Human Rights Law Centre

Ending racially discriminatory laws that lead to the over-imprisonment of Aboriginal and Torres Strait Islander women and girls

Submission to Wiyi Yani U Thangani (Women's Voices) project

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Human Rights Law Centre

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1. Scope and limitations

1. The Human Rights Law Centre is an independent, not-for-profit, non-government organisation. We undertake litigation, advocacy, campaigns and research work to better protect and promote human rights in Australia.

2. The Human Rights Law Centre maintains a strong relationship and works in partnership with Aboriginal and Torres Strait Islander community controlled organisations including the National Aboriginal and Torres Strait Islander Legal Services (NATSILS), state and territory Aboriginal legal services, health organisations and peak coalitions on laws, policies and strategies that impact the rights and interests of Aboriginal and Torres Strait Islander peoples. The Human Rights Law Centre also plays a key role in the Change the Record Coalition and is engaged in policy and law reform activities directed at ensuring more effective responses to crime and reducing the over-incarceration rates of Aboriginal and Torres Strait Islander peoples.

3. The Human Rights Law Centre fundamentally supports the right of Aboriginal and Torres Strait Islander communities to be self-determining in all aspects of life, including in relation to the legal system. This submission seeks to highlight racial inequality in the legal system and laws

and policies that contribute to adverse experiences and the disproportionate contact of Aboriginal and Torres Strait Islander women with the legal system.

4. The over-imprisonment of Aboriginal and Torres Strait Islander peoples, particularly women, has a strong causal relationship to social and economic disadvantage and structural discrimination. It is also closely linked to oppression, violence, trauma and discrimination associated with colonisation. This is well documented and, in May 2017, the Human Rights Law Centre and Change the Record published a report, *Over-Represented and Overlooked: the Crisis of Aboriginal and Torres Strait Islander Women's Over-Imprisonment,* on this issue.[1] This submission builds on that report and further highlights how governments continue to overlook and ignore the specific experiences and unique needs of Aboriginal and Torres Strait Islander women and girls.

2. Terminology

5. The term "Aboriginal and Torres Strait Islander women" is used throughout this submission to reflect women who identify either, or both, as Aboriginal and/or Torres Strait Islander. The term "women" is inclusive of the experience of young women and girls for the most part but, when referring specifically to the unique experience of young females aged under the age of 18 years old, the term "Aboriginal and Torres Strait Islander girls" is used.

3. Over-imprisonment of Aboriginal and Torres Strait Islander women and girls

6. While this submission considers the over-representation of Aboriginal and Torres Strait Islander women in the criminal legal system, it is important to recognise that the majority of Aboriginal and Torres Strait Islander peoples never commit offences.[2] This is especially the case for Aboriginal and Torres Strait Islander women, the vast majority of whom will never enter the criminal legal system as offenders or be incarcerated.[3]

7. It is well documented, however, that Aboriginal and Torres Strait Islander women are vastly over-represented in the criminal legal system and in prisons. Aboriginal and Torres Strait Islander women are the fastest growing prison demographic, with imprisonment rates

[1] Human Rights Law Centre and Change the Record, 'Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment' (Report, May 2017).
[2] Australian Law Reform Commission, 'Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (Final Report, ALRC Report No 133, 2017) 41.
[3] Ibid 348.

exceeding those for both Aboriginal and Torres Strait Islander men and non-Indigenous women.

8. As at 30 June 2018, there were 1,230 Aboriginal and Torres Strait Islander women in Australian prisons, making up a staggering 34 per cent of the adult female prison population.[4] This differs starkly from the position in 1991, when there were only 121 Aboriginal and Torres Strait Islander women in prison, representing 17 per cent of the female prison population.[5]

9. Aboriginal and Torres Strait Islander women are generally forced into the legal system at an earlier age, are less likely to be granted bail, are more likely to be remanded in custody, are more likely to serve shorter sentences and are almost twice as likely to return to prison after release when compared to non-Indigenous women.

3.1 Laws that lead to over-imprisonment

10. The reforms recommended in this submission should sit within a broader framework that addresses the systemic racism, poverty and family violence experienced by many Aboriginal and Torres Strait Islander women. Approximately 70–90 per cent of Aboriginal and Torres Strait Islander women in prison have experienced family violence, sexual abuse and trauma.[6] This reflects a failure of governments to prevent violence against Aboriginal and Torres Strait Islander women or to respond and support the healing and recovery needs of marginalised women. It further highlights the limitations of the perpetrator/victim lens in understanding and responding to trauma and violence.

11. Aboriginal Community Controlled Organisations have done extensive work identifying what appropriate responses to family violence can look like. An example of this is the *Strong Families, Safe Kids: Family Violence Response and Prevention for Aboriginal and Torres Strait Islander Children and Families* discussion paper prepared by SNAICC – National Voice for our Children, the National Family Violence Prevention Legal Services Forum (NFVPLS) and the National Aboriginal and Torres Strait Islander Legal Services (NATSILS).[7] We do not seek to duplicate or speak over the top of that work, but echo calls for system-wide recognition of the unique experiences of Aboriginal and Torres Strait Islander women.

3.2 Problematic policing practices

12. There is a long history of over-policing of Aboriginal and Torres Strait Islander communities and disproportionate and adverse police contact. The discriminatory over-policing of Aboriginal and Torres Strait Islander communities is increasingly experienced by Aboriginal and Torres

[4] Australian Bureau of Statistics, 'Prisoners in Australia' (Data Tables, 8 December 2018).
[5] John Walker, *Australian Prisoners 1991* (Australian Institute of Criminology, 1992) 22.
[6] See Australian Law Reform Commission, above n 2, 117.
[7] SNAICC, NFVPLS and NATSILS, 'Strong Families, Safe Kids: Family Violence Response and Prevention for Aboriginal and Torres Strait Islander Children and Families' (Policy Paper, September 2017).

