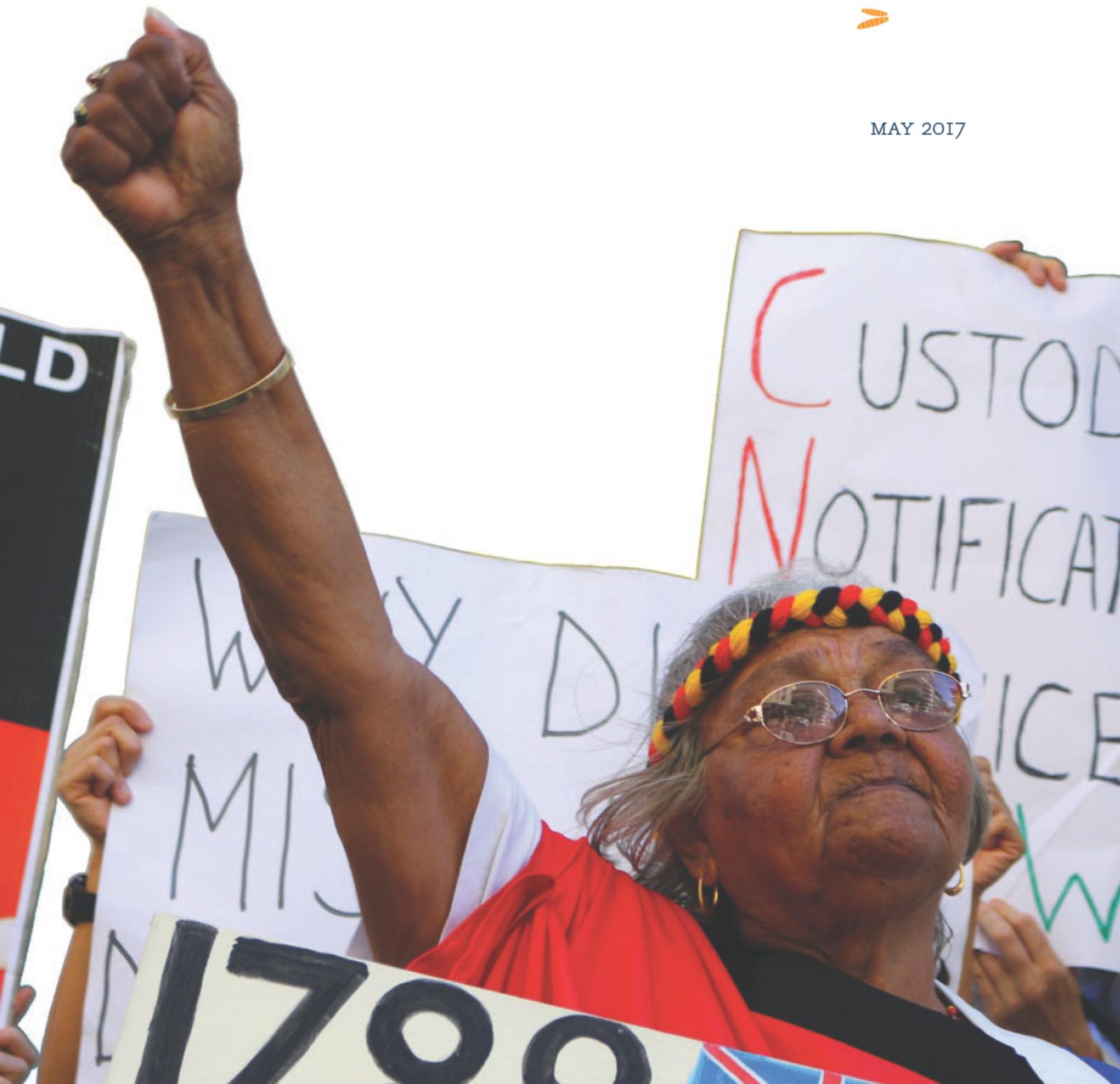


# Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment



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Adrienne Walters



W: [www.hrlc.org.au](http://www.hrlc.org.au)

Shannon Longhurst



W: [www.changetherecord.org.au](http://www.changetherecord.org.au)

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The Change the Record Coalition is a group of leading Aboriginal and Torres Strait Islander, legal, community and human rights organisations working collaboratively to address the disproportionate rates of violence and imprisonment experienced by Aboriginal and Torres Strait Islander people.

The Change the Record Coalition is calling for greater investment in early intervention, prevention and diversion strategies. These are smarter solutions that increase safety, address the root causes of violence against women, cut reoffending and imprisonment rates, and build stronger and safer communities.

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This report reflects a collaboration between the Change the Record Coalition Steering Committee and the Human Rights Law Centre. The Human Rights Law Centre is indebted to the Change the Record Coalition Steering Committee member organisations for their expertise and input into the report.

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Photo of Vickie Roach by Mahala Strohfeldt ©Change the Record Coalition. Cover photo of Nanna Carol Roe taken and provided by Charandev Singh.

Other photographs ©Gary Radler, Gary Radler Photography. The women and children depicted in the images are models; use of the images does not imply that they have had any involvement in the criminal justice system.

## Acknowledgements

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*Aboriginal and Torres Strait Islander people should be aware that this document may contain images or names of people who have since passed away.*

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## Foreword

Vickie Roach

**I spent many years in and out of the courts, children's homes and jails. Now I have a Masters degree and I'm a writer, an activist and an advocate for the de-carceration of my people.**

There were a lot of challenges. Some are like those of many other Aboriginal and Torres Strait Islander women in prisons and police cells. I was Stolen Generation and my mum was too. I was taken when I was two years old. Child welfare and the police held me responsible for things that kids at home with their families never would have been. I never learned 'normal' relationships. I was on my own by the age of 13. I ended up squatting and got addicted to heroin.

When I was young, I felt like I had no power to do anything. All I could do was rebel in my own way and run away. When I was 17, I went to adult prison for self-administering heroin and returned shortly after release for credit fraud. I then found some stability in my life and managed to stay on the 'right' side of the fence for the next 10 years. When I did go back inside, it was after losing my son in a bitter custody dispute with a violent ex-partner, other violent relationships and sexual assault.

I know, like too many Aboriginal and Torres Strait Islander women, what it feels like to be stuck in a violent relationship and to have no trust in police. I know what it is like to have police press charges against you even though you are the victim.

The last time I went to prison it was because I injured someone – accidentally, but seriously. It is a deep source of shame, but it was also a big wake up call. While in prison, I fought to be allowed to study philosophy, sociology, literature and writing, and worked with lawyers and activists, as an equal, to successfully challenge prisoner voting ban laws in the High Court. I've always been an avid reader and had a strong sense of justice.

While education in prison was important for me, what would have been more helpful would have been not being taken from my mother, and not being criminalised at a young age. I needed support, stable housing and healing when I was young, not punishment. Later, I needed stable housing to escape family violence, but I was unsafe and vulnerable.

Governments need to recognise that Aboriginal and Torres Strait Islander women have different needs and strengths to men. This report is important because it focuses on Aboriginal and Torres Strait Islander women, who have been overlooked for too long.

Too many of our women are trapped in an unresponsive criminal justice system. What is needed are approaches that deal with drugs, family violence, housing, loss of self-esteem, disconnection from country and culture and the myriad other cultural complexities faced by Aboriginal and Torres Strait Islander women, which result in ever increasing numbers of our women and young girls being criminalised.

The criminal justice system assigns personal responsibility and punishes Aboriginal and Torres Strait Islander women for actions that are the consequence of failed child removal and forced assimilation policies. If we are truly concerned about justice for Aboriginal and Torres Strait Islander women however, we should be asking ourselves and our governments, how we as a society have so badly failed these women.

We need alternatives that are healing, not punitive. There's nothing to be gained from a punitive approach; it doesn't deter crime. You need to respect women's dignity, but so often the criminal justice system takes that away.

The criminal justice system damages women, children, men, entire communities. Governments need to get rid of laws that are criminalising so many of our women. When women go to jail, kids are often left behind and go into the child protection system. We have no trust in that system.

'Tough on crime' does not work. We need more prevention and diversion. Governments should be looking for ways to close prisons. Governments, courts and police need to work with and learn from Aboriginal and Torres Strait Islander people. We know the solutions – investment in housing, education and health – that's what makes a difference and helps communities stay strong and healthy.

# Executive Summary

**“My granddaughter paid the biggest price. She’s lying in the graveyard and we’re still waiting for justice. She should never have been locked up. If there were proper and fair laws in place, she would be with us today.”**

Nanna Carol Roe, fighting for justice for her granddaughter, Ms Dhu.

The crisis of Aboriginal and Torres Strait Islander women’s over-imprisonment, both in prisons and police cells, is causing immeasurable harm.

The tragic and preventable death of Ms Dhu, a 22 year old Yamatji woman, while in the custody of Western Australian police because of unpaid fines is a devastating example of how the justice system fails Aboriginal and Torres Strait Islander women. Despite repeatedly asking for help, Ms Dhu died of an infection flowing from a fractured rib – an injury sustained as a result of family violence. Being unable to pay fines saw her locked up and treated inhumanely by police officers before dying in their care. At a time when she needed help, the justice system punished her.

Ms Dhu’s case is not an isolated one – the deaths of eleven women in prisons and police cells for minor offending were examined by the Royal Commission into Aboriginal Deaths in Custody. Only nine months ago, another young Aboriginal woman and the mother of four children, died while in police custody in NSW.

Women’s imprisonment rates generally have soared much faster than men’s in recent decades. Today, Aboriginal and Torres Strait Islander women’s over-imprisonment rates are nearly 2.5 times what they were at the time of the landmark 1991 report of the Royal Commission into Aboriginal Deaths in Custody.

Today, Aboriginal and Torres Strait Islander women comprise 34 per cent of women behind bars but only 2 per cent of the adult female Australian population. Even more women are cycling in and out of courts and police cells. This is a crisis, carrying with it profound effects for

Aboriginal and Torres Strait Islander women, their children and their communities.

While the vast majority of Aboriginal and Torres Strait Islander women will never enter the justice system as offenders, the lives of those who do are marked by acute disadvantage. The overwhelming majority of Aboriginal and Torres Strait Islander women in prison are survivors of physical and sexual violence. Many also struggle with housing insecurity, poverty, mental illness, disability and the effects of trauma. These factors intersect with, and compound the impact of, oppressive and discriminatory laws, policies and practices, both past and present. Too often, the impact of the justice system is to punish and entrench disadvantage, rather than promoting healing, support and rehabilitation.

Criminal justice systems across Australia continue to be largely unresponsive to the unique experiences, circumstances and strengths of Aboriginal and Torres Strait Islander women. Successive governments have forfeited opportunities to prioritise preventative and diversionary approaches that are tailored to address the drivers of offending.

Some 80 per cent of Aboriginal and Torres Strait Islander women in prisons are mothers. Many women in the justice system care not only for their own children, but for the children of others and family who are sick and elderly. Prosecuting and imprisoning women is damaging for Aboriginal and Torres Strait Islander children, who are already over-represented in child protection and youth justice systems.

Despite growing evidence that prison harms and that once in prison, women are more likely to return, we see more and more women imprisoned, including growing numbers in prison awaiting trial or sentencing ('on remand'). This is simply unacceptable. When women are taken into custody, even for short periods on remand, the impacts can be life altering, long-term and intergenerational; disconnection from family and community, children taken into child protection, housing and employment lost.

There are ways to respond to women's offending that are more effective and cheaper and that address the causes of offending. All levels of government can and must do better.

The Change the Record Coalition represents an opportunity for governments to work with Aboriginal and Torres Strait Islander people to develop solutions. Change the Record is large coalition of Aboriginal and Torres Strait Islander, human rights and community organisations. Its *Blueprint for Change* outlines a series of recommendations and 12 overarching principles for reducing imprisonment rates and violence against Aboriginal and Torres Strait

Islander women and children. Critically, it emphasises the importance of investing in communities and Aboriginal and Torres Strait Islander community-driven prevention and early-intervention measures. Such approaches will tackle the causes of offending, whilst building safer, stronger and more resilient communities.

This report builds on Change the Record's vital work. The report's emphasis is on the criminal justice system and the importance of responding to the distinct rights, histories and circumstances of Aboriginal and Torres Strait Islander women, which are different in many respects to those of men. In particular, violence against Aboriginal and Torres Strait Islander women, which contributes directly and indirectly to women's offending, must be addressed to reduce the number of Aboriginal and Torres Strait Islander women in the criminal justice system, both as victim/survivors and offenders. Strategies must also be responsive to the vital roles Aboriginal and Torres Strait Islander women play in their communities and families, including as primary carers of children.

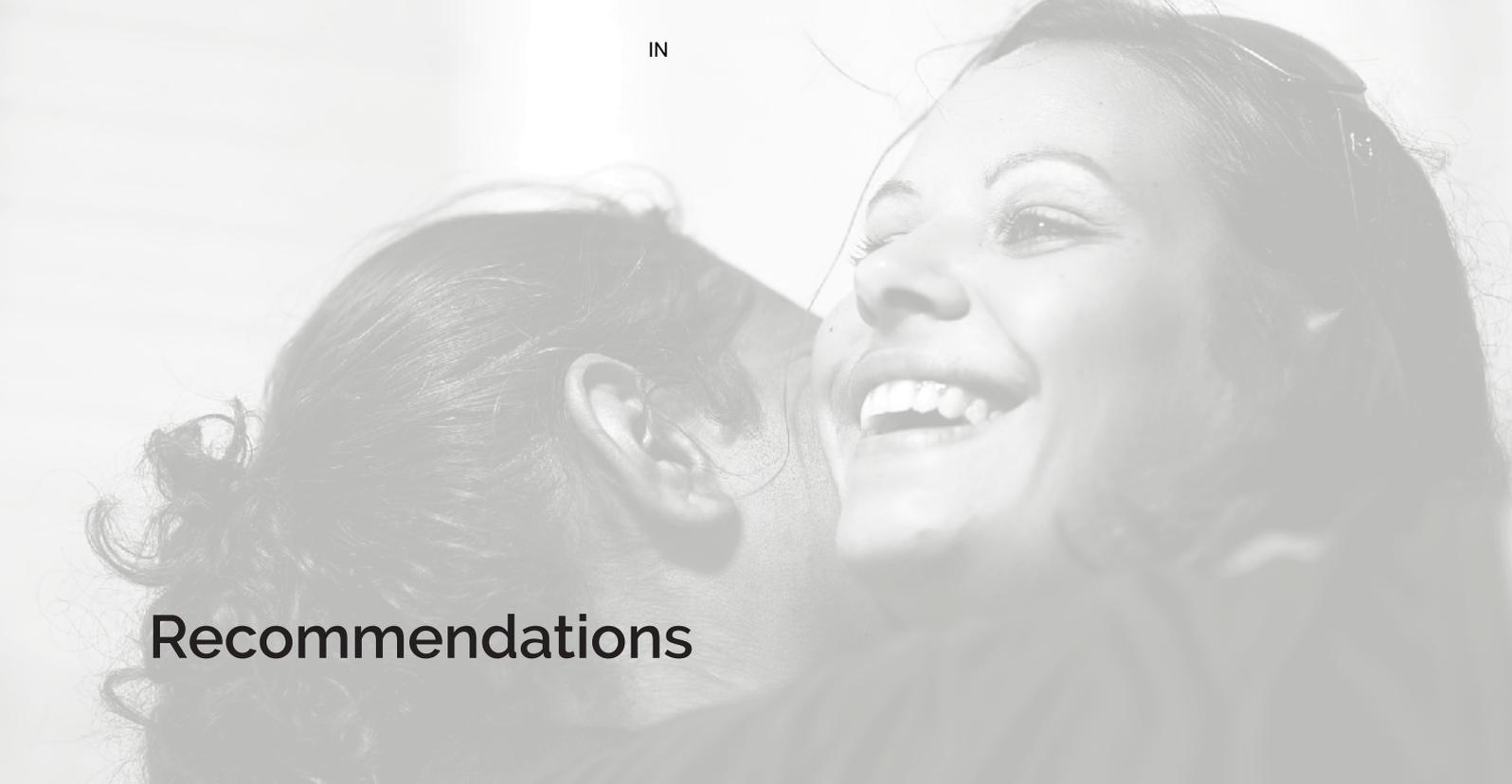
Critically, this report calls for strategies to be designed, implemented and evaluated by, and in partnership with, Aboriginal and Torres Strait Islander women, consistent with principles of community control and self-determination.

Reducing the racialised and gendered impact of state and territory criminal justice systems requires system-wide structural and cultural change. A shift away from 'tough on crime' approaches is urgently needed, including non-punitive responses to low level offending and public drunkenness.

Governments need to shift away from justice systems that perpetuate cycles of disadvantage and instead build systems that focus on empowering Aboriginal and Torres Strait Islander women to turn their lives around.

This requires Aboriginal and Torres Strait Islander Legal Services and Aboriginal Family Violence Prevention Legal Services to be properly and sustainably funded to provide holistic assistance and meet demand. It requires significant changes to policing practices that see Aboriginal and Torres Strait Islander women simultaneously over-policed as offenders and under-policed as victim/survivors. Further, governments need to prioritise initiatives that divert women out of the justice system and that promote connection with family, community and country.

Reducing Aboriginal and Torres Strait Islander women's over-imprisonment also requires key decision-makers, like police and courts, to reckon with the impacts of colonisation and institutionalised discrimination, including the differential impacts on Aboriginal and Torres Strait Islander women and men.



# Recommendations

## Recommendation 1:

All levels of government commit to increased funding and support for Aboriginal and Torres Strait Islander community-led prevention and early intervention efforts to reduce violence against women and offending by women.

## Recommendation 2:

Federal, state and territory governments develop consistent data collection systems that track Aboriginal and Torres Strait Islander women's trajectory through criminal justice systems. Systems should ensure that data is disaggregated, including on the basis of race, sex, gender identity, intersex status, age, disability, socio-economic status and family responsibilities.

## Recommendation 3:

State and territory governments review laws and policies to identify those which unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women, with a view to:

- decriminalising minor offences that are more appropriately dealt with in non-punitive ways
- implementing alternative non-punitive responses to low level offending and public drunkenness
- abolishing laws that lead to the imprisonment of people who cannot pay fines.

