SUBMISSION TO ROYAL COMMISSION INTO VICTORIA'S MENTAL HEALTH SYSTEM

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ACKNOWLEDGEMENTS

We acknowledge the Wurundjeri People of the Kulin Nation as the traditional owners of the land on which our offices are located. We pay our respects to their Elders past, present and emerging.

We are grateful to our clients, colleagues and community for trusting us with their stories and for granting us permission to use and share their experiences in this document.

We are grateful to members of the executive of the Yarra Drug & Health Forum (YDHF) who reviewed and contributed to this submission, particularly surrounding issues of dual diagnosis.

This submission was co-authored by Jennifer Black, Karen Fletcher, Sophie L'Estrange, and Hui Zhou for Fitzroy Legal Service.

PREFACE

Thank you for providing the opportunity to contribute to the Royal Commission into Mental Health.

Fitzroy Legal Service recognises that every person has a right to respect for their physical and mental integrity on an equal basis with others.[1] We support systems that enable voluntary engagement with mental health treatment. We support the development of limitations on involuntary and coercive practices. Our submissions are to be read within this framework.

We use the term **psycho-social disability**, consistent with the language used in the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) (ratified 17 July 2008), to describe the experience of people living with restrictions or impairments related to a broad spectrum of mental health concerns or conditions. We include in this broad spectrum the experiences of people who suffer from trauma related to violence or intergenerational experience of institutional harm.

[1] *Convention on the Rights of Persons with Disability*, (Entered into force 3 May 2008) art 17.

Summary of Recommendations

An integrated approach to mental health:

Recommendation 1: That the Victorian government invests in community-based services that can meaningfully engage with the complexity of people with psycho-social disability and who experience other forms of marginalisation.

Recommendation 2: That the Victorian government recognises and supports new and existing integrated service partnerships between mental health services (and other social services) and community legal centre outreach programs.

Recommendation 3: That the Victorian government provides increased and stable funding to sustain existing service delivery of community legal services and to support development of innovative services to dedicatedly address the need of people with psycho-social disability.

Social marginalisation, dual diagnosis and the criminal justice system:

Recommendation 4: That the Victorian Government implements and evaluates a comprehensive state-wide co-responder model of police, mental health and drug and alcohol workers to crisis mental health or dual diagnosis related incidents.

Recommendation 5: The Victorian government work with existing mental health, AOD, and CATT team services to expand and create alternate mental health and crisis response services.

Recommendation 6: The decriminalisation of public space offences

Recommendation 7: Decriminalisation of drug use and personal possession of illicit substances within Victoria.

A health harm minimisation approach rather than a criminal justice approach:

Recommendation 8: A review and reform of the current bail laws taking into consideration disproportional effect of criminalisation on people with a psycho-social disability and/or problematic drug use.

Recommendation 9: Expand and reform both the Criminal Justice Diversion program and Victoria Police 'pre-charge' diversion policy directives to allow more meaningful and less discriminatory participation by people who have psycho-social disability, and/or face other social marginalisation (which can have the effect of excluding them from benefiting from Diversion).

Housing, homelessness, mental health and criminalisation:

Recommendation 10: To raise the age of criminal responsibility to 14 years of age (reflecting the Raise the Age Campaign).

Recommendation 11: **Recommendation 11:** Funding of public and social housing creation and restoration to be prioritised as a matter of urgency and the selling of public land stock to private developers is ceased.

Community mental health care, not prisons:

Recommendation 12: That the Commission attend prisons and youth detention centres to take oral evidence, in person, from imprisoned adults and children on their lived experience of psycho-social disability in the criminal justice and prison systems and proposals they may have for systemic improvement including:

- Their experience of the relationship between their mental health and contact with the criminal justice and prison systems
- The impact of imprisonment on their mental health
- Their experiences of accessing – or attempting to access - mental health treatment and support both in the community - before and after imprisonment- and in prison

Recommendation 13: That the Commission obtain the data on mental health services in Victorian prisons collected for the 2018 QCMHR survey *Prison Mental Health Services: A comparison of Australian Jurisdictions*.

Recommendation 14: That the Victorian Government increase funding to community-based advocacy for people – and particularly Aboriginal women – at risk of criminalisation and imprisonment due to family violence, mental health and drug and alcohol issues.

Recommendation 15: That the Department of Health and Human Services publish data on children placed in out-of-home care as a result of the imprisonment of a parent or primary carer.

Recommendation 16: That the Commission consider the recommendations of the July 2015 report of the Monash University Criminal Justice Research Consortium, *The Impact of Incarceration on Children's Care: A Strategic Framework for Good Care Planning*.

Recommendation 17: That the Victorian Government commit to substantial reduction in imprisonment of children and adults with psycho-social disability over the next 10 years to be achieved through of a whole-of-government "justice reinvestment" strategy that diverts funding from incarceration to programs proven to improve mental health and community safety including:

- Accessible, affordable and stable publicly funded housing
- community-based treatment - including residential care - for psycho-social disability and drug and alcohol dependency
- mental health crisis response by a mental health workforce, rather than law enforcement
- parenting and youth support and accessible child care

Endorsements

We have had the benefit of reading the submissions from the following groups and organisations and endorse their recommendations:

- The Women's Leadership Group of Women Transforming Justice
- Djirra
- Federation of Community Legal Centres
- Victorian Alcohol and other Drug Association (VAADA)
- The Council to Homeless Persons
- Mental Health Legal Centre (Justice System and Forensic Mental Health Submission)

1. About Fitzroy Legal Service

The Fitzroy Legal Service is one of the oldest community legal centres in Australia. Since its inception, Fitzroy Legal Service has worked extensively with a high volume of clients, providing legal assistance in criminal law matters, victims of crime assistance applications, family law, family violence, tenancy law, infringements matters and other civil law matters. A significant proportion of our clients live with a psycho-social disability.

We work in specialist mental health courts with two Fitzroy Legal Service lawyers co-located at the Neighbourhood Justice Centre, a multi-jurisdictional court with a number of co-located support services, including mental health services. We also regularly appear at the Assessment and Referral Court (ARC) a Magistrates' Court list 'for accused persons who have a psycho-social disability and /or a cognitive impairment' [2]

Fitzroy Legal Service has particular expertise in working with clients who live with both a psycho-social disability and problematic alcohol and drug use, including through evidence based harm minimisation approaches:

- Fitzroy Legal Service's Drug Outreach Lawyer (DOL) program has been providing legal services to vulnerable people who use drugs and who are disengaged from traditional in-house legal services for 17 years. This program is grounded in the outreach model of service delivery working closely with staff from outreach location agencies to provide legal advice and assistance to clients who utilise their services. A significant proportion of DOL clients have a dual diagnosis of both a psycho-social disability and drug addiction.
- Fitzroy Legal Service staff have occupied long term positions on the Committee of the Yarra Drug Health Forum, the Board of Harm Reduction Victoria (a peer based organisation concerned with illicit drug use), and the board of Harm

[2] see Magistrates' Court of Victoria, 'Assessment and Referral Court (ARC) <https://www.mcv.vic.gov .au/about-us/assessment-and-referral-court-arc>

Reduction Australia (a national organisation committed to reducing the health, social and economic harms associated with drug use). Fitzroy Legal Service has also worked with Australian Injecting & Illicit Drug Users League, a peer based national organisation focused on rights and elimination of stigma surrounding drug use through production of legal resources for drug users living in the various states and territories.

In February 2019, Fitzroy Legal Service merged with Darebin Community Legal Centre (DCLC). Darebin Community Legal Centre has also worked specifically with people who have a psycho-social disability and who have contact with mental health systems.

In particular, DCLC has provided a state-wide Prisoner Advocacy Program for over 20 years. The service provides free legal advice, information and representation accessible to all imprisoned persons in Victoria via a dedicated Prison Advice Line and by mail, and is focused predominately on assisting people issues relating to prison conditions, access to health and services and corrections-based issues such as parole.

