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Dear Secretariat,

**RE: SUBMISSION ON ACCESS TO LEGAL ASSISTANCE SERVICES**

The UNSW Law Society is the peak representative body for all of the students in the UNSW Faculty of Law. Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. We seek to develop UNSW Law students academically, professionally, personally and socially, and seek to assist UNSW Law students to aspire towards their professional and personal paths. The UNSW Law Society is proud to celebrate a rich diversity of students with a multiplicity of aims, backgrounds and passions.

We welcome the opportunity to make a submission to the Senate Finance and Public Administration Committees' inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services. The submission below reflects the varied backgrounds, perspectives, values and opinions of the students of the UNSW Law Society. While our submission is in prepared form, it will address specific questions from the public inquiry document, namely-

- (d) The consequences of mandatory sentencing regimes on Aboriginal and Torres Strait Islander men, women and juveniles;
- (e) The reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles
- (g) The effectiveness of alternatives to imprisonment for Aboriginal and Torres Strait Islander Australians

Kind Regards,

UNSW Law Society

# ACCESS TO LEGAL ASSISTANCE SERVICES

*Submission to the Finance and Public  
Administration References Committee*

*April 2015*

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*The consequences of mandatory sentencing regimes on  
Aboriginal and Torres Strait Islander incarceration  
rates*

## *Introduction*

Mandatory sentencing now permeates almost every jurisdiction of Australian criminal law in one form or another. It reverses the generally accepted practice in which parliaments set maximum penalties for crimes, and the judiciary exercises discretion in order to ensure proportionality in sentence. Mandatory sentencing is a policy that is largely aimed at reducing crime rates through both general and specific deterrence; however, its effectiveness in achieving these aims is questionable. Further, mandatory sentencing has been proven to have disproportionately adverse effects on rising rates of incarceration for Indigenous Australians. For these reasons, mandatory sentencing is an insupportable policy.

It is our submission that mandatory sentencing undermines the essential role of judicial discretion in sentencing, is an ineffective measure in the reduction of crime, and has severe adverse effects on the incarceration rates of Aboriginal and Torres Strait Islander people. These arguments align consistently with the findings of the Law Council of Australia in its *Discussion Paper on Mandatory Sentencing* of May 2014.<sup>1</sup>

## *Judicial Discretion and Proportionality in Sentence*

In line with settled principles about why and how crimes are punished, the High Court has declared proportionality a fundamental principle of sentencing law.<sup>2</sup> Implicit in ensuring proportionality of sentence is the operation of judicial discretion. Judicial discretion in sentencing allows for a non-arbitrary judgement to be made about the appropriateness of sentence after the offence has been committed, with knowledge of the full circumstances. Mandatory sentencing reverses this principle. Parliament, often motivated by “tough on crime” political aims, prescribes the punishment of the offence before it has even taken place, leaving no room for the

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<sup>1</sup> Law Council of Australia, ‘Policy Discussion Paper: Mandatory Sentencing’, May 2014. Found at [http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS\\_Discussion\\_Paper\\_Final\\_web.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/discussion%20papers/MS_Discussion_Paper_Final_web.pdf)

<sup>2</sup> *Chester v R* (1988) 165 CLR 611, 618.

individuality of circumstances to mitigate sentence.<sup>3</sup> This toughness often manifests in the setting of mandatory sentences that pre-suppose a severity of circumstances that may not be applicable to certain real life circumstances.

Often these prescriptions include minimum periods of incarceration. For example, the *Sentencing Amendment (Mandatory Minimum Sentences) Act* 2013 in the Northern Territory implemented a mandatory sentencing scheme for “violent offences”. Under this scheme, an offender who commits a violent offence and has a previous violent offence conviction must be sentenced to imprisonment. Violent offences could include something as petty as common assault, which can be committed by as minor an act as throwing a cup of water on someone.

Numerous real life cases demonstrate the extremely disproportionate results of mandatory sentencing. A 15-year-old Aboriginal boy convicted of stealing some pencils and stationery, for instance, received a 20-day sentence, and died whilst in custody.<sup>4</sup> Such disproportionate punishment is the result of the removal of judicial discretion. By their nature mandatory sentencing schemes can ultimately result in significantly harsher sentences than discretionary sentencing practise would allow. Often the punishment does not fit the crime, and such outcomes violate the principles of justice.

### *Mandatory Sentencing’s Consequences for Indigenous Incarceration*

The rate at which Aboriginal and Torres Strait Islander persons is exacerbated by the destruction of the principle of proportionality under mandatory sentencing regimes. As this submission is responding to a variety of jurisdictions, an exhaustive analysis of each individual scheme is not made. However specific examples and general trends may be adduced.

Such trends exist alongside a continually increasing incarceration rate of indigenous Australians. The Indigenous incarceration rate has continued to grow since the Royal

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<sup>3</sup> Nicholas Cowdery QC, ‘Some aspects of Sentencing’, (Speech delivered at Legal Studies Association 2007 Conference, 23 March 2007, Sydney).

<sup>4</sup> Above n 1, [20], p. 11. See for further examples.