Strait Islander women. Over-policing sees many low level offences that remain untargeted in non-Indigenous communities result in excessive police interaction, arrests and charges for Aboriginal and Torres Strait women. Greater interaction with police increases the risk of women facing additional charges, such as resisting arrest.[8] The culmination of these practices see more Aboriginal and Torres Strait Islander women funnelled into prisons.

13. The de-gendered application of family violence legislation has played a role in this. When responding to incidents of family violence, wrongful gender and racial stereotypes can result in police failing to identify the appropriate victim/survivor and impair or infect police responses. This results in an increasing number of women victims/survivors being criminalised and reciprocal family violence orders being issued, with the Special Rapporteur on Violence against Women noting that this disproportionately punishes Aboriginal and Torres Strait Islander women.[9] This is confirmed by Aboriginal Family Violence Prevention Legal Services, which highlight that poor and discriminatory police responses to Aboriginal women seeking protection from family violence, including police disbelieving Aboriginal women, minimising or trivialising their experiences, or labelling family violence as reciprocal.

14. It is also hugely problematic that police act as the gatekeeper to accessing court-ordered diversion programs in jurisdictions like Victoria, where it is a requirement that police prosecutors consent for a person to be referred to a diversion program. Police have unfettered and unreviewable discretion in this regard. Giving police the power to determine whether a person can participate in a diversion program, which can have life altering affects in terms of diverting someone out of the criminal legal system and potentially engaging them with services that can address the underlying causes of their offending, often leads to unjust outcomes.

3.3 Lack of diversion options

15. Appropriately tailored diversion opportunities can provide more targeted interventions to reduce the number of Aboriginal and Torres Strait Islander women being forced into prisons. Governments have, however, traditionally failed to offer culturally responsive diversion programs. When they have, the focus has been on Aboriginal and Torres Strait Islander men.[10]

16. There are also systemic barriers to women's participation in diversion programs, including that Aboriginal and Torres Strait Islander women are:

[8] Sisters Inside, Submission to Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism*, 2018.
[9] Dubravka Šimonović, 'End of Mission Statement by Dubravka Šimonović, United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences' (Speech delivered at the press conference following her visit throughout Australia from 13 to 27 February 2017, Canberra, 27 February 2017).
[10] See generally Lorana Bartels, 'Diversion Programs for Indigenous Women' (Research in Practice Report No 13, Australian Institute of Criminology, 2010) 3.

(a) less likely to make admissions to police because of their experiences of over-policing and systemic racism (diversion usually requires an admission of wrongdoing);

(b) more likely to have prior convictions and/or be facing multiple charges, which make them ineligible for diversion;

(c) more likely to have substance abuse issues and/or co-existing mental illness, which make their circumstances too complex; and

(d) more likely to live in rural and remote locations where diversion programs are not available.[11]

17. Diversion options should be equitable and accessible to Aboriginal and Torres Strait Islander women. They should build on Aboriginal and Torres Strait Islander women's strengths and respond to their unique needs and circumstances. Flexibility needs to be built into these programs to break down the barriers highlighted above so that far more Aboriginal and Torres Strait Islander women are able to access programs and address issues in their lives. This is a much more effective way to prevent future engagement with the legal system in comparison to issuing fines that women might struggle to pay or locking women up.

18. The Victorian Aboriginal Child Care Agency runs the Koorie Women's Diversion program in Gippsland aimed at preventing Koorie women from further contact with the justice system. For up to 12 months, the program offers Koorie women:

(a) intensive case management and appropriate support (for their families when appropriate too);

(b) support to successfully complete their court orders, bail and/or community corrections orders;

(c) referrals to programs and services that reduce their likelihood of offending or reoffending; and

(d) help to navigate the justice and broader social welfare systems.[12]

19. Diversion programs like this, operated by Aboriginal Community Controlled Organisations, have a greater chance of engaging Aboriginal and Torres Strait Islander women through the provision of culturally appropriate services that better support their needs. A number of Aboriginal Community Controlled Organisations and Aboriginal and Torres Strait Islander Legal Services are doing effective work in this space, but need security and ongoing funding.

[11] Fiona Allison and Chris Cunneen, 'Indigenous Bail Diversion: Program Options for Indigenous Offenders in Victoria' (Victorian Department of Justice, 2009) 29; Eileen Baldry and Chris Cunneen, 'Imprisoned Indigenous Women and the Shadow on Colonial Patriarchy' (2014) 47(2) *Australian & New Zealand Journal of Criminology* 276, 288–9.
[12] See Victorian Aboriginal Child Care Agency, 'Koorie Women's Diversion' (2018) <https://www.vacca.org/page/service-information/woman/koorie-womens-diversion>.

20. Specialised women's advocacy groups, like Sisters Inside, have facilitated a number of gender specific diversion programs in Queensland that support women to address their specific needs. These programs include the Special Circumstances Court (SCC) Support Program, 3-2-1 Transition Support Program and the recent Yangah Bail Support Program for Girls.

21. The Aboriginal Legal Service of Western Australia (ALSWA) have two Aboriginal diversion officers as part of their Youth Engagement Program which provides flexible, holistic and individualised case management and support to clients of ALSWA who are appearing in the Perth Children's Court. Services provided include mentoring, assistance with accommodation, identification of appropriate programs and services, referrals and introductions to other services, reminders about appointments and court dates, and general case management. As at October 2018, the Program had supported 12 young people who were referred to the Juvenile Justice Team (diversion from a court imposed sentence).[13] Nine of these referrals were successfully completed (64%) and diverted from further court hearings. The Program supported four young people to complete their requirements of court conferencing and thereby avoided further adjournments to enable completion or more punitive sentences.

22. Given the importance of diverting young people out of the criminal legal system at the earliest possible age, it was disappointing to see the Victorian Aboriginal Legal Service's Balit Ngulu legal service forced to close in September 2018 due to lack of government funding. It was the only legal service in Australia dedicated to Aboriginal young people and assisted young people negotiate diversion plans with police prosecutors.

