

11. Aboriginal and Torres Strait Islander Women

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Summary

11.1 The Terms of Reference to this Inquiry 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 intergenerational trauma, including family and sexual violence, child removal, mental illness and disability and poverty.

11.2 Strategies that aim to address the offending of Aboriginal and Torres Strait Islander women must take a trauma-informed and culturally appropriate approach. These strategies must be responsive to the numerous reasons why Aboriginal and Torres Strait Islander women become involved in the criminal justice system and the multiple layers of disadvantage they face.

11.3 Aboriginal and Torres Strait Islander women constitute a fast growing group in prison populations, yet the historically low numbers of female Aboriginal and Torres Strait Islander offenders—and misunderstandings of their criminogenic needs—has meant that few appropriately-designed criminal justice responses are available.

11.4 This chapter briefly reviews some of the alternatives to incarceration, including holistic, trauma-informed diversion programs for Aboriginal or Torres Strait Islander women who have experienced deep and intergenerational trauma. To minimise reoffending and to help Aboriginal and Torres Strait Islander women out of the criminal justice system, it is critical that criminal justice responses are not only trauma-informed and culturally appropriate but are developed with and delivered by Aboriginal and Torres Strait Islander women.

11.5 Female Aboriginal and Torres Strait Islander offenders are likely to have been victims, often of family violence. In this chapter the ALRC makes recommendations to enhance police responses to family violence in Aboriginal and Torres Strait Islander communities.

Incidence

11.6 The vast majority of Aboriginal and Torres Strait Islander women will never enter the criminal justice system as offenders, or be incarcerated.¹ It is well established, however, that Aboriginal and Torres Strait Islander women are vastly over-represented in the criminal justice system and in the prison population, and that the numbers of female Aboriginal and Torres Strait Islander prisoners are rapidly growing.²

11.7 In 2016, Aboriginal and Torres Strait Islander women represented 34% of all women in prison.³ The level of imprisonment for Aboriginal and Torres Strait Islander women exceeded that of non-Indigenous women by a factor of 21.2—that is Aboriginal or Torres Strait Islander women were 21.2 times more likely to be imprisoned than non-Indigenous women. Further still, the rate of imprisonment for Aboriginal and Torres Strait Islander women exceeded even that of non-Indigenous men.⁴

11.8 Aboriginal and Torres Strait Islander women are also significantly over-represented in the remand population, meaning that Aboriginal and Torres Strait Islander women may be less likely to be granted bail by the court than non-Indigenous people.⁵ In fact, Aboriginal and Torres Strait Islander women were 15.7 times more likely to be in prison on remand than non-Indigenous women—an over-representation ratio even higher than that of Aboriginal and Torres Strait Islander men to non-Indigenous men (10.9).⁶

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.

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 No 19, Indigenous Justice Clearinghouse, June 2015) 11; Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) [4.13.1]; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 16. See also ch 3.

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 See ch 3.

5 See ch 5.

6 See ch 3.

11.9 This rate of over-representation is a persistent and growing problem. Since 2006, the rate of imprisonment of Aboriginal and Torres Strait Islander women increased from 365.8 per 100,000 adult Aboriginal and Torres Strait Islander females in 2006, to 464.8 per 100,000 in 2016.⁷

11.10 Aboriginal and Torres Strait Islander incarceration has been characterised by:

- low-level offending including justice procedure offences and failure to pay a fines);
- prior incarceration; and
- short terms of imprisonment.⁸

11.11 Aboriginal and Torres Strait Islander female prisoners are disproportionately more likely than their non-Indigenous counterparts to:

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

11.12 In their 2017 Report the Human Rights Law Centre and Changing the Record asserted that:

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

7 See ch 3.

8 Lorana Bartels, above n 1, iii; Lorana Bartels, 'Sentencing of Indigenous Women' (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.

9 See, eg, 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).

extreme disadvantage, the criminal justice system perpetuates and institutionalises discrimination and inequality.¹⁰

11.13 Although the 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 pathways of Aboriginal and Torres Strait Islander female offenders.¹¹ This has been a longstanding problem. 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.¹²

11.14 Although now beginning to improve, data analysis in relation to Aboriginal and Torres Strait Islander women has been particularly hampered because publicly available data may not disaggregate Aboriginal and Torres Strait Islander women from men, or Aboriginal and Torres Strait Islander women from non-Indigenous women.¹³

11.15 Legal Aid WA raised concerns around the failure of existing data on Female Aboriginal offenders ‘to consider Aboriginal women as a separate group with a unique set of circumstances and needs’ where analysis of that data ‘tends to focus on Aboriginal people *or* gender as a group, yet rarely the intersection of the two’.¹⁴

11.16 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.¹⁵ This lack of consistency between jurisdictions can make comparisons difficult, and contributes to the lack of evidence-based solutions in relation to Aboriginal and Torres Strait Islander women.¹⁶

11.17 Limitations of data are further discussed in Chapter 3. The importance of consistency in data collection and of empirical evidence and evaluated programs form key features of Aboriginal Justice Agreements and criminal justice targets. These are further discussed in Chapter 16.

Drivers of incarceration for Aboriginal and Torres Strait Islander women

11.18 The rate at which Aboriginal and Torres Strait Islander women are imprisoned

10 Human Rights Law Centre and Change the Record Coalition, above n 1, 16.

11 Ibid 21.

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

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

14 Legal Aid WA, *Submission 33*.

15 Senate Standing Committees on Finance and Public Administration, 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.

16 Senate Standing Committees on Finance and Public Administration, 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.

has been identified as a reflection of the multiple and layered nature of the disadvantage they face.¹⁷ The links between entrenched disadvantage, including social, cultural and economic forms, and increased rates of criminal justice contact, are well-established.¹⁸ A cycle of ongoing disruption—caused partly by repeated low-level offending and short terms of incarceration—can exacerbate existing disadvantage and make it extremely difficult for a female offender to reintegrate into her community.¹⁹

Family violence and sexual abuse

11.19 Aboriginal and Torres Strait Islander women are frequent victims of crime, particularly interpersonal or violent crime.²⁰ Female Aboriginal and Torres Strait Islander prisoners are likely to have been victims of crime themselves, particularly family violence and sexual abuse.²¹ 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 were survivors of family and other violence.²² A New South Wales study in 2014 revealed that 70% of the Aboriginal and Torres Strait Islander female prisoners disclosed they were survivors of child sexual abuse, with 44% subject to ongoing sexual abuse as adults and 78% experiencing violence as adults.²³ The National Association of Community Legal Centres submitted similar data on the rates of sexual abuse and assault of Aboriginal women in prison in NSW.²⁴ A study of Victorian female prisoners found 87% were victims of sexual, physical or emotional abuse, with most having suffered abuse in multiple forms.²⁵

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- 17 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 Standing Committees on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 4–7.
- 18 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4; Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 126; Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 27–42; 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.
- 19 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.
- 20 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.
- 21 Council of Australian Governments, above n 20, 1; Productivity Commission, above n 2, 4.98.
- 22 Mandy Wilson et al, ‘Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia’ (2017) 7(1) *SAGE Open* 6.
- 23 Human Rights Law Centre and Change the Record Coalition, above n 1, 17; Mary Stathopoulos and Antonia Quadara, ‘Women as Offenders, Women as Victims: The Role of Corrections in Supporting Women with Histories of Sexual Abuse’ (Women’s Advisory Council of Corrective Services NSW, 2014) 18.
- 24 Mary Stathopoulos and Antonia Quadara, above n 23.
- 25 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013).

