# Northern Territory of Australia:

The shame of Indigenous female incarceration

Matilda Hurst 2019



The author acknowledges the traditional owners of country throughout Australia, and their continuing connection to land, water and community, and pays respect to them and their cultures, and to Elders both past, present and emerging.





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## **Summary**

"The extraordinarily high rate of incarceration of Aboriginal and Torres Strait Islanders, including women and children, is a major human rights concern."  $^{\rm 1}$ 

Overrepresentation of Indigenous women in the criminal justice system is a crisis warranting immediate attention.<sup>2</sup> In the Northern Territory, Indigenous women represent 26.40% of the female population and yet they are a staggering 80.72% of female offenders<sup>3</sup> and 84.54% of the prison population.<sup>4</sup> These rates of incarceration continue to increase. This situation is unacceptable, and this paper attempts to explore why there has been a continual rise in Indigenous female incarceration rates in the Northern Territory since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) in 1991. In addition, it will examine the Northern Territory government's response to some key RCIADIC recommendations to provide insight into how these responses (or lack thereof) have played a role in the plight of indigenous women today.

In the analysis of data, Indigenous women are often grouped with non-Indigenous women or with Indigenous men.<sup>5</sup> Data at the state and territory level suffers the same deficiencies. The lack of specific data makes the tracking of the post-RCIADIC Indigenous female incarceration rates difficult. However, what is presented in this paper will provide irrefutable evidence that 28 years after the RCIADIC, the current situation is dire and warrants immediate attention.

The Royal Commission into Aboriginal Deaths in Custody (RCIADC) produced its final report in 1991. It investigated the social, cultural, and legal issues underlying deaths in custody and made 339 recommendations. Addressing all 339 recommendations of the RCIADIC is not feasible for this paper. The purpose is to consider those that have a significant impact on the incarceration rates of Indigenous women. Therefore, the responses (or lack thereof) to recommendations that may be contributing to the upward trajectory of Indigenous female incarceration rates are addressed.

<sup>&</sup>lt;sup>5</sup> Human Rights Law Centre and Change the Record Coalition (2017) Over-represented and Overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment p21. Retrieved from https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812 234196/OverRepresented\_online.pdf



<sup>&</sup>lt;sup>1</sup> United Nations. (2017) Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia (p12). Retrieved from

http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/CountryReports.aspx

<sup>&</sup>lt;sup>2</sup> Human Rights Law Centre and Change the Record Coalition (2017) Over-represented and Overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment. Retrieved from https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812 234196/OverRepresented online.pdf

<sup>&</sup>lt;sup>3</sup> Australian Bureau of Statistics (2018) Recorded Crime - Offenders, 2016-17. Retrieved from http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4519.02016-17?OpenDocument

<sup>&</sup>lt;sup>4</sup> Australian Bureau of Statistics (2017) Prisoners in Australia, 2017. Retrieved from http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Prior%20a dult%20imprisonment~15



Adhering to mainstream norms in policy development and implementation can result in harmful ramifications for Indigenous people; especially women. A major shift in legislative and policy development and implementation must occur to effectively address the upward trajectory of Indigenous female incarceration rates.

Since 2009, Indigenous advocates have been touting the introduction of justice reinvestment as a policy approach that could contribute positive change toward reducing Indigenous incarceration rates. Justice reinvestment is a policy approach that redirects funding from prisons to local communities. In Australia, these projects are predominantly targeted at youth. However, despite the evidence proving this approach successful, there are no projects in place to address the alarming incarceration rates experienced by Indigenous women.

In the Northern Territory, greater importance needs to be placed on providing alternative court proceedings that are more culturally appropriate. Court services neglect to provide suitable environments to deal with language barriers and cultural disparities which in turn, puts Indigenous people in disadvantaged positions.

Up to 80% of the Indigenous prisoner population in the Northern Territory originates from regional or remote communities. 6 Indigenous offenders are less likely to receive sentencing alternatives, as they are often not available in remote areas due to lack of funding and services to support them.

The specific issues and needs of Indigenous women are rarely considered in the development of post-release support and programs. There are some post-release support services available in the Northern Territory that deliver valuable services; however, they are not based in remote communities, where the majority of Indigenous women will return to.

There is a widespread problem in Indigenous Affairs policy-making in Australia. The realities of policies experienced by Indigenous people are often overlooked.<sup>8</sup> In particular, current approaches undervalue the experiences of Indigenous women too often by neglecting to consider them as a unique cohort that merits independent attention.

The problems described in this report have deep historical roots. Accordingly, this paper will begin by exploring historical events that have contributed to the current state of Indigenous affairs in Australia.

The RCIADIC investigated the social, cultural, and legal issues underlying deaths in custody, and its recommendations aimed at improving not only the number of deaths but also Indigenous people's troubling relationship with the criminal justice system. It is a despairing testament to the lack of social and cultural progress that many of the underlying issues and

<sup>&</sup>lt;sup>8</sup> Jordan, K., et al (2018) Joint response to the Deloitte Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody piii Retrieved from https://apo.org.au/node/212076



<sup>&</sup>lt;sup>6</sup> Ibid p235

<sup>&</sup>lt;sup>7</sup> Baldry E and McCausland R (2009) p2 Retrieved from https://www.researchgate.net/publication/265082906\_Mother\_Seeking\_Safe\_Home\_Aboriginal\_Women\_Pos t-Release



recommendations remain relevant and unresolved today. The national incarceration rate of Indigenous people has doubled from 14% of the prison population in 1991<sup>10</sup> to 28% in 2018. In the Northern Territory, the rate is a staggering 84%. Indigenous people are now dying in custody at a greater rate than before the RCIADIC.

Nationally, Indigenous female incarceration rates have increased by 148% since the RCIADIC, making them the fastest growing segment of the prisoner population in Australia. Australia's Indigenous women are incarcerated at more than 20 times the rate of non-Indigenous women. In 2017, Indigenous women represented 2.7% of Australia's female population yet they represent 33.58% of female prisoners.

The RCIADIC was a milestone in the investigation of Indigenous people's relationship with the criminal justice system. However, it received some criticism highlighting its failure to adequately consider Aboriginal women in its inquiry. This criticism is warranted as there was no specific chapter dedicated to women's issues and it expressly referred to Indigenous women in only 5 of its 339 recommendations. The RCIADIC data indicated that in the Northern Territory, Indigenous women accounted for 88% percent of women in police custody:

<sup>&</sup>lt;sup>19</sup> Marchetti, Elena (2007) Indigenous Women and the RCIADIC - Part II [online]. Indigenous Law Bulletin, Vol. 7, No. 2, Dec 2007 - Jan 2008: p6-10. Retrieved from https://search-informit-com-au.ntln.idm.oclc.org/documentSummary;dn=561580102364910;res=IELAPA



<sup>&</sup>lt;sup>9</sup> The Report of Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (2017) Volume 1 p256 Retrieved from

https://childdetentionnt.royalcommission.gov.au/Pages/Report.aspx

<sup>&</sup>lt;sup>10</sup> Anthony, T (2016) Deaths in custody: 25 years after the royal commission, we've gone backwards Retrieved from https://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109

<sup>&</sup>lt;sup>11</sup> Australian Bureau of Statistics (2019) Corrective Services, Australia, December quarter 2018 Retrieved from http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0

 $<sup>^{12}</sup>http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by\%20Subject/4517.0^2018^{Main\%20Features^{Aborigin}al\%20and\%20Torres\%20Strait\%20Islander\%20prisoner\%20characteristics\%20^{13}$ 

<sup>&</sup>lt;sup>13</sup> Jordan, K., et al. (2018) Joint response to the Deloitte Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody p1 Retrieved from http://caepr.cass.anu.edu.au/sites/default/files/docs/2018/12/Topical\_issue\_4\_2018\_Jordan\_et\_al\_final\_\_KJ 2\_(002).pdf

<sup>&</sup>lt;sup>14</sup> Law Council of Australia (2018) The Justice Project Part 1 - Aboriginal and Torres Strait Islander People p5 Retrieved from https://www.lawcouncil.asn.au/files/web-

pdf/Justice % 20 Project/Final % 20 Report/Aboriginal % 20 and % 20 Torres % 20 Strait % 20 Islander % 20 People % 20 % 28 Part % 20 1 % 29. pdf

<sup>15</sup> ibid

<sup>&</sup>lt;sup>16</sup> Australian Bureau of Statistics Census of Population and Housing (2016) Retrieved from http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal %20and%20Torres%20Strait%20Islander%20Population%20Data%20Summary~10

<sup>&</sup>lt;sup>17</sup> Australian Bureau of Statistics (2017) Prisoners in Australia, 2017 Retrieved from http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Prior%20a dult%20imprisonment~15

<sup>&</sup>lt;sup>18</sup> Marchetti, Elena (20017) Indigenous Women and the RCIADIC - Part I [online]. Indigenous Law Bulletin, Vol. 7, No. 1, Nov 2007: p6-9 Retrieved fromhttps://search-informit-com-au.ntln.idm.oclc.org/documentSummary;dn=636801407334264;res=IELAPA



One would have thought that the sheer weight of such data would have demanded a response which considered the relationship between Aboriginality, gender, police practices and the use of custody...Yet despite the empirical evidence on the specific overrepresentation of Black women, they barely rate a mention.<sup>20</sup>

This paper will review available data and undertake a rigorous assessment of policy interventions and the outcomes thereafter for Indigenous women in the Northern Territory jurisdiction post-RCIADIC to date.

# **Historical Background & Context**

"It is imperative that any approach to reducing the incarceration rates of Indigenous women considers the effect of colonisation and past government policies."  $^{21}$ 

The trauma generated by the history outlined in this section has manifested in a range of additional problems such as community dysfunction, marginalisation, disempowerment, poverty, alcohol and substance use, and other antisocial behaviours.<sup>22</sup>

Indigenous women are vulnerable to intersectional discrimination (a compounding of discrimination in specific ways brought about by race, gender, and other social categories) within the criminal justice system.<sup>23</sup> As such, this has resulted in Indigenous women being identified as the most legally disadvantaged group in Australia.<sup>24</sup> Acts of violence against Indigenous women are widespread and remain at disproportionately high levels.<sup>25</sup> In the Northern Territory, the rate of hospitalization is up to 86 times higher for Indigenous women than non-Indigenous women, and in the desert region of Central Australia, it is a staggering 95 times higher.<sup>26</sup>

<sup>&</sup>lt;sup>26</sup> The Conversation (2016) FactCheck Q&A: are Indigenous women 34-80 times more likely than average to experience violence? Retrieved from https://theconversation.com/factcheck-qanda-are-indigenous-women-34-80-times-more-likely-than-average-to-experience-violence-61809



<sup>&</sup>lt;sup>20</sup> Kerley and Cunneen (1995) quoted in Bartels, L (2010) Indigenous women's offending patterns: A literature review (Research and Public Policy Series No 107, Australian Institute of Criminology) p4 Retrieved from https://aic.gov.au/publications/rpp/rpp107

<sup>&</sup>lt;sup>21</sup> Law Society of Western Australia (2017) Briefing Paper: Issues that contribute to the incarceration of Aboriginal and Torres Strait Islander women in Western Australia. Np. Retrieved from http://www.lawsocietywa.asn.au/wp-

 $content/uploads/2015/10/2017OCT06\_LawSociety\_Briefing Papers\_Issues Contribute In carceration\_ATIPWA.pdf$ 

<sup>&</sup>lt;sup>22</sup> Willis, M (2003) Non-disclosure of violence in Australian Indigenous communities p10 Retrieved from https://aic.gov.au/publications/tandi/tandi405

<sup>&</sup>lt;sup>23</sup>Law Council of Australia (2017) Incarceration Rates of Aboriginal and Torres Strait Islander Peoples p29 Retrieved from https://www.alrc.gov.au/sites/default/files/subs/108.\_law\_council\_of\_australia.pdf
<sup>24</sup>Braybrook, A (2015) Family Violence in Aboriginal Communities, 2 DVRCV Advocate 20 p1 citing Aboriginal and Torres Strait Islander Commission 2003 Submission to the Senate Legal and Constitutional References Committee, Parliament of Australia, Inquiry into Legal Aid and Access to Justicep4 Retrieved from http://www.thelookout.org.au/sites/default/files/Family-violence-in-Aboriginal-communities-FVPLS.pdf
<sup>25</sup> Australian Human Rights Commission (2016) Social Justice and Native Title Report 2016 p29 Retrieved from https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-nati-2



There are socio-economic disadvantages faced by Indigenous women in the Northern Territory. The 2016 census<sup>27</sup> data revealed that in Indigenous females over the age of 15:

- 20% have obtained Year 8 or below or never attended school;
- 67% had a weekly income below the national minimum wage; and
- 27% are employed either full or part time.

In the Northern Territory, 79% of the Indigenous population lives outside the capital city area.<sup>28</sup> Indigenous women from remote locations subscribe to different cultural practices and lifestyles that can have a detrimental impact on their interactions with police and the criminal justice system as they are misunderstood or misinterpreted. For example, a woman from a remote community may use violence against another woman which is in line with customary law (payback), however, to the police this is merely an assault and is not an accepted nor recognized cultural practice. Differences such as language and cultural norms are very rarely (if ever) taken into consideration by police and the judiciary.

It is well recognized and documented that Australia's Indigenous people, particularly women, experience significant socio-economic disadvantage. This disadvantage is especially apparent in the Northern Territory. The high rates of violence as perpetrators, victims, and witnesses and the alarming rates of contact with the criminal justice system can be attributed to a range of current and historical factors. These include; inter-generational trauma, poverty, poor educational and health outcomes; and a lifetime of being subjected to institutional racism. While these factors heighten the susceptibility of all Indigenous people coming into contact with the criminal justice system, they often have a unique impact on Indigenous women.<sup>29</sup> It is important to clarify that this paper is not implying that these current and historical events are the only contributors to incarceration rates. It does not seek to excuse the violent or harmful actions of Indigenous men and women, nor does it suggest that past events have inhibited Indigenous people from having control over their own agency. Rather, it is giving recognition to aspects of history that serve as drivers of issues concerning Indigenous women today.

