



Sisters Inside Inc
Submission to Queensland Productivity Commission
Inquiry into Imprisonment and Recidivism:
Draft Report

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Sisters Inside welcomes the opportunity to provide a further submission to the Queensland Productivity Commission's Inquiry into Imprisonment and Incarceration. This submission responds to the information requests, questions and issues raised in the Commission's Draft Report. This submission should be read in partnership with our first submission to the Commission (November 2018), which provided details of equally-important proposed prevention, early intervention and legislative improvements which have not been repeated here. This submission builds on our oral submissions to the Commission at the public hearing in Brisbane on 3 May 2019.

Framework for assessing options

Sisters Inside is deeply committed to a society that provides the conditions for safety for every person, a society in which no person is treated as disposable¹. Under our current legal and social services systems, Aboriginal and Torres Strait Islander women are largely excluded from the promise of 'safety' through formal structures. Compared with non-Indigenous women, Aboriginal and Torres Strait Islander women are more likely to be survivors of domestic, family and sexual violence²; at the same time, in Queensland, Aboriginal and Torres Strait Islander women are 15 times more likely to be in prison than non-Indigenous women³. In prison, Aboriginal and Torres Strait Islander women are exposed to sexual assault by the state in the form of routine strip searches⁴, and other forms of violence such as solitary confinement⁵, malnutrition and lack of access to adequate health services. These contradictions relating to Aboriginal and Torres Strait Islander women's 'safety' reflect the ongoing violence of colonisation. The carceral state – policing, prisons and other mechanisms of surveillance and social control – is a core component of this colonial state. To move beyond the violence of colonisation and the colonial state, we believe the carceral state must be dismantled and, ultimately, abolished.

Prison abolition is an imaginative project. To *imagine abolition* requires community members and Government agencies to move beyond entrenched ways of understanding 'problems' and 'solutions', including moving beyond the binary of 'crime' and 'punishment'. To *imagine abolition* requires us to clearly identify *in whose interests* laws and policies operate and to prioritise the safety of the most marginalised groups in our communities. To *imagine abolition* requires transformative changes to dismantle structural racism and state violence, and to eradicate inequality.

Transformative change requires courageous leadership. It requires commitment to legislation and policies that may not be accepted by those whose voices have been the loudest in 'law and order debates'. Many transformative changes will fall outside the criminal legal system and its 'institutions' (e.g. legislation and resourcing to address poverty and the housing crisis).

Since we started drafting this submission, the Queensland Government announced that it would spend at least \$620 million to build a new men's prison at Gatton. This announcement comes less than 12 months after the Queensland Government converted Southern Queensland Correctional Centre from a men's prison to the first private women's prison in Queensland. These policy decisions fail to address the root causes of imprisonment; they simply 'rearrange the deck chairs on the Titanic', abandoning greater numbers of marginalised people to violent futures of imprisonment, surveillance and control.

In our view, the Commission must adopt an abolitionist framework for assessing the effectiveness and legitimacy of its proposed recommendations to support community safety. Decarceration must be the fundamental consideration – that is, do proposed recommendations shrink the carceral state and its institutions? And how do the proposed recommendations benefit women in prison, particularly Aboriginal and Torres Strait Islander women?

¹ See Erica R Meiners, *For the Children? Protecting Innocence in a Carceral State* (University of Minnesota Press, 2016), especially Introduction, chapter 2 and chapter 7. Copies can be provided on request.

² Australian Institute of Health and Welfare, 'Family, domestic and sexual violence in Australia' (2018). Available at: <https://www.aihw.gov.au/getmedia/d1a8d479-a39a-48c1-bbe2-4b27c7a321e0/aihw-fdv-02.pdf.aspx?inline=true>. Accessed 17 May 2019.

³ Australian Bureau of Statistics, '4517.0 Prisoners in Australia, 2018' (11 April 2019), table 17. Available at: <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Main+Features100002018?OpenDocument>. Accessed 17 May 2019.

⁴ Amanda George, 'Strip searches: Sexual assault by the state' (1993) 18(1) *Alternative Law Journal* 31. Available at: <http://www.austlii.edu.au/au/journals/AltLawJl/1993/8.pdf>. Accessed 17 May 2019.

⁵ Office of the Chief Inspector 'Chief Inspector Report, 2016: Brisbane Women's Correctional Centre Full-Announced Inspection Report, 16th to 20th of November 2015' (Exhibit 23, Crime and Corruption Commission, Taskforce Flaxton, 15 May 2018), pp26-27. Available at: <http://www.ccc.qld.gov.au/corruption/taskforce-flaxton/exhibits/exhibit-list-taskforce-flaxton>. Accessed 19 May 2019.

Address the housing crisis for women in prison

Lack of safe, affordable housing is the central issue for women in prison in Queensland. Accommodation is the most significant brokerage cost across all of Sisters Inside's programs. Access to housing is especially difficult for people who survive on fixed incomes through Centrelink. There is also a lack of independent advocacy and support for people to maintain housing, especially in situations where people experience short-term imprisonment.

In late March 2019, Anglicare published the national Rental Affordability Snapshot. The Snapshot surveyed over 69,000 rental listings across Australia advertised on realestate.com.au. This report found that, in the whole of Australia a total of:

- 317 rentals were affordable for a single person on the Disability Support Pension
- 75 rentals were affordable for a single parent with one child on Newstart
- 2 rentals were affordable for a single person in a property or share house on Newstart
- 1 rental was affordable for a single person in a property or share house on Youth Allowance
- 0 rentals were affordable for a single person on Newstart or Youth Allowance in any major city or regional centre.

This means that **no** houses are affordable for the vast majority of women released from prison in Queensland who depend on Centrelink for income, in areas that also provide access to services and support. Through our work, we are aware that there are a number of women who have been granted parole languishing in prison due to unavailable accommodation. We are also aware that sometimes women choose not to apply for parole as they do not have an address.

The Sofronoff report clearly recognised the role of homelessness as a barrier to parole and recommended the establishment of an intergovernmental taskforce to examine the issue of the availability of suitable long-term accommodation for prisoners. In our view, this recommendation did not go far enough. Every stakeholder understands housing is an issue. It is time for the Queensland Government to take action and implement policies that treats affordable housing as an essential need and a right, rather than a privilege.

The Draft Report states that the Queensland Government will be required to spend up to \$6.5 billion on new prisons or cells by 2025, at the current rate of growth. According to Queensland Government statistics, the number of unique individuals being criminalised is decreasing, even though imprisonment rates are rising. This suggests that a smaller group of adults and children with complex needs are being churned through the criminal legal and prison systems. In our view, this demonstrates that the prison system is not working. It is a clear argument to try something new – to reallocate funding that would be spent on new prisons or cells to provide subsidised affordable housing for individuals and families in Queensland and expand the support services available for people. If the Queensland Government fully subsidised housing for every woman in prison for 12 months, it would cost just over \$16.5 million⁶.

A clear policy to prioritise accommodation for criminalised women is essential to encourage service providers to assess and accept women directly from prison. Currently, in our experience, women with complex support needs are the most likely to be excluded from supported accommodation due to their criminal history and lack of ability to effectively connect with support services while they are in prison.

The Queensland Government has recently funded small pilot housing programs in South East Queensland and North Queensland to support women in prison to access direct housing. Sisters Inside supports greater expansion of housing models that allow women to access publicly subsidised housing and outreach support throughout the community. We have provided our proposal for a successful housing model to support criminalised women to the Commission on a confidential basis.

The Commission must make a clear recommendation for greater investment in public and community housing by the Queensland Government to ensure that all women in prison have access to safe, affordable housing for themselves and their children on release.

⁶ Calculations based on rent at \$350 per week and 906 women in prison as at 31 March 2019.

Reduce the scope of the criminal law

Sisters Inside strongly supports the Commission's proposals to reduce the scope of the criminal law. Women entrenched in cycles of criminalisation are routinely charged with 'minor' offences that reflect social marginalisation, rather than 'criminality'. Until the Queensland and Commonwealth Governments address structural racism, poverty, homelessness and inequality, and provide adequate, accessible health care services for substance use and mental illness, it is not fair to criminalise people for offences that are directly related to these issues.

Based on our experience, we suggest that the following offences should be prioritised for decriminalisation in Queensland:

Offence	Rationale for decriminalisation
Public nuisance ⁷	<p>Public nuisance is a very broad offence that is often used to criminalise behaviour or actions related to homelessness, substance misuse and/or mental illness.</p> <p>Research about public nuisance in Queensland published in 2018 found that:</p> <ul style="list-style-type: none"> • Aboriginal and Torres Strait Islander children are up to 13 times more likely to be charged with public nuisance than non-Indigenous children; • the proportion of Aboriginal and Torres Strait Islander women appearing in court on public nuisance charges steadily increased between 2008 and 2014; and • Aboriginal and Torres Strait Islander women are also more likely to receive infringement notices for public nuisance for 'offensive' behaviour or offensive language directed at police officers.⁸ <p>In our view, the disproportionate use of this offence to criminalise Aboriginal and Torres Strait Islander people, particularly young women, warrants decriminalisation.</p>
Urinating in a public place ⁹	<p>This offence predominantly targets people experiencing homelessness, namely high rates of Aboriginal and Torres Strait Islander people. Rather than criminalising urination, the Queensland Government and local councils could provide adequate public toilet facilities for everybody to use.</p>
Begging in a public place ¹⁰	<p>This offence directly targets people who are poor. In our experience, Aboriginal and Torres Strait Islander young women have been targeted by this offence. It is now widely recognised that Newstart, Youth Allowance and related payments are insufficient to meet individuals' basic needs¹¹. In circumstances where a large proportion of people receive inadequate income support, it is not appropriate for begging to be a criminal offence.</p>
Fare evasion ¹²	<p>The same rationale as begging applies to decriminalising fare evasion. In our experience, this offence disproportionately affects children and Aboriginal and Torres Strait Islander people. Public transport is an essential service, especially for children and many people on low incomes or income support. Campaigns in the United States have successfully pushed for changes to the prosecution and punishment of fare evasion¹³. Although they do not argue for complete decriminalisation, these campaigns highlight the economic and social costs of enforcement and its discriminatory impact on people of colour.</p>

⁷ s 6, *Summary Offences Act 2005* (Qld).

⁸ Tamara Walsh, 'Public nuisance, race and gender' (2018) 26(3) *Griffith Law Review* 334. Copy of the research paper can be provided on request.

⁹ s 7, *Summary Offences Act 2005* (Qld).

¹⁰ s 8, *Summary Offences Act 2005* (Qld).

¹¹ See e.g. Australian Council of Social Service, 'Raise the Rate: Increase Newstart and related payments' (March 2018). Available at: <https://www.acoss.org.au/wp-content/uploads/2018/03/Raise-the-Rate-Explainer-1.pdf>. Accessed 16 May 2019.

¹² s 143AC, *Transport Operations (Passenger Transport) Act 1994* (Qld).

¹³ TransitCenter, 'Why decriminalise fare evasion?' (9 January 2019). Available at: <http://transitcenter.org/2019/01/09/why-decriminalize-fare-evasion/>. Accessed 17 May 2019.