11.20 The prevalence of family violence in Aboriginal and Torres Strait Islander communities, and the damaging effects of family violence and sexual abuse have been recognised as key drivers of the incarceration of Aboriginal and Torres Strait Islander men and, increasingly, women.²⁶ Family violence has been described as cyclical and intergenerational.²⁷

11.21 Research suggests that Aboriginal and Torres Strait Islander women are up to 35 times more likely to experience domestic and family violence than non-Indigenous Australian women²⁸ and that Aboriginal and Torres Strait Islander women and girls are 31 times more likely to be hospitalised due to domestic and family violence-related assaults compared to non-Indigenous women and men.²⁹

11.22 Aboriginal and Torres Strait Islander women face many barriers when attempting to access the justice system. The National Family Violence Prevention Legal Services (NFVPLS) submitted:

[F]rontline experience demonstrates that Aboriginal and Torres Strait Islander women face a wide array of complex and compounding barriers to accessing support, including the reporting of family violence. Those barriers include:

- a lack of understanding of legal rights and options and how to access advice and support;
- mistrust of mainstream legal, medical, community and other support services and their ability to understand and respect the needs and wishes of Aboriginal and Torres Strait Islander women;
- a lack of cultural competency and experiences of direct or indirect discrimination across the support sector, including by police and other agencies such as child protection;
- a lack of access to interpreters or support for people with low levels of literacy;
- fear of child removal if disclosing experiences of violence and/or risk of criminalisation;
- particular cultural or community pressures not to go to the police, such as perceived threats to cultural connection (especially for children) or to avoid increased criminalisation of Aboriginal and Torres Strait Islander men; and
- poverty and social isolation.³⁰

26 PwC's Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (2017) 23.

27 See, eg, Aboriginal Peak Organisations (NT), Submission No 134 to the Senate Standing Committees on Finance and Public Administration, *Domestic Violence in Australia* (August 2014) 4; Janet Stanley et al, 'Causal Factors of Family Violence and Child Abuse in Aboriginal Communities: Exploring Child Sexual Abuse in Western Australia' (Australian Institute of Family Studies, prepared for the Western Australian Government Inquiry into Responses by Government Agencies to complaints of Family Violence and Child Abuse in Aboriginal Communities, 2002).

28 National Plan to Reduce Violence against Women and Their Children, *Third Action Plan 2016–2019 of the National Plan to Reduce Violence against Women and Their Children 2010–2022* (2016) 1, citing Australian Institute of Health and Welfare, *Family Violence among Aboriginal and Torres Strait Islander Peoples* (2006).

29 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011—Report* (2011) 29.

30 National Family Violence Prevention Legal Services, *Submission 77*.

11.23 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,³¹ 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’.³²

11.24 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—addressing the prevalence of family and sexual violence in Aboriginal communities must be a priority and involve targeted trauma-informed responses including culturally competent supports and interventions. As the Human Rights Law Centre and Change the Record Coalition have stated, ‘[r]esponding 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’.³³

11.25 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 and other treatments and supports in what is often a relatively short prison episode.³⁴ Short sentences are further discussed in Chapter 7, while a greater exploration of the effects of prison environments on Aboriginal and Torres Strait Islander women is discussed below.

11.26 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.³⁵

11.27 The 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.³⁶ The impact of fines on the incarceration of women is discussed in Chapter 12. 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.³⁷ A discussion on the development of criminal justice targets is included in Chapter 16.

31 Aboriginal Justice Advisory Council, *Holistic Community Justice: A Proposed Response to Aboriginal Family Violence* (Attorney-General’s Department (NSW), 2001) 6 as cited in Human Rights Law Centre and Change the Record Coalition 17.

32 Ibid.

33 Ibid.

34 Lorana Bartels, ‘Painting the Picture of Indigenous Women in Custody in Australia’ (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1, 11.

35 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).

36 Ibid.

37 Ibid.

Mental health and cognitive impairment

11.28 Rates of psychological disability for Aboriginal and Torres Strait Islander women are more than double that for Aboriginal and Torres Strait Islander men.³⁸ 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.³⁹ 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.⁴⁰

11.29 Female Aboriginal and Torres Strait Islander offenders also commonly have histories involving substance abuse.⁴¹ 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.⁴² Aboriginal and Torres Strait Islander women who are survivors of family violence are also more likely to experience mental illness and cognitive impairment.⁴³

11.30 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 over-represented in multiple areas of disadvantage compared to men—be they Aboriginal and/or Torres Strait Islander or otherwise.⁴⁴ These include rates of: complex needs; out-of-home care; police contact; remand episodes; homelessness; and victimisation.⁴⁵ 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.

11.31 National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted to this Inquiry that:

A substantial number of Aboriginal and Torres Strait Islander women are entering the criminal justice system with an undetected disability. Aboriginal and Torres Strait Islander women with cognitive impairment have some of the highest rates of the criminal justice system of any social group, and are significantly over-represented

38 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.

39 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.

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

41 Ibid 13.

42 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.

43 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.

44 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.

45 Ibid.

compared to men. Experiences of disability and poor mental health must be a central focus of the development of culturally safe diversionary options.⁴⁶

11.32 The criminal justice system is poorly suited to respond to complex needs arising from mental illness, disability, acquired brain injury 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 Aboriginal and Torres Strait Islander women to become incarcerated in the first place.⁴⁷ This is particularly the case for cognitive impairment, which remains chronically undiagnosed and largely misunderstood. This is further explored in Chapter 10 that looks at access to justice issues.

Poverty and homelessness

11.33 Poverty and homelessness is a significant factor in the lives of many Aboriginal and Torres Strait Islander women who are incarcerated where:

Poverty has been shown to magnify the detrimental effect that minor offending has on an offender. The Top End Women's Legal Service Inc noted: In 2015-16, around 60 percent of TEWLS clients were experiencing or at risk of experiencing domestic and family violence; over 60 percent were on a low or nil income; and over 20 percent identified having a disability and/or mental illness. Additionally, in 2015-16, TEWLS provided double the amount of advices as the previous year, and triple the amount of casework, with women still being referred out due to capacity constraints.⁴⁸

11.34 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. The negative impact of fines, including offensive language offences and driving offences, is discussed in Chapter 12.

11.35 Sisters Inside suggested a link between poverty, homelessness and criminal behaviours stating:

Poverty, homelessness and social exclusion are also drivers of criminalisation and imprisonment for women. The Newstart Allowance is the only source of income for many criminalised women prior to and after their imprisonment. The Newstart Allowance has not increased in real terms (i.e. greater than CPI) since 1994.⁴⁹

11.36 NATSILS submitted:

Homelessness and poverty increase the chances of individuals entering the criminal justice system. It is necessary for legal frameworks to support those who experience homelessness rather than further marginalise and criminalise experiences of homelessness. Additional support services are required to ensure the availability of accommodation options and stable housing to meet certain community based orders.

46 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

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

48 Top End Women's Legal Service, *Submission 52*.

49 Sisters Inside, *Submission 119*.

Disconnection from country and culture, and the inter-generational effects of historic treatment of Aboriginal and Torres Strait Islander people, plays a role in the over-representation of Aboriginal and Torres Strait Islander people in prison.⁵⁰

11.37 The interaction of Aboriginal and Torres Strait Islander female disadvantage and incarceration was also described by the Human Rights Law Centre and Change the Record Coalition, reporting ‘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’.⁵¹

11.38 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 the safeguard of judicial oversight.⁵²

11.39 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.⁵³

11.40 Homelessness or a lack of stable accommodation can be a criminogenic factor for Aboriginal and Torres Strait Islander women that is often elevated on release from prison—adding to the likelihood of reoffending. This in turn may put children at a high risk of entering the child protection system.⁵⁴

11.41 Aboriginal and Torres Strait Islander women are the least likely of any group within prisons to be able to find appropriate accommodation upon release from incarceration—particularly where they have dependent children.⁵⁵ A study of NSW and Victorian Aboriginal and Torres Strait Islander female prisoners released between 2001–2003 found that:

- none of the women was able to find stable family accommodation;
- half were still homeless at nine months after release; and
- over two-thirds (68%) returned to prison within nine months.⁵⁶

11.42 Legal Aid NSW highlighted accommodation issues for Aboriginal and Torres Strait Islanders upon release from prison, drawing attention to the following case study:

50 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

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

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

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

54 *Ibid* 18.

55 *Ibid*.