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<sup>&</sup>lt;sup>27</sup>Australian Bureau of Statistics (2018) 2016 Census Community Profiles: Northern Territory Retrieved from http://quickstats.censusdata.abs.gov.au/census\_services/getproduct/census/2016/communityprofile/7?open document

<sup>&</sup>lt;sup>28</sup> Australian Bureau of Statistics Census of Population and Housing (2016). Retrieved from http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Aboriginal %20and%20Torres%20Strait%20Islander%20Population%20Data%20Summary~10

<sup>&</sup>lt;sup>29</sup> Law Society of Western Australia (2017) Briefing Paper: Issues that contribute to the incarceration of Aboriginal and Torres Strait Islander women in Western Australia Np Retrieved from http://www.lawsocietywa.asn.au/wp-



#### Colonisation

"Kidnapping Indigenous women and children for economic and sexual exploitation was common." <sup>30</sup>

History tells us that Captain James Cook 'discovered' Australia in 1770 and on January 26<sup>th</sup>, 1788 Captain Arthur Phillip, commanding the First Fleet, established the first colonial settlement at Sydney Cove. Following his arrival, Captain Cook declared Australia terra nullius, 'no one's land,' and the colonial immigrants enthusiastically embraced the concept and began dispossessing Indigenous people of their land.<sup>31</sup> Archaeological evidence has, in fact, revealed that Indigenous people have inhabited the land for over 65,000 years.<sup>32</sup>

This period of Australia's history has been misrepresented. The extent of mass killings of Indigenous people has come to light with the 2017 release of an online map 'Colonial Frontier Massacres in Central and Eastern Australia 1788-1930.'<sup>33</sup> This resource defines a massacre as the indiscriminate killing of six or more undefended people. To date, over 400 massacres and 10,000 Indigenous deaths have been mapped, however, the map is a living document and as research continues it is expected that these numbers will increase. In the majority of these cases, no colonists were held accountable for their actions; therefore, Indigenous people received no justice for these atrocities.

A further devastating impact of colonisation on Indigenous people was the introduction of diseases by the colonial immigrants such as smallpox, which decimated the Indigenous populations who had no resistance or traditional remedies. In 1789, just one year after the arrival of the First Fleet, a smallpox epidemic broke out amongst the Indigenous population of Port Jackson, who were resisting the colonial immigrants' seizure of their land. Nearby communities were also affected with extensive loss of life. The outbreak was sudden, severe, and unusual and some speculate that it was not an act of nature but rather a planned biological attack on the Indigenous people of the land.<sup>34</sup> How the disease was introduced to the Indigenous inhabitants has never been determined. The disease affected entire generations and killed up to 70% of the indigenous population. In many instances, those that survived were left without family or community elders and leaders. The exposure to other imported viruses and illnesses such as influenza, measles, tuberculosis, and sexually

<sup>&</sup>lt;sup>34</sup> Warren, C (2014) Was Sydney's smallpox outbreak of 1789 an act of biological warfare against Aboriginal tribes? Retrieved from http://www.abc.net.au/radionational/programs/ockhamsrazor/was-sydneys-smallpox-outbreak-an-act-of-biological-warfare/5395050



<sup>&</sup>lt;sup>30</sup> Australian Human Rights Commission. (1997) Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families Np Retrieved from https://www.humanrights.gov.au/sites/default/files/content/pdf/social\_justice/bringing\_them\_home\_report.pdf

<sup>&</sup>lt;sup>31</sup> Australian Museum (2016) Indigenous Australia Timeline - 1500 to 1900 Retrieved from https://australianmuseum.net.au/indigenous-australia-timeline-1500-to-1900

<sup>&</sup>lt;sup>32</sup> Guardian Australia (2017) Australian dig finds evidence of Aboriginal habitation up to 80,000 years ago Retrieved from https://www.theguardian.com/australia-news/2017/jul/19/dig-finds-evidence-of-aboriginal-habitation-up-to-80000-years-ago

<sup>&</sup>lt;sup>33</sup>University of Newcastle (2018) Colonial Frontier Massacres in Central and Eastern Australia 1788-1930. Retrieved from https://c21ch.newcastle.edu.au/colonialmassacres/



transmitted diseases, was also fatal to Indigenous people. The Indigenous population at the time of colonisation was estimated to be more than 700,000. Following exposure to colonial disease and falling victim to the many massacres, it was at a low of 93,000 people in 1900.<sup>35</sup> That is a loss of approximately 87% of the population in just over one hundred years.

Colonial policy encouraged the movement of Indigenous people from more desired and resource-rich lands to remote missions and reserves. This policy helped to produce the remoteness of the locations where many indigenous women live today. Today the lack of access to services and employment opportunities significantly impacts the lives of these women and there are repercussions for being forced to live in such desolate areas.

#### **Federation**

"At the time of drafting the Constitution, the rights, cultures, history, and prior occupation of Australia by Aboriginal and Torres Strait Islander people was not considered to be valuable or important enough to be included in the Constitution. And so Aboriginal and Torres Strait Islander peoples were excluded from the discussions concerning the creation of a new nation to be situated on their ancestral lands and territories."

On January 1<sup>st</sup>, 1901, the Commonwealth of Australia was established through federation and the Australian Constitution - the preeminent source of law - came into being. The original constitution stated, "in reckoning the numbers of people... Aboriginal natives shall not be counted." It also stated that the Commonwealth would legislate for any race aside from Indigenous people.<sup>37</sup> Life for Indigenous people did not see improvement after federation; the Australian government and state governments' policies were conspicuously racist. The inhumane and appalling manner in which Indigenous people were treated continued.

The exclusion of Indigenous people from Commonwealth law meant that they were subject to six separate sets of state laws and regulations. The state governments controlled every aspect of Indigenous people's lives; their freedom of movement, whom they could associate with, the land they could live on, removal from their families and communities, their employment conditions, denial of access to welfare and limited access (if any) to health and education services. The shaping of these laws was undoubtedly informed by the belief that Indigenous people were an inferior race and that government was best placed to determine how they should be treated and governed.

<sup>&</sup>lt;sup>37</sup>Dow, C and Gardiner-Garden, J (2011) Overview of Indigenous Affairs: Part 1: 1901 to 1991. Retrieved from https://www.aph.gov.au/About\_Parliament/Parliamentary\_Departments/Parliamentary\_Library/pubs/BN/101 1/IndigenousAffairs1



<sup>35</sup> ibid

<sup>&</sup>lt;sup>36</sup> Reconciliation Australia Aboriginal and Torres Strait Islander Australians and the Constitution Retrieved from https://www.reconciliation.org.au/wp-content/uploads/2017/11/Recognising-Aboriginal-and-Torres-Strait-Islander-people-in-the-Australian-Constitution.pdf



Colonisation, federation, and the period that followed brought nothing positive to Indigenous people and their culture. They were dispossessed of their land, massacred through violence and disease, experienced racial discrimination, and were subjected to policies that tore families apart and sought to destroy a culture. The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS), reviewing the first century and a half of British-Aboriginal relations in Australia, characterizes it as "a period of dispossession, physical ill-treatment, social disruption, population decline, economic exploitation, discrimination, and cultural devastation." AIATSIS has documented the decline in Indigenous rights through this period and highlights that by the 1920s, every State had legislated for the removal of Aboriginal children from their parents.<sup>38</sup>

Mick Dodson was the first Indigenous person to graduate with a law degree and hold the position of Australia's first Aboriginal and Torres Strait Islander Social Justice Commissioner. In a speech regarding citizenship and Indigenous people, he succinctly described the circumstances of an Indigenous person in Australia prior to the attainment of citizenship in 1967:

"To give a sample of the many examples, that meant that we could generally not obtain a passport, we could not travel between imposed states borders (regardless of where the borders for our country lay), we did not have access to society's basic institutions, we could not purchase alcohol, and we could not participate in the political life of the country. We were not even counted in the census of the people of this country."<sup>39</sup>

#### **Stolen Generations**

"Aboriginal society regards any child of Aboriginal descent as Aboriginal.

Aboriginal children were not removed because their 'white blood' made them 'white children' and part of the 'white community'. They were removed because their Aboriginality was 'a problem'. They were removed because, if they stayed with 'their group', they would acquire their 'habits', their culture and traditions."<sup>40</sup>

Beginning in the early twentieth century, the removal of Indigenous children from their families and communities was a policy agreed upon by all governments, both State and Commonwealth. As stated previously, there had been a tremendous decline in the Indigenous population post-colonisation, and by the end of the nineteenth century it was

<sup>&</sup>lt;sup>40</sup> Australian Human Rights Commission (1997) Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. Np Retrieved from https://www.humanrights.gov.au/sites/default/files/content/pdf/social\_justice/bringing\_them\_home\_report.pdf



<sup>&</sup>lt;sup>38</sup> The Australian Institute of Aboriginal and Torres Strait Islander Studies (2019) Aboriginal natives shall not be counted Retrieved from https://aiatsis.gov.au/exhibitions/aboriginal-natives-shall-not-be-counted <sup>39</sup>Dodson, M (1993) Aboriginal and Torres Strait Islander People and Citizenship Retrieved from https://www.humanrights.gov.au/news/speeches/aboriginal-and-torres-strait-islander-people-and-citizenship-dodson-1993



apparent that the 'full blood'<sup>41</sup> population was declining but the rate of 'half castes'<sup>42</sup> was increasing. To deal with this perceived 'problem', governments sought to segregate 'full bloods' onto reserves and missions and merge 'half castes' with the white population. The 1997 Bringing Them Home<sup>43</sup> report, which investigated the forcible removal of Indigenous children from their families and communities throughout Australia from 1910 to 1970, uses a quote from Brisbane's *Telegraph* newspaper on May 1937, to illustrate the abhorrent thinking of the time.

"Mr Neville [the Chief Protector of WA] holds the view that within one hundred years the pure black will be extinct. But the half-caste problem was increasing every year. Therefore, their idea was to keep the pure blacks segregated and absorb the half-castes into the white population. Sixty years ago, he said, there were over 60,000 full-blooded natives in Western Australia. Today there are only 20,000. In time, there would be none. Perhaps it would take one hundred years, perhaps longer, but the race was dying. The pure-blooded Aboriginal was not a quick breeder. On the other hand, the half-caste was. In Western Australia, there were half-caste families of twenty and upwards. That showed the magnitude of the problem."

In 1937, the policy and practice of merging the 'half castes' with the white population was replaced with a policy of assimilation. Thus, rather than integrating, indigenous people were now forced to assimilate with the white culture and abandon any connection to their own roots and cultural background. Assimilation was adopted with the expectation that all Indigenous people would live as white Australians did. The removal of children and the assimilation policy caused lasting damage to cultural, spiritual, family, and community connections, and left an ongoing and inter-generational impact on Indigenous people.

The Bringing Them Home report detailed and supported findings of genocide and other gross violations of human rights. The report acknowledges the meticulous intention required to commit genocide and went to great lengths to support its findings. The purpose of the Commonwealth and State governments of Australia in the implementation of their policies was to eliminate Indigenous culture. This was the same Commonwealth government that had legislated the 'White Australia Policy' in 1901, limiting immigration to only the British.

Trauma resulting from the removal of Indigenous children from their families was compounded by their abuse and mistreatment whilst in the care of institutions and white

https://www.humanrights.gov.au/sites/default/files/content/pdf/social\_justice/bringing\_them\_home\_report.



<sup>&</sup>lt;sup>41</sup> "full blood" was a person with no white parent

<sup>&</sup>lt;sup>42</sup> "half caste" was a person with one white parent

<sup>&</sup>lt;sup>43</sup> Australian Government. Australian Human Rights Commission (1997) Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families Retrieved from



foster families or when forced into servitude. The trauma for the families and communities at the loss of their children is immeasurable and continues to this day.<sup>44</sup>

The 1970's may be considered the official end of the Stolen Generation. However, the removal of Indigenous children from their families has continued to increase. The harm and trauma experienced by the Stolen Generations is now undeniably being experienced by a new generation. The rate of Indigenous children in out-of-home care in 2009 was 44.8 per 1,000.<sup>45</sup> The rate in 2016 had risen to 56.6 per 1,000 children in comparison to the non-Indigenous rate of 5.8 per 1,000 children.<sup>46</sup> The number of Indigenous children in out-of-home care is predicted to almost triple by 2035.<sup>47</sup> The consequences of the past and current situations in the child protection space deter Indigenous women from reporting when they fall victim to family violence. This is due to fear that their children will be removed from their care.<sup>48</sup>

#### Inter-generational Trauma

"Historical trauma is normalised within a culture as it becomes deeply rooted within the collective and is passed from generation to generation through the same mechanisms that transmit culture."

Indigenous Australians continue to deal with intergenerational trauma, which is defined as trauma passed on from generation to generation, as a consequence of colonisation and government laws and policies that followed. The effects of intergenerational trauma can be devastating to families and communities. Trauma continues to be a part of many Indigenous Australians' lives in the form of poor physical health, mental health problems, addiction, incarceration, domestic violence, self-harm, and suicide. Essentially, this ensures that their

<sup>&</sup>lt;sup>49</sup> Altman, J quoted in Royal Commission into the Protection and Detention of Children in the Northern Territory (2017) p177 Retrieved from https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory



<sup>&</sup>lt;sup>44</sup> Healing Foundation (2017) Bringing them home 20 years on: an action plan for healing p19-10 Retrieved from https://healingfoundation.org.au/app/uploads/2017/05/Bringing-Them-Home-20-years-on-FINAL-SCREEN-1.pdf

<sup>&</sup>lt;sup>45</sup> Australian Government, Australian Institute of Health and Welfare (2010) Child protection Australia 2008–09 Retrieved from https://www.aihw.gov.au/getmedia/b0df902e-0df3-43fd-a9f3-2679cf753f91/10859.20100901.pdf.aspx

<sup>&</sup>lt;sup>46</sup> Australian Government, Australian Institute of Health and Welfare (2017) Child protection Australia 2015–16 Retrieved from https://www.aihw.gov.au/getmedia/bce377ec-1b76-4cc5-87d9-d0541fca586c/20479.pdf.aspx?inline=true

 $<sup>^{47}</sup>$  United Nations (2017) Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia p15 Retrieved from https://documents-dds-

ny.un.org/doc/UNDOC/GEN/G17/234/24/PDF/G1723424.pdf?OpenElement

48 Law Council of Australia (2018) The Justice Project Part 1 - Aboriginal and Torres Strait Islander People p30
Retrieved from https://www.lawcouncil.asn.au/files/web-

pdf/Justice%20Project/Final%20Report/Aboriginal%20and%20Torres%20Strait%20Islander%20People%20%28 Part%201%29.pdf



lives are caught up in a vicious cycle.<sup>50</sup> For Indigenous women, intergenerational trauma has contributed to the environment of violence in which they live. The prevalence of family violence in Indigenous communities, particularly in remote areas, is well known and is a constant.<sup>51</sup> Most of this violence is perpetrated by men against women.<sup>52</sup>

Research indicates that people who experience trauma are more likely to engage in self-destructive behaviours, have poorer health status, and find themselves regularly in contact with the criminal justice system.<sup>53</sup> Sufferers of inter-generational trauma have witnessed these behaviours in the older generations, thus compounding the cycle of trauma.

