



**FEDERATION**  
OF COMMUNITY LEGAL CENTRES VIC

# A JUST AND AND EQUITABLE COVID RECOVERY

A COMMUNITY LEGAL SECTOR  
PLAN FOR VICTORIA

# CONTENTS

|   |           |
|---|-----------|
| Executive Summary   | 4         |
| Recommendations   | 5         |
| <b>INTRODUCTION</b>   | <b>8</b>  |
| The community legal sector in Victoria  | 8         |
| Impacts of COVID on the need for free legal assistance                                    | 9         |
| The community legal sector's plan for a just and equitable recovery                       | 9         |
| <b>SECTION 1: PEOPLE IN FINANCIAL HARDSHIP</b>  | <b>10</b> |
| 1.1 Retaining and expanding measures to ease the financial impacts of COVID               | 12        |
| 1.2 Embedding protections against predatory behaviour                                     | 13        |
| 1.3 Supporting all Victorians to live in dignity, through the COVID recovery and beyond   | 15        |
| <b>SECTION 2: PEOPLE IN INSECURE HOUSING</b>  | <b>18</b> |
| 2.1 Protecting tenants throughout the COVID recovery                                      | 19        |
| 2.2 Investing in public and community housing to keep people safe                         | 21        |
| <b>SECTION 3: PEOPLE WHO HAVE EXPERIENCED FAMILY VIOLENCE</b>                             | <b>24</b> |
| 3.1 Building on improvements to court processes and facilities                            | 26        |
| 3.2 Integrating legal services into the family violence support system                    | 29        |
| <b>SECTION 4: PEOPLE IN INSECURE WORK</b>   | <b>30</b> |
| 4.1 Addressing insecure work to keep people safe from exploitation                        | 32        |
| <b>SECTION 5: PEOPLE IN PRISON</b>  | <b>66</b> |
| 5.1 Protecting the welfare and human rights of people in prison                           | 38        |
| 5.2 Progressing towards decarceration and a safer prison system                           | 40        |
| <b>SECTION 6: YOUNG PEOPLE</b>  | <b>42</b> |
| 6.1 Avoiding injustice for young people in the COVID recovery                             | 44        |
| 6.2 Intervening early to reduce marginalisation and avoid the 'revolving door' of justice | 46        |
| 6.3 Taking and keeping children out of prison   | 48        |

## 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.

# EXECUTIVE SUMMARY

The COVID-19 pandemic has exposed fault-lines running through society in Victoria, and around the world. As a public health crisis, the elderly and the immunocompromised have been the most vulnerable to the pandemic's dangers – but as the catalyst for swift and comprehensive changes to how our world works, and as a profound economic shock, other groups of people within our community have been the hardest hit. People experiencing family violence, people in prison, people experiencing financial hardship, people in insecure work and housing and young people are at significant risk of being left behind as Victoria enters the recovery period unless focused and concerted efforts are made by government to repair these cracks in our social support system.

The impacts of COVID, and the government responses to it, have been felt across almost all facets of life in Victoria, from education, housing and work, through to the experience of family violence and conditions in our prison system. Each of these systems is governed by laws and policies which set out Victorians' rights and responsibilities and serve to protect against unfair or harmful treatment.

The CLC sector has seen first-hand how COVID has affected the Victorian community, especially its more disadvantaged members. COVID has highlighted and worsened existing weaknesses in the effectiveness of these legal protections and the processes in place to uphold them. Some government measures have been vital in softening the blow of COVID-19 and the economic slowdown, others have not worked as well as they should. Some actions taken by government agencies are pushing people further into hardship, while others have improved welfare and access to justice.

This document sets out the CLC sector's plan for a just and equitable recovery that fills the gaps in our social support system and embeds protections for the disadvantaged members of our community, to ensure that no one gets left behind in the transition to the 'new normal'. This includes both targeted repairs to embed COVID measures that have worked, and move away from those that haven't; and more fundamental changes to strengthen protections for disadvantaged people and build the future resilience of our social support system.

A just and equitable recovery must:

- ▼ expand and entrench vital protections for financially disadvantaged Victorians
- ▼ improve the fairness and resilience of our housing systems
- ▼ make sure no workers are left behind in Victoria's economic rebuild
- ▼ embed access to justice for all victim-survivors of family violence and build on best practice legal supports in measures to respond to the 'shadow pandemic'
- ▼ protect the welfare and human rights of people in prison throughout the COVID recovery, and move towards a safer prison system
- ▼ protect children and young people impacted by the crisis and keep them out of the justice system

We endorse the Victorian Aboriginal Legal Service's Covid-19 Recovery Plan. The Federation recognises that Aboriginal and Torres Strait Islander people are often adversely impacted by injustice. We support them in their fight for self-determination and equality.

This report has been developed in consultation with Community Legal Centres from across Victoria.

# RECOMMENDATIONS

## FINANCIAL HARDSHIP: RECOMMENDATIONS

TO EXPAND AND ENTRENCH VITAL PROTECTIONS FOR FINANCIALLY DISADVANTAGED VICTORIANS



- ▼ Continue the suspension of debt recovery action by Fines Victoria for all non-safety related fines, including public space, public transport, toll, council and voting offences until at least March 2021.
- ▼ Permanently increase the amount available under Utility Relief Grants.
- ▼ Introduce enforceable regulatory measures to protect telecommunications consumers.
- ▼ Prevent unethical and predatory conduct by debt management firms through the introduction of new legislation or regulations.
- ▼ Retain and enforce existing responsible lending laws.
- ▼ Retain increased social security payments and continue the suspension of the liquid asset means waiting period.
- ▼ Include support for international students in need as part of recovery measures.

## INSECURE HOUSING: RECOMMENDATIONS

TO IMPROVE THE FAIRNESS AND RESILIENCE OF OUR HOUSING SYSTEMS



- ▼ Create a mechanism for the RTDRS to waive or reduce arrears accrued by a tenant within the COVID-19 period, where it is fair and reasonable.
- ▼ Create a provision that prior to making a possession order, VCAT must consider whether or not to order a waiver of all or part of the deferred rent or rental arrears; and whether to order a rental reduction.
- ▼ Create a new stream of DHHS financial relief, which covers arrears already accrued from 1 March 2020 until the expiry of the Residential Tenancies COVID-19 regulations.
- ▼ Implement a transitional rent reduction scheme until at least September 2021, with changes to ensure the schemes' effectiveness in protecting tenants.
- ▼ Extend the DHHS rent relief grant scheme until at least September 2021 to be accessed as part of the transitional rent reduction process, and that the administration of the grant scheme be reviewed.
- ▼ Ensure that all tenants are provided with timely and accessible information about their rights and options in relation to tenancy law and protections.
- ▼ Retain protections to prevent tenancy database listings where the tenant was unable to pay their rent due to a COVID-19 reason.
- ▼ A standardised reference form be introduced which would enable a more objective assessment of rental applications
- ▼ Expand public and community housing stock by 6,000 properties each year for 10 years, including 300 homes designated for Aboriginal and Torres Strait Islander people.
- ▼ Ensure that community housing tenants are not disadvantaged compared to public housing tenants as a result of differences in policies, procedures or governance.



### PEOPLE EXPERIENCING FAMILY VIOLENCE RECOMMENDATIONS



TO EMBED ACCESS TO JUSTICE FOR ALL FAMILY VIOLENCE VICTIM-SURVIVORS AND BUILD ON BEST PRACTICE LEGAL SUPPORTS IN THE RESPONSE TO THE 'SHADOW PANDEMIC'

- ▼ Take steps to ensure that people who cannot meaningfully access online court proceedings are not excluded from the digital court transition.
- ▼ Expand remote witness facilities, including to enable people to give evidence from home, supported by risk assessment to make sure it is safe.
- ▼ Retain the new, streamlined processes for exchange of documents and Family Violence Intervention Order (FVIO) application outcomes between court staff and legal representatives.
- ▼ Expand the Specialist Family Violence Court (SFVC) framework across Victoria, including adequate resourcing for legal assistance services.
- ▼ Retain the warm referral process at non-SFVC Magistrates' Courts, pending the expansion of the SFVC model.
- ▼ Support the integration of legal services into the family violence system.

### PEOPLE IN INSECURE WORK: RECOMMENDATIONS



TO MAKE SURE NO WORKERS ARE LEFT BEHIND IN VICTORIA'S ECONOMIC REBUILD

- ▼ Amend the *Fair Work Act* to create an assumption of 'employee' status to combat sham contracting, and improve regulatory oversight in relation to contracting processes and sham contract-heavy industries.
- ▼ Amend the *Fair Work Act* to automatically convert casual employees to part- or full-time employees after 12 months' continuous employment.
- ▼ The Victorian Government should amend the *Equal Opportunity Act 2010 (Vic)* (EOA) to reinstate and strengthen the Victorian Equal Opportunity and Human Rights Commission's functions and powers to proactively investigate and enforce breaches of the EOA.

### PEOPLE IN PRISON: RECOMMENDATIONS



TO PROTECT THE WELFARE AND HUMAN RIGHTS OF PEOPLE IN PRISON THROUGHOUT THE COVID RECOVERY, AND MOVE TOWARDS A SAFER PRISON SYSTEM

- ▼ Retain digital visit technologies to allow people in prison to remain connected with family, friends and community
- ▼ Corrections Victoria invests in technology to improve connectivity and increase access to devices and video links to ensure that everyone in prison has fair and sufficient access to remote visit capabilities
- ▼ Resume in-person visits as soon as possible under medical guidance
- ▼ The use of Protective Quarantine must be necessary and proportionate to the risk of contracting or spreading COVID-19
- ▼ Ensure that Protective Quarantine aligns to best practice principles for correctional quarantine and does not constitute solitary confinement or punishment
- ▼ Provide accessible, up-to-date information about Protective Quarantine restrictions to prisoners, families, and legal representatives
- ▼ Process Emergency Management Day applications quickly and fairly
- ▼ Repeal the reverse onus categories in the *Bail Act*, 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.
- ▼ A person should not be remanded in custody for an offence that is unlikely to result in a sentence of imprisonment or for longer than their likely sentence.
- ▼ Institute a National Preventative Mechanism under the Optional Protocol to the Convention Against Torture in consultation with the Victorian Aboriginal community to monitor detention conditions

### YOUNG PEOPLE: RECOMMENDATIONS



TO PROTECT CHILDREN AND YOUNG PEOPLE FROM THE IMMEDIATE AND LONG-TERM EFFECTS OF THE COVID CRISIS

- ▼ Withdraw all COVID-related fines issued to children and young people aged 18 and under, and prioritise a service, education and health-based response.
- ▼ Amend the *Children, Youth and Families Act* to allow the extension of family reunification obligations, and support families/carers to safely reinstate meaningful contact with their children.
- ▼ Support the development, retention and expansion of pre-court referrals and advice for parties to family violence matters heard at the Children's Court.
- ▼ Improved exercise of discretionary powers by Victoria Police to divert children and young people from the justice system including through the development of a comprehensive Victoria Police Manual Procedure and Guideline.
- ▼ Remove the requirement for Victoria Police or prosecutions to consent to a diversion in the *Criminal Procedure Act 2009 (Vic)*, making diversion available at the instance of a magistrate.
- ▼ Raise the minimum age of imprisonment in Victoria to at least 14 years.
- ▼ Ensure that all children have access to specialist bail decision-makers, and to adequate bail support, supervision and accommodation services, on a 24-hour, 7 days a week basis.
- ▼ Expand the Children's Court to headquarter courts across Victoria with dedicated magistrates trained in youth crime, child protection and causes of AVITH.

# INTRODUCTION

The COVID-19 pandemic has exposed fault-lines running through society in Victoria, and around the world. As a public health crisis, the elderly and the immunocompromised have been the most vulnerable to the pandemic's dangers – but as the catalyst for swift and comprehensive changes to how our world works, and as a profound economic shock, other groups of people within our community have been the hardest hit. People experiencing family violence, people in prison, people experiencing financial hardship, people in insecure work and housing and young people are at significant risk of being left behind as Victoria enters the recovery period unless focused and concerted efforts are made by government to repair these cracks in our social support system.

The community legal sector has seen first-hand the impacts that COVID, and the government responses to it, have had on members of the Victorian community. Some government measures have been vital in softening the blow of COVID-19 and the economic slowdown, others have not worked as well as they should. Some actions taken by government agencies are pushing people further into hardship, while others have improved welfare and access to justice. This document sets out the community legal sector's recommendations for a just and equitable COVID-19 recovery, based on what we have seen happen in the lives of our clients, and what we believe can be done to make sure that Victoria's economic recovery from this crisis is a recovery for everyone.

## THE COMMUNITY LEGAL SECTOR IN VICTORIA

Community Legal Centres ('CLC's) are independent community organisations that provide free legal assistance to the public. As distinct from Victoria Legal Aid, CLCs work directly with and in their local community. The Federation of Community Legal Centres ('Federation') represents 48 CLCs across Victoria, each providing members of their local community with legal advice, information, ongoing assistance and referral services.

CLCs focus on helping people who face economic and social disadvantage, meeting the legal needs of Victorians who are not able to access Legal Aid assistance and who cannot afford a private lawyer.<sup>1</sup> CLCs assist members of the public with tenancy, employment, social security, family law and family violence, 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. Unaddressed, legal issues can escalate and ultimately carry heavy consequences, including significant financial strain or bankruptcy, physical ill-health, psychological distress and homelessness. The risks posed by unresolved legal need are especially severe for the many CLC clients who already experience some form of disadvantage, as existing vulnerabilities are compounded by risks arising from legal problems.

The community legal assistance sector plays a crucial role in ensuring equitable access to justice and in strengthening the capacity of Victoria's community service network to meet the needs of vulnerable people, including in regional areas.

## IMPACTS OF COVID ON THE NEED FOR FREE LEGAL ASSISTANCE

The COVID health crisis has had wide ranging financial economic and social impacts on individuals and communities across Victoria, creating significant areas of legal need while challenging the ability of the legal system.

