Human Rights Law Centre

Reimagining and fixing Victoria's broken criminal legal system

Submission to the Legal and Social Issues Committee's Inquiry into Victoria's Criminal Justice System

24 August 2021

Prepared by Monique Hurley, Amala Ramarathinam and Meena Singh at the Human Rights Law Centre.

Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

E: monique.hurley@hrlc.org.au
W: www.hrlc.org.au

Follow us at http://twitter.com/rightsagenda

Join us at www.facebook.com/HumanRightsLawCentreHRLC/

Contents

1. Executive Summary

1.1 The Human Rights Law Centre makes this submission to the Legal and Social Issues Committee's Inquiry into Victoria's criminal justice system (the **Inquiry**).

1.2 The focus of this submission is on the terms of reference that focus on what the Victorian Government can do to address Victoria's growing prison population, because the state is currently in the midst of a mass imprisonment crisis.

1.3 The prison population has exploded and increased by 58 per cent over the last ten years.[1] The number of women in Victorian prisons has more than doubled over the past decade[2] and, in 2021, over half the women in prison were unsentenced and have not been found guilty of the alleged offending they were arrested for.[3]

1.4 Due to the ongoing impacts of colonisation, systemic racism and discriminatory policing, the number of Aboriginal and Torres Strait Islander people in prisons has nearly tripled over the last ten years.[4] Aboriginal and Torres Strait Islander people now represent 10 per cent of the prison population compared to six per cent in 2010.

1.5 No child belongs in prison, yet the number of children behind bars has increased to 623 children in prison between July 2019 and July 2020 from 560 in the previous year; which is despite the impacts of the COVID-19 pandemic and a decrease nationally in the number of children in prison over the same period.[5]

1.6 This spiralling growth in prison populations has happened during a time period when the rates of recorded offences and criminal incidents have remained relatively flat.[6]

1.7 Years of 'tough on crime' politics have got us to this point, and we now have a criminal legal system which turbo-charges injustice. Increasingly, prisons are being used to as a "catchall solutions to social problems"[7] and serving as warehouses for people experiencing poverty, family violence, housing instability, mental health conditions and addiction issues.

1.8 This Inquiry presents an opportunity to reimagine and create a fairer legal system for everyone. This submission makes a number of recommendations to help achieve this and key recommendations include:

(a) **Closing prisons rather than building new ones,** with the money allocated to building prisons invested in support services that divert people away from the legal system.

(b) **Fixing Victoria's broken bail laws** to reduce the number of people – particularly women - being pipelined in and out of prisons on remand.

(c) Reimagining our youth legal system, which starts with **raising the age of criminal responsibility** from ten to at least 14 years old with no exemptions.

[1] Department of Justice and Community Safety - Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 (December 2020) www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20.

[2] Crime Statistics Agency, *Characteristics and offending of women in prison in Victori*a, 2012-2018, November 2019.

[3] Department of Justice and Community Safety - Corrections Victoria, Annual Prisoner Statistical Profile 2009-10 to 2019-20 (December 2020) www.corrections.vic.gov.au/annual-prisoner-statistical-profile-2009-10-to-2019-20.

[4] Ibid.

[5] Australian Institute of Health and Welfare, *Youth Justice in Australia 2019-2020*, Australian Government, data table s80b; see also Australian Institute of Health and Welfare, *Youth justice in Australia 2018-2019,* Australian Government, data table s80B.

[6] Crime Statistics Agency, Recorded Offences: www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-offences-2; Crime Statistics Agency, Recorded Criminal Incidents: www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/recorded-criminal-incidents-2

[7] Rachel Kushner, Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind, The New York Times magazine (17 April 2019).

2. Recommendations

2.1 The Inquiry should recommend that the Victorian Government work towards closing, rather than opening new and expanding current prisons. Instead, this money should be allocated to building new public homes and investing in services that divert people away from the criminal legal system.

2.2 The Inquiry should recommend that bail laws be reformed by:

(a) Repealing the reverse-onus provisions in the *Bail Act 1977* (Vic), particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and Schedules 1 and 2).

(b) Creating 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. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.

(c) Repealing the offences of committing an indictable offence while on bail (section 30B), breaching bail conditions (section 30A) and failure to answer bail (section 30).

2.3 The Inquiry should recommend that parole laws be reformed by:

(a) Creating a presumption that an application for parole will automatically be made at the earliest eligibility date. This should be accompanied by a requirement that, when mandated programs have not been completed due to their unavailability in prison, this cannot be a bar to parole being granted.

(b) Repealing regulation 5 of the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) which exempts the Parole Board from the operation of the Charter. This should be accompanied by repealing section 69(2) of the *Corrections Act 1986* (Vic) which currently provides that, in exercising its functions, the Parole Board is not bound by the rules of natural justice.

(c) Repealing section 77C of the *Corrections Act 1986* (Vic), which provides the Adult Parole Board with 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, and replacing it with a new section that provides time served on parole, prior to a parole order being cancelled, counts as time served.

(d) Repealing section 460(7) of the *Children, Youth and Families Act 2005* (Vic), which provides that in the event a child's parole is cancelled, and unless the Youth Parole Board otherwise orders, no part of the time between the person's release on parole and recommencing to serve the unexpired portion of the sentence is regarded as time served in respect of the sentence, and replacing it with a new section that provides that time served on parole, prior to the parole order being cancelled, counts as time served.

2.4 The Inquiry should recommend that the Victorian Government properly resource an effective and independent police oversight body.

2.5 The Inquiry should recommend a review of the *Summary Offences Act 1966* (Vic) with a view to decriminalising minor offending.

2.6 The Inquiry should recommend the decriminalisation of the use of cannabis and the possession of cannabis for personal use and replace it with a public health response.

2.7 The Inquiry should recommend greater investment in culturally safe family violence prevention and legal services to stop women who have survived family violence being forced into the criminal legal system.

2.8 The Inquiry should recommend the repeal of mandatory sentencing provisions.

2.9 The Inquiry should recommend that the requirement for police to consent to diversion be removed from section 59 of the *Criminal Procedure Act 2009* (Vic).

2.10 The Inquiry should recommend that people in prison be better protected from cruel and degrading in prisons treatment by:

(a) Stopping the use of solitary confinement;

(b) Ending routine strip searching; and

(c) Funding a National Preventative Mechanism (**NPM**) or multiple NPMs to implement Victoria's obligations to prevent torture and cruel, inhuman or degrading treatment or

punishment in all places of detention pursuant to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**OPCAT**).

2.11 The Inquiry should recommend that we reimagine the youth legal system by:

(a) Amending section 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the age of criminal responsibility from ten to at least 14 years old.

(b) Amending the *Children, Youth and Families Act 2005* (Vic), *Sentencing Act 1991* (Vic) and *Bail Act 1977* (Vic) to prohibit:

(i) children under the age of 16 years being sentenced to, or remanded in, prison;

(ii) children under the age of 18 years being sentenced to adult imprisonment; and

(iii) the transfer of children under the age of 18 years from youth justice custody to an adult prison.

(c) Investing in Aboriginal and Torres Strait Islander-designed and led diversionary programs and alternatives to prison that meet the needs of Aboriginal and Torres Strait Islander children.

2.11.1 Amending the Victorian statutory Children's Court diversion scheme to maximise opportunities for children to obtain diversion. This should include:

(a) introducing a legislative presumption in favour of diversion;

(b) removing the requirement for prosecutorial consent to diversion in section 356D(3)(a) of the *Children, Youth and Families Act 2005* (Vic);

(c) repealing section 356F of the *Children, Youth and Families Act 2005* (Vic), which sets out the matters a prosecutor must consider when consenting to diversion; and

(d) reviewing current exclusions under section 356B of the *Children, Youth and Families Act 2005* (Vic) for certain road safety offences with a view to repealing exclusions for less serious road safety offences.

3. Victoria does not need more prisons

3.1 In the 2019/2020 budget, the Victorian Government announced a $1.8 billion expansion of prisons across Victoria.[8]

3.2 Rather than building more prisons, this money should instead be invested in services that divert people away from the criminal legal system and address the underlying causes of people's offending so that they do not offend again.