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

Case Study: Kayla

Legal Aid NSW assisted Kayla, an Aboriginal woman leaving custody. She advised us that many years earlier she had left social housing because of domestic violence, and became homeless. She applied for social housing at the Department of Housing, indicating that she left her previous tenancy because of domestic violence. Despite this, her application was refused because of a debt she owed to the Department. She was not advised of her right to appeal this refusal. She was given 28 days of emergency housing. She was subsequently homeless for six years and did not have her children with her during that period. She was physically and sexually assaulted during this time. Eventually, she was convicted of criminal offences and incarcerated.⁵⁷

11.43 The Law Council of Australia suggested:

Access to adequate housing is a growing and serious issue in Australia. Aboriginal women exiting prison who have children face extreme difficulty in establishing a home where they can live with their children post-release. Children of imprisoned parents are at a higher risk of homelessness and disrupted childhoods than other young people. International human rights law recognises that every person has the right to adequate housing. Article 11 of the International Covenant on Economic, Social and Cultural Rights, which Australia is a party, states: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right”.

There is strong evidence that indicates the best solutions are to invest in health and housing support services, so that there is an adequate safety net for people who are vulnerable. Without adequate housing Aboriginal women may be forced into homelessness, making them particularly vulnerable to violence and to police interference, harassment and re-arrest for public order offences.⁵⁸

11.44 Josephine Cashman highlighted the need for increased funding for housing and other infrastructure especially in remote communities:

A 2015 infrastructure audit of the 73 largest remote Indigenous communities in the NT found that less than 50% had mobile and data services. Only 26% had standard town planning regimes, less than 50% had a permanent police presence, and housing met only 60% of demand. Nearly all had no sea transport services, ensuring that communities in the north are inaccessible by land for half the year due to flooding. The impact of this lack of infrastructure is devastating for Indigenous communities. In the worst affected areas, overcrowding is at a rate of 19 adults and children per room. The solution is to build enabling environments across remote Australia. This will require large investments over coming decades.⁵⁹

57 Legal Aid NSW, *Submission 101*. See also Law Council of Australia, *Submission 108*.

58 Law Society of Western Australia, *Submission 111*; Law Council of Australia, *Submission 108*.

59 J Cashman, *Submission 105*.

Criminal Justice services, programs and responses

Recommendation 11–1 Programs and services delivered to female Aboriginal and Torres Strait Islander offenders within the criminal justice system—leading up to, during and post-incarceration—should take into account their particular needs so as to improve their chances of rehabilitation, reduce their likelihood of reoffending and decrease their involvement with the criminal justice system. Such programs and services, including those provided by NGOs, police, courts and corrections, must be:

- developed with and delivered by Aboriginal and Torres Strait Islander women; and
- trauma-informed and culturally appropriate.

11.45 In their report on Koori women in the criminal justice system, the Victorian Equal Opportunity and Human Rights Commission suggested that 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.⁶⁰ Strategies that aim to address the offending of Aboriginal and Torres Strait Islander women should be responsive to the numerous reasons why Aboriginal and Torres Strait Islander women become involved in the criminal justice system and the multiple layers of disadvantage they face. This suggests that programs and services must take a trauma-informed and culturally appropriate approach.

11.46 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.⁶¹

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.⁶²

11.47 Programs developed for Aboriginal and Torres Strait Islander men do not necessarily transpose to Aboriginal and Torres Strait Islander women—each group

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

61 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.

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

having different needs.⁶³ 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.⁶⁴

11.48 Dr Vickie Hovane, Dorinda Cox and Professor Harry Blagg described a systemic failing of the criminal justice system, where programs delivered to Aboriginal peoples, particularly Aboriginal women, are not designed by Aboriginal people and particularly not by Aboriginal women, thus failing to meet their needs:

Inter-generational trauma impacts on all Aboriginal families and communities. It impacts on individuals, families, communities and cultures. For Aboriginal people, it is a collective consequence of colonisation rather than simply an individual experience. It is compounded by negative contact with the justice and related systems, such as children's protection. Because this trauma impacts across all levels of Aboriginal society, there is a need for a holistic and life-span approach to addressing the issue. Such an approach starts as a minimum from pre-birth through to later-life. It aims to reduce the incidence of issues such as foetal alcohol spectrum disorders (FASD) as a result of maternal substance use, low birthweight due to poverty, and other impairments among children being born into Aboriginal families. Such an approach should also respond to the traumatising impacts of processes such as the Stolen Generations on the health and wellbeing of individuals, families and communities, across generations. These are all symptoms of the profound intergenerational trauma experienced by Aboriginal people.

Mainstream approaches and programs, particularly those relying on cognitive behavioural therapeutic techniques have only limited value for responding to intergenerational trauma among Aboriginal people including those who are imprisoned. It is time for a paradigm shift that requires investment in Aboriginal led, designed and managed initiatives. The current system has been designed by White people for White people. More specifically, it is designed by White men for White men – Aboriginal women are particularly disadvantaged because of this.⁶⁵

11.49 Dorinda Cox further suggested failings in the way in which diversionary programs are delivered:

Many of the Aboriginal women are hyper vigilant due to their trauma and medication is used for behavioural management, rather than having culturally led therapeutic responses these should be lead by Aboriginal organisations and workers to engage with Aboriginal women on their specific needs across remand, sentenced and pre-release facilities... Mapping the journey into, through and post release from the justice system is critical in understanding the challenges, barriers and experiences to build a new system that enables diversionary away from the current high levels of Aboriginal women in prison and to be responsive to the transmission of intergenerational trauma of Aboriginal people and communities.⁶⁶

63 Australasian Institute of Judicial Administration, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (2016) 13; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 25, 98.

64 Human Rights Law Centre and Change the Record Coalition, above n 1, 17; Lorana Bartels, 'Diversion Programs for Indigenous Women' (Research in Practice Report No 13, Australian Institute of Criminology, 2010) 3.

65 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

66 D Cox, *Submission 120*.

Police responses

Recommendation 11–2 Police engaging with Aboriginal and Torres Strait Islander people and communities should receive instruction in best practice for handling allegations and incidents of family violence—including preventative intervention and prompt response—in those communities.

11.50 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 people and their communities.⁶⁷

11.51 The ALRC recognises that police practices, and police and community relationships, have much improved over recent years. However, a number of stakeholders emphasised that issues remain, suggesting in particular, that Aboriginal and Torres Strait Islander women are over-policed as offenders,⁶⁸ while also being under-recognised as victims of crime. Queensland Law Society stated:

‘police practices that contribute to stereotyping First Nations women as violent and/or untrustworthy or criminal may contribute to the increase of criminalisation and over-representation of Aboriginal and or Torres Strait islander women in the criminal justice system.’⁶⁹

11.52 The Australian Institute of Criminology has identified a combination of factors underlying the deep mistrust of police by some Aboriginal and Torres Strait Islander women. 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.⁷⁰ The ALRC acknowledges the views of many stakeholders that, while 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

67 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 Standing Committees on Finance and Public Administration, 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* (Australian Human Rights Commission, 2016) 40–2; *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016).

68 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 Standing Committees on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 12–13.