In the early days of the pandemic, mass job losses and changes to social security and tenancy laws in Victoria led to unprecedented demand for free legal assistance with employment, welfare and tenancy-related legal problems. As the year progressed and lockdown measures continued, and more Victorians have fallen into financial hardship, CLCs have experienced an increase in the complexity of legal (and non-legal) problems faced by their clients.

As Victoria enters the recovery period, and government supports that had provided a safety net for many Victorians come to an end, the community legal sector anticipates that legal need will increase, especially amongst those cohorts who were already disadvantaged prior to the pandemic. For some people, problems that had been postponed by government COVID responses will come to fruition before they are able to recover financially, such as mortgage or rent payments resuming at pre-COVID levels leading to the risk of evictions as the moratorium ceases. For others, continuing and worsening financial hardship through the slow economic rebuild may create new legal problems, such as falling afoul of predatory lending practices, or struggling to pay infringements or utilities bills. While there are legal mechanisms in place to protect against some of these harms, they are difficult to navigate and do not provide complete coverage. Legal help is often necessary. Meanwhile, the large and growing backlog of Family Violence Intervention Order (FVIO) proceedings at Victoria's courts represents a huge parcel of need for community legal assistance, as CLCs provide a significant fraction of legal services for people with FVIO matters.

Private legal representation is expensive, and even before the economic shock of the pandemic hit, was out of reach for many people experiencing legal problems. The fraction of the community in need of free legal assistance will only grow as restrictions and stimulus packages come to an end but legal need, and financial and economic pressures, remain.

## THE COMMUNITY LEGAL SECTOR'S PLAN FOR A JUST AND EQUITABLE RECOVERY

Impacts from COVID have been felt across almost all facets of life in Victoria, from education, housing and work, through to the experience of family violence and conditions in our prison system. Each of these systems is governed by laws and policies which set out Victorians' rights and responsibilities and serve to protect against unfair or harmful treatment.

COVID has highlighted and worsened existing weaknesses in the effectiveness of some of these legal protections and the processes in place to uphold them. At the same time, some responses to the pandemic have created new vulnerabilities by restricting people's capacity to work or go to school, while others have improved welfare by increasing safety nets such as social security payments.

This document sets out the CLC sector's plan for a just and equitable recovery that fills the gaps in our social support system and embeds protections for the disadvantaged members of our community, to ensure that no one gets left behind in the transition to the 'new normal'. This includes both targeted repairs to embed COVID measures that have worked, and move away from those that haven't; and more fundamental changes to strengthen protections for disadvantaged people and build the future resilience of our social support system.

## SECTION 1:

# PEOPLE IN FINANCIAL HARDSHIP

The pandemic has placed many Victorians in financial hardship. The re-opening of businesses and reactivation of the economy is rightly a core priority for governments at the local, state and federal level, and will support many people to return to financial stability. However, it is crucial that Victoria's COVID recovery is a recovery for everyone – especially people who were experiencing disadvantage before the pandemic hit, and who have been disproportionately affected by its impacts.

The Federation is calling for measures to support everyone in Victoria – no matter their socio-economic position – to recover and live in financial security in a 'COVID Normal' world. This includes recommendations to retain measures that have softened the blow of COVID, to embed protections against predatory behaviours targeting people experiencing hardship, and to change parts of our legal and administrative systems that are – contrary to government recovery goals – entrenching financial hardship within our community.

As a result of COVID-19, more people in Victoria are at risk of experiencing financial hardship, and those who were already disadvantaged are feeling the strain more acutely than ever. Australia already has one of the highest household debt levels in the world, with the ratio of household debt to disposable income at 185%<sup>2</sup>. In October 2020, a University of Melbourne survey found more than 20% of people were feeling financially stressed, and having difficulties paying for essentials.<sup>3</sup> People experiencing financial troubles are vulnerable in multiple ways: from exploitation by dodgy 'payday loan' companies, to the compounding effects of rental arrears, utilities bills, mortgage stress and health expenses, to adverse action in relation to unpaid fines and escalating infringements. Sustained financial difficulty can lead to poorer outcomes across many aspects of people's lives, from educational outcomes for children through to chronic physical and mental ill-health.

The response to COVID-19's economic impact by both the Federal and Victorian governments has sought to soften the blow of loss of employment, particularly through changes to the social security system and payments to support people excluded from the Centrelink safety net, but also through suspending fine debt recovery, and requiring energy retailers to provide more assistance to people struggling to pay utilities bills, and so on. These measures have been vital in supporting people in Victoria facing financial hardship as a result of COVID-19, but also in changing the lives of people already reliant on social security payments or otherwise experiencing hardship.

However, some measures implemented at the outset of COVID-19 are imminently coming to a close – despite it being clear that full economic recovery from the pandemic will take at least several years – and some crucial supports were never extended to some groups vulnerable to the financial impacts of the pandemic. At the same time, protections against predatory or unfair behaviour in the financial and essential services sector are incomplete, and some are even at risk of being wound back. This means that people in financial hardship remain in danger of exploitation.

A just and equitable recovery must retain and enhance measures to ensure that everyone is supported to get back on their feet in a sustainable, dignified way over the months and years that the economic rebuild can be expected to take.

## 1.1 RETAINING AND EXPANDING MEASURES TO EASE THE FINANCIAL IMPACTS OF COVID

Government agencies have responded to COVID-19 by introducing a welcome suite of measures to provide respite to people facing fines, infringements and warrants, and government-funded Utility Relief Grants ('URG's) have allowed people to temporarily cover essential utility bills in periods of acute financial crisis. However, a clear gap has emerged in relation to the telecommunications sector. The lack of effective obligations on telecommunications providers to offer hardship support to customers has already resulted in vulnerable people losing access to digital technologies essential for staying connected with loved ones, healthcare, employment, and government services, and will continue to expose people in hardship to further disadvantage without urgent change. The Federation believes that measures that have been effective in protecting people from further hardship must be retained and expanded, while new steps are vital to expanding protections to the increasingly essential telecommunications industry.

### FINES AND INFRINGEMENTS

Fines Victoria suspended recovery of debts owed to it in the early days of the COVID-19 outbreak. This action appropriately recognised the serious financial impacts of the pandemic on people across Victoria – but Fines Victoria resumed its debt recovery campaigns in June before the emergence of the 'second wave'. Recommencement of debt recovery action now – while the immediate impacts of COVID-19 continue to be felt – unfairly disadvantages all Victorians experiencing financial insecurity due to or during COVID-19.

**Recommendation:** Continue the suspension of debt recovery action by Fines Victoria for all non-safety related fines, including public space, public transport, toll, council and voting offences until at least March 2021.

### UTILITY RELIEF GRANTS

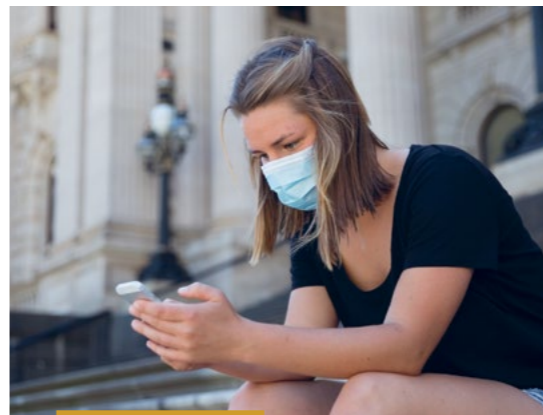
The response to COVID has included measures to soften the blow of financial hardship in relation to utilities. URGs are existing government payments available to people facing acute financial crisis, and comprise sums paid directly to utility retailers to cover part or all of the applicant's utility bill. URGs are a critical intervention that can prevent disconnections and debt spirals for households. The Energy Services Commission, which regulates Victoria's energy, water and transport sectors, introduced a requirement, effective 1 October 2020, that utility retailers must assist eligible customers to complete and submit a URG application. This is an ongoing requirement, and is a positive recognition of the burden that spiralling utilities costs can otherwise have on people undergoing financial hardship.

The Federation has seen the positive impacts that URGs have made to its members' clients over the course of the pandemic, and strongly supports the requirement on retailers to support customers in submitting URG applications. The Federation also supports the tariff check requirement being made permanent, and a moratorium on disconnections. The Federation also recommends a permanent increase to the URG amount should be instated to ensure that the payment sufficiently protects people in need, given rising energy costs and the likelihood that people will continue to spend more time at home.

**Recommendation:** Permanently increase the amount available under Utility Relief Grants

### TELECOMMUNICATIONS REGULATION

Utilities providers are regulated to ensure that they take steps to assist consumers facing financial difficulties, which have been vital in protecting Victorians through the COVID crisis, and will continue to be crucial throughout the recovery period. In contrast, despite telecommunications now an essential service for many Victorians, very few obligations exist in this sector. Instead, an industry code forms the bulk of consumer protection mechanisms, and fall far short of equivalent protections for customers of other essential services.



There is currently no requirement on telecommunications providers to offer an affordable payment plan to people who are experiencing difficulty in paying their phone or internet bills. While providers are required under the Telecommunications Consumer Protection Code ('Code') to have a hardship policy which includes at least three options set out in the Code, the provider retains the choice of which option to offer consumers based in its assessment of the consumer's needs which may be neither fair nor accurate.

There are also minimal assurances to protect against the use of telecommunications accounts to perpetrate financial abuse in the family violence or elder abuse context. Where other sectors have developed controls to prevent financial coercion, there is no enforceable or standardised mechanism to prevent telecommunications account holders remaining liable to the costs or debts of family members who use services linked to their account. In fact, the Code actually permits this. Clause 6.1.3. of the Code simply requires a provider to tell the account holder that they remain liable for the use of the service if the provider is aware the account holder is not the end user. This creates a clear risk of financial abuse.

Finally, telecommunications suppliers are permitted under the existing industry code to restrict, suspend or disconnect a service without notice if they assess a customer as presenting an 'unacceptably high credit risk'.<sup>4</sup> This stands in sharp contrast to the energy retail sector in Victoria, where energy retailers can only disconnect consumers as a last resort, after meeting obligations contained in the Essential Services Commission's (ESC)'s Payment Difficulty Framework, and after following stringent notification requirements. These protections recognise the adverse consequences of electricity disconnection for both health and financial wellbeing.

Disconnection from a phone or internet service can also have serious implications, particularly for people experiencing disadvantage. Disconnected customers' social connections, capacity to work and communicate with employers, and ability to access important government and health services, especially in the context of ongoing digitisation of government services, can all be affected. Yet, despite the impacts that disconnection from a phone or internet service can have, no equivalent protections exist in relation to those services.

The Federation recommends the urgent introduction of measures to protect telecommunications consumers as part of the COVID recovery. This is a key part of ensuring that our consumer protections are sufficient and able to be directly enforced by an empowered regulator, and that the significant numbers of Victorians experiencing financial hardship are not pushed into further difficulty by inadequate and unfair actions by telecommunications providers.

**Recommendation:** Introduce enforceable regulatory measures to protect telecommunications consumers

## 1.2 EMBEDDING PROTECTIONS AGAINST PREDATORY BEHAVIOUR

Financial hardship places people at risk of exploitation by predatory behaviour, as debt vultures and dodgy loan companies seek to take advantage of people's desperation to their own gain. The economic impacts of COVID risk pushing more and more people into financial trouble – and thereby increasing exposure to predatory behaviours in the debt and credit sector. At the same time, financial predators are using increasingly sophisticated techniques to target people experiencing vulnerability or disadvantage.

Australia's consumer laws provide some protection against predatory behaviours in the debt and credit sector, but are neither comprehensive nor sufficiently well-known by the community to stop these predatory practices. This section sets out recommendations aimed at reinforcing, expanding, and retaining, as necessary, elements of consumer law protection that the Federation believes are essential to a just recovery period.

## "DEBT VULTURES"

So-called 'debt management' firms target people concerned about bills, home repossession or their credit reports. These firms promise 'a life free from debt' or a 'clean' credit rating, offering quasi-legal or quasi-financial advice on debt options, debt negotiation, 'repairing' credit reports, arranging debt agreements (a form of insolvency), managing money, and so on. The problem is twofold: the firms charge exorbitant fees, which the person seeking help often can't afford, and they often can't deliver on what they promise. CLCs assisting clients with credit and debt issues frequently encounter clients who have signed up for debt services out of desperation and fear, only to be hit with fees for services not delivered, and threats of legal action upon non-payment. This only serves to increase the financial and emotional impacts of pre-existing money stress.

Debt vulture firms have evolved in a regulatory black hole: there is no legal requirement to hold a licence for the kind of dubious 'debt management' services they offer, or even to meet basic competency and ethical standards.

There is a real and significant risk that these problematic firms will ramp up their efforts in the COVID-19 recovery period, in light of the serious and ongoing financial hardship that many Victorians are finding themselves in. Without new laws to fix the regulatory black hole that has allowed this predatory and unethical conduct in the past, people in financial trouble in the wake of COVID will remain exposed to exploitation. The recovery response must include measures to fix this regulatory gap and combat unfair conduct by debt management firms. This must cover firms that represent consumers in disputes with creditors, and firms that provide advice or other services 'behind the scenes'.

**Recommendation: Prevent unethical and predatory conduct by debt management firms through the introduction of new legislation or regulations**

## PREDATORY LENDING

### PAYDAY LOANS AND CONSUMER LEASES

Payday loans – short-term, high-interest cash loans of up to \$2000 – and consumer leases (also known as rent-to-buy) are extremely expensive forms of credit targeted at people in financial difficulty. The way that credit companies offer these schemes means that many people who sign up for them end up far worse-off financially. Predatory lending is an umbrella term for loan practices – including payday loans and rent-to-buy schemes – that are unfair, irresponsible and aggressively targeted at people experiencing financial hardship. Credit companies market their products to people facing money problems, such as a utility bill or car registration they can't pay, while rent-to-buy schemes sell the promise of items like cars, air-conditioners, and so on, over a series of instalments. The problem with both schemes is that they're deliberately sold to people who can least afford the exorbitant fees and charges associated with these products. Payday loans carry extremely high equivalent annual interest rates (often more than 200% per annum), forcing people to take out loan after loan to make repayments and ultimately trapping them in a loan spiral, while rent-to-buy schemes also carry high fees and charges and often end up costing far more than the value of the product itself – profiting the company to the expense of the consumer. In fact, there are no cost caps at all for consumer leases.