Commission into Aboriginal Deaths in Custody with a 37% increase between 2001 and 2008.<sup>5</sup> In the Northern Territory, where mandatory sentencing schemes have been consistent policy for nearly 2 decades, the percentage of aboriginal people within the state's total population is 30%, but their incarcerated representation is 80%.<sup>6</sup>

The 2014 Australian Law Council's Discussion Paper<sup>7</sup> provides an excellent analysis of the links between growing incarceration rates and the introduction of various mandatory sentencing schemes, and below are some of its key findings:<sup>8</sup>

- Mandatory sentences have consistently adversely affected indigenous Australians. In the Northern Territory, the 1997 mandatory sentencing scheme incarcerated 8.6 times more Aboriginal than non-Aboriginal people.<sup>9</sup>
- Incarceration for relatively trivial matters as a result of mandatory sentencing can be seen in the findings of the North Australian Aboriginal Justice Agency, where 38% of NT's prisoners were serving a sentence of three months or less, and 63% were serving sentences less than six months.<sup>10</sup> Where the NT has the highest population of indigenous people, this impact is not insignificant on overall indigenous incarceration rates.
- Where mandatory sentencing in the Northern Territory was introduced for some violent offences in 2008, the outcomes for all offenders were similar. However, as an Indigenous man was 68 times more likely to come before the

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<sup>5</sup> Jacqueline Fitzgerald, 'Why are Indigenous imprisonment rates rising?' August 2009 Crime and Justice Statistics Bureau Brief, NSW Bureau of Crime Statistics and Research at [http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll\\_bocsar.nsf/vwFiles/BB41.pdf/\\$file/BB41.pdf](http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/BB41.pdf/$file/BB41.pdf).

<sup>6</sup> Northern Australian Aboriginal Justice Agency, 'Mandatory Sentencing Fact Sheet', p. 4, at <http://www.naaja.org.au/wp-content/uploads/2014/05/Mandatory-sentencing-fact-sheet-final2.docx>

<sup>7</sup> Above n 1.

<sup>8</sup> Specifically paragraphs 110-123 on pages 29- 31 of the Australian Law Council discussion paper, above n 1.

<sup>9</sup> Office of Crime Prevention, Northern Territory Government, Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience (August 2003) p. 3.

<sup>10</sup> See evidence of Mr J. Sharp, North Australian Aboriginal Justice Agency, Senate Legal and Constitutional Affairs References Committee, Inquiry into the value of a justice reinvestment approach in Australia, Hearing Transcript, 1 May 2013, p. 14. As referenced in above n 1, paragraph 115.

law for this type of offence, the impact these laws have on indigenous incarceration is significant.<sup>11</sup>

- Further, aboriginal men were 20 times more likely to be convicted of these violent offences, meaning that the overall impact of the mandatory sentencing scheme fell disproportionately on the Indigenous population.<sup>12</sup>

In summary, the UNSW Law Society submits the following:

1. Mandatory sentencing regimes can, and do, result in disproportionately severe sentences due to the revocation of judicial discretion.
2. The types of sentences that are mandated often involve mandatory incarceration.
3. The combination of jurisdictional demographics and the types of offences chosen often mean that a disproportionate number of indigenous people are caught by the schemes.
4. Short prison sentences form a significant proportion of the incarcerated population, reflecting the impact of mandatory sentencing for less-serious offences.

This disproportionate representation significantly impacts on the overall rate of Aboriginal and Torres Strait Islander people in custody.

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<sup>11</sup> Stephen Jackson and Fiona Hardy, 'The Impact of Mandatory Sentencing on Indigenous Offenders' (Speech delivered at Sentencing Conference 2010, National Judicial Conference, Canberra 6 & 7 February 2010) p. 3. As referenced in above n 1, paragraph 117.

<sup>12</sup>Ibid.



(e)

*High Incarceration rates for Aboriginal and Torres  
Strait Islander men, women and juveniles*

## (1) *Juveniles*

### *Background*

#### (a) *Profile of Indigenous population*

Aboriginal and Torres Strait Islander community makes up a small (3%) of the total population.<sup>1</sup> Compared to the general population the Indigenous community is much younger, with an average age of 22 years and under.<sup>2</sup> The majority of Indigenous people live in metropolitan or regional areas of states and territories. In 2014 the *Australian Institute of Health and Welfare* reported that the largest population of Indigenous people reside in New South Wales, while the Northern Territory's population was said to have had the largest proportion of Indigenous people.<sup>3</sup>

#### (b) *The difference between Indigenous and non-Indigenous population*

##### *Exposure to life's stressors*

Indigenous communities suffer far more from life stressors compared to the non-Indigenous population. These include: serious illness and disability; alcohol and drug related problems; family or siblings incarcerated; overcrowding at home; death of a family or a loved one. In 2004-2005 the *National Aboriginal and Torres Strait Islander Health Survey* reported Indigenous people were experiencing two or more of these life stressors over the previous 12 months, while 27% percent were reported to have had experienced four or more life stressors over the same period.<sup>4</sup> Parker also highlighted that the significant effect of stress on Aboriginal children in Western Australia.<sup>5</sup> The Western Australian Aboriginal Children Health Survey (WAACHS) reported that a significant number of Aboriginal children aged 4-17 years were living in families

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<sup>1</sup> Australian Institute of Health and Welfare. *Australia's health 2014. Australia's health series no. 14. Cat. no. AUS 178* <<http://www.aihw.gov.au/publication-detail/?id=60129547205>>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Roz Parker, 'Aboriginal and Torres Strait Islander mental health: an overview' In Nola Pudie, Pat Dudgeon and Roz Walker (eds), *Working together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*. (Commonwealth of Australia, 2010) <[http://aboriginal.telethonkids.org.au/media/54847/working\\_together\\_full\\_book.pdf](http://aboriginal.telethonkids.org.au/media/54847/working_together_full_book.pdf)>.

