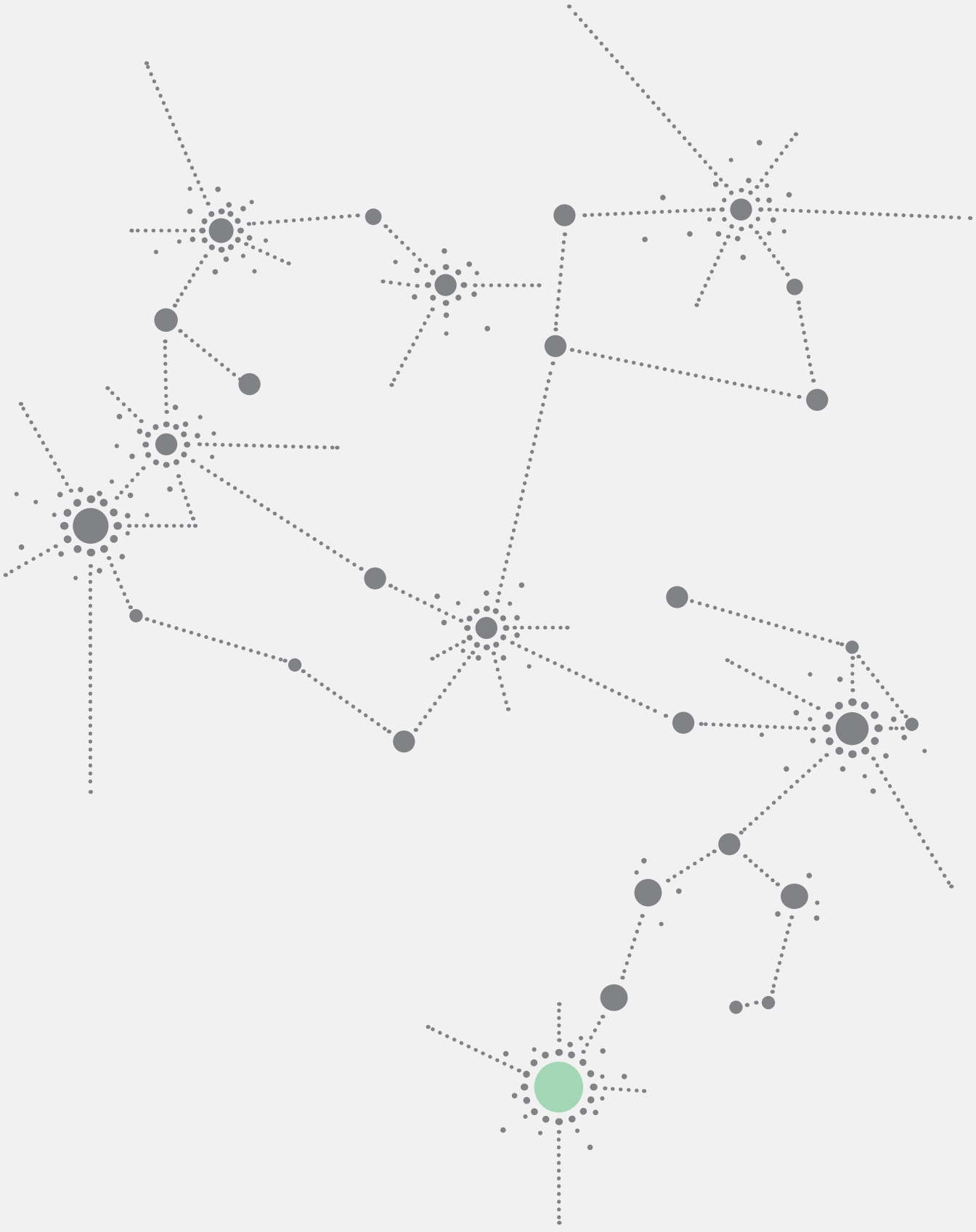

A Constellation of Circumstances

The Drivers of Women's Increasing Rates of Remand in Victoria

REPORT JULY 2020

The authors recognise the sovereignty of the Woi Wurrung (Wurundjeri) and Boon Wurrung peoples of the Kulin Nation as the custodians of the land on which we work. We pay respect to their Elders past, present and emerging.

Citation of this Report

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CONTENTS

0.1 Acronyms

BaRC – Bail and Remand Court

CCO – Community Corrections Order

CSA – Crime Statistics Agency

CV – Corrections Victoria

DHHS – Department of Health and Human Services

DPFC – Dame Phyllis Frost Centre

FVIO – Family Violence Intervention Order

GBB – Good Behaviour Bond

IO – Intervention Order

MCV – Magistrates' Court of Victoria

MMC – Melbourne Magistrates Court

SAC – Sentencing Advisory Council

0.2 Executive Summary

This report presents a summary of the findings of a study investigating the reasons for significant growth in women's rates of remand in Victoria. The study involved the analysis of prison entrance and Bail and Remand Court (BaRC) data; 100 hours of court observations conducted in BaRC; and 13 semi-structured interviews with criminal defence and duty lawyers. Fieldwork for the study was undertaken in between June 2019 and March 2020.

The findings of the study indicate the following issues and areas for further focused investigation and advocacy:

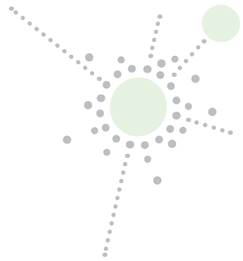
- Often women's offending is low-level, but there are a 'constellation of circumstances' that contribute to their criminalisation and incarceration, including homelessness, poverty, family violence, untreated health problems and addiction;
- Recent reforms to the *Bail Act* 1977 (Vic) have impacted upon remand rates;
- Policing has become 'tougher' under the new bail regime;
- It is common that women spend 'dead time' on remand and receive 'time served' prison sentences;
- High bail thresholds can create pressure to finalise or 'plead out' matters in BaRC;
- Magistrates exercise discretion when making decisions about bail but are restricted by the expanded tests embedded in the *Bail Act*.

A significant and emergent theme from this study is the nexus between family violence, homelessness and women's criminalisation. The apparent connections between these issues highlight a gendered injustice that urgently requires further research.

Ultimately, this study finds that women are particularly disadvantaged across a range of factors that are relevant to making an application for bail, including access to housing, personal relationships and family support, mental health and alcohol and drug supports. The so-called 'risks' that women present with in the courtroom are not indicators of community safety concerns. Instead, they are more likely to index women's disadvantage and marginalisation.

Based on the findings of the study, the authors of this report call for:

- Divestment from policing and prisons;
- Investment in long-term housing for women experiencing violence and poverty;
- Renewed understanding of illicit drug use, mental ill-health and interpersonal violence as social and health issues requiring appropriate community-based support and services;
- Investment in holistic wrap-around community-based support services for women experiencing or at risk of criminalisation;
- A review of bail laws to bring them in line with the principle that imprisonment should only be used as a last resort; and
- Any decreases in prisoner numbers observed during the COVID-19 pandemic should be sustained and extended into the future.



Significant changes to the *Bail Act* that came into effect in 2018 have made it increasingly difficult for women (and men) to obtain bail.

1.0 Introduction

In Victoria, the average number of women entering prison each month has increased three-fold over the past decade. [1] The trebling of women's 'flow-through' numbers is largely attributable to growth in the remand or un-sentenced population. In 2019, almost 9 out of 10 women entering custody were un-sentenced. [2] While on remand, women often lack access to in-prison programs, risk being evicted from their housing, losing their job and enduring custody battles over their children. [3] Regardless of length, a period of imprisonment can be disruptive and traumatising, and Australian research suggests that there is a dearth of support for remandees upon release from prison. [4,5,6,7] Remand growth is further compounding the crisis of Aboriginal and Torres Strait Islander women's disproportionate incarceration. [8] Aboriginal and Torres Strait Islander women are 21 times more likely to be imprisoned than non-Indigenous women in Australia. [9] In Victoria, Aboriginal and Torres Strait Islander women are the only prisoner cohort with more remandees than sentenced prisoners. [10] The death in custody of Yorta Yorta woman Veronica Nelson on 2 January 2020, while on remand in Victoria's maximum-security women's prison for shoplifting charges, starkly reinforces the urgency of halting and reversing the trend of imprisonment for Aboriginal and Torres Strait Islander women.

Significant changes to the Victorian *Bail Act 1977* (Vic) (henceforth, *Bail Act)* that came into effect in 2018 have made it increasingly difficult for women (and men) to obtain bail. The Victorian government pursued bail reform in the immediate wake of the Bourke Street mall attack in January 2017. During the attack, the recently bailed Dimitrious Gargasoulas drove a car into pedestrians along Bourke Street in Melbourne's Central Business District (CBD), killing 6 people, including an infant, and injuring another 30 or more. [11] As the public reeled from the attack, the Victorian Government announced changes to the bail system and a major review of bail laws to be conducted by Justice Paul Coghlan, former Director of Public Prosecutions. Through its swift reaction, the government echoed a pattern, that researchers have observed nationally, of 'an increasingly politicised environment around bail reform', especially the use of the bail regime to send a 'tough on crime' message. [12]

The 2018 bail reforms place more people in the 'reverse onus' position for bail. That is, the onus is placed on the accused person to establish either 'exceptional circumstances' or a 'compelling reason' to justify the grant of bail. [13] Prior to 2018, the exceptional circumstances test for bail applied only to people accused of a small number of very serious offences, including murder, treason, trafficking or cultivation of commercial quantities of drugs of dependence, and terrorism offences. The 2018 changes to the *Bail Act* significantly widened the net of the exceptional circumstances test by applying it to people accused of committing a Schedule 2 offence while on bail for a Schedule 1 or 2 offence. [14] This reform means that people that have received bail for alleged low-level offending – such as shop theft (an indictable offence) [15] – and are accused of continuing to engage in low-level offending, can find themselves having to pass the highest legal test in order to be granted bail.

The declaration of a State of Emergency in Victoria on 16 March 2020 to combat COVID-19 has served to highlight the urgency of addressing the heavy flow of remandees between prisons and the community. [16] Soon after the declared emergency, academics and advocates around Australia were calling on state governments to release un-sentenced and vulnerable prisoners to spare them from the risk of exposure to COVID-19 in custody

1. Based on data reported in Department of Justice and Community Safety – Corrections Victoria, *Monthly time series prisoner and offender data to February 2020*, (Victoria: State Government of Victoria, 2020).
2. Ibid.
3. Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (Melbourne: Victorian Government Printer 2015).
4. Eileen Baldry, 'Women in Transition: From Prison to…', *Current Issues in Criminal Justice, 22/2*: (2010).
5 Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and Inspection of the Dame Phyllis Frost Centre* (Melbourne: Victorian Government, 2017).
6. Melanie Schwartz, Sophie Russell, Eileen Baldry, David Brown, Chris Cunneen and Julie Stubbs, *Obstacles to Effective Support of People Released from Prison: Wisdom from the Field* (Sydney: UNSW, 2020).
7. Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (Melbourne: Sentencing Advisory Council, 2020).
8. Human Rights Law Centre and Change the Record, *Over-represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-imprisonment* (Melbourne: Human Rights Law Centre Ltd and Change the Record Coalition, 2017).
9. Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples: Final Report* (Sydney: ARLC, 2017), 22.
10. Australian Bureau of Statistics, 4517.0 - *Prisoners in Australia, 2019*(Canberra: Australian Bureau of Statistics, 2019).
11. Lorana Bartels, Karken Gelb, Caroline Spiranovic, Rick Sarre and Shannon Dodd, "Bail, Risk and Law Reform: A Review of Bail Legislation across Australia", *Criminal Law Journal*, 42/2 (2018) 91-107.
12. Ibid. 91
13. The exceptional circumstances test applies to people accused of committing a 'Schedule 1' offence and has been interpreted to mean 'something unusual or out of the ordinary', which may be comprised of a variety of factors; whereas the show compelling reasons test applies to people accused of committing a Schedule 2 offence and the test has been interpreted to mean 'sufficiently convincing to move the decision maker'. See *Hang Cao v DPP* (2015) VSC 198; *MZYPZ v Minister for Immigration* (2012) 127 ALD 510.
14. *Bail Amendment (Stage One) Act* 2017 (Vic).
15. *Crimes Act 1958* (Vic), s74.
16. Daniel Andrews, (Premier), 'State of Emergency Declared in Victoria Over COVID-19' [media release], *Premier of Victoria*, 16 Mar. 2020, <https://www.premier.vic.gov.au/state-of-emergency-declared-in-victoria-over-covid-19/>, accessed 4 May 2020.