DCLC also manages Women Transforming Justice ('WTJ'), a two-year pilot project delivered in partnership with Law and Advocacy Centre for Women (LACW) and Flat Out Inc., a support service for women exiting prison. WTJ was established in response to the escalating increases in the number of women in Victorian prisons and works with women in court and in the community to enhance their prospects of bail and support them and their children to live in safety and stability. The work of WTJ is guided by a leadership group of women with lived experience of prison and criminalisation**. The WTJ leadership group have made their own submission to the Commission, which is endorsed by Fitzroy Legal Service.**

DCLC has specific expertise in family violence, having run a duty lawyer service predominately working with affected family members in the Specialist Family Violence Division of Heidelberg Magistrates' Court for over a decade.

Reference in these submissions to Fitzroy Legal Service ('**FLS**') hereafter will mean Fitzroy Legal Service (incorporating Darebin Community Legal Centre).

2. Overview

These submissions are informed by our extensive work with clients who live with psycho-social disability, many of whom also experience other vulnerabilities such as homelessness or drug and alcohol addiction.

Our submissions will address the following areas:

3. An integrated approach to mental health
4. Social marginalisation, dual diagnosis and the criminal justice system
5. A health harm minimisation approach rather than a criminal justice approach
6. Housing, homelessness, mental health and criminalisation
7. Community mental health care, not prisons

We note that these areas often intersect and overlap and, as such, do so in our submission as well.

3. An integrated approach to mental health

An individual's psycho-social disability does not exist within a vacuum but rather coexists with, or is interrelated to, other forms of social marginalisation. As an overarching principle, we submit that any mental health response that aims to have meaningful individual and systemic impact must be integrated and holistic, addressing all issues impacting on social health and wellbeing.

The recent Royal Commission into Family Violence, for example, found that approximately 40 per cent of men accessing mental health services have experienced childhood sexual abuse, and between 50 and 90 percent of women have experienced child sexual abuse or another form of family violence. Of women who have

experienced three or four types of gender-based violence, seventy-seven per cent had made suicide attempts.[3]

The ongoing health implications for people experiencing family violence are complex and risk factors for further harm are high, including through increased risk of alcohol and other drug dependence, further violence, discrediting as a result of diagnosis and engagements with legal processes, including criminalisation. This exposes the complex and interconnectedness of family violence, criminalisation and mental health, and we submit is only one example of how psycho-disability and other marginalisation intersect.

We submit that to understand and respond meaningfully to the negative experiences lived by people with psycho-social disability, there needs to be an understanding of the various and compounding social issues that impact them, the ways these social issues intersect, and how to address them holistically and effectively. We submit that any mental health response needs to be an integrated approach. That is, any mental health response needs to also be: a family violence response; a housing and economic and social rights response; a harm reduction response to alcohol and other drugs; a criminal justice response that is grounded in rehabilitation; and a response to other forms of marginalisation experienced by groups, including Aboriginal and Torres Strait Islander communities.

3.1 Investment in community-based services to meet complex needs

People with psycho-social disability are over-represented in the criminal justice system. Due to deinstitutionalisation and the care of people with psycho-social disability by often poorly funded community services, there is some evidence to suggest that the burden of managing psycho-social disability has been shifted in part to the criminal justice system.[4] There is therefore a pressing need for adequate

[3] Victoria, Royal Commission into Family Violence, Report and recommendations (2016) vol 1V, ch 18.
[4] Homelessness Australia, *States of Being: Exploring the Links Between Homelessness, Mental Illness and Psychological Distress* (Policy Paper, November 2011); Debbie Kilroy, Submission to Select Committee on Mental Health, *Inquiry* (4 August 2005) 92 as cited in Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health – From Crisis to Community* (First Report, 30 March 2006) 350.

community based care that can sufficiently meet the complex needs of individuals with a psycho-social disability, drug use or dual diagnosis.

The Victorian Alcohol and Drug Association (VAADA) has prepared an extensive submission on how the Alcohol and Other Drugs (AOD) sector and Mental health services and systems can provide more coordinated and effective community based services. FLS endorses VAADA's recommendations. Our extensive experience with clients with psycho-social disability confirms:

- Lack of access to mental health services, particularly earlier intervention, is the single biggest impediment to co-ordinated care.
    - For example, many of our clients have attended hospital emergency departments seeking assistance following a suicide attempt or drug overdose, only to experience a lack of meaningful engagement and referral.
- Support and treatment for people with a dual diagnosis does not occur in a coordinated manner.
    - For example, the major public rehabilitation centres do not have facilities to address both issues simultaneously which, in our experience, often results in our clients being turned away.
- Recovery and community participation supports, such as community housing, are vital for people cycling through the criminal justice system, in particular on bail or leaving prison.
- People who experience family violence must have access to mental health care that is safe, and that understands the dynamics of violence in intimate partner and other family relationships.
    - For example, viewing responses to trauma such as acute distress as a strictly mental health problem without awareness of different mechanisms of power, control and coercion in family violence, can contribute to further disempowerment and harm experienced by the victim of violence.

Ultimately, better community care:

- Diverts individuals from the criminal justice system in the first place; and
- Reduces prison numbers by allowing people to be on bail in the community engaging with appropriate supports (see discussion on bail at 4.2.4 below).

Recommendation 1: That the Victorian government invests in community-based services that can meaningfully engage with the complexity of people with psycho-social disability and who experience other forms of marginalisation.

3.2 Investment in integrated legal services

Legal stress plays a significant role in a person's mental health and wellbeing and getting free or affordable access to legal help and assistance is crucial to recovery. There is significant evidence for the benefit of delivering integrated legal services in partnership with health and wellbeing organisations.[5]

FLS's extensive experience delivering outreach legal services in partnership with other community-based organisations (including our drug outreach lawyer working on the ground in primary health services, needle syringe programs and rehabilitation facilities since 2002; and relevantly our health justice partnership with MIND Australia) has facilitated the possibilities of attaining better social health outcomes for clients through the strength of integrated support to identify, prevent, and address their legal and social needs.

[5] Christine Coumarelos, Pascoe Pleasence and Zhigang Wei, 'Law and disorders: illness/disability and the experience of everyday problems involving the law' (Justice Issues Working Paper No 22, Justice Issues, Law and Justice Foundation of NSW; Suzie Forell, Health Justice Australia, *Mapping a New Path: The Health Justice Landscape* (2017); Centre for Innovative Justice, *Multidisciplinary Response Models: Report to the Southern Melbourne Integrated Family Violence Partnership* (September 2016).

Toby – a case study

Our drug outreach lawyer (DOL) met Toby (a pseudonym) when he was using the Medically Supervised Injecting Room (MSIR).

Toby had a number of criminal charges before the court, all relating to his experiences of homelessness and drug use. Toby had been homeless for some time, was experiencing significant issues due to his psycho-social disability and drug dependence, and had not previously engaged a lawyer.

The charges had been percolating through the system for some time, and the effect of not having those matters finalised put Toby at further risk of being remanded.

Having our drug outreach lawyer on-site and embedded in the service delivery of the MSIR enabled the following outcomes:

- ability for the DOL to meet Toby;
- establishing a relationship through 'borrowed trust' of association with the MSIR and opportunity to form a relationship of trust between DOL and Toby;
- enabled holistic understanding of the nature of social issues and the intersection with legal matters, to achieve targeted referrals to support services;
- when Toby was ultimately remanded for further offending, he was able to rely on the relationship with the DOL;
- relying on the former connection with Toby, and the work already done to prepare his case, Toby's matter was fast tracked through the court system; and
- Toby obtained supported housing and received a good behaviour bond, thereby reducing his risk of re-offending.

This is but one of the many examples of how an investment in integrated legal and social services can bring about excellent health and social outcomes for people experiencing psycho-social disability.

Functional and effective partnerships through integrated services are the result of the hard work and dedication of those involved. Working relationships take time to become properly established and their success and longevity require those involved to be securely and adequately funded.

We strongly recommend that the provision of integrated legal and social services be prioritised, and that funding:

- factor in adequate planning, relationship building and evaluation;
- be sustainable and long-term; and
- enable the innovation and design of new partnerships to address service gaps.

Recommendation 2: That the Victorian government recognises and supports new and existing integrated service partnerships between mental health services (and other social services) and community legal centre outreach programs.