<sup>5</sup> Parker, above n 4.

where seven or more major life stress events had occurred over the preceding 12 months.<sup>6</sup> These all indicate that Indigenous juveniles are disadvantaged when it comes to education, health care and employment and thus more likely to experience domestic violence, to be taken into state care and even to engage in offending behaviours.<sup>7</sup>

### *Historical Trauma*

In comparison to the non-Indigenous population, the Indigenous population has been affected by traumatic historical events that are still being felt by the Indigenous children. For a better understanding of the impact of historical and intergenerational trauma in context see the following extract by Atkinson:<sup>9</sup>

*Trauma in this context refers to an event that is psychologically overwhelming for an individual. The event involves a threat (real or perceived) to the individual's physical or emotional wellbeing. This person's response to the event involves intense fear, helplessness or horror, or for Children, the response might involve disorganised or agitated behaviour (Briere & Scott; Courtis 1999; Guarino et al 2009).*

*Complex trauma results from the problem of an individual's exposure to multiple or prolonged traumatic events that do not categorically fit psychiatric criteria for post-traumatic stress disorder. These events are typically of an interpersonal nature such as psychological maltreatment, neglect, physical and sexual abuse (van der Kolk 2005). The events often begin in childhood and can extend over an individual's life span.*

*Indigenous Australian children may experience trauma (once or multiple) through their own direct experience and secondary exposure (Ralph et al 2006) and are at a high risk of experiencing complex trauma. Direct exposure of trauma might include abuse, neglect and exposure to violence. In 2011, indigenous children were 5.4 times more likely than non-indigenous children to experience a hospital separation for assault, eight times as likely to be the subject of substantiated child abuse or neglect and 15 times more likely to be under juvenile justice supervision (AIHW 2011).*

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<sup>6</sup> Parker, above n 4.

<sup>7</sup> Ibid.

<sup>9</sup> Judy Atkinson, Research sheet no 21, Produced for Closing the Gap Clearinghouse. Canberra: Australian Institute of Health and Welfare, *Trauma-informed services and trauma-specific care for Indigenous Australian children* (2013).

*The chance of a child growing up in an unsafe home and live in an unsafe community is higher for Indigenous Children than for non-indigenous. This is because in the aboriginal population there are many family that have not healed from the trauma of past events including displacement from Country, institutionalisation and abuse. The Stolen Generations also represent a significant cause of trauma. In 2008, an estimated 8% of Indigenous people aged 15 and over reported being removed from their natural family and 38% had relatives who had been removed from their natural family (ABS 2009). This trauma can pass to children (inter-generational trauma) (Atkinson 2002; Atkinson et al. 2010).*

*Indigenous children may experience a range of distressing life events including illness and accidents, hospitalisation or death of close family members, exposure to violence, family disintegration (with siblings separated due to forced removals, relationship breakdown and possibly incarceration) and financial stress (ABS 2006, 2009; Haebich 200; Siburn et al 2006)*

It is therefore clear that Indigenous juveniles have a complex history and thus are at a higher risk of offending than non-Indigenous juveniles.

(c) *The development and risk factors of criminal behaviour*

Young people aged 10-17 years are in a complex yet delicate relationship with the juvenile justice system. The relationship between the two is complicated by the developmental stage of these young people. Young people aged 10-17 years are at a discovery stage of their development, and are discovering their identify by testing their boundaries. As young people reach 15-16 years, some may experiment with illicit drugs or antisocial behaviour.<sup>10</sup>As young people progress towards adulthood, the vast majority of them grow out of this phase and they join the rest of the community in conducting themselves according to the law.<sup>11</sup>

Experts looking into antisocial behaviour of adolescence have found a range of precursors for adolescent antisocial behaviour (Appendix-1) as well as a number of

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<sup>10</sup> Kelly Richards, 'Trends in Juvenile detention in Australia' (2011) 416 *Trends & Issues in Crime and Criminal Justice* <[http://www.aic.gov.au/en/publications/current\\_series/tandi/401-420/tandi416.aspx](http://www.aic.gov.au/en/publications/current_series/tandi/401-420/tandi416.aspx)>.

<sup>11</sup> Kelly Richards, 'What makes juvenile offenders different from adults offenders?' (2011) 409 *Trends & Issues in Crime and Criminal Justice*

protective factors (Appendix 2).<sup>12</sup> Beresford highlighted the relationship between the precursors and adolescent antisocial behaviour by noting that the literature has for a long time recognised individual characteristics— such as family background, school experience and community characteristics— as risk factors for juvenile offending.<sup>13</sup>

(d) *Overview of overrepresentation of Indigenous juveniles in detention*

Overrepresentation of Indigenous juveniles in detention is not a new trend. In 2007, 59% of the juvenile detention population was Indigenous.<sup>14</sup> Indigenous juveniles are up to 28 times more likely than non-Indigenous youth to be detained in a correctional facility.<sup>15</sup> It was reported that from 2004-2011 the rate of detention of non-Indigenous has decreased by 27.6% while rate of detention of Indigenous juvenile has increased by 1.6%.<sup>16</sup>

*Why are Indigenous Juveniles overrepresented in detention?*

(a) *Mental health problems and trauma*

It is possible that Indigenous juveniles are overrepresented because of untreated mental health issues.<sup>17</sup> Osmond suggests that conduct disorders and Attention Deficit Hyperactivity Disorders are indicators of future adolescent antisocial behaviour.<sup>18</sup> Since 1989, there has been consistent evidence of higher proportions of juveniles in detention suffering from mental health issues.<sup>19</sup> Sawyer reported that the prevalence

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<sup>12</sup>Dina Smart et al, 'Patterns and precursors of adolescent antisocial behaviour: Types, resiliency and environmental influences' Second Report, 2003. Melbourne, Vic: Australian Institute of Family Studies and Crime Prevention Victoria <http://www.aifs.gov.au/atp/pubs/reports/cpv/report2.html>

<sup>13</sup> Q Beresford, G Partington and G Gower, *Reform and Resistance in Aboriginal Education* (Revised edition UWA Publishing, 2012) 244.