[There are] underlying and systemic issues that make criminalised women particularly vulnerable to the deleterious impacts of a public health crisis.

and the pain caused by excessive lockdowns and bans on prison visits — and in Victoria, the courts appear to have heeded this call to a significant extent, with figures for May 2020 showing that women's prison numbers have declined by 27% when compared to this time last year. [17] On 19 March 2020, the Supreme Court of Victoria granted bail to a woman who had previously been denied bail twice in the Magistrates' Court. The Judge considered that the COVID-19-related delays in the justice system contributed to 'exceptional circumstances' and helped her to meet this test, which she had been previously unable to meet. The Judge noted that were significant prison lockdowns to occur in the near future, they 'would have substantial effects on her and, no doubt, her relationship with her family, which would be a dramatic development for a person who had not previously been in custody'.[18] While our study does not specifically address the impacts of COVID-19 on bail and remand outcomes for women – as we halted our fieldwork when the state of emergency was declared – it nevertheless develops key knowledge about the underlying and systemic issues that make criminalised women particularly vulnerable to the deleterious impacts of a public health crisis. These include a lack of access to safe housing, inadequate mental health or drug and alcohol supports in the community, experiences of family violence, and heightened surveillance and policing when on bail. Future research can and should build on these findings to investigate the social, economic and health impacts of the COVID-19 pandemic on criminalised and incarcerated women.

17. Lorana Bartels, Thalia Antony and Karen Fletcher, 'Open letter to Australian Governments on COVID-19 and the criminal justice system', *Australian Lawyers for Human Rights* (21 March, 2020) <https://alhr.org.au/open-letter-australian-governments-covid-19-criminal-justice-system/>, accessed 4 May 2020. Department of Justice and Community Safety - Corrections Victoria, Monthly time series prisoner and offender data to May 2020, (Victoria: State Government of Victoria, 2020).

18. *Re Broes* VSC 128 (19 March 2020), para 40.

2.0 Methods

This study of women's bail and remand outcomes involves the analysis of statistical data, observations of the Bail and Remand Court (BaRC) at the Melbourne Magistrates' Court (MMC), and semi-structured interviews with criminal defence and duty lawyers. [19] We received approval to conduct the study from the La Trobe Human Research Ethics Committee on 28 May 2019 and fieldwork was completed during June 2019-March 2020.

2.1 Statistical Data

Statistical data for this study was collected from two sources: Magistrates' Court of Victoria (MCV) and Corrections Victoria (CV). Data on BaRC compiled by MCV was accessed upon request and permission was received to use the data in this report. We accessed the BaRC monthly report dated November 2019, which included general data on BaRC hearings gathered between July 2018 and November 2019, and more specific data on hearing outcomes gathered between July-November 2019. Only a small portion of this data was distinguished by sex/gender.

Monthly data on prisoner numbers compiled by CV is publicly available on their website. We accessed data on the numbers of sentenced and un-sentenced prisoners, and prison receptions (both distinguished by sex/gender) for the period July 1998-December 2019.

2.2 Bail and Remand Court Observations

In total, we conducted 100 hours of non-continuous observations in BaRC at MMC. These hours were spread over 23 days. During this time, we observed 36 women's bail applications or finalisations. Court observations were conducted in two phases (see Table 1 below).

Table 1. Court Observation Record

Observation period	June-July 2019	February-March 2020	Total
Hours of observation	66	34	**100**
Days in attendance	13	10	**23**
Number of women's hearings	20	16	**36**

To conduct court observations, we regularly attended BaRC during each period of fieldwork on both weekdays and weekends, during its hours of operation from 10am to 9pm daily. On occasion, we attended BaRC to observe when notified by a key informant/stakeholder of an upcoming application for bail. The latter approach was made possible by sustained engagement and communication with research participants (i.e. lawyers we interviewed) during the course of the study.

19. None of the cases observed in BaRC were matters that Fitzroy Legal Service acted in and none of the lawyers interviewed were employed by Fitzroy Legal Service.

During observations, we took fieldnotes in an observation journal; noted down the basic details of each case we observed (both women and men); and made detailed notes about women's cases. We ensured that all notes taken during court observations preserved the anonymity of everyone present. The notes on women's cases were used to fill in a 2-page case summary sheet developed in advance for the present study. Each of the 36 cases analysed in this report has its own case summary sheet, which includes legal and demographic information (where possible) and details about the cases put forward by the police informant and prosecution, the defence lawyer and/or the accused, and the magistrate's reasoning for their decision.

Court observations were conducted in various sessions of BaRC: weekday (10-4pm); weeknight (4.30-9pm); and weekend (10-9pm). In addition to applications for bail, women's finalised matters were included in the study. This is because several lawyers suggested that increasingly difficult thresholds for bail may be influencing women's decisions to consolidate and plead out their charges, rather than serve a period on remand. We did not include in our sample any hearings in which women appeared but ultimately made no application for bail or did not finalise their matters, including custody management issues or adjournments.

2.3 Interviews with lawyers

During June-August 2019, 13 semi-structured interviews were conducted with criminal defence and duty lawyers with at least one year of experience representing women applying for bail in Victoria. Interview participation was voluntary, and we have preserved the anonymity of participants. The following interview questions were used as prompts to explore trends and issues in women's bail and remand from the perspective of lawyers representing them:

- What are the key issues that women confront when applying for bail?
- Why do many women *not* apply for bail?
- From your observations, what are the impacts of remand on women's lives and wellbeing?
- From your observations, what have been the impacts of recent Victorian bail reforms on women?
  - How have they affected magistrate decision-making around bail/remand?
  - How have they affected police practices around bail/remand?
- What role, if any, do family violence experiences play in women's criminalisation and remand into custody?
- What role, if any, does mental health (and the need for mental health treatment) play in women's bail applications and/or remand into custody?
- From your understanding, do prison capacities impact upon bail/remand decisions?

The duration of the semi-structured interviews ranged from 23 minutes to 57 minutes, with an average length of 34 minutes. Interviews were audio recorded and transcribed for coding and analysis. We analysed a total of 7 hours and 22 minutes of interview recordings.

2.4 Data analysis

The project utilised quantitative and qualitative methods of analysis. Data from MCV and CV outlined above was analysed quantitatively to determine, for example, the proportions of BaRC hearings and hearing outcomes that resulted in remand for women during the time period of study; and recent growth in un-sentenced prison receptions by sex/gender.

To analyse the court observation data, we conducted a 'systematic content analysis' [20] of the information recorded in case summary sheets of women's bail application and finalisation outcomes to identify common demographic, legal and offense-related themes in the sample of cases observed. The case summary sheets were uploaded into NVivo software and classified and coded according to a pre-determined coding and classification scheme, which included but was not limited to:

- Applicable bail threshold test (show compelling reasons/exceptional circumstances);
- Nature of legal support and representation provided to the accused (legal aid/private defence/self-representation);
- Offence type (offenses against the *Bail Act*/ theft/driving offences/etc.);
- Demographic, health and social factors (young offender/poor mental health/homeless/etc.)
- Basis of police prosecution opposition to bail (unacceptable risk/extensive offending history/etc.);
- Basis of legal case made for bail (low level offending/supports in place/etc.); and
- Magistrate decision, any conditions, and rationale (bail granted/bail denied/sentenced/etc.).

Classifying the case summary sheets using the above categories (and more) allowed us to conduct basic quantitative analysis of the sample of cases observed to determine, for example, the proportion of accused persons experiencing homelessness; and the proportion of bail applications that were denied. The coding scheme above also enabled us to conduct qualitative analysis of fieldnotes recorded in the case summary sheets, such as the basis of police opposition to bail.

To analyse the interview data, we adopted a 'grounded theory' approach. [21] We conducted close readings of transcribed responses to each question and progressively developed a coding scheme for each question as themes arose in the transcripts. The coding scheme thereby largely emerged from the data itself (rather than applying a pre-conceived coding scheme). After establishing our coding schemes for the interview data, we employed NVivo software to conduct line-by-line coding of interview transcripts to systematically identify the subthemes and overarching themes in interviewee's responses to each question. Each interview transcript was coded at least twice by different members of the research team and the coding scheme was refined as this process was carried out. Key themes were identified by referring to the frequency with which they appeared across the 13 interview transcripts, as calculated in NVivo.

20. Mark Hall and Ronald Wright, "Systematic Content Analysis of Judicial Opinions", *California Law Review*, 96/1 (2008) 63-122.
21. Melanie Birks and Jane Mills, *Grounded Theory: A Practical Guide* (Los Angeles: Sage, 2011).

3.0 Findings

3.1 Statistical data: BaRC overview

During the 17-month period July 2018-November 2019, there were on average 915 BaRC hearings per month, including 142 hearings involving a 'female' accused. These records include BaRC hearings conducted in Melbourne Magistrates' Court (majority), Melbourne Metro and Regional courts. This amounts to roughly 30 hearings per day, including an average of 4-5 women's matters being heard in BaRC daily.

Unfortunately, most of the BaRC data to which we were granted access was not differentiated by recorded sex/gender. For the limited data that was sex/gender specific, [22] we have identified the following findings, which reflect BARC records for the 5-month period July to November 2019:

- the accused was recorded as female in 16.13% of BaRC hearings (n=733)
  - Corrections Victoria data for the same time period shows that 13.66% (n=663) of those entering prison un-sentenced are recorded as female–this suggests that police practices surrounding bail may be impacting women more than court decision making (since a higher proportion of women are brought before BARC than entering the prison system) [23]
- the accused was recorded as female in 12.11% (n=90) of refused bail applications (total=743)

Since the proportion of women refused bail is lower than the overall proportion of women's hearings, this suggests that in BaRC, men's hearings are more likely to result in a refusal of bail than women's hearings. Of the total 733 BaRC hearings recorded as having a 'female' accused during July-November 2019:

- 43.93% of women were remanded (n=322) (in contrast 62.62% of men were remanded (n=2386))
  - This proportion is comprised of women making no application (n=232) (72% of remanded women and 31.7% of total women's hearings in BaRC) and women having their bail application refused (n=90) (28% of remanded women and 12.3% of total women's hearings in BaRC)

Corrections Victoria data for the same time period records 633 women entering prison un-sentenced (almost double the remand number recorded by BaRC).

Based on the above figures, the remaining 56.07% of BaRC hearings involving a 'female' accused (n=411) during this period resulted in either: bail being granted, the matter(s) being finalised, or adjourned. However, we cannot identify the specific numbers for each outcome. The overall figures for hearing outcomes, not distinguished by sex/gender, can give us a broader picture of trends in BaRC.