Disadvantage experienced by Indigenous Australians, compared to that of non-Indigenous Australians, has been acknowledged for many years and is documented annually in 'The Closing the Gap Prime Ministers Report'. <sup>54</sup> Victims of the Stolen Generations and their descendants are in significantly poorer health than other Indigenous Australians and are more likely to be homeless, unemployed, relying on government welfare to survive, and to experience higher rates of violence and mental health problems. Contact with the police and criminal justice system is also consistently higher, and the likelihood of arrest and incarceration is twice as high. <sup>55</sup>

#### Institutional Racism

"Despite making up just three percent of the general population, about one quarter of Australia's prison population is Aboriginal or Torres Strait Islander. That cannot be explained by anything like criminality that is associated with a particular background.

<sup>&</sup>lt;sup>55</sup> Australian Institute of Health and Welfare (2018) Aboriginal and Torres Strait Islander Stolen Generations and descendants: numbers, demographic characteristics and selected outcomes Retrieved from https://www.aihw.gov.au/getmedia/a6c077c3-e1af-40de-847f-e8a3e3456c44/aihw-ihw-195.pdf.aspx?inline=true



<sup>&</sup>lt;sup>50</sup> Dudgeon,P, Milroy, H & Walker, R (eds) (2014) Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice 2<sup>nd</sup> Ed. Retrieved from https://www.telethonkids.org.au/globalassets/media/documents/aboriginal-health/working-together-second-edition/working-together-aboriginal-and-wellbeing-2014.pdf

<sup>&</sup>lt;sup>51</sup> Australian Crime Commission (2015) The Final Report of The National Indigenous Intelligence Task Force 2006-2014 p10 Retrieved from https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/evidence-2017/evidence4november/Exh-1145-001.pdf

<sup>&</sup>lt;sup>52</sup> Perpitch, N (2017) Aboriginal mothers in WA jails discuss domestic violence in lives, as study finds 'culture of fighting' Retrieved from http://www.abc.net.au/news/2017-02-15/aboriginal-mothers-in-wa-jails-talk-about-violence-in-lives/8270166

<sup>&</sup>lt;sup>53</sup>Atkinson, J, Nelson, J & Atkinson (2010) Trauma, transgenerational transfer and effects on community wellbeing, in N Purdie, P Dudgeon, & R Walker (eds), Working together: Aboriginal and Torres Strait Islander mental health and wellbeing principles and practice, Australian Institute of Health and Welfare Retrieved from http://www.aipro.info/drive/File/Trauma,%20transgenerational%20transfer%20and%20effects%20on%20com munity%20wellbeing.%20J.%20Atkinson%20et%20al..pdf

<sup>&</sup>lt;sup>54</sup> Australian Government, Department of Prime Minister and Cabinet (2017) Closing the Gap: Prime Minister's Report 2017 Retrieved from https://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf



It can't be explained away by just socio-economic location. It is indicative of some institutional racism."<sup>56</sup>

Institutional racism is the acceptance of forms of racial discrimination that have become entrenched in systems and seen as common or standard behavior within the society or institution.

Discrimination against Indigenous women on the grounds of gender, race, and class is structurally and institutionally entrenched in Australia.<sup>57</sup> The preeminent law in Australia, the Constitution, is a foundational component of institutional racism in the country. It offers no references to Indigenous people being the first Australians, nor does it acknowledge their attachment to the land or their unique history, culture, or language. It blatantly disregards racial equality through Section 25, which allows for the states to disqualify a person from voting entirely on the basis of their race. Section 51 (xxvi) of the Australian Constitution is commonly referred to as the "race power".

"Australia holds the dubious distinction of being the only developed country in the world to have a 'race power' that allows for the Parliament to enact racially discriminatory laws." <sup>58</sup>

This section allows the Commonwealth government to create racially-motivated laws. The disturbing issue associated with Section 51 (xxvi) is that nowhere is it specified that these special laws have to benefit or protect the people of any race. Therefore, it allows for the possibility of discrimination based on race. This type of discrimination has in fact occurred with: Kartinyeri V Commonwealth finding that Section 51 (xxvi) did not restrict the Commonwealth from making laws to the detriment of a particular race. <sup>59</sup> The "race power" and lack of recognition and equality for Indigenous people in the Australian constitution enables institutional racism to exist and to even thrive.

The impact of institutional racism exists in many facets of Indigenous women's lives from education, employment, housing, and most significantly in the criminal justice system. <sup>60</sup> Chief Justice Wayne Martin QC clearly articulates the impact of institutional racism within the criminal justice system:

<sup>&</sup>lt;sup>60</sup> Judicial Commission of New South Wales (2018) Equality before the Law Bench Book Release 12 Community Legal Services NSW, Submission No 106 https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Equality before the Law Bench Book.pdf



<sup>&</sup>lt;sup>56</sup> Soutphommasane, T (2017) Institutional racism Retrieved from https://www.humanrights.gov.au/news/speeches/institutional-racism

<sup>&</sup>lt;sup>57</sup> United Nations (2017) Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia p16 Retrieved from https://documents-dds-

ny.un.org/doc/UNDOC/GEN/G17/234/24/PDF/G1723424.pdf?OpenElement

<sup>&</sup>lt;sup>58</sup> The NSW Aboriginal Land Council (2011) Submission: Australian Constitutional reform to recognise Aboriginal and Torres Strait Islander peoples p6 Retrieved from

http://www.alc.org.au/media/73892/110902%20australian%20constitutional%20reform%20submission.pdf <sup>59</sup> Nettheim, G (1998) The Hindmarsh Bridge Act Case: Kartinyeri v Commonwealth, Indigenous Law Bulletin 18 Retrieved from http://www.austlii.edu.au/au/journals/ILB/1998/48.html



"There cannot be any doubt that Aboriginal people are significantly disadvantaged within our criminal justice system in almost every aspect of that system's operation."

His further elaboration in justifying this statement is illustrated below with the use of a visual aid that outlines the vicious cycle in which Indigenous people are so often trapped.

"Aboriginal people are much more likely to be questioned by police than non-Aboriginal people."

"If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people."

"When questioned they are more likely to be arrested rather than proceeded against by summons."

"If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted."

"So at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people." 61

<sup>&</sup>lt;sup>61</sup> Martin, W (2017) Unequal Justice for Indigenous Australians p19 Retrieved from https://www.supremecourt.wa.gov.au/\_files/Unequal%20Justice%20for%20Indigenous%20Australians%20by %20Martin%20CJ%2026%20June%202017.pdf





#### Northern Territory Emergency Response ("The Intervention")

"We feel here that the intervention offers us absolutely nothing, excepting to compound the feeling of being second class citizens. The only thing that we have gained out of the intervention is the police." – Utopia  $elder^{62}$ 

On 21 June 2007, the Australian Government announced a series of broad-ranging measures to be introduced in Indigenous communities across the Northern Territory. These measures were implemented to address what it described as the 'national emergency confronting the welfare of Aboriginal children'; relating to child abuse and family violence. The Minister described the measures to be introduced as 'stabilising and protecting communities in the crisis area', with all action supposedly 'designed to ensure the protection of Aboriginal children from harm.'<sup>63</sup> The government claimed to take these action in response to the findings of the Ampe Akelyernemane Meke Mekarle (Little Children are Sacred) report.<sup>64</sup> They responded swiftly to seize control of many aspects of the daily lives of Indigenous residents in 73 targeted remote communities. The government claimed that child abuse was rampant (later disproven) and that this was a national emergency. The timing of the response, just months out from an election, was seen as a possible driver for the national emergency.

This response came with no warning and no consultation. Coercive measures that would have been inconceivable in non-Indigenous communities were established and then implemented. <sup>65</sup>

The Northern Territory Emergency Response Act 2007 (NTER),<sup>66</sup> commonly known as 'the intervention', was legislation based on race which put it at odds with the Racial Discrimination Act 1975.<sup>67</sup> The government's approach in addressing this contradiction lacked subtlety as they decided to suspend the act and allow for the imposition of an explicitly racist regime over Indigenous communities.

<sup>&</sup>lt;sup>67</sup> Federal register of Legislation (2019) Retrieved from https://www.legislation.gov.au/Details/C2016C00089



<sup>&</sup>lt;sup>62</sup> Korff, J (2019) Northern Territory Emergency Response (NTER) - "The Intervention" Retrieved from https://www.creativespirits.info/aboriginalculture/politics/northern-territory-emergency-response-intervention#fnref7

<sup>&</sup>lt;sup>63</sup> Australian Human Rights Commission (2007) Social Justice Report 2007 Chapter 3 Retrieved from https://www.humanrights.gov.au/publications/social-justice-report-2007-chapter-3-northern-territory-emergency-response-intervention

<sup>&</sup>lt;sup>64</sup> Ampe Akelyernemane Meke Mekarle - Little children are sacred (2007) Retrieved from http://www.inquirysaac.nt.gov.au/pdf/bipacsa\_final\_report.pdf

<sup>&</sup>lt;sup>65</sup> Perche, D (2017) Ten years on, it's time we learned the lessons from the failed Northern Territory Intervention Retrieved from https://theconversation.com/ten-years-on-its-time-we-learned-the-lessons-from-the-failed-northern-territory-intervention-79198

<sup>&</sup>lt;sup>66</sup> Federal register of Legislation (2019) Retrieved from https://www.legislation.gov.au/Series/C2007A00129



The independent panel appointed by the Commonwealth Government to review the operation of the intervention raised concerns over the suspension of the Racial Discrimination Act:

"Experiences of racial discrimination and humiliation as a result of the NTER were told with such passion and such regularity that the Board felt compelled to advise the Minister for Indigenous Affairs during the course of the Review that such widespread Aboriginal hostility to the Australian Government's actions should be regarded as a matter for serious concern.

There is intense hurt and anger at being isolated on the basis of race and subjected to collective measures that would never be applied to other Australians. The Intervention was received with a sense of betrayal and disbelief. Resistance to its imposition undercut the potential effectiveness of its substantive measures."<sup>68</sup>

The Army was dispatched into Indigenous lands as a 'shock and awe' tactic to send a clear message that the Commonwealth was in complete control. The legislation received bipartisan support. Shelter from racial discrimination became non-existent for Indigenous people in prescribed areas of the Northern Territory.

The intervention had a colossal impact on the lives of Indigenous people and their communities. The rapid implementation which neglected any form of consultation led to fear and confusion. The use of the army as the lead organization resembled another invasion. This tactic was executed, despite the knowledge that people were still suffering from the impacts of the first invasion. The suspension of the Native Title Act, the granting of 5-year leases to the Commonwealth Government, and the removal of the requirement for non-Aboriginal people to apply for permits to access the land in 73 communities, were all seen as yet another attempt to misappropriate sacred Indigenous land.

For Indigenous women, the implication that they were bad mothers was front and centre, with compulsory health checks to be undertaken on all Indigenous children. The fear of having children taken away became a reality again and many fled communities and hid their children. The distrust of government and service providers was further entrenched for another generation.

Bans were placed on alcohol and garish signs erected. Additional bans on pornography saw some television station signals cut entirely and inspections of all computers were undertaken. Welfare payments were linked to school attendance, with half of the payment quarantined into the income management system and not paid in cash.

The intervention provoked fear and anger within many communities. Anger that there was no attempt at consultation before implementation, and fear that their children would be

<sup>&</sup>lt;sup>69</sup> Australian Broadcasting Corporation (2007) PM urges Aboriginal communities not to fear intervention plan Retrieved from https://www.abc.net.au/news/2007-06-27/pm-urges-aboriginal-communities-not-to-fear/82458



<sup>&</sup>lt;sup>68</sup>Royal Commission into the Protection and Detention of Children in the Northern Territory (2017) Chapter 4 p173 Retrieved from https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory



taken from them and/or their land would be stolen again after many years of fighting to reclaim it.

Related Indigenous policies were also impacted by using this paternalistic approach to the provision of programs and services offered to Indigenous people and communities. At the core of these policies was the dismantling of the employment opportunities and municipal community services with the closure of the Community Development Employment projects (CDEP). The closing of the CDEP lead to the Northern Territory having the highest level of Indigenous unemployment it had experienced in years.

The Intervention's health impacts have since been assessed and deemed as severe. The impact on health and wellbeing can be attributed to psychological damage caused by the punitive nature of the measures taken and imposition of culturally inappropriate policies.<sup>70</sup>

One of the most disturbing impacts of the intervention was the alarming increase in the rate of suicide and self-harm. Between 2001-2005 and 2006-2010, the incidence of Indigenous youth suicide in the Northern Territory increased by 160%. In contrast, non-Indigenous youth suicide had declined by one third. Indigenous girls made up 40% of youth suicide in the Northern Territory when the national average is less than 10%.<sup>71</sup>

Following the intervention, the Commonwealth enacted section 16AA of the Crimes Act 1914<sup>72</sup> that prohibits Northern Territory Courts from accepting any form of customary law or cultural practice during sentencing as a reason for excusing, justifying, authorising, requiring, or lessening the seriousness of the criminal behaviour to which the offence relates.73

The incarceration rate for Indigenous women is now more than three times pre-intervention levels. The number of young Indigenous females entering detention increased from just 5 in 2006, to 48 in 2016.<sup>74</sup>

Much of the NTER remains in place through the Stronger Futures in the Northern Territory Act (2012).75

"The intervention has had consequences that will have repercussions for generations."76— Professor Mick Dodson, Aboriginal leader

<sup>&</sup>lt;sup>76</sup> Korff, J (2019) Northern Territory Emergency Response (NTER) - "The Intervention" Retrieved from https://www.creativespirits.info/aboriginalculture/politics/northern-territory-emergency-responseintervention#fnref7



<sup>70</sup> ibid

<sup>&</sup>lt;sup>71</sup>Australian Human Rights Commission (2016) Social Justice Report (2012) Retrieved from https://www.humanrights.gov.au/sites/default/files/document/publication/social justice report 2012.pdf

<sup>&</sup>lt;sup>72</sup> Federal Register of Legislation (2019) Retrieved from https://www.legislation.gov.au/Details/C2019C00048 <sup>73</sup>North Australia Aboriginal Justice Agency (2017) Submission to Australian Law Reform Commission inquiry

into the incarceration rate of Aboriginal and Torres Strait Islander peoples Retrieved from

http://www.naaja.org.au/wp-content/uploads/2017/02/NAAJA-submission-to-the-ALRC October-2017.pdf <sup>74</sup>Gibson, P (2017) 10 impacts of the NT Intervention Retrieved from

https://www.sbs.com.au/nitv/article/2017/06/21/10-impacts-nt-intervention

<sup>&</sup>lt;sup>75</sup> Federal Register of Legislation (2019 Retrieved from https://www.legislation.gov.au/Details/C2012A00100



## The Available Data, with a Note on Deficiencies.

"Although the lack of reliable and cross-comparable data in relation to offending and incarceration is an issue affecting Aboriginal and Torres Strait Islander people generally, it is an issue that particularly hinders accurate assessment of the needs and pathways of Aboriginal and Torres Strait Islander female offenders. This has been a longstanding problem. In 2002 and in 2004, the Aboriginal and Torres Strait Islander Social Justice Commissioner stressed that the paucity of data in relation to Aboriginal and Torres Strait Islander female offending had rendered them 'invisible' in the criminal justice system."

