



OHCHR: Input - Report on violence against Indigenous women and girls

SUBMISSION ON BEHALF OF THE LAW AND ADVOCACY CENTRE FOR WOMEN LTD

31 JANUARY 2022

Objectives

The Law and Advocacy Centre for Women welcomes the opportunity to make a submission to the OHCHR regarding the violence perpetrated against Indigenous women and girls. The submission will focus on the different manifestations of violence experienced by indigenous women and girls in Australia (referred to as First Nations or Aboriginal and Torres Strait Islander women) who are criminalized through involvement in the criminal legal system in Victoria. In this context, it will address the Special Rapporteur's call for information on good practices, challenges and data.

Background to the Law and Advocacy Centre for Women

The Law and Advocacy Centre for Women Ltd ('LACW') is a community legal centre operating across the state of Victoria, Australia. It is the only legal service in Victoria whose primary focus is to provide a gender-specific approach to assisting women who are in, or at risk of entering, the criminal justice system. LACW was established in 2016, specifically in response to the rising rates of criminalisation and imprisonment for women. Its mandate is to combat these trends by providing a holistic approach to women in the justice system, providing a wraparound service that combines legal advice and representation with case management to address the underlying causes of women's criminalisation and imprisonment. The majority of LACW's legal work is in the provision of criminal defence advocacy. Other areas of practice include infringements and fines; victims of crime assistance; family violence intervention orders and child protection. Approximately 30% of LACW's clients identify as Aboriginal or Torres Strait Islander women.

LACW acknowledges that we operate on Aboriginal land, and that our office is located on the stolen land of the Wurundjeri people of the Kulin Nation. We pay our respects to Elders past and present. Sovereignty over this land was never ceded and it always was, and always will be, Aboriginal land.

We acknowledge also that Aboriginal and Torres Strait Islander people experience disproportionate adverse impacts across the whole spectrum of the justice system – including as a result of discriminatory and racist policing practices, inter-generational trauma, and systemic failures leading to their gross over-representation in the prison system. We also recognise the resilience and strength of Aboriginal and Torres Strait Islander communities, and the leadership they have shown and continue to show in advocating for and implementing reforms to this system.

We encourage the Special Rapporteur to hear and centre the voices of Aboriginal and Torres Strait Islander women and girls in shedding light on the specific manifestations of violence experienced by them and providing guidance to States and other stakeholders on the measures needed to further prevent and combat such violence.

Introduction

In this report, LACW focuses primarily on the relationship between violence against Aboriginal and Torres Strait Islander women and girls and their criminalisation. This relationship is underpinned by the ongoing impacts of colonial violence as perpetrated by police, justice systems and prisons which have seen the gross over-representation of Aboriginal and Torres Strait Islander women in the criminal legal system, and in Australian prisons. To address this, investment and resources must be directed towards self-determination and Aboriginal community-controlled organisations, and diverted from policing and carceral systems. In addition, the voices of those with lived experience of these systems must be elevated.

The intersection between family violence and criminalisation for Aboriginal and Torres Strait Islander women and girls

There is often a direct relationship between women’s trauma and personal relationships and their contact with the justice system; between complex health needs - including mental health and chronic illness – and criminalisation; and between substance abuse, past trauma, family violence and victimization.¹

Criminalised women are more likely than men to have experienced childhood victimisation (particularly sexual abuse), as well as subsequent victimisation as adolescents and adults, including sexual assault and family violence.² Evidence suggests that between 77 per cent to 90 per cent of incarcerated women have been exposed to traumatic events.³ An Australian Institute of Criminology study found in 2004 that

¹ Law and Advocacy Centre for Women, *Inquiry into Victoria’s Criminal Justice System* (September 2021) 2.

² Stathopoulos, Mary and Antonia Quadara, *Women as offenders, women as victims: The role of Corrections in supporting women with histories of sexual abuse* (Report for the Women’s Advisory Council of Corrective Services NSW, 2014) 25-26.

³ Green, Bonnie, Jeanne, Miranda, Daroowalla, Anahita and Juned Siddique, ‘Trauma exposure, mental health functioning and program needs of women in jail’ (2005) 51 (1) *Crime & Delinquency* 133-151, 134.

