

SMART JUSTICE FOR WOMEN

Smart Justice for Women: Policy Platform 2022-2024

Reducing the criminalisation of women in Victoria

Version 1: January 2023

About Smart Justice for Women

Smart Justice for Women (SJFW) is a subcommittee under the broader Smart Justice Coalition coordinated by the Federation of Community Legal Centres Victoria and the Law and Advocacy Centre for Women.

SJFW includes members from the community legal sector, Aboriginal Community Controlled Organisations, community services sector, legal assistance sector, academia, and other organisations with an interest in reducing the criminalisation of women in Victoria. The role of SJFW is to reduce the criminalisation of women in Victoria by:

- advocating for law reform, policy change and structural change
- influencing community attitudes and promoting social change
- providing leadership and expertise on issues impacting on women's criminalisation
- establishing a consultative body on issues impacting on women's criminalisation
- promoting information, knowledge, evidence and resource sharing between members
- fostering a collaborative approach to service delivery within the legal assistance sector and across a range of sectors.

Approach

SJFW takes an inclusive approach to the term 'women', in recognition of the ongoing discrimination experienced by gender diverse people in the criminal legal system. SJFW recognises the ongoing targeting, injustice and discrimination towards trans and gender diverse people in and by the criminal legal system.

SJFW also recognises that women in all their diversity are discriminated against on the basis of intersecting and compounding factors – such as race, culture, language, disability, age, geography, homelessness, and income. This intersectionality impacts on women's experiences with the criminal legal system and SJFW acknowledges that these structural marginalisations (in addition to gender) contribute to criminalisation.

SJFW advocates for approaches that impose the least restrictions on a women's liberty when they are in contact with the criminal legal system.

Acknowledgements

SJFW pays our deepest respect to Traditional Owners across Victoria, in particular, to all Elders past and present. We also acknowledge all Aboriginal and Torres Strait Islander people in

Victoria and pay respect to the knowledge, cultures and continued history of all Aboriginal and Torres Strait Islander Nations.

SJFW acknowledges that responses to the criminalisation of women will be most effective and safe for women if they are informed and developed in partnership with women with lived experience of the criminal legal system.

This policy platform has been endorsed by the organisations listed in the final section.

SJFW works in a dynamic and evolving policy landscape. This document will be periodically reviewed by SJFW. The first of these reviews will be undertaken in the first half of 2023.

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Background

Women have specific, gendered pathways to criminalisation and imprisonment that are different to men. Between 70 to 90 per cent of women in prison have experienced trauma and abuse prior to entering prison, including family violence and sexual abuse. Women in prison have higher rates of mental ill-health, substance abuse and homelessness.¹ Women are also less likely to have committed violent offences and are more likely to be criminalised due to issues associated with drug dependence or poverty.² As a minority in the criminal legal system, women often encounter systems and processes that are not responsive to their particular needs.

The majority of women in Australian prisons are parents, with 85 per cent having been pregnant at some point in their lives, and 54 per cent having at least one dependent child.³ The inter-generational impacts of this are immense, with children of parents who have been imprisoned much more likely to be involved in the criminal legal system themselves. Children whose mothers are in prison are more likely to have disrupted education, poor health and unstable housing, all of which are factors that heighten the risk of a child or young person entering the child protection or criminal legal system.⁴ Accordingly, issues around the criminalisation and imprisonment of women also concern the rights of children, the obligations of governments to act in the best interest of children, and the cultural rights of women and children.

For a number of years, women have been the fastest growing cohort in Australian prisons. Between 2009 and 2019, the female prison population in Australia increased by 64 per cent, compared with 45 per cent for males.⁵ Aboriginal and Torres Strait Islander women are grossly over-represented in these figures, with 33 per cent of women in Australian prisons identifying as Aboriginal or Torres Strait Islander.⁶ In Victoria, the number of women in prison almost doubled between June 2007 and June 2019.⁷ The imprisonment rate for Aboriginal women almost tripled during the same period.⁸ These figures represent a significant failing in terms of reaching the National Closing the Gap target of reducing the rate of Aboriginal and Torres Strait Islander people in custody by at least 15 per cent by 2031. SJFW recognises the leadership of Aboriginal and Torres Strait Islander communities and organisations in advocating for

¹ Australian Institute of Health and Welfare, *The Health of Australia's Prisoners*, July 2020.

² Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012-2018*, November 2019.

³ Australian Institute of Health and Welfare, *The Health of Australian Prisoners*, 2018, pp. 14 and 72.

⁴ J Sherwood et al, *Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison*, 2013, p.83, 85.

⁵ Australian Institute of Health and Welfare, *The health and welfare of women in Australia's prisons*, November 2020.

⁶ Ibid.

⁷ Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019.

⁸ Ibid.

reform to address this, and the importance of Aboriginal self-determination in determining and implementing reforms that will impact their communities.

There is an urgent need to stem the growth in the female prison population. To this end, SJFW has identified key reforms required in order to reverse the increasing incarceration and criminalisation of women, prioritising:

- criminal legal system reform that recognises and responds to the unique needs of women
- urgent investment in safe and affordable housing options for women
- providing adequate resources for health and social services to support women at the first risk of criminalisation.

Women and the Criminal Legal System

- Aboriginal and Torres Strait Islander women are imprisoned at 21 times the rate of non-Aboriginal and Torres Strait Islander women.⁹
- The ways that women become engaged in the criminal legal system and are imprisoned are different to men.¹⁰
- Women are more likely to have experienced trauma prior to entering prison. Between 70 to 90 per cent of women in prison have been victims of violence and abuse.¹¹
- Women in prison have higher rates of mental ill-health, substance use, and homelessness compared to men.¹²
- Women are less likely than men to have committed violent offences.¹³
- Women are more likely than men to be criminalised due to issues associated with drug dependence, including drug offending, theft, and property offences.¹⁴
- The majority of women in Australian prisons have children, with 85 per cent having been pregnant at some point in their lives, and 54 per cent having at least one dependent child.¹⁵
- 33 per cent of women in prison in Victoria had an acquired brain injury prior to entering prison, compared to 2 per cent of the general Australian population.¹⁶
- The high numbers of women in prison undermines the cultural rights of Aboriginal women and their children.
- Placing women in prison has ongoing inter-generational impacts.¹⁷

⁹ Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, May 2017.

¹⁰ Caruana, C. Campbell, E., Bissett, T & Ogilvie, K. (2021), *Leaving custody behind: Foundations for safer communities and a gender-informed criminal justice systems* Centre for Innovative Justice, RMIT University. See Part One: Gender and criminalisation, p.21.

¹¹ H Johnson, *Drugs and crime: A study of incarcerated female offenders*, Research and public policy series, 2004; Justice Health & Forensic Mental Health Network, *2015 Network Patient Health Survey report*, 2017; M Wilson et al, *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia*, SAGE Open, January 2017.

¹² Australian Institute of Health and Welfare, *The Health of Australia's Prisoners*, July 2020.

¹³ Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012-2018*, November 2019.

¹⁴ Ibid.

¹⁵ Australian Institute of Health and Welfare, *The Health and Welfare of Women in Australia's Prisons*, November 2020.

¹⁶ M Jackson et al, *Acquired Brain Injury in the Victorian Prison System*, Corrections Victoria Research Paper Series 4, 2011.

¹⁷ While we understand that women from culturally and linguistically diverse backgrounds have negative interactions with the criminal legal system, there is not clear data on the extent to which the

Victoria's Increasing Numbers of Women in Prison

- For a number of years, women have been the fastest growing cohort in Australian prisons.
- Aboriginal and Torres Strait Islander women are grossly over-represented in these figures, with 33 per cent of women in Australian prisons identifying as Aboriginal or Torres Strait Islander.¹⁸
- The number of women in Victorian prisons has more than doubled over the past decade,¹⁹ with the number of Aboriginal women in prison more than tripling.²⁰
- The increase in the number of women being held in Victorian prisons has been largely driven by an increase in the remand population.
- In June 2019, 46 per cent of women in Victorian prisons were on remand (unsentenced) as compared with 25 per cent in 2007.²¹
- More than half of the female prison population is currently on remand. At 30 June 2021, 221 of 411 women in prison were unsentenced.²²
- A key driver of this increase has been recent changes to the *Bail Act 1977* (Vic) which were introduced in 2018. This was a significant reform to the criminal legal system designed to target men who have committed violent offences, but which is having a disproportionate impact on women.²³
- As a consequence of the bail reforms, the net has been cast so wide that marginalised people, in particular women, charged with relatively minor offences, are now spending unnecessary time on remand while awaiting the outcome of their legal proceedings.²⁴
- This has had a particularly damaging impact on women, who with even short periods on remand may be separated from children, housing and other community supports.²⁵

criminal legal system disproportionately impacts these women. There needs to be improved data to capture the experiences of women from culturally and linguistically diverse backgrounds who are in contact with the criminal legal system.