3.3 Victoria does not need the new maximum-security prison that is under construction at Chisholm Road in Lara next to the existing prison precinct which includes Barwon and Marngoneet prisons.[9]

3.4 We also do not need to expand the Dame Phyllis Frost women's prison by 106 new cells at a cost of $188.9 million.[10]

3.5 The Human Rights Law Centre is part of the Homes not Prisons campaign (currently led by Flat Out), which is calling on the Victorian Government to stop the expansion of the Dame Phyllis Frost women's prison and re-allocate the money to public housing and support for criminalised women and their children.[11]

3.6 Discriminatory policing and unfair laws continue to funnel increased numbers of people into prisons. A new prison just enables this to happen at even higher rates.[12] The COVID-19 pandemic has shown that it is possible to reduce imprisonment rates, with the number of women detained at the Dame Phyllis Frost women's prison dropping for the first time in decades at the height of the pandemic in June 2020.[13]

---

[8] Build Homes Not Prisons: homesnotprisons.com.au/.

[9] Engage Victoria, Chisholm Road Prison Project, engage.vic.gov.au/chisholmroadprison.

[10] Premier of Victoria, Construction Set To Start On Women's Prison Upgrade (Media release) 19 March 2021, www.premier.vic.gov.au/construction-set-start-womens-prison-upgrade.

[11] Build Homes Not Prisons: homesnotprisons.com.au/.

[12] Six months after the Ravenhall prison was opened, its 1000-person capacity was filled: see Chris Vedelago and Royce Millar, *Stack and rack: Victoria's newest prison already full and set to expand again, The Age* (7 July 2019) accessible: www.theage.com.au/national/victoria/stack-and-rack-victoria-s-newest-prison-already-full-and-set-to-expand-again-20190706-p524qr.html.

[13] Department of Justice and Community Safety - Corrections Victoria, Monthly time series prisoner and offender data (June 2021) www.corrections.vic.gov.au/monthly-time-series-prisoner-and-offender-data.

3.7 Instead of investing in opening new and expanding current prisons, the Victorian Government should work towards reducing the number of people in Victorian prisons long term by enacting the reforms recommended by this submission.

Recommendation: The Inquiry should recommend that the Victorian Government work towards closing, rather than opening new and expanding current prisons. Instead, this money should be allocated to building new public homes and investing in services that divert people away from the criminal legal system.

4. Broken bail laws and growing remand rates

The issue

4.1 People suspected or accused of a crime are innocent until proven guilty. Coercive powers to arrest and detain people suspected or charged with a crime should only be used where necessary and as a measure of last resort.

4.2 Bail is the system that determines whether someone arrested for an alleged crime is released from custody on the promise that they will go to court at a later date to face the criminal charges alleged against them.

4.3 Victoria's bail laws have become increasingly punitive and are arguably the most onerous in Australia.[14] This is, in part, due to the bail reforms introduced by the Victorian government in 2018. The reforms were intended to target men, but are impacting women experiencing poverty and Aboriginal and Torres Strait Islander women the most.

4.4 This is because of:

(a) The reverse onus provisions, which require a person to show that 'compelling reasons' or 'exceptional circumstances' exist for them to be released on bail. If a person is unable to meet the applicable legal test, then bail must be refused.

(b) The broad range of offending captured by these reverse onus provisions. Previously, the 'exceptional circumstances' test applied only to the most serious offences. Now, if people engage in repeat, low-level wrongdoing – like shoplifting – they can be held to the same standard as people accused of the most violent and dangerous crimes.

4.5 Alarmingly, reverse onus provisions also apply to children. Children should never be subject to such provisions which can make time in prison the default setting. This is especially the case given that children who are refused bail are exposed to the harm of the prison environment in circumstances where, overwhelmingly, they will ultimately not receive a custodial sentence.[15]

How did we get here?

4.6 The Coghlan Review of Victoria's bail laws (the Coghlan Review) was commissioned following the Bourke Street tragedy where six people were killed and at least 30 were injured by James Gargasoulas a few days after he was released on bail. The first tranche of reforms recommended by the Coghlan Review have been implemented, but none of the second tranche have been actioned so far.

4.7 The impact of the reforms has made an already unfair system for granting bail even more punitive.

4.8 The reforms were intended to make it harder for people to get bail where they were applying for consecutive bails and recommended that reverse onus provisions apply to a broader range of offending. A new category of Schedule 2 Offences was created, and it now also includes allegedly committing an indictable offence whilst on bail[16] (or on summons, a community corrections order or parole for another indictable offence). Schedule 2 Offences also include offences against the *Bail Act 1977*, including failure to answer bail and contravening bail conditions.

4.9 The result of these reforms is that people who are accused of engaging in repeat, low-level wrongdoing can be held to the same bail standard as people accused of the most violent crimes. These are likely to be offences that are connected to housing insecurity and economic instability. The current bail system makes it very difficult for people in these circumstances to be granted bail

[14] Dr Marilyn McMahon, 'No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention', (August 2019) Department of Parliamentary Services, Parliament of Victoria, 12.
[15] Sentencing Advisory Council, Children held on remand in Victoria, 42.
[16] *Bail Act 1977* (Vic), section 30A.

and so they are needlessly detained on remand, even though they are unlikely to ever receive a prison sentence if they are found guilty of the underlying offences.

4.10 When on remand, people in prison are often unable to access targeted programs that could address the underlying issues that may have contributed to their offending.

4.11 Compounding this, the treatment of breaches of bail conditions means people can quickly escalate to far harder bail tests even though breaches are minor or technical in nature and result from people's disadvantage.

Impact of the current bail laws on women

4.12 Recent data from Corrections Victoria shows that over half the women in Victorian prisons are unsentenced for the alleged offending that they were arrested for. [17]

4.13 More women are being denied bail, not because they pose a risk to the community, but because they themselves are at risk – of family violence, homelessness, economic disadvantage and mental illness. [18] These intersecting forms of disadvantage make it harder for women to put forward a case in favour of bail, which often makes time behind bars the default setting. [19]

4.14 This results in the injustice of women typically spending short periods in prison on remand and often pleading guilty and receiving a 'time served' sentence. This raises concerns, as identified by the Sentencing Advisory Council, about whether the increasing likelihood of receiving a time served prison sentence might inappropriately encourage some people on remand to plead guilty in the hope of being released earlier than if they proceeded to trial. [20]

4.15 For those experiencing family violence, their disadvantage is compounded because the bail laws punish rather than help address their circumstances. In a review of their case files, the Women's Legal Service in Victoria found almost 60 per cent of their clients who were named as the respondents to police intervention orders had been incorrectly identified as the perpetrator. [21]

4.16 Djirra, the Aboriginal community controlled specialist family violence service in Victoria, considers that the rate of misidentification for Aboriginal and Torres Strait Islander women is likely to be higher. [22] This is consistent with a recent study by Australia's National Research Organisation for Women's Safety, which highlighted that perpetrators of family violence against Aboriginal and Torres Strait Islander women, in particular, "regularly engage" in systems abuse, which includes seeking out protection orders against their victims as a form of manipulation. [23]

4.17 Schedule 2 Offences include Family Violence Intervention Order (**FVIO**) contraventions. In practice, this means that FVIO contravention charges are assessed by reference to, at least, 'compelling reasons'. Second and subsequent FVIO breaches (or a less serious crime in the context of a previous FVIO breach) may trigger the 'exceptional circumstances' test. If women are being misidentified as perpetrators in FVIO matters and then being subsequently charged with breaches of orders, they can be quickly exposed to escalating bail thresholds.

Impact of the current bail laws on Aboriginal and Torres Strait Islander people

4.18 In Victoria, the number of Aboriginal and Torres Strait Islander women in prison has increased significantly and peaked at 14 per cent of the female prison population in 2019. By virtue of this, Aboriginal and Torres Strait Islander women are also over-represented in the remand population.