3.3. Sector funding

The Victorian Inquiry into Access to Justice found that people with psycho-social disability are particularly vulnerable to having a legal problem.[6] In our experience, a large proportion of our clients report living with psycho-social disability and often their legal problems both stems from and, especially if unaddressed, exacerbate our client's psycho-social disability.[7]

In the 2017-18 financial year Victoria Legal Aid administered $28.2 million (inclusive of both State and Federal contributions) to thirty-seven community legal centres across the state. Although funding is not equal across the thirty-seven centres (for obvious reasons such as size, catchment area etc.) this equates to an average of just over $760,000 per centre annually.

[6] Department of Justice and Regulation, Government of Victoria, *Access to Justice Review: Reports and Recommendations* (Report, 1 August 2016) vol 1, 78.
[7] Christine Coumarelos et al, Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Victoria* (Access to Justice and Legal Needs Report, August 2012) vol 14, 16.

At Fitzroy Legal Service our 2017-18 allocated budget was $746,124 (non-inclusive of project grants and fundraising activities). In that same financial year we assisted 4,585 clients. If that total budget was only spent on client services (that is, not including operational costs and services that are not directly client facing) this would equate to approximately $163 per client. We know that in reality we are working with much less to assist clients.

To successfully and meaningfully provide a mental health response, it is critical to effectively fund community legal centres to respond to the legal need of people experiencing psycho-social disability. Effective funding means dedicated, long-term adequate funding that is sufficient to sustain the work done. There needs to be an ability to maintain projects and service delivery models that have proved to successfully address legal concerns of people experiencing psycho-social disability, as well an ability to respond flexibly and innovatively to developing community needs.

Recommendation 3: That the Victorian government provides increased and stable funding to sustain existing service delivery of community legal services and to support development of innovative services to dedicatedly address the need of people with psycho-social disability.

4. Criminalisation of people with psycho-social disability

While people with a psycho-social disability are indeed overrepresented in the criminal justice system[8] and in imprisonment in particular,[9] there is no evidence that this cohort is inherently more likely to offend.[10] Criminalisation as an effect of deinstitutionalisation and resulting lack of mental health services in the community as discussed above is not however the only fact effecting the overrepresentation of people with a psycho social disability in the criminal justice system.

Firstly, there is a strong link between the criminalisation of psychosocial disability and drug use. Research, supported by our experience at FLS, demonstrates that the prevalence of dual diagnosis is the norm rather than the exception for people coming into contact with the criminal justice system.[11] Combined with the 'war on drugs' approach means an increased proportion of people with psycho social disabilities and/or drug use are caught in the criminal justice system. [12]

The impacts other layers of social disadvantage such as homelessness (see discussion at section 5) and other socially-disabling experiences such a childhood sexual abuse or family violence are experienced at higher levels by those with psycho-social disabilities.[13] Additionally, it has also been evidenced that there is a link between

[8] James Ogloff et al, Australian Institute of Criminology, *The Identification of Mental Disorders in the Criminal Justice System* (Trends & Issues in Crime and Criminal Justice Report No. 334, March 2007); Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health – From Crisis to Community* (First Report, 30 March 2006).

[9] Henderson, S (2003) *Mental Illness and the Criminal Justice System,* Mental Health Coordinating Council, as cited in Eileen Baldry, Leanne Dowse and Melissa Clarence. 'People with Mental and Cognitive Disabilities: Pathways into Prison' (Background Paper for Outlaws to Inclusion Conference, UNSW School of Social Sciences and International Studies, February 2012).

[10] Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health – From Crisis to Community* (First Report, 30 March 2006) ch 13. **(citation 11 in VAADA report)** see also Simpson and Hogg 2001)

[11] Ibid; Victorian Department of Human Services, *Dual Diagnosis: Key directions and Priorities for Service Development* (Report, 01 May 2007, Victorian State Government).

[12] Eileen Baldry, Leanne Dowse and Melissa Clarence. 'People with Mental and Cognitive Disabilities: Pathways into Prison' (Background Paper for Outlaws to Inclusion Conference, UNSW School of Social Sciences and International Studies, February 2012).

[13] Also *Royal Commission into Family Violence*: *Report and Recommendations* (Report, March 2016) Vol IV, 18, 72.

trauma and experiencing a psycho-social disability and/or problematic drug use[14] - illicit drug use in turn inherently exposes a person to increase risk of interactions with the criminal justice system.

It is beyond the scope and resources of our submission to comprehensively address why these vulnerabilities increase interaction with the criminal justice system. However, below we focus on some key areas that reflect our legal practice experience. Additionally Fitzroy Legal Service has particular expertise in working with clients who live with both a psycho-social disability and problematic alcohol and drug use (dual diagnosis); we will examine these keys areas through a dual-diagnosis lens. However, many of the recommendations are valuable and relevant for individuals for people coming into contact with the criminal justice system who live with a psycho-social disability alone.

4.1 The use of police to respond to incidents involving people with a dual diagnosis.

Police are frequently called to manage people with a psycho-social disability and/or drug use who are seen as having difficult, challenging or anti-social behaviours.[15] At these incidents police can resolve the issues informally, call emergency mental health services for assistance, take the individual to hospital or arrest and charge them. Research confirms[16] and our clients experience suggests that arrest and criminal charge is the predominant police response. This decision to arrest and charge means

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14 Liz Wall and Antonia Quadara, Australian Institute of Family Studies, *Acknowledging complexity in the impacts of sexual victimisation trauma* (ACSSA Issues No 16, February 2014); Glenys Dore et al, 'Post-Traumatic Stress Disorder, Depression and Suicidality in Inpatients with Substance Use Disorders' (2012) 31(3) *Drug and Alcohol Review* 294.

15 Eileen Baldry, 'Disability at the margins: limits of the law' (2014) 23(3) *Griffith Law Review* 370, 370-388; Office of Police Integrity, Government of Victoria, *Policing People Who Appear to be Mentally Ill* (OPI Review, November 2012); Select Committee on Mental Health, Parliament of Australia, *A National Approach to Mental Health – From Crisis to Community* (First Report, 30 March 2006).

16 Joel W Godfredson et al, 'Police Perceptions of Their Encounters with Individuals Experiencing Mental Illness: A Victorian Survey' (2011) 44(2) *Australian and New Zealand Journal of Criminology* 180, 180–195; Office of Police Integrity, Government of Victoria, *Policing People Who Appear to be Mentally Ill* (OPI Review, November 2012); Community Offender Services, Probation and Parole Service, Department of Corrective Services, Submission No 317 to Mental Health Council of Australia, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (2004) as cited in Mental Health Council of Australia, *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* (Report, 2014), 220 as cited in Council to Homeless Persons, *Messaging Guide to the Royal Commission into Mental Health; Housing, Homelessness and Mental Health (*Guide, 2019).

that a health issue is transformed into a criminal justice issue. Police are not trained mental health practitioners and research confirms[17] and our clients' experience suggests police intervention often escalates the situation, resulting in additional charges such as resist or assault police.

John – a case study

John (a pseudonym) was experiencing psychosis. He lived with a psycho-social disability and used drugs. He was running on a busy street and police attended as first responders.

Police attempted to assist John, but their attendance only heightened his feelings of anxiety, stigma and fear. Police restrained John while they waited 30 minutes for an ambulance to take him to hospital. During this time, it was alleged John assaulted police. Following this incident a large number of charges were laid, including: assault emergency worker on duty, resist emergency worker, reckless cause injury and willfully damage property. All charges related to police interaction. There was no offence for the original conduct – running on the road.

John had no criminal prior convictions. John was completely unable to navigate his way through the criminal justice system, self-representing at court appearances. The matter was continually adjourned for a long period of time. John was on bail, leaving him vulnerable to remand if he failed to comply with his bail conditions or had further interaction with the criminal justice system.

Finally, John engaged a legal representative who was linked closely with his primary health service. His lawyer advised that he may have the defence of mental impairment. However, as he did not trust the mental health system, his lawyers were unable engage a psychiatrist to obtain a report.