¹⁸ Australian Institute of Health and Welfare, *The Health and Welfare of Women in Australia's Prisons*, November 2020.

¹⁹ Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012-2018*, November 2019.

²⁰ Ibid.

²¹ Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019.

²² Corrections Victoria, *Monthly Time Series Prisoner and Offender Data*, July 2021.

²³ See Caruana et al., above n 10, p.49.

²⁴ Ibid.

²⁵ Ibid.

No More Prisons

1. Work towards closing, rather than opening new and expanding current prisons. Instead, in consultation with the community, re-allocate the money to building new public homes and investing in services that divert women away from the criminal legal system.

Bail Reform

1. Repeal the reverse-onus and double uplift provisions of the Bail Act and create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk.
2. Adopt a gendered, culturally appropriate, and non-discriminatory approach to determining 'risk' to community safety that accounts for the specific disadvantage and marginalisation experienced by women.
3. Ensure that women are not refused bail due to their social and medical circumstances (including, for example, homelessness or mental illness and/or psychological distress). Investment is required to ensure all women have access to safe, stable, and affordable housing that meet their specific needs.
4. Reclassify, as summary offences, low-level indictable offences that are often committed by women due to their poverty, disadvantage, and marginalisation, including drug offences, theft and property offences, and public nuisance and unlawful assembly. Review all offences, including summary offences, with a view to decriminalising low-level offences linked to poverty, disadvantage, and substance dependency.
5. Improve police responses to women charged with low-level offending, including increased use of charging on summons, review of police decisions, and transparency around police bail decisions.

Sentencing

1. Review the sentencing hierarchy and Community Corrections Orders to provide additional options for community-based treatment and rehabilitation that is tailored to the specific needs of women.
2. Require decision-makers to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples as part of the

sentencing process, and require training to be undertaken by decision-makers to ensure the appropriate implementation of these considerations.

3. Increase therapeutic sentencing practices, restorative justice processes and the use of structured sentence deferral to deliver tailored, rehabilitative outcomes.
4. Abolish short sentences whilst providing safeguards against 'sentence creep', to ensure that women are not imprisoned for short periods of time disrupting their support system, including employment, education, caring responsibilities, and housing. This should be referred to the Victorian Law Reform Commission for consideration.
5. Take into account the significant increase in numbers of women on remand in Victoria when considering reforms to sentencing.
6. Adopt a harm-reduction approach to drug-related offending that prioritises rehabilitative and community-based and community-driven responses.
7. Stop women entering and re-entering the criminal legal system. Maximise and increase every opportunity to divert women away from the criminal legal system (formally and informally), for all types of charges, at every stage of the criminal legal process.
8. Include a person's caring responsibilities as a specific consideration in sentencing, requiring decision-makers to consider the impact of a sentence on dependent children.

Parole

1. The purpose of parole for women should be to support their rehabilitation and reintegration into the community, including reunification with their children.
2. Ensure that women are not refused parole due to homelessness or a lack of social and affordable housing. Investment is required to ensure all women have access to safe, stable, and affordable housing that meet their specific needs. Women who are eligible for parole and provide their consent should be automatically put on the priority waiting list for social housing.
3. Fund community services to begin exit planning from prison for women at an earlier date than currently occurs.
4. The Adult Parole Board should automatically consider whether women are suitable for parole at the earliest eligibility date. Women need to be provided with appropriate and accessible support throughout the application process, and decision-makers should take into account the reasons for any non-completion of a rehabilitation or other program while in prison.
5. The Adult Parole Board should cease to be exempt from the *Charter of Human Rights and Responsibilities Act 2006* (Vic), be bound by the rules of natural justice, and allow for applicants to be legally represented.

Policing

1. Divert funding for policing into community services, including front-line health services and Aboriginal and Torres Strait Islander Community Controlled organisations.
2. Reduce the over-policing of Aboriginal and Torres Strait Islander communities in Victoria, taking into account the need to address the systemic racism and discrimination inherent in policing practices in Victoria.
3. Establish a robust police monitoring regime and mandate public reporting of policing data to increase transparency and accountability, which includes police-perpetrated family violence, misidentification of women as perpetrators of family violence, and complaints concerning police responses to family violence.
4. Ensure that Victoria Police facilitate appropriate referrals to support services for Aboriginal women, women from culturally and linguistically diverse backgrounds, and women with complex needs, including women with a disability.
5. Increase transparency, accountability, and oversight of police through the establishment of a robust and independent Police Ombudsman to investigate police misconduct.
6. Fully implement the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).
7. Address the various contributing factors to the criminalisation of women who are victim-survivors of family violence, including the problem of police misidentifying women who are victim-survivors as "primary aggressors". This involves addressing racially targeted policing and discrimination, which has a disproportionate impact on Aboriginal women and women from culturally and linguistically diverse backgrounds.
8. Increase opportunities for women to engage in pre-charge and diversionary programs, including gender-informed and culturally appropriate programs and making diversion available at the instance of a Magistrate without the need for the consent of police or prosecutors.
9. Increase transparency and accountability of police around charging practices and bail decisions, including a new requirement for police to always provide reasons when refusing to grant bail.
10. Minimise the role of police in the response to public drunkenness. Instead, implement a health-based response to public drunkenness that is properly funded and resourced and based on co-design and consultation with community organisations and health services, including Aboriginal and Torres Strait Islander communities.
11. Adopt a health-based, harm-reduction approach in responding to drug use, and reinvest resources for the law enforcement response into community-based health and treatment services for drug use.

Housing

1. Ensure that women are not criminalised, incarcerated or delayed in release from prison due to a lack of affordable and social housing and the increased risk of entering or re-entering the criminal legal system due to homelessness.
2. Ensure that all housing provided to women – social, affordable, and private housing – is aimed at ensuring that women have a home, and should meet accepted community standards of what constitutes a home.
3. Ensure that women have access to housing that is stable and secure, including security of tenure or an ongoing lease agreement and tenancy rights.
4. Ensure that housing is provided to criminalised women on a Housing First basis and includes alcohol and other drugs , mental health, family violence and parenting support from agencies outside the criminal legal system, especially Aboriginal Community Controlled Organisations.
5. Take into account the specific needs of women regarding safety and childcare in meeting their housing needs, including the provision of housing that is safe and free from violence, has appropriate space, is appropriate for children and is culturally appropriate.
6. Recognising that an address is required for release from prison, ensure victim-survivors of family violence do not return to unsafe or unstable living arrangements upon their release from prison.
7. Empower women to exercise control over their own lives, including by keeping the provision and management of their housing separate from their access to supports, and ensuring that no single organisation has an undue level of influence over a woman’s life.
8. Empower women to make their own choices about where they live, who they live with and who comes into their home and when.
9. Build a minimum of 60,000 new public and community homes by 2032 to ensure all Victorians have access to affordable and secure homes.
10. Invest in data and monitoring to determine future housing needs for women in contact with the criminal legal system.

Support System

1. Ensure that supports are responsive to women’s needs at the first risk of criminalisation by:
 - adequately resourcing support services to prioritise early intervention, voluntary support to reduce the risk of criminalisation
 - mobilising support services, including generalist and universal services, to identify risks and provide adequate referrals to specialist services
 - building capability amongst Victoria Police members to deliver gender sensitive and trauma-informed responses,²⁶ have knowledge of local

²⁶ See Caruana et al., above n 10, p.70.

service networks to undertake warm referrals, and continue to improve the use of the Victoria Police e-Referral Program (VPer) for referrals to local service providers.

2. Ensure that supports are accessible and sustained to enable women to reconnect with their community and to reduce the risk of reoffending by:
 - establishing universal access to a therapeutic, trauma-informed model of case management, services (including comprehensive and timely healthcare), pre-release planning/throughcare, whether sentenced or on remand, that incorporates sustained, practical support for women to re-establish stability and connections with family and community
 - implementing a whole-of-government approach, coordinated by the Department of Health, to coordinate services to address women's needs upon return to the community
 - implementing a "housing guarantee" policy to prevent women from becoming homeless when leaving prison. To support operation of this policy, housing support using a Housing First approach must be a key component of throughcare. This policy must be resourced with housing support workers and available houses to support women exiting prison.
3. Ensure that supports are safe and respectful of the specific needs of women engaged with the criminal legal system, including the adoption of trauma-informed and integrated practice across the service system by:
 - reforming intake and screening processes to ensure women with complex needs, trauma, and family/caring responsibilities can access services
 - adequately resourcing support services to work collaboratively and in a coordinated way across the services system, including having the resources to establish partnerships, warm referral pathways, and integrated services
 - tailoring support services for Aboriginal women, culturally and linguistically diverse women, women with disabilities, trans and gender diverse people and women with significant histories of trauma and abuse (including young women)
 - building capability of workers in support services to establish trusted relationships with women seeking their support, including training in trauma-informed and intersectional support and care and the need to overcome stigma and discrimination towards criminalised women
 - providing adequate and sustained funding for Aboriginal and Torres Strait Islander Community Controlled organisations.