Australia already has one of the highest rates of household debt in the world, and COVID has seen, and is likely to continue to see, debt levels increase significantly. As more people come under financial strain, payday loan companies will have a greater market for their unfair, predatory lending practices. There was a review into the sector in 2016, which made a number of recommendations for reform. Despite the Federal Government accepting the vast majority of those recommendations, recently it watered down those commitments. We are still yet to see legislation introduced to Parliament. All recommendations from the 2016 review must be implemented in order to reduce the harm from these products.<sup>5</sup>

## OTHER TYPES OF LENDING

Responsible lending laws exist to protect people from unconscionable practices in the financial services sector. These laws apply to consumer credit, including mortgages, personal loans, consumer leases, payday loans, car loans and credit cards. Companies providing these loans must make reasonable enquiries about loan applicants' financial circumstances and objectives, take steps to verify this information, and assess whether the credit is 'not unsuitable' before providing a loan. The laws are enforced by the Australian Securities and Investments Commission.

The Banking Royal Commission uncovered and publicised innumerable stories of people across Australia being deliberately mis-sold unaffordable credit, despite these responsible lending laws. In light of this, Commissioner Kenneth Hayne recommended that the laws be strengthened and enforced (Recommendation 1.1). However, in September 2020, the Federal Government announced its intention to repeal the responsible lending laws for all forms of consumer credit, except payday loans and consumer leases. The Federation and the Victorian CLC sector strongly oppose this action.

In order to be a recovery for everyone, the economic rebuild from COVID-19 must be shored up by mechanisms to protect people experiencing hardship from financial exploitation. This means that the existing responsible lending laws must be maintained and better enforced – and certainly not rolled back or undermined. Doing so would hurt individuals and families, hinder our economic recovery and contradict the very first recommendation of the Banking Royal Commission.

**Recommendation: Retain and enforce existing responsible lending laws**



## 1.3 SUPPORTING ALL VICTORIANS TO LIVE IN DIGNITY, THROUGH THE COVID RECOVERY AND BEYOND

The increase to social security payment amounts has softened the financial blow of COVID-19 for people in hardship across Australia – but it has also transformed the lives of people already relying on social security payments. There have been widespread reports of people being able to afford fresh fruit and vegetables, safe housing and medical treatment for the first time in years as a result of the increase to the payments. If we are to rebuild the economy in a way that is just, equitable and leaves no one behind, we cannot return to levels of social security that place people below the poverty line. At the same time, the social security safety net must extend to everyone experiencing financial hardship, including the temporary visa holders who form a vital part of Victoria's economy and society.

### SOCIAL SECURITY RATES AND RULES

The introduction of the Coronavirus Supplement, \$550 a fortnight, effectively doubled the ordinary rate payable to the more than 1.6 million people who receive the JobSeeker payment (formerly named Newstart). Before COVID-19, the basic rate of this payment had not materially increased since 1994, despite the steady rise in cost of living. Households relying on social security payments were living in poverty, and were five times more likely to be living below the poverty line than households earning a wage as at 2018.<sup>6</sup> It is impossible to budget household expenses on the 'normal' rate of \$550/fortnight: research undertaken in 2019 found that, after housing costs, households dependent on Newstart were, on average, \$124 a week below the poverty line.<sup>7</sup>

The other key change was the suspension of the Liquid Assets Waiting Period ('LAWP'). Usually, applicants for social security who have savings are required to wait up to 13 weeks to access payments, effectively guaranteeing their dependency on social security by forcing them to use up their own personal safety net.



The LAWP affects certain groups particularly harshly, with Community Legal Centres frequently assisting:

- ▼ Older people who haven't reached pension age and who are forced to use up a significant portion of their retirement savings before qualifying for income support, then facing age-related barriers to employment
- ▼ Younger people in insecure work who are forced to decimate savings, including any superannuation they may have drawn down, to make ends meet
- ▼ Single parents who may not have strong support networks and who are without a financial buffer to enable them to adequately provide for their children, keep up to date with utility payments, and meet unexpected expenses such as car repairs

The LAWP was suspended as part of the social security response to COVID-19, allowing people affected by the economic shutdown to retain a degree of financial security.

No one wants to be dependent on social security, but there simply aren't enough appropriate employment opportunities for everyone who can work to be in secure, sufficient work. People are still losing their jobs, and applying for social security payments, as businesses that had managed to survive the first months of the lockdown close down. It will take time – years – for Victoria's economy to recover. However, the Federal Government is persisting with its plan to reinstate the LAWP and to reduce social security payments to their insufficient, poverty-inducing pre-COVID rates before the end of 2020.

We have seen the huge difference that this increased payment has made in the lives of people across Australia, and we have seen how vital the social security safety net is to people who become unemployed or are otherwise affected in times of crisis. We have also seen that the Federal Government can provide sufficient funds to bring its citizens out of poverty.



The COVID recovery must build on, not undermine, the progress made in enabling Australians to live in dignity. The Federation, alongside charities and social support organisations across Australia, believes that the proposed reduction in social security payments will serve only to push vulnerable people further into financial hardship – with no long-term benefit to the economy as a whole. People in poverty have no money to spend to stimulate the economy, and are more likely to access public services such as health and housing. More importantly, however, the opportunity to live healthy, dignified lives that has been afforded through the long-overdue increase to social security payments cannot fairly be taken away from people in hardship, especially during the recovery period where other income sources remain insecure and hard to find.

**Recommendation: Retain increased social security payments and continue the suspension of the liquid asset means waiting period**

## INTERNATIONAL STUDENTS

Students from all over the world travel to Australia for tertiary education, and are a vital part of our cities' culture and society, as well as providing a key source of revenue for both the university sector and the Australian government. However, international students are not, generally, eligible to receive social security payments. With the retail and hospitality sectors that provide most of their employment shut down, international students have been unable to work, and are entirely dependent on charity or on payments from families overseas – many of whom live in countries worse-hit by the virus than Australia.

The Victorian Government, in recognition of the dire situation facing many international students, set up a \$45 million International Student Emergency Relief Fund to provide one-off payments of up to \$1,100 to students affected by the pandemic.<sup>9</sup> These payments have been a vital boost to recipients, but with the ongoing shutdown students are still experiencing extreme financial hardship.

A just and equitable COVID recovery cannot be one that leaves people behind, just because of the type of visa they hold and regardless of their ability to work, to return to their home country, or to support themselves independently. While some retail and hospitality businesses are reopening, it will take time for many to return to their pre-COVID operating levels, both because of ongoing restrictions and because of broader economic challenges faced by business, and not all international students were employed in these sectors. The Federation recommends that government recovery measures include supports for students in need until they are able to access alternative, secure forms of income.

**Recommendation: Include support for international students in need as part of recovery measures**

## SECTION 2:

# PEOPLE IN INSECURE HOUSING

Some of the most significant fault lines exposed by the pandemic have related to housing. Rental and mortgage stress have increased, and the consequences of Victoria's long-standing lack of social housing for our most disadvantaged community members have become more acute than ever. The recovery must embed and enhance the protections for tenants experiencing hardship that have been so important in keeping some renters housed, while sustained and meaningful investment in public and community housing is an essential part of ensuring that the rebuilding of Victoria's economy sits on just foundations. Both measures will be crucial to improving our society's resilience to future economic shocks.

The Victorian Government has recognised the impacts of COVID on people in the private rental market, responding with a suite of measures to soften the financial consequences for private renters. The moratorium on evictions, introduction of a rent reduction process and rent relief grants have helped people living in private residential tenancies to retain their accommodation. However, many remain unaware of the scheme and unsure of their rights, and the protections are set to expire in March 2021 – long before our economy will be fully recovered. The CLC sector now recommends the implementation of a transitional rent reduction scheme and certain other measures to continue protections for renters in a fair and measured way over 2021.

Meanwhile, one of the most significant fault lines exposed by the pandemic has been the lack of public and community housing in Victoria. The supply of social housing has fallen far short of demand for decades, and the compounding impact of increased financial hardship and stay-at-home orders create an even more serious problem. The community legal sector echoes calls made by housing organisations and charities for renewed investment in public and community housing as a core part of the COVID recovery.

## 2.1 PROTECTING TENANTS THROUGHOUT THE COVID RECOVERY

Protective measures including the evictions moratorium and rent reduction scheme introduced as part of the government's COVID response have been essential in helping tenants stay safely housed over this period. In order to avoid an uptick in evictions when these protections end but tenants remain in financial hardship (especially given the end of the JobSeeker and JobKeeper increased payments), the CLC sector recommends the implementation of transitional measures to soften the impact of changes scheduled in March 2021.

## RENTAL ARREARS

There are a large number of tenants who will face an increased risk of eviction at the end of March 2021, when the temporary measures expire, due to rental arrears accrued during COVID-19 or because of rent deferral arrangements that are coming to an end. The CLC sector has seen many tenants experiencing financial hardship steadily accrue arrears over the course of 2020 because they were unable to negotiate a rent reduction or payment plan; did not access the rent reduction scheme because they didn't know about it or were worried about adverse action from their landlords; or because the rent reduction they did achieve through negotiation was ultimately unaffordable.

In order to avoid the eviction of people in this situation when the moratorium on evictions comes to an end, the Federation recommends that VCAT or the Residential Tenancies Dispute Resolution Scheme (RTDRS) be given the power to waive or reduce deferred rent and rental arrears accrued between March 2020 and March 2021. To ensure the fairness of this measure, the waiver should only be available when the tenant has accrued the arrears due to a COVID reason and it would be fair and reasonable to do so (including consideration of landlord circumstances). The CLC sector has developed a detailed proposal for such a mechanism in its Transitioning Tenancy Law from COVID-19 Emergency Measures to Economic Recovery briefing paper. The Federation endorses the suggestions put forward in this paper.

The Federation also recommends that financial relief be available to tenants where deferred rent or arrears accrued during the COVID period are not waived or reduced.

**Recommendation:** Create a mechanism for the RTDRS to waive or reduce arrears accrued by a tenant within the COVID-19 period, where it is fair and reasonable to do so.

**Recommendation:** Create a provision that prior to making a possession order, VCAT must consider whether or not to order a waiver of all or part of the deferred rent or rental arrears; and whether to order a rental reduction.

**Recommendation:** Create a new stream of DHHS financial relief, which covers arrears already accrued from 1 March 2020 until the expiry of the Residential Tenancies COVID-19 regulations.



## 2.2 INVESTING IN PUBLIC AND COMMUNITY HOUSING TO KEEP PEOPLE SAFE

Never has the need for a safe, comfortable and secure home been so pressing than during the COVID crisis. Our collective health has relied on finding appropriate housing for everyone, and the lack of permanent community and public housing has been acutely felt. We know that having a home is critical for people's mental, physical and social wellbeing, it can allow people to escape family violence and raise their family safely. The economic recovery from COVID provides the opportunity – and the clear need – to invest in both public and community housing to keep people safe and supported as they, and the Victorian community as a whole, rebuild in the wake of the pandemic. At the same time, it's important that sufficient protections are in place to ensure that social housing is safe and secure, and that people whether they rely on public or community housing, have the same rights and protections. The recent trend to transfer responsibility for affordable housing from the government to the not-for-profit sector should not result in lower quality housing outcomes for people who need our help the most.

Tenants' reliance on rental references from landlords and agents is another source of vulnerability. There is currently a lack of visibility and regulation around the provision of rental references, which creates the risk of negative references which unfairly alert prospective landlords to irrelevant circumstances like a tenant's exercise of their legal rights. The current reliance on informal, verbal references also creates the possibility that agents or landlords misdescribe complex dynamics – such as damage to a property resulting from family violence.

The use of a standardised reference could instead promote reliance by landlords and agents on more objective criteria when assessing rental applications, and the Federation recommends that a reference pro forma be developed and introduced as part of the COVID recovery measures.

**Recommendation: Retain protections to prevent tenancy database listings where the tenant was unable to pay their rent due to a COVID-19 reason.**

**Recommendation: A standardised reference form be introduced which would enable a more objective assessment of rental applications**

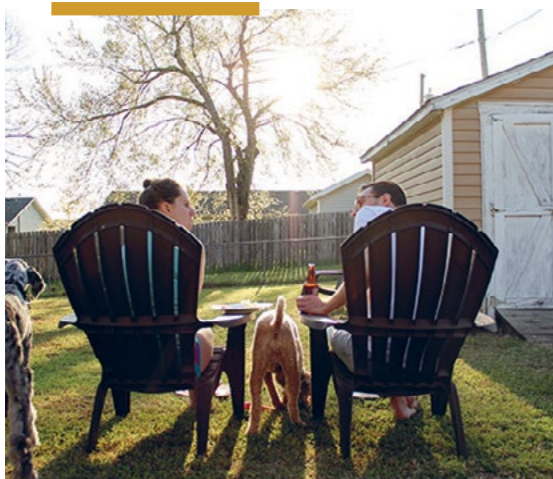
## TRANSITIONAL RENT REDUCTION SCHEME

The rent reduction scheme has seen over 55,000 rent reduction agreements lodged with Consumer Affairs Victoria,<sup>9</sup> while the Victorian Government's rent relief grant program has also played a critical role in keeping tenants safely housed through the COVID crisis. It is clear that the financial impacts of COVID will continue to be felt by many tenants for some time, especially if the scheduled reductions to JobKeeper payments take place, and as employers continue to face business challenges.

