

9. Female Offenders

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Summary

9.1 The Terms of Reference ask the ALRC to have regard to ‘Aboriginal and Torres Strait Islander women and their rate of incarceration’. This chapter contextualises Aboriginal and Torres Strait Islander female offending within experiences of trauma, including isolation, family and sexual violence, and child removal. Consequently, the ALRC makes some proposals in the Discussion Paper related to the provision of services that may be required to address some of the criminogenic factors of female Aboriginal and Torres Strait Islander offenders.

9.2 While the ALRC makes no proposals in this chapter, chapters 5, 6, and 7 include proposals, questions and discussions on areas that specifically respond to Aboriginal and Torres Strait Islander women’s incarceration.

Underlying factors

9.3 The vast majority of Aboriginal and Torres Strait Islander women will never enter the criminal justice system as offenders, or be incarcerated.¹ However, Aboriginal and Torres Strait Islander female offenders are the fastest growing prison cohort in Australia, growing at a rate which significantly exceeds the growth rate of other

¹ See, eg, Lorana Bartels, ‘Indigenous Women’s Offending Patterns: A Literature Review’ (Australian Institute of Criminology, 2010) iii; Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women’s Growing Over-Imprisonment* (2017) 5; Don Weatherburn, ‘Rack ’em, Pack ’Em and Stack ’Em: Decarceration in an Age of Zero Tolerance’ (2016) 28(1) *Current Issues in Criminal Justice*; Law Council of Australia, *Addressing Indigenous Imprisonment: National Symposium—Discussion Paper* (2015) 9.

offenders, including Aboriginal and Torres Strait Islander male offenders.² They represent over one-third (34%) of all incarcerated women, despite representing only 2% of the adult female population.³ At June 2016, Aboriginal and Torres Strait Islander women were incarcerated at a rate which was 21 times the rate for non-Indigenous women,⁴ while in the Northern Territory (NT), Aboriginal and Torres Strait Islander women made up 86% of the adult female prison population.⁵

9.4 The rate at which Aboriginal and Torres Strait Islander women are imprisoned has been identified as a reflection of the multiple and layered nature of the disadvantage they face as a cohort.⁶ The links between entrenched disadvantage—including social, cultural and economic forms—and increased rates of criminal justice contact, are well-established.⁷ Aboriginal and Torres Strait Islander female prisoners are disproportionately more likely than their non-Indigenous counterparts to:

- have experienced family violence and sexual assault;
- be mothers and primary care givers of children;⁸
- have mental illness or cognitive disability;
- have substance abuse issues;

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- 2 Human Rights Law Centre and Change the Record Coalition, above n 1, 10; Peta MacGillivray and Eileen Baldry, 'Australian Indigenous Women's Offending Patterns' (Brief 19, Indigenous Justice Clearinghouse, June 2015) 11; Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (Produced for the Steering Committee for the Review of Government Service Provision, 2016) [4.13.1]; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 16.
- 3 Human Rights Law Centre and Change the Record Coalition, above n 1, 10; Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) tables 2, 4; Australian Bureau of Statistics, *Australian Demographic Statistics, Cat No 3101.0* (2016) table 7; Australian Bureau of Statistics, *Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026, Cat No 3238.0* (2014) series B, 18 years and over, table 1.
- 4 Human Rights Law Centre and Change the Record Coalition, above n 1, 10; Australian Bureau of Statistics, above n 3, table 20.
- 5 Human Rights Law Centre and Change the Record Coalition, above n 1, 10; Australian Bureau of Statistics, above n 3, table 20; Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2016, Cat No 4512.0* (2017).
- 6 Human Rights Law Centre and Change the Record Coalition, above n 1, 16; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013), 84; 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* (March 2013) 4–7.
- 7 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 126; Human Rights Law Centre and Change the Record Coalition, above n 1, 16; Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into the Impact of Drug-Related Offending on Female Prisoner Numbers: Interim Report* (2010) v–vi.
- 8 Holly Johnson, 'Drugs and Crime: A Study of Incarcerated Female Offenders' (Research and Public Policy Series No 63, Australian Institute of Criminology, 2004) 20; 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* 85; Koori Justice Unit, Department of Justice (Vic), 'Koori Women's Diversion Project' (Presentation, Koori Women's Diversion Project Working Group, 3 July 2013).