Overall, the most common hearing outcome (not sex/gender specific) in BaRC is no application, followed by bail refused/granted, finalised and, lastly, adjourned (i.e. filing hearings or part-heards). For example, during the period July to November 2019:

- 43.17% (n=1965) BaRC hearings resulted in no application
- 31.42% (n=1430) BaRC hearings resulted in a bail decision (refused/granted)
- 19.57% (n=891) BaRC hearings resulted in a finalisation (plea)
- 5.82% (n-265) BaRC hearings were filing hearings or part-heard (adjourned)

For BaRC hearings that proceeded to a bail application (n=1430), bail was slightly more likely to be refused (n=743) than granted (n=687): 51.96% of bail applications in BaRC were refused, while 48.04% were granted during July to November 2019.

For hearings (men and women) that were finalised in BaRC during July-November 2019 (n=891), the most common orders were:

- fine 45.12% (n=402)
- CCO 23.79% (n=212)
- Imprisonment 13.92% (n=124)
- other 17.17% (n=153) [24]

For those did not make an application for bail upon arrest and remand to the court (n=1965), or who were refused bail (n=743) (total=2708), the time until the next hearing ranged from:

- 0-3 days, 31.94% (n=865)
- 4-7 days, 15.84% (n=429)
- 9-14 days, 19.83% (n=537)
- 14+ days, 32.39% (n=877)

Lastly, only 0.97% of BaRC hearings were conducted via AVL during this period.

22. Note that court records may not accurately represent a person's self-identified sex/gender.

23. Based on data reported in Department of Justice and Community Safety – Corrections Victoria, *Monthly time series prisoner and offender data to February 2020.*

24. Note that there can be more than one finalised outcome per hearing as these relate to individual charges.

3.2 Court observations: Overview

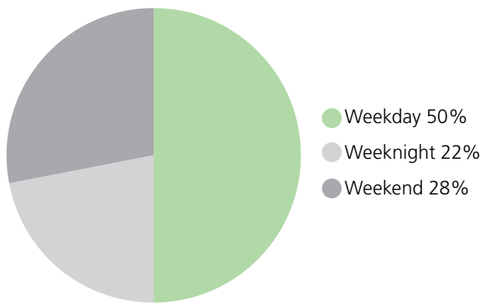
We conducted 100 hours of court observations in BaRC during June-July 2019 and February-March 2020. In total, we observed 36 women's hearings that involved an application for bail or a finalisation of criminal matters. [25] The basic characteristics of these 36 cases are outlined in this section.

3.2.1 BaRC sessions in which cases were heard

We observed 18 cases in BaRC on a weekday between 10am and 4pm; 8 cases on a weeknight between 4.30pm and 9pm; and 10 cases on a weekend. Therefore, half the cases we observed took place during BaRC weekday sessions. Unfortunately, officially collected data on BaRC does not include a breakdown of matters heard in different court sessions, so we cannot determine if our sample of observations is representative in terms of time and day of hearings.

Figure 1. BaRC session in which women's cases in the sample were heard

BaRC SESSIONS



3.2.2 Length of time on remand

The majority (n=25, 69.4%) of cases we observed in BaRC were "fresh arrests", having spent less than two nights in remand:

- Eleven women had been remanded the day of their hearing (30.6%);
- Fourteen women had spent 1-2 nights on remand (38.9%);
- Four women (11.1%) had spent an extended period of time on remand: 5 days, 28 days, 2 months, 93 days; and
- Seven women had spent an unknown amount of time on remand (19.4%).

The small proportion of women in the sample who had spent an extended period of time on remand, i.e. 5+ days (n=4, 11.1%) can likely be attributed to many bail applications for women already transferred to the Dame Phyllis Frost Centre (the maximum-security women's prison) being booked-in to be heard in another smaller Magistrates' courtroom located in the County Court building, rather than BaRC in the Magistrates' Court building (where we conducted observations). The lawyers we interviewed informed us that this often occurs because of overcrowding issues in the basement cells at the Magistrates' Court, which are segregated by sex/gender.

For the women in our sample whose prior imprisonment or lack thereof was noted during their hearing, the majority had not served a previous term of imprisonment. In our sample of 36 hearings:

- Fourteen women had no prior imprisonment (38.9%);
- Seven women had been previously imprisoned (19.4%); and
- For 15 women (41.7%), it was unknown whether they had been in prison before.

The majority of women in our sample had prior convictions and when compared to our notes on prior imprisonment, it is clear that the majority of these convictions resulted in non-custodial sentences. In our sample of total hearings observed in BaRC:

- Eight women had no prior convictions (22.2%);
- Seventeen women had prior convictions (47.2%);
- It was unknown for 11 women whether they had prior convictions (30.6%).

3.2.3 Demographics

The demographics of the women in our sample of observations varied. Firstly, their ages were diverse:

- Seven were young (under 25) (19.4%);
- Six were aged between 25-40 (16.7%);
- Ten were aged between 40-49 (27.8%);
- One woman was 81 years of age (2.8%); and
- Twelve women were of unknown age (33.3%).

There were several other social factors that stood out amongst the women we observed in BaRC:

- More than one in three women in our sample (n=13, 36.1%) were homeless or had unstable housing at the time of remand;
- The majority of women (n=23) were unemployed at the time of their hearing (63.9%) (and only 3 specifically mentioned employment (8.3%); the remainder were unknown);
- Ten women had psychiatric assessments conducted by Forensicare [26] while in the court cells (27.8%) and an additional 7 women had diagnosed mental illness (19.4%);
- Six women were primary carers of children (16.7%) and an additional 12 women were mothers to children not in their care (33.3%);
- Only 5 women had family support in court (13.9%); and
- One woman identified as Aboriginal (case #18, weekday, represented, bail granted) and she was the only woman to have a case worker in court.

The apparent under-representation of Aboriginal and Torres Strait Islander women in our sample may be attributed to women not mentioning their Aboriginality during their hearing, especially if they were self-represented and unaware of specific provisions in the *Bail Act* that require a bail decision maker (e.g. magistrate, police sergeant, bail justice) to take a person's Aboriginality and cultural ties into account. [27] Ten (27.8%) of the 36 hearings that we observed in BaRC involved women representing themselves.

25. We did not take detailed notes about women's hearings that we observed that resulted in no application for bail (such as 'custody management' issues or adjournment).

26. Forensicare describes itself as the leading provider of forensic mental health services in Victoria. It is also known as the Victorian Institute of Forensic Mental Health. See Forensicare 'About Us', *Forensicare* [website] (2020) <www.forensicare.vic.gov.au>, para 1, accessed 11 May 2020.

27. Section 3A of the *Bail Act* 1977 (Vic) reads: In making a determination under this Act in relation to an Aboriginal person, a bail decision maker must take into account… any issues that arise due to the person's Aboriginality, including—
(a) The person's cultural background, including the person's ties to extended family of place; and
(b) Any other relevant cultural issue or obligation.

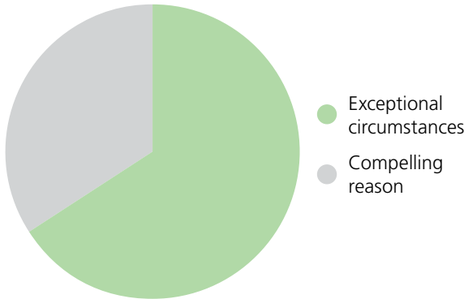
3.2.4 Bail applications

Of the 36 women's hearings included in our sample, 29 (80.6%) resulted in the accused making an application for bail. 13 of these women were denied bail (44.8%) and 16 of them were granted bail (55.2%). [28] Of the 16 women granted bail, 3 of them were bailed to an ambulance for in-patient assessment (18.8%) (in cases #1, #10, #27). Police opposed bail in 26 of the 29 women's bail applications we observed (89.7%). Two of the three women for whom police did not oppose bail (cases #10 and #27) were bailed to an ambulance, which suggests that an in-patient assessment is more likely to encourage police to support a woman's application for bail. The remaining case in which police supported a bail application (case #29) involved a woman with an intellectual disability charged with five counts of breaching bail and required to meet the exceptional circumstances test.

The majority of women that applied for bail in our sample were required to meet the 'exceptional circumstances' test in order to be granted bail (n=19, or 65.5%); while the minority were required to "show compelling reason" (n=10, or 34.5%).

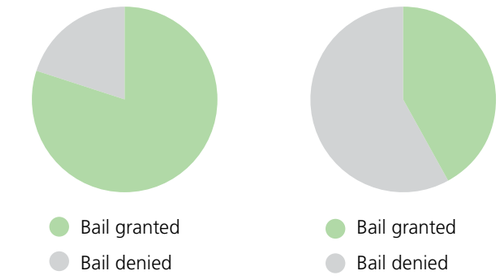
Figure 2. The test women applying for bail in the sample were required to meet

BAIL THRESHOLD



Those required to show compelling reasons (n=10) were more likely to be granted bail (n=8) (80.0%) than denied bail (n=2) (20.0%). In contrast, those required to meet the exceptional circumstances threshold (n=19) were more likely to have their bail application denied (n=11) (57.9%) than they were to be granted bail (n=8) (42.1%).

Figure 3. Likelihood of being granted bail when in the "Show Compelling Reason" category versus "Exceptional Circumstances" amongst women in the sample



However, these outcomes are also likely influenced by the fact that all of the women required to show compelling reason (n=10) were legally represented; whereas 10 of the 19 women that were subject to the exceptional circumstances test were self-represented (52.6%). Therefore, all of the self-represented women in our sample applied for bail and were required to show exceptional circumstances. A lack of legal representation correlated with poor outcomes for women subject to the exceptional circumstances test in their applications for bail:

- Only 2 of the 10 women who were self-represented were granted bail (40.0%);
- 6 of the 9 women who were legally represented were granted bail (66.7%percentage).

In our sample as a whole, including both bail applications and finalisations (n=36), 10 women were self-represented (27.8%). We observed more women representing themselves during weekend sessions of BaRC:

- Of the 10 women we observed in BaRC weekend sessions, 5 were self-represented (50%);
- Of the 8 women we observed in BaRC weeknight sessions, 3 were self-represented (37.5%);
- Of the 18 women we observed in BaRC weekday sessions, only 2 were self-represented (11.1%).

Women appearing in BaRC on the weekend in our sample were therefore much more likely to be self-represented.

3.2.5 Finalisations

In our sample of 36 hearings, 7 women consolidated their pleas in order to finalise their matters in BaRC (19.4%), rather than make an application for bail. All of the women that finalised their matters (n=7) had legal representation. Two of the women that finalised their matters received a prison term. See Table 2 for further details of the finalised matters we observed in BaRC.

28. Unfortunately, we cannot effectively compare our sample with BaRC data reported by MCV and outlined above to establish if it is representative, because the proportion of bail applications that are granted or refused in BaRC are not clearly broken down by sex/gender in MCV data. While MCV reports on the numbers of women whose bail application was refused, it does so only as a total proportion of hearings (including adjournments, no application, custody management issues, etc.) not as a total proportion of applications for bail.