Before the RCIADIC there was very little data on Indigenous women in custody and there has been only a slight improvement since.

Indigenous women are either grouped with non-Indigenous women or with Indigenous men in the analysis of data.<sup>78</sup> Data at state and territory level suffer the same deficiencies. Data relating to Indigenous people and data relating to women (where available) fail to provide a complete detailed insight into the circumstances of Indigenous women.

The lack of specific data makes the tracking of Indigenous female incarceration rates post-RCIADIC difficult. This coupled with the changing format and presentation of data by the Australian Bureau of Statistics has rendered this section lacking. What is presented, however, provides irrefutable evidence that 28 years on from the RCIADIC, the current situation is dire and warrants immediate attention.

As illustrated in the graphic below, Indigenous females represent 26.40% of the Northern Territory population<sup>79</sup> yet they accounted for 84.54% of the female prison population in 2017.<sup>80</sup> The figures may not offer the true extent of the situation. Current ABS prisoner data does not provide a number that accounts for individuals who enter and leave prison each year.<sup>81</sup> This data is a snapshot from June 30<sup>th</sup> of each year. Such census figures do not take into account the numbers of prisoners who move through the system over the period of a

<sup>&</sup>lt;sup>81</sup> Australian Law Reform Commission (2017) Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples p33 Retrieved from https://www.alrc.gov.au/publications/indigenous-incarceration-report133



 $<sup>^{77}</sup>$  Australian Law Reform Commission (2017) Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples p350 Retrieved from

https://www.alrc.gov.au/publications/indigenous-incarceration-report133

<sup>&</sup>lt;sup>78</sup> Human Rights Law Centre and Change the Record Coalition (2017) Over-represented and Overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment p21 Retrieved from https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812 234196/OverRepresented\_online.pdf

Australian Bureau of Statistics (2016) 2016 Census QuickStats. Retrieved from
 http://quickstats.censusdata.abs.gov.au/census\_services/getproduct/census/2016/quickstat/IQS7
 Australian Bureau of Statistics (2017) Prisoners in Australia, 2017 Retrieved from

http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2017~Main%20Features~Prior%20adult%20imprisonment~15



month, or 6 months, or a year. <sup>82</sup> Indigenous women are disproportionately affected by protective custody orders, incarceration for fines, and other mandatory sentencing schemes for lower-level offences. <sup>83</sup> As such, they may serve less than 12 months and the actual numbers of Indigenous women who have served time in prison would likely be much higher if intakes and releases were also taken into account throughout the year.



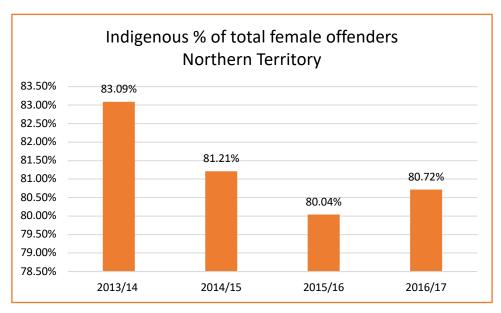
Available data regarding the offending rates of Indigenous women in the Northern Territory from 2013 reveals that they consistently account for over 80% of female offenders.

<sup>&</sup>lt;sup>83</sup>The Guardian (2018) Half of Indigenous women who died in custody did not receive appropriate medical care Retrieved from https://www.theguardian.com/australia-news/2018/sep/10/indigenous-women-in-custody-more-likely-than-men-to-have-died-where-policy-not-followed



<sup>&</sup>lt;sup>82</sup> Baldry, E (2010) Women in Transition: From Prison to...p255 Retrieved from https://www.researchgate.net/publication/278075494\_Women\_in\_Transition\_from\_prison\_to





Source ABS Recorded Crime - Offenders Report 2013/14 2014/15 2015/16 and 2016/17

Data representing the types of offences Indigenous women commit is not easily found and what is available is limited and inconsistent. Statistics for ABS prisoners in Australia do provide detail on most serious offences for those incarcerated, however, reliable data on arrests resulting in non-custodial sentences or fines are not easily accessible. That said, available data indicates that an Indigenous woman in the Northern Territory is 12 times more likely to be incarcerated than her non-Indigenous counterpart.

<sup>&</sup>lt;sup>84</sup> Human Rights Law Centre and Change the Record Coalition (2017) Over-represented and Overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment p11 Retrieved from https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812 234196/OverRepresented\_online.pdf







**Source ABS Prisoners in Australia 2018** 

Due to harsh protective custody laws, Indigenous women in the Northern Territory face a far higher risk of being taken into police custody without having committed an offence than their non-Indigenous counterparts. Under these 'paperless arrest' laws, police are afforded the discretion to detain someone for up to 4 hours if they have reasonable suspicion that the person may be drunk in a public place and likely to commit an offence, or may intimidate, alarm, or cause substantial annoyance to others. During 2017–2018, 4,039 Indigenous women in the Northern Territory were taken into police protective custody as opposed to 48 non-Indigenous women, 98.83% of women taken into custody were Indigenous.

This significant disparity has remained consistent for the past 10 years. Every year since 2006 over 98% of women held in custody are Indigenous.<sup>87</sup>

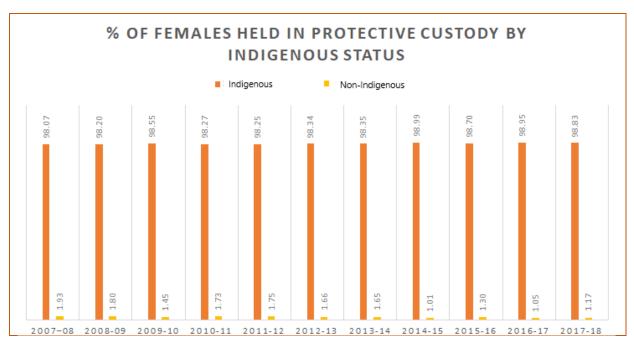
<sup>&</sup>lt;sup>87</sup> Northern Territory Police Fire and Emergency Services – Annual Report 2017–18 p216 Retrieved from https://www.pfes.nt.gov.au/Publications-and-forms.aspx



<sup>&</sup>lt;sup>85</sup> Australian Bureau of Statistics (2018) Prisoners in Australia 2018 Retrieved from https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0

<sup>&</sup>lt;sup>86</sup> Human Rights Law Centre (2017) High Court finds the exercise of Northern Territory's punitive police lock-up powers lawful Retrieved from https://www.hrlc.org.au/news/2017/3/8/high-court-finds-the-exercise-of-northern-territorys-punitive-police-lock-up-powers-lawful





Source: Northern Territory Police Fire and Emergency Services - Annual Report 2017-18

# Northern Territory Government Response to the Royal Commission into Aboriginal Deaths in Custody

"The Northern Territory ('NT') has long been a gold medal performer when it comes to locking people up."88

The RCIADIC recommendations focussed on three key areas;

- reducing rates of Indigenous incarceration;
- increasing the safety of Indigenous people in custody; and
- advancing Indigenous self-determination.<sup>89</sup>

This section will deal with the Northern Territory government's responses to the first of those, reducing rates of Indigenous incarceration, as it relates to Indigenous women.

The context for the government's responses must be recognized; the political atmosphere in the Northern Territory regarding Indigenous affairs varies considerably to that of the Eastern seaboard. There is constant pressure placed on the government to address 'antisocial behaviour' commonly associated with Indigenous alcohol-related behaviour. This has

Hunyor, J (2015) Imprison me NT: Paperless arrests and the rise of executive power
 In the Northern Territory, Indigenous Law Review Volume 8 Issue 21, p3 Retrieved from
 http://www.naaja.org.au/wp-content/uploads/2014/07/IMPRISON-ME-NT-by-Jonathon-Hunyor.pdf
 Jordan, K., et al. (2018) Joint response to the Deloitte Review of the implementation of the
 recommendations of the Royal Commission into Aboriginal Deaths in Custody p2 Retrieved from
 http://caepr.cass.anu.edu.au/sites/default/files/docs/2018/12/Topical\_issue\_4\_2018\_Jordan\_et\_al\_final\_\_KJ
 2\_(002).pdf





remained a common theme for all governments post-RCIADIC. The desire for governments to be viewed as 'tough on crime' has also been a recurring theme. This theme is yet another element of society that disproportionately impacts Indigenous women through the major influence it has had on the criminal justice system, such as over-policing, bail laws, and limited sentencing options. This context could explain to some degree why as of November 2016, Northern Territory Correctional Services (NTCS) had implemented only 71 of the 339 recommendations from the RCIADC.<sup>90</sup>

Addressing all 339 recommendations of the RCIADIC is not feasible for this paper. Instead, the purpose of this paper is to consider those that have a significant impact on the incarceration rates of Indigenous women. As such the response (or lack thereof) to recommendations which may have contributed to the upward trajectory of incarceration rates are addressed.

#### **Recommendation 85. That:**

- a) Police Services should monitor the effect of legislation which decriminalises drunkenness with a view to ensuring that people detained by police officers are not being detained in police cells when they should more appropriately have been taken to alternative places of care;
- b) The effect of such legislation should be monitored to ensure that persons who would otherwise have been apprehended for drunkenness are not, instead, being arrested and charged with other minor offences. Such monitoring should also assess differences in police practices between urban and rural areas; and
- c) The results of such monitoring of the implementation of the decriminalisation of drunkenness should be made public.

The Northern Territory Government does not consider this recommendation to be applicable to their jurisdiction, as drunkenness was decriminalized prior to the RCIADIC. However, there is a complicated set of laws under the Liquor Act 1979 Prelating to certain areas and/or premises declared as 'regulated places,' 'regulated premises,' 'restricted areas,' and 'alcohol protected areas.'

In 'restricted areas,' the possession and consumption of alcohol is strictly controlled. The Liquor Act makes it an offence to have liquor in one's possession in a restricted area, unless one has a permit. Penalties include up to 6 months imprisonment. 'Restricted areas' include

<sup>&</sup>lt;sup>92</sup> Northern Territory Legislation (2018) Retrieved from https://legislation.nt.gov.au/Legislation/LIQUOR-ACT-1978



<sup>&</sup>lt;sup>90</sup> Northern Territory Government Submission Australian Law Reform Commission Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples p 17 -18 Retrieved from https://www.alrc.gov.au/sites/default/files/subs/118. nt government.pdf

<sup>&</sup>lt;sup>91</sup> Deloitte Access Economics (2018) Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody (2018) p 171 Retrieved from

https://www2.deloitte.com/au/en/pages/economics/articles/review-implementation-recommendations-royal-commission-aboriginal-death-custody.html



many areas occupied or frequented by Indigenous people, such as town camps or urban living areas. 93

The Commonwealth government legislation, Stronger Futures in the Northern Territory Act 2012<sup>94</sup>, and its predecessor, the Northern Territory Emergency Response Act 2007<sup>95</sup>, incorporated 'alcohol protected areas' in the Northern Territory Liquor Act. These are areas prescribed by the federal minister and are all remote Indigenous communities. It is an offence to possess liquor, consume liquor, bring liquor into, or supply liquor to a third person in an alcohol protected area. Once more, penalties include up to 6 months imprisonment.

The laws outlined are contrary to the intent of this recommendation, which was to provide help and support and seek alternatives to arrest, such as Sobering up Shelters. <sup>96</sup> They are also discriminatory, given the widely-known alcohol issues Indigenous people suffer from. Rather than seeking alternative solutions to drunkenness, both tiers of government have further criminalized it.

In 2013, the Northern Territory Government introduced alcohol prevention orders (APOs) and alcohol mandatory treatment orders (AMT). APOs allowed police to issue an order to a person charged with an offence subject to a prison sentence if they suspected that person was affected by alcohol at the time. It banned the individual from possessing alcohol or going to a location where it was being sold. AMT orders could be issued to any individual that had been picked up by the police three times in two months for being of intoxicated. As a result of this order, they would be required to undertake three months of treatment within a detention facility. The data reveals that 86% of APOs and 97% of AMTs issued across the Northern Territory were issued to Indigenous people. These disproportionate figures could indicate a targeting of Indigenous people or a leniency toward non-Indigenous people, there is no definitive reason published for the imbalance.

In 2014, an Indigenous woman lost her life while being held in custody under an AMT order.<sup>97</sup> These measures effectively criminalized drunkenness for Indigenous people which has the potential to result in inhumane practices with detrimental consequences.