No More Prisons

In the 2019/2020 budget, the Victorian Government announced \$1.8 billion to expand prisons across Victoria, including \$188.9 million to expand the Dame Phyllis Frost women's prison. Yet, the COVID-19 pandemic has shown that it is possible to reduce imprisonment rates, with the number of women in prison dropping for the first time in decades in June 2020.

Expanding the women's prison by 106 new cells is misguided and unnecessary. Investing in imprisonment will only entrap more women into damaging cycles of disadvantage and criminalisation that feed 'revolving door' imprisonment and have devastating impacts on families and communities.

SJFW calls for a justice re-investment approach, whereby the funds earmarked for prisons should instead be invested in holistic support strategies designed to reduce women's vulnerability to criminalisation by addressing the underlying causes of offending and breaking the cycle of recidivism (such as, more public housing)²⁷. A justice re-investment approach uses data to identify local, community-identified need, and is most effective when done as a partnership between government and the community.

²⁷ The Senate Legal and Constitutional Affairs References Committee, Value of a Justice Reinvestment Approach to Criminal Justice in Australia, June 2013, page 3.

Bail Reform

The increase in the number of women being held in custody in Victoria has been largely driven by an increase in the remand population. In June 2019, 46 per cent of women in Victorian prisons were on remand (unsentenced) as compared with 25 per cent in 2007.²⁸ At 30 June 2021, 221 of 411 women in prison were unsentenced.²⁹

The exponential and unprecedented growth in the number of women on remand in custody to the 2013 and 2018 is largely attributable to legislative reforms to the *Bail Act 1977* (Vic) (Bail Act), which introduced the following:

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

We acknowledge that bail reform is a politically sensitive issue in Victoria and that the reforms made occurred in the context of heightened public concern following the Bourke Street tragedy on 20 January 2017. However, far too often, SJFW bears witness to the unintended consequences of these legislative changes for women experiencing marginalisation, particularly Aboriginal and Torres Strait Islander women.

Data confirms that women on remand are in most cases, not the subject of the serious violent charges that the reverse onus tests sought to address. Of unsentenced women remanded in custody in Victoria:

- almost one-third had drug offences as their most serious charge
- over 35 percent were charged with theft (including shop theft), fraud or other property related offences.³⁰

Housing large numbers of unsentenced women in custody for these types of offences is an expensive holding pattern, costing the Government \$391.18 per woman, per day.³¹

Spending time remanded in custody frequently interrupts important protective factors and opportunities for recovery and rehabilitation that may address underlying causes for offending behaviours:³² community supports, including mental health intervention is interrupted; stable housing is generally put at risk; employment or job readiness programs are paused.

²⁸ Corrections Victoria, *Annual Prisoner Statistical Profile*, June 2019.

²⁹ Corrections Victoria, *Monthly Time Series Prisoner and Offender Data*, July 2021.

³⁰ Ibid.

³¹ Australian Institute of Criminology, *How much does prison really cost? Comparing the costs of imprisonment with community corrections*, 2018, p. 40.

³² See Caruana et al., above n 10, p.41.

Most devastatingly for many women, being remanded in custody results in their children being removed from their care. Most women in Australian prisons have children – with over half having at least one dependent child.³³ Children removed from their mothers on remand are placed in the care of family members, kinship carers or into state care. This is traumatic for mothers and children alike – and for many, sets in motion a damaging trajectory.³⁴

An increasing number of children are being removed from the care of Aboriginal and Torres Strait Islander women given that they are over-represented in Victoria’s prison system.

Incarceration of mothers has a devastating impact on their children. A recent NSW Parliamentary Inquiry into impacts of parental imprisonment on children³⁵ made the following recommendations:

- Bail and sentencing legislation should be amended to require consideration of a defendant’s status as a primary carer before imposing a custodial sentence.
- When it is unavoidable that a primary carer is taken into custody, interventions should be required to better support their children.

The Victorian Legislative Council Legal and Social Issues Committee also inquired into children affected by parental incarceration, resulting in the following findings:³⁶

- Children are invisible victims of crime. The experience of parental involvement in the criminal legal system is an adverse, traumatic childhood experience that, without appropriate intervention and support, may affect them negatively throughout their life.
- There is inadequate data collection and analysis about the scope and impacts for children affected by parental incarceration.
- It is likely that alongside rising incarceration rates due to changes to bail and sentencing laws, the number of children affected is also increasing.
- No Department, agency, or unit has formal responsibility for leading or coordinating the support response, despite Victoria being subject to a range of international and Victorian legal requirements for human rights and the specific rights of the child.

³³ Australian Institute of Health and Welfare, *The Health and Welfare of Women in Australia’s Prisons*, November 2020.

³⁴ Victorian Government, *Youth Justice Strategic Plan 2020-2030* found that over 40 per cent of children and young people in contact with the youth justice system are the subject of current or previous child protection intervention (p. 9).

³⁵ New South Wales. Parliament. Committee on Children and Young People. Report no 4/57, *Support for children of imprisoned parents in New South Wales*, June 2022 (<https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2572#tab-reportsandgovernmentresponses>)

³⁶ Victoria. Parliament. Legislative Council Legal and Social Issues Committee. Inquiry into children affected by parental incarceration, 2022 (<https://new.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-children-with-imprisoned-parents>)

- The interests of children are not adequately considered at various points of the criminal legal system.

The Committee made 29 recommendations to improve responses to children affected by parental incarceration, including the following:

- Reform to reduce the growing prison population.
- Establishing a mandate for Department of Families, Fairness and Housing (DFFH) to respond to children and families affected by parental incarceration, including providing adequate funding for specialist, community-based service providers.
- Developing and implementing child-aware practice and protocols for Victoria Police, courts, and corrections.
- Providing accessible, affordable, and family-centred opportunities for parents to engage in children’s care whilst incarcerated.

SJFW calls for immediate action to:

1. Reform the reverse-onus provisions of the Bail Act

SJFW calls for the Bail Act to be urgently reviewed in light of its disproportionate impact on women in the criminal legal system. Specifically, we call for urgent changes to the Bail Act as follows:

- Repeal the reverse-onus provisions.
- Create a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk.
- Include a specific provision in the Bail Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.
- Remove any ‘double uplift’ provisions from the Bail Act that propel persons accused of low-level offending into the highest threshold for bail.

The Bail Act could be amended to repeal the reverse onus tests and replace them with a single test – unacceptable risk. This would mean that the Bail Act provides for a presumption in favour of bail unless there is a specific and immediate risk to the safety of another person. The Victorian Law Reform Commission recommended this approach in 2007.³⁷

³⁷ Victorian Law Reform Commission, *Simplifying the Bail Act*, 2007.

2. A gendered and culturally-competent, non-discriminatory understanding of the concept of 'risk' - both at a system level, and when discrete decisions are made

A key consideration in bail decision-making is the concept of 'risk,' and in particular whether a person applying for bail presents an unacceptable risk of further offending, failing to comply with conditions of bail, endangering the safety or welfare of any person, or interfering with witnesses.

The concept of risk is gendered and racialised. The risks that women present with during applications for bail are more likely to be indicators of disadvantage and marginalisation, in particular around housing instability and impoverishment, rather than risks to community safety.³⁸ Yet these markers of disadvantage that impact particular groups are treated as risk factors. Markers of disadvantage must not be regarded as risks. In addition to this, the assessment of risk by decision-makers, including when informed by the application of risk assessment tools, contain cultural and racial biases that disadvantage Aboriginal and Torres Strait Islander people.³⁹

Bail decision-making should be primarily concerned with the risk that the person poses to the safety and welfare of the public, or to a particular person, and whether or not that particular risk is unacceptable, rather than the risks associated with a woman's impoverishment, marginalisation, housing instability or culture. In other words, considerations relating to 'risk' should not be equated with decisions relating to 'need'.⁴⁰ Issues such as homelessness, mental ill-health, and other vulnerabilities are more effectively addressed through investment in community-based supports.

3. Homelessness should not be a precursor to the refusal of bail

Lawyers working in the remand court have identified lack of secure housing as the biggest barrier women face when applying for bail.⁴¹ The overwhelming need for a stable home address places many women, at a greater risk of being remanded in

³⁸ E Russell et al, *A Constellation of Circumstances – The Drivers of Women's Increasing Rates of Remand in Victoria*, July 2020.