Table 2. Finalised matters and their outcomes

Case #	BaRC session	Charges	Age	Prior imprisonment	Mental health Drug use Housing	Outcome
4	Weekday	8 charges total: 3 breaches of FVIO (non-violent) Breaches of bail	44	Served one prior prison term (39 days)	Forensicare assessment Homeless	3-months prison
7	Weekday	2 x shop-theft Trespass Possess marijuana Breaches of bail	44	No prior prison Minor offending on/off over 20 years	Disability pension (anxiety) Homeless	8-months GBB
9	Weeknight	Multiple counts of theft Assault	20	No prior prison	Disability pension Methadone program Lives with mother	$1000 fine (already on Drug Treatment Order)
11	Weeknight	Trespass Breach of bail (curfew) Theft Breach of CCO	Young	No convictions recorded for prior offenses	None identified	12-months CCO 75 hours community work
28	Weekday	16 charges incl. theft, possession, driving without licence	43	Prior conviction resulted in CCO	Forensicare assessment Active drug user Unstable housing	12-months CCO Transfer to ambulance
33	Weeknight	Driving matters, incl. drink driving, driving while disqualified	81	Prior convictions No prior prison	Alcohol dependency Homeless	12-months CCO driver's license cancelled
34		Driving and dishonesty offences, including identity fraud		Previous imprisonment	Diagnosed mental illness Active drug user	6-months prison 12-months CCO

3.3 Interviews and court observations: Key themes and issues

To provide broader context to our court observation findings outlined above, this section describes the key themes that emerged from the 13 interviews we conducted with criminal defence and duty lawyers about women navigating the bail and remand system. Our interview findings are organised here into six themes and can be summarised as:

- There are a 'constellation of circumstances' that contribute to women's criminalisation and incarceration;
- Recent bail reform has impacted upon remand rates;
- Policing has become 'tougher' under the new bail regime;
- It is common that women spend 'dead time' in prison and receive time served prison sentences;
- High bail thresholds can create pressure to finalise or 'plead out' matters in BaRC; and
- Magistrates exercise discretion when making decisions about bail but are restricted by the expanded tests embedded in the *Bail Act*.

While presenting these findings from our interviews, we also incorporate examples from our court observations, where appropriate and relevant, in order to further develop and demonstrate how these themes and issues play out for women in BaRC.

3.3.1 Women and remand: A 'constellation of circumstances that operate against them'

All of the lawyers we interviewed suggested that women's various and interlinked experiences of disadvantage heighten their vulnerability to criminalisation and remand. Lawyers noted that criminalised women have generally been experiencing a range of hardships prior to being remanded, including homelessness, poverty, family violence, untreated physical and mental health problems, and drug and alcohol addiction. Lawyer 8 described this as, a constellation of circumstances that operate against them and when combined, these issues create what Lawyer 6 identified as 'a level of chaos in their lives'. Lawyer 1 argued that:

> often [women's] offences are much lower level, but the chaos that's attached to their lives has meant that they have just really struggled to deal with all of those things.

"It's very rare that we would see women charged with criminal offending who hadn't had some sort of experience of family violence in their background, whether that was an immediate precursor or a previous trauma."

These unstable and difficult circumstances often leave women taken into custody very unwell and distressed. Women's offending, Lawyer 2 suggested:

> is in the great majority of cases driven by poverty and trauma and disadvantage and things like mental health issues or drug addiction. Those things are often coming from the experience of trauma… It can either be an underlying issue that has maybe contributed to poverty or unemployment or mental health issues, or it can be something that has been immediate.

All of the lawyers we interviewed emphasised that experiences of family violence were very common amongst criminalised and incarcerated women. As Lawyer 2 put it:

> it's very rare that we would see women charged with criminal offending who hadn't had some sort of experience of family violence in their background, whether that was an immediate precursor or a previous trauma.

Rather than a straightforward or one-directional relationship between women's experiences of family violence and criminalisation, there are multiple different ways and scenarios in which these interact and co-occur for women. As Lawyer 6 explained:

> The stats will show I'm sure that there is a very high percentage of women who have faced charges who have experienced family violence. But… it's not a straightforward connection, [as if] family violence has X impact. Normally it's that [family violence] contributes to a chaotic existence and therefore it's more likely to lead to all sorts of other things like drugs and mental health problems and homelessness and all those things play in together to lead to the likelihood of committing crime. Particularly low-level offences, like poverty-related offences.

The significance of overlapping issues of homelessness, trauma, addiction, mental health and disadvantage was consistently emphasised by the lawyers we interviewed. These issues were also common in the cases we observed in BaRC. As noted above, more than one in three women in our sample were homeless or had unstable housing at the time of their hearing and almost half had a diagnosed mental illness or required a Forensicare psychiatric assessment while in the court cells. One of these cases – case #16, which was arguably the most complex bail application we witnessed – strongly illustrated the convergence of these themes.

More than one in three women in our sample were homeless or had unstable housing at the time of their hearing and almost half had a diagnosed mental illness or required a Forensicare psychiatric assessment while in the court cells.

Case Study 1. Case #16 (BaRC weekday, represented, bail granted)

The accused had been on remand for 93 days and this was her third bail hearing. Her lawyer submitted that she was living in her car at the time of arrest and her extensive history of homelessness was linked to a long history of family violence victimisation. The charges included multiple thefts, driving while un-licenced, drug driving, possession of ice, and reckless conduct endangering life. She was required to meet the exceptional circumstances test to be granted bail.

Her lawyer presented evidence of the impacts of her extensive history of trauma and arranged access to housing and other services that would support her application for bail, including a CISP report and a letter from a housing service confirming that housing will be available to the accused should she be bailed. The defence lawyer submitted that the magistrate 'should place great weight on the fact that she is a victim of family violence' and that 'the female prison is overcrowded – 70% of women in prison are victims of family violence'.

In their reasoning for granting bail with deferred sentence, the magistrate stated (*emphasis added*):

> I appreciate the submission you are making that puts her offending into context… Her issues relate to her drug use and housing… *I am mindful that female remand population is on the rise.* If I put her on deferral there would be quite strict conditions… My first thought this morning was you need more time in custody… But your lawyer's submission has persuaded me to grant bail with deferral.

In this case, the lawyer successfully highlighted a range of individual and systemic injustice issues to persuade the magistrate to grant bail to their client. This lawyer had spent considerable time on this woman's case, challenging the police investigatory process and charges and finding new facts and circumstances to lodge three applications for bail over several months to finally secure her release from DPFC. The procurement of housing and support services were integral to her success in eventually obtaining bail after a lengthy time on remand.

Homelessness is arguably the most significant barrier for women seeking bail.

‘There’s an acute shortage of community-based services for [Aboriginal] women… We want women in the community, we don’t want them in custody.’

Homelessness is arguably the most significant barrier for women seeking bail. All of the lawyers we interviewed identified homelessness and lack of stable accommodation as a major issue for criminalised women. While the *Bail Act* does not stipulate that housing is a requirement for bail, lawyers argued that unstable housing definitely lessens a woman’s chance of success. As Lawyer 6 suggested ‘it’s definitely harder to get bail without an address, but it’s not impossible’. Lawyer 13 gave an example of a magistrate’s probable line of reasoning:

> where did she live? Homeless? Couch surfing? Well… how is this person possibly going to comply with their bail conditions if they’re just couch surfing?!

As noted above, 13 women or 36.1% of our sample drawn from BaRC observations were homeless or in unstable/precarious housing at the time of remand. Several more women had histories of homelessness and only recently secured housing. Of the 13 women without stable housing at the time of remand:

- six were denied bail;
- four finalised their matters;
- and three women were granted bail.

For the three women that were bailed despite their unstable housing upon remand, one of these was bailed to an ambulance; another woman’s lawyer secured supported housing for her; and another woman had temporary housing. We observed cases in which homelessness was raised as a reason to deny bail, for instance in case #5, police include ‘homelessness issues’ in their opposition to bail; in case #8, the magistrate notes homelessness as a relevant factor when making a decision to deny bail; in cases #22 and #36, the Magistrate denies bail in part because the bail address cannot be confirmed. In case #36, the magistrate stated in their reasoning:

> I am not satisfied that you’ve demonstrated exceptional circumstances. It’s a very high level of satisfaction that the law requires of me and I don’t even know where you would live!

The need to arrange housing, support and treatment options for mental ill-health or drug and alcohol dependency can delay a woman’s bail application or reduce her chance of success if these are not already in place. Lawyers were concerned about the current housing crisis in Melbourne and the apparent nexus between homelessness and criminalisation. The difficulty of securing emergency or transitional housing is a significant barrier to the timely preparation of bail applications. Lawyer 6 explained that:

> due to the shortage of emergency housing there is a real issue with finding appropriate housing for people who are homeless to run a bail application on the spot.

Women may confront particular barriers to securing bail if they do not have access to housing. Lawyer 3 suggested that,

> magistrates are perhaps more hesitant to bail a woman to the streets because they recognise either subconsciously or consciously the vulnerability of a woman on the street versus the vulnerability of a man on the street.

Lawyer 6 stated that they work with:

> a lot of women who have found themselves homeless due to family violence, which is often a barrier to getting bail.

Lawyers 3 and 4 elaborated on the gendered dimensions of homelessness, family violence and remand:

> They won’t apply for bail again because it can be really difficult for them to propose accommodation. One of the first factors that characterises an abusive relationship is isolation from one’s family. So, when they finally get to this point where they’ve been remanded, often times because they’ve been in that family violence relationship, they’re completely isolated from alternate family members that can come and give them support and talk to them... I think it is pretty easy to see the connection between family violence and them not being able to get bail. It’s a gendered issue, 100 per cent. (Lawyer 3)

> The nuanced factor when dealing with women is homelessness really comes into play... particularly where women are fleeing domestic violence, homelessness becomes a real issue. While not having a house, not having a static address isn’t a reason for denying bail, [having a house is] a pretty big reason for giving it. (Lawyer 4)

Since housing significantly increases the likelihood a woman’s application for bail will be successful, a lack of housing and support may dissuade women from applying for bail upon arrest, or delay their application, as noted above. For instance, Lawyer 5 suggested that women might not apply for bail because:

> they don’t think they’re going to get bail, or their lawyer tells them they’re not going to get bail, because they’ve got nowhere to go or because they’re not getting the treatment they need in the community or they’re not getting the drug and alcohol supports in the community’.

Lawyer 4 emphasised the specific marginalisation experienced by Aboriginal women struggling with poor mental health:

> There’s an acute shortage of community-based services for [Aboriginal] women… We want women in the community, we don’t want them in custody…. If we can stand up in front of a magistrate and say this applicant has an appointment tomorrow morning with this service

> to engage with mental health [and] drug and alcohol counselling… the application for bail becomes much stronger. The problem is there's just not a lot of services.

In a context of shortage of available and appropriate drug and alcohol support and mental health provision in the community, several lawyers reported confronting a perception that some women are "better off in custody", rather than being bailed to an ambulance for in-patient assessment. As Lawyer 10 reflected:

> If they're really, really unwell, then often we find that the mental health services are saying, "well, they're better off in custody", because there's so little guarantee in the community that they're going to be treated or admitted [if bailed to an ambulance for in-patient assessment] ... It just seems like a real indictment on the mental health system that it's better for them to be in custody, or that is what the mental health services are telling us.

During our fieldwork, we observed three bail applications (out of a total of 29) that resulted in women being granted bail on the condition that they were immediately transferred to an ambulance for an in-patient assessment. We also witnessed police making an argument to deny bail on the basis of a perceived need for drug and alcohol treatment for the accused in case #13. This case is described below in Case Study 2.

Case Study 2. Case #13 (BaRC weekend, self-represented, bail denied)

The accused had multiple outstanding charges including possession and 5 outstanding warrants for failing to appear. It was alleged that she had committed Schedule 2 offences while on a CCO. She was now required to meet the exceptional circumstances test. Police argued that, "she will benefit from some time spent in prison so she can receive adequate drug treatment and rehabilitation."

"It just seems like a real indictment on the mental health system that it's better for them to be in custody, or that is what the mental health services are telling us."

The Crime Statistics Agency (CSA)[29] reports that half of the women that entered prison on remand in 2018 were the victim of at least one reported crime in the previous two years, most commonly assault.

A woman's fear for her safety may influence her decision to apply for bail when brought to court. Data on imprisoned women consistently shows high rates of victimisation. The Crime Statistics Agency (CSA)[29] reports that half of the women that entered prison on remand in 2018 were the victim of at least one reported crime in the previous two years, most commonly assault. Lawyer 4 recounted one way that victimisation can impact on women's bail application, or lack thereof:

> The few times that a woman has actively instructed me not to apply for bail is always for fear of her safety in the community, or she's just got nowhere else to go and this is four walls and it's a feed. So, we will apply for bail as often as we can and most people who we think are eligible for bail will apply for it. Yeah, as I said, just the few times I've had particularly a woman client say, "no, I don't want bail, I'm quite happy where I am", is because of those reasons.

