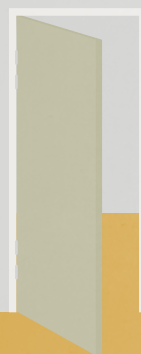
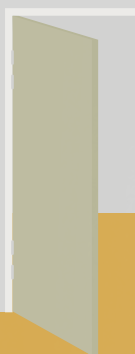
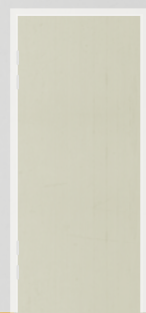


PATHWAY TO DECARCERATION:

A JUSTICE SYSTEM
RESPONSE TO COVID-19



ACKNOWLEDGEMENT OF COUNTRY

The Federation of Community Legal Centres and the Law Institute of Victoria acknowledge the Traditional Owners of the lands across Victoria and note that this document was developed on the lands of the Wurundjeri people of the Kulin Nations.

We recognise that the over-incarceration of Aboriginal and Torres Strait Islander families and children is in part a devastating consequence of colonisation, intergenerational trauma and ongoing experiences of systemic racism.

We pay our respects to the strength and resilience of Aboriginal and Torres Strait Islander peoples and cultures and to all Elders past, present and emerging and recognise their unceded sovereignty.

ABOUT THE FEDERATION

The Federation of Community Legal Centres (the Federation) is the peak body for Victoria's community legal centres (CLCs). CLCs are localised, independent, community-based organisations that provide free legal assistance and work to ensure equitable access to justice. CLCs help the community with tenancy, employment, social security, family law and family violence, criminal law, consumer law and many other legal problems. These types of legal problems are often complex, stressful and almost always carry serious implications for affected individuals' lives and livelihoods.

The Federation works with CLCs to continually improve the impact of CLCs and to strengthen the capacity of Victoria's community services sector. The Federation also works to drive creativity and innovation in the delivery of integrated legal services to communities and enable a strong collective voice for justice and equality.

The Federation received detailed input to inform this submission from the following CLCs:

- Victorian Aboriginal Legal Service
- Human Rights Law Centre
- Justice Connect
- Law and Advocacy Centre for Women
- Fitzroy Legal Service
- Mental Health Legal Centre

ABOUT THE LAW INSTITUTE OF VICTORIA

The Law Institute of Victoria (LIV) is the peak membership body for the Victorian legal profession, representing approximately 19,000 lawyers, students and people working in the law in Victoria, interstate and overseas. Its members are legal professionals from all practice areas, and work in the courts, academia, policy, state and federal government, community legal centres and private practice.

The LIV's membership consists of senior lawyers who specialise in criminal law and who assist vulnerable families and children, for example, through providing frontline services for victims of family violence, and referrals to social support services, assisting perpetrators of FV navigate the justice system and access behavioural change programs and child protection matters.

EXECUTIVE SUMMARY

THE COVID-19 PANDEMIC IS CREATING NEW CHALLENGES FOR GOVERNMENTS AROUND THE WORLD AS THEY IMPLEMENT MEASURES TO PROTECT THE COMMUNITY AND KEEP PEOPLE SAFE.

The Federation of Community Legal Centres and the Law Institute of Victoria acknowledge the complex challenges facing the Victorian Government during the COVID-19 health crisis and the difficult decisions necessary for prisons to meet their duty of care to people living and working in prisons.

Due to high rates of community transmission in Victoria and positive COVID-19 tests of people in the prison system, including staff, there is an immediate risk that COVID-19 will continue to enter the prison system in Victoria and become increasingly difficult to contain. Given the high rate of 'churn' in the justice system, it also poses a significant public health risk should an outbreak in prison occur, placing additional pressure on the health care system and emergency services.

Across Victoria, there have been outbreaks in congregated and overcrowded environments - in aged care facilities, meat processing plants, public housing towers and cruise ships. Evidence from around the world indicates that COVID-19 would spread rapidly through the prison system.

While certain prevention and control measures have been introduced across the prison system, including the establishment of protective quarantine units and the suspension of face-to-face personal visits, these measures are unlikely to contain an 'outbreak' given the evidence within prisons internationally.¹ Longer-term measures and strategies are needed in order to preserve the health and lives of people in these facilities and in the wider community. Given the over-crowded environment and highly transient populations, a reduction in the number of people in prison should be a key aspect of a public health response.

If COVID-19 spreads through the prison system, based on the high levels of chronic health conditions among people in prison, people will die. It is particularly concerning given many people are held in custody for extended periods of time, without having their matter heard before the Court and/or are being held for low-level offending.

