reinvestment in the US and the UK has been on reducing spending on prisons, justice reinvestment as it is developing in Australia includes the wider objectives of reducing crime and strengthening communities.³¹⁸ The AIC has provided a description that illustrates this more expansive meaning as it applies in the Australian context.³¹⁹

A data-driven approach to reducing criminal justice expenditure and improving criminal justice system outcomes through reductions in imprisonment and offending. Justice reinvestment strategies involve evidence-based understandings of local contexts, circumstances and needs that impact on involvement in the criminal justice system.

As such, initiatives that have emerged in Australia are more likely to involve systems reform beyond those associated with the criminal justice system, with a growing number offering lessons for Victoria. These include place-based, community-led initiatives, as well as a sector-wide, cross-government approach in NSW to another seemingly intractable social issue – child protection.

Evidence also offers a wealth of experience and knowledge about the governance, legislative, programmatic and cultural change that is needed. See **Appendix A** for information about justice reinvestment approaches implemented in Australia. Overall, however, the ability to show long-term economic benefits of justice reinvestment is likely to be crucial to the success of any strategy to reduce women's prison numbers in Victoria.³²⁰ The opportunity which currently presents is a commitment to the type of cross-government strategy which is a feature of successful reform in overseas jurisdictions and which is necessary to sustain a whole-of-government justice reinvestment strategy.

³¹⁶ Fabelo, *ibid*; Australian Broadcasting Commission, Texas Experiment with Justice Reinvestment (16 Apr 2013) Lateline, <<http://www.abc.net.au/lateline/texas-experience-with-justice-reinvestment/4633756>>

³¹⁷ Jennings et al., above n 51.

³¹⁸ Willis & Kapira, n 314.

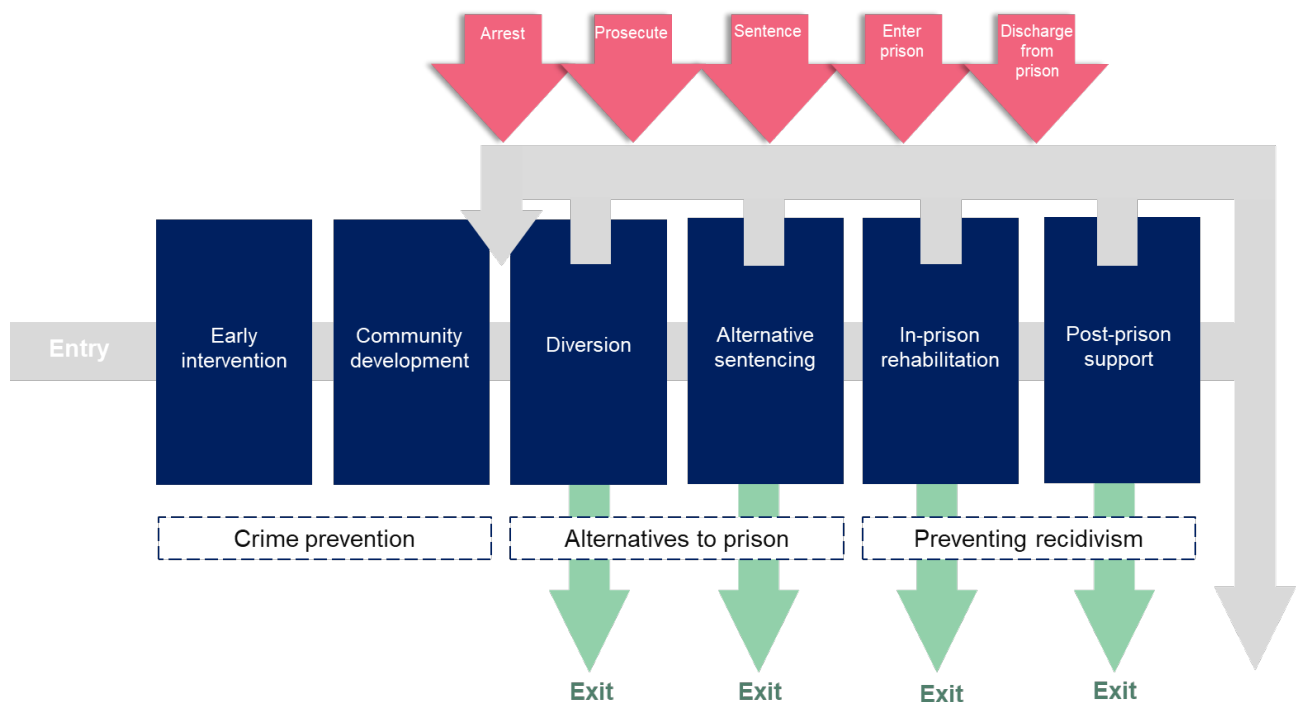
³¹⁹ *Ibid.*, vi.

³²⁰ Mission Australia (2013) *Submission No 99 to Senate Legal and Constitutional Affairs References Committee*, Parliament of Australia, Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia (2013), 4.

In a 2019 report on strategies to reduce imprisonment and recidivism rates in Queensland,³²¹ the QPC made wide-ranging recommendations regarding ways: to address the causal factors behind offending; to deter and prevent crime; to ensure that imprisonment is used only where an offender poses an unacceptable risk to the community; and to strengthen opportunities for rehabilitation and integration in the community.

While “pathways” to prison are anything but linear, the following diagram – modelled on that included in the QPC report – illustrates the many opportunities to reduce contact with the criminal justice system, or for this contact to function as a positive intervention instead.

Figure 10: Opportunities for positive intervention



Source: Modified version of diagram from QPC Summary Report, 2019b (Figure 1, p.4)

The US and UK experiences show that efforts to reduce imprisonment rates also need to be supported by:

- the recruitment of high-level change-champions;
- strong government/community sector partnerships;
- youth justice reforms to prevent early involvement in the justice system;
- extending caution diversion programs to adults;
- sentencing reform, including removal of mandatory sentencing provisions; reduction in both the number of criminal offences, as well as in the severity of penalties; and greater use of community-based sentencing;
- ensuring easier access to bail and the provision of bail support programs;
- the introduction of sentencing credit programs to allow for reductions in time served; and
- changes to risk and needs assessment frameworks.

³²¹ QPC 2019a, above n 290, 4.

Key lessons for US states that achieved the greatest reductions in prison numbers include that:³²²

- achieving and maintaining buy-in from all relevant stakeholders is challenging, but essential;
- without bi-partisan commitment to adequate funding, reforms can be delayed, fail to realise the intended benefits, or never be fully implemented;
- data collection and analysis, as well as the rigorous monitoring and evaluation of reforms, are critical; and
- broad reforms need to be augmented by strategies to provide solutions for more serious, high-risk offenders, who are often overlooked in reform.

The US experience also highlights the importance of setting specific goals and targets to address racial or gender disparity in prison populations; and to deliver tailored approaches for particular cohorts. For example, in the literature on state decarceration strategies in the US, there was minimal reference to gender specific programs, even for states with disproportionately high rates of female incarceration such as South Dakota.³²³

Of five US states assessed by the Sentencing Project to have achieved good results in reducing prison populations, there was no evidence that gender-specific reforms formed part of the decarceration ‘packages’ adopted. This seems to have meant that, while significant reductions in the overall prison populations were achieved in Connecticut and South Carolina (of 25 and 14 per cent respectively over a ten-year period), the female prison population remained relatively stable in Connecticut and actually *increased* in South Carolina.³²⁴ These figures suggest that women’s particular experiences; the gendered factors which bring them into contact with the criminal justice system; and the way which systemic drivers impact them disproportionately to accelerate this contact must be the focus of a specific, Women’s Justice Reinvestment Strategy.

Towards a Women’s Justice Reinvestment Strategy

The foundations for reform outlined in this part of the paper are intended to kick-start a conversation about a **Women’s Justice Reinvestment Strategy for Victoria**. Trialling such a strategy would achieve the twin aims of prioritising reform for a particularly vulnerable and growing cohort of Victoria’s prison population, as well as developing a template capable of wider application.

Rather than presenting multiple reform recommendations relating to the myriad issues impacting criminalised women, the Women’s Justice Reinvestment Strategy (the Strategy) is proposed as a suite of action based on **five interrelated foundations for reform** which we see as necessary to deliver an evidence-based, sustainable and joined-up program of meaningful change. Some of these options have wider application and are likely to support reduction in imprisonment rates generally. The five foundations are:

- **Foundation One: Commit, coordinate, invest**
- **Foundation Two: Address systemic drivers**
- **Foundation Three: Support, rehabilitate, integrate**
- **Foundation Four: Community-led design**
- **Foundation Five: Research, evaluate, share**

³²² Schrantz, D., DeBor, S., & Mauer, M. (2018) *Decarceration strategies. How 5 states achieved substantial prison population reductions*. The Sentencing Project; La Vigne, N., Bieler, S., Kramer, L., Ho, H., Kotonias, C., Mayer, D., McClure, D., Pacifici, L., Parks, E., Peterson, B. & Samuels, (2011) Justice reinvestment Initiative State Assessment Report. Urban Institute.

³²³ La Vigne et al., 2014, above n 322, 117.

³²⁴ Schrantz et al., above n 322.

Interspersed are promising examples of justice innovation, being programs, policies and reforms implemented in Victoria and elsewhere which promote decarceration generally, as well as tailored approaches to women's criminalisation. As with our 'foundations for reform', these are not presented as exemplars from a comprehensive review of decarceration strategies but, rather, as signposts of what is possible.

The CIJ notes that most of the foundations for reform offered in this paper are not being presented for consideration for the first time. Rather, they are drawn from previous studies and the recommendations from law reform, advisory and activist agencies;³²⁵ promising approaches adopted locally and overseas; insights gained from the CIJ's ongoing advocacy work in the sector; as well as identified gaps in current knowledge that require further research and review.

Some are relatively straightforward and cost-neutral to implement – and in turn are likely to result in justice savings in the short-term. Others represent high-level opportunities with more significant system-wide and resourcing implications. All require targeted approaches for Aboriginal women that are culturally safe and community owned.

The CIJ offers these in the hope that they will stimulate further discussion, inquiry and law reform, leading ultimately to responses that seek to leave the use of custody for women, as well as the high, down-stream social and financial costs that this incurs, far behind.

³²⁵ Where possible we have referenced previous recommendations relevant to women's involvement in the criminal justice system and broader prison reform. We do not profess, however, to have undertaken an exhaustive review of all relevant inquiries, or of progress in implementation of recommendations. The 'foundations for reform' included here are those that our research indicates remain relevant to women's experience of the justice system in Victoria.

3.1 Foundation One: Commit, invest, coordinate

To counter an ongoing drift towards custodial responses, a more coordinated, transparent and informed approach to criminal justice reform is required - one predicated on addressing the fundamental causes of offending and preventing systemic drivers from disproportionately impacting cohorts for which they were not designed.

The experience of the recent public health crisis offers valuable lessons in ways to do things differently in a post-pandemic environment. Predominant amongst these is that cooperation across government and partisan lines is essential in the pursuit of common objectives.

The call for evidence-based policy was also a key recommendation of the QPC, as was the value of greater clarity and understanding across all criminal justice agencies of:

- the longer-term objectives of criminal justice reform;
- the wider social, fiscal and systems implications of specific policy or practice changes, and the needs of specific cohorts, including women; and
- the effectiveness of current approaches, as well as any proposed alternatives.

3.1.1 Coordinating reform – a Women’s Justice Reinvestment Strategy

As the first step under this Foundation, the Victorian Government must recognise the inherent relationship between policy decisions regarding sentencing and court reform; support for Aboriginal self-determination; responses to gendered violence and child protection; police practice and, of course, investment in associated support services. This requires a whole-of-government, cross-portfolio strategy designed to reverse women’s incarceration rates. National and county strategies in the UK ³²⁶ and Scotland³²⁷ provide templates for such an approach.

Justice innovation: UK Female Offender Strategy

The UK Government took steps towards this recognition through its 2018 release of a Female Offender Strategy. The Female Offender Strategy included:

- a commitment to divert resources previously allocated to the building of five new women’s prisons;
- an emphasis on early intervention, including making the clear connection between the provision of adequate funding for domestic violence services in the community and prevention of offending;
- supporting the police to take a gender-informed approach to interactions and interventions with women, including working in a trauma-informed way and diverting women from prosecutorial processes;
- emphasising custody as a last resort, particularly for short sentences and prioritising community-based responses as more effective in reducing reoffending;
- increasing gender-informed assessments and information available to courts and Corrections staff around women’s needs, as well as information about available supports in the community;

³²⁶ Ministry of Justice 2018a, above n 150.

³²⁷ See for example the Scottish Government’s national offender management strategy. *Reducing Reoffending. Strategy for the Management of Offenders* (2006). Safer Scotland, Scottish Executive. <<https://www.familiesoutside.org.uk/content/uploads/2011/02/NatStratManagOff.pdf>>

- piloting women's residential centres and increasing bail accommodation supports in the community;
- providing greater support for those on sentence in the community, including gender-informed community-based treatment options;
- professionalisation of the prison and probation workforce, including through the appointment of champions to drive gender-informed practice and monitor training and rehabilitation targets;
- a range of steps to improve the custodial environment, including a greater focus on trauma-informed practice, women's health and wellbeing, individualising support and safety requirements and recognising the role that greater links with families and children can play in rehabilitation;
- an emphasis on improving education and employment opportunities;
- a cross-departmental approach which commits to developing and sharing evidence.

The UK Strategy was long in the making and its decision to divert funding previously flagged for the construction of additional women's prisons was particularly welcomed.³²⁸ Concern was expressed by advocates at the time, however, that it was relatively light on detail and, most importantly, was not necessarily supported by the funding that was essential to ensure the delivery of associated support services. Similarly, commentators stressed the importance of allowing adequate time and opportunity for courts and other agencies to adopt an appropriately gender-informed approach.³²⁹

With a similar focus on justice reinvestment, as well as appropriate and sustainable funding, the CIJ therefore urges the Victorian Government to develop a **Women's Justice Investment Strategy**. This Strategy should be aimed at reducing the incarceration rates of women and their involvement in the wider criminal justice system, including via investment in relevant supports and services in the community.

A cross-portfolio initiative, the development of the Strategy could be jointly co-ordinated and championed by:

- the Attorney General;
- the Minister for Crime Prevention, Corrections, Youth Justice and Victim Support;
- the Minister for the Prevention of Family Violence, Women and Aboriginal Affairs; and
- the Minister for Police.

The Strategy would also usefully involve participation from the Minister for Child Protection, Minister for Mental Health and the Minister for Housing in recognition of the relationship which women's contact with the criminal justice system has to these portfolios.

Supporting the Strategy, a **Women's Justice Investment Taskforce** would be required to drive its development. Ideally, the Taskforce would consist of funded representation from:

- the relevant business units from the departments of Justice and Community Safety (including the Koori Justice Unit) and Families, Fairness and Housing;
- core criminal justice agencies (including Victoria Police, the Office of Public Prosecutions, the judiciary, Victoria Legal Aid, the Law Institute of Victoria and the Victorian Bar);

³²⁸ Ryder, O. 'A response to the Female Offender Strategy.' (July 12 2018). Centre for Crime and Justice Studies <<https://www.crimeandjustice.org.uk/resources/response-female-offender-strategy>>

³²⁹ Booth, N., Masson, I., & Baldwin, L. (2018) 'Promises, promises: Can the Female Strategy deliver?' 65 (4) *Probation Journal*, 428-438.

- community agencies working with criminalised women (including women's advocacy groups, Community Legal Centres, Aboriginal Community Controlled Organisations and community-based services); and
- women with lived experience of prison and the criminal justice system.

Key features of the Strategy could include:

- a commitment to reinvest prison infrastructure budget allocations towards community-based accommodation and supports;
- a commitment to early intervention and prevention in the community;
- a commitment to identifying, tracking and reforming systemic drivers which disproportionately impact on women and other vulnerable cohorts;
- a commitment to diversion, rehabilitation and integration approaches which are gender-informed, as well as community led and designed;
- commitment to measurable objectives, actions and timeframes to achieve Strategy objectives, including modelling of prison bed and other savings;
- the provision of specific guidance on the performance objectives and assessment requirements under the Strategy for key agencies within and outside the criminal justice system.

Development of the Strategy as a long-term program of reform would need to include initial scoping work, including the Strategy's intended role, structure and targets, as well as an agenda and budget to support its implementation.

3.1.2 Committing to criminal justice objectives

As a further and crucial step, the Strategy must be underpinned by defined and shared objectives for the criminal justice system. The QPC stressed the value of embedding the long-term, overarching objectives of the criminal justice system into legislation; and for key agencies to be provided with clear guidance regarding how to operationalise them, as well as how their performance in doing so will be assessed.

The following wording proposed by the QPC prioritises the need for a therapeutic approach that addresses the drivers of criminal justice system contact, and for imprisonment to be limited to those individuals who pose a risk to public safety.³³⁰

Improve community well-being over time by reducing harms from crime. The criminal justice system should efficiently and effectively aim to:

- address the causal factors behind offending;
- deter criminal activity;
- incapacitate individuals who present an unacceptable risk to the community;
- reduce the risk of future offending through rehabilitation and community integration; and
- maintain the legitimacy of the system.

³³⁰ Queensland Productivity Commission (QPC) (2019b) *Imprisonment and recidivism. Summary Report*, Queensland Government, 18.

Over-arching objectives such as these could underpin a Women's Justice Reinvestment Strategy in Victoria. Incorporating clear objectives into the 'purposes' sections in criminal justice legislation such as laws relating to bail, sentencing, youth justice and Corrections would help to promote greater consistency across criminal justice agencies; set standards for criminal justice reform; and send a strong message to the community about the wider role of the justice system in preventing reoffending.

For example, it may surprise many members of the public that the *Corrections Act 1986* (Vic), makes no reference either to the rehabilitation of people in the corrections system or to the reduction of recidivism as a purpose of the legislation.³³¹ This absence has led researchers to describe Victoria's legislative framework for rehabilitation as being "virtually non-existent".³³²

Similarly, the introduction of an over-arching purpose along these lines into the *Bail Act 1977* would bring into sharp relief the extent to which the current regime may not necessarily be achieving the aim for which it was designed. For example, it places the concept of "community safety" above the principle that imprisonment should always be an option of last resort. It does so, however, without defining the concept, nor considering how remanding low-level offenders into custody might actually achieve this aim, particularly over the longer term.

Here the CIJ notes that the conversation between government and the Victorian population about the objectives of the criminal justice system is a complex one to have. Research shows that governments rely on public 'opinion' about 'law and order' to develop responses, but that public 'opinion' is rarely fully informed, with conventional approaches to surveys and polling providing limited opportunities for in depth analysis.³³³

Further, while evidence indicates that public opinion shifts with the benefit of information and exposure to the detail and background of specific cases, it also suggests that change in opinion is hard to sustain.³³⁴ This means that governments have a unique responsibility and opportunity to reinforce the role of criminal justice systems in preventing crime; in rehabilitating those individuals who come into contact with these systems; and in strengthening communities at the same time as punishing and deterring wrongdoing.

3.1.3 Investing in evidence-based decision-making

Just as importantly, Victoria's current approach to decision-making and criminal justice reform is not well equipped to address the complex social issues that system users experience. Policy relevant to addressing what the QPC characterised as the "wicked problem"³³⁵ of crime and imprisonment is developed across multiple government departments and implemented in a system comprised of agencies characterised both by their independent function on the one hand, and by their *interdependence* on the other.

³³¹ Winford, S., (7 May 2019) *Reversing the trend of mass incarceration – do prisons have a role? Some simple steps to start turning the tide on Victoria's prison population* Centre for Innovative Justice, RMIT University.

³³² Heseltine K, Sarre R & Day A. (2011) Prison-based correctional rehabilitation: An overview of intensive interventions for moderate to high-risk offenders. *Trends & issues in crime and criminal justice* no. 412. Canberra: Australian Institute of Criminology. The purposes of the Act are defined in section 1 to be: (a) to provide for the establishment management and security of prisons and the welfare of prisoners; and (b) to provide for the administration of services related to community-based corrections and for the welfare of offenders; and (c) to provide for other correctional services. By way of comparison, the ACT has incorporated a legislative mandate for rehabilitation into its sentencing and correction legislation (*Crimes (Sentence Administration) Act 2005*, which is to be read together with the provisions of the *Corrections Management Act 2007*).

³³³ Mitchell, B., and Roberts, J., (2010) *Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales* Coventry University and Nuffield Foundation, 1.

³³⁴ Indermaur et al. above n 18; Gill, above n 12.

³³⁵ See Table 8.1 in the final report for an analysis of the characteristics of 'wicked problems' that make them so difficult to address. QPC 2019a, above n 290, 98.

The current approach to decision-making and criminal justice reform in Victoria does not allow for coordinated and evidence-based responses to the complex social issues that lead to offending.

This can result in the various agencies that constitute the criminal justice system implementing new laws and policies within the context of their own priorities, with little incentive for one agency or government department to invest in changes that will benefit outcomes relevant to another. Data that would contribute to an assessment of the effectiveness of new policies or legislation is also either not collected, not shared, or not shared in a consistent way.

The end result is that hard decisions made on a daily basis – whether to arrest or summons; grant bail or remand; or impose a custodial or community-based sentence – are made within the increasingly confined parameters of the law, largely independent of downstream considerations. This results in a siloed system, rather than one unified by an overarching systems logic.

The QPC recommended significant changes to the “decision-making architecture” in the Queensland criminal justice system, via the creation of an independent Justice Reform Office (JRO)³³⁶ to ensure coordinated and evidence-based policy making. The proposed JRO would be tasked with establishing cross-agency decision-making mechanisms; monitoring justice system reform;³³⁷ reviewing policy and budget submissions of criminal justice agencies before they go to Cabinet; providing expert advice on systems-wide issues; and supporting criminal justice agencies to apply evidence-based policy.

Another model aimed at driving evidence-driven approaches to justice reform is the Centre for Court Innovation (CCI) in New York State. A public/private partnership between the New York Courts system, the Fund for the City of New York (NYC) and a wide range of non-profit and government agencies, the CCI runs programs, undertakes research and provides expert advice on measures to promote violence prevention, alternatives to incarceration and rehabilitative court based programs. Operating for over 20 years, the CCI has been instrumental in the establishment of NYC’s therapeutic courts; contributing to bail reforms (described later in this paper); developing bail risk assessment tools; and running numerous diversion programs for low-level offending.

Like many comparable jurisdictions, Victoria funds the SAC, a dedicated body tasked with the specific function of “informing, educating and advising on sentencing issues”.³³⁸ The SAC plays a vital role in Victoria, bridging “the gap between the community, courts and government” by communicating the purposes of sentencing to the public, as well as collecting and collating evidence around sentencing trends and the impacts of relevant law reform.