Following a change of government, these laws were repealed in 2017 and replaced with a harm-minimization strategy. This strategy introduced a 'banned drinkers register,' which prevents people with alcohol-related offences from purchasing alcohol and includes

https://www.missionaustralia.com.au/servicedirectory/185-alcohol-other-drugs/darwin-sobering-up-shelter <sup>97</sup> Everingham, S (2014) Aboriginal woman dies undertaking mandatory NT alcohol rehabilitation program Retrieved from https://www.abc.net.au/news/2014-11-14/aboriginal-woman-dies-in-nt-mandatory-alcohol-rehab-program/5890444



<sup>&</sup>lt;sup>93</sup> Review of the Implementation of RCIADIC (2015) Chapter 13 p236-288 Retrieved from https://changetherecord.org.au/resources/files/Chapter%2014\_%20Imprisonment%20As%20A%20Last%20Re sort%20(1).pdf

<sup>&</sup>lt;sup>94</sup> Federal Register of Legislation (2019) Retrieved from https://www.legislation.gov.au/Details/C2012A00100

<sup>&</sup>lt;sup>95</sup> Federal register of Legislation (2019) Retrieved from https://www.legislation.gov.au/Series/C2007A00129

<sup>&</sup>lt;sup>96</sup> Mission Australia (2019) Darwin Sobering up Shelter Retrieved from



voluntary referral to rehabilitation programs.<sup>98</sup> This is a return to a previous policy that produced no solid evidence of success. Whether a return to this policy will be effective is yet to be seen. Voluntary referral may not be effective for many Indigenous people as there is shame associated with seeking treatment, as well as concern about getting into trouble with the law. For many women, concern over losing their children may also be a barrier to seeking help.<sup>99</sup> Another barrier for women with children is the very few family-friendly treatment services in the Northern Territory that accept children.<sup>100</sup>

Recommendation 87(a): That All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders

The Northern Territory introduced 'Paperless Arrest' laws in December 2014. These laws are at direct odds with Recommendation 87(a). The law provides police with the discretion to detain a person for 4 hours or until no longer intoxicated without charge. Additionally, detainment can occur if police suspect they have committed, were committing, or were about to commit a minor offence that could otherwise be dealt with by way of an infringement notice. At the end of the 4-hour period, the police can either release the person unconditionally, issue an infringement notice, release them on bail, or bring the person before a court.<sup>101</sup>

Following the death in custody of an Indigenous man in 2015, the Northern Territory coroner called for the repeal of the manifestly unfair 'paperless arrest' laws that impact so disproportionately on one sector of the community. He found that these laws are irreconcilable with RCIADIC recommendations of arrest and detention as an option of last resort and that there is a clear link between this law and an increase in Indigenous incarceration rates.<sup>102</sup>

The Northern Territory has the highest rate of homelessness in Australia and 88.4% of all homeless persons are Indigenous. <sup>103</sup> Although no Indigenous female-specific figure is available, 50.4% of all homeless persons in the Northern Territory were female. This makes it the only jurisdiction in Australia where more females than males were homeless. With the

Hunyor, J (2015) Imprison me NT: Paperless arrests and the rise of executive power
 In the Northern Territory, Indigenous Law Review Volume 8 Issue 21, p3 Retrieved from
 http://www.naaja.org.au/wp-content/uploads/2014/07/IMPRISON-ME-NT-by-Jonathon-Hunyor.pdf
 Cavanagh, G (2015) Inquest into the death of Perry Jabanangka Langdon (2015) NTMC 016 p32 Retrieved from https://localcourt.nt.gov.au/sites/default/files/decisions/NTMC16PerryLandoninquest.pdf
 Australian Bureau of Statistics (2018) Census of Population and Housing: Estimating homelessness, 2016 Retrieved from http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/2049.02016?OpenDocument



<sup>&</sup>lt;sup>98</sup> Davidson, H (2017) Northern Territory repeals alcohol laws 'discriminatory' to Indigenous people Retrieved from https://www.theguardian.com/australia-news/2017/aug/18/northern-territory-repeals-alcohol-laws-discriminatory-to-indigenous-people

<sup>&</sup>lt;sup>99</sup> National Indigenous Drug and Alcohol Committee (2014) Alcohol and other drug treatment for Aboriginal and Torres Strait Islander peoples p7-8 Retrieved from

https://healthinfonet.ecu.edu.au/healthinfonet/getContent.php? linkid=592238&title=Alcohol+ and + other+drug+treatment+for+Aboriginal+ and + Torres+Strait+Islander+peoples

<sup>&</sup>lt;sup>100</sup> Riley, T (2017) Alcohol Policies and Legislation Review Final Report p 109 Retrieved from https://alcoholreform.nt.gov.au/\_\_data/assets/pdf\_file/0005/453497/Alcohol-Policies-and-Legislation-Review-Final-Report.pdf



banning of alcohol in remote communities, Indigenous women travel to major towns such as Darwin to consume alcohol. For most, they have no place to stay and subsequently resort to residing in the 'long grass.' 104

A 2011 study by Larrakia Nation found that nearly 50% of 'long grassers' consume alcohol six or more days a week and that the median weekly consumption is 75 standard drinks. This level of consumption presents high health risks and increases the likelihood of contact with police.

The Northern Territory government commissioned the Alcohol Policies and Legislation Review in 2017. The review recommended:

"In relation to a person apprehended under Part V11 Division 4 of the Police Administration Act, Police be required to exhaust all other reasonable alternatives for the person's care and protection before detaining a person at a police station under the protective custody laws, this should be monitored to ensure this is occurring."

The government, in its 2018 response, supported the review's recommendation.<sup>107</sup> Despite this support, no change has been made to date.

Recommendation 89. That, the operation of bail legislation should be closely monitored by each government to ensure that the entitlement to bail, as set out in the legislation, is being recognised in practice. Furthermore, the Commission recommends that the factors highlighted in this report as relevant to the granting of bail be closely considered by police administrators.

The Northern Territory Bail Act<sup>108</sup> states that the police may inform the person of their right to apply for bail as an alternative to bringing the arrested person before a justice or a court. And thereafter, they must ensure that he or she is able to communicate with a legal practitioner or person of his or her choosing in connection with an application for bail. However, there is no guarantee of an entitlement to bail as set forth in the recommendation.

https://alcoholreform.nt.gov.au/\_\_data/assets/pdf\_file/0009/485316/NTG-Position-on-Alcohol-Policies.pdf <sup>108</sup> Northern Territory Legislation (2019) Retrieved from https://legislation.nt.gov.au/Legislation/BAIL-ACT-1982



<sup>&</sup>lt;sup>104</sup> Homeless Indigenous people in Darwin are often called "Long grass People" or "Longgrassers" because their camps are hidden in the long grass. They are also known as "Itinerants" because they move between the city and country areas or Aboriginal Lands in the Northern Territory

<sup>&</sup>lt;sup>105</sup> Taylor, P, Japanardi Walker, S & Marawili, B (2011) Message in the bottle: a survey of drinking patterns and attitudes about alcohol policy amongst Darwin's homeless Retrieved from http://larrakia.com/wp-content/uploads/2014/05/Message-in-the-Bottle.pdf

<sup>&</sup>lt;sup>106</sup> Northern Territory Government (2017) Alcohol policies and legislation review final report Retrieved from https://alcoholreform.nt.gov.au/about-the-review

<sup>&</sup>lt;sup>107</sup>Northern Territory Government (2018) Table of recommendations NT government position on alcohol policies and

Legislation review final report's recommendations Retrieved from



The Northern Territory Bail Act is limited in consideration of cultural practice or customary law in bail hearings through application of section 15AB (1)(b) of the Crimes Act 1914.<sup>109</sup> This section of the Crimes Act states that cultural practice or customary law cannot be taken into account in bail hearings as a reason excusing, justifying, authorising, requiring, or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates. The Crimes Act specifically precludes customary law and cultural practice being used in the prescribed manner for bail matters in the Northern Territory. 110 This restriction placed on the Northern Territory by the Commonwealth hinders their ability to implement bail laws that are appropriately suited to Indigenous people such as those in Victoria which require that a bail decision maker take into account any issues that arise due to a person's Indigenous status, including ties to family or place and other relevant cultural issues or obligations. 111 Indigenous women have significant cultural obligation to family and community as caregivers and cultural advisors that should be considered in the granting of bail. This is another aspect of the system that has unequal consequences for Indigenous women, because when bail requirements are set regardless of cultural and family responsibilities, it can be more difficult for some women to meet bail commitments due to their potentially lower socioeconomic status. This is particularly evident with Indigenous women who are incarcerated because they could not pay bail for misdemeanours. 112

Until January 2018, the Northern Territory was the only state or territory in Australia that did not have a program to support young people on bail. These programs are beneficial in assisting young people with their bail responsibilities. The recent implementation of the program has allowed more Indigenous youth to benefit from their right to bail. Given that Indigenous women are the fastest-growing segment of the prisoner population, a similar program would benefit Indigenous women. Due to family responsibilities and cultural obligations, Indigenous women are highly vulnerable to non-compliance with current bail conditions.

<sup>&</sup>lt;sup>113</sup> Northern Territory Government (2018) Reforming the Broken Youth Justice System: Bail Support Services Retrieved from http://newsroom.nt.gov.au/mediaRelease/24188



<sup>&</sup>lt;sup>109</sup> Federal Register of Legislation (2019) Retrieved from https://www.legislation.gov.au/Details/C2019C00048 <sup>110</sup> Ihid n34

<sup>&</sup>lt;sup>111</sup> Legislation Victoria (2019) Retrieved from

 $http://www.legislation.vic.gov.au/Domino/Web\_Notes/LDMS/PubStatbook.nsf/edfb620cf7503d1aca256da40\\ 01b08af/8DF057C8BCC08426CA2577C1001C0CDC/$FILE/10-070a.pdf$ 

<sup>&</sup>lt;sup>112</sup> Northern Territory Government Submission Australian Law Reform Commission Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (2017) p25 Retrieved from https://www.alrc.gov.au/sites/default/files/subs/118.\_nt\_government.pdf



Recommendation 90. That in jurisdictions where this is not already the position:

- a. Where police bail is denied to an Aboriginal person or granted on terms the person cannot meet, the Aboriginal Legal Service, or a person nominated by the Service, be notified of that fact;
- b. An officer of the Aboriginal Legal Service or such other person as is nominated by the Service, be granted access to a person held in custody without bail; and
- c. There be a statutory requirement that the officer in charge of a station to whom an arrested person is taken give to that person, in writing, a notification of his/her right to apply for bail and to pursue a review of the decision if bail is refused and of how to exercise those rights.

Prior to March 2019, there was no legislation in place to support this recommendation. The only requirement under Police Orders was that 'reasonable steps' be taken to notify an Aboriginal Legal Service if an Indigenous person was refused bail. 114 From March 2019, a Custody Notification System administered by the North Australia Aboriginal Justice Agency (NAAJA) commenced. Funding for three years from the Commonwealth was dependent on the Northern Territory legislating to ensure use of the service is mandatory and agreeing to its on-going funding. 115

The introduction of the Custody Notification Service fulfils the requirements of the recommendation.

Recommendation 92. That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.

There is no legislation, regulation, or policy stipulating that imprisonment should be utilized as a sanction of last resort in the Northern Territory. The government acknowledged this in 2017, stating, 'the principle of ensuring that incarceration is used only as an option of last resort is not specified for adult offenders.' 116

Mandatory sentencing is in direct conflict with recommendation 92 and has a disproportionate impact on Indigenous people. Mandatory sentencing laws were enacted

<sup>&</sup>lt;sup>117</sup>Australian Law Reform Commission (2017) Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples p276 Retrieved from https://www.alrc.gov.au/publications/indigenous-incarceration-report133



<sup>&</sup>lt;sup>114</sup>Deloitte Access Economics (2018) Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody (2018) p 182 Retrieved from

https://www2.deloitte.com/au/en/pages/economics/articles/review-implementation-recommendations-royal-commission-aboriginal-death-custody.html

<sup>&</sup>lt;sup>115</sup> Department of Prime Minister and Cabinet (2018) Investing to prevent deaths in police custody in the NT Retrieved from https://ministers.pmc.gov.au/scullion/2018/prevent-deaths-custody

<sup>&</sup>lt;sup>116</sup> Northern Territory Government (2017) Submission Australian Law Reform Commission Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples p15 Retrieved from https://www.alrc.gov.au/sites/default/files/subs/118. nt government.pdf



in the Northern Territory in 1997 for juvenile and adult offenders. These laws required that offenders are automatically incarcerated at minimum prescribed periods for particular offences. The Juvenile Justice Amendment Act (No2) 2001 repealed mandatory sentencing for juvenile offenders, while the Sentencing Amendment Act (No 3) 2001 repealed mandatory sentencing for property offences for adults.<sup>118</sup>

Under the 1997 mandatory sentencing laws, Indigenous people were 8.6 times more likely to be incarcerated under mandatory sentencing than non-Indigenous people. 119 Yet mandatory sentencing laws regarding assaults came into effect in the Northern Territory in 2008, 120 through the Sentencing Amendment (Violent Offences) Act 2008 (NT) and for certain violent offences through the Sentencing Amendment (Mandatory Minimum Sentences) Act 2013.

The North Australian Aboriginal Justice Agency (NAAJA) found that the mandatory sentencing led to Indigenous people being incarcerated. It found that they might not have been imprisoned, if not for these laws. They also discovered that longer sentences were being imposed. 121

Recommendation 109. That State and Territory Governments examine the range of non-custodial sentencing options available in each jurisdiction with a view to ensuring that an appropriate range of such options is available.

The only alternative sentencing options offered in the Northern Territory include; Community Work Orders, Home Detention, and Community Custody Orders. These sentencing options are costly and rarely offered in remote Indigenous communities where a large number of Indigenous women reside.

The current Northern Territory government established an Aboriginal Justice Unit in 2017, with an aim to reduce Indigenous incarceration rates. The unit was charged with the development of an Aboriginal Justice Agreement which would include actions relating to the fulfilment of recommendation 109. The draft agreement was due in December 2018, however, has not been released to date.

<sup>&</sup>lt;sup>123</sup> Northern Territory Government (2017) Aboriginal Justice Agreement Fact Sheet Retrieved from https://justice.nt.gov.au/\_\_data/assets/pdf\_file/0005/550274/aboriginal-justice-agreement-fact-sheet.pdf



<sup>&</sup>lt;sup>118</sup> Human Rights Commission (2001) Commission welcomes repeal of mandatory sentencing laws in NT Retrieved from https://www.humanrights.gov.au/news/media-releases/commission-welcomes-repeal-mandatory-sentencing-laws-nt

<sup>&</sup>lt;sup>119</sup> Northern Territory Government (2003) Mandatory sentencing for adult property offenders the Northern Territory experience @003) p3 Retrieved from

http://www.lto.nt.gov.au/justice/policycoord/documents/statistics/mandatory\_sentencing\_nt\_experience\_20 031201.pdf

<sup>&</sup>lt;sup>120</sup> Law Council of Australia (2014) Policy Discussion Paper on Mandatory Sentencing p30 Retrieved from https://www.lawcouncil.asn.au/docs/ff85f3e2-ae36-e711-93fb-005056be13b5/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf.

<sup>&</sup>lt;sup>121</sup> Ibid p30

<sup>&</sup>lt;sup>122</sup>Sorenson, H (2017) Northern Territory Labor Government launches Aboriginal Justice Unit Retrieved from https://www.ntnews.com.au/news/northern-territory/northern-territory-labor-government-launches-aboriginal-justice-unit/news-story/b45bcf8878b8d348367aa69d65cd1173



Recommendation 120. That governments consider introducing an on-going amnesty on the execution of long outstanding warrants of commitment for unpaid fines.

If a fine was more than ten years old warrants of commitment for imprisonment for non-payment were of no effect under the Northern Territory Justices Act. However, this legislation was superseded by the Local Court (Criminal Procedure) Act,<sup>124</sup> which does not include such amnesty. There are no amnesty provisions in any existing legislation.

The Northern Territory government introduced the Fines Recovery Unit in 2002. One of the principal goals of this unit is to reduce the number of fine defaulters who are imprisoned by providing a range of payment options. Data on how this initiative has affected Indigenous women is unavailable.