³⁹ A Day et al, *Assessing violence risk with Aboriginal and Torres Strait Islander offenders: consideration for forensic practice*, June 2019.

⁴⁰ See Caruana et al., above n 10, p.73.

⁴¹ E Russell et al, *A Constellation of Circumstances – The Drivers of Women's Increasing Rates of Remand in Victoria*, July 2020.

custody. This is exacerbated by the high rates of homelessness and housing instability faced by criminalised women, often due to family violence.⁴²

There must be greater investment in safe, suitable, and affordable housing options for women, in particular those at risk of criminalisation, in order to ensure that prison does not become an alternative to housing. Specific housing should be made available for women on remand or at risk of criminalisation, and supported accommodation must be available for women with underlying mental health or disability support needs. No woman should be refused bail because she does not have access to a home.

4. Reclassify offences relating to poverty and drug dependence

A key driver of women's criminalisation and increasing imprisonment is the categorisation of certain offences related to survival and/or poverty as 'indictable offences'. This includes shop thefts or petty thefts, and offences relating to alcohol and other drug use.

Approximately one-quarter of unsentenced women received into prison in 2018 were charged with drug use and possession offences involving methylamphetamine.⁴³ This is a significant increase from 2012, when only 5 per cent of unsentenced women were charged with possessing or using that drug.⁴⁴

Reclassifying these offences, which are symptomatic of underlying issues of ill-health and impoverishment, as summary offences would invite a different response that is properly directed towards diversion and rehabilitation rather than further criminalisation through a punitive sentencing process. In addition, it would remove these matters as a trigger for the double uplift provisions and the reverse onus tests in the Bail Act.

It is our position that the following offences should be re-classified as summary offences:

- Theft, where the theft in question relates to property below a certain value.⁴⁵
- Handling stolen goods, where circumstances indicate the offending relates to survival/poverty.⁴⁶

⁴² Domestic and family violence is the main reason that women and children leave their home in Australia. See eg. Australian Housing and Urban Research Institute, *Housing, homelessness and domestic and family violence: What's the policy issue?* March 2020.

⁴³ Crime Statistics Agency, *Characteristics and Offending of Women in Prison in Victoria 2012-2018*, November 2019.

⁴⁴ Ibid.

⁴⁵ Crimes Act 1958 (Vic), s 74.

⁴⁶ Crimes Act 1958 (Vic), s 88.

- Obtaining property by deception, where circumstances indicate the offending relates to survival/poverty.⁴⁷
- The common law offences of public nuisance and unlawful assembly.⁴⁸
- Possessing drug of dependence.⁴⁹

Many low-level offences are linked to income inequality, poverty, mental ill-health, or substance use.⁵⁰ The Inquiry into Victoria’s Criminal Justice System has called for a review of all offences with a view to minimising the criminalisation of low-level offending linked to underlying forms of disadvantage and substance dependency.⁵¹ This review must be prioritised to decriminalise low-level offences linked to poverty, disadvantage, and substance dependency.

5. Decisions around charging and remanding practices by police

Police are responsible for a significant number of decisions that impact on the bail and remand process. These decisions are often not subject to review and can have far-ranging consequences for women, especially in light of the consequences that arise as a result of breaching bail conditions.

Accordingly, SJFW calls for the following:

- Greater use by police of ‘charge and summons’ (a notice requiring a person to come to court) when charging someone with low-level offences, as opposed to placing a person on bail
- Greater transparency in the decision-making process used by police and bail justices when they refuse bail.
- Greater use by police of their discretion to grant bail where the accused person is an adult experiencing marginalisation or an Aboriginal person.

⁴⁷ Crimes Act 1958 (Vic), s 81.

⁴⁸ Crimes Act 1958 (Vic), s 320.

⁴⁹ Drugs, Poisons and Controlled Substances Act 1991 (Vic), s 73.

⁵⁰ Parliament of Victoria, Legislative Council – Legal and Social Issues Committee, Inquiry into Victoria’s Criminal Justice System, p.478-480.

⁵¹ Ibid.

Sentencing

Prison is not a safe place for women. There are inherent risks to the physical and mental health of women posed by the prison environment, particularly given the high rates of prior victimisation, trauma and mental ill-health suffered by the overwhelming majority of women in Australian prisons.⁵² Rehabilitation should be prioritised as the primary factor to consider in sentencing.

With these principles in mind, SJFW calls for the following reforms in relation to sentencing:

1. Review of the sentencing hierarchy and Community Corrections Orders

The current range of sentencing options under the *Sentencing Act 1991* (Vic) (Sentencing Act) is not broad enough to address the wide range of circumstances of women who come before the courts. In particular, there is only one community-based sentencing option – the Community Corrections Order (CCO). If the Court will not impose a CCO because a person has breached an earlier CCO, or if Corrections Victoria assess that a person is not suitable for a CCO, the next step ‘up’ in the ‘sentencing hierarchy’ is imprisonment. If the Court deems that a CCO is not warranted, the next step ‘down’ in the sentencing hierarchy is a fine. There is no intermediate sentencing option with a focus on rehabilitation.

It is vitally important that the sentencing regime includes options for community-based treatment and rehabilitation that are better tailored to the individual circumstances of women. These options must account for the nexus between trauma, prior victimisation (in particular family violence), homelessness, and women’s criminalisation. It is particularly important to understand the impact that these negative experiences can have on the ability of women engaged in the criminal legal system to comply with the current CCO regime. Otherwise, these women are often being set up to fail.

If a person is identified as not having complied with the conditions of a CCO, a more collaborative, problem-solving response should be adopted. This should include considering options for additional support and/or a review of the CCO’s conditions. The instigation of breach proceedings should be a last resort.

Sentencing options must also respond to the over-representation of women with disabilities in the criminal legal system. The use of Justice Plans must also allow for greater flexibility, both in relation to their implementation and compliance, and around

⁵² H Johnson, *Drugs and crime: A study of incarcerated female offenders*, Research and public policy series, 2004; Justice Health & Forensic Mental Health Network, *2015 Network Patient Health Survey report*, 2017; M Wilson et al, *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia*, SAGE Open, January 2017.

the criteria for eligibility. The current practice requiring a diagnosis of intellectual disability to have been made prior to a person turning 18 is unnecessarily rigid and exclusive. The intersection between mental health, substance use, and cognitive impairment must be better understood so that it becomes the foundation for tailoring treatment that is appropriate to the individual, rather than a barrier that excludes people from particular treatment programs.

2. Specific consideration of Aboriginality in sentencing

The increasing over-representation of Aboriginal women in Victoria's prison system, and in the criminal legal system more generally, gives rise to the need for specific consideration to be given to a person's Aboriginality in sentencing. In particular, consideration must be given to:

- cultural identity
- the individual's connection to community, country, and kinship
- the underlying drivers of Aboriginal women's criminalisation, such as inter-generational trauma, historical and contemporary community circumstances, and historical and contemporary government policies
- the individual's strengths as well as the strengths of their community
- culturally-appropriate, community based options and programs relevant for the sentencing decision.

Accordingly, we join with the Victorian Aboriginal Legal Service and call for the following:

- Amendments to section 5(2) of the *Sentencing Act* to require courts to take into consideration the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.
- Regular face-to-face cultural competence training for Judges and Magistrates, to enhance their ability to comply with amended section 5(2) of the *Sentencing Act*.
- Self-determined initiatives to improve sentencing outcomes for Aboriginal people, such as the introduction of Aboriginal Community Justice Reports,⁵³ along with ongoing, sustainable funding.

⁵³ Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports Project*, Information Sheet, Accessed August 2021.

3. Increase in therapeutic sentencing practices and the use of structured sentence deferrals

There are real alternatives to the traditional process of sentencing that can deliver tailored, rehabilitative outcomes that benefit the individual and the community as a whole. Therapeutic sentencing options and practices, such as structured and supported deferral of sentences, can provide support to women while in the community and reduce the likelihood that they will be sentenced to a term of imprisonment once their matters are finalised.

SJFW calls for investment in community-based and voluntary programs which operate in more flexible ways and include outreach support. These are particularly important in the context of criminalised women's experiences of therapeutic sentencing practices and court programs, given their additional caring responsibilities and almost universal experiences of trauma.⁵⁴ SJFW also supports increased access to restorative justice processes which are trauma-informed and culturally safe.

4. The abolition of short sentences

On average, women are serving shorter prison sentences than men.⁵⁵ Women are most likely to be charged with drug-related offences, assault, and property offences (other than burglary),⁵⁶ which typically result in shorter sentences.

Even brief periods of time in custody are detrimental to women.⁵⁷ Short sentences disrupt crucial support systems such as employment, caring for children or family, and most importantly, housing.