---

[17] Corrections Victoria, *Prisoner and Offender Statistics*, (2021) State Government of Victoria, accessible: www.corrections.vic.gov.au/prisons/prisoner-and-offender-statistics.
[18] Russell et al., *A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria* (2020) Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society: Melbourne.
[19] Russell et al., *A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria* (2020) Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society: Melbourne.
[20] Sentencing Advisory Council, Time served prison sentences in Victoria (February 2020) 13.
[21] Emma Younger, *When police misjudge domestic violence, victims are slapped with intervention order applications* (15 August 2018) *ABC News*, accessible: www.abc.net.au/news/2018-08-15/domestic-violence-victims-mistaken-for-perpetrators/10120240.
[22] Djirra, Submission to the Parliamentary Inquiry into Family, Domestic and Sexual Violence (July 2020) 29, accessible; www.aph.gov.au/DocumentStore.ashx?id=186ba985-fdc8-4df9-a58c-bec3b2a6bf02&subId=690999.
[23] Marcia Langton, Kristen Smith et al., *Improving family violence legal and support services for Aboriginal and Torres Strait Islander women*, (December 2020) Australia's National Research Organisation for Women's Safety, 69, accessible: www.anrows.org.au/project/improving-family-violence-legal-and-support-services-for-indigenous-women/.

89.2 per cent of Aboriginal and Torres Strait Islander women entering prisons are unsentenced on reception.[24]

4.19 The death of Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman Veronica Nelson last year illustrates the dangerous application of the current bail laws.[25] Ms Nelson was arrested and taken into custody for shoplifting-related offences. Due to the escalating impacts of the reverse onus provisions, the 'exceptional circumstances' test was applied during her bail hearing, even though the alleged offending was minor. Ms Nelson was refused bail and remanded at the Dame Phyllis Frost women's prison, where she died in custody. Her inquest will be held next year.

4.20 The current bails laws set up a system that makes it very hard for many Aboriginal and Torres Strait Islander women to succeed. Bail conditions imposed by decision makers frequently fail to properly take into account cultural and practical considerations.

4.21 The Australian Law Reform Commission has highlighted that bail conditions, such as curfews, can restrict people from contacting their networks and performing cultural responsibilities.[26] Aboriginal and Torres Strait Islander women can also be less able to comply with bail conditions where they do not have culturally appropriate supports — particularly when they might be experiencing family violence and have limited control over their own security, living arrangements and daily choices.[27]

4.22 While section 3A of the *Bail Act 1977* requires that a person's "Aboriginality" - including their cultural background, ties to extended family or place and other relevant cultural issues or obligations - be considered when making a decision about bail, this does not appear to have had the impact of reducing the number of Aboriginal and Torres Strait Islander people being detained on remand. Since the introduction of the provision in 2010, the percentage and number of Aboriginal and Torres Strait Islander people – particularly women – on remand has continued to rise. According to the Australian Law Reform Commission, section 3A is not well understood and is underutilised.

Impact of the current bail laws on children

4.23 A high number of children in prison are detained in prison on remand, with the number of unsentenced children on remand on an average day in Victoria doubling between 2010 and 2019, from 48 to 99 children.[28]

4.24 Children should never be subject to reverse-onus bail provisions that only serve to entrench children in the criminal legal system.

4.25 Reverse onus provisions flip the usual process for granting bail on its head; instead of children being afforded a presumption in favour of bail, reverse onus provisions mandate a presumption that children, in certain circumstances, will not be granted bail unless they satisfy the court otherwise.

4.26 In practice, this means that a child who is charged with committing a theft while on bail in relation to another alleged theft must be remanded into custody unless they can convince the bail decision-maker that there is a 'compelling reason' why they should be granted bail.

4.27 As found by the Commissioner for Children and Young People (**CCYP**), "aspects of the bail system create barriers to Aboriginal children and young people being granted bail and complying with bail conditions, exposing them to damaging custodial remand environments".[29]

4.28 This is because children who are refused bail are exposed to a custodial environment, which places them at further risk of stigmatisation and increased likelihood of experiencing physical and

---

[24] Corrections Victoria, Annual Prison Statistical Profile 2019-2020, (2021) State Government of Victoria, Table 2.3: Aboriginal and Torres Strait Islander Prisoner Receptions, By Sex and Legal Status on Reception, accessible: Annual Prisoner Statistical Profile 2009-10 to 2019-20.

[25] Victorian Aboriginal Legal Service, *Coronial Inquest into the death of Victoria Marie Nelson to examine healthcare in Victorian prisons and bail laws* (29 March 2021) accessible: www.vals.org.au/coronial-inquest-into-death-of-veronica-marie-nelson-to-examine-healthcare-in-victorian-prisons-and-bail-laws/.

[26] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* (2017), Australian Government, Chapter 2: Bail and the Remand Population.

[27] Djirra, Submission to the Royal Commission into Victoria's Metal Health System (July 2019) accessible: djirra.org.au/wp-content/uploads/2019/07/Djirras-Submission-to-the-Royal-Commission-into-Victorias-Mental-Health-System_final.pdf.

[28] Sentencing Advisory Council, Children Held in Remand in Victoria Report (2020).

[29] Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (June 2021) 451.

psychological harm.[30] They experience disruptions to their family life, social and emotional development, education and employment. These factors are exacerbated for Aboriginal and Torres Strait Islander children.[31]

4.29 Further, there is "no evidence that harsher bail laws reduce youth crime, but there is an abundance of evidence that creating a presumption against bail means more children behind bars for behaviour that a court has not even found them guilty of."[32]

4.30 This has been the case in Victoria, with the changes to the bail laws in 2017 and 2018 triggering an increase in the number of children detained on remand.[33]

4.31 The most recent Sentencing Advisory Council's report hypothesised that amendments to the *Bail Act 1977* made in 2018, and specifically the introduction of reverse onus provisions, "would probably have led to further increases in the number of children held on remand, although this is unconfirmed by data at this stage."[34]

4.32 The Victorian community is not safer for the application of reverse onus provisions to children. They instead result in children entering a cycle of imprisonment and reoffending. Reoffending rates are higher where children have previously been sent to prison, and this escalates the more contact that children have with the system.[35]

4.33 Repealing the reverse onus provisions would create a fairer system for granting bail to children by allowing bail decision-makers to adopt a child centred approach and give due regard to principles such as using custody as a last resort and acting in the best interests of the child.[36]

4.34 We support the repeal of the reverse onus bail provisions for everyone in prison, and particularly for children.

Recommendations: The Inquiry should recommend that bail laws be reformed by:

(a) Repealing the reverse-onus provisions in the *Bail Act 1977* (Vic), particularly the 'show compelling reason' and 'exceptional circumstances' provisions (sections 4AA, 4A, 4C, 4D and Schedules 1 and 2).
(b) Creating 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. This should be accompanied by an explicit requirement in the Act that a person may not be remanded for an offence that is unlikely to result in a sentence of imprisonment.
(c) Repealing the offences of committing an indictable offence while on bail (section 30B), breaching bail conditions (section 30A) and failure to answer bail (section 30).

5. Broken parole laws and a bloated prison population

The issue

5.1 The parole laws in Victoria have made it increasingly difficult for people to access parole and fulfil their parole conditions. This is, in part, due to the reforms following the Callinan review of the parole system in Victoria (the Callinan Review). Like the bail reforms, the parole reforms were designed to ensure that people who had committed very serious crimes were subject to a closer scrutiny before being granted parole. The reforms have, however, had a disproportionate impact on women experiencing poverty and Aboriginal and Torres Strait Islander women.

---

[30] M Ericson and T Vinson, Young people on remand in Victoria: balancing individual and community interests, Jesuit Social Services, Richmond, 2010, 18–20.
[31] Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (June 2021), 455.
[32] Change The Record, *Queensland youth justice 'reform' a dangerous step backwards for children and the community*, (10 February 2021), accessible: changetherecord.org.au/change-the-record/posts/queensland-youth-justice-reform-a-dangerous-step-backwards-forchildren-and-the-community.
[33] McMahon, 'No bail, more jail?' 1; K Derkley, Lawyers warn of bail crisis, Law Institute Journal, 2018.
[34] Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes,* (September 2020) State of Victoria, [1.5].
[35] Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria,* (2016) State of Victoria, chapters 4 and 5.
[36] Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (June 2021) 462.

5.2 The parole laws have made it harder for people to access parole because:

5.3 People in prison must make an application to be considered for release on parole. There is no automatic date where release on parole may be considered, the onus rests with the individual.

5.4 To be eligible for parole, people must complete certain programs while in prison. There has, however, been limited availability of pre-parole programs.

5.5 People must also demonstrate that they have access to stable and secure housing if released on parole. This punishes people without access to housing instead of supporting people to find a safe and secure home.

