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WOMEN PRISONERS IN VICTORIA

A report on the considerations and conclusions of the Equal Opportunity Commission of Victoria in determining whether to seek the Attorney-General's consent to conduct a formal investigation into systemic discrimination against women in Victorian prisons

The body of the report contains information that was current on 6 February 2006, the date of the Commission's decision. Updating of information in the report has been incorporated in footnotes or in the appendix. (25 August 2006)

CONTENTS

EXECUTIVE SUMMARY

PART 1: FCLC/VCOSS SUBMISSION

Part 1 of the report summarises the main allegations in the FCLC/VCOSS submission.

PART 2. CORRECTIONS VICTORIA RESPONSE

Part 2 summarises the key points of the *Better Pathways* strategy and Corrections Victoria's response to specific matters raised by the Commission.

PART 3. BACKGROUND INFORMATION AND OTHER RESEARCH

Part 3 details the research that was taken into account in considering the Submission. This comes under the subheadings:

- Profile of women in Victorian prisons
- The women's prisons
- Individual complaints of discrimination by women in prison received by EOCV
- Inquiries into women in prison overseas
- Inquiries into women in prison interstate
- Victorian developments
- Other Research

PART 4. APPLICATION OF LEGAL PRINCIPLES

Part 4 explains the legal principles applied by the Commission in responding to the Submission.

PART 5. CONCLUSION AND NEXT STEPS

Part 5 provides the conclusions the Commission has drawn on whether to conduct a systemic review and details what action it will be taking.

Executive Summary

On 6 February 2006, in response to a submission by the Federation of Community Legal Centres and the Victorian Council of Social Services, the Equal Opportunity Commission of Victoria decided not to seek the Attorney-General's consent to conduct a formal investigation into systemic discrimination against women in Victorian prisons. Instead the Commission decided to call upon Corrections Victoria to perform an audit of the infrastructure, policies and procedures applying to women in prison to ensure compliance with the *Equal Opportunity Act (Vic)*, and to consult with the Commission in the framing and monitoring of the audit.

In April 2005 the Equal Opportunity Commission of Victoria received a submission from the Federation of Community Legal Centres (FCLC) and the Victorian Council of Social Services (VCOSS) requesting a systemic review of discrimination against women in Victorian prisons. Specifically they asked that the Commission conduct an investigation under section 156 of the Victorian *Equal Opportunity Act 1995* (the Act) against the State of Victoria.

The FCLC and VCOSS submission (the Submission) alleges that women in prison are discriminated against in all the main areas of the prison system including the way they are classified, the management and disciplinary procedures, the health services, education and occupational programs. The discrimination occurs, it is claimed, on a systemic level because of entrenched policies and procedures. The Submission argues that women in prison are discriminated against on the basis of their gender because the prison system is based on the men's model and does not acknowledge the differences between men and women. For example, the Submission claims, the classification system does not take into account that female prisoners pose less of a security risk than male prisoners and that about seventy percent of female prisoners in Victoria have dependent children. The Submission also alleges that women in prison are discriminated against on the ground of parental status, race, disability and religious belief. It states that the disadvantage experienced by women in prison is compounded by belonging to a specific needs group. For example it is claimed that women with mental illnesses and/or intellectual disabilities are inappropriately disciplined for behaviour that may require treatment or that could be better managed with training and awareness of the disability.¹

¹ Request for a Systemic Review of Discrimination Against Women in Victorian Prisons, April 2005 Prepared by Pia Cerveri, Kate Colvin, Marika Dias, Amanda George, Jiselle Hanna, Greta Jubb, Arati Vidyasagar and Claire Weigall on behalf of The Federation of Community Legal Centres and The Victorian Council of Social Service

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Corrections Victoria (CV) is the operator of the two women's prisons. CV has asserted from the outset that it does not accept the Submission's claims of systemic discrimination against women in Victorian prisons.² In November 2005 the Victorian Government launched a multi-agency strategy called *Better Pathways: An Integrated Response to Women's Offending and Reoffending*. The *Better Pathways* strategy was created in response to concern about the significant increase in the number of women in prison (84 per cent increase in Victoria between 1998 and 2003). The major focus for CV is on reducing imprisonment through diversion to community based options, reducing re-offending through better rehabilitative and transitional options and reducing victimisation. The strategies include the development of a women's correctional services framework, the construction of a flexible intensive support unit and the employment of a sexual assault support officer.³ CV has also provided information about a number of existing policies, programs and procedures that have been or are being developed with specific consideration of women prisoners including the disability framework, Mothers and Children Program, the Aboriginal Wellbeing Officers and the Strip Search Pilot Program.⁴ CV claims that the strategies it is developing in relation to *Better Pathways* and other policies and programs will address concerns about conditions for women in prison. CV has actively and transparently sought to improve the conditions under which women are kept in detention in addition to seeking to employ alternative strategies for the detention of women.

The Act requires that the administrators of Victorian prisons do not unlawfully discriminate by treating a prisoner less favourably than another prisoner on the basis of a personal characteristic covered in the Act. Characteristics covered include sex, parental status, age, race, or disability. Individual prisoners may lodge complaints of discrimination with the Commission. Apart from dealing with complaints of discrimination made by individual prisoners, the Commission can, in some situations, investigate issues of systemic discrimination. The relevant section for the submission under consideration is subsection 156(2). The Commission can only conduct an investigation under this section with the consent of the Minister and where certain requirements are satisfied. These requirements include that there may be contraventions of the Act of a systemic and serious nature that cannot be dealt with adequately by the lodging of individual complaints.

For the purpose of determining whether there may be contraventions of the Act under subsection 156(2), it is necessary for the Commission to consider only whether at *face value* the allegations disclose cases of discrimination. The research presented in this

² Letter dated 21 June 2004 from Kelvin Anderson, Commissioner of Corrections Victoria addressed to FCLC and copied to EOCV

³ *Better Pathways: An Integrated Response to Women's Offending and Reoffending*, November 2005

⁴ Corrections Victoria (2005) *Response to matters raised in the EOCV's correspondence of 26 May 2005*.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

report therefore is of a preliminary nature, sufficient for determining whether to seek the Attorney-General's consent to conduct an investigation but not to establish findings of fact or law. In keeping with this approach, women in prison themselves were not interviewed by the Commission and the information in the submission has been considered without a rigorous testing of the facts as would occur where a determination was being made in a tribunal hearing. The Commission has conducted the research necessary to inform itself generally on the issues. The Commission did not request that CV provide a formal response to the allegations contained in the Submission but only that it respond to specific matters needing further clarification raised by the Commission.

The Commission has considered the allegations raised in the Submission within the context of the following research. The Commission has conducted a site visit of the Dame Phyllis Frost Centre (DPFC), and held discussions with representatives from FCLC, VCOSS, CV, Ombudsman Victoria, Victorian Institute of Forensic Mental Health and the Anti-Discrimination Commission Queensland. The Commission has considered the *Better Pathways* strategy and CV initiatives to improve conditions for women in prison. The Commission has also considered the work done in this area by other agencies. These include the Ombudsman Victoria's Review into Persons in Custody which is soon due for public release⁵, the Victorian implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody⁶, and the Women in Prison Review by the Anti-discrimination Commission of Queensland, which is due to release its report in early 2006⁷.

The Commission accepts that at face value the Submission raises some allegations which may disclose breaches of the laws prohibiting discrimination on the ground of sex, parental status, disability, religious belief or race under the Act. The Commission also accepts that the alleged discrimination is of a systemic and serious nature that cannot be dealt with adequately by the lodging of individual complaints. There is a systemic character to many of the allegations, as they involve law, policies and procedures that apply to women in prison as a group. Further, a significant number of the allegations are of a serious nature as they concern the fundamental rights of women from disadvantaged backgrounds in vulnerable situations. These include allegations relating to women being over-classified, the frequency and distressing nature of strip-searches, and the failure to meet the medical needs of women in prison

⁵ The report by the Ombudsman and OPI on Conditions for Persons in Custody was released on 19 July 2006 and is available at

[http://www.ombudsman.vic.gov.au/CA256F2D00228847/Lookup/Custodyreport/\\$file/CustodyReport.pdf](http://www.ombudsman.vic.gov.au/CA256F2D00228847/Lookup/Custodyreport/$file/CustodyReport.pdf)

⁶ Review Reports volumes 1 and 2, Victorian Government Printer October 2005

⁷ The report was released in March 2006 and is available on the Anti-discrimination Commission Queensland website, www.adcq.qld.gov.au

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

with mental illness. Some of the allegations raised in the submission have similarly been raised as areas of concern in information received from agencies such as Ombudsman Victoria and Victorian Institute of Forensic Mental Health.

Those requirements having been satisfied, the Commission turned to the question of whether it should exercise its discretion to request the Minister's consent to a formal investigation. Particularly relevant to the discretion issue is the question of whether the *Better Pathways* strategy and current initiatives of CV obviate the need for the Commission's involvement.