## Recommendation 4:

State and territory governments develop and implement long-term community-led Aboriginal and Torres Strait Islander Justice Agreements, which include:

- measures that build on the strengths of Aboriginal and Torres Strait Islander women to address offending and experiences of violence
- a monitoring and evaluation plan involving partnership with Aboriginal and Torres Strait Islander communities and organisations.

## Recommendation 5:

The Council of Australian Governments develop, in partnership with Aboriginal and Torres Strait Islander peak organisations, a fully resourced national plan of action or partnership agreement directed towards addressing Aboriginal and Torres Strait Islander over-imprisonment and violence rates.

## Recommendation 6:

The Council of Australian Governments develop, in partnership with Aboriginal and Torres Strait Islander peak organisations, national justice targets to:

- close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2040
- cut disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040, with priority strategies for women and children.

**Recommendation 7:**

The Federal Government, together with state and territory governments where appropriate, should:

- permanently reverse planned funding cuts to the Aboriginal and Torres Strait Islander Legal Services
- adequately and sustainably fund Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services to:
  - » meet existing demand for services, including culturally-safe and specialist prevention and early intervention programs
  - » address unmet legal need regardless of geographic location
  - » develop models of holistic support and case management for women.

**Recommendation 8:**

State and territory police adopt education, training and recruitment practices that promote:

- Aboriginal and Torres Strait Islander women's employment and participation
- more appropriate police responses to Aboriginal and Torres Strait Islander women both as victim/survivors of violence and offenders.

**Recommendation 9:**

State and territory police ensure that police protocols and guidelines prioritise the protection of, and provision of support to, Aboriginal and Torres Strait Islander women and children subject to violence. Responding to an incident of family violence should never be used as an opportunity to act upon an outstanding warrant against a victim/survivor of violence.

**Recommendation 10:**

State and territory governments, in consultation with Aboriginal and Torres Strait Islander Legal Services, introduce custody notification laws that make it mandatory for the police to notify Aboriginal and Torres Strait Islander Legal Services of any Aboriginal and Torres Strait Islander person taken into custody. Aboriginal and Torres Strait Islander Legal Services must be resourced to respond to notifications with legal and welfare checks. Custody notification systems should be regularly reviewed.

**Recommendation 11:**

State and territory police prioritise developing partnership programs with Aboriginal and Torres Strait Islander communities that aim to build trust and respect between police and young people. Programs should include gender-specific responses for girls and young women.

**Recommendation 12:**

State and territory governments invest in diversion initiatives for Aboriginal and Torres Strait Islander women, including programs with housing for women and children, which are designed and run by or in partnership with Aboriginal and Torres Strait Islander women. Programs should ensure eligibility for women facing multiple charges and who have criminal records.

**Recommendation 13:**

State and territory governments amend criminal procedure laws and policies to require police, lawyers, courts and corrections officers to prioritise diversionary options for Aboriginal and Torres Strait Islander women at all stages of the criminal process.

**Recommendation 14:**

State and territory governments develop Work and Development Order schemes modelled on the NSW scheme, in partnership with Aboriginal and Torres Strait Islander community representatives and organisations. The scheme should be available both as a response to fine default and as an independent sentencing option. Family violence survivors should be eligible for the scheme and breach of a Work and Development Order should not result in further penalty.

**Recommendation 15:**

State and territory governments amend bail and sentencing laws and processes to ensure that:

- historical and systemic factors contributing to Aboriginal and Torres Strait Islander people's over-imprisonment are taken into account in all bail and sentencing decisions involving Aboriginal and Torres Strait Islander people
- informed consideration is given to the impact of imprisonment, including remand, on dependent children.

### Recommendation 16:

Police and courts in each state and territory develop guidance materials and ensure that police and judicial officers are regularly educated by Aboriginal and Torres Strait Islander people about:

- the gendered impacts of colonisation and systemic discrimination and disadvantage
- how these impacts contribute to Aboriginal and Torres Strait Islander people's over-imprisonment.

### Recommendation 17:

State and territory governments work with Aboriginal and Torres Strait Islander representatives and organisations, including representatives of existing Aboriginal and Torres Strait Islander sentencing courts, to determine whether, and how, to adopt processes for *Gladue*-type reports in sentencing.

### Recommendation 18:

State and territory governments work with Aboriginal and Torres Strait Islander communities to monitor and evaluate the accessibility and appropriateness of existing Aboriginal and Torres Strait Islander sentencing processes for women.

## Scope and limitations

This report brings together key themes from consultations with Aboriginal and Torres Strait Islander organisations, academics and other experts, however it does not purport to speak on behalf of Aboriginal and Torres Strait Islander women.

This report consolidates the existing but limited research on Aboriginal and Torres Strait Islander women's over-representation in the criminal justice system. It is not a comprehensive analysis of issues in each state and territory. Instead the report seeks to identify broad themes. It is acknowledged that different challenges are faced by Aboriginal and Torres Strait Islander women in remote, regional and urban areas in different states and territories.

This report addresses Aboriginal and Torres Strait Islander women's experiences of violence as a factor contributing to women's offending. Responding to violence in communities more broadly has been addressed in a number of other reports<sup>1</sup> and is not within the scope of this report.

In addition, whilst a number of recommendations in this report are applicable to girls and young women in the youth justice system, this has not been the focus of the report. The needs of children are different to those of adults

and require a specialist approach. Multiple inquiries have looked at Aboriginal and Torres Strait Islander children's experiences of youth justice and child protection and the inter-relationship between the two and made important recommendations.<sup>2</sup>

Many of the issues raised in this report are relevant to Aboriginal and Torres Strait Islander men's over-imprisonment. This is addressed where relevant but is not the focus of the report.

Due to the scope of this report, conditions and programs in prisons and issues related to parole and post-release support are not addressed. There is however a large body of evidence that points to the need for prison systems to respond to the unique needs of women, including Aboriginal and Torres Strait Islander women.<sup>3</sup> In view of the high number of imprisoned women who have children, there have been calls for conditional releases, child-friendly alternative facilities, parenting support programs, and prison policies that promote contact with family.<sup>4</sup> These matters warrant dedicated attention.

## Terminology

The term, 'Aboriginal and Torres Strait Islander women' is used throughout the report and captures women who identify either, or both, as Aboriginal and/or Torres Strait Islander. Where original sources use the term 'Indigenous', 'Aboriginal' or 'Koori', this is reflected in this report.

The term 'criminal justice system' is used broadly to capture the laws, systems and processes associated with the policing, prosecuting and imprisoning of Aboriginal and Torres Strait Islander women, including in police custody and on remand. Each state and territory has its own criminal justice system.

Terms like 'imprisonment' and 'in custody' are used interchangeable throughout this report. Women in police cells and in correctional facilities on remand and after sentencing are captured by such terms.

1. See, eg, Harry Blagg et al, *Innovative Models in Addressing Violence Against Indigenous Women: State of Knowledge Paper* (Landscapes Issue No 8, ANROWS, August 2015).

2. See, eg, current Royal Commission into the Protection and Detention of Children in the Northern Territory; <<https://childdetentionnt.royalcommission.gov.au/>>.

3. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (Human Rights and Equal Opportunity Commission, 2002) ch 5; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004* (Human Rights and Equal Opportunity Commission, 2005) ch 2.

4. Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing* (Report No 4, March 2015) 266, recommendations 29-30.



# Aboriginal and Torres Strait Islander women are over-imprisoned



Aboriginal and Torres Strait Islander people make up around 27 per cent of the adult prison population but only 2 per cent of the adult Australian population. Numerous reports have examined the chronic and growing over-representation of Aboriginal and Torres Strait Islander people in the criminal justice systems and prisons.<sup>5</sup> Few reports however, have focused specifically on women.<sup>6</sup>

Governments need to urgently turn their attention to stemming the soaring imprisonment rates of Aboriginal and Torres Strait Islander women, which have grown faster than that of both Aboriginal and Torres Strait Islander men and non-Indigenous women since 1991.

As at 30 June 2016, there were 1,062 Aboriginal and Torres Strait Islander women in Australian prisons, making up a staggering 34 per cent of the adult female prison population.<sup>7</sup> At the time of the 1991 landmark Royal Commission into Aboriginal Deaths in Custody there were only 121 Aboriginal and Torres Strait Islander women in prison, representing 17 per cent of the female prison population.<sup>8</sup>

The imprisonment rate of Aboriginal and Torres Strait Islander women has increased 148 per cent since 1991<sup>9</sup> and Aboriginal and Torres Strait Islander women are currently imprisoned at 21 times the rate of non-Indigenous women.<sup>10</sup> From 2000 to 2016, their imprisonment rate increased at over double the rate of Aboriginal and Torres Strait Islander men.<sup>11</sup> Aboriginal and Torres Strait Islander women enter the justice system at an earlier age and are almost twice as likely to return to prison after release compared to non-Indigenous women.<sup>12</sup>

Action must be taken now to prevent the numbers from soaring further.

The statistics vary across different states and territories, but the situation is worst in the NT and WA. In the NT, Aboriginal and Torres Strait Islander women made up 86 per cent of the adult female prison population as at 30 June 2016 and around 31 per cent of the general female population. However, WA has by far the highest Aboriginal and Torres Strait Islander women's imprisonment rate in Australia relative to population size at nearly twice the national average, followed by NSW, SA and the NT.<sup>13</sup>

While this report is not focused on youth justice systems, it is important to note that Aboriginal and Torres Strait Islander girls and young women made up 53 per cent of the female youth detention population in 2015-16 and, on an average day, were nearly 20 times more likely to be in youth detention than their non-Indigenous counterparts.<sup>14</sup> Despite their small numbers relative to boys and young men, it is critical that the rights of young Aboriginal and Torres Strait Islander women and girls are given specific attention to prevent entrenching cycles of disadvantage and imprisonment into the future.

### % OF ABORIGINAL & TORRES STRAIT ISLANDER PEOPLE IN PRISON

% of Australia's adult population that's Aboriginal & Torres Strait Islander:

2%

% of Australia's adult **prison** population that's Aboriginal & Torres Strait Islander:

27%

% of Australia's adult **female** population that's Aboriginal & Torres Strait Islander

2%

% of Australia's adult **female prison** population that's Aboriginal & Torres Strait Islander

34%

At the time of the Royal Commission into Aboriginal Deaths in Custody, Aboriginal & Torres Strait Islander women in prison represented **17%** of the female prison population

Source: Australian Bureau of Statistics, Prisoners in Australia, 2016

## Aboriginal and Torres Strait Islander women's rights are overlooked

The actual number of women in the justice system is small when compared to men. As a result, the rights of women have historically been overlooked. The particular rights of Aboriginal and Torres Strait Islander women, if taken into account at all, are often subsumed within the subset of 'women' or 'Aboriginal and Torres Strait Islander people'. As Julie Stubbs observed in 2011:

While belated attention has begun to be paid to research and programs directed towards the victimisation of Indigenous women — some of which recognise the overlap between victimisation and offending — there has been little attention given to the criminalisation of Indigenous women and their needs and interests within criminal justice.<sup>15</sup>

Aboriginal and Torres Strait Islander women are too often marginalised by a system that 'identifies groups of needs and rights holders such as women and Indigenous people, but fails to provide for the needs of people who dwell at the intersection of these groups'.<sup>16</sup> Even the recommendations of the Royal Commission into Aboriginal Deaths in Custody have been criticised for lacking a gender-specific analysis of the problems that had the most harmful impact on Indigenous women: family violence and police treatment of Indigenous women'.<sup>17</sup>

Three Social Justice Commissioner reports have noted that the interests of Aboriginal and Torres Strait Islander women in the criminal justice system are not served by systems and programs designed for women generally, or for Aboriginal and Torres Strait Islander men.<sup>18</sup> The circumstances, needs and strengths of Aboriginal and Torres Strait Islander women continue to be overlooked today.

## What do we know about Aboriginal and Torres Strait Islander women as offenders in the criminal justice system?

It is difficult to paint an accurate picture of Aboriginal and Torres Strait Islander women as offenders, because data collection across states and territories is limited and inconsistent.

In addition, offending patterns differ based on the differing law and order priorities and cultures in each state and territory. For example, in Western Australia, Aboriginal and Torres Strait Islander women are much more likely to be convicted of driving and vehicle-related offences and public order offences than in New South Wales, where Aboriginal and Torres Strait Islander women are more likely to be convicted of drug-related offending.<sup>19</sup> Driving and vehicle related offences are similarly high in the Northern Territory compared to other jurisdictions.<sup>20</sup> Aboriginal and Torres Strait Islander women in the Northern Territory also face a greater risk of being taken into police custody

without having committed an offence through draconian ‘paperless arrest’ and punitive protective custody laws.<sup>21</sup>

Of the little available data, it is possible to say about Aboriginal and Torres Strait Islander women’s interaction with the justice system as offenders that they are:

- nearly twice as likely as non-Indigenous women to have been imprisoned previously, which in turn means a higher risk of being re-imprisoned<sup>22</sup>
- charged and prosecuted at high rates for minor offending, such as public order offences, driving and vehicle offences and shop-lifting offences, in some jurisdictions<sup>23</sup>
- more likely to be imprisoned for acts intended to cause injury than non-Indigenous women<sup>24</sup>
- more likely to be in prison serving shorter sentences than non-Indigenous women<sup>25</sup>
- being imprisoned on remand in growing numbers<sup>26</sup>
- at greater risk of being unable to pay fines and comply with bail and parole conditions and community sentencing orders.<sup>27</sup>

Aboriginal and Torres Strait Islander women tend to enter the criminal justice system at a younger age than non-Indigenous women and are more likely to have a mental or cognitive disability and to have been subject to sexual and family violence than Aboriginal and Torres Strait Islander men and non-Indigenous women.<sup>28</sup> These characteristics are discussed further below.

In terms of broad offending patterns at a national level, as much as a national picture can be painted, Aboriginal and Torres Strait Islander women are most commonly prosecuted for driving and traffic offences, assault offences, theft offences and offences against justice procedures (breaches of court orders, like bail). By far the most common penalty is a fine, but community orders and imprisonment are also used.<sup>29</sup>

## The over-imprisonment of Aboriginal and Torres Strait Islander women is an urgent human rights issue

For Aboriginal and Torres Strait Islander women, systemic racial discrimination and sex discrimination are everyday realities that intersect and have a compounding impact. They are also inextricably linked with other factors, such as disability, socio-economic status, age, sexual orientation and gender identity, which impact individual women differently.

The criminal justice system has been blind to this reality for too long. Aboriginal and Torres Strait Islander women’s right to equality before the law and to non-discrimination are imperilled by the lack of policies and programs designed with their unique rights at the core.

Limited inquiries have examined Aboriginal and Torres Strait Islander women’s over-imprisonment as a human rights issue. Inquiries by the Anti-Discrimination Commission Queensland and the NT Ombudsman have focused on the conditions of women in prison, rather than the factors that lead them there. The reports expressed concern about systemic sex and racial discrimination against women in prison.<sup>30</sup> A 2013 report by the Victorian Equal Opportunity and Human Rights Commission noted that:

- the failure to address underlying causes of Koori women’s over-imprisonment in Victoria compromises their human rights, and the rights of Koori children and communities who are profoundly impacted when women are imprisoned
- the fact that a lack of diversionary options, including post-release support, contributes to Koori women’s heightened risk of imprisonment ‘offends the right to equality before the law’
- the failure to provide culturally competent services may be a breach of the positive duty to eliminate discrimination in the Victorian *Equal Opportunity Act 2010*.<sup>31</sup>

The growth in imprisonment rates and the multiple forms of discrimination Aboriginal and Torres Strait Islander women face is of international concern. The United Nations Special Rapporteur on the Rights of Indigenous Peoples has observed:

When looked at through a human rights lens, it is clear that many indigenous women and girls have difficulties with the law because of prior violations of their human rights. Issues associated with disregard for collective and individual indigenous rights – such as abuse of women, mental health problems and poverty – have been identified as causal factors in criminal behaviour among indigenous women.<sup>32</sup>

In 2010 the Special Rapporteur conducted a mission to Australia and recommended that the Australian Government ‘take immediate and concrete steps to address the fact that there are a disproportionate number of Aboriginal and Torres Strait Islanders, especially juveniles and women in custody’.<sup>33</sup> Following a visit to Australia in 2017, the Special Rapporteur described the over-imprisonment of Aboriginal and Torres Strait Islander people as ‘simply astounding’ and reiterated the need to address the growing numbers of women in prison, some 70 to 90 per cent of whom are survivors of sexual and family violence.<sup>34</sup>

The Special Rapporteur on Violence Against Women has also raised concern about the rapid rise in Aboriginal and Torres Strait Islander women’s over-imprisonment, including the lack of alternatives to prison, and particularly for women with children, recommending that governments amend laws contributing to over-imprisonment.<sup>35</sup>

## The over-imprisonment of Aboriginal and Torres Strait Islander women harms families and communities

Prison is a stressful and traumatic experience for many Aboriginal and Torres Strait Islander women, most of whom have significant histories of trauma. It disconnects women from children, family, community and country. The unnecessary imprisonment of a growing number of Aboriginal and Torres Strait Islander women contributes to the dislocation and fragmentation of families and communities, when action to strengthen communities is needed.

The impact of imprisonment on women, their families and communities is profound, particularly when viewed in the context of the high number of Aboriginal and Torres Strait Islander men in custody. The sheer number of men and women missing from some families and communities creates devastating gaps in terms of parenting, income, child care, role models and leadership.<sup>36</sup> High imprisonment rates see governments spending more money on managing prison populations rather than schools, services and community-driven programs that aim to prevent contact with the criminal justice system.