5.6 People who are released on parole also need to meet a number of parole conditions and face disproportionate punishment if they do not meet those conditions. This is problematic because:

5.7 Strict parole conditions set people up to fail. Inflexible parole conditions can be hard to meet and increase the likelihood of people committing technical breaches, detracting from their ability to engage with the rehabilitative functions of parole.

5.8 People face overly punitive and harsh punishment for parole breaches, which can see them funnelled back into prison to serve sentences longer than what they were sentenced to.

How did we get here?

5.9 The Callinan Review was commissioned by the Victorian Government after the rape and murder of Jill Meagher by Adrian Bayley, who was on parole at the time of this offending. The Callinan Review called for reforms to make it more difficult to secure parole, particularly for "potentially dangerous parolees."[37] The reforms that followed made it more difficult for all people in prison to access parole.

5.10 The Callinan Review made 23 recommendations about Victoria's parole system. A 2016 review by the Victorian Auditor-General's Office found that 22 of the 23 recommendations had been responded to with reforms, and the one other recommendation had partly been responded to with reforms.[38]

5.11 Following the Callinan Review, the onus for making an application for parole has been placed onto the individual applicant. Previously, the Parole Board would initiate consideration for parole, even for "serious offenders".[39] This places the burden on the individual person to navigate the parole laws and, in effect, has abrogated the State's responsibility for advance planning and preparation for parole applications.

5.12 Further, those who are granted parole are often faced with a strict set of parole conditions. Just prior to the release of the Callinan Review, the Victorian Government passed legislation to make the breach of parole conditions a criminal offence. Victoria Police can now arrest, detain and charge people who breach parole, with a penalty of up to three months imprisonment.[40] This results in people being funnelled back to prison for what can be technical breaches of their parole, and with people being charged with another separate criminal offence. A technical breach could include minor behaviour such as missing curfew by an hour, not reporting to Community Corrections or not attending a medical assessment.

5.13 Notably, if the Adult Parole Board cancels a person's parole, none of the time that the person spent on parole is counted as part of their sentence, unless the Board directs otherwise.[41] This means that people who have their parole cancelled have to re-serve that time in prison, as well as whatever time remains on their sentence.

5.14 Alarmingly, 54 per cent of people who had their parole cancelled did not have their time spent on parole counted towards their sentence. The most common reason for denial was because the person "relapsed into drug use".[42] Instead of helping and supporting people who experience issues with substance use, people are being sent to prison to serve more time than they were originally sentenced.

---

[37] Ian Callinan AC, *Review of the Parole System in Victoria*, (2013) Department of Justice, Corrections Victoria, see measure 7.
[38] Victorian Auditor-General's Office, *Administration of Parole* (February 2016), Appendix B1.
[39] Parliamentary Library Research Service, *Research Brief: Corrections Amendment (Parole Reform) Bill 2013*, (2013) Parliament of Victoria.
[40] Corrections Victoria, *Victoria's parole system* (2020) State Government of Victoria.
[41] Adult Parole Board, *Annual Report 2019-2020* (2020) State Government of Victoria, 27.
[42] Ibid.

5.15 This is not the case in Queensland, where time spent on parole is generally counted as time served in circumstances where a person's parole is later cancelled (see section 211 of the *Corrective Services Act 2006* (Qld)) which provides that the time a person spends on parole can count as time served.

5.16 The current parole system is resulting in fewer people being released on parole.[43] This means more people are serving their full sentence and being released from prison with no support services.[44] This is contributing to the increase in the prison population and also increases the likelihood of people re-offending post-release.[45]

5.17 Parole reform needs to be complemented by adopting a 'throughcare' model to help people exiting prison transition back into the post-prison world. The throughcare model provides for the coordinated provision of support and services to a person, during their time in prison and continuing for a substantial time as they reintegrate back into the community.[46]

Impact of the parole system on women

5.18 The number of women being granted parole has fallen dramatically over the past decade, both as a percentage of women released and in overall numbers. In 2006/2007, 26 per cent of women released from prison were released on parole.[47] By 2018/2019, only 4 per cent of women released from prison in Victoria were released on parole.[48]

5.19 Numerous barriers prevent women being able to access parole once they have served their non-parole period. These include lack of access to stable accommodation and the unavailability of programs in custody. The Callinan Review recommended that parole only be granted if a person has undertaken programs which either the Court or Corrections ordered, directed or believes that the person should engage with. This is particularly problematic given the lack of programs available for women in prison to access, and that women may not receive the necessary support to apply and access the programs that are available.[49]

5.20 The Adult Parole Board also considers access to suitable and stable accommodation necessary to be granted parole.[50] This condition can be a challenging barrier for women leaving prison, given that they have high rates of housing instability.[51] Many women in Victorian prisons have experienced family violence;[52] which is the leading reason that women access homelessness services in Victoria.[53] Women exiting prison may not have a safe home to return to and there is a lack of housing services that are appropriate for women who are exiting prison on parole and who are, or at risk of, experiencing family violence. Setting 'suitable and stable accommodation' as criterion for parole can result in women weighing up the risk of returning to violent relationships, or risk having their parole denied.[54]

Impact of the parole system on Aboriginal and Torres Strait Islander people

5.21 There are particular barriers for Aboriginal and Torres Strait Islander people engaging with the current parole system. Only 4 per cent of the total number of people on parole are Aboriginal and Torres Strait Islander people,[55] despite Aboriginal and Torres Strait Islander people making up ten per cent of the Victorian prison population.[56]

---

[43] Victorian Auditor-General's Office, *Administration of Parole* (2016) State Government of Victoria.
[44] Ibid.
[45] Victorian Aboriginal Legal Service, *Australian law reform commission submission: Incarceration rates of Aboriginal and Torres Strait Islander Peoples* (2017).
[46] See, for example, the North Australian Aboriginal Justice Agency's (NAAJA) Throughcare Program in the Northern Territory which aims to reduce repeat offending by providing strength-based case management and referral services to help people access the support and services they need to help them stay out of prison.
[47] Corrections Victoria, *Annual Prisoner Statistical Profile 2006-7 to 2018-19,* (2020) State Government of Victoria, Table 3.10: 'All Prisoner Discharges, By Sex and Discharge Type'.
[48] Ibid.
[49] Victorian Auditor-General's Office, *Administration of Parole* (February 2016) State Government of Victoria, Part 2: Preparation for parole.
[50] Adult Parole Board, *Annual Report 2019-2020* (2020) State Government of Victoria, 25.
[51] Department of Justice and Community Safety, *Women in the Victorian Prison System* (2019) State Government of Victoria, 3.
[52] Ibid, 4.
[53] Legislative Council Legal and Social Issues Committee, *Inquiry into homelessness in Victoria* (2021) Parliament of Victoria, 68.
[54] Department of Justice and Community Safety, *Women in the Victorian Prison System* (2019) State Government of Victoria, 12.
[55] Adult Parole Board, *Annual Report 2019-2020* (2020), State Government of Victoria, 26.
[56] Australian Bureau of Statics, *Prisoners in Australia* (2020).

5.22 Aboriginal and Torres Strait Islander women are particularly impacted by the current parole system because they experience greater difficulty accessing pre-release programs that are necessary to be eligible for parole. This is because there is a lack of culturally appropriate programs and also because Aboriginal and Torres Strait Islander women tend to serve shorter sentences or are more likely to be on remand, which disqualifies them from accessing programs.[57]

5.23 Aboriginal and Torres Strait Islander people are also disproportionately impacted by strict parole conditions and are often given a greater number of, and more stringent, parole conditions which lead to a greater chance of conditions being breached.[58] This is especially the case for Aboriginal and Torres Strait Islander women, where overly strict parole conditions that do not take into account their intersectional experiences make their pathway to success on parole much harder.[59]

5.24 In Victoria, a significant number of people choose not to apply for parole which is likely due to the possibility of receiving a harsh punishment for breach of parole.[60] The Australian Law Reform Commission has recommended that court-ordered parole be introduced in Victoria, as an automatic date for release on parole "provides a solution for the set of circumstances when Aboriginal and Torres Strait Islander prisoners prefer to avoid coming before a parole authority."[61]

Impact of the parole system on children

5.25 Children are generally eligible for parole where they have received a sentence of six months or longer. Part way through their sentence, the Youth Parole Board will set a review date and assess whether a child should be granted parole, and if so, what conditions should be attached.[62] The Youth Parole Board has noted a declining trend in the number of parole orders issued for children; 160 parole orders were made in 2019-2020, down from 185 in 2018-2019 and 243 in 2017-2018.[63]