Offence	Rationale for decriminalisation
<p>Being intoxicated in a public place¹⁴</p>	<p>The Royal Commission into Aboriginal Deaths in Custody recommended the abolition of public drunkenness in 1991 (Recommendation 79). Over 28 years later, Queensland is one of two states that has failed to decriminalise this offence¹⁵.</p> <p>With the coronial inquest into the tragic death of Auntie Tanya Day in Victoria in December 2017, this offence has again achieved national prominence¹⁶. In Auntie Tanya Day's inquest, which is ongoing, the Victorian Coroner has made a preliminary recommendation to the Attorney-General to abolish the offence of public drunkenness¹⁷.</p> <p>As long as this offence remains 'on the books' in Queensland, there is a risk that we more Aboriginal or Torres Strait Islander people will die in police custody. This offence must be abolished in Queensland.</p>
<p>Drug offences in connection with personal use:</p> <ul style="list-style-type: none"> • Possessing dangerous drugs or relevant substances or things¹⁸ • Possessing things used in connection with drug offences, including hypodermic needles¹⁹ • Supplying dangerous drugs (when supply is to oneself)²⁰ 	<p>Criminalisation undermines the ability for a supportive, non-stigmatising health care and trauma responses to drug use because it focuses systemic resources and attention on the symptoms of drug use (i.e. possession, dirty needles, stealing to 'feed the habit'), rather than the underlying factors that cause women to start, and continue, using drugs. In our experience, most women use drugs to self-medicate in response to trauma, such as sexual assault, physical abuse, grief and/or chronic pain. Many women are long-term drug users, and were often introduced to drugs in their childhood and/or through violent, exploitative relationships.</p> <p>Punishment through the criminal law does not actually support women to access and maintain support or treatment for problematic drug use. At present, women's options to access rehabilitation or other counselling services is severely limited. Many residential rehabilitation services are prohibitively expensive, culturally-inappropriate, non-secular and reject women with 'serious' criminal histories. Outreach counselling services are not accessible for women who do not have stable housing or other support. These gaps in the services system reinforce criminalisation as a pathway to access services (e.g. through initiatives such as the Drug Court). It would be better to provide adequate health care and social services outside the criminal law framework, to give women meaningful choices to access rehabilitation or support with drug use.</p>

¹⁴ s 10, *Summary Offences Act 2005* (Qld).

¹⁵ Deloitte Access Economics, 'Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody' (August 2018), pp 160-161. Available at <https://www.pmc.gov.au/sites/default/files/publications/rciadic-review-report.pdf>. Accessed 17 May 2019.

¹⁶ 'Open letter calling for the offence of public drunkenness to be abolished' (Letter to Victorian Premier from Tanya Day's family, 15 April 2019). Available at: <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5cb2bbc7e2c483d2509c8c76/1555217356060/Open+Letter+Repeal+Public+Drunkenness.pdf>. Accessed 17 May 2019.

¹⁷ Calla Wahlquist, 'Death in custody prompts push to change Victoria's public drunkenness laws', *The Guardian (online)*, 6 December 2018. Available at: <https://www.theguardian.com/australia-news/2018/dec/06/death-in-custody-prompts-push-to-change-victorias-public-drunkenness-laws>. Accessed 17 May 2019.

¹⁸ ss 9 and 9A, *Drugs Misuse Act 1986* (Qld).

¹⁹ s 10, *Drugs Misuse Act 1986* (Qld).

²⁰ s 6, *Drugs Misuse Act 1986* (Qld). To the extent that s 9B applies to supply for personal use, this should also be decriminalised. We have seen cases of women being charged for supplying dangerous drugs on the basis of text messages sent to purchase drugs for their own personal use. We understand supply charges are used in cases where actual possession cannot be established by police.

Offence	Rationale for decriminalisation
<p><i>Bail Act 1980</i> (Qld) offences:</p> <ul style="list-style-type: none"> • Failure to appear²¹ • Breach of bail conditions²² 	<p>Bail is essentially a promise by a person charged with a criminal offence to return to court for their matter to be resolved or finalised. According to research published by the Queensland Sentencing Advisory Council, the number of people sentenced for offences against the <i>Bail Act 1980</i> (Qld) as their most serious offence increased by 64% between 2005-06 and 2015-16; the total number of people sentenced for offences against the <i>Bail Act 1980</i> (Qld) increased by 134% in the same period.²³</p> <p>Most women do not set out to deliberately breach their bail conditions or miss court. More often, women's life circumstances are a barrier to meeting bail conditions. For example, women who are homeless or have complex mental health issues may find it difficult to maintain reporting requirements. Sometimes women forget to report and then feel fearful about returning to the police station. In our experience, women are routinely apprehended on warrants, which suggests that most women are not deliberately (or successfully) 'on the run' from police or the courts²⁴. Pursuant to s 33(4) of the <i>Bail Act 1980</i> (Qld), if a person is sentenced to imprisonment for failure to appear, this sentence is cumulative. This is unnecessarily harsh as sentences of imprisonment are ordinarily served concurrently.²⁵</p> <p>If a person fails to appear in court in accordance with their bail undertaking or repeatedly breaches conditions (e.g. failing to report to police), a warrant could still be issued to allow police to bring the person back to court without the need for additional charges. In relation to breaches of bail conditions, the legislation already provides that certain groups (i.e. children) and certain conditions (i.e. conditions related to rehabilitation, treatment or other intervention programs or courses, including Drug Assessment and Referral) do not attract punishment for non-compliance.</p> <p>Given the increasing rate of charges for these offences, it seems apparent that punishing people does not have a deterrent effect. In our view, these offences no longer support the efficient administration of the legal system. If these offences were decriminalised, it might reduce remand rates as it would shift resources within the legal system from individual compliance to systemic mechanisms to ensure people attend court for their matters.</p> <p>We note that the Queensland Police Service has indicated that it is currently exploring an approach to allow police to exercise greater discretion to action contravention of court-ordered bail, to reduce punitive responses to technical and low-risk breaches.²⁶</p>

We support legislative amendments to take the above offences completely outside the criminal punishment system, rather than limiting the sanctions imposed to monetary penalties (fines). While we support the introduction of income-based fines, we are concerned that greater use of fines for the above offences would further entrench marginalised women in debt to the State Government. As at 30 June 2017, individuals had, on average, \$1,540 in unpaid fines registered with the State Penalties Enforcement Registry (SPER)²⁷. In our experience, criminalised women owe significantly higher amounts to SPER²⁸ and should not be exposed to compounding debt for offences of marginalisation.

²¹ s 33, *Bail Act 1980* (Qld).

²² s 29, *Bail Act 1980* (Qld).

²³ Queensland Sentencing Advisory Council, *Sentencing Spotlight on... breach of bail offences* (November 2017), p 4.

²⁴ In our experience, many women we work with are apprehended on warrants. However, we are not aware of how many warrants are issued each year, how many warrants are executed by police and/or how many warrants remain unexecuted. It would be beneficial if this data was available to consider trends in relation to bail and policing.

²⁵ s 155, Penalties and Sentences Act 1992 (Qld).

²⁶ Queensland Police Service, Letter submission to Queensland Sentencing Advisory Council dated 27 May 2019, pp 1-2. Available at: https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0005/615371/web-submission-QPS.pdf

²⁷ Queensland Audit Office, 'Finalising unpaid fines' (Report 10: 2017-18, February 2018), p19.

²⁸ It is not uncommon for us to see women with debts over \$5,000 or even \$10,000.

Criminalisation for domestic and family violence

As detailed in our previous submission, we are concerned about the increasing criminalisation of Aboriginal and Torres Strait Islander women for breaches of domestic violence protection orders. Issues relating to 'victims who use violence' and policing practices in relation to criminalised women have been recognised by the Queensland Domestic and Family Violence Death Review Advisory Board in their annual reports.

The Queensland Government must review legislation and charging practices for breaches of domestic violence protection orders to ensure the original intent of the legislation is being implemented.

Other matters

In addition to reducing the scope of the criminal law, charging practices must be clarified to ensure that people are charged with the least serious offence on each occasion. For example, if a person shoplifts goods under the value of \$150, police can choose to charge the person with either 'unauthorised dealing with shop goods'²⁹ (colloquially known as "UTAG") or with stealing³⁰. UTAG is a regulatory offence with a maximum penalty of 6 penalty units; in contrast, stealing is an offence under the Criminal Code with a maximum penalty of 5 years imprisonment. We frequently see women who have previous convictions for UTAG being charged with the more serious offence of stealing, even if the value of the goods taken in subsequent incidents is very low (e.g. lollies from IGA or baby formula). We recommend the Queensland Government amends legislation and/or Queensland Police Service guidelines to require that people are always charged with the least serious offence available on the facts. Diversionary options must be made available for people charged with low-level shoplifting.

In our view, the same principle ought to apply to assaults against police and correctional officers³¹. For example, in relation to police, there are two offences that apply to assaulting or obstructing police officers: assault or obstruct police officer under the *Police Powers and Responsibilities Act 2000* (Qld) (PPRA)³² and serious assault under the Criminal Code³³. The maximum sentence for the PPRA offence is 60 penalty units or 12 months imprisonment if the assault or obstruction happens within a licensed premises or in the vicinity of a licensed premises, or otherwise 40 penalty units or 6 months imprisonment. In contrast, the maximum penalty for serious assault is 14 years imprisonment in circumstances of aggravation³⁴ or otherwise, 7 years imprisonment.

We are aware of cases where women have been charged with both offences in relation to the same incident, but the more serious offence has ultimately been preferred. We are also aware of cases where women have been charged with serious assault for 'wilful obstruction' for resisting strip searches. In our view, it is not appropriate for the charge of serious assault to extend to any form of obstruction, as the basis for the charge is not particularised on women's criminal histories. The overlap between these laws must be clarified to minimise people's exposure to significant sentences. We also believe the scope of the PPRA offence should be clarified, as it is common for women to be charged with an offence in respect of each officer involved in their arrest. As most 'minor' matters are dealt with in the Magistrates Court, there is very little accountability for these charging and prosecution practices.

It is beyond our capacity to consider the potential for the civil law to reduce the scope of the criminal law. We note that in some circumstances, civil law options may require a criminal law complaint. For example, insurance policies for property damage often require a police complaint. This issue has been raised in relation to the criminalisation of children in residential care³⁵; in our experience, paid carers often call the police in response to incidents, as a requirement of insurance claims (or other 'policies and procedures' imposed in accordance with the regulatory frameworks for these services). To support alternatives to criminalisation, it may be useful to implement legislative amendments to clarify the requirements for insurance claims, particularly in relation to damage caused by children or damage to Queensland Government property. Charging people for wilful damage that is covered by insurance is arguably

²⁹ s 5, *Regulatory Offences Act 1985* (Qld).

³⁰ s 398, *Criminal Code*.

³¹ For correctional officers, compare s 124, *Corrective Services Act 2006* (Qld) and s 340, *Criminal Code*.

³² s 790, PPRA.

³³ s 340, *Criminal Code*.

³⁴ The circumstances of aggravation only apply to offences against police officers under this section. The circumstances of aggravation include: if a person bites or spits on the police officer or throws at, or in any way applies to, the police officer a bodily fluid or faeces; if the person causes bodily harm to the police officer; or if the person is, or pretends to be, armed with a dangerous or offensive weapon or instrument.