The Commission welcomes the introduction of the *Better Pathways* strategy as a major step forward towards improving the circumstances of women in the prison system. However, the Commission does not accept that the strategy directly addresses the allegations of discrimination against women prisoners. The strategy focuses on reducing the imprisonment of women by exploring diversionary options and recognizing that a significant number of women offenders have been victims of abuse. Its stated objectives do not include focusing on compliance with principles of equitable treatment contained in applicable anti-discrimination legislation. Further, the strategy is currently at the very early stages of implementation. At this stage, except for a few specific strategies already developed, in the main it sets out general goals and priorities, and expresses the aim to develop policy or standards which address these.⁸ That being said, there is nonetheless significant potential for *Better Pathways* and other CV initiatives to include reforms that will address many of the allegations of discrimination.

An investigation under section 156(2) would involve a formal investigation and if the Commission is satisfied that there has been a breach of the Act, the Commission must try to conciliate the matter. If then the Commission determines that the matter is unable to be successfully conciliated it would be obliged, under section 158 of the Act, to refer the matter to the Victorian Civil and Administrative Tribunal for determination. The Commission believes this process may be unnecessarily formal and adversarial at this stage given what is acknowledged to be the positive development of the *Better Pathways* strategy.

An alternative power is available under section 162 of the Act. This section provides the Commission with broad educative and research functions in relation to the elimination of discrimination. Because a section 156(2) investigation may be overly formal and restrictive and because the Commission can adopt an alternative and

⁸ Information provided by CV on the development and implementation of Better Pathways since the Commission's decision in February 2006 is available in the appendix.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

broader role under section 162 of the Act, the Commission has decided not to request the Minister's consent for a formal investigation under section 156(2).

The Commission has decided to adopt a role under section 162 in educating and influencing reforms for women in prison to better recognise their rights to equality under the Act. This role is particularly relevant in light of the major initiatives being developed through the *Better Pathways* strategy. Use of the section 162 power would allow a more flexible and solution-based approach to the issues raised in the Submission.

The Commission has formed the view that there should be a CV initiated audit of the infrastructure, policies and procedures applying to women in prison aimed at ensuring compliance with anti-discrimination obligations under the Act. It is recommended that this audit be conducted in association with the *Better Pathways* strategy which amongst other initiatives, commits to the development of a policy framework for the delivery of correctional services for women. The Commission calls upon CV to incorporate anti-discrimination standards into this framework to guide the development and delivery of correctional services for women. The *Better Pathways* strategy promises to develop measures that will address the areas of prisoner classification, prison disciplinary processes, the use of force, health services, strip-searches, education and occupational programs, and the needs of women with children, Indigenous women, CALD women and women with disabilities. In developing these measures the Commission further calls upon CV to review all areas for compliance with anti-discrimination law and to introduce measures that will ensure the elimination of discrimination.

It is also recognised that some of the allegations in the Submission may be better addressed through a human rights framework rather than through the more specific parameters of anti-discrimination law which requires one group to be disadvantaged compared to another group. Internationally, a broad body of work has been developed that provides guidelines on human rights compliant imprisonment.⁹ The Commission's focus must be, according to the parameters of the Act, the principles of anti-discrimination law. It is however entirely appropriate and desirable for CV to evoke International Human Rights guidelines on the treatment of prisoners in the scope of the audit. The Commission believes that a broader human rights context is important in order to find a solutions-based approach to the issues and would be consistent with

⁹ The most prominent of these is the *United Nations Standard Minimum Rules for the Treatment of Prisoners* which has been used to provide minimum standards for compliance with article 10 of the *International Covenant on Civil and Political Rights*.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

the development of the Victorian *Charter on Human Rights and Responsibilities Bill 2006*.¹⁰

In summary, the Commission seeks to be involved in the development of an audit tool for CV by providing equal opportunity and human rights advice on the framing of the audit and in monitoring its progress.

The Commission has decided not to seek the Attorney-General's consent for a formal investigation at this stage on the basis that an audit will be undertaken that includes the following characteristics:

- The capacity to identify the measures necessary to eliminate and avoid discrimination in the infrastructure, policies and procedures applying to women in prison;
- Independence;
- Informed by expert advice in relation to the application of anti-discrimination and human rights principles;
- Transparency in terms of its formulation, implementation and findings; and
- Publicly available findings.

CV has displayed a strong commitment to recognizing the human rights of women in prison through its implementation of the *Better Pathways* strategy and other initiatives. It is in acknowledgment of this commitment that the Commission seeks a collaborative approach with CV rather than a formal inquiry. The Commission's aim is to assist in building upon and developing CV's initiatives so that discrimination against women in prison may be avoided.

This report details the legal principles, the research and information taken into account in arriving at the decision to decline the request for an investigation under section 156 and to instead adopt an educating and influencing role under section 162.

The body of the report contains information that was current on 6 February 2006, the date of the Commission's decision. Updating of information in the report has been incorporated in footnotes and in the appendix.

¹⁰ On 25 July 2006 the *Charter on Human Rights and Responsibilities Bill 2006* (Vic) received assent.

Part 1: FCLC/VCROSS Submission

The main allegations in the Submission are summarised below.

Access to health services

1. Health services do not respond to women's reproductive health issues or the physical and mental health issues arising from women's experiences of sexual violence.
2. Women in prison have less access to specialist services and experience more delays than men in prison.
3. Women do not have adequate access to privacy in their health care. This is because the majority of health care occurs in open clinic spaces with curtain dividers, in full hearing and view of other prisoners, guards and health staff.
4. Women can only see a doctor if they receive a referral from a nurse and can only see a specialist if they receive a referral from a doctor. The women report that this triage system presents barriers to receiving medical care and that their symptoms are often taken too lightly.
5. Women prisoners with mental illness have insufficient access to specialist services and are "managed" rather than "treated". See "Women with mental illness" below.
6. Health services do not accommodate the needs of Indigenous and culturally and linguistically diverse (CALD) women. See "Indigenous women" and "CALD women" below.

The classification system

7. Classification of women does not take into account that women prisoners generally pose less of a security risk than men prisoners and does not take into account the needs of women with children.
8. All remand prisoners are automatically classified as maximum security. Indigenous women are more likely to be on remand because they are more likely to be homeless.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Confinement at a level higher than justified by their security rating.

9. DPFC is a maximum security prison and holds 260 women prisoners. The other women's prison, HM Prison Tarrengower (Tarrengower), is a minimum security prison and holds 54 women. Women are confined at DPFC although they are not classified as maximum security prisoners. This is because there are insufficient minimum security places available at Tarrengower. Seventy percent of women prisoners are held in confinement at a level higher than justified by their security rating. Men's confinement better accords with their security rating as there is a greater number of men's prisons.
10. Further, there are certain groups of women who are predisposed to being accommodated at DPFC because services which aim to meet their needs are provided at DPFC. These groups include Indigenous women and women with intellectual disability.

Management and Discipline

11. Women prisoners are disciplined to a greater degree than men prisoners. This includes a higher rate of charges for less serious incidents, a higher application of physical restraint, and a more punitive response to women's expressions of distress or other mental health issues.
12. Women with mental illnesses and intellectual disabilities are inappropriately disciplined for behaviour that may require treatment or that could be better managed with training and awareness of the disability. For more detail, see below under the headings "Women with mental illness" and "Women with intellectual disability".
13. In addition, Indigenous and CALD women experience detrimental treatment in relation to the disciplinary processes. Reasons for this are outlined below.
14. Inappropriate use of force is used in the management of women. An example given is of the shackling of women when accessing external medical services.

Strip Searches

15. Strip searches have a more traumatic effect on women than men given their greater history of experiencing sexual and other abuse. Women are subject to strip searches more frequently because strip searches are conducted before and after visits. Due to their stronger family ties, women prisoners receive more

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

visits. Strip searches are an unreasonable requirement given the lower risk attached to women prisoners.

16. For reasons of race or disability, some women prisoners experience additional detriment in relation to strip searches- see below under “Indigenous women” and “Women with mental illness”.

Release from Prison Programs

17. Severe restrictions have been placed on ‘release from prison programs’ for women as well as men because of escapes by male prisoners during earlier more lenient programs. The restrictions do not take into account that for women there is a greater use and need for permits and less risk associated with them.

Access to educational services and employment opportunities

18. Women have less access to these than men prisoners. Educational and employment programs are designed for the needs of men. Men are offered courses of greater quantity, quality, variety and relevance than women.

Women with children and the Family Reunification program

19. While family visits do exist, and there is a range of programs for having children stay in prison, such measures are inadequate.
20. The Family Reunification program at the DPFC has been closed while parenting and family reunification programs have been maintained at the men’s prisons.