5.26 A barrier for children being granted parole is the condition that they have access to stable and suitable housing.[64] The Youth Justice Board noted that "delays or deferral of parole are routinely required when accommodation is not available."[65] The impact of this is particularly felt by children who have been subject to the child protection system, and do not have family options for accommodation.[66]

5.27 For children who are granted parole, they are subject to several mandatory conditions and in most cases several "special conditions". The mandatory conditions include that they "must report as and when directed by [their] parole officer" and that they "must not leave Victoria without the written permission of the Youth Parole Board." The most common special condition applied in 2019-20 was to require attendance at substance abuse counselling as directed.[67]

5.28 If children are found to have breached these conditions, they can be subject to punitive and disproportionate punishment. Their parole can be cancelled, and children can be made to serve the whole of the parole period (including the time that they were in the community, as well as the time remaining on the sentence) back in prison.[68] This means that children who have their parole cancelled can end up being in prison longer than what they were originally sentenced to. This is far too common, with over 50 per cent of all children released on parole in 2019-2020 having their parole cancelled.[69]

5.29 The current parole system does not allow children to succeed - by setting overly strict parole conditions that end up funnelling them back into the criminal legal system.

Recommendations: The Inquiry should recommend that parole laws be reformed by:

---

[57] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples,* (2017) State Government of Victoria, Chapter 9: Prison Programs and Parole, Australian Government, 292.
[58] Rachel Hew and Tanya Sinha, *Barriers to Parole for Aboriginal and Torres Strait Islander people in Australia* (2013) The University of Queensland Australia, 15.
[59] Ibid, 22-23.
[60] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisons in Victoria* (2015) 30.
[61] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017) Australian Government, Chapter 9: Prison Programs and Parole, Australian Government.
[62] Department of Justice and Community Safety, *Parole in the youth justice system,* Victoria State Government.
[63] Youth Parole Board, *Annual Report 2019-2020* (2020) State Government of Victoria, 23.
[64] Penny Armytage and James Ogloff, *Meeting needs and reducing offending: Youth justice review and strategy* (2017) State Government of Victoria.
[65] Youth Parole Board, *Annual Report 2019-2020* (2020) State Government of Victoria, 6.
[66] Ibid, 6.
[67] Ibid, 22.
[68] Ibid, 17.
[69] Ibid, 33.

(a) Creating a presumption that an application for parole will automatically be made at the earliest eligibility date. This should be accompanied by a requirement that, when mandated programs have not been completed due to their unavailability in prison, this cannot be a bar to parole being granted.
(b) Repealing regulation 5 of the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) which exempts the Parole Board from the operation of the Charter. This should be accompanied by repealing section 69(2) of the Corrections Act 1986 (Vic) which currently provides that, in exercising its functions, the Parole Board is not bound by the rules of natural justice.
(c) Repealing section 77C of the *Corrections Act 1986* (Vic), which provides the Adult Parole Board with 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, and replacing it with a new section that provides time served on parole, prior to a parole order being cancelled, counts as time served.
(d) Repealing section 460(7) of the *Children, Youth and Families Act 2005* (Vic), which provides that in the event a child's parole is cancelled, and unless the Youth Parole Board otherwise orders, no part of the time between the person's release on parole and recommencing to serve the unexpired portion of the sentence is regarded as time served in respect of the sentence, and replacing it with a new section that provides that time served on parole, prior to the parole order being cancelled, counts as time served.

6. End discriminatory policing practices

6.1 There is a long history of over-policing of Aboriginal and Torres Strait Islander communities in Victoria which acts as a driver of people into the prison system.

6.2 Despite this, a significant investment of $2 billion in police has led to an additional 3,135 police officers on Victorian streets over the last five years.

6.3 Discriminatory policing needs to end, and this starts with diverting the excessive amount of funding allocated to policing into front line community services, including Aboriginal Community Controlled Organisations.

6.4 Over-policing sees many low-level offences that remain untargeted in non-Indigenous communities result in excessive police interaction, arrests and charges for Aboriginal and Torres Strait people. Greater interaction with police increases the risk of people facing additional charges, such as resisting arrest, and ending up in prison.

6.5 The Victorian Government must properly resource an independent police oversight body so that the status quo of police investigating the actions of other police and avoiding responsibility for discriminatory policing ends. In order to be effective, this body should have sufficient powers to refer matters for criminal investigation.

Recommendation: The Inquiry should recommend that the Victorian Government properly resource an effective and independent police oversight body.

7. Decriminalise minor offending

7.1 The criminalisation of minor offending and its impact on the over-imprisonment of Aboriginal and Torres Strait Islander people is well documented.

7.2 Following on from key recommendations made by the Royal Commission into Aboriginal Deaths in Custody, there have been repeated calls for the decriminalisation of minor offending — including public order offences like begging, public drunkenness and offensive language — and the implementation of non-punitive responses.

7.3 Due to the tireless advocacy of the family of Yorta Yorta woman Tanya Day, the Victorian Government has finally committed to decriminalising public drunkenness. The reforms are due to come into effect in November 2022 in order to provide time for a transition away from the current criminal law-based response to a public health-based one.[70]

[70] Expert Reference Group, Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness Report to the Victorian Attorney-General (August 2020): www.justice.vic.gov.au/public-drunkenness.

7.4 In recognition of the fact that public drunkenness is a health issue, members of Victoria Police should not be involved as first responders in the public health response. This is because, once Victoria Police are involved in an incident, there will always be a risk of escalation and up-charging. If members of Victoria Police must remain involved as first responders, their powers to intervene must be strictly limited and subject to appropriate and robust legislative safeguards.

7.5 A police cell is never a safe place for an intoxicated person and there is no scope for a protective custody regime in Victoria.

7.6 Public drunkenness reform should be complemented by broader summary offences reform and a review of the *Summary Offences Act 1966* (Vic) that creates a number of other low-level offences that can be used by police to unfairly target Aboriginal and Torres Strait Islander people and people experiencing poverty.

7.7 For example, it should no longer be an offence to engage in obscene, indecent, threatening language and behaviour in public per section 17 of the *Summary Offences Act 1966* (Vic). Similarly, section 49 of the *Summary Offences Act 1966* (Vic) which makes 'begging in a public place' an offence punishable by 12 months' imprisonment should be repealed immediately.

7.8 We also support the position adopted by the Victorian Aboriginal Legal Service, Fitzroy Legal Service and Victoria Legal Aid in their respective submissions to the Inquiry into the Use of Cannabis in Victoria that the use of cannabis and the possession of cannabis for personal use be decriminalised and replaced by a public health response.[71]

Recommendations: The Inquiry should recommend a review of the *Summary Offences Act 1966* (Vic) with a view to decriminalising minor offending. The Inquiry should also recommend the decriminalisation of the use of cannabis and the possession of cannabis for personal use and replace it with a public health response.

8. Address the unintended impacts of the criminalisation of family violence

8.1 As discussed above, when responding to incidents of family violence, wrongful gender and racial stereotypes can result in police misidentifying the appropriate victim/survivor and impairing or infecting police responses. This results in an increasing number of women victim/survivors being criminalised and subject to family violence orders instead of being protected by them.

8.2 The Special Rapporteur on Violence against Women has noted that this disproportionately punishes Aboriginal and Torres Strait Islander women.[72]

8.3 This is confirmed by National Family Violence Prevention Legal Services Forum, which highlights those discriminatory police responses to women seeking protection from family violence, including police disbelieving Aboriginal women, minimising or trivialising their experiences, or labelling family violence as reciprocal.[73]

8.4 The Victorian Government needs to ensure that the enforcement of laws do not criminalise women who are victim/survivors of family violence and improve responses for victim/survivors who are misidentified by police as the primary aggressor in incidents of family violence.

Recommendation: The Inquiry should recommend greater investment in culturally safe family violence prevention and legal services to stop women who have survived family violence being forced into the criminal legal system.