Accordingly, the Federation recommends that the scheme should continue for at least an additional six months after March 2021, with some modifications. The *Transitioning Tenancy Law* briefing paper sets out the sector's recommendations for changes to the rent reduction scheme after March 2021, which include the provision of information about negotiating a rental reduction and their rights and responsibilities, by both landlords/agents and by Consumer Affairs Victoria, and limitations on the possibility of agreements to defer rather than reduce rent.

These recommendations respond to issues that the CLC sector has seen in the operation of the current scheme, where some tenants have been placed in an unequal bargaining position as a result of not understanding how the negotiation scheme is designed to work, and others have accrued unaffordable arrears as a result of unfairly negotiated deferral agreements.

**Recommendation: Implement a transitional rent reduction scheme until at least September 2021, with changes to ensure the schemes' effectiveness in protecting tenants.**



## RENT RELIEF GRANTS

The rent relief grants provided by DHHS have provided critical support for tenants, and should be available to tenants as part of the transitional rent reduction scheme after March 2021.

The expansion to the eligibility criteria for the grants has been a positive step, and the effectiveness of the scheme could be further improved by ensuring that information about how the grant operates, whether tenants will be eligible and the amount they could receive is provided to tenants. Ideally, information should be given to tenants who are eligible for the rent relief grant program prior to negotiating rental reduction agreements, to assist in the achievement of fair and reasonable rent reduction agreements.

**Recommendation: Extend the DHHS rent relief grant scheme until at least September 2021 to be accessed as part of the transitional rent reduction process, and that the administration of the grant scheme be reviewed.**

**Recommendation: Ensure that all tenants are provided with timely and accessible information about their rights and options in relation to tenancy law and protections.**

## RENTAL REFERENCES AND BLACKLISTING

Tenants frequently tell CLCs that they are afraid that if they exercise their rights under the COVID tenancy protections, they will experience reprisal from their landlord or real estate agent, such as by providing a negative rental reference or by blacklisting them on rental databases. This fear prevents tenants from seeking a rental reduction or otherwise asserting their legal rights – especially the many tenants who may not seek legal assistance with their rental problem.

The introduction of a prohibition on blacklisting tenants for unpaid rent due to a COVID reason has been an important protection for tenants with rental arrears, and will mean that many tenants impacted by the pandemic are still able to access housing in the private rental market in future. The Federation recommends that this prohibition is retained throughout the COVID recovery period, after March 2021.



Housing sector research commissioned by one of Australia's largest community housing providers found that, as at 2019, one in five of people who live in community housing who had previously been homeless were no longer housed by their provider after six months, and that a third of people entering community housing after leaving prison or health institutions were homeless after six months.<sup>13</sup> Within 18 months, three quarters of people who had entered community housing from prison or hospital were homeless.<sup>14</sup>

Policies and procedures affording protections and rights to community housing tenants are not consistent across the sector, nor are they equivalent to public housing protections. As more people become reliant on community housing, and as the stock of housing properties is expanded, it is important that no one is excluded from the safety net afforded by comprehensive, fair housing policies and laws. It is also vital that community housing providers are supported to build workforce and governance capacity to implement improved policies fairly and to meet the complex needs of their clients.

**Recommendation: Ensure that community housing tenants are not disadvantaged compared to public housing tenants as a result of differences in policies, procedures or governance.**

Recent decades have seen a shift in the makeup of social housing from public housing towards community housing, as the Victorian Government has transferred both ownership and management of some existing housing stock to the not-for-profit sector, and has resourced the social housing sector through funding to community housing rather than investing in public housing development. However, this transfer of responsibility has not always been accompanied by resources for capacity-building to ensure that community housing providers have the policies, protocols and governance structures to safely and sustainably meet the needs of people reliant on their services.

At the same time, because community housing providers are non-government organisations, they are not bound by the same level of legal obligations as social housing landlords as the Office of Housing is as the public housing landlord. This can operate to the detriment of people living in community housing compared to public housing. For example:

- ▼ Public housing tenants can apply for a six-month 'temporary absence' from their properties, for reasons including family violence, medical treatment and imprisonment, which allows them to pay a reduced rate of rent (\$15 per week) during this time. This is unavailable to community housing tenants.
- ▼ Compensation is not sought from public tenants where a property has been damaged due to violence, third parties or fair wear and tear, but can be from community housing tenants.
- ▼ Public housing tenants' rental payments cannot be more than 25 per cent of their total household income; there is no such universal limit in the community housing sector.
- ▼ The Office of Housing is required to take into account human rights and procedural fairness considerations before attempting to evict public housing tenants; there is no equivalent obligation for community housing providers.

Many community housing providers are dedicated, skilled organisations assisting their clients in a highly resourced-constrained and at times difficult environment. However, these legal disparities create the risk – which too often eventuates – that people in community housing are less well-protected and more likely to be evicted than people in public housing.

## EXPANSION TO VICTORIA'S SOCIAL HOUSING STOCK

Secure housing is fundamental to live a safe, dignified and productive life – yet even before COVID hit, there were more than 80,000 people waiting for social housing,<sup>10</sup> and almost 25,000 Victorians homeless on any one night.<sup>11</sup> Many more people who are not yet homeless are at risk of losing their housing and becoming dependent on the public and community housing system due to a range of factors, including declining housing affordability, rental stress and instability, mental health crises and family violence. The need for public and community housing will only increase as a result of the economic impacts of COVID. If our public and community housing stock is not expanded to meet this need, more and more people will become homeless or end up in insecure, unsafe housing. Once people are in this position, it is difficult to retain or find employment, stay healthy, care for children – and near impossible to re-enter secure housing in the private rental market. The potential for escalating impacts to individual wellbeing, and increasing costs through rising dependence on other publicly funded systems like health and social security as people are less able to meet their own needs, is enormous.

Victoria's economic recovery will be a time of significant government spending as we seek to rebuild and reactivate our regional economy – and it is crucial that the Victorian Government takes this opportunity to invest in both public and community housing and build a resilient affordable housing system. The Victorian Government has committed to building 1,000 public housing properties over three years,<sup>12</sup> and the community legal sector welcomes this effort. However, given the number of people in need of housing even before the COVID crisis, and the ongoing economic impacts the pandemic will have for years into the future, this expansion falls far short of what is necessary.

The Federation joins other social support organisations – all of whom see the consequences of unsafe housing for the people they support every day – in calling for the construction of 6,000 new public and community housing properties every year for the next 10 years, including 300 homes for Aboriginal people.

We understand that expanding the stock of public and community housing will take time, and that there are difficulties in finding and obtaining appropriate sites for housing developments, especially given the changing and diverse demographic make-up of people in need of social housing. However, delaying investment any longer will only postpone the inevitable: housing affordability has been declining in Melbourne and many parts of regional Victoria for decades, and the economic shock of COVID will continue to impact many people's capacity to afford housing for years to come – the affordable housing crisis can be expected to get worse, not better, over time. The Victorian Government must take action now to invest in both public and community housing as a fundamental part of a just and equitable recovery for our state.

**Recommendation: Expand public and social housing stock by 6,000 properties each year for 10 years, including 300 homes designated for Aboriginal and Torres Strait Islander people.**

## EQUAL PROTECTIONS FOR ALL SOCIAL HOUSING TENANTS

The expansion to Victoria's social housing stock that is necessary to safely house all Victorians in the wake of the COVID crisis and beyond must be founded upon legal protections to ensure that everyone who depends on social housing is treated equally.

Social housing is an umbrella term for public housing, owned and managed by the Victorian Government, and community housing, provided by not-for-profit organisations. Community housing associations play an important role in meeting the housing needs of a range of vulnerable groups within our community, including people with disabilities, people experiencing mental and physical illness, people in poverty, and victim-survivors of family violence. These cohorts have complex needs, and require extra help to live safe and comfortable lives.

The 'shadow pandemic' of family violence seen around the world since the onset of COVID has also been felt in Victoria, as greater financial, employment, health and housing insecurity and social isolation measures make it easier for perpetrators to control and harm victim-survivors. The potential for elder abuse is also significant in a context of isolation as family members come under increased financial pressures. Family violence is first and foremost a safety issue – but the legal system plays a fundamental role in creating and enforcing the formal structures that keep victim-survivors safe and prevent perpetrators from causing further harm.

The legal assistance sector has worked, and continues to work, with the courts, family violence services and Victoria Police to improve access to justice for people affected by family violence, especially in the context of social distancing and remote hearing processes disrupting pathways to accessing legal assistance. Some models developed through this collaboration have considerably improved both the outcomes and administration of FVIO matters, and should be expanded and improved on through the COVID recovery period and beyond to capture more courts and more people in need.

Initiatives developed at the Specialist Family Violence Courts (SFVCs) to contact parties to proceedings and provide legal advice, and to foster early contact between legal assistance providers and police, hold particular promise in reducing demand on court resources in a safe, accountable and efficient way. These initiatives could and should be enhanced by use of a secure web-based platform on which negotiations can be undertaken and information shared. This will support efforts to reduce the large and growing court backlog across magistrates' courts. Meanwhile, some adaptations to COVID-related restrictions by the Magistrates' Court have improved the safety and accessibility of court hearings. These include much better remote/ video-conferenced access to the courts. These improvements should be retained or expanded, even after social distancing restrictions ease.

### SECTION 3:

# PEOPLE WHO HAVE EXPERIENCED FAMILY VIOLENCE

The COVID-19 crisis has seen the rate of family violence increase across Victoria, at the same time as public health measures have placed new pressures on the legal system's capacity to process Family Violence Intervention Order ('FVIO') applications. The large and growing backlog of FVIO matters will need to be addressed through the mobilisation of, and cooperation between, community legal assistance providers, Victoria Police and the courts to ensure that access to justice is not sacrificed in the rush to process matters. Meanwhile, as the legal system transitions towards COVID Normal, it is vital to ensure that appropriate and adequate support is available to victim-survivors, including through improving the accessibility of the courts and of legal assistance services.



However, legal services are not yet sufficiently embedded in the family violence system to ensure that everyone who needs legal help can access it. Although improving access to assistance for victim-survivors and perpetrators of family violence has been a key area of focus for the Victorian Government in recent years, there still remains a gap in the level of legal assistance available and accessible. Where victim-survivors and perpetrators of family violence miss out on legal assistance, a crucial opportunity can be lost to intervene early and resolve disputes in a safe and fair way. For example, better access to legal assistance can help to ensure the best and most sustainable outcome of FVIO matters, to tailor orders to the needs of the parties as appropriate, to ensure that both parties understand the implications of the order. The important opportunity to identify and address other related legal issues is also missed – such as parenting arrangements, tenancy disputes, or visa issues. If unaddressed, these related issues can have a significant impact on the wellbeing of victim-survivors and their children.

While the Federation acknowledges that a number of the recommendations set out in this chapter are already receiving support from Government, it is the Federation's view that a strong, just and fair recovery must ensure that social support systems remain connected and accessible by the people who most need assistance.

### 3.1 BUILDING ON IMPROVEMENTS TO COURT PROCESSES AND FACILITIES

Government restrictions as part of the pandemic management plan have impacted on the ability of people to attend court in person, conduct hearings and provide the necessary court documents and evidence required for court proceedings. In response, the judicial system introduced a range of improvements to court processes and facilities. The Magistrates' Court, which hears FVIO matters, made significant progress in implementing online hearings and remote appearances by witnesses (often victim-survivors). These measures should be retained and improved to build on the progress they have made in increasing access to justice and safety at FVIO proceedings. Meanwhile, the development of pre-court engagement and referral models at Victoria's existing SFVCs have, anecdotally, resulted in improved outcomes for people involved in FVIO proceedings. Pre-court engagement has included early provision of legal advice and, in some cases, the early and safe resolution of FVIO proceedings.

These models have only been made possible through the dedicated investment in SFVCs, and further resources should be devoted to extending the critical elements of the SFVC model to courts across Victoria. The models can and should also be improved upon by a secure web-based platform on which negotiations can be undertaken and information shared. By way of example only WebEx is currently the default platform for Victorian courts and Microsoft Teams is currently the default platform for Victoria Police. We believe that both VLA and CLCs would be readily able to use either platform or another one that is agreed upon by all participants. This is especially urgent in light of the need to safely, accountably and fairly resolve the considerable backlog of FVIO matters.

### ONLINE HEARINGS

The transition to online hearings has increased access to justice for some people with family violence matters before court, including some people in regional areas and people who felt unsafe attending court. In particular, remote witness facilities – which are rooms usually at courts or prosecutors' offices, equipped with facilities to allow people to give evidence via videolink – can mitigate against the retraumatising effect of participating in legal proceedings for victim-survivors by reducing the risk of coming into contact with their abuser.

It is important that the benefits of the digital court transition can be extended to as many people as possible – and that new systems do not mean the exclusion of people who are unable to access online court processes, and therefore need to attend court in person. Some people do not have the devices or capacity to use online systems, and unless in-person hearings are recommenced or initiatives are developed to cater to this cohort, they risk being disadvantaged as a result of the procedural changes.

The Federation recommends that in-person court should be retained for those who need it, including for people who cannot assess remote facilities safely, or that resourcing be provided to set up remote hearing facilities at key locations, including at CLC and Legal Aid offices to allow lawyers to assist clients to attend virtual hearings.

The Federation also recommends that remote witness facilities be expanded to ensure that as many victim-survivors as possible have access to this support, supported by a safety assessment to make sure it is safe for people to give evidence from their home. To enable evidence to be given remotely from any location requires safety assessment protocols to be urgently developed by the legal sector, courts and police.

**Recommendation: Take steps to ensure that people who cannot meaningfully access online court proceedings are not excluded from the digital court transition.**

**Recommendation: Expand remote witness facilities, including enabling people to give evidence from home, supported by risk assessment to make sure it is safe.**

### INFORMATION AND EVIDENCE PROCESSES

The submission and use of information relevant to legal proceedings is highly regulated, with evidence laws and court processes dictating how and when documents and information can be exchanged between people appearing in court, their legal representatives, and court staff.