Five of the lawyers we interviewed suggested that poor resourcing for duty lawyers and the fact that accused persons only have 'one shot' at a represented bail application can dissuade women from applying for bail when first remanded. Following the 2018 bail reforms, Lawyer 5 suggested that:

> less people are getting bail and so, we're having to make the call, the difficult call, of not running bail because there's just no hope of getting bail in many circumstances.

However, others argued that practitioners should always encourage women to apply for bail upon arrest, regardless of the exceptional circumstances test, since another attempt at a represented bail application is possible when there are new facts and circumstances. While more time and resourcing would certainly support lawyers in the preparation of stronger bail applications, they would not necessarily guarantee better results for women because of the punitive nature of the new bail laws. Frequently critical of recent bail reforms, lawyers suggested that they were intended to put more people behind bars. As lawyer 4 put it:

> even if you had all the time in the world, you might say to this person… "you're in exceptional circumstances, the system is working as designed"... this is a by-product of a system designed to capture people who offend while on bail.

The impacts of the new tests for bail when someone is in a reverse onus position are discussed in more detail below.

29. Samantha Walker, Paul Sutherland and Melanie Millstead, *Characteristics and offending of women in prison in Victoria, 2012-2018* (Melbourne: Crime Statistics Agency, 2019).

Several lawyers reported that women with children experience significant anxiety and worry about what will happen to their family if they are not bailed. A period of remand can have enduring impacts on families, extending well beyond a woman's release from.

"As they build more prisons… our biggest mental health care provider is the prisons at the moment."

Time on remand is often very distressing, particularly for women who are primary carers. As Lawyer 3 summed it up:

> the biggest concern for women going into custody is their kids and housing situation.

We observed six bail applications by women who were primary carers to their children and two of these women were denied bail. In interviews, several lawyers reported that women with children experience significant anxiety and worry about what will happen to their family if they are not bailed. A period of remand can have enduring impacts on families, extending well beyond a woman's release from custody.
Lawyers relayed how remand can lead to isolation from children and interventions by DHHS, which can have devastating consequences for women and their families. As Lawyer 9 argued:

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

Short terms of imprisonment, with or without sentence, are particularly disruptive. Lawyer 4 put forward that remand has no benefits for women:

> short periods of remand always have negative impacts because it just disrupts whatever it is that they're doing. It doesn't have any therapeutic benefit, and when you're on remand you don't get access to programs generally, so there's no benefit at all.

The lawyers we interviewed often suggested that time on remand can contribute to worsening mental health. As Lawyer 4 elaborated:

> A classic example would be a woman living in her car, fleeing domestic violence, self-medicating with drugs and alcohol. Presents as very unwell, quite traumatised, goes into the prison. The prison decides that she's a bit of a risk to herself so then they put her in an isolation cell… so she's dealing with all of that on her own.

A key problem associated with remanding women with poor mental health is the lack of consistency and continuity in access to medications between custody and the community. The disruption to mental health treatment that can arise from a period of remand can exacerbate mental ill health. As Lawyer 3 explained:

> There often seems to be a lag in mental health treatment coming from custody into the community, so you experience a situation where someone might be receiving treatment in a custodial setting but then they're released onto the street. They don't have their [prescriptions]; they don't have any money. We then expect that person who is often exhibiting mental health symptoms by the end of the day to make an appointment with their GP, get a script, go to the chemist, you know? So, [remand] impacts on mental health, both in custody and in terms of accessing treatment when they're released, is a huge issue.

While awaiting a bail hearing at the Melbourne Magistrates' Court, women are detained in the basement cells. [30] Lawyers described these cells as particularly unhospitable, especially when women are distressed upon arrest. Lawyer 8 stated that:

> some ladies will sit in the cells and not come up for their hearings because they're so traumatised and the cells here in particular are awful. It's just an awful place to be.

Lawyer 9 pointed out the particular implications of poor remand conditions for Aboriginal and Torres Strait Islander women, suggesting:

> if you think about Aboriginal people in custody and the capacity to monitor their wellbeing in custody, that's just a tinderbox waiting to go up.

Less than six months after this statement was made in interview, Yorta Yorta woman Veronica Nelson died while on remand in the DPFC, after having been denied bail in BaRC on 31 December 2019, where she appeared without legal representation for a charge of shoplifting while on a Community Corrections Order. While the Coroner's findings on cause of death are yet to be made, Ms Nelson's death nevertheless reinforces the urgency of rethinking the application of highly onerous bail thresholds to vulnerable women.

In interviews, lawyers expressed concerns about government investment in prisons outpacing its investment in community-based mental health services. As Lawyer 3 succinctly argued:

> as they build more prisons… our biggest mental health care provider is the prisons at the moment.

The perception of misplaced resourcing was reiterated by Lawyer 4, who suggested:

> I don't think the mental health system has kept pace with the criminal justice system… I don't think that's unique to women, but I think women are bearing the brunt of it.

Lawyer 9 expressed the urgent need to pursue alternatives to prisons:

> The alternative is so starkly obvious, but we keep funnelling shitloads of money into corralling people into these pits of misery. In the alternative, you set up supported alternatives in the community and the money that is saved and the health of the community. You know, the residual impact of that disruption [of imprisonment] to family and to children and to community is extraordinary, to put it bluntly.

30. The need to separate women and men in custody can also delay women's timely access to legal counsel and court schedules.

"We've seen a whole cohort of women who would previously never have been on remand… They shouldn't ever have been looking at spending time in prison... So, there's a real kind of injustice component."

"Frequently, breaching your bail conditions could be in the context of experiences of family violence."

3.3.2 Bail reform: 'A lot of players are forgetting that imprisonment should be a last resort'

There was a general perception amongst the lawyers we interviewed that the most recent changes to the *Bail Act* have continued to drive growth in the women's remand population. Lawyer 5 stated:

> I'm noticing a lot more women in the cells than I used to after the reforms last year… and a lot of offences that in my view do not warrant a term of imprisonment. And I'm getting that feeling and outrage a lot more for woman than I am for men.

Lawyer 8 reported witnessing :

> a lot of women with low-level offending… shop stealing, that sort of thing, winding up in custody for longer periods of time than they might otherwise serve as a sentence.

Lawyer 2 reiterated this perception of an unjustified increase in women's remand:

> we've seen a whole cohort of women who would previously never have been on remand… They shouldn't ever have been looking at spending time in prison... So, there's a real kind of injustice component.

Lawyer 12 added that many of these women are:

> being remanded on lower level offending when they've failed to appear at court… I've seen women in custody held for a full day on driving charges because they've failed to appear a couple of times.

Corrections Victoria data on prison receptions during 2018-2019 confirms that the numbers of un-sentenced women and men entering prison have continued to increase in the twelve months that followed the second of three stages of bail reform in 2018. However, the increase in un-sentenced men (20.8%) has been greater than women (11.03%) during this specific period. In other words, at the point of entry to the prison system, changes to the bail laws in mid-2018 are being borne more heavily by men. However, when prison reception data is examined over a five-year period, the rate of growth in the women's remand population has outpaced that of men. Between August 2014-2019, annual prison receptions for un-sentenced women increased by 81.28%, compared to 66.4% for men. This longer trajectory of a gendered increase in remand suggests that the 2018 bail reforms cannot be viewed in isolation. Rather, the unprecedented numbers of un-sentenced women in prison is more likely the result of a combination of interlocking forces and processes, including the nexus between family violence, women's homelessness and criminalisation discussed above; dramatic increases in police numbers; and, importantly, the criminalisation of bail breaches in 2013.

Two new bail-related offences were introduced In December 2013: contravening a conduct condition of bail and committing an indictable offence while on bail.[31] These 'secondary offences' (because they arise secondarily to a person's involvement in the criminal justice system) have had a significant impact on the women's remand population.[32] The CSA reports that in 2018, half the women who entered prison on remand were charged with one of the two new bail offences introduced in 2013.[33] These bail offences have gendered dimensions. For example, Lawyer 11 pointed out that women's caring responsibilities can 'impede their ability to attend court', which leads to breach of bail charges that can 'land them in custody'. Moreover, as outlined above, women experiencing poor mental health, drug and alcohol issues, unstable housing, and/or family violence may struggle to comply with bail conditions and attend all scheduled court dates. Lawyer 12 argued that:

> particularly with vulnerable clients who either are homeless, living transient lifestyles or have complex mental health issues like a lot of our clients do, coming to court can be really hard.

When intervention orders or bail conditions are imposed on people in these contexts, in the words of Lawyer 12, it 'just leads to further criminalisation, a revolving door'. Lawyer 11 provided further examples of how family violence can contribute to women's 'secondary' criminalisation:

> Frequently, breaching your bail conditions could be in the context of experiences of family violence, whether it be the case that they're being prevented from going to court or their partners are hiding the letters from the lawyer or paperwork, or other kinds of experience of controlling behaviour.

Failing to appear can quickly contribute to what Lawyer 6 describes as a 'cascading series of events' that lead to imprisonment. As Lawyer 9 explains:

> A breach of a bail condition is an offence against the *Bail Act*, putting it into a higher schedule of offending. I think the reality is that those offences impact more on women because they are at greater risk of homelessness, poverty, all these other factors that are in play mean that they are more likely to infringe upon those offences or that legislation and therefore… on a ratio basis, they're more likely to present in breach of bail.

31. In 2007, the Victorian Law Reform Commission recommended against the introduction of a new bail-related secondary offence on the basis that it might have a disproportionate effect on vulnerable persons, especially those with drug issues, those with mental health issues, those experiencing homelessness and young offenders who may not yet appreciate the seriousness of adhering to conditions. Review of the *Bail Act*: Final Report, p. 128.
32. Sentencing Advisory Council, *Secondary Offenses in Victoria* (Melbourne: Sentencing Advisory Council, 2017).
33. Samantha Walker, Paul Sutherland and Melanie Millstead, *Characteristics and offending of women in prison in Victoria.*

“The operation of those provisions have overwhelmingly punished women, and that’s not what was articulated as the purpose of that legislation. Because often the offences that push them into those offences aren’t offences against people or the community, they’re just offences that are borne out of poverty and desperation.”

The CSA reports that the 2013 bail offences were responsible ‘in large part’ for a significant increase in the proportion of unsentenced women being placed in a ‘reverse onus position for the grant of bail’.[34] Between 2012-2018, the proportion grew from 37% to 79% of women on remand (the 79% figure is comprised of 76% show compelling reason, 3% exceptional circumstances).[35] While the vast majority of unsentenced women in early 2018 were subjected to the compelling reason test, changes to the *Bail Act* in the latter half of 2018 have included a range of new offences (and offence combinations) in the exceptional circumstances test for bail. While our small sample of court observations prevents us from making generalisable claims, it is notable that in contrast to the CSA’s data above, the majority (n=19) of women’s bail applications (n=29) we observed in BaRC required the accused to meet the exceptional circumstances test in order to be granted bail.

The shift towards women being subject to the exceptional circumstances test for bail after the 2018 reforms was frequently reinforced by lawyers we interviewed. As Lawyer 9 argued, prior to 2018:

> Exceptional circumstances was treason and murder… [and other] really serious things that no one ever did… it never came up. I reckon I’ve done two, maybe three in the Magistrates’ Court back in the old regime. Now every [woman’s bail] application is exceptional circumstances, almost without fail, because the shift in the way in which the charges are categorised or positions of people are categorised is so tipped the other way that it’s almost impossible—well, it’s just very rare that they’re not in that category.