[71] Victorian Aboriginal Legal Service, submission to the Inquiry into the Use of Cannabis in Victoria (September 2020); Fitzroy Legal Service, submission to the Inquiry into use of Cannabis in Victoria Legislative Council Legal & Social Issues Committee (September 2020); Victoria Legal Aid, submission to the Inquiry into the Use of Cannabis in Victoria (31 August 2020).
[72] Dubravka Šimonović, 'End of Mission Statement by Dubravka Šimonović, United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences' (Speech delivered at the press conference following her visit throughout Australia from 13 to 27 February 2017, Canberra, 27 February 2017).
[73] Aboriginal and Family Violence Prevention & Legal Service Victoria, Submission to the VLRC Inquiry into the *Victims of Crime Assistance Act 1996* (November 2017) 25.

9. Divert people away from the criminal legal system

9.1 We need to divert people away from the criminal legal system and invest in early intervention and prevention approaches that divert people away from the criminal legal system and address the underlying causes of people's offending.

9.2 It is hugely problematic that police act as the gatekeeper to accessing court-ordered diversion programs, where it is a requirement that police prosecutors have to agree for a person to be referred to a diversion program.

9.3 Giving police the power to determine whether a person can participate in a diversion program, which can have life altering effects in terms of diverting someone out of the criminal legal system and potentially engaging them with services that can address the underlying causes of their offending, often leads to unjust outcomes.

9.4 The requirement for police consent for people to access diversion must be removed.

9.5 Diversionary programs should also be available at all stages of the legal system, and opportunities to access diversion should be as broad as possible.

9.6 The Victorian Government must also resource Aboriginal Community Controlled Organisations to continue developing and providing a range of culturally responsive and gender specific diversionary programs to meet the intersectional needs of people engaging with the criminal legal system.

9.7 Best practice examples of programs already being run by Djirra – Victoria's specialist family violence prevention legal service for Aboriginal women – include:

(a) Dilly Bag, which is a small group residential workshop which draws on cultural principles and the strength of Aboriginal heritage in order to promote healing, to motivate and to unlock the potential within each participant according to their expectations and circumstances.

(b) Young Luv, which is designed for Aboriginal young women aged 13 to 18. It is a half day activity facilitated by Aboriginal women to engage Aboriginal teenagers in a culturally safe space where they can talk about, reflect on and better understand important issues affecting their lives.[74]

Recommendation: The Inquiry should recommend that the requirement for police to consent to diversion be removed from section 59 of the *Criminal Procedure Act 2009* (Vic).

10. End mandatory sentencing

10.1 Laws in Victoria that impose mandatory minimum sentences should be repealed. An example of these laws is section 10AA of the *Sentencing Act 1991* (Vic) which provide mandatory minimum sentences for assaults against emergency workers.

10.2 Mandatory sentencing laws can increase incarceration rates and are a driver of the over-incarceration of Aboriginal and Torres Strait Islander people.[75]

10.3 This is because mandatory sentencing laws remove the discretion of the court to consider mitigating factors or alternate sentencing options and fail to account for the intersectional disadvantage experienced by many people who come into contact with the criminal legal system. This can result in arbitrary penalties being imposed in circumstances where they might have unintended consequences and be grossly inappropriate.

Recommendation: The Inquiry should recommend the repeal of mandatory sentencing provisions.

[74] For more information, see the Djirra website: https://djirra.org.au/what-we-do/.
[75] Australian Law Reform Commission, Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples (December 2018) 273.

11. Stop funnelling people into prisons that only serve to harm them

11.1 Prisons are harmful places where abuse thrives behind closed doors. This was recently demonstrated by the Special Report on Corrections tabled in the Victorian Parliament by the Independent Broad-based Anti-corruption Commission (**IBAC**).[76]

11.2 In that report, IBAC exposed serious and systemic wrongdoing in Victorian prisons and made a number of alarming findings, including that:

(a) prison officers at Port Phillip Prison used excessive force against two people in prison, one of whom has an intellectual disability;
(b) prison officers at Port Phillip Prison used inappropriate strip-searching practices; and
(c) during two critical incidents at Port Phillip Prison, prison officers failed to activate their body-worn cameras and intentionally interfered with camera recordings.

11.3 The IBAC report highlights some particularly egregious conduct identified through their investigations, but there are also a number of routine prison practices that place people in prison at risk of being subjected to harmful treatment on a regular basis, including the use of solitary confinement and routine strip searching.

Stopping solitary confinement

11.4 Solitary confinement is a cruel practice that causes irreparable harm to the people who are subjected to it. Solitary confinement is used in Victorian prisons under a number of different labels - isolation, separation, seclusion, segregation and lockdowns. While the words 'solitary confinement' are not used explicitly in Victorian legislation, the practice should be banned in law, regardless of how it is labelled.

11.5 Solitary confinement can be particularly painful for women,[77] and the Victorian Ombudsman has previously found that the use of separation practices on women detained at the Dame Phyllis Frost women's prison may amount to cruel and degrading treatment.[78]

11.6 The Victorian Ombudsman has also previously raised alarming concerns regarding the use of solitary confinement on children in prisons, uncovering instances of young people being subjected to prolonged solitary confinement in excess of 15 days.[79] This can amount to torture, and prompted the Victorian Ombudsman to recommend that Victoria ban the use of solitary confinement in prisons in law.[80]

11.7 Aboriginal and Torres Strait Islander children interviewed by the Koori Youth Council as part of the *Ngaga-dji* project reported incidents where they had been isolated in "the slot". Children reported being left in the slot for hours and days and being fed through a hole in the door. Being held in the slot was described as being the worst experience of their life.[81]

11.8 The Australian Children's Commissioners and Guardians have confirmed the particularly detrimental impact solitary confinement can have on children:

11.9 It is almost impossible to reconcile seclusion with the 'best interests' of the child as it serves no integrative or rehabilitative objective. Children in detention are particularly susceptible to medical, social and psychological problems which can be seriously exacerbated by the use of seclusion cells or being left alone in their own cells for extended periods of time.[82]

---

[76] IBAC, Special report on Corrections: IBAC Operations Rous, Caparra, Nisidia and Molara (June 2021).
[77] Sharon Shalev, *Solitary confinement is harder for women: Should it stop?* (22 March 2021) Association for the Prevention of Torture, accessible: www.apt.ch/en/blog/solitary-confinement-harder-women-should-it-stop.
[78] Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and inspection of the Dame Phyllis Frost Centre* (November 2017), accessible: www.ombudsman.vic.gov.au/our-impact/investigation-reports/implementing-opcat-in-victoria-report-and-inspection-of-dame-phyllis-frost-centre/.
[79] Victorian Ombudsman, *OPCAT in Victoria: A thematic investigation of practices related to solitary confinement of children and young people* (5 September 2019), accessible: www.ombudsman.vic.gov.au/our-impact/investigation-reports/opcat-in-victoria-a-thematic-investigation-of-practices-related-solitary-confinement-of-children-and-young-people/.
[80] Ibid.
[81] Koori Youth Council, *Ngaga-dji (hear me):* young voices creating change for justice (2018), 33.
[82] Australian Commissioners and Guardians, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices, Australian Commissioners and Guardians, 2016, 62.

11.10 While prison authorities justify the use of solitary confinement as a behaviour and risk management tool, solitary confinement is frequently used as a substitute for proper health care for people with disability or compromised mental health.[83] The stress of the closed environment, absence of meaningful social contact and the lack of activity can, however, severely heighten behaviours and symptoms.[84]

11.11 Use of this harmful practice does nothing to address the underlying causes of 'challenging' behaviour and can even exacerbate those behaviours as a person's mental and physical health deteriorate.

11.12 Most people in prison will be released and will spend the rest of their lives as our neighbours, in our communities. Subjecting people in prison to cruel treatment does not make us safer. Rather, it damages people and can lead to an increased risk of reoffending after release.[85]

11.13 During the pandemic, the Victorian Government also increased the circumstances in which people can be subjected to solitary confinement. Instead of taking the safer approach of reducing prison populations, all people entering prison are subjected to 14-days arbitrary detention in 'quarantine' regardless of their COVID-19 risk. This approach - and the 'operational needs' of the prison - place people at increased risk of being detained in conditions that amount to solitary confinement during this 14-day period.[86] This response is disproportionate and cannot become the new norm.

11.14 Change is also possible. Overseas, a number of jurisdictions in the United States have passed legislative measures to restrict the use of solitary confinement in prisons, or significantly limit the use of solitary confinement, by imposing caps on the number of consecutive days that people can be detained in solitary confinement.[87]

Ending routine strip searching

11.15 Overly broad laws permit the practice of routine strip searching in Victorian prisons, which involves forcing people in prison to remove their clothing on a regular basis.