- have entered into the child protection system as children;
- have earlier and more frequent criminal justice contact—including police contact and incarceration;
- be living in unstable housing or homeless;
- be unemployed; and
- have lower levels of educational attainment.⁹

9.5 As the Victorian Equal Opportunity and Human Rights Commission noted, the complex needs of many Aboriginal and Torres Strait Islander female offenders is deeply intertwined with historical and ongoing experiences of intergenerational trauma, institutionalisation, and colonisation.¹⁰ This suggests that strategies which aim to address the complex needs of Aboriginal and Torres Strait Islander female offenders should take a trauma-informed and culturally appropriate approach. These strategies should be responsive to the numerous reasons why Aboriginal and Torres Strait Islander women may choose not to disclose their histories, and the multiple layers to the disadvantage they face.

9.6 Aboriginal and Torres Strait Islander female offenders disproportionately experience incarceration defined by:

- low-level offending (eg, failure to pay a fine);
- repeat incidents; and
- short terms of incarceration.¹¹

9.7 This can result in a cycle of ongoing disruption, caused partly by repeated low-level offending and incarceration, which exacerbates existing disadvantage and makes it extremely difficult to reintegrate into society.¹² Although data is not conclusive, it appears that Aboriginal and Torres Strait Islander women are incarcerated at greater rates for minor crimes which, if committed by a non-Indigenous woman, are unlikely to attract prison sentences.¹³ One possible explanation for why Aboriginal and Torres Strait Islander women may be incarcerated at greater rates is that they often have long

9 Human Rights Law Centre and Change the Record Coalition, above n 1, 16; Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1.

10 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 22.

11 Lorana Bartels, above n 1, iii; Lorana Bartels, 'Sentencing of Indigenous Women (2012)' (Brief No 14, Indigenous Justice Clearinghouse, November 2012) 3; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 20.

12 Human Rights Law Centre and Change the Record Coalition, above n 1, 4–5; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 88.

13 Human Rights Law Centre and Change the Record Coalition, above n 1, 11–2, 24; Lorana Bartels, above n 1; Bartels, above n 11; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 56.

criminal records marked by low-level offending.¹⁴ For example, a 2012 study revealed that 67% of Aboriginal and Torres Strait Islander female prisoners had been incarcerated previously, compared to 36% of non-Indigenous women.¹⁵ By contrast, others argue that Aboriginal and Torres Strait Islander people are in general less likely to receive a custodial sentence than those who are non-Indigenous.¹⁶

9.8 There is a long list of royal commissions, reports, inquests, and inquiries documenting both the existence and effects of policing practices on Aboriginal and Torres Strait Islander communities and peoples generally.¹⁷ The ALRC acknowledges that police practices, and police and community relationships, have much improved over recent years. However, a number of stakeholders emphasised that issues remain, in particular, suggested that Aboriginal and Torres Strait Islander women are over-policed as offenders,¹⁸ while also being under-recognised as victims of crime.

9.9 With respect to over-policing, the evidence indicates that this group are more likely to be charged and arrested for public order offences and other forms of minor offending than non-Indigenous women.¹⁹ These include offences such as offensive language and behaviour, driving offences, and justice procedure offences (such as breach of a community-based order). When compared to non-Indigenous women, Aboriginal and Torres Strait Islander women are also more likely to be subject to ‘preventative’ detention regimes—such as the Alcohol Mandatory Treatment regime (AMT) in the NT.²⁰ AMT is discussed in Chapter 8.

14 Human Rights Law Centre and Change the Record Coalition, above n 1, 12; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 56; Don Weatherburn and Stephanie Ramsay, ‘What’s Causing the Growth in Indigenous Imprisonment in NSW?’ (Bureau Brief Issue Paper No 118, NSW Bureau of Crime Statistics and Research, 2016) 10.

15 Bartels, above n 11, 1.

16 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 37.

17 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5 recs 60–1, 79–91, 214–33; Human Rights Law Centre and Change the Record Coalition, above n 1, 22; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 42; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 70, 80; Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System—Discussion Paper* (2010) 36; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (2016) 40–2; *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016).

18 See, eg, Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 39, 42; Human Rights Law Centre and Change the Record Coalition, above n 1, 24, 30–3; 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* (March 2013) 12–13.