## Immediate and generational impacts on children

It is estimated that some 80 per cent of Aboriginal and Torres Strait Islander women in prisons are mothers.<sup>37</sup> Women are often the primary or sole carer of their own children and the children of extended family members, as well as caring for the sick and elderly. When women are taken into custody, even for short periods, the impacts ripple throughout families and communities and can have ‘long-term cumulative effects’.<sup>38</sup> As the Australian Human Rights Commission noted:

Mothers that are prisoners experience difficulties in maintaining their relationship with their children and suffer disruptions to family life, which can lead to their children suffering from emotional and behavioural problems. Indigenous women prisoners, in particular, can suffer from disruptions to their cultural responsibilities and dislocation from their communities.<sup>39</sup>

The growing number of Aboriginal and Torres Strait Islander women entering prisons has concerning implications for the generations to come. Children whose mothers spend time in prison are more likely to have a disrupted education, poor health and unstable housing – factors that heighten the risk of a young person entering child protection or justice systems.<sup>40</sup> Aboriginal and Torres Strait Islander children are already grossly over-represented in child protection systems across Australia. Once in the child protection system, the risks of entering the criminal justice system increase considerably. For example, recent data published by the Australian Institute of Health and Welfare indicates that young people on child protection orders are 27 times more likely to be under a youth justice supervision order in the same year.<sup>41</sup>

If we are to prevent more and more Aboriginal and Torres Strait Islander women ending up in prison and the havoc this wreaks on the lives of their children and communities, urgent action must be taken now.

5. Notably, a review into the incarceration of Aboriginal and Torres Strait Islander peoples is being undertaken by the Australian Law Reform Commission during 2017.
6. Notable exceptions include: Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Unfinished Business: Koori Women and the Justice System* (2013); Debbie Kilroy, *The Over-Representation of Aboriginal and Torres Strait Islander Women in Prison* (Sisters Inside, 2013).
7. Australian Bureau of Statistics (ABS), *Prisoners in Australia, 2016* (8 December 2016) (data tables).
8. John Walker, *Australian Prisoners 1991* (Australian Institute of Criminology, 1992) 22.
9. From 187.6 per 100,000 people to 464.8 per 100,000 as at 30 June 2016. See Walker, *ibid*, 22-23; ABS, above n 7.
10. The rate for Aboriginal and Torres Strait Islander women was 464.8 per 100,000 people, while for non-Indigenous women it was 21.9 per 100,000 as at 30 June 2016: ABS, above n 7.
11. Australian Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (2016) figure 4.13.1 (119 per cent increase).
12. ABS, above n 7.
13. *Ibid*; ABS, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* (August 2011); ABS, *Corrective Services Australia, Australia, December Quarter 2016* (16 March 2017).
14. Australian Institute of Health and Welfare, *Youth Justice in Australia 2015-16* (Bulletin 139, 2017) (data tables).
15. Julie Stubbs, 'Indigenous Women in Australian Criminal Justice: Over-represented but Rarely Acknowledged' (2011) 15 *Australian Indigenous Law Review* 47, 48.
16. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, above n 3, 168.
17. Elena Marchetti, 'Indigenous Women and the RCIADIC – Part 1' (2007) 7(1) *Indigenous Law Bulletin* 6. See also Megan Davis, 'A Reflection on the Royal Commission into Aboriginal Deaths in Custody and its Consideration of Aboriginal Women's Issues' (2011) 15(1) *Australian Indigenous Law Review* 25.
18. Aboriginal and Torres Strait Islander Social Justice Commissioner: *Social Justice Report 2004*, above n 3, 22; *Social Justice Report 2002*, above n 3, 135; *Social Justice Report 2001* (Human Rights and Equal Opportunity Commission, 2001) 15. The 2002 and 2004 reports focussed on pre-and post-prison release support.
19. Peta MacGillivray and Eileen Baldry, 'Australian Indigenous Women's Offending Patterns' (Brief 19, Indigenous Justice Clearinghouse, 2015) 4.
20. *Ibid*.
21. Aboriginal women in the NT make up around 74 per cent and 89 per cent of women detained under paperless arrest and protective custody laws respectively: written correspondence, Northern Territory Police, Fire & Emergency Services, written correspondence (21 April 2017).
22. ABS, above n 7. When factors such as offence type and criminal history are controlled, it appears that in some courts Aboriginal and Torres Strait Islander women are imprisoned at the same or lower rate as non-Indigenous women. See further at pages 43-44.
23. Lorana Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series No 107, Australian Institute of Criminology, 2010).
24. Lorana Bartels, 'Sentencing of Indigenous Women' (Brief 14, Indigenous Justice Clearinghouse, 2012) 3. This has been linked to the higher rates of violence against Aboriginal women. See pages 17-18.
25. *Ibid* 3; Bartels, above n 23.
26. National figures could not be obtained. For state and territory figures, see, eg, Department for Correctional Services, *Annual Reports* (2016) Government of South Australia <<http://www.corrections.sa.gov.au/>>; Department of Correctional Services, *Annual Statistics* (2015) Northern Territory Government <<http://www.territorystories.nt.gov.au/>>; Department of Justice, *Statistical Reports* (2016) NSW Government <<http://www.correctiveservices.justice.nsw.gov.au/>>.
27. Factors of disadvantage that create barriers to complying with orders are discussed at pages 16-18.
28. Eileen Baldry and Chris Cunneen, 'Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy' (2014) 47(2) *Australian & New Zealand Journal of Criminology* 276, 280. See further pages 16-18.
29. MacGillivray and Baldry, above n 19. The issue of fines leading to imprisonment is discussed at pages 38-39.
30. Anti-Discrimination Commission Queensland, *Women in Prison* (2006) 45; Ombudsman for the Northern Territory, *Women in Prison — Northern Territory: Report of the Investigation into Complaints from Women Prisoners at the Darwin Correctional Centre* (2008) 96.
31. VEOHRC, above n 6, 81. See also the work of Sisters Inside, an organisation dedicated to advocating for the human rights of women in the criminal justice system, <<http://www.sistersinside.com.au/>>.
32. Victoria Tauli Corpuz, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli Corpuz*. UN DOC A/HRC/30/41 (6 August 2015) [40]-[41]; more generally, see United Nations Division for the Advancement of Women, *Gender and Racial Discrimination: Report of the Expert Group Meeting, 21-24 November 2000* (2000).
33. James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya: Addendum — Situation of Indigenous Peoples in Australia*, UN Doc A/HRC/15/37/Add.4 (1 June 2010) [102].
34. Victoria Tauli-Corpuz, *End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz on Her Visit to Australia* (3 April 2017). For sources of data and discussion about violence and women's offending see pages 17-18.
35. Concerns with access to health care, prison conditions and post-release support were also raised: Dubravka Šimonović, *End of Mission Statement by Dubravka Šimonović, United Nations Special Rapporteur on Violence Against Women, Its Causes and Consequences, on Her Visit to Australia from 13 to 27 February 2017* (27 February 2017).
36. Hannah Payer, Andrew Taylor and Tony Barnes, 'Who's Missing? Demographic Impacts from the Incarceration of Indigenous People in the Northern Territory, Australia' (Crime, Justice and Social Democracy: Proceedings of the 3rd International Conference, 2015, vol 1).
37. Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 *Contemporary Nurse: A Journal for the Australian Nursing Profession* 83, 85.
38. UN Division for the Advancement of Women, above n 32.
39. Australian Human Rights Commission, *Human Rights and Prisoners* (2009).
40. Sherwood and Kendall, above n 37, 85.
41. Australian Institute of Health and Welfare, 'Young People in Child Protection and Under Youth Justice Supervision 2013-14' (Data Linkage Series No 21, 2016) vi.





# Responding to the complex web of factors driving over-imprisonment



The overwhelming majority of Aboriginal and Torres Strait Islander women in Australia will not be imprisoned. However, Aboriginal and Torres Strait Islander women are alarmingly over-represented in prisons and police cells, and there is a clear link between entrenched social, economic and cultural disadvantage and interaction with the criminal justice system. The over-representation of Aboriginal and Torres Strait Islander women in criminal justice systems across Australia is ‘a reflection of the multiple layered patterns of disadvantage and extreme forms of marginalisation experienced by Aboriginal people.’<sup>42</sup>

While the experience and circumstances of women vary considerably, studies suggest that Aboriginal and Torres Strait Islander women in prison are more likely than non-Indigenous women in prison to:

- be survivors of family violence and/or sexual violence (and are less likely to disclose this)
- be the primary carer for children, including non-biological children
- have mental, cognitive or physical disabilities
- to have misused alcohol or drugs
- be younger when entering prison
- have completed less schooling
- be homeless, living in public housing or insecure housing
- be unemployed
- have had previous interaction with the justice system.<sup>43</sup>

These realities drive the over-representation of Aboriginal and Torres Strait Islander women in Australian criminal justice systems. They stem from the oppression, violence, trauma and discrimination associated with colonisation, transmitted through generations. In effectively punishing Aboriginal and Torres Strait Islander women for extreme disadvantage, the criminal justice system perpetuates and institutionalises discrimination and inequality.

## Understanding the impact of colonisation and intergenerational trauma on women

The colonisation process inflicted on Aboriginal and Torres Strait Islander people in the two centuries since British arrival has corresponded with brutality, massacres, land dispossession, forced relocation into missions, forced labour, removal of children, and other discriminatory policies of control, cultural destruction and assimilation.<sup>44</sup>

These histories, and their catastrophic impact, pervade the lives of Aboriginal and Torres Strait Islander people today and contribute to distrust in institutions like the courts and the police.

Bearing witness to the past traumatic experiences of family and community is a form of trauma and can have persistent impacts on people’s lives, particularly where compounded by more direct forms of trauma, like exposure to violence.<sup>45</sup> Unresolved intergenerational and direct trauma significantly contributes to the enormous

challenges facing Aboriginal and Torres Strait Islander families and communities today.<sup>46</sup>

Critically, the systems and institutions of colonisation are gendered ones, reinforcing the dominance of white men. This means that the institutions and systems of criminal justice in Australia have had, and continue to have, different impacts on Aboriginal and Torres Strait Islander women and men.<sup>47</sup> This is evident in the ongoing racial and gendered structural inequalities in the criminal justice system, which have seen ‘tough on crime’ approaches by governments correspond with Aboriginal and Torres Strait Islander women’s imprisonment rates growing faster than any other group since the 1991 Royal Commission into Aboriginal Deaths in Custody.

Ongoing discrimination, disempowerment and inter-generational trauma contribute to, and compound the profound social and economic marginalisation of many Aboriginal and Torres Strait Islander women. While these factors underlie offending, it is also important to recognise and build on the strength and resilience of Aboriginal and Torres Strait Islander women, and their communities, in responding to the crisis of over-imprisonment.

## Responding to the circumstances of Aboriginal and Torres Strait Islander women

The Royal Commission into Aboriginal Deaths in Custody emphasised the need to confront the systemic economic, social and cultural disadvantage of Aboriginal and Torres Strait Islander people to reduce over-imprisonment.<sup>48</sup>

This need has not changed, and has only grown more urgent.

Some of the factors underlying Aboriginal and Torres Strait Islander women’s over-imprisonment, outlined on page 16, correlate with those driving men’s over-imprisonment. However, as the National Family Violence Prevention and Legal Services Forum has noted:

It is clear that the intersectional and intergenerational experiences of Aboriginal women are underlying factors behind the causes of Aboriginal women’s incarceration. These causes are very often different to the causes of imprisonment of Aboriginal men.<sup>49</sup>

Family and sexual violence, mental illness and disability, substance misuse, housing insecurity and poverty are particularly relevant causal factors.

## Family and sexual violence

High numbers of women in prison are survivors of family violence and/or sexual violence.<sup>50</sup> Even greater numbers of Aboriginal and Torres Strait Islander women are survivors of violence, with a recent study of Aboriginal women in prison in WA indicating that up to 90 per cent had been subject to violence.<sup>51</sup> A study in 2003 of Aboriginal women in prison in NSW found that a staggering 70 per cent were survivors of childhood sexual abuse and 44 per cent had been subject to sexual violence as adults.<sup>52</sup>

The number of Aboriginal and Torres Strait Islander women in prison who have experienced physical and/or sexual violence is likely to be higher than reported – it has been estimated that around 90 per cent of violence against Aboriginal and Torres Strait Islander women is not reported to police.<sup>53</sup>

Histories of violence contribute to women’s offending in direct and indirect ways. In NSW, it was reported by the Aboriginal Justice Advisory Council in 2001 that at least 80 per cent of Aboriginal women surveyed linked previous experiences of abuse indirectly to their offending.<sup>54</sup> The experience and effects of sexual violence have been described as ‘central features of women’s pathways into offending, their experiences of custody, and their capacity to engage in rehabilitation programs’.<sup>55</sup> Together with the impacts of intergenerational trauma, this indicates a clear need for trauma-informed justice system responses, which are culturally-safe and led by, or in partnership with, Aboriginal and Torres Strait Islander community controlled organisations with expertise in supporting victim/survivors of family violence.

While prison may be a respite for a small number of women, prisons are not sites of safety and support and are ill-equipped to help women build lives free from violence. Many of the systems of prisons replicate the dynamics of power and control in violent relationships and can re-traumatise women.<sup>56</sup> Routine strip searching is one such practice. In a recent report by the Human Rights Law Centre, Vickie Roach compared strip searches to family violence in the following way:

Well how many domestic violence relationships does the man actually strip you before he starts smashing you around? It’s happened to me. Because it makes you more vulnerable, it makes you more exposed, it makes their control over you ultimate. And the state uses it in a similar way.<sup>57</sup>

Family violence contributes significantly to women’s experiences of homelessness, poverty, poor physical and mental health and substance misuse. It can also be a catalyst for further trauma through the removal of children.

These are factors that cause women to offend.<sup>58</sup> A report by Sisters Inside in 2010 noted ‘many Indigenous women and girls are not only stuck in cycles of abuse as victims, but also get stuck in cycles of offending in an effort to cope with their difficult life situations.’<sup>59</sup>

Responding effectively to violence against Aboriginal and Torres Strait Islander women will address one of the key underlying drivers of women’s offending, which should in turn lead to less women in the justice system, both as victim/survivors and offenders.

### Housing and care responsibilities

Secure and stable housing is critical to breaking the cycle of Aboriginal and Torres Strait Islander women’s over-imprisonment. Without safe and secure housing, women are more likely to offend or breach the conditions of bail, community sentencing orders and parole. Homelessness and financial insecurity see women and their children lead insecure lives and forces some women to remain dependent on violent partners or family members. Aboriginal and Torres Strait Islander women access crisis accommodation at 15 times the rate of non-Indigenous women.<sup>60</sup>

Entering prison can mean losing secure housing and having children taken into the child protection system. Upon release, Aboriginal and Torres Strait Islander women are the least likely of all groups of prisoners to find appropriate housing and support services, particularly when they have dependent children.<sup>61</sup> For example, a study in NSW and Victoria found that 68 per cent of Aboriginal and Torres Strait Islander women surveyed between 2001 and 2003 returned to prison within 9 months of release. None lived in stable family housing post-release and half of those still out of prison were homeless at 9 months post-release.<sup>62</sup>

Challenges in securing stable and appropriate housing can be a barrier to reunification with children and may mean children remain in the child protection system. As noted above, children in the child protection system are then themselves more likely to enter the justice system as youths or adults, increasing the risks of long term cycles of disadvantage and imprisonment.<sup>63</sup>

### Mental illness, disability and substance misuse

Aboriginal and Torres Strait Islander women with a disability who are involved in the criminal justice system are much more likely to have been caught up in the child protection system, to experience homelessness and to be victim/survivors of violence relative both to Aboriginal and Torres Strait Islander men and to non-Indigenous women.<sup>64</sup>

Research in NSW and the NT suggests that the police and court system end up ‘managing’ Aboriginal and Torres Strait Islander people with a mental and/or cognitive disability in the absence of ‘coherent frameworks for holistic disability, education and human services support’<sup>65</sup> and are woefully ill-equipped to do so.

Strikingly, Aboriginal and Torres Strait Islander women are more than twice as likely as men to experience psychological disability.<sup>66</sup> A study in WA revealed significantly higher rates of hospital admission for psychiatric issues for Aboriginal women.<sup>67</sup> A Victorian study found that 92 per cent of Koori women in prison had received a lifetime diagnosis of mental illness and nearly half met the criteria for post-traumatic stress disorder.<sup>68</sup> This is perhaps unsurprising given that trauma is a ‘prominent experience among Aboriginal women in custody.’<sup>69</sup> Mental illness is often linked with, or complicated by, a substance misuse disorder.<sup>70</sup>

The early identification and diagnosis of mental and cognitive disability, including foetal alcohol spectrum disorder, is a challenge across criminal justice systems generally. The over-representation of Aboriginal and Torres Strait Islander women in the criminal justice system, and higher rates of disability suggests that a substantial number of Aboriginal and Torres Strait Islander women are entering the criminal justice system with an undetected disability.<sup>71</sup>

