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# JUSTICE REFORM INITIATIVE: SUBMISSION TO THE SOCIAL AND LEGAL ISSUES INQUIRY INTO THE VICTORIAN CRIMINAL JUSTICE SYSTEM

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## THE JUSTICE REFORM INITIATIVE

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The Justice Reform Initiative (JRI) is a national justice advocacy organisation that considers that jailing is failing. We are working to reduce over-incarceration in Australia and promote a community, in which disadvantage is no longer met with a default criminal justice system response (see JRI 2021). We currently have a network of over 100 eminent Australians as our patrons, including two former Governors-General, a number of former High Court judges, current and former public prosecutors, and multiple former parliamentarians from all sides of politics.

The JRI recognises the need for multiple legislative and policy, social, health, and human service reforms to be enacted, so that historically over-incarcerated and disadvantaged populations have opportunities to thrive in the community. The Justice Reform Initiative acknowledges that we are joining an incredible group of advocates and organisations who have been working for years to bring about change to the justice system in Australia. This is especially the case for Aboriginal and Torres Strait Islander led organisations who have been driving advocacy work in the area of over-incarceration for decades. The Justice Reform Initiative respects First Nations leadership and seeks to support and wherever possible elevate existing justice reform and advocacy voices. We welcome the opportunity to provide this submission to the Social and Legal Issues Committee's inquiry into the Victorian Criminal Justice System.

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## INTRODUCTION

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In order to understand the increases in Victoria's prison populations; to explore strategies to reduce recidivism; and to build alternative strategies to imprisonment, we need firstly to acknowledge that we are currently incarcerating (across Australia, and certainly right now in Victoria) large numbers of people who have been criminalised as a consequence of their disadvantage. We know that our prisons are filled with people who have come from situations of extreme poverty. We also know that *had the* majority of people we incarcerate, received support and opportunity in the community; had they had access to resources, to education, to housing,

to employment; had their disabilities and mental health conditions been adequately responded to, and had they had access to drug and alcohol treatment at the moment *when* they needed help, had they had access to anchors and cultural connection in the community to assist with trauma and poverty and discrimination, – then we would have a vastly different looking justice system.

There is very little debate about any of this in the research literature in terms of the demographics of who goes to prison.<sup>1</sup> The fact of disadvantage of course, does not and should not minimise the severity of crime, and nor does it diminish the importance of understanding and responding to the impacts of crime on victims. However, in order to understand how to reduce the numbers of people in custody, and to understand the problems of the existing system, we need to have the context of disadvantage front and centre of our analysis and focus on the underlying social and economic causes and drivers of incarceration.<sup>2</sup>

There have now been more than three decades' worth of government reports, inquiries and commissions into the over-representation of disadvantaged groups (including significantly Aboriginal and Torres Strait Islander populations) in Australian prisons and into the *failures* of imprisonment for these groups.<sup>3</sup> Without exception, these reports have pointed to the critical role of addressing the social and health drivers of incarceration, the failure of our existing systems to do that, and need to respond to the criminalisation of poor, marginalised, and colonised populations.

Although breaking cycles of recidivism, disadvantage and incarceration is sometimes described as a 'wicked' policy problem, or an area where there is uncertainty about 'what works', there are – quite aside from the mountains of government reports that outline clear strategic directions in terms of *the kinds* of projects that work, clear examples and case studies both from Australia and internationally that point to approaches that are led by the community and health sectors which can make a profound difference in disrupting entrenched criminal justice system trajectories.<sup>4</sup>

There is also a growing body of more formal research exploring the impact of particular kinds of support.<sup>5</sup> But critically, there is also the expertise of people with experience of incarceration, alongside practitioner expertise. This 'data' is not always as easy to capture as recidivism rates but is absolutely essential in contributing to our knowledge and understanding about 'what works' for people in breaking justice system trajectories.