At some courts, the transition to online hearings has been supported by a new, streamlined process whereby court staff email FVIO application outcomes and orders to legal representatives. This system has resulted in efficiencies, and the Federation recommends that, at the very least, these new processes should be retained and expanded to all courts not currently operating in this manner. Ideally, as set out above, the courts, the legal assistance sector and Victoria Police should agree on a secure web-based platform for the sharing of this information.

**Recommendation: Retain the new, streamlined processes for exchange of documents and FVIO application outcomes between court staff and legal representatives.**

### CLIENT-FOCUSED REFERRAL PROCESSES

Specialist Family Violence Courts (SFVCs) have been set up at five pilot locations across Victoria over 2019 and 2020, in response to recommendations made by the Victorian Royal Commission into Family Violence. The community legal assistance sector has been closely involved in the development and implementation of the SFVCs, including by developing a special model for the delivery and allocation of legal services to people with matters at SFVCs.

Since the onset of COVID-19, legal services are witnessing the way in which SFVC locations are employing integrated and innovative practices to respond to client needs and attempt to address court backlog through early intervention. SFVC locations have been better placed to quickly implement client-focussed processes to facilitate referrals to duty lawyer services including for pre-court assistance, due to having significantly higher numbers of lawyers providing services at these courts, amongst other things.

However, the recent Victorian Auditor-General's Office (VAGO) report on managing Support and Safety Hubs and the first Family Violence Reform Implementation Monitor (FVRIM) report to the Victorian parliament states that the scale and pace of change required was not fully recognised in the implementation of the first five hubs, resulting in service coordination not yet being consistent or effective.

One example of this is the lack of a consistent model for the state-wide integration, connection and funding of legal services to The Orange Door and specialist family violence services. While, over time, ad hoc local arrangements have evolved for legal services to deliver some assistance to hub clients, the level and availability of legal help is not consistent across hub sites, and the lack of a cohesive process for linking clients with legal services contradicts the wraparound purpose of the hubs.

The Federation recommends that the Victorian Government use the opportunity provided by the COVID recovery response to support the integration of legal services into the family violence system across the state.

**Recommendation: Support the integration of legal services into the family violence system.**

## 3.2 INTEGRATING LEGAL SERVICES INTO THE FAMILY VIOLENCE SUPPORT SYSTEM

A fundamental part of safely and fairly addressing instances of family violence is the provision of accessible legal assistance services, especially to vulnerable people who are likely to be facing other legal problems. As we enter the COVID recovery period, it is crucial to ensure that improving access to legal services is a key part of the ongoing efforts to respond to the increased rates of family violence caused by the pandemic.

### THE ORANGE DOOR HUBS AND INTEGRATED LEGAL SERVICES

The Orange Door hubs are a free service for adults, children and young people who are experiencing or have experienced family violence and families who need extra support and are intended to bring together the key services they may require to stay safe.

A less intensive, but nonetheless effective, warm referral process has been adopted by some non-SFVC Magistrates' Courts. The Magistrates' Court has introduced a new system where people who present at or phone the court regarding FVIO matters are given the option of a warm referral to a duty lawyer legal service. This means that people's contact details are provided to legal services (if they consent), who can then contact them in the lead up to their court date – proactively reaching people with legal need, rather than placing the onus on often-vulnerable people to find legal assistance.

The Federation recommends that this warm referral process is retained after COVID-19 restrictions are eased to encourage pre-court engagement and improve access to legal assistance for people who need it. The process must be followed, as set out in the practice directions provided to all Magistrates' Courts across Victoria, to ensure consistent use of the referral system.

**Recommendation: Expand the Specialist Family Violence Court framework across Victoria, including adequate resourcing for legal assistance services.**

**Recommendation: Retain the warm referral process at non-SFVC Magistrates' Courts, pending the expansion of the SFVC model.**

For example, the Ballarat and Shepparton SFVCs now enable the provision of legal advice by community duty lawyers before the first date at which people are required to return to court. This has the dual purpose of ensuring that legal advice is provided at the earliest opportunity and reducing the number of parties attending court. Legal assistance services have received very positive feedback from clients about the SFVC pilots. This process has allowed the duty lawyer services to assist more clients before their court day and has also minimised delays on the day.

At the Frankston SFVC, a model for police-led referrals has been established. Many FVIO applications are made by Victoria Police (instead of the victim-survivor). In Frankston, Victoria Police now refer victim-survivors to legal assistance approximately two weeks before they are due to appear in court for their first hearing date. This model encourages and enables victim-survivors, people using family violence, legal services and police to negotiate the matter prior to court. In cases where all parties can be reached this often leads to the resolution of the matter prior to the court hearing. For matters that are not able to be resolved, this model presents both parties with an opportunity to understand the other's position and potentially resolve some areas of dispute. In both situations, the demand on court time is reduced – but more legal assistance and police resources are required.

The development of these models has only been made possible because legal services have been specifically funded to provide services under the SFVC Legal Practice model that includes pre-court, at court and post-court assistance. Investment to support SFVCs at more locations can be expected to deliver significant returns, both in terms of improved safety for victim-survivors but also in terms of justice system costs. The Federation recommends that the SFVC framework be implemented at all Magistrate's Courts across Victoria, including the adequate resourcing of community legal assistance services to deliver holistic support.



## SECTION 4:

PEOPLE IN  
INSECURE  
WORK

The impact of COVID-19 has exposed the weakness in Australia's employment protection system for individuals employed in insecure work arrangements, and the grave consequences those protection gaps can have on individual workers and the community: with a lack of legal protections and the legal literacy to assert the few rights they do have, casually and precariously employed workers had little choice but to continue working as the health crisis unfolded, putting themselves, their families, and communities at risk. As has been acknowledged by the Victorian Government, our workplace laws have not kept pace with changes in the employment landscape in Australia in recent decades. The COVID recovery will – rightly - include schemes to boost employment opportunities for those hardest-hit by the pandemic, most of whom have not been adequately protected by Australia's employment laws to date. It is vital that any recovery plan embeds better protections for vulnerable workers to improve the long-term resilience of Victoria's workforce, and to ensure the fair treatment of workers as the economic downturn continues to pose challenges for businesses.



Australia's workplace protections assume a traditional, full-time, permanent employer-employee relationship, and fail to protect the increasing number of workers employed in alternative arrangements. Migrant workers, women, young people and people from disadvantaged backgrounds are all more likely to be employed in insecure work arrangements: in other words, their employment arrangement attracts very minimal protection from Australia's workplace laws. At the same time, pre-existing financial disadvantage, caring responsibilities, a lack of legal understanding and other factors can further weaken these vulnerable workers' bargaining power and ability to assert the legal rights they do possess.

The impacts of COVID-19 on businesses and the economy had a disproportionate impact on Victoria's more vulnerable cohorts. The COVID recovery is already focussing on supporting businesses to reopen and rebuild. Supports include programs to support industries like agriculture that have been impacted by the reduction in casual backpacker and migrant workers through sourcing labour.

In order to ensure the COVID recovery is fair, and help to build a more resilient Victorian economy and community, the Government must also focus on extending and enhancing protections for insecurely employed workers, or we risk more vulnerable community members than ever falling through the cracks in our legal system. In addition, attention must be given to the discrimination that vulnerable groups can experience in work places.



## 4.1 ADDRESSING INSECURE WORK TO KEEP PEOPLE SAFE FROM EXPLOITATION

The 'gig economy' that has arisen in Victoria and around the world in recent years has taken many goods and services to new heights of convenience for both the consumer and for businesses. And in Victoria, just as in other places, this convenience has been supported by the proliferation of a deeply financially and legally insecure 'on-demand workforce'. The *Inquiry into the Victorian On-Demand Workforce* was commissioned by the Victorian Government in 2018 to investigate this problem, and the report was released in September 2020. Chairperson Natalie James made a suite of recommendations designed to clarify and secure the work status of 'on-demand' workers, which the Federation strongly supports – noting that the community legal sector, which frequently provides assistance to on-demand workers, has a key role to play in the response and will enhance the work/reach of government, industry and unions. The CLC sector anticipates an uptick in attempts to exploit vulnerable workers as businesses continue to cope with a challenging economic landscape through the COVID-19 recovery period, making the need to address insecure work more urgent than ever.

### SHAM CONTRACTING

Sham contracting refers to the practice of hiring workers as 'independent contractors' when they are in practice an employee. This allows employers – often, in the gig economy context, digital platforms – to obtain labour without being obliged to extend any of the legal benefits that employees are owed, such as leave entitlements, minimum wage, and protections from unfair dismissal. This practice is unlawful under Australia's employment legislation, the *Fair Work Act* (Cth), but is nonetheless rife, especially amongst groups of workers who are vulnerable to exploitation – for example, people who are newly arrived in Australia, refugees, young people, and financially disadvantaged people. The CLC sector has found that sham contracting is a core business practice throughout the cleaning, food and goods delivery, home and commercial maintenance (e.g. painters), and building and construction industries. With greater demand for delivery and cleaning services to be expected throughout the COVID recovery, government investment in infrastructure and renovation programs, and more people in need of work, it is likely that the number of people in these and other contract-heavy sectors – and thus at risk of sham contracting exploitation – will grow.

The *On-Demand Workforce* Inquiry Report identified the lack of clarity in Australia's workplace laws around whether someone is an 'employee' (as opposed to a contractor) as the 'root cause' of many of the issues relating to insecure work in the gig economy context.<sup>15</sup> The most straightforward and low-cost way to address this issue is the introduction of a clear definition into the *Fair Work Act*. The Federation recommends the insertion of a provision which assumes that a worker is an employee unless the person for whom they are performing work can prove that the worker is genuinely carrying on their own business (and therefore an independent contractor).<sup>16</sup> In recognition of the power imbalance between workers and employers – especially in the gig economy context – this provision shifts the onus of establishing a genuine contracting relationship onto the employer.

Changes to the law will only be effective if accompanied by practical measures to implement better oversight of relevant regulatory processes to prevent sham contracting in the first place, and enforce legal protections. In some instances, gig economy arrangements are conditional upon applicants having an ABN, even though the ultimate arrangement will for all intents and purposes equate to employment. Better oversight and more support during the ABN application and grant process could assist to combat this problem. Other efforts to prevent an increase in sham contracting in the COVID recovery period should include greater auditing and on-the-spot inspections of platform-based businesses and other key industries (including construction, cleaning services and courier/distribution workers), and working with the community legal sector to identify serial offenders for investigation by the Fair Work Ombudsman or other appropriate authorities.

**Recommendation:** Amend the *Fair Work Act* to create an assumption of 'employee' status to combat sham contracting, and improve regulatory oversight in relation to contracting processes and sham contract-heavy industries.

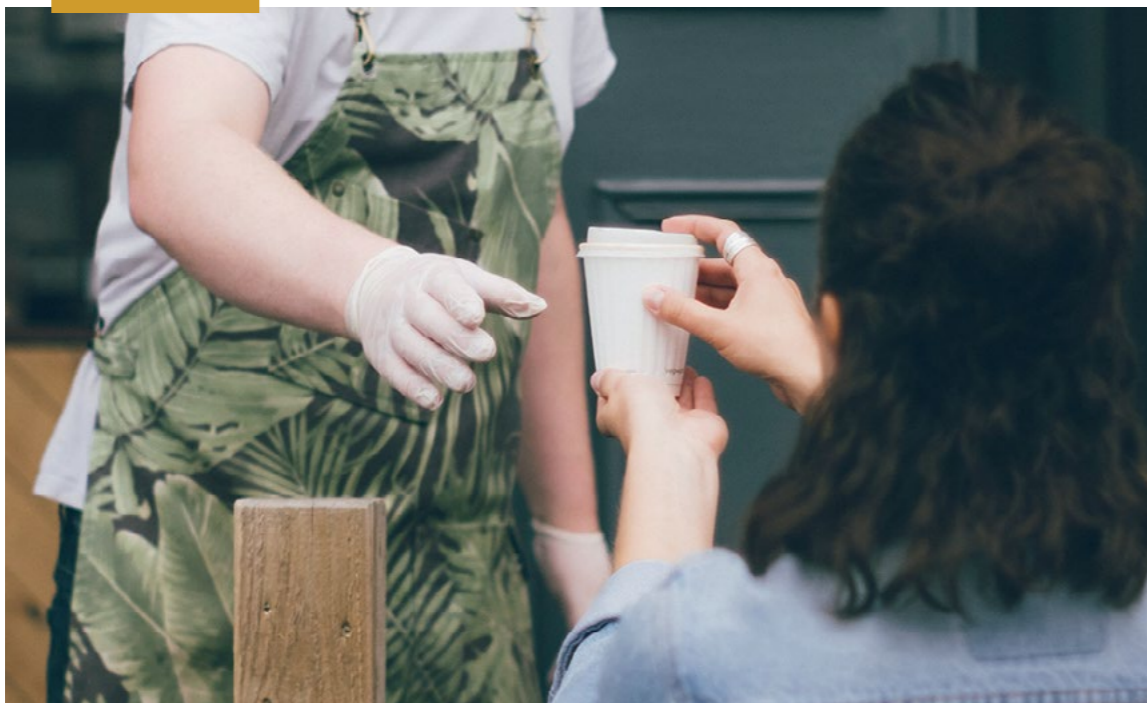
### CASUAL WORKERS

COVID has also exposed the vulnerability of workers hired on casual contracts. Under the *Fair Work Act*, people employed as casuals have far fewer protections than full-time and permanent employees. This means it is much easier for employers to fire and replace staff who, for example, are unable to work because their child is ill and is sent home from childcare, or because their home suburb becomes a COVID 'hotspot' and stay-at-home orders are reintroduced.