42. Harry Blagg et al, 'Systemic Racism as a Factor in the Over-Representation of Aboriginal People in the Victorian Criminal Justice System' (Equal Opportunity Commission, Victoria, 2005) 8.
43. See generally Wendy Loxley and Kerryn Adams, 'Women, Drug Use and Crime: Findings from the Drug Use Monitoring in Australia Program' (Research and Public Policy Series No 99, Australian Institute of Criminology, 2009) 24; Lorana Bartels, 'Painting a Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1; Rowena Lawrie, "'Speak Out Speak Strong" — Researching the Needs of Aboriginal Women in Custody — Digest' (2003) 8(2) *Australian Indigenous Law Reporter* 85, 1-5.
44. It should be noted that for some Aboriginal communities, particularly those in the Northern Territory and Western Australia, the forces of colonisation were not felt acutely until the early twentieth century and first contact with Anglo-Australian law and culture is still within the living memory of some people.
45. Healing Foundation, *Growing Our Children Up Strong and Deadly: Healing for Children and Young People* (undated) <<http://www.health.act.gov.au>>
46. See discussion in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008* (Australian Human Rights Commission, 2009) 155-6.
47. Baldry and Cunneen, above n 28; Expert Mechanism on the Rights of Indigenous Peoples, *Access to Justice in the Promotion and Protection of the Rights of Indigenous Peoples: Restorative Justice, Indigenous Justice Systems and Access to Justice for Indigenous Women, Children and Youth, and Persons with Disabilities*, UN Doc A/HRC/27/65 (7 August 2014) [46].
48. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4.
49. National Family Violence Prevention Legal Services, Submission to Australian Law Reform Commission, *Inquiry into the Incarceration of Indigenous Australians: Comments on the Draft Terms of Reference* (13 January 2017) 1.
50. Mary Stathopoulos et al, *Addressing Women's Victimisation Histories in Custodial Settings* (ACSSA Issues No 13, Australian Institute of Family Studies, 2012); K Moloney et al, 'Women in Prison: The Central Issue of Gender Characteristics and Trauma History' (2009) 123 *Public Health* 426; Holly Johnson, 'Drugs and Crime: A Study of Incarcerated Female Offenders' (Research and Public Policy Series No 63, Australian Institute of Criminology, 2004).
51. Mandy Wilson et al, 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia' (Jan-March, 2017) *SAGE Open* 1, 6.
52. Lawrie, above n 43, 1-5. This reflects the higher rates of sexual and physical violence against Aboriginal and Torres Strait Islander women, who are 34 times more likely to be hospitalised for family violence related injuries than non-Aboriginal women: Australian Institute of Health and Welfare, *Australia's Welfare 2015* (Australia's Welfare Series No 12, 2015) 340.
53. Matthew Willis, 'Non-Disclosure of Violence in Australian Indigenous Communities' (Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, 2011) 1.
54. Aboriginal Justice Advisory Council, *Holistic Community Justice: A Proposed Response to Aboriginal Family Violence* (NSW Attorney-General's Department, 2001) 6, as cited in Bartels, above n 23. See also Lorana Bartels, 'Violent Offending By and Against Indigenous Women' (2012) 8(1) *Indigenous Law Bulletin* 19.
55. Mary Stathopoulos and Antonia Quadara, *Women as Offenders, Women as Victims: The Role of Corrections in Supporting Women with Histories of Sexual Abuse* (Corrective Services NSW, 2014) 4
56. Stathopoulos, above n 50.
57. Human Rights Law Centre, *Total Control: Ending the Routine Strip Searching of Women in Victoria's Prisons* (2017) 14.
58. National Family Violence Prevention Legal Services, above n 49, 2.
59. Kilroy, above n 6, 3.
60. Bartels, above n 23, 28.
61. Eileen Baldry, 'Home Safely: Aboriginal Women Post-Prison and their Children' (2009) 7(15) *Indigenous Law Bulletin* 14.
62. Eileen Baldry et al, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39(1) *Australian and New Zealand Journal of Criminology* 20, 25-6.
63. Australian Institute of Health and Welfare, above n 14; Commission for Children and Young People, *Always Was, Always Will Be Koori Children: Systemic Inquiry into Services Provided to Aboriginal Children and Young People in Out-of-Home Care in Victoria* (State of Victoria, 2016) 96-7.
64. Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (UNSW, 2015) 10.
65. Ibid 148.
66. Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal Peoples* (October 2010).
67. Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Overcoming Indigenous Disadvantage: Key Indicators 2014* (2014) cited in Bartels, above n 23, 12.
68. James Ogloff et al, *Koori Prisoner Mental Health and Cognitive Function Study* (Victorian Department of Justice, February 2013) 13.
69. Ibid, 35; see also Bartels, above n 23, 11.
70. Ibid.
71. Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* (2015).

# Community-based prevention and early intervention measures, not prisons



The Change the Record Coalition's *Blueprint for Change*, supported by a large coalition of Aboriginal and Torres Strait Islander, human rights and community organisations, calls for governments to

invest in holistic prevention and early-intervention strategies and to design and implement these in genuine partnership with Aboriginal and Torres Strait Islander people.<sup>72</sup> Such approaches tackle the root causes of offending and violence against women and children, rather than simply responding to the consequences of these scourges.

The *Blueprint's* recommendations call for governments to invest in communities, not prisons, and to focus on safety and strengthening communities. Redirecting funding from prisons to community-based prevention and early-intervention measures is commonly referred to as 'justice reinvestment' and is being trialled most prominently in Bourke, New South Wales and Ceduna, South Australia. It is based on evidence that demonstrates that strong and healthy families and communities are most effective in preventing crime and promoting safety. Experience from overseas shows that justice reinvestment initiatives can reduce crime and imprisonment rates, cut government spending on prisons and strengthen communities.<sup>73</sup>

While prevention and early-intervention strategies outside of the criminal justice system are not the focus of this report, they are critical to reducing Aboriginal and Torres Strait Islander women's over-imprisonment. The UN Committee on the Elimination of Racial Discrimination and a number of Australian parliamentary inquiries, including an inquiry into the death in custody of Aboriginal man, Mr

Ward, in Western Australia, have recommended justice reinvestment approaches.<sup>74</sup>

Justice reinvestment strategies respond to community needs and strengths, including family support, violence prevention, housing and health needs that are so often linked to Aboriginal and Torres Strait Islander women's offending. Such strategies must ensure that Aboriginal and Torres Strait Islander women play a central role in the design, implementation and evaluation of prevention and early-intervention strategies, consistent with principles of self-determination. The particular rights, responsibilities and strengths of women are best understood by women and are key to effective strategies. This is demonstrated for example, by the leading role of women and the Marninwarntikura Women's Resource Centre in strategies that saw a reduction in violence and alcohol abuse in the Fitzroy Valley, Western Australia.<sup>75</sup>

## Recommendation 1:

All levels of government commit to increased funding and support for Aboriginal and Torres Strait Islander community-led prevention and early intervention efforts to reduce violence against women and offending by women.

## Better data collection to identify effective responses

To design effective prevention, early intervention and diversion measures, we must know more about Aboriginal and Torres Strait Islander women who come into contact with the criminal justice system.

A dearth of reliable data was noted in the Social Justice Commissioner's reports in 2002 and 2004. The 2002 report stated that Aboriginal and Torres Strait Islander women 'remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs.'<sup>76</sup>

While there have been improvements in the collection of data, both by the Australian Bureau of Statistics (ABS) and by state and territory corrections departments, too often Aboriginal and Torres Strait Islander women are either grouped with non-Indigenous women or with Aboriginal and Torres Strait Islander men in the analysis of data. For example, while the ABS had data about the percentage of Aboriginal and Torres Strait Islander *people* in prison on remand and the number of women in prison on remand, the percentage of Aboriginal and Torres Strait Islander *women* on remand was not identified.<sup>77</sup> Even less is known about the experiences of younger Aboriginal and Torres Strait Islander women compared to older women, or women with mental or cognitive disabilities. Data tracking what happens to women as they go through the justice system is also lacking.

In addition, there is a lack of consistency between jurisdictions in the types of data collected, which prevents accurate comparisons.<sup>78</sup> A 2015 review of state and territory data that sought to address, in part, the data gap noted:

Despite assistance from each Australian jurisdiction, the data on Indigenous women arrested, charged and processed via courts...were not readily available and were not readily comparable across jurisdictions or between Indigenous and non-Aboriginal women. Indigenous women are routinely not differentiated from Indigenous men or from non-Aboriginal women in many data sets. Given that Indigenous women are the fastest growing group in Australian prisons and are 16-17 times more likely than their non-Indigenous counterparts to be incarcerated, it is imperative that accurate, detailed and readily accessible data are available.<sup>79</sup>

The collection and reporting of disaggregated data about the reasons Aboriginal and Torres Strait Islander women enter the criminal justice system, and their experiences of the system, is essential for the development of evidence-based solutions.<sup>80</sup> The Federal Government has an important role to play with state and territory governments in coordinating consistent and reliable data collection.

## Recommendation 2:

Federal, state and territory governments develop consistent data collection systems that track Aboriginal and Torres Strait Islander women's trajectory through criminal justice systems. Systems should ensure that data is disaggregated, including on the basis of race, sex, gender identity, intersex status, age, disability, socio-economic status and family responsibilities.

72. The Change the Record Coalition Steering Committee, *Blueprint for Change* (2015).
73. See, eg, Justice Center, Council of State Governments, *Justice Reinvestment in Kansas* (2007) 2; Nancy LaVigne et al, *Justice Reinvestment Initiative State Assessment Report* (Urban Institute, 2014) 3-4.
74. Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) [20]; Standing Committee on Environment and Public Affairs, Legislative Council of Western Australia, *Inquiry into the Transportation of Detained Persons: The Implementation of the Coroner's Recommendations in Relation to the Death of Mr Ward and Related Matters* (2011); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013).
75. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (Australian Human Rights Commission, 2011) ch 3; Harry Blagg et al, above n 1.
76. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* above n 3, 135; see also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004*, above n 3, 15.
77. See Australian Bureau of Statistics, *Corrective Services* (16 March 2017); Australian Bureau of Statistics, above n 7. The ACT, SA and NT published disaggregated data about women on remand.
78. MacGillivray and Bartels, above n 19, 2. Most states and territories publish prisoner data, however such data must be interpreted with caution, particularly prison census data: see Lorana Bartels, 'Painting a Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1, 2.
79. See MacGillivray and Baldry, above n 19, 11 (citations omitted). Recent data indicates that Aboriginal and Torres Strait Islander women are now imprisoned at 21 times the rate of non-Indigenous women, above n 7.
80. *Ibid.*



# Challenging racialised and gendered justice system outcomes



Outcomes in Australia's criminal justice system are distinctly racialised and gendered.

Many 'tough' laws, policies and practices that appear racially and socio-economically neutral on their face, operate to the detriment of Aboriginal and Torres Strait Islander people, particularly women. For example, the draconian *Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA)* provides for a series of enforcement mechanisms for unpaid court fines, the culmination of which is imprisonment without any judicial oversight.<sup>81</sup> Those who are poorer are at greater risk of being locked up. Aboriginal and Torres Strait Islander women are more likely to be living in poverty, and thus have been found to be more likely to be locked up for unpaid fines.<sup>82</sup>

There is a long history of over-policing of Aboriginal and Torres Strait Islander communities, including high numbers of Aboriginal and Torres Strait Islander women being picked up for very low level offending, like the use of offensive language. At the same time, there is a history of police responding poorly to Aboriginal and Torres Strait Islander women who experience violence.<sup>83</sup> Many Aboriginal and Torres Strait Islander women understandably hold a deep distrust of the police.

Across state and territory criminal justice systems, inadequate assessment of Aboriginal and Torres Strait Islander women's interests, together with a shortage of tailored programs and accommodation options, means the denial of opportunities for successful diversion, rehabilitation and the rebuilding of lives. In addition, the failure of judges and magistrates to meaningfully engage with the impacts of

Aboriginal and Torres Strait Islander women's experiences of colonisation and acute disadvantage can contribute to a lack of equality in bail and sentencing decisions.

Each of these broad themes is discussed in turn in the following sections.

## The need for system-wide change, in reality and rhetoric

Redressing racialised and gendered outcomes in the criminal justice system requires system-wide practical and cultural change, including a shift away from 'tough on crime' laws and approaches to policy making. Such approaches counteract benefits that might be gained through evidence-based community-focused responses.

### Tough on crime approaches undermine positive change

'Tough on crime' approaches are punitive ones that do not try to address the underlying reasons for offending. They include:

- giving police excessive powers to arrest and detain in response to, or to 'prevent', minor offending, and for public drunkenness
- mandatory sentencing laws
- stricter bail laws
- breach of bail offences
- more severe sanctions for fine default.

They reflect a deliberate strategy by governments concerned with satisfying a perceived public demand for punitive responses, and are often a response to high profile violent crimes or undesirable ‘anti-social’ behaviour, such as public drinking.<sup>84</sup> Public opinion about criminal justice issues is, however, problematically informed in large part by the media, which:

tend to focus on unusual, dramatic and violent crime stories, in the process painting a picture of crime for the community that overestimates the prevalence of crime in general and of violent crime in particular. Thus public concerns about crime typically reflect crime as depicted in the media, rather than trends in the actual crime rate.<sup>85</sup>

Aside from being an ill-informed and short-sighted response, ‘tough on crime’ approaches also tend to rely on stereotyped ideas of who offenders are, with little consideration of who else may be affected – too often the most vulnerable members of our community, such as Aboriginal and Torres Strait Islander women, are unfairly swept up into the criminal justice system.<sup>86</sup>

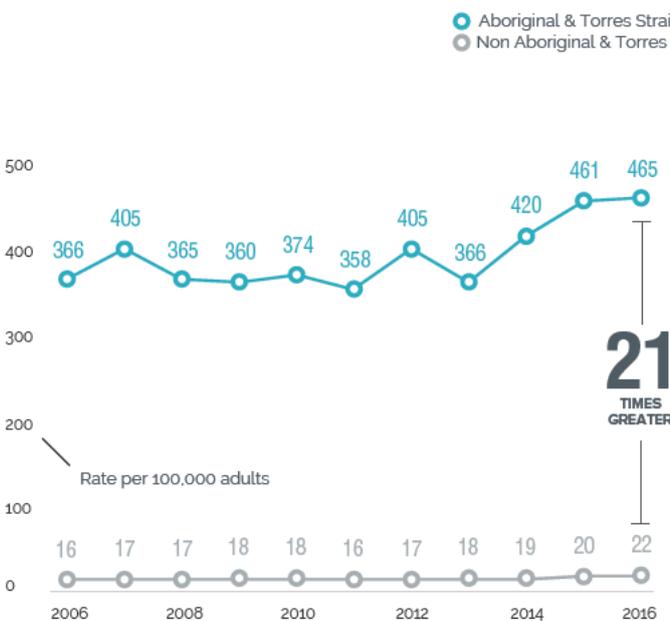
The result of punitive ‘tough on crime’ approaches is a swelling of prison populations – caused more by an increased use of and reliance on imprisonment rather than increases in crime. For example, an increase in Aboriginal and Torres Strait Islander people’s imprisonment in

NSW between 2001 and 2008 was found to be the result of more frequent use of imprisonment rather than an increase in offending – 25 per cent of the increase was caused by greater use of remand and 75 per cent because more Aboriginal and Torres Strait Islander people were sentenced to imprisonment and for longer periods.<sup>87</sup>

People are less punitive when properly informed.<sup>88</sup> A shift away from unhelpful ‘tough on crime’ approaches therefore requires strong political leadership and a commitment to educating the public about the actual trends in crime and the effectiveness of alternatives to prison.

Prison is a blunt and harmful crime control measure and there is growing evidence that prison increases risks of re-offending on release.<sup>89</sup> There are more effective and cheaper ways to reduce crime than to send more and more women, many of whom are mothers, to prison. Governments need to commit long term, both in reality and rhetoric, to a criminal justice system that prioritises diversion, rehabilitation and support for Aboriginal and Torres Strait Islander women and men. Such approaches promote community safety because they prioritise addressing issues that cause people to offend, and therefore prevent crime from occurring in the first place.

**RATE OF ADULT IMPRISONMENT BY YEAR**  
per 100,000



“Aboriginal & Torres Strait Islander women are **over-policed** as perpetrators of crime, however they are also **under-policed** and **under-served** by the justice system as victim/survivors of crime”

Source: Australian Bureau of Statistics, Prisoners in Australia, 2016

## Non-punitive alternatives to low level offending

As part of moving away from the unhelpful, tough on crime, paradigm, state and territory governments should be looking to adopt alternative responses to behaviours captured by low level criminal offences. Aboriginal and Torres Strait Islander women have historically been locked up in prisons and police cells at high rates for minor offending – of the 11 deaths of women examined by the Royal Commission into Aboriginal Deaths in Custody, none were in custody for serious offences.

While nationally, it appears that women are now imprisoned less for minor offending, they are still being prosecuted, penalised and imprisoned for minor offending at unacceptable rates (public order offences, driving and vehicle offences and justice procedure offences).<sup>90</sup>

Aboriginal and Torres Strait Islander women are also being taken into police custody for short periods, particularly in the NT and WA where paperless and preventative arrest powers and overly-broad protective custody laws see Aboriginal and Torres Strait Islander people disproportionately locked up compared to non-Indigenous women.<sup>91</sup>

Often, the penalty for minor offending will be a fine, but a fine can be a significant burden, particularly for women with children, women with a disability and women who are unemployed. A fine can trigger escalating consequences – the suspension of a drivers licence, a community corrections order, further court action and imprisonment for a short period.

The events leading to Ms Dhu's death in custody demonstrate the cascading impact of punitive approaches to minor offending

## Ms Dhu – cascading impact of punitive approaches to minor offending

Ms Dhu, a 22 year old Yamatji woman, was taken into custody for non-payment of fines amounting to \$3,662.34, including costs and enforcement fees. She had no realistic means of paying the fines. WA law gave police the power to imprison her without judicial oversight. The Coroner who investigated Ms Dhu's death in custody observed that:

The fines related to her convictions for offences of disorderly behaviour [swearing], obstructing public officers, assaulting a public officer, failure to comply with request to give police personal details, and breach of bail...The offence of assaulting a public officer was unquestionably a serious matter. The other offences stemmed from behaviour that could be described as low-level offending.<sup>92</sup>

The Coroner noted the risk of charges escalating where police respond in a heavy-handed way to minor offending, such as swearing — a risk also identified by the Royal Commission into Aboriginal Deaths in Custody.

A number of important recommendations were made by the Coroner, including increasing out of court options for low level offending, using community work and development orders as alternatives to incarceration and abolishing laws that see people imprisoned for not paying fines.<sup>93</sup>

There are more effective ways to respond to minor offending and public drunkenness than simply locking people up.

Offences like public drinking and offensive language should be decriminalised, consistent with the recommendations of the Royal Commission into Aboriginal Deaths in Custody.<sup>94</sup> Paperless arrest laws must be abolished, as recommended by the Northern Territory Coroner in 2015.<sup>95</sup> Addressing alcohol misuse and disorderly conduct requires a health-focused response, not a punitive one, particularly in view of the



link between alcohol misuse and Aboriginal and Torres Strait Islander peoples' histories of trauma and mental illness. Relevantly, in March 2017 the Western Australian Coroner recommended removing the power of police to arrest and detain 'intoxicated people for street drinking' after police inappropriately detained an Aboriginal woman rather than taking her to hospital.<sup>96</sup> Her arrest and detention for public drunkenness occurred at the time of a 'zero tolerance' approach to street drinking in Broome.

Many minor driving offences and vehicle registration offences could be easily prevented through programs and services that help women with their licence and car registration, especially women on low incomes and women in regional and remote locations where public transport is lacking. A 'strong association between driver licencing, education and employment' was identified in a recent survey of Aboriginal and Torres Strait Islander people in NSW, indicating the need to address barriers to accessing and maintaining a drivers licence, including licence suspension as an enforcement option against people who cannot pay fines.<sup>97</sup>

Breaches of bail conditions, such as a young woman missing a curfew, should not constitute a criminal offence. Rather, the response should include an assessment of the appropriateness of bail conditions and investment by governments in bail support programs for Aboriginal and Torres Strait Islander women.<sup>98</sup> In addition, governments should be looking to address factors that see courts send women in complex circumstances to prison instead of granting bail (see pages 37-38).