Of particular concern is the effect of short-term incarceration on Aboriginal and Torres Strait Islander women. Aboriginal and Torres Strait Islander people are more likely to be sentenced to short terms of imprisonment than their non-Indigenous counterparts.⁵⁸ Furthermore, over one-fifth of Aboriginal and Torres Strait Islander people in Australian prisons are serving sentences of less than 12 months with a median time

⁵⁴ See Caruana et al., above n 10, p.81.

⁵⁵ Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015.

⁵⁶ Corrections Victoria, *Women in the Victorian Prison System*, January 2019.

⁵⁷ E Baldry, *Women in transition: From prison to...*, *Current Issues in Criminal Justice*, November 2019 pp. 253-267.

⁵⁸ Australian Bureau of Statistics, *Prisoners in Australia*, December 2020.

spent on remand of 2.7 months.⁵⁹ This suggests Aboriginal and Torres Strait Islander people are being incarcerated for relatively minor or repeat low-level offences.

For these reasons, it is SJFW's position that short sentences should be abolished. However, this must be accompanied by safeguards to protect against 'sentence creep' where a person is sentenced to a greater period of imprisonment than would otherwise be warranted in order to overcome the abolition of short sentences. There must also be investment in adequate and appropriate community-based options that can be used instead of short sentences.

These issues should be referred to the Victorian Law Reform Commission for consideration, to ensure that the process is informed by thorough research, evidence from other jurisdictions, and input from stakeholders.

5. Connection between bail laws and sentencing practice

Any consideration of abolition of short sentences, and of sentencing reform generally, must also include reform to Victoria's current bail laws.

According to the Sentencing Advisory Council, 'Victoria's increasing remand population is indirectly affecting sentencing outcomes. Time spent on remand seems to increase the likelihood that a court will ultimately impose a sentence of imprisonment.'⁶⁰

The increasing use of 'time-served' sentences and of remand more generally can result in unfairness to the accused person, and can undermine their prospects of rehabilitation.

Any reform of Victoria's sentencing regime must occur alongside a review of the current bail laws that have triggered the largest increase in Victoria's remand population and the use of 'time-served' sentences.

6. Prioritising a demand and harm-reduction approach to drug use

Approximately one-quarter of unsentenced women entering prison in 2018 were

⁵⁹ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, July 2017.

⁶⁰ Sentencing Advisory Council, *Time Served Prison Sentences in Victoria*, February 2020.

charged with drug use and possession offences involving methylamphetamine.⁶¹ This is a significant increase from 2012, when only 5 per cent of unsentenced women were charged with possessing or using that drug.⁶²

The increase in women's drug-related offending underscores the need for rehabilitative approaches to sentencing. Reducing substance use harms and dependence is most effective when delivered through community-based, culturally appropriate, alcohol and other drug treatment programs, such as assertive outreach⁶³, alcohol and drug counselling, or through residential rehabilitation with a community provider.

Opioid replacement therapy should also be readily available with access expedited to reduce the risk of withdrawal. People in prison should be able to obtain a second opinion if they are not satisfied with the prison based prescribing general practitioner.

The fusion of rehabilitation with surveillance and control in a prison environment and/or when delivered within a strict abstinence framework, undermines the effectiveness of rehabilitation, especially where substance use is a result of prior trauma and victimisation. This approach also exacerbates substance related harms, such as the spread of blood borne viruses as well potential prison-based violence through facilitating and enhancing a prison based black market.

SJFW therefore advocates for a rehabilitative approach to drug-related offending that is tailored to the unique needs of women, and is trauma-informed, community-based, health-driven, and based on harm-reduction principles.

7. Caring responsibilities as a specific consideration in sentencing

The majority of women in Australian prisons have children, with 85 per cent having been pregnant at some point in their lives, and 54 per cent having at least one dependent child.⁶⁴ Eighty per cent of Aboriginal and Torres Strait Islander women in prisons are mothers.⁶⁵

⁶¹ Crime Statistics Agency, *Characteristics and Offending of Women in Prison in Victoria 2012-2018*, November 2019.

⁶² Ibid.

⁶³ Assertive outreach describes an approach where workers actively and persistently engage with people with complex needs in their own environment/setting (including people who are sleeping rough), in order to establish trust, build relationships and provide information and practical support necessary to assist the person to engage with specialist homelessness, mental health and alcohol and other drugs services.

⁶⁴ Australian Institute of Health and Welfare, *The Health and Welfare of Women in Australia's Prisons*, November 2020.

⁶⁵ J Sherwood et al, *Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison*, 2013.

Women are overwhelmingly the primary carers of children, as well as carers for the sick and elderly in their community.⁶⁶ When women are imprisoned, even for short periods, the impacts ripple throughout families and communities and have long-term effects. The Australian Human Rights Commission noted that ‘mothers that are prisoners can impact family relationships and can lead to their children suffering from emotional and behavioural problems’.⁶⁷

Children whose mothers are in prison are more likely to have disrupted education, poor health, and unstable housing, all of which are factors that heighten the risk of young person entering child protection or the criminal legal system.⁶⁸ For example, young people on child protection orders are 27 times more likely to be under a youth justice supervision order in the same year.⁶⁹

SJFW strongly advocates for the inclusion of a specific provision in the Sentencing Act requiring decision-makers to consider the impact of the imposition of a term of imprisonment on dependent children. This is in line with recent research, which argues that the best interests of the children of people who offend should always be a significant factor to be weighed in the sentencing process.⁷⁰ This would also align with the UN Convention on the Rights of the Child, which requires in Article 3(1) that the best interests of the child is the primary consideration in all actions concerning children.

⁶⁶ See Caruana et al., above n 10, p.26.

⁶⁷ Australian Human Rights Commission, *Human Rights and Prisoners*, 2009.

⁶⁸ J Sherwood et al, *Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison*, 2013.

⁶⁹ Australian Institute of Health and Welfare, *Young People in Child Protection and Under Youth Justice Supervision 2013-14*, 2016.

⁷⁰ T Walsh et al, *Sentencing parents: The consideration of dependent children*, *Adelaide Law Review*, 2016, pp. 135-161.

Parole

The number of women granted parole has fallen dramatically over the past decade, both as a percentage of women released and in overall numbers. In 2006/7, 26 per cent of women released from prison in Victoria were released on parole, that is, 123 of the 480 women released.⁷¹ By 2018/19, only 4 per cent of women released from prison in Victoria were released on parole, that is, 70 of the 1802 women released.⁷²

Numerous barriers exist to prevent women being able to access parole once they have served their non-parole period in custody. These barriers include lack of access to stable accommodation and the unavailability of programs in custody. In addition, following the *Review of the Parole System in Victoria*, carried out by Ian Callinan AC in 2013, the onus for making an application for release on parole was placed onto the individual applicant, effectively abrogating the State's responsibility for advance planning and preparation for parole applications and placing this instead on the individual.

When coupled with intensive case management delivered by well-resourced support services, parole can provide a valuable opportunity for women to reintegrate into the community after time in custody and reduce their risk of reoffending. Conversely, women who complete their full sentence in custody without time on parole are often released back into the community with few supports, which increases the risk of harm both to the individual and to the community.

SJFW calls for the following reforms:

1. The purpose of parole for eligible women should be to support their rehabilitation and reintegration into the community

According to the Adult Parole Board, the purpose of parole is to “promote public safety by supervising and supporting the transition of offenders from prison into the community”.⁷³ This purpose can only be achieved by properly supporting women's rehabilitation.

Public safety is promoted not by creating barriers to release on parole, but by providing women the support they need to live safely, stably, and without offending in the community after prison. Evidence indicates that the most effective results are produced when this support is provided by community-based services, rather than an extension of the criminal legal system through courts or Corrections Victoria. Measures

⁷¹ Corrections Victoria, *Annual Prisoner Statistical Profile 2006-07 to 2018-19*.

⁷² Ibid.

⁷³ Adult Parole Board, *Parole Manual*, June 2020.

to reduce harm to the community should take into account the harm caused to families and children when mothers and carers are in custody.

Our position is as follows:

- Women on parole should be supported by well-resourced and appropriate services that are delivered by community-based providers, rather than Corrections Victoria.
- These services must be culturally competent, informed by Aboriginal and/or Torres Strait Islander people and gender-informed, including being responsive to the needs of non-binary and gender diverse people.
- Parole should be focused on support, rehabilitation and reintegration rather than surveillance and control.
- The unique opportunities for women in being granted parole – including being reunited with their children – should be central to policy and decision-making about parole.

2. Lack of availability of social and affordable housing should not be a barrier to women being granted parole

The Adult Parole Board requires that parole applicants have an address of “suitable and stable accommodation” before they will consider an application for parole.⁷⁴ Victoria’s lack of social and affordable housing (in particular, public and Aboriginal Community Controlled housing) is a huge barrier for women applying for or being granted parole. This is exacerbated by further barriers that many women face due to family violence in the home, caring responsibilities, and higher rates of homelessness and unstable housing prior to entry into prison.