<sup>14</sup> Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia *Indigenous Australians, Incarceration and the Criminal Justice System* (2010).

<sup>15</sup> Richards, above n 9; Beresford, above n 12.

<sup>16</sup> Richards, above n 9.

<sup>17</sup> C Osmond, 'Anti-social behaviour and its surveillant inter-semblage in New South Wales, Australia' (2008) 7 *Surveillance & Security* 325-343.

<sup>18</sup> *Ibid.*

<sup>19</sup> Kerig et al, 'Posttraumatic Stress as a Mediator of the Relationship Between Trauma and Mental Health Problems Among Juvenile Delinquents' (2009) 38 *Journal of Youth and Adolescence* 1214.

of mental health problems in the custodial population of young people has remained consistently high through the period of 20 years from 1989-2009.<sup>20</sup>

The lack of access to health care services as well as the presence of the risk factors of antisocial behaviours in Aboriginal communities means that Indigenous juveniles are far more likely than non-Indigenous juveniles to engage in antisocial behaviour. Beresford noted the precursors for antisocial behaviours (see appendix) are prevalent in Indigenous communities.<sup>21</sup> The precursors he identified included substance abuse, excessive alcohol consumption, risk of mental health problems, high levels of social disadvantage, increase risk of exposure to stressful life events (unemployment, homelessness, family problems and incarceration). Based on his findings he suggests that Indigenous juveniles are more likely to engage in antisocial behaviour. It is interesting to note that no protective factors were identified to be unique to the Indigenous community.<sup>22</sup>

Mental health problems amongst juvenile detainees are not unique to Australia. Experts from United States, and United Kingdom have reported that juvenile detainees are 3 times more likely to experience mental health problems compared with their counterparts in the general population.<sup>23</sup> While causes of poor mental health are multifactorial, substance use and childhood trauma are factors which disproportionately affect Indigenous juveniles. A study on juveniles in detention in New South Wales, reported a relationship between childhood neglect and violence (physical or sexual) and the mental health problems displayed by the juvenile detainees.<sup>24</sup> Furthermore the study found that over half (60%) of juvenile detainees reported experiences of childhood abuse or neglect during the course of their life.

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<sup>20</sup> M Sawyer et al, 'Mental health problems among young people on remand: has anything changed since 1989?' (2010) 34 *Australian and New Zealand Journal of Public Health* 6, 594-7.

<sup>21</sup> Beresford, Partington and Gower, above n 12.

<sup>22</sup> Parker, above n 4.

<sup>23</sup> Desai et al, 'Mental Health Care in Juvenile detention facilities: A review' (2006) 44 *Journal of American Academy of Child and Adolescent Psychiatry*, 798-806.

<sup>24</sup> E Moore, C Gaskin, D Indig, 'Childhood maltreatment and post-traumatic stress disorder among incarcerated young offenders' (2013) 37 *Child Abuse & Neglect* 10, 861-870.

This finding is consistent with findings of other studies, which have highlighted the relationship between trauma and development of various mental health disorders.<sup>25</sup>

(b) *Policing and sentencing decision*

The traditional approach of the children's courts is also contributing to the overrepresentation of Indigenous juvenile convicted and imprisoned. Courts that give undue weight to public safety consideration are far more likely to impose harsher penalties on the alleged juvenile offender.<sup>28</sup> Indigenous young people are more likely than non-Indigenous young people<sup>29</sup> to come in contact with the criminal and so more likely to be incarcerated. Such an approach furthermore, over-looks the safety and wellbeing of the offender, as it fails to approach the hearing as an opportunity to provide social and health services to the offender. It further fails to address the overrepresentation of Indigenous juveniles in the criminal justice system. There are alternatives to imprisonment available per the *Young Offenders Act 1997 (NSW)*, for example, the issuing of cautions or warnings or referrals to the Youth Justice Conference. However, Sheehan found that the Children's courts in NSW, WA, NT place greater emphasis on public safety when the court exercised its discretionary power to make orders.<sup>30</sup> There was also lower use of Diversion options seen in the three jurisdictions of NSW, WA and NT that was observed.<sup>31</sup>

Appendix 1<sup>32</sup>

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<sup>25</sup> Arig et al, 'Trauma exposure and posttraumatic stress disorder in delinquent females adolescents' (2008) 49 *Journal of Child Psychology and Psychiatry*, 79-87; J.F. Chapman, J.D. Ford 'Relationships between suicide risk, traumatic experiences, and substance use among juvenile detainees' (2008) 12 *Archives of Suicide Research*, 50-61; L.S. McReynolds, G.A. Wasserman 'Self-injury in incarcerated juvenile females: Contributions of mental health and traumatic experiences *Journal of Traumatic Stress*' (2011) 24 *Journal of Traumatic Stress*, 752-755; G.A. Wasserman, L.S. McReynolds, 'Contributors to traumatic exposure and posttraumatic stress disorder in juvenile justice youths' (2011) 24 *Journal of Traumatic Stress*, 422-429.

<sup>28</sup> See *Children (Criminal Proceedings) Act 1987 (NSW)* s 33, except for s 33(1)(a).

<sup>29</sup> Beresford, Partington and Gower, above n 12.

<sup>30</sup> R Sheehan and A Borowski, 'Australian's Children's Courts: The Findings of a National Assessment' (Paper presented at the Applied Research in Crime and Justice Conference, Sydney 18-19 February 2015).