87 per cent of women in custody were victims of sexual, physical or emotional abuse.⁴ A third of female prisoners identify as Aboriginal or Torres Strait Islander, despite only making up 3% of the general population.⁵

The experiences of criminalised women are not universal. Aboriginal and Torres Strait Islander women and girls experience over policing and other forms of systemic racism,⁶ and are more likely than non-Aboriginal women to be imprisoned for minor offences such as disorderly conduct, minor property and traffic offences and breaches of court orders.⁷ The number of Aboriginal women in prison has more than tripled between 2012 and 2018.⁸ This increase occurred at a significantly disproportionate rate compared with the general population of incarcerated women; and all men in prison, including First Nations men.⁹

This increase does not appear to be driven by an increase in offending by First Nations women but, rather, by increased police involvement in their lives.¹⁰ In addition to increased policing and restrictive bail laws, over-representation of First Nations women in the justice system is inextricably linked to individual and collective trauma.¹¹

First Nations women are more likely than non-First Nations women to have experienced serious family violence and sexual abuse.¹² First Nations women in custody also disproportionately sustain physical

⁴ Johnson, Holly, *Drugs and crime: A study of incarcerated female offenders* (Australian Institute of Criminology: Research and public policy series, 2004) xiv.

⁵ Keeping Women Out Of Prison Coalition, *The disproportionate incarceration of Indigenous Women* (March 2020) 1.

⁶ Ibid.

⁷ MacGillivray, P. & Baldry, E. (2015) *Australian Indigenous Women's Offending Patterns* Brief 19 Indigenous Justice Clearinghouse; Anthony, T. & Blagg, H. (2013) 'STOP in the Name of Who's Law? Driving and the Regulation of Contested Space in Central Australia' 22(1) *Social and Legal Studies*, 43; Cunneen, C. & Tauri, H (2016). *Indigenous Criminology*, Bristol, United Kingdom, Policy Press; J. Purdy, (1996) 'Postcolonialism: the emperor's new clothes' 5(3) *Social and Legal Studies* 405; Heffernan, E., Anderson, K & Dev, A. (2012) *Inside Out—The Mental Health of Aboriginal and Torres Strait Islander People in Custody*, Queensland Government; Finnane, M. & McGuire, J. (2001) 'The uses of punishment and exile: Aborigines in colonial Australia' 3(2) *Punishment and Society* 279.

⁸ Note that this number has reduced due to the COVID-19 pandemic. Crime Statistics Agency, *Characteristics and offending of women in prison in Victoria, 2012-2018*, November 2019.

⁹ Ibid, As at 30 June 2019, the proportion of the male prison population that identifies as Aboriginal was 10%. Corrections Victoria.

¹⁰ See State Government of Victoria, *Victorian Government Aboriginal Affairs Report 2019* (2019), Table 15.2.1 (see caveats regarding this data).

¹¹ State Government of Victoria, (2018) *Burra Lotjpa Dunguludja. Victorian Aboriginal Justice Agreement: Phase 4. A partnership between the Victorian Government and Aboriginal community*, 18; See also Parker, R. & Milroy, H. (2014) 'Aboriginal and Torres Strait Islander Mental Health: An Overview' in Dudgeon, P., Milroy H., & Walker, R. (eds) *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* Commonwealth Government.

¹² Lawrie, R. (2003) 'Speak Out Speak Strong – Researching the Needs of Aboriginal Women in Custody.' 8 *Australian Indigenous Law Report*, 81– 4; J. & Tolmie J.,(2008) 'Battered women charged with homicide: advancing the interests of Indigenous women' 41(1) *Australian & New Zealand Journal of Criminology* 138-161; Blagg, H., Morgan, N., Cunneen, C. & Ferrante, A. (2005) *Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System*, Equal Opportunity Commission of Victoria; Jackson et al, above n 127 'Acquired Brain Injury in the Victorian Prison System' (Research Paper Series No 04, Corrections Victoria, April

injuries from violence¹³ and are more likely than men in prison to have acquired brain injuries in part related to family violence.¹⁴ First Nations women in custody have high rates of reproductive health problems, many of which are associated with gendered violence.¹⁵ Research with First Nations women in custody notes the clear link which women draw between experiences of abuse and substance dependence, and then substance dependence and imprisonment.¹⁶ Systemic failures within correctional services and a lack of responsiveness to the gendered and cultural needs of First Nations women have also been identified as reinforcing criminalisation.¹⁷

Criminal legal processes and gaol serve to exacerbate the trauma experienced by most criminalised women, by re-traumatising them and undermining their prospects for rehabilitation. Likewise, services for victims of violence alienate women who have been involved with the criminal justice system themselves.¹⁸

2011) 6; Kendall, S., Lighton, S., Sherwood, J., Baldry, E. & Sullivan, E. (2019), 'Holistic Conceptualizations of Health by Incarcerated Aboriginal Women in New South Wales, Australia' 29(11) *Qualitative Health Research*, 1549-1565; Parker & Milroy (n 13).