19 Human Rights Law Centre and Change the Record Coalition, above n 1, 22; Victoria Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders—Discussion Paper* (2017) 173; Mary Stathopoulos and Antonia Quadara, ‘Women as Offenders, Women as Victims: The Role of Corrections in Supporting Women with Histories of Sexual Abuse’ (Report, Women’s Advisory Council of Corrective Services NSW, 2014) 17; Bartels, above n 9.

20 Human Rights Law Centre and Change the Record Coalition, above n 1, 24.

9.10 In a 2013 report, the Victorian Equal Opportunity and Human Rights Commission cited an example of over-policing of an Aboriginal woman. In that matter, police charged a pregnant 21 year old Aboriginal mother of two small children with a fraud offence for travelling on a train using a child's ticket—when the lesser, and more appropriate,²¹ charge of failure to carry a valid ticket was open and available to them.²² This matter is discussed further in Chapter 2.

9.11 The results of punitive policing and arrest practices against Aboriginal and Torres Strait Islander women can be tragic—of the 11 female deaths examined as part of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), none of the women were incarcerated for serious offences.²³ More recently, the death of Ms Dhu in custody in Western Australia (WA) illustrates the escalating impacts that minor offending can result in when combined with racial stereotypes, assumptions, and discrimination by police. The Coroner's report into the death of Ms Dhu noted that she had been arrested on various warrants of commitment, and that it had been calculated that she would have had to 'spend four days in custody unless outstanding fines ... were paid'.²⁴

9.12 The Australian Institute of Criminology has identified a combination of factors as underlying the deep mistrust of police by some Aboriginal and Torres Strait Islander women.²⁵ These include: over- and under-policing; the historical role of police in implementing former government policies including those relating to child removal; a history of conflict between police and Aboriginal and Torres Strait Islander communities; and the role of police in Aboriginal and Torres Strait Islander deaths in custody. The ALRC acknowledges the views of many stakeholders that, although the past cannot be undone, there are strong pathways to be forged between Aboriginal and Torres Strait Islander communities and police, and that these can result in better outcomes for people, including women, in those communities.

9.13 Numerous articles and reports have argued that Aboriginal and Torres Strait Islander female offenders are, by and large, a group that requires support, prevention, and diversion—not punitive responses.²⁶ However, there remains a lack of available evaluations of 'what works' in terms of reintegration of Aboriginal and Torres Strait Islander female prisoners and offenders.²⁷ It is evident that programs that work for

21 *Re Mitchell* [2013] VSC 59 (8 February 2013).

22 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 46.

23 Human Rights Law Centre and Change the Record Coalition, above n 1, 24.

24 *Inquest into the Death of Ms Dhu (11020-14)* (Unreported, WACorC, 16 December 2016); Human Rights Law Centre and Change the Record Coalition, above n 1, 24.

25 Matthew Willis, 'Non-Disclosure of Violence in Australian Indigenous Communities' (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 4–10.

26 See, eg, Chris Cunneen, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems' in Sandra Bucerius and Michael Tonry (eds), *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford University Press, 2014) 280; Human Rights Law Centre and Change the Record Coalition, above n 1, 5; Amanda Porter, 'The Price of Law and Order Politics: Re-Examining the *Fines, Penalties and Infringement Notices Enforcement Amendment Act 2012* (WA)' (2015) 8(16) *Indigenous Law Bulletin* 28.

27 Australasian Institute of Judicial Administration, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (2016) 2, 13; Lorana Bartels, above n

Aboriginal and Torres Strait Islander men do not necessarily work for Aboriginal and Torres Strait Islander women—each group having different needs.²⁸ Aboriginal and Torres Strait Islander women, in particular, appear to engage most effectively with an intersectional approach that recognises their needs both as women and as Aboriginal and Torres Strait Islander people.²⁹