³⁵ Queensland Family and Child Commission, *Joint agency protocol to reduce preventable police call-outs to residential care services* (August 2018), p 22. Available at: https://www.qfcc.qld.gov.au/sites/default/files/joint_agency_protocol_to_reduce_preventable_police_call-outs_to_residential_care_services.pdf. Accessed 19 May 2019.

unnecessary, as the harm may be adequately addressed through the civil law system. Currently, the policy position is to place the financial cost of restitution with the person who caused the damage, rather than an insurance company; in our view, the default position should be reversed.

Provide options for victim involvement

We commend the Commission's consideration of options to provide for greater 'victim' involvement in the court process. There is an emerging body of literature relating to community accountability, transformative justice and restorative justice processes, particularly in the United States³⁶. In large part, abolitionist initiatives operate outside the formal criminal legal system³⁷. We are aware of one program – Common Justice – that works within the adult criminal legal system in New York to provide voluntary, victim-centred alternatives to incarceration for people charged with 'violent' offences³⁸.

In relation to concepts such as restoration and restitution, the concept of 'victim' must be interrogated. In our experience, in some cases that involve restitution, 'victims' are Government agencies (e.g. in relation to wilful damage charges) or large companies (e.g. in the case of shoplifting from supermarkets). In the youth justice system, we often support children in restorative justice conferences for low-level shoplifting offences. Although restorative justice is better than the mainstream court process, it does not recognise the role of structural factors, such as poverty, as underlying causes of children's behaviour. Therefore, restorative justice processes imply that the 'harm' of lost profits for large companies is morally equivalent to the harm caused by childhood poverty and social exclusion. These processes also contrive a 'relationship' to be 'restored' between children and companies.

We support transformative change to introduce greater accountability into the criminal legal system; however, we believe genuine accountability must start with acknowledging the role of the state in creating the conditions of 'crime' through laws and policies that perpetuate marginalisation. At present, we do not believe it would be appropriate to include restoration principles as a sentencing purpose in the *Penalties and Sentences Act 1992* (Qld).

Increase the range of non-prison sanctions

Home detention

We do not support the proposal in Draft Recommendation 4 to introduce home detention in Queensland. Home detention extends the violence of the prison system into people's homes. It normalises surveillance and compliance, rather than support, autonomy and accountability. It provides a basis for greater expansion of the carceral state by resources and population. We are concerned that home detention will have a negative gendered impact for women, both as people sentenced for offences and as family members.

Citing evidence that women are exposed to harsher penalties under home detention, George explains that home detention builds on and reinforces the home as a site for the control and punishment of women³⁹. It may expose women to further punishment, as it 'criminalises' ordinary activities such as drinking, being late or leaving the house as potential conditions of an order⁴⁰.

Home detention may also expose women to violence, as they may feel unable to leave a violent relationship or call the police for assistance. Aboriginal and Torres Strait Islander women are already less likely to call police in situations of domestic violence, due to distrust of the service system as well as fear of

³⁶ See e.g. Transform Harm website at <https://transformharm.org>.

³⁷ Ibid, for an overview of many of these initiatives.

³⁸ For more information on the principles that underpin Common Justice's approach, see Danielle Sered, 'Accounting for Violence: How to Increase Safety and Break Our Failed Reliance on Mass Incarceration' (Vera Institute of Justice, 2017). Available at: <https://d3n8a8pro7vhm.cloudfront.net/commonjustice/pages/82/attachments/original/1506608259/accounting-for-violence.pdf?1506608259>. Accessed 19 May 2019.

³⁹ Amanda George, 'Women and Home Detention – Home Is Where the Prison Is' (2006) 18(1) *Current Issues in Criminal Justice* 79, p 83. Available at: <http://www.austlii.edu.au/au/journals/CICrimJust/2006/17.pdf>. Accessed 19 May 2019.

⁴⁰ Ibid, pp 86-87.

reprisals⁴¹. In situations where a violent partner is sentenced to home detention, women will be even less likely to call police, as reporting would potentially result in new charges for a violent incident *and* a breach of the home detention order.

Many criminalised women are single mothers or have primary responsibility for children in the context of violent, unstable relationships. Home detention is not in the best interests of children in households with criminalised caregivers; it is likely to impose unreasonable restrictions on a caregiver's ability to support children and it may lead to involvement or intervention by child protection authorities. For example, a mother may not feel able to accompany a child to hospital if she is subject to a curfew under home detention and a medical emergency happens 'after hours'. Limits on 'normal' parenting may expose women to (additional) surveillance by child protection authorities, creating significant distress. Intervention by child protection authorities may then cause further negative consequences, including removal of children and the criminalisation of children and mothers.

As a sentencing option, home detention perpetuates the inequality that already exists in the criminal legal system as it will only be available to women who have a 'suitable' home⁴². We are aware from our work supporting women with bail and parole that many women in prison do not have a 'suitable' address. In this sense, home detention will not be a 'quick fix' to reduce the number of women in prison.

Recommendations for imprisonment in low-security prisons

We do not support the proposal to allow courts to sentence people to low security prisons. This sentencing option still exposes people to the violence of the prison system, including strip searches, humiliating and intrusive urine testing, breaches of discipline, restricted access to health services and education, and social stigma. We agree that judicial officers should take the circumstances of actual imprisonment into account in sentencing. However, in cases where low security imprisonment is contemplated, we would question whether actual imprisonment must be imposed at all.

Like home detention, this sentencing option may also reinforce inequalities as Aboriginal and Torres Strait Islander women with complex needs are less likely to be recommended for low security prisons based on their criminal history and 'recidivism'. In our view, a better starting point would be to provide mechanisms for early discharge from sentences in cases where people demonstrate 'progression' through the prison and parole systems. Funding through Legal Aid or direct funding to Prisoners' Legal Service should be made available to support prisoners to access early discharge options.

Other changes to sentencing legislation

At present, sentencing legislation does not support positive outcomes for women in prison, especially women on remand. Sisters Inside has made a submission to the Queensland Sentencing Advisory Council's review of community based orders, imprisonment and parole on these issues. We have **attached** our submission for the Commission's reference.

Greater transparency in sentencing

In relation to Draft Recommendation 5, greater transparency in relation to court statistics and judgements would assist the role of the Queensland Sentencing Advisory Council and support community accountability for sentencing. At present, sentencing remarks in the Magistrates Court and District Court are rarely publicly available (even though it is possible for members of the public to sit in courts for most sentences). There are very limited detailed statistics about the finalisation of charges in the lower courts. Lack of easily accessible information on individual cases and trends limits the possibility for appeals. In our view, resources ought to be directed to Queensland Courts and/or the Queensland Government Statistician's office to provide greater transparency regarding sentencing outcomes and trends.

We note that the Parole Board has raised concerns about the Queensland Corrective Services statistics on successful completion of parole orders.⁴³ These concerns support greater transparency in data reporting and analysis by Queensland Corrective Services to ensure better outcomes for people on parole.

⁴¹ Domestic and Family Violence Death Review and Advisory Board, *2016-17 Annual Report* (2017), p 60. Available at: https://www.courts.qld.gov.au/_data/assets/pdf_file/0003/541947/domestic-and-family-violence-death-review-and-advisory-board-annual-report-2016-17.pdf. Accessed 19 May 2019.

⁴² Amanda George, 'Women and Home Detention – Home Is Where the Prison Is' (2006) 18(1) *Current Issues in Criminal Justice* 79, p 82.

⁴³ Parole Board Queensland, Submission to Queensland Sentencing Advisory Council, 31 May 2019, pp 9-13. Available at: https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0007/616543/web-submission-12-combined.pdf; Parole Board Queensland, Further Submission to Queensland Sentencing Advisory Council, 14 June 2019, pp3-5. Available at:

Victim rights to direct appeals of sentences

Sisters Inside does not support legislative amendments to give victims of crime a right to instruct the Director of Public Prosecutions to seek leave to appeal against a sentence handed down by the District or Supreme Court (or any other court).

Reduce the use of remand

Encouraging confidence in, and greater use of, bail

Remand is a gendered issue, and Aboriginal and Torres Strait Islander women are most affected by the extreme rise in remand in the criminal legal system. As at 31 March 2019, there were 9,036 adults in prison in Queensland.⁴⁴ Women represented 10% of the total prison population (906 women). Around 36% of women in prison were Aboriginal and/or Torres Strait Islander women (326 women). In total, around 38% of women were unsentenced; however over 43% of Aboriginal and Torres Strait Islander women were unsentenced. In contrast, only around 31% of Aboriginal and Torres Strait Islander men and non-Indigenous men were unsentenced.

Sisters Inside does not support the development of 'risk' assessment tools for the purpose of remand decision-making. 'Risk' assessment tools reproduce racialised biases⁴⁵. 'Risk' is not an objective concept; in our experience, in the bail context, a decision-maker's assessment of a woman's 'riskiness' is often directly related to her social circumstances and her social needs. In the Queensland context, Aboriginal and Torres Strait Islander women are therefore likely to be assessed as 'high risk' under any bail 'risk' assessment tools, further entrenching these women in imprisonment.

In our experience, lack of accommodation, drug rehabilitation services and/or mental health services are the main reasons that women are remanded in prison. Issues with access to, and funding for, legal representation also contribute to women spending significant periods of time on remand. These structural factors must be addressed in order to support greater use of bail.

In our view, the Queensland Government must fund more free or low-cost rehabilitation and drug counselling services. Services must be accessible for criminalised women; currently, most residential rehabilitation service providers do not accept women directly from prison or do not accept women with 'serious' criminal histories⁴⁶. They should also be appropriate to the needs of mothers, Aboriginal and Torres Strait Islander women and non-religious women. Assessment of referrals often does not include actual conversations with women; rather women are often excluded on the basis of an assessment 'on the papers'. These policies and assessment processes exclude women in prison from access to essential health services and prolong their period of time on remand. Even when women are 'eligible' to access rehabilitation services, lack of stable transitional accommodation can be a barrier to women's participation in these programs. Some service providers do not wish to accept women into programs unless they have an alternative address, as women may be discharged from the rehabilitation program unexpectedly.

Overall, lack of access to stable, suitable and affordable accommodation continues to be the biggest issue for all women in prison. As explained above and detailed in our earlier submission, the Queensland Government must implement policies and funding arrangements to provide housing options for criminalised women.

We support expansion of independent and voluntary advocacy and support services to support women on remand or at risk of remand to apply for bail. These programs must be supported by legislative amendments to the *Bail Act 1980* (Qld), especially to remove penalties for breaches of bail conditions and/or failure to appear. Removing penalties will support independent, non-government organisations to work more effectively with people on bail to provide support through voluntary programs.

https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0008/617147/submission-12b-parole-board-queensland-further-submission.pdf

⁴⁴ Queensland Corrective Services, 'Custodial Offender Snapshot March 2019' (Custodial Offender Snapshot – statewide dataset, 24 April 2019). Available at: <https://data.qld.gov.au/dataset/custodial-offender-snapshot-statewide/resource/3390914d-abd4-4a16-b081-d296099f1f61>. Accessed 19 May 2019.