<sup>31</sup> *Ibid.*

<sup>32</sup> Vassallo S, Smart D, Sanson A et al, 'Patters and precursors of adolescent antisocial behaviour' (Australian Institute of Family Studies and Crime Prevention, 2002)

Risk Factors				
Child factors	Family factors	School context	Life events	Community and cultural factors
prematurity low birth rate disability prenatal brain damage birth injury low intelligence difficult temperament chronic illness insecure attachment poor problem solving beliefs about aggression attributions poor social skills low self esteem lack of empathy alienation hyperactivity/disruptive behaviour impulsivity	<p><i>Parental characteristics:</i>                      teenage mothers                      single parents                      psychiatric disorder,                      especially depression                      substance abuse                      criminality                      antisocial models</p> <p><i>Family environment:</i>                      family violence and                      disharmony                      marital discord                      disorganised                      negative interaction/                      social isolation                      large family size                      father absence                      long term parental                      unemployment</p> <p><i>Parenting style:</i>                      poor supervision and                      monitoring of child                      discipline style (harsh                      or inconsistent)                      rejection of child                      abuse                      lack of warmth and                      affection                      low involvement in                      child's activities                      neglect</p>	school failure normative beliefs about aggression deviant peer group bullying peer rejection poor attachment to school inadequate behaviour management	divorce and family break up war or natural disasters death of a family member	socioeconomic disadvantage population density and housing conditions urban area neighbourhood violence and crime cultural norms concerning violence as acceptable response to frustration media portrayal of violence lack of support services social or cultural discrimination



Appendix 2<sup>33</sup>

Protective Factors				
Child factors	Family factors	School context	Life events	Community and cultural factors
social competence social skills above average intelligence attachment to family empathy problem solving optimism school achievement easy temperament internal focus of control moral beliefs values self related cognitions good coping style	supportive caring parents family harmony more than two years between siblings responsibility for chores or required helpfulness secure and stable family supportive relationship with other adult small family size strong family norms and morality	positive school climate prosocial peer group responsibility and required helpfulness sense of belonging/bonding opportunities for some success at school and recognition of achievement school norms re violence	meeting significant person moving to new area opportunities at critical turning points or major life transitions	access to support services community networking attachment to the community participation in church or other community group community/cultural norms against violence a strong cultural identity and ethnic pride

<sup>33</sup> Smart et al, above n 11.

## (2) Women

The Australian Bureau of Statistics indicates that the rate at which indigenous women are incarcerated is currently the highest on record.<sup>1</sup> The rise in indigenous imprisonment is said to be a result of the severity of the ‘criminal justice system’s treatment of Indigenous offenders’.<sup>2</sup> As a consequence, indigenous women are now imprisoned at an alarming higher rate since the Royal Commission into Aboriginal Deaths in Custody.<sup>3</sup> In each jurisdiction the reasons are complex, so to examine the causes of incarceration for Aboriginal and Torres Strait Islander women broadly, this section focuses on the nature of offences and the underpinning mental health reasons.

### *Minor offences*

Bartels found that indigenous women are more likely to receive a custodial sentence for minor offences compared to other non-Indigenous women in prison.<sup>4</sup> The types of offences committed by Indigenous women are generally associated with severe poverty relating to ‘non payment of fines, shop lifting, driving and alcohol related offences.’<sup>6</sup> Stubbs concurred that Indigenous women are twice as likely to be in custody than non- Indigenous women, with good order offences being their most serious crime accounting for 54 per cent.<sup>7</sup>

Incarcerating Indigenous women for less serious crimes is problematic and unnecessary as it fails to consider other diversionary programs and highlights a lack of non-custodial options that meet the needs of indigenous women offending.<sup>8</sup> It was found that in the lower courts, which deal with less serious offences, the court was

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<sup>1</sup> Lorana Bartels, ‘Sentencing of Indigenous Women’ (2012) 12 *Indigenous Justice Clearinghouse* [1-8].

<sup>2</sup> Julie Stubbs, ‘Indigenous Women in Australia Criminal Justice: Over- represented but rarely acknowledged,’ (2011) 15 *Australian Indigenous Law Review* 47, 51.

<sup>3</sup> *Ibid.*

<sup>4</sup> Bartels, above n 1, 2; *Ibid* 3.

<sup>6</sup> Elizabeth Grant and Sarah Paddick, ‘Aboriginal Women in the Australian Prison System’ (September 2014 < <http://rightnow.org.au/writing-cat/article/aboriginal-women-in-the-australian-prison-system/>>

<sup>7</sup> Stubbs, above n 2, 54.

<sup>8</sup> Bartels, above n 1, 4.

more likely to sentence indigenous people to imprisonment.

Stubbs indicates that one justification is that lower courts have less time to make sentencing decisions with very little information about the defendant.<sup>9</sup> The impact of these decisions on Indigenous women consequently disrupts family life and contributes to ongoing disadvantage. Most Indigenous women in prison are on remand or serving sentences for less than 12 months,<sup>10</sup> suggesting that the type of offences pose little threat to the community. It is evident that there is a failure to use punitive punishment as a final option. Other factors are police treatment of Indigenous women and changes to bail laws which are contributing to more Indigenous women being before the courts and joining the prison population.<sup>11</sup>

### *Fine default*

Fine defaulting is a substantial cause for the rising rate of incarceration for Indigenous women. In Western Australia, the number of Indigenous women in prison for fine defaults escalated by 576 per cent since 2008.<sup>12</sup> Alarming, two thirds of women serving a custodial sentence for fine defaults are indigenous.<sup>13</sup> The policy operates disproportionately on those most vulnerable, particularly Indigenous women and only exacerbates poverty and disadvantage, It furthermore fails to deter fine defaulting or gather fine revenue.<sup>14</sup> In 2014, an Aboriginal woman named Miss Dhu died in custody after being detained for an unpaid \$1000 fine.<sup>15</sup> The decision to incarcerate Miss Dhu cost her and her family her life. Amnesty International and other human rights organisations condemned the legislation demanding that there must be more culturally appropriate alternatives.<sup>16</sup>

To reduce the incarceration of Indigenous women there is a clear need for policy reform to ensure fine defaults do not translate into prison sentences.<sup>17</sup> The policy

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<sup>9</sup> Stubbs, above n 2, 54.