Indigenous Women

21. Indigenous women experience racism from prison officers. Individual instances of racism include verbal abuse or arbitrary write-ups for breaches of conduct rules by prison officers.
22. Indigenous women prisoners suffer even higher rates of inappropriate classification than the rest of the female prison population. This is because:
 - i) they are more likely to be held on remand and not granted bail due to homelessness; and

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

- ii) they are likely to be housed at the DPFC where the services for Indigenous women are located.

- 23. There is a need for Indigenous prison officers (currently none), more Indigenous medical staff and specific medical responses to Indigenous prisoners.
- 24. Indigenous women are even more traumatised by strip searches than non-Indigenous women. This is because Indigenous women report an even higher rate of previous experience of sexual assault and have a collective memory of rape as a tool of cultural dispossession.
- 25. The CCP program is currently only available to prisoners serving a sentence of three years or more. This policy disadvantages Indigenous women who are mostly serving sentences below 12 months.
- 26. Educational, occupational and post release programs do not adequately accommodate the cultural needs of Indigenous women.

Women of culturally and linguistically diverse (CALD) background

- 27. CALD women are discriminated against on the ground of race and/or religious belief. A culture of racism is allowed to pervade the prison system. The Submission relies on anecdotal evidence of incidents of racism by prisoners and prison officers, as well as the finding of Victorian Prison Health Study (after conducting training inside the prisons 2002 – 2004) that there was “pervasive and intractable racism”.
- 28. CALD women are disadvantaged in accessing health services, education and occupational programs and in navigating the prison system. This is partly because interpreters and translations are not adequately provided. For example, the prison operating procedures manual is in English only.
- 29. Religious services are not provided to all religious groups.
- 30. For many CALD women in prison, a variety of culturally relevant foods are not available.

Women with mental illness

- 31. Women prisoners have a higher rate of mental illness than male prisoners. However, they do not have access to equivalent services to those provided at

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

the Melbourne Assessment Prison for men. The Melbourne Assessment Prison has a ten bed acute care unit for observation of patients with mental health issues. A number of beds are allocated to women prisoners at Thomas Embling hospital but these are insufficient. Instead of providing appropriate treatment and support, the prison system places these women in Muirhead cells and responds punitively to them.

32. Women who are at risk of suicide or self-harm (SASH) are placed in Muirhead cells, also known as 'wet cells'. They are strip searched and then must wear nothing else besides a canvas gown.

33. Muirhead cells contain no furniture except for very rudimentary bedding. There is no privacy as one entire wall is made of glass for observation purposes.

Women with intellectual disability

34. Women with intellectual disabilities are supervised by male corrections officers in the evening and night shifts. This should not be occurring given the vulnerability of women with intellectual disabilities.

35. Women prisoners with intellectual disability are likely to be housed at DPFC where the perception is that a range of services can be provided to them. As a result, these women are subject to a higher security regime than necessary.

36. Women with intellectual disabilities are more likely to admit to offences, including those they did not commit. They will commonly not understand orders or what rules exist and so will be found in breach. Further, the system of Governor's hearings is not modified for people with an intellectual disability.

Part 2. Corrections Victoria Response

For the purpose of determining whether to seek the Attorney-General's consent to conduct an investigation, the Commission's role involves informing itself to the degree necessary to assess whether at face value the Submission raises some allegations which may disclose breaches of the *Equal Opportunity Act 1995 (Vic)*. Accordingly the Commission did not request that CV provide a formal response to the allegations contained in the Submission but only that it respond to specific matters needing further clarification raised by the Commission.

In correspondence and in discussion with the Commission, CV has asserted that the Victorian Government's *Better Pathways* strategy which was launched in November 2005 will address concerns about conditions for women in prison. A summary of the strategy and the relevant initiatives is set out below under the sub-heading *Better Pathways*.

In correspondence, CV has also provided the Commission with further information in response to matters raised by the Commission. A summary of this information is set out after the section on *Better Pathways*.

Better Pathways

The *Better Pathways* strategy aims to address the increase in women's imprisonment in Victoria by reducing the risk of first time offences and repeat offences, and by exploring diversionary options.

In addition, the strategy aims to address women's "victimisation" by recognising that a significant number of women offenders have experienced sexual, physical and psychological abuse.

CV has identified that its major focus is on reducing imprisonment (through diversion to community based options), reducing re-offending (through better rehabilitative and transitional options) and reducing victimisation.

The *Better Pathways* strategy consists of 37 initiatives. Of these, 28 are to be implemented by 30 June 2009, and nine are proposed *future directions* for action over the medium to longer term. The Government has allocated \$25.5 million over four years to implement the *Better Pathways* strategy. This includes \$18.3m for programs

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

and services to support women offenders and prisoners and \$7.2m for improvements to women's prison facilities.

An Implementation Steering Committee comprising representatives from a range of Government departments will oversee the implementation and evaluation of the *Better Pathways* strategy.

Development of a policy framework for the delivery of correctional services for women

The *Better Pathways* Strategy states that, "Corrections Victoria will develop a policy framework, incorporating a unifying set of principles to guide the development and delivery of correctional services for women. Areas of correctional practice to be addressed by the policy framework include risk assessment, prisoner classification, prison disciplinary processes and the use of force."

Health services

In relation to health services for women prisoners, the Strategy promises to upgrade the medical centre at DPFC. The upgrade will provide a new multi-purpose room for health promotion and education, additional consultation rooms and a new dispensary system and post-dose supervision area for the Opioid Substitution Therapy Program.

For women with mental illnesses, an onsite 20-bed flexible intensive support unit will be established at DPFC to provide accommodation and specialist care, including 24 hour nurse staffing. The unit will provide a flexible mix of beds, including acute care, sub acute care, psychosocial, crisis care and aged care beds.

The strategy also commits to the development of standards for the provision of health care services, including mental health care.

Strip-searches

The Strategy states, "Corrections Victoria will continue to develop procedures for conducting personal searches across the women's prison system that are sensitive to women's needs. To date this has involved reducing the number of personal searches conducted at DPFC and using a different method of conducting personal searches at Tarrengower.(e.g. searching half the body before the other, rather than requiring a total strip)".

Education and occupational programs

Education facilities will be improved by building more classroom space and other features at DPFC.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Renovations will be carried out on the prison industries facilities at DPFC. These will include expanding the workshop area.

Standards for the management of women will be introduced. Such standards will oversee the provision of education and training programs and employment options across the women's prison system. Also, recommendations from the 2002 Review of Education and Training in Victorian Prisons will be implemented.

A pilot program will be established to provide women offenders and women leaving prison with employment and training opportunities. A dedicated case manager will support women who participate in the program.

Women with children

Corrections Victoria will work with the Department of Human Services to explore ways of strengthening assistance for the children of women in prison.

CV will investigate the benefits of purpose-built accommodation for Mothers and Children Program participants. (The Mothers and Children Program allows children up to school age to live with their mothers in prison.)

Indigenous Women

Transitional housing for Indigenous women on bail will be established to address the issue of homelessness as a barrier to being granted bail.

CALD Women

A full-time Vietnamese liaison officer will be employed. The officer will provide advice on, and raise awareness of, cultural issues among prison staff, help women access programs and services and provide practical assistance. The officer will also deliver or arrange interpreting and translating services as required.

A new dedicated place of worship for women prisoners will be created.

INFORMATION PROVIDED BY CV IN RESPONSE TO MATTERS RAISED BY THE COMMISSION

In response to matters raised by the Commission, CV has provided additional information in its letter of 26 July 2005 and in the attachment headed, "Response to matters raised in the Equal Opportunity Commission of Victoria's correspondence of 26 May 2005". A summary of the key points made by CV are set out below. (In some cases the information in the letters from CV has been supplemented by further information received from CV or by the Commission's own research.)

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Health

- The average cost of providing primary health services, including psychiatric services per prisoner is approximately four times greater for women than for men

Women with children

- A dedicated prison-based Program Support Worker has been recently appointed to help delivery of the parenting and family support program.

Discipline

- “The number of prison incidents and the number of disciplinary hearings as a result of prison incidents is commonly higher in those facilities which hold maximum security prisoners. The particularly high rate of women prisoners being charged with prison incidents can be attributed to the complex environment at the DPFC, a multifunctional facility which accommodates prisoners of all security ratings and includes mainstream, protection and management prisoners. Such an environment is not reflected anywhere else in the prison system. Further, the difficulties associated with managing women with complex personality disorders and/or significant mental health issues in a corrections environment are reflected in the high rate of incidents at DPFC.”¹¹
- The Correctional Management Standards for Prisons in Victoria is being redeveloped with input from the Women’s Correctional Services Advisory Committee (comprising 14 non-government members).

Classification

- CV has engaged the former Deputy Ombudsman to conduct an organisational review of its sentence management process.
- The Women’s Correctional Services Advisory Committee is providing advice on a new classification structure which will determine how the women prisoners are accommodated, managed, what access to programs they have, and when they leave prisons.

