



FEDERATION
OF COMMUNITY LEGAL CENTRES VIC

INQUIRY INTO VICTORIA'S CRIMINAL JUSTICE SYSTEM

Submission to the Legal and Social Issues Committee

ABOUT THE FEDERATION

The Federation is the peak body for Victoria's Community Legal Centres (CLCs). Our members are at the forefront of helping those facing economic, cultural or social disadvantage and whose life circumstances are severely affected by their legal problem. For over 40 years CLCs have been part of a powerful movement for social change, reshaping how people access justice, creating stronger more equitable laws, and more accountable government and democracy.

We pursue our vision of a fair, inclusive, thriving community through challenging injustice, defending rights and building the power of our members and communities. As an influential advocate, our voice is distinct and courageous: we are not afraid to challenge government, big business, or other powerful actors to ensure equality and fairness for all.

Read our strategic plan online:

fclc.org.au/about

WE WANT A COMMUNITY THAT IS FAIR, INCLUSIVE AND THRIVING: WHERE EVERY PERSON BELONGS AND CAN LEARN, GROW, HEAL, PARTICIPATE AND BE HEARD.

The Federation:

- ▼ Enables a strong collective voice for justice and equality;
- ▼ Mobilises and leads CLCs in strategic, well coordinated advocacy and campaigns;
- ▼ Works with members to continuously improve the impact of community legal services;
- ▼ Drives creativity and excellence in the delivery of legal services to communities;
- ▼ Helps make justice more accessible.

Our members lead collaboration and advocacy via several Working Groups, providing guidance and direction for the Federation's work, as well as opportunities for joint advocacy.

Together with our members and communities, we work to dismantle unjust systems that perpetuate racism, sexism, homophobia, ableism, economic injustice and other inequalities. Our priority is to be fully accountable to the communities we represent.



THE FEDERATION ACKNOWLEDGES THE TRADITIONAL ABORIGINAL OWNERS OF COUNTRY AND WE PAY OUR RESPECTS TO ELDERS PAST, PRESENT AND EMERGING. WE RECOGNISE THEIR CONTINUING CONNECTION TO LAND, WATER AND COMMUNITY. SOVEREIGNTY WAS NEVER CEDED.

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SECTION 1: INTRODUCTION AND RECOMMENDATIONS

Recommendations

We have set out a summary of our recommendations to the Inquiry into Victoria's Criminal Justice System (the **Inquiry**) below.

We support the Inquiry recommending:

- Reform to bail laws to reduce the increasing number of people on remand in custody.
- Raising the age of criminal responsibility from 10 to at least 14 years old.
- Reviewing the *Summary Offences Act 1966* (Vic) to determine which indictable offences should be reclassified, and which summary offences should be decriminalised.
- Repealing all mandatory sentencing provisions.
- Properly resourcing an effective and independent police oversight body.
- Reform to parole laws to create a fairer parole process and to improve transparency and accountability of the Adult Parole Board.
- Removing the requirement for Victoria Police or prosecutions to consent to a diversion and making it available at the instance of a Magistrate.
- Additional investment in community legal assistance to provide legal advice and holistic, wrap-around support to people at risk of coming into contact with the criminal legal system or reoffending.
- Additional investment in support services and community legal services for victims of crime to ensure they have the support they need to recover from offending.
- Improving responses to the misidentification of victims as perpetrators of family violence.
- Adopting a rehabilitative approach to substance use that is community-based and led, health-driven and based on harm reduction principles.
- Improving access to affordable and social housing to reduce the risk of criminalisation and re-offending post-release.

We also endorse the submissions made by Smart Justice for Young People (SJ4YP) and Smart Justice for Women (SJFW) to the Inquiry. We support the Inquiry adopting SJ4YP's recommendations to reduce rates of youth offending and SJFW's recommendations to reduce the criminalisation of women.

The current situation in Victoria

For decades, the community legal sector in Victoria has advocated for evidence-based approaches to criminal justice issues. The evidence is clear that investing in early intervention, community-based support and diverting people from the criminal legal system is the most effective approach to prevent offending and to reduce recidivism.

In Victoria, there is a disconnect between what works to reduce crime and the policy approach of the Victorian Government. A few high profile, violent incidents, such as the devastating loss of life caused by the Bourke Street tragedy, have led successive governments to implement punitive reforms. Many of these reforms have focused on punishment instead of prevention, often in the name of making communities safer. A common feature of these reforms has been to reduce judicial discretion and limit the courts' ability to take into account the particular circumstances of each case.