⁴⁵ Chicago Community Bond Fund, 'Punishment is Not a "Service": The Injustice of Pretrial Conditions in Cook County' (24 October 2017), pp 6-7. Available at: <https://chicagobond.org/wp-content/uploads/2018/10/pretrialreport.pdf>. Accessed 20 May 2019.

⁴⁶ In areas outside South East Queensland, rehabilitation services are often more willing to accept women directly from prison and provide more personalised assessments of women's suitability for their services.

Currently, Sisters Inside provides two highly successful programs funded by the Queensland Government to support women with bail – the Supreme Court Bail Program and the Decarceration Program. Sisters Inside is funded by Queensland Corrective Services to provide the Supreme Court Bail Program for women in Queensland prisons.

The Draft Report states that Queensland Corrective Services initiated the Supreme Court Bail Program⁴⁷. In fact, between 2003 and 2016, Sisters Inside ran an unfunded Supreme Court Bail Program at Brisbane Women's Correctional Centre in collaboration with law students from the University of Queensland. Following sustained advocacy, we have been funded by Queensland Corrective Services to provide the Supreme Court Bail Program in South East Queensland since March 2016 and in Townsville since February 2017. Funding was recently extended in South East Queensland following the Queensland Government's decision to open Southern Queensland Correctional Centre as a private women's prison.

The Supreme Court Bail Program supports eligible women to apply for bail in the Supreme Court, in its jurisdiction as a 'review' court in circumstances where bail is refused in the Magistrates Court. Sisters Inside Supreme Court Bail Workers also support bail applications in the Magistrates Court by working alongside women and their legal representatives to address obvious barriers to bail, such as accommodation.

The Decarceration Program was recently funded by the Department of Child Safety, Youth and Women. It comprises four full time positions (a Manager and three Decarceration Support Workers) who work with women in the Brisbane city watch house and courts to improve the likelihood of successful bail applications. Workers also provide support to assist women to meet their bail (or sentence) conditions.

For the reasons outlined above, we do not support home detention.

We also do not support electronic monitoring: it is costly, it net widens, it does not prevent 'crime' and it is highly stigmatising, especially for people on bail⁴⁸. Electronic monitoring is punitive; it is an extension of imprisonment. Use of electronic monitoring for bail punishes people prior to sentence, in circumstances where charges may be withdrawn, discontinued or not proven at trial. Electronic monitoring does not stop crime or ensure community safety.

Use of electronic monitoring also raises ethical concerns about the privatisation of 'public safety' as Governments generally outsource the provision of monitoring technology to the private sector⁴⁹. In the United States, the significant costs of electronic monitoring are passed onto 'users'⁵⁰. It is very concerning to imagine a future in which criminalised women on inadequate fixed incomes through Centrelink might be required to pay fees for their release through electronic monitoring.

Reducing time spent on remand

Draft Recommendation 7 states that the Queensland Government should assess whether there are opportunities to reduce time spent on remand by reducing court delays and increasing time for bail hearings. Initiatives within the courts are likely to be difficult to implement without broader changes to bail decision-making and legal representation.

In our view, to reduce remand times, the Queensland Government must make specific funding available via Legal Aid for lawyers to apply for bail. The current Legal Aid funding system does not incentivise lawyers to apply for bail. This funding structure is especially problematic for low-level offences in the Magistrates Court as lawyers are not paid to do quality work *and* the delays can be more significant, especially for women with complex needs or a significant volume of minor charges.

⁴⁷ Queensland Productivity Commission, Draft Report: Inquiry into Imprisonment and Recidivism (2019), p 174.

⁴⁸ See Center for Media Justice and Urbana-Champaign Independent Media Center, 'No More Shackles: Why We Must End the Use of Electronic Monitors for People on Parole' See also Lorana Bartels and Marietta Martinovic 'Electronic monitoring: The experience in Australia' (2017) 9(1) *European Journal of Probation* 80.

⁴⁹ Center for Media Justice, 'Fact sheet: Electronic monitoring is a form of incarceration'. Available at: <https://centerformediajustice.org/wp-content/uploads/2018/03/electronic-monitoring-infographic-final.pdf>. Accessed 20 May 2019.

⁵⁰ See Olivia Solon, "Digital shackles": the unexpected cruelty of ankle monitors', *The Guardian (online)*, 28 August 2018. Available at: <https://www.theguardian.com/technology/2018/aug/28/digital-shackles-the-unexpected-cruelty-of-ankle-monitors>. Accessed 20 May 2019; James Kilgore and Emmett Sanders, 'Ankle monitors aren't humane. They're another kind of jail', *Wired (online)*, 8 April 2018. Available at: <https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail/>. Accessed 20 May 2019.

Amendments to the Bail Act 1980 (Qld)

Draft Recommendation 8 suggests amendments to the *Bail Act 1980* (Qld) (the **Bail Act**). We are wary of supporting further piecemeal amendments to the Bail Act. In our view, the Bail Act requires a substantial overhaul. In addition to introducing 'guiding principles', we believe the Bail Act must be amended to restore the presumption of bail for all offences, to abolish penalties for failure to appear and breaches (as outlined above), and to clarify the legislative principles relating to 'unacceptable risk'. The best interests of the child should be included as a factor in bail decision-making so the criminal legal system does not undermine children's safety by imprisoning their primary caregivers. We suggest the Bail Act should be referred to the Queensland Law Reform Commission for a comprehensive review.

Improve rehabilitation and reintegration

Sisters Inside is not aware of the completion rates of in-prison programs or the evidence base for these programs. We believe that prisons can never be an appropriate environment for 'rehabilitation'. Violence, humiliation and social control are normalised in the prison system, undermining women's mental health and wellbeing.

Instead of focusing on 'better' prison infrastructure, we see some scope for legislative changes to improve women's material conditions in prison. For example, we strongly support legislative changes to the *Corrective Services Act 2006* (Qld) to prohibit the use of strip searching, solitary confinement, degrading urine testing procedures and routine use of force, physical and chemical restraints. In our view, these changes would support women's wellbeing in prison and support greater focus on assisting women to successfully transition from prison.

To support women to successfully transition from prison, Sisters Inside supports ongoing funding (ideally, 5 year contracts) for independent, specialist services that support women in prison and post-release from prison. Sisters Inside offers highly successful services to support women to transition successfully from prison. Our service model, *Inclusive Support*, is led by women and their identification of their needs. It recognises women as the experts in their own lives, and capable of making decisions to prioritise the wellbeing of themselves and their families.

As outlined in our previous submission, Sisters Inside's Health Support Program is an example of a highly successful program that supports women transitioning from prison. The success of the Health Support Program is underpinned by our unique model of service, our ability to support referrals between programs for women in prison and on release, and our positive reputation among women as a voluntary, confidential and non-stigmatising service.

Sisters Inside has very recently been funded by the Department of Child Safety, Youth and Women to provide the Re-Entry Service for women transition from Southern Queensland Correctional Centre. This funding is only available for a short period of time (18 months). To ensure women can continue to access support, longer term funding arrangements are necessary.

As well as specialised, independent, transition support services, Sisters Inside supports initiatives for external service providers to work directly with women in prison. Greater use of Leaves of Absences could support these initiatives. In this regard, Sisters Inside strongly supports the reintroduction of resettlement/reintegration leave and work release programs to support women in prison to transition into the community. We note the Sofronoff Report recommended amending the *Corrective Services Act 2006* (Qld) to reintroduce resettlement leave, and this recommendation was supported in principle by the Queensland Government⁵¹.

QCS could be required to report against the following Key Performance Indicators to ensure accountability and transparency for 'rehabilitation':

- breaches of discipline, strip searches and use of solitary confinement (if these are not abolished);
- number of people eligible for parole and number who apply for parole prior to their parole eligibility date or within one week after it (in cases where parole eligibility date is the same as sentence date);
- number of people returned to prison for suspension of parole and reason for suspension;
- use of Leaves of Absence to support work, study, parenting and transition from prison.

⁵¹ Queensland Government, 'Response to Queensland Parole System Review recommendations' (Published 16 February 2017), item 59. Available at: <https://parolereview.premiers.qld.gov.au/assets/government-response-to-qpsr-recommendations.pdf>. Accessed 20 May 2019.

We strongly support the proposal in Draft Recommendation 12 to ensure that all prisoners have up-to-date identity documents on release, particularly a Medicare card, birth certificate and bank account. Additionally, the Queensland Government must work closely with Centrelink to ensure that women have immediate access to crisis payments upon release.

The Queensland Government must also allocate funding for independent parole advocates to support women and men to transition from prison effectively. Independent advocates would be particularly important to ensure that women who enter or return to prison on parole suspensions are supported to address the reasons for their return as soon as possible. This would include liaising with the Parole Board, supporting women to access legal representation (if required) and maintaining women's existing connections with community-based services. Since 31 July 2018, Sisters Inside has advocated with the Parole Board on behalf of almost 120 women, including in relation to accommodation and other barriers to parole.

Address gaps in prevention and early intervention

In our view, prevention and early intervention is best guaranteed through accessible social services, rather than piecemeal policies that stigmatise individual communities or groups. Women and their children should not have to be deemed "at risk" in order to access essential services such as housing, mental health support or substance use counselling. In our view, addressing the housing affordability crisis would be the best 'prevention' policy to reduce imprisonment and re-imprisonment for women.

We note Draft Recommendation 13 recommends the Queensland Government should publish its Youth Justice Action Plan in response to the *Report on Youth Justice*. In our experience, girls who have been criminalised and imprisoned as children often experience the worst social and criminal legal outcomes as adults. Ending the criminalisation and imprisonment of children in Queensland is essential to building safe communities and reducing the number of adults in prison.

We note the Queensland Government has published its *Youth Justice Strategy 2019-2023*. The Strategy clearly recognises the importance of keeping children out of court and youth prisons. However, the current legislative and policy framework for Youth Justice does not support the goals of minimising children's contact with the criminal legal system. Connections to country, family and services cannot be built nor maintained if children are in youth prisons or watch houses.

A new approach is required, which recognises children's inherent vulnerability. In our view, legislative and policy amendments which immediately reduce the number of children in youth prisons and watch houses are the best way to ensure community safety *in the long term*.

For Sisters Inside, three priority policy and legislative changes are:

1. raising the minimum age of criminal responsibility to at least 14 years old;
2. legislating to provide greater police accountability for charging and to encourage greater use of diversionary options for children; and
3. implementing a clear bail decision-making framework for children.

Raising the minimum age of criminal responsibility

At present, the minimum age of criminal responsibility in Queensland is 10 years old. There is a rebuttable presumption (known as *doli incapax*), which provides that children under 14 years old are not criminally responsible unless it is proven by the prosecution that they had capacity at the time of the alleged offence to know that they ought not to do the act or omission. In our experience it is commonplace for children under 14 years to be sentenced for offences and *doli incapax* is very difficult to use in practice.

There is emerging international and national consensus to raise the minimum age of criminal responsibility to at least 14 years old.

In its General Comment on children's rights in juvenile justice, the United Nations Committee on the Rights of the Child states:⁵²

... a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower [minimum age of criminal responsibility] to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level. [...] A higher [minimum age of criminal responsibility], for instance 14 or 16 years of age, contributes to a juvenile justice system which, in accordance with article 40(3)(b) of CRC, deals with children in conflict with the law without resorting to judicial proceedings, providing that the child's human rights and legal safeguards are fully respected.