The failure to pay a fine, or to comply with community orders or bail or parole conditions, will often not reflect wilful non-compliance.<sup>99</sup> The response should not

therefore, be an escalation of penalties culminating in a short term of imprisonment. Such an approach ignores factors of disadvantage and family responsibilities that mean that Aboriginal and Torres Strait Islander women in the criminal justice system often have difficulty complying with court orders and paying fines.

As discussed below, alternative responses are required, that involve careful assessment of, and response to, needs and strengths, rather than penalising disadvantage.

### Recommendation 3:

State and territory governments review laws and policies to identify those which unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women, with a view to:

- decriminalising minor offences that are more appropriately dealt with in non-punitive ways
- implementing alternative non-punitive responses to low level offending and public drunkenness
- abolishing laws that lead to the imprisonment of people who cannot pay fines.

### Overarching frameworks to guide legal system cultural change and promote government accountability

Overarching frameworks with bipartisan political support, like the Council of Australian Governments' (COAG) 'Closing the Gap' framework and state and territory Aboriginal Justice Agreements (AJA), involve setting of targets in partnership with Aboriginal and Torres Strait Islander people. Progress, or a lack of progress, can be measured against those targets.

Victoria and the ACT currently have an AJA. AJAs in Queensland, NSW and WA have expired, while the NT is developing one. AJAs have varied across jurisdictions, however all have identified goals, actions and strategies to reduce Aboriginal and Torres Strait Islander over-imprisonment. AJAs do have significant limitations, however Fiona Allison and Chris Cunneen have concluded that AJAs have:

contributed to a more coherent government focus upon Indigenous justice issues and...have been associated with criminal justice agencies developing Indigenous-specific frameworks...they have also led to development of a number of effective initiatives and programs in the

justice area. An [AJA] can also advance principles of government accountability with independent monitoring and evaluation, with maximum Indigenous input into those processes. [AJAs] have effectively progressed Indigenous community engagement, self-management, and ownership where they have set up effective and well-coordinated community-based justice structures and/or led to the development of localised strategic planning, as well as through encouraging initiatives that embody such ideals.<sup>100</sup>

The setting of targets, together with the collection of data and monitoring and evaluation, are essential to holding governments to account and encouraging a culture of continuous reflection and improvement in the way the criminal justice system accommodates Aboriginal and Torres Strait Islander people's interests.

The Victorian AJA has been described as meeting 'the highest standards in terms of Indigenous participation, implementation, monitoring and independent evaluation'.<sup>101</sup>

Each state and territory government should have in place an Aboriginal and Torres Strait Islander-led AJA, which feeds into a whole-of-government strategic plan, and localised implementation plans supported by community justice groups. In light of the clear link between

### The Victorian Aboriginal Justice Agreement

Victoria is currently in phase three of its AJA, phase one having started in 2000. This approach is consistent with the long-term commitment required by governments to reduce Aboriginal and Torres Strait Islander over-imprisonment.

It was not until phase two, and a commitment to a whole-of-government strategy focused on addressing drivers of offending, that real improvements in justice outcomes for Koori people in Victoria were demonstrated.<sup>102</sup>

While Koori imprisonment rates increased between 2006 and 2016 in Victoria, an independent review of phase two of the AJA identified lower imprisonment rates than projected.<sup>103</sup> It should be noted however, that it is very difficult to measure the contribution of the AJA to changes in imprisonment rates.

Highlighting the importance of evaluating of AJAs, an evaluation of phase two of Victoria's AJA identified a lack of diversionary options for Koori women. Culturally appropriate diversion programs for Koori women therefore formed part of phase three (discussed below).

women's offending and experiences of violence, AJAs should also address women's over-representation as victim/survivors of crime.<sup>104</sup>

Genuine partnership in the design, implementation and evaluation of AJAs is key to their effectiveness and will necessitate state and territory governments funding and supporting independent Aboriginal and Torres Strait Islander representative bodies, including at the regional and local levels.<sup>105</sup> The voices of Aboriginal and Torres Strait Islander women and front line service providers must be front and centre.

Overarching and measurable national justice targets in the COAG Closing the Gap framework and a fully resourced national action plan are important accountability mechanisms and would add to the impetus for state and territory governments to have effective AJAs, jurisdictional targets and data collection systems in place. While the Closing the Gap framework includes community safety as one of its seven 'building blocks', it is the only area without any national targets. The National Indigenous Law and Justice Framework, which was not backed up by any funding commitments, expired in 2015.<sup>106</sup>

#### Recommendation 4:

State and territory governments develop and implement long-term community-led Aboriginal and Torres Strait Islander Justice Agreements, which include:

- measures that build on the strengths of Aboriginal and Torres Strait Islander women to address offending and experiences of violence
- a monitoring and evaluation plan involving partnership with Aboriginal and Torres Strait Islander communities and organisations.

#### Recommendation 5:

The Council of Australian Governments develop, in partnership with Aboriginal and Torres Strait Islander peak organisations, a fully resourced national plan of action or partnership agreement directed towards addressing Aboriginal and Torres Strait Islander over-imprisonment and violence rates.

#### Recommendation 6:

The Council of Australian Governments develop, in partnership with Aboriginal and Torres Strait Islander peak organisations, national justice targets to:

- close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2040
- cut disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040, with priority strategies for women and children.

#### Access to holistic Aboriginal and Torres Strait Islander community controlled legal services

The legal system is complex, alienating and paternalistic for many Aboriginal and Torres Strait Islander women, who typically face a multitude of barriers to accessing justice, resulting in poorer justice outcomes. It is imperative that Aboriginal and Torres Strait Islander women are able to access culturally safe and gender-sensitive civil and criminal law services if they are to avoid the pathway to prison. One legal service commented:

Fundamentally, outcomes for Aboriginal and Torres Strait Islander women are vastly improved when there is access to a culturally safe service where women feel that their culture is accepted, recognised and celebrated – a stark contrast to other facets of the justice system.<sup>107</sup>

There are a number of Aboriginal and Torres Strait Islander community controlled legal services around Australia:

- Aboriginal and Torres Strait Islander Legal Services (ATSILSs) bring together over 40 years' experience in providing legal and wraparound services in relation to criminal law, child protection, victims of crime compensation, family law, housing, racial discrimination and other civil law services.
- Aboriginal Family Violence Prevention Legal Services (FVPLSs) provide holistic and specialist assistance for victim/survivors of family violence and sexual assault with family violence, child protection, family law and victims of crime compensation matters.

Many services also provide social work, financial counselling and other support services, as well as early intervention, prevention and community legal education

programs, meaning more holistic services for their clients. For example:

- The Central Australian Aboriginal Legal Aid Service runs the Kungkas Stopping Violence Program, which aims to address causes of violent offending by Aboriginal women in Alice Springs prison.
- The Family Violence and Prevention Legal Unit in Fitzroy Valley, WA, is run within Marninwarntikura Woman's Resource Centre and is attached to a women's shelter.
- The Aboriginal Family Violence Prevention and Legal Service Victoria has a prison-based support worker who links women to legal and support services and provides support and safety planning for release. It also runs a family violence early-intervention program, called 'Sisters Day In'.<sup>108</sup>
- The North Australian Aboriginal Justice Agency has a social worker attached to its youth justice service and an award-winning Throughcare service that provides support to adults and young people in prison and post-release.
- The Aboriginal Legal Rights Movement in South Australia has a financial counselling service to assist men and women at court with fines.
- The Aboriginal Legal Service of WA has a Youth Engagement Program, with three Aboriginal diversion officers providing individualised case management to young offenders.
- The Victorian Aboriginal Legal Service is partnering with Corrections Victoria and Aboriginal Housing Victoria to build transitional supported housing for women exiting prison.

Aboriginal and Torres Strait Islander community controlled legal services play a crucial role in utilising cultural strengths and building the capacity of individuals, families and communities – a key determinant in preventing violence, reducing offending, dismantling barriers to justice and reducing social isolation.<sup>109</sup>

These services are insufficiently funded to meet demand. The FVPLS's report being forced to turn away 30-40 per cent of those seeking assistance nationally, most of whom are women.<sup>110</sup> ATSILS deliver legal assistance over 200,000 times per year but are forced to turn many women away at a time when the need for their services is at crisis levels.<sup>111</sup>

Regular threatened and actual funding cuts, such as the Federal Government's ongoing savings measure from the 2013 mid-year economic and fiscal outlook, means future funding uncertainty. This inhibits long term planning to meet the legal needs of Aboriginal and Torres Strait Islander women – including criminal law, family violence and other civil law needs.<sup>112</sup> It means extremely vulnerable women being unable to get help with legal issues before they escalate, women appearing in court unrepresented and opportunities to divert women onto more positive and empowering pathways lost.

A 2016 Senate inquiry into Aboriginal and Torres Strait Islander people's experiences of law enforcement and justice services heard 'overwhelming evidence about the legal needs of Aboriginal and Torres Strait Islander people which are not being met'<sup>113</sup> and that there is inadequate funding for legal services for Aboriginal and Torres Strait Islander people.<sup>114</sup>

The failure of successive governments to sustainably fund Aboriginal and Torres Strait Islander community controlled legal services reflects the gross inequality in our legal system that contributes to Aboriginal and Torres Strait Islander over-imprisonment. Both the UN Committee on the Elimination of Racial Discrimination and the Special Rapporteur on the Rights of Indigenous People have called for the Federal Government to adequately fund these vital services.<sup>115</sup>

Aboriginal and Torres Strait Islander community controlled legal services must be properly and sustainably funded. With Aboriginal and Torres Strait Islander women's over-imprisonment having increased so dramatically, and at a faster rate than men's, funding should also allow for these services to develop holistic models that are tailored to women's circumstances, both as offenders and victim/survivors, including culturally safe and individualised support and case management.

## Recommendation 7:

The Federal Government, together with state and territory governments where appropriate, should:

- permanently reverse planned funding cuts to the Aboriginal and Torres Strait Islander Legal Services
- adequately and sustainably fund Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services to:
  - » meet existing demand for services, including culturally-safe and specialist prevention and early intervention programs
  - » address unmet legal need regardless of geographic location
  - » develop models of holistic support and case management for women.

81. *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.
82. In 2016, Aboriginal women made up 64 per cent of all female fine defaulters: Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) 13; Aboriginal Legal Service of Western Australia, *Addressing Fine Default by Vulnerable and Disadvantaged Persons: Briefing Paper* (August 2016).
83. Senate Legal and Constitutional Affairs References Committee, above n 74, 12 (citing Sisters Inside, Submission No 69 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*).
84. See eg Coronial findings in relation to two deaths in custody, which occurred in the context of 'zero tolerance' and pro-arrest approaches to public drinking (including paperless arrest laws in the NT). G Cavanagh SM, *Inquest into the Death of Kumanjaji Langdon* [2015] NTMC 016 [11]; R V C Fogliani, Western Australia State Coroner, *Record of Investigation into Death of Ms Mandijarra* (31 March 2017) [68].
85. Karen Gelb, *Myths and Misconceptions: Public Opinion Versus Public Judgment about Sentencing* (Sentencing Advisory Council, 2006) [15].
86. For discussion, see Chris Cunneen, 'Colonial Processes, Indigenous People and Criminal Justice Systems' in Sandra Bucerius and Michael Tonry (eds), *The Oxford Handbook of Ethnicity, Crime and Immigration* (Oxford University Press, 2014) 386; Baldry and Cunneen, above n 28; Sandra Porter, 'The Price of Law and Order Politics: Re-Examining the Fines, Penalties and Infringement Notices Enforcement Act 2012 (WA)' (2014) 8(16) *Indigenous Law Bulletin* 28.
87. Jacqueline Fitzgerald, *Why are Indigenous Imprisonment Rates Rising?* (Issue Paper No 41, NSW Bureau of Crime Statistics and Research, 2009).
88. *Ibid.*
89. Donald Ritchie, *Does Imprisonment Deter? A Review of the Evidence* (Sentencing Matters, Sentencing Advisory Council, 2011).
90. MacGillivray and Bartel, above n 19.
91. See Northern Territory Police, Fire & Emergency Services, above n 21; *Inquest into the Death of Kumanjaji Langdon*, above n 84 [66] (paperless arrest laws, which exist in the NT only); *Record of Investigation into Death of Ms Mandijarra*, above n 84 [363] (broad protective custody and preventative arrest powers).
92. R V C Fogliani, Western Australia State Coroner, *Record of Investigation into Death of Ms Dhu* (15 December 2016) 144 [784]-[785].
93. *Ibid* 151, recommendations 6 and 7.
94. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, 28, recommendations 80-1, 85.
95. *Inquest into the Death of Kumanjaji Langdon*, above n 84 [92].
96. *Record of Investigation into Death of Ms Mandijarra*, above n 84 [68], [366], [374], recommendation 1.
97. Rebecca Ivers et al, 'Driver Licensing: Descriptive Epidemiology of a Social Determinant of Aboriginal and Torres Strait Islander Health' (2016) 40(4) *Australian and New Zealand Journal of Public Health* 377. Driver licence suspension for fine default is three times higher for Aboriginal and Torres Strait Islander people in NSW compared to non-Indigenous people: *ibid* 377-8.
98. There is a dearth of bail support programs for Aboriginal and Torres Strait Islander women. For discussion on bail support and Aboriginal people, see Gabrielle Denning-Cotter, *Bail Support in Australia* (Brief 2, Indigenous Justice Clearinghouse, April 2008).
99. See, eg, discussion in VEOHRC above n 6. Issues associated with fines is further discussed at pages 38-39.
100. Fiona Allison and Chris Cunneen, *Indigenous Justice Agreements* (Current Initiatives Paper 4, Indigenous Justice Clearinghouse, 2013) 6.
101. *Ibid.*
102. See Nous Group, *Evaluation of the Aboriginal Justice Agreement – Phase 2* (Final Report for Victorian Department of Justice, 2012) 54.
103. *Ibid* 36.
104. For discussion see Allison and Cunneen, above n 100, 6.
105. The Royal Commission into Aboriginal Deaths in Custody noted the importance of properly constituted, ongoing Indigenous representative bodies to the development of justice policy: Allison and Cunneen, above n 100.
106. Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009-2015* (Parliaments of the Commonwealth, States and Territories, 2010).
107. Written correspondence, National Family Violence Prevention Legal Service Forum (31 March 2017).
108. 'Sisters Day In' is a tailored version of 'Sisters Day Out' family violence early intervention and prevention program designed to build resilience, promote cultural strength and reduce family violence: *ibid.*
109. *Ibid*; Written correspondence, National Aboriginal Torres Strait Islander Legal Services (10 April 2017).
110. National Family Violence Prevention Legal Service Forum, *ibid.*
111. National Aboriginal and Torres Strait Islander Legal Services, Submission to the Inquiry on Domestic Violence and Gender Inequality (April 2016) 3, <<http://www.natsils.org.au/PolicyAdvocacy.aspx>>.
112. Written correspondence, National Aboriginal and Torres Strait Islander Legal Services, 24 April 2017.
113. Senate Finance and Public Administration Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 25 [3.2].
114. *Ibid* 17 [2.43].
115. Victoria Tauli-Corpuz, above n 34; Committee on the Elimination of Racial Discrimination, above n 74 [19].
116. Stathopoulos et al, above n 50.

## Positive responses by police and courts



Community-based prevention and early-intervention measures offer significant potential to reduce the number of Aboriginal and Torres Strait Islander women entering the criminal justice system in the first place. There will however, be women who enter the system. The goal of the criminal justice system, from policing to prison, should be to prevent women from entering prison, except as a last resort, and to reduce the likelihood of women reoffending.

The criminal justice system must be responsive to Aboriginal and Torres Strait Islander women's interests and strengths if it is to contribute to the broader goal of reducing imprisonment rates. There are a number of points at which police and courts make decisions that can dramatically alter women's lives. These points present an opportunity to help women transition onto a more positive trajectory.<sup>116</sup>

### Addressing over-policing and under-policing

Historically, police have played a devastating role in executing laws aimed at dislocating, controlling and assimilating Aboriginal and Torres Strait Islander people. The Royal Commission into Aboriginal Deaths in Custody observed that much of the excessive police intervention into the lives of Aboriginal and Torres Strait Islander people has been 'arbitrary, discriminatory, racist and violent'.<sup>117</sup> There is as a result an understandable distrust of the police among Aboriginal and Torres Strait Islander people.

The discriminatory over-policing of Aboriginal and Torres Strait Islander people and communities is not just an issue of the past – it continues to be a reality and considerable source of stress and anxiety for Aboriginal and Torres Strait Islander communities across much of Australia.<sup>118</sup> The 2016 Federal Court decision of the *Wotton v State of Queensland* is a pertinent example.

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### Wotton v Queensland – racial discrimination and policing

The case concerned the response of Queensland Police to the death in police custody of Mulrunji Doomadgee in 2004 and the subsequent unrest on Palm Island, Queensland. Justice Mortimer of the Federal Court of Australia found that the police acted in a racially discriminatory manner.

Importantly, Justice Mortimer noted the disregard and ignorance of police officers towards the history of Palm Island as a mission to which Aboriginal and Torres Strait Islander people were forcibly removed and treated oppressively, including by police. This provided essential context for understanding the relationship between residents of the island and Queensland Police.

In concluding her judgment, Justice Mortimer forcefully observed that:

[f]or those in command and control of particular policing activities, and for those in charge of a police investigation into the death of a person in police custody, to perform their functions *differently by reference to the race of the people they are dealing with* is ... an affront to the rule of law.<sup>119</sup>

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### The over-policing and under-policing of Aboriginal and Torres Strait Islander women

While Aboriginal and Torres Strait Islander women are over-policed as perpetrators of crime, they are also under-policed and under-served by the justice system as victim/survivors of crime, including by police responses that minimise their experiences of violence.<sup>120</sup>

Distrust of police and fear of children being taken into child protection are two key concerns that influence the many Aboriginal and Torres Strait Islander women who choose not to report violence against them to police.<sup>121</sup>

A lack of trust in police and other state authorities may help explain why Aboriginal and Torres Strait Islander

women are more likely to be charged and convicted of violent crimes than non-Indigenous women – if violence is a lived experience and if a woman does not trust the police to respond appropriately to violence, resorting to violence may be seen as the only effective form of protection for herself and her children.<sup>122</sup>

The trauma of repeated victimisation combined with deep distrust of police can shape the way that women behave when police do intervene. There is a history of police, the majority of whom are non-Indigenous and male, viewing Aboriginal and Torres Strait Islander women's responses to violence as atypical and 'difficult'. Such was the case for Ms Mullaley.