69 Queensland Law Society, *Submission 86*.

70 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.

outcomes for people, including women, in those communities. In their Report, the Human Rights Law Centre and Change the Record Coalition suggested that to better address family violence in Aboriginal and Torres Strait Islander communities:

...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.⁷¹

11.53 Because family violence contributes significantly to the factors that contribute to offending—including child removal, homelessness, poverty, poor physical and mental health and substance misuse—the way police respond to family violence incidents can have a significant impact on women's offending and incarceration.⁷²

11.54 Historical and ongoing processes of colonisation provide important context for the way in which police respond to family violence within Aboriginal and Torres Strait Islander households and communities and the way those communities in turn perceive that police response.⁷³ Factors identified as particularly affecting contemporary police responses in relation to family violence include the historical role of police in child removals and the deaths in custody of Aboriginal and Torres Strait Islander men—as well as a history of police responding poorly when Aboriginal and Torres Strait Islander women report family violence.⁷⁴

11.55 One of the key challenges facing police in relation to family violence affecting Aboriginal and Torres Strait Islander households and communities is under-reporting. An Australian Institute of Criminology (AIC) 2010 review highlighted research that suggested up to 90% of violence against Aboriginal and Torres Strait Islander women goes unreported to police.⁷⁵

11.56 The AIC found that although there are structural barriers affecting the reporting of family violence generally (including perceptions of inadequate justice system responses), fear and distrust of police and the justice system is a factor particularly affecting the reporting of family violence by Aboriginal and Torres Strait Islander women.⁷⁶ Antoinette Braybrook suggested that Aboriginal victims/survivors of family

71 Human Rights Law Centre and Change the Record Coalition, above n 1, 33.

72 Sisters Inside, *Submission 119*; J Cashman, *Submission 105*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*; National Family Violence Prevention Legal Services, *Submission 77*; Human Rights Law Centre, *Submission 68*; Top End Women's Legal Service, *Submission 52*.

73 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 2 [13.2.2–13.2.14]; Willis, above n 70, 3; Human Rights Law Centre and Change the Record Coalition, above n 1, 16.

74 Sisters Inside, *Submission No 69* to Senate Standing Committees on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013).

75 Willis, above n 70, 1.

76 *Ibid* 4.

violence face significant impediments to reporting and seeking support for family violence including:

lack of understanding of legal rights and options and how to access supports when experiencing family violence poor police responses and discriminatory practices within police and child protection services community pressure not to go to the police in order to avoid increased criminalisation of Aboriginal men.⁷⁷

11.57 In her 2016 address to the National Press Club, Jacinta Price outlined the many difficulties with respect to Aboriginal and Torres Strait Islander people making complaints to police in relation to family violence and abuse:

I could spend days giving examples of acts of family violence that I have been witness to or learned of within my own family in remote communities ... Where I am related to both victim and perpetrator and where the kinship network demands loyalty to your family members even if they are a perpetrator. One is expected to pretend that these perpetrators are decent human beings and ignore the fact that they have committed acts of physical and sexual violence towards those you love. Because to speak the truth is to create conflict. So from early in life, everyone learns to lie to keep the peace—which manifests into child and youth suicide and the continuation of a destructive cycle. I have given just a glimpse of examples of violence that some Aboriginal women experience. The number of deaths due to homicide that have impacted my family is in the hundreds. And in the NT alone for Aboriginal families it is in the thousands. But this epidemic is not only occurring in remote areas but within urban Aboriginal communities as well. The code of silence that victims live in blankets both remote and urban Australia.⁷⁸

11.58 Stakeholders to this Inquiry noted the barriers to reporting family violence including: a lack of understanding of their legal rights and options; mistrust of mainstream legal and other services; fear of child removal if they disclose experiences of violence and/or the risk of criminalisation; and cultural or community pressures not to go to the police.⁷⁹

11.59 The NFVPLS assessed that:

... a combination of preventative education, community engagement, support services and legal assistance (as both early intervention and response) are all crucial parts of the continuum of services to address and reduce family violence against Aboriginal and Torres Strait Islander women and children ...⁸⁰

11.60 Josephine Cashman noted benefits arising from supports around the reporting of family violence, submitting that where ‘victims are supported and encouraged to report violence, the act of reporting itself works to deter offenders and potential offenders by signalling intolerance for this criminal behaviour’.⁸¹

77 Antoinette Braybrook, ‘Family Violence in Aboriginal Communities’ 2 *Domestic Violence Resource Centre Victoria Advocate* 20.

78 Jacinta Price, ‘Violence and Silence’ in *Ending the Violence in Indigenous Communities* (National Press Club Address, CIS Occasional Paper 152, 2016) 4.

79 National Family Violence Prevention Legal Services, *Submission 77*; Aboriginal Legal Service of Western Australia, *Submission 74*.

80 National Family Violence Prevention Legal Services, *Submission 77*.

81 J Cashman, *Submission 105*.

11.61 A number of stakeholders also voiced concerns about calls to minimise police involvement as a response to the issue of over-policing. Commenting on the Third Action Plan to Reduce Violence Against Women (implemented as part of the National Plan to Reduce Violence against Women and their Children 2010–2022), Professor Marcia Langton stated:

It recommends that cases of violence against Indigenous women and children should be dealt with, and I quote, through ‘activities that provide wraparound, case-managed support for families, and encourage behavioural change without resorting to police or courts’. Indigenous women who are involved in ending the violence against us are asking this question: Why would the Third National Action Plan to end Violence recommend that police and courts not be involved in the rising tide of violence against us? What about the rule of law, so highly valued by all major political parties and the bedrock of Australian society? I am calling it ‘drinking the Kool Aid’.⁸²

11.62 Josephine Cashman has expressed similar views on this aspect of the Third Action Plan and suggested that ‘Forcing victims to resolve crimes perpetrated against them without going to the police will do nothing but feed the destructive culture of silence that allows criminals to gain power over communities through fear, and further normalise criminal behaviours’.⁸³

11.63 These stakeholders were strongly of the view that a core problem for Aboriginal and Torres Strait islander women and their families is a lack of police responsiveness to the experience of Aboriginal women experiencing violence.⁸⁴

11.64 Under-reporting of family violence to police can have a negative impact on victims and can increase their own offending and subsequent incarceration. However, many stakeholders to this Inquiry also spoke of the other side of policing, the over-policing of certain types of offending. With respect to over-policing, the evidence indicates that Aboriginal and Torres Strait Islander women are more likely to be charged and arrested for public order offences and other forms of minor offending than non-Indigenous women.⁸⁵ These offences include 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.⁸⁶ AMT is discussed in Chapter 13.

82 Marcia Langton, ‘If We Don’t Stop the Violence, We Have No Chance of Closing the Gap’ in *Ending the Violence in Indigenous Communities* (National Press Club Address, CIS Occasional Paper 152, 2016) 11.

83 Josephine Cashman, ‘Lack of Response Prevents Progress’ in *Ending the Violence in Indigenous Communities* (National Press Club Address, CIS Occasional Paper 152, 2016) 17.

84 Hannah McGlade, ‘The Causes and Consequences of Violence against Indigenous Women and Girls, Including Those with Disabilities’ (Panel Discussion, Palais Des Nations, Geneva, 20 September 2016).

85 Human Rights Law Centre and Change the Record Coalition, above n 1, 22; Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders—Discussion Paper* (2017) 173; Mary Stathopoulos and Antonia Quadara, above n 23, 17; Bartels, ‘Painting the Picture of Indigenous Women in Custody in Australia’, above n 34.

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

11.65 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.⁸⁷

[F]ive of the females were detained for drunkenness, three for unpaid fines, one for driving without a licence and while under the influence of alcohol, and one for indecent language. [Ms] O'Rourke (the juvenile) was detained while arrangements were being made to return her to Sydney because she did not want to return to her most recent foster care placement.⁸⁸

11.66 More recently, the death of Ms Dhu in custody in Western Australia (WA) illustrated 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 Ms Dhu would have had to 'spend four days in custody unless outstanding fines ... were paid'.⁸⁹

11.67 This case illustrates the failure of police to empathetically respond to the circumstances of an Aboriginal woman experiencing family violence. Ms Dhu died in police custody of complications from an infected rib fracture—an injury sustained in a family violence incident—after repeated failure by officers to provide access to adequate medical care. As was noted by the Human Rights Law Centre, this failure was largely rooted in the false assumption by police officers that Ms Dhu was withdrawing from substance addiction, rather than the victim of 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'.⁹⁰

11.68 A further case of Ms Mitchell, a 22-year old pregnant Aboriginal woman with two small children, also illustrates how over-policing and harsh use of officer discretion can further contribute to distrust and fear of police. Ms Mitchell was charged with a serious fraud offence for travelling as an adult on a child's ticket when a lesser and more appropriate infringement notice offence was available to officers. On appeal following her refusal of bail, the Supreme Court of Victoria noted:

[O]ver policing of Aboriginal communities and their overrepresentation amongst the prison population are matters of public notoriety. In this case I regard the use of

87 Ibid.

88 Elena Marchetti, 'Victims or Offenders: Who Were the 11 Indigenous Female Prisoners Who Died in Custody and Were Investigated by the Australian Royal Commission into Aboriginal Deaths in Custody?' (2013) 19(1) *International Review of Victimology* 37, 37–8.