In subsequent deliberations, the Committee has considered age limits below 14 years as too low an acceptable standard in relation to imprisonment.⁵³

In November 2017, representatives from over 60 organisations signed an open letter calling on the Premier of Victoria to raise the minimum age of criminal responsibility to 14 years old.⁵⁴ Recently, the Law Council of Australia has unanimously resolved to change the Law Council's policy to support 14 years old as the minimum age of criminal responsibility.⁵⁵

The Royal Commission into the Protection and Detention of Children in the Northern Territory recommended that the Northern Territory Government raise the minimum age of criminal responsibility to 12 years old, and amend the *Youth Justice Act* (NT) so that children under 14 years old may not be ordered to serve time in youth prisons (with very limited exceptions)⁵⁶.

Given the high rates of unsentenced children in youth prisons, we must increase the minimum age of criminal responsibility in line with the age that we deem it appropriate to expose children to imprisonment. If we accept that imprisonment is inappropriate for children under 14 years old, we must take legislative action to remove those children from the youth justice system entirely by raising the minimum age of criminal responsibility.

There is general acceptance that children aged between 10-14 years are undergoing significant hormonal, physical and emotional development.⁵⁷ Therefore, children at this age require support and guidance, not punishment or punitive supervision through the criminal legal system. Our very low age of criminal responsibility is inconsistent with international guidance and with other laws, including criminal laws, designed to protect children. For example, in the Queensland *Criminal Code*, there are a number of offences that specifically protect children under 16 years old from various harms (e.g. in Chapter 22, 'offences against morality').

Raising the minimum age of criminal responsibility is a low-cost, high-impact and effective reform to address the over-imprisonment of children. The impact of these reforms would be most significant in Queensland, which imprisons the highest number of 10-13 year olds nationally. Queensland is also the only state which has consistently reported an increase in the number of children in youth prisons since 2014-15. The money saved by reducing imprisonment must be directed to social services as well as independent, community-based initiatives that provide ongoing support to 10-13 year olds and their families. It is essential that young people's participation in any targeted programs is fully voluntary (otherwise, we risk replicating the demonstrably ineffective prison model at the community level).

The Queensland Government have the opportunity to demonstrate national leadership by taking a progressive position on raising the minimum age of criminal responsibility.

⁵² Committee on the Rights of the Child, *General Comment No 10 : Children's rights in juvenile justice*, 44th session, UN Doc CRC/C/GC/10 (25 April 2007), 11. See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, GA Res 40/33, UN GAOR, 40th sess, 96th plan mtg, Sup no 53, UN Doc A/RES/40/33 (29 November 1985), rule 4.

⁵³ William Schabas and Helmut Sax, 'Article 37: Prohibition of Torture, Death, Penalty, Life Imprisonment and Deprivation of Liberty' in Andre Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 2006), 57. This appears to be in the context of the Committee discussing UK practice.

⁵⁴ Karin Derkley, 'Open letter calls for age of criminal responsibility to be raised to 14' (28 November 2017). Retrieved from: <https://www.liv.asn.au/Staying-Informed/LJJ/LJJ/November-2017/Experts-call-to-raise-age-of-criminal-responsibility>.

⁵⁵ Law Council of Australia, 'Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax' 26 June 2019 (Media statement). Available at: <https://www.lawcouncil.asn.au/media/media-releases/commonwealth-states-and-territories-must-lift-minimum-age-of-criminal-responsibility-to-14-years-remove-doli-incapax>.

⁵⁶ Royal Commission into the Detention and Protection of Children in the Northern Territory (November 2017), Recommendation 27.1. Available at: <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>.

⁵⁷ Megan Mitchell, 'Keynote address' (Presented at Jesuit Social Services National Justice Symposium, Melbourne, 18 September 2013) (and references). See also, Jesuit Social Services, *Too much too young: Raise the age of criminal responsibility to 12* (October 2015), 4-5.

Legislating to provide greater police accountability

Sisters Inside recommends amending section 11 of the *Youth Justice Act 1992* (Qld) (**YJ Act**) to provide stronger guidance to police officers to use alternatives to charging children and to provide greater accountability for decisions to charge. Currently, section 11 does not provide an adequate decision-making framework to support the use of alternatives to charging. Section 11(2) must be amended to require police officers to consider a greater range of factors, including the age and vulnerability of the child, the public interest in proceeding with a charge, the social issues surrounding the child's contact with police, and the consequences of charging the child, including the likelihood of remand.

In our view, section 11 also fails to provide adequate accountability for the exercise of police officers' discretion in relation to charging. Legislative amendments must be introduced to require police to document the reasons for not using alternatives to charging children. Requiring police officers to document their decisions would support a culture of accountability, and compliance with the Youth Justice Principles and the *Human Rights Act 2019* (Qld) (which will enter into force on 1 January 2020). This process may also ensure courts, lawyers and service providers have better information about a child's needs, if a child is charged and bail is opposed.

Implementing a clear bail decision-making framework for children

Sisters Inside also recommends that the Queensland Government implements a clear bail decision-making framework to support police officers and judges to release more children from watch house and youth prisons. In our view, a clear bail decision-making framework for children must:

- affirm that imprisonment is a last resort for *all* children;
- recognise the inherent vulnerability of *all* children in contact with the criminal legal system;
- recognise the detrimental impact of imprisonment on children's social connections, education, development, health and wellbeing; and
- provide for a positive obligation to address children's social needs, e.g. through Child Safety (if children are already subject to child protection intervention or through the Department).

Lack of accommodation, lack of support for families and/or lack of access to essential health services should never result in children being imprisoned. The Queensland Government must take responsibility to address these needs, either through resourcing and/or appropriate bail conditions.

Expand diversionary options

Police are the gatekeepers of the criminal legal and prison systems. Police exercise significant discretion regarding when to charge, what charges are laid and whether to refuse or oppose bail.

Expanding diversionary options and increasing police accountability are essential policy mechanisms to reduce the number of people entering and returning to the prison system. We strongly support Draft Recommendation 16, namely:

- introducing legislative and policy-based KPIs that require police officers to exercise discretion to **not** charge and to document charging decisions;
- expanding the diversionary options available to police officers. Adult cautioning must be systematically implemented to divert people apprehended for minor offences from the criminal legal system. Rather than on-the-spot fines, which may simply entrench people in poverty, we would prefer to see voluntary referrals to support services to address the underlying issues that bring people into contact with the police;
- developing a simplified public interest test for police officers and police prosecutors to encourage diversion or discontinuance of charges that proceed to court.

Legislative and policy changes should be supported by greater transparency, including regular statistical reporting about the use of diversion and the reasons why diversion is not used.

Pre-charge diversionary options must be supported by targeted resources to ensure that people can immediately access voluntary and independent support to address their needs. Sisters Inside would be open to working with the Queensland Government to trial a Women and Girls Centre in Brisbane, to support diversionary options for women experiencing homelessness and violence. Women who otherwise

would be charged with street offences, drug offences, stealing/fraud and “violent” offences against public officers could be referred to the Centre for support. This diversionary option could also assist women to re-engage with parole, therefore reducing the number of women who return to prison for parole suspensions.

Build a better decision-making architecture

In reality, it is difficult to separate imprisonment and the operation of the criminal legal system from other areas of public policy. As previously identified, structural factors such as poverty, homelessness, racism, substance misuse and mental illness (and a lack of services to address trauma) bring women into contact with the criminal legal and prison systems. These issues must be addressed at the policy level, to reduce the footprint of the criminal legal system and reduce reliance on imprisonment, punishment and surveillance to address social problems.

Sisters Inside supports greater transparency and oversight in relation to policy and legislative decision-making that affects women in the criminal legal system. In our view, a new statutory body is preferable to interdepartmental arrangements. The new body must be independent of the police, Queensland Corrective Services and the court, but have the ability to make directions regarding the implementation of policies and procedures underpinning legislation and monitor Key Performance Indicators for criminal justice institutions.

Other reviews and inquiries have repeatedly recommended the establishment of an independent Chief Inspectorate for youth and adult prisons, and the parole system.⁵⁸ The Queensland Government has indicated its commitment to these recommendations.⁵⁹ The Queensland Government must legislate and resource an independent oversight body for youth and adult prisons as a priority.

‘Recidivism’ – trends and measurements

The Draft Report highlights several different measurements for ‘recidivism’ and seeks information on approaches, technical details and challenges to improve understanding of the functioning of the criminal legal system.

Sisters Inside believes that the current criminal punishment system is structurally flawed. ‘Recidivism’ measures and ‘risk’ assessment tools that focus on individual characteristics or trajectories through the system do not adequately reflect the structural factors that underpin why people are coming into contact with the legal system.

Sisters Inside has serious concerns about the discriminatory operation of Queensland Corrective Services’ risk assessment tools for Aboriginal and Torres Strait Islander women. In our experience, Aboriginal and Torres Strait Islander women are more likely to have higher ‘re-offending’ or ‘recidivism’ scores as a result of the adverse experiences of colonisation. The security classification system is a proxy for ‘risk’ assessments within Queensland prisons. As at 31 March 2019, 74% of Aboriginal and Torres Strait Islander women in Queensland prisons had a ‘high’ security classification, compared with 62% of non-Indigenous women⁶⁰. In contrast, only around 15% of Aboriginal and Torres Strait Islander women have a ‘low’ security classification, compared with 30% of non-Indigenous women⁶¹.

In our view, ‘risk’ assessment tools perpetuate deficit narratives about Aboriginal and Torres Strait Islander people, and mask the structural racism of over-policing, criminalisation and imprisonment. We note that the ‘risk’ assessment tools and the research confirming their validity are not publicly available.

⁵⁸ *Queensland Parole System Review Report* (December 2016), recommendation 88; *Independent Review of Youth Detention Report* (December 2016), recommendation 8.R1.

⁵⁹ Queensland Government, ‘Response to Queensland Parole System Review recommendations’. Available at: <https://parolereview.premiers.qld.gov.au/assets/government-response-to-qpsr-recommendations.pdf>. Department of Justice and Attorney-General, ‘Government response to the independent review of youth detention’, p 9. Available at: <http://www.youthdetentionreview.qld.gov.au/governments-response-to-the-report.pdf>.

⁶⁰ Queensland Corrective Services, ‘Custodial Offender Snapshot March 2019’ (Custodial Offender Snapshot – statewide dataset, 24 April 2019). Available at: <https://data.qld.gov.au/dataset/custodial-offender-snapshot-statewide/resource/3390914d-abd4-4a16-b081-d296099f1f61>. Accessed 19 May 2019.

⁶¹ *Ibid.*

Greater transparency by the Queensland Government would support consideration of the adequacy and validity of risk assessment frameworks, especially for Aboriginal and Torres Strait Islander people and other racialised communities.