Repeated low-level offending and procedural justice offences such as breaches of bail can quickly raise the threshold test to exceptional circumstances, which increases the difficulty of making a case for bail. Lawyer 13 argued that ‘even compelling reason is quite tough to show. It’s definitely harder than show cause was’ (referring to the pre-2018 name for this similar test). Lawyer 12 expressed incredulity at the types of offences that can position people in the exceptional circumstances category:

> it seems ludicrous that a woman who drives un-licenced, then fails to appear at court, then gets bailed again and then fails to appear again, would end up in the same category as murder… For those ones it’s easy to make out exceptional circumstances often, because you can just say that.

Lawyers frequently identified the capacity for bail laws to further marginalise women in the criminal justice system. Lawyer 13 pointed out that:

> if you are a woman applying for bail, you’re subject to the same tests that the men are, and [the 2018 bail reforms were] not really, in my view, designed to capture low-level female offenders. This was reinforced by Lawyer 2, who suggested ‘that experience of facing a really high test for minor offending does seem to be disproportionately impacting on particular groups of people, including women.

Lawyer 12 called this ‘the number one impact’ of the bail reforms:

> more women are being caught in the test of compelling reason and exceptional circumstances, and so therefore rather than … [being] bailed by [a] bail justice or police, [they] are getting brought to court.

Lawyer 3 emphasised that increased punitiveness towards women – in particular, Aboriginal women and other multiply disadvantaged women – was not a stated aim of the new bail laws. Their effects on this cohort thus signify, to Lawyer 3, a kind of perversion of justice, or an unintended consequence of these reforms:

> I think the operation of those provisions have overwhelmingly punished women, and that’s not what was articulated as the purpose of that legislation. Because often the offences that push them into those offences aren’t offences against people or the community, they’re just offences that are borne out of poverty and desperation.

The concern for growing numbers of people caught in the widened net of the exceptional circumstances test was reiterated by many of the lawyers we interviewed. Lawyer 9 argued that in the fallout from the high-profile Bourke Street mall attack, noted in the Introduction, bail legislation was reformed in an attempt to prevent the most serious and horrific crimes, which in many cases, are unpredictable. Yet, in contrast to its rationale, lawyers suggested that the bulk of people impacted by recent bail reform engage in predictable low-level offending in conditions of poverty and marginalisation. Lawyer 9 argued that:

> [Police and magistrates are] somewhere in the dark just going, “until someone says something, we’re going to keep locking people up and lodging them”. Because they’re terrified. They’re running on fear that if they make the decision that sees a Gargasoulas [occur again] that everything is going to be on them… We have legislated for the unpredictable when… the most solid predictors of crime are poverty, mental health, [ill] health, Aboriginality. Like, [we have] all of these predictors and yet we’re legislating for two guys who were unpredictable. It’s just nonsense.

Lawyer 5 summed it up by pointing out that:

> throughout all this reform—the bail reform and the changes to the Bail Act—I think a lot of players are forgetting that imprisonment should be a last resort.

While the new bail laws *do* allow police considerable discretion to grant bail from the station, the lawyers we interviewed suggested that police discretion is not being used nearly enough.

34. Ibid. 28.
35. Ibid.

3.3.3 Policing under the new bail regime: A 'tough on crime' mandate

Since 2018, the *Bail Act* provides only for the court to grant bail for people required to meet the exceptional circumstances test, except in cases where the person is Aboriginal, a vulnerable adult, or a child. [36] This means that if the accused is a member of one of these groups, or if the accused is only required to show compelling reasons, police can still grant bail from the police station. However, lawyers suggested that they have noticed 'less discretion being used by police in giving people bail at the police station' (Lawyer 10). As Lawyer 5 explained, police:

> do have to apply the tests, whether someone shows compelling reason or exceptional circumstances. But in my view their discretion is not being used properly because we're still seeing so many people come through in remand for low level offending that doesn't warrant imprisonment.

Lawyer 7 noted that, 'bail justices aren't really being used very much anymore either'. Amidst a broader trend in rising remand rates, Lawyer 4 reflected on the challenges of advocating for Aboriginal women who have been arrested:

> If someone identifies as Aboriginal, the station sergeant can still grant bail. A lot of police don't know that. We find ourselves giving advice to police saying, "well, look, in this situation you can actually grant her bail if you wanted to". That's when it's generally revealed that actually they've got no interest in granting bail anyway.

Lawyers generally attributed police unwillingness to bail from the station to an overly cautious approach to bail decision-making, driven in part by confusion over their powers under the new bail laws and in part by fear of making the "wrong" decision. Lawyer 7 stated that:

> 'the level of caution from everyone has really increased and so that discretion that the police can apply in certain circumstances, I don't usually find they are'.

The development of a conservative and 'risk-averse' culture surrounding bail amongst police may be contributing to remand growth, as police opt to remand people to court rather than bail from the police station, as allowable under the reformed *Bail Act* in many circumstances. Lawyer 1 recounted:

> when the first reforms flowed out they just erred on the side of sheer caution—of "we don't actually understand what these reforms are so we better not get it wrong".

36. A vulnerable adult is defined in the Bail Act 1977 (Vic) s3AAAA as a person over 18 years that 'has a cognitive, physical or mental health impairment that causes the person to have difficulty in—(a) understanding their rights; or (b) making a decision; or (c) communicating a decision.'

'Police have interpreted the recent reforms to the Bail Act to mean: 'We have to be tough on crime. We now have a mandate to do that.'

Lawyer 1 described a feeling of *'nervousness attached to bail decisions for the police'* after the Bourke Street mall attack. As Lawyer 4 reiterated:

> I find police unsure about what to do under the bail regime. In the early stages when the bail changes came out, they were just throwing everyone in front of a magistrate because they didn't… want to take the risk of being the one that releases someone who ends up doing something atrocious, like Gargasoulas.

Others conceived of police aversion to granting bail as an embrace of a more punitive "law and order" approach, which intensifies pressure on the court system. Lawyer 9 described it as 'a culture now that has set in' within the police, 'that says, "no, we're not bailing you, you can go to the court"', which creates 'more turnover' in the Magistrates' court. Lawyer 3 added that the police have interpreted the recent reforms to the Bail Act to mean: 'We have to be tough on crime. We now have a mandate to do that'.

Once someone is brought before the Magistrates' Court for a bail hearing and is required to either show compelling reason or exceptional circumstances, lawyers suggested that police tend to oppose bail seemingly by default. Indeed, as noted above, police opposed bail in 26 of the 29 women's bail applications we observed in BaRC.

Police opposed bail in 26 of the 29 women's bail applications we observed in BaRC.

This trend in our observations was reinforced by lawyers' experiences of preparing bail applications: Lawyer 12 described it as a 'mentality' amongst police, that as soon as someone is in a reverse onus position, the police 'have to oppose' bail. Lawyer 9 confirmed this perception, describing:

> You go to police here and say… "here's the situation, she's exceptional circumstances, so you're opposing?" [and they respond], "oh, we're opposing because it's exceptional circumstances". It's like, "that's not a point of opposition, that's just the threshold. You don't have to oppose bail if we reach the threshold!"

Lawyer 8 explained that:

> the police position is that they will always oppose bail if someone [needs to] show compelling reason or exceptional circumstances. So, there's a lot of preposterous bail applications where [police] informants are opposing bail for low-level offending like shop stealing based on the risk of reoffending.

In two of the three cases we observed in which police did not oppose bail, the accused was bailed to an ambulance for immediate in-patient assessment, such as in Case #10 summarised below in Case Study 3, and the remaining woman had an intellectual disability.

Case Study 3.
Case #10
(BaRC weeknight, represented, bail granted)

The accused lived in public housing and her most recent charge was failing to answer bail, which required that she now show compelling reason in order to be granted bail again. Both the police prosecutor and the magistrate agreed that the outstanding matters were 'not serious' and unlike the vast majority of bail applications we observed, police did not oppose bail in this case. The accused's sister was present in court and provided $100 surety that she would re-appear. While on remand it was evident that she was very unwell and following a Forensicare assessment, she was granted bail on the condition that she be immediately transferred to an ambulance for in-patient assessment.

3.3.4 'Dead time' and the 'domino effect' of time served prison sentences

Lawyers' expressed concerns that bail laws are contributing to a trend of women spend increasing amounts of time in prison prior to sentencing for low-level offending that would ultimately not warrant a term of imprisonment, or would attract a lesser sentence than the time they have already served. Lawyer 1 called this 'dead time':

> People have spent eight months in custody and the appropriate sentence is four months' jail. So, the magistrate will sentence them to four months' jail time served… Then you've got what we call "dead time" … that's time served that hasn't actually been attached to a sentence. It's always good to know about dead time, because dead time can be used against other matters. [37]

Several lawyers noted this trend of women spending time on remand and then eventually receiving a non-custodial sentence, or a shorter prison term than their period of remand, or in some cases, having their charges withdrawn or dismissed altogether. This is supported by data reported by the CSA that in 2018, only 61.7% of women remanded in custody in Victoria received a sentence of imprisonment, including time served, and 8.5% of un-sentenced women's charges were not proven in court. [38] This data suggests that roughly one in three women are spending 'dead time' in prison un-sentenced and arguably should have never been remanded in the first place. Lawyer 7 reported seeing:

> a lot of women who don't get bail, but when their matters are finalised sometimes [they] walk away with a financial penalty, which is horrible when you've had 30 days at Dame Phyllis [Frost Centre], for essentially nothing. [They] walk out with a fine.

This account indicates that new bail laws are creating a system that punishes women excessively and potentially undermines the principle of proportionality.

During court observations, we observed a case (#7) in which a woman had spent two nights on remand that ultimately became 'dead time' when she received a good behaviour bond upon consolidating and finalising her matters with a guilty plea. This case is outlined in Case Study 4

Case Study 4.
Case #7
(BaRC weekday, represented, finalisation)

A woman aged 44 is pleading guilty to very minor charges: two charges of shop theft (bottles of wine at BWS), one of trespass, and one of cannabis possession (supposedly 3 grams) after members of the public made complaints about her behaving erratically in a busy inner-city location. Her lawyer submits that these two nights in custody on remand far exceed the matters in court. She has some prior convictions, including two priors for cannabis possession, but has never been sentenced to prison before. She is on a disability pension for anxiety issues. She had been living with friends for the past two weeks, but the magistrate agreed with the lawyer that she had effectively been homeless for two years. The police prosecutor calls for the magistrate to impose a 'significant fine' (for a broken window associated with trespass incident) and recognise time served. The magistrate responds with incredulity: 'Why would I fine her? She is homeless and on a disability pension!' The magistrate sentenced her to an undertaking of good behaviour for 8 months on the condition that she see a doctor (GP) and submit to a police DNA swab. The accused argues that she does not consent to her DNA being taken and becomes visibly distressed by this condition.

37. This is also referred to as 'Renzella time' or 'Renzella dead time' following R v Renzella (1997) VR 2.

38. Samantha Walker, Paul Sutherland and Melanie Millstead, *Characteristics and offending of women in prison in Victoria.*

“Everything is much harder now. There are just more people in custody and people are doing their time backwards.”

“These women will walk around with these criminal histories for the rest of their lives, and from then on, their prospects of getting bail I reckon reduce by 60 per cent.”

In addition to spending two nights in prison that were ultimately determined to be excessive and unnecessary punishment, the woman described in case #7 above was forced to submit to an invasive DNA swab as a condition of her sentence. This illustrates that women engaging in predictable, non-violent and very minor offending can be subject to punitive and invasive measures, even in the absence of a custodial sentence.