89 *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.

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

s 82(1) of the [*Crimes Act 1958* (Vic)] (obtaining financial advantage by deception) to charge an adult for travelling on a child's ticket as singularly inappropriate.⁹¹

11.69 Previous research has highlighted that poor police responses can involve minimising or dismissing Aboriginal and Torres Strait Islander women's experiences of family violence, or reflects a focus on their perceived criminality rather than their victimisation.⁹² As the Human Rights Law Centre noted:

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. Many Aboriginal and Torres Strait Islander women understandably hold a deep distrust of the police...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'.⁹³

11.70 These poor responses include documented cases 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.⁹⁴ Sisters Inside submitted:

[W]e are seeing rising rates of Aboriginal and Torres Strait Islander women charged with breaches of domestic violence protection orders, often in circumstances where the police (rather than the intimate partner) have applied to impose the order. The criminalisation of Aboriginal and Torres Strait Islander women for acts of domestic violence is unacceptable and totally inconsistent with the evidence that women and children are disproportionately survivors of violence.⁹⁵

11.71 Legal Aid NSW drew attention to their experience of police failing to correctly identify the primary perpetrator of family violence:

Celia was the victim of violence from Harry over a 20 year relationship. They have a child together ... There was an incident at their home and police were called. Harry claimed that Celia scratched his face. Police charged Celia with assault occasioning actual bodily harm and intimidation and applied for an ADVO [Apprehended Domestic Violence Order] against Celia. Celia was required to leave the home and could not see her child.

Celia disclosed to the DVU [Legal Aid NSW Domestic Violence Unit] lawyer that she has actually been the victim of serious physical and sexual violence by Harry for

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

See, eg, Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 42; Sheena Fleming, Tim Prenzler and Janet Ransley, '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; Human Rights Law Centre and Change the Record Coalition, above n 1, 31–2.

93 Human Rights Law Centre and Change the Record Coalition, above n 1, 22, 31.

94 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [12.35]–[12.41].

95 Sisters Inside, *Submission 119*.

years. Celia said that on the night in question, Harry had punched her and tried to take her phone to stop her from calling police. Celia feared for her life and defended herself ... DVU represented Celia in defence of the criminal charges and the ADVO. The evidence confirmed Celia's injuries to her face; and the Triple 000 calls were played in court. The court accepted Celia's account of violence and dismissed the charges and the ADVO application.⁹⁶

11.72 These police responses help explain the distrust and fear that many Aboriginal and Torres Strait Islander women feel in relation to reporting family violence to police. These responses may also help explain why Aboriginal and Torres Strait Islander women are more likely than their non-Indigenous counterparts to be charged and imprisoned for 'acts intended to cause injury'— where in some cases resorting to violence may be seen as the only feasible means of defending themselves and their children against a violent partner.⁹⁷

Positive police responses

11.73 As noted above, more consistent and higher quality police responses to Aboriginal and Torres Strait Islander women experiencing family violence could dramatically influence the incidence of their imprisonment—because family violence is a key driver of criminogenic factors such as substance abuse, contact with the child protection system and unresolved trauma.

11.74 The Human Rights Law Centre noted the importance of police discretion in diverting Aboriginal and Torres Strait Islander women out of further involvement with the criminal justice system:

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. ... 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.⁹⁸

11.75 Just Reinvest NSW submitted that community ownership is important in successful police responses to family violence and highlighted the Bourke Tribal Council's *Growing our Kids up Safe Smart Strong* example:

The program involves the police visiting the home of perpetrators of domestic violence following a DV incident with a member of the community for a check-in – the purpose of the visit being both supervisory and supportive. The police and the Aboriginal community in Bourke worked together in partnership to reduce family violence. In doing so they created an environment of support for families. Repeat Victim Assaults have reduced from 45 in the second half of last year, to a total of 28 in the first half of this year.⁹⁹

96 Legal Aid NSW, *Submission 101*.

97 Mandy Wilson et al, above n 22, 1, 6.

98 Human Rights Law Centre and Change the Record Coalition, above n 1, 30.

99 Just Reinvest NSW, *Submission 82*.

11.76 The Aboriginal Legal Service (ALS) NSW/ACT supplementary submission¹⁰⁰ also supported genuine community engagement and involvement in police responses to family violence:

With respect to community engagement, participants strongly emphasised the importance of community policing approaches. This includes, among other things, frontline police attending cultural events and programs in their communities. This is necessary to combat perceptions of police in the community as only responding to 'bad' situations. Participants suggested that the police place particular emphasis on attending schools and educating children, to demonstrate that they are good community role models and potentially demonstrate policing as a viable career.

In relation to family violence in Aboriginal communities, participants suggested that police work with the whole family, not only victims or perpetrators. Additionally, participants suggested police act proactively through ongoing engagement with families in which violence may be in issue. This would improve perceptions of police and increase trust placed in the police by the community to effectively respond to incidents if they occur.¹⁰¹

11.77 The Change the Record Coalition also stressed the value of engagement with Aboriginal and Torres Strait Islander family and community services in responding to family violence—and pointed to the Victoria Police 'e-learning package' as a successful product of this type of engagement:

Police need to be less confrontational in their approach to taking out intervention orders on behalf of family violence victims and need to better understand the complexities of Aboriginal communities when dealing with family violence. Engaging other services to support family violence victims during this period is crucial. It is preferable that Aboriginal services be engaged or police should explore with the client and family which services have previously worked or if there are any particular support workers that the victim or family would prefer to engage...The Victoria Police e-learning package, developed in response to recommendations of the Victorian Royal Commission into Family Violence, is one example of a positive initiative taken to improve police responses to Aboriginal and Torres Strait Islander victims/survivors of family violence. Part of the success of this initiative was its close consultation with and inclusion of Aboriginal community members and Aboriginal Community Controlled Organisations. The e-learning package is compulsory for all levels of the police force and, to date, it has been completed by 11,700 police officers across Victoria. It is just the first step in the development of a new family violence education framework and creation of a family violence centre of learning within Victoria Police in order to implement recommendations of the Royal Commission into Family Violence.¹⁰²

100 The ALS conducted a series of state-wide community justice forums with ALS staff, community leaders and stakeholders to get their input on the issues raised in the discussion paper. Over 250 people attended forums in Coffs Harbour, Dubbo, Moree, Nowra, and Redfern over August and September 2017.

101 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.