11.16 Being subjected to routine strip searching can be humiliating and degrading for any person, and can be particularly harmful for women and children in prison. This is because 65 per cent of women in prison have been victim/survivors of family violence,[88] and 71 per cent of children in youth prisons are victims of abuse, trauma or neglect.[89]

11.17 Strip searches can be re-traumatising, compound the harm caused by past experiences of violence and undermine a person's ability to address the underlying causes of their offending.

11.18 Routine strip-searching means "prison is not and cannot be a therapeutic community, as prisons are built on an ethos of power, surveillance and control, yet trauma sufferers require safety in order to begin healing."[90]

11.19 Evidence from Australia and around the world shows that routine strip searching does not have a deterrent effect, and that reducing strip searches does not increase the amount of contraband in prisons.

---

[83] Human Rights Law Centre, *Stopping solitary confinement: Submission to the Royal Commission into Violence, Neglect and Exploitation of People with Disability: Criminal Justice System issues paper* (31 March 2020).
[84] Ibid.
[85] See for example, Christopher Wildeman and Lars Hojsgaard Anderson, *Long-term consequences of being placed in disciplinary segregation* (12 March 2020) Criminology, 58:3, 423-453, accessible: onlinelibrary.wiley.com/doi/10.1111/1745-9125.12241; see further, Walsh, et al, *Legal perspectives on solitary confinement in Queensland* (2020) University of Queensland and University of Queensland and Prisoners' Legal Service; see also Kayla James and Elena Vanko, *The impacts on solitary confinement* (April 2021) Vera Institute of Justice, accessible: vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf.
[86] See Andreea Lachsz & Monique Hurley (2021) Why practices that could be torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons, *Current Issues in Criminal Justice*, 33:1, 54-68.
[87] See Federal Anti-Solitary Taskforce, *A blueprint for ending solitary confinement by the Federal Government* (June 2021) American Civil Liberties Union; see also Garrison Lovely, *Solitary confinement is torture, and it should be banned everywhere,* (2021) Jacobin, accessible: jacobinmag.com/2021/04/solitary-confinement-halt-act-new-york.
[88] Corrections Victoria, *Women in the Victorian Prison System* (2019) Department of Justice and Community Safety. See also Human Rights law Centre, *Total Control: Ending the routine strip searching of women in Victoria's prisons* (December 2017).
[89] Youth Parole Board, *Annual Report* 2019-2020, (September 2020) 33.
[90] Flat Out Inc, *Submission No 980 to Victoria, Royal Commission into Family Violence* (29 May 2015).

11.20 For example, in the United Kingdom, the use of alternative search measures has not had any negative impacts on safety or security.[91] In Australia, the reduction in strip searching at two women's prisons in Western Australia did not lead to an influx of contraband being brought into these facilities.[92]

11.21 There is no reason to subject people in prison to a practice that can scar them for life when prison authorities can instead use safer and more effective search methods, such as wands and body scanners. We understand that this technology has been deployed in some Victorian prisons and has resulted in a decline in the rates of strip searching of women and children.[93]

11.22 There is still significant room for improvement and, to the extent that body scanning technology would further reduce the rates at which people in prison are strip searched, such investment should be made.

11.23 The laws in Victoria should also be amended to prohibit the routine strip searching of people in prisons. A strip search should only ever be permitted as a last resort after all other less intrusive search alternatives have been exhausted and there remains reasonable intelligence that the person is carrying dangerous contraband.

11.24 The reasons for any strip search, and the basis for having reasonable intelligence, must always be documented, in order to ensure transparency and accountability.

11.25 Enshrining protections like this in legislation is integral. As pointed out by the Royal Commission into the Protection and Detention of Children in the Northern Territory, changes in policy are not enough. Specific legal obligations must be placed on people to ensure compliance and to remove uncertainty between law and policy.[94]

Preventing mistreatment behind bars

11.26 To prevent mistreatment behind bars, the Victorian Government must urgently establish and adequately resource a NPM or multiple NPMs to oversee conditions and the treatment of people in prisons, police cells and all other places of detention as part of implementing their obligations pursuant to the United Nation's anti-torture protocol - OPCAT.

11.27 OPCAT-compliant inspections of places of detention would help shine a light on practices behind bars that undermine people's ability to address the causes of their offending and leave prison with the best chance of avoiding future contact with the criminal legal system, like the use of cruel and degrading practices such as solitary confinement and routine strip searching.

11.28 It is concerning that little progress has been made to date in establishing and resourcing independent monitoring and oversight of prisons, police cells and other places of detention in Victoria. This raises serious concerns about whether the January 2022 deadline for implementation of OPCAT will be met.

11.29 The Victorian Government must engage with civil society, including Aboriginal and Torres Strait Islander organisations, in transparent, inclusive and robust consultations on how it plans to implement OPCAT as a matter of priority.

Recommendations: The Inquiry should recommend that the Victorian Government:

(a) Stop the use of solitary confinement in prisons;
(b) End routine strip searching in prisons; and
(c) Fund an NPM or multiple NPMs to implement Victoria's obligations to prevent torture and cruel, inhuman or degrading treatment in all places of detention pursuant to OPCAT.

[91] See, eg, Lord Carlile, *An independent inquiry into the use of physical restraint, solitary confinement and forcible strip searching of children in prisons, secure training centres and local authority secure children's homes* (2006) The Howard League for Penal Reform, 173.
[92] See, eg, Office of the Inspector of Custodial Services, *Strip searching in Western Australian Prisons* (March 2019) 9.
[93] See, eg, Lily D'Ambrosio, *New Gatehouse to Boost Security and Keep People Safe* (15 January 2020) accessible: www.lilydambrosio.com.au/news/new-gatehouse-to-boost-security-and-keep-people-safe/.
[94] See Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, 2018) 264.

12. Reimagining the youth legal system

12.1 No child belongs in prison. Yet between July 2019 and July 2020, there were 623 children in prison compared to 560 in the previous year. This increase is despite the impacts of the COVID-19 pandemic and a decrease nationally in the number of children in prison over the same period. [95]

12.2 Aboriginal and Torres Strait Islander children are over-represented in this cohort. Between July 2019 and July 2020, 15 per cent of children under youth justice supervision in Victoria (community and detention) were Aboriginal and Torres Strait Islander children, in circumstances where they comprise 1.5 per cent of the Victorian population aged ten to 23 years. [96]

12.3 There is an urgent need to reimagine the youth legal system and this starts with raising the age of criminal responsibility from ten to at least 14 years old.

Raising the age of criminal responsibility

12.4 Every child should be free to go to school, have a safe home to live in and be supported to learn from their mistakes. But right now, children as young as ten years old can be locked away in Victorian prisons.

12.5 Every day a child spends in prison can cause lifelong harm to that child's growth and development. Engagement with the youth legal system compounds disadvantage, trauma and increases the potential for further offending by children.

12.6 Locking children up in prison creates a vicious cycle of disadvantage that can entrench them in the criminal legal system. Evidence shows that the earlier a child is forced into the criminal legal system, the more likely they are to reoffend. [97]

12.7 To break this cycle, we must reimagine the youth legal system. This starts by raising the age of criminal responsibility to at least 14 years old.

12.8 The medical evidence is also clear - children who are arrested by police, sent to court or locked away, are more likely to develop mental illness, disengage from school, become homeless and even die prematurely.

12.9 Research also shows that children's brains are still developing throughout these formative years where they have limited capacity. [98]

12.10 The current, very low age of criminal responsibility is out of step with international human rights standards. The United Nations Committee on the Rights of the Child has confirmed that the minimum age should be set no lower than 14 years old, and the median age of legal responsibility worldwide is 14 years old. [99] The United Nations Committee has also recommended that laws be changed to ensure that children under the age of 16 years "may not legally be deprived of their liberty" and locked up in prison.

12.11 The CCYP has described the current low age of criminal responsibility as having "devastating consequences for Aboriginal children and their families." The CCYP recommended the age of criminal responsibility be raised to 14, and that children under 14 years be provided with therapeutic, culturally based, child-centred and coordinated responses to anti-social behaviour in Aboriginal children under 14 years. [100]

12.12 While proposed measures in the Victorian Youth Strategy are a first step to strengthen diversion and early intervention opportunities for young people, raising the age of criminal responsibility is the only way to ensure that children stay out of the criminal legal system.