Public debate on criminal justice issues generally focuses on punishment instead of prevention, often in the name of responding to the needs of victims of crime. The mainstream media plays a key role in shaping public perceptions of the criminal legal system. Public debate in Victoria is fuelled by the mainstream media, which has the ability to perpetuate misconceptions about criminal justice issues.¹ Research has shown that the media disproportionately focuses on a small number of dramatic and violent cases.² This often leaves the public with an inaccurate picture of criminal justice issues.

In their paper, *Myths and Misconceptions: Public Opinion versus Public Judgement about Sentencing*, the Sentencing Advisory Council outlined the following findings, among others:

- People have very little accurate knowledge of crime and the criminal legal system.
- When people are given more information, their levels of punitiveness drop dramatically.
- People with previous experiences of crime victimisation are no more punitive than the general community.
- People favour increasing the use of alternatives to imprisonment.

¹ J Grosholz & C Kubrun, *Crime in the news: how crimes, offenders and victims are portrayed in the media*, *Journal of Criminal Justice and Popular Culture*, January 2007; K Gelb, *Myths and Misconceptions: Public opinion versus public judgment about sentencing*, Sentencing Advisory Council, 2006; K Gelb, *More Myths and Misconceptions*, Sentencing Advisory Council, 2008.

² *Ibid.*

- People believe that the most effective way to control crime is via programs such as education and parental support, rather than criminal justice interventions.
- People's sentencing preferences are actually very similar to the judiciary and the sentences imposed by the courts.
- People favour rehabilitation over punishment as the primary purpose of sentencing for young people who offend, and for first time offences and property related offences.³

There are also common misconceptions about the causes of offending.

The needs of victims of crime

Another common misconception is the idea that punitive approaches to offending and harsher sentencing will lead to better outcomes for victims of crime. The needs of victims of crime vary significantly and depend on a range of factors.⁴ Victims of crime are also best served by reducing offending and recidivism, which requires less punitive approaches.

Recent reviews and inquiries have considered reforms that are necessary to respond to a range of victims' needs, rights and entitlements, including:

- to be provided with information and support;
- to be treated with respect and dignity;
- to participate in criminal justice processes and decision making;
- to be protected from trauma, intimidation and unjustified interference with privacy; and
- to be able to seek reparation.⁵

These reviews and inquiries recognise that victims' needs are far more complex than the desire for punishment, and support the case for efforts to be directed towards responding to a range of victims' needs.

³ Ibid.

⁴ Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victims Services Review*, November 2020 p. 23.

⁵ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process: Report*, July 2018; Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victims Services Review*, November 2020; Centre for Innovative Justice, *Communication with Victims about Resolution Decisions*, April 2019; Victorian Law Reform Commission, *Review of the Victims of Crime Assistance Act 1996: Report*, September 2018; Royal Commission into Family Violence, *Report and Recommendations*, March 2016; Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report*, November 2012.

The link between victimisation and offending is one of the strongest empirical associations in criminological literature.⁶ A 2012 review of the literature on the ‘victim-offender overlap’ identified studies reporting that more than half of victims of crime become offenders and vice versa.⁷ We also know that between 70 to 90 per cent of women in prison are victims of family violence, sexual abuse or child abuse.⁸

From this perspective, it is vitally important that reforms to improve victims’ experiences and respond to their needs, do not lead to more punitive approaches towards offending or increase incarceration.

Key reforms over the past decade

Over the past decade, a number of key reforms have been implemented in Victoria that have increased the punitive nature of the criminal legal system and contributed to the escalating numbers of people in prison and on remand. This is coupled with increased investment in policing. In 2016, the Victorian Government announced a \$2 billion investment in police to recruit an additional 3,135 police officers over five years.

Changes to the *Bail Act 1977* (Vic) (the **Bail Act**) have resulted in a significant number of people charged with low-level and non-violent offences being refused bail. The reforms are having a significant impact on people who are disadvantaged or vulnerable, and the number of people on remand is skyrocketing, particularly the numbers of women.

There have been a number of sentencing reforms over the past decade that have reduced judicial discretion, coupled with an increase in the use of mandatory sentencing. This includes, for example, new mandatory minimum sentences for offences against emergency and custodial workers (such as, police and correctional officers); restrictions on the use of Community Corrections Orders for serious offences; and the abolition of suspended sentences.

⁶ Centre for Innovative Justice, *Strengthening Victoria’s Victim Support System: Victims Services Review*, November 2020 p. 23.

⁷ W G Jennings et al, *On the overlap between victimisation and offending: A review of the literature*, Aggression and Violent Behaviour (2012) 17.