<sup>10</sup> Bartels, above 1, 4.

<sup>11</sup> Ibid.

<sup>12</sup> WA, Labor Discussion Paper, *Locking in Poverty: How Western Australia drives the poor, women and Aboriginal people to prison*, (Paul Papalia, Shadow Minister for Corrective Services) Warnbro, 2014 ,9 .

<sup>13</sup> Ibid.

<sup>14</sup> Ibid 10.

<sup>15</sup> Amnesty International, *Truth and Justice needed for Miss Dhu, latest WA death in custody* (September 2014) < <http://www.amnesty.org.au/news/comments/35511/>>

<sup>16</sup> Ibid.

<sup>17</sup> Human Rights and Equal Opportunity Commission (Cth), *Social Justice Report (Report 2002)* < <https://www.humanrights.gov.au/publications/hreoc-social-justice-report-2002-indigenous-women-and-corrections-landscape-risk#5.1.1>>

decision to serve a prison sentence as opposed to paying a fine puts unnecessary pressure on the prison system and the cost outweighs the benefit making it an economic loss. More troubling, is that as of 2014, the WA government intends to adapt male prisons to accommodate women rather than consider more economic and culturally viable diversionary options.<sup>18</sup> Indigenous women unable to pay fines need to be supported rather than imprisoned.

### *Mental health: ‘Transcarceration’*

The closure and lack of adequate psychiatric and mental institutions has been linked to the increase of Indigenous women being placed in prisons.<sup>19</sup> Baldry and Cunneen label this trend as ‘transcarceration’<sup>20</sup> where Indigenous women, who need psychiatric support to deal with mental illness, are instead being incarcerated for committing less serious crimes.<sup>21</sup> Greater investment of funds and infrastructure into mental well-being is essential to reduce the over-representation Indigenous women in custody.

Generally, female prisoners with a mental condition out-number male prisoners,<sup>22</sup> and evidence indicates that Indigenous women are the most over-represented group of prisoners with mental illness.<sup>23</sup> Indigenous women with a mental impairment constitute the extraordinary surge of those increasingly incarcerated with long histories as victims of sexual abuse and higher rates of substance misuse.<sup>24</sup>

The World Health Organisation (“WHO”) warns the nature of incarceration only exacerbates mental health problems where people enter prisons with a mental health condition.<sup>25</sup> Prison deprives one’s liberty and aspects such as ‘disciplinary regimes, lack of choice of activities, restricted contact with families’<sup>26</sup> - especially children.

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<sup>18</sup> Paul Paplia *Locking in Poverty: How Western Australia drives the poor, women and Aboriginal people to prison*, Labor Discussion Paper, Perth, 2014, 9.

<sup>19</sup> Eileen Baldry and Chris Cunneen, ‘Indigenous women and the shadow of colonial patriarchy,’ (2014) 47 *Australian and New Zealand Journal of Criminology* 2, 281.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

<sup>25</sup> World Health Organisation, *Health in Prisons: A WHO guide to the essentials in prison health* (2007) 141.

<sup>26</sup> Anita Mackay, ‘Women in Australian prisons and why they need human rights protections’ (October 2013) < <http://asiapacific.anu.edu.au/regarding-rights/2013/10/04/women-in-australian-prisons-and-why-they-need-human-rights-protections/>>

Internal socialisation factors only deteriorate the mental health of Indigenous women and systematically contributes to the fracturing of family structures.

To ameliorate the proliferation of Indigenous women incarcerated, governments must implement and guarantee sustainable psychiatric support for mental and cognitive disorders in a culturally respectful manner to address the nature of offences these women commit. Incarcerating Indigenous women with mental illness fails to deal with the issue as a health priority and only perpetuates the cycle of recidivism, particularly for minor offences. For prisons to meet the needs of Indigenous women with mental illness and reduce psychological harm government ‘health authorities and prison staff [must] acknowledge that the preventative treatment and health care for prisoners must be equivalent to those provided in the community.’<sup>27</sup>

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<sup>27</sup> World Health Organisation, *Health in Prisons: A WHO guide to the essentials in prison health* (2007) 141.

### (3) Men

The over-representation of Aboriginal and Torres Strait Islander males in the prison system has become disturbingly conventional in modern day Australia. Even more troubling is the fact that, despite drastic reforms and harrowing parliamentary reports, these rates continue to increase. This begs the increasingly important question: why?

As at 30 June 2014, Aboriginal and Torres Strait Islanders accounted for 27% of the total prisoner population and approximately 3% of the total Australian population.<sup>1</sup> 90% of those Aboriginal and Torres Strait Islanders imprisoned were male, with the most common offences charged being acts intended to cause injury (35%)<sup>2</sup> and unlawful entry with intent (16%).<sup>3</sup> ‘The NSW Bureau of Crime Statistics and Research 2009 report on New South Wales Indigenous offenders revealed that between 2001 and 2008 its Indigenous prison population increased by 56.4%.<sup>4</sup> It is this continued increase that Parliament should aim to stem.