The remit and associated resourcing of the SAC remains relatively narrow, however, when considered in the context of the wide-ranging and complex challenge of criminal justice reform. In particular, the SAC is not tasked with exploring the narratives behind criminal justice system contact, nor on developing the type of solutions which are required to prevent or reverse this contact, particularly from a systems-based perspective.

For this reason, Victoria could consider investing in an equivalent of the JRO as articulated by the QPC, or an equivalent of the CCI as a formal partnership between government and independent approaches to criminal justice reform. Such an agency could work in collaboration with agencies such as the SAC to contribute to and broaden the focus on evidence-based policy, while at the same time being focused on system reform and redesign, with capacity to support the trial of innovative solutions.

³³⁶ The proposed statutory body would be governed by a board that includes representatives from criminal justice agencies and the community.

³³⁷ QPC 2019b, above n 330, p19. The QPC envisaged the development of a kind of ‘justice impact’ test to help government assess “the cost-benefit - including any unintended consequences – of policy or legislative changes that would have sizeable impacts on the community”.

³³⁸ Sentencing Advisory Council, <<https://www.sentencingcouncil.vic.gov.au/>>

Opportunities for reform

Women's Justice Reinvestment Strategy

The Victorian Government should seek to develop and establish a **Women's Justice Reinvestment Strategy** aimed at reducing the incarceration rates of women and their involvement in the wider criminal justice system, including via investment in relevant supports and services in the community. The Strategy should be a cross-portfolio initiative, championed and led by the Ministerial responsibilities of:

- Crime Prevention, Corrections, Youth Justice and Victim Support;
- Attorney-General;
- Prevention of Family Violence, Women and Aboriginal Affairs; and
- Police.

The Strategy would also usefully involve participation from the Minister for Child Protection, Minister for Mental Health and the Minister for Housing in recognition of the relationship which women's contact with the criminal justice system has to these portfolios.

The Strategy should be supported by a Taskforce, including representation from:

- the relevant business units from the departments of Justice and Community Safety (including the Koori Justice Unit) and Families, Fairness and Housing;
- core criminal justice agencies (including Victoria Police, the Office of Public Prosecutions, the judiciary, Victoria Legal Aid, the Law Institute of Victoria and the Victorian Bar);
- community agencies working with criminalised women (including women's advocacy groups, Community Legal Centres, Aboriginal Community Controlled Organisations and community-based services); and
- women with lived experience of prison and the criminal justice system.

Development of the Strategy as a long-term program of reform would need to include initial scoping work, including the Strategy's intended role, structure and targets, as well as an agenda and budget to support its implementation.

Defined and shared objectives

The Taskforce and Ministerial champions of the Strategy should also commit to developing defined and shared objectives to be included in the 'purposes' sections of relevant criminal justice legislation. Key agencies should also be provided with clear guidance regarding how to operationalise them, as well as how their performance in doing so will be assessed.

Decision-making architecture

The Victorian Government should consider improving the state's criminal justice 'decision-making architecture' by, investing in an independent body to work in partnership with government and which has a clearly articulated role to:

- develop and communicate evidence about people's experiences of crime and the criminal justice system;
- take a systems-based approach to design and reform; and
- support the trial of innovative solutions.

This could be along the lines of the "Justice Reform Office" recommended by the QPC or the Center for Court Innovation in New York State.

3.2 Foundation Two: Address systemic drivers

As discussed in Part Two of this paper, recent changes to bail and sentencing in response to crimes committed by a small number of violent male offenders³³⁹ has followed a wider pattern of reform³⁴⁰ which disproportionately impacts women. While more punitive laws may appear to address immediate public concerns by removing serious offenders from the community, they do little to improve long-term community safety.³⁴¹

The wider, and largely unintended,³⁴² impact of the Victorian bail reforms has been to prioritise custody over bail or diversion for people charged with low-level, non-violent offences. These people constitute the majority of those in the system³⁴³ and an even higher proportion of women in the system. Given what is known about the criminogenic effects of imprisonment, this means that these reforms may be acting instead to *compromise* community safety in the longer term.³⁴⁴

To have meaningful impact on the rate at which women are imprisoned, the Women's Justice Investment Strategy would need to involve a program of wide-ranging changes to policing, bail, sentencing, youth justice and correctional law and policy to address the structural factors associated with women's growing presence in the justice system.

While achieving the objectives under this foundation envisages an ambitious agenda crossing criminal justice agency boundaries and requiring significant investment in service support, in this section we focus specifically on the need for urgent review of the laws and policies that have been linked to the disproportionate growth in the number of women incarcerated in Victoria's prisons.

Given what is known about the criminogenic effects of imprisonment, existing bail and sentencing laws are likely to be compromising community safety in the longer term.

These are provided in recognition of the wider reform and investment needed to effect enduring change in these rates, some of which are addressed under Foundations Three and Four.

³³⁹ Coghlan, P. (2017) *Bail Review. First advice to the Victorian Government*. Retrieved 28 May 2021 from <<https://engage.vic.gov.au/bailreview>>

³⁴⁰ Schrantz et al., above n 322.

³⁴¹ Harding, D., Morenoff, J., Nguyen, A., Bushway, S., & Binswanger, I. (2019) A natural experiment study of the effects of imprisonment on violence in the community. 3 *Nature Human Behaviour*, 671-677.

³⁴² We note that the Attorney-General of Victoria at the time, Martin Pakula, conceded in 2017 that "We do realise that there will be more people held on remand as a consequence of these changes, there's no question about that" ABC News (online) *Victoria's bail system to become the most onerous in Australia after review, State Government says* (8 May 2017). Retrieved 28 May 2021 from <<https://www.abc.net.au/news/2017-05-08/victoria-set-to-tighten-bail-justice-system-after-review/8505506#:~:text=The%20Victorian%20Government%20says%20it,following%20Melbourne's%20Bourke%20Street%20rampage>>

³⁴³ The QPC noted that 62 per cent of sentences handed down in Queensland are for non-violent offending, with an estimated 30 per cent of offenders characterised as chronic, but relatively low harm offenders. QPC 2019b, above n 330, 2.

³⁴⁴ QPC 2019b, *ibid*; 1; Cullen, F. T., Jonson, C. L., & Nagin, D. S. (2011) 'Prisons do not reduce recidivism: The high cost of ignoring science.' 91 *The Prison Journal*; Bales, W., & Piquero, A. (2012) 'Assessing the impact of imprisonment on recidivism', 8 *Journal of Experimental Criminology*, 71-101; Cid, J. (2009) 'Is imprisonment criminogenic? A comparative study of recidivism rates between prison and suspended prison sanctions' 6 (6) *European Journal of Criminology*, 459-480.

3.2.1 Prevent contact at an early age

Evidence firmly establishes that early contact with the formal justice system is associated with subsequent and more significant offending. Analysis of Victorian data by the SAC indicates that the younger a child is at their first sentence, the more likely they are:

- to reoffend and to reoffend violently;
- to be dealt with in the adult jurisdiction for further offending; and
- to be incarcerated in an adult prison by the time they turn 22.

With each one-year increase in a child's age at first sentence, the risk of reoffending was found to reduce by 18 per cent.³⁴⁵ For young Aboriginal and Torres Strait Islander people, early contact with the system brings with it a 70 per cent likelihood that they will return.³⁴⁶ Similarly, data from the US indicates that the majority of people sentenced to a period of incarceration in their lifetime have been in contact with the system by age 25.³⁴⁷

These findings are consistent with a significant body of literature which suggests that the justice system is itself criminogenic – that is, that the social exclusion, stigmatisation, anti-social influences and trauma resulting from imprisonment **encourages and reinforces offending behaviour**.³⁴⁸ A focus on broader youth justice strategies to prevent early contact with the justice system should therefore form part of any strategy aimed at reducing imprisonment rates.

Justice reinvestment initiatives aimed at reducing incarceration in certain jurisdictions in the US feature responses for at-risk young people. Two of the five US states profiled by the Sentencing Project for achieving significant reductions in prison numbers prioritised strategies including:

- raising the age of criminal responsibility (raised to 18 years in Connecticut in 2012);
- policy changes to school suspensions and expulsions to disrupt the school to prison pipeline;
- changes to the criteria for detention of young people;
- enhanced programs and supervision to support transitions for young people from detention back to the community;
- criminal record expungement for young people aged 17-25 years after five years of successful community reintegration; and
- anti-gun-violence programs directed at young people;

In Connecticut, changes in approaches to young people resulted in a decrease in arrests of under-18s by 63 per cent and of incarceration by 77 per cent, between 2009-2016.³⁴⁹

Similarly, a long-standing focus on diversion of young people away from the formal justice system – such as through warnings, cautions and restorative justice conferencing – has contributed to a consistently low rate of youth justice involvement in Victoria.

³⁴⁵ Stewart, F., Bathy, Z., & Fisher, G. (2016) *Reoffending by children and young people in Victoria*, Sentencing Advisory Council.

³⁴⁶ Armytage, P., & Ogloff, J. (2017) *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending – Part 1*.

³⁴⁷ Schrantz et al., above n 322, 13.

³⁴⁸ Cullen et al., above n 344; Cid, above n 344; Vieraitis, L., Kovandzic, T., and Marvell, T. (2007) 'The criminogenic effects of imprisonment: Evidence from state panel data, 1974–2002' 6(3) *Criminology & Public Policy* 589–622; Spohn, C., and Holleran, D. (2002) 'The effect of imprisonment on recidivism rates of felony offenders: A focus on drug offenders,' 40(2) *Criminology* 329–358; Bales et al., above n 344.

³⁴⁹ Schrantz et al., above n 322, 11.

The number of incidents allegedly committed by children aged 14 and under in Victoria almost halved between 2009-10 and 2015-16,³⁵⁰ coinciding with a policy direction focused on diversion. A 43 per cent reduction in the sentenced cases in the Children's Court also occurred over roughly the same period.⁴⁵

The CIJ looks forward to further progress from actions proposed under the 2020-2030 Victorian Youth Justice Strategic Plan,³⁵¹ as well as the expanded focus on early intervention, diversion and group conferencing. In particular, we applaud the adoption of a gender-responsive, strengths-based approach to girls and young women in the Plan.³⁵²

Similarly promising is the development of a framework to address the criminalisation of young people in out-of-home care, developed in partnership between the former Department of Health and Human Services, Victoria Police, the Victorian Aboriginal Child Care Agency (VACCA) and the Centre for Excellence in Child and Family Welfare.

Regardless, Victoria still subjects children as young as 10 to arrest and imprisonment. By raising the age of criminal responsibility to a more internationally acceptable level and by developing alternatives for younger children who offend, there is potential to achieve immediate reductions in the number of children in contact with the system,³⁵³ meaning that fewer young people graduate to adult prisons in the longer term.³⁵⁴ The urgent need for the Victorian Government, and for all Australian jurisdictions, to raise the age of criminal responsibility, is discussed in more detail at **Appendix B**.

3.2.2 Divert women, adapt policing

Numerous potential changes to policing policy and practice could, as part of a Women's Justice Investment Strategy, reduce the number of women moving through the justice system. In this section we focus on two priority actions which have the potential to be developed in partnership with Victoria Police, being:

- establishing greater opportunities to divert women involved in low-level offending from prosecution; and
- implementing a framework for a gender-informed approach to policing.

3.2.2.1 Adult diversion strategies

Given the low-level nature of the majority of offences with which women are charged, diversion from prosecution, as well as from criminal justice processes overall, should be a clear priority of any Women's Justice Reinvestment Strategy. As recommended by the Human Rights Law Centre, this could be achieved by implementing legislative and policy change requiring Victoria Police to consider all alternatives to prosecution for low-level offending, including "cautions, warnings, concession penalty notices and diversion programs that allow for pre-charge referrals".³⁵⁵

³⁵⁰ Centre for Innovative Justice, (2020) *Submission to the Council of Attorneys-General, Review of age of criminal responsibility* <<https://cij.org.au/cms/wp-content/uploads/2020/03/centre-for-innovative-justice-review-of-age-of-criminal-responsibility-submission-28-february-2020-final.pdf>>

³⁵¹ Victorian Government, Youth Justice Strategic Plan 2020-2030. May 2020c.

³⁵² This is described as involving a gender-responsive case management approach, health screening and admission procedures, as well as the provision of programs to address the 'specific issues, risks and needs of girls and young women'.

³⁵³ Analysis by the CIJ indicates that raising the age of criminal responsibility to 14 would mean that approximately 8,000 Australian young people per year would be diverted away from the harmful effects of the criminal justice system. Centre for Innovative Justice 2020, above n 350.

³⁵⁴ United Nations Committee on the Rights of the Child, (18 September 2019) General comment No. 24 on children's rights in the child justice system, 81st session, UN Doc CRC/C/GC/24.

³⁵⁵ Human Rights Law Centre. (2018) 'Ending racially discriminatory laws that lead to the over-imprisonment of Aboriginal and Torres Strait Islander women and girls. Submission to the *Wiyi Yani Thangani* (Women's Voices) project', 17 December 2018.

This was echoed by the service providers consulted for the scoping project which functioned as the inception for this paper. Practitioners spoke of the need to develop a transparent and rigorous prosecutions policy to guide police decision-making about when to pursue prosecution.

Similarly, the QPC advocated for the adoption of problem and community-oriented policing plans, developed in partnership with communities which have high levels of criminal justice system contact. The QPC also outlined ways to incentivise police in the use of diversion, including a “multi-stage caution and diversion scheme for all drug possession that allows for a staged response, and a three-tier deferred prosecution arrangement”.³⁵⁶

Under the latter, prosecution would be deferred by agreement on the condition that the individual desists from further offending for a specified period, or undertakes assessment, referral and treatment to address offending behaviours.³⁵⁷

A number of Victorian-based programs offer diversion in certain circumstances, including under the Adult Pre-Charge Diversion Program at the MCV, which is primarily for first time offenders, where prosecutors agree. Under the scheme, judicial officers set conditions that must be completed as part of a diversion plan. Conditions may include: an apology to, or compensation for the victim; counselling or treatment; and donations to charitable organisations.³⁵⁸

The Koori Women’s Diversion Program delivered by VACCA is an example of a gender-specific, culturally informed program. Providing up to 12 months intensive case managed support and referral for Aboriginal women, the program is aimed at reducing offending, reoffending and contact with the justice system overall. The program also supports Koori women on bail or CCOs and includes healing programs.

Further afield, the Humberside Police Adult Female Triage Project was a women’s conditional caution program piloted in the UK, in which women who admitted to low-level offending were diverted from prosecution. Participation was conditional on women attending a Together Women one-stop women’s centre for assessment and then engaging with the supports offered.³⁵⁹ An evaluation of the program found a 46 per cent reduction in re-arrest over a 12 month period and, when compared with a control group of similar justice-involved women, a 48 per cent lower daily likelihood of rearrest.³⁶⁰

Similar results are reflected in other women’s caution programs,³⁶¹ while evaluations of non-gender specific programs have found that female participants tended to achieve more successful outcomes than men.³⁶² This suggests that, rather than being available only to first time offenders, diversion is an effective path for criminalised women overall, albeit with the provision of the appropriate supports.

Police programs that divert low-level offenders from prosecution have been found to reduce rates of rearrest by 46%.

³⁵⁶ QPC 2019a, above n 290, recommendation 34.

³⁵⁷ QPC 2019a, above n 290, recommendation 35.

³⁵⁸ Magistrates’ Court of Victoria, <<https://www.mcv.vic.gov.au/find-support/diversion>> (page updated March 2020)

³⁵⁹ Depending on the woman’s history and needs, this could include a range of courses designed to help women with skills such as parenting, anger management and domestic abuse awareness.

³⁶⁰ Brennan, I., Green, S., & Sturgeon-Adams, L. (2015). *Centre for Criminology and Criminal Justice report: An experimental evaluation of an adult female triage pilot project for Humberside Police*. University of Hull.

³⁶¹ Easton, H., Silvestri, M., Evans, K., Matthews, R., & Walklate, S. (2010). Conditional Cautions: Evaluation of the women specific condition pilot. *Ministry of Justice Research Series 14*, 10.

³⁶² Police and Crime Commissioner for Cambridgeshire and Peterborough, (2018) Conditional Caution scheme evaluation: Final report <<https://www.cordisbright.co.uk/admin/resources/conditional-caution-evaluation-final-reportfinal.pdf>>

3.2.2.2 Gender-responsive policing

A gendered approach to policing is needed which takes explicit account of women's specific needs and the link between trauma and offending.³⁶³ This would help to address what one academic has characterised as "the over-policing of women as offenders, and the under-policing of women as victims", particularly as this relates to Aboriginal women.³⁶⁴

The UK Government went some way to acknowledging this when it released a specific Police Guidance on working with women in the criminal justice system, "Managing Vulnerability",³⁶⁵ concurrent with the release of its Female Offender Strategy, described above. This Guidance provides data and evidence on women's experiences and needs; evidence around 'what works'; and emphasis on a gender-specific, 'Whole System Approach' for police to assess and identify the most appropriate outcome for women with whom they interact in the context of offending.

Along similar lines, a Women's Justice Investment Taskforce could work with Victoria Police to develop a direction-setting approach to responding to criminalised women. This could include the appointment of a Women's Policing Lead at a senior command level to drive an agenda of action, which could cover:

- the development of guidelines on good practice in relation to women in contact with the criminal justice system, including women-specific approaches to risk assessment, staff training, diversionary measures and referral to local support services;³⁶⁶
- transparent reporting on progress on training provided by the Victoria Police Family Violence Centre of Learning regarding common trauma responses to family violence, as well as the appropriate identification of predominant aggressors when attending family violence incidents;³⁶⁷
- the implementation of *Police and Aboriginal Community Protocols Against Family Violence* (PACPAFV - formerly known as the *Aboriginal Family Violence Police Protocols* or *Koori Family Violence Protocols*)³⁶⁸ across the state and ongoing training of members on the application of the protocols and appropriate responses to family violence, "including preventative intervention and prompt response", as recommended by the ALRC in the *Pathways to Justice* report;³⁶⁹ and

³⁶³ This is a key feature of the Female Offender Strategy in the United Kingdom. See paragraphs 46-48. Ministry of Justice 2018a, above n 150.

³⁶⁴ As characterised by Dr Hannah McGlade in the Law Council of Australia webinar, 'Closing the Justice Gap: Implementing the ALRC's Pathways to Justice Roadmap', (Webinar, 29 October 2020). <https://www.lawcouncil.asn.au/media/news/closing-the-justice-gap-implementing-the-alrcs-pathways-to-justice-roadmap-webinar>

³⁶⁵ Ministry of Justice, UK Government, (2018c) *Managing vulnerability: Women. Fact pack*. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/721190/polic-e-guidance-on-working-with-vulnerable-women-web.pdf

³⁶⁶ This was a recommendation of the Prison Reform Trust in 2014, above n 127.

³⁶⁷ The need for this training to include emphasis on preventative intervention and prompt responses when police are engaging with Aboriginal and Torres Strait Islander people and communities, was a recommendation of the 2017 ALRC inquiry (Recommendation 11-2). ALRC, 2017, above n 28.

³⁶⁸ Ibid, recommendation 11-2. First established in 2008, PACPAFVs are operating at 10 sites in Victoria (Ballarat, Bairnsdale, Dandenong, Darebin, Latrobe, Mildura, Shepparton, Swan Hill, Warrnambool, and Wimmera) with a further two sites at Geelong and Echuca planned. The protocols reflect a trilateral partnership between the Dhelk Dja Partnership Forum, Aboriginal Justice Forum and Victoria Police, and is informed by a statewide family violence steering group involving Dhelk Dja, Family Safety Victoria, Koori Justice at the MCV and representatives from a range of Aboriginal agencies. Police currently receive no specific training on the application of the protocols, but undertake cultural competency delivered at the local level in addition to a mandatory online learning module, 'Understanding family violence in the Aboriginal community.' Email communication with Victoria Police, March 2021.

³⁶⁹ Ibid, recommendation 11-2. See also recommendation 151 of the Royal Commission into Family Violence (RCFV).

- the establishment of independent investigative and complaints mechanisms for reporting breaches of the good practice guideline and failure to comply with the PACPAFV.

Reforms to Victoria Police practice and policy have significant potential to change the trajectory of women who have contact with the criminal justice system and who could experience this contact as a positive intervention – diverting them away from system involvement, rather than propelling them further into a system which does them harm.

3.2.3 Reform bail laws

Discussed in Part Two, Victorian bail law and practice is inescapably linked with steep increases in the number of women and other vulnerable cohorts held in custody and, ultimately, with entrenchment of disadvantage. As such, a rethink of our approach to bail is urgently needed.

Victoria has a long record of more flexible bail provisions; the experience of reform in other jurisdictions; and a growing research base on which to draw. Just as relevantly, changes in approaches to bail during the height of the COVID-19 restrictions during 2020 which resulted in a significant drop in the number of women held in custody,³⁷⁰ yet had no discernible impact on public safety, offer a template for thinking differently about the use of pre-trial detention.

Together with measures to address delays between bail hearings and sentencing, reducing the flow of un-sentenced people into Victorian prisons would assist an already over-burdened justice system to address the backlog of criminal matters post-COVID. Failure to do so may lead to people languishing on remand for much longer periods of time.

Calls are increasing for Victoria's current bail laws to be amended and simplified,³⁷¹ and for the reverse onus tests and two step processes of determination to be removed.³⁷² Recommendations for reform from other jurisdictions include restricting the use of remand where there is no real prospect of the defendant receiving a custodial sentence;³⁷³ and providing more guidance to courts in determining bail decisions.

The latter includes broadening the guiding principles in bail legislation, as flagged in Foundation One, to include recognition of the damaging impact of imprisonment on defendants, their families and the wider community, as well as ensuring that bail provisions and the way that they are applied in practice align with these principles.³⁷⁴ It also involves consideration of the development of risk assessment tools to assist bail decision-makers to make more evidence-based and consistent bail determinations.³⁷⁵ This includes ensuring that lack of adequate accommodation or access to appropriate support cannot be used as a reason to refuse bail³⁷⁶ and that ensuring that assessments of "risk" are not equated with assessments of "need".

³⁷⁰ Reductions were also seen in the prison population in NSW, with seventy per cent of the decrease associated with a decline in the remand population. This has been attributed to police issuing fewer court attendance notices, and police and courts being more likely to grant bail. Anthony, T. 'Indigenous prison rates can fall fast: here's the proof' *The Age* (online, August 7, 2020) <<https://www.theage.com.au/national/indigenous-prison-rates-can-fall-fast-here-s-the-proof-20200805-p55in2.html>>

³⁷¹ McMahon, above n 257. It was a strong recommendation of the VLRC in its review of the *Bail Act*, that "people who are affected by a law should be able to understand it". Victorian Law Reform Commission. (2007) *Review of the Bail Act, Final Report Summary*, 5.