Governments across Australia frequently note that reducing recidivism and reoffending is a policy priority, and yet, rather than properly investing in community and health, rather than acknowledging the experts who have written submission after submission, and the researchers and practitioners who have for decades been demonstrating how we might do things differently, we continue to spend billions of dollars building new prisons, we continue to spend billions of dollars every year across Australia on locking people up; *knowing* as we do that the experience of incarceration and justice system involvement, *increases* the likelihood of further imprisonment. The point here, is that it is not simply a matter of building an evidence base about what works. There is already an evidence base (including an alarming evidence base about prisons harms). What we are lacking is resourcing and political will.

## STRATEGIES TO REDUCE RECIDIVISM<sup>6</sup>

1. Our starting point for thinking about recidivism is firstly that people with complex disadvantage should have the opportunity to be supported in the community, *rather* than managed in justice system settings. Prison should be used *genuinely* as a last resort, and not as a default response to complex disadvantage.
2. If we are keen to genuinely shift behaviours and reduce recidivism, we need to be very clear that people do not change their behaviour as a consequence of punishment or the threat of punishment; they change it as a consequence of support, care, and connection.
3. When people go to prison, regardless of the length of time they are imprisoned for, they require access to meaningful support, drug and alcohol treatment, mental health support, disability specific support, education, and connection with community when released. At the moment this support is haphazard, non-systemic and often a matter of 'luck' in terms of access.
4. People (all of us! But especially people who have been criminalised for most of their lives) need the opportunity to be viewed and treated in their full humanity- not as somebody who is just an offender or a crim or an inmate or indeed even a patient. People need to be acknowledged as much more than their deficits and need to be seen and worked with- not just in terms of 'offending behaviour' or 'illness'. There is significant desistance research into the importance of the creation of an identity outside of the justice system in reducing recidivism
5. People need holistic, wrap-around, trauma informed, relational casework and outreach support when they leave prison that is genuinely hopeful and compassionate. People need to be able to build trusting relationships over time with workers, who they know that they are going to be in their corner. Support needs to be long term. People who have lifetimes of trauma and incarceration need more than short term support.
6. People need help and support and advocacy navigating complicated and often discriminatory systems post-release which are frequently set up in such a way that failure is much more likely than success.
7. People need somewhere to live when they leave prison. Housing – and the affordable housing crisis is not something any of us can ignore if we are serious about keeping people out of prison. It is now well understood that stable housing on release from a period of incarceration is vital in reducing the risk of re-offending<sup>7</sup>.
8. Pre-release planning and pre-release support is critical in terms of building a sustainable post-release pathway. Wherever possible this support should be conducted by the same community based health or social service organisation that is also providing post-release support.
9. First Nations communities have the answers to First Nations over-incarceration and are the experts in the delivery of community based culturally safe programs. This expertise should be embedded and centred in all strategies to reduce recidivism.

10. People with experience of incarceration are the experts in what is needed post-release. They need to be part of the conversation about service design, delivery and implementation.
11. Access to services – access to health care or support services in prison, and access to services for people leaving prison, should be available to everybody who wants to have support. Services and programs that work to keep people out of prison are frequently not funded to adequately meet demand. Post-release service delivery providers regularly note the numbers of people who access services for the first time and say "I wish you'd been there when I got out the first time". For so many people access to services is a matter of luck; they happened to be in a particular prison; they happened to hear about a particular worker; they happen to be released to a particular geographic region; they happened to be leaving prison at a time when a space was available in a housing program. A huge and systemic difference would be made, if every single person who put their hand up for support was able to receive it at the time when they identified they needed it.

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### ALTERNATIVE JUSTICE STRATEGIES TO REDUCE VICTORIA'S PRISON POPULATION

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There are multiple avenues for reducing Victoria's prison population. It is clear that jailing is failing in most of its stated crime control ambitions. It fails to deter and it fails to rehabilitate. And in so doing, it fails to protect the community in any systemic sense. Although prison is reasonably successful at incapacitation for short periods of time, almost everybody who goes to prison gets out. At the moment almost everybody who goes to prison gets out in a state that is *worse* than what it was when they were first incarcerated. Prison is itself criminogenic. That is, any time in prison *increases* rather than reduces the likelihood of future imprisonment. Recidivism rates around Australia (and in Victoria) show very clearly that prison doesn't work to reduce re-offending. In Victoria, 44% of people will return to prison within two years following release.