[17] Anthony J O'Brien and Katey Thom, 'Police Use of Tasers in Mental Health Emergencies: A Review' (2014) 37(4) *International Journal of Law and Psychiatry* 420; Michael T Rossler and William Terrill, 'Mental Illness, Police Use of Force, and Citizen Injury' (2017) 20(2) *Police Quarterly* 189.

With the support of his doctor, his lawyer was able to collect enough material to convince a police prosecutor that this was a not a matter which belonged in the criminal justice system. It was agreed that the process had been detrimental to John's mental health and a waste of police and court resources. John was granted a criminal justice diversion 4 years after the original incident.

Victoria's current approach with police as first responders is ineffective, failing to meaningfully engage people with appropriate community services. It is also costly[18] and causes further harm. These harms include the trauma and stigma of a public, at times violent arrest, further criminalisation, and potentially imprisonment.

An alternative is a co-responder model, involving police and appropriate community services. One such model is the Mental Health and Police (MHaP) initiative. MHaP builds upon the Police Ambulance and Clinical Early Response (PACER) pilot program and operates with the aim to improve responses to those in mental health crisis by linking police, with mental health professionals. MHaP operates to provide mental health support, responses other than transportation to an emergency department, and de-escalation to those is crisis.

MHaP is not however, a comprehensive state-wide program and does not recognise the co-occurrence of psycho-social disability and drug use. We recommend that the inclusion of drug and alcohol workers within this framework. This approach would prove cost effective[19] leading to a reduction in mental health and dual diagnosis related arrests and the associated harms discussed above.

[18] The financial cost of managing someone with disability via the criminal justice system are higher than costs of supporting them early and well via social and human services. Ruth McCausland et al, 'People with Mental Health Disorders and Cognitive Disability in the Criminal Justice System: Cost Benefit Analysis of Early Support and Diversion, AHRC' (Report, UNSW, August 2013) in Eileen Baldry, 'Disability at the margins: limits of the law' (2014) 23(3) *Griffith Law Review* 370.
[19] Ibid.

Recommendation 4: That the Victorian Government implements and evaluates a comprehensive state-wide co-responder model of police, mental health and drug and alcohol workers to crisis mental health or dual diagnosis related incidents.

4.1.1. Alternative mental health responses

To avoid the revolving door of the criminal justice system, wherever possible and appropriate non-criminal responses need to be made available for people in need. This includes services other than the police as first responders.

We are cognisant of avoiding alternate modes of arrest developing in their place – such as the paperless arrest laws of the Northern Territory. We are equally aware that people often call on the police to respond to mental health and public space crises because there is no other available option known to them.

From discussions with other community legal centres we know that the CATT team is only able to respond to call outs in the most extreme of cases whereas the police are much more likely to attend other call out requests. The result being that we are currently lacking in lower level and preventative mental health call out assistance whilst concurrently growing an unhelpful reliance on police.

Research and consultation is needed to evaluate programs and experiences of existing mental health, AOD and CATT team services to expand and create alternative mental health and non-emergency crisis response services.

We believe that investing in preventative support systems will help to reduce the instances of extreme crisis call outs – creating a safe environment for those experiencing mental health needs and our emergency service workers.

Recommendation 5: The Victorian government work with existing mental health, AOD, and CATT team services to expand and create alternate mental health and crisis response services.

4.2 Policies and laws that criminalise difficult, challenging or anti-social behaviour relating to mental health and drug use.

4.2.1 Criminal charges surrounding police as first responders

As the above case study of John illustrates police are frequently called to manage people with a psycho-social disability and/or drug use who are seen as having difficult, challenging or anti-social behaviours. One of the additional harms from these interactions is a large number of charges including for example; assault emergency worker, assault or resist police, or willfully damage property. These charges often result from the escalation of the incident and the police interaction rather than the behaviors police were called for in the first place.

As discussed above a comprehensive state-wide co-responder model of police, mental health and drug and alcohol workers to crisis mental health or dual diagnosis related incidents would address this incidental criminalisation.

4.2.2 Public space offences

Public space offences are those offences relating to a person's interactions with and use of public space. Naturally, these offences disproportionally affect homeless persons and other persons who spend more time in public places, such as or young people, or who are more visible in public spaces – such as racially targeted persons,[20] young people,[21] those exhibiting psycho-social disability,[22] or persons under, or appearing to be under, the influence of drugs or alcohol.

There is clear and significant evidence that the criminalisation of activities like begging, drinking in public, offensive language and other public space offences has a

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[20] Australia Human Rights Commission, *Indigenous Deaths in Custody: Chapter 6 Police Practices* <https://www.humanrights.gov.au/publications/indigenous-deaths-custody-chapter-6-police-practices>

[21] Youth Affairs Council of Victoria, 'Submission to the Inquiry into Public Drunkenness' 1 May 2001; Australian Law Reform Commission, *Children's involvement in criminal Justice processes* <https://www.alrc.gov.au/publications/18-childrens-involvement-criminal-justice-processes/public-spaces>

[22] Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness*, AGPS, Canberra, 1993,p. 758

disproportionate effect on the vulnerable cohorts discussed above. There is also clear and significant evidence that an enforcement or criminal justice based approach is ineffective[23] costly and causes further harm. As discussed above these harms include, the trauma and stigma of a public of arrest, interaction or harassment from police or enforcement agencies, further criminalisation and potentially imprisonment (see further discussion of Victorian Bail law reform at 4.2.4).

The 2009 Royal Commission into Aboriginal Deaths in Custody called for the abolishment of the offence of drunk in a public place and we echo their long overdue recommendation.

Introducing, or re-introducing, people into the criminal justice system for such low-level, non-violent offences is antithetical to the harm-reduction approach to psycho-social disability, substance use disorders and homelessness that a modern, informed and progressive society should be taking.

To further a harm-reduction response to persons alcohol and drug affected, we support further investment in sobering-up services as modelled by the Koori Community AOD Recovery Service run by Ngwala Willumbon who link clients with ongoing AOD, homelessness and other welfare services.

Recommendation 6: The decriminalisation of public space offences.

4.2.3 Decriminalisation of low level drug offending

There is significant Australian and International research demonstrating that the current law and order approach to drug control has failed to minimise the harms associated with drug use.[24]

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23 Ibid.

24 See eg, Global Commission on Drugs, *War on Drugs: Report of the global commission on drug policy* (Report, June 2011); Bob Douglas and David McDonald, *The Prohibition Of Illicit Drugs Is Killing And Criminalising Our Children And We Are All Letting It Happen,* Report of a high level Australia 21 Roundtable (2012).

Many overseas jurisdictions have decriminalised drug use in some form,[25] The Portugal model is perhaps the most comprehensive.[26]

FLS supports the decriminalisation of drug use and personal possession of illicit substances within Victoria in conjunction with a shift in focus to rehabilitation and evidence based harm minimisation strategies. There is already significant work advocating for the adoption of this approach within Australia.[27] As discussed above drug use and mental health issues cannot be discussed in isolation, considering the prevalence of dual diagnosis any harm minimisation approaches to drug use will result in less people with psycho-social disabilities being criminalised.

Recommendation 7: Decriminalisation of drug use and personal possession of illicit substances within Victoria.

4.2.4 Current bail laws

Recent changes to Victorian bail laws has expanded the number of offences for which there is a presumption against granting bail. This has resulted in people being held on remand for minor breaches of bail conditions, such as curfews, failing to report for bail, shop theft or drug possession. As discussed above many of these offences come from policies and laws that criminalise homelessness, mental health and drug use in the first place.

Additionally, the way in which the tests that courts apply when deciding whether to grant a person bail does not always indicate the seriousness of the charge, but rather vulnerability factors including lack of safe accommodation, lack of community

[25] Ben Mostyn, Helen Gibbon and Nicholas Cowdery, 'The Criminalisation of Drugs and the Search for Alternative Approaches' (2012) 24(2) *Current Issues in Criminal Justice* 33.