23. Diverting Aboriginal and Torres Strait Islander women and girls away from the legal system is essential. State and territory governments should therefore offer a range of gender specific and culturally responsive diversion options, provided by women's organisations and Aboriginal Community Controlled Organisations, to reduce the number of women being pushed into the legal system.

3.4 Fines and criminalisation of minor offending

24. The criminalisation of minor offending and its impact on the over-imprisonment of Aboriginal and Torres Strait Islander women is well documented. Following from key recommendations of the Royal Commission into Aboriginal Deaths in Custody, there have been repeated calls for the decriminalisation of minor offending — including public order offences like drunkenness and offensive language, vehicle and driving offences and other minor offences that result in being punished with a fine — and the implementation of non-punitive responses.

25. For the purposes of this submission, we focus on fines. Financial penalties can have serious adverse consequences for disadvantaged offenders, in particular Aboriginal and Torres Strait

[13] NATSILS, Submission to Attorney-General's Department, *Review of the Indigenous Legal Assistance Programme* (5 October 2018).

Islander women with experiences of housing instability, health issues, carer responsibilities, family violence or poverty. This is because women with experiences of disadvantage are less likely to be able to pay or resolve their fines or mitigate their impact.

26. In each state and territory, fine enforcement laws permit imprisonment as part of their fines enforcement regime.[14] The process and the likelihood of incarceration differs across the states and territories. Draconian laws like the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) provide for a series of enforcement mechanisms for unpaid court fines, the culmination of which is imprisonment without judicial oversight (however, we note the Western Australian Government's promise to reform these laws).

27. Laws like these have a disproportionate impact on the rates of imprisonment of Aboriginal and Torres Strait Islander women. This is particularly the case in Western Australia, with the Inspector of Custodial Services reporting in April 2016 that Aboriginal and Torres Strait Islander women are disproportionately represented in the fine default population. The report found that "Aboriginal women comprised only 15 per cent of total prisoner receptions but 22 per cent of fine default receptions. Furthermore, Aboriginal people comprised 64 per cent of female fine defaulters and only 38 per cent of male final defaulters."[15]

28. The tragic and preventable death of 22 year old Yamatji woman, Ms Dhu, highlights the cascading impact that punitive approaches to minor offending can have. Ms Dhu was taken into police custody for non-payment of fines amounting to $3,662.34. She had no realistic means of paying the fines. Despite repeatedly asking for medical help while in police custody, she was treated in an inhuman way and ultimately died of an infection flowing from a fractured rib — a family violence injury.

29. The Coroner who investigated Ms Dhu's death recommended that laws that lead to the imprisonment of people for unpaid fines should be abolished. This has been echoed by the Australian Law Reform Commission, the United Nations Special Rapporteur on Violence against Women, the Human Rights Committee and the Special Rapporteur on Indigenous Peoples.[16] Despite overwhelming calls for reform, state and territory governments have made little progress in abolishing these unjust and discriminatory laws.

3.5 Punitive bail laws

30. Being held in custody, in a police cell or in prison for even a short period of time can be dangerous, invasive, disruptive and destabilising, especially for women, where the social as

[14] See, eg, *Crimes (Sentencing Administration) Act 2005* (ACT) s 116ZK; *Fines Act 1996* (NSW) pt 3, div 6; *Fines and Penalties (Recovery) Act* (NT) ss 88, 90–91; *State Penalties Enforcement Act 1999* (Qld) pt 6; *Sentencing Act 2017* (SA) s 115; *Fines Reform Act 2014* (Vic) s 165; *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.
[15] Office of the Inspector of Custodial Services, 'Fine Defaulters in the Western Australian Prison System' (Report, Government of Western Australia, April 2016).
[16] Australian Law Reform Commission, above n 2, recommendation 12–1. See also Šimonović, above n 9.

well as the financial costs of short-term remand can be very high.[17] Yet Aboriginal and Torres Strait Islander women are significantly overrepresented in the remand population, with Aboriginal and Torres Strait Islander women 15.7 times more likely to be in prison on remand than non-Indigenous women.[18]

31. There is strong evidence to suggest these disproportionate remand rates are a result of unfair and punitive bail laws that are applied uniformly to men and women. As pointed out in submissions made to the Australian Law Reform Commission, Western Australia has seen an "especially sharp and alarming" 150% growth in Aboriginal and Torres Strait Islander women being held on remand from 2009 to 2016. Further, in Victoria in 2012, 60% of Aboriginal and Torres Strait Islander women held on remand were released without sentence.[19]

32. Most Aboriginal and Torres Strait Islander women held on remand do not pose a serious risk to the community, with the Australian Law Reform Commission surmising that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low-level offending. The Victorian Equal Opportunity and Human Rights Commission found that Aboriginal and Torres Strait Islander women are often denied bail due to "a lack of safe, stable and secure accommodation to which they could be bailed, particularly in regional locations."[20] As a significant number of Aboriginal and Torres Strait Islander women who are forced to interact with the legal system have experienced family violence, their housing situation can be precarious. This is compounded by the lack of housing options available to Aboriginal and Torres Strait Islander women who seek safe accommodation post-release, especially if they have children.

33. Bail laws are overly punitive, do not take into account the unique experiences and needs of Aboriginal and Torres Strait Islander women, are blind to the effect that remand might have on children in a woman's care and fail to require consideration of a person's status as an Aboriginal and Torres Strait Islander person. Save for serious violent offences, state and territory governments should abolish presumptions against bail and show cause provisions. In their place, governments should introduce a presumption in favour of bail for people who do not pose a demonstrable serious risk to the community. Governments must also provide more culturally appropriate bail support programs and safe accommodation options for women and children.