There is not one magic 'reform' fix in terms of reducing prison numbers, but there are multiple reforms that will make a significant difference and the Justice Reform Initiative welcomes any opportunity to support government in this regard.

There are some reforms that are required urgently that fall broadly within the purview of evidence based law reform. Raising the Age of Criminal Responsibility is a clear example of a shift that is required immediately. The evidence is clear that 14 is the *minimum* age, developmentally and neurologically, that children could or should be held criminally responsible<sup>8</sup> There are in fact compelling developmental arguments to suggest this age should be higher. The United Nations Committee on the Rights of the Child has pointed to developments and neuroscientific evidence that shows adolescent brains continue to mature beyond teenage years and has therefore 'commend[ed] States Parties to have an even higher minimum age, for instance 15 or 16 years.'<sup>9</sup> Quite aside from the developmental considerations, it is clear that the earlier young people have contact with the justice system, the greater the likelihood of ongoing justice system involvement. Locking up children does not make the community safer.

There is also in Victoria a clear need to urgently reform bail legislation. This is discussed in some more detail below.

Other reform areas that will make a difference in reducing the prisoner population operate

outside of the justice system and in the community. There is for instance a strong research base to suggest that if we were to adequately invest in programs and supports for people leaving prison, that we would be able to have a significant impact on recidivism rates.<sup>10</sup>

A commitment by government to genuinely investing in such services could involve expanding and scaling up programs/services that are either promising, or already have significant evaluation/evidence (for example the work of VACRO, ACSO, Flat Out, Djirra and others in Victoria are already making a significant difference in supporting people build pathways out of the justice system).

There is also evidence about the effectiveness of specialist courts in diverting people from the justice system<sup>11</sup>, the effectiveness of pre-charge and other kinds of diversion<sup>12</sup>, the effectiveness of shifting legislative frameworks in reducing re-offending<sup>13</sup>, specific diversionary programs, including diversionary programs for at risk young people<sup>14</sup> and restorative and transformative justice.<sup>15</sup> There is as noted earlier, not an absence of evidence into alternative approaches. The issue has primarily been an absence of resourcing and political will.

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## FACTORS CONTRIBUTING TO VICTORIA'S GROWING REMAND AND PRISON POPULATIONS

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### SENTENCED POPULATION

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Judges and magistrates have fewer sentencing options since the abolition of suspended sentences and the abolition of Home Detention. There appears to be a trend to harsher sentencing, coinciding with reduced sentencing options available to the judiciary. For instance, the use of imprisonment as a sentencing outcome has increased dramatically for both shop theft, and theft from a motor vehicle between 1 July 2016 and 30 June 2019. These are relatively low level offences which would historically have attracted a higher proportion of community-based orders and a lower proportion of prison sentences.<sup>16</sup>

No two cases are the same. Case presentations are increasingly complex. Judicial officers need the sentencing options, and the sentencing discretion to do justice in each individual case and to respond to the increasing prevalence of the factors discussed above such as mental illness, homelessness and drug dependency.

Reducing recidivism relies heavily on community and health supports. Courts provide a point of crisis intervention –a key intersection. Although they are not support services in themselves, court based support services in both mainstream and specialist courts provide a bridge to community and health support. The Magistrates Court (MCV) has a suite of mainstream and specialist court programs. The two most relevant here are the Bail Support program (CISP, described below, and the Assessment and Referral Court (ARC). ARC is in 5 locations and deals with criminal cases including sentencing. Its purpose is to help people deal with underlying factors contributing to offending. Its focus is on people with a complex mental health presentation. It has been highly successful and we note that the Victoria Mental Health Royal Commission recommended its expansion to all headquarter magistrates courts.

What is now needed is the resourcing to enable expansion and mainstreaming across the state of court programs which reduce the risk re-offending by connecting people to services and supports (housing is fundamental) and supporting them over time.