Our position is as follows:

- Women who are eligible for parole and provide their consent should be automatically put on the priority waiting list for social housing when they start preparing their parole application.
- A minimum of 60,000 new public and community homes need to be built by 2032.
- Housing must be provided to criminalised women on a Housing First basis and includes alcohol and other drugs, mental health, family violence and parenting support from agencies outside the criminal legal system, especially Aboriginal Community Controlled Organisations
- Investment is needed in data and monitoring to determine future housing needs for women in contact with the criminal legal system.

⁷⁴ Adult Parole Board, *Parole Manual*, June 2020.

- There should be increased investment in social and affordable housing options that are specifically targeted to women in the criminal legal system, including those exiting prison.
- No woman should be refused parole because she does not have access to a home.

3. Parole applications should occur at the earliest eligibility date

Prior to 2015, there was a presumption that parole would be granted at the eligibility date unless there was a compelling reason why this should not occur. Since 1 April 2015, the onus has instead been on the person applying for parole to make the necessary application. This change was triggered largely in response to violent offending committed by men who had been released on parole.

Women in prison face multiple barriers in applying for parole, including lack of knowledge of the parole system and of their rights, administrative delays, and the lack of access to relevant programs or assessments. This is reducing the opportunities for women to even apply for parole, let alone make a successful application.

Our position is as follows:

- There should be a presumption that an application for parole will be made at the earliest eligibility date.
- The State is better resourced and equipped to undertake the administrative processes required for parole applications to progress. Accordingly, these applications should occur automatically, rather than women in prison bearing the onus of applying.
- Women in prison should be supported in these applications through the availability of independent information and education around parole processes, and timely access to programs and assessments, especially where these are a pre-requisite for consideration of parole.
- The government should be obliged to provide access to mandated programs in a timely manner.
- Where mandated programs have not been completed in prison, this should not be an automatic barrier to parole being granted. Decision-makers should have regard to the reasons for non-completion, including the availability of the programs, and their appropriateness for the individual having regard to factors including the cultural safety of the programs and their delivery.

4. Charter compliance and natural justice

The Parole Board should:

- cease to be exempt from the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)⁷⁵
- be bound by the rules of natural justice⁷⁶
- allow for applicants to be legally represented.

Benefits would include the following.

- Encouraging positive participation in the parole process.
- Increasing community confidence in the decisions of the Parole Board by improving transparency.
- Increasing levels of acceptance of parole decisions.
- Better serving the purposes of parole, in particular supporting rehabilitation and reintegration, reducing likelihood of reoffending.
- Reducing the risk of discriminatory practices that could impact on Aboriginal and Torres Strait Islander applicants.

In addition, the ‘double punishment’ provision contained in section 77C of the *Corrections Act 1986* (Vic) should be repealed. This provision provides that the Adult Parole Board has discretion to direct that some or all of the period during which a parole order that is cancelled, or taken to be cancelled, was in force, is regarded as time served in respect of the prison sentence. This should be replaced by a new provision which provides that time served on parole, prior to a parole order being cancelled, counts as time served.

⁷⁵ *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) at r5 (a) lists the Adult Parole Board as being exempt from the operation of the Charter.

⁷⁶ *Corrections Act 1986* (Vic) at s 69(2) states that the Adult Parole Board is not bound by the rules of natural justice in exercising its functions.

Policing

Women's increasing criminalisation is inextricably linked to policing practices.⁷⁷ The over-policing of Aboriginal and Torres Strait Islander communities, the criminalisation of poverty through the policing of activities such as begging and homelessness, and the criminalisation of health issues including mental ill-health and alcohol and other drug use, places women experiencing marginalisation in a cycle of increasing criminalisation and police contact, and on a trajectory towards imprisonment.

Additionally, current practices in relation to policing family violence often lead to the misidentification of women as primary aggressors in family violence incidents, and/or a response from police that criminalises victims.

SJFW calls for the following reforms to policing:

1. Funding should be diverted from policing into community services including front-line health and Aboriginal and Torres Strait Islander community organisations

Increased funding for police does not equate to an increase in public and community safety. Investment in housing, health, and community services to prevent cohorts experiencing marginalization coming into contact with police, and refocusing police efforts to respond to significant offending rather than policing crimes that are committed due to poverty or drug dependence, will have a much more significant and long-lasting impact on community safety.

2. Action must be taken immediately to address the over policing of Aboriginal communities in Victoria

Numerous studies demonstrate that Aboriginal and Torres Strait Islander people are less likely to be provided with opportunities for diversion⁷⁸, more likely to be charged with public nuisance offences⁷⁹ and more likely to be targeted for offences such as

⁷⁷ See Caruana et al., above n 10, p.43.

⁷⁸ N Papalia, *Disparities in Criminal Justice System Responses to First-Time Juvenile Offenders According to Indigenous Status*, May 2019.

⁷⁹ Sentencing Council Queensland, *Connecting the Dots*, March 2021.

being drunk in a public place⁸⁰. However, Victoria Police are reluctant to collect and release data on policing practices between different ethnic and cultural groups.⁸¹

Our position is as follows:

- We acknowledge that both historic and contemporary relationships between police and Aboriginal communities have been fraught, and a commitment to addressing systemic racism and ending impunity is crucial for moving towards a more just, equal, and safe future for everyone.
- Discrimination and racism in policing practices, particularly in relation to Aboriginal and Torres Strait Islander communities, must be acknowledged and immediately addressed through reforms to increase police accountability.

3. Increase police accountability

Increasing transparency and oversight in relation to police practices must include the following:

- Ending the practice of police investigating police, and establishing a Police Ombudsman for the investigation of complaints against police that is human rights compliant, adequately resourced, independent, prompt, transparent, victim-centred, and responsive to the needs of Aboriginal people.
- Proper implementation of OPCAT in relation to treatment and conditions in police custody, including the establishment of a National Preventive Mechanism whose operations, policies, frameworks, and governance are culturally appropriate and safe for Aboriginal people.
- Greater education and training of police members about issues relating to the criminalisation of women and Aboriginal and Torres Strait Islander communities, including training on racial discrimination (noting that police training alone is not sufficient to engender systemic changes in police practices and must occur alongside the strengthening of police accountability mechanisms).
- To more accurately track the criminalisation of women a wide-ranging police monitoring regime must be established to review police conduct and performance, and mandate public reporting of policing data. Policing metrics should be monitored by an external body that provides publicly available reports to Parliament, with compliance obligations for police. The metrics should include:
 - police response to culturally and linguistically diverse women

⁸⁰ Australian Bureau of Statistics, *Prisoners in Australia (2018)*, Table 1.

⁸¹ M McGowan and C Knaus, 'Essentially a cover-up': why it's so hard to measure the over-policing of Indigenous Australians, *The Guardian*, 13 June 2020.

- police responses to family violence, including police-perpetrated family violence and mis-identification of victim survivors as perpetrators of family violence (including, gender and demographic data)
- police use of force and weapons
- the perceived ethnicity of people subject to a police stop and search
- complaints and complaint handling data; including complaints about police’s family violence responses
- the impact of litigation against Victoria Police
- Facilitating appropriate referrals to support services for Aboriginal women, women from culturally and linguistically diverse backgrounds, and women with complex needs, including women with a disability.

4. Improving responses where a victim has been incorrectly identified as a perpetrator of family violence

The Royal Commission into Family Violence raised concerns about the misidentification of the predominant aggressor in family violence situations and its associated impact on women.⁸² A small study conducted by Women’s Legal Service Victoria in 2018 revealed that of the 55 female clients named by police as respondents to intervention orders, 32 were incorrectly identified.⁸³

The misidentification of women as the predominant aggressor in family violence situations leads to the criminalisation of family violence victim-survivors, compounding their distress and trauma.⁸⁴ This disproportionately impacts Aboriginal women and women from culturally and linguistically diverse backgrounds. As part of addressing misidentification by police, this requires focus on racially targeted policing and discriminatory policing practices. Our position is that Victoria Police should implement the following reforms, in consultation with community legal services, Aboriginal legal services, Victoria Legal Aid and family violence services:

- A clear and transparent protocol needs to be developed for Victoria Police that sets out the process for someone to raise a concern that a party may have been misidentified and avenues to rectify the misidentification. Victoria Police should develop and implement a process for the review of all Family Violence Intervention Order applications where the risk of misidentification of the primary aggressor is higher, including Aboriginal and Torres Strait Islander women and culturally and linguistically diverse women.

⁸² Royal Commission into Family Violence, *Summary and Recommendations*, March 2016.