Instead of individualised measures, frameworks or assessment tools, we support the development of an evidence-base that shows the interlocking ways in which the criminal legal system, and other state institutions, have intervened (or failed) in criminalised women's lives. For example, researchers at the University of New South Wales developed several related studies linking institutional datasets to understand the trajectory of people with identified mental health disorders or cognitive disability through the criminal legal, health and social services systems (known as the MHDCD dataset)⁶². The report on Aboriginal and Torres Strait Islander peoples' experiences is particularly instructive. The researchers found:

Indigenous people in the MHDCD cohort are significantly more likely to have experienced earlier and more frequent contact with the criminal justice system and greater disadvantage than non-Indigenous people. Indigenous people in the cohort were significantly more likely to: have been in out-of-home-care, to come into contact with police at a younger age and at a higher rate as a victim and offender, to have higher numbers and rates of convictions, more episodes of remand, and higher rates of homelessness than non-Indigenous people. People in the cohort with complex support needs (multiple diagnoses and disability) in particular are significantly more likely to have earlier contact with police, to have been Juvenile Justice clients, and to have more police and prison episodes throughout their lives than those with a single or no diagnosis. Yet the data also highlights that most of the offences by Indigenous people in the cohort were in the less serious categories of offences – theft and related offences, public order offences, offences against justice procedures, government security and government operations, and traffic and vehicle regulatory offences.

Indigenous women in the cohort experienced the highest rate of complex needs. Indigenous women were significantly more likely than non-Indigenous women to have been in out-of-home care as children. They experienced their first police contact at a younger age and had a significantly higher number of police contacts and convictions across their lives than non-Indigenous women in the cohort.

*Indigenous women were more likely than non-Indigenous women to have been in custody as juveniles. They had significantly more remand episodes and custodial episodes over their lifetime. Indigenous women with complex needs in particular have significantly higher convictions and episodes of incarceration than their male and non-Indigenous peers. They were more likely to have been homeless and to have been victims of crime than non-Indigenous women in the cohort.*⁶³

These findings inform a more nuanced understanding of 'recidivism' because they show the role of structural and institutional factors in producing the 'risk' of criminalisation, especially for Aboriginal and Torres Strait Islander women. This type of research, in the Queensland context, would support a genuinely accountable appraisal of the 'performance' of the criminal punishment system, and other state institutions, in the lives of criminalised women.

Conclusion

According to the Draft Report, at the current rate of growth, the Queensland Government will be required to spend up to \$6.5 billion by 2025 to build new prisons or cells. Queensland cannot afford more prisons; the economic and social costs are too high.

In our view, the evidence is clear – prisons undermine community safety and create further harm in society, for individual women, their families and their children. The Queensland Government must exercise courageous leadership to transform the criminal legal system and reduce imprisonment. We urge the Commission and the Queensland Government to implement legislative and policy changes that transform the root causes of imprisonment, marginalisation and violence in our communities.

⁶² See resources and reports available online at <https://www.mhdcd.unsw.edu.au/>.

⁶³ Eileen Baldry, Ruth McCausland, Leanne Dowse and Elizabeth McEntyre, "A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system" (October 2015), p 10. Available at https://www.mhdcd.unsw.edu.au/sites/www.mhdcd.unsw.edu.au/files/u18/pdf/a_predictable_and_preventable_path_final.pdf. Accessed 30 April 2019.



Submission to Queensland Sentencing Advisory Council

Community based sentencing orders, imprisonment and parole

Options Paper

May 2019

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Introduction

Sisters Inside welcomes the opportunity to make a public submission to the Queensland Sentencing Advisory Council's review of community based sentencing orders, imprisonment and parole.

As the Council is aware, Sisters Inside is an independent community organisation that exists to advocate for the collective human rights of women and girls in prison, and provide services to meet the needs of women, girls and their families. Established in 1992, Sisters Inside has over 25 years experience supporting criminalised women and girls. Our work is informed by our *Values and Vision*,¹ which were developed by women in prison, alongside Sisters Inside's Management Committee.

Our submission is informed by our experience supporting women and girls in the criminal legal system through our programs and services. According to the Queensland Productivity Commission, if current rates of growth in prison numbers continue, the Queensland Government will be required to spend up to \$6.5 billion on new prison infrastructure alone by 2025.² In our view, the Queensland Government and the Queensland community cannot afford to direct more resources to prisons; rather, we believe resources must be directed to addressing the social context of criminalisation and imprisonment, including homelessness, mental illness, substance use, and intergenerational trauma.

Sisters Inside believes judicial officers must have a broad range of options available to them to craft sentences consistent with each defendant's particular circumstances. We also believe all changes to sentencing legislation and practice must support *decarceration* – a reduction in the numbers of women in prison or subject to formal supervision by Queensland Corrective Services. We are particularly concerned to ensure that changes to sentencing legislation contribute to reducing the over-representation of Aboriginal and Torres Strait Islander women and girls in prison. We note our position accords with fundamental principles 4 and 5, identified in the Council's Options Paper.

Sentencing process and framework

Question 1: Sentencing principles

Sisters Inside agrees with the views of legal stakeholders that the principle of imprisonment as a last resort has been eroded by successive amendments to section 9 of the *Penalties and Sentences Act 1992* (Qld).³ In our view, section 9 requires a comprehensive review to ensure that a sentence which supports people to remain or return to the community on a community based order is *always* considered by judicial decision makers. In our view, this principle is particularly important in the context of Queensland's high remand rates, especially for Aboriginal and Torres Strait Islander women in prison.⁴

Question 2: Mandatory sentencing

Sisters Inside is opposed to all mandatory sentences, including mandatory cumulative sentences⁵ and minimum non-parole periods.⁶ In our view, mandatory sentences are unfair and undermine the efficient administration of the criminal legal system. For example, as identified in the Options Paper, mandatory

¹ Sisters Inside, *Values and Visions*. Available at: <https://sistersinside.com.au/about/sisters-inside/our-values-and-vision/>. Accessed 30 May 2019

² Queensland Productivity Commission, *Inquiry into imprisonment and recidivism: Draft Report* (February 2019), p xviii.

³ Queensland Sentencing Advisory Council, *Community based orders, imprisonment and parole: Options Paper* (April 2019), p 63. (Hereafter cited as QSAC, Options Paper.)

⁴ According to Queensland Corrective Services data, as at 31 March 2019 43% of Aboriginal and Torres Strait Islander women in prison in Queensland are unsentenced: Queensland Corrective Services, 'Custodial Offender Snapshot March 2019' (Custodial Offender Snapshot – statewide dataset, 24 April 2019). Available at: <https://data.qld.gov.au/dataset/custodial-offender-snapshot-statewide/resource/3390914d-abd4-4a16-b081-d296099f1f61>. Accessed 19 May 2019.

⁵ The Options Paper identifies the cumulative sentencing provision in s156A, *Penalties and Sentences Act 1992* (Qld). We also note that terms of imprisonment imposed under s33(4), *Bail Act 1980* (Qld) for failure to appear must be cumulative. In our experience, this provision has very negative consequences for women.

⁶ For example, mandatory minimum non-parole periods for people sentenced to life imprisonment: s181, *Corrective Services Act 2006* (Qld). See also other legislative provisions that affect parole eligibility in chapter 5, *Corrective Services Act 2006* (Qld).

sentences do not provide an incentive for defendants to plead guilty, particularly in relation to the offence of murder.⁷

In our experience, mandatory sentences have a particularly negative gendered impact, particularly for Aboriginal and Torres Strait Islander women. For example, the Council has previously found that since 2008-09, the proportion of women sentenced for breach of bail offences increased, while the proportion of men sentenced in that period decreased.⁸ In our experience, many women are being sentenced for failure to appear, which requires a mandatory cumulative sentence if imprisonment is imposed.⁹

In the context of the recent changes to the definition of murder, we are concerned that this offence combined with the mandatory sentence will have a disproportionately harsh impact on women.¹⁰ We have also observed that mandatory community based sentences in relation to certain offences¹¹ have a disproportionate impact on Aboriginal and Torres Strait Islander women, who are more likely to be charged for offences in public places.¹²

We believe all mandatory sentences must be abolished.

Intensive Correction Orders

We refer to our previous submission to the Council regarding Intensive Correction Orders (ICOs). Sisters Inside supports Option 3 in relation to ICOs, which provides for ICOs to be retained with amendments to allow for greater flexibility in the conditions imposed.

The reason for our position is that:

- Sisters Inside does not support introduction of Community Correction Orders;
- the available data suggests ICOs are a positive, successful sentencing option, with relatively high completion rates;¹³
- abolishing ICOs may have a negative gendered impact, as women are more likely to be sentenced to ICOs compared to men;¹⁴
- there is merit in maintaining ICOs as they may be an appropriate sentence to ensure people avoid actual imprisonment;
- greater flexibility can be achieved with minor legislative amendments that allow greater judicial discretion and monitoring in respect of the components of ICOs. (We do not support administrative breach powers.)

Even if Community Correction Orders were introduced in Queensland, Sisters Inside would still support retaining ICOs as a unique sentencing option.

We also note the possible complexity in respect of Commonwealth offences if ICOs are abolished and replaced by CCOs. ICOs are a prescribed offence for Queensland pursuant to section 20AB(1AA)(c) of the *Crimes Act 1914* (Cth) and regulation 6 of the *Crimes Regulations 1990* (Cth). We are aware that ICOs are commonly used in cases of Centrelink fraud. In Australia, women are up to twice as likely to be charged with Centrelink fraud offences than men.¹⁵ The gendered impacts of abolishing ICOs may be particularly detrimental for women in this category.

⁷ QSAC, Options Paper, p81.

⁸ Queensland Sentencing Advisory Council, *Sentencing spotlight on ... breach of bail offences* (November 2017) p 5. Available at: https://www.sentencingcouncil.qld.gov.au/_data/assets/pdf_file/0007/543598/qsac-spotlight-series-breach-of-bail.pdf. Accessed 30 May 2019.

⁹ s33(4), *Bail Act 1980* (Qld).

¹⁰ See e.g. Felicity Caldwell, 'Fears women could be jailed for life for killing violent partners', *Brisbane Times (online)*, 25 March 2019. Available at: <https://www.brisbanetimes.com.au/politics/queensland/fears-women-could-be-jailed-for-life-for-killing-violent-partners-20190325-p517fw.html>. Accessed 30 May 2019.

¹¹ ss180A-D, *Penalties and Sentences Act 1992* (Qld).

¹² See e.g. Tamara Walsh, 'Public nuisance, race and gender' (2018) 26(3) *Griffith Law Review* 334. Copy of the research paper can be provided on request.

¹³ QSAC, Options Paper, p 89.

¹⁴ *Ibid*, p 96.

¹⁵ Scarlet Wilcock, 'Policing Welfare: Risk, Gender and Criminality' (2016) 5(1) *International Journal for Crime, Justice and Social Democracy* 113, p114 (citing Prenzler).

Community Correction Orders

According to the Options Paper, the Council's preferred option is to introduce CCOs, replacing probation, community service orders and ICOs (Option 3). We understand the Victorian model of CCOs most closely resembles Option 3. Sisters Inside is opposed to the introduction of Community Correction Orders (CCOs) in Queensland. Sisters Inside supports Option 1, to retain probation and community service orders with minor changes.