⁸ H Johnson, *Drugs and crime: A study of incarcerated female offenders*, *Research and public policy series*, 2004; Justice Health & Forensic Mental Health Network, *2015 Network Patient Health Survey report*, 2017; M Wilson et al, *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia*, SAGE Open, January 2017.

There have also been significant reforms to parole. The number of people being released on parole has significantly reduced over the past decade,⁹ which means that people are not being properly supported to transition back into the community post-release.

A significant increase in the number of people in prison

Between 2015 and 2019, the number of people in prison increased by around 2,000 people. If you look at the trend over the past decade, you can see that on 30 June 2011, there were 4,737 people in prison.¹⁰ On 30 June 2021, there were 7,249 people in prison.¹¹ This is an increase of over 60 per cent in 10 years.

In regard to the increase in prison spending, the total budget output for the Corrections portfolio for 2021–22 was \$1.675 billion,¹² compared to only \$639 million in 2010.¹³ It is important to keep in mind that the cost of imprisoning a person per day in Victoria is \$323.45, compared with \$46.84 per day for a Community Corrections Order.¹⁴ This is coupled with high rates of recidivism: 44.2 per cent of people released from prison in Victoria in 2017–18 returned to prison within two years.¹⁵

Since 2013, there has been a dramatic increase in the number of people on remand in custody. During the early stages of the COVID-19 pandemic, there was a reduction in the number of people on remand because courts were taking into account the significant delays in the justice system and the fact that people would face lengthy periods on remand. However, those numbers are now back to where they were at prior to February 2020 and are likely to increase where delays arising from COVID-19 are no longer factored into bail decisions.

Impacts on women, Aboriginal and Torres Strait Islander people and young people

The number of women in Victorian prisons has more than doubled over the past decade.¹⁶ At 30 June 2021, more than half of the women in Victorian prisons were on

⁹ Corrections Victoria, *Annual Prisoner Statistical Profile 2006-07 to 2018–19*, accessed August 2021.

¹⁰ Corrections Victoria, *Corrections statistics: quick reference*, accessed August 2021.

¹¹ Corrections Victoria, *Monthly time series prisoner and offender data*, accessed August 2021.

¹² Corrections Portfolio Presentation, *Public Accounts and Estimates Committee Inquiry into Budget Estimates 2021–22, 30 June 2021*.

¹³ Corrections Portfolio Transcript, *Public Accounts and Estimates Committee Inquiry into Budget Estimates 2010–11*, 14 May 2010.

¹⁴ Corrections Victoria, *Corrections statistics: quick reference*, accessed August 2021.

¹⁵ Council of Australian Governments, *Report on Government Services*, February 2021.

¹⁶ Crime Statistics Agency, *Characteristics of offending of women in prison in Victoria 2012-2018*, November 2019.

remand.¹⁷ A key driver of this escalation in women's imprisonment has been changes to the Bail Act introduced in 2018.

Due to the ongoing impacts of colonisation, systemic racism and discriminatory policing, the number of Aboriginal and Torres Strait Islander people in prison has nearly tripled over the last 10 years.¹⁸ Aboriginal and Torres Strait Islander people now represent 10 per cent of the prison population, compared to six per cent in 2010. We recognise the leadership of Aboriginal and Torres Strait Islander communities and organisations in advocating for reform to address this, and the importance of Aboriginal self-determination in determining and implementing reforms that will impact their communities.

No child belongs in prison, yet the number of children in detention on remand in Victoria has increased to 624 children between July 2019 and July 2020¹⁹ from 566 in the previous year.²⁰ This is despite the impacts of the COVID-19 pandemic and a decrease nationally in the number of children in detention on remand over the same period.

Other groups that are over-represented in the criminal legal system in Victoria are people with mental ill-health, people with disabilities, people who use substances, and people from culturally and linguistically diverse backgrounds.

An evidence-based, Smart Justice approach

For over a decade, the Smart Justice coalition led by the Federation of Community Legal Centres Victoria sought to enhance the safety of all Victorians by promoting understanding of criminal justice policies that are effective, evidence-based and human rights compliant. In short, Smart Justice is about community safety – the smart way.

The starting point to preventing crime is understanding what causes crime and that no single factor causes crime. While there is debate about the importance of various factors, most agree that multiple factors cause crime, and causes of criminal behavior vary between different people and between different types of crimes.²¹ The overall crime rate is affected by a number of factors, including:

- the number of people who become involved in crime;
- the rate at which these people commit offences; and

¹⁷ Corrections Victoria, *Monthly Time Series Prisoner and Offender Data*, July 2021.

¹⁸ Corrections Victoria, *Annual Prisoner Statistical Profile 2009-10 to 2019-20*, December 2020.