Addressing the complex needs of ATSI female offenders

Parenting responsibilities and intergenerational trauma

9.14 Some estimates suggest that up to 80% of Aboriginal and Torres Strait Islander female prisoners are mothers,³⁰ with 20% Aboriginal and Torres Strait Islander children nationally experiencing parental incarceration.³¹ Stakeholders told the ALRC that the incarceration of Aboriginal and Torres Strait Islander women contributes to gaps in ‘parenting, income, child care, role models and leadership’ in their communities,³² entrenching future disadvantage.³³ The intergenerational nature of Aboriginal and Torres Strait Islander female incarceration appears to be borne out in data that shows that Aboriginal and Torres Strait Islander children, who are removed from their mothers, are themselves not only much more likely to enter the criminal justice system,³⁴ but also are at higher risk of ‘developing behaviour problems, experiencing psychosocial dysfunction, experiencing stigmatisation and discrimination, and suffering negative health outcomes’.³⁵ The Australian Institute of Health and Welfare noted that young people who are the subject of child protection orders are 27 times more likely to be under a youth justice supervision order in the same year.³⁶ Aboriginal and Torres Strait Islander young males and females were 1.7 and 2.2 times as likely to be the subject of a supervision order, compared to their non-Indigenous counterparts.³⁷

1, ix; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 5–6, 70.

28 Australasian Institute of Judicial Administration, above n 27, 13; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 25, 98.

29 Human Rights Law Centre and Change the Record Coalition, above n 1, 17; Australian Institute of Criminology, *Diversion Programs for Indigenous Women* (2010) 3.

30 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 81.

31 Simon Quilty, ‘The Magnitude of Experience of Parental Incarceration in Australia’ (2005) 12(1) *Psychiatry, Psychology and Law* 256–7; Michael Levy, ‘Children of Prisoners: An Issue for Courts to Consider in Sentencing’ (Speech, Federal Criminal Justice Forum, Canberra, 29 September 2008).

32 Human Rights Law Centre and Change the Record Coalition, above n 1, 13.

33 See, eg, Hannah Payer, Andrew Taylor and Tony Barnes, ‘Who’s Missing? Demographic Impacts from the Incarceration of Indigenous People in the Northern Territory, Australia’ (Paper, Crime, Justice and Social Democracy: 3rd International Conference, 2015) vol 1; Human Rights Law Centre and Change the Record Coalition, above n 1, 13; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 76, 90–1.

34 Department of Juvenile Justice (NSW), *NSW Young People in Custody Health Survey: Key Findings Report* (2003).

35 Arlene F Lee, ‘Children of Inmates: What Happens to These Unintended Victims?’ (2005) 67(3) *Corrections Today* 84; PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017) 33.

36 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016) vi.

37 *Ibid.*

9.15 In 2017, the United Nations Special Rapporteur on Violence Against Women emphasised the crucial importance of diverting Aboriginal and Torres Strait Islander women from the criminal justice system—particularly those who are mothers—and recommended that state and territory governments amend laws that contribute to their unnecessary imprisonment.³⁸

9.16 The Special Rapporteur specifically recommended that fine default laws be amended, in part due to their disproportionate impact on the rate of imprisonment of Aboriginal and Torres Strait Islander women.³⁹ Fines are discussed in Chapter 6. The Rapporteur also recommended the introduction of family violence ‘justice targets’ as part of the Council of Australian Government’s ‘Closing the Gap’ measures, noting the role of family violence in the incarceration of Aboriginal and Torres Strait Islander women.⁴⁰ Justice targets are discussed in Chapter 10.

Family violence and sexual abuse

9.17 Aboriginal and Torres Strait Islander women are frequent victims of crime, particularly interpersonal or violent crime.⁴¹ Prison population surveys have revealed high rates of family violence and sexual abuse among incarcerated Aboriginal and Torres Strait Islander women. One Western Australian study suggested that up to 90% of Aboriginal and Torres Strait Islander female prisoners are survivors of family and other violence.⁴² A New South Wales study revealed that 70% of the Aboriginal and Torres Strait Islander female prisoner cohort disclosed they were survivors of child sexual abuse, with 44% subject to ongoing sexual abuse, and 70% experiencing violence as adults.⁴³ Unsurprisingly, these experiences of trauma often translate into higher rates of psychiatric issues—with Aboriginal and Torres Strait Islander women more than 11 times more likely to experience severe psychological distress than the general population.⁴⁴

9.18 Aboriginal and Torres Strait Islander women are among the least likely to disclose the fact that they are survivors of violence and sexual abuse—with studies showing that up to 90% of violence directed at Aboriginal and Torres Strait Islander women is unreported to police.⁴⁵ Poor police responses may be a contributing factor to the under-reporting of violence against Aboriginal and Torres Strait Islander women.