The Options Paper notes that CCOs are highly resource intensive sentencing orders.¹⁶ In our view, it is highly inappropriate to prioritise additional resources for Queensland Corrective Services (QCS) to implement CCOs, instead of addressing the fundamental issues that contribute to entrenched cycles of criminalisation and imprisonment. People should not have to be criminalised to access essential services such as substance use counselling and rehabilitation or other support services.

For example, the Queensland Government's resources would be better directed to addressing homelessness. We believe addressing homelessness through adequately funded social housing or subsidised private housing would have a greater positive impact on community safety than the introduction of CCOs. In April 2019, Anglicare published the national Rental Affordability Snapshot.¹⁷ The Snapshot surveyed over 69,000 rental listings across Australia advertised on realestate.com.au and found that:

- 317 rentals were affordable for a single person on the Disability Support Pension
- 75 rentals were affordable for a single parent with one child on Newstart
- 2 rentals were affordable for a single person in a property or share house on Newstart
- 1 rental was affordable for a single person in a property or share house on Youth Allowance
- 0 rentals were affordable for a single person on Newstart or Youth Allowance in any major city or regional centre.

This means that **no** houses are affordable for many of the most marginalised people in Queensland, who are churned through the criminal legal system. Unless we have a society that supports the conditions for all people to live in safety, then we cannot expect to successfully implement community based orders of any kind.

We are also concerned that CCOs will undermine clarity, transparency and consistency in sentencing, in relation to the conditions imposed on people's orders. It is not yet clear to us how CCOs would be recorded on people's criminal history. There is a possible gendered impact of certain types of conditions, particularly as criminalised women are more likely to present with complex needs and trauma. The Australian Law Reform Commission appeared to accept the research and evidence that Aboriginal and Torres Strait Islander women often have greater difficulty complying with the requirements of sentences, and a punitive response is not appropriate to address the underlying drivers of their incarceration.¹⁸ In our view, CCOs will not offer diversion; rather they risk imposing a 'suite' of punitive conditions that reflect women's level of need rather than 'risk'.

In the context of Queensland's current imprisonment numbers, it does not make sense to introduce CCOs. The number of unique individuals (adults and children) convicted of criminal offences is decreasing in Queensland.¹⁹ As imprisonment numbers have continued to rise in the same period, this is a very concerning trend. It suggests that a smaller group of people are being proceeded against by police and further entrenched in the criminal legal system. This is reflected in high remand rates. Remand is a gendered issue, and Aboriginal and Torres Strait Islander women are most affected by the extreme rise in remand in the criminal legal system. As at 31 March 2019, there were 9,036 adults in

¹⁶ Ibid, pp 125-126 referring to Victorian experience. See also pp133-134.

¹⁷ Anglicare Australia, Rental Affordability Snapshot 2019 (April 2019). Available at: <https://anglicare-ras.com/>. Accessed 30 May 2019.

¹⁸ Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples: Final Report* (ALRC Report 133, December 2017), see esp pp266, 358-359. Available at: https://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_133_amended1.pdf. Accessed 30 May 2019.

¹⁹ There were 112,768 'unique offenders' in Queensland in 2017-18, a decrease of 5.4% from 119,170 'unique offenders' in the previous year. This is the second successive yearly decrease. Queensland Government Statistician's Office, *Crime report, Queensland, 2017-18* (2019), p80 (see p 2 for definitions). Available at <http://www.qgso.qld.gov.au/products/reports/crime-report-qld/crime-report-qld-2017-18.pdf>. Accessed 30 May 2019.

prison in Queensland.²⁰ Women represented 10% of the total prison population (906 women). Around 36% of women in prison were Aboriginal and/or Torres Strait Islander women (326 women). In total, around 38% of women were unsentenced; however over 43% of Aboriginal and Torres Strait Islander women were unsentenced. In contrast, only around 31% of Aboriginal and Torres Strait Islander men and non-Indigenous men were unsentenced.

According to the Australian Bureau of Statistics, New South Wales and Victoria both experienced the largest increases in prison numbers between 2017 and 2018, and as at 30 June 2018 the proportion of unsentenced prisoners was higher in both Victoria and New South Wales than in Queensland.²¹ Based on informal conversations with stakeholders we know in Victoria, we understand CCOs have contributed (at least in part) to rising remand rates. We note that Victoria had one of the lowest percentages of successful completions for supervision orders in 2017-18.²² We are concerned that breach of CCOs will contribute to higher remand rates in Queensland.

We particularly concerned that CCOs will not address fundamental *sentencing* issues arising as a consequence of very high remand rates, as CCOs will provide greater power and influence to QCS to assess suitability.

Finally, we note the introduction of CCOs may politicise the sentencing process, which could undermine the effective operation of the criminal legal system. As the Options Paper notes, the Victorian Sentencing Advisory Council ultimately recommended *against* introducing CCOs because of 'the possible fast-tracking of offenders to prison and the potential for uncertainties and disparities in sentencing outcomes should a broader range of conditions be made available under a single form of community order'.²³ CCOs were introduced in Victoria as an election commitment of the Liberal-National Coalition Government.²⁴ Since their introduction, there have been successive legislative amendments to CCOs, eroding their applicability to certain categories of offences.²⁵ The Options Paper also identifies that there has been a reduction in the use of community orders in England and Wales, which some have attributed to magistrates lacking confidence in the effectiveness of community orders.²⁶ We do not want to see a 'law and order' auction in Queensland.

Given Queensland's very high imprisonment and remand rates, we are concerned that fundamental legislative changes to introduce CCOs would have an overall negative impact on the most marginalised people in our communities, especially Aboriginal and Torres Strait Islander women. We note the Queensland Productivity Commission's preliminary finding that 65% of people are in prison for non-violent offences.²⁷ We believe any fundamental changes to community based sentences must be explicitly linked to reducing the number of people in prison (e.g. greater use of prison-probation sentences).

Question 4: Home detention

Sisters Inside does not support introduction of home detention as a sentencing option in Queensland. Additionally, Sisters Inside does not support electronic monitoring, in conjunction with home detention or as a separate, distinct sentence condition.

In our view, home detention extends the violence of the prison system into people's homes. It normalise surveillance and compliance, rather than support, autonomy and accountability. It provides a basis for greater expansion of the carceral state by resources and population. We are concerned that home detention will have a negative gendered impact for women, both as people sentenced for offences and as family members.

²⁰ Queensland Corrective Services, 'Custodial Offender Snapshot March 2019' (Custodial Offender Snapshot – statewide dataset, 24 April 2019). Available at: <https://data.qld.gov.au/dataset/custodial-offender-snapshot-statewide/resource/3390914d-abd4-4a16-b081-d296099f1f61>. Accessed 19 May 2019.

²¹ See Australian Bureau of Statistics, 4517.0 – Prisoners in Australia, 2018. Available at: <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>. Accessed 30 May 2019.

²² QSAC, Options Paper, p129.

²³ Ibid, p113 (citing Victorian Sentencing Advisory Council report).

²⁴ Ibid, p114.

²⁵ Ibid, pp123-124.

²⁶ Ibid, p131.

²⁷ Queensland Productivity Commission, *Inquiry into imprisonment and recidivism: Draft Report* (February 2019), p ix.

Citing evidence that women are exposed to harsher penalties under home detention, George explains that home detention builds on and reinforces the home as a site for the control and punishment of women.²⁸ It may expose women to further punishment, as it 'criminalises' ordinary activities such as drinking, being late or leaving the house as potential conditions of an order.²⁹

Home detention may also expose women to violence, as they may feel unable to leave a violent relationship or call the police for assistance. Aboriginal and Torres Strait Islander women are already less likely to call police in situations of domestic violence, due to distrust of the service system as well as fear of reprisals.³⁰ In situations where a violent partner is sentenced to home detention, women will be even less likely to call police, as reporting would potentially result in new charges for a violent incident *and* a breach of the home detention order.

Many criminalised women are single mothers or have primary responsibility for children in the context of violent, unstable relationships. Home detention is not in the best interests of children in households with criminalised caregivers; it is likely to impose unreasonable restrictions on a caregiver's ability to support children and it may lead to involvement or intervention by child protection authorities. For example, a mother may not feel able to accompany a child to hospital if she is subject to a curfew under home detention and a medical emergency happens 'after hours'. Limits on 'normal' parenting may expose women to (additional) surveillance by child protection authorities, creating significant distress.

As a sentencing option, home detention perpetuates the inequality that already exists in the criminal legal system as it will only be available to women who have a 'suitable' home.³¹ We are aware from our work supporting women with bail and parole that many women in Queensland prisons do not have a 'suitable' address. According to the 2018 National Prisoner Health Data Collection, people who entered prison were 66 times more likely to be homeless than people in the general population, and 54% of people leaving prison who participated in the survey expected to be homeless on release.³²

If the State is unwilling to divert resources to provide housing for women in prison, it is unconscionable to introduce a sentencing option that relies on people having a home.

Similar criticisms are applicable to electronic monitoring. It is costly, it net widens, it does not prevent 'crime' and it is highly stigmatising.³³ Use of electronic monitoring also raises ethical concerns about the privatisation of 'public safety' as Governments generally outsource the provision of monitoring technology to the private sector.³⁴ In the United States, the significant costs of electronic monitoring are passed onto 'users';³⁵ it is very concerning to imagine a future in which criminalised women on inadequate fixed incomes through Centrelink might be required to pay fees for their release through electronic monitoring. The Queensland Government's limited resources should not be directed to expanding surveillance, instead of resourcing non-punitive support options such as drug rehabilitation or community mental health services.

²⁸ Amanda George, 'Women and Home Detention – Home Is Where the Prison Is' (2006) 18(1) *Current Issues in Criminal Justice* 79, p 83. Available at: <http://www.austlii.edu.au/au/journals/CICrimJust/2006/17.pdf>. Accessed 19 May 2019.

²⁹ *Ibid*, pp 86-87.

³⁰ Domestic and Family Violence Death Review and Advisory Board, *2016-17 Annual Report* (2017), p 60. Available at: https://www.courts.qld.gov.au/_data/assets/pdf_file/0003/541947/domestic-and-family-violence-death-review-and-advisory-board-annual-report-2016-17.pdf. Accessed 19 May 2019.

³¹ Amanda George, 'Women and Home Detention – Home Is Where the Prison Is' (2006) 18(1) *Current Issues in Criminal Justice* 79, p 82.

³² Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (May 2019), pp 22-24. Available at <https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true>. Accessed 30 May 2019.

³³ See Center for Media Justice and Urbana-Champaign Independent Media Center, 'No More Shackles: Why We Must End the Use of Electronic Monitors for People on Parole' See also Lorana Bartels and Marietta Martinovic 'Electronic monitoring: The experience in Australia' (2017) 9(1) *European Journal of Probation* 80.

³⁴ Center for Media Justice, 'Fact sheet: Electronic monitoring is a form of incarceration'. Available at: <https://centerformediajustice.org/wp-content/uploads/2018/03/electronic-monitoring-infographic-final.pdf>. Accessed 20 May 2019.

³⁵ See Olivia Solon, 'Digital shackles: the unexpected cruelty of ankle monitors', *The Guardian (online)*, 28 August 2018. Available at: <https://www.theguardian.com/technology/2018/aug/28/digital-shackles-the-unexpected-cruelty-of-ankle-monitors>. Accessed 20 May 2019; James Kilgore and Emmett Sanders, 'Ankle monitors aren't humane. They're another kind of jail', *Wired (online)*, 8 April 2018. Available at: <https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail/>. Accessed 20 May 2019.