Indigenous women

- The current Corrections Victoria Health Care Standards require health staff to be sensitive to Indigenous culture. Prisoners are also given the choice of using

¹¹ Corrections Victoria (2005) *Response to matters raised in the EOCV’s correspondence of 26 May 2005.*

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

a culturally specific health worker where available. A Koori health worker regularly attends DPFC.

- The Aboriginal Wellbeing officer role for both DPFC and Tarrengower is a full-time position held by an Indigenous woman. This position provides culturally appropriate services and support to Indigenous women and advises prison staff.
- Indigenous Awareness Training is delivered as part of the Recruit Training Course.
- Prison receptions data for the 2003/04 financial year indicate that the sentence lengths received by Indigenous women were similar to those received by non-Indigenous women.
- In addition to the Rehabilitation and Reintegration Permit (applying to prisoners serving sentences of three years or more), a 'Release Assistance' permit for prisoners with shorter sentences is provided in the last six months of their sentence.

CALD women

- CALD cultural awareness training is delivered as part of the Recruit Training Course.
- Certain religious denominations have chaplains who attend the prison regularly. Special visits can be arranged for other religious denominations.
- Procedures in the event of fire or evacuation have been translated into Vietnamese.
- While the Operating Procedures Manual is not available in different languages, selected operation procedures of particular relevance have been translated into Vietnamese.

Women with disabilities

- A disability framework is being developed for men and women prisoners.¹² The first phase will involve a 12 month project to develop guiding principles. This framework is intended to drive a coordinated program of actions about prisoners with disabilities across the Victorian prison system. The Public

12 Project Plan CV019, CV Disability Framework

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Advocate is on the board for this project. One of its main strategies was to develop and pilot a screening tool to identify all new prisoners with acquired brain injuries.¹³

- CV is developing guidelines with Department of Human Services and Office of the Public Advocate to support prisoners with intellectual disabilities through disciplinary hearings.

The Corrections Inspectorate

The Corrections Inspectorate is separate from CV. It is an internal unit of the Department of Justice (DOJ) and its Director, Jan Schuard,¹⁴ reports to the Secretary, DOJ. CV is also an internal unit of DOJ. The role of the Corrections Inspectorate is to provide monitoring and advice on the operations, conduct and performance of correctional services. It conducts whole-of-prison reviews, thematic reviews, unannounced prison inspections, investigates serious incidents occurring within the Corrections system, and administers the Official Prison Visitors scheme on behalf of the Minister for Corrections. The Director of CI is about to conduct a thematic review of the DPFC and Tarrengower prisons.¹⁵ The reports generated by the Corrections Inspectorate are not public documents.

Women's Correctional Services Advisory Committee

- This Committee, Chaired by the Parliamentary Secretary for Justice, was established in 2003 by the Minister for Corrections, following cessation of the Victorian Women's Prison Council. The WCSAC advises the Minister for Corrections on strategic directions and service requirements for women in the Victorian correctional services system. The committee is comprised of fourteen non-governmental representatives with experience in the area of women's correctional services. They are providing advice on a new classification structure which will determine how the women prisoners are accommodated, managed, what access to programs they have, and when they leave prisons. They are also working on redevelopment of the standards for the management of women prisoners so that they specifically reflect the needs of women.¹⁶

¹³ To date, the pilot program has been completed at selected prison locations, with a larger evaluation project, including women prisoners, soon to be delivered. The disability framework also sought to develop a screening tool to identify prisoners with hearing impairments, targeted specifically at Indigenous prisoners. Preliminary testing has been completed at several prison locations (including DPFC) and a report is being prepared with recommendations for future directions: Corrections Victoria (2006) *Comments on the Report Women Prisoners in Victoria*

¹⁴ Jan Shuard is no longer Director of the Corrections Inspectorate. Albert Bentincontri is currently Acting Director: CV response, 6 June 2006.

¹⁵ In the first half of 2007 the CI plans to conduct a 'Healthy Prisons' audit of DPFC and a post-audit review of the audit conducted at HM Prison Tarrengower late last year: CV response, 6 June 2006.

¹⁶ Women's Health Victoria (2005) *Gender Impact Assessment: Corrections Victoria* p. 4.

PART 3. BACKGROUND INFORMATION AND OTHER RESEARCH

PROFILE OF WOMEN IN VICTORIAN PRISONS

On 30 June 2003, the female prisoner population in Victoria was 281 out of a total prisoner population of 3,763. There was an 84 per cent increase in women prisoners in Victoria between 1998 and 2003.^{17 18}

On 30 June 2005, the female prisoner population was 257 out of a total prisoner population of 3,692.¹⁹

Data from 30 June 2004 show that Victorian women are most likely to be in prison for property offences (33.2%), followed by offences against the person (21.3%) and drug offences (18.4 %). In contrast, men are most likely to be in prison for offences against the person (33.8%).^{20 21}

On 30 June 2005, 34.2% of women in Victorian prisons were there for property related offences, 26.8% for offences against the person and 17.5% for drug offences.²²

In Australia in 2003, the median aggregate sentence length for female sentenced prisoners was 27 months. The median aggregate sentence length for males was 42 months.^{23 24}

17 *Statistical Profile of the Victorian Prison System 1999/2000 to 2003/2004*, Department of Justice 2005

18 As at 30 June 2006, women prisoners represented 6.3% of the total prison population. Unsentenced women represented 20.8% of the total female prisoner population compared to 18.7% for male prisoners: Corrections Victoria (2006) *Comments on the Report Women Prisoners in Victoria*

19 *Statistical Profile of the Victorian Prison System 2000/2001 to 2004/2005*, Department of Justice 2006

20 *Statistical Profile of the Victorian Prison System 1999/2000 to 2003/2004*, Department of Justice 2005

21 As at 30 June 2006, women who had been sentenced to a period of imprisonment were more likely to be serving a sentence for offences against property (33.9%), whereas men were more likely to be serving sentences for offences against the person (37.2%): Corrections Victoria (2006) *Comments on the Report Women Prisoners in Victoria*

22 *Statistical Profile of the Victorian Prison System 2000/2001 to 2004/2005*, Department of Justice 2006

23 1301.0 - Year Book Australia, Australian Bureau of Statistics, 2005 available at <http://www.abs.gov.au/Ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article202005?opendocument&tabname=Summary&prodno=1301.0&issue=2005&num=&view=>.

24 As at 30 June 2006, Women prisoners were more likely to be older (32.2% of women were 40 years of age or older, compared to 30.7% of men) than their male counterparts and serving shorter sentences than men (42.8% of

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

On 30 June 2004, the proportion of women in Victorian prisons born in countries where the primary language is other than English was 13.2%, an increase of about 6% in three years. The most marked increase has been the number of women born in Vietnam who represented 9.8% of the women prisoner population (24 prisoners) on 30 June 2004. In the same year, there were 10 women identifying as Aboriginal or Torres Strait Islander.^{25 26}

CV collects data on prisoners who are registered with Department of Human Services as having an intellectual disability. CV does not currently collect statistical data relating to the incidence of prisoners with other disabilities but intends to develop its data collection as a strategy of the disability framework described above.²⁷

In relation to both mental and physical health, Australian women prisoners are a high-need group compared with women in the general community.²⁸ Similar results amongst women prisoners in Victoria were found in a sample survey conducted as part of a study on Victorian prisoner health by consultants for the Department of Justice.²⁹

Better Pathways refers to research that shows that compared to male prisoners, female prisoners in Victoria are:

- more likely to have injected illicit drugs and to have committed their offence while under the influence of drugs and/or to support their drug use;
- more likely to have been diagnosed with a mental illness, including depression;

women were serving sentences of less than 12 months compared to 32.5% of men): Corrections Victoria (2006) *Comments on the Report Women Prisoners in Victoria*

25 1301.0 - Year Book Australia, Australian Bureau of Statistics, 2005 available at <http://www.abs.gov.au/Ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article202005?opendocument&tabname=Summary&prodno=1301.0&issue=2005&num=&view=>.

26 As at 30 June 2006, Indigenous women made up 6.1% (i.e. 15 women) of the total female prison population, compared to Indigenous male prisoners who made up 5.4% (i.e. 200 men) of the total male prison population: Corrections Victoria (2006) *Comments on the Report Women Prisoners in Victoria*

27 Information provided by Corrections in July notes that currently there are two women in custody in Victoria who are registered with Department of Human Services as having an intellectual disability: Corrections Victoria (2006) *Comments on the Report Women Prisoners in Victoria*

28 "Other Areas of Concern, Women in Prison" Australian Social Trends 2005 Australian Bureau of Statistics, Catalogue no.4102

29 *Victorian Prisoner Health Study* Deloitte Consulting, Department of Justice February 2003

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

- more likely to have experienced childhood sexual abuse;
- more likely to have experienced multiple violent relationships;
- more likely to have dependent care responsibilities, yet less likely to have a partner to look after their children while in prison.³⁰

A 1995 study found that more than 85% of female prisoners were mothers of young children and, prior to prison, were more often than not the heads of single households.³¹

THE WOMEN'S PRISONS

There are two women's prisons in Victoria- the Dame Phyllis Frost Centre and HM Prison Tarrengower. Corrections Victoria is the public authority responsible for correctional facilities in Victoria.