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### A punitive response to a woman's experience of family violence

Ms Mullaley was violently assaulted by her partner and found injured and naked by WA police officers. She was then charged with, and later convicted of, assaulting the police who attended the scene. Ms Mullaley's agitated behaviour and the processing of charges against her 'distracted' police and caused some delay in responding to concerns subsequently raised about the welfare of her child, who was later murdered by the perpetrator.

The Corruption and Crime Commission of Western Australia investigated the incident and noted that the police failed to consider whether the cause of Ms Mullaley's behaviour 'might be the result of an attack that left her naked and injured.'<sup>123</sup> It was noted that:

Some officers have referred to the aggression and behaviour of [Ms Mullaley and her father] as significant factors in preventing police from responding sooner to the abduction of [Ms Mullaley's son]. There is justification for this view but assumptions were made about the cause of aggression and other behaviour instead of a dispassionate analysis of the whole scene which began with violence to [Ms] Mullaley.<sup>124</sup>

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Police responses that focus on criminality rather than victimisation can be compounded by the infliction of poor treatment by police themselves. This point is painfully evident in the conduct of police prior to the death of Ms Dhu in police custody.

### Ms Dhu - racial and gendered assumptions infecting police responses

Ms Dhu was taken into police custody when police attended a house and took her former partner into custody for breach of an intervention order. While at the house, police acted on an old warrant that ordered that Ms Dhu be imprisoned because of a failure to pay court fines. Ms Dhu died in police custody of an infected fractured rib – an injury sustained in a family violence incident.

Despite repeated requests and cries for help by Ms Dhu, police and health professionals responded woefully inadequately to her rapidly deteriorating health over the three days she was in police custody. Their assessment of her condition was infected by an erroneous assumption made early in her imprisonment that her behaviour was the result of drug withdrawal. This resulted in a cascading series of errors and ultimately, her tragic and avoidable death. The conduct of police was described by the Coroner as ‘inhumane’ and ‘unprofessional’.<sup>125</sup>

The cases of Ms Dhu and Tamica Mullaley are distinct, however both women were victims of family violence and in both cases, wrongful gender and racial stereotypes underpinned assumptions made by police about the reasons for an Aboriginal woman’s ‘difficult’ behaviour. In both cases, these assumptions negatively affected the police response, with the end result being a failure to respond promptly to the reality and urgency of the situation.

### Police discretion

Police exercise considerable discretion in relation to whether they arrest, charge, caution, divert, bail, or refer a person to support. ATSILS have consistently pointed to a bias in the exercise of police discretion against diverting or cautioning Aboriginal and Torres Strait Islander people, particularly young people.<sup>126</sup> Research in several jurisdictions has supported this view.<sup>127</sup> There is evidence also that Aboriginal and Torres Strait Islander women are more likely to be arrested and charged with an offence compared to non-Indigenous women.<sup>128</sup>

A 2013 Victorian case involving a young Aboriginal woman highlights an extreme example of poor use of police discretion.

### Poor use of police discretion against a young mother

Ms Mitchell, a 22 year old Aboriginal woman who was pregnant and had two young children, was arrested and denied bail by police for a number of non-violent offences. One offence - travelling as an adult on a child’s public transport ticket – was an infringement notice offence, however police decided to instead charge her with a fraud offence, which carried much higher penalties, including prison. She was denied bail by police, and remanded by a Magistrate, largely because of her history of non-violent offending.

On appeal, a Supreme Court Judge granted bail. The Judge was required by law to consider the fact that Ms Mitchell was an Aboriginal person. In this context, he described pursuing a serious fraud charge for the minor offence of travelling on a child’s public transport ticket as ‘singularly inappropriate’. The Judge stated that ‘over policing of Aboriginal communities and their over-representation amongst the prison population are matters of public notoriety’.<sup>129</sup>

### Addressing the harm caused by over-policing and under-policing

Poor police responses and institutionalised racial bias in the use of discretion leaves Aboriginal and Torres Strait Islander women at greater risk of harm and potentially increases the risks of women offending to protect themselves.

Change the Record has called for changes in the way that police interact with Aboriginal and Torres Strait Islander people and communities, including improved cultural awareness, with the aim of building trust, promoting safety and reducing crime. Police must come to understand and be responsive to the justified distrust Aboriginal and Torres Strait Islander women have in police and the high rates of violence and trauma in many women's lives.

Addressing institutionalised patterns of behaviour is no easy task. There is however, a clear need for police protocols that require officers to prioritise responding to Aboriginal and Torres Strait Islander women's victimisation. There is also an urgent need for training and recruitment practices that ensure appropriate responses to Aboriginal and Torres Strait Islander women and that promote Aboriginal and Torres Strait Islander women's participation. The Coroner in Ms Dhu's case called for mandatory, ongoing and location-specific cultural competency training and assessment, with Aboriginal people involved in the delivery of training.<sup>130</sup> Improving police responses will be assisted if Aboriginal and Torres Strait Islander women are employed to work as, and to train, police officers.

### Notifying ATSILS when an Aboriginal or Torres Strait Islander person is taken into custody

One of the key recommendations of the Royal Commission into Aboriginal Deaths in Custody was the introduction of state and territory custody notification systems (CNS). CNS operate variably across different states and territory, but in general, they require that police notify the state or territory ATSILS when an Aboriginal or Torres Strait Islander person is taken into police custody.<sup>131</sup> ATSILS need to be appropriately resourced to ensure that when a notification is received, legal and welfare checks can be undertaken.

CNS can be lifesaving. Had a resourced and effective CNS been in place in Western Australia in 2014, Ms Dhu may have had a lawyer to advocate for her welfare and she may have survived.<sup>132</sup>

The death of a young woman in NSW police custody in 2016 (see below) highlights the importance of CNS laws mandating that police notify the ATSILS every time an Aboriginal or Torres Strait Islander person is taken into custody, and for notification systems to be regularly reviewed.

### Improving relationships between police and Aboriginal and Torres Strait Islander people

In researching and consulting for this report, no specific initiatives could be identified that aim to improve relationships between Aboriginal and Torres Strait Islander women and the police. While not a female-specific program, the Clean Slate Without Prejudice program was identified as a positive initiative.

### A death in custody in NSW - the importance of mandatory notification

Ms M, a young Wiradjuri woman and mother of four children (not named in case of cultural sensitivities), died in police custody in July 2016. Her death in police custody was the first in NSW since the introduction of a CNS 16 years earlier.

The circumstances surrounding her death in custody are still to be examined by the coroner. Police report that Ms M was taken into custody for protective reasons because she appeared to be intoxicated, while her family have said that no alcohol or illegal drugs were found in her body. The Aboriginal Legal Service of NSW/ACT has said that it was not notified when Ms M was taken into custody.<sup>133</sup>

The CNS in NSW places a legal obligation on police to notify the Aboriginal Legal Service when an Aboriginal or Torres Strait Islander person is taken into police custody as part of a police investigation or for questioning.<sup>134</sup> There is no obligation on police to notify the Aboriginal Legal Service when they take a person into protective custody.

## The Clean Slate Without Prejudice Program

The Redfern Clean Slate Without Prejudice Program started in 2009 as a partnership between NSW Police and the Tribal Warrior Association. The aim was to address high crime rates in Redfern and improve relationships between police and Aboriginal and Torres Strait Islander young people.

The program is a ‘grassroots community, holistic exercise, assistance and referral program’. Participants undertake boxing training three mornings per week and are offered assistance with accommodation, employment and training. Police officers and Aboriginal leaders train with the young people. Young people are referred by schools, social services, courts or the police. Participation in the program can form part of a suspended sentence and young people in prison can now participate.

It has been reported that between 2008 and 2014 robberies in the area dropped by 73 per cent, assaults on police dropped by 57 per cent and break-and-enters nearly halved.<sup>135</sup>

Initially, the Clean Slate program focused on Aboriginal and Torres Strait Islander boys, however female Aboriginal and Torres Strait Islander mentors have now been employed, to encourage greater participation by young women.

While there are fewer Aboriginal and Torres Strait Islander girls and young women in the justice system compared to boys and young men, the numbers are growing.

It is therefore critical that such programs are tailored to the interests of girls and young women, including those in the child protection system who are most at risk of entering the youth justice system. Stopping Aboriginal and Torres Strait Islander women entering the justice system at a young age can prevent or reduce their interaction with the system throughout the rest of their lives.

### Recommendation 8:

State and territory police adopt education, training and recruitment practices that promote:

- Aboriginal and Torres Strait Islander women’s employment and participation
- more appropriate police responses to Aboriginal and Torres Strait Islander women both as victim/survivors of violence and offenders.

### Recommendation 9:

State and territory police ensure that police protocols and guidelines prioritise the protection of, and provision of support to, Aboriginal and Torres Strait Islander women and children subject to violence. Responding to an incident of family violence should never be used as an opportunity to act upon an outstanding warrant against a victim/survivor of violence.

### Recommendation 10:

State and territory governments, in consultation with Aboriginal and Torres Strait Islander Legal Services, introduce custody notification laws that make it mandatory for the police to notify Aboriginal and Torres Strait Islander Legal Services of any Aboriginal and Torres Strait Islander person taken into custody. Aboriginal and Torres Strait Islander Legal Services must be resourced to respond to notifications with legal and welfare checks. Custody notification systems should be regularly reviewed.

### Recommendation 11:

State and territory police prioritise developing partnership programs with Aboriginal and Torres Strait Islander communities that aim to build trust and respect between police and young people. Programs should include gender-specific responses for girls and young women.

## Diverting women out of the system and into support at all stages

Diversion aims to transition individuals away from the traditional criminal justice process and prison. Diversion options can include treatment, healing, family support, education and training programs that target the root causes of offending.<sup>136</sup> They might also include restorative justice processes like victim-offender conferencing or family group conferences that aim to directly engage the offender with the consequences of their offending and repairing the harm.

Diversion options that build on women's strengths and respond to their unique needs and circumstances, offer a much more effective pathway to preventing future interaction with the justice system than a fine or imprisonment.<sup>137</sup> Research has found that offenders placed on diversionary pathways are less likely to reoffend when compared to those sentenced to a term of imprisonment.<sup>138</sup> Diversion is also more cost-effective – it costs more to send a woman to prison than it does to have her participate in a rehabilitation-focussed residential diversion program.<sup>139</sup>

Diversion programs also present an opportunity for governments, courts and Aboriginal and Torres Strait Islander communities and organisations to partner and invest in community-driven responses.

### When can Aboriginal and Torres Strait Islander women be diverted?

Diversion can be broadly understood as an alternative option to traditional police and court processes at all points of contact with the justice system. For example:

- Women can be diverted through the use of police discretion to caution and link with support, rather than issuing a fine or pursuing charges.
- Courts can make orders at any stage of criminal proceedings to divert women out of the system and away from prison, including when considering bail and sentencing.
- Even within the walls of prison, access to effective treatment and pre- and post-release support can divert women from reoffending in the future.<sup>140</sup>

Earlier diversion lessens the potential negative effects of interaction with the criminal justice system. An emphasis on culturally-specific and gender-specific diversion should therefore underpin the entire criminal justice system. This of course requires police, court staff, judicial officers and corrections staff to ensure that Aboriginal and Torres Strait Islander women are identified and assessed for diversion programs.

### Supporting diversion programs developed by and for Aboriginal and Torres Strait Islander women

Despite the potential offered by diversionary options, Aboriginal and Torres Strait Islander people have lower participation and completion rates, particularly in programs not specifically designed to respond to their needs. In general, Aboriginal and Torres Strait Islander women have very few options for culturally-responsive diversion programs relative to men, with only handful existing around the country.<sup>141</sup>

Studies have identified systemic barriers to participation, including that Aboriginal and Torres Strait Islander women are:

- less likely to make admissions to police (diversion usually requires an admission of wrongdoing)
- more likely to have prior convictions and/or be facing multiple charges, which make them ineligible for diversion
- more likely to have substance abuse issues and/or co-existing mental illness, which make their circumstances too complex
- more likely to live in rural and remote locations where diversion programs are not available.<sup>142</sup>

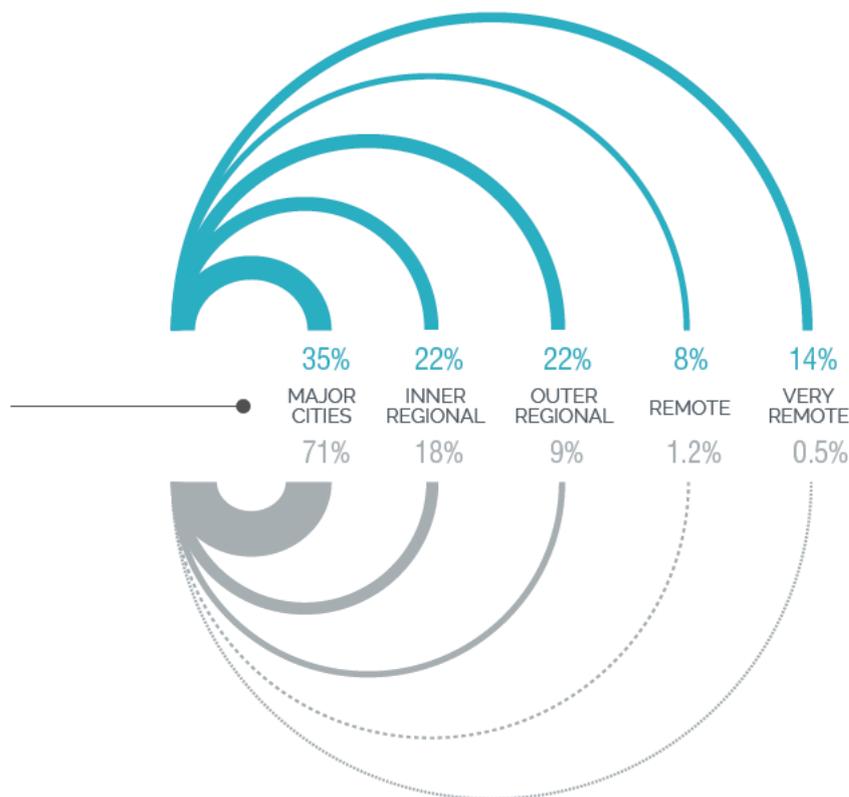
Diversion laws, policies and programs for Aboriginal and Torres Strait Islander women need to be designed to counteract these barriers and tackle drivers of offending. Lorana Bartels has noted that Aboriginal and Torres Strait Islander women's acute and intersectional disadvantage requires 'more intensive and multi-dimensional services'.<sup>143</sup> Importantly, early assessment of a woman's circumstances is required to identify drivers of offending and appropriate responses.

For Aboriginal and Torres Strait Islander women with child care responsibilities, court orders that require fulltime participation in diversion programs may set them up for failure. Programs should accommodate family and cultural responsibilities and be available to women in their communities, to prevent women being forced to choose between family connections and responsibilities and complying with conditions of diversion. Diversion programs that are not designed by, or in partnership with, Aboriginal and Torres Strait Islander women, and that have onerous requirements, may do more harm than good – they may be perceived as another instance of unhelpful state intervention, compromising the likelihood of success and potentially causing distress or reinforcing distrust in the system.<sup>144</sup>

## WHERE PEOPLE LIVE

% of population

- Aboriginal & Torres Strait Islander Population
- Non Aboriginal & Torres Strait Islander Population



“the use of imprisonment, suspended sentences and monetary orders in the sentencing of Aboriginal & Torres Strait Islander defendants may in part be a response to the **difficulties** of supervising and managing community-based alternatives in **outer regional & remote locations**”

Bond & Jeffries, 2013

Source: Australian Bureau of Statistics, Estimates of Aboriginal and Torres Strait Islander Australians, June 2011

### Creating culturally responsive and gender-specific diversion programs

There is a clear need for all levels of governments to work with Aboriginal and Torres Strait Islander women to fill the gap in culturally-competent and gender-specific diversion programs. This need was identified in a review of phase two of the Victorian Aboriginal Justice Agreement, which found that Koori women responded more positively to community-based alternatives to court.<sup>145</sup> One of the objectives of phase three of the Aboriginal Justice Agreement therefore was to ‘implement initiatives that divert Koori women from prison, and reduce numbers on remand’.<sup>146</sup>

## Koori Women's Diversion Program

The Koori Women's Diversion Program has a multi-disciplinary steering committee that includes members of Victoria's Koori community. Two key initiatives developed through the program are

### 1. Intensive case management services in Mildura and Morwell

Koori caseworkers have been placed at Aboriginal community controlled organisations in Mildura and Morwell. Both were areas identified as having high numbers of Koori women in contact with the justice system and significant gaps in service provision for Koori women. The caseworkers provide a single point of assistance to address the many issues faced by Koori women that contribute to offending, including family violence.

The program aims to break down barriers to Koori women accessing assistance by providing women with holistic and streamlined caseworker support throughout the criminal justice process.

The services were developed in partnership with Koori communities in Mildura and Morwell, and are tailored to respond to the needs of Koori women offenders and complement existing services. The program is showing considerable promise, with high levels of engagement by Koori women. In addition, magistrates have been supportive and have referred women to the service as a diversion option.