³⁷² McMahon, *ibid*.

³⁷³ As recommended by the UK Prison Reform Trust in 2014, above n 127.

³⁷⁴ See recommendation 15. QPC 2019a, above n 290. The QPC noted that such a principle would be "consistent with maximising the safety of the community but would take a longer-term view." (p. 314).

³⁷⁵ McMahon, above n 257. McMahon quotes evidence from other jurisdictions that more than 80 per cent of people bailed do not offend while on bail; those who do reoffend while on bail tend to commit offences similar to the original alleged offence; and those on bail for violent offences were the least likely to commit similar offences while on bail (p.19). See also QPC 2019a, above n 290.

³⁷⁶ As suggested by agencies consulted for the scoping project which preceded this Issues Paper.

Further afield are examples of more substantial rethinks of approaches to bail. Recent changes to bail laws and practice implemented in New York City (NYC) to curtail pre-trial detention provide an example of a jurisdiction making a decisive move away from counterproductive pre-trial approaches.³⁷⁷ Based on a *presumption of release* in all cases, the laws extend earlier reforms by imposing a ban on pre-trial detention for the majority of people charged with a misdemeanour or non-violent felony. The reforms are estimated to reduce in the remand population in NYC by 43 per cent, removing over 3,000 people from the city's daily prison population.³⁷⁸

With twin imperatives of halving the city's prison population within six years of the 2020 changes³⁷⁹ while maintaining public safety, the reforms were based on evidence relating to flight risk; the likelihood of failure to attend court; the impact of refusal of bail on plea decisions; inconsistency in judge-made bail decisions; and the criminogenic effect of even short periods of detention.

Justice innovation: New York Bail Reforms

Key features of the NYC bail reforms include:

- A legislative requirement for mandatory release (no bail set, or pre-trial detention ordered) for the majority of all criminal cases.³⁸⁰ Pre-trial detention can still be used in up to 88 per cent of violent felonies.
- For the minority of cases where pre-trial detention is permissible, strict legal criteria apply, including that:
 - all defendants must be released on their own recognizance without conditions unless there is found to be a *“risk of flight to avoid prosecution”*, rather than just a risk of accidentally missing a court date;
 - even where a risk of flight is demonstrated, the judge must order the least restrictive condition that will *“reasonably assure the principal's return to the court”*. This may involve pre-trial supervision, being sent court date reminders, or conditions requiring counselling, treatment; family violence programming, measures relating to victim safety and education and employment attendance.

Seen as the “middle ground” between straight release and pre-trial detention, the city-wide pre-trial supervision program, established in 2016, allows participants who pose a real risk of missing their court date to remain at home under supervision. Participants are assigned to one of five ‘supervision levels’, depending on the seriousness of the alleged crime, and an assessment of their likelihood of appearing in court without supervision.

Supervised release also involves a comprehensive needs assessment and, where required, case-managed referral to relevant support services, including for housing, employment, education, mental health and substance abuse.

³⁷⁷ Rempel, M., & Pooler, T. (2020) *Reducing pre-trial detention in New York City: Data-driven strategies for decarceration*, Centre for Court Innovation. The authors note that Washington DC and New Jersey, New York have implemented similar measures.

³⁷⁸ Ibid.

³⁷⁹ As well as meeting this legislated target, the city also committed to closing the notorious Rikers Island jails. In the US, local city jails house people held on remand pending trial and those serving short sentences of one year or less (sentences of just 26 days nationwide). Federal and State prisons generally incarcerate people charged with a felony and serving long sentences. In 2016, approximately 30 per cent of people incarcerated in a correctional facility were held in local jails. Ibid.

³⁸⁰ Laws coming into effect on January 2020 eliminated money bail and pre-trial detention in most misdemeanour and non-violent felony matters. Amendments taking effect in July 2020 have since limited the types of non-violent felonies that are eligible for mandatory release. Ibid.

The NYC reforms illustrate the importance of concerted policy commitments and targets to drive change. They also provide a template for combining pre-trial release with increased support and supervision. While it is still too early to track the wider impact of the legislation,³⁸¹ emerging figures from the January 2020 reforms signal that judges are making greater use of the supervised release program than was anticipated, including in cases involving more serious alleged offending.³⁸²

3.2.4 Diversify sentencing options

In light of the high proportion of criminalised women serving short, damaging periods in custody, there is a clear need for greater use of community-based sentencing options as an alternative to imprisonment. This has the potential to have a significant impact on incarceration rates of women, particularly of Aboriginal and Torres Strait Islander women.³⁸³

Indications from the US are that community-based sentences cost a tenth of custodial sentences and, when successfully completed, are more likely to lead to a reduction in reoffending than custodial responses.³⁸⁴ There is also persuasive evidence from the UK that custodial sentences of less than 12 months are less effective at reducing reoffending than community orders.³⁸⁵

One-year reoffending rates of women on community orders in the UK between 2005 and 2008 were 6 - 12 per cent lower than for closely matched samples released from custody over the same period.³⁸⁶

Increased opportunities to serve sentences in the community, however, necessitate access to well resourced, evidence-based and integrated programs which support compliance, rehabilitation and integration into the community over the longer term.

While this is discussed further under Foundation Three, the limited evidence available suggests that Victoria's community-based sentencing options are not operating as effectively for women because of a lack of these supports.

Sentences that are served in the community cost a tenth of custodial sentences and, when successfully completed, are more likely to lead to a reduction in reoffending than sentences of imprisonment.

Recent research by Jesuit Social Services³⁸⁷ found that participants in CCO programs experienced CCOs as punitive. There was also limited evidence for the assertion that completing orders supported them to address issues that could lead to further offending, given that support for education, training and employment was lacking and that there were low rates of engagement with therapeutic programs.

This study confirmed previous research into prison transition support, which found that programs which are perceived by participants as being meaningful and non-punitive and which are tailored to the individual are more likely to be effective in achieving rehabilitative outcomes. The findings also highlighted that "appropriate, skill-building and pro-social community work programs targeting women is needed", as is research into the specific needs of women on CCOs.³⁸⁸

³⁸¹ The July amendments to the legislation provide for extensive data-tracking and public reporting requirements relating to the reforms, allowing for future amendments to be evidence-led. Ibid.

³⁸² Ibid.

³⁸³ Sentences received by Aboriginal women are on average, half the length of non-Indigenous women. Bartels, L. (2012b) 'Sentencing of Indigenous women', Indigenous Justice Clearinghouse, Brief 14, 3.

³⁸⁴ Picard et al., above n 272; Andrews & Bonta, above n 34.

³⁸⁵ Ministry of Justice, United Kingdom. (2018b) 'Do offender characteristics affect the impact of short custodial sentences and court orders on reoffending?' Analytical Summary.

³⁸⁶ Ministry of Justice, United Kingdom. (2010) *Sentencing Statistics: England and Wales 2009*, (Ministry of Justice Statistics Bulletin. London).

³⁸⁷ Green et al., 2020, above n 270.

³⁸⁸ Ibid.

Researchers have highlighted that the degree to which expanded community sentencing options impact on women's incarceration rates depends on how these options are perceived by those making sentencing decisions, as well as the degree to which they are gender focused. Hedderman and Gunby suggest that Magistrates would benefit from guidance on how different community order conditions might be ranked in relation to each other.³⁸⁹

This aligns with findings from the WTJ evaluation that advocacy tools are needed to ensure that bail decision-makers understand the practical issues relevant to criminalised women when making orders, including access to transport and phones and caregiving responsibilities.³⁹⁰

With these caveats noted, changes to sentencing law and practice, combined with reform of Victoria's bail mechanisms, would effectively divert more women from prison. While a range of options are available, the CIJ's focus here is on changes to sentencing that would arguably have the greatest impact on driving down women's prison rates, namely the expansion of community-based sentencing options and, just as crucially, *their application in a gender-responsive way*.

These changes require a focus on:

- how the system responds to low-level offending;
- the prevalence in the use of short sentences of imprisonment; and
- how this sits with the principle of imprisonment as a last resort.

The reforms proposed here should be supported by a clearer articulation of the over-arching principles guiding sentencing, as suggested under Foundation One, and associated action to ensure that practice aligns with these principles. Such action could include:

- the introduction of restrictions in the use of imprisonment in non-violent crimes;
- a presumption against remanding in custody or imprisoning pregnant women or women with dependent children, in accordance with the Bangkok Rules;³⁹¹
- a prohibition on sentences of six months or less (subject to access to appropriate community-based alternatives);³⁹² and
- culturally appropriate sentencing dispositions which take greater account of the circumstances of the individual charged and the context of the offending.³⁹³

Similarly, changes allowing for increased access to parole and support services should be considered. Along these lines, the ALRC's 2017 *Pathways to Justice* report recommended automatic parole for sentences of under three years, and the provision of adequate parole support services.³⁹⁴

³⁸⁹ Hedderman, C., & Gunby, C. (2013). Diverting women from custody: The importance of understanding sentencers' perspectives, (2013) *Probation Journal* 60(4) 425–438.

³⁹⁰ Campbell et al., 2020 above n 30, recommendations 3 and 5e.

³⁹¹ PRT 2014, above n 127; Human Rights Law Centre, above n 355.

³⁹² A NSW Parliamentary Select Committee investigating the increase in the state's prison population in 2002 calculated that simply abolishing prison sentences of six months or less would immediately bring about a 60 per cent drop in the number of prisoners received into custody weekly: Lind, B., & Eyland, S. (2002) 'The impact of abolishing short prison sentences', NSW Bureau of Crime Statistics and Research, *Crime and Justice Bulletin*. Section 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) requires a court to provide reasons when sentencing someone to a term of imprisonment for 6 months or less.

³⁹³ See recommendation 6 of the ALRC *Pathways to Justice* report, which sought to ensure that sentencing takes into account "unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples." and 'Indigenous Experience' reports to inform sentencing in higher courts. ALRC 2017, above n 28.

³⁹⁴ Ibid., recommendation 9-2.

In the UK, adults serving a prison sentence of less than two years are released after serving half their sentence, with the remainder of the sentences served in the community “on licence” (i.e., subject to conditions), and a further period of supervision under the Transforming Rehabilitation Programme.³⁹⁵

As noted above, any sentencing reform that involves the increased use of community-based orders must ensure that the conditions set, the supervision provided and the policy and processes relating to breaches take into account the specific challenges faced by women and other cohorts. Crucial to the success of these reforms is investment in effective support programs, discussed under Foundation Three.

³⁹⁵ See the *Offender Rehabilitation Act*, which came into force in 2015. *Determinate prison sentences* Sentencing Council, UK (Web Page) <<https://www.sentencingcouncil.org.uk/sentencing-and-the-council/types-of-sentence/determinate-prison-sentences/>>

Opportunities for reform

Prevent contact at an early age

By raising the age of criminal responsibility to a more internationally acceptable level and by developing alternatives for younger children who offend, there is potential to achieve immediate reductions in the number of children in contact with the system, with fewer young people graduating to adult prisons in the longer term.

Divert women, adapt policing

- Establishing greater opportunities to divert women involved in low-level offending from prosecution; and
- Implementing a framework for a gender-informed approach to policing, including training around appropriate assessments of risk and decisions in relation to bail.

Reform bail laws

The three-year anniversary of the second tranche of the most recent reforms of Victoria's bail laws seems a timely and urgent opportunity for further review and reform. As part of the Women's Justice Investment Strategy, this should include:

- Commissioning of a targeted review regarding women's experiences of bail since COVID-19 restrictions were imposed to track patterns of subsequent contact with the criminal justice system and associated support needs during this time;
- Removal of the reverse-onus provisions in the current bail laws and a return to a presumption of bail, with consideration of a specific requirement that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment;
- Removal of 'double uplift provisions', with a single test for bail decisions which assesses whether there is an unacceptable risk to community safety;
- Referral of the operation of the remainder of Victoria's bail laws to the Victorian Law Reform Commission for comprehensive review.

A detailed examination of the impacts of substantial tranches of reform to the state's bail mechanisms will surface considerable evidence about the way in which these laws have been impacting certain cohorts in the community. This examination will also interrogate the extent to which these laws have been achieving their stated objective of increasing community safety or compromising safety instead.

Expand sentencing options

Given the potential for community-based sentences to divert women facing charges for low-level offences from custody, early initiatives under the Women's Justice Investment Strategy should include:

- Abolition of custodial sentences for offences which would attract a six-month sentence or less;
- The commissioning of a review into the eligibility, assessment and operation of CCOs for women and the extent to which CCOs accommodate the specific practical and support needs of women;
- The commissioning of a specific study into the way in which current therapeutic sentencing options impact on women.

This work could inform the development of evidence-based and gender-informed risk assessment tools to assist police and courts in the exercise of discretion in considering applications for bail, as well as community-based sentencing options for women.

3.3. Foundation Three: Support, rehabilitate, integrate

As noted under Foundation Two, without the provision of services which address the factors driving women's criminal justice involvement, and which provide alternatives to custody, legislative and policy change will not suffice. Given what is known about the role played by trauma and socio-economic disadvantage in women's criminalisation, considerable scope exists for justice mechanisms to function as a positive intervention in the lives of women whose experience of trauma pushes them into contact with the system.

Clearly the first priority of government should be to provide early intervention services *in the community* which prevent women from coming into contact with police and courts in the first place. Nonetheless, significant need persists for increased investment in specialist and mainstream supports for women as an adjunct to the criminal process, as well as in custody. Services which meet women's immediate practical needs, as well as those which provide more long-term, therapeutic support, therefore need to be coordinated and accessible at early and multiple points of a woman's contact with the criminal justice system.

While the literature and the Bangkok Rules commonly refer to the goal of the "reintegration" of prisoners into the community following release, the CIJ suggests that a more appropriate descriptor is the word "integration". This is due to the fact that many people in contact with the criminal justice system have never been integrated in the community in the first place, with their socioeconomic marginalisation driving their contact with police, as well as contributing to challenges in accessing and engaging in services. It is for this reason that women participating in community-based bail conditions or sentencing conditions which are primarily compliance-focused struggle to comply and why specialist, holistic responses are more likely to have effect.

3.3.1 Gender-informed bail supports

Echoing the NYC program to an extent, Victoria already has a number of bail support programs which aim to reduce reoffending by an individual on bail; increase the likelihood of defendants appearing in court, and provide an alternative to detention for those remanded due to their personal circumstances, rather than the seriousness of the charges they face.³⁹⁶ At their best they can support compliance with bail conditions for people with multiple and intersecting needs, including by facilitating access to housing³⁹⁷ and vital support services.

Studies of bail support programs, however, often adopt a gender-neutral lens. Where research does address the issue of women on bail in the community, this has largely been addressed through examination of discrete, gender-specific bail support programs, instead of systematic investigation of legal and non-legal needs for women on bail in the community.

This research gap is evident in an AIC 2017 literature review of bail support programs operating across Australia. Despite the absence of discussion regarding the bail support needs of women specifically, however, the review draws on evaluation data and commentary to identify a set of "best practice principles" which could be of relevance in developing support programs for women. These included the importance of:

- voluntary participation – seen as essential to encouraging and maintaining engagement, as well as supporting long-term behaviour change;
- timely and individualised support – i.e., the availability of programs that are flexible enough to provide tailored support as soon as a participant is released on bail;

³⁹⁶ Willis, M. (2017) *Bail Support: A Review of the literature*, Research Report No. 4, Canberra: Australian Institute of Criminology < <https://aic.gov.au/publications/rr/rr004/> >

³⁹⁷ Evidence from NSW suggest that, as at 2016, breach of a residential bail condition was found to be the third most likely condition to be breached. The proportion of breaches of this condition were found to be higher among Indigenous people, and that one fifth of defendants found to breach bail were subsequently remanded in custody. Donnelly, N., and Trimboli, L. (2018) *The nature of bail breaches in NSW* (NSW Bureau of Crime Statistics and Research, Crime and Justice Statistics Bureau Brief, Issue Paper no. 133, May 2018)

- holistic – addressing the full range of needs and issues affecting the participant;
- collaboration – involving intergovernmental and inter-organisational responses;
- program philosophy – underscored by a strong, sound and consistent program philosophy;
- greater focus on support, rather than on intensive supervision; and
- local – making use of local community resources, particularly for Aboriginal and Torres Strait Islander people and those from a CALD background.³⁹⁸

The AIC review also draws attention to the series of challenges confronting bail support programs for adults in Australia. Predominant amongst these was a clear lack of sufficient affordable housing options; substance treatment places, particularly residential options; and culturally appropriate support services.³⁹⁹ This is also of particular relevance for women, given that women present with higher rates of homelessness, substance dependence and trauma.

High quality legal support and information about bail have also been highlighted as essential for criminalised women.⁴⁰⁰ As discussed in Part Two, recent data from Victoria found that over half of women on remand between 2015 and 2016 had not applied for bail, with even fewer Aboriginal women reporting having applied.⁴⁰¹

Russell and colleagues' observations of women's appearances in the Bail and Remand Court during 2019 suggests that this trend was continuing,⁴⁰² while the Corston Review in the UK placed a similar emphasis on the provision of bail information for women. The Corston Review's findings included that, when women arrive in prison, they are dependent on others to build a strong and convincing case for any subsequent appeals of bail decisions.⁴⁰³ For this reason, women need access to skilled and specialist legal advice and representation which can assist them to apply for bail successfully. This is discussed further below at 3.3.1.2.

3.3.1.1 Court-based, therapeutic bail support

Specific to Victoria, the Court Integrated Services Program (CISP) provides the bulk of court-based support for individuals on bail.⁴⁰⁴ Operating at the MCV since 2006, the program is available to accused persons who are on bail, summons or remand pending a bail hearing or sentence deferral,⁴⁰⁵ who have health or social needs that contribute to their offending; and who consent to participation.

Functioning primarily as a bail compliance initiative, participants in the program receive short-term case management and referral to support and therapeutic services for substance dependence, homelessness, disability, mental health or social and cultural isolation. Engagement with services can be made a condition of bail. Where not imposed as a bail condition, engagement with services is not judicially monitored unless it is considered that this would assist with rehabilitation.

³⁹⁸ Ibid.

³⁹⁹ Ibid.

⁴⁰⁰ McMahon, above n 257; Russell et al., above n 15.

⁴⁰¹ DJCS, above n 42, 6.

⁴⁰² Russell et al., above n 15.

⁴⁰³ Corston, J. (2007) *The Corston Report: A Review of Women with Particular Vulnerabilities in the Criminal Justice System*. Home Office (UK), 2007, 7-10.

⁴⁰⁴ Other therapeutic court programs available in the MCV are the Assessment and Referral Court, or ARC, (a specialist list for defendants with a mental illness or cognitive impairment), and the Drug Court responsible for imposing and supervising Drug Treatment Orders. The Family Drug Treatment Court in the Children's Court is a judicially monitored, therapeutic program for parents whose children have been taken into state care due to substance dependence issues.

⁴⁰⁵ Defendants with complex needs may find compliance with CCO conditions challenging. Participation in CISP as part of a deferral of sentence can provide an opportunity to establish some greater stability in their lives and, in the process, to gain experience of court supervision processes.

At the time of writing, CISP is in the early stages of expansion. Changes from November 2020 include more specialist case management of complex matters by specially trained Advanced Case Managers, and the implementation of a risk and needs-based approach to how the program is accessed and services are delivered. From January 2021, the County Court of Victoria (CCV) is also piloting CISP services, including onsite drug and alcohol counselling services, for those seeking bail or deferral of sentencing.⁴⁰⁶ Participation in the CCV pilot is dependent on a person having capacity to comply with program requirements. For those whose support needs are so significant that their ability to comply is in doubt, the CIJ understands that a recommendation for an appropriate treatment and support pathway will be made to the court.

An evaluation of CISP conducted in the first two years of its operation⁴⁰⁷ found engagement with the program was associated with significant improvement in the mental health and social functioning of participants; reduced levels of problematic alcohol use; and lower rates of reoffending in the months after participants completed the program. Given that CISP was effectively a referral service in the early stages of implementation at the time, however, the evaluators noted that measuring more tangible outcomes was both problematic and premature. In addition, the paucity of bail and community corrections data made it difficult to assess the extent to which participation in the program increased compliance while, apart from differences in the support needs with which women presented, there was little focus on how particular cohorts, including women, experienced the program.⁴⁰⁸

A separate Victorian study in 2014, found that, as a management tool for “people experiencing multiple markers of vulnerability”, therapeutic bail can in fact act to *marginalise* vulnerable cohorts further, particularly when viewed in the context of inadequate service provision.⁴⁰⁹ The study concluded that, for those whose life circumstances result in non-compliance with mandated conditions, therapeutic programs are experienced as punitive, and can effectively widen the reach of penal power to pre-trial processes.

The stakeholders consulted for the scoping project which preceded this paper highlighted how these concerns played out in the lives of women with whom they worked. One service provider saw the CISP model – described as a ‘desk-based approach’ that requires the client to come to the service and is delivered within a compliance framework (i.e., primarily in a court setting, by court staff and linked to sentencing outcomes) – as problematic as a model of care.

Other stakeholders reported that the mandated programs available under CISP were generally not aligned with women’s immediate priorities (i.e., housing and regaining custody of children), but were skewed towards issue-specific, target-based interventions.

Services working with criminalised women report that therapeutic bail supports do not adequately address the specific needs of women.

Stakeholders similarly reported that women who are without housing and are desperate to secure accommodation which will enable them to reunite with their children, are unlikely to be in a position to engage effectively with mental health and other therapeutic programs. Stakeholders also highlighted the need for intensive outreach support under the program, including to prisons, in order to reach women experiencing multiple vulnerabilities.

⁴⁰⁶ Excluding people accused of sex offences. Court Integrated Services Program (CISP) *Pilot factsheet*, County Court of Victoria, January 2021.

⁴⁰⁷ Ross, S. (2009) *Evaluation of the Court Integrated Services Program. Final report*, University of Melbourne, (2009). The cost-effectiveness of the program was conducted by PricewaterhouseCoopers in the same year. See, Department of Justice, (2009) *Economic evaluation of the Court Integrated Services Program (CISP). Final report on economic impacts of CISP*. PricewaterhouseCoopers.

⁴⁰⁸ One finding was that Magistrate referrals to the program were more likely where the defendant was female and women were also more likely to self-refer to the program. No difference in completion rates of men and women were found. Ross, *ibid*.

⁴⁰⁹ Colvin, E. (2014) *Conditional justice: Therapeutic bail in Victoria* (Doctor of Philosophy thesis, Monash University).

Similarly, many stakeholders related instances of women missing appointments and meetings, particularly under the Drug Court program, due to the competing demands as the sole parent of young children.