102 Change the Record Coalition, *Submission 84*.

11.78 Sisters Inside preferred a locally-driven response to violence within regional and remote Aboriginal and Torres Strait Islander communities, but did not support diversion of funds to police-community programs:

Rather than relying on police, communities must be funded and supported to develop local, Indigenous-controlled responses to violence. Additionally, funding should be made available for appropriate crisis accommodation and related support services to allow women and children the choice to leave dangerous situations...We do not support diverting funds from direct investment in Aboriginal and Torres Strait Islander communities and organisations to “community” programs operated by the police.¹⁰³

11.79 The NSW Bar Association encouraged police to extend their involvement with Aboriginal and Torres Strait Islander communities by entering ‘into genuine and meaningful collaborations with communities to reduce family violence, such as the Domestic Violence Home Visiting Program in Bourke’.¹⁰⁴

Diversion programs

11.80 Diversion programs involve initiatives that seek to divert offenders from the criminal justice system and may include ‘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’.¹⁰⁵

11.81 Many stakeholders to this Inquiry have urged that diversion initiatives and responses to Aboriginal and Torres Strait Islander female offending and incarceration be underpinned by the demonstrated strengths of Aboriginal and Torres Strait Islander women. 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.¹⁰⁶ Vickie Hovane, Dorinda Cox and Harry Blagg submitted that:

Mainstream approaches and programs, particularly those relying on cognitive behavioural therapeutic techniques, have only limited value for responding to intergenerational trauma among Aboriginal people including those who are imprisoned. It is time for a paradigm shift that requires investment in Aboriginal led, designed and managed initiatives.¹⁰⁷

11.82 Commissioner for Children and Young People WA suggested:

There is a strong need for a range of diversionary programs tailored to the needs of young female offenders and those at high risk of offending. As young female offenders represent only a small proportion of young offenders they are often overlooked for dedicated programs and services, however their high vulnerability for

103 Sisters Inside, *Submission 119*.

104 NSW Bar Association, *Submission 88*.

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

106 Australasian Institute of Judicial Administration, above n 63, 13.

107 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

harm and exploitation must be recognised and given due attention.... young females who participated in my office's youth justice consultation identified the need for culturally appropriate programs and services to better support their mental health, wellbeing and education needs and their overall rehabilitation. More could also be done to make legal services more accessible to young Aboriginal women by ensuring they are culturally secure, including being delivered by Aboriginal people and organisations, being safe and confidential and providing access to interpreters where required.¹⁰⁸

11.83 Despite the lack of evidence generally in terms of 'what works' in relation to Aboriginal and Torres Strait Islander women to reduce and mitigate the effects of contact with the criminal justice system, some key principles have been identified.¹⁰⁹ The Law Council of Australia suggested that diversion programs for Aboriginal and Torres Strait Islander 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;
- 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.¹¹⁰

11.84 NFVPLS provided an example of a diversion program specifically designed to meet the needs of Aboriginal and Torres Strait islander offenders:

The Dilly Bag Program is an intensive women's cultural strengthening program delivered by the Aboriginal Family Violence Prevention and Legal Service (Victoria) that targets Aboriginal women, and has been adapted to work with women on community based orders. The program assists Aboriginal women with recovery from trauma they may have experienced in their lives. Dilly Bag builds on cultural strength and experiences to explore ways to increase self-esteem and enhance emotional,

108 Commissioner for Children and Young People Western Australia, *Submission 16*.

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

110 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.

physical and spiritual well-being, which strengthens the ability of Aboriginal women to reduce their vulnerability to family violence. It is a residential program in a community setting that highlights the important roles Aboriginal women play in their community as leaders and nurturers. Dilly Bag was developed in response to an identified gap in therapeutic programs that provide culturally-based healing for Aboriginal women where the program has been developed and delivered for and by Aboriginal women. An external evaluation of the program determined that it has significant beneficial impacts, including increased self-esteem and well-being, strengthened relationships and networks, increased knowledge and understanding of family violence and the supports available, and significant changes to participants' lifestyles such as living arrangements, matters relating to custody of children and personal care.

11.85 The Northern Territory Government submitted that:

Although there are currently no diversionary options specifically for Aboriginal female offenders in the Northern Territory, the Through-Care program at NAAJA and the Kunga Stopping Violence program through CAALAS offers re-integration support and case management for Aboriginal women who have been sentenced to a term of imprisonment.¹¹¹

11.86 Where Aboriginal and Torres Strait Islander specific diversion 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 offenders. Systemic barriers specific to Aboriginal and Torres Strait Islander women include:

- lower rates of admission to police diversions—because diversion options often require an admission of wrongdoing;¹¹²
- demand for diversionary initiatives often exceeding supply—particularly in relation to court-based diversionary options;¹¹³
- 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;¹¹⁴
- 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

111 Northern Territory Government, *Submission 118*.

112 Reasons for mistrust of police by Aboriginal and Torres Strait Islander women are discussed by the ALRC at [11.52].

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

114 *Ibid* 60.

- high rates of remand and short sentences, making them ineligible for any programs that may aid in reducing recidivism.¹¹⁵

11.87 The ALRC's recommendation—that all programs and services delivered to female Aboriginal and Torres Strait Islander offenders within the criminal justice system should take into account their particular needs and be developed with and delivered by Aboriginal and Torres Strait Islander women and be trauma-informed and culturally appropriate—builds on these observations.

What is required is for governments and their agents to trust Aboriginal people to know what is needed and how to respond to the needs of people, families and communities. What is required is Aboriginal led and responsive, place-based initiatives that are trauma and attachment informed; initiatives which aim to heal families rather than simply focusing on individuals. The need to maintain and rebuild attachments and connections, severed by imprisonment, is critical for the rehabilitation of Aboriginal people, particularly women, and for the health and wellbeing of children and other dependents.¹¹⁶

Prison environments, programs and services

11.88 Many stakeholders raised the failings and inadequacies in the actual prison environment and in particular of the services delivered to Aboriginal and Torres Strait Islander women while incarcerated. Jesuit Social Services described these as:

- Chronic overcrowding leading to pressure on every aspect of prison operations. Overcrowding has led to further housing and facility issues such as limited access to basic amenities including shelter from harsh weather and access to bathrooms
- Failing to prepare women for transition back into the community post-release because of a lack of access to education and rehabilitation programs
- Limited employment opportunities for women
- The under-identification of health issues among female prisoners and the consequent lack of access to health care in the facility
- A number of issues relating to basic necessities including food, hygiene, clothing and recreational activities
- Inadequate culturally-appropriate supports to understand and navigate the prison system, such as induction provided in languages other than English
- Risks to infants and children housed with their mothers in prison under the current arrangements.¹¹⁷

11.89 The experience for women, and particularly Aboriginal and Torres Strait Islander female offenders in prison, is vastly different to that experienced by male offenders. Bartels and Gaffney argue that there are problems in the way in which correctional services are delivered to female offenders:

115 Prison programs are discussed in ch 9.

116 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

117 Jesuit Social Services, *Submission 100*.

A majority of facilities do not specifically cater for female prisoners is due, in part, to the fact that traditionally, the majority of prisoners have been male.... more is required to effectively address the specific issues relevant to women and ensure that correctional policies and practices applied to women are not merely an adaptation of those considered appropriate for men.¹¹⁸

11.90 The experience of incarceration for female prisoners who have been victims of physical and sexual abuse can be especially both difficult and damaging. 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 women, and reinforcing themes of powerlessness, lack of control, and vulnerability to an already traumatised group.¹¹⁹ De-incarceration and women's prisoner advocate, Debbie Kilroy, has described the effects of prisons on women as follows:

They are based on rigid rules, imposed by authority figures (often in an arbitrary manner), and requiring absolute obedience. Common prison practices, in particular strip-searching, often re-traumatise women with a history of abuse contributing to increased incidents of self-harm. Prison staff typically respond to threatened or actual self-harm, by placing women in isolation – a practice totally contrary to the best medical advice. And, in some jurisdictions, male officers undertake tasks such as inspecting women's cells at night, observing (often naked) women in isolation cells and participating in strip searches. Far from preparing a woman to return to society, they leave her more vulnerable to ongoing abuse than ever before:

As a result of even a very short period in prison a woman may lose her housing and employment (if she had these prior to imprisonment).

Many women lose custody of their children - with their children, too often, going into state care.

Any treatment they were receiving for mental health issues or substance abuse will have been stopped, or, at best, suspended.

If a woman was participating in education or training, she may permanently lose her place.

Many (particularly women who went to prison unexpectedly) will have accumulated further debts and a poor credit rating, and have lost most of their household items and personal belongings.

And, women leave prison with a new or extended criminal record which is an added barrier to accessing employment, housing and services.

For women leaving prison, these often appear insurmountable obstacles. Many will engage in self harm, and some will commit suicide. At least 40% will return to prison

118 Lorana Bartels and Antonette Gaffney, 'Good Practice in Women's Prisons: A Literature Review' (Technical and Background Paper 41, Australian Institute of Criminology, February 2011) 1.