38 United Nations Special Rapporteur on the Rights of Indigenous Peoples, *End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, on Her Visit to Australia* (2017).

39 Ibid.

40 Ibid.

41 Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (2011) 1; Productivity Commission, above n 2, 4.98.

42 Mandy Wilson et al, ‘Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia’ (2017) 7(1) *SAGE Open* 2158244016686814, 6.

43 Human Rights Law Centre and Change the Record Coalition, above n 1, 17; Stathopoulos and Quadara, above n 19, 18.

44 Bartels, above n 9, 11.

45 Willis, above n 25, 1; Human Rights Law Centre and Change the Record Coalition, above n 1, 17.

9.19 There have been documented instances of police responding poorly or not at all to offending that occurs against Aboriginal and Torres Strait Islander women—particularly in relation to family violence. The case of Ms Mullaley is illustrative. In March 2013, Ms Mullaley was assaulted by her partner and found naked and injured by Western Australian police officers. Instead of being taken to medical services or given medical aid, Ms Mullaley was charged with assaulting police, with her behaviour branded a ‘distraction’ from other issues raised by Ms Mullaley with police about a potential threat to her child’s safety. The child was ultimately murdered by her abusive partner. Upon investigation by the WA Corruption and Crime Commissioner, it was noted that police had failed to consider whether the cause of Ms Mullaley’s behaviour was related to family violence committed against her—and had instead made assumptions that Ms Mullaley was a perpetrator, not a victim.⁴⁶

9.20 Submissions to the ALRC and NSWLRC joint inquiry into family violence in 2010 also provided examples of police charging Aboriginal and Torres Strait Islander women who are the subject of family violence protection orders with ‘aid and abet’ provisions in relation to their breach.⁴⁷ The following example was provided by National Legal Aid to that Inquiry:

An Aboriginal woman living in the Pilbara had been in a long-term violent relationship. After being physically assaulted again, she obtained an interim violence restraining order against her partner on the advice of the police. Some weeks later after pressure from extended family and her children she allowed her partner to attend her house to see the children. Her partner again assaulted her and the police were called to the house. The police charged her partner with assault and breach of the restraining order. The woman was also charged with breach of restraining order as a party to the offence. She pleaded guilty and was given a fine. She remarked to the refuge that she would never seek a protection order again.⁴⁸

9.21 Although experiences of abuse have not been found to directly contribute to rates of Aboriginal and Torres Strait Islander female incarceration, traumatic histories can have secondary and cascading effects which can continue long after the initial abuse has ended. In 2001, the NSW Aboriginal Justice Advisory Council reported that at least 80% of Aboriginal women surveyed linked previous experiences of abuse indirectly to their offending,⁴⁹ with histories of sexual abuse in particular noted as ‘central features of women’s pathways into offending, their experiences of custody, and their capacity to engage in rehabilitation programs’.⁵⁰ Research reveals that prison—rather than being a refuge from violence or sexual abuse—can actually mirror the power dynamics of abusive relationships, with acts such as routine strip-searching contributing to the ongoing re-traumatisation of Aboriginal and Torres Strait Islander

46 Human Rights Law Centre and Change the Record Coalition, above n 1, 31.

47 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 517–8; *Keane v Police* (1997) 69 SASR 481, 484.

48 National Legal Aid, Submission No 232 to Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response* (15 July 2010).

49 Human Rights Law Centre and Change the Record Coalition, above n 1, 17.

50 *Ibid.*

women, and reinforcing themes of powerlessness, lack of control, and vulnerability to an already traumatised cohort.⁵¹

9.22 This suggests that in order to address the issue of Aboriginal and Torres Strait Islander female incarceration rates—as well as the high rates of substance abuse and psychological distress—the causes of trauma must be addressed through culturally competent supports and interventions. However, due to the short length of sentences Aboriginal and Torres Strait Islander women commonly receive, there can be practical difficulties in providing appropriate mental health treatment and other supports in what is often a relatively short prison episode.⁵² Short sentences are discussed in Chapter 4.