Dame Phyllis Frost Centre

Dame Phyllis Frost Centre is a maximum security prison for women. It provides a multi-purpose prison for maximum, medium and minimum security sentenced and remand prisoners, including both mainstream and protection prisoners. It has the capacity to hold approximately 260 women.

Accommodation is provided in units or single cells. Units provide group accommodation with shared kitchen and other facilities for medium and minimum security prisoners. DPFC also has two special cell blocks housing 20 prisoners each. One is designed for protection prisoners, and the other houses prisoners with a history of poor behaviour.

The prison was formerly privately operated and known as the Metropolitan Women's Correctional Centre. Due to problems in the management of the prison resulting in unacceptable conditions for the women, the Government stepped in to take control and in 2000 ownership and management was transferred to the public sector.

³⁰ *Better Pathways: An Integrated Response to Women's Offending and Reoffending*, November 2005

³¹ M A Farrell, *A comparative policy study of incarcerated mothers and their young children in Queensland, NSW, Victoria and England* (PhD, 1995) above n 36, 25.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

HM Prison Tarrengower

HM Prison Tarrengower is a minimum security prison situated 136km north of Melbourne with an emphasis on release preparation. The prison houses up to 54 women in accommodation units.³²

INDIVIDUAL COMPLAINTS OF DISCRIMINATION BY WOMEN IN PRISON RECEIVED BY EOCV

To date, very few complaints have been received by the Commission from women prisoners. A search of complaints lodged with the Commission from 1 July 2000 to 30 June 2004 against prisons in Victoria by female prisoners, reveals that seven complaints were lodged by one individual in 2000. All involved slightly different circumstances but with a repeated focus on gender identity. No complaints were received concerning the issues raised in the submission.

The low number of complaints received by the Commission compared to those received by Ombudsman Victoria³³ may be partly due to the fact that unlike Ombudsman Victoria the Commission has not conducted prison visits in the past to receive enquiries from women prisoners. It is appreciated that women in prison are a disadvantaged group in terms of health and education levels, making it more difficult for them to lodge complaints, particularly within the isolating context of the prison. FLC representatives have also advised that women in prison are deterred by the fact that communications by phone and letters are not private.³⁴ Recently the Commission received a request from a group of women in prison that the Commission meet them to discuss the lodging of individual complaints. The Commission will respond to this request as part of the normal course of fulfilling our statutory functions under the Act. .

INQUIRIES INTO WOMEN IN PRISON OVERSEAS

In recent years the situation of women in prison has been subject to scrutiny in various countries. In early 2004 the Canadian Human Rights Commission released its report entitled "Protecting Their Rights". Based on a two year enquiry, the report found that women prisoners continue to face systemic human rights problems in the federal correctional system. In late 2004, following a number of prison deaths, the Northern

³² 2006 Australian Institute of Criminology Last modified: 6 January 2006 Correctional facilities in Victoria <http://www.aic.gov.au/research/corrections/facilities/vic.html>

³³ Ombudsman Victoria conducts bi-monthly visits to the Dame Phyllis Frost Centre to speak with the women in prison. In the last financial year it received forty-five complaints from women prisoners about conditions in prison.

³⁴ CV has informed the Commission that its operating procedures allow prisoners to send written communication to the EOCV without it being opened by prison staff, and that whilst prisoner telephone conversations with the EOCV are not currently private, there is scope for them to be treated as such in the future: Corrections Victoria (2006) *Comments on the Report Women Prisoners in Victoria*

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Ireland Human Rights Commission produced "The Hurt Inside" based on research into the care of women prisoners. In the United Kingdom, the Commission on Women and the Criminal Justice System was established in 2003, with a group of high profile Commissioners looking at women's experiences across the whole of the criminal justice system. Findings were published in March 2004. An annual review tracking progress has just been undertaken, entitled "Stop Women Dying in Prison".

INQUIRIES INTO WOMEN IN PRISON INTERSTATE

Prison advocacy groups interstate have also made claims of discrimination against women in prison, similar to those contained in the submission. In 2004 the Anti-Discrimination Commission Queensland received a submission from a prison advocacy group called "Sisters Inside" and the New South Wales Anti-Discrimination Board received a submission from an organisation called the "Beyond Bars Alliance". Whilst the Anti-Discrimination Commission Queensland decided to undertake an inquiry, the New South Wales Anti-Discrimination Board declined.

Two other anti-discrimination or human rights reviews into prison systems have been conducted in recent years. The Human Rights & Equal Opportunity Commission conducted an inquiry into children in Immigration Detention³⁵ and the ACT Human Rights and Discrimination Commissioner conducted a human rights audit of Quamby Youth Detention Centre³⁶. These inquiries did not specifically focus on women in prison.

Anti-Discrimination Commission Queensland inquiry into women in prison

In June 2004 the Anti-Discrimination Commission Queensland (ADCQ), in response to the application for an inquiry from Sisters Inside, decided to conduct a review. The submission from Sisters Inside alleges systemic discrimination on the basis of sex, parental status, race and disability and raises similar issues to the FCLC/VCOSS submission. The review was conducted under section 235 of the *Anti-Discrimination Act 1991 (Qld)*. This section provides the Commission with the power to conduct investigations, undertake research and education, consult with various organisations to ascertain means of improving services and conditions affecting groups, and promote human rights. Approval of the Minister is not a pre-requisite to the use of this power.

³⁵ *A last resort? The National Inquiry into Children in Immigration Detention & Community Guide* available at www.hreoc.gov.au

³⁶ *Audit of Quamby Youth Detention Centre*, ACT Human Rights & Equal Opportunity Commission, 30 June 2005

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

The ADCQ conducted an exhaustive review lasting twenty months. This included visiting the women's prisons and speaking with inmates and staff, advertising for public submissions, and soliciting the views of key stakeholders.

The ADCQ investigated and examined against anti-discrimination legislation and International human rights standards, the main aspects of women's prisons in Queensland. Such aspects included classification, infrastructure, disciplinary processes, and health systems.³⁷

VICTORIAN DEVELOPMENTS

Ombudsman Victoria's Investigation into Persons in Custody

The Ombudsman's investigation encompasses persons held in prisons or police custody. Its terms of reference include examining the specific conditions and arrangements for persons in custody. Term of reference 2.4 states that it will also be examined whether the needs of particular groups of detainees are met, including women, Aboriginal people, culturally diverse groups, non English speaking background detainees and people who have a mental illness or a disability.³⁸ The report on the investigation is due to be released in July 2006.³⁹

37 In March 2006 the ADCQ officially released its report on the treatment of women prisoners. This report details the review process, the findings of the review and key recommendations. In framing its recommendations, the report also refers to international human rights standards and international instruments on the minimum rules for prisoners. Particular areas of concern in the report include:

- the current classification system which may be over-classifying women;
- discrimination against Indigenous women;
- the failure to take into account the best interests of children in the treatment of women prisoners with dependent children;
- strip-searches conducted on women being held in crisis support units;
- the high rate of mental illness among the women and the failure to address their needs; and
- a lack of independence in the official prisons' watchdog.

The report makes 68 recommendations which include:

- the introduction of new legislation that must consider and adequately accommodate the specific circumstances of women in custody;
- the reduction of the frequency of strip-searches;
- a ban on male guards observing women prisoners held in detention or in crisis support units;
- non-custodial sentencing options such as home detention to be available to women with dependent children;
- correctional services to consider alternatives to prison for Indigenous prisoners, such as "Healing Lodges" and improved post release and transitional support services to avoid recidivism;
- increased cultural and disability awareness training of correctional services' staff; and
- the creation of an independent, statutory office of Chief Inspector of Prisons, which reports directly to Parliament to ensure independence from the Department of Corrective Services:

Women in Prison : A Report by the Anti-Discrimination Commission Queensland, March 2006. The report is available on the Anti-discrimination Commission Queensland website, www.adcq.qld.gov.au

38 Conditions for persons in custody, Terms of Reference 8 June 2005

39 The report by the Ombudsman and OPI on Conditions for Persons in Custody was released on 19 July 2006 and is available at [http://www.ombudsman.vic.gov.au/CA256F2D00228847/Lookup/Custodyreport/\\$file/CustodyReport.pdf](http://www.ombudsman.vic.gov.au/CA256F2D00228847/Lookup/Custodyreport/$file/CustodyReport.pdf). It raises

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

The Commission recently met with Ombudsman Victoria and was advised that the investigation and the complaints they have received from women prisoners are consistent with many of the allegations raised in the FCLC/VCOSS submission. Ombudsman Victoria has also raised as a serious concern the inappropriate use of management cells to hold women who need treatment for mental illness. Other concerns include over-classification of women, inadequate access to medical and mental health services, and the traumatic effect and frequency of strip searches.