34. Even when Aboriginal and Torres Strait Islander women are granted bail, the inclusion of onerous conditions and a failure to take into account a woman's cultural, family, housing and personal circumstances can see women imprisoned for minor breaches of bail conditions.

[17] Australian Law Reform Commission, above n 2, 153.
[18] Ibid 348.
[19] Ibid 153.
[20] Victorian Equal Opportunity and Human Rights Commission, 'Unfinished Business: Koori Women and the Justice System' (Report, 2013); ibid 155.

Missing curfew without further offending should not result in an immediate return to prison. Courts need to stop imposing boilerplate, inappropriate and onerous bail conditions. Rather than setting women up to fail, courts should be required to assess and consider a woman's individual circumstances and issues arising due to her status as an Aboriginal and Torres Strait Islander person, including the appropriateness of bail conditions.

3.6 Mandatory sentencing

35. Despite repeated calls for repeal,[21] mandatory and presumptive sentencing legislation still exists in most Australian jurisdictions. It is of particular concern in the Northern Territory and Western Australia, the two jurisdictions with the highest rates of Aboriginal and Torres Strait Islander incarceration and where mandatory sentencing laws have a disproportionate impact of Aboriginal and Torres Strait Islander peoples.[22] Amendments made earlier this year in Victoria and the Northern Territory imposing mandatory sentencing for assaults against emergency workers are also alarming and should be repealed.[23]

36. By its nature, mandatory and presumptive sentencing regimes can have a disproportionate impact on Aboriginal and Torres Strait Islander women. Mandatory sentencing laws remove the discretion of the court to consider mitigating factors or alternate sentencing options and fail to account for the intersectional disadvantage experienced by many Aboriginal and Torres Strait Islander women. This results in arbitrary penalties being imposed in circumstances where they might be grossly inappropriate and have unintended consequences (for example, Aboriginal and Torres Strait Islander women losing custody of their children).

3.7 Poor treatment in prison

37. For the purposes of this section, we focus on the poor treatment in prison of Aboriginal and Torres Strait Islander women and the needs of a significant number of detained women who are also the primary carers of children. Prison is a terrible experience for all people, including men, but this submission seeks to point out the ways in which the prison experience can impact differently on women when compared to men. We do not seek to reinforce gendered stereotypes about who should bear the responsibility of caring for children, but address the current reality that around 80 per cent of Aboriginal and Torres Strait Islander women in prison have care giving responsibility for children.

[21] See, eg, Royal Commission into Aboriginal Deaths in Custody (Final Report, Australian Government Publishing Service, 1991); Australian Law Reform Commission, above n 2.
[22] See, eg, *Sentencing Act* (NT) s 78B (aggravated property offences), pt 3 div 6A (violent offences), pt 3 div 6B (sexual offences); *Misuse of Drugs Act* (NT) ss 37(2)–(5) (second and subsequent drug offence); *Domestic and Family Violence Act* (NT) ss 121(2), s 122(2) (second and subsequent offence); *Criminal Code Act Compilation Act 1913* (WA) s 297(5) (grievous bodily harm in the course of home burglary), s 401(4)(b) (repeat home burglary), s 318(5) (assault of a public officer).
[23] See, eg, *Sentencing Act 1991* (Vic) s 10AA.

3.8 Failure of prisons to meet the needs of women

38. State and territory governments should focus on keeping women out of prison. They can do this by addressing the factors that can lead to offending, including properly resourcing housing, family violence, drug and alcohol and other social services. Women's prisons across Australia are punitive and harsh places that entrench and further compound disadvantage. They are fundamentally dehumanising places that are ill-equipped to rehabilitate or help rebuild lives or address the unique needs of Aboriginal and Torres Strait Islander women. The move towards the privatisation of some women's prisons, notably in Queensland, will compound this. Currently, not all prisons have gender-specific policies that provide for the unique needs of women (for example, their health care needs and caring responsibilities for their children). In prisons where men and women are co-located, facilities and programming favour male prisoners.

39. These failures were recognised by the recent Australian Law Reform Commission's *Pathways to Justice* report, which recommended that programs and services delivered to Aboriginal and Torres Strait Islander women — leading up to, during and post-incarceration — should take into account their particular needs. Programs and services must be trauma-informed, culturally appropriate and developed with and delivered by Aboriginal and Torres Strait Islander women. We support the Australian Law Reform Commission's recommendation, but emphasise that the primary focus must be on cutting the number of Aboriginal and Torres Strait Islander women being forced into prisons in the first instance.

40. The Kunga Stopping Violence program, run by the North Australian Aboriginal Justice Agency, is an excellent example of a program that focuses on community reintegration for Aboriginal and Torres Strait Islander women who have been imprisoned for violent offending. The program supports women for up to 12 months post release and helps develop strategies in relation to: drug and alcohol dependencies, emotional intelligence, intergenerational trauma, family violence, accommodation and positive thinking.

41. Along with programs and services, funding is needed to support Aboriginal and Torres Strait Islander women to meaningfully engage with the legal system and access the programs and services that need to be made available leading up to, during and post-incarceration. Adequately funded Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services that provide holistic and preventative case management are essential.

3.9 Strip searching

42. Strip searches are conducted routinely and frequently in most jurisdictions around Australia. They require women to remove every item of clothing in front of two guards and in some cases, subject women to the further indignity of having to cough and squat. These searches

are unwarranted and cause unnecessary harm to marginalised women. Wherever possible, women should be spared this trauma. This is especially the case given that a significant number of Aboriginal and Torres Strait Islander women in prison have experienced trauma and many are survivors of family violence and/or sexual abuse. Subjecting Aboriginal and Torres Strait Islander women to this humiliating practice can compound trauma and seriously undermine trust, recovery and ultimately a woman's ability to heal and move on with her life.