While it is too simplistic to proffer that there is any one answer to explain these rates, as it would ignore the unique human quality inherent to each offender, it is useful to examine some of the shared experiences that male Aboriginal and Torres Strait Islander prisoners encounter as being possible predictors of imprisonment. A study conducted by Don Weatherburn in 2008 indicated that alcohol abuse, welfare dependence, unemployment, being a member of the stolen generation, family stability, and completing year 12 all ‘exert strong positive effects on the risk of arrest.’<sup>5</sup> Fitzgerald’s 2009 paper ‘*Why are Indigenous imprisonment rates rising?*’, however, declares the rise in incarceration rates to be based mainly on harsher sentencing and remand,

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<sup>1</sup> Australian Bureau of Statistics, ‘Prisoners In Australia’ (30 June 2014) <[www.abs.gov.au](http://www.abs.gov.au)>.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Thalia Anthony, ‘Sentencing Indigenous Offenders’ (Brief 7 March 2010) <<http://www.indigenousjustice.gov.au/briefs/brief007.pdf>>

<sup>5</sup> Weatherborn D et al. ‘Predictors of Indigenous Arrest: an exploratory study’ (2008) *The Australian* 317.

rather than an increase in offences.<sup>6</sup> While all of the above needs to be factored into any consideration of the issue, for the purpose of brevity this submission will investigate the effects of alcohol, and the overall justice system on male Aboriginal and Torres Strait Islander incarceration.

### *Substance Abuse*

In Weatherburn's study, the strongest correlation between instances of Aboriginal and Torres Strait Islander imprisonment, apart from the offender being a male, was the consumption of alcohol.<sup>7</sup> Other troubling statistics include the estimate that '71% of Indigenous homicides occurred in situations where both the offender and victim were drinking (as opposed to 19% of non-Indigenous homicides).'<sup>8</sup>

Though Indigenous Australians are approximately twice as likely to abstain from drinking as non-Indigenous Australians, they are much more likely to engage in high-risk alcohol abuse.<sup>9</sup> A 2003 survey from NSW indicated that at the time of their offence, 28% of Indigenous prisoners were intoxicated, in comparison to 11% of non-indigenous prisoners.<sup>10</sup> 73% of Aboriginal and Torres Strait Islander men, versus 59% of other men, reported themselves to be intoxicated at the time of offence, and 28% of Aboriginal men, compared with 20% of non-Aboriginal men, suggested that the crime was committed to buy drugs or alcohol.<sup>11</sup>

### *The Justice System*

Aboriginal and Torres Strait Islander men become familiar with the justice system at a much younger age than that of their non-Indigenous counterparts.<sup>12</sup> Sixty-one

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<sup>6</sup> Fitzgerald, J, Why are Indigenous imprisonment rates rising? Issue Paper no. 41, BOCSAR, August 2009.

<sup>7</sup> Weatherborn D et al. 'Predictors of Indigenous Arrest: an exploratory study' (2008) *The Australian* p 317

<sup>8</sup> Preventative Health Taskforce, 'Key Trends in Alcohol related Harm' (Technical Paper 3, June 2009)

<[http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/09C94C0F1B9799F5CA2574DD0081E770/\\$File/alcohol-3.pdf](http://www.health.gov.au/internet/preventativehealth/publishing.nsf/Content/09C94C0F1B9799F5CA2574DD0081E770/$File/alcohol-3.pdf)>

<sup>9</sup> Ibid

<sup>10</sup> NSW Health, '2009 NSW Inmate Health Survey: Aboriginal Health Report' (2010)

<<http://www.justicehealth.nsw.gov.au/publications/inmate-health-survey-aboriginal-health-report.pdf>>

<sup>11</sup> Ibid

<sup>12</sup> Ibid

percent of the incarcerated male Aboriginal and Torres Strait Islander group reported a history of juvenile detention, as opposed to 31% of those not within the Aboriginal and Torres Strait Islander group.<sup>13</sup>

Though a history of juvenile detention should not legally prejudice the sentencing of an Aboriginal and Torres Strait Islander should they later be tried as an adult, it does demonstrate an early acquaintance with the justice system which may have a major effect on later life decisions. Being imprisoned at such a formative age restricts young Aboriginal and Torres Strait Islander men from socialising and creating ties with the community, and instead engenders in them the harsh dog-eat-dog world that often exists in detention facilities. These harsh lessons could lead them to commit criminal offences in the outside world.

Changes in those regulations dealing with remand and sentencing have frequently been touted as contributing to the rise in male Aboriginal and Torres Strait Islander incarceration. The Standing Committee on Community Services and Social Equity issued the following statement in 2004:

*"The growth in the sentenced prisoner population appears to be due...to an increase in the proportion of Aboriginal offenders given a prison sentence and the length of the prison terms imposed. There has been no overall increase in the number of Aboriginal adults convicted but there was an increase in the number convicted specifically of offences against justice procedures. These results suggest that the substantial increase in the number of Aboriginal people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself."<sup>14</sup>*

Aboriginal and Torres Strait Islander prisoners on remand comprised 25% of the increase of all Aboriginal and Torres Strait Islander incarceration rates. In 2001 12.7% of Aboriginal and Torres Strait Islander were refused bail, as compared with 15.4% in 2008. There was also an increase in the sentencing of Aboriginal and Torres Strait Islander offenders, up from 16.9% in 2001, to 20.4% in 2008. These statistics are coupled with both a rise in the length of remand time and sentences.<sup>15</sup>

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<sup>13</sup> Ibid

<sup>14</sup> The Standing Committee on Community Services and Social Equity (2004)

<sup>15</sup> Fitzgerald, J, Why are Indigenous imprisonment rates rising? Issue Paper no. 41, BOCSAR, August 2009.