¹³ Jackson, M., Hardy, G., Persson, P. & Holland, S. (2011) *Acquired Brain Injury in the Victorian Prison System*, Research Paper Series No 04, Corrections Victoria, 6; Kendall (n 14).

¹⁴ Jackson et al (n 15).

¹⁵ Kendall (n 14) 1557.

¹⁶ Lawrie (n 14) 82; Kendall (n 14); Sullivan, E., Kendall, S., Chang, S., Baldry, E., Zeki, R., Gilles, M., Wilson, M., Butler, T., Levy, M., Wayland, S., Cullen, P., Jones, M. & Sherwood, J. (2019) 'Aboriginal mothers in prison in Australia: a study of social, emotional and physical wellbeing' 43(3) *Australian and New Zealand Journal of Public Health* 241-247; Bartels, L. (2012) 'Violent Offending by and against Indigenous Women' 8(1) *Indigenous Law Bulletin*, 19-22; Abbott, P., Lloyd, J. Joshi, C., Malera-Bandjolan, K., Baldry, E., McEntyre, E., Sherwood, J., Reath, J., Indig D & Harris, M. (2018) 'Do Programs for Aboriginal and Torres Strait Islander People Leaving Prison Meet Their Health and Social Support Needs?' 26(1) *Australian Journal of Rural Health*, 6-13; Baldry, E. & Cunneen, C. (2014) 'Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy' 47(2) *Australian & New Zealand Journal of Criminology*, 276; Baldry, E. (2014) 'Disability at the margins: limits of the law' 23(3) *Griffith Law Review* 370, 383; Baldry, E., Ruddock, J. & Taylor, J. (2008) *Aboriginal Women with Dependent Children Leaving Prison Project: Needs Analysis Report*, Indigenous Justice Clearinghouse, Homelessness NSW; Jones, J., Wilson, M., Sullivan, E., Atkinson, L., Gilles, M., Simpson, P.L., Baldry, E. & Butler, T (2018), 'Australian Aboriginal Women Prisoners' Experiences of Being a Mother: A Review' 14(4) *International Journal of Prisoner Health* 221; MacGillivray, P. & Baldry, E. (2015) *Australian Indigenous Offending Patterns* Brief 19 Indigenous Justice Clearinghouse ; Ogloff, J.R.P., Pfeifer, J.E., Shepherd, S.M. & Ciorciari, J. (2017) 'Assessing the Mental Health, Substance Abuse, Cognitive Functioning, and Social/Emotional Well-Being Needs of Aboriginal Prisoners in Australia' 23(4) *Journal of Correctional Health Care* 398, (although we note that the numbers in the study were small).

¹⁷ Crime Research Centre, University of Western Australia, (2007) *Low Risk - High Needs: Indigenous Women and the Corrective Services System*.

¹⁸ Law and Advocacy Centre for Women (n 1) 2.

Case example

LACW acted for one First Nations woman who was raised in out of home care. She was the victim of sexual assault and family violence in her childhood and had her first contact with the criminal justice system when she was 11 years old. Her history of institutionalisation, complex trauma, drug use and mental illness all contribute to her ongoing criminalisation within a system that is unresponsive to her needs and, in particular, does not provide a culturally safe space for healing.¹⁹

The legal process itself can serve to retraumatise women, who are often required to reveal their most traumatic experiences in a court full of strangers. As reflected by one practitioner working as part of a Victorian bail support program:

*“the idea that you should be expected in a court room of people, most of whom you’ve never met, to disclose the worst things that have ever happened to you, that is patriarchal violence and in many cases that’s **colonial violence** as well for Aboriginal women ... I think shame comes into that as well because I mean imagine having to stand in front of a Magistrate and say ‘I have all of these lived experiences. I have no money. I have no house. My kids have been taken.’ The amount of shame that is attached to those experiences. It is just such an abusive process against women.”²⁰*

Misidentification of First Nations women as primary perpetrators in family violence incidents

An important manifestation of colonial legal systems contributing to ongoing violence against First Nations women is an emerging trend in Victoria where First Nations women are being misidentified as the primary perpetrator in family violence incidents, leading to their criminalization and further victimisation.