## REMAND POPULATION

The remand numbers in Victorian prisons are extraordinarily high: 44% of the male prisoner population and 55% of the female prisoner population are unsentenced.

Recent changes (May 2018) to the Victorian Bail Act are a significant issue. The structure and terms of the Bail Act appear to be directly contributing to increased remand numbers. Under Schedule 2 if an indictable offence is committed by an accused person who is already on bail, or summons for an earlier indictable offence, that person must show “compelling reasons” for release. This will apply when both offences are indictable but relatively minor (eg shoplifting). Many cannot demonstrate “compelling reasons”, are remanded in custody and later sentenced to a short term of imprisonment as “time served”. As a result, we are now seeing sentences of imprisonment for offences which would normally have attracted lower penalties, including community- based orders.

Sentencing data for the Magistrates Court shows an increase in the percentage number of cases sentenced to imprisonment (just under 5% to just over 13% from 2005 to mid 2020), and a decrease in the use of Community Corrections orders. The use of the time-served prison sentence appears to be contributing to this (certainly since mid 2018)-driving a higher rate of incarceration.

We believe further reform of the Bail Act is necessary to address this. A reclassification of a number of relatively minor offences, taking them out of the indictable category and therefore not caught by Schedule 2, 1(a) and 1(b), or other restructure for the same purpose, would be a good starting point.

Bail Act reforms that were driven by the intent to keep the community safer, and respond to serious, violent offending, have ended up drawing many more people into incarceration (including significantly women who have not committed serious offences).

As noted by the Centre of Innovative Justice in their recent landmark report into women's over-incarceration; women are carrying 'the burden of reforms intended to address the violent offending of men.'<sup>17</sup>

Restricted access to bail, parole and reduced use of community- based sentencing orders have all resulted in an increase in incarceration, specifically in remand populations.

Laws designed to protect the community are funnelling large numbers of people who are committing low level offences into the justice system.

While the intent of tightening bail laws is to keep the community safe, the criminogenic impact of imprisonment itself must be factored in to any analysis of their utility. The experience of imprisonment (whether this is on remand or as a sentenced prisoner) *increases* the likelihood of re-offending and re-imprisonment. The more people we are sending to prison the less safe we are making the community.

Bail support programs have an important role to play. The Court Integrated Services Program (CISP) at the County and Magistrates Courts is an excellent model. It operates at 20 Magistrates Court locations including all major/headquarter courts. Eligibility criteria are directed at physical or mental illness, drug and alcohol dependency, homelessness and inadequate

family, social or economic support. It aims to reduce the likelihood of reoffending by assistance with access to support services and case managers provide critical support people who are on the program.

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### THE EXPERIENCES OF PEOPLE WHO HAVE INTERACTED WITH THE CRIMINAL JUSTICE SYSTEM, INCLUDING VICTIMS

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The Justice Reform Initiative recognises that there is a critical need to both recognise and elevate the experience of victims in the criminal justice system. One of our NSW Patrons is Ken Marslew who has been one of the leading national advocates for victims of crime and their families and through his work with 'Enough is Enough' is a strong proponent of restorative justice principles.

Key issues of consideration with regard to the role of victims in the context of the current system of criminal justice system include:

- Incarceration fails many victims of crime in the same way that it fails the broader the community; that is, it does not operate to keep the community safe because the experience of incarceration in fact *increases* the likelihood of future offending
- Victims and offenders do not exist in two separate neat categories (the vast majority of women in prison for instance, are themselves victims of crime; the vast majority of crime occurs between people who know each-other)
- Most victims do not want their own experience of crime to be experienced by anybody else and are keen for responses to crime that reduce the likelihood of the crime recurring
- Consideration should be given where appropriate for processes for repairing harm that exist outside of the adversarial court process (restorative and transformative modes of justice)

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### HOW BEST TO ENSURE JUDGES AND MAGISTRATES ARE WELL EQUIPPED TO SENTENCE AND DEAL WITH OFFENDERS, AND TO TAKE UP POSITIONS IN SPECIALIST COURTS

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Magistrates and judges must have alternative options available to them so that they are able to shift our reliance on incarceration when it is not warranted.