¹⁹ Australian Institute of Health and Welfare, *Youth Justice in Australia 2019-2020* (see table 109b).

²⁰ Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-2019* (see table 109b).

²¹ D Rose, *Poverty and Crime, Thinking about poverty*, October 2017, pp. 107–108.

- the length of time people stay involved in crime.²²

Lowering the crime rate involves addressing each of these factors: from early intervention with young people at risk of involvement in crime, to working with those with substantial criminal histories to address the causes of reoffending.

The link between inequality and imprisonment

There is a clear link between government policies that entrench inequality and an increase in rates of criminal offending. A range of studies have pointed to a relationship between economic inequality and crime.²³ Poverty and unemployment are risk factors for offending.²⁴ While poverty does not cause crime itself, research indicates that reducing disadvantage and income inequality will reduce crime.²⁵

Similarly, there is extensive evidence that providing a person with stable housing,²⁶ employment opportunities,²⁷ and community-based supports for mental ill-health,²⁸ substance use²⁹ or victimisation³⁰ can reduce the likelihood that a person will come into contact with the criminal legal system.

Reinvesting in stronger communities and early prevention

A cost effective way of preventing crime is to tackle its causes through criminal justice policies, such as justice reinvestment.³¹ Justice reinvestment diverts a portion of the

²² D Weatherburn, *Law and Order in Australia – Rhetoric and Reality*, Current Issues in Criminal Justice, 2004, pp. 318-319.

²³ T Newburn, *Social disadvantage, crime and punishment, Social Advantage and Disadvantage*, Oxford University Press, 2016, pp. 322–340.

²⁴ D Weatherburn, *Law and Order in Australia – Rhetoric and Reality*, Current Issues in Criminal Justice, 2004, pp. 318–319.

²⁵ Ibid.

²⁶ D Padgett et al, *Housing First: Ending Homelessness, Transforming Systems, and Changing Lives*, November 2015.

²⁷ S Lageson et al, *How work affects crime and crime affects work over the life course*, Handbook of life course criminology: Emerging trends and directions for future research, 2013, pp. 201–212.

²⁸ K Heilbrun et al, *The movement towards community-based alternatives to criminal justice involvement and incarceration for people with severe mental illness*, 2015.

²⁹ D Weatherburn, *Law and Order in Australia – Rhetoric and Reality*, Current Issues in Criminal Justice, 2004, pp. 318–319.

³⁰ Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victims Services Review*, November 2020 p. 23.

³¹ Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples*, March 2018.

funds spent on prisons to local communities. The money is then reinvested in programs and services that address the underlying causes of crime in that community.

Another effective way of preventing crime is investing in early intervention programs targeted to at-risk young people. Typically, young people who offend start getting involved in crime somewhere between 12 and 16 years of age. Most of these young people have one or two contacts with the criminal legal system and do not reoffend, while a small proportion commit more serious offences and eventually enter the adult criminal legal system.³²

One of the strongest risk factors for young people becoming engaged with the criminal legal system is neglect of children by parents.³³ Research shows that this risk factor can be reduced through other supportive relationships with family, school and the community. Early intervention and positive support structures for young people is a critical part of long-term crime prevention.

³² D Rose, *Poverty and Crime, Thinking about poverty*, October 2017, pp. 107–108.

³³ D Weatherburn, *Law and Order in Australia – Rhetoric and Reality*, Current Issues in Criminal Justice, 2004, pp. 318–319.

SECTION 2: IMPROVING VICTORIA'S CRIMINAL LEGAL SYSTEM

Bail reform

A key priority for the community legal sector is reform to the Bail Act. In recent years, there has been a significant increase in the number of people on remand in custody in Victoria.³⁴

In 2013, new offences of contravening a conduct condition of bail and committing an indictable offence while on bail were introduced. In 2018, there was a significant expansion of the reverse onus tests for bail, with higher thresholds applying to minor offences through the creation of a new 'show compelling reasons' test and a much wider application of the 'show exceptional circumstances' test.

In combination, these changes to the Bail Act mean that a significant number of people with low-level and non-violent charges against them are being refused bail. The reforms are having a significant impact on people that are disadvantaged or vulnerable, and the number of people on remand has risen sharply, particularly in relation to women.

The Bail Act must be reviewed in light of its disproportionate impact on people who have engaged in low-level, non-violent offending, particularly in relation to women and Aboriginal and Torres Strait Islander people.

We recommend reform to bail laws to reduce the increasing number of people on remand in custody.

Raising the age of criminal responsibility

The current minimum age of criminal responsibility in Australia at 10 years of age harms children, and in particular Aboriginal and Torres Strait Islander children. It is discriminatory, and is out of step with human rights standards and research on child development.