Mental illness, disability, and substance abuse

9.23 Rates of psychological disability for Aboriginal and Torres Strait Islander women are more than double that for Aboriginal and Torres Strait Islander men.⁵³ This includes higher rates of hospitalisation for psychiatric issues, as well as higher rates of mental illness, Post-Traumatic Stress Disorder (PTSD), and cognitive impairment.⁵⁴ One Victorian study revealed that more than nine in ten (92%) Aboriginal and Torres Strait Islander female prisoners surveyed had received a lifetime diagnosis of a recognised mental illness, and almost half met the criteria for PTSD.⁵⁵

9.24 Aboriginal and Torres Strait Islander female offenders also commonly have histories involving substance abuse.⁵⁶ For many of these prisoners, self-medicating can be a response to childhood and ongoing trauma, which may include experience in or with the child protection system, homelessness, and being a victim of abuse.⁵⁷ Aboriginal and Torres Strait Islander women who are survivors of family violence are also more likely to experience mental illness and cognitive impairment.⁵⁸

9.25 Aboriginal and Torres Strait Islander women with cognitive impairment have among the highest rates of criminal justice system contacts of any group and are significantly overrepresented in multiple areas of disadvantage compared to men—

51 Ibid; Human Rights Law Centre, *Total Control: Ending the Routine Strip Searching of Women in Victoria's Prisons* (2017) 14; Mary Stathopoulos et al, 'Addressing Women's Victimisation Histories in Custodial Settings' (ACCSA Issues No 13, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2012) 10–11.

52 Bartels, above n 9, 11.

53 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People, Oct 2010, Cat No 4704.0* (2010); Human Rights Law Centre and Change the Record Coalition, above n 1, 18.

54 Human Rights Law Centre and Change the Record Coalition, above n 1, 18; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 33.

55 Victoria Department of Justice, *Koori Prisoner Mental Health and Cognitive Function Study—Final Report* (2013) 13.

56 Ibid 13.

57 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 77; Sisters Inside, *The Over-Representation of Aboriginal and Torres Strait Islander Women in Prison* (2013) 3.

58 Eileen Baldry, 'Continuing Systemic Discrimination— Indigenous Australian Women Exiting Prison' in *Women Exiting Prison: Critical Essays on Gender, Post-Release Support and Survival* (Routledge, 2013) 99–100.

Aboriginal and Torres Strait Islander or otherwise.⁵⁹ These include rates of: complex needs; out-of-home care; police contact; remand episodes; homelessness; and victimisation.⁶⁰ It may also be the case that cognitive impairment—including Foetal Alcohol Spectrum Disorders (FASD)—may remain undetected and undiagnosed, often leading to a cycle of incarceration and disadvantage.

9.26 The criminal justice system is poorly suited to respond to complex needs arising from mental illness, disability, and substance abuse. The Human Rights Law Centre and the Change the Record Coalition argue that the role of prison has become—in many cases—simply to ‘warehouse’ or ‘manage’ people who fall into these categories, without providing appropriate or adequate support in addressing the underlying issues that led them to become incarcerated in the first place.⁶¹ This is particularly the case for cognitive impairment, which remains chronically undiagnosed and largely misunderstood. These issues are explored in Chapter 11 dealing with access to justice.

Poverty

9.27 Poverty has been shown to magnify the detrimental effect that minor offending has on an offender. The most common penalty Aboriginal and Torres Strait Islander women receive are fines.⁶² Fines can have hugely significant impacts when they are imposed on people who experience poverty and disadvantage.⁶³ The Human Rights Law Centre and Change the Record Coalition argued that ‘unpaid fines [as well as enforcement costs], may in reality mean a choice between imprisonment and children going without food, clothes or other necessities’.⁶⁴

9.28 The interaction of poverty and punitive criminal justice regimes can be hugely damaging for Aboriginal and Torres Strait Islander women, particularly in relation to unpaid fine regimes, penalty notices, and Criminal Infringement Notices (CINs). It can result in escalating consequences arising from what may begin as relatively minor and victimless offending. Fines are discussed in Chapter 6. Common examples raised by stakeholders to date include offensive language offences and the issuing of speeding tickets.

9.29 Stakeholders suggested that the Western Australian fines legislation has particularly significant consequences for Aboriginal and Torres Strait Islander women. The legislation provides for a series of escalating consequences that, when combined with poverty, eventually results in the imprisonment of the fine defaulter, without any safeguard of judicial oversight.⁶⁵

59 Eileen Baldry et al, ‘A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System’ (University of New South Wales, 2015) 45.