The CIJ's evaluation of the WTJ program, which included practitioner reports about the limits of court-based therapeutic bail programs for women, echoed the insights emerging from these consultations. Findings included the fact that assessments for support through CISP were not sufficiently timely and could take a number of days or weeks, as well as that the compliance-based approach of CISP meant that many WTJ clients needed additional, outreach-based support to succeed on bail. Support was needed, in particular, to attend and cope with CISP appointments, which women experienced as punitive and as an extension of the criminal justice system, rather than as a support.⁴¹⁰

While the recent enhancement of CISP has potential to meet the needs of criminalised women more effectively, the emerging evidence signals a clear need for all therapeutic court programs to adopt a gender-informed approach. This should include gender-informed assessment and intake models; more comprehensive wrap-around services and care coordination; and the adoption of proactive and assertive outreach.

3.3.1.2 Specialist, gender-informed bail support

A number of international jurisdictions and their correctional regimes have developed specific support programs for women in the community on bail. As referred to above, an example of one such program in Victoria – funded through a grant from the Victorian Legal Services Board – was the WTJ pilot program.

Under the pilot, women were provided with gender-informed legal advice and representation in bail applications, as well as gender-informed, outreach-based case management. The program sought to improve women's prospects of being granted bail, as well as to support them to remain safe and stable in the community while on release.

Justice innovation: Women Transforming Justice

The WTJ project was a multi-component program delivered by Fitzroy Legal Service (FLS), the Law and Advocacy Centre for Women (LACW) and Flat Out Inc. which sought to “proactively advocate for decarceration” at both the individual and systemic level through:

- the facilitation of a Women's Leadership Group for women with lived experience of the criminal justice system, supported by FLS;
- the development of an integrated Court Support Program (CSP) for women, operated by LACW and Flat Out; and
- advocacy for systemic reform, led by FLS.

The overarching objective of the CSP component was to support women to be released from, and stay out of, custody. It met this aim by providing skilled, integrated and women-specific legal representation and outreach-based case management, as well as by attempting to influence decision-makers to take a gender-responsive approach.

The evaluation found that the CSP had improved legal outcomes for the majority of women accessing the program, with 76 per cent of clients being granted bail at their first application. Women were also supported with their non-legal needs, including through intensive outreach; practical assistance, such as transport to and from appointments, food or phone vouchers; assistance to find housing and advocacy for referrals to other services.

⁴¹⁰ Campbell et al., 2020, above n 30.

Support continued to be offered during COVID-19 restrictions during 2020, when the project partners doubled their efforts to pursue bail applications and continued to provide face to face outreach to women once they were on bail.

Court observations conducted for the evaluation witnessed judicial officers stating that, “but for” the intensive support offered by LACW and Flat Out, they would have remanded the woman appearing before them into custody.

Despite the effectiveness of the program, the evaluation found that structural drivers and lack of services in the community were a barrier for women succeeding once they had been granted bail, with lack of a supported housing pathway a particular challenge. The evaluation also found that criminalised women faced distinct barriers in accessing services, including:

- strict bail conditions with which women struggled to comply due to lack of financial resources, including for public transport or petrol to attend appointments;
- strict service eligibility criteria, including related to substance dependence or a criminal history that excluded them from services, such as residential rehabilitation;
- exclusion from specialist family violence services because of criminal histories or identification by police as a perpetrator;
- assessments by external services that women were “too complex” to engage; and
- resulting stigma and fear about service engagement from criminalised women, including that engagement would prompt child removal.

The evaluation found that program measures which focused on recidivism – or even on the successful granting of bail – were not always useful in the context of women experiencing multiple and intersecting needs. Rather, evaluation findings made clear that earlier indicators of ‘success’ for criminalised women should include:

- women returning to and/or staying engaged with assertive outreach support and legal representation when required, including over a long period of time;
- women having secure housing;
- women returning to services for support, when required; and, critically
- women staying alive once they were in the community.

Recommendations from the evaluation included that the partners develop a Framework for Gender Responsive Approaches which could drive wider service system reform. This would involve the production of advocacy tools which could be used to increase understanding of decision makers, policymakers and service providers around how best to respond to women who have come into contact with the criminal justice system, including:

- lists of practical considerations that need to be taken into account by judicial officers when making orders in relation to criminalised women, such as access to transport; phones; and other resources which are crucial to women being able to comply with bail conditions and sentencing outcomes based in the community;
- Resources to support understanding around the relationship of multiple, co-occurring issues to pre-existing and ongoing trauma which mean that women may need additional supports to engage effectively with other services, rather than being dismissed by services as being “too complex”.

As WTJ was a pilot, the funding for the CSP component concluded at the end of 2020. The funding for another fundamental component, the Women's Leadership Group, is continuing, with findings from the evaluation similarly indicating the multiple benefits and strength which women gained from their participation in the group. This included their capacity to share their stories and influence systemic reform, experience employment, and set their own agenda. As the evaluation indicated, however, the CSP component was just as critical, particularly in the context of identified barriers to service engagement and bail completion. Accordingly, the CIJ recommends that government consider funding programs which include specialist legal advice and representation, as well as assertive, outreach-based case management for women.

3.3.1.3 Residential bail options

As highlighted in relation to the WTJ project, dedicated housing options are a fundamental missing ingredient in existing bail support programs in Victoria, even in gender-informed bail support programs. With the high prevalence of homelessness experienced by justice-involved women, and the associated growth in the female remand rate in Victoria,⁴¹¹ this indicates an urgent need for tailored housing options for criminalised women. One such option that has received limited attention in the literature is the establishment of residential bail hostels for women.

Bail hostels have been characterised as a viable alternative to remand when designed appropriately.

A feature of UK bail support programs, bail hostels have been characterised as a viable alternative to remand for women.⁴¹² While hostels established in the ACT and in South Australia provide limited evidence on their effectiveness in Australia,⁴¹³ when combined with evidence from the UK, useful insights can be gleaned about appropriate design.

Despite the failure to consider gender explicitly, a recent review into bail hostels in Australia brought to light factors important for consideration.⁴¹⁴ One South Australian bail hostel reviewed, was set up specifically to address the high rate of people on short term remand who were homeless or at risk of homelessness and experiencing "addressable issues". Offered in partnership with Anglicare South Australia, the service consisted of a purpose-built facility with 30 self-contained units on several floors. The program catered for women charged with criminal offences, as well as Aboriginal and Torres Strait Islander men and women facing charges. Those who were accepted into the program paid rent through their private earnings, on the assumption that the accommodation enabled the participant to establish or maintain employment.

A number of challenges and shortcomings of the program were highlighted. These included a "no visitors" policy, unless visitation happened in the foyer, as well as the inability to accommodate defendants with children.⁴¹⁵ This highlights the continuing dominance of male-centred program design and the need for the adoption of more gender-responsive models.

Challenges encountered in the UK similarly suggest that hostels need to adopt a more holistic approach to meet the many support needs with which women present. A 2004 report found that, despite women-only hostels reporting vacancies, bail officers struggled to find places for women. Investigating this further, the author found that either the hostels were rejecting some women on the basis of factors such as substance dependence or serious mental health issues; or, alternatively, that women were reluctant to use the hostels, deeming them unsuitable due to a lack of appropriate facilities for children, as well as distance of their home community.⁴¹⁶

⁴¹¹ Russell et al., above n 15.

⁴¹² Pratt, J., and Bray, K.(1985) 'Bail hostels – Alternatives to custody?' 25(2) *The British Journal of Criminology*, 160-171; Corston, above n 403.

⁴¹³ It is difficult to determine with certainty the effect of bail hostels as they are still in its early days of implementation, and the first external review has not been made publicly available.

⁴¹⁴ Presneill, A. (2018) *A Viable Solution? Bail Hostels in the ACT*. ACT Inspector of Correctional Services.

⁴¹⁵ Ibid.

⁴¹⁶ Edgar, above n 210, 35.

Insights from the CIJ's consultations with service agencies reflect and expand on the concerns discussed in the literature. A paramount issue raised by partner agencies in consultations is that such facilities should be independent of Corrections funding and management. Stakeholders saw this as essential to avoid the net-widening of systems surveillance to women who have yet to be convicted, as well as features and processes that replicate those of correctional facilities. These include things such as CCTV cameras; 24-hour on-site surveillance; locks on doors; restrictions on visitors (and in particular, children); strict curfew conditions; and external access to client case notes and assessment plans, all of which can increase the likelihood of breach proceedings.

Overall, feedback from stakeholders stressed the need for well-designed, gender-specific and culturally appropriate⁴¹⁷ residential bail support that is adequately resourced to provide case managed support.

3.3.2 Early and sufficient rehabilitation and integration support

Bangkok Rules

- Prison staff to be trained to ensure that they have the skills to support the rehabilitation and reintegration of women prisoners (Rule 29).
- Gender-specific assessment and classification methods to be implemented for women to ensure individualised planning for their early treatment, rehabilitation and release. Assessment must:
 - Take into account the generally low-risk profile of women prisoners and the particularly harmful effects of high-security measures on women;
 - Include the collection of background information relating to women's experiences of violence, mental disability and substance abuse, as well as parental and care-taking responsibilities;
 - Ensure that women's sentence plans include programs and services that match their needs;
 - Ensure that women with mental health-care needs are housed in the least restrictive and lowest security level possible and receive appropriate treatment; (Rules 40 & 41).
- Prisons are to provide for home leave, open prisons, halfway houses and community-based programs to assist women's transition from prison, reduce stigma and re-establish contact with their families at the earliest possible stage (Rule 45).
- Prisons, in collaboration with non-government support agencies are to provide comprehensive and individualised rehabilitation plans for women (Rule 46).
- Further psychological, medical, legal and practical support shall be provided to women after release, in cooperation with community agencies (Rule 47).

⁴¹⁷ Discussion in relation to culturally appropriate bail programs is featured under Foundation Four: Community-led design.

While there is limited data on the efficacy of custodial rehabilitation programs designed for women, there is clear evidence that measures to address the causes of offending and support integration into the community upon release are successful in reducing recidivism. In fact, without rehabilitation, incarceration alone is likely to *increase* rates of offending.⁴¹⁸ Reforms which aim to promote rehabilitation therefore have important implications for community safety, as well as meeting social justice and cost-saving objectives.

Without rehabilitation, incarceration is likely to *increase* rates of offending – but institutions with a primary function of depriving liberty should never be the vehicle for support when support could be provided in the community.

The CIJ is mindful that advocacy for investment in the rehabilitative capacity of prisons can seem at odds with a justice

reinvestment approach. The CIJ's clear position is that institutions which have a primary function of depriving people of their liberty should never be prioritised as the location for treatment and support when that support could be more appropriately provided in the community.

Given the system's lack of focus on the objective of rehabilitation as discussed at 3.1.2, it is also the CIJ's view that the funding and contracting of community services under the proposed Women's Justice Reinvestment Strategy should occur outside Corrections Victoria. As discussed above, this would help to prevent what practitioners contributing to this paper described as a drift in the provision of Corrections funded programs by community-based services towards a more punitive approach – one that often perpetuates women's entrapment in the criminal justice system.

By way of context, increased investment in prison programs needed under this reform foundation must occur in parallel with wider measures to reduce female prison numbers. The ultimate aim should be to build the service capacity of the community sector to meet the needs of criminalised women *in the community*, via early intervention, as well as via transition from prison and post-release supports where contact with the system has not been able to be prevented.

3.3.2.1 Adequate resourcing

The Bangkok Rules provide an unequivocal imperative for governments and prison services to ensure that women's contact with the prison system maximises opportunities for rehabilitation and integration into the community upon release. Yet a 2015 investigation into rehabilitation and transitional programs provided in Victorian prisons by the Victorian Ombudsman found significant deficiencies and gaps in the support available to people in prison.⁴¹⁹

The Ombudsman reported problems in service provision across most program areas,⁴²⁰ noting that rising numbers were contributing to significant delays in people accessing programs in custody, including substance dependence programs. Combined with limited access to transitional support and treatment, this resulted in little or no supports available at both entry and exit points. This situation was described as "a lost opportunity for early intervention", with follow-up support in the community post-release available to only 20 per cent of prisoners released.⁴²¹

A limited number of beds for specialist mental health treatment similarly compromised the support provided to people in custody experiencing acute distress, with a lack of specialist support for the many people in custody living with an ABI. Corrections Victoria were described as continually "fail[ing] to meet benchmarks for the education and training" to which they had committed.

⁴¹⁸ Bartels L. & Gaffney, A. (2011) *Good Practice in women's prisons: A literature review* Technical and Background Paper 21, Australian Institute of Criminology; Heseltine et al., above n 333; Andrews & Bonta, above n 34; Chen, M.K., & Shapiro, J.M. (2007) 'Do harsher prison conditions reduce recidivism? A discontinuity-based approach'. *American Law and Economics Review* 9: 1–29.

⁴¹⁹ Victorian Ombudsman, (2014) *Investigation into the Rehabilitation and Reintegration of prisoners in Victoria* Discussion Paper, October 2014.

⁴²⁰ Ibid.

⁴²¹ Only 700 of the approximately 6,600 people who leave prison each year are provided with transitional support and that this is limited in nature – generally between three and 22 hours of support. Ibid.

Concerns were also raised about inadequate resourcing for Aboriginal staff to deliver advocacy and support, as well as the fact that cultural programs designed for Aboriginal and Torres Strait Islander inmates were not consistently available across all prisons. In particular, the Ombudsman noted a lack of transitional support, finding that only 700 of the approximately 6,600 people who leave prison each year were provided with transitional support and that this was limited in nature – generally ranging between three and 22 hours of support.

In addition to inadequate funding for community agencies delivering transition programs, stakeholders consulted for this paper described how short-term funding cycles can hinder effective service delivery. Stakeholders explained that a lack of certainty relating to funding can impact on a service's ability to plan, develop and evaluate programs. This concern was reflected in a recent report which identified funding instability as one of four key obstacles in the delivery of effective transitional support for people leaving prison in NSW. A recommendation arising from that report was that funding contracts should be for a minimum of five years.⁴²²

In addition to these overall deficiencies, the Ombudsman noted that, while men in custody have access to transitional housing and a dedicated youth unit, there was no equivalent for women. Women were also found to have limited access to services.

The dearth of programs available to women is graphically illustrated in testimony recently provided to the disability Royal Commission in Victoria.

Unlike men, women have no access to a residential program to help in the transition from prison to the community, and have limited access to other support services.



*...programs and courses [are] available for men and not for women...I don't even understand that, nothing for women. You know, I did like industrial cleaning or something like that, first aid, but that's sort of like --- that's the cap of what Corrections could offer me, whereas for men there was like, you know, family violence, there was anger management, help with getting a job, help with this, help with that...I just lived in a constant state of "I don't know if I'm going to make it", desperation and hopelessness. It's like it didn't matter what I tried or who --- who I talked to, it was --- it was as though --- I just slipped through the cracks all the time, all the time. And no one cared...nobody cared at all.*⁴²³

3.3.2.2 Assessment and planning

The standards set by the Bangkok Rules envisage a holistic, trauma-informed, case-management approach to program planning and delivery in women's prisons. They stress the need for gender-informed, individualised assessment and reception processes that are geared to identifying and responding to the many vulnerabilities with which women received into prisons present, as well as the specific needs of Aboriginal and Torres Strait Islander women; women from CALD communities; women with a disability; and women who identify as LGBTQI+.

⁴²² Schwartz, M. Russell, S. Baldry, E., Brown, D., Cunneen, C., Stubbs, J. (2020) *Obstacles to effective support of people released from prison: Wisdom from the field* Rethinking Community Sanctions Project, UNSW.

⁴²³ Evidence of Dorothy Armstrong, Transcript of proceedings, Tuesday 23 February 2021. Day 6. Accessed 18 March 2021 from <<https://disability.royalcommission.gov.au/system/files/2021-02/Transcript%20Day%206%20-%20Public%20hearing%2011%2C%20Brisbane.pdf>> Dorothy is an Adviser and Peer Support Worker employed by the CIJ.

Echoing this, the Victorian Ombudsman recommended that effective case-management should be delivered by community-based services and that medical and mental health assessment of women should be conducted immediately upon their reception into custody, linked with discharge planning and connection with external supports, particularly housing.

Reception processes also help to determine an individual's security classification, with this classification in turn influencing access to work and rehabilitative programs. Commentators have noted that, when applied to women, generic assessment processes can result in security ratings that are unnecessarily high, particularly when women's experiences of violence and their resulting poor mental health are misinterpreted as a security risk.⁴²⁴ This highlights the importance of requirements set by the Bangkok Rules for the development and implementation of classification methods that are gender-specific.

3.3.2.3 Transition and post-release support

Currently, it is estimated that one third of women who have been incarcerated in Victoria will reoffend and return to prison,⁴²⁵ with high recidivism rates generally attributed to a lack of adequate post-release services.⁴²⁶ Similar to the lack of supports for women on bail, as noted above, in 2015 the Victorian Ombudsman concluded that the growing number of women in prison was influenced by the lack of a medium security prison or transition centre and, as a result, the minimal options available to women for a staged transition to life in the community.⁴²⁷

Here it is important to note the work of community-based support post-release delivered by organisations such as Jesuit Social Services, the Victorian Association for the Care and Resettlement of Offences, the Australian Community Support Organisation and others. These agencies receive funding through the Department of Justice and Community Safety (DJCS) to provide transition and post-release support to people who have been in custody.

Around one third of women who have been incarcerated in Victoria will reoffend and return to prison. High recidivism rates are generally attributed to a lack of adequate post-release services.

Flat Out are currently piloting the Women Inside and Out program, a philanthropically funded program providing personalised case management via a dedicated support worker for women six months before release, through to 12 months post release. Based on an assertive outreach model, the program assists women to access support in areas such as housing, health (including AOD and mental health) reunification with children, financial concerns and pending legal matters.

As the CIJ's 2017 study of one such service identified, the challenges facing these services include that funding is cyclical and short-term; that housing stock is deeply under-resourced or difficult to access; and that clients' needs post-release are so significant and varied that it is incredibly difficult to ensure that they have access to, and remain engaged with, necessary services. The compliance-based focus of Corrections engagement post-release also poses a substantial challenge.⁴²⁸

⁴²⁴ Huber, above n 26.

⁴²⁵ Quinn, K., (2008) *Women and Corrections, Gender Impact Assessment*, Women's Health Victoria, No 3, 1-12

⁴²⁶ Prison Reform Trust 2017, above n 53.

⁴²⁷ Victorian Ombudsman, 2014, above n 420. Also of concern is the fact that women on remand, who have yet to have charges proved against them, are also being housed in a maximum security facility.

⁴²⁸ Campbell, E. (2017) *Integrating the Indefensible: what role should the community play?* Centre for Innovative Justice, RMIT University <<https://cij.org.au/cms/wp-content/uploads/2018/08/integrating-the-indefensible-cij.pdf>>

Research on incarcerated women's post-release needs has also highlighted the lack of pre-release planning⁴²⁹ and the inadequacies of male-centred post-release programs as major reasons for poor community transitions for women. In particular, Baldry argues that conventional post-release programs and the 'throughcare' model of prisoner management⁴³⁰ fail to deliver for women given:

- they are generally not available to people who are in custody for shorter periods of time, including those on remand, which is the most common experience of prison for women;
- the lack of specialist programs which accommodate high rates of mental health, cognitive and substance dependence disorders amongst women; and
- the disproportionate levels of disadvantage from which women enter prison and return to post-release.

Given barriers to accessing services which can help women to prepare for release, combined with restricted access to support and housing in the community, women are increasingly likely to be released from remand or sentence without the opportunity to address the gendered factors contributing to their offending.

Day and colleagues also found that women are unable to access services due to a range of reasons, including child caring responsibilities and the cost of travel to agencies, while financial difficulties can force women to return to abusive relationships or to resort to illicit sources of income.⁴³¹ This echoes findings from the WTJ evaluation in relation to women's capacity to comply with bail conditions. Important to note, barriers to accessing services were further exacerbated during the recent COVID-19 crisis, when beds in some AOD rehabilitation services were halved, while some services stopped taking referrals altogether.⁴³²

Aboriginal women, in particular, are poorly serviced by post-release programs⁴³³ and often do not feel like they are consulted around their needs for transitioning out of prison.⁴³⁴ In addition to the absence of programs meeting the needs of Aboriginal women, Abbott and colleagues' review of literature indicates that Aboriginal and Torres Strait Islander options for release disproportionately exclude them from access to support programs.

A considerable body of research exists regarding the characteristics of effective programming for prison-to-community transition.⁴³⁵ Lessons from available data on the features which promote effective rehabilitation include the following:

- punitive and surveillance-oriented approaches are largely ineffective and can increase recidivism.⁴³⁶ Services that work collaboratively with participants work best, particularly for women;⁴³⁷
- tailored, rather than one-size-fits-all approaches are more likely to reduce offending;⁴³⁸

⁴²⁹ Trotter & Flynn, above n 125.

⁴³⁰ This is the policy of ensuring continuous and coordinated management of prisoners from their reception until their successful integration in the community on release and is the dominant correctional policy in Australia. Baldry, E. (2010) 'Women in Transition: From Prison to...' 22(2) *Current Issues in Criminal Justice*, 253, 256.

⁴³¹ Day et al., above n 53.

⁴³² Caruana, above n 16.

⁴³³ Abbott et al., 2018, n 195.

⁴³⁴ Baldry 2010, above n 431.

⁴³⁵ We rely here on useful summaries of the literature provided in Green et al., 2020, above n 270; Trotter & Flynn, above n 125; Barnett, G., & Howard, F. (2018) 'What doesn't work to reduce reoffending? A review of reviews of ineffective interventions for adults convicted of crimes.' 23(2) *European Psychologist*, 11-129

⁴³⁶ Barnett & Howard, *ibid*.

⁴³⁷ Trotter, C., McIvor, G., & Sheehan, R. (2012), 'The effectiveness of support and rehabilitation services for women offenders' 65(1) *Australian Social Work*, 6-20.

⁴³⁸ Sapouna, M., Bisset, C., Conlong, A-M., & Matthews, B., (2015) *What works to reduce reoffending: A summary of the evidence*. Justice Analytical Services, Edinburgh: Scottish Government.

- the use of high-intensity interventions for low-risk offenders can be counter-productive;⁴³⁹
- assessment of risk plays a crucial role and should be gender-sensitive;⁴⁴⁰
- wrap-around, multi-faceted interventions, including life skills, housing support, drug and alcohol treatment, employment placement and follow up support, work best.⁴⁴¹
- services for women in particular should be holistic, and should include family-focused interventions,⁴⁴² as well as support for finance and debt;⁴⁴³
- employment and training programs are important but are likely to be ineffective when provided in isolation;⁴⁴⁴
- improved social support, mentoring and quality relationships between supervisors and program participants is important;⁴⁴⁵ and
- unpaid community work must be seen as meaningful and worthwhile to participants.⁴⁴⁶

Maintaining a community-based order is challenging for many offenders, with innovative approaches to the concepts of offender “risk” and “need” required to assist and complement their successful completion. Qualitative research suggests that voluntary, pro-social models of community integration are effective.