[26] Drug Policy Alliance, *Drug Decriminalization in Portugal: A Health-Centered Approach* (February 2015) 1 <https://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Portugal_Decriminalization_Feb2015.pdf>

[27] Alex Wodak, Bob Douglas, and David Neil McDonald, *Alternatives to prohibition: Illicit drugs: How we can stop killing and criminalising young Australians*, Report of the second Australia21 Roundtable on Illicit Drugs held at The University of Melbourne (6 July 2012); Ibid 24; Alex Wodak, 'What works best in the war on drugs', *The Conversation* <https://theconversation.com/what-works-best-in-the-war-on-drugs-31015>.

connection and support and can often lead to people with complex needs, including psycho-social disabilities being remanded.

These laws are disproportionately affecting vulnerable cohorts discussed above including people with a psycho-social disability and/or drug use.[28] They have resulted in a 22 percent increase in un-sentenced prisoners since 30 June 2017. For many these remand periods are often longer than any sentence that they would have received for the offences for which they were charged.

Recommendation 8: A review and reform of the current bail laws taking into consideration disproportional effect of criminalisation on people with a psycho-social disability and/or problematic drug use.

5. A health harm minimisation approach rather than a criminal justice approach

A common theme of the above analysis is that a health based harm minimisation approach rather than a criminal justice approach should be prioritised to direct people with psycho-social disabilities and or drug use into rehabilitate interventions rather than the criminal justice conveyor belt.[29]

In their submission to this Commission, the Women's Leadership Group of our Women Transforming Justice state: "the criminal justice system is relied upon to respond to the needs of individuals with dual-diagnosis, rather than healthcare services.' We endorse this view. Ultimately, the central problem is treating health issues such as drugs and psycho-social disability as criminal justice issues rather than applying a social health-based harm minimisation approach.

[28] Karin Derkley, 'Vulnerable clients, including women, Indigenous people and those with mental health issues, are missing out on bail under recent reforms', *Law Institute of Victoria* (1 Oct 2018) <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/October-2018/Lawyers-warn-of-bail-crisis>
[29] Ibid 12.

5.1. Criminal Justice Law reform

As discussed above a social health-based harm minimisation approach would provide a systemic transformation of society's approach to caring for people with psycho-social disabilities and/or drug use. However, in the absence of this investment the following section addresses some key aspects criminal justice law reform that may mitigate the current situation, namely:

- Criminal Justice diversion
- Pre-Charge Diversion/ Cautioning Schemes
- Rehabilitation (rather than incarceration) as a central focus of the Criminal Justice System.

5.1.1 Criminal Justice Diversion

The Criminal Justice Diversion program allows eligible individuals to have their criminal matter 'diverted' from the mainstream court system.

Currently in the Victorian system Criminal Justice Diversions can generally only be received by an individual once, and only where they have no prior criminal history. This process ignores the reality that substance addiction and psycho-social disability are unlikely to be a once-off event. By only allowing users Diversion on one occasion, their ability to effectively engage with services and manage their psycho-social disability or addiction is diminished.

FLS supports an expansion and reform of the Criminal Justice Diversion program to allow people with a psycho-social disability or dual diagnosis to also benefit from being diverted from the criminal justice system. We recommend the following changes:

- Expand the Criminal Justice Diversion program to include a presumption of Diversion for low-level drug offences;
- Expand the Criminal Justice Diversion program to include a presumption of Diversion where a person can show that their psycho-social disability is a significant factor in the alleged offending;
- Remove the need for the accused person to 'accept responsibility' for the alleged charge and replace with a commitment to engage with treatment – our

experience is that for people whose psycho-social disability was a significant factor in offending, 'accepting responsibility' it is often an arbitrary and unhelpful concept does not reflect the experience of the person affected by the psycho-social disability;

- Enable review and support rather than strict compliance acknowledging the reality of relapse.

As the current system offers diversion through absolute prosecutorial discretion, including a presumption for bail would help to reduce the tendency for this discretion to negatively impact Aboriginal and Torres Strait Islander peoples due to over-policing and bias.[30]

5.1.2 Pre-Charge Diversion/ Cautioning Schemes

In addition to the Criminal Justice diversion scheme discussed above. Victoria Police have policy directives in place to support the issuing of diversion or caution as an alternative to the laying of a charge. These 'pre-charge' diversions are conditional on attendance at a clinical assessment and attendance for drug treatment at a drug treatment agency.

We submit that 'pre-charge' diversion presents a significant opportunity for people with a psycho-social disability and or drug addiction to avoid interaction with the criminal justice system, particularly if developed and implemented alongside a co-responder model such as MHaP.

We recommend a Victoria police policy change expanding the circumstances in which a 'pre-charge' diversion could be granted. This could allow police officers to redirect a person into therapeutic and rehabilitative services instead of prosecuting them for low-level offences attributable to drug addiction and/or mental health issues. As with Criminal Justice Diversion we also recommend that:

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[30] Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 22; Victorian Aboriginal Legal Service, Submission to the Victorian Parliament, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (September 2017) 3.

- people with psycho-social disability and/or drug addiction could receive a pre-charge diversion on more than one occasion;
- a presumption in favour of 'pre charge' diversion for low-level drug offences; and,
- a presumption in favour of 'pre charge' diversion where a person can show that their psycho-social disability is a significant factor in the alleged (low level) offending.

Recommendation 9: Expand and reform both the Criminal Justice Diversion program and Victoria Police 'pre-charge' diversion policy directives to allow more meaningful and less discriminatory participation by people who have psycho-social disability, and/or face other social marginalisation (which can have the effect of excluding them from benefiting from Diversion).

5.2 Rehabilitation (rather than incarceration) as a central focus of the Criminal Justice System

In the absence of a social health-based harm minimisation approach, the focus of the criminal justice response in relation to psycho-social disability and/or drug use must shift from punitive measures such as prison to rehabilitation as a central focus. People with psycho-social disability or a dual diagnose experience who have contact with the criminal justice system have multiple and interrelated legal, social and health problems, which can often compound their experience of those problems. A key concern should be facilitating targeted access to services which can holistically address these compounding concerns and pave a way for rehabilitation and positive outcomes at every step in the criminal justice process - from the time of contact with police, at the time of charge, whilst on bail, on remand, at sentence and serving sentence, post release and on parole.

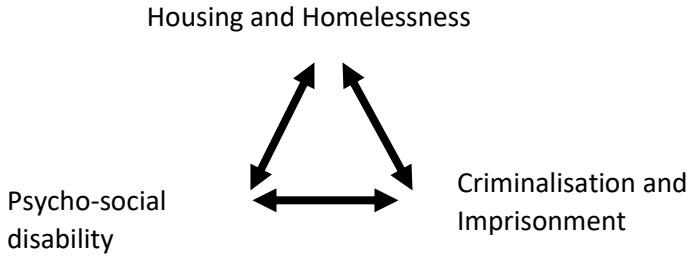
As such, we support recommendations of the Law Institute of Victoria to this Commission regarding holistic approaches, dual diagnosis, and post-prison services.

Treating rehabilitation as a central pillar is particularly critical when addressing youth contact with the criminal justice system. In light of the specific vulnerability of young people and resulting criminalisation of young people's behaviours and the impact particularly on young people who experience additional social marginalisation, we support the calls of the Raise the Age Campaign to raise the age of criminal responsibility to 14 years of age and support the submission of the Human Rights Law Centre.

Recommendation 10: To raise the age of criminal responsibility to 14 years of age (reflecting the Raise the Age Campaign).

6. Housing, homelessness, mental health and criminalisation

In addressing the mental health system in Victoria, we ask the Commission to pay considerable weight to the role that safe, secure and stable housing plays in preventing, managing and recovering from psycho-social disability. Most importantly, the triangular relationship influence between psycho-social disability, criminalisation and housing.



We base our recommendations on the following evidence based understandings and FLS experiences:

- There is a multi-causal relationship between psycho-social disability, homelessness and interactions with the criminal justice system.

- Around 30% of people accessing specialist homeless services repot a diagnosed psycho-social disability[31], 15% reported a diagnosed psycho-social disability before experiencing homelessness and a further 16% reported developing a psycho-social disability after their experience of homelessness commenced.[32]

- The absence of safe, stable and secure housing has a detrimental effect on a person's health and mental health.