Casual employees are workers employed or paid on a casual basis – similarly to 'employee', there is no additional definition of 'casual' under the *Fair Work Act*. Casual workers are generally not entitled to paid leave or able to access unfair dismissal or redundancy payments. Casuals are legally entitled to a higher hourly rate of pay than other employees, and to shifts of minimum duration (generally 2-4 hours).

Some casuals genuinely do work irregular numbers and patterns of hours, but many work regular, full-time-equivalent hours. Despite working in equivalent arrangements to full-time employees, casuals in this position are nonetheless not entitled to the same protections. Although they rely on the regular income from their work, their employer retains the right to unilaterally and with no notice terminate their employment or severely decrease their hours. Although casual workers technically have the right to refuse shifts, and are legally protected from 'adverse action' if they refuse a shift, it has been widely observed that shift refusal results in poor treatment at work/less shifts being offered, and so in reality, casual workers enjoy few genuine benefits of flexibility.

This phenomenon was immediately apparent when government orders responding to COVID unexpectedly halted or otherwise impacted on businesses across Victoria – especially the hospitality, childcare and cleaning industries which have a highly casualised workforce. Casual workers were among the most immediately and significantly affected; having no legal right to ongoing work, many were fired, with no entitlement to leave being paid out to cushion the financial impacts. Crucially, many casually employed workers are already among the more socio-economically disadvantaged members of our community.





The increasing casualisation of workers across many industries has led to a new focus on how to better protect casuals, especially those who have worked regular and systematic hours for a sustained period. Rules have been introduced to enable workers to request to convert ongoing work arrangements involving regularised hours to formal full-time or part-time employment. Legislation was developed by the Commonwealth Government to extend this right to workers not covered by an award, but ultimately not passed.<sup>17</sup> The precarious position of long-term casual workers was recognised in the immediate response to COVID-19: casual employees have been entitled to access JobKeeper payments if they had been employed on a regular and systemic basis for longer than 12 months by their employer. However, there has also been criticism of the exclusions in the JobKeeper provisions, in particular the disproportionate impact the 12 month limit had on young people who are more likely to have entered the labour market recently, and other casual workers who have been employed 'regularly' over the required period but for a range of different employers.

Momentum to better protect casual workers should not be lost – indeed, extending legal protections and entitlements to casual workers is more important during the COVID recovery period than ever before. Although the health crisis is easing in Victoria, and businesses are starting to reopen, the significant economic recession faced by Victoria and the country in general mean that people in precarious work will continue to bear the brunt of restructuring and business changes across the economy.

The Federation recommends that changes should be made to the *Fair Work Act* to automatically convert casual employees who have worked a regular pattern of hours on an ongoing basis for the same employer for 12 months to permanent full-time or part-time employees (depending on number of hours usually worked). The onus should not be on employees to request the conversion, but should be automatic after 12 months of regular employment. There is a significant disparity in bargaining power between employers and casual employees, who are dependent on income from working full-time hours and often in comparatively low skill/qualification industries. This change would afford better protection to long-term casual workers, in line with both the contribution they make to their employers and the reliance they have on their income, and in recognition of the power disparity inherent to their working arrangements.

**Recommendation: Amend the *Fair Work Act* to automatically convert casual employees to part- or full-time employees after 12 months' continuous employment.**

## BETTER PROTECTION FOR VULNERABLE WORKERS FROM DISCRIMINATION AT WORK

Many workers who seek advice from CLCs in relation to employment law issues, particularly gig economy-related matters, are disadvantaged in their capacity to enforce their legal rights. Some have travelled to Australia from other countries and have limited knowledge about Australian employment law, others speak limited English, many are socio-economically disadvantaged, and some are critically dependent on income from platform work, being temporary visa holders or otherwise excluded from Australia's social security safety net. These barriers to legal literacy and capacity are difficult to overcome, which is why a protection mechanism for vulnerable cohorts are so vital.

These types of vulnerabilities can lead to discrimination in the workplace, especially when there aren't systemic safeguards in place. In order to ensure that post-COVID protections are as effective as possible, the Federation recommends that the Victorian Government enhance the power and resources of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) to allow for the investigation and enforcement of breaches of anti-discrimination and sexual harassment laws.

**Recommendation: The Victorian Government should amend the *Equal Opportunity Act 2010* (Vic) (EOA) to reinstate and strengthen the Victorian Equal Opportunity and Human Rights Commission's functions and powers to proactively investigate and enforce breaches of the EOA.**



## SECTION 5:

PEOPLE  
IN PRISON

People in Victoria's prisons are acutely vulnerable to the physical health risks of COVID, but also to adverse wellbeing and human rights consequences of COVID-related restrictions. As Victoria progresses into the recovery period, and restrictive measures remain in place, Government must take proactive steps to fulfil its duty of care towards those in its custody. This includes ensuring that people in prison can remain connected with loved ones and legal assistance, and that restrictions are not disproportionately severe compared to the actual level of COVID risk.



Ultimately, the best way to mitigate the health and wellbeing risks posed to people in the prison system is to reduce the prison population. The second-best way is to ensure that conditions within prison are carefully monitored to protect against unnecessarily punitive or harmful measures. Both pathways are an essential part of a just and equitable recovery and transition to COVID Normal in the corrections context.

The serious health risks posed by the possibility of COVID-19 entering corrective facilities led to the imposition of Protective Quarantine and other restrictive health measures for people in custody. While this was no doubt successful in avoiding the spread of COVID-19 through Victoria's prison population, it is crucial to ensure that use of the new powers does not unacceptably infringe on the human rights of people in prison and remains proportional to the risk as it changes. At the same time, innovations to maintain connections between the prison population and their loved ones and legal assistance have been successful and should be retained and enhanced over the COVID recovery period and beyond.

Ultimately, decarceration is the best way to reduce the level of COVID-related risk inherent to the prison environment, both to people inside and outside prison walls. The prison population has already been declining in recent months, partly as the courts have accepted that COVID-19 and other factors combine to create 'exceptional circumstances' and 'compelling reasons' sufficient to rebut the presumptions against bail under the *Bail Act 1977*. There are actions government can and should take to safely build on and sustain this trend.

## 5.1 PROTECTING THE WELFARE AND HUMAN RIGHTS OF PEOPLE IN PRISON

The COVID response has seen the restriction of in-person visits to people in prison, as well as the creation of new opportunities for social connection through digital technologies. The introduction of Protective Quarantine, meanwhile, undeniably mitigated the risk of a COVID-19 outbreak in the prison system, but has also threatened the legal and human rights of people entering prison. The use of Emergency Management Days to recognise the increased restrictiveness of time spent in prison is a welcome safeguard against injustice, but it is important that this measure is used consistently, transparently and fairly to achieve this objective.

As we enter the recovery period, there are immediate actions that can and should be taken in relation to these prison processes to preserve prisoner welfare, human rights and access to justice.

### VISITS

In-person visits have been restricted across the prison system, as a necessary measure to prevent the transmission of COVID between people in prison and the community. At the same time, legislative amendments were introduced to allow people who had been prohibited from visiting prisons to communicate with people inside prison in other ways. Corrections Victoria has made videoconferencing and telephone facilities available to prisons for remote visits, and being able to stay in touch with their friends and family has been crucial to the wellbeing of people in prison during this period. CLC lawyers have also been able to speak with clients through remote visit technology.

The Federation has welcomed the efforts made by Corrections Victoria to enable people in prison to remain in contact with people outside prison, and supports the continued facilitation of remote visits during and after the COVID recovery period. People in prison have been able to connect with loved ones in regional areas, overseas or interstate in new ways, and the improvements to prisoner welfare created through these changes should be retained into the future.

At the same time, it can be more difficult for people in prison to receive legal advice remotely, especially when legal appointments are competing for the use of limited video link facilities, and when priority must be given to those requiring access to video links for remote court attendance. In this context, the Federation recommends that Corrections Victoria invest in technology to improve connectivity and increase access to devices and video links to ensure that everyone in prison has fair and sufficient access to legal assistance and remote visit capabilities.

It can also be challenging for people in prison to remain meaningfully connected with their children through remote visits, especially babies and young children who have less ability to use and understand digital communication technologies. This may also be true for people in prison with elderly relatives or loved ones or those with complex communication needs. The Federation recommends the resumption of in-person visits as soon as it is safe to do so.

**Recommendation: Retain digital visit technologies to allow people in prison to remain connected with family, friends and community**

**Recommendation: Corrections Victoria invests in technology to improve connectivity and increase access to devices and video links to ensure that everyone in prison has fair and sufficient access to remote visit capabilities.**

**Recommendation: In-person visits resume as soon as possible under medical guidance.**



### PROTECTIVE QUARANTINE

The response to the risk of COVID-19 entering prisons has included the introduction of Protective Quarantine at all prisons in Victoria, in which everyone entering prison custody is placed in isolation units for 14 days. The Federation acknowledges that Protective Quarantine is a necessary measure to separate people at risk of carrying COVID from the rest of the prison population.

However, the enforced isolation of people in the prison context can quickly evolve into detention that infringes upon human rights and negatively affects the mental health of those detained. If Protective Quarantine is to remain a feature of Victoria's prisons into the new COVID Normal, in order to avoid unacceptable human rights contraventions now and into the future Protective Quarantine must be tailored to the public health risk as it evolves, only used when medically necessary, and not constitute solitary confinement.

Solitary confinement comprises the confinement of people in prison for 22 hours or more a day without meaningful human contact,<sup>18</sup> and is one of the most serious forms of punishment available in the Victorian justice system, given the profound impacts involuntary and constant isolation can have on people's mental and physical wellbeing. The Royal Commission into Aboriginal Deaths in Custody recommended three decades ago that Aboriginal and Torres Strait Islander people should never be held alone in rooms or cells, and for the estimated 90% of women in prison who are victim-survivors of family violence, confinement can replicate prior experiences of surveillance and control – compounding their trauma even further.

Protective Quarantine must not operate as de facto solitary confinement, and must remain a proportional response. All efforts must be made to ensure that people in Protective Quarantine are able to have out-of-cell hours and can still access services and programs they may need.

The Federation recommends that the policies and procedures implementing Protective Quarantine be aligned to the following principles, developed by medical staff working in correctional contexts in the United States:<sup>19</sup>

Oversight by, and access to, medical staff;

- ▼ Equivalent access to media and entertainment as other people in the same level of corrective custody;
- ▼ The means to communicate with people outside prison, including legal representatives;
- ▼ Regular updates from medical staff about the ongoing need (or otherwise) for quarantine; and
- ▼ Appropriate ventilation, furniture and temperature.

It is also vital that people in prison, and their families and legal representatives, are kept informed of policies and procedures relating to Protective Quarantine. New powers introduced with the COVID Omnibus legislation allow corrections staff to issue directions to people in their custody that are necessary to medically examine, assess, test or treat the person, if the person gives informed consent to the procedure. As with COVID-19 health restrictions more broadly, rules in Protective Quarantine are subject to frequent alteration. CLC clients have reported that the procedures around COVID-19 testing and release from quarantine have been unclear, creating anxiety and uncertainty for themselves and their families. Ensuring the provision of up-to-date and easily accessible information about Protective Quarantine policies and procedures, and the medical basis for restrictions, would help to alleviate these worries while enabling people to give the required consent to medical directions.

**Recommendation: The use of Protective Quarantine must be necessary and proportionate to the risk of contracting or spreading COVID-19**

**Recommendation: Ensure that Protective Quarantine aligns to best practice principles for correctional quarantine and does not constitute solitary confinement or punishment**

**Recommendation: Provide accessible, up-to-date information about Protective Quarantine restrictions to prisoners, families, and legal representatives**

## EMERGENCY MANAGEMENT DAYS

People in prison can apply for 'Emergency Management Days' ('EMDs'), which allow for days spent in unusually restrictive or disrupted environments to be counted towards their sentences at an increased rate. People who can demonstrate good behaviour while suffering deprivation or disruption during an emergency can apply for up to four EMDs for each day or part of a day they spend in the emergency situation, or up to 14 days 'in other circumstances of an unforeseen and special nature'.<sup>20</sup>

Corrections Victoria has accepted applications for EMDs based in COVID restrictions, including time spent in Protective Quarantine, which are granted on a fortnightly basis. This has been an important way of ensuring that the impact of the COVID-19 restrictions is as fair and minimal as possible, and the Federation has welcomed the proactive application of EMDs by Corrections Victoria. The Federation is also pleased that this measure has been extended to people on remand.

In order to ensure that EMDs are as fair as possible, it is important that applications are processed in a timely, transparent way so that eligible prisoners are granted EMDs in time for release at the correct date. In addition, people being held on remand and subject to quarantine or otherwise in lock-down should have EMDs applied immediately, rather than fortnightly, so that they do not lose the opportunity to have these credited against their sentence. EMD calculations should also be provided to a person as soon as possible, to ensure that the most up-to-date information on the time they have served can be provided to the court when their legal matter is heard.

There have been reports that applications for EMDs by people who are eligible have been rejected on the basis that the applicant has transitional needs – that is, they require support to find housing or other support services when they leave prison. This is an unfair outcome that only serves to further disadvantage people in need after they have served their sentence. If necessary, additional resources should be allocated to ensure that the lack of housing and other support pathways does not force people to stay in prison longer.

**Recommendation:** Process Emergency Management Day applications quickly and fairly

## 5.2 PROGRESSING TOWARDS DECARCERATION AND A SAFER PRISON SYSTEM

The risks posed by COVID to the prison population will persist until a vaccine is developed and widely available. To mitigate the health, wellbeing and human rights risks posed by COVID through recovery and into the 'new Normal', government must embed legal reforms to safely and sustainably reduce the prison population, and to ensure that conditions within prison are carefully monitored for compliance with human rights standards.

### BAIL REFORM

Victorian 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 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.<sup>21</sup> This is partly due to an increase in bail being granted to persons caught by the reverse onus 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) ('Bail Act').