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

—17% within 12 months and 27% within 2 years. (One major study found that 70% of Aboriginal and Torres Strait Islander women returned to prison within 9 months.) The prognosis for their children's future lives will have similarly deteriorated - particularly if they were taken into care. The lives of most women and their families will be significantly worse than when they first went to prison. It is hardly surprising that many women feel compelled to return to violent relationships following their release.¹²⁰

11.91 In its submission to this Inquiry, the Criminal Lawyers Association of the Northern Territory pointed to issues related to overcrowding within women's prisons and the deleterious effects on women prisoners :

The number of Indigenous female offenders and defendants is growing. However, the infrastructure of the criminal justice system is ill-equipped to deal with this. It is an established fact, and commented upon by the judiciary, that there is acute overcrowding in the female sections of the Northern Territory jails, particularly Alice Springs. This has compromised the availability of education programs due to lack of space. It has also led to unrest within the prison population, including recent reports of women inmates fighting over scarce basic necessities such as undergarments.¹²¹

11.92 The Northern Australian Aboriginal Justice Agency submitted that:

In the Northern Territory, female prison facilities are grossly overcrowded. A recent report found that the new Darwin Correctional Precinct, only open in 2016, was already at 3 times the appropriate capacity for women. This needs to be addressed immediately... as well as overcrowding, facilities need to be culturally appropriate. For example, current procedures for visitations require strip searches, which does not acknowledge that Aboriginal and Torres Strait Islander women in prison are oftentimes survivors of sexual abuse and domestic violence and there is the potential for strip searches to re-traumatise survivors of such violence.¹²²

11.93 Academic Elizabeth Grant noted a shift in approach by some correctional agencies to respond to the needs of Aboriginal prisoners so as to fulfil cultural obligations such as sorry business through the construction of small shelters in which prisoners could gather and grieve.¹²³ Drawing on this work, Legal Aid WA submitted that 'prisons for women should provide a respectful and dignified prison environment where women are empowered to make meaningful and responsible choices'.¹²⁴ It further suggested that services and programs provided to Aboriginal women in prison should reflect Aboriginal culture, traditions and beliefs, including providing outdoor areas for cultural gatherings such as fire pits for the preparation and cooking of traditional foods and shelters in which to gather and grieve.

120 Debbie Kilroy, 'Women in Prison in Australia' (Panel Presentation, Current Issues in Sentencing Conference, 6-7 February 2016).

121 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

122 North Australian Aboriginal Justice Agency, *Submission 113*.

123 Elizabeth Grant, 'Designing Carceral Environments for Indigenous Prisoners: A Comparison of Approaches in Australia, Canada, Aotearoa New Zealand, the US and Greenland (Kalaallit Nunaat)' (2016) 1 *Advancing Corrections Journal* 26, 35.

124 Legal Aid WA, *Submission 33*.

11.94 The South Australian Legal Services Commission supported what it described as ‘Mother-and-Infant Facilities’ in women’s prisons where the Commission identified such facilities were able to lower the risk of offending, in conjunction with ‘significantly improved outcomes’ for both mothers and children. The Commission raised concerns about the lack of such a facility at the Adelaide Women’s Prison.¹²⁵

11.95 The National Congress of Australia’s First Peoples (Congress) succinctly outlined the intersect between historic trauma and the prison environment stating:

The damage inflicted on Aboriginal and Torres Strait Islander women can be aggravated by invasive and disempowering prison routines that may trigger past traumas. One such example is strip-searching, in which the woman experiences disempowerment and vulnerability that can be likened to experiences of family violence. Although such routines may play an important functional role in the criminal justice system, Congress stresses that they must be used only where absolutely necessary, and that culturally appropriate measures should be taken to minimise their detrimental effects on Aboriginal and Torres Strait Islander women’s mental health. The intergenerational and ongoing trauma experienced by Aboriginal and Torres Strait women clearly demonstrates that alternative treatment is needed. Congress submits that mainstream service providers are unlikely to cater to the specific needs of Aboriginal and Torres Strait Islander women. Further, programs specifically for Aboriginal and Torres Strait islander women, such as ‘Sisters Inside,’ while successful, do not have the funding or scope to instigate change on a national level.¹²⁶

11.96 As a means of ameliorating these issues Congress made recommended that more funding be allocated towards developing specialised therapeutic and rehabilitation services specifically for Aboriginal and Torres Strait Islander women.¹²⁷

11.97 One example of a prison program that seeks to meet the needs of Aboriginal and Torres Strait Islander women was provided by NFVPLS:

The Prison Support Program (*Name pending) is delivered to Victorian Aboriginal women at the Dame Phyllis Frost Centre and Tarengower Prison who are survivors of violence or abuse. The program provides culturally safe and holistic support and links women into a range of services and supports to address a broad spectrum of legal and non-legal needs, including for example legal advice for family violence, child protection or victims of crime assistance; family violence counselling, housing, drug and alcohol services, parenting programs and more. The program also facilitates the provision of community legal education to provide information to Aboriginal women in prison about their legal rights and the services available. The majority of the women supported through this program are on remand, and aged between 18 and 34. The program can also support women preparing to exit prison and post-release to ensure women have a network of supports and plans in place to address safety and risk, and reduce vulnerability to further victimisation or criminalisation upon release. Through this program, FVPLS Victoria has seen a profound transformation in many of the women we work with – from an attitude of despair or having given up hope for

125 Legal Services Commission of South Australia, *Submission 17*.

126 National Congress of Australia’s First Peoples, *Submission 73*.

127 Ibid.

the future, to one of renewed motivation to address the issues that led to imprisonment.¹²⁸

11.98 Outlining the barriers to the delivery of programs to Aboriginal and Torres Strait Islander women within prisons, and the difficulties caused to their families through imprisonment, Kimberly Community Legal Services Inc noted:

Aboriginal female prisoners are a cohort in need of particular attention. Many prison programs are unavailable to women due to a lack of female prison staff, and others are not culturally or gender appropriate. Many Aboriginal women prisoners are victims as well as offenders, which is an important consideration in providing appropriate prison programs. Imprisonment of women, and especially of mothers who are the primary carers of children, can cause extraordinary amounts of disruption to family cohesion. Visiting hours for those who are the primary carers of children should be extended to allow for their caretaking responsibilities to be maintained.¹²⁹

11.99 Prison programs are discussed in more detail at Chapter 9.

Prison for mothers and their children

11.100 Legal Aid Western Australia submitted that ‘most women in prison are mothers and carers. Most are also survivors of physical and sexual violence’¹³⁰. Some estimates suggest that up to 80% of Aboriginal and Torres Strait Islander female prisoners are mothers,¹³¹ with 20% of Aboriginal and Torres Strait Islander children nationally experiencing parental incarceration.¹³²

11.101 The effect on imprisonment on women significantly impacts upon their capacity to parent or care for family members as well as impacting upon children. The Human Rights Law Centre noted:

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.¹³³

11.102 The incarceration of Aboriginal and Torres Strait Islander women can therefore contribute to gaps in ‘parenting, income, child care, role models and leadership’ in their communities,¹³⁴ entrenching future disadvantage.¹³⁵ The

128 National Family Violence Prevention Legal Services, *Submission 77*.

129 Kimberley Community Legal Services, *Submission 80*.

130 Legal Aid WA, *Submission 33*.

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

132 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).

133 Human Rights Law Centre and Change the Record Coalition, above n 1, 5.

134 *Ibid* 13.

135 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.