# **Moving Forward**

"We need a smarter form of justice that takes us beyond a narrow-eyed focus on punishment and penalties, to look more broadly at a vision of justice as a coherent, integrated whole." 126

The RCIADIC outlined the connection of unacceptably high Indigenous incarceration rates and the lack of laws; embedding the belief that incarceration should be a sanction of last resort. The RCIADIC promoted alternatives to prison as important for reducing numbers of those incarcerated, which would in turn, reduce deaths in custody.

This section outlines options for change which could assist in reducing incarceration rates for Indigenous females in the Northern Territory.

#### Justice Reinvestment

"Only by listening to, and working collaboratively together with Aboriginal and Torres Strait Islander communities, can we comprehensively address the troubling over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system." 127

<sup>&</sup>lt;sup>127</sup> Australian Capital Territory Government (2017) Family-focused Justice Reinvestment trial to help reduce over-representation of Aboriginal and Torres Strait Islanders in justice system Retrieved from https://www.cmtedd.act.gov.au/open\_government/inform/act\_government\_media\_releases/rattenbury/201 7/family-focused-justice-reinvestment-trial-to-help-reduce-over-representation-of-aboriginal-and-torres-strait-islanders-in-justice-system



<sup>&</sup>lt;sup>124</sup>Northern Territory Legislation (2019) Retrieved from https://legislation.nt.gov.au/Legislation/LOCAL-COURT-CRIMINAL-PROCEDURE-ACT-1928

<sup>&</sup>lt;sup>125</sup> Change the Record (2015) Review of the Implementation of RCIADIC Chapter 14 p287-288 Retrieved from https://changetherecord.org.au/resources/files/Chapter%2014\_%20Imprisonment%20As%20A%20Last%20Re sort%20(1).pdf

<sup>&</sup>lt;sup>126</sup> Dodson, P (2016) Speech to National Press Club quoted in Medhora, S (2016) Patrick Dodson says Indigenous incarceration rate an 'utter disgrace' Retrieved from https://www.theguardian.com/australianews/2016/apr/13/patrick-dodson-says-indigenous-incarceration-rate-an-utter-disgrace



Justice reinvestment is a policy approach that redirects funding from prisons to local communities. Justice reinvestment as an option for addressing Indigenous incarceration rates first gained some traction when former Aboriginal & Torres Strait Islander Social Justice Commissioner Tom Calma dedicated his last formal report in 2009 to the subject. The communities then utilize funds in preventative programs and services such as diversionary and community development initiatives aimed at reducing crime and incarceration rates.

In 2013, there was a senate enquiry into justice reinvestment which contained 8 recommendations regarding the adoption of justice reinvestment. The Central Australian Aboriginal Legal Aid Service (CAALAS) submitted to the enquiry that a characteristic of many Indigenous communities is the high level of disadvantage. They stated that justice reinvestment strategies can attempt to alleviate community disadvantage and strengthen community capacity by investing in housing, education, health services and prevention programs.

Justice reinvestment offers benefits to women and children in Indigenous communities. By reducing offending and imprisonment, the number of children with an incarcerated parent would decrease which would help in fostering healthier families and children. It has the potential to reduce the number of children who enter the child protection system and more importantly; to disrupt the intergenerational cycle of offending. <sup>130</sup>

There are economic benefits for government; however, the benefits for individuals and communities are far more important. By addressing the social determinants of crime — unemployment, homelessness, health and education issues — justice reinvestment has the potential to improve life outcomes for Indigenous women and their children by keeping the family unit whole and cultural practices in-tact. It has the likelihood to build strong, safe and cohesive communities that provide a haven away from the criminal justice system.<sup>131</sup>

https://www.aph.gov.au/parliamentary\_business/committees/senate/legal\_and\_constitutional\_affairs/completed inquiries/2010-13/justicereinvestment/report/index



<sup>&</sup>lt;sup>128</sup> Aboriginal & Torres Strait Islander Social Justice Commissioner (2009) 2009 Social Justice Report Retrieved from

https://www.humanrights.gov.au/sites/default/files/content/social\_justice/sj\_report/sjreport09/pdf/sjr\_2009 web.pdf

<sup>&</sup>lt;sup>129</sup> Legal and Constitutional Affairs References Committee (2013) Value of a justice reinvestment approach to criminal justice in Australia pxi – xii Retrieved from

https://www.aph.gov.au/parliamentary\_business/committees/senate/legal\_and\_constitutional\_affairs/completed\_inquiries/2010-13/justicereinvestment/report/index

<sup>&</sup>lt;sup>130</sup> Legal and Constitutional Affairs References Committee (2013) Value of a justice reinvestment approach to criminal justice in Australia p71 Retrieved from

 $https://www.aph.gov.au/parliamentary\_business/committees/senate/legal\_and\_constitutional\_affairs/completed\_inquiries/2010-13/justicereinvestment/report/index$ 

<sup>&</sup>lt;sup>131</sup> Legal and Constitutional Affairs References Committee (2013) Value of a justice reinvestment approach to criminal justice in Australia p81 Retrieved from



Justice reinvestment has proven successful in some states of the United States $^{132}$  and has started to gather momentum in Australia, with the Australian Capital Territory leading the way. $^{133}$ 

It is recommended as an option in recent publications and most notably, the Commonwealth government-commissioned 2018 Pathways to Justice<sup>134</sup> report which specifically recommends:

- 4.1 the establishment of an independent justice reinvestment body to promote the reinvestment of resources from the criminal justice system to local community development initiatives, to address the drivers of crime and incarceration, and to provide expertise in the methodology of justice reinvestment.
- 4.2 government support for place-based justice reinvestment initiatives, through resourcing, facilitating access to data, and facilitating participation by and coordination between relevant government departments.

One year on from the Pathways to Justice report, the Commonwealth government has taken no action on these recommendations (or in fact any recommendations from the report).<sup>135</sup>

#### Maranguka Justice Reinvestment Project

The remote town of Bourke, located in North west New South Wales, was the first major pilot site in Australia to adapt and implement an Indigenous-led, place-based model of justice reinvestment. The project commenced in 2013.

The justice reinvestment project in Bourke is applying a Collective Impact approach which involves:

- A whole-of-community and whole-of-government common agenda to solve social problems to reduce youth crime and increase community safety through a coordinated joint plan of action;
- Shared measures for change based on real-time data;
- A common approach, based on best evidence, for creating change in shared measures and developing the will and capacity within the system to implement these responses;

<sup>&</sup>lt;sup>135</sup> Law Council of Australia (2019) One year on, Government fails to respond to ALRC's Indigenous over-incarceration report Retrieved from https://www.lawcouncil.asn.au/media/media-releases/one-year-ongovernment-fails-to-respond-to-alrcs-indigenous-over-incarceration-report



<sup>132</sup> PwC Indigenous Consulting (2017) Indigenous incarceration – unlocking the facts Retrieved from https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf

<sup>&</sup>lt;sup>133</sup>Australian Capital Territory Government (2018) Justice Reinvestment Strategy Retrieved from https://justice.act.gov.au/page/view/3829/title/justice-reinvestment-strategy

<sup>&</sup>lt;sup>134</sup> Australian Law Reform Commission (2017) Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples p350 Retrieved from

https://www.alrc.gov.au/publications/indigenous-incarceration-report 133



- A backbone organization to perform the necessary functions of facilitating the collaboration, continuously communicating, and tracking change in the shared measures; and
- A clear financial picture of the cost of implementation and the costs saved through effective implementation.<sup>136</sup>

Maranguka has been considered a success and seen as a leader in justice reinvestment. It has been the subject of an Australian Broadcasting Commission program. Data released in 2018 by Maranguka showed that in Bourke, between 2015 and 2017, rates decreased by:

- 18% for major offences;
- 34% for non-domestic violence related assaults;
- 39% for domestic violence related assaults;
- 39% for drug offences; and
- 35% for driving offences

Rates of re-offending also dropped significantly. There was a 72% reduction in the number of people under 25 arrested for driving without a licence. 138

#### Yarrabi Bamirr

Yarrabi Bamirr<sup>139</sup> is a program based in Canberra that provides wrap-around support for select Indigenous people when they leave prison. The program aims to keep families together, prevent homelessness, and reduce incarceration. It has a particular focus on women, as it was recognized by the Australian Capital Territory government that Indigenous female incarceration often has flow-on effects through the whole family. The trial commenced in April 2017 and following its perceived success was extended in July 2018.<sup>140</sup>

Yarrabi Bamirr was co-designed with a range of stakeholders, including Indigenous service providers, community groups, academics, and those with lived experience of the justice system.<sup>141</sup>

<sup>&</sup>lt;sup>141</sup> Australian Capital Territory Government (2017) Family-focused Justice Reinvestment trial to help reduce over-representation of Aboriginal and Torres Strait Islanders in justice system Retrieved from https://www.cmtedd.act.gov.au/open\_government/inform/act\_government\_media\_releases/rattenbury/201 7/family-focused-justice-reinvestment-trial-to-help-reduce-over-representation-of-aboriginal-and-torresstrait-islanders-in-justice-system



<sup>&</sup>lt;sup>136</sup> Youthlaw (2019) Justice reinvestment in action with Aboriginal and Torres Strait Islander communities Retrieved from http://youthlaw.asn.au/campaigns-advocacy/justice-reinvestment-home/aboriginal-and-torres-strait-islanders/

<sup>&</sup>lt;sup>137</sup> Australian Broadcasting Commission (2016) Backing Bourke Retrieved from https://www.abc.net.au/4corners/backing-bourke:-four-corners/7849600

<sup>&</sup>lt;sup>138</sup> Youthlaw (2019) Justice reinvestment in action with Aboriginal and Torres Strait Islander communities Retrieved from http://youthlaw.asn.au/campaigns-advocacy/justice-reinvestment-home/aboriginal-and-torres-strait-islanders/

<sup>139 &</sup>quot;walk tall" in Ngunnawal

<sup>&</sup>lt;sup>140</sup> Le Lievre, K (2018) ACT justice reinvestment trial extended after strong results Retrieved from https://www.canberratimes.com.au/national/act/act-justice-reinvestment-trial-extended-after-strong-results-20180714-p4zrgk.html



Workers from the local Indigenous Health Service, Winnunga Nimmityjah, work together with families to develop unique family plans with goals related to key issues such as housing, health, justice, education, and employment. Cross-government support is then provided to help address community needs.<sup>142</sup>

An independent evaluation of that program by the Australian National University is currently underway.

#### **Bail Reform**

"Interventions addressing the over-representation of Indigenous people in custodial remand need to be aimed at both addressing the underlying causes of the offending behaviour and targeting bail decision-making and procedures in the criminal justice system." <sup>143</sup>

The Victorian Bail Amendment Act 2010 requires that those making bail determinations take into account any complications that arise due to a person's Indigenous status, including ties to family or place and other relevant cultural issues or obligations. This could include cultural obligation due to the kinship structure, attendance, participation, or organization of ceremonies or cultural obligation as a traditional land owner. Victoria has continued ongoing review and amendment of its bail laws to provide fairness to other vulnerable groups, such as those with mental illnesses and/or children.

Australia-wide, there is evidence that Indigenous women are a fast-growing group within the remand population. To confront this trend in the Northern Territory, reform to the Bail Act and deletion of section 15AB(1)(b) of the Crimes Act is crucial. This section of the Crimes Act specifically precludes customary law and cultural practice being used in the prescribed manner for bail matters in the Northern Territory. The Commonwealth has used its power over the Northern Territory to impose this approach.

Until the cultural circumstances of Indigenous women are taken into consideration (as they are in Victoria) Indigenous women in the Northern Territory will continue to be remanded into custody at alarming rates. The Commonwealth categorically imposing their power over the Northern Territory is unjust and directly victimizes Indigenous people.

https://www.alrc.gov.au/publications/indigenous-incarceration-report133 <sup>146</sup> Ibid p34



<sup>142</sup> ibid

<sup>&</sup>lt;sup>143</sup> Anderson-Bond, T, Mazerolle, P and Sanderson, J (2011) Exploring Bail and Remand Experiences for Indigenous Queenslanders p2. Retrieved from

https://www.premiers.qld.gov.au/publications/categories/reports/assets/exploring-bail-and-remand-experiences.pdf

<sup>&</sup>lt;sup>144</sup> Legislation Victoria (2019) Retrieved from

 $http://www.legislation.vic.gov.au/Domino/Web\_Notes/LDMS/PubStatbook.nsf/edfb620cf7503d1aca256da4001b08af/8DF057C8BCC08426CA2577C1001C0CDC/$FILE/10-070a.pdf$ 

<sup>&</sup>lt;sup>145</sup> Australian Law Reform Commission (2017) Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples p153 Retrieved from



As well as legislative reform, the Northern Territory government should consider funding bail support programs to assist Indigenous people (particularly women) to obtain bail and to comply with bail conditions. The Australian Capital Territory as part of its major justice reforms has adopted this approach.

#### Ngurrambai

Ngurrambai<sup>147</sup> is a two-year trial program that commenced in December 2017 in the Australian Capital Territory. It is a culturally appropriate model for Indigenous detainees that includes court-based bail support, outreach bail support and support of bail applications from detainees.<sup>148</sup>

The program is delivered by the Aboriginal Legal Service (NSW/ACT) and provides services, intervention, and support. It is designed to assist an Indigenous person to successfully complete their bail period. The program may be undertaken on a voluntary basis or mandated as a condition of bail. A care plan is developed with the person and they are supported throughout their bail period, with referrals and other support they need.<sup>149</sup>

### **Court Proceedings**

"Some 80% of the accused persons dealt with by the Northern Territory criminal courts are Indigenous Australians. Aboriginal people are the mainstream in our courts." <sup>150</sup>

In the Northern Territory, greater importance needs to be placed on providing alternative court proceedings that are more culturally appropriate. Court services neglect to provide suitable environments to deal with different languages and cultural disparities which in turn situates Indigenous people in disadvantaged positions.

The language barrier experienced by Indigenous women during court proceedings is immense. More than 100 languages and dialects are spoken by Indigenous people in the Northern Territory. Each of these varies greatly in their grammatical structures, concepts, and vocabulary. Court proceedings contain legal jargon and language that is foreign to many people (particularly for Indigenous women for whom English may be a fourth or fifth

<sup>&</sup>lt;sup>151</sup> Northern Territory Government (2019) Retrieved from https://nt.gov.au/community/interpreting-and-translating-services/aboriginal-interpreter-service/aboriginal-languages-in-nt



<sup>&</sup>lt;sup>147</sup> a Ngunnawal word meaning 'perceive' (I see, I hear, I understand).