Lawyers perceived the new bail laws as making it increasingly difficult for accused persons to avoid time in prison. As Lawyer 4 argued, ‘everything is much harder now. There are just more people in custody and people are doing their time backwards’. By “doing time backwards”, this lawyer is referring to magistrates handing out ‘time served’ prison sentences. A time served prison sentences is a sentence of imprisonment imposed upon someone where the length of imprisonment is equal to the amount of time that they have spent on remand in custody.[39] Data analysed by the Sentencing Advisory Council (SAC) indicates that alongside significant growth in rates of remand, time served prison sentences are being used much more frequently by Victorian courts. In the seven years prior to 30 June 2018, time served prison sentences quadrupled: growing from 5% to 20% of *all* prison sentences in Victoria.[40] Lawyer 11 elaborated on the problems associated with this trend:

> People are being sentenced to time served for time they’ve served whilst waiting for the matter to come to court. Often… that is just a fixed date. The [magistrate asks], “how long have they been in custody?” It’s not a real consideration of the severity of the offending and what term of imprisonment is warranted. It’s often the case that, well, some imprisonment seems like it might be in range. They’ve been in [prison] this long, we’ll sentence to what they [have already served] – and just release them. So, in the circumstances, women are accruing terms of imprisonment on their record, and as is frequently the case… [the penalty] tends to go up in scale as opposed to down. It’s very difficult to go down in scale once you have a term of imprisonment on your record.

Like Lawyer 11, other lawyers expressed concern that a time served prison sentence, which can seem like a pragmatic or desirable option after having already spent time in prison, can actually set a precedent for more time in prison in the future. Lawyer 7 describes this as a “domino effect”:

> if they have received time served, it sets the precedent that if there’s any sort of offending again they’re likely to be remanded on it. Potentially in terms of penalty they would be looking at imprisonment purely because they have received it before. So, it’s a real domino effect.

Lawyer 3 unpacks this logic further:

> One of the things that lawyers look at when they’re assessing prospects of bail is: has someone served a period of incarceration? Usually my experience is these women end up receiving short periods of jail rather than Community Corrections Orders or alternate dispositions, because… [if] they don’t apply for bail, they get remanded for two weeks. They come back and then a lawyer says to them, “well, you could plead now, and you’ve done enough time, we’ll finish the matter off”. If that happens three or four times, suddenly you’ve got a criminal history where in the space of three months you’ve been dealt with by way of prison disposition for street level offending. So, a magistrate looking at it is going to say, “well, why would I not jail this person?” […] It cuts the legs off one of the strongest arguments a person can make for bail which is: this is low-level offending; this person is not ultimately going to attract a period of imprisonment when they plead guilty. The magistrate turns around and goes, “oh, actually, they’ve got jail the last three times they’ve been before the court”. So, you can see it’s a double-edged sword…. It’s hard to come back from because there’s not [currently] a spent-conviction scheme [in Victoria]. So, [potentially] these women will walk around with these criminal histories for the rest of their lives, and from then on, their prospects of getting bail I reckon reduce by 60 per cent.

Lawyer 9 argues that this pattern of time served prison sentences will skew the data:

> to say women are getting custodial sentences. The only reason they’re getting custodial sentences is because they’re in custody already, having been refused bail,

simply because the threshold tests for bail are so difficult to meet. This suggests that in addition to contributing to prison growth, recent bail reforms may have wide-reaching and long-lasting effects on women’s justice outcomes. SAC also raises concern about time served prison sentences encouraging people on remand to plead guilty, in order to escape prison and other forms of correctional control (such as CCOs) sooner.[41] This sentiment is echoed by the lawyers we interviewed, especially in regard to the difficulty of establishing exceptional circumstances in order to be bailed.

3.3.5 Pressure to finalise matters: ‘I’m just going to plead guilty because then there’s a high likelihood I’ll get out’

Some lawyers suggested that the difficulties of meeting the new bail thresholds are creating more pressure for women to enter pleas and finalise their matters, rather than apply for bail, simply in order to get out of custody sooner. Lawyer 12 suggested that:

> the easiest way often to get out would be to [plead], because [of] the high threshold of the Bail Act… When women do have this complex combination of no housing, drug use and poor mental health, it’s really hard to justify bail.

39. Sentencing Advisory Council, *Time Served Prison Sentences.*
40. Ibid. 17.
41. Sentencing Advisory Council, *Time Served Prison Sentences*, 10.

People will actually choose to plead guilty on the day to get out, and they'll get out with a fine or a bond or a discharge, practically nothing, but will have spent one or two or three days in the cells, which is wildly disproportionate to the offending.

Lawyer 6 described a common scenario:

> They're remanded, they're in an exceptional circumstances category because of this cascading series of events based on very, very minor offending. So often those people will actually choose to plead guilty on the day to get out, and they'll get out with a fine or a bond or a discharge, practically nothing, but will have spent one or two or three days in the cells, which is wildly disproportionate to the offending. That's why they're getting very, very low sentences, because the magistrate will take [that] into account... So, my guess without having seen the stats is that there would be a lot more pleas without the police having to provide any evidence in Court One because women are making a practical decision: "well, I need to get out. I'm just going to plead guilty because then there's a high likelihood I'll get out". Because to apply for bail they need to meet the exceptional circumstances test.

The implicit pressure to finalise matters quickly in BaRC has concerning implications for due process and the testing of police evidence. Lawyers reported that in the remand court, there is less burden on police to prove charges because people are entering pleas rather than applying for bail. Lawyer 12 suggested that 'a lot of matters are being pushed to finalisation because they're looking at a fine or a bond or a corrections order'. While this may indeed reflect a good outcome for the individual, on a systemic level it may impede due process and police accountability. As Lawyer 12 explained:

> It's not holding the police to full scrutiny… They can lay charges and arrest someone and if they're in a high test for bail and we push to finalise the matter, they're never going to be held to account to actually prove the charges... So, the level of accountability on the police is lower because a lot more matters are just getting finalised and there's not as much scrutiny on the investigation… because in a bail application the magistrate takes the case at its highest, that's reality. At night court especially, a lot of police informants […] don't come, so we're not able to cross-examine them. The magistrates just have this summary, which is sometimes extraordinary and there's no statements obtained or evidence to support it.

In light of the police accountability and procedural justice issues raised here, trends in the finalisation of women's matters in BaRC is an area for further investigation. Amongst the 36 women's hearings we observed in BaRC, 7 finalised their matters rather than apply for bail. Two of these women received a sentence of imprisonment: in case #4 the accused received 3 months and in case #34 she received 6 months imprisonment. In contrast to the other five women who received non-custodial sentences, both of these women (in cases #4 and #34) had served time in prison before. This may reflect the concerning 'domino effect' of prison time begetting more prison time outlined above.

The level of accountability on the police is lower because a lot more matters are just getting finalised and there's not as much scrutiny on the investigation.

3.3.6 Magistrate discretion and application of the Bail Act 1977 (Vic)

In the views of the lawyers we interviewed, the ways in which magistrates interpret the new bail laws can vary significantly, especially in regard to what constitutes a compelling reason or exceptional circumstances. Lawyer 5 explained that, 'across the bench you're going to have very different interpretations… of those thresholds. So, there absolutely is discretion there'. Lawyer 3 described 'a real inconsistency… in what constitutes exceptional circumstances'. Lawyer 5 argued that magistrates exercised their discretion more than police under the new bail laws, in part because:

> magistrates have a much better, more thorough, more complex understanding of what those thresholds are... The magistrate is also having the benefit of a full remand summary, a lawyer who is prepared and also knows the law making those submissions.

Several lawyers advocated for more magistrate discretion to interpret women's circumstances as exceptional when they're in custody for low-level offending. From the perspective of Lawyer 9, the system's disproportionate and punitive response to women should be viewed as exceptional simply because it is unjust:

> It's farcical if they don't [apply discretion] ... If you have someone who is in custody, say a woman in custody with no prior history and offences for which she is not going to get a custodial sentence, how can they justify leaving her there? That in itself is exceptional because … there's an opportunity to intervene, instead we're corralling.

Lawyer 10 described it as 'a balancing act for the court' when attempting to interpret the meaning of 'risk' under the *Bail Act:*

> Is that a risk of further low-level offending? Is that something that we're willing to accept, given that this person really shouldn't be in custody waiting for this matter to be heard because they're not going to get a term of imprisonment? … I think when you're talking about… women who are in really vulnerable positions with lack of housing or lack of support in the community, lack of family, it makes it harder to address risk, which then means that we find some people falling short.

When you're talking about… women who are in really vulnerable positions with lack of housing or lack of support in the community, lack of family, it makes it harder to address risk, which then means that we find some people falling short.

During court observations, we noted that several women appeared to be simultaneously experiencing criminalisation and family violence victimisation, although the accused's victim status was rarely highlighted by lawyers or magistrates.

While lawyers generally urged magistrates to apply more discretion to grant bail for women, they also recognised the constraints that Magistrates have to work within. As lawyer 6 suggested, there is a limit to magistrates' discretion when interpreting the relevant tests: 'they're constrained, like there's only so much they can do, if it's not exceptional, it's not exceptional'.

Several lawyers argued that magistrates should have additional considerations when making bail decisions for women, especially in regard to experiences of family violence. This could be similar to the clauses in the *Bail Act* that require bail decision-makers to take account of Aboriginality, youth and vulnerability [42] One lawyer recalled an attempt to make this argument in court within the constraints of the exceptional circumstances test:

> I had a bail application for a woman who was a long-term sufferer of family violence, who was homeless, and I put the statistics in front of the magistrate and I said, you should consider this person to be part of a vulnerable group and apply the weight to that that you would give to me making the same submission for an Aboriginal person. This is the very definition of a vulnerable group. Of course, they'll say, "oh, we'll take that into account", but ultimately bail refused because she's in exceptional circumstances. (Lawyer 3)

Similarly, Lawyer 4 argued:

> So, you're looking at a situation where an applicant for bail, a woman applicant for bail, is the protected person in an intervention order. Now, to me that seems outrageous that she will then be the one having to prove that she's eligible for bail. I think there does need to be some sort of provision that acknowledges just the impact… if you're either a protected person in an IO or if you're a proven victim or at risk of family violence then that has to add an extra level of consideration for the magistrate, in favour of granting bail.

During court observations, we noted that several women appeared to be simultaneously experiencing criminalisation and family violence victimisation, although the accused's victim status was rarely highlighted by lawyers or magistrates. In case #24, described in Case Study 5, the criminalisation of a woman experiencing intimate partner violence was exceedingly obvious.

42. These 'special vulnerability clauses' are defined in Section 3AAA of the *Bail Act* 1977 (Vic).

Case Study 5. Case #24 (BaRC weekend, represented, bail granted)

The accused is a 24-year old woman with three children and is potentially pregnant. She is in the exceptional circumstances category – she has two separate matters of breaching an a FVIO for which she is on two counts of bail. The father of her children is the protected person. She was arrested and remanded two days prior when police were called to an incident following reports of a female (the accused) being assaulted in a motor vehicle. When police attended they observed she had a cut to her left eyebrow, scratches and bruising. She was not compliant with respect to police questions regarding the assault against her. Police charged her with persistent breach of intervention order since she was in the motor vehicle with the protected person. While in the cells, she reportedly acted prejudicial towards to police, yelling and causing damage. Apart from the police summary that indicated that she had been assaulted by the 'victim', there is no mention of family violence during her bail application. It did not appear that there were any FVIO applications in place where she is the protected person.

Aboriginal women are uniquely marginalised within a patriarchal and settler colonial legal system, especially when applying for bail.

The nexus between family violence and women's criminalisation emerged as an important theme in both court observations and interviews with lawyer. This nexus is reflected in other recent studies, including a Corrections Victoria (2019) study that found in 2015-16, 65% of women entering prison on remand in Victoria reported that they were a victim of family violence, which is most likely an underestimate due to under-reporting [43]. Further detailed exploration of this topic is beyond the scope of this report. Instead, dedicated research and investigation of the co-occurrence of criminalisation and intimate partner violence for women is needed in a future study, which we emphasise in the Discussion and Future Research section of this report.