For example, a recent evaluation of the Neighbourhood Justice Centre⁴⁴⁷ suggests that community justice models achieve significant improvements in community order compliance when compared with more traditional, compliance-based approaches. The author of this particular evaluation noted that community justice models pose evaluative difficulties because it is difficult to attribute positive outcomes to a single cause – arguably echoing the WTJ evaluation’s findings that measures of success in this field must become more nuanced.

Similarly, an investigation of the Victorian Association for the Care and Resettlement of Offenders (VACRO) Women’s Mentoring Program suggests that there are indirect links between mentoring and the positive outcome of “desistance”, yet the precise nature of the association was not able to be identified with any certainty.⁴⁴⁸

⁴³⁹ Sentencing Advisory Council, (2019b) *Rethinking sentencing for young adult offenders* Victorian Government; Gill, C., & Wilson, D.B. (2017) ‘Improving the success of re-entry programs: Identifying the impact of service-need fit on recidivism’. 44(3) *Criminal Justice and Behaviour*, 336-359.

⁴⁴⁰ van Voorhis, P., Wright, E.M., Salisbury, E., & Bauman, A. (2010), ‘Women’s risk factors and their contributions to existing risk/needs assessment: the current role of a gender responsive supplement’, 37 *Criminal Justice and Behaviour*, 261-288.

⁴⁴¹ Newton, D., Day, A., Giles, M., Wodak, J., Graffam, J., and Baldry, E. (2018) ‘The impact of vocational education and training programs on recidivism: A systematic review of current experimental evidence 62 (1) *International Journal of Offender Therapy and Comparative Criminology*, 187-207.

⁴⁴² One form of social support that is not extensively discussed in the literature but emerged from the CIJ’s consultations with service providers is the need for programs that build parenting capacity, as well as more direct support around reunification with children.

⁴⁴³ Cobbina, J. E., ‘Reintegration success and failure: Factors impacting reintegration among incarcerated and formerly incarcerated women’ (2010) 49 (3) *Journal of Offender Rehabilitation*, 210-232.

⁴⁴⁴ Newton et al., above n 441.

⁴⁴⁵ Sapouna et al., above n 438.

⁴⁴⁶ Mc Ivor, G., (2010) ‘Paying Back: 30 years of unpaid work by offenders in Scotland’ 2(1) *European Journal of Probation*, 41-61

⁴⁴⁷ Ross, S. (2015) *Evaluating neighbourhood justice: Measuring and attributing outcomes for a community justice program*, Australian Institute of Criminology. See also the companion evaluation of the cost effectiveness of the model: Morgan, A., & Brown, R. (2015) *Estimating the costs associated with community justice*, Australian Institute of Criminology.

⁴⁴⁸ Brown, R., & Ross, S. (2018) ‘Assisting and Supporting women released from prison: Is mentoring the answer?’ *Current Issues in Criminal Justice* 22(2) 217 – 232.

A 2012 evaluation of a separate program operated by Women and Mentoring (WAM) also found links between mentoring support and women's increased confidence and capacity to cope with life in the community in ways which would contribute to a process of desistance.⁴⁴⁹ This evaluation noted, however, that short-term studies were not sufficient to map any links between mentoring support and more concrete, conventional measures, such as recidivism, given that desistance from offending was such a long-term prospect for many criminalised women.

A more recent evaluation of the WAM program⁴⁵⁰ found that the program was successful in supporting women to address issues associated with their offending. Mentors were found to be particularly effective in helping women to achieve goals relating to substance misuse and mental health by supporting women to seek professional help; and by maintaining contact with women when they were in hospital or rehabilitation. Only 13 per cent of women matched with a mentor reported reoffending during their involvement with the program.

In sum, knowledge of "what works" in criminal justice suggests that offender needs - whether linked directly or indirectly to offending behaviour - must be fully acknowledged in order to expect positive outcomes in the successful completion of court orders.⁴⁵¹ The literature also stresses the need for a rethink as to how to *measure* the effectiveness of interventions supporting transition from prison. This is discussed under Foundation Five. Similar to the experience of court-based bail support being experienced as punitive, referred to above, where post-release supports are overseen by Corrections Victoria, critics have also expressed concerns that they form part of a "reintegration industry"⁴⁵² which simply extends correctional involvement in a woman's life⁴⁵³ without addressing the factors known to drive her into contact with the system she is endeavouring to leave.

3.3.3 Investment in an integrated service sector

Stakeholders consulted for the CIJ's scoping project stressed that the fragmented nature of the service sector compounded disadvantage for criminalised women. Integrated practice requires time and resourcing, while under-resourced services face barriers to collaboration, including competing for funding. As a result, the sector can be ill-equipped to address the complexity of women's interconnected needs. The need for greater system collaboration and information sharing were key findings from the CIJ's Supporting Justice Project – a project aimed at improving the justice system's response to people with cognitive impairment and intellectual disability.⁴⁵⁴

Stakeholders also highlighted, and the WTJ evaluation confirmed, how stigma and discrimination experienced by criminalised women can impact their access to services, particularly for women charged with violent offences or presenting with mental health or AOD issues.⁴⁵⁵ As a result, women (and services) can fall through the gaps or remain unaware of available supports.

Ensuring women's early access *in the community* to the services which address issues known to be associated with women's criminalisation – and, in particular, affordable housing, protection from violence and effective treatment for substance dependence – are therefore the best ways of diverting them from involvement in the criminal justice system.

⁴⁴⁹ Keating, C. (2012) Evaluation of the Women and Mentoring Program. Final report, Effective Change <<http://womenandmentoring.org.au/cms/wp-content/uploads/2014/09/Women-and-Mentoring-Evaluation-Report.pdf>>

⁴⁵⁰ Clapp, C., & Rosauer, K. (2021) *Women and Mentoring*, Melbourne: Lirata Consulting.

⁴⁵¹ Brown & Ross, above n 448.

⁴⁵² Carlen, P. & Tombs, J. (2006) 'Reconfigurations of penalty' 10 *Theoretical Criminology*, 337-360.

⁴⁵³ Carlton, B. & Baldry, E. (2013) 'Therapeutic correctional spaces, transcarceral interventions: post-release support structures and realities experienced by women in Victoria, Australia' in Carlton, B. & Segrave, M. (ed), *Women exiting prison: critical essays on gender, post-release support and survival*, Routledge, 140-181; Bumiller 2013, above n 244.

⁴⁵⁴ Centre for Innovative Justice, Supporting Justice system map (Web Page) <<https://cij.org.au/research-projects/supporting-justice-system-map/>>

⁴⁵⁵ Such as facing exclusion from mainstream family violence services, as noted in Part Two.

The importance of support at the earliest possible opportunity was highlighted in a joint project between DJCS and the former Department of Health and Human Services (DHHS). This project examined the trajectories of a common client cohort who had interacted with justice and social services. Preliminary findings relating to service interactions for these groups included that:

- the first presentation to the service system was typically through crisis-end responses such as child protection, hospital emergency or Victoria Police as victims of crime;
- few of those initial presentations resulted in referrals to other support and, of those, even fewer individuals subsequently engaged with services;
- common clients then tended to have minimal service interactions from that initial presentation until they entered the system at the 'pointy-end' i.e., through either child protection or criminal justice involvement as people charged with offences; and
- across the cohorts, a small proportion represented the majority of service usage across DJCS and DHHS.⁴⁵⁶

These findings point to the need for effective intervention at much earlier points of contact with the justice and service system to prevent a trajectory into experiences of custody over the longer term.

In the UK, the Together Women Project (TWP)⁴⁵⁷ uses shop-front support hubs to offer holistic support to women charged with offences and those 'at risk' of offending and is one example of a coordinated and gender-informed approach. The TWP works closely with the local Probation Trusts – agencies that perform a role similar to that of Community Correctional Services in Victoria – to provide intensive support programs at TWP centres.

While the CIJ notes the caution the involvement of correctional services, this collaboration appears to play a pivotal role in developing sentencing packages in partnership with clients; as well as giving judicial decision-makers increased confidence to order women to undertake a community-based sentence. The adoption of a client-centred approach is reported as providing a sense of agency for women who are often disempowered by their previous experiences of victimisation and is described as key to the program.⁴⁵⁸

Closer to home, the Miranda Project⁴⁵⁹ is a gender-specific approach to crime prevention, diversion and post-prison support for women in NSW. The program offers holistic support *in the community* for women with multiple needs who are at risk of family violence and criminal justice system involvement, as well as women attending court, on community orders, or exiting prison.

⁴⁵⁶ Ellard, R., Campbell, E., & Caruana, C. (2020) *Strengthening Victoria's Victim support system: Victim Services Review – Final report*, Centre for Innovative Justice, RMIT University. At <<https://cij.org.au/cms/wp-content/uploads/2020/11/strengthening-victorias-victim-support-system-victim-services-review-centre-for-innovative-justice-november-2020.pdf>>

⁴⁵⁷ Based on best practice from other similar schemes e.g., the Asha Centre and the 218 Centre. See: Rungay, J. (2004) *The Asha Centre: Report of an Evaluation*, The Asha Women's Centre; Loucks, N., Malloch, M., McIvor, G., and Gelsthope, L., *Evaluation of the 218 Centre* (2006) Scottish Executive Justice Department).

⁴⁵⁸ Hollin, C., & Palmer, E. (2006) 'Criminogenic need and women offenders: A critique of the literature.' *Legal and Criminological Psychology* 11, 179-195.

⁴⁵⁹ Stubbs, J. & Baldry, E. (2017) 'In pursuit of fundamental change within the Australian penal landscape. Taking inspiration from the Corston Report' in Moore L. et al., (ed) *Women's imprisonment and the case for abolition: Critical reflections on Corston ten years on*. Routledge. See also: The Miranda Project (Web Page. Community Restorative Centre) <<https://www.crcnsw.org.au/services/miranda-project/>>

Justice innovation: The Miranda Project (NSW)

The Miranda Project is an initiative of the NSW Corrective Services NSW Women's Advisory Council; the Community Restorative Centre, a community-based service providing support to people involved in the criminal justice system and their families; and "an independent group of committed women in the community".⁴⁶⁰

Run by women, for women, the Miranda Project was funded in 2017 by Women NSW to prevent women becoming criminalised, and to divert them from custody by providing support for women at risk of offending; pre-sentence as an option for women on bail; as part of a community-based sentence; or as a condition of parole.

Providing services both in the community and in custody, Miranda offers casework support, group activities, access to victims counselling, and connections with other key services.

⁴⁶⁰ Stubbs & Baldry, *ibid.*, 129. This group of activists worked alongside several individuals who personally funded the development of the initiative.

Opportunities for reform

Gender-informed supports

To support the suite of reforms aimed at assisting women to complete bail and sentences in the community, the Women's Justice Reinvestment Strategy should include:

- Commissioning of a review of available bail support programs and a concerted program of investment to ensure that there is gender-informed and appropriate support for women completing bail in the community;
- Development of a Gender Responsive Framework for decision makers and service providers to understand the practical, as well as trauma-based, needs of women seeking to comply with bail conditions or community-based sentences.

To perform an early intervention, crime-prevention function, the Women's Justice Investment Strategy/Taskforce should also commission a feasibility study for the piloting of an independent, community-based woman's support hub in Victoria. Learning from The Miranda Project in NSW and similar initiatives in the UK, the pilot program should incorporate the following characteristics:

- Working closely with Community Correctional Services in the support of women on bail, CCOs, or on parole;
- Engaging with courts and judicial officers to ensure that the service is viewed as an appropriate referral point for women seeking bail;
- Providing mentoring opportunities to women in contact, or at risk of contact, with the criminal justice system through collaboration with, and investment in, existing Victorian mentoring programs;
- Most crucially, operating as a community-based project, rather than as an extension of Corrections, and funded independently of Corrections.

Targets and accountability

To support women's access to and engagement with these supports, the Women's Justice Reinvestment Strategy should include:

- Development of targets for the rehabilitation and reintegration of prisoners, with specific targets relating to Aboriginal people, women and young people, as well as for individual prisons. These targets should be reported to the Victorian Parliament, with updates on progress in meeting those targets to be provided every 12 months.
- Development of targets in relation to women's engagement with early intervention, in-prison, transition and post release services, including universal supports such as medical, mental health and disability services.

Priority targets should include:

- Establishment of a residential transitional release facility for women, with through-care support via continued case-managed, holistic supports; and
- Development of minimum standards in the delivery of post-release support to be incorporated into the *Standards for the Management of Women Prisoners in Victoria*.

The minimum standards should include case-managed support to ensure that women are provided with: short-term housing for women at risk of homelessness on release; adequate documentation for proof of identity; a Medicare and Myki card; financial assistance for the first week of release; assistance to establish an email account and procure a mobile phone; copies of educational and vocational qualifications, including those attained in prison; and appropriate transport on release.

3.4 Foundation Four: Community led design



Our criminal justice system is in crisis, but that crisis is not to do with an increased criminality of our people. It is caused by unnecessary over-incarceration and a lack of desperately needed investment in community diversion options. The system is broken. We are not.

June Oscar, Aboriginal and Torres Strait Islander Social Justice Commissioner⁴⁶¹

From the RCIADIC 30 years ago, to the detailed 2017 report arising from the ALRC's national inquiry,⁴⁶² there is no shortage of knowledge on the nature and extent of the shameful over-representation of Aboriginal people across Australia's criminal justice systems and the deep, systemic change that is urgently required. In discussing options to reverse the imprisonment rate of Aboriginal women – the fastest growing cohort of the prison population – it is therefore not the CIJ's intention to canvass the many recommendations made in the last thirty years, or to propose new mechanisms for their implementation.

Aboriginal women are the fastest growing cohort in the Victorian prison population.

With implementation of the RCIADIC recommendations showing disappointing progress, however, and the failure by the Commonwealth Government to offer formal acknowledgement of the ALRC's recommendations, the political impetus for change appears limited at best.⁴⁶³ For this reason, the CIJ joins calls for governments at all levels to take urgent action⁴⁶⁴ to implement the ALRC recommendations and to invest in culturally responsive women's justice programs.

3.4.1 Achieving better justice outcomes

The most recent report on key indicators relating to Aboriginal and Torres Strait Islander disadvantage indicates positive progress in some areas relevant to health, aspects of education and connection to culture. There has been little or no change for some indicators, however, and clear evidence of regression in others. For example, the adult imprisonment rate *increased* by 72 per cent between 2000 and 2019 and, while the youth detention rate decreased, it is still 22 times the non-Indigenous equivalent.⁴⁶⁵

Findings from the ALRC inquiry clearly indicate that Aboriginal people fare significantly worse than non-Indigenous Australians at *all* stages of the criminal justice process. Data from 2016 presented in the ALRC's report indicates that Aboriginal people are:

- more likely to come to the attention of police and seven times more likely to be charged;
- less likely as a young person to be cautioned, and more likely to face charges;

⁴⁶¹ McDonald, P. (31 March 2020) 'Urgent action needed over high proportion of Indigenous women in prison, report says' ABC News online. <<https://www.abc.net.au/news/2020-03-31/urgent-action-needed-over-indigenous-women-in-jails/12103372>>

⁴⁶² ALRC 2017, above n 28.

⁴⁶³ Law Council of Australia, 2020, above n 364.

⁴⁶⁴ Allam, L. (26 October 2020) 'Stop reporting and start doing, lawyers tell NSW inquiry into 'inhumane' Indigenous incarceration' *The Guardian*, (online) <<https://www.theguardian.com/australia-news/2020/oct/26/stop-reporting-and-start-doing-lawyers-tell-nsw-inquiry-into-inhumane-indigenous-incarceration>>

⁴⁶⁵ Productivity Commission (2020b), *Overcoming Indigenous Disadvantage: Key Indicators 2020*. For the Steering Committee for the Review of Government Service Provision (Australian Government 2020).

- 11 times more likely to held on remand;
- 12.5 times more likely to receive a sentence of imprisonment for like offences;
- significantly over-represented in receiving short sentences of imprisonment, partly due to the unavailability or unsuitability of community-based alternatives; and
- disproportionately impacted by mandatory sentencing provisions and fine enforcement regimes.

Failings in achieving better justice outcomes for Aboriginal people in Victoria and other Australian jurisdictions have been linked, amongst other things, to limited opportunities for Aboriginal self-determination⁴⁶⁶ in the context of a state-run criminal justice system.⁴⁶⁷ Justice systems have conspicuously lagged behind in endorsing community-ownership of solutions to the over-representation of Aboriginal people in the criminal justice pipeline.⁴⁶⁸

The 35 recommendations made by the ALRC, and those arising from the 2017 report of the *Royal Commission into the Detention and Protection of Children in the Northern Territory*, provide a comprehensive roadmap for governments to improve justice outcomes for Aboriginal children and adults. While only two of the ALRC recommendations are specific to women, most (such as recommendations for the greater use of restorative justice, as well as the importance of justice reinvestment)⁴⁶⁹ would have a significant impact on the rate at which women come into contact with the justice system. Monitoring of implementation by the ALRC, however, suggests only four instances of recommendations being implemented, three of which were Western Australian and Northern Territory reforms.⁴⁷⁰

In its 2018 review of progress in the implementation of the RCIADIC recommendations,⁴⁷¹ Deloitte similarly noted that, although 42 of the 339 recommendations related to the need for diversion from police custody and the use of imprisonment as a last resort, the rate at which Aboriginal people are being incarcerated indicates a wholesale failure of governments to engage with these recommendations. In fact, the lowest proportion of fully implemented recommendations across the Commonwealth and all states were found to be those relating to self-determination, non-custodial approaches and the cycle of offending.

Further, a comparison of average implementation status across states showed that Victoria lags behind the Commonwealth and the larger states of Queensland and NSW. Deloitte found that, while there were pockets of good progress, Victoria was not performing well in terms of the provision of non-custodial approaches and diversion from prison.

⁴⁶⁶ Recognised in international law and underscoring the recommendations of key reviews into Aboriginal incarceration, self-determination includes the right of Indigenous peoples to maintain their distinct legal institutions and processes, i.e., to make, administer and live by their own laws. See the United Nations Declaration on the Rights of Indigenous People.

⁴⁶⁷ For a discussion of the need for Aboriginal self-determination in the administration of justice, see Hughes, J.' (6 August 2020) 'To achieve racial justice, we must self-determine meaningfully'. Centre for Innovative Justice <<https://indigenoux.com.au/to-achieve-racial-justice-we-must-self-determine-meaningfully/>>

⁴⁶⁸ The establishment of the Indigenous sentencing courts, seen as a manifestation of self-determination, being a notable exception.

⁴⁶⁹ See discussion at Appendix A.

⁴⁷⁰ Australian Law Reform Commission, *Implementation*, <<https://www.alrc.gov.au/implementation-final-reports/>> Note however, that Victoria has introduced protocols for police to notify the Victorian Aboriginal Legal Service and Aboriginal Community Justice Panels when an Aboriginal person is brought into custody. In 2018, the Victorian Government and the Aboriginal Justice Caucus committed to piloting Aboriginal Community Justice Reports over the five-year period of Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4.

⁴⁷¹ Department of the Prime Minister and Cabinet, (2018) *Review of the implementation of the Royal Commission into Aboriginal Deaths in Custody*. <<https://www.niaa.gov.au/resource-centre/indigenous-affairs/review-implementation-royal-commission-aboriginal-deaths-custody>>

3.4.2 The role of Aboriginal Justice Agreements

Both Deloitte and the ALRC emphasise the centrality of Aboriginal Justice Agreements (AJAs) in pursuing effective justice reform in partnership with Aboriginal people. In particular, the ALRC concluded that AJAs can improve government accountability and are the vehicle via which joint justice objectives across government departments and agencies can be achieved.⁴⁷²

For over 19 years the Victorian AJA, a partnership between Victorian Aboriginal communities and the Victorian Government, has worked to improve Koori justice outcomes. The agreement reflects Aboriginal Victorians' aspirations for greater self-determination in the development of justice-related policy and community ownership, design and delivery of associated services and programs.

In 2018, *Burra Lotjpa Dunguludja* ('Senior Leaders Talking Strong'), the fourth phase of the Victorian AJA, was finalised.⁴⁷³ The agreement aims to close the gap on the over-representation of Aboriginal people in the justice system by 2031, including by ensuring:

- strong and safe Aboriginal families and communities;
- fewer Aboriginal people in the criminal justice system;
- a more effective justice system with greater Aboriginal control; and
- greater self-determination in the justice sector.

The Koori Justice Unit in the DJCS is playing a pivotal role in leading work under *Burra Lotjpa Dunguludja*. Three initiatives currently underway or completed that are of relevance to women are:

- **The Aboriginal women's residential program feasibility study:** a project to develop a model for a cultural and gender-specific residential program for Aboriginal and Torres Strait Islander women in Victoria who are involved with the criminal justice system;⁴⁷⁴
- **Family-centred approaches for clients with complex needs:** the development of a family-centred model for better addressing the needs of Aboriginal families in contact with the justice system to be implemented in three location on an ongoing basis; and
- **Bail assistance for Aboriginal women:** a project to develop women's bail support options which can better meet the cultural and gender specific needs of Aboriginal women applying for and completing bail.

A fourth project involves research to increase understanding into ways to support compliance with Community Corrections Orders by Aboriginal adults, and the potential for the establishment of an Aboriginal community-controlled model for delivering Community Correctional Services. All four initiatives share a common goal of privileging Aboriginal voices in the design and development of new service models which aim to improve justice outcomes for Aboriginal and Torres Strait Islander people.

It is essential that the Victorian AJA remains the primary vehicle for the implementation of the ALRC recommendations, as well as other reforms needed to reverse the ballooning incarceration rate of Aboriginal women in Victoria. This will ensure that criminal justice policies, processes and programs are community-owned, and therefore likely to be effective. By using existing frameworks, it will also help in managing the significant consultative burden on Aboriginal communities.

⁴⁷² ALRC, above n 28, 505.

⁴⁷³ Victoria's first Aboriginal Justice Agreement was finalised in 2000.

⁴⁷⁴ As part of its work advancing the strategies identified in [Burra Lotjpa Dunguludja](#), Phase 4 of the Victorian Aboriginal Justice Agreement, the Koori Justice Unit (KJU) in the Department of Justice and Community Safety (DJCS), commissioned Djirra, a family violence prevention and legal service for Aboriginal women, to undertake this study into residential alternatives to imprisonment of women. Conducted in partnership with the CIJ and PricewaterhouseCooper's Indigenous Consulting (PIC), the project will develop and test operating model options, and identify potential assets, locations and facility design.