This 'Pathway to Decarceration' provides solutions that the Victorian Government should consider to reduce the number of people in Victorian prisons and it complements the current restrictions aimed at reducing rates of transmission of the virus in the broader community. Any mechanism to reduce the population in prison, however, must have regard for the safety of victim-survivors of family violence who may be impacted by the release of their perpetrators.



COMMITMENT



POLICING



PROSECUTIONS



DIVERSION



BAIL REFORM



HOMELESS



PAROLE



LEGISLATIVE MECHANISMS



POST-RELEASE HOUSING



IF COVID-19 SPREADS THROUGH THE PRISON SYSTEM, IT COULD HARM VICTORIA'S MOST MARGINALISED PEOPLE

Many people in the prison system are particularly vulnerable due to age or pre-existing health conditions. Around six per cent of the prison population is over the age of 60.² Around one-third of people entering the prison system have a chronic medical condition such as asthma, cancer, cardiovascular disease, diabetes or are living with a disability.³ According to Australian Institute of Health and Wellbeing, 45 per cent of women received into Australian jails have a chronic health condition.

Aboriginal and Torres Strait Islander people are overrepresented in the prison system, with a majority having underlying health conditions, and are therefore more likely to be impacted by COVID-19. Aboriginal and Torres Strait Islander organisations have raised concerns that COVID-19 entering prisons will lead to more Aboriginal deaths in custody.⁴

A significant number of people in Victoria's prison system experience mental health issues, have experienced homelessness, have a disability, substance addiction or are victim-survivors of family violence or sexual abuse. If COVID-19 spreads throughout the prison system, it will pose a serious risk to the health, wellbeing and lives of some of Victoria's most disadvantaged people.

Female prisoners are one of the most vulnerable cohorts in the community with disproportionate experiences of victimisation from family violence and sexual abuse, mental illness, substance addiction, poverty and housing insecurity.⁵ For the estimated 90 per cent of women in prison who are victim-survivors, being placed in isolation will compound their trauma and, in many instances, mirror their experiences of surveillance and control.

The majority of women entering prison are mothers (85 per cent), with one in 50 being pregnant at the time they enter custody. By isolating incarcerated women as a form of infection control, children are also impacted as they have limited ability to connect and communicate with their mother. These barriers to communication can also weaken a woman's case for family reunification.

REMANDEES AT RISK

At 17 July 2020, 36.3 per cent of the male and 42 per cent of the female prison population were on remand and awaiting resolution of their charges.⁶ Due to the current Court backlog, many will spend more time on remand than they could receive as a sentence for their offence. In addition to this, many people in the prison system are there for low-level offending and do not pose a significant risk to the community. In 2018-19, 27.7 per cent of people discharged from prison served a sentence of less than one month, and 76.2 per cent of people had served less than six months.⁷

For example, a woman held in a Victorian jail is increasingly likely to have been charged with breaching justice orders, such as bail, a community corrections order or family violence intervention order, with a recognised growth in the numbers of women being misidentified as predominant aggressors where they are actually the victim-survivor of long-standing family violence.⁸ In 2018, 74 per cent of women entering prison on remand were charged with a breach of order.⁹

WHY DOES VICTORIA NEED A 'PATHWAY TO DECARCERATION'?

A 'Pathway to Decarceration' is critical if the Government is to reduce the number of Victorians exposed to the risks of COVID-19 and control its spread.

People are more likely to contract COVID-19 within the prison system due to over-crowding, difficulties isolating and social distancing, and because it is more difficult to maintain hygiene. This means people on remand, people in prison and staff working in the system are all at greater risk of contracting and spreading the virus.

Additionally, current measures to curb the spread of COVID-19 are resulting in a harsher prison environment that is detrimental to the health, social and emotional wellbeing of those in the system. These measures, including extensive and cyclical lockdowns, protective quarantine units and restrictions on visits, put additional pressure on people in a period of particular vulnerability.

WHAT IS WORKING?

The number of people in the prison system across Victoria has declined due to COVID-19. At 17 July 2020, there were 7,030 people in Victorian prisons, compared with 8,067 on the same date in 2019 - a reduction of 12.9 per cent.¹⁰

This is partly due to an increase in bail being granted to persons caught by the reverse onus bail provisions. The courts have found that COVID-19, in combination with other factors, poses "exceptional circumstances" or "compelling reasons" to rebut the presumptions against bail under the *Bail Act 1977* (Vic).