Ombudsman Victoria conducts regular visits to the Dame Phyllis Frost Centre to speak with the women in prison. In the last financial year it received forty-five complaints from women prisoners about conditions in prison. The majority of these concerned health services.

At this stage Ombudsman Victoria does not contemplate the initiation of any projects focusing on women prisoners. However, Ombudsman Victoria does intend to monitor the progress of *Better Pathways* by requesting regular reports.

The Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody⁴⁰

Community consultation was conducted as part of this 2005 review. Responses to this consultation in relation to correctional services included:

- Poor standards of health care particularly in relation to mental health;
- The need for more and better educational programs especially incorporating Aboriginal culture;
- Lack of cultural awareness among correctional staff; and
- Blatant racism by individuals within the correctional system⁴¹.

The report makes recommendations in relation to conditions for Indigenous prisoners. None of these relate specifically to women. Recommendations are made on education, risk assessment, use of discipline, health care, and other aspects of prison

some similar concerns to those expressed in the FCLC/VCOSS Submission, particularly with regards to classification and mental health care issues for women prisoners.

⁴⁰ *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody*, Volumes 1 and 2, Victorian Government Printer, October 2005

⁴¹ *Ibid*, p22

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

conditions. There is also a recommendation for the employment of a full-time Indigenous complaints officer

Victorian Institute for Forensic Mental Health

Significant concerns have been raised by the Victorian Institute of Forensic Mental Health (operating as Forensicare) regarding the shortfalls in mental health services for prisoners in its Annual Report 04/05. According to the Annual Report, “the combined effect of the increasing prison population and the new mental impairment legislation⁴² has led to a serious and escalating shortfall in our secure inpatient capacity, and in turn our prison and community services.”⁴³

Forensicare provides the following services:

- Thomas Embling Hospital. This is a 100-bed secure hospital, primarily for patients from the criminal justice system who are in need of psychiatric assessment and/or care and treatment. It has six accommodation units covering acute and continuing care, and includes a specialised women's unit with 10 beds.
- A 24 hours a day, seven-days a week mental health service at the Melbourne Assessment Prison (MAP). The mental health services at MAP consist of a 16 bed acute Assessment unit, in which initial assessment and treatment is provided to seriously mentally ill male prisoners by a multi-disciplinary team. Combined with this is an outpatient service and a reception assessment service. A mental health assessment is undertaken on every prisoner received into custody at the prison. According to the Annual Report, “The busiest, and arguably most challenging, mental health program in Victoria is provided at MAP. On any one day, approximately one-third of the total population in this maximum security reception prison is there due to mental health issues.”⁴⁴
- Sessional visits by consultant psychiatrists at five regional prisons. Consultant psychiatrists provide twice weekly sessions to women prisoners at DPFC and a session every month or two at Tarrengower.

⁴² *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

⁴³ *Victorian Institute of Forensic Mental Health Annual Report 04/05*, CEO's report, p9

⁴⁴ *Ibid*

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

The Annual Report points out that there has been a greater increase in prison numbers than planned for. This was contributed to by the increase in female prisoners, which has outstripped the services available. According to the Annual Report, “[a] particularly distressing aspect of this escalation has been the increase in female prisoners - an 80% increase since 1998”... For people with a serious mental illness in prison, many remain untreated, and in order to admit them to Thomas Embling Hospital, we are forced to return to prison people whose illness is only partially treated. This situation carries considerable risk for prison management.”⁴⁵

Doctor Doug Bell, Assistant Clinical Director Victorian Institute of Forensic Mental Health has advised the Commission that there are very limited current options for women who need acute care. The main issue, Dr Bell says, is that for women there is no comprehensive inpatient assessment and limited specialist doctors. Mental health services provided for women at DPFC amount to one psychiatric nurse on duty every day 24 hours per day and only about one and a half days per week attendance by a psychiatrist. Women who need acute care are managed rather than treated. They are placed into the special needs unit or if their behaviour is difficult to manage, they are placed into the management or high risk units. Dr Bell believes that this is inappropriate for women who essentially need treatment.^{46 47}

Public Advocate

At the start of 2004, the Public Advocate presented to the Corrections Commissioner a research report entitled “From Corrections to the Community”.⁴⁸ The report makes recommendations on the need for an accurate identification of prisoners with cognitive disability upon reception into the prison system. It also makes recommendations on appropriate rehabilitation and case management methods, and successful reintegration processes when prisoners return to the community.

⁴⁵ Ibid, Clinical Director's Report p13

⁴⁶ Information provided to Commission by Dr Bell in conversation on 1 December 2005

⁴⁷ Issues of adequacy and availability of treatment for women prisoners suffering from mental illness have arisen in three recent cases heard in the Supreme Court of Victoria Court of Appeal. In *R v Rollo* [2006] VSCA 154 the appellant was successful in challenging the length of her sentence, one of the grounds being the fact that the appellant was suffering from a depressive condition but had not received any psychiatric care at DPFC, where she was located. Warren CJ stated that the case highlighted the ‘deficiencies in the provision of adequate mental health services to women prisoners in the corrections system’. Similarly, in *R v SH* [2006] VSCA 83, the appellant’s sentence was reduced due to a finding by the court that there was a lack of adequate medical and psychological care made available to the appellant, who had been sexually assaulted in prison and consequentially suffered from post traumatic stress disorder. In *R v Wooden* [2006] VSCA 97 it was noted that the appellant was suffering from serious mental illness, but had been discharged from Thomas Embling Hospital due to bed shortages.

⁴⁸ The report is available on the Office of the Public Advocate website at <http://www.publicadvocate.vic.gov.au/CA256A76007E8265/OrigDoc/~6FD5EC06663D43ACA256E540076FEE6?OpenDocument>

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

The Public Advocate is on the project board for a disability framework being implemented by CV. More information on this disability framework is given earlier in this report.

In addition, the Equal Opportunity Commission of Victoria, Public Advocate, Police and Department of Human Services are on a working group which is in the process of finalizing guidelines to assist police to identify people with cognitive disability.⁴⁹

OTHER RESEARCH

Not For Service

The Australia-wide report, "Not For Service: Experiences of Injustice and Despair in Mental Health Care In Australia" was launched late 2005. It is based on nationwide research of thousands of Australians in contact with mental health systems. The report comments on the overrepresentation and under-servicing of people with a mental illness in the criminal justice system

Recommendation 4b provides:

"that as a matter of urgency all jurisdictions develop nationally consistent guidelines on the assessment, sentencing and provision of specialised mental health care (according to the NMHS) for mentally ill people in contact with the justice and/or detention systems";

Recommendation 4c provides:

*"that all Australian jurisdictions provide specialised legal services, diversionary and reintegration programs for people with a mental illness in contact with the justice and/or detention systems."*⁵⁰

⁴⁹ The OPA working group commenced in September 04. The guidelines will form part of the Victorian police manual.

⁵⁰ *Not For Service: Experiences of Injustice and Despair in Mental Health Care In Australia*, Mental Health Council of Australia, the Brain and Mind Institute and HREOC, 2005

PART 4. Application of legal principles

THE INVESTIGATION POWER

Individual complaints of discrimination can be lodged with the Commission by the women prisoners themselves or by their representatives. The Submission however argues that discrimination against women prisoners is so broad and so entrenched in the policies and procedures of the prison system that a systemic inquiry is needed. The Submission therefore asks the Commission to initiate an investigation pursuant to section 156 of the *Equal Opportunity Act 1995* (the Act). The relevant part is section 156(2). This section provides that the Commission may, with the consent of the Minister, investigate a matter where, in the course of performing its functions under section 162, the Commission becomes aware of circumstances where a breach of the Act may have occurred. The matters which may be investigated under section 156(2) are limited by section 157(1). This section provides that, "A matter may be investigated under section 156 (1) or (2) only if –

- a) it is of such a serious nature that it warrants the investigation; and
- b) it concerns a possible contravention in relation to a class or group of people; and
- c) the circumstances are such that the lodging of a complaint by one person only would not be appropriate.

This then causes the EOCV to approach the request through following a sequence of decisions, namely:

1. Has the EOCV learnt of these matters in the course of performing its functions under section 162 of the Act?;
2. Does the information provided disclose circumstances where a breach of the Act may have occurred?;
3. Is section 157(1) satisfied?; and
4. Should the Commission exercise its discretion to request the consent of the Minister for an investigation under section 156(2)?