³⁴ Corrections Victoria, *Annual Prisoner Statistical Profile 2009--10 to 2019--20*, accessed August 2021.

The evidence shows that the younger a child is when they have their first contact with the criminal legal system, the higher the chance of future offending and the more likely they are to have long-term involvement in crime.³⁵

The United Nations Committee on the Rights of the Child has called for countries to have a minimum age of criminal responsibility set at 14 or higher and recommends that children under 16 should not be deprived of liberty.³⁶ The Commissioner for Children and Young People in Victoria has also recommended that the age of criminal responsibility be raised to 14, and that Aboriginal and Torres Strait Islander children under 14 years be provided with therapeutic, culturally-based, child-centred and coordinated responses to anti-social behaviour.³⁷

We recommend raising the age of criminal responsibility from 10 to at least 14 years old.

Summary offences review

Many minor offences are used by police to unfairly target Aboriginal and Torres Strait Islander people and people experiencing poverty. There have been repeated calls for the decriminalisation of minor offending and the implementation of non-punitive responses, following on from key recommendations made by the Royal Commission into Aboriginal Deaths in Custody.

A number of offences in Victoria are committed due to underlying issues relating to income inequality, mental ill-health or substance use. This includes indictable offences such as shop thefts or petty thefts, offences relating to alcohol and other drug use, and common law offences of public nuisance and unlawful assembly. It also includes summary offences relating to public drunkenness, begging, and offensive language.

We recommend a review of the *Summary Offences Act 1966* (Vic) to determine which indicatable offences should be reclassified, and which summary offences should be decriminalised.

³⁵ Sentencing Advisory Council, *Reoffending by children and young people in Victoria*, 2016, p.31.

³⁶ Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, 81st session, UN Doc CRC/C/GC/24, 18 September 2019.

³⁷ Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, June 2021, p. 24.

Mandatory sentencing

Mandatory sentencing laws have been found to increase incarceration rates and are costly with no corresponding evidence that they act as an effective form of deterrence.³⁸

There are a wide range of offences in Victoria which require courts to impose custodial sentences, as well as mandatory minimum sentences. For example, there are minimum mandatory sentences for causing serious injury to an on-duty emergency or custodial worker (such as, prison officers and police),³⁹ as well as for contravening a supervision order under the *Serious Offenders Act 2018* (Vic).⁴⁰

Mandatory sentencing laws signify a departure from standard approaches to sentencing which provide for a maximum penalty to be imposed upon conviction based on the gravity of the offence. These provisions constrain judicial discretion to determine the most appropriate sentence in each individual case having regard to any mitigating factors or alternative sentencing options.⁴¹ They conflict with principles of proportionality and ‘imprisonment as a last resort’.

Mandatory sentencing laws can have a disproportionate impact on particular groups, including Aboriginal and Torres Strait Islander people.⁴² These provisions fail to have regard to the context of offending and the intersectional disadvantage experienced by many people who interact with the criminal legal system.

We recommend repealing all mandatory sentencing provisions.

Police oversight

There has been a significant investment in policing rather than community-based responses to offending. As policing increases, greater trust is placed in the hands of the police. However, the mechanisms in place for independent oversight of police are inadequate. Critical reforms are required to ensure a robust system of police accountability that serves the community.⁴³

For many years, the community legal sector has been calling for an independent system for the effective investigation of complaints against police. The majority of complaints against police officers are investigated by the police. While the Independent Broad-based

³⁸ Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples*, December 2018, pp. 273, 275.

³⁹ *Sentencing Act 1991* (Vic), s10AA.

⁴⁰ *Ibid*, s10AB.

⁴¹ Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples*, December 2018, p.274.

⁴² *Ibid*, p.273.

⁴³ Flemington and Kensington Community Legal Centre, *Joint submission to the Inquiry into the external oversight of police corruption and misconduct in Victoria*, August 2017.

Anti-corruption Commission (IBAC) has legislative power to investigate police misconduct, most complaints regarding police misconduct are referred to the police for investigation or 'management'.⁴⁴ When there is a death in police custody in Victoria, although this is subject to mandatory investigation and inquest by the Coroner, the investigation is in practice carried out for the Coroner by the police. Police also investigate complaints directed at police officers in relation to abuse, assault, racial abuse, degradation, torture or excessive force.⁴⁵

There is an inherent conflict of interest in vesting investigative powers for police misconduct in the police themselves. This undermines public confidence in the outcomes of police investigations into misconduct and weakens police accountability.⁴⁶ This can disproportionately impact communities that are over-policed. This includes Aboriginal and Torres Strait Islander communities in Victoria where there is a long history of over-policing, a key driver of incarceration.