The courts have recognised the impact COVID-19 is having on the prison system and those in the system who have been impacted by increased restrictions. They have also recognised the impact on the administration of justice, such as delays to trials and the likelihood of people being on remand for an extensive period of time.

The Federation of Community Legal Centres and the Law Institute of Victoria welcome the decline in the number of people in prison and encourage the Victorian Government to continue to reduce the population by adopting a combination of proactive strategies including policy and legislative reform. This is a significant opportunity for the Government to obtain data regarding bail compliance and offending rates whilst on bail. As such, we ask that the Government ensure appropriate data retention mechanisms are in place to provide an evidence-basis to inform any future reviews of bail laws.

PATHWAY TO DECARCERATION

1. GOVERNMENT COMMITMENT

MAKE A COMMITMENT TO REDUCE THE NUMBER OF PEOPLE IN PRISONS

Around the world, governments are acting to reduce the number of people in their prison systems, including in France, Turkey, Chile, the United Kingdom, Scotland, Ireland, India and Iran.

It is imperative to state-wide efforts to control the spread and reduce the harm of COVID-19, that the Victorian Government urge all sections of government to work together to reduce prison numbers. This will empower the entire system to use existing powers, functions, programs and services to achieve that goal.

The effort to reduce prison numbers requires a whole-of-government response.

This includes:

- ▼ Victoria Police
- ▼ Courts
- ▼ Prosecutions
- ▼ Corrections Victoria
- ▼ Private prison providers
- ▼ Adult Parole Board
- ▼ Department of Justice and Community Safety
- ▼ Department of Health and Human Services
- ▼ Housing providers
- ▼ Community services

This approach has been recommended in the United States by a coalition of universities, including Washington State University, the University of Pennsylvania and the University of Tennessee.¹¹



2. POLICING

ENCOURAGE USE OF DISCRETION FOR LOW-LEVEL OFFENDING OR BAIL OFFENCES

Police officers should be encouraged to grant police bail, commence proceedings by way of charge and summons or use alternatives to charging people for low-level offending or breach of bail offences, except where the person poses a significant risk to the community.

This should include low-level offences, such as begging, that overwhelmingly impact marginalised people who do not pose a significant threat to the community.

People on bail should not be returned to custody if they do not pose a significant risk to the community. This includes situations in which a person has committed an indictable offence while on bail, breached a condition of bail, or has failed to answer bail.

It should be noted that legal services have raised concerns that limited access to phones and insufficient credit during the COVID-19 health crisis has made it difficult for some individuals to comply with reporting obligations.

MISIDENTIFICATION OF VICTIMS OF FAMILY VIOLENCE

Victoria Police should go to additional efforts to ensure that victim-survivors of family violence are not misidentified as a predominant aggressor and do not have intervention orders made against them. For example, Victoria Police should provide training at all appropriate levels relating to identifying primary aggressors and can strengthen their efforts to ensure early referrals to legal assistance services for family violence matters, including Community Legal Centres, Aboriginal Legal Services and Victoria Legal Aid.

3. PROSECUTIONS

NON-CUSTODIAL OPTIONS FOR LOW-LEVEL OFFENDING OR BAIL OFFENCES

If it is likely that a person who has committed a low-level offence or a bail offence would face imprisonment if prosecuted, prosecutions should be encouraged to use their discretion to offer alternatives, such as using the option of entering into an undertaking.

4. DIVERSION

POLICE SHOULD BE ENCOURAGED TO INITIATE DIVERSION AND PROSECUTIONS SHOULD BE ENCOURAGED TO CONSENT TO A DIVERSION WHEREVER POSSIBLE.

In particular, diversion should be pursued instead of a criminal conviction for all low-level offending or bail offences, except where the person poses a significant risk to the community.

As it stands, there are no public guidelines or frameworks for police in how to exercise their discretion, and there is no right of appeal against a decision by police to withhold consent, or for the court to review a refusal of diversion by police. This means that decision-making by police may be arbitrary, inconsistent or discriminatory, and without any oversight. This is concerning for particular cohorts of people, including people experiencing homelessness, as well as Aboriginal and Torres Strait Islander peoples and culturally diverse peoples, who are already overrepresented in the criminal justice system. The use of diversion over the past 13 years has gradually declined from 8.1 per cent of sentenced cases in 2005-06 to 5.9 per cent in 2017-18.¹² This decline is without oversight and public accountability and raises concerns as to why the Victoria Police guidelines for diversions are not publicly available.