---

[95] Australian Institute of Health and Welfare, *Youth Justice in Australia 2019-2020*, Australian Government, data table s80b; see also Australian Institute of Health and Welfare, *Youth justice in Australia 2018-2019,* Australian Government, data table s80B.
[96] Commission for Children and Young People, *Our Youth, Our Way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (9 June 2021) ccyp.vic.gov.au/news/our-youth-our-way-report-released/.
[97] Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016) State Government of Victoria, 31.
[98] Judge Andrew Becroft, '*From Little Things, Big Things Grow' Emerging Youth Justice Themes in the South Pacific*, 5 referring to Sir Peter Gluckman, *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (2011) Wellington, Office of the Prime Minister's Science Advisory Committee, 24.
[99] Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).
[100] Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (9 June 2021) 24.

12.13 There are community programs and alternatives to prison that are already working - we just need to fund them and stop building new prisons to lock children up.

12.14 By way of example, the Koorie Youth Council runs programs to support Aboriginal and Torres Strait Islander young people and develop the capacity of organisations that provide services to them. They coordinate Marram Ngayin ('Stay Strong'), which helps Aboriginal organisations to deliver mentoring to Aboriginal and Torres Strait Islander children aged 12–25 years through training, logistical and planning support. The Marram Ngayin framework encourages the development of high-quality youth mentoring that supports children who may be at risk of engagement with the criminal legal system, and guides them towards positive alternatives.

12.15 Another example is Dardi Munwurro ('Strong Spirit'), which delivers culturally sensitive and safe respectful relationship programs to Aboriginal and Torres Strait Islander boys and young men in Victoria. These programs improve boys' capabilities to gain and maintain respectful relationships, providing them with social skills that lower the risk they are put in unjust childhood detention. Bramung Jaarn ('Brothers Walking Together') is a program run by Dardi Munwurro that supports Aboriginal and Torres Strait Islander boys aged 10–17 to nurture positive social networks and cultural connections.

12.16 A third example is Barreng Moorop, which provides intensive case management for Aboriginal and Torres Strait Islander children aged 10–14 at risk of interaction with the youth legal system. The program is run by the Victorian Aboriginal Child Care Agency, in collaboration with Jesuit Social Services and the Victorian Aboriginal Legal Service. Barreng Moorop case workers support Aboriginal and Torres Strait Islander children to receive welfare, housing, family and education services. The program is trauma-informed and prioritises the care and development of Aboriginal and Torres Strait Islander children by Aboriginal and Torres Strait Islander people.

12.17 This Committee should listen to the calls of Aboriginal and Torres Strait Islander, human rights, medical and legal bodies, United Nations experts and the CCYP and recommend raising the age of criminal responsibility to at least 14 years old.

Establishing a minimum age of incarceration

12.18 Youth prisons are unsafe and harmful environments for children, particularly Aboriginal and Torres Strait Islander children because "custody removes Aboriginal children and young people from their families, communities and culture, often compounding the trauma and disconnection experienced by Aboriginal communities as a result of longstanding child removal practices and intergenerational incarceration."[101]

12.19 This has been confirmed by the CCYP, who have found that "current laws allowing children to be remanded in, or sentenced to, youth justice custody disproportionately harm Aboriginal children."[102]

12.20 There is also no evidence that children spending time in prison reduces offending,[103] and in fact time in custody often results in a cycle of reoffending, remand and custodial sentences that is underpinned by the current system's failure to meet children's underlying needs.[104]

12.21 The United Nations Committee on the Rights of the Child has recommended that laws be changed to ensure that children under the age of 16 years "may not legally be deprived of their liberty". They have also encouraged "State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age."[105]

12.22 We support the CCYP's call for the Victorian Government to enact:

(a) amendments to the *Bail Act 1977* (Vic) and the *Children, Youth and Families Act 2005* (Vic) to prohibit a bail decision-maker from remanding a child under the age of 16 to prison;

[101] Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (9 June 2021) 166.
[102] Ibid, 41.
[103] Penny Armytage and James Ogloff, *Meeting needs and reducing offending: Youth justice review and strategy* (2017) State Government of Victoria, 15.
[104] Sentencing Advisory Council, Reoffending by children and young people in Victoria (December 2016).
[105] Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, 81st sess, UN Doc CRC/C/GC/24 (18 September 2019).

(b) amendments to the *Children, Youth and Families Act 2005* to prohibit the Children's Court from sentencing a child under the age of 16 to prison; and
(c) amendments to the *Sentencing Act 1991* to prohibit an adult court from sentencing a child under the age of 16 to prison.[106]

Diverting children away from the legal system

12.23 All reform moving forward should align with raising the age of criminal responsibility and diverting children away from the legal system at every opportunity. One way to do this is developing and funding a range of culturally responsive and gender specific diversionary programs tailored to meet the intersectional needs of children.

12.24 Diversion of children from the youth legal system is required by international human rights law, with Article 40 of the United Nations Convention on the Rights of the Child stating that, wherever possible, states should put into place measures for dealing with children without resorting to legal proceedings.

12.25 As identified by the CCYP, while "diversion can be an effective response to offending behaviour, which in turn can limit the ongoing involvement of children and young people in the youth justice system", Aboriginal and Torres Strait Islander children have "insufficient access to culturally appropriate diversion programs across Victoria".

12.26 Access to diversion should not be restricted by prior offending or by categories of offending, be dependent on an admission of guilt, or be conditional on the police or prosecutor's consent. Diversionary programs should be available at all stages of the youth legal system, from apprehension to final disposition, and opportunities for children to access Children's Court diversion should be as broad as possible.

12.27 To realise this, we support the CCYP's call for:
(a) the Victorian Government to prioritise investment in Aboriginal and Torres Strait Islander-led diversionary programs across Victoria that meet the needs of Aboriginal and Torres Strait Islander children; and
(b) the Victorian statutory Children's Court diversion scheme to be amended to maximise opportunities for children to obtain diversion.[107]

12.28 This should include introducing a legislative presumption in favour of diversion, removing the requirement for prosecutorial consent to diversion in section 356D(3)(a), repealing section 356F that sets out the matters a prosecutor must consider when consenting to diversion and reviewing current exclusions under section 356B of the *Children, Youth and Families Act 2005* for certain road safety offences.

12.29 All the above reform must be done within a broader context of self-determination, with Aboriginal and Torres Strait Islander communities appropriately resourced to design, administer and supervise the youth legal system. As found by the CCYP: "services designed, controlled and delivered by the Aboriginal community have the greatest potential to produce the best outcomes for Aboriginal children".[108]

Recommendations: The Inquiry should recommend that the Victorian Government:

(a) Amend section 344 of the *Children, Youth and Families Act 2005* (Vic) to raise the age of criminal responsibility from ten to at least 14 years old.
(b) Amend the *Children, Youth and Families Act 2005* (Vic), *Sentencing Act 1991* (Vic) and *Bail Act 1977* (Vic) to prohibit:
  (i) children under the age of 16 years being sentenced to, or remanded in, prison;
  (ii) children under the age of 18 years being sentenced to adult imprisonment; and
  (iii) the transfer of children under the age of 18 years from youth justice custody to an adult prison.
(c) Invest in Aboriginal and Torres Strait Islander-designed and led diversionary programs and alternatives to prison that meet the needs of Aboriginal and Torres Strait Islander children.
(d) Amend the Victorian statutory Children's Court diversion scheme to maximise opportunities for children to obtain diversion. This should include:

[106] Commission for Children and Young People, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (9 June 2021) finding 4 and recommendations 8-10.
[107] Ibid, 450.
[108] Ibid, 106.

(i) introducing a legislative presumption in favour of diversion;
(ii) removing the requirement for prosecutorial consent to diversion in section 356D(3)(a) of the *Children, Youth and Families Act 2005* (Vic);
(iii) repealing section 356F of the *Children, Youth and Families Act 2005* (Vic), which sets out the matters a prosecutor must consider when consenting to diversion; and
(iv) reviewing current exclusions under section 356B of the *Children, Youth and Families Act 2005* (Vic) for certain road safety offences with a view to repealing exclusions for less serious road safety offences.