43. The practice of routine strip searching has been described as cruel and degrading treatment by the European Court of Human Rights.[24] Concerns about this practice in Australia have been raised by the Human Rights Law Centre,[25] the Victorian Ombudsman, the United Nations Special Rapporteur on Violence against Women and the Special Rapporteur on the Rights of Indigenous Peoples.[26]

44. Strip searches of girls are particularly abhorrent and unnecessary. The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory canvassed examples of male correctional officers being present during strip searches.[27]

45. Women should only be strip searched as a last resort in circumstances where there is reasonable intelligence which indicates that she is carrying dangerous contraband. If it is determined that a strip search is required, it should only be undertaken after all other less intrusive search alternatives (such as scanners and wands) have been exhausted. In recognition of the harm caused by strip searching, the ACT changed its laws in 2008 to only permit strip searching on the basis of a reasonable suspicion, rather than on a routine basis. The other states and territories should take immediate action to enact similar laws prohibiting the practice of routine strip searches.

3.10 Solitary confinement

46. The term "solitary confinement" refers to the "confinement of prisoners for 22 hours or more a day without meaningful human contact".[28] It involves the involuntary placement of a prisoner in a room from which they are unable to leave, denying them meaningful contact with therapeutic professionals, other prisoners or family. Solitary confinement poses a significant risk to the emotional, psychological and physical health and wellbeing of prisoners, particularly those with psychosocial or cognitive disabilities. Proven negative health effects include anxiety,

[24] *Frerot v France* (European Court of Human Rights, Chamber, Application No 70204/01, 12 September 2007); *Wieser v Austria* (European Court of Human Rights, Chamber, Application No 2293/03, 22 February 2007).
[25] Human Rights Law Centre, 'Total Control: Ending the Routine Strip Searching of Women in Victoria's Prisons' (Report, 7 December 2017).
[26] Dubravka Šimonović, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Her Mission to Australia*, UN Doc A/HRC/35/30 (17 April 2018); Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017).
[27] Royal Commission and Board of Inquiry into the Protection and Detention of Children (Final Report, 2018) 445.
[28] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175, 70th sess, Agenda Item 106, UN Doc A/RES/70/175 (8 January 2016) ('*Nelson Mandela Rules*').

depression, anger, obsessive thoughts, paranoia and psychosis.[29] The Royal Commission into Aboriginal Deaths in Custody noted the particularly detrimental impact of solitary confinement on Aboriginal and Torres Strait Islander prisoners in 1991.[30]

47. A Human Rights Watch report on *Abuse and Neglect of Prisoners with Disabilities in Australia* released earlier this year details the specific trauma experienced by Aboriginal and Torres Strait Islander women with disabilities detained in solitary confinement.[31] The report found that women with disabilities are particularly affected by solitary confinement practices, given they are overrepresented in punishment units and often discriminated against by being viewed as a "management issue".[32]

48. It is estimated that 86 per cent of Aboriginal and Torres Strait Islander women in prison have a diagnosed mental health condition.[33] Being isolated often exacerbates the symptoms of mental health conditions, especially those associated with the trauma. As documented by Human Rights Watch:

> The stress of a closed and heavily monitored environment, absence of meaningful social contact, and lack of activity can exacerbate mental health conditions and have long-term adverse effects on the mental well-being of people with psychosocial or cognitive disabilities. All too frequently, people with psychosocial or cognitive disabilities can decompensate in solitary confinement, attempting suicide or requiring emergency psychosocial support or psychiatric hospitalization.[34]

49. Despite this, women's prisons do not provide adequate mental health services, lack appropriate trained and qualified staff and utilise punitive rather than supportive responses to behaviour related to a person's disability.

3.11 Prison a last resort for primary carers

50. There needs to be greater flexibility in sentencing options to allow for people that are primary carers for children — the majority of whom are women — to care for their children. Given the history of the Stolen Generations and the ongoing, disproportionately high rates of removal of Aboriginal and Torres Strait Islander children from their families, Aboriginal and Torres Strait Islander women need to be able to maintain care of their children. The best place to do this is in the community, supported by family and culturally responsive support services.

51. In New South Wales, section 26(2)(l) of the *Crimes (Administration of Sentences) Act 1999* (NSW) makes local leave permits available to a "female inmate who is the mother of a young

[29] Human Rights Watch, 'Abuse and Neglect of Prisoners with Disabilities in Australia' (Report, 6 February 2018) <www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>.
[30] Royal Commission into Aboriginal Deaths in Custody, above n 21, [25.7.12].
[31] Human Rights Watch, above n 29.
[32] Ibid, based on a Human Rights Watch interview with a nurse.
[33] PwC's Indigenous Consulting, 'Indigenous Incarceration: Unlock the Facts' (Report, May 2017) 23.
[34] Human Rights Watch, above n 29.

child or young children, enabling the inmate to serve her sentence with her child or children in an appropriate environment". Based on this provision, the ACT Standing Committee on Justice and Community Safety in their *Inquiry into Sentencing* recommended a similar provision be adopted in the ACT so that the primary carer of a young child or young children could serve their sentence in an appropriate and approved environment away from prison.[35]

52. These provisions should also apply to pregnant women, who should be able to serve their sentences in the community rather than in prison. The Inspector of Custodial Services in Western Australia recently released a report, *The Birth at Bandyup Women's Prison,* which demonstrates that Western Australian prisons are ill-equipped to meet the needs of pregnant women. On 11 March 2018, an Aboriginal woman in Bandyup Women's Prison was forced to give birth alone in her prison cell. The Inspector of Custodial Services found that the woman and her baby were put at unnecessary risk, "caused by cascading failures, predominately due to inaction and poor communication".[36] The Inspector of Custodial Services went on to find that:

> These failures were compounded by inadequate infrastructure to support women in their late stages of pregnancy, a problem that has been brewing for over a decade. Amy was housed in a unit that was inappropriate for a pregnant woman. Her cell was located upstairs, and the retrofitted double bunk made the cell so cramped it was difficult for emergency aid to be provided.[37]

3.12 Mother-baby units and prison nursery programs

53. While all efforts should be made to allow pregnant women and women with caring responsibilities to reside in the community, if pregnant women or women with young children are held in prison and meet certain eligibility criteria, they should be able to access ante- and post-natal health services and young children should be able to live with them in custody. Currently, mother-baby units and prison nursery programs exist in some, but not all, prisons that detain women.