Sentencing is one of the most important functions of judicial officers. The community must have confidence that sentencing is not only impartial but is well-informed. The necessary set of skills and attributes for judges and magistrates is well understood; legal knowledge, sound temperament, fairness, patience, personal integrity and so on. The community is entitled to expect that the fundamental qualities will come with the person appointed to judicial office. But there is an important educational role for courts and judicial colleges to play in the identification and development of specific skills for the role, such as good clear communication and an informed awareness of the worlds from which those appearing before them so often come and the nature of the issues confronting them. Courts have done much on that front (awareness of Indigenous cultures is an example) and will need to keep doing so.

Specialist courts (Drug Courts, Koorie Courts, Family Violence Courts and others) are playing an ever-more prominent role. For good reason they are now entrenched in the justice system. They have a key role to play in reducing recidivism. They have brought new techniques to

judicial practice- therapeutic jurisprudence and “solution-focused” judging amongst them. Judicial officers are expected to deploy the relevant skills and techniques to make specialist courts succeed. They should have the judicial education/training to help them develop those skills, to enable them to most effectively engage people appearing before them with the programs and resources intended to provide support, and thereby lower the risk of re-offending. Australia’s formal judicial education system is mature and well respected by the judiciary. Courts provide in-house professional development. Victoria’s Judicial College (JVC) has a central role to play, a reputation for excellence and works in very close collaboration with the judiciary.

For example, JCV is responsible for developing and delivering multi-disciplinary training for specialist family courts in Shepparton, Ballarat, Moorabin, Frankston and Heidelberg. This training involves a departure from traditional adversarial modes of justice and a move to a collaborative and problem-solving approach.

Provided the resources are available, there are good reasons to be confident that this combination of approaches can ensure that judges and magistrates are well equipped to take up positions in specialist courts.

<sup>1</sup> <https://www.aihw.gov.au/reports/prisoners/health-australia-prisoners-2018/summary>; For example see literature reviewed in <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#prisoner-characteristics-australia>; <https://www.aihw.gov.au/reports-data/population-groups/prisoners/overview>; <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/2-context/social-determinants-of-incarceration/>

<sup>2</sup> For example, see analysis in Cunneen, Baldry, Brown, Schwartz, Steel and Brown (2013) *Penal Culture and Hyperincarceration: The Revival of the Prison*, Routledge.

<sup>3</sup> For example, as detailed in <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/2-context/social-determinants-of-incarceration/>

<sup>4</sup> Sotiri, M (2020) Building Pathways Out of the Justice System: Supporting Women and Reducing Recidivism, in Precedent Issue 161, November/December 2020

<sup>5</sup> McNeill, F., Farrall, S., Lightowler, C., and Maruna, S. (2012) Re-examining evidence-based practice in community corrections: beyond ‘a confined view’ of what works. *Justice Research and Policy*, 14 (1) UNSW Sydney.

<sup>6</sup> See: WEAVE, *Creating Futures* (Evaluation report, April 2020); Women’s Justice Network, *Adult Mentoring Program* (Evaluation report, 2016); Community Restorative Centre, *Alcohol and Other Drugs Transition Program* (Evaluation report, 2016); Sotiri, M (2016) Churchill Fellowship report; M Sotiri and S Russell, ‘Pathways home: How can we deliver better outcomes for people who have been in prison?’, *Housing Works*, Vol. 15, No. 3, 2018, 41; M Borzycki and E Baldry, ‘Promoting integration: The provision of prisoner post-release services’, *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology: Canberra, No. 2, 2003; J Gilbert and B Elley, ‘Reducing recidivism: An evaluation of the pathway total reintegration programme’, *New Zealand Sociology*, Vol. 30, No. 4, 2015, 15–37; B Angell, E Matthews, S Barrenger, A Watson and J Draine, ‘Engagement processes in model programs for community re-entry from prison for people with serious mental illness’, *International Journal of Law and Psychiatry*, Vol. 37, 2014, 490–500; B Hunter, A Lanza, M Lawlor, W Dyson and D Gordon, ‘A strengths-based approach to prisoner re-entry: The fresh start prisoner re-entry program’, *International Journal of Offender Therapy and Comparative Criminology*, Vol. 60, No. 11, 2016, 1298–314; D Padgett, L Gulcur and S Tsemberis, ‘Housing first services for people who are homeless with co-occurring serious mental illness and substance abuse’, *Research on Social Work Practice*, Vol. 16, No. 1, 2006, 74–83; S Kendall, S Redshaw, S Ward, S Wayland and E Sullivan, ‘Systematic review of qualitative evaluations of re-entry programs addressing problematic drug and alcohol use and mental health disorders amongst people transitioning from prison to communities’, *Health and Justice*, Vol. 6, No. 4, 2018.