It is important that the government properly resources an independent body which can effectively investigate police complaints and meets the following human rights standards:⁴⁷

- Independent (that is, hierarchically, institutionally, and practically).
- Capable of conducting an adequate investigation (able to determine whether police actions are unlawful or breach requisite standards leading to disciplinary/criminal sanctions).
- Prompt (the agency must be responsive to ensure trust and confidence in the system).
- Transparent and open to public scrutiny.
- Victim-centred (enables the victim to fully participate in the investigation and safeguards their legitimate interests).

The investigation must be capable of being initiated by the state where the complainant is unable to make their own complaint due to death or debilitating injury. This body should also have sufficient powers to refer matters for criminal investigation where appropriate.

We recommend properly resourcing an effective and independent police oversight body.

⁴⁴ Ibid.

⁴⁵ Flemington and Kensington Community Legal Centre – Police Accountability Project, *Policy briefing paper: Independent investigation of complaints against the police*, 2017, p.8.

⁴⁶ Flemington and Kensington Community Legal Centre, *Joint submission to the Inquiry into the external oversight of police corruption and misconduct in Victoria*, August 2017.

⁴⁷ Ibid, p.2.

Parole reform

There has been a significant decline in the number of people granted parole over the past decade. In 2009–10, 30 per cent of people released from prison in Victoria were released on parole, compared to 6 per cent in 2019–20.⁴⁸

There are various barriers hindering people from accessing parole once their non-parole period has ended. These barriers include the lack of availability of appropriate programs in prisons, as well as challenges accessing secure accommodation in the community. Following the *Review of the Parole System in Victoria*, conducted by Ian Callinan AC in 2013, the onus shifted from the state to the individual applicant to make an application for release on parole which exacerbates existing challenges.

Parole can assist people to reintegrate into the community where it is coupled with intensive case management delivered by well-resourced support services. Effective reintegration can reduce the risk of recidivism. People who complete their full sentence and are not released on parole often transition back into the community with limited supports in place. This can undermine the reintegration process into the community and can increase the risk of reoffending.

We recommend reform to parole laws to create a fairer parole process and to improve transparency and accountability of the Adult Parole Board.

Diversions

Diversions programs offer a pathway away from further criminalisation and access to treatment and rehabilitation. Diversions programs can address the underlying issues that are causing interactions with police. However, the limited opportunities for people to engage in these programs, and the ability of police to refuse diversion, undermines its effectiveness. Numerous studies also demonstrate that Aboriginal and Torres Strait Islander people are less likely to be provided with opportunities for diversion.⁴⁹

The use of diversion has gradually declined from 8.1 per cent of sentenced cases in 2005–06 to 6.4 per cent in 2019–20.⁵⁰ This decline is without oversight and public accountability and raises concerns as to why the Victoria Police guidelines for diversions are not publicly available.

Police should be encouraged to initiate diversion, and prosecutions could be encouraged to consent to a diversion wherever possible. However, there are no public guidelines or

⁴⁸ Corrections Victoria, *Annual Prisoner Statistical Profile 2009–10 to 2019–20*.

⁴⁹ N Papalia, *Disparities in Criminal Justice System Responses to First-Time Juvenile Offenders According to Indigenous Status*, May 2019.

⁵⁰ Sentencing Advisory Council, *Sentencing Outcomes in the Magistrates' Court*, accessed September 2021.

framework 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 people and culturally diverse people, who are already overrepresented in the criminal legal system.

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.⁵¹

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.

We recommend removing the requirement for Victoria Police or prosecutions to consent to a diversion and making it available at the instance of a Magistrate.

Access to community legal assistance

Community Legal Centres (CLCs) take a holistic, community-based and multi-disciplinary approach to providing legal assistance and support to some of the most vulnerable Victorians to ensure that a range of their needs are met, to reduce inequality, and to ensure that their legal problems do not escalate. This is often done through an integrated service model that involves legal and community service professionals (such as, social workers, advocates, and financial counsellors) working in partnership to meet people's needs in a holistic way. This also enables legal professionals to work with community service professionals to upskill them in being able to identify legal problems and understand legal systems, rights and entitlements to better address client needs.

CLCs regularly provide criminal law advice and representation to clients, including people who experience entrenched disadvantage. Legal advice and representation are critical for people who are in contact with the criminal legal system or at risk of incarceration. Access to legal assistance at an early stage, alongside other wrap-around supports, can seek to address underlying causes of offending and decrease the risk of incarceration. As incarceration increases the risk of reoffending, this can disrupt cascading impacts.