The presumptions against bail are new and stand in direct contradiction to the long-standing legal principle that bail should be granted as the default, with only limited circumstances justifying refusal. Since the introduction of the amendments in 2018, remand rates in Victoria have risen steeply, with women and Aboriginal and Torres Strait Islander people featuring disproportionately in the increase. Given the high rates of underlying, chronic health conditions among Aboriginal and Torres Strait Islander people entering custody – and amongst the prison population generally – a reduction in the number of people on remand is an essential

element of the COVID-19 recovery. Therefore, the Federation recommends that the reverse onus provisions in the *Bail Act* should be repealed, and all bail decision-making should be based on a single test – unacceptable risk – as was the case prior to the amendments. 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.

This approach not only simplifies bail decision-making which will alleviate pressures on court time and resources, but it 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 reverse onus provisions can apply to people accused of relatively minor and non-violent offending where the offence is committed while on bail, a community corrections order or adjourned undertaking. This means that many people are captured by the reverse onus provisions and are refused bail that do not pose a real risk to community safety.

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 or for longer than their likely sentence.

The decline in Victoria's prison population due to COVID presents an opportunity for the Government to critically assess its restrictive bail laws and how reducing the flow of people into the corrections system can be sustained through recovery, in order to make the criminal justice system work more fairly and effectively.

**Recommendation:** Repeal the reverse onus categories in the *Bail Act*, 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.

**Recommendation:** A person should not be remanded in custody for an offence that is unlikely to result in a sentence of imprisonment or for longer than their likely sentence.

## THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

Australia made a commitment to implement the Optional Protocol to the Convention against Torture ('OPCAT') in 2017, but a National Preventative Mechanism ('NPM') to prevent the ill-treatment, torture and death of detained people has not yet been instituted. The correctional system's responses to COVID have highlighted the vulnerability of people in prison to unfair, disproportionate and harmful treatments. The Federation considers that the creation of an NPM for the Victorian prison system would bring a vital independent source of oversight to Victoria's correctional (and other detention-based) facilities, and should be implemented as soon as possible. The NPM would play a particularly valuable role in assessing the ongoing justification of COVID-based restrictive measures.

The Federation supports the position of member CLC the Victorian Aboriginal Legal Service ('VALS') that the Victorian Government must undertake robust, transparent and inclusive consultations with the Victorian Aboriginal community on the implementation of OPCAT. Aboriginal people are over-represented in the Victorian criminal justice system, including in police custody and especially in the youth justice context, and the operations, policies, frameworks and governance of the oversight body must be culturally appropriate and safe for Aboriginal people.

**Recommendation:** Institute a National Preventative Mechanism under the Optional Protocol to the Convention Against Torture in consultation with the Victorian Aboriginal community to monitor detention conditions

## SECTION 6:

# YOUNG PEOPLE

The isolating effect of COVID-19 has been felt acutely by Victoria's young people, with lockdown measures disrupting the routines and connections that keep young people safe and engaged. Many vulnerable Victorians will be exposed to increased risk of family violence, mental health pressures due to financial and health stresses and financial disadvantage as a result of the pandemic. For children and young people, who have less agency and fewer resources to protect themselves, especially in the context of increased social isolation, the impact may be more severe.



Therefore, the community legal sector and youth advocacy services are concerned that as more children and young people are impacted by the risks and changes from COVID-19, there may be other longer-term consequences experienced by these cohorts. For example, young people may become disengaged from education, and as a result, we anticipate an increase in interactions with the justice system – especially amongst already marginalised groups such as Aboriginal and Torres Strait Islander children, and children from refugee and newly arrived culturally and linguistically diverse backgrounds. A just and equitable recovery from COVID-19 must be one that protects, rather than punishes, children and young people at risk of coming into contact with the justice system.

We know that early experiences with the criminal justice system is a strong risk factor for further offending, and we know that this risk is heightened for young people who are socially marginalised, who have experienced violence or abuse, or who are disengaged from the education system. The restrictions put in place to manage COVID have created and exacerbated these risk factors, with already disadvantaged young people facing isolation at home and new barriers to staying engaged with school.

There are multiple points at which interventions can help at-risk young people to avoid or leave the justice system. The community sector, including CLCs, focuses on trying to intervene before young people get into serious trouble, educating children about their legal rights and responsibilities, assisting young people to try and de-escalate legal problems, and connecting them with a range of services they may need, including mental health, homelessness and family violence supports.

The deeper a young person's involvement with the justice system becomes, the harder it is to help them get back on track. CLCs see what happens when young people are imprisoned: too often, the adult clients with the most complex legal problems and needs were first caught up in the justice system as children, and were never supported to find their way out of the system. Instead, they were locked up, criminalised, and further ostracised from the social, educational and other supports that could have kept them safe.

The COVID recovery must include proactive steps to strengthen the interventions that take and keep young people away from the criminal justice system, or we will risk leaving our most vulnerable children and young people behind.

Parents or carers may also be required to address DHHS concerns about their capacity to care for their children by, for example, attending residential rehabilitation facilities, completing supervised urine drug screens, attending counselling and engaging with other support services. The closures and reduced capacity of many such services during this time has meant that people subject to these requirements are unable to meet them – again with consequences for themselves and their children.

If addressing these issues isn't an immediate part of the Victorian Government's COVID recovery, some of Victoria's most vulnerable children will feel the impacts of this crisis in a very specific and unjust way for the rest of their lives. The CLC sector asks the government to take urgent steps to amend the *Children, Youth and Families Act 2005* to allow the courts to extend the timeframes for parents and carers to meet family reunification requirements, and to support families to reinstate meaningful contact with their children. Already struggling families should not be required to shoulder the burden of the current service constraints<sup>25</sup>.

If addressing these issues isn't an immediate part of the Victorian Government's COVID recovery, some of Victoria's most vulnerable children will feel the impacts of this crisis in a very specific and unjust way for the rest of their lives. The CLC sector recommends that the government take urgent steps to amend the *Children, Youth and Families Act 2005* to allow the courts to extend the timeframes for parents and carers to meet family reunification requirements, and to support families to reinstate meaningful contact with their children. The community services sector has been advocating for this change for a long time, and the Federation considers this an opportunity for Victoria to ensure already struggling families do not continue to shoulder the burden of the current service constraints.

**Recommendation: Amend the *Children, Youth and Families Act* to allow the extension of family reunification obligations, and support families/carers to safely reinstate meaningful contact with their children.**

## FAMILY PRESERVATION AND REUNIFICATION

When families come to the attention of the Department of Health and Human Services ('DHHS') for child protection concerns, requirements can be placed on parents, families or carers to demonstrate their capacity to care for the children in question in order to retain custody or, if children have been removed, to regain caring responsibilities. In the case of many vulnerable children impacted by the child protection system, their carers or parents may be on bail, on parole, undertaking Community Corrections Orders, or in prison.

Laws relating to child protection and the separation of families by the government are built around the fundamental importance of ongoing and consistent contact between children and families to children's development and recovery. For Aboriginal children and families – who are vastly over-represented in Victoria's child protection system - the Aboriginal Child Placement Principle recognise the importance of preserving Aboriginal children and young people's connections to their own culture, family, kinship networks and community for their wellbeing.

Measures introduced in response to COVID have seriously impacted the ability of particular cohorts to meet these requirements. The suspension of in-person visits to prisons, as well as the general restrictions on travel and socialising, have meant that many parents and carers involved in the child protection system cannot currently communicate with their children, or can only do so via phone or video. This is an extremely challenging, and often impossible, situation when contact is with babies, young children or those with complex communication needs. It is also the case that many families/carers don't have access to video facilities and consequently cannot exercise that option even when it is afforded.

In many cases, contact between parents or carers and children is mediated by other parties, such as extended family members or service providers. The COVID crisis and public health measures have meant that these intermediaries are unavailable or unwilling to facilitate contact. Not only does this impact on the emotional bond that these contact mechanisms are designed to preserve, but in some cases, the resulting lack of contact is interpreted by authorities (such as DHHS or the courts) as the parent/carer's disinterest or inability to contact their children. Aboriginal families face particular disadvantage in this respect, as kinship carers are often of advanced age and immunocompromised.

the infringements system's application to children is education and rehabilitation – not punishment in the form of a financial burden they can't meet, and stress and anxiety about an issue they can't address.

There are also procedural protections in place for children who are fined. Ordinarily when a child cannot pay a fine, the fine will be registered with the Children's Court through the specialist CAYPINS process. This system allows for enforcement orders to be made in a way that does not result in criminal proceedings or a criminal record for a child, and the Registrar responsible for administering the CAYPINS process has indicated that COVID-19 fines issued to children can be registered on the database. However, as at October 2020, Victoria Police have not adopted the practice of registering COVID-19 fines they issue to children and young people with CAYPINS – meaning that the fines can continue to be enforced by Fines Victoria. The experience of receiving escalating infringement and warrant notices can, for a child perhaps even more so than an adult, be extremely stressful, especially in the frequent circumstances of the child having no financial capacity to meet the fine.

Fines Victoria has resumed its enforcement of infringements after a moratorium in the early months of the COVID pandemic. Because Victoria Police are not registering COVID fines with CAYPINS, children and young people are and will continue to be pursued through the court system for fines they cannot pay. This will use up limited court resources and cause significant stress for young people and their families, without delivering any discernible benefit to the state given the inability for most young people – especially those already experiencing disadvantage – to pay their fines. The Federation recommends that all outstanding infringements issued to children and young people for breaches of public health restrictions are retracted and instead prioritise a service, education and health-based response.

**Recommendation: Withdraw all COVID-related fines issued to children and young people aged 18 and under, and prioritise a service, education and health-based response.**

## 6.1 AVOIDING INJUSTICE FOR YOUNG PEOPLE IN THE COVID RECOVERY

Some parts of the Victorian Government's response to the COVID-19 pandemic have unfairly impacted on young people, and will impact them in the COVID recovery. Usually, Victoria's infringements system recognises that young people are neither as morally responsible for illegal conduct nor as financially capable of paying fines as adults. However, young people have been hit with the same COVID-19 fines as adults, with disproportionately severe consequences. Meanwhile, in the child protection context, social distancing measures are impeding families' and carers' ability to address protective concerns and meet other requirements necessary to achieve family reunification. The barriers faced by parents, families and carers have unfair flow-on impacts for children, whose ability to maintain relationships is threatened by events beyond their control.

### COVID-19 FINES

Police have been fining children and young people for breaches of COVID restrictions at higher rates in Victoria than in other states<sup>22</sup>, with some young people reporting that they feel targeted and numerous reports of children being fined rather than warned by Victoria Police. Fining children and young people to the same degree as adults fails to recognise either the lesser moral culpability children have for their actions or their lower financial capacity to pay fines, and risks unnecessarily pushing young people into the justice system. Fines will continue to be issued by Victoria Police as long as there are COVID-related restrictions in place, and the COVID recovery must include measures to protect young people from the disproportionately severe consequences of infringements.

In the Children's Court, there are limits on the amount that a Magistrate or Registrar can fine a young person<sup>23</sup>. In this context, a COVID-specific fine issued to a child is 10 times greater than what a court could impose if they were charged and found guilty of breaching the same COVID-19 directions<sup>24</sup>. The reduced fines for children in Victoria's laws recognise children's reduced financial capacity to pay fines, and that fining children any greater amount is setting them up to fail. The real aim of

## ADOLESCENT VIOLENCE

Risk factors for family violence have been exacerbated during the COVID restrictions period. Not only has this been the case for victims but also for adolescents using family violence in the home. Matters involving young people using family violence are heard in the Melbourne Children's Court, where a specialist approach is taken to respond to young people's behaviour in a rehabilitative manner. This can involve, for example, identifying factors within the young person's life that may be causing the violent behaviour, and linking them with support services to address these issues.

As part of its response to COVID-19, the Children's Court developed a practice of adjourning matters for eight weeks as a means of minimising health risks to young people and their families. However, this has had the side effect of young people going for long periods of time without the ability to speak to a lawyer or to engage with other support services they may have otherwise been linked in with following an appearance at court. This created concerns that young people – already isolated by the public health measures from school, extended family and friends, and at increased risk of violence at home – were missing out on the opportunity for a positive intervention through the court process.

Addressing this access gap should be a key part of any COVID recovery plan. The initiative led by the CLC sector and Victoria Legal Aid to try and reach young people before, or as soon as possible after, their initial court date by streamlining an early referral processes with the court is an example of how to close this access gap. Through this process, the family violence registry at the Children's Court obtains the consent of young people and their families to pass on their contact details to their lawyers. The legal services are then able to proactively make contact to provide legal advice and referrals to relevant non-legal services at an early stage, before the conflict escalates further.

These moves toward pre-court referrals and advice for parties in family violence matters constitute a significant change in practice. Whereas previously, parties would routinely only receive advice on the day of court (which could be some weeks after a violent incident in the home), this new opportunity for advice, advocacy and referral may increase the safety of young people and their families from the point of crisis. The Federation recommends that this process be embedded through formal processes and resourcing in the COVID recovery, and should be expanded to all Children's Courts across Victoria.

**Recommendation: Support the development, retention and expansion of pre-court referrals and advice for parties to family violence matters heard at the Children's Court.**

## 6.2 INTERVENING EARLY TO REDUCE MARGINALISATION AND AVOID THE 'REVOLVING DOOR' OF JUSTICE

It has been well established that, particularly for already vulnerable or marginalised groups, early contact with the justice system sets children and young people up for failure. Once they have entered the criminal justice system – especially if they are formally arrested and placed on remand – it is very, very difficult for children to find their way out. Recognising this, cautioning and diversion programs aim to intervene at the point of initial arrest to link at-risk children to services to support behaviour change and, often, re-engagement with education and social connections. CLCs focus on early intervention services for young people, building their capacity to understand legal rights and responsibilities, the consequences of getting into trouble with the law, and where they can turn to help with an issue that might otherwise push them into offending behaviour – such as experiencing family violence or other forms of abuse.