### 2. Odyssey House Victoria Koori Women's Diversion Program

This program provides six drug and alcohol treatment and rehabilitation family places in a culturally appropriate setting in Melbourne for Koori women with substance abuse issues who are in contact with the justice system. A Koori Support worker has been employed and more than 45 women have commenced treatment through the program. The program aims to:

- provide culturally-appropriate and holistic treatment in a residential setting for Koori women referred from the justice system
- enable women to remain with their children while accessing treatment
- divert women out of the criminal justice system at any stage of the process, including as a bail option, an alternative to prison or as a post-release program.<sup>147</sup>

## Bail, remand and the need for accommodation and support

While national data about the proportion of Aboriginal and Torres Strait Islander women in prisons on remand does not appear to exist, remand rates for women generally have grown faster than men in Australia.<sup>148</sup> There is data from some states and territories that shows growing and highly variable numbers of Aboriginal and Torres Strait Islander women on remand. For example, during 2015-16 in South Australia, 93 per cent of Aboriginal and Torres Strait Islander women admitted into prison were there on remand and made up 61 per cent of the total number of women on remand.<sup>150</sup> In contrast, a population count on 30 June 2015 in the NT revealed that 34 per cent of

Aboriginal and Torres Strait Islander women in prison were there on remand, but made up 85 per cent of all women on remand.<sup>151</sup>

Disadvantage securing stable and suitable accommodation has also been identified as significantly contributing to the number of Aboriginal and Torres Strait Islander women denied the opportunity of diversion through bail and instead placed into prison on remand.<sup>152</sup> It has been suggested that housing insecurity and homelessness are likely to have a heavier impact on young women's prospects of being bailed because 'histories of physical and sexual abuse often make it less likely that young women will have a stable home environment to return to'.<sup>153</sup>

In the absence of other accommodation and treatment options, remand may be viewed by police and the courts as the only appropriate environment in which to place a woman who needs stability, safety and support.<sup>154</sup> This is an unacceptable situation. The implications of deciding to remand a woman, even for a short time, can be life-altering – she may be disconnected from family and community support, children may be taken into child protection and housing or employment lost. Women then struggle to access programs when remanded because the length of their stay is unpredictable and often of short duration. This is in addition to the stress and trauma of prison itself.

A lack of appropriate housing not only increases the risk of bail being denied, but for women who are bailed, it heightens the challenges of complying with bail conditions (similar concerns arise in the context of community sentencing orders and parole conditions). ‘Tough on crime’ criminal justice reforms have seen breach of bail conditions increasingly become a criminal offence and growing numbers of women being charged with justice procedure offences.

If cycles of disadvantage and offending are to be broken, there is an acute need for bail support and diversion programs that are linked with accommodation for Aboriginal and Torres Strait Islander women and their children.<sup>155</sup>

### Alternatives to fines that women cannot pay

The most common sentence received by Aboriginal and Torres Strait Islander women is a fine.<sup>156</sup> Curtailing the incarceration of Aboriginal and Torres Strait Islander women requires that judges not rely on, or feel that their only option is to, issue a fine. Aboriginal and Torres Strait Islander women are already more likely to experience multifaceted disadvantage.<sup>157</sup> Responding to fines, and enforcement costs which are inevitably added to unpaid fines, may in reality mean a choice between imprisonment and children going without food, clothes or other necessities.

Evidence from WA suggests that sentencing judges may be more aware of, and responsive to, the social costs and harm to children when Aboriginal and Torres Strait Islander women are imprisoned, and more likely to recognise prospects for rehabilitation for Aboriginal and Torres Strait Islander women than non-Indigenous women.<sup>158</sup> However, community-based alternatives to prisons and fines are under-utilised for Aboriginal and Torres Strait Islander offenders generally.<sup>159</sup> It has been noted for example that:

research suggests that the use of imprisonment, suspended sentences and monetary orders in the sentencing of Indigenous defendants may in part be a response to the difficulties of supervising and managing community-based alternatives in outer regional and remote locations.<sup>160</sup>

In some jurisdictions, such as WA, failure to pay court-ordered fines can lead to imprisonment without further judicial oversight. In other jurisdictions, failure to pay a fine may result in a community service order, breach of which can result a return to court and imprisonment. Alternatively, failure to pay a fine may result in licence suspension and subsequent imprisonment for driving without a valid licence.<sup>161</sup> These laws increase the risks that the poorest and most disadvantaged in society will be locked up precisely because they are poor and disadvantaged.

The Royal Commission into Aboriginal Deaths in Custody described the practice of imprisoning those who cannot pay fines an injustice and stated that ‘there are compelling social and economic reasons to provide an alternative way to address fine default other than to imprison the defaulters.’<sup>162</sup>

During the inquest into the death of Ms Dhu, referred to above, the Coroner noted the disproportionate impact of the fine default imprisonment laws in WA on Aboriginal women and recommended that the WA Government abolish the laws.<sup>163</sup> This is yet to happen.<sup>164</sup>

State and territory laws should require magistrates and judges to consider whether community-based diversion options are more appropriate than a fine based on an offender’s socio-economic circumstances. This will allow

for consideration of financial and family circumstances and the likely impact of a fine. In addition, laws that lead to the over-imprisonment of Aboriginal and Torres Strait Islander women for unpaid fines could be replaced with a system similar to the Work and Development Order scheme in NSW.<sup>165</sup>

**Diversion and the NSW Work and Development Order scheme**

The Work and Development Order scheme offers a promising alternative to the punitive enforcement of fines against people who cannot pay them. It is a legislated scheme and operates as a collaborative arrangement between the NSW Government, Legal Aid NSW and the Aboriginal Legal Service of NSW/ACT.

Those who cannot pay their fines because of certain vulnerabilities, such as homelessness, mental illness, disability or acute economic hardship, undertake voluntary work, health treatment, education or training, financial counselling, drug and alcohol treatment or a mentoring program.<sup>166</sup> The activities are individualised and respond to issues contributing to offending. At the same time, a person can apply to have some of their debt written off. Compliance with the order is supervised, typically by an approved non-government agency or a health professional.

Importantly, while compliance will reduce fine debt over time, breach of the order *does not incur further penalty*.

The scheme has been evaluated positively, both in terms of reducing reoffending rates, engaging clients in positive treatment and training activities and alleviating the stress associated with unpaid fine debts.<sup>167</sup> It has been recommended by Legal Aid NSW that the scheme explicitly apply to people experiencing family violence.

**Recommendation 12:**

State and territory governments invest in diversion initiatives for Aboriginal and Torres Strait Islander women, including programs with housing for women and children, which are designed and run by or in partnership with Aboriginal and Torres Strait Islander women. Programs should ensure eligibility for women facing multiple charges and who have criminal records.

**Recommendation 13:**

State and territory governments amend criminal procedure laws and policies to require police, lawyers, courts and corrections officers to prioritise diversionary options for Aboriginal and Torres Strait Islander women at all stages of the criminal process.

**Recommendation 14:**

State and territory governments develop Work and Development Order schemes modelled on the NSW scheme, in partnership with Aboriginal and Torres Strait Islander community representatives and organisations. The scheme should be available both as a response to fine default and as an independent sentencing option. Family violence survivors should be eligible for the scheme and breach of a Work and Development Order should not result in further penalty.

117. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, [13.2.3].
118. Senate Finance and Public Administration Committee, above n 113, 80-2.
119. *Wotton v State of Queensland* (No 5) [2016] FCA 1457, [1806] (emphasis added).
120. See, eg, VEOHRC, above n 6 42; Sheena Fleming et al, 'The Status of Indigenous Women in Policing: A Queensland Case Study', (2013) 24(3) *Current Issues in Criminal Justice* 357, 358; Chris Cunneen, 'Policing and Aboriginal Communities: Is the Concept of Over-Policing Useful?' in Chris Cunneen (ed), *Aboriginal Perspectives on Criminal Justice* (Sydney University Institute of Criminology, 1992) 76.
121. Willis, above n 53.
122. Wilson, above n 51.
123. Corruption and Crime Commission, *Report on the Response of WA Police to a Particular Incident of Domestic Violence on 19-20 March 2013* (State of Western Australia, 2016) 21.
124. *Ibid.*, 2.
125. *Record of Investigation into Death of Ms Dhu*, above n 92, from [454].
126. See, eg, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) ch 7.
127. See eg Lucy Snowball, *Diversions of Indigenous Juvenile Offenders* (Trends and Issues in Crime and Criminal Justice No 355, Australian Institute of Criminology, 2008) 3; Chris Cunneen, 'Changing the Neo-Colonial Impacts of Juvenile Justice' (2008) 20 *Current Issues in Criminal Justice* 13; Troy Allard et al, 'Police Diversion of Young Offenders and Indigenous Over-Representation (Trends & Issues in Crime and Criminal Justice No 309, Australian Institute of Criminology, 2010).
128. Bartels, above n 23, 3.
129. *Re Mitchell* [2013] VSC 59 (8 February 2013), [13]. Legal and practical issues with the granting of bail for Aboriginal women are discussed further at pages 37 and 46.
130. *Record of Investigation into Death of Ms Dhu*, above n 92, 137-8, recommendations 3 and 4.
131. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, 111, recommendations 223-4.
132. The introduction of a custody notification scheme modelled on the NSW scheme was called for by the Aboriginal Legal Services of WA and recommended for consideration by the WA Government during the Inquest into the death of Ms Dhu: *Record of Investigation into Death of Ms Dhu*, above n 92 [841]-[844], recommendation 10.
133. Calla Wahlquist, 'Indigenous Woman Died in Police Custody After Notification Service Not Used', *The Guardian* (online) 16 August 2016 <<https://www.theguardian.com/australia-news/>>; Sarah Whyte, "'No Alcohol or Illegal Drugs' Found in System of Indigenous Woman Who Died in Police Custody' Australian Broadcasting Association (online) 5 September 2016 < <http://www.abc.net.au/news/>>.
134. *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) reg 37.
135. Dan Box, 'Clean Slate Without Prejudice, Tribal Warrior, Redfern and a Bold Boxing Experiment', *The Australian* (online), 30 January 2016, <<http://www.theaustralian.com.au/life/>>. Note that this data cannot be verified as attributable to the program alone.
136. Specialist therapeutic courts, such as drug courts, may also be described as diversion programs, but are not considered in this report. See Australian Institute of Health and Welfare, *Diverting Indigenous Offenders from the Criminal Justice System* (Resource Sheet No 24, Closing the Gap Clearinghouse, 2013) 5.
137. *Ibid.*, 9.
138. VEOHRC, above n 6, 29.
139. *Ibid.*, 81.
140. Prevention and early-intervention programs outside of criminal justice systems that target women at risk can also be understood as a form of diversion, but are beyond the scope of this report. See generally Lorana Bartels, 'Diversion Programs for Indigenous Women' (Research in Practice Report No 13, Australian Institute of Criminology, 2010) 3.
141. *Ibid.*, 2. Bartels notes that very little research has been done on the effectiveness of diversion for Aboriginal and Torres Strait Islander women.
142. Fiona Allison and Chris Cunneen, *Indigenous Bail Diversion: Program Options for Indigenous Offenders in Victoria* (Victorian Department of Justice, 2009) 29; Baldry and Cunneen, above n 28, 288-9.
143. Bartels, above n 140, 2.
144. See generally Chris Cunneen, 'Racism, Discrimination and the Over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17 *Current Issues in Criminal Justice* 329, 343.
145. Nous Group, above n 102, 54.
146. *Victorian Aboriginal Justice Agreement Phase 3 (AJA3): A Partnership Between the Victorian Government and Koori Community* (Department of Justice, 2013) 102.
147. Written correspondence from Simone Gristwood, Koori Justice Unit, Department of Justice (7 April 2017).
148. Australian Bureau of Statistics, above n 7.
149. See Fitzgerald, above n 87; Bartels, above n 23; VEOHRC, above n 6.
150. The Department for Correctional Services, *Annual Report 2015-6* (Government of South Australia, 2016) 59, 141, 143.
151. Northern Territory Department of Correctional Services, *Annual Statistics 2014-2015* (2016) 26, 35.
152. VEOHRC, above n 6, 50. Similar findings have emerged in studies examining the rise in youth detention numbers: Australian Institute of Criminology, *Drivers of Custodial Remand for Young People* (24 April 2015) <<http://www.aic.gov.au/>>.
153. *Ibid.*, citing Katrina Wong et al, *Bail Me Out: NSW Young Offenders and Bail* (Youth Justice Coalition, 2009).
154. VEOHRC, above n 6, 51.
155. *Ibid.*, 50-1.
156. MacGillivray and Baldry, above n 19, 10.
157. Aboriginal and Torres Strait Islander women sit at the intersection of two groups more likely to experience multifaceted disadvantage – women are more likely to than men, and Aboriginal and Torres Strait Islander people are more likely to than non-Indigenous people. See Tegan Cruwys et al, *Marginalised Australians: Characteristics and Predictors of Exit Over Ten Years 2001-10* (2013).
158. Bartels, above n 24, 1.
159. Christine Bond and Samantha Jefferies, 'Differential Sentencing of Indigenous Offenders' (2013) 8(7) *Indigenous Law Bulletin* 15, 17.
160. *Ibid.*
161. Mary Spiers Williams and Robyn Gilbert, 'Reducing the Unintended Impact of Fines' (Current Initiatives Paper 2, Indigenous Justice Clearinghouse, 2011) 5.
162. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, [22.5.84].
163. *Record of Investigation into Death of Ms Dhu*, above n 92, [795]-[798]; see also Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (Government of Western Australian, 2016) (this report does not capture those detained in police cells for fine default); Aboriginal Legal Service of Western Australia, above n 82.
164. Suspended fine orders have been introduced (see Sentencing Legislation Amendment Bill 2016 cl 48-52), but section 53 of the *Fines, Penalties and Infringement Notices Enforcement Act* (WA) remains.
165. Such a scheme has been called for by, for example, the Aboriginal Legal Service of WA. See Aboriginal Legal Service of Western Australia, above n 82.
166. *Fines Act 1996* (NSW) pt 4, div 8.
167. Department of Attorney-General & Justice, *A Fairer Fine System for Disadvantaged People: An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (Government of New South Wales, May 2011) 40-43.



# Sentencing and bail decisions informed by historical experiences and circumstances



Sentencing is a complex process undertaken by judges and magistrates. The purposes for which sentences can be imposed and factors that must be taken into account by courts are set down

in law. The sentencing process is underpinned by the notion of ‘individualised justice’, in which like offences and offenders are treated alike, but allowance made for difference.<sup>168</sup>

Sentencing decisions can have far-reaching consequences for an Aboriginal or Torres Strait Islander woman’s life, and that of her family and community. As the Supreme Court of Canada has observed:

Sentencing judges are among those decision-makers who have the power to influence the treatment of aboriginal offenders in the justice system. They determine most directly whether an aboriginal offender will go to jail, or whether other sentencing options may be employed which will play perhaps a stronger role in restoring a sense of balance to the offender, victim, and community, and in preventing future crime.<sup>169</sup>

The decision as to whether to bail or remand an accused person in prison is also guided by legislation and, as noted above, must be understood as having profound impacts on Aboriginal and Torres Strait Islander women’s lives.

## How do courts take Aboriginal and Torres Strait Islander status into account?

Only the ACT and Queensland *require* judges to consider the cultural background of an Aboriginal or Torres Strait Islander offender at sentencing.<sup>170</sup> In Queensland, this requirement is contingent on submissions being made by the relevant Aboriginal or Torres Strait Islander community justice group. In other jurisdictions, judges and magistrates have broad discretion to consider the circumstances and background of an offender, which means that different judges can consider factors relevant to a woman’s cultural background differently, if at all. In some courts, specific Aboriginal and Torres Strait Islander sentencing processes play a role in informing the court about cultural considerations (see below).

As a result of a lack of legislative guidance, it has largely been left to courts in the context of sentencing to determine when and how to take into account the historical and contemporary systemic discrimination and disadvantage experienced by Aboriginal and Torres Strait Islander people. In doing so, courts have said that ‘[t]he relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.’<sup>171</sup>

The High Court of Australia was asked in 2013 in the case of *Bugmy v The Queen*<sup>172</sup> to consider whether courts should be required to go beyond the individual circumstances of an Aboriginal offender, and take ‘judicial

notice' in all cases of the systemic social and economic disadvantage known to acutely affect Aboriginal and Torres Strait Islander offenders in Australia.<sup>173</sup>

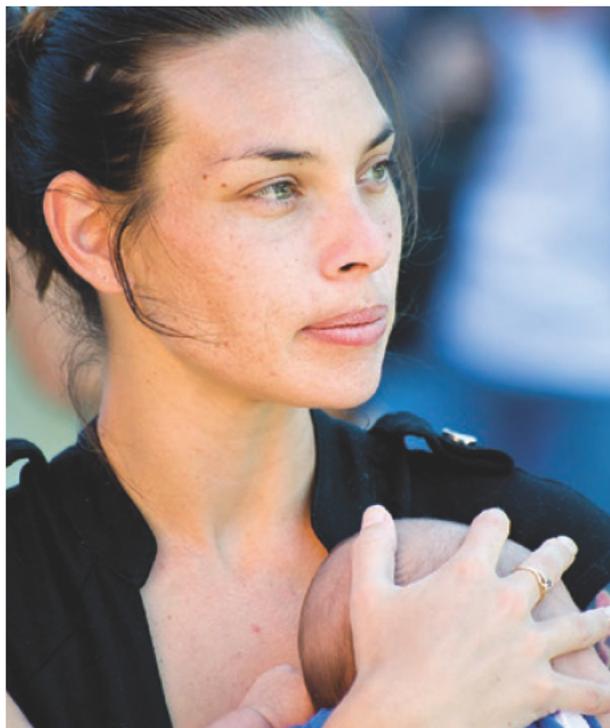
The Court dismissed such an approach as 'antithetical to individualised justice'.<sup>174</sup> It observed that taking 'judicial notice' of systemic disadvantage would tell the court 'nothing about a particular Aboriginal offender' and that material would need to be provided to the court that establishes an offender's background of disadvantage.<sup>175</sup>

What this means in practice is a race-neutral starting point – an individual's experience of disadvantage as a result of the historical and contemporary treatment of Aboriginal and Torres Strait Islander people may be taken into account, however that experience has to be established through evidence presented to the court. Judges then have broad discretion as to whether and how it is taken into account at sentencing.