⁵¹ Magistrates' Court of Victoria, *Annual Report 2015–16*, September 2016, pp. 12, 14.

For example, the Law and Advocacy Centre for Women (LACW) is a CLC specialising in criminal defence advocacy for women who are imprisoned, or at risk of entering the criminal legal system. LACW has an in-house case management team, including an in-house social worker, providing wrap-around support to clients. In many cases, women are at risk of criminalisation because of social, health and family challenges that they experience because of entrenched disadvantage and family violence.

In one matter, the lawyer and social worker assisted Jane⁵² who had criminal charges against her. Among other factors, Jane was homeless, had an acquired brain injury and experienced mental ill health as a sexual assault survivor. The social worker put in place important supports for Jane which made her well enough to engage with the legal process and then proceeded to set up longer-term plans for ongoing support from services that the client had previously struggled to engage with. As the court could see that there was a detailed support plan in place for Jane, she was allowed to continue to engage with support services, rather than receiving a custodial sentence. The integrated approach not only led to a successful legal outcome, but also enabled Jane to address the underlying causes of her offending.⁵³

We recommend additional investment in community legal assistance to provide legal advice and holistic, wrap-around support to people at risk of coming into contact with the criminal legal system or reoffending.

Victims of crime

There is a clear link between victimisation and offending. A 2012 review of the literature on the 'victim-offender overlap' identified studies reporting that more than half of victims of crime become offenders and vice versa.⁵⁴ Between 70 to 90 per cent of women in prison are victims of family violence, sexual abuse or child abuse.⁵⁵ From that perspective, it is vitally important that reforms to improve victims' experience of summary proceedings do not lead to more punitive approaches towards offending and/or increase incarceration rates.

It is vitally important for victims of crime to be provided with access to support services that meet a range of needs to ensure that their victimisation does not escalate or

⁵² Note: an alias has been used for the purpose of confidentiality.

⁵³ Federation of Community Legal Centres, *Meeting People Where They Are – Delivering Integrated Community Legal Services*, June 2020, p.27.

⁵⁴ W G Jennings et al, *On the overlap between victimisation and offending: A review of the literature*, Aggression and Violent Behaviour (2012), p.17.

⁵⁵ H Johnson, *Drugs and crime: A study of incarcerated female offenders*, Research and public policy series, 2004; Justice Health & Forensic Mental Health Network, *2015 Network Patient Health Survey report*, 2017; M Wilson et al, *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia*, SAGE Open, January 2017.

compound. Victimization or trauma can lead to further problems that become risk factors for offending such as homelessness, mental ill-health, unemployment or substance use. CLCs have expertise in providing trauma-informed responses to people who are vulnerable or experiencing disadvantage, including victims of crime. Many CLCs have integrated services with support services, including support workers, psychologists, counsellors, or caseworkers, to ensure that their clients' needs are being met. Without CLCs engaging in early intervention practices, many legal problems for victims will escalate, potentially resulting in offending.

The Centre for Innovative Justice's report 'Strengthening Victoria's Victim Support System: Victim Services Review' outlined the importance of providing victims with access to legal advice and assistance in relation to a range of multiple needs.⁵⁶ Evidence shows that there is a strong nexus between crime victimisation and legal need. For example, studies have estimated that multiple experiences of crime can increase the risk that a person will experience civil legal problems by 192 per cent, a greater rate than other commonly identified risk factors such as disability, sole parenthood, low income or dependence on social security.⁵⁷

We recommend additional investment in support services and community legal services for victims of crime to ensure they have the support they need to recover from offending.

Misidentification of victims of family violence

Misidentification of victims of family violence as perpetrators was raised as a concern by the Royal Commission into Family Violence and continues to be a pervasive issue.⁵⁸ A small study conducted by Women's Legal Service Victoria in 2018 found that of the 55 female clients named by police as respondents to family violence intervention orders (FVIOs), 32 were incorrectly identified.⁵⁹

The misidentification of women as perpetrators in family violence situations can lead to the criminalisation of victims and can have other far-reaching impacts, including in relation to child protection and family law proceedings. It can also compound distress and trauma for women who have experienced family violence.

⁵⁶ Centre for Innovative Justice, *Strengthening Victoria's Victim Support System: Victim Services Review*, November 2020, p.149.

⁵⁷ V Kemp et al, *The Problems of Everyday Life: Crime and the Civil and Social Justice Survey*, Centre for Crime and Justice Studies, 2007, p.5.

⁵⁸ Royal Commission into Family Violence, *Summary and Recommendations*, March 2016.

⁵⁹ Women's Legal Service Victoria, *Snapshot of police family violence intervention order applications*, January–May 2018.