- 'Homelessness' does not only mean sleeping rough but includes emergency accommodations, couch-surfing, temporarily staying with friends or family, caravan parks, boarding houses and inadequate dwellings without tenure where there is no control over the space, or that is unsafe, unstable, not private or insecure.[33]

- There is a waiting list of over 36,000 applicants for social housing[34] and on any given night 24,000 Victorians are homeless.[35]

- Homeless persons are overrepresented in prison populations – 1 in 3 persons entering prison reporting they were homeless in the four weeks prior to incarceration.[36]

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[31] Australian Institute of Health and Welfare, 2018, Specialist Homelessness Services Collection 2016-17. As cited in the Council to Homeless Persons messaging guide to this Commission.
[32] Johnson, G., and Chamberlain, C., 2011, Are the homeless mentally ill?, *Australian Journal of Social Issue*s, Volume 46, Issue 1, p.36. As cited in the Council to Homeless Persons messaging guide to this Commission.
[33] Australian Bureau of Statistics*, Information Paper: A Statistical Definition of Homelessness* (Catalogue No 4922.0, 04 September 2012); 'About Homelessness', *Vincent Care* (Web Page, 05 July 2019) <https://www.vincentcare.org.au/our-services/about-homelessnessunder-housing-and-homeless/>
[34] Legal and Social Issues Committee, Legislative Council, Parliament of Victoria, *Inquiry into the Public Housing Renewal Program* (Report No 11, 05 June 2018).
[35] Australian Bureau of Statistics as cited by 'Facts about homelessness', *Council to Homeless Persons* (Web Page, 05 July 2019) <https://chp.org.au/homelessness/>
[36] Australian Institute of Health and Welfare. *The health of Australia's prisoners 2018* (Report, 30 May 2019); Eileen Baldry et al, Australian Housing and Urban Research Institute, *Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration?* (Final Report No 46, 01 Aug 2003).

- Homelessness increases risk of interactions with the criminal justice system as victim or offender[37] and interactions with the criminal justice system increase the risk of homelessness.
- 50 per cent of persons exiting prison reported they expected to be homeless upon release.[38]
- Those escaping family violence, often women and children, are at increased risk of experiencing homelessness and psycho-social disability – and that victims of family violence are overrepresented in prison populations.
- An absence of access to stable housing is a predictor of a person being denied bail or parole.

6.1. Public, social and community housing

In light of the interconnected relationship between housing, mental health and criminalisation we are of the understanding that one cannot be addressed without simultaneously considering the others.

The bipartisan "tough on crime" stances from successive governments has produced an environment where punishment, denunciation and deterrence have taken policy and funding focus over preventative programs and therapeutic responses.

In the latest budget release the Andrews government is allocating an additional $1.8 billion into new prisons (an expected increase of the recurrent cost to $1.2 billion annually) whilst only an additional $209 million has been pledged to public housing (an existing $412 million annual spending).

If the underlying causes of criminalisation and imprisonment, such as housing, mental health, discrimination and substance abuse, are not given adequate weight and

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[37] Jason Payne, Sarah Macgregor and Hayley McDonald, Australian Institute of Criminology, *Homelessness and housing stress among police detainees: Results from the DUMA program* (Report No 492, 12 February 2015); Sarah Larney et al, 'Factors associated with violent victimisation among homeless adults in Sydney, Australia' (2009) 33(4) *Australia and New Zealand Journal of Public Health* 347, 347-51.

[38] Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (Report, 30 May 2019).

attention we should expect to see continuing increases in prison populations – and due to the multi-direction influences, resultant increases in need in these areas.

We support submissions made by the Council to Homeless Persons, the Federation of Community Legal Centres, Djirra, VAADA, and the Law Institute of Victoria in calling for increased funding into the creation and restoration of public, community and social housing and stronger protections, policies, procedures and services to support tenants

We further urge the Commission to recommend a cessation of the selling of public land stock to private developers.

Recommendation 11: Funding of public and social housing creation and restoration to be prioritised as a matter of urgency and the selling of public land stock to private developers is ceased.

7. Community mental health care, not prisons

7.1 The Commission should take oral evidence, in prisons, from imprisoned adults and children with lived experience of psycho-social disability

The Commission is required, under its terms of reference, to examine how to improve mental health outcomes for people in contact with the justice system and to have regard to the evidence of people with lived experience of that system.

We urge the Commission to go into Victorian prisons and youth detention centres to take oral evidence from imprisoned people about their experiences of the mental health, criminal justice and prison systems and their insights into potential improvements.

This is of particular importance given the significant barriers for imprisoned people to make submissions, due to the lack of access to technology, including telephone

and computer access, and lack of internet and recording devices. For some, further barriers including literacy and language, and differing abilities can make it more difficult to contribute.

We submit that special measures should be taken to ensure that Aboriginal imprisoned persons are able to give evidence that includes the engagement of specialist Aboriginal staff to deliver a culturally safe process.

Recommendation 12: That the Commission attend prisons and youth detention centres to take oral evidence, in person, from imprisoned adults and children on their lived experience of psycho-social disability in the criminal justice and prison systems and proposals they may have for systemic improvement including:

- Their experience of the relationship between their mental health and contact with the criminal justice and prison systems
- The impact of imprisonment on their mental health
- Their experiences of accessing – or attempting to access - mental health treatment and support both in the community - before and after imprisonment- and in prison

7.2 Prisons as mental health institutions

Intensive clinical research published in the Australia & New Zealand Journal of Psychiatry in 2005 found such high rates of serious psycho-social disability amongst imprisoned persons in NSW which sparked a serious debate in the medical profession: "Are prisons the mental health institutions of the 21st Century?"[39]

This is a significant question to consider given that:

- Forty percent of people entering Australian prisons report they have been diagnosed with a psycho-social disability in their lifetime.[40]

[39] Paul White and Harvey Whiteford, 'Prisons: mental health institutions of the 21st Century?'(2006) 185(6) *Medical Journal of Australia* 302, 302-3.
[40] Ibid 37

- Women report significantly higher rates than men: 65% compared to 36%.[41]
- Surveys of imprisoned persons based on clinical assessment, rather than self-report, have found significantly higher rates because they identify undiagnosed conditions. For example, clinical assessment of 246 imprisoned women in Canada in 2018 [42] found:
    - more than 75% had a lifetime or current psycho-social disability;
    - at least two-thirds reported symptoms consistent with a co-occurring mental disorder with drug and alcohol use or borderline or antisocial personality disorder;
    - more than half reported a lifetime major psychiatric condition, either a psychosis, major depression or bi-polar disorder;
    - 17.9% had a current major psychiatric condition; and
    - Indigenous women had the highest prevalence of mental disorder, and the most serious impairment in functioning.

7.3 Conditions, treatment and support for people with mental health conditions in custody

We support the submissions of Victoria Legal Aid to the Productivity Commission[43] on the problems with conditions, treatment and support for people with mental health conditions in custody in Victoria and particularly their observation that current overcrowding due to recent very steep increases in prisoner receptions (see section 4 above and section 7.5 below) is exacerbating these problems.

FLS regularly receives concerning reports from our clients in custody about their difficulties accessing primary mental health care, including medication and treatment for drug and alcohol dependency.

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[41] Ibid.
[42] G Brown et al, Correctional Service of Canada, *Prevalence of mental disorder among federally sentenced women offenders: In-Custody and intake samples* (Research Report R-420, April 2018).
[43] Victoria Legal Aid, *Intersections between mental health and the legal system and the impacts for people and communities:* Submission to the Productivity Commission's Inquiry into the Economic Impact of Mental Ill-Health, pp 8-9.

Reports from women held on remand at the Dame Phyllis Frost Correctional Centre (for women) are particularly worrying, with women reporting weeks of delay in mental health assessments; abrupt and unwanted changes to medication; exclusion of all remand prisoners (now 50% of admissions) from opioid substitution programs and other counselling and treatment programs; and access to mental health professionals such as specialist nurse practitioners and psychologists. These matters are addressed by Mental Health Legal Centre in their Submission to the Commission regarding Justice System and Forensic Mental Health. We support their submissions.