3.4.3 Aboriginal and Torres Strait Islander people as victims of crime

While Aboriginal and Torres Strait Islander people experience disproportionate contact with the criminal justice system in terms of criminal offending, what is less well recognised is the profile of Aboriginal and Torres Strait Islanders as victims of crime. The fourth iteration of the Victorian AJA has a specific focus on victimisation experienced by Aboriginal communities, highlighting the need for:

- responses that coordinate support for families, when family members are involved in the justice system, to enhance their capacity to heal from trauma, and improve parenting, relationship, communication and problem-solving capabilities;
- meeting the specific needs of Aboriginal victims and witnesses of crime, particularly children;
- providing culturally-informed support and enabling access to the services needed to ensure that healing can occur, as well as support to enable access to services which assist in participation in the prosecution process;
- meeting the particular needs of vulnerable children and young people in out of home care due to family violence and supporting them to access the services they need to avoid future involvement with the criminal justice system;
- addressing underlying causes of offending through healing and trauma-informed approaches that explore the intergenerational experiences of people affected by violence, strengthening protective factors and increasing coping strategies;
- enabling Aboriginal stakeholders to self-determine program outcomes, design, deliver and evaluate justice services for Aboriginal people; and
- building the capacity of justice services to provide family-centred, wrap around, holistic programs and services that promote the healing of the individual and contribute to the wellbeing of the community.

In the CIJ's review and proposed redesign of Victim Support Services, commissioned by the DJCS, the CIJ made a number of recommendations in relation to improving supports for Aboriginal victims of crime.⁴⁷⁵ This included recommending that cultural safety should be a foundational requirement of all victim-focused services and supported through ongoing education, practice development, as well as continuous improvement activities which build the capacity of organisations and individual practitioners to support victims of crime from different backgrounds.

The CIJ similarly recommended that a Cultural Safety Practice Lead be engaged by the Victim Services, Support and Reform Unit in the DJCS to work with the Koori Justice Unit (KJU) to help meet the relevant goals of the fourth Aboriginal Justice Agreement. The CIJ also recommended:

- an increase in resourcing of culturally-specific roles in existing victim support services to enable gender-informed case management through employment of male and female practitioners, as well as to ensure that practitioners are not working in isolation and can support each other, with two roles ideally based at relevant service providers;
- resourcing to support greater capacity for community engagement and to recognise the importance of developing trust and community relationships in encouraging service engagement, as well as reporting of crime victimisation';
- a focus on service provision to Aboriginal clients, without a requirement to support additional, non-Aboriginal clients;

⁴⁷⁵ Ellard et al., above n 456.

- capacity of outreach based service support, including co-location of victim support services with Aboriginal Community Controlled Organisations, rather than with Victoria Police, as is currently the case in some circumstances;
- greater capacity for data collection and for tracking referrals and service provision relevant to distinct cohorts.

The CIJ urges the Victorian Government to maintain a focus on these recommendations as part of the Women's Justice Reinvestment Strategy. Doing so would assist in recognising the strong link between crime victimisation and offending, as well as the particularly acute relationship between crime victimisation, intergenerational trauma and contact with the criminal justice system experienced by Aboriginal women.

3.4.4 Culturally safe & competent programming

In discussing ways to address the over-incarceration of Aboriginal women, the ALRC emphasised the lack of appropriately designed programs and services. Accordingly, it recommended investment in trauma-informed and culturally appropriate approaches for women, including those provided by non-government organisations, police, courts and Corrections, "developed with and delivered by Aboriginal and Torres Strait Islander women".⁴⁷⁶

A core characteristic of culturally safe programming identified in the literature is healing through culture and country. This can include mentoring and storytelling sessions with Elders; art and artefact making; bush medicine; dance; and being on country.⁴⁷⁷ Culturally relevant programming can also involve reframing standard therapeutic activities, such as meditative techniques, in a culturally relevant context.⁴⁷⁸ Noting the complex circumstances in which clients often present, researchers suggest case management and problem-solving in order to stabilise and improve the safety and security of a client before embarking on cultural healing processes.⁴⁷⁹

Addressing the support needs of Aboriginal people involved in the justice system calls for both clinical and cultural competence.⁴⁸⁰ Key to ensuring that programs are culturally safe is the involvement of appropriately trained and supported Aboriginal staff.⁴⁸¹

⁴⁷⁶ ALRC 2017, above n 28. See recommendation 11-1.

⁴⁷⁷ As outlined in the NSW Aboriginal Residential Healing Drug and Alcohol Network (NARHDAN). Shakeshaft, A., Clifford, A., James, D., Doran, C., Munro, A., Patrao, T., Jeffries, D. (2018). Understanding clients, treatment models and evaluation options for the NSW Aboriginal Residential Healing Drug and Alcohol Network (NARHDAN): a community-based participatory research approach. In. Canberra: National Drug and Alcohol Research Centre, Department of the Prime Minister and Cabinet.

⁴⁷⁸ Hovane, V., Dalton Jones, T., & Smith, P. (2014). Aboriginal Offender Rehabilitation Programs in P. Dudgeon, H. Milroy, & R. Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Australian Government Department of Prime Minister and Cabinet, Telethon Institute for Child Health Research, Kulunga Research Network, The University of Western Australia, 2nd ed, 2014), 509-522.

⁴⁷⁹ Gee, G., Dudgeon, P., Schultz, C., Hart, A., & Kelly, K. (2014). Aboriginal and Torres Strait Islander Social and Emotional Wellbeing' in P. Dudgeon, H. Milroy, & R. Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Australian Government Department of Prime Minister and Cabinet, Telethon Institute for Child Health Research, Kulunga Research Network, The University of Western Australia, 2nd ed, 2014).

⁴⁸⁰ Berry, S., and Crowe, T., (2009) 'A review of engagement of Indigenous Australians within mental health and substance abuse services' 8 (1) *Australian e-Journal for the Advancement of Mental Health*, 1-12.

⁴⁸¹ Atkinson, J., Nelson, J., Brooks, R., Atkinson, J., and Ryan, K., (2014) 'Addressing Individual and Community Transgenerational Trauma' in P. Dudgeon, H. Milroy, & R. Walker (ed), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Australian Government Department of Prime Minister and Cabinet, Telethon Institute for Child Health Research, Kulunga Research Network, The University of Western Australia 289-306; Brideson, T., Havelka, J., McMillan, F., and Kanowski L. (2014) 'The Djirruwang Program: Cultural affirmation for effective mental health' in P. Dudgeon, H. Milroy, & R. Walker (ed), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*, Australian

In the absence of sufficient qualified Aboriginal staff, the literature recommends the use of cultural consultants of the same gender and language/cultural group as clients.⁴⁸²

In addition to insights on culturally safe clinical practice, the Closing the Gap Clearinghouse⁴⁸³ has identified high level principles associated with culturally safe programs. These include flexibility in program design and delivery; involving community in both the development and delivery of programs; building trust and relationships with community and clients; and a well-trained and resourced workforce, with a focus on staff retention and service continuity.

Literature on gender-specific bail and diversion programs has also highlighted the need for culturally appropriate programs for women, emphasising the importance of flexibility to overcome barriers to participation by Aboriginal women.⁴⁸⁴ These include the fact that Aboriginal women are more likely to have prior convictions and be facing multiple charges because of the numerous drivers propelling them into repeat contact with the criminal justice system; as well as more likely to be experiencing mental health or substance dependence issues and therefore to be excluded by program eligibility criteria.

The Koori Women's Diversion program, run by VACCA, involves up to 12 months of intensive case managed support to complete bail or Community Corrections Orders, as well as help to navigate the justice and broader social welfare systems. Radke's 2018 paper on the Women's Yarning Circle, a women's bail program available in the Southeast Queensland Indigenous Sentencing Court, or Murri Court, also illustrates the strengths of culturally appropriate bail services.⁴⁸⁵ The program promotes relationships with Elders and Respected Persons of the same gender to allow for greater understanding of the underlying reasons for offending behaviour – including systemic issues and intergenerational trauma.

Like therapeutic court programs, however, Radke acknowledges that the use of pre-sentencing bail programs is highly controversial and problematic in that it widens the legal system's net of control. She also identifies the challenges associated with the program, including the risk that gender-specific bail programs can marginalise gender-diverse defendants. Radke highlights how the adoption of a flexible approach to the program's delivery, such as allowing 'sister girls' and 'brother boys' to attend the Yarning Circle that align with their gender identity, can help to address this. Nevertheless, Radke sees such programs as one of the few ways in which a court can assist defendants to avoid imprisonment by effectively completing a community sentence.

In 2014 the Victorian Equal Opportunity & Human Rights Commission made recommendations for culturally appropriate programs to promote diversion and rehabilitation of Aboriginal women involved in the justice system, including:

- establishment of a culturally appropriate residential program for Koori women on bail, Community Corrections Orders and post release;
- enhancing Local Justice Worker and Koori Offender Support and Mentoring Programs;
- providing nomination rights to residential drug and alcohol services with a Koori focus;
- delivery of additional Koori specific interventions within women's prisons;

Government Department of Prime Minister and Cabinet, Telethon Institute for Child Health Research, Kulunga Research Network, The University of Western Australia 523-532.

⁴⁸² Berry & Crowe, above n 480.

⁴⁸³ Osborne, K., Baum, F., and Brown, L. (2013) 'What works? A review of actions addressing the social and economic determinants of Indigenous health' Closing the Gap Clearinghouse, Issues Paper no. 7 <<https://www.aihw.gov.au/reports/indigenous-australians/what-works-a-review-of-actions-addressing-the-social-and-economic-determinants-of-indigenous-health/contents/table-of-contents>>

⁴⁸⁴ Allison, F., & Cunneen, C. (2009) *Indigenous Bail Diversion: Program Options for Indigenous Offenders in Victoria*, Victorian Department of Justice; Baldry & Cunneen, above n 195.

⁴⁸⁵ Radke, A. (2018) 'Women's Yarning Circles: A Gender-specific bail program in one Southeast Queensland Indigenous Sentencing Court' 29(1) *Australian Journal of Anthropology* 53.

- enhancing transition planning and services for Koori women exiting prison, including the Transition Assistance Program, Konnect, mentoring programs and the Women's Integrated Support Program; and
- developing a Koori women's Restart housing project.⁴⁸⁶

Some of these recommendations have been progressed under *Burra Lotjpa Dunguludja*, as noted above. In particular, the Victorian Government has committed under Goal 2.3 to 'explore the feasibility of a residential program similar to Wulgunggo Ngalu Learning Place to provide cultural and gender-specific supports for Aboriginal women involved in the Corrections system.'

The CIJ notes that there are currently only two programs in Victoria (Winja Ulupna and Yakapna Family Centre) that offer culturally specific residential services for adult Aboriginal women, with one mainstream service, Odyssey House Victoria, also funded to reserve eight beds for Aboriginal women. A further program, Bunjilwarra, provides services for Aboriginal young people aged 16-25, including women and girls. Overall, this means that there are currently 25 residential beds for Aboriginal women and girls in Victoria, 11 of these in gender-targeted settings.

On 13 February 2020 the Government also announced funding for a new Aboriginal Women's Transitional Housing facility, which will consist of six one-bedroom units and an onsite culturally responsive intensive case management service. Some of the units will have access to a second bedroom for women entering the facility with children.⁴⁸⁷

It is vital that these programs are equipped to respond to the circumstances which characterise Aboriginal women's experiences of the criminal justice system – circumstances and histories which are both culturally and gender-specific. For example, authors have identified compounding factors which can exclude Aboriginal people from programs, including issues around participating in a group setting that is not culturally safe; as well as the mental health and substance dependence issues disproportionately experienced by Aboriginal women,⁴⁸⁸ as discussed in Part Two.

This highlights the urgent need for alternatives to custody and mainstream programming, such as residential options which promote culturally appropriate and safe treatment, as well as one on one, wrap around support⁴⁸⁹ which can adopt a strengths-based, rather than deficit-based, approach and support substance rehabilitation, family reunification and employment opportunities.⁴⁹⁰

One study has reflected on elements of best practice for residential programs for Aboriginal and Torres Strait Islander people, including women. These included:

- programs being flexible and accessible, including with capacity to support women on remand or serving short sentences;
- services being culturally competent in design and delivery;
- holistic programming that can respond to multiple and converging health and social needs, as well as factors impacting on longer term wellbeing, such as financial stability, housing, education and employment;
- programs taking a longer-term view of recovery and integration through program duration and/or opportunities for re-entry where participants relapse or do not complete;

⁴⁸⁶ Victorian Equal Opportunity and Human Rights Commission, above n 197.

⁴⁸⁷ Victorian Government, (13 February 2020) *Housing to help Aboriginal women leaving prison* (Media Release) Mirage News <<https://www.miragenews.com/housing-to-help-aboriginal-women-leaving-prison/>>

⁴⁸⁸ Abbott et al., 2018, n 195, 9.

⁴⁸⁹ Jonscher, Samantha. (9 October 2020) *Australian-first Life Skills Camp, an alternative to custody, opens in Alice Springs for Aboriginal women*. ABC online <<https://www.abc.net.au/news/2020-10-09/life-skills-camp-combats-high-rates-of-aboriginal-incarceration/12745040>>

⁴⁹⁰ See also Baggarrook Women's Transitional Housing program, co-designed by the Victorian Aboriginal Legal Service and partner agencies <<https://www.vals.org.au/baggarrook/>>

- the involvement of families and communities, which would be particularly critical for women, and will impact the design of the facilities, potential locations, programming and the staffing profile; and
- inter-agency coordination and linkages between prisons and community-based services to facilitate supported transition out of custodial settings.⁴⁹¹

3.4.4 Aboriginal social and emotional wellbeing

Holistic interventions for Aboriginal people require understanding of the interlinked nature of experiences of criminal justice involvement, trauma and disadvantage. These include social and historical factors impacting Aboriginal peoples' disproportionate experiences of poor mental health, substance dependence issues and contact with the both the welfare and criminal justice system.⁴⁹²

The concept of Aboriginal social and emotional wellbeing (SEWB) recognises the connected and reinforcing relationships between cultural, social and health realms and has emerged as a key concept to guide program development. It acknowledges that individual and community wellbeing is "shaped by connections to body, mind and emotions, family and kinship, community, culture, land and spirituality".⁴⁹³ Strong connections are linked with resilience, while disruptions to these connections, such as those flowing from colonisation, are likely to result in poorer outcomes.

The concept of SEWB is an approach that contrasts with the more individualistic and disease-focused Western medical framework. Given the primacy of working with an Aboriginal concept of SEWB, commentators note that practitioners supporting Aboriginal people in criminal justice and rehabilitation settings would benefit from a "comprehensive culturally appropriate assessment package".⁴⁹⁴ A range of professional guidelines⁴⁹⁵ to support culturally safe practice are also in use, as well as culturally validated tools for assessing mental health, cognitive functioning, substance dependence and SEWB needs.

⁴⁹¹ Abbott et al., 2018, n 195.

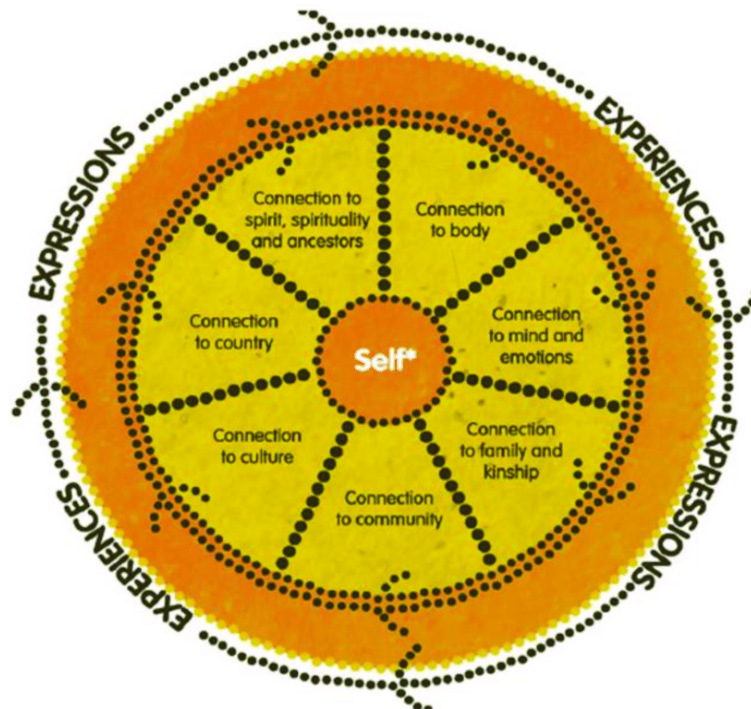
⁴⁹² Parker & Milroy, above n 185.

⁴⁹³ Gee et al., n 479.

⁴⁹⁴ Hovane et al., above at n 478.

⁴⁹⁵ These include: Australian Psychological Society, Guidelines for the Provision of Psychological Services for, and the Conduct of, Psychological Research with Australian and Torres Strait Islander People of Australia, 2003; Australian Indigenous Psychology Association (AIPA) Framework for Assessment; National Practice Standards for the Mental Health Workforce 2013; and 'Dance of Life' framework developed by Helen Milroy for the Royal Australian and New Zealand College of Psychiatrists' (RANZCP) Indigenous Mental Health Group.

Figure 11: Aboriginal and Torres Strait Islander Social and Emotional well-being



Source: Gee et al., 2014, p. 57.

The term SEWB was endorsed in the first National Aboriginal Health Strategy (NAHS) in 1989, emanating from advocacy by Aboriginal Community Controlled Health Organisations (ACCHOs).⁴⁹⁶ Despite researchers and clinicians observing that the SEWB concept has played a critical role in “reclaiming and renewing Aboriginal and Torres Strait Islander understandings of health and wellbeing, and legitimising and disseminating these understandings within the current health policy landscape”,⁴⁹⁷ there has been limited progress in the development and implementation of actions plans and frameworks which take SEWB into account.

While the term defines health in terms consistent with Aboriginal perspectives, commentators highlight the fact that significant differences in understandings of SEWB and mental health among diverse Aboriginal and Torres Strait Islander communities means that practitioners must engage with local Elders and community leaders in order to develop a specific account of SEWB in the communities and cultures in which they practice.⁴⁹⁸ Overall, however, they argue that SEWB is used in the Aboriginal health context in ways that are distinct from “mainstream” uses of the term, signifying “a relatively distinct set of wellbeing domains and principles, and an increasingly documented set of culturally informed practices”.⁴⁹⁹

A SEWB framework developed during the course of a national consultancy set out nine guiding principles that underpin the SEWB concept:

- health as holistic;
- the right to self-determination;

⁴⁹⁶ Gee et al., n 479.

⁴⁹⁷ Ibid, 56.

⁴⁹⁸ Ibid.

⁴⁹⁹ Ibid, 56-57.

- the need for cultural understanding;
- the impact of history in trauma and loss;
- recognition of human rights;
- the impact of racism and stigma;
- recognition of the centrality of kinship;
- recognition of cultural diversity;
- recognition of Aboriginal strengths.⁵⁰⁰

The central role of healing through culture points to a key resource for resilience available to Aboriginal women in the criminal justice system. It underscores the importance for interventions to “take into account and seek to address Indigenous women’s, often traumatic, life experiences, disabilities and disadvantaged contexts”.⁵⁰¹ It similarly highlights the importance of developing responses that support women in accessing cultural knowledge and spirituality, kinship and community networks, as well as integrated support services.

⁵⁰⁰ Ibid, 57.

⁵⁰¹ Social Health Reference Group (2004) in *National Strategic Framework for Aboriginal and Torres Straits Islander People’s Mental Health and Social and Emotional Well Being 2004-09*. National Aboriginal and Torres Straits Islander Health Council and National Mental Health Working Group Canberra: Department of Health and Ageing.

Opportunities for reform

Implement recommendations

Initiatives to address the over-representation of Aboriginal women in the Victorian criminal justice system should be considered in the wider context of:

- the roadmap for reform as proposed by the ALRC in the Pathways to Justice report and by the *Royal Commission into the Detention and Protection of Children in the Northern Territory*; and
- existing mechanisms for developing justice policy and programs in partnership with Aboriginal people, i.e., the Victorian AJA.

By establishing a schedule for the implementation of recommendations arising from these and other relevant inquiries, and by committing adequate resourcing for the Koori Justice Unit (KJU) and Aboriginal Justice Forum to lead engagement with communities in the development and implementation of reforms, the Victorian Government will lay the foundation for more targeted approaches for Aboriginal women.

Identify appropriate measures and set targets

To ensure that a gender-informed approach remains at the centre of this work, the KJU, in partnership with the Women's Justice Investment Taskforce, should identify measures to address the specific needs of Aboriginal women not addressed by the ALRC and other recommendations. As noted under Foundation Three, targets in relation to achieving women-centred reform objectives should be incorporated into the fifth iteration of the Victorian AJA, the Women's Justice Investment Strategy and Closing the Gap Strategy.

Recognise crime victimisation and provide adequate support

Cultural safety is fundamental to all victim-focused services and must be supported through ongoing education, practice development, as well as continuous improvement activities. A Cultural Safety Practice Lead should be engaged to work with the KJU to help meet the relevant goals of the Aboriginal Justice Agreement (AJA).

As recommended by the CIJ in its Victim Services Review, the Victorian Government should increase resourcing of culturally-specific roles in existing victim support services to ensure capacity for community engagement; outreach; gender-informed and culturally safe and supported ways of working. This should include co-location of services at Aboriginal Community Controlled Organisations, to develop trust and community relationships and encourage service engagement, as well as reporting of crime victimisation.

Invest in culturally safe programming

Concurrently with this work, the Victorian Government should invest in the development and expansion of culturally responsive women's justice programs. This would include acting on findings from projects commissioned under the fourth Victorian AJA currently underway, as well as working with the KJU, Aboriginal Justice Forum members and partners across the projects to contribute to the development of a Culturally Safe Programming Framework.

Promoting and valuing Aboriginal Social and Emotional Wellbeing

Reforms implemented under the Women's Justice Reinvestment Strategy should use the concept of Aboriginal Social and Emotional Wellbeing (SEWB) to inform program design, as well as to measure program outcomes. Program design should be based on achieving long term outcomes and improvements in SEWB as measures of positive program outcomes, beyond simplistic measures related to recidivism. This could include the nine domains identified above which recognise the central role of healing through connection to culture and country.