<sup>&</sup>lt;sup>148</sup> Australian Capital Territory Government (2017) Bail support program provides more support to Aboriginal and Torres Strait Islander detainees Retrieved from

https://www.cmtedd.act.gov.au/open\_government/inform/act\_government\_media\_releases/rattenbury/201 7/bail-support-program-provides-more-support-to-aboriginal-and-torres-strait-islander-detainees

<sup>&</sup>lt;sup>149</sup>Aboriginal Legal Service (NSW/ACT) (2018) Annual Report 2017-18 p 45 Retrieved from https://www.alsnswact.org.au/wp-content/uploads/2018/10/HIGH-RES-FINAL-V10-ALS-Annual-Report-2017-18.pdf

<sup>&</sup>lt;sup>150</sup> Goldflam, R (2015) Where's my interpreter? p9 Retrieved from

http://www.supremecourt.nt.gov.au/conferences/documents/presenter-info/Russell%20Goldflam%20-%20Where's%20my%20interpreter.pdf



language). Interpreter services provide valuable support, however, with the vast amount of languages spoken, obvious challenges arise in the capacity to provide adequate assistance.

"Many words of Aboriginal languages have a single word equivalent in English. However, there are many words for which there are a range of senses—and they can vary according to context." <sup>152</sup>

The video of a reverse role-play titled, 'You Understand, Don't You?' (Pintupi-Luritja), <sup>153</sup> illustrates how judges can underestimate or dismiss the need for interpreters. When the need for an interpreter is accepted, access to interpreters can prove difficult. In the Northern Territory, there is a shortage of appropriately trained and qualified interpreters in Aboriginal languages, including in some of the major language groups. <sup>154</sup> The complex kinship system also means that many qualified interpreters may be unable to work with those in their kinship group. For Indigenous female defendants, it may be inappropriate to have male interpreters in some situations.

Expressing his opinion that innocent people may be sent to prison because of the language barrier, Chief Justice Martin states that there is an 'obvious and direct link' between access to interpreter services and the number of Indigenous people in prisons.

"If the accused person does not understand the language in which the case is being conducted, then the process is invalid, it's ineffective and it's a nullity." 155

Addressing the language barrier will take more than better access to interpreters. The way in which court proceedings are conducted exacerbates the problem.

Circuit Courts, known locally as 'bush courts,' operate in 30 communities throughout the Northern Territory. These courts are conducted in rooms attached to police stations in most communities. In larger communities, the court may sit for 3 days and hear in excess of 40 cases involving more than 60 charges. A recent Australian Broadcasting Commission article dubbed the system, 'the fast food of justice.' Defendants in remote communities are represented by Aboriginal Legal Services, who are acknowledged as being overworked and

<sup>&</sup>lt;sup>156</sup> Clarke, A and Lewis, D (2019) Two lawyers, three days, and 44 cases: Is Bush Court in the NT the fast food of justice? Retrieved from https://www.abc.net.au/news/2019-02-16/background-briefing-northern-territory-bush-court/10817642



<sup>&</sup>lt;sup>152</sup> Moore, D (2014) Indigenous Law Bulletin Volume 8, Issue 12 Retrieved from http://www.austlii.edu.au/au/journals/ILB/2014/17.pdf

<sup>&</sup>lt;sup>153</sup> Indigenous community videos on demand (2015) Retrieved from https://www.ictv.com.au/video/item/3190

<sup>&</sup>lt;sup>154</sup> North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service (2014) Submission to the finance and public administration references committee p3 Retrieved from https://www.aph.gov.au/Parliamentary\_Business/Committees/Senate/Finance\_and\_Public\_Administration/Legal\_assistance\_services/Submissions

<sup>&</sup>lt;sup>155</sup> Bernbrige, C (2015) WA Chief Justice Wayne Martin fears language barriers putting innocent people behind bars Retrieved from https://www.abc.net.au/news/2015-09-27/language-barriers-putting-innocent-people-in-jail,-judge-fears/6803004



underfunded. Lawyers are given little time to provide adequate representation to clients whom they may only meet and consult with minutes before the court proceedings begin.

The Victorian Koori Courts are legislated and operate in the Children's, Magistrates', and County Courts. Generally, Koori Courts provide an informal atmosphere and allow greater participation by the Indigenous community in the court process. Indigenous Elders and Respected Persons provide information on the background of the accused and possible reasons for offending behaviour. They may also explain relevant kinship connections, how particular crimes have affected the Indigenous community, and provide advice on cultural practices, protocols, and perspectives pertinent to sentencing. The Koori Courts focus on reducing cultural alienation and ensuring that appropriate sentencing outcomes are developed with a high level of community support. These courts are considered more informal than mainstream courts and have a 'plain-language' focus. A 2011 evaluation of the Court found it to be more engaging, inclusive, and less intimidating than the mainstream court. 158

Circle Sentencing is a legislated alternative sentencing process available in parts of New South Wales. It is generally used to deal with more serious crimes and often entails full community involvement as well as consideration of traditional Indigenous forms of dispute resolution and customary law. It directly involves local Indigenous people in the decision-making process. The Circle Sentencing legislative aims are:

- To include members of Aboriginal communities in the sentencing process;
- To increase confidence of Aboriginals in the sentencing process;
- To reduce barriers between Aboriginal communities and courts;
- To provide more appropriate sentencing options for Aboriginal offenders;
- To provide support to victims of offences by Aboriginal offenders;
- To allow greater participation for Aboriginal offenders and their victims in the sentencing process; and
- To increase awareness amongst Aboriginal offenders about the consequences of their actions.<sup>159</sup>

Circuit (bush) Courts in the Northern Territory have some similarities to circle courts and statutory-based Indigenous Courts in other jurisdictions; however, they are not legislated. The Circuit (bush) Court system in the Northern Territory requires review and reform to better satisfy the rights of Indigenous people. The issues of language and culture should be at the forefront of any future reform. To achieve effective and meaningful change, Indigenous people (both men and women) need to be included in the architectural design of

<sup>&</sup>lt;sup>160</sup> Blokland, J (2007) Bush Courts – A Forum p3 Retrieved from https://clant.org.au/wp-content/uploads/the-bali-conference/2007/Blokland-J.pdf



<sup>&</sup>lt;sup>157</sup> Victorian County Court (2019) Retrieved from https://www.countycourt.vic.gov.au/learn-about-courtcourt-divisions/county-koori-court

<sup>&</sup>lt;sup>158</sup> County Court of Victoria and the Department of Justice (2011) County Koori Court: Final Evaluation Report p49 Retrieved from https://www.countycourt.vic.gov.au/files/documents/2018-08/ckc-evaluation-reportfinal27sep110.pdf

<sup>&</sup>lt;sup>159</sup> Sydney Criminal Lawyers (2018) Does circle sentencing work? Retrieved from https://www.sydneycriminallawyers.com.au/blog/does-circle-sentencing-work/



any current and future reform. Non-Indigenous people, however well-intentioned, do not have the language skills and cultural knowledge to design successful reform.

## **Sentencing Alternatives**

"Family violence and other stressors manifest across the life cycle, and across generations. This cycle is typified by periods in prison, which entrenches trauma, family breakdown, contact with child protection and out-of-home-care systems, homelessness, family violence, substance misuse and mental health episodes. These inform further contact with the criminal justice system, re-imprisonment, post-release breakdown, reoffending and re-imprisonment." <sup>161</sup>

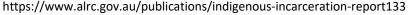
Considering the undisputed disadvantage experienced by Indigenous women in the Northern Territory, sentencing alternatives could offer a pathway out of the cycle of incarceration and recidivism. A justice system that adopts the RCIADIC key recommendation that incarceration is used only as an option of last resort should be aspired to. Constantly being sent back to prison affects Indigenous women and their families' connection to the land. The loss of connection to the land through repeated imprisonment directly damages Indigenous women's identity and culture. 162

The Northern Territory alternatives to incarceration mechanisms that currently exist for adult offenders are:

- Community-based orders<sup>163</sup>;
- Community work orders<sup>164</sup>;
- Good behaviour orders<sup>165</sup>; and
- Home detention. 166

Another form of discrimination against Indigenous people, particularly women, surfaces due to geographical location. Up to 80% of the Indigenous prisoner population in the Northern Territory originate from regional or remote communities. <sup>167</sup> Indigenous offenders are less likely to receive any of the alternatives listed above, as those options are often not offered

 $<sup>^{167}</sup>$  Australian Law Reform Commission (2017) Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples p235 Retrieved from





<sup>&</sup>lt;sup>161</sup> Victorian Equal Opportunity and Human Rights Commission quoted in Value of a justice reinvestment approach to criminal justice in Australia (2013) p17 Retrieved from

https://www.aph.gov.au/parliamentary\_business/committees/senate/legal\_and\_constitutional\_affairs/completed inquiries/2010-13/justicereinvestment/report/index

<sup>&</sup>lt;sup>162</sup> Viviani, M (2016) Indigenous women and their incarceration for minor crime p5 Retrieved from http://www.acw.org.au/Aboriginal-women-and-their%20ncarceration-for-petty-crime.pdf

<sup>&</sup>lt;sup>163</sup> Northern Territory Government (2019) Retrieved from https://nt.gov.au/law/prisons/community-based-order

<sup>&</sup>lt;sup>164</sup> Northern Territory Government (2019) Retrieved from https://nt.gov.au/law/prisons/community-work-order

<sup>&</sup>lt;sup>165</sup>Northern Territory Government (2019) Retrieved from https://nt.gov.au/law/prisons/good-behaviour-order-supervised

<sup>&</sup>lt;sup>166</sup> Northern Territory Government (2019) Retrieved from https://nt.gov.au/law/prisons/home-detention



in remote areas due to a lack of funding and services to support them. For Indigenous women, this means incarceration at a significant distance from their children, rather than an alternative that could keep them close to home.

For Indigenous women based in urban areas, mainstream services fail to provide relevant and culturally safe options, where service providers understand and respect cultural differences and are responsive to the cultural rights, practices, values, and expectations of Indigenous women. They also fall short of adequately addressing underlying issues of intergenerational trauma and addressing the need for services that understand the social, historical, and political context of an individual, including the impact of these factors on their health, safety, and wellbeing. Cultural competence is a critical precursor to accessible, safe, and effective services for Indigenous women.

If access to the sentencing alternative options (that are available in the urban Northern Territory) were made available in remote and regional areas, it would be a step toward reducing incarceration rates. However, what is also a necessity in curbing the alarming increase of Indigenous female incarceration rates is the introduction of additional options. These options need to be both culturally and gender appropriate. Once more, Indigenous women need to be the architects of such options.

The Substance Misuse Assessment and Referral for Treatment (SMART) Court, established in 2011, was dissolved after only 18 months. This court offered referral to services for substance abuse rehabilitation as an alternative to incarceration. This court was of therapeutic jurisprudence and heard criminal matters where the offender had a history of serious substance misuse and had subsequently committed an offence.

<sup>&</sup>lt;sup>174</sup> Aboriginal Peak Organisation NT (2014) Submission to the Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities p34 Retrieved from http://www.amsant.org.au/apont/wp-content/uploads/2015/02/140417-APO-NT-Submission-Intoharmfuluse-of-alcohol-in-ATSI-communities.pdf.



 $<sup>^{168}</sup>$  Walker, R, Schultz, C, Sonn, C (2014) Cultural competence – transforming policy, services, programs and practice Retrieved from

https://www.researchgate.net/profile/Roz\_Walker/publication/259715151\_Cultural\_Competence\_-\_Transforming\_Policy\_Services\_Programs\_and\_Practice/links/59759182a6fdcc83488e90ad/Cultural-Competence-Transforming-Policy-Services-Programs-and-Practice.pdf?origin=publication\_detail 

169 Jordan, K., et al (2018) Joint response to the Deloitte Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody p4 Retrieved from 

http://caepr.cass.anu.edu.au/sites/default/files/docs/2018/12/Topical\_issue\_4\_2018\_Jordan\_et\_al\_final\_\_KJ 

2 (002).pdf

<sup>&</sup>lt;sup>170</sup> Walker, R, Schultz, C, Sonn, C (2014) Cultural competence – transforming policy, services, programs and practice Retrieved from

https://www.researchgate.net/profile/Roz\_Walker/publication/259715151\_Cultural\_Competence\_-\_Transforming\_Policy\_Services\_Programs\_and\_Practice/links/59759182a6fdcc83488e90ad/Cultural-Competence-Transforming-Policy-Services-Programs-and-Practice.pdf?origin=publication\_detail 

171 ibid

<sup>&</sup>lt;sup>172</sup> Rawlinson, C (2013) 'SMART courts' elimination worries Chief Magistrate as mandatory rehab begins Retrieved from http://www.abc.net.au/local/stories/2013/07/01/3793167.htm

<sup>&</sup>lt;sup>173</sup> Therapeutic jurisprudence is an interdisciplinary method of legal scholarship that aims to reform the law in order to positively impact the psychological well-being of the accused person.



The purpose of the court was to reduce offending and antisocial behaviour, increase rehabilitation, reduce the number of people re-offending, provide a pathway into treatment, reduce harm, and improve health and social outcomes.<sup>175</sup>

The SMART court was disbanded following a change of government, with no evaluation of its effectiveness. 176

Re-establishing a similar model that has a mandate to provide sentencing alternatives would provide Indigenous women with a path to rehabilitation rather than prison. To be effective, the court would have to convene in regional centres and remote communities and make the alternatives accessible in those locations. The alternatives would also require the inclusion of specific programs tailored toward the Indigenous female cohort.

## **Diversion Programs**

"Access to and use of rehabilitative, preventative, and diversionary responses to criminal behaviour provide vital opportunities to break the offending cycle. To be most effective, these responses should be gender specific and culturally relevant." 177

Diversion programs are based on restorative justice principles which share some commonality with Indigenous customary law, in the belief that the whole community is affected by a crime and that relationships need to be repaired.

In the Northern Territory, a range of diversion programs are available to youth.<sup>178</sup> There are no such programs for adults since the abolition of the SMART court. Every other jurisdiction in Australia has some form of a diversion program for adults. Generally, they're intended for those with mental health or substance-abuse issues.<sup>179</sup>

Tasmania https://www.magistratescourt.tas.gov.au/about\_us/criminal\_division/drug\_treatment\_orders



<sup>&</sup>lt;sup>175</sup> Australian Institute of Criminology (2005) Specialty courts in Australia: Report to the Criminology Research Council p27 Retrieved from http://crg.aic.gov.au/reports/2005-07-payne/2005-07-payne.pdf.

<sup>&</sup>lt;sup>176</sup> Aboriginal Peak Organisation NT (2014) Submission to the Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities p34 Retrieved from

http://www.amsant.org.au/apont/wp-content/uploads/2015/02/140417-APO-NT-Submission-Into-harmfuluse-of-alcohol-in-ATSI-communities.pdf.