The requirement for Victoria Police or prosecutions to consent to a diversion could be removed from the *Criminal Procedure Act 2009* (Vic). The Magistrates' Court of Victoria Annual Report 2015-16 internal review of diversion programs formed the view that: 'diversion should be available at the instance of a magistrate and not initiated by notice of a member of Victoria Police' and that diversion should not be subject to veto by the prosecution.¹³

Diversion provides an opportunity for a therapeutic response to address the disadvantage that led to the offending. Diversion into a care program or treatment that addresses the root cause of offending reduces the rate of recidivism and therefore the number of people held in custody.

5. BAIL REFORM

Restrictive bail laws, accompanied by broader changes in practices, have led to escalating remand rates in Victoria. Aboriginal and Torres Strait Islander people and women feature disproportionately in this increase. Given the high rates of underlying chronic health conditions experienced by Aboriginal and Torres Strait Islander people and women and therefore the increased risk of further deaths in custody, a reduction in the number of people on remand should be a key aspect of a COVID-19 public health response. Prison must be a place of last resort.

The reverse onus categories in the Bail Act should be abandoned, and all bail decision-making should be based on a single test – unacceptable risk. There should be a presumption in favour of bail, except in circumstances where there is a specific and immediate risk to the community or individual.

BASE BAIL DECISION-MAKING ON A SINGLE TEST – UNACCEPTABLE RISK.

This approach not only simplifies bail decision-making but also avoids the breach of legal principle involved in reverse onus provisions (which impose responsibility on the person applying for bail to satisfy the court as to why they should not be detained in custody). The Government must also ensure that a person is not remanded in custody for an offence that is unlikely to result in an immediate sentence of imprisonment.

To facilitate this urgently as a response to the increased risk of COVID-19 in the prison system, the application of items 1 and 30 in Schedule 2 to the Bail Act, and of sections 4AA(2)(c) and (d) of the Bail Act, should be temporarily suspended. This would result in only those who pose a serious risk to the community being required to show compelling reasons or exceptional circumstances.

The Victorian Aboriginal Legal Service, Human Rights Law Centre and Fitzroy Legal Service have recommended that the Government:

1. Repeal the reverse-onus provisions in the Bail Act, particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and schedules 1 and 2 of the Bail Act).
2. Create a presumption in favour of bail for all offences, except in circumstances where there is a specific and immediate risk to the physical safety of another person. This should be accompanied by an explicit requirement in the

Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

3. Repeal the offences of committing an indictable offence while on bail (s. 30B), breaching bail conditions (s. 30A) and failure to answer bail (s. 30).

An automatic administrative review process should be put in place for all persons currently on remand to have their remand status reviewed, applying the above tests. That review process should start with those people considered at risk of death or serious harm should they contract COVID-19.

6. PEOPLE WITHOUT A HOME

People should not be denied bail or community orders because they do not have a home. There are people on remand within the prison system who would be eligible for release on bail if they were to have access to stable accommodation.

SUPPORTED ACCOMMODATION AND COURT INTEGRATED SERVICES FOR PEOPLE WITHOUT A HOME.

The Government should:

- ▼ Increase supported accommodation options, including funding organisations to provide culturally appropriate housing and wrap-around services for Aboriginal and Torres Strait Islander people;
- ▼ Expand support programs for people on bail and community corrections orders; and
- ▼ Expand the Court Integrated Services Program.

Accommodation options must support people to recover in the community and should not impose intrusive security and surveillance systems and restrictions on movement and community and family ties that can lead to breaches of accommodation rules and a swift return to custody.





7. EXISTING LEGISLATIVE MECHANISMS

USE EXISTING LEGISLATIVE MECHANISMS TO REDUCE THE NUMBER OF PEOPLE IN THE PRISON SYSTEM.

There are existing legislative mechanisms that should be used to reduce the number of people in the prison system, including administrative leave and emergency management days.

Under section 57A of the Corrections Act 1986 (Vic), people can be granted administrative leave if they have pre-existing health issues. This includes elderly people, people with chronic health conditions, disabilities and mental health conditions. Aboriginal and Torres Strait Islander people should also be considered for administrative leave given their particular vulnerabilities.

Under section 58E of the Corrections Act 1986 (Vic), people can be released from prison if they have been granted Emergency Management Days (EMDs). The legislation provides that a sentence can be reduced by up to four days for each day of restrictions and deprivations during the COVID pandemic – provided the applicant has been of good behaviour - or by 14 days early release in other circumstances of an unforeseen and special nature. This provision should continue to be used proactively to expedite the release of people from prisons that are soon to be released.