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Each of these questions will be dealt with in turn.

1. Has the EOCV learnt of these matters in the course of performing its functions under section 162 of the Act?

Pursuant to section 162, the Commission must provide education to the community on the elimination of discrimination and may undertake research into any matter arising from, or incidental to, the provisions of this Act. The Commission in fulfilling these functions is active in engaging with a broad range of community groups including VCOSS and FCLC. In the course of its engagement with VCOSS and FCLC, the Commission first learned generally of the allegations of discrimination. This eventually culminated in the Commission's receipt of the Submission.

2. Does the information provided disclose circumstances where a breach of the Act may have occurred?

For the purpose of determining whether to conduct an inquiry, it is necessary only to consider whether unlawful discrimination under the Act *may* have occurred. The Commission has therefore considered whether, on taking the Submission's allegations at face value, breaches of the Act are revealed. The assessment is based largely on the information contained in the submission itself, without a rigorous testing of the facts as would occur where a determination was being made in a tribunal hearing. The assessment is also informed by the Commission's preliminary research into the matters raised. Allegations in the submission would not be taken at face value where the Commission has incontrovertible information which contradicts these allegations. In general, however, the Commission's research appears to support many of the allegations.

It is not proposed to examine each allegation separately. Rather, the allegations will be analysed generally with some specific examples discussed.

It is unlawful to discriminate against someone on the ground of a characteristic included in the Act in certain circumstances. The Submission alleges discrimination on the grounds of sex, carer status, race, disability and religion. These are characteristics included in the Act.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Discrimination is prohibited under the Act in specified areas of life such as in employment, education, accommodation and the provision of goods and services. The allegations concern the services provided to women prisoners by the State of Victoria. The Act prohibits a service provider from discriminating against a person by:

- Refusing to provide them with their services
- In the terms on which the services are provided to them
- By subjecting them to any other detriment in connection with the provision of services to them

The Act gives a broad inclusive definition of services which includes services provided by a government department or public authority. In a previous decision the Equal Opportunity Board found that the provision of facilities within prisons for the care and custody of children by prisoners came within the definition of “services” under the Act.⁵¹ It is likely that the definition would encompass the various aspects of the correctional service provided to the women including the classification system, the management processes, the health services and the educational and occupational programs.

Discrimination may be direct or indirect and sometimes both.

Direct discrimination occurs when someone is treated unfairly compared to someone else in similar circumstances because they happen to belong to a particular group of people or have a particular characteristic. An example of this may be where on-site acute mental health care is available to male but not to female prisoners.

Indirect discrimination occurs when there is a requirement (or rule) that is the same for everyone but has an effect that disadvantages people with a particular characteristic and the requirement is unreasonable having regard to the circumstances. An example of indirect discrimination may be the allegation that disciplinary rules do not take into account the specific needs of people with intellectual disabilities. In such a situation the requirement is that all prisoners must follow prison rules or be penalised. Prisoners with intellectual disabilities may be less able to understand or comply with prison rules than prisoners with full cognitive ability. They are therefore less able to avoid being penalised. Finally it may be argued that the requirement is unreasonable given that prisoners with intellectual disability may be better managed with measures that take into account their specific needs.

A substantial number of the allegations disclose a possible breach of the Act.

⁵¹ *Henderson v Victoria* (1984) EOC 92-027

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Listed below are some examples of the allegations which the Commission believes may disclose, at face value, cases of discrimination (whether direct and/or indirect). These will be focused around discrimination on the grounds of sex, race and/or disability which are the main grounds of discrimination disclosed in the allegations. Similar allegations of discrimination in the areas of race and disability can be found in men's prisons. The VCOSS and FCLC submission asserts that the intersection between sex and other attributes results in greater discrimination.

Sex discrimination

- women have no equivalent to the on-site acute care mental health unit available for men;
- more women than men are held in confinement at a level higher than justified by their security rating;
- women are subjected to a higher rate of prison disciplinary charges for less serious offences compared to men;
- the classification system treats women less favourably by not taking into account that women prisoners generally present less risk than men prisoners, and the needs of women as mothers (this could also amount to discrimination on the ground of carer status);
- women are subject to strip searches more frequently than men because strip searches are conducted before and after visits and women prisoners, due to their stronger family ties, receive more visits.

Race discrimination

- Indigenous women prisoners suffer even higher rates of inappropriate classification than the rest of the female prison population because:
 - they are more likely to be held on remand because they are homeless and not granted bail; and
 - they are likely to be housed at the DPFC where the services for Indigenous women are located.
- Indigenous women are even more traumatised by strip searches than non-Indigenous women because they report an even higher rate of previous experience of sexual assault

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

- CALD prisoners do not have adequate access to information in their own languages in situations such as prison rules, health and education services where it is important that such access is provided.

Disability discrimination

- Women with mental illness and/or intellectual disabilities are inappropriately disciplined for behaviour that may require treatment or that could be better managed with training and awareness of the disability.
- Women with mental illness who need acute care are placed in management or high risk units instead of being provided with the required treatment.
- Women with certain disabilities are predisposed to being accommodated at DPFC and therefore in maximum security, because services which aim to meet their needs are provided at DPFC.
- Women with intellectual disabilities are supervised by male corrections officers in the evening and night shifts, exposing vulnerable women to intolerable risk.

3. Are these breaches capable of being investigated under section 157?

Section 157 requires that the allegations disclose possible discrimination of a serious and systemic nature that cannot be addressed appropriately by the lodging of a complaint by one person.

In the Commission's view, the allegations of discrimination are of a sufficiently serious nature in the terms of the requirements of section 157. Issues fundamentally affecting a person's quality of life include access to mental health services, the infliction of force in the practice of shackling or strip searching, and the services designed to enable women with dependent children to adequately fulfill their mothering role in prison. Further, they involve a group of people, many of whom have a mental illness, and a history of having suffered sexual abuse and other victimisation, and all of whom have been denied their liberty and are relatively powerless to act on the alleged contraventions. Some of the allegations raised in the submission have similarly been raised as areas of concern in information received from agencies such as Ombudsman Victoria and Victorian Institute of Forensic Mental Health.

The section 157 requirement that the discrimination concerns a group of people is also satisfied. The allegations disclose discrimination in the realm of policies, practices and procedures that has resulted in fundamental inequality between groups.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Finally, the third requirement of section 157 is satisfied, in that the Commission in dealing with single complaints would be confined to addressing the specific circumstances related to individual cases of discrimination. The breadth of systemic concerns involved in the allegations call for an approach that would allow a more comprehensive consideration of the underlying practices and procedures that may result in inequality between groups.

4. Should the EOCV exercise its discretion to request permission from the Minister to undertake an investigation?

The Act does not provide considerations to be taken into account in the exercise of the Commission's discretion. The Commission has internal guidelines on the circumstances in which it would conduct systemic inquiries. The guidelines that would be of relevance in this case are:

- i. Whether the matter is one of broad public interest;
- ii. Whether a systemic inquiry would have the potential to lead to durable outcomes; and
- iii. Whether there are alternative and preferable remedies available for addressing the issue.

i Whether the matter is one of broad public interest

In relation to the first guideline, a major determinant is whether the Commission Members are satisfied that it would be in the public interest for the Commission to allocate the often significant amount of resources to an intervention. The Commission members may be satisfied even where there may be some public controversy, or other risk factors associated with proceeding. The Commission holds that this matter is one of broad public interest. As discussed above, the alleged discrimination is of a serious nature affecting a significant number of people.

ii Whether a systemic inquiry would have the potential to lead to durable outcomes; and

In relation to the second guideline, it needs to be considered whether a systemic inquiry would have the potential to lead to durable outcomes or whether the *Better Pathways* strategy obviates the need for a systemic inquiry.

Better Pathways is a major strategy demonstrating a real commitment from CV to reduce women's offending and re-offending, and to provide a more rehabilitative environment in prison. It remains to be seen whether the outcomes of the implementation of this framework will directly address the allegations of discrimination

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

against women prisoners or cover the broad range of matters included in the submission. At this early stage in the implementation of Better Pathways, the strategy sets out general goals and priorities, and expresses the aim to develop policy or standards which address these. Even where the strategies seem quite specific there are important details still to be developed. For example, *Better Pathways* has proposed the establishment of a 20-bed flexible intensive support unit at DPFC to provide accommodation and specialist care, including 24 hour nurse staffing, to women prisoners with mental health care needs and other medical needs. Whilst the number of beds proposed seems to be positive, it is not clear how many of the beds will be available specifically for women with mental illness. Further, there is no detail as to the level of specialist and multi-disciplinary care which will be provided and whether these mental health services will be provided by private bodies or Forensicare.⁵²

Importantly, specific attention has not been given to the allegations that women with mental illness are being “managed” by being placed in management units or Muirhead cells rather than being treated or offered other accommodation of their needs. Given that the construction of the new intensive support unit at DPFC will take up to four years, there is also no interim measure proposed to address the serious shortage of treatment options currently being experienced by women prisoners with mental health care needs.