3.5 Foundation Five: Research, evaluate, share

Bangkok Rules

- Efforts shall be made to organise and promote comprehensive, result-oriented research on the offences committed by women; the reasons that trigger women's contact with the criminal justice system; the impact of secondary criminalisation and imprisonment on women; the characteristics of women offenders; as well as programs designed to reduce reoffending by women, as a basis for effective planning, program development and policy formulation to respond to the social reintegration needs of women (Rule 67).
- Efforts shall be made to organise and promote research on the number of children affected by their mothers' contact with the criminal justice system, and imprisonment in particular, in order to contribute to policy formulation and program development, taking into account the best interests of the children (Rule 68).
- Efforts shall be made to review, evaluate and make public periodically the trends, problems and factors associated with offending behaviour in women and the effectiveness in responding to the social reintegration needs of women offenders, as well as their children, in order to reduce the stigmatisation and negative impact of those women's contact with the criminal justice system (Rule 69).
- The media and the public shall be informed about the reasons behind women's entrapment in the criminal justice system and the best way to respond to their needs and those of their children. Policies relating to women in the justice system must be informed by research and good practice examples that are published and disseminated. Information relevant to women in the justice system shall be provided on a regular basis to the media, the public and agencies working with women. Criminal justice agencies are to be provided with regular training on the Bangkok Rules and research findings relevant to women in the justice system (Rule 70).

As has been discussed elsewhere, it is crucial for policy and programming reform related to decarceration to be evidence-based and data-driven. This is particularly the case for cross-government strategies adopting a justice reinvestment approach which, by their very nature, are outcomes focussed. Similarly, efforts to increase the knowledge base on women's criminalisation – an area of inquiry that has only recently attracted more substantial research attention – is essential to the development of gender-sensitive policy and service provision.

Although there is growing academic and policy interest in women's criminalisation, many gaps in the evidence base remain and women still have a low profile in the literature. For example, it is common for major reviews and studies to make scant reference to the needs of women, with Belknap noting that “women and girls are routinely excluded from most studies and theories or, if included, [this was] done in a gender stereotypical way”.⁵⁰² Criminal justice data-sets that do not provide disaggregated statistics further frustrate efforts to understand women's experiences.

Evaluation is increasingly recognised as an essential part of effective service development and decision-making. In particular, new or innovative approaches being trialled should be subject to rigorous monitoring and evaluation, both to inform decisions about whether to continue to fund the project or modify it in some way, as well as to contribute to our collective knowledge of what works, and what is possible.

⁵⁰² Belknap, above n 37.

For this reason, findings from the evaluation of policies and programs relating to women in the justice system should be publicly available to ensure the widest possible use of data. Broader input into the debate about reform in this area is hampered when findings about the efficacy of key government policies and programs are not published.⁵⁰³

Evaluating the impact of criminal justice policy and programming not only requires approaches capable of capturing the specific criminogenic needs and experiences of vulnerable populations, it also demands careful consideration of appropriate measures of impact. The Bangkok Rules articulate a proactive role for government in the commissioning and dissemination of research relating to women in the justice system; engaging in media and community education campaigns; evaluating the effectiveness of programs and policies; and reporting progress in the implementation of the Rules. In this section, the CIJ suggests a sample of options to assist the Victorian Government to take up this role and also touches on considerations relevant to research and evaluation in this area.

3.5.1 More nuanced measures of impact

Currently, the predominant measure used to assess the effectiveness of criminal justice strategies is recidivism. The appropriateness of this approach is increasingly subject to academic debate, given our understanding of the complexity of the drivers of offending and recognition that desistance from offending is not a single event, but a process involving reduced or less serious offending over time.⁵⁰⁴ Reliance on the “blunt measure”⁵⁰⁵ of recidivism alone is likely to result in many programs being assessed as ineffective, despite multiple individual and community benefits, as well as associated reductions in justice spending.⁵⁰⁶

Calls are emerging for governments to develop more realistic, nuanced and gendered measures when evaluating responses to women’s contact with the criminal justice system. These include markers of positive, incremental changes⁵⁰⁷ that support desistance from offending,⁵⁰⁸ such as:

- improvements in health status;
- greater social connectedness;
- ability to access stable housing, paid employment or education and training;
- reduced substance dependence or risky substance use patterns;
- improvement in management of mental health conditions, including sustained engagement with therapeutic support and/or stabilisation on medication;
- improved family wellbeing, including retaining or gaining custody or access to children;
- reductions in experiences of family violence; and
- stabilisation of financial status, including access to appropriate support benefits (e.g., disability pension, NDIS funding).

⁵⁰³ The full evaluation report relating to the Better Pathways strategy, and the 2014 evaluation of the *Targeted Women’s Correctional Response* are not publicly available. At the time of writing, there was no indication when an evaluation of initiatives delivered under the *Strengthening Connections* policy could be expected.

⁵⁰⁴ Maruna, S., Lebel, T. P., Mitchell, N., & Naples, M. (2004) ‘Pygmalion in the reintegration process: Desistance from crime through the looking glass’ *Psychology, 10*(3) *Crime & Law*, 271–281; Berghuis, M. (2018) ‘Reentry programs for adult male offender recidivism and reintegration: A systematic review and meta-analysis’. 62(14) *International Journal of Offender Therapy and Comparative Criminology*, 4655–4676.

⁵⁰⁵ Green et al., 2020, above n 270.

⁵⁰⁶ Farabee, D., Zhang, S. X., & Wright, B. (2014). ‘An experimental evaluation of a nationally recognized employment-focused offender reentry program’ 10(3) *Journal of Experimental Criminology*, 309–322.

⁵⁰⁷ Gelb, K., Stobbs, N., & Hogg, R. (2019). *Community-based sentencing orders and parole: A review of literature and evaluations across jurisdictions*. Queensland Sentencing Advisory Council.

<https://www.sentencingcouncil.qld.gov.au/data/assets/pdf_file/0003/615018/edited-final-literature-review.pdf>

⁵⁰⁸ Ibid.

In particular, research regarding criminalised women's experiences points to the multiple barriers to desistance, as well as compliance with bail and court orders, which many face. For example, the WTJ evaluation highlighted the way in which service engagement of any kind can be a major step forward for criminalised women, given their:

- history of being repeatedly let down by services and mistrust of services where child removal may be a risk;
- exclusion from services where their multiple and trauma-related needs may see them classified as too 'complex'; or
- exclusion from support services because of their contact with the criminal justice system, including where they have been classified as a perpetrator of family violence.⁵⁰⁹

The evaluation therefore emphasised the needs for more nuanced measures of success, indicating that qualitative research with criminalised women should be an essential feature of relevant research and evaluation.

As noted above, Flat Out has developed an innovative evaluation and social impacts measurement framework for their Women Inside and Out Program, a support and advocacy program for women in contact with the justice system. The framework is grounded in evidence and best practice approaches to working with criminalised women and uses four tools to collect qualitative and quantitative data.

These include a customised participant questionnaire; a staff observation report; an approach to recording case notes that allows for qualitative data analysis; and art therapies to collate undefined qualitative outcomes.⁵¹⁰ In 2020, Flat Out received a Social Impact Measurement Network Australia award for the Framework.

3.5.2 Culturally informed research and evaluation

Just as crucial are increased and more robust evaluations of Aboriginal and Torres Strait Islander programs and investment in culturally-informed and strength-based evaluation measures.⁵¹¹ Whether conducted by Aboriginal evaluators, or by evaluators who are technically and culturally capable, Aboriginal and Torres Strait Islander priorities and perspectives need to be central to any evaluation of programs designed for Aboriginal people.

This is particularly the case in relation to evaluations of Aboriginal healing programs, where conventional clinical and biomedical methods are not appropriate, and a valuing of Aboriginal knowledge systems is required. Despite debates about evaluation methodology, literature indicates that the findings of evaluations using methods grounded in local Indigenous knowledge are consistent across programs and jurisdictions, as are the factors associated with successful healing. Literature therefore calls for a range of innovative methods to be used which can measure subtle attitudinal and behavioural change over time.⁵¹²

⁵⁰⁹ Campbell, 2017, above n 170.

⁵¹⁰ Flat Out Inc. & For-Purpose Evaluations (2020) *Women Inside & Out. Outcomes Measurement Framework Operations Manual*.

⁵¹¹ Australian Government (2013), *Strategic Review of Indigenous Expenditure*; Productivity Commission 2013, *Better Indigenous Policies: The Role of Evaluation*, Better Indigenous Policies: The Role of Evaluation - Roundtable proceedings Australian Government. An example of such a measure is the Aboriginal Resilience and Recovery Questionnaire assessment tool, developed by Dr Gee which assesses a range of personal, relationship, community and cultural strengths and resources associated with resilience, healing and recovery from trauma. See Gee, G. (2016). *Resilience and recovery from trauma among Aboriginal help-seeking clients in an urban Aboriginal community-controlled organisation* Doctor of Philosophy thesis, Melbourne University.

⁵¹² McKendrick, Brooks, R., Hudson, J., Thorpe, M., & Bennett, P. (2017) 'Aboriginal and Torres Strait Islander Healing Programs – a Literature Review' Healing Foundation.

Acknowledging the difficulties of existing programs in accessing and monitoring quantitative data, a recent report recommended the potential use of more qualitative frameworks for evaluation, such as using case studies which track client progress.⁵¹³ Other evaluation frameworks indicated in the literature include individual and community empowerment measures. Authors have suggested that individual empowerment domains include:

- experiences and capacities;
- actions and behaviours throughout the intervention;
- control and ownership; and
- skills/education development.⁵¹⁴

Studies propose that community empowerment is measured using the 'Cultural identity interventions systematic review proforma' developed by MacLean and colleagues⁵¹⁵ and include:

- involvement of Aboriginal researchers;
- relationships of researchers and participants;
- community involvement with study design and implementation;
- training and capacity building of researchers and community members;
- reporting back to communities; and
- the value of the research to the community.⁵¹⁶

As described under Foundation Four, the concept of Aboriginal SEWB offers a promising way to approach measuring the effectiveness of programs. An evaluation framework designed to track improvements in SEWB has greater capacity to be framed positively; to have regard to strengths and resilience; and to capture less easily quantified successes and improvements that are nonetheless associated with desistance from offending, such as greater cultural knowledge, connection to Aboriginal spirituality and a sense of meaning. The logic of such a framework would be underpinned by the literature that links offending behaviour and risk factors with poor SEWB and, conversely, improved SEWB with reductions and desistance from offending.⁵¹⁷

Recent initiatives in the field of Indigenous research and evaluation provide further guidance in the development of culturally appropriate approaches. The Mayi Kuwayu project is identified as a ground-breaking study with capacity to inform cultural programming and the development/implementation of evaluation frameworks which centre Aboriginal culture and wellbeing.⁵¹⁸

⁵¹³ CIRCA, & Anne Markiewicz and Associates (2013). Attorney General's Department Evaluation of Indigenous Justice Programs - Project B - Final Report. In: Sydney: Cultural and Indigenous Research Centre Australia. 216.

⁵¹⁴ Bovill, M., Chamberlain, C., Bar-Zeev, Y., Gruppeta, M., & Gould, G. S. (2019). 'Ngu-ng-gi-la-nha (to exchange) knowledge. How is Aboriginal and Torres Strait Islander people's empowerment being upheld and reported in smoking cessation interventions during pregnancy: a systematic review.' 25 (5) *Australian Journal of Primary Health*, 395-401 397.

⁵¹⁵ MacLean, S., Ritte, R., Thorpe, A., Ewen, S., & Arbena, K. (2015). Assessing compliance with Aboriginal and Torres Strait Islander health research guidelines within systematic reviews. *Australian Indigenous Health Bulletin*, 15(4).

⁵¹⁶ Bovill et al., above n 514, 397.

⁵¹⁷ For a very recent and forceful articulation of the links between Aboriginal culture and wellbeing, and their role in relation to shifting entrenched patterns of disadvantage, see the Lowitja Institute's (2020) Close the Gap report, "We nurture our culture for our future, and our culture nurtures us."

⁵¹⁸ Bourke, S., Wright, A., Guthrie, J., Russell, L., Dunbar, T., & Lovett, R. (2018). Evidence Review of Indigenous Culture for Health and Wellbeing. *The International Journal of Health, Wellness, and Society*, 8(4), 12-27; Salmon et al., above n 199.

The project investigates the link between Aboriginal and Torres Strait Islander wellbeing and cultural determinants of health, with the study objectives including generating “indicators of Aboriginal and Torres Strait Islander cultural practice and expression that capture diversity and maintain meaning across contexts”.⁵¹⁹ A recent element of the project, a summary of literature investigating Aboriginal culture and wellbeing, developed an indicative schema of six domains for describing Aboriginal and Torres Strait Islander peoples’ culture, which may be a useful basis for developing and evaluating programs in the criminal justice context. These are:

- connection to country;
- indigenous beliefs and knowledge;
- indigenous language;
- family kinship and community; and
- self-determination and leadership.

Guidance on conducting ethical and culturally informed research with Aboriginal people is provided in a suite of resources.⁵²⁰ Resources have also been created to improve access by Aboriginal and Torres Strait Islander people to data relating to their own people and communities. The Indigenous Data Network (IDN), an Indigenous-controlled network based at the University of Melbourne, was established to facilitate this.⁵²¹ The need to build capacity in the Aboriginal community in the use of data is identified as a priority reform in the new agreement on Closing the Gap.⁵²²

⁵¹⁹ Jones, R., Thurber, K. A., Chapman, J., D’Este, C., Dunbar, T., Wenitong, M., . . . Lovett, R. (2018b). Study protocol: Our Cultures Count, the Mayi Kuwayu Study, a national longitudinal study of Aboriginal and Torres Strait Islander wellbeing. *BMJ Open*, 8, 1-7.

⁵²⁰ These include the *Cultural Respect Framework for Aboriginal and Torres Strait Islander Health* (2016-2026); *AIATSIS Code of Ethics for Aboriginal and Torres Strait Islander Research* (2020); *Road Map II: A Strategic Framework for Improving the Health of Aboriginal and Torres Strait Islander People through Research* (2010); *Keeping Research on Track II*, a companion document to *Ethical conduct in research with Aboriginal and Torres Strait Islander Peoples and communities*; and the *NHMRC Guidelines for researchers and stakeholders* (2018).

⁵²¹ University of Melbourne 2019, Indigenous Data Network: Putting Indigenous Data Back in Community Hands, Indigenous Studies Unit. Retrieved 7 September 2020 from

<https://mispgh.unimelb.edu.au/_data/assets/pdf_file/0003/3072117/IDN-Background-DRAFT-190517.pdf>

⁵²² National Indigenous Australians Agency (NIAA), 2020, Communiqué: Third meeting of the Joint Council on Closing the Gap, 7 March, Australian Government.

Opportunities for reform

Evaluation framework

The body established to oversee justice reform and “decision making architecture” described under Foundation One should be tasked with establishing an overarching evaluation framework for justice related policies and programs, including a specific focus on evaluation of policies and programs for women and other groups experiencing particular socioeconomic marginalisation. This framework should include:

- The development of holistic and trauma-informed measures of effective programming to address offending and recidivism;
- Culturally safe and appropriate measures to acknowledge the experiences of Aboriginal and Torres Strait Islander people
- A requirement that all inquiries, reports and policies relevant to the criminal justice system should include consideration of the experiences and specific needs of women, and of Aboriginal and Torres Strait Islander women in particular; and
- A requirement that all evaluations and reviews conducted by or on behalf of Corrections Victoria and the Department of Justice and Community Safety (DJCS) be made public.

Culturally informed research and evaluation

Acknowledging the principles outlined in the *Warawarni-gu Guma Statement*⁵²³ and the importance of researchers not comparing Aboriginal-specific statistics with whole of population data or that of specific cultural groups, the Victorian Government should work with the Aboriginal Justice Forum and the Koori Justice Unit (KJU) to develop a framework for culturally informed research and evaluation of programs directly targeting Aboriginal and Torres Strait Islander communities, including a specific recognition of and focus on gender.

This framework should centre Aboriginal Social and Emotional Wellbeing (SEWB) as a primary measure of effectiveness in recognition of its relationship to crime prevention and desistance, and be informed by emerging and important work such as the Mayi Kuwayu Study, to identify appropriate and culturally appropriate domains for evaluation and measurement.

⁵²³ ANROWS, 2018, above n1.

3.6 Conclusion to Part Three

This paper has attempted to highlight how Victoria's criminal justice system is not functioning as intended, nor as the community would expect. Across the criminal justice landscape, the ultimate effects of piecemeal legislative reforms are working *against* the objective of community safety, rather than towards it – sweeping up low level offenders with measures created to respond to high profile, serious crime – and leaving people more damaged and likely to offend as a result.

What's more, the impacts of these reforms are being felt by the most disadvantaged and marginalised in the community. This includes people with disabilities, people experiencing mental illness, people experiencing substance dependence, people living in poverty and homelessness and, across all jurisdictions, people from Aboriginal and Torres Strait Islander communities.

As this paper has highlighted, however, these impacts are being felt especially acutely by women – and Aboriginal women at extraordinarily disproportionate rates. Given that the vast majority of criminalised women have been victims of gendered violence, this means that the impact of reforms designed to curb violent male offending are instead being felt by victims of crime.

With so many of these women mothers, the burden of these impacts are also being felt by their children – children who have often experienced family violence themselves, who may be living with

The impact of reforms designed to curb violent male offending are instead being felt by victims of crime.

Criminal justice systems are expected to protect victims of crime, to protect children – rather than compound the harm they have experienced.

the continuing effects of colonisation as members of Aboriginal communities; and are now bearing the brunt of the criminal justice system's heavy handed-response. Criminal justice systems are expected to protect victims of crime, to protect children, rather than compound harm. This means that Victoria's criminal justice system is in urgent need of reform.

Addressing the specific legislative drivers such as those described in Part Two of this paper, however, are only part of the

equation. Given the multiple social and structural factors which lead women into contact with criminal justice systems – acknowledged by the emphasis in the Bangkok Rules on non-custodial and therapeutic responses and described in Part One – correcting legislative directions which have taken Victoria off course will not be sufficient.

The foundations proposed in Part Three of this paper, therefore, are a starting point for us to contemplate a different way forward – a path which will lead us away from escalating prison rates and the extraordinary social and economic cost that incarceration can cause. The Foundations do not purport to be a comprehensive list of necessary reforms, nor the only way to conceive the change required. What's more, the Foundations are far from the *only* steps needed, given that the best way to reduce incarceration rates is to invest in stronger community supports and to prevent people from coming into contact with the criminal justice systems in the first place.

Rather, the proposed foundations are about perceiving the interrelated, whole-of-government nature of the task, as well as laying the groundwork so that change can be sustained. It is the CIJ's hope that, through a considered strategy of reform and investment, Victoria can recognise that its current response to women who come into contact with the criminal justice system is failing. Equally, we hope that Victoria can recognise that there *is* a way out of the policy tangle if we:

- Commit, coordinate and invest;
- Address systemic drivers;
- Support, rehabilitate and integrate;
- Prioritise community-led design; and
- Research, evaluate and share.

Doing so will help to give genuine effect to the international community's call for non-custodial responses for women. While the ten year anniversary of the Bangkok Rules saw Victoria's capacity to answer this call severely compromised, the CIJ hopes that we will be in a very different position when the next significant anniversary of the Rules comes to pass – that we have understood what it takes to build gender-informed criminal justice systems and to lay the foundations for safer communities as a result.

By prioritising measures which change the trajectory for criminalised women and by reducing numbers in women's prisons, we may build evidence which can be applied in other contexts. For now, though, the task is to invest in a considered strategy; to change the trajectory for too many vulnerable women and their children; and, in doing so, leave the use of custody behind.

APPENDIX A: Justice reinvestment in Australia

Justice reinvestment is well established in the US, with growing interest in trialling justice investment initiatives in Australia, including both place-based, community-led initiatives as well as sector-wide, cross-government approaches. In its 2013 report, *Value of a justice reinvestment approach to criminal justice in Australia*, the Australian Senate Standing Committee on Legal and Constitutional Affairs (the Senate Inquiry) recommended that the Commonwealth trial justice reinvestment in Australia and establish an “independent central coordinating body for justice reinvestment”.⁵²⁴

In addition to the 2013 Senate Inquiry, three separate parliamentary committees in 2009, 2011 and 2014 have recommended piloting justice reinvestment strategies. In 2010, two reports commissioned by the NSW Minister of Juvenile Justice proposed that funding earmarked for new juvenile justice centres instead be invested in early intervention support for young people and families, as well as in tailored programs for high-risk offenders.⁵²⁵

A key player in the championing of justice reinvestment for Aboriginal communities is the independent agency, Just Reinvest NSW. The agency was created in 2011 as an initiative of the Aboriginal Legal Service NSW/ACT and is the lead agency in justice reinvestment strategy in regional NSW (see profile below). In a 2017 policy paper, *Key Proposals #1: Smarter sentencing and parole law reform*,⁵²⁶ Just Reinvest NSW identified the following three strategies as key to reducing the over-representation of Aboriginal people in the NSW prison system:

- Increased access to intensive Corrections orders in NSW and an expansion of their scope to include programs for violent offenders and intensive rehabilitation orders;
- Replacing short sentences of six months or less with non-custodial options, including greater use of intensive Corrections orders, with the provision of specific support to meet the needs of Indigenous women; and
- increasing support and transitional release options to help reduce the incidence of parole breaches and promoting reintegration into the community post release.

The agency also proposed changes to legislation and practice to provide for better tailoring of court orders to meet the needs of individual offenders; improved support and supervision for people on bail, Corrections orders and family violence orders; changes to make penalty notices and fines fairer; and greater use of Indigenous courts.

The promise of justice reinvestment as a response to rising incarceration rates of Aboriginal and Torres Strait Islander people was also highlighted by the Australian Law Reform Commission (ALRC). In doing so the ALRC explained that many of the drivers of incarceration for Aboriginal and Torres Strait Islander people are “external to the justice system, and justice reinvestment involves a commitment to invest in ‘front-end’ strategies to prevent criminalisation”.⁵²⁷ In addition, the ALRC acknowledged that place-based investment approaches, with their emphasis on working in partnership with communities, align with notions of self-determination and are known to be effective in addressing Aboriginal and Torres Strait Islander disadvantage.⁵²⁸

⁵²⁴ Senate Standing Committee on Legal and Constitutional Affairs. (2013) *Value of a justice reinvestment approach to criminal justice in Australia*, Commonwealth of Australia.

⁵²⁵ McGinness, A. (2010) *A strategic review of the New South Wales juvenile justice system: Report for the Minister for Juvenile Justice*. (Canberra, Noetic Solutions); McGinness, A., and Dermott, T. (2010) *Effective practice in juvenile justice: Report for the Minister for Juvenile Justice* (Canberra, Noetic Solutions).

⁵²⁶ Just Reinvest NSW (2017) *Policy paper: key proposals #1: Smarter sentencing and parole law reform*.