⁸³ Women’s Legal Service Victoria, *Snapshot of police family violence intervention order applications*, January – May 2018.

⁸⁴ See Caruana et al., above n 10, p.42.

- Victoria Police should use greater discretion to withdraw, assess and consider reversal of Family Violence Intervention Order applications where there is misidentification. And develop guidance for members to assist with determining whether to withdraw.
- Upon withdrawing a Family Violence Intervention Order application, Victoria Police should conduct a risk assessment and consider whether a Family Violence Intervention Order should be made on behalf of the victim survivor who has been misidentified in accordance with their wishes.
- Victoria Police should develop guidance for considering the withdrawal of related criminal charges where misidentification has occurred.
- There should be specific training for Victoria Police to improve understanding of the gendered nature and intersectional dynamics of family violence and coercive control, and the contexts which contribute to women’s victimisation. However, police training alone is not sufficient to engender systemic changes in police practices and must occur alongside the strengthening of police accountability mechanisms.

We note that other improvements are also needed across the criminal legal system to improve responses where a victim has been incorrectly identified as a perpetrator of family violence, including improved responses to misidentification by courts, the legal profession, child protection and government departments.

5. Opportunities for women to engage in pre-charge programs and diversionary programs should be increased

Diversion programs offer a pathway away from further criminalisation and access to treatment and rehabilitation. Diversion programs can address the underlying issues that are causing interactions with police. However, the limited opportunities for women to engage in these programs, and the ability of police to refuse diversion, undermines its effectiveness.

Our position is as follows:

- There should be greater access to and resourcing of diversionary programs delivered by community-based providers, in particular for drug-related charges.
- Options for diversionary programs should include gender-informed and culturally-appropriate programs that take into account the different pathways towards criminalisation for women and the barriers to access they may face in relation to particular programs.
- The requirement for Victoria Police or prosecutions to consent to a diversion should be removed from the *Criminal Procedure Act 2009* (Vic).

- As recommended by the Chief Magistrate, the granting of the diversion program should be a matter for the discretion of the magistrate and not be subject to veto by the prosecution.⁸⁵

6. Police should be held accountable for their charging practices and bail decisions

There is a lack of transparency around police decisions to proceed with criminal charges and to grant or refuse bail where they have discretion to do so. These decisions are fundamental in the context of the increasing number of women on remand in Victoria's prison system.

There should be greater transparency and independent oversight of police practices and decision-making, specifically around:

- the decision to initiate charges by way of bail rather than summons
- the decision to not grant bail from the police station
- considerations of an accused person's vulnerabilities as defined in the Bail Act and the consideration of section 3A
- bail conditions that are attached to police bail.

Police should also be required to provide reasons for not granting bail from the police station when that option is legally available.

7. Public drunkenness should be decriminalised

We welcome the Victorian Government's move to decriminalise public drunkenness, and acknowledge the central role of Aboriginal and Torres Strait Islander advocates in leading this reform.

However, we support the position of community advocates that police should not play a part in the response to public drunkenness.

In pursuing these reforms, our position is that the Victorian Government should undertake the following:

- Establish a robust co-design process for the implementation of a health-based response to public drunkenness.

⁸⁵ Magistrates' Court of Victoria, *Annual Report 2015-16*, September 2016, p.14.

- Roll out a state-wide, culturally-appropriate public health model which is properly funded and resourced.
- Continue to consult with the Aboriginal community, particularly the families of Aboriginal people who have died in custody.
- Minimise the involvement of police in this model. No one should be detained in a police cell because they are intoxicated in public. However, if new police powers are legislated, police should only be engaged in the response to someone who is intoxicated as a last resort if there is a serious and imminent risk of significant harm to that person or other people.
- Remove Protective Service Officers from being involved in any response.
- Ensure that there are robust safeguards in place to protect the health, safety, and human rights of people who are being dealt with for public drunkenness.

8. Police should adopt a health response when dealing with drug use

Approximately one-quarter of unsentenced women received into prison in 2018 were charged with drug use and possession offences involving methylamphetamine.⁸⁶ This is a significant increase from 2012, when only 5 per cent of unsentenced women were charged with possessing or using that drug.⁸⁷

Unsentenced women who entered prison in 2018 had more extensive offending, drug use, victimisation, and family violence histories compared to women who entered prison in 2012.⁸⁸ However, there is no evidence that there was an increase in the seriousness of offending in this cohort. This suggests that it is the exacerbation of the underlying vulnerabilities to criminalisation, rather than an increase in the seriousness of women's offending, that is driving the increase in women's criminalisation and imprisonment.

The increase in women's drug-related offending underscores the need for rehabilitative approaches and a health-based response. Rehabilitation is most effective when delivered on a voluntary basis through community-based outreach programs or through residential rehabilitation with a community provider.

Reforms to the way in which drug use is policed and criminalised will have a significant impact in reducing women's criminalisation in Victoria.

⁸⁶ Crime Statistics Agency, *Characteristics and Offending of Women in Prison in Victoria 2012-2018*, November 2019.

⁸⁷ Ibid.

⁸⁸ Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria 2012-2018*, November 2019.

Our position is that Victoria Police and the Victorian Government should undertake the following:

- Commit to the adoption and implementation of a health-based, harm-reduction response to drug use.
- Reinvest resources that would have been spent on law enforcement, prosecution and incarceration into community-based health and treatment services.
- Consult with community-sector providers in implementing this response.

Housing

Women in Victoria are increasingly at risk of entering the criminal legal system, and of facing delays in exiting on parole due to a lack of affordable and social housing.⁸⁹ A lack of affordable and social housing also means that hundreds of women in Victoria are at risk of being released from prison into homelessness each year.

This lack of housing for Victorians in need has been acknowledged by the Victorian Government through its recognition that there is more need for affordable housing through its 'Big Housing Build'. Whilst the Big Build is a step in the right direction, it will provide community housing or privately controlled housing that excludes criminalised women, women experiencing family violence, and women with mental health and alcohol and other drugs issues. More needs to be done to ensure housing is affordable for women who have come in contact with the criminal legal system.

As the number of women in prison in Victoria grows, the number of women being released into homelessness will continue to increase. In the context of COVID-19, housing issues will continue to escalate given the increase in women experiencing family violence by a current or former cohabiting partner since the start of the pandemic.

Women in Victoria should not be criminalised, spend longer in prison, or be released from prison into homelessness due to lack of housing. All Victorian women should have easy access to a safe, secure, stable, and affordable home that meets their needs. Housing should empower women to make their own choices, exercise their rights, and have control over their own lives. As per Housing First principles⁹⁰, and in recognition of housing as a basic human right, access to and retention of housing should not be conditional upon engagement with supports or run through Corrections Victoria.

⁸⁹ Social housing is short-term and long-term rental housing owned and run by the government or not-for-profit agencies. It includes both public housing and community housing. It is for people on low incomes, especially those who have recently experienced homelessness or who have other special needs. There is no agreed definition of affordable housing in Australia. For the purposes of this document, affordable housing is housing where the cost is no more than 30 per cent of that household's net income. It is for people on very low, low and moderate incomes.

⁹⁰ D Padgett et al, *Housing First: Ending Homelessness, Transforming Systems, and Changing Lives*, November 2015.

SJFW calls for the following principles to be embedded in the housing response to women at risk of engaging, currently engaged or formerly engaged with the criminal legal system:

1. Women should not be criminalised due to lack of housing

There is an acute lack of secure and affordable housing. In particular, a lack of public and Aboriginal Community Controlled housing means that women are at increased risk of entering the criminal legal system due to homelessness. Women are also at increased risk of becoming homeless after leaving prison and then reoffending due to lack of housing.

Our position is as follows:

- All women should have a home to reduce their risk of entering the criminal legal system.
- No woman should be refused bail or parole because she does not have access to a home.
- No woman should be released from prison into homelessness due to a lack of affordable and social housing.
- No woman should end up in prison, or remain in prison, due to a lack of appropriate housing.

This can be achieved by:

- investing in new social housing by building a minimum of 60,000 new public and community homes by 2032
- ensuring that housing is provided to criminalised women on a Housing First basis
- investing in data and monitoring to determine future housing needs for women in contact with the criminal legal system.

2. All women should have a home

All housing provided to women – social, affordable, and private housing – should be aimed at ensuring that women have a home and should meet accepted community standards of what constitutes a home.

Housing should:

- be a person's home first and foremost

- reflect the built form of Victoria's broader housing stock
- be dispersed among the community (not centralised)
- be diverse
- not look like, or be designed as, a workplace for support providers or staff
- aim to ensure that Aboriginal people living in Victoria achieve quality housing outcomes.

3. All women should have access to housing that is stable and secure

It is important for women at risk of homelessness or recovering from homelessness, including for the recovery of victim-survivors of family or sexual violence, to have a home that is stable and secure.