60 Ibid.

61 Human Rights Law Centre and Change the Record Coalition, above n 1, 18.

62 Ibid 38.

63 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 46.

64 Human Rights Law Centre and Change the Record Coalition, above n 1, 38.

65 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).

9.30 The interaction of Aboriginal and Torres Strait Islander female disadvantage and incarceration is described by the Human Rights Law Centre and Change the Record Coalition in the following terms:

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.⁶⁶

9.31 Even where fine default does not result in imprisonment, the interaction of poverty and CINs can result in driver licence disqualification for Aboriginal and Torres Strait Islander women, on the basis that they are often unable to pay the fine. This can create impossible situations for women, particularly in areas that are not supported by transport infrastructure. For instance, it makes it impossible, or at the least, very difficult to continue to meet family needs such as dropping children off at school or attending medical appointments.

9.32 Unpaid fines resulting in driver licence disqualification can have serious and cascading effects in these situations, and can result in the imprisonment of the Aboriginal and Torres Strait Islander women for secondary offences such as driving while disqualified.⁶⁷

Homelessness and lack of stable accommodation

9.33 The lack of stable accommodation can mean that Aboriginal and Torres Strait Islander women are more likely to breach community-based orders, parole and bail. It has been identified as contributing to higher levels of criminal justice contact and incarceration for Aboriginal and Torres Strait Islander people.⁶⁸ However, because of the central role Aboriginal and Torres Strait Islander women play in raising children, the importance of securing stable accommodation for this cohort is elevated.⁶⁹ One common consequence of incarceration—particularly where there are repeated episodes of short-term incarceration—is that the offender may lose access to their existing housing. This puts their children at high risk of entering the child protection system.⁷⁰

9.34 Aboriginal and Torres Strait Islander women are the least likely of any cohort to be able to find appropriate accommodation upon release from incarceration—particularly where they have dependent children.⁷¹ A study of NSW and Victorian Aboriginal and Torres Strait Islander female prisoners released between 2001–2003 found that:

- none of the women were able to find stable family accommodation;

66 Human Rights Law Centre and Change the Record Coalition, above n 1, 22.

67 Ibid 38.

68 Council of Australian Governments, *Prison to Work Report* (2016) 47; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 22.

69 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 76–7.

70 Human Rights Law Centre and Change the Record Coalition, above n 1, 18.

71 Ibid.

- half were still homeless at nine months after release; and
- over two-thirds (68%) returned to prison within nine months.⁷²

Diversion

Question 9–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?

9.35 Stakeholders consulted to date have stressed that diversion initiatives and responses to Aboriginal and Torres Strait Islander female offending and incarceration must be underpinned by the demonstrated strengths of Aboriginal and Torres Strait Islander women as a group. Diversion programs might involve ‘treatment, healing, family support, education and training programs that target the root causes of offending’ as well as ‘restorative justice processes ... that aim to directly engage the offender with the consequences of their offending and repairing the harm’.⁷³

9.36 The Australasian Institute of Judicial Administration has observed that diversion initiatives and programs that are effective for non-Indigenous women or Aboriginal and Torres Strait Islander men may be ineffective or even detrimental to Aboriginal and Torres Strait Islander women.⁷⁴ Despite the lack of evidence generally in terms of ‘what works’ in relation to Aboriginal and Torres Strait Islander women in terms of reducing and mitigating the effects of criminal justice system contact,⁷⁵ some key principles have been identified. Diversion programs for Aboriginal and Torres Strait Islander female offenders should:

- be culturally and gender specific;
- draw on community knowledge in their design and delivery;
- recognise the significant role of Aboriginal and Torres Strait Islander women in family and community life;
- ensure Aboriginal and Torres Strait Islander women ‘have a stable base—especially in regards to safe and secure housing’;
- allow Aboriginal and Torres Strait Islander women ‘to be with their children and support families to rebuild;
- deal with experiences of violence, trauma and victimisation—and secondary consequences of these;

72 Eileen Baldry et al, ‘Ex-Prisoners, Homelessness and the State in Australia’ (2006) 39(1) *Australian & New Zealand Journal of Criminology* 8.