### Why courts should be taking historical and systemic factors into account

The High Court's approach has been criticised as denying 'Indigenous offenders their unique historical, cultural and politico-economic context' and imposing 'a race neutrality that results in unequal and prejudicial outcomes'.<sup>176</sup>

For Aboriginal and Torres Strait Islander women confronting the courts as offenders, there would appear to be little hope that compounding experiences of racial and sex discrimination will be taken into account by courts as a systemic background factor anytime in the near future.<sup>177</sup> Already, there are very few cases that have examined how sentencing principles concerning Aboriginal and Torres Strait Islander people might relate to the distinct experiences and circumstances of women.<sup>178</sup>



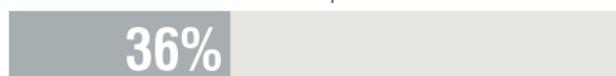
While this issue may be viewed as somewhat academic, the implications are real. Aboriginal and Torres Strait Islander women in prison are more likely to have been previously imprisoned.<sup>179</sup> As discussed above, the reasons for this are complex and include the intergenerational impacts of colonisation, violence, discriminatory policing and socio-economic disadvantage. It is however, the history of offending that is the most persuasive factor impacting on differences in sentencing between Aboriginal and Torres Strait Islander and non-Indigenous offenders.<sup>180</sup>

#### PRIOR IMPRISONMENT of those currently in prison

of those currently in prison, % **non** Aboriginal & Torres Strait Islander **men** who've been in prison before:



of those currently in prison, % of **non** Aboriginal & Torres Strait Islander **women** who've been in prison before:



of those currently in prison, % Aboriginal & Torres Strait Islander **men** who've been in prison before:



of those currently in prison, % Aboriginal & Torres Strait Islander **women** who've been in prison before:



Source: Australian Bureau of Statistics, Prisoners in Australia, 2016

It appears that if the handicap associated with prior imprisonment was alleviated, greater equality in the use of imprisonment orders between Aboriginal and Torres Strait Islander women and non-Indigenous women might be expected. Research suggests that once variables like past and current offending are controlled, there may be parity in sentencing outcomes, at least in higher courts.<sup>181</sup> This is not to say that prior convictions should never be taken into account in sentencing. Rather, the historical and systemic factors that mean Aboriginal and Torres Strait Islander people are more likely to have a history of offending should be taken into account to ensure more substantive equality in the justice system. In doing so however, care needs to be taken to ensure that violence perpetrated against Aboriginal and Torres Strait Islander women is not minimised.

Of course, the goal of governments should not just be to achieve equality in sentencing outcomes in light of the impact of colonisation, assimilation and other policies

of control and cultural destruction directed specifically against Aboriginal and Torres Strait Islander people. Equity in court outcomes is needed, through investment in Aboriginal and Torres Strait Islander-specific court processes, diversion options and sentencing options.<sup>182</sup>

## How the law could change to promote substantive equality

A legislative obligation to take historical and systemic factors into account

A legislative obligation to take into account the circumstances of Aboriginal offenders exists in Canada and has resulted in courts engaging more openly and constructively with the history and impacts of colonisation on Aboriginal people in Canada.

### The Canadian approach to sentencing Aboriginal offenders

The Canadian criminal justice system is similar to that in Australia in that it requires a focus on individualised justice. However, its federal criminal law imposes a specific requirement on judges to consider

‘all available sanctions other than imprisonment that are reasonable in the circumstances...with particular attention to the circumstances of aboriginal offenders.’<sup>183</sup>

This has forced courts to engage with Canada’s own brutal colonial history and its impact on Aboriginal people in Canada today, including over-imprisonment. In a landmark decision involving a female Aboriginal offender, the Supreme Court of Canada described the law as ‘remedial in nature’ and as aiming to ‘ameliorate the serious problem of overrepresentation of aboriginal people in prisons’.<sup>184</sup> In 2012 the Supreme Court of Canada emphatically stated that

Courts must take judicial notice of such matters as the history of colonialism, displacement, and the residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal people.<sup>185</sup>

Sentencing judges in Canada must now take into account:

- the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts
- the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection.<sup>186</sup>

A causal link between offending behaviour and an offender’s status as an Aboriginal person need not be proven. Such matters are viewed as providing context for assessing specific information provided to the court about the offender’s circumstances, rather than being the basis for automatically ordering a lighter sentence.<sup>187</sup>

The Canadian approach was distinguished by the High Court of Australia in *Bugmy* because Canadian law *requires* judges to take into account the circumstances of Aboriginal offenders.

In light of the High Court’s decision, it is now incumbent on state and territory governments to legislate to ensure that historical and systemic factors that have contributed to Aboriginal and Torres Strait Islander people’s over-imprisonment inform decisions by courts about whether or not to imprison. Most relevantly to women, this should include experiences of sexual and family violence, and the detrimental generational impact of imprisonment on their children. Such action is consistent with recommendations of the ACT Standing Committee on Justice and Community Safety in 2015 and the Law Reform Commission of Western Australia.<sup>188</sup>

Of course, law reform alone will not result in consistency towards, or address factors contributing to Aboriginal

and Torres Strait Islander women’s over-imprisonment. In Canada, it has been reported that a lack of Aboriginal-specific diversionary, restorative and healing options, together with inconsistent application of the law, has undermined the goals of the law, and Aboriginal imprisonment rates have continued to climb.<sup>189</sup>

For courts to make culturally competent and gender-sensitive sentencing orders, there needs to be such options available. As noted above in the context of diversion, there are simply not enough healing, rehabilitative, educational or restorative community-based options for Aboriginal and Torres Strait Islander women. All levels of government must address this gap as a matter of urgency.

In addition, judicial officers must be regularly trained and educated and engage with Aboriginal and Torres Strait Islander community controlled legal services and representative forums if the impacts of colonisation and systemic disadvantage are to meaningfully inform the decision-making of courts.

Reports that focus on the experiences and circumstances of Aboriginal and Torres Strait Islander women

As part of informing and educating the judiciary and ensuring greater equity in sentencing, reports are needed that link an offender’s circumstances with historical and systemic factors impacting on the lives of Aboriginal and Torres Strait Islander women and men.

### Gladue reports

In Canada, specialised reports, referred to as ‘Gladue reports’, are prepared, generally by Aboriginal people, to:

- identify the unique experience of Aboriginal offenders, such as removal from parents, institutional care, discrimination, lack of education, homelessness, poverty and substance abuse
- inform the court about culturally appropriate rehabilitative options for the offender.

The individual’s experience is located within the collective Aboriginal experience in Canada in order to explore innovative and culturally-tailored options for punishment, healing and reform.<sup>190</sup>

State and territory laws in Australia provide for pre-sentencing reports. However, the processes for preparing these reports and their contents have been described as unsuitable for ensuring that courts are meaningfully informed of an Aboriginal offender's history and circumstances and appropriate sentencing options.<sup>191</sup> Their role is not to locate an Aboriginal or Torres Strait Islander woman's offending within the broader context of colonisation, intergenerational trauma and socio-economic disadvantage. Nor is their role to examine culturally-safe and gender-specific sentencing possibilities, including options that respect the centrality of connection to family, community and country in the rehabilitation and healing of Aboriginal and Torres Strait Islander women.

Aboriginal and Torres Strait Islander sentencing processes, such as the Murri Courts and Community Justice Groups in Queensland, can ensure that such matters are brought to the attention of magistrates and judges through verbal submissions and written reports.<sup>192</sup> To ensure all courts consider historical and systemic factors in their decision-making, including higher courts hearing more serious cases, *Gladue*-type reports may also have a role to play in some jurisdictions in ensuring more equitable and appropriate sentencing outcomes.<sup>193</sup>

In response to similar concerns, the ACT Parliamentary Standing Committee on Justice and Community Safety recommended in 2015 that a process be established for the creation of reports similar to *Gladue* reports in Canada.<sup>194</sup>

*Gladue* reports can take time to prepare, which might result in delay. Further, they may not be necessary where Aboriginal and Torres Strait Islander sentencing processes, such as those of the Murri Courts and Community Justice Groups in Queensland and law and justice groups in the NT, already exist. State and territory governments should therefore work with Aboriginal and Torres Strait Islander communities and organisations, including representatives of existing Aboriginal and Torres Strait Islander sentencing courts and justice groups, to determine whether and how *Gladue*-type reports can be incorporated into the criminal process.

Importantly, for the distinct experiences and circumstances of Aboriginal and Torres Strait Islander women to be brought out in such reports, it will be necessary to employ and train Aboriginal and Torres Strait Islander women to prepare, or substantially contribute to, such reports.

## Bail decisions

Consideration of Aboriginal and Torres Strait Islander women's systemic disadvantage should also be a requirement in bail decisions, particularly given the growing numbers of Aboriginal and Torres Strait Islander women in prison on remand.

Bail laws in NSW, NT and Victoria require Aboriginal and Torres Strait Islander status, including cultural obligations and ties to extended family or place, to be taken into account by police, bail justices and magistrates in determining whether to grant bail where an accused person is Aboriginal or Torres Strait Islander.<sup>195</sup> The amendment to the Victorian *Bail Act* was said to reflect an effort to promote substantive equality in bail decisions and to recognise the historical and continuing disadvantage of Aboriginal and Torres Strait Islander people, which has led to overrepresentation in prison, including on remand.<sup>196</sup> This section has seen courts in Victoria consider, for example, the compounding discrimination and vulnerability of an Aboriginal child with a disability in granting bail.<sup>197</sup>

More generally, the rate of all women's imprisonment on remand is growing faster than that of men. Given the high number of Aboriginal and Torres Strait Islander women in the justice system who are primary carers, there is a need for greater consideration of the impact of not granting bail on dependent children.

Bail support and diversionary options linked with accommodation, designed by and for Aboriginal and Torres Strait Islander women, are required for such legislative reforms to have their intended affect.

## Recommendation 15:

State and territory governments amend bail and sentencing laws and processes to ensure that:

- historical and systemic factors contributing to Aboriginal and Torres Strait Islander people's over-imprisonment are taken into account in all bail and sentencing decisions involving Aboriginal and Torres Strait Islander people
- informed consideration is given to the impact of imprisonment, including remand, on dependent children.

### Recommendation 16:

Police and courts in each state and territory develop guidance materials and ensure that police and judicial officers are regularly educated by Aboriginal and Torres Strait Islander people about:

- the gendered impacts of colonisation and systemic discrimination and disadvantage
- how these impacts contribute to Aboriginal and Torres Strait Islander people's over-imprisonment.

### Recommendation 17:

State and territory governments work with Aboriginal and Torres Strait Islander representatives and organisations, including representatives of existing Aboriginal and Torres Strait Islander sentencing courts, to determine whether, and how, to adopt processes for *Gladue*-type reports in sentencing.

## Specialist Aboriginal and Torres Strait Islander court processes

The language, processes and formality of the courtroom are alien to many Australians. For Aboriginal and Torres Strait Islander people the alienation of the court process can be compounded by, and reinforce, the oppression and discrimination associated with forces of colonisation.

In most states and territories, there have been attempts to incorporate aspects of Aboriginal and Torres Strait Islander justice processes, albeit largely limited to the sentencing stage, after a finding or plea of guilty. These include Aboriginal Sentencing Circles in South Australia, Murri Courts in Queensland, Koori Sentencing Courts in Victoria and law and justice groups in the NT, such as the Ponki mediators in the Tiwi Islands and Kurdiji in Lajamanu. There is potential for these forums to have a greater role in early-intervention and diversion strategies, however it is not within the scope of this report to examine this in detail.

Aboriginal and Torres Strait Islander sentencing courts do not practice customary law, rather they are a modification of the state's formal legal process. Their processes are less formal and more dialogue-based and involve Aboriginal and Torres Strait Islander community elders

and respected persons as key participants. While the magistrate or judge retains ultimate power in determining how to sentence an offender, the aim is to ensure a more culturally relevant process and sentence.

Evaluations of Aboriginal and Torres Strait Islander sentencing courts have pointed to the important role they play in empowering communities to take greater ownership of at least one aspect of the criminal process. They provide a more culturally relevant sentencing process and encourage consideration of the wider circumstances of the lives of offenders and victims. Critically, they also promote cross-cultural learning within justice institutions.<sup>198</sup>

Data indicates that Aboriginal and Torres Strait Islander women do participate as offenders, however very little focus has been directed to the effectiveness of Aboriginal and Torres Strait Islander sentencing courts for female offenders.<sup>199</sup> Typically, they exclude family and sexual violence offences, of which women are overwhelmingly the victims/survivors. No research could be identified that looked at whether the courts are equipped to provide both a culturally relevant and gender-sensitive response that deals appropriately both with women's histories of victimisation and offending.

### Recommendation 18:

State and territory governments work with Aboriginal and Torres Strait Islander communities to monitor and evaluate the accessibility and appropriateness of existing Aboriginal and Torres Strait Islander sentencing processes for women.

168. *Postiglione v The Queen* (1997) 189 CLR 295, 301 (Dawson and Gaudron JJ).
169. *R v Gladue* [1999] 1 SCR 688, 723[65].
170. *Penalties and Sentences Act 1992* (Qld) s 9(2)(p); Crimes (Sentencing) Act 2005 (ACT) s 33(1)(m).
171. *R v Fernando* (1992) 76 A Crim R 58, 62 (Wood J). For commentary on the application of the *Fernando* principles see Richard Edney, 'The Retreat from *Fernando* and the Erasure of Indigenous Identity in Sentencing' (2006) 6(11) *Indigenous Law Bulletin* 8.
172. (2013) 249 CLR 571 ('*Bugmy*').
173. *Ibid.* [28]-[41]. See Sarah Krasnostein, 'Too Much Individualisation, Not Enough Justice: *Bugmy v The Queen*' (2014) 39(1) *Alternative Law Journal* 12; Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2016) *Melbourne University Law Review* 47.
174. *Bugmy* (2013) 249 CLR 571, [41].
175. *Ibid.* The Court did accept the acute disadvantage of Aboriginal peoples as a whole, and the fact that the negative impacts of childhood deprivation do not lessen over time.
176. Anthony, Bartels and Hopkins, above n 173, 53.
177. For discussion of the impact of *Bugmy* on the sentencing of Aboriginal women see Lucy Jackson, 'Sentencing Indigenous Women after *Bugmy*' (2015) 40 *Alternative Law Journal* 171.
178. Julie Stubbs, 'Indigenous Women in Australian Criminal Justice: Over-represented but Rarely Acknowledged' (2011) 15 *Australian Indigenous Law Review* 47, 58.
179. Australian Bureau of Statistics, above n 7. See also Sentencing Advisory Council, *Comparing Sentencing Outcomes for Koori and Non-Koori Adult Offenders in the Magistrates Court of Victoria* (State of Victoria, 2013) 59.
180. Christine Bond and Samantha Jeffries, 'Indigeneity and the Judicial Decision to Imprison' (2011) 51 *British Journal of Criminology* 256, 270; Sentencing Advisory Council, *ibid.*
181. Bond and Jeffries 271-2; Christine Bond and Samantha Jeffries, 'Differential Sentencing of Indigenous Offenders: What Does Research Tell Us?' (2013) 8(7) *Indigenous Law Bulletin* 15.
182. *Ibid.*, 17.
183. *Criminal Code*, RSC 1985, c C-46, s 718.2(e).
184. *R v Gladue* [1999] 1 SCR 688, 737[93].
185. *R v Ipeelee* [2012] 1 SCR 433, [59]-[60]. For application in the context of sentencing Aboriginal women, see also *R v Pelletier* 2016 ONCJ 628.
186. *R v Ipeelee* [2012] 1 SCR 433, 468-9[59]-[60]; *R v Gladue* [1999] 1 SCR 688.
187. *R v Ipeelee* [2012] 1 SCR 433, 469-83[60]-[83] (LeBel J for McLachlin CJC, Binnie, LeBel, Deschamps, Fish and Abella JJ).
188. Standing Committee on Justice and Community Safety, ACT Legislative Assembly, above n 4, [6.176], recommendation 18; Law Reform Commission of Western Australia, *The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report, Project 94, 2006), 177, recommendation 37.
189. Graeme Hamilton, 'Twenty Years After Federal Government Changed Sentencing, Aboriginals Still Disproportionately Fill Our Prisons' *National Post* (online) 22 June 2016 <<http://news.nationalpost.com/news/canada/>>.
190. *R v Gladue* [1999] 1 SCR 688, 725-8[70]-[74]. See also Kelly Hannah-Moffat and Paula Maurutto, 'Re-contextualising Pre-sentence Reports: Risk and Race' (2010) 12 *Punishment and Society* 262, 266. The reports are named after a Supreme Court case, *R v Gladue*.
191. Written correspondence, Aboriginal Legal Service of Western Australia (30 March 2017)
192. For discussion, see Elena Marchetti and Thalia Anthony, 'Sentencing Indigenous Offenders in Canada, Australia and New Zealand' *Oxford Handbooks Online: Criminology and Criminal Justice, International and Comparative Criminology* (2016) 19-20.
193. Thalia Anthony, Enhancing Justice for Indigenous Defendants Through Community Pre-Sentence Reports (forthcoming) 4. Draft on file with Human Rights Law Centre.
194. Standing Committee on Justice and Community Safety, ACT Legislative Assembly, above n 4, [6.178], recommendation 20.
195. *Bail Act 1977* (Vic) s 3A; *Bail Act 2013* (NSW) s 18; *Bail Act* (NT) s 24.
196. Statement of Compatibility, Bail Amendment Bill 2010 (Vic) [3495] The Victorian provision must be read with the cultural rights of Aboriginal people recognised in Victoria's *Charter of Human Rights and Responsibilities Act 2006* s 19.
197. See, eg, *DPP v S E* [2017] VSC 13; see also VEOHRC, above n 6, 49-50.
198. The successes and limitations of Aboriginal sentencing courts have been written about extensively and a detailed analysis is beyond the scope of this report. See, eg, Elena Marchetti, *Indigenous Sentencing Courts* (Brief 5, Indigenous Justice Clearinghouse, December 2009); for evaluations, see Cultural and Indigenous Research Centre Australia, *Evaluation of Circle Sentencing Program* (NSW Attorney-General's Department, 2008); Zoe Dawkins et al, *County Koori Court: Final Evaluation Report* (Clear Horizon Consulting for the County Court of Victoria and the Victorian Department of Justice, 2011).
199. Bartels, above n 140.



Human Rights Law Centre Ltd  
Level 17, 461 Bourke Street  
Melbourne VIC 3000  
T: +61 (3) 8636 4450  
W: [www.hrlc.org.au](http://www.hrlc.org.au)



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