54. Absent protection concerns, babies should never be removed from their mothers. It is critically important for long term health and wellbeing that both mothers and babies have the opportunity to bond and form an attachment through feeding, playing and comforting. To this end, the Western Australian Inspector of Custodial Services has concluded that it would be "wrong if women ever had their babies removed because there was insufficient capacity".[38]

[35] Standing Committee on Justice and Community Safety, *Inquiry into Sentencing* (Report No 4, March 2015).
[36] Office of the Inspector of Custodial Services, 'The Birth at Bandyup Women's Prison in March 2018' (Report, Government of Western Australia, 12 December 2018) ('The Birth at Bandyup Women's Prison in March 2018').
[37] Ibid.
[38] Office of the Inspector of Custodial Services, '2017 Inspection of Bandyup Women's Prison' (Report, Government of Western Australia, December 2017) 30 ('2017 Inspection of Bandyup Women's Prison').

55. International human rights law unanimously says that the decision to allow a child to stay with their parent in prison shall be based on the best interests of the child.[39] Recently, a mother was told by Bandyup Women's Prison in Western Australia that she would not be able to keep her newborn baby in her care. While doctors and midwives confirmed that it was in the baby's best interests to stay with her mother, the Western Australian government tried to force separation due to a lack of capacity at the prison nursery. Following tense negotiations and under threat of imminent litigation, the government allowed the newborn to remain with her mother. It is, however, unclear how many new mothers have been separated from their newborn babies in similar circumstances.

56. Research suggests that there is no evidence of harm to children involved in prison nursery programs.[40] Some studies have advised that mothers involved in prison nursery programs may be considerably more motivated to succeed in prison-related services, including educational and substance abuse programs, and had lower recidivism rates. If well conceptualised, prison nursery programs have the potential to better maintain the connection between mothers and their children during imprisonment. We reiterate, however, that primary priority should be given to ensuring pregnant women and women with caring responsibilities are given every opportunity to be in the community with their children.

3.13 Neglected facilities

Adult prisons

57. Many prisons that detain Aboriginal and Torres Strait Islander women are over-crowded, lack appropriate facilities and are in poor condition. The Inspector of Custodial Services in Western Australia reported that Bandyup Women's prison has suffered from neglect, indifference and structural inequality, with the gap between the bullet point promises of official policy documents being stark and unforgivable.[41]

58. As set out above, an Aboriginal woman at Bandyup was recently forced to give birth alone in her cell. The Inspector of Custodial Services conducted a review into the event in order to understand how "such distressing, degrading and high risk set of events could have occurred in a 21st Century Australian prison."[42] There are also reports of another woman being transported from Bandyup to hospital naked, handcuffed and covered in her own blood.

[39] *Nelson Mandela Rules*, above n 28, arts 28–9; *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders*, UN Doc A/C.3/65/L.5, 6 October 2010, arts 48–52 ('*Bangkok Rules*'); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 28 ILM 1457 (entered into force 3 January 1976) art 3.1.
[40] Aron Shlonsky et al, Literature Review of Prison-Based Mothers and Children's Programs (Final Report, Victorian Department of Justice and Regulation, 2016).
[41] Office of the Inspector of Custodial Services, '2017 Inspection of Bandyup Women's Prison', above n 38.
[42] Office of the Inspector of Custodial Services, 'The Birth at Bandyup Women's Prison in March 2018', above n 36.

59. Despite the Inspector of Custodial Services noting that Bandyup felt "far less volatile in 2017 compared to previous years", the facility remains inappropriate for the purposes of providing the rehabilitative environment needed in order to foster the programs and services recommended in this submission.[43]

Youth detention

60. Aboriginal and Torres Strait Islander children are 24 times more likely than non-Indigenous children to be in detention.[44] While Aboriginal and Torres Strait Islander children make up only 5 per cent of children aged 10–17 years nationally, they comprise 50 per cent of the children under youth justice supervision and 58 per cent of children *in detention* on an average day.[45]

61. A significant number of children held in detention have a history of trauma or disadvantage. Approximately two thirds of children in detention are victims of childhood abuse, trauma or neglect and may have a disability or mental health issue.[46]

62. Allegations of children being abused and mistreated while in youth detention facilities have been ubiquitous in recent years, resulting in a litany of inquiries into the conditions and treatment of children behind bars in almost every jurisdiction in Australia.[47] These inquiries have confirmed that Australia is breaching its international obligations by failing to ensure children deprived of their liberty are protected and treated with dignity and humanity.

63. The current youth detention facilities in the Northern Territory, including Don Dale, are not fit for purpose and pose a risk to the safety and wellbeing of girls. This was confirmed by the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, which found that girls suffered unequal treatment through the denial of access to facilities, services and programs, inadequate provision of hygiene facilities, unjustified isolation and harsher conditions in comparison to male detainees. While the Northern Territory government accepted all the recommendations of the Royal Commission, they have made little progress towards closure of these unfit and harmful facilities.