Women’s Legal Service Victoria reported that 57 per cent of women initially named as perpetrators on police applications for Family Violence Intervention Orders (FVIOs) were found to be victim/survivors.²¹ Women may already be less inclined to report violence for fear of having their children removed or to avoid punishment from a partner. The prospect of being misidentified as the perpetrator of that violence is therefore likely to leave women even more at risk – pushed into criminalisation by proactive policing measures which were intended to keep them safe.²²

¹⁹ Ibid.

²⁰ Centre for Innovative Justice, *Women Transforming Justice: Final Evaluation Report* (December 2020) 51-2.

²¹ Ulbrick, M. & Jago, M. (2018) *‘Officer, she’s psychotic and I need protection’: police misidentification of the ‘primary aggressor’ in family violence incidents in Victoria*. Women’s Legal Service Victoria, Monash University.

²² Centre for Innovative Justice (n 22) 25.

Case example

LACW acted for an Aboriginal woman who was charged with unlawful assault. The victim of the assault was her then-husband, who had been perpetrating multiple forms of family violence against her for approximately eight years. Following an altercation, her husband assaulted her and she responded in self-defence then called the police. When the police arrived, although she had sustained injuries, she denied that he had been violent to her due to fear of reprisal and mistrust of the police. However, he had visible scratches as a result of her self-defence. Only she was charged. She gave a statement to police the following day explaining what had happened, but he was never charged.

Family violence responses must take explicit account of women's specific needs and address what one academic has characterised as "the over-policing of women as offenders, and the under-policing of women as victims", particularly as this relates to Aboriginal women.²³ Racist policing practices that stigmatise First Nations women and fail to protect them must be abolished.

Child removal and violence

Considering the grossly disproportionate rate at which children are removed by the State from First Nations women and families, and the contextual history of the Stolen Generations in Australia, child removal must be understood as an ongoing act of colonial violence, perpetrated against First Nations women and their families. Child removal is particularly prevalent amongst women who are criminalised. Child removal is also linked to incarceration later in life amongst First Nations women. It is therefore unsurprising that First Nations women in custody describe removal of children as the most significant injury to their health and social and emotional wellbeing, as it reinforces pre-existing, as well as introducing new trauma.²⁴

First Nations women are more likely than non-First Nations women to have experienced serious family violence, and to sustain physical injuries as a result of violence.²⁵ First Nations women may be fearful of reporting family violence due to specific fears of having children removed, in addition to a general

²³ As characterised by Dr Hannah McGlade in the Law Council of Australia webinar, 'Closing the Justice Gap: Implementing the ALRC's Pathways to Justice Roadmap', (Webinar, 29 October 2020).

<https://www.lawcouncil.asn.au/media/news/closing-the-justice-gap-implementing-the-alrcs-pathways-to-justice-roadmap-webinar>

²⁴ Centre for Innovative Justice (n 22) 32; 3 Kendall, S., Lighton, S., Sherwood, J., Baldry, E. & Sullivan, E. (2019), 'Holistic Conceptualizations of Health by Incarcerated Aboriginal Women in New South Wales, Australia' 29(11) Qualitative Health Research, 1549-1565.

²⁵ Centre for Innovative Justice (n 22) 38; 4 Lawrie, above n 100; Stubbs, J. & Tolmie J.,(2008) 'Battered women charged with homicide: advancing the interests of Indigenous women' 41(1) Australian & New Zealand Journal of Criminology 138-161; Blagg, H., Morgan, N., Cunneen, C. & Ferrante, A. (2005) Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System, Equal Opportunity Commission of Victoria; Jackson et al, above n 127 'Acquired Brain Injury in the Victorian Prison System' (Research Paper Series No 04, Corrections Victoria, April 2011) 6; Kendall, S., Lighton, S., Sherwood, J., Baldry, E. & Sullivan, E. (2019), 'Holistic Conceptualizations of Health by Incarcerated Aboriginal Women in New South Wales, Australia' 29(11) Qualitative Health Research, 103.

underlying mistrust of authorities and police, which is a product of generational child removal.²⁶ As a result, First Nations women are disproportionately faced with enduring family violence within a system that does not provide culturally safe processes for their protection.