Aboriginal and Torres Strait Islander women are significantly over-represented within the remand population. At census date in 2019, they were the only prisoner cohort in Victoria that were more likely to be un-sentenced than sentenced (ABS 2019). In the *Bail Act,* Aboriginality is explicitly noted as a factor that requires special consideration in a decision regarding bail. Several lawyers pointed out that Aboriginal women are uniquely marginalised within a patriarchal and settler colonial legal system, especially when applying for bail.

43. Department of Justice and Community Safety, *Women in the Victorian Prison System.*

As Lawyer 3 explained:

> An Aboriginal woman with a history of being oppressed by the Western world is in a situation where they're having to ask a white decision maker, often a white male decision maker, for their liberty. Then being told, "well, if you don't work with these other white organisations, we're not going to give you bail because you're too at-risk". You can see how women can get pretty disenfranchised, particularly the Aboriginal women, being told by the people that have oppressed them that… they are being exposed to too much risk or they represent too much of a risk.

While poor mental health was consistently raised by lawyers as a key issue amongst women applying for bail, when taken as a relevant decision-making factor, it can function quite differently according to context and magistrate discretion. Poor mental health can be viewed simultaneously as a "vulnerability" that warrants leniency and a "risk" factor that may contribute to further offending or breach of bail.

> Mental health can be read as a vulnerability factor, but it can also be read as a risk factor… It's difficult when you're approaching your bail application as a lawyer to address the vulnerability factors… that could form parts of why this person should be bailed, but also to not feed too much into the depersonalizing tropes of mental illness and hysterical women, which would feed into being an unacceptable risk and a risk of further offending. (Lawyer 11)

Case Study 6. Case #1 (BaRC weekday, represented, bail granted)

Police used a Forensicare report to argue that the accused's "anti-social behavior" was an "unacceptable risk to the public". She had a diagnosis of schizophrenia. Her lawyer argued "if she's not granted bail today, she will likely be in prison for three months… a lengthy stay in prison is not how the criminal justice system should approach people with mental health issues." The magistrate agreed with the defence lawyer that offending was low-level and that the accused was unlikely to receive a custodial sentence. The accused was bailed to ambulance for in-patient assessment.

This hearing highlighted how poor mental health can be constructed as a 'risk' that can be mobilised in support of a police case against bail for someone engaging in low-level offending.

The notion that mental ill health is a "risk" is commonly raised by police prosecutors, as Lawyer 7 reflected:

> the police will often indicate in their remand summaries that the person has got mental health issues and they don't think they're dealing with [them] and that's a risk for reoffending.

We observed this in BaRC, for example in case #1 which is described in Case Study 6 above.

Increasing investment in community-based mental health support would help to provide alternative options to incarceration for women struggling with mental health issues.

4.0 Discussion and Future Directions for Research

This research highlights numerous systemic issues in the current bail and remand system that negatively impact upon women. Women experiencing significant social marginalisation, trauma and hardship are too readily 'uplifted' into the highest reverse onus threshold test for bail, which further entraps them into a cycle of criminalisation and incarceration. The increase in women's remand has far-reaching and damaging impacts on individuals, families and communities. There are significant social and fiscal costs of un-checked prison growth, including the entrenchment of cyclical disadvantage and inequality, and the diversion of public spending away from health, education, housing and support systems that can support community safety. The currently unfolding crisis in the criminal justice system during the COVID-19 pandemic only serves to highlight the importance – indeed, the urgency – of exploring alternatives to incarceration.

This study yields important insights into the negative impacts of Victorian bail laws on women and the systemic drivers for women's increasing incarceration. We interviewed 13 criminal and duty lawyers in Melbourne that reported seeing a range of factors and patterns amongst women applying for bail and the authorities responding to them that, when analysed together, are remarkably consistent. Combining lawyer interviews with 100 hours of first-hand observations of BaRC and statistical data from Corrections Victoria and MCV allows us to map and analyse a more nuanced picture of women's criminalisation from different vantage points. We have collected anonymous details about the individual circumstances of represented and un-represented women in BaRC and broader reflections and insights from the lawyers often representing them. We further placed both of these in the context of the available quantitative data on women's prison entrants and

There are significant social and fiscal costs of un-checked prison growth, including the entrenchment of cyclical disadvantage and inequality, and the diversion of public spending away from health, education, housing and support systems that can support community safety.

matters heard in BaRC. However, there are also limitations to our study. These include a relatively small number of women's cases observed in BaRC; the lack of gender-differentiated statistics in some BaRC data reported by MCV; and the absence of perspectives from magistrates, social and support workers, and most importantly, criminalised women themselves. The limits of our study, and some of its emergent findings, point to several additional topics that are important to research in future.

Given their unique vantage point as decision-makers, this report highlights the need for research focused on magistrates' experiences of granting and denying bail to women. Magistrates' perspectives on the upwards trend in women's remand, and the challenges and opportunities involved in halting or reversing it, would lend valuable insights into the systemic barriers that women confront at the point of remand into custody.

The observations and experiences of criminal and duty lawyers indicate that recent reforms to the *Bail Act* are reshaping and reorienting policing away from discretion to bail and towards remanding women for minor and non-violent administrative and other offences (such as breach of bail and shop theft). This creates a widened and more punitive net that is capturing vulnerable and marginalised women in the prison's 'revolving door', causing massive disruptions to their lives and those of their families, and exacerbating existing disadvantages and traumas. Further research into the gendered and racialised policing of bail and other secondary offences is urgently needed.

Our study indicates that the shift towards a more restrictive and punitive bail and remand system is having – or has the potential to have – perverse impacts on legal outcomes. This risk principally arises through the use of 'time served' sentences, which can inadvertently create precedents for future imprisonment for relatively minor offending. Further investigation of this potential 'domino effect' of time served sentences should be a priority. Our findings also suggest that more research is needed into the impacts of legal representation on women's bail applications, especially the relationships between BaRC session times (i.e. weekday, weeknight, weekend), legal representation, and length of time spent on remand.

Emergent findings from the current study indicate that there is a nexus between family violence, homelessness and women's criminalisation, which requires further investigation. Although

The so-called 'risks' that women present with in the courtroom are not indicators of community safety concerns. Instead, they are more likely to index women's disadvantage and marginalisation.

largely outside the scope of this report, which focused principally on the impacts of bail laws on women, findings from our study suggest that the aforementioned nexus may be produced by a range of different factors and processes, such as:

- homelessness and lack of options to leave a violent relationship;
- co-offending in the context of a violent relationship;
- criminalisation occurring at the point of women seeking assistance for family violence from police;
- dual application of intervention orders;
- criminalisation due to breaches of intervention orders;
- police misidentification of the predominant aggressor; and
- a perception of women as less 'innocent' or 'deserving' if they offend.

Each of these issues – and how they inform women's criminalisation and incarceration – are essential topics for future research, especially in light of the significant mobilisation of resources towards addressing violence against women in the wake of the Victorian Royal Commission into Family Violence. Our study indicates that the intensification of policing and legal responses to family violence may have perverse outcomes for women with limited access to support systems and who may be experiencing criminalisation for family violence-related or other matters.

Ultimately, our research suggests that women are particularly disadvantaged across a range of factors that are relevant to making an application for bail, including access to housing, personal relationships and family support, mental health and alcohol and drug supports. The mobilisation of generic 'risk' factors in the courtroom, undifferentiated by gender, are in most cases experienced by women as vulnerabilities. The so-called 'risks' that women present with in the courtroom are not indicators of community safety concerns. Instead, they are more likely to index women's disadvantage and marginalisation. Interrupting women's criminalisation will require that we pose new questions about the normalisation of policing and imprisonment as responses to social problems and explore the possibilities that might emerge through the pursuit of strategies of decarceration.

Appendix 1. Case Summary Sheet template designed by authors for court observations

Reference	**Observer**		**Case ref #**	
	Date & Time		**Day/night court**	
Bail app or finalisation				
Outcome Any bail conditions				
Court date scheduled				
Advocates *Do not record any names or specific organisations	**Lawyer Y / N** **Lawyer type**		**Case worker Y / N** **Worker type**	**Other**
Charge/s				
Details of offence/s *Do not record any names or specific locations				
Bail threshold test				
Applicant details (if known) *Do not record any names or specific locations **IO = Intervention order	**Age**		**Racial/cultural background**	
	Lives in urban/ rural area			
	History of homelessness or unstable housing Y / N / Unclear			
	Employed Y / N		**Occupation**	
	Children			
	Prior convictions			
	Previous imprisonment			
	Length of current period of remand			
	Forensicare assessment or other noted disability or mental health issues			
	Substance abuse issues			
	Currently subject to IO Y / N		**Subject to IO in past Y / N / U nclear**	
	CISP referral Y / N / U nclear			
	Other relevant factors			
Basis of opposition to bail e.g. 'risk' factors (police case)				
Basis of case for bail				
Magistrate's decision and reasoning				
Any discussion of family violence				
Any other notes *Do not record any names or specific locations				

Appendix 2. Table of women's bail applications and finalisations observed in BaRC (basic details), June-July 2019 and February-March 2020

Case ref #	Type	Session	Test for bail	Legal Representation	Outcome
1	Bail app	Weekday	Compelling	Yes	Bail granted
2	Bail app	Weekday	Compelling	Yes	Bail granted
3	Bail app	Weekday	Compelling	Yes	Bail denied
4	Plea	Weekday	N/A	Yes	3m prison
5	Bail app	Weekday	Exceptional	Yes	Bail denied
6	Bail app	Weeknight	Exceptional	No	Bail denied
7	Plea	Weekday	N/A	Yes	8m GBB
8	Bail app	Weeknight	Exceptional	No	Bail denied
9	Plea	Weeknight	N/A	Yes	$1000 fine
10	Bail app	Weeknight	Compelling	Yes	Bail granted
11	Plea	Weeknight	N/A	Yes	12m CCO
12	Bail app	Weekend	Compelling	Yes	Bail granted
13	Bail app	Weekend	Exceptional	No	Bail denied
14	Bail app	Weekend	Exceptional	No	Bail denied
15	Bail app	Weekday	Exceptional	No	Bail granted
16	Bail app	Weekday	Compelling	Yes	Bail granted
17	Bail app	Weeknight	Exceptional	No	Bail denied
18	Bail app	Weekday	Exceptional	Yes	Bail granted
19	Bail app	Weekday	Exceptional	Yes	Bail granted
20	Bail app	Weekday	Exceptional	No	Bail denied
21	Bail app	Weekend	Exceptional	No	Bail denied
22	Bail app	Weekday	Exceptional	Yes	Bail denied
23	Bail app	Weekend	Exceptional	No	Bail denied
24	Bail app	Weekend	Exceptional	Yes	Bail granted
25	Bail app	Weekend	Compelling	Yes	Bail granted
26	Bail app	Weekend	Exceptional	No	Bail granted
27	Bail app	Weekday	Compelling	Yes	Bail granted
28	Plea	Weekday	N/A	Yes	12m CCO
29	Bail app	Weekday	Exceptional	Yes	Bail granted
30	Bail app	Weekday	Exceptional	Yes	Bail denied
31	Bail app	Weekday	Exceptional	Yes	Bail granted
32	Bail app	Weekday	Exceptional	Yes	Bail granted
33	Plea	Weeknight	N/A	Yes	12m CCO
34	Plea	Weeknight	N/A	Yes	6m prison
35	Bail app	Weekend	Compelling	Yes	Bail granted
36	Bail app	Weekend	Compelling	Yes	Bail denied

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