64. Banksia Hill Detention Centre in Western Australia has been a failure.[48] It is the only youth detention facility in Western Australia and houses boys and girls, sentenced and unsentenced,

[43] Office of the Inspector of Custodial Services, '2017 Inspection of Bandyup Women's Prison', above n 38.
[44] Ibid.
[45] Australian Institute of Health and Welfare, Youth Justice in Australia 2016–17 (Report, 2018) 7–8.
[46] Commission for Children and Young People, 'The Same Four Walls: Inquiry into the Use of Isolation, Separation and Lockdowns in the Victorian Youth Justice System' (Report, March 2017) 6. See also Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (Interim Report, 31 March 2017) 38.
[47] See, eg, Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, 2018); Queensland Government, 'Independent Review of Youth Detention' (Report, December 2016); Commission for Children and Young People, above n 46; Office of the Inspector of Custodial Services, 'Behaviour Management Practices at Banksia Hill Detention Centre' (Report, Government of Western Australia, June 2017); New South Wales, Inspector of Custodial Services, 'Use of Force, Separation, Segregation and Confinement in NSW Juvenile Justice Centres' (2000).
[48] See Office of the Inspector of Custodial Services, 'Annual Report 2017–2018' (Government of Western Australia, 2018).

from 10 to 18 years old. The Inspector of Custodial Services in Western Australia has repeatedly recommended that Banskia Hill be closed and for the Western Australian government to invest in smaller, home like facilities. Like in the Northern Territory, girls detained at Banksia Hill have experienced discrimination and unequal treatment, particularly in relation to accessing programs, services and educational or training opportunities. Recently, there have been reports that children who should have been released have remained locked up in that facility because the government could not find accommodation. The facility needs to be closed and funding needs to be allocated to programs, services and accommodation tailored to meet the needs of young people.

65. Construction of a new youth detention centre in Victoria is due to commence in December 2018. The Victorian government has dedicated $288.7 million to build the facility at Cherry Creek in Melbourne's outer Western suburbs. Victoria does not need a youth prison. It should be working towards closing youth prisons. The Victorian Government's *Inquiry into Youth Justice Centres in Victoria* did not give due consideration to the specific needs of girls.[49] The money dedicated to this project would be better spent developing alternative, child appropriate accommodation and therapeutic options as a replacement to youth prisons. In addition, any youth specific alternative must meet the needs of Aboriginal and Torres Strait Islander girls.

3.14 The child protection to prison pipeline

3.15 Women in prison losing custody of children in their care

66. Around 80 per cent of Aboriginal and Torres Strait Islander women in prison are mothers. The prison system makes it difficult for mothers who are also prisoners to maintain relationships with their children. The location of prisons make them difficult to access, visits can be challenging to schedule and phone access is often limited. This makes it incredibly difficult for women to see and communicate with their children while detained in prison.

3.16 Cross-over of girls from child protection to prison

67. Aboriginal and Torres Strait Islander children are grossly over-represented in child protection systems across Australia. Research shows that children and young people who have been abused or neglected are at greater risk of engaging in criminal activity, and of entering the youth justice system. Once in the child protection system, the risks of being forced into the criminal legal system increase considerably.

68. The intersection between child protection and imprisonment is deeply gendered. Aboriginal and Torres Strait Islander girls account for the highest demographic of young people who have received child protection services to also have spent time in detention. Research shows that

[49] Parliament of Victoria, Inquiry into youth justice centres in Victoria (Report, March 2018).

girls in detention are 1.5 times as likely as boys to have received child protection services before being channelled into the criminal legal system, with 70.5 per cent of Aboriginal and Torres Strait Islander girls and 69.6 per cent of non-Indigenous girls who spent time in detention also receiving child protection services. This is compared to 48 per cent of Aboriginal and Torres Strait Islander boys and 47.9 per cent of non-Indigenous boys.[50] This shows a strong correlation between child offending and entrenched disadvantage, indicating that the causes of offending in younger children are strongly connected to a failure by governments and service providers to address maltreatment, trauma and complex needs through earlier intervention and support.

69. In addition, children placed in residential care units can be unnecessarily criminalised because of overly punitive responses to perceived behavioural issues.[51] Compared to parents in a normal family setting, there is strong evidence to suggest that carers and residential care workers are more likely to call police to manage behaviour in out of home care settings.[52] The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory highlighted instances where police were called in response to instances where young people had damaged a $6 waste paper bin, kicked a door, broken a mug, thrown an item in the direction or a worker or broken a kitchen utensil.[53]

70. Placement breakdown, exposure to further trauma while in care and co-location of "high risk" young people in congregate accommodation also contribute to a higher risk of offending.

71. Recently, New South Wales and Queensland have adopted inter-agency protocols to reduce preventable police call-outs to residential care services.[54] These protocols provide a clear and consistent framework and better training and support for staff in residential care units to help them manage low-level incidents within the unit, without involving police.

4. Recommendations

Laws that lead to over-imprisonment

1. All levels of government commit to decarceration strategies and to significantly reducing the number of Aboriginal and Torres Strait Islander women being imprisoned.

[50] Australian Institute of Health and Welfare, 'Young People in Child Protection and under Youth Justice Supervision 2013–17' (Data Linkage Series No 21, Australian Government, 2018).
[51] Victoria Legal Aid, 'Care Not Custody: A New Approach to Keep Kids in Residential Care out of the Criminal Justice System' (Report, 2016).
[52] Ibid.
[53] Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (Final Report, 2018) 20.
[54] See, eg, Protocol to Reduce the Criminalisation of Young People in Residential Out of Home Care (New South Wales, 2016); Joint Agency Protocol to Reduce Preventable Police Call-outs to Residential Care Services (Queensland, 2018).

2. All levels of government set measurable goals and timeframes, from which the impact of decarceration strategies can be assessed. As called for by NATSILS, this should be part of a national justice target included in the Closing the Gap strategy.

3. All levels of government commit to implementing the recommendations of the Australian Law Reform Commission's *Pathways to Justice* report.

Problematic policing practices

4. State and territory police develop and implement police protocols and guidelines for appropriately responding to family violence, without criminalising Aboriginal and Torres Strait Islander women and girls. In this regard, attention should be paid to the recommendations of the Victorian Royal Commission into Family Violence — especially recommendation 151 — and the implementation of protocols like the Koori Family Violence Police Protocols.