COVID has caused huge disruption to the structures and supports that keep children out of the justice system – and has increased the risk of factors that push them into it, including poorer mental wellbeing, financial disadvantage, poverty and family violence. The CLC sector is concerned that the impacts of COVID on young people may lead to an increase in interactions with the justice system. Now more than ever, early interventions must be available and proactively used for all children and young people to stop an escalation in the 'revolving door' of youth justice.

## CAUTIONING AND DIVERSION

Victoria's system for responding to antisocial behaviour by young people is designed to provide multiple points of exit, at which intervention can pull young people out of the path of trouble and help them get back on track. These points of exit are controlled by decision-makers within the legal system. After families and educational institutions, the police carry the responsibility for the earliest exit pathways: police decide whether to stop a young person, whether to caution them, whether to arrest them, whether to press charges, and whether to advocate for bail or remand. Some of these decisions are contained, to a limited extent, by laws guiding their use, but police retain a considerable degree of discretion.

The CLC sector is concerned that Victoria Police have, on more occasions than is justified, taken a punitive response to young people alleged to have breached the COVID restrictions. Victoria Police has an important role in law enforcement and have the capacity to tailor their approach to children that consistently takes into account their age and stage of development.

Although Victoria is entering the COVID recovery period, it will take time for the fracturing of young people's support networks to heal, and risk factors for contact with the justice system will remain heightened for some time, particularly among cohorts and families who were already disadvantaged prior to the pandemic.

To avoid this translating into rising numbers of children and young people becoming trapped in the youth justice cycle, Victoria Police must exercise the discretionary powers that they alone hold to redirect young people away from the justice system at each stage they can do so: warning and referring instead of cautioning, cautioning instead of charging, summoning instead of arresting, and pushing for bail instead of remand. This should be facilitated through the development of a comprehensive Victoria Police Manual Procedure and Guideline dedicated to dealing with a child that consolidates disparate advices to members found across the manual. This guidance should acknowledge the need to address overrepresentation cohorts including Aboriginal and Torres Strait Islander Children and children with a history of child protection and embed presumptions in favour of cautions, diversion and summons for these groups of children. The Federation also acknowledges the partnership between WEstjustice and Victoria police through the Youth Early Intervention Pilot currently in its design phase.

Victoria Police must exercise their discretionary powers to caution young people and divert them away from the justice system, to avoid an increase in the number of children and young people getting trapped in the youth justice cycle.

The CLC sector also supports that 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.<sup>26</sup>

**Recommendation: Improved exercise of discretionary powers by Victoria Police to divert children and young people from the justice system including through the development of a comprehensive Victoria Police Manual Procedure and Guideline.**

**Recommendation: Remove the requirement for Victoria Police or prosecutions to consent to a diversion in the *Criminal Procedure Act 2009 (Vic)*, making diversion available at the instance of a magistrate.**



## 6.3 TAKING AND KEEPING CHILDREN OUT OF PRISON

There are some circumstances in which children and young people will end up in custody. As the risk factors for young people coming into contact with the justice system increase as a result of COVID, it is more important than ever that custody is considered a last resort.

Children under 14 should never be incarcerated: they are too young to fully understand the consequences of their actions, and they are too vulnerable to the severely adverse mental, social and physical consequences of imprisonment. At the same time, the significant decline in the youth prison population over the course of the pandemic indicates that the pre-COVID levels of incarceration – particularly in the remand context – were unnecessarily high. Recent research by the Sentencing Advisory Committee indicates that some young people are imprisoned pending sentencing because they don't have a safe place to live. Prison should never be the answer to children being unsafe at home, and there are changes that can and must be made to improve bail in the youth justice context – especially in the wake of such significant disruptions to young people's lives.

### RAISE THE AGE

Community legal centres, charities, social service organisations and advocates from across Victoria and Australia have been calling for the minimum age of imprisonment to be raised from 10 to 14 for decades, yet children who cannot even sign up for most social media accounts are still being put behind bars. This is unacceptable and must be changed. The CLC sector has welcomed the recent announcement made by the Australian Capital Territory to raise the age of criminal responsibility. Victoria can and must take the lead here, or risk entrenching disadvantage – and criminal behaviour – amongst its most vulnerable young people, including Aboriginal and Torres Strait Islander children and young people, girls and young women, and children who are also involved in the child protection system.



The impacts of prison on young people, the disproportionate representation of already disadvantaged children within the justice system, and the clear links between incarceration and further marginalisation and offending have been established and set out for government repeatedly and comprehensively in recent years. We call attention particularly to the submissions made by the Federation, a number of CLCs and the Victorian Aboriginal Legal Service to the Council of Attorney-Generals' 2020 Review of the Age of Criminal Responsibility; to the *Ngaga-dji* report published by Koorie Youth Council in 2019; and to the many reports and submissions prepared by the Raise the Age campaign.

Children under 14 have always been too young to be imprisoned, but with the economic impacts, social isolation and the closure of schools as a result of COVID-19 increasing risk factors for criminalisation, it is vital that Victoria acts now to prevent more children ending up in prison, where no child should be.

**Recommendation: Raise the minimum age of imprisonment in Victoria to at least 14 years.**

### BAIL AND REMAND

Recent research by the Victorian Sentencing Advisory Council investigated the outcomes of cases when children are held on remand.<sup>27</sup> Since June 2010, the average daily number of unsentenced children held in custody increased by 106%.<sup>28</sup> The CLC sector is deeply concerned by the data which shows two-thirds of the children held on remand do not ultimately serve custodial sentences.<sup>29</sup> This means that children are being incarcerated in circumstances where their conduct did not warrant imprisonment. This is supported by the significant decline in the number of young people remanded in custody since March 2020. This decline clearly shows that children and young people can be kept out of prison while awaiting sentencing without compromising their safety or the safety of the community. This provides a strong rationale for not allowing the remand population to return to pre-COVID levels.

Another trend of concern to the CLC sector is the continuing remand of chronically overrepresented groups of children, for example, children in Out of Home Care and children from refugee backgrounds and/or new and emerging culturally and linguistically diverse communities. The decisions over the past several months which have resulted in a reduced remand population should also extend to these overrepresented and vulnerable groups of children and young people.

The harmful effects of incarceration on children are not limited to post-sentence imprisonment: even a short period in custody alienates and marginalises children, disrupting connections to community, education and family, and compounding self-perceptions of being a 'bad' kid which only serve to make further anti-social behaviour more likely. At the same time, the rehabilitative and educational programs that are used to help young people serving sentences in prison are often not available to those on remand.

Even more concerning is the likely possibility that some young people are being refused bail and held on remand because they do not have safe accommodation. Although Victoria's laws stipulate that bail must not be refused for a child solely due to a lack of adequate accommodation,<sup>30</sup> both the Sentencing Advisory Council<sup>31</sup> and the Armytage & Ogloff review of Victoria's youth justice system in 2019 concluded that young people without adequate housing are more likely to be remanded.<sup>32</sup> Another related issue is the lack of support services – including housing – for young people arrested outside of business hours. The Central After-Hours Assessment and Bail Placement Service (CAHABPS), which assesses the suitability of a child for bail and assists with organising accommodation, is not a 24-hour service. This means that some young people are not able to be linked up with services they may need to be released into the community, and are instead held in custody.<sup>33</sup>

COVID has caused huge disruptions to young people's lives, but has also shown that the remand of many young people whose behaviour doesn't even justify imprisonment can be avoided. The CLC sector supports the Sentencing Advisory Council's recommendation that government action should prioritise efforts to ensure that all children have access to specialist bail decision-makers, and to adequate bail support, supervision and accommodation services, especially outside of business hours.<sup>34</sup> CLCs also recommend the expansion of the specialised Children's Court to headquarter courts across Victoria with dedicated magistrates trained in youth crime, child protection and causes of AVITH, to mitigate against the risk of 'postcode justice' disadvantaging young people in regional and rural areas who have come into contact with the justice system during the COVID period.

**Recommendation: Ensure that all children have access to specialist bail decision-makers, and to adequate bail support, supervision and accommodation services, on a 24-hour, 7 days a week basis.**

**Recommendation: Expand the Children's Court to headquarter courts across Victoria with dedicated magistrates trained in youth crime, child protection and causes of AVITH.**

## REFERENCES

- 1 A large portion of Legal Aid funding is dedicated to assisting people facing criminal charges, and there is limited Legal Aid assistance available in many areas of civil law.
- 2 See <https://www.smh.com.au/politics/federal/agency-puts-australia-on-notice-amid-concerns-about-household-debt-20200522-p54viv.html>
- 3 University of Melbourne and the Melbourne Institute, Research insights: Taking the Pulse of the Nation (October 2020), <https://melbourneinstitute.unimelb.edu.au/publications/research-insights/covid-19>
- 4 Communications Alliance, TCP Code C628:2019, (July 2019) 6.7.1.
- 5 See [https://treasury.gov.au/sites/default/files/2019-03/C2016-016\\_SACC-Final-Report.pdf](https://treasury.gov.au/sites/default/files/2019-03/C2016-016_SACC-Final-Report.pdf)
- 6 Australian Council of Social Services and University of New South Wales, Poverty in Australia (2018) <[https://www.acoss.org.au/wp-content/uploads/2018/10/ACOSS\\_Poverty-in-Australia-Report\\_Web-Final.pdf](https://www.acoss.org.au/wp-content/uploads/2018/10/ACOSS_Poverty-in-Australia-Report_Web-Final.pdf)>.
- 7 National Social Security Rights Network (EJA), NNSRN submission to the adequacy of Newstart and related payments (October 2019) <<http://ejaustralia.org.au/wp/wp-content/uploads/2020/01/Newstart-Inquiry-SubmissionNNSRN.pdf>>.
- 8 Office of the Premier, 'Emergency Support for Victoria's International Students' (29 April 2020) <<https://www.premier.vic.gov.au/emergency-support-victorias-international-students>>.
- 9 Consumer Affairs Victoria, weekly data as at 25 October 2020.
- 10 Department of Health and Human Services Victoria, 'Victorian Housing Register Transition Report', (June 2019); Victorian Public Tenants Association, 'Housing Wait List Jumps Again', (2019) < <https://vpta.org.au/housing-wait-list-jumps-again/>>.
- 11 Council to Homeless Persons, 'Homelessness will increase as social housing proportion falls', (2019) <<https://chp.org.au/mediareleases/homelessness-will-increase-as-social-housing-proportion-falls/>>.
- 12 State of Victoria, 'Delivering More Public Housing for Victorians' (2019) <<https://www.premier.vic.gov.au/delivering-more-publichousing-for-victorians/>>.
- 13 Johson, G.McCallum, S. Watson, J., Who stays, Who Leaves and Why? Occupancy Patterns at Unison Housing Between 2014-2016 (2019) 4, 5.
- 14 Johson, G.McCallum, S. Watson, J., Who stays, Who Leaves and Why? Occupancy Patterns at Unison Housing Between 2014-2016 (2019) 4, 5.
- 15 Natalie James, Report of the Inquiry into the Victorian On-Demand Workforce (September 2020), [7.1.1].
- 16 WEstjustice, JobWatch and Springvale Monash Legal Service, Submission to Select Committee on Temporary Migration, 69.
- 17 Natalie James, Report of the Inquiry into the Victorian On-Demand Workforce (September 2020), [120].
- 18 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandel Rules), UN Doc A/RES/70/175 (17 December 2015) Rule 44
- 19 AMEND, The ethical use of medical isolation – not solitary confinement – to reduce COVID-19 transmission in correctional settings (9 April 2020) <<https://amend.us/wp-content/uploads/2020/04/Medical-Isolation-vs-Solitary-Amend.pdf>>.
- 20 *Corrections Act* 1986, s 58E, and *Corrections Regulations* 2019.
- 21 Data provided by Corrections Victoria as at 17 July 2020.
- 22 See <https://www.theage.com.au/national/victoria-ahead-on-penalties-victoria-leads-nation-on-covid-19-lockdown-fines-20200527-p54x0d.html>
- 23 A child under 15 years can only be fined up to \$165.20 for a single offence and a child aged 15 to 17 years can only be fined up to \$826.6
- 24 In relation to the new fine of \$4,967 for taking part in unlawful gatherings, the fine is 30 times higher than what a child under 15 could be fined by the Children's Court and is six times higher than what a 15 to 17-year old could be fined.
- 25 See <https://www.legalaid.vic.gov.au/about-us/news/more-work-needed-to-achieve-safe-and-certain-homes-for-victorian-children>
- 26 Magistrates' Court of Victoria, Annual Report 2015-16 (30 September 2016) 12,14.
- 27 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020).
- 28 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), ix.
- 29 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), x.
- 30 *Bail Act* 1977 (Vic) s3B(3).
- 31 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), x, 53.
- 32 Ogloff and Armytage, 163.
- 33 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), 28.
- 34 Sentencing Advisory Council, Children Held on Remand in Victoria: A Report on Sentencing Outcomes (September 2020), 70.



**PRINTED ON ECOSTAR+**  
PAPER MADE CARBON NEUTRAL  
WITH FSC RECYCLED CERTIFIED  
FIBRE SOURCE.



**WE APPRECIATE AND CELEBRATE DIVERSITY  
IN ALL ITS FORMS. WE BELIEVE DIVERSITY OF  
ALL KINDS MAKES OUR TEAMS, SERVICES AND  
ORGANISATIONS STRONGER AND MORE EFFECTIVE.**

**Federation of Community  
Legal Centres Victoria**

Location: Level 3, 225 Bourke St,  
Melbourne Victoria 3000

Phone: 03 9652 1500

Email: [administration@fclc.org.au](mailto:administration@fclc.org.au)

Social: @CommunityLawVic

ABN 30 036 539 902

REGISTRATION A0013713H

*Community Legal Centres are  
the heart of a movement for justice.*