We are also concerned that imprisoned adults and children suffering psycho-social disability are also at increased risk of internal prison discipline and management processes including solitary confinement and restraint which, in turn, severely impact their mental health.

Many imprisoned persons in these circumstances also find it difficult to access complaint mechanisms and advocacy services such as our Prison Advocacy Program because of their ill health and vulnerability in the prison system.

We urge the Commission to make special effort to speak to imprisoned persons in management and segregation units in the prisons and youth detention centres.

7.4 Lack of data on mental health services in Victorian prisons

Legal and advocacy services such as FLS, the Mental Health Legal Centre and Victoria Legal Aid can provide sample and anecdotal data on the inadequacy of mental health services for our incarcerated clients but we submit there is an urgent need for system-wide data to be made available in order for the Commission to make useful recommendations on the improvements required.

A comparative survey of mental health services in Australian prisons was published by the Queensland Centre for Mental Health Research (QCMHR) at the University of Queensland in 2018. [44] The survey included the following summary of publicly available information on mental health services in Victorian prisons:

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[44] Bobbie Clugston et al, Queensland Centre for Mental Health Research, *Prison Mental Health Services: A Comparison of Australian Jurisdictions* (Research Report 2018).

- Acute mental health services in Victorian prisons are primarily delivered by the Victorian Institute of Forensic Mental Health (Forensicare), a statutory service created under section 117B of the *Mental Health Act 1986 (Vic)*.
- Mental health services are provided by Forensicare through a contractual arrangement with the Victorian Department of Justice and Regulation – primarily at the Melbourne Assessment Prison, the Dame Phyllis Frost Centre, and the Metropolitan Remand Centre. Services are also provided by visiting consultant psychiatrists and nurse practitioners to public prisons.
    - Since September 2017, Forensicare has delivered the prison mental health services at Port Phillip Prison and, since it commenced in November 2017, also has responsibility for the prison mental health services delivered at the Ravenhall Correctional Centre.
- Primary mental health care services in Victorian prisons are also delivered by private providers including: Correct Care Australasia (a subcontractor of GEO Group Australia); G4S (the operator of Port Phillip Prison) which sub-contracts St Vincent's Correctional Health Services; GEO Group Australia and Caraniche psychology services.

The 2018 QCMHR survey also includes data obtained from prison mental health service providers in all Australian jurisdictions (except Victoria – see below) on the following matters:

- Use of force to provide involuntary treatment
- Specialist mental health staffing (per 550 persons imprisoned)
- Services by custodial setting (including on arrest, at court, on remand, during sentence and during transition to community)
- Mental health screening and assessments
- Treatment and care types (from prevention and primary to acute)
- Transitions and onward referral

The report notes (at page 7): *During the validation process, Victoria advised the research team that they were not able to participate in the project. All data relating to Victoria which is not publicly available has therefore been removed from the final report.*[45]

We submit that in order to properly assess the state of mental health care and services provided to people who are imprisoned, the Commission must obtain date on mental health services in Victorian prisons. Fitzroy Legal Service has written to the project's Victorian contact to ask whether the missing Victorian data can be made available to the Commission to aid your deliberations.

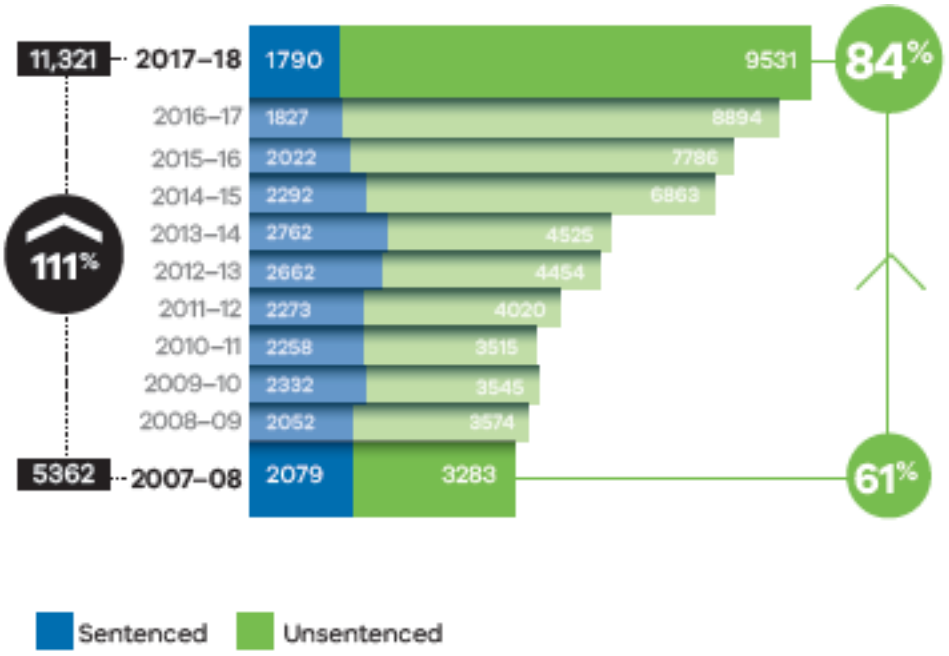
Recommendation 13: That the Commission obtain the data on mental health services in Victorian prisons collected for the 2018 QCMHR survey *Prison Mental Health Services: A comparison of Australian Jurisdictions*.

7.5 The number of people going to prison in Victoria has more than doubled in a decade

- 11,321 adults went to prison in Victoria in 2017–18.[46] This number has more than doubled in the last 10 years
- The proportion of unsentenced prisoners has increased from 61 per cent to 84 per cent of all receptions.

[45] ibid

[46] Corrections Victoria, Department of Justice and Regulation*, Annual Prisoner Statistical Profile 2006-07 to 2017-18* (Statistical Profile, 2018).



7.6 The highest rates of increase in imprisonment are among women and Aboriginal people

Over the last decade:

- The number of women entering Victorian prisons each year has more than tripled.
- The number of Aboriginal people being imprisoned has more than quadrupled.
- The number of Aboriginal women has increased more than 750%
- Seventeen per cent of the 1614 women who went to prison in Victoria in 2017/18 were Aboriginal women.
- In 2007 24.9 % of Victoria's women's prison population were on remand - that is, unsentenced and denied bail.[47]
- Today around half of women in prison in Victoria are on remand.[48]

[47] Ibid Table 1.2.
[48] Ibid.

It is imperative to note that less than 20% of women who are refused bail and remanded into custody will go on to be sentenced to a term of imprisonment longer than the term they serve on remand – and many will ultimately receive no custodial sentence at all.[49]

7.7. Family violence as a driver of imprisonment of women – particularly Aboriginal women

In 2018/19 Fitzroy Legal Service, in partnership with the Law and Advocacy Centre for Women and Flat Out Inc, has conducted intensive advocacy in Magistrates Courts through the *Women Transforming Justice* project for women to be released on bail rather than imprisoned on remand.

Our experience has shown that:

- Barriers to release on bail - including lack of stable housing, mental health issues and alcohol and drug dependency – are proving insurmountable in many cases.
- One of the most prevalent underlying factors is family violence. The vast majority of criminalised women are victims of sexual abuse and family violence in their childhood and as adults. Studies suggest that between 60 and 90 per cent of women in prison have experienced sexual abuse and other forms of violence in their childhood.[50] The Royal Commission into Family Violence also found that 'a substantial majority' of the women it consulted in prison had experienced family violence.[51]

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[49] Department of Justice and Community Safety, Corrections Victoria, *Women in the Victorian Prison System* (Report, January 2019).

[50] Ibid 4. It is difficult to be certain about these figures given routine underreporting and delays in reporting – see also Department of Justice and Community Safety, Corrections Victoria, *Women in the Victorian Prison System* (Report, January 2019) 4. It is difficult to be certain about these figures given routine underreporting and delays in reporting: see also *Royal Commission into Family Violence*: *Report and Recommendations* (Report, March 2016) vol V, 237-250; *Royal Commission into Family Violence*: *Report and Recommendations* (Report, March 2016) vol VI, 239; *Royal Commission into Institutional Responses to Child Sexual Abuse: Nature and Causes* (Final report, 15 December 2017) vol 2, 10, 67-68 (noting the significant barriers to understanding the prevalence of child sexual abuse in institutional contexts, including under-reporting and delays with reporting).