Housing should:

- have security of tenure or have the capacity to be permanent (i.e. capacity to enter into an ongoing lease agreement)
- ensure residents can exercise tenancy rights over their home.

4. All women should have access to housing that meets their needs

Women have particular needs regarding safety and childcare that should be taken into account in meeting their housing needs.

Housing should:

- be safe and free from violence
- have appropriate space (multiple bedrooms if needed)
- be appropriate for children
- meet the specific needs of trans and gender diverse communities
- be appropriate and accessible for people with disabilities
- be culturally appropriate (construction, location and support)
- empower Aboriginal self-determination by being designed for and delivered by Aboriginal people.

5. Housing should empower women to exercise control over their own lives

When a woman requires support in their own home, the provision and management of their housing should be separate from the provision and management of their supports.

Housing should:

- ensure that no one organisation has an undue level of influence over a person's life
- enable a person to choose their support provider and change their support arrangements without this affecting their housing and vice versa.

If supports are provided in conjunction with housing, these supports should be provided by appropriate organisations, including Aboriginal Community Controlled Organisations.

6. Housing should empower women to make their own choices

Women should have a choice about where they live, who they live with, and who comes into their home and when, rather than this being determined by the housing or support provider.

Housing should:

- support women to exercise agency
- support family reunification.

Support System

Women in Victoria's prison system are one of the most marginalised groups in the community, with the majority experiencing homelessness, poverty, family violence, untreated health problems, and drug dependence.⁹¹ A significant number of women in prison have a disability.⁹²

The social and health support system can play a critical role in identifying and responding to these issues and preventing women from becoming criminalised and reducing the harms associated with justice-involvement.

The priority for any support system reform must be ensuring that women can access the support they need at the right time in the right settings.

The SJFW calls for the following support system reforms:

1. Supports must be responsive at the first risk of criminalisation

Many women in the criminal legal system have experienced mental health and alcohol or other drug-related issues, but have not accessed supports before entering the criminal legal system. Providing support to address these issues early can prevent women from becoming criminalised.

Some women do not self-identify mental health or alcohol and other drug issues, or do not seek support due to a lack of understanding of these service systems or due to stigma associated with treatment. For women who do seek support for mental health or alcohol and other drug issues, there are often barriers to accessing treatment services, driven in part by how services are rationed, and how places are prioritised and allocated to service users, that results in less available places for people seeking support voluntarily.

The majority of women in prison have also experienced family violence⁹³ and may have entered the criminal legal system following a family violence incident. Providing support to girls and young women in family violence situations should be a priority to ensure that they do not go down a path of criminal offending.

⁹¹ E Russell et al, *A Constellation of Circumstances: The drivers of womens' increasing rates of remand in Victoria*, July 2020, p 5.

⁹² Australian Institute of Health and Welfare, *The Health and Welfare of Women in Australia's Prisons*, November 2020

⁹³ H Johnson, *Drugs and crime: A study of incarcerated female offenders, Research and public policy series*, 2004; Justice Health & Forensic Mental Health Network, *2015 Network Patient Health Survey report*, 2017; M Wilson et al, *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia*, SAGE Open, January 2017.

Since the *Royal Commission into Family Violence in Victoria*, many sectors have improved their capability to identify and respond to family violence, including through the implementation of the multi-agency risk assessment and management framework (MARAM). However, there is more to be done to ensure services can identify family violence situations early, and provide appropriate support or referrals for women.

Police responses to family violence incidents should provide a critical point of intervention to identify and respond to support needs, but many police members still do not respond effectively to women in family violence situations, and instead contribute to criminalisation. For example, police may misidentify women as the primary aggressor in family violence situations, particularly Aboriginal and Torres Strait Islander women. They may lack understanding of, and capacity to respond to, offending behaviour that arises due to complex needs, family violence and trauma, or lack understanding of community-based, local service systems, and rely on cold referral to state-wide agencies who may not be the appropriate service response.

Our position is as follows:

- Support services must be adequately resourced to prioritise early intervention, voluntary support to reduce the risk of criminalisation.
- Support services, including generalist and universal services, must be mobilised to identify risks and provide adequate referrals to specialist services.
- Victoria Police members must have capability to deliver gender sensitive and trauma-informed responses, have knowledge of local service networks to undertake warm referrals, and continue to improve the use of the Victoria Police e-Referral Program (VPer) for referrals to local service providers.

2. Supports must be accessible and sustained to reconnect with community and prevent reoffending

Prison, by its nature and design, is inherently traumatic. Women on average serve shorter sentences than men,⁹⁴ and there is a much higher proportion of women on remand.⁹⁵ As a consequence, many women in prison have limited or no access to reintegration programs.⁹⁶ The majority of women in prison have experienced trauma

⁹⁴ Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria 2012-2018*, November 2019.

⁹⁵ Corrections Victoria, *Monthly Time Series Prisoner and Offender Data*, July 2021.

⁹⁶ Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, September 2015, p 94.

due to being victim-survivors of family violence, sexual assault, or child abuse⁹⁷, and incarceration itself is a significantly traumatising event. Despite the inherently traumatic nature of prison exacerbating existing distress, there is a lack of therapeutic, gender-responsive and trauma-informed support provided to women in prison. This requires effective trauma-informed and culturally safe training for staff working in prisons.

Recognising the high rates of trauma already experienced by women who come into contact with the criminal legal system, women must not be subject to further traumatisation in prison. The OPCAT oversight mechanisms need to be implemented as part of ending the use of solitary confinement and other degrading practices. After women leave prison, they are also at a heightened risk of violence and victimisation and require support more than ever. However, the supports provided when women exit prison are either inadequate or not sufficiently sustained. There is also poor coordination and a lack of continuity in supports between the criminal legal system and the community support system. Unfortunately, the lack of access to supports for women in prison and post-release often results in higher recidivism rates.

Our position is as follows:

- Women must have universal access to a therapeutic, trauma-informed model of case management, services (including, comprehensive and timely healthcare), pre-release planning/throughcare, whether sentenced or on remand, that incorporates sustained, practical support for women to re-establish stability and connections with family and community.
- A whole-of-government approach, coordinated by the Department of Health, must be implemented to coordinate services to address women's needs upon return to the community.⁹⁸
- A "housing guarantee" policy must be implemented, to prevent women from becoming homeless when leaving prison.⁹⁹ To support operation of this policy, housing support using a Housing First approach must be a key component of throughcare. This policy must be resourced with housing support workers and available houses to support women exiting prison.

⁹⁷ H Johnson, *Drugs and crime: A study of incarcerated female offenders*, Research and public policy series, 2004; Justice Health & Forensic Mental Health Network, *2015 Network Patient Health Survey report*, 2017; M Wilson et al, *Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia*, SAGE Open, January 2017.

⁹⁸ Jacqui Hawkins, Coroner, *Finding into death without inquest - COR 2017 6235*, February 2021, p 25.

⁹⁹ Parliament of Victoria Legislative Council Legal and Social Issues Committee, *Inquiry into Homelessness in Victoria - Final Report*, March 2021, p 184.

3. Supports must be safe and respectful of the specific needs of women engaged with the criminal legal system

There are a number of problems with the way that support services are currently funded and resourced which can impact on women's access to supports. Many agencies are funded to provide services that address individual or discrete issues, and may not be well-equipped to respond to the complex, co-occurring needs of women at risk of criminalisation or engaged with the criminal legal system.¹⁰⁰ For example, many services do not operate in a trauma-informed way or provide culturally safe and appropriate services to women, in particular, culturally and linguistically diverse women and women with disabilities. Services also do not generally respond to a person's care or family responsibilities – children can often be invisible in these systems.

Women who have been criminalised also face challenges and barriers in accessing the support services they need. This can include the stigma of being criminalised or discrimination. Women who have been criminalised are also often mistrusting of support services due to previous experiences or trauma, and are less likely to access services independently or voluntarily.

Our position is as follows:

- Intake and screening processes should be reformed to ensure women with complex needs, trauma and family/caring responsibilities can access services.
- Support services must be resourced to work collaboratively and in a coordinated way across the services system, including having the resources to establish partnerships, warm referral pathways, and integrated services.
- Support services must be tailored for Aboriginal women, culturally and linguistically diverse women, women with disabilities, trans and gender diverse people and women with significant histories of trauma and abuse (including young women).
- Workers in support services must have the capacity to establish trusted relationships with women seeking their support, including training in trauma-informed and intersectional support and care and the need to overcome stigma and discrimination towards criminalised women.
- Aboriginal and Torres Strait Islander Community Controlled organisations must be properly and sustainably funded.

¹⁰⁰ See Caruana et al., above n 10, p.91.

Endorsements