Research with Aboriginal women in custody indicates that a significant majority will be biological mothers with care of children prior to their experience of incarceration.²⁷ In addition, Aboriginal cultural expectations involve caring for children in extended family and kinship structures.²⁸ This means that a majority of Aboriginal women in custody are likely to have biological children, as well as caring responsibilities for additional children.²⁹

Regardless of whether or not they were classified as “primary carers” of children when entering custody, incarceration clearly disrupts opportunities for incarcerated mothers and carers to maintain contact with children. Concerns about children’s wellbeing feature strongly amongst incarcerated women,³⁰ concerns which are likely to be heightened where children are in the care of the state or a violent partner.³¹

A study by the Victorian Department of Justice and Regulation found that women who had been separated from their children were more likely to return to custody than women whose connection with their children had been supported. Other studies have shown that even short periods of separation can have profoundly devastating impacts on the mother-child bond, with custody functioning as a “double punishment”.³² When in prison, women who have lost custody of their children are usually at higher risk of self-harm.³³

This brings with it increased risk that the children of incarcerated women will be taken into state care, thus perpetuating the cycle of violence against First Nations women by State systems and structures that are grounded in the ongoing colonial enterprise. Given women’s wider caring responsibilities, including Aboriginal women’s cultural responsibility for the care of non-biological children, the

²⁶ Centre for Innovative Justice (n 22) 25; Flynn, C. (2011) ‘Responding to the Children of women in prison: Making the invisible visible’, *Family Relationships*

²⁷ Bartels, L. (2010). Indigenous women's offending patterns: A literature review. Research and public policy series no. 107. Canberra: Australian Institute of Criminology; Lawrie, R. (2003) ‘Speak Out Speak Strong – Researching the Needs of Aboriginal Women in Custody.’ 8 *Australian Indigenous Law Report*, 81– 4.

²⁸ Jones, J., Wilson, M., Sullivan, E., Atkinson, L., Gilles, M., Simpson, P.L., Baldry, E. & Butler, T (2018), ‘Australian Aboriginal Women Prisoners’ Experiences of Being a Mother: A Review’ 14(4) *International Journal of Prisoner Health* 221.

²⁹ Centre for Innovative Justice (n 22) 32.

³⁰ Goulding, D. (2004) *Severed connections: An exploration of the impact of imprisonment on women’s familial and social connectedness*, Centre for Social and Community Research, Murdoch University.

³¹ Centre for Innovative Justice (n 22) 31.

³² Moloney, K.P. & Moller, L.F. (2009) ‘Good Practice for Mental Health programming for women in prison: Reframing the Parameters,’ 123(6) *Journal of Public Health* 431-433.

³³ Mitchell, B.K. & Howells, K. (2002) ‘The Psychological Needs of Women Prisoners: Implications for Rehabilitation and Management’ 9(1) *Psychiatry, Psychology and Law* 34-43; Hooper, C.A. (2003) ‘Abuse, interventions and women in prison: A literature review’, *Literature Review*, London: HM Prison Service, Women’s Estate Policy Unit.

incarceration of women clearly has significant down-stream implications for child welfare and family cohesion.³⁴

Recommendations

LACW advocates for a number of key reforms that would address violence against First Nations women in the context of their criminalisation. These include:

- Increasing funding for wrap-around support services that are gender-informed and culturally safe and specific for First Nations women and girls.
- Increasing the supply of public housing, including with specific housing directed to First Nations women exiting the prison system.
- Redirecting funding from prisons and policing to instead invest in community services.
- Improving responses to victims of family violence who are misidentified by police as the primary aggressor, resulting in increased criminalisation of women who are victim-survivors of family violence.
- Ensuring that supports are safe and respectful of the specific needs of First Nations women engaged with the criminal legal system, including the adoption of trauma-informed, culturally safe and integrated practices across the service system.
- In the Australian context, as advocated by Djirra (a Victorian Aboriginal Community Controlled family violence prevention organization), develop and implement a dedicated National Plan to end violence against Aboriginal and Torres Strait Islander women. This ensures that self-determined solutions to eliminate violence will be invested in.³⁵

For further queries, please contact:

Elena Pappas, CEO, Law and Advocacy Centre for Women Ltd
epappas@lacw.org.au
www.lacw.org.au

With thanks to Sophie Hunt and Amity Clayfield for their assistance in preparing this submission.

³⁴ Centre for Innovative Justice, *Leaving Custody Behind: Foundations for safer communities & gender-informed criminal justice systems* Issues Paper (July 2021) 27.

³⁵ *Djirra Key Calls*, National Summit on Women's Safety September 2021.