Suspended sentences

Consistent with the Council's fundamental principle 2, Sisters Inside supports retaining suspended sentences.

Question 5: Suspended sentences

Sisters Inside believes suspended sentences are under-utilised as a sentencing option. One barrier to greater use of suspended sentences may be lack of legislative recognition for extended periods of successful compliance with bail (c.f. pre-sentence custody). If successful completion of bail was more explicitly taken into account, this might encourage greater use of wholly suspended sentences.

Question 6: Guidance on setting operational period

To ensure the operational period for a suspended sentence made in combination with a community based order is proportionate, we would support a legislative amendment to section 144 of the *Penalties and Sentences Act 1992* (Qld) to require the operational period to be the shortest period possible and in proportion to any other sentence. Alternatively, this guidance could be included in a bench book. We believe it would not be useful to specify a specific proportion, as this may undermine judicial discretion.

Question 7: Power of court dealing with breach

We support amending the wording in sections 147(2) and 147(3) of the *Penalties and Sentences Act 1992* (Qld) to promote greater judicial discretion in sentencing for breaches. We further support legislative amendments to allow for judicial decision makers to impose a fine and/or make no other order in respect of a breach of a suspended sentence.

Question 8: Breach powers

Sisters Inside would support introducing a legislative discretion for a court to deal with a breach of a suspended sentence imposed by a higher court. We largely agree with the Council's preferred model for this procedure, based on section 651 of the *Criminal Code* (Qld).³⁶ Under this model, a court could deal with a breach on its own motion, provided (a) the court considers it appropriate; (b) the defendant is legally represented; (c) the Crown and the defendant consent; and (d) sufficient information about the original offence and circumstances in which it was imposed is before the court.

Question 9: Combined suspended sentence/community based order

Sisters Inside supports Option 2, to reform suspended sentences to allow a court to order a suspended sentence combined with probation or community service order for a single offence. Sisters Inside does not support the introduction of conditional suspended sentences, as this would undermine the unique features of suspended sentences for people who do not require supervision. Any breaches of the conditions of the community based order should be dealt with under Part 7, Division 2 of the *Penalties and Sentences Act 1992* (Qld), and not as a breach of the suspended sentence. Any period of supervision must be limited to the maximum period available for probation under s92 of the *Penalties and Sentences Act 1992* (Qld) (i.e. 3 years) and supervision ought to be proportionate to any operational period.

If a person successfully complies with probation and no longer requires ongoing supervision, we suggest there should be legislative amendments to allow the person or QCS to apply either to a court for the probation order to be discharged.

Court ordered parole

Data requested by Sisters Inside from Queensland Courts confirms that since 2007-08, an increasing number of women appear to be sentenced to period of imprisonment with a parole eligibility date within 6 months of their sentence date. In 2007-08, 27 Aboriginal and Torres Strait Islander women and 53 non-Indigenous women were sentenced to a period of imprisonment with a parole eligibility date within

³⁶ QSAC, Options Paper, p189.

six months of their sentence date; in contrast, in 2016-17 – at the peak of this trend – 118 Aboriginal and Torres Strait Islander women and 313 non-Indigenous women had parole eligibility dates within 6 months of their sentence date³⁷. Although the numbers decreased in 2017-18, the number of women being sentenced with a parole eligibility date in close proximity to their sentence remains significantly higher than 10 years ago.

In our experience, women are often sentenced to a period of imprisonment and the parole eligibility date is set as the sentence date. Women are often not sentenced to periods of imprisonment longer than three years; however, a parole eligibility date (rather than a parole release date) is required because women have been charged with further offences while subject to an existing parole order.

These trends suggest that women are increasingly becoming entrenched in cycles of criminalisation for 'minor' offences, as a result of social exclusion and disadvantage. While women's marginalised situation is recognised by courts, because women are sentenced with a parole eligibility date, they are spending longer periods of time in prison because of systemic delays in the parole and social services system.

The operation of the Parole Board has significantly improved following implementation of the recommendations of the Sofronoff review. However, women still face significant barriers to parole, especially in relation to housing, mental health services and advocacy with the Parole Board. Legislative amendments are required to ensure that the sentencing and parole system work together fairly and effectively, particularly for women.

Question 10: Setting of parole release date

In relation to the anomaly identified in *R v Sabine* [2019] QCA 36 (18 February 2019), we support the position that a subsequent court which sentences a person to a lesser period of imprisonment than an existing sentence is not required to set a parole release date.

Question 11: Court powers where offence committed while on parole

We strongly support amendment of sections 209, 211 and 215 of the Corrective Services Act 2006 (Qld) and section 160B(3) of the *Penalties and Sentences Act 1992* (Qld) to allow greater judicial discretion to craft sentences that support immediate release from imprisonment. As indicated above, in our experience, women are frequently sentenced with immediate parole eligibility dates or parole eligibility dates within a very short period of the sentence date. In these cases, it is absolutely unjust that women are required to apply to the Parole Board for parole.

These provisions must be amended to give a subsequent sentencing court discretion to set a parole release date. Additionally, if the court imposes a community based order (which we have seen in rare circumstances), in circumstances where a person's parole is suspended, there ought to be a mechanism for the court to also order the person's release from prison in respect of the suspended parole order.

Question 13: Pre-sentence custody

Sisters Inside agrees that sections 159A(1) and 159(4)(b) of the *Penalties and Sentences Act 1992* (Qld) should be amended to clarify the circumstances in which a court can declare pre-sentence custody by removing the words 'for no other reason'. Imprisonment is costly, and has significant social costs for women and their families. In our view, it is appropriate that any time a woman spends in prison should be taken into account by the sentencing court.

Question 14: Availability of parole for short sentences of imprisonment

Sisters Inside reiterates the highly damaging consequences of short sentences of imprisonment for women. A short sentence of imprisonment can result in loss of employment, housing or access to

³⁷ Received via email from Jennifer Gallagher, A/Senior Performance Information Advisor, Courts Performance and Reporting Unit, Department of Justice and Attorney-General on 10 October 2018. A copy of this data can be provided on request.

certain Centrelink benefits,³⁸ removal of children and deterioration in physical and mental health and wellbeing.

Sisters Inside supports legislative amendments that would serve to reduce *actual* periods of imprisonment of 6 months or less. We are cautious of the possible impact of abolishing court ordered parole for short sentences – this change may lead to longer sentences and/or it may lead to more women spending actual time in prison, rather than being immediately released to court ordered parole.

We would support legislative amendments that provide better outcomes for women sentenced to short periods of imprisonment, as long as this did not result in higher numbers of women spending actual time in prison. One option may be to provide strong legislative guidance that any periods of imprisonment under 6 months must be wholly suspended, unless it is in the interests of justice for a person to be sentenced to actual time in prison.

We agree that court ordered parole should remain an option for sentences of six months or less in certain situations, for example if a person is re-sentenced for breach of a suspended sentence or if a person is sentenced for offences committed while they were subject to an existing parole order. In respect of activation of a suspended sentence, the current provisions in relation to court ordered parole should apply – that is, a court must set a parole release date if the sentence is less than 3 years. In relation to sentences of imprisonment, where a previous parole order has been in place, the court should have discretion to set a parole release date or a parole eligibility date (see response to question 11).

Options for reforming court ordered parole

Sisters Inside supports the extension of judicial discretion to order court ordered parole for all sentences of between 3 to 5 years, and for sexual offences.

We understand the concerns that courts may not be able to adequately assess ‘risk’ at the time of sentence; however, we note that Queensland Corrective Services could notify the Parole Board of any risks prior to a person being released to court ordered parole, resulting in a suspension. We are aware of cases that already occur where people’s court ordered parole is suspended prior to their release from prison, e.g. due to lack of suitable accommodation.

Sisters Inside does not support legislative changes that would undermine the current position in section 160B(2), which requires the court to set a parole release date in certain circumstances. In our view, certainty is an important value in sentencing, particularly to assist with referrals for support and to plan for release from imprisonment. Any change to this position may result in more women spending actual time in prison, which would have significant detrimental consequences for women’s health and wellbeing. There are more funded services to support women sentenced to immediate release on court ordered parole (e.g. Women’s Early Intervention Service (pilot) recently funded in the Brisbane Magistrates Court).

Sisters Inside does not support the requirement for mandatory pre-sentence reports (see below question 15).

Implementation – Issues and challenges

Question 15: Pre-sentence reports

Sisters Inside supports Option 1, to retain the current approach to pre-sentence reports. We note this is the Council’s preferred option.

³⁸ According to changes to Commonwealth policy, people must re-apply for the Disability Support Pension if they have been in prison for longer than 13 weeks.

Sisters Inside does not support mandatory pre-sentence reports for any orders or conditions. Mandatory requirements for pre-sentence reports may result in delays, without any guarantee that the reports will be of a high quality or provide useful information to the court. We are also concerned that requiring pre-sentence reports by QCS might prejudice particular defendants, who would not be funded by Legal Aid to prepare their own independent report. For people with complex needs, a pre-sentence report prepared based on a 'risk' framework may fail to adequately recognise the impact of trauma and social factors.

Sisters Inside recognises the value of the specialist cultural reports prepared in the Murri Court. However, we believe it would have significant resourcing implications to extend these reports more broadly.

Other issues

Question 16: Administrative mechanisms

Section 651 of the *Criminal Code* (Qld) creates unnecessary complexities and delays for people on remand. In circumstances involving pre-sentence custody, the Crown's consent should not be required to transfer matters to higher courts. This should be available on defence election, on certification by a lawyer.

In relation to ex officio indictments under section 561 of the *Criminal Code* (Qld), these are still used in cases where the Crown does not consent to transfer particular matters under section 651. In these circumstances, there should be a prompt administrative mechanism to provide for the matter to be 'resolved' in the Magistrates Court.

We do not have any comments on section 189 of the *Penalties and Sentences Act 1992* (Qld).

Question 17: Sentencing disposition – Convicted and not further punished

We do not believe it is a high priority to legislate the sentence of 'convicted and not further punished'. Any legislative provisions introduced to reflect this sentence should allow for judicial discretion, and not limit the application of this sentence to particular circumstances.

Questions 18, 19 & 20: Power of courts to deal with breaches of CBOs

Sisters Inside supports amendments to the *Penalties and Sentences Act 1992* (Qld) to provide for judicial discretion to allow courts to deal with breaches of community based orders imposed in other jurisdictions.

In cases where the Magistrates Courts or the District Court are dealing with a community based order from a higher court, we agree that this discretion should be exercised on the court's own motion, if the court is satisfied that it is appropriate in all the circumstances and the defence consents.

We agree that it makes sense to amend section 124 of the *Penalties and Sentences Act 1992* (Qld) to prevent totality issues. To avoid significant delays between sentences for new offences and breach proceedings being instituted by QCS, we suggest it would be appropriate to impose a statutory timeframe within which QCS is required to bring breach proceedings (e.g. within 30 days of being notified of the new offence) to prevent significant delays for defendants.