Lack of diversion options

5. State and territory criminal laws and policies be amended to:

   (a) require police to consider all alternatives to charges for low level offending, including cautions, warnings, concession penalty notices and diversion programs that allow for pre-charge referrals for Aboriginal and Torres Strait Islander women; and

   (b) in circumstances where charges must be laid, require police, prosecutors, judicial officers and corrections officers to prioritise diversion programs for Aboriginal and Torres Strait Islander women at all stages of the legal process.

6. State and territory criminal laws authorising referral to a diversion, rehabilitation or therapeutic program from a court should not be conditional on the consent of the prosecution. The views of police prosecutors could be a factor in the decision, which should be made by a judge or magistrate, but should not be the determinative factor.

7. State and territory governments develop and provide a range of culturally responsive and gender specific diversionary, rehabilitation and therapeutic programs tailored to meet the intersectional needs of Aboriginal and Torres Strait Islander women.

8. State and territory governments set measurable goals, monitor and evaluate and publicly report on the accessibility and effectiveness of diversion and rehabilitation programs for Aboriginal and Torres Strait Islander women.

9. State and territory governments provide funding security for diversion programs tailored to meet the intersectional needs of Aboriginal and Torres Strait Islander women, designed and delivered by, or in partnership with, Aboriginal Community Controlled Organisations.

Fines and criminalisation of minor offending

10. State and territory governments, in consultation with Aboriginal and Torres Strait Islander Legal Services, introduce and resource custody notification systems that make it mandatory

for the police to notify and facilitate access to Aboriginal and Torres Strait Islander Legal Services by any Aboriginal and Torres Strait Islander person taken into custody.

11. State and territory governments end laws and policies which unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women including:

(a) abolishing laws that lead to imprisonment of people for unpaid fines;

(b) amending laws to ensure that fine default enforcement measures that restrict a person's ability to drive are subject to an assessment of circumstances and impact; and

(c) decriminalising minor offences — for example, offensive language offences (except offences that aim to protect marginalised groups of people, such as racial vilification offences) and public drunkenness offences — and implementing alternative non-punitive responses to this type of offending.

Punitive bail laws

12. State and territory bail laws be amended to:

(a) require bail authorities to consider:

(i) a person's status as an Aboriginal and Torres Strait Islander person, including cultural background, ties to family and place, and cultural obligations. By way of example, section 3A of the *Bail Act 1977* (Vic) provides that:

> In making a determination under the Bail Act in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including—
>
> (a) the person's cultural background, including the person's ties to extended family or place; and
>
> (b) any other relevant cultural issue or obligation.

(ii) the impact of a particular decision on any children in the person's care; and

(iii) whether the bail authority is satisfied the person poses a demonstrable serious risk to the community before refusing bail;

(b) provide that bail must not be refused to a child on the sole ground that the child does not have any, or any adequate, accommodation (which, by way of illustration, is what section 3B(3) of the *Bail Act 1977* (Vic) provides for);

(c) save for serious violent offences, abolish presumptions against bail and show cause provisions; and

(d) save for serious violent offences, introduce a presumption in favour of bail for people who do not pose a demonstrable serious risk to the community.

13. State and territory governments stop building new youth prisons, work towards the closure of current youth prisons and immediately invest in developing alternative, smaller, child-appropriate accommodation and therapeutic options to replace existing youth prisons.

14. State and territory governments work with peak Aboriginal and Torres Strait Islander organisations to end the incarceration of women by identifying measures required to support Aboriginal and Torres Strait Islander women to remain in the community, particularly secure housing, and infrastructure for culturally appropriate bail support.

Mandatory sentencing

15. State and territory governments abolish mandatory sentencing laws.

Failure of prisons to meet the needs of women

16. State and territory governments ensure that prisons and any secure facilities that imprison women have culturally responsive and gender specific policies and procedures, which are to be developed in conjunction with Aboriginal and Torres Strait Islander women and prisoner support organisations.

17. State and territory governments ensure that Aboriginal and Torres Strait Islander women and girls have equal access to health, education, training, recreation and personal care facilities as boys and men detained in prison.

18. State and territory governments fund organisations that support Aboriginal and Torres Strait Islander women to engage with the legal system and develop models of holistic support and case management for women.

Strip searching

19. State and territory governments prohibit routine strip searches and ensure that searches are only conducted on Aboriginal and Torres Strait Islander women and girls where there is a reasonable suspicion that the person has serious contraband and other search alternatives have been exhausted.

Solitary confinement

20. In recognition of the high rates of trauma, ill-health and disability experienced by Aboriginal and Torres Strait Islander women and girls, state and territory governments should prohibit the use of solitary confinement on Aboriginal and Torres Strait Islander women and girls.

Neglected facilities

21. State and territory governments ensure that:

    (a) gender and culturally sensitive support and mental health services are made available to Aboriginal and Torres Strait Islander women in prison; and

(b) all prison officers receive regular gender and culturally sensitive training on how to interact with people with disabilities, in particular those with psychosocial or cognitive disabilities.

The child protection to prison pipeline

22. State and territory governments amend sentencing laws to allow for leave passes and/or conditional release for people who are the primary carer of a young child or young children so that they can serve their sentence in an appropriate community-based environment, with their children, away from prison.

23. If women must be detained in prison because they pose a demonstrable serious risk to the community, state and territory governments make mother-baby units and prison nursery programs available in all prisons in circumstances where:

(a) a mother wants to remain with her child; and

(b) it is determined to be in the child's best interests to remain in the care of the mother.

24. State and territory governments raise the age of criminal responsibility to 14 years old.

25. State and territory governments put in place safeguards to prevent the criminalisation of children in out of home care. In jurisdictions where there is no protocol, state and territory governments work with relevant stakeholders to develop and implement inter-agency protocols to respond appropriately to the behaviour of young people in care.