These figures are influenced by the fact that an alleged offender's previous convictions are taken into account in bail and sentencing determinations. Aboriginal and Torres Strait Islander male prisoners are statistically more likely to have been previously incarcerated than non-Aboriginal and Torres Strait Islander prisoners, with 81% of Aboriginal and Torres Strait Islander offenders having previously been imprisoned, compared to only 56% of non-Aboriginal and Torres Strait Islander offenders.<sup>16</sup> Aboriginal and Torres Strait Islander offenders are also almost twice as likely to have three or more offences as their non-Aboriginal and Torres Strait Islander offenders.<sup>17</sup>

Bail considerations that factor in the alleged offender having a stable residence can also prejudice Aboriginal and Torres Strait Islander men from being granted release, as Aboriginal and Torres Strait Islander experience four times the rate of homelessness as the rest of the population.<sup>18</sup>

Judges, by virtue of the common law, are encouraged to consider all material factors when imposing sentences on an offender.<sup>19</sup> Cultural heritage has been recognised as one of those factors.<sup>20</sup> Indeed, the Australian Law Reform Commission and the Law Reform Commission of Western Australia have recommended that the cultural background of the offender is a relevant sentencing consideration.<sup>21</sup> However, there is much more that could be done in order to ensure that the consideration of cultural heritage in sentencing has a substantive effect on implicit biases within the criminal justice system.

Engraining this factor into statute would recognise the issue at hand, and would inform judges and magistrates that the relevant parliament considers it necessary to reduce the rate at which members of the Aboriginal and Torres Strait Islander community are being imprisoned. This is equally applicable to bail laws.

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<sup>16</sup> NSW Health, '2009 NSW Inmate Health Survey: Aboriginal Health Report' (2010) <<http://www.justicehealth.nsw.gov.au/publications/inmate-health-survey-aboriginal-health-report.pdf>>

<sup>17</sup> Ibid

<sup>18</sup> Australian Institute of Health and Welfare, 'A profile of homelessness for Aboriginal and Torres Strait Islander people' (May 2011) <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737418954>> p5.

<sup>19</sup> *Neal v The Queen* [2011] VSCA 172, 326.

<sup>20</sup> *R v Fuller-Cust* [2002] VSCA 168, [80].

<sup>21</sup> Thalia Anthony, 'Sentencing Indigenous Offenders' (Brief 7 March 2010) <<http://www.indigenousjustice.gov.au/briefs/brief007.pdf>>

### *Conclusion*

There are a number of reasons behind the proliferation of Aboriginal and Torres Strait Islander incarceration. These include alcohol and implicit prejudices engrained within the justice system. To curb the effects of this rise it is important that any attempted solutions should not be the result of paternalism, but rather should be a culmination of Aboriginal and Torres Strait Islander engagement.

*g.*  
*Regarding the Effectiveness of Current Methods of  
Early Intervention for Sexual Assault Offenders in  
Aboriginal and Torres Strait Islander Communities*

*Why early intervention is sought less frequently by Indigenous women who are victims of sexual violence*

Sexual violence within Indigenous communities is overwhelming perpetrated by the partner or husband of the victim. The Aboriginal Justice Council reported that in the majority (53%) of sexual assault cases in a sample group the offender was known to the victim. Furthermore, in 69% of these cases, the offender was the victim's spouse or partner.<sup>1</sup> The intimate nature of these relationships causes many indigenous women to exercise caution in inviting outsiders into the dynamics of such relationships if they are to turn abusive.<sup>2</sup>

In addition, the disproportionate incarceration of Indigenous Australians causes indigenous women to be hesitant in reporting sexual violence to the police in its early stages.<sup>3</sup> The overrepresentation of Indigenous Australians in prisons dissuades indigenous women from seeking assistance from law enforcement when a relationship first becomes abusive, as they have grounds to fear that their partner may be incarcerated for their actions.

*How this results from a lack of adequate services available to Indigenous women who may otherwise seek early intervention*

At the present time, victims of sexual violence are encouraged to approach police if they wish to seek intervention. For the reasons outlined in the above section this is not always an appropriately accessible option for indigenous women.

Services which are effective in prompting indigenous women to seek assistance as soon as relationships begins to become sexually abusive are likely are community-based. The existence of gender-appropriate members of the Indigenous community to whom Indigenous victims of sexual violence feel secure in disclosing details

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<sup>1</sup> Harry Blagg, *Crisis Intervention in Aboriginal Family Violence* (Department of the Prime Minister and Cabinet, 2000).

<sup>2</sup> L Schetzer & Henderson J, 'Public consultations: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW' [2003] (1) *Access to Justice and Legal Needs, Law and Justice Foundation of NSW*.

<sup>3</sup> Aboriginal and Torres Strait Islander Women's Task Force on Violence, Queensland, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence report* (2000).

concerning incidents of sexual violence to, who can liaise with police where appropriate, would best ensure early intervention is promoted. Such a program would see that issues of sexual violence would be resolved with a less of a period of delay in which the violence may continue or escalate, causing greater harms to the victim and increasing the extent of the criminal actions of the offender, thus leaving them likely to face harsher sentencing.

### *Conclusion*

It is evident that the effectiveness of early intervention measures in place at this point in time is greatly diminished as a direct result of the hesitance of Indigenous women in seeking assistance from the police. For early intervention to be effective it is necessary to take a community-based approach to intervention by promoting the existence of more readily approachable Indigenous sexual violence officers who work with police to create a secure environment for women to come forward with concerns relating to sexual violence earlier.