At this early stage in the development of *Better Pathways* it is impossible to determine whether the strategy will be capable of eliminating discrimination against women in prison as the strategy is in its formative stages. Nevertheless there is major potential for *Better Pathways* and other CV initiatives to include reforms that will address many of the allegations of discrimination.

iii Whether there are alternative and preferable remedies available for addressing the issue.

The third guideline involves a consideration of whether there are alternative and preferable remedies available for addressing the issue.

An investigation under section 156(2) is based on an individual complaint handling process. Pursuant to section 158 of the Act the Commission is to conduct an investigation as if it were an individual complaint. If, after investigation, the Commission is satisfied that there has been a breach of the Act, the Commission must

⁵² Information provided by CV on the development and implementation of Better Pathways since the Commission's decision in February 2006 is available in the appendix.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

try to conciliate the matter. If the Commission determines that the matter is unable to be successfully conciliated, it would be obliged under section 158 of the Act, to refer the matter to the Victorian Civil and Administrative Tribunal for determination. The Commission believes this process may be unnecessarily formal and adversarial at this stage given the current development of the *Better Pathways* strategy. Further, in view of the complexity of the issues, a more solutions-based approach is required. An adversarial process may be less effective in this respect.

An alternative power exists under section 162 of the Act.

162. Commission's educative and research functions

- 1) The Commission must undertake programs for the dissemination of information for the education of the public with respect to –
 - (a) the elimination of discrimination, sexual harassment and vilification on the ground of race or religious belief or activity;
 - (b) the promotion of equality of opportunity;
 - (c) any other matters relevant to the provisions of this Act.
- 2) The Commission may undertake research into any matter arising from, or incidental to, the provisions of this Act.

Under section 162 of the Act, the Commission has broad educative and research functions in relation to the elimination of discrimination.

Because a section 156(2) investigation may be overly formal and adversarial given CV initiatives to improve conditions for women in prison and because the Commission can adopt an alternative and broader role under section 162 of the Act, the Commission has decided not to request the Minister's consent for an investigation under section 156(2).

The Commission has decided to instead adopt a role under section 162 in educating and influencing reforms for women in prison to better recognise their rights to equality under the Act, particularly in light of the major initiatives being developed through the *Better Pathways* strategy. This role will allow the Commission to assist CV in the development of the anti-discrimination and human rights framework against which the policies, programs, practices and infrastructure of the women's prison system will be measured. Under section 162 the Commission would also be able to consult with interested agencies on the development and monitoring of the audit.

In addition, the role will allow the Commission to call on CV to address the discriminatory issues that also affect male prisoners. As referred to above, some

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

of the allegations concerning discrimination on the grounds of race, disability, parent status or religion may also affect male prisoners.

Finally, it is recognised that some of the allegations in the Submission may be better addressed through a human rights framework rather than through the more specific parameters of anti-discrimination law which requires one group to be disadvantaged compared to another group. The Commission's focus must be, according to the parameters of the Act, the principles of anti-discrimination law. It is, however, entirely appropriate and desirable for Corrections Victoria to evoke International Human Rights guidelines on the treatment of prisoners in the scope of the audit. The Commission believes that a broader human rights context is important in order to find a solutions-based approach to the issues and would recognize the Victorian Government's proposal that is expected to go before Parliament this year for the enactment of a Charter of Human Rights and Responsibilities.⁵³ A brief explanation of the application of International Human Rights law is provided below.

INTERNATIONAL HUMAN RIGHTS LAW

Australia has agreed to abide by a number of International instruments which protect a broad range of fundamental human rights. These include the *International Covenant on Civil and Political Rights*, *International Covenant on Economic, Social and Cultural Rights*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, *Convention on the Elimination of All Forms of Discrimination against Women* and *Convention on the Rights of the Child*.

Some of the international instruments contain provisions which apply specifically to prisoners. For example, article 10 of the *International Covenant on Civil and Political Rights* contains a right for all prisoners to be treated with humanity and with respect for the inherent dignity of the human person. Pursuant to these instruments, a broad body of work has been developed that provides guidelines on human rights compliant imprisonment. The most prominent of these is the *United Nations Standard Minimum Rules for the Treatment of Prisoners* which has been used to provide minimum standards for compliance with article 10 of the ICCPR.

It would be useful, to take one example, to examine strip-searching practices against the relevant guidelines on human rights compliant imprisonment standards developed under article 10 rather than only in relation to the discrimination issue of whether someone is disadvantaged more than someone else because they have a particular characteristic covered by the Act. Another example pertains to the rights of the pre-school age child who is housed in the prison with his or her mother. The *Convention*

⁵³ On 25 July 2006 the *Charter on Human Rights and Responsibilities Bill 2006* (Vic) received assent.

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

on the Rights of the Child which Australia has adopted would provide helpful standards to guide policies and procedures in the area of prisoners with children.

Despite Australia's accession to the body of international human rights instruments, Australia's recognition of human rights through legislation is limited. Laws prohibiting discrimination fulfill a few of the commitments to protect the human rights contained in the international instruments to which Australia has acceded. Currently the ACT has legislation which provides limited recognition of civil and political rights and Victoria is planning to pass similar legislation in 2006.⁵⁴

⁵⁴ On 25 July 2006 the *Charter on Human Rights and Responsibilities Bill 2006* (Vic) received assent. This legislation will provide a mechanism from the first of January 2008 for monitoring all Victorian legislation and the policies and programs of government departments and agencies for compliance with civil and political rights.

PART 5. Conclusion and Next Steps

After assessing the allegations of discrimination in the Submission and conducting preliminary research on the issues, the Commission on 6 February 2006 decided not to seek the Attorney-General's consent to conduct a formal investigation into systemic discrimination against women in Victorian prisons. Instead the Commission has decided to call upon Corrections Victoria to perform an audit of the infrastructure, policies and procedures applying to women in prison to ensure compliance with anti-discrimination obligations under the Act, and to consult with the Commission in the framing and monitoring of the audit.

The decision to decline to seek the Attorney-General's consent to conduct a formal investigation into systemic discrimination does not in any way detract from the seriousness of the allegations in the submission. As the report makes clear, the Commission has a preliminary view that a substantial number of the allegations, if accepted at face value, disclose discrimination against women prisoners primarily on the grounds of sex, disability, and/or race in the provision of services by Corrections Victoria. Some of these allegations suggest that discrimination may be of a systemic and serious nature.

The Commission's decline was based on the belief that:

- CV has embarked on a range of initiatives that aim to improve the delivery of correctional services to women, and
- a collaborative approach between CV and the Commission toward the development and implementation of an audit tool would be potentially more effective in tackling any policies, practices or facilities that may systemically discriminate against women prisoners.

The Commission further believes that in order to maximise the opportunity for effective and solution-based results, the audit should also take into account International Human Rights standards applying to prisoners.

It is recommended that this audit be conducted in association with the *Better Pathways* strategy which amongst other initiatives, commits to the development of a policy framework for the delivery of correctional services for women. Such an audit should incorporate anti-discrimination standards into this framework to guide the development and delivery of correctional services for women. The *Better Pathways* strategy promises to develop measures that will address the areas of prisoner classification, prison disciplinary processes, the use of force, health services, strip-searches, education and occupational programs, and the needs of women with children,

EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

Indigenous women, CALD women and women with disabilities. In developing these measures the Commission believes that CV should review all areas for compliance with anti-discrimination law and to introduce measures that will ensure the elimination of discrimination.

The Commission seeks to be involved in the development of an audit tool for CV by providing advice on the anti-discrimination and human rights principles that will form the framework of the audit. It also seeks to monitor the implementation of the audit, and have the capacity to publicly report on progress and developments arising from the audit

The Commission has decided not to seek the Attorney-General's consent for a formal investigation at this stage on the basis that an audit will be undertaken that includes the following characteristics:

- The capacity to identify the measures necessary to eliminate and avoid discrimination in the infrastructure, policies and procedures applying to women in prison;
- Independence;
- Informed by expert advice in relation to the application of anti-discrimination and human rights principles;
- Transparency in terms of its formulation, implementation and findings; and
- Publicly available findings.

The final extent of the Commission's role will of course depend on available resources and whether CV adopts our recommendations.

CV has displayed a strong commitment to recognizing the human rights of women in prison through its implementation of the *Better Pathways* strategy and other initiatives. It is in acknowledgment of this commitment that the Commission seeks a collaborative approach rather than a formal inquiry. The Commission's aim is to assist in building upon and developing Correction's initiatives so that discrimination against women in prison may be avoided.

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EMBARGOED UNTIL TUESDAY 19 DECEMBER 2006

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