[51] *Royal Commission into Family Violence*: *Report and Recommendations* (Report, March 2016) vol V, 239.

Studies also indicate extremely high rates of violence and victimisation among Aboriginal women in prison.[52] Aboriginal women are 34 times more likely than non-Aboriginal women to be hospitalized for family violence-related injuries.[53] The Royal Commission into Family Violence also found that as at 2013-14, 'an Aboriginal person was 7.3 times more likely than a non-Aboriginal person to be an affected family member in a family violence incident'.[54]

Women's experiences of family violence drive the circumstances that result in offending, criminalisation and incarceration. Numerous studies have shown that women in prison disproportionately experience trauma and complex mental health problems, substance misuse and dependence, homelessness and financial insecurity.[55]

In particular, family violence is a significant contributor to women's homelessness and homelessness is often a key factor in women's offending and incarceration.[56] Likewise, women experiencing complex trauma and mental health problems as a result of family violence often self-medicate with illicit substances, which in turn results in their criminalisation.[57]

This is further reflected in the Victorian Government's Strengthening Connections: Women's Policy for the Victorian Corrections System, which highlights:

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[52] See e.g. Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori Women and the Justice System* (Report, July 2013) 36-7; Human Rights Law Centre, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Over-Imprisonment* (Report, 18 May 2017) 12; Australian Institute of Health and Welfare, *Australia's Welfare 2015* (Report No 12, 20 August 2015) 340 (noting that Aboriginal women are 34 times more likely to be hospitalised for family violence than non-Aboriginal women).
[53] Ibid 59, ch 26.
[54] Ibid.
[55] See for example, Victoria, Royal Commission into Family Violence, Report and recommendations (2016) vol V, ch 26, p. 238.
[56] Jacki Holland, 'Treating Disadvantage? A Gendered Exploration of Women's Offending, Post-Release Experiences and Needs' (2017) 30(1) *Parity* 30(1), 34.
[57] See e.g. Emily J. Salisbury and Patricia Van Voorhis, 'Gendered Pathways: A Quantitative Investigation of Women Probationers' Paths to Incarceration' (2009) 36(6) 541, 558, 560; Mary Stathopolous et al, Australian Institute of Family Studies, *Addressing women's victimisation histories in custodial settings* (ACSSA Issues No 13, December 2012) 6.

- The link between women's offending and their drug use, and in particular that 'a stronger nexus between the severity of women's substance abuse and their offending is evident than for men';
- The fact that 'women's offending often arises and is cultivated through their relationships', including partners or spouses; and
- The manner in which women's complex trauma (and consequent mental instability) directly contributes to behaviours that result in women being charged with criminal offences.[58]

These are also factors that contribute to a reluctance among magistrates to grant bail, i.e. lack of a suitable bail address (homelessness) and untreated psycho-social disability and/or drug and alcohol dependency.

In the absence of secure accommodation and mental health and drug and alcohol support considered necessary for a safe release on bail, increasing numbers of women are imprisoned on remand.

Recommendation 14: That the Victorian Government increase funding to community-based advocacy for people – and particularly Aboriginal women – at risk of criminalisation and imprisonment due to family violence, mental health and drug and alcohol issues.

7.8 Imprisonment of primary carers and child mental health and wellbeing

The number and rate of children in out-of-home-care in Victoria increased from 6,542 in 2013 (5.2 per 1000 children) to 10,312 in 2016 (7.5 per 1000 children).[59] We submit that increased rates of imprisonment of primary carers is a contributing factor.

[58] Corrections Victoria, Department of Justice and Regulation, *Strengthening Connections: Women's Policy for the Victorian Corrections System* (Policy, 4 December 2017) 11.
[59] Sentencing Advisory Council, *Crossover Kids: Vulnerable Children in the Youth Justice System* (Report No 1, 27 June 2019).

Around one third of women entering prison were primary carers for their children before their incarceration.[60]

The dramatic increase in the imprisonment of women – and particularly Aboriginal women – in recent years also mean increases in the number of children whose primary carer is imprisoned and for whom alternative living arrangements – including out-of-home and state care – must be made.

There are no publicly available data on the number of children who are made homeless or placed in out-of-home care because of the imprisonment of their primary carer. The Department of Health and Human Services do not formally collect data on the parental imprisonment status of children with whom they are in contact other than in case notes.[61]

We submit that this data should be collected and made public so that children impacted by imprisonment are made visible, and adequately supported - in both the criminal justice and child protection systems.

A 2015 Monash University study of the impact of incarceration on children's care in Victoria and NSW[62] explored the intergenerational impacts of parental imprisonment and made a number of useful recommendations. We urge the Commission to consider these – including extending the use of interagency Family Care Plans to the criminal justice system.

The researchers also observed that children of parents with a psycho-social disability share many characteristics of children of imprisoned parents. These include shared shame, stigma, poor mental health outcomes, antisocial behaviour, abrupt separation from parent due to institutionalization, and limited access to services.

These factors also increase the risk of children being imprisoned in youth detention centres. For example, 45% of sentenced or remanded children and young people

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[60] Corrections Victoria, Department of Justice and Regulation, *Strengthening Connections: Women's Policy for the Victorian Corrections System* (Policy, 4 December 2017)
[61] Monash University Criminal Justice Research Consortium, *The Impact of Incarceration on Children's Care: A Strategic Framework for Good Care Planning* (Report, July 2015).
[62] Monash University Criminal Justice Research Consortium, *The Impact of Incarceration on Children's Care: A Strategic Framework for Good Care Planning* (Report, July 2015).

have been subject to a previous child protection order.[63] The adverse mental health impacts of imprisonment on children's mental health are well documented.[64]

Recommendation 15: That the Department of Health and Human Services publish data on children placed in out-of-home care as a result of the imprisonment of a parent or primary carer.

Recommendation 16: That the Commission consider the recommendations of the July 2015 report of the Monash University Criminal Justice Research Consortium, *The Impact of Incarceration on Children's Care: A Strategic Framework for Good Care Planning*.

7.9 Victoria should invest in improving mental health – not building more prisons

Since 2014 prison capacity in Victoria has grown from 6,400 to more than 8,200 beds. The 2019/20 state budget includes $1.8 billion for the construction of 1600 more. This will provide capacity to imprison 10,000 Victorians at a recurrent cost of more than $1.2 billion per year. In our view this money could be far better spent.

We submit that the Government's response to increasing levels of imprisonment should be prevention – not prisons. We submit that the current boom in imprisonment is more likely to exacerbate mental ill health and social disadvantage than to prevent it[65] – harming both the people currently in prisons and future generations.

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[63] Legal and Social Issues Committee, Legislative Council, Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria: Final Report* (Report, 2018) 19-26.

[64] Eileen Baldry and Chris Cunneen, 'Locking up kids damages their mental health and sets them up for more disadvantage. Is this what we want?' *The Conversation* (online, 21 June 2019) <https://theconversation.com/locking-up-kids-damages-their-mental-health-and-sets-them-up-for-more-disadvantage-is-this-what-we-want-117674>

[65] Z. Cutcher et al, 'Poor health and social outcomes for ex-prisoners with a history of mental disorder: a longitudinal study' (2014) 38(5) *Australia and New Zealand Journal of Public Health* 424, 424-9.

Recommendation 17: That the Victorian Government commit to substantial reduction in imprisonment of children and adults with psycho-social disabilities over the next 10 years to be achieved through of a whole-of-government "justice reinvestment" strategy that diverts funding from incarceration to programs proven to improve mental health and community safety including:

- Accessible, affordable and stable publicly funded housing
- community-based treatment - including residential care - for psycho-social disability and drug and alcohol dependency
- mental health crisis response by a mental health workforce, rather than law enforcement
- parenting and youth support and accessible child care