Corrections Victoria should work with health service providers within the prison system and legal services to identify people with pre-existing health issues that could be eligible for administrative leave or released under EMDs provisions.

People in prison could be assisted with their efforts to apply for administrative leave or release under existing legislation by making the relevant policies and procedures publicly available and providing freecall numbers for prisoners to contact CLCs.

Measures to release people from the prison system must also include efforts to ensure that people have appropriate support available to transition back into the community, as well as supports necessary to ensure safety in the COVID-19 context including safe and secure housing.

Applications for EMDs should be processed in a timely, transparent way so that prisoners eligible for them have their applications processed in time for release at their eligibility date. In addition, people being held on remand and subject to quarantine or otherwise in lock-down should have their EMDs applied immediately (rather than fortnightly) so that they do not lose the opportunity to have these credited against their sentence. Furthermore, these calculations should be provided to the person without delay so that the most up to date information on the time they have served is available when their legal matter is heard by the court.

EMDs should not be refused on the basis that no housing support has been provided. This is concerning for people serving short terms – including 14 days in Quarantine Units – who are not receiving EMDs because no housing support is available. Additional administrative and housing support resources should be provided to ensure safe and appropriate decarceration measures are not defeated because of administrative delay in processing applications.

8. PAROLE

All applications for parole should be processed in a timely way, so that a decision is made by the Adult Parole Board prior to prisoners' earliest eligibility dates. There should be publicly available data on processing applications to ensure parole applications are being processed well before applicants complete their court ordered non-parole period.

GRANT PAROLE TO PEOPLE IN PRISON WHO POSE A LOW RISK TO THE COMMUNITY IF RELEASED.

People in prison should be provided with legal and case-management support to assist with parole applications. Corrections Victoria or the Adult Parole Board should work proactively with legal assistance services, including Community Legal Centres, Aboriginal Legal Services and Victoria Legal Aid, to ensure that every applicant for parole has been provided with access to legal and accommodation assistance. Many legal assistance providers including the Victorian Aboriginal Legal Service and the Law and Advocacy Centre for Women also provide case-management services.

Corrections Victoria should ensure that site visits to inspect properties for parole accommodation can continue to occur despite COVID-19 restrictions.

9. POST-RELEASE HOUSING

Every person who exits prison – whether at their full time release date, on bail or on parole, should have access to safe, stable and supported accommodation.

NO PERSON SHOULD BE RELEASED INTO HOMELESSNESS.

Access to housing is critical to ensure that people can access the supports they need to reintegrate into the community and to reduce the risk of offending. Research has shown that if people in prison exit into homelessness, they are twice as likely to return to prison within the first nine months of release.¹⁴

Post-release housing options can be improved by:

- ▼ Implementing measures to sustain housing for people on remand or short sentences, including increasing access to housing workers, expanding the Corrections Victoria brokerage scheme and providing pre- and post-release integrated legal services;
- ▼ Increasing access to temporary safe, supported and culturally appropriate accommodation options and support services for people exiting the prison system with improved transitional pathways to longer-term housing;
- ▼ Increasing access to permanent, secure public housing for people engaged with the criminal justice system and identifying people being released from custody as a priority cohort for public housing; and
- ▼ Improved access to community housing and better rights for people in community housing.

It is vital, for the well-being of people in prison and in the community, that people in the prison system are able to exit the prison system safely and with appropriate support. Not only does exiting prison without a home increase the likelihood of reoffending, but without an address to return to, many people on remand are not able to secure bail, and people on sentences are not able to access parole. This leaves many people in prison who should or could be in the community.

Given the current rate of recidivism in Victoria sits at 43.3 per cent and with the cost of incarceration at \$317.90 per person per day¹⁵, access to secure housing with supports is a critical component of reducing COVID-19 health risks for prisoners and tackling Victoria's costly imprisonment rate.

Additionally, there needs to be increased information and assistance for people engaged with the criminal justice system to ensure they understand what housing options are available, how to apply, the waiting lists and wait times.





CONCLUSION

If each of these steps are taken, the number of people in Victoria’s prison system will be significantly reduced and this will reduce the risk of COVID-19 spreading within the prison population and into the wider community.

THE LESS PEOPLE IN THE PRISON SYSTEM WHEN THERE IS A COVID-19 OUTBREAK, THE MORE LIVES OF PEOPLE IN THE PRISON SYSTEM AND THE COMMUNITY WILL BE SAVED.

The Government can act now to send a clear message that these lives are worth saving. The whole system can work together to reduce prison numbers and curb the spread of COVID-19, otherwise the outcome could be devastating.

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