There needs to be ongoing improvements in the accurate identification of the primary aggressor by Victoria Police to ensure that women are not misidentified. There also needs to be robust mechanisms put in place to address misidentification where it has occurred. This not only involves improvements in police processes, but also in other areas, including courts, the justice system and the child protection system.

There are various reforms that should be implemented by Victoria Police, in consultation with the community legal sector, Victoria Legal Aid and family violence services. These include:

- Delivering training to Victoria Police to improve understanding of the dynamics and gendered nature of family violence and coercive control, as well as the contexts which contribute to women's victimisation.⁶⁰
- Developing a clear and transparent protocol setting out the process where there is a concern that a person has been misidentified.
- Implementing a process for the review of FVIO applications where the risk of misidentification is higher, including for Aboriginal and Torres Strait Islander women and culturally and linguistically diverse women.
- Utilising greater discretion to withdraw FVIOs where misidentification has occurred and developing related policy guidance to assist in such determinations.
- Developing guidance for the withdrawal of related criminal charges where misidentification has occurred or exploring options for diversion (e.g., where unconditional withdrawal of charges is not appropriate).

We recommend improving responses to the misidentification of victims as perpetrators of family violence.

Substance Use

A significant number of people in prison are charged with drug use and possession offences. As of 30 June 2020, 14.7 per cent of people were in prison for drug offences (as their most serious offence/charge) which was higher for women at 26 per cent.⁶¹ The criminalisation of drug use and possession leads to an increase in the number of people in prison for those offences, while also increasing other types of offending. In order to reduce drug-related offending, people must be able to access health and support services that focus on rehabilitation, and are delivered through community-based and led, culturally appropriate programs that take a harm reduction approach.

⁶⁰ Ibid.

⁶¹ Corrections Victoria, *Annual Prisoner Statistical Profile 2009–10 to 2019–20*.

A harm reduction approach aims to address issues relating to alcohol and drug use by reducing the harmful effects of substances. Harm reduction considers the health, social and economic consequences of alcohol and other drug use on both the individual and the community as a whole. It includes interventions such as needle and syringe programs and medically supervised injecting centres.

We recommend adopting a rehabilitative approach to substance use that is community-based and led, health driven and based on harm reduction principles.

Housing

A lack of affordable and social housing⁶² means that more people are at increased risk of entering the criminal legal system due to homelessness. It also means that hundreds of people in Victoria are at risk of being released from prison into homelessness each year.

Homelessness forms part of entrenched disadvantage experienced by many people who come into contact with the criminal legal system. The Australian Institute of Health and Welfare found that about one third (33%) of people reported being homeless in the four weeks prior to entering prison.⁶³ Among other factors, homelessness increases the likelihood of interactions with the police and visibility in public areas.

The lack of access to stable housing can have profound flow on effects once people enter the criminal legal system. Lack of secure housing can be a barrier to being granted bail and parole.⁶⁴ It is critical that there is investment in safe, stable and affordable housing in order to ensure that people are not refused bail or parole due to homelessness and housing instability. In line with the Housing First principles,⁶⁵ and in recognition of housing as a basic human right, access to transitional housing for people exiting prison should not be conditional on engagement with supports or run through Corrections Victoria.

⁶² Social housing is short-term and long-term rental housing owned and run by the government or not-for-profit agencies. It includes both public housing and community housing. It is for people on low incomes, especially those who have recently experienced homelessness or who have other special needs. There is no agreed definition of affordable housing in Australia. For the purposes of this document, affordable housing is housing where the cost is no more than 30 per cent of that household's net income. It is for people on very low, low and moderate incomes.

⁶³ Australian Institute of Health and Welfare 2019, *The Health of Australia's Prisoners 2018*, Cat. No. PHE 246. Canberra: AIHW, p.vii.

⁶⁴ See for example, E Russell et al, *A Constellation of Circumstances – The Drivers of Women's Increasing Rates of Remand in Victoria*, July 2020.

⁶⁵ D Padgett et al, *Housing First: Ending Homelessness, Transforming Systems, and Changing Lives*, November 2015.

According to Housing First principles,⁶⁶ access to safe and permanent housing must be the first priority for people experiencing homelessness. This recognises the significant challenges in addressing people's complex needs where they do not have a home. Once housing is secured, then this provides an opportunity for support services to address a person's complex needs, including drug and alcohol counselling or mental health treatment. It follows that housing is vitally important to reduce risk factors for offending or recidivism post-released.

We recommend improving access to affordable and social housing to reduce the risk of criminalisation and re-offending post-release.

⁶⁶ Ibid.