<sup>7</sup> Martin, C., Reeve, R., McCausland, R., Baldry, E., Burton, P., White, R. and Thomas, S. (2021) *Exiting prison with complex support needs: the role of housing assistance*, AHURI Final Report No. 361, Australian Housing and Urban Research Institute Limited, Melbourne, <https://www.ahuri.edu.au/research/final-reports/361>, doi:10.18408/ahuri7124801.

<sup>8</sup> see Cunneen C (2017). *Arguments for Raising the Minimum Age of Criminal Responsibility*. Comparative Youth Penalty Project. Sydney: University of New South Wales. <http://cypp.unsw.edu.au/node/146>; Cunneen C, Russell S & Schwartz M (2021). Principles in diversion of Aboriginal and Torres Strait Islander young people from the criminal jurisdiction, *Current Issues in Criminal Justice*, 33: 170-190; Farmer E (2011). The age of criminal responsibility: Developmental science and human rights perspectives, *Journal of Children’s Services*, 6: 86-95.

<sup>9</sup> United Nation Convention on the Rights of the Child (2019). *General Comment No. 24 (2019) on Children’s Rights in the Child Justice System*.

<sup>10</sup> See Sotiri, McCausland, Reeve, Phelan and Byrnes (forthcoming) ‘They’re there to support you and help you, they’re not there to judge you’ Breaking the cycle of incarceration, drug use and release: Evaluation of the Community Restorative Centres AOD and

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Reintegration Programs; NSW Health Report (please note, I am happy to provide a copy of this un-released report to the committee); Semczuk, M; Shakeshaft, A; Knight, A; Maple, M; Mckay, K; Shakeshaft, B (2012) An Analysis of the Relationship between a community based program for young people with multiple and complex needs and the prevalence of crime, NDARC Monograph No. 65; see also references at footnote 5

<sup>11</sup> <https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/11-access-to-justice-issues/specialist-courts-and-diversion-programs/>

<sup>12</sup> [https://www.bocsar.nsw.gov.au/Pages/bocsar\\_topics/Diversion.aspx](https://www.bocsar.nsw.gov.au/Pages/bocsar_topics/Diversion.aspx);

<https://whatworks.college.police.uk/toolkit/Pages/Intervention.aspx?InterventionID=65>; <https://www.eugene-or.gov/4508/CAHOOT>

<sup>13</sup> <https://www.nber.org/papers/w28600>; <https://www.washingtonpost.com/dc-md-va/2021/03/26/baltimore-reducing-prosecutions/>;  
[https://www.nber.org/system/files/working\\_papers/w28600/w28600.pdf](https://www.nber.org/system/files/working_papers/w28600/w28600.pdf)

<sup>14</sup> Semczuk, M; Shakeshaft, A; Knight, A; Maple, M; Mckay, K; Shakeshaft, B (2012) An Analysis of the Relationship between a community based program for young people with multiple and complex needs and the prevalence of crime, NDARC Monograph No. 65

<sup>15</sup> <https://www.churchilltrust.com.au/project/to-explore-victim-centred-restorative-justice-programs-for-sexual-assault-and-personal-violence/>

<sup>16</sup> <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics>

<sup>17</sup> <https://cij.org.au/cms/wp-content/uploads/2021/07/leaving-custody-behind-issues-paper-july-2021-.pdf>