73 Human Rights Law Centre and Change the Record Coalition, above n 1, 35.

74 Australasian Institute of Judicial Administration, above n 27, 13.

75 Human Rights Law Centre and Change the Record Coalition, above n 1, 21.

- promote and strengthen connection to culture;
- support Aboriginal and Torres Strait Islander women to navigate the complex and fragmented service system; and
- use a wrap-around approach, providing life skills, parenting skills, mental health services, drug and alcohol support and disability support, as required.⁷⁶

Barriers to effective diversion of Aboriginal and Torres Strait Islander women

9.37 Where Aboriginal and Torres Strait Islander specific programs do exist, the ALRC has heard that they are commonly offered only to Aboriginal and Torres Strait Islander men and exclude Aboriginal and Torres Strait Islander women, in part due to the much greater total volume of male prisoners. Systemic barriers specific to Aboriginal and Torres Strait Islander women include:

- lower rates of admission to police—because diversion options often require an admission of wrongdoing;⁷⁷
- demand for diversionary initiatives often exceeding supply—particularly in relation to court-based diversionary options;⁷⁸
- high rates of homelessness and lack of stable housing, compounded by family violence—making it difficult to engage with court and other community-based diversionary initiatives;⁷⁹
- the likelihood that Aboriginal and Torres Strait Islander women have criminal records than their non-Indigenous counterparts, or be facing multiple charges—making them often ineligible for diversionary options that may exist;
- higher rates of substance abuse and mental health issues—which can make their circumstances too complex for existing diversionary options with strict eligibility criteria; and
- high rates of remand and short sentences, making them ineligible for any programs that may aid in reducing recidivism.⁸⁰

The need for improved data collection

9.38 Although lack of reliable and cross-comparable data in relation to offending and incarceration is an issue affecting Aboriginal and Torres Strait Islander people generally, it is an issue that particularly hinders accurate assessment of the needs and

76 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 6–7. See also Sisters Inside, *The Over-Representation of Aboriginal and Torres Strait Islander Women in Prison* (2013) 2–8.

77 Reasons for mistrust of police by Aboriginal and Torres Strait Islander women are discussed by the ALRC above.

78 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 58.

79 Ibid 60.

80 Prison programs are discussed in Chapter 5.

pathways of Aboriginal and Torres Strait Islander female offenders.⁸¹ In 2002 and in 2004, the Aboriginal and Torres Strait Islander Social Justice Commissioner stressed that the paucity of data in relation to Aboriginal and Torres Strait Islander female offending had rendered them ‘invisible’ in the criminal justice system.⁸²

9.39 Although now beginning to improve, data analysis in relation to Aboriginal and Torres Strait Islander women has been particularly hampered by the fact that data collected regularly does not disaggregate Aboriginal and Torres Strait Islander women and men, or Aboriginal and Torres Strait Islander and non-Indigenous women.⁸³ This is part of the ‘invisibility’ of Aboriginal and Torres Strait Islander women in the criminal justice system. One example of this is provided by the Human Rights Law Centre and Change the Record Coalition:

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.⁸⁴

9.40 Even where data is collected in a disaggregated way, it may not be cross-comparable with other jurisdictions because of the way in which the data has been collected, differences in statutory definitions, or differences in the way in which criminal justice processes operate.⁸⁵ This lack of consistency between jurisdictions can make comparisons impossible or misleading, and contributes to the lack of evidence-based solutions in relation to Aboriginal and Torres Strait Islander women.⁸⁶

9.41 The importance of consistency in data collection and the importance of empirical evidence and evaluated programs form key features of Aboriginal Justice Agreements, discussed in Chapter 10.

9.42 The ALRC invites comment on what, if any, reforms to criminal justice laws or legal frameworks could be made to respond to the increasing rate of female Aboriginal and Torres Strait Islander incarceration.

81 Human Rights Law Centre and Change the Record Coalition, above n 1, 21.

82 Ibid 21; Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004* (2005) 135.

83 Human Rights Law Centre and Change the Record Coalition, above n 1, 21.

84 Ibid.

85 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 45–6; Human Rights Law Centre and Change the Record Coalition, above n 1, 21.

86 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 46–50; Human Rights Law Centre and Change the Record Coalition, above n 1, 21.