<<http://www.justreinvest.org.au/policy-paper-key-proposals-1/>>

⁵²⁷ ALRC, 2017 n 28, 27.

⁵²⁸ Ibid.

In particular, the ALRC asserted that all the recommendations arising from its 2017 report were underscored by a reinvestment ethos and that two in particular called for Commonwealth, state and territory governments to establish independent justice reinvestments agencies and to support the delivery of “tailored, local solutions to the particular drivers of incarceration in a community”.⁵²⁹

Despite the strong, continuing endorsement of justice reinvestment as a reform strategy, there has been a lack of momentum in Australia in the wide-spread uptake of recommendations. That said, the examples of a small, successful, local initiative and a state-wide, inter-governmental investment approach, both located in NSW, provide different templates for tackling two of the most ‘wicked’, and interrelated problems in Australia – unacceptable rates of imprisonment of Aboriginal children and young people and persistently poor outcomes of children in the out-of-home care system.

Place-based justice reinvestment

The Maranguka Justice Reinvestment Project, the first major justice reinvestment project in Australia, was developed by JusticeReinvest NSW and the Australian Human Rights Commission in partnership with local community groups. The project uses a community-led approach to provide better coordinated, intensive support to vulnerable children and families with the aim of providing a circuit breaker to youth offending.

The project, which commenced in 2014 and is funded largely by philanthropists, followed the four steps of the JustReinvest implementation strategy, which involves crime mapping and analysis; developing options to reduce offending; implementation; and evaluation. The Project is supported by the Bourke Tribal Council, an Aboriginal leadership group that provides a governance mechanism to oversee the delivery and coordination of community services.

Justice innovation: Maranguka Justice Reinvestment Project (MJRP) Bourke, NSW

Setting: Bourke, a town in western NSW where more than 30 per cent of the population identifies as Aboriginal, had the highest rate of juvenile crime, sexual assault, family violence and breach of bail in NSW.⁵³⁰ The community of Bourke was grossly over-represented in the justice system, with close to a quarter of young Aboriginal people and young adults from the Bourke local government area in custody.

Program: The pilot program consisted of preventative, diversionary and community development initiatives to address the underlying causes of crime. Initiatives included:

- a community hub and multi-disciplinary teams working with government and non-government agencies to address the needs of young people and their families, including housing; assistance for young people to secure a driver's license; family support; and the creation of a safe house for vulnerable young people;
- a data dictionary and community snapshot covering domains such as health, education, criminal justice, employment and housing, providing an evidence base for decisions related to JustReinvest; and
- a set of goals based around four focus areas: early childhood and parenting, children and young people aged eight to 18 years, the role of men, and service delivery reform.

⁵²⁹ Ibid, 25. See recommendations 4-1 and 4-2.

⁵³⁰ Bureau of Crime Statistics and Research (BOCSAR), New South Wales recorded crime statistics quarterly update, September 2015.

Outcomes: An impact assessment by KPMG released in 2018 highlights evidence of improvement in three key areas:

- family strength: there was a 23 per cent reduction in police recorded incidence of domestic and family violence and comparable drops in rates of reoffending;
- youth development: the assessment noted a 31 per cent increase in Year 12 student retention rates and a 38 per cent reduction in charges across the top five juvenile offence categories;
- adult empowerment: findings included a 14 per cent reduction in bail breaches and 42 per cent reduction in days spent in custody.

KPMG estimated a gross economic impact of the project of \$3.1 million in 2017. Of this, approximately two-thirds related to the justice system and one third related to broader economic impact to the region. The economic impact was estimated to be approximately five times greater than operational costs in 2017. KPMG noted that, if just half of the results achieved in 2017 were sustained, Bourke could deliver an additional economic impact of \$7 million over the next five years.⁵³¹

A sector-wide investment approach

NSW has also led the way in the implementation of a state-wide investment approach to the reform of the out-of-home care system. Although not characterised as a justice reinvestment initiative, the *Their futures matter* strategy has many hallmarks of that approach, bringing a whole-of-government, data-driven focus on the issues driving the growing number of children taken into care and redirecting resources from crisis responses to early intervention.

The strategy was developed in response to findings from the 2016 independent review of the out-of-home care system in NSW (the Tune review), commissioned in response to the growth in the out-of-home care population and continuing poor outcomes for at-risk children. The report found that, despite increased expenditure on programs and cross-government cooperation, the existing system was “ineffective and unsustainable”,⁵³² and had failed to achieve significant improvement in the long-term outcomes for children.

Like the issue of women’s criminalisation, the drivers of demand for out-of-home care are complex, cutting across numerous portfolio responsibilities. The responsible department, Family and Community Services, was described as having “minimal influence over drivers of demand and levers for change”.⁵³³ Similarly, programs provided to families were found to be siloed, difficult for families to navigate, and lacking a solid evidence base, with 67 per cent of programs not evaluated and outcomes rarely measured. As is commonly the case in other jurisdictions, the system was described as crisis driven, with inadequate attention and funding for early intervention.

⁵³¹ KPMG (2018) *Maranguka Justice Reinvestment Project. Impact assessment*. <https://www.justreinvest.org.au/wp-content/uploads/2018/11/Maranguka-Justice-Reinvestment-Project-KPMG-Impact-Assessment-FINAL-REPORT.pdf>

⁵³² Tune, D. (2016) *Independent review of out of home care in NSW. Final report*. <https://www.acwa.asn.au/wp-content/uploads/2018/06/TUNE-REPORT-indepth-review-out-of-home-care-in-nsw.pdf>

⁵³³ Ibid, 4.

Justice innovation: Their futures matter

Approach: Development of cross-government strategy to improve long-term outcomes in the out-of-home care system. Three enablers of reform included:

- an investment approach to service delivery, including a whole of system view that involves focus on clients with the greatest need; creation of a cross-govt dataset; focus on early intervention and long-term outcomes; and an iterative approach to testing, learning and developing;
- focus on evidence-based approaches; and
- funding directed to services with the greatest social return, including identification of funding across government departments.

Leadership and governance: This involved the creation of an independent commissioning entity, the Stronger Communities Investment Unit (SCIU) (formerly known as the Their Futures Matter Implementation Unit), with responsibility for implementing the reforms in partnership with NSW Government agencies. The SCIU:

- holds the funding and commissions tailored service solutions providing holistic family services delivered across a variety of different government agencies; and
- leads the redesign of the intake, assessment and referral systems.

Intervention strategies: The strategy facilitates access to services relating to health and mental health; education and skills development; employment; positive parenting and relationships; housing; and therapeutic foster care. The strategy also involves an Aboriginal co-design approach. Initiatives provided under the strategy include:

- home-based family therapy and intensive, tailored supports for families with substantiated abuse and/or neglect;
- trauma-informed counselling and allied services for children in out-of-home care;
- a support service for young people aged under 15 who are in unstable statutory kinship or foster care;
- home-based support as an alternative to residential care for young people with complex behaviours;
- futures planning and support for young people aged 17 - 24 who have been in out-of-home care;
- targeted support for young parents under the age of 25 years; and
- an Aboriginal-led mentoring program for young people aged 15-18 in the out-of-home system.

The NSW government has committed \$190 million to the project over four years.

Challenges in implementation

In a recent literature review, the AIC highlighted the numerous challenges in employing justice reinvestment in Australia, which may explain the lack of momentum in adopting the recommendations of parliamentary committees.⁵³⁴ These include:

⁵³⁴ Willis & Kapira, n 314.

- a lack of robust data on the effectiveness of interventions to reduce offending and imprisonment;
- the complex and deeply embedded nature of some drivers of contact with the criminal justice system, particularly the disadvantage disproportionately experienced by Aboriginal people; and
- delays in the realisation of financial savings, as well as uncertainty about what savings can be directly attributed to the initiatives.

Others argue that multi-partisan support across state and federal jurisdictions is necessary for justice reinvestment to succeed, but is particularly difficult to achieve in the Australian federal context.⁵³⁵ Any focus on justice reinvestment in Victoria would also need to overcome the siloed nature of service provision across Corrections and community-service providers.⁵³⁶

In light of these challenges, the AIC identified components likely to promote the establishment of meaningful and effective justice reinvestment. These are:

- the creation of a National Justice Reinvestment Centre to provide technical assistance to agencies developing investment programs;
- strong governance structures, including steering committees and other advisory bodies with membership drawn from government, community agencies, and academia;
- a combination of investment and reinvestment models, with the former involving initial financial investment to 'kick-start programs; and
- multi-faceted interventions suited to local circumstances, operating at different points across community and criminal justice system processes.

There are a number of critiques of justice reinvestment principles. These include that access to education, healthcare, employment and housing is a basic human right requiring meaningful and ongoing policy investment, which should not be linked to anticipated savings in other areas.⁵³⁷

In submissions to the 2013 inquiry by the Senate Standing Committee on Legal and Constitutional Affairs, contributors highlighted the fact that the disadvantage currently facing groups over-represented in the Australian criminal justice system, such as Aboriginal communities, are complex and manifold and require responses beyond the confines of what justice reinvestment promises.⁵³⁸ They argued that that poorly conceived reinvestment programs are seen to do little to alleviate structural inequalities at the root of criminalisation, but instead redirect money into a different form of control. In addition, benefits from justice reinvestment strategies may not extend to Aboriginal communities when initiatives are inaccessible, culturally inappropriate, or not responsive to their needs.⁵³⁹

⁵³⁵ See submissions made by Ms Tammy Solonec, Director, National Congress of Australia's First Peoples, and Ms Melanie Schwartz, Chief Investigator, Australian Justice Reinvestment Project to the 2013 Senate Inquiry (*Committee Hansard*, 17 April 2013, p. 19; and 1 May 2013, p. 57, respectively).

⁵³⁶ Written submission to the 2013 Senate Inquiry by the South Australian Justice Reinvestment Working Group, Submission 28, p. 7.

⁵³⁷ In this regard, justice reinvestment is not consistent with abolitionist agendas. See: Flat Out Inc. (2013) Submission to the 2013 Senate Standing Committee on Legal and Constitutional Affairs into the Value of a justice reinvestment approach to criminal justice in Australia.

⁵³⁸ See submissions to the 2013 Senate Inquiry by the Indigenous Social Justice Association Melbourne; the Freedom Socialist Party; Ms Hudson Miller from the Uniting Church; Flat Out; and the North Australian Aboriginal Justice Agency.

⁵³⁹ See submissions to the 2013 Senate Inquiry by the Indigenous Social Justice Association and The Centre for Independent Studies; Law Council of Australia, Submission No 78 to Senate Finance and Public Administration References Committee, Parliament of Australia, Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services (20 May 2015), 5.

APPENDIX B: Raising the age of criminal responsibility

In all Australian jurisdictions, the age of criminal responsibility is currently 10 years.⁵⁴⁰ This is one of the lowest ages of criminal responsibility in the world, with the median age of criminal responsibility internationally set at 14.⁵⁴¹ It means that a child as young as 10 can be arrested, held in custody and charged by police; remanded in pre-trial custody until their matter is heard; brought before a court; and, for some children, sentenced to a supervised order in the community or detention in a youth detention facility.

Australia continues to incarcerate children as young as 10, despite evidence of the criminogenic effect of early involvement in the justice system. The SAC's analysis of Victorian data found that the younger a child is at their first sentence, the more likely they are to reoffend; to reoffend violently; to continue offending into the adult jurisdiction; and to be imprisoned in an adult prison by the age of 22.⁵⁴²

The same review also found that with each one-year increase in a child's age at first sentence, the risk of reoffending reduced by 18 per cent. These findings are consistent with a significant body of literature which suggests that the justice system is itself criminogenic – that is, that the social exclusion, stigmatisation, anti-social influences and trauma resulting from imprisonment encourages and reinforces offending behaviour.

The number of young people in Australia being exposed to the potentially harmful effects of the criminal justice system is not inconsequential: approximately 8,000 young people under the age of 14 were proceeded against by police in 2017-18.⁵⁴³ The majority were dealt with for property-related offences as the primary offence, with theft, unlawful entry with intent and property damage together accounting for more than half of primary offences.⁵⁴⁴

For those children aged 10 to 13 who were charged and proceeded against in court, approximately 780 were subject to supervision in the community and a further 600 imprisoned in a detention facility.⁵⁴⁵ Like women in the justice system, many of those held in detention were on remand, having not yet been found guilty of a crime.⁵⁴⁶

The current age of criminal responsibility is inconsistent with scientific evidence on child and adolescent brain development and cognition. Neurobiological evidence suggests that human brains are not fully mature until they reach their early twenties.⁵⁴⁷

⁵⁴⁰ See *Crimes Act 1914* (Cth), s 4M; *Criminal Code Act 1995* (Cth), s 7.1; *Criminal Code* (NT), s 38(1) & 42AP; *Children (Criminal Proceedings) Act 1987* (NSW), s 5; *Children, Youth and Families Act 2005* (Vic), s 344; *Young Offenders Act 1993* (SA), s 5; *Criminal Code Act Compilation Act 1913* (WA), s 29; *Criminal Code Act 1899* (Qld), s 29(1); and *Criminal Code 1924* (Tas), s 18(1); *Criminal Code 2002* (ACT), s 25. We note here that the Australian Capital Territory has recently committed to raising the age of criminal responsibility during the course of 2021. Bladen, L (13 February 2021) 'Bill to raise age of criminal responsibility in ACT expected by end of year' *The Canberra Times* (online) <https://www.canberratimes.com.au/story/7124499/bill-to-raise-age-of-criminal-responsibility-in-act-expected-by-end-of-year/>

⁵⁴¹ A survey of 86 countries around the world found that the median age of criminal responsibility is 14. Cunneen, C. (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project University of New South Wales, Sydney.

⁵⁴² Stewart et al., above n 345.

⁵⁴³ Australian Bureau of Statistics, (2019c) *Recorded Crime – Offenders*, (webpage, 11 February 2021) Table 21: Youth offenders, Sex and principal offence by age 2017-18. Please note, this dataset excludes public order and 'miscellaneous' offences.

⁵⁴⁴ It is important to note that acts intended to cause injury still represented a considerable proportion of this cohort's offending (approximately one-quarter). The CIJ also recognises the significant impact on victims that property-related offending can have, as our own research with victims of crime has highlighted.

⁵⁴⁵ Australian Institute of Health and Welfare. (2019b) *Youth justice in Australia 2017-18*. Table S40b: Young people under community-based supervision during the year by age, sex and Indigenous, Australia, 2017-18. Table S74b: Young people in detention during the year by age, states and territories, 2017-18 (2019).

⁵⁴⁶ According to the Australian Human Rights Commission, *Children's rights in Australia: a scorecard* (2019), more than half of young people in youth detention on an average day are unsentenced, awaiting an outcome.

⁵⁴⁷ Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (2012b).

The SAC has noted that “this neurological immaturity (combined with various aspects of psychosocial immaturity), may undermine adolescents’ ability to refrain from criminal behaviour.”⁵⁴⁸ Research indicates that an under-developed frontal lobe, which is responsible for reasoning, planning and organisation, contributes to a lack of impulse control for young people. This tendency is further compounded by an attraction to risk; privileging of immediate reward; and a failure to account in any meaningful way for future costs. Neurological, hormonal and social factors also make young people highly susceptible to peer pressure.⁵⁴⁹

There is significant evidence that many young people who come into contact with the criminal justice system have an intellectual disability; mental health issues; and/or cognitive functioning in the extremely low to borderline range.⁵⁵⁰ Research shows that justice involved youth have often experienced “profound childhood adversity and trauma, including histories of physical or sexual abuse, neglect, family disruption and/or significant economic disadvantage.”⁵⁵¹

Two-thirds of young people in detention in Victoria are, or have been, the subject of a child protection order,⁵⁵² and young people in out-of-home care are 19 times more likely to have contact with the youth justice system.⁵⁵³ As is evident from data relating to criminalised women, these experiences are strongly associated with male offending.

Disproportionate impact on Aboriginal and Torres Strait Islander young people

As discussed elsewhere in this paper, systemic racism has contributed to Aboriginal and Torres Strait Islander young people being disproportionately represented in youth detention facilities. They are less likely to be cautioned,⁵⁵⁴ often receive harsh sentences for minor offences; receive limited access to diversionary options; and are more likely to be processed through the courts than non-Aboriginal young people.⁵⁵⁵

As a result, on an average day in Australia, more than three quarters of those under the age of 14 in detention are Aboriginal and Torres Strait Islander young people.⁵⁵⁶ This is despite Aboriginal and Torres Strait Islander young people making up less than three per cent of all young people aged 10 to 13 in Australia.⁵⁵⁷

Aboriginal and Torres Strait Islander young people are also more likely to have *early* contact with the criminal justice system.⁵⁵⁸ Early contact with the system can itself be criminogenic - once a young person enters the system, there is a 70 per cent likelihood that they will return,⁵⁵⁹ setting them on a path of cycling in and out of justice-involvement and making it more likely that they will graduate to the adult system.

⁵⁴⁸ Ibid, 26.

⁵⁴⁹ Sentencing Advisory Council, 2012b, above n 547.

⁵⁵⁰ See e.g., Justice Health and Forensic Mental Health Network and Juvenile Justice NSW (2017) *2015 Young People in Custody Health Survey: Full Report*.

⁵⁵¹ Fitz-Gibbon, K., & O'Brien, W. (2019) 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)' 8(1) *International Journal for Crime, Justice and Social Democracy*.

⁵⁵² Commission for Children and Young People, (2017) Victoria State Government, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* 6.

⁵⁵³ CREATE Foundation (2018) *Youth Justice Report: Consultation with young people in out-of-home care about their experiences with police, courts and detention*.

⁵⁵⁴ ALRC 2017, above n 28.

⁵⁵⁵ Law Council of Australia (2018) 'Aboriginal and Torres Strait Islander Peoples', *Justice Project Final Report*.

⁵⁵⁶ Australian Institute of Health and Welfare, 2019b, above n 545. See Table S78a: Young people in detention on an average day by age, sex and Indigenous status, Australia, 2017–18.

⁵⁵⁷ CIJ analysis using ABS data. Australian Bureau of Statistics (2019b) 03101.0 - *Australian Demographic Statistics, Jun 2019 and 3238.0 – Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026*.

⁵⁵⁸ Australian Institute of Health and Welfare (2018) *Youth Justice in Australia 2016-2017*.

⁵⁵⁹ Armytage & Ogloff, above n 346.

Aboriginal and Torres Strait Islander people with a cognitive disability are also significantly more likely to be charged with their first offence at a younger age than those without cognitive impairment.⁵⁶⁰ A recent health survey of young people in custody indicated that almost one-quarter of Aboriginal and Torres Strait Islander young people in custody had a diagnosed intellectual disability, compared with 11 per cent of non-Aboriginal young people. More than 65 per cent of Aboriginal and Torres Strait Islander young people in custody had been diagnosed with a mental health disorder.⁵⁶¹

A national study of children with Foetal Alcohol Syndrome (a subset of Foetal Alcohol Spectrum Disorder, or FASD) found that 65 per cent of children with the condition were Aboriginal.⁵⁶² FASD is known to affect attention, impulsivity, learning, interpersonal relatedness, social skills, working memory and language development,⁵⁶³ and has been linked to increased risk of justice involvement.⁵⁶⁴

Innovative approaches to address offending

Innovative and community-based approaches such as restorative justice, justice reinvestment, and evidence-based programs offer a viable, more cost-effective response to offending behaviour and prevent young people from being exposed to the harmful effects of the justice system. These types of therapeutic responses are also likely to be far more effective at addressing those factors which “appear to be most closely associated with serious and persistent youth crime, like disadvantaged neighbourhood of residence, poverty, early childhood abuse and rejection, illiteracy and so on.”⁵⁶⁵

There is also evidence that there is a need for police cautions to be more widely available to young people, particularly for Aboriginal young people and those in the care of the state. Aboriginal and Torres Strait Islander young people are less likely to be cautioned.⁵⁶⁶ Research by the CREATE Foundation has found that many young people in residential care interact with the justice system due to minor offences, such as fare evasion or stealing a chocolate bar.

For some, their offending is welfare motivated – for example, breaking into a building to sleep because they were homeless. For others, their justice-involvement is the result of an act committed in a residential care facility, such as minor property damage, that would not result in police involvement if the act occurred in a home environment.⁵⁶⁷

Justice reinvestment projects, such as the place-based Maranguka project discussed in Appendix A, delivered a range of interventions targeted at young people. These included a driving program for young people who had committed a licensing offence or were struggling to obtain a license; school holiday activity programs and a comprehensive Youth Support Model.

Maranguka has had significant impact on outcomes for the Bourke community across multiple domains from birth to adulthood. Prior to its implementation, the Bourke community had the highest rate of youth crime and family violence in New South Wales. Between 2016 and 2017, achievements included:

⁵⁶⁰ Australian Institute of Criminology (2017) *Aboriginal prisoners with cognitive impairment: Is this the highest risk group?*.

⁵⁶¹ Justice Health and Forensic Mental Health Network and Juvenile Justice NSW (2016) *2015 Young People in Custody Health Survey: Key Findings for All Young People*.

⁵⁶² Elliot E. et al (2008) ‘Fetal alcohol syndrome: A prospective national surveillance study’, *Archives of Disease in Childhood* 93(9).

⁵⁶³ O’Malley, K, ed. (2007) *FASD: An overview* New York: Nova Science Publisher Inc.

⁵⁶⁴ Carol Bower et al.(208) ‘Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia’ *BMJ Open* 8(2).

⁵⁶⁵ Centre for Innovative Justice (2019) *It’s healing to hear another person’s story and also to tell your own story: Report on the CIJ’s Restorative Justice Conferencing Pilot Program*. RMIT University, Melbourne. https://cij.org.au/cms/wp-content/uploads/2018/08/rmit_8691-rjcpp-report-web.pdf

⁵⁶⁶ ALRC 2017, above n 28.

⁵⁶⁷ CREATE Foundation (2018) *Youth Justice Report: Consultation with young people in out-of-home care about their experiences with police, courts and detention* (2018).

- improved educational outcomes;
- reductions in the number of juvenile charges and bail breaches by juveniles; and
- reductions in the number of days spent in custody by adults.⁵⁶⁸

As the Maranguka example shows, justice reinvestment's focus on early intervention and holistic approaches has the capacity to address drivers of youth offending in ways that the youth justice system cannot. For example, it can:

- deliver interventions that support young people to engage in education and employment;
- work with families in ways that are strengths-based;
- build the capacity of young people to manage their health and psychosocial wellbeing; and
- develop and implement strategies to reduce financial disadvantage, housing instability and other factors known to drive offending behaviour.

The emphasis on place-based and community-led solutions is also consistent with the principle of self-determination, making justice reinvestment a powerful tool for Aboriginal communities and leaders to address the over-representation of young people in the justice system.

⁵⁶⁸ KPMG, above n 531.

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