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,¹³⁶ but also are at higher risk of ‘developing behaviour problems, experiencing psychosocial dysfunction, experiencing stigmatisation and discrimination, and suffering negative health outcomes’.¹³⁷ 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.¹³⁸

11.103 In its submission to this Inquiry, the ACT Government acknowledged that the ‘impact of female incarceration can be especially devastating for families where children are involved’.¹³⁹ The Aboriginal Legal Service NSW/ACT noted that,

‘the incarceration of Aboriginal and Torres Strait Islander women has a significant, negative impact on families. This is particularly the case where children are removed while the mother is in custody, and placed in non-Aboriginal care or care that is not on country’.¹⁴⁰

11.104 Dorinda Cox pointed to complexities and trauma experienced by many Aboriginal and Torres Strait Islander women that brings them into contact with the criminal justice system resulting in not only child removal but the perpetuation of intergenerational trauma stating:

In my observations whilst visiting Aboriginal women in prison they have told me how they have wanted to leave violent relationships and have gone to seek help and refuge only to be flagged in the system as unable or unwilling to protect their children from violence. This systemic contact results in the removal of the children with more permanent consequences in child placement through government policies. The removal of Aboriginal children from their families and communities, in particular their mothers, has a historical legacy for Aboriginal people. The removal of Aboriginal women from their role in families and communities, further fragments and exacerbates the social and cultural issues that occur in the everyday lives of Aboriginal people. The immediate consequence for the women on a deeply personal level is the interruption of attachment to their children resulting in transmission of inter-generational trauma and further entrenching cycles of disempowerment, sometimes resulting in multiple generations of Aboriginal women from the same families incarcerated at the same time.¹⁴¹

11.105 The Queensland Law Society drew attention to the need to support Aboriginal and Torres Strait Islander female prisoners who have children, submitting that:

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

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

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

139 ACT Government, *Submission 110*.

140 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.

141 D Cox, *Submission 120*.

- (a) Incarceration of women has significant implications for families and can lead to family law and child protection issues. Women tend to be primarily caregivers for children and may be the only caregiver in a family. In these circumstances, incarceration can lead to children being placed in out of home care and triggering the entire child protection machinery, which often results in trauma to children, separation from family and community and difficulty achieving reunification. It can also place considerable pressure on extended families.
- (b) The enormous impact of incarceration on women's family relationships and responsibilities in relation to their children must be considered.
- (c) There are ongoing impacts on the health and wellbeing of women where they have lost their children as a result of their imprisonment. This can lead to destructive and self-sabotaging behaviours, for example, increased drug use to self-medicate, which then leads to further offending to support a drug habit.¹⁴²

11.106 Dr Vicky Hovane, Dorinda Cox and Professor Harry Blagg pointed to the negative effect upon children and families where often multiple generations of Aboriginal women are removed into prison stating:

Aboriginal women are pivotal in maintaining the health and wellbeing of families. When Aboriginal women are removed from the family structure via imprisonment it creates a massive crisis, affecting a range of dependents, principally children. The crisis is exacerbated when there are multiple generations of women from one family in prisons, as is the case at Bandyup prison in WA. The ramifications reverberate negatively across the breadth and depth of family and community wellbeing.¹⁴³

The impact of incarceration on children

11.107 Although this Report is directed to the over-representation of Aboriginal and Torres Strait Islander adults in prison, as noted above, it is important to recognise that they—particularly the women—may be the primary carer of children.

11.108 Given the highly disproportionate incarceration rates of both Aboriginal and Torres Strait Islander men and women, their imprisonment will have a consequentially disproportionate but largely hidden adverse outcome for their children.

11.109 The Human Rights Law Centre has noted:

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.¹⁴⁴

11.110 When exploring the impact of incarceration on children, it is relevant to consider the Convention on the Rights of the Child. Article 3.1 of the Convention provides that 'In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative

142 Queensland Law Society, *Submission 86*.

143 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

144 Human Rights Law Centre and Change the Record Coalition, above n 1, 5.

bodies, the best interests of the child shall be a primary consideration'.¹⁴⁵ While the Convention has been ratified by Australia it has not been enacted into domestic law.

11.111 When the primary carer of an Aboriginal or Torres Strait Islander child is in custody (whether on remand or sentenced), there is a considerable risk that the child will be taken into out-of-home care. Such an outcome can arise while the parent is in custody and may continue even after release if the child's parent is then homeless. The NSW Bar Association made clear this issue pointing out that:

When an Indigenous women is incarcerated, there is often a significant disruption in the family and an increased risk that the children will end up in the child protection system. The impact of separation of Indigenous children from their families and communities is irrefutable. The incarceration of Indigenous women, often the primary or sole carers compounds the trauma. The Bringing Them Home report found that the effects on children of separation from the primary carer can have serious long-term consequences on these children's lives. Separation of children at a young age results in depression, trust and self worth issues, choice of inappropriate partners, difficulties parenting their own children and unresolved trauma and grief. This separation fractures families and results in children who are more likely to have disrupted education, poor health and unstable housing. This ultimately creates conditions entrenching the cycle of disadvantage.¹⁴⁶

11.112 The number of Aboriginal and Torres Strait Islander men and women in prison and children in out-of-home care suggests more attention should be given to the Convention and the rights and best interests of the children involved as a primary consideration when courts sentence the primary carer of the child, usually their mother, to a period of imprisonment.

11.113 The New South Wales Bar Association suggested:

When sentencing an Aboriginal or Torres Strait Islander woman to a term of imprisonment, a court must pay particular attention to the impact on her children and any evidence of intergenerational trauma caused by a history of removal and separation.¹⁴⁷

11.114 The *Crimes Act 1914* (Cth) requires that, in federal sentencing, 'the court must take into account such of the following matters as are relevant and known to the court: ... the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'.¹⁴⁸ Section 16A(2)(p) would apply to an Aboriginal or Torres Strait Islander offender facing incarceration for a federal offence who has a child or children, especially mothers.

11.115 An approach that considers the 'probable effect' on these children could, on a wide reading of the section, be thought to be important to take into account, particularly where the decision about incarceration is finely balanced and involves a less serious offence.

145 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.1.

146 NSW Bar Association, *Submission 88*.

147 *Ibid*.

148 *Crimes Act 1914* (Cth) s 16A(2)(p).

11.116 Such an approach could take into account that many Aboriginal and Torres Strait Islanders, and non-Indigenous offenders, are likely to receive a custodial sentence because they live in a remote area with few sentencing alternatives that would be available to those offenders living in metropolitan or major regional areas.

11.117 The courts have however determined that the application of section 16A(2)(p) would only apply in ‘exceptional’ circumstances.¹⁴⁹

11.118 This issue does not solely arise in Commonwealth legislation. For example, in NSW, there is no equivalent provision to s 16A(2)(p). However, it has been established at common law that courts can take hardship to family and dependants into account as a subjective matter in sentencing in State offences but only in ‘highly exceptional’ circumstances where ‘it would be, in effect, inhuman to refuse to do so’.¹⁵⁰

11.119 The NSW Court of Criminal Appeal has held that, although the effect of imprisonment on an offender’s family can be taken into account as one subjective circumstance in sentencing, in the absence of exceptional circumstances it cannot be taken into account as a specific matter that results in a substantial reduction or elimination of a sentence’.¹⁵¹ Similar considerations apply to people remanded in custody pending trial or sentence.

11.120 The ALRC suggests that the impact that incarceration of a primary care giver has on his or her children—at least in areas of Australia that have inadequate or no alternatives to imprisonment—should be taken into account by sentencing courts. As this issue came to attention late in the course of this Inquiry, and was not identified in the Discussion Paper or the subject of detailed consultation, the ALRC does not make a recommendation to address this issue. However, the ALRC suggests that the concerns raised in respect of the impact of incarceration on children are of sufficient importance for governments to consider reviewing the scope and application of the ‘exceptional circumstances’ sentencing consideration.

149 See, for example, *R v Togiass* (2001) 127 A Crim R 23, 25–6 (Spigelman CJ); *Anna Le v Regina* [2006] NSWCCA 136, 25 (Latham J).

150 See *R v Wirth* (1976) 14 SASR 291, 295–6 (Wells J), followed by the NSW Court of Criminal Appeal in *R v Edwards* (1996) 90 A Crim R 510.

151 *R v Girard* [2004] NSWCCA 170 [21]; *R v X* [2004] NSWCCA 93 [24].