<sup>&</sup>lt;sup>177</sup> Australian Government (2010) National Indigenous Law and Justice Framework 2009–2015 p16 Retrieved from https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/resources/files/2009-national-indigenous-law-and-justice-framework.v1.pdf

<sup>&</sup>lt;sup>178</sup>Northern Territory Government (2019) Young people: diversion programs Retrieved from https://nt.gov.au/law/young-people/young-people-diversion-programs

<sup>&</sup>lt;sup>179</sup> Australian Capital Territory https://www.health.act.gov.au/services-and-programs/alcohol-and-drug-services/diversion-services

Queensland http://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Diversion-and-referral-options

New South Wales http://www.localcourt.justice.nsw.gov.au/Pages/about\_us/court\_programs.aspx Western Australia https://www.mhc.wa.gov.au/getting-help/diversion-support-programs/ South Australia

http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/default.aspx Victoria https://www.mcv.vic.gov.au/find-support/diversion



With the consistent rise of incarceration rates among Indigenous women in the Northern Territory, they are certainly a population that could benefit from access to well-designed and delivered diversion programs, rather than continuous incarceration.

Diversion from the criminal justice system can occur at various points of contact:

- Prior to first contact with the police (culturally appropriate prevention such as Family Wellbeing programs);<sup>180</sup>
- During contact with police (cautioning instead of arrest);
- During court processing (bail support programs, Indigenous Courts/ Circle Sentencing processes); and
- After sentencing (rehabilitation programs).

The Northern Territory is proving to be unsuccessful in utilizing diversion tactics at all points of contact. The adoption of diversion as a means of reducing incarceration rates should be accepted in conjunction with Indigenous women-specific practices.

The successful adaptation of mainstream models used in the alcohol and other drugs field could inform the development of Indigenous female-specific diversion programs. It has been found that adaptations of evidence-based mainstream interventions that integrate culturally-specific practices, including traditional values, spirituality, and activities, have been more effective than mainstream services. <sup>181</sup> Using the same methodology, the mainstream requirements of diversionary programs could be compiled, while also addressing the specific needs of the Indigenous person. For women, a further adaptation could be included that involves the family in the diversion program, allowing for no break in the mother-child relationship and adhering to the cultural norms of kinship.

### Post-Release Support

"Indigenous women face a wide range of issues upon their release from prison, two issues were continually highlighted ... Housing and healing were continually identified as the critical issues to be addressed if a woman exiting prison is to attend to other areas of her life." 182

Australian Human Rights Commission (2005) Social Justice Report 2004 Chapter 2. Retrieved from https://www.humanrights.gov.au/publications/social-justice-report-2004-chapter-2-walking-women-addressing-needs-indigenous-women#5



<sup>&</sup>lt;sup>180</sup> Brown, C et al (2018) The Aboriginal Australian Family Wellbeing Program: A Historical Analysis of the Conditions That Enabled Its Spread Retrieved from

https://www.frontiersin.org/articles/10.3389/fpubh.2018.00026/full

<sup>&</sup>lt;sup>181</sup> National Indigenous Drug and Alcohol Committee (2014) Alcohol and other drug treatment for Aboriginal and Torres Strait Islander peoples p9 Retrieved from

https://healthinfonet.ecu.edu.au/healthinfonet/getContent.php? linkid=592238&title=Alcohol+and+other+drug+treatment+for+Aboriginal+and+Torres+Strait+Islander+peoples



Numerous studies have established a link between homelessness and increased rates of incarceration and recidivism. There are no post-release support initiatives based in remote communities, where the majority of Indigenous women return home.

Healing and wellness are critical issues for Indigenous women exiting prison. Processes for healing have the potential to increase the health and well-being of Indigenous women, with a possible outcome being reductions in rates of recidivism. Social and emotional well-being programs are available through various Indigenous-controlled health services. However, Indigenous women released from prison would have to make a self-referral or rely on support services to help them access this type of support if it was available in their community.

In addition to assistance with housing and healing, the need for employment-related support is equally important after release from prison. Employment opportunities in remote Indigenous communities are limited; and with a criminal history, the likelihood of employment is reduced.

The Northern Territory has some high-quality support services that are provided by non-government entities such as:

- The Women of Worth program; based in Darwin and providing 6 months pre-release and 12 months post-release support to women;<sup>185</sup>
- Kunga Stopping Violence Program; based in Alice Springs works with women who
  have been incarcerated for a violent offence. The program runs a 4-week course in
  prison, where the women are visited in prison each week by case managers and are
  assisted with planning for their release. It is a voluntary program and seeks to help
  women break cycles of violence in their lives and to keep them out of prison. The
  program continues working with women for 12 months post-release;<sup>186</sup> and
- The Throughcare program; based in Darwin and travels to the Katherine and Wadeye regions. The program aims to reduce repeat offending by addressing the 'throughcare' needs of adult prisoners and youth detainees. Throughcare commences at imprisonment and continues until the person is living a safe, fulfilling, and trouble-free life back out in the community.<sup>187</sup>

Whilst these programs deliver valuable services; they are either a woman's program or an Indigenous program for men and women. Indigenous women tend not to access

 <sup>185</sup> YWCA Darwin (2019) Retrieved from http://www.ywcaofdarwin.com.au/pages/programs/women-of-worth
 186 North Australia Aboriginal Justice Agency (2019) Retrieved from http://www.naaja.org.au/our-programs/throughcare/
 187 ibid



<sup>&</sup>lt;sup>183</sup> Baldry E, McDonnell D, Maplestone P and Peeters M (2003) Australian Prisoners' Post-release Housing Retrieved from http://www.austlii.edu.au/journals/CICrimJust/2003/22.pdf

<sup>&</sup>lt;sup>184</sup> Australian Human Rights Commission (2006) Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Families p13. Retrieved from https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/ending-family-violence-0



mainstream post-release support or education. <sup>188</sup> Services that are tailored to their unique needs are lacking. The specific issues and needs of Indigenous women are rarely considered in the development of post-release programs. <sup>189</sup> What is required is a flexible continuum of support services and programs that are tailored to Indigenous women and reflect their current and complex circumstances. <sup>190</sup> However, the traditional approach to distributing available funding for programs and services is dictated by an economy of scale, and there are more males so there are more male-focussed services. This negatively impacts Indigenous women, as it delivers minimum resources to a cohort that has a high level of need. <sup>191</sup> Without these types of services, the cycle of recidivism is likely to continue.

# New Approaches to Legislative and Policy Development

"Current laws and policies continue to contribute to the swift escalation in the incarceration rates of Aboriginal and Torres Strait Islanders. Though not explicitly targeted at those populations, their disproportionate impact is clear." <sup>192</sup>

Even beyond the specific reforms and programs discussed in the previous section, there is a widespread problem in the way that Indigenous Affairs policy-making is conducted in Australia. The realities of policy as experienced by Indigenous people are often overlooked. In particular, current approaches undervalue the experiences of Indigenous women by neglecting to consider them as a unique cohort, warranting independent attention. In the Northern Territory, Indigenous people are the majority client group in the criminal justice system, and as such, policy making in this area should involve on-going Indigenous consultation and input at the very least.

At the Commonwealth level, the Aboriginal and Torres Strait Islander Act 2005<sup>194</sup> was the legislation that was considered to be the foundation of a new era concerning Indigenous affairs. The primary objective was to ensure maximum participation of Indigenous people in the formulation and implementation of government policies that affect their community members. However, only two years later the Northern Territory Emergency Response

<sup>&</sup>lt;sup>194</sup> Federal Register of Legislation (2016) retrieved from https://www.legislation.gov.au/Details/C2016C00689



<sup>&</sup>lt;sup>188</sup> Bartels, L (2010) p7 Diversion programs for Indigenous women Retrieved from https://aic.gov.au/publications/rip/rip13

 $<sup>^{189}</sup>$  Baldry E and McCausland R (2009) Mother Seeking Safe Home: Aboriginal Women Post-Release p 2 Retrieved from

https://www.researchgate.net/publication/265082906\_Mother\_Seeking\_Safe\_Home\_Aboriginal\_Women\_Post-Release

<sup>&</sup>lt;sup>190</sup> Baldry, E (2009) Home Safely: Aboriginal Women Post-Prison and their Children Indigenous Law Bulletin 14 Retrieved from http://www.austlii.edu.au/au/journals/ILB/2009/44.html

<sup>&</sup>lt;sup>191</sup> Australian Human Rights Commission (2006) Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Families p14 Retrieved from https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/ending-family-violence-0

<sup>&</sup>lt;sup>192</sup> United Nations (2017) Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia p12 Retrieved from

http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/CountryReports.aspx <sup>193</sup> Jordan, K., et al (2018) Joint response to the Deloitte Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody piii Retrieved from https://apo.org.au/node/212076



occurred, which evidently had no Indigenous participation or even consultation in its development and implementation.

The Uluru Statement from the Heart was released May 26<sup>th</sup> 2017, following 18 months of consultation and debate, culminating in a constitutional convention at Uluru. The consultation had around 250 delegates in attendance who subsequently agreed to the Uluru Statement from the Heart.<sup>195</sup>

The statement is grounded in Indigenous people's right to sovereignty, and the statement calls for constitutional reform to empower Indigenous people to take 'a rightful place in our own country.' This was to be achieved through:

- A national representative body with the power to advise parliament on laws that affect Indigenous people; and
- A 'Makarrata<sup>196</sup> Commission' to supervise a process of agreement-making between governments and First Nations and undertake a public truth-telling process.<sup>197</sup>

Following the convention, the Commonwealth government rejected the statement outright. The Prime Minister cited the following reasons:

- Such a body was not desirable that it undermines equality and the principle of oneperson one-vote;
- It was unclear how the voice to Parliament would work;
- It would inevitably become seen as a third chamber of parliament; and
- It would not have enough support to succeed at a referendum. 198

The rejection of the statement should not be the end of addressing the issue of a lack of Indigenous input relating to laws that affect them and the need for this to be modified. Not only the criminal justice arena, but all aspects of law require Indigenous voices to improve outcomes for Indigenous people.

The Northern Territory government has recently undertaken consultations to develop an Aboriginal Justice Agreement.<sup>199</sup> To date, the promised draft agreement has not been released.<sup>200</sup> This agreement offers an opportunity to undertake radical change in how legislation and policies impacting Indigenous people are developed.

<sup>&</sup>lt;sup>200</sup>Northern Territory Government (2017) Aboriginal Justice Agreement Fact Sheet Retrieved from https://justice.nt.gov.au/\_\_data/assets/pdf\_file/0005/550274/aboriginal-justice-agreement-fact-sheet.pdf



 <sup>195</sup> Referendum Council (2017) Retrieved from https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru Statement From The Heart 0.PDF

<sup>&</sup>lt;sup>196</sup> Makarrata is a Yolngu word meaning "a coming together after a struggle".

<sup>&</sup>lt;sup>197</sup> Hobbs, H (2017) Listening to the heart: what now for Indigenous recognition after the Uluru summit? Retrieved from https://theconversation.com/listening-to-the-heart-what-now-for-indigenous-recognition-after-the-uluru-summit-77853

 <sup>&</sup>lt;sup>198</sup> Department of Prime Minister and Cabinet (2017) Response to Referendum Council's report on
 Constitutional Recognition Retrieved from http://pmtranscripts.pmc.gov.au/release/transcript-41263
 <sup>199</sup> Northern Territory Government (2018) Retrieved from https://justice.nt.gov.au/attorney-general-and-justice/northern-territory-aboriginal-justice-agreement



An astute finding of the 2016 report, 'A Safer Northern Territory through Correctional Interventions,' was that a paradigm shift is required in the Northern Territory Department of Correctional Services to recognize that policies should be designed to service an indigenous majority rather than a non-Indigenous minority population.<sup>201</sup> This type of shift in thinking is precisely what is needed in all features of the criminal justice system, not just corrections. Such a change in reasoning would validate the need to design laws, policies, and programs that meet the needs of the Indigenous majority, not just the non-Indigenous minority. Laws, policies, and programs are necessary that meet the needs of all but also have the Indigenous majority at the forefront.

A further transformation is required to recognize Indigenous women as a unique cohort, with separate and distinct needs. Indigenous women are particularly vulnerable to intersectional discrimination within criminal justice processes because their experience of discrimination and violence is bound up in the colour of their skin as well as their gender. They are victims of a complex frame of dynamics in their lives, including violence, poverty, trauma, grief and loss, cultural and spiritual breakdown. There is a consistent pattern indicating that incarcerated Indigenous women have been victims of assault and sexual assault at some time in their lives. The current lack of attention to these distinct needs further marginalizes Indigenous women and contributes to the continuation of inequities.

Adhering to mainstream norms and ignoring unique circumstances in policy development and implementation can result in harmful ramifications for Indigenous people, especially Indigenous women. The combination of socio-economic conditions faced by many Indigenous women contributes to their vulnerability and renders their needs more complex than others. On Indigenous women are involved at all levels from drafting of legislation to the delivery of government-funded services, their subjection to disadvantage and discrimination will continue. A major shift towards the inclusion of Indigenous participation in appropriately targeted legislative and policy development and implementation must occur. This could begin to adequately address the upward trajectory of Indigenous female incarceration rates.

At a Commonwealth level, reconsidering the adoption of the Uluru Statement would be an adequate and rational starting point, as would honouring the intent of the Aboriginal and Torres Strait Islander Act 2005. In the Northern Territory, the Aboriginal Justice Agreement

<sup>&</sup>lt;sup>205</sup> Australian Human Rights Commission (2006) Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Families p91 Retrieved from https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/ending-family-violence-0



Hamburger, K et al (2016) A Safer Northern Territory through Correctional Interventions: Report of the review of the Northern Territory Department of Correctional Services p7 Retrieved from https://justice.nt.gov.au/attorney-general-and-justice/justice-publications/hamburger-report
 Australian Human Rights Commission (2006) Ending Family Violence and Abuse in Aboriginal and Torres Strait Islander Families p6 Retrieved from https://www.humanrights.gov.au/our-work/aboriginal-and-torresstrait-islander-social-justice/publications/ending-family-violence-0
 Ibid p87

<sup>&</sup>lt;sup>204</sup> Australian Human Rights Commission (2005) Social Justice Report 2004 Chapter 2. Retrieved from https://www.humanrights.gov.au/publications/social-justice-report-2004-chapter-2-walking-women-addressing-needs-indigenous-women#5



should ensure that Indigenous female voices are recognized, respected, and included in legislative and policy development and implementation.

A lack of Indigenous female input creates a void in knowledge. Policy makers lack the cultural competence to successfully develop policies that can bridge the divide between mainstream and Indigenous worlds.

## Conclusion

"If we are to disrupt the trends we must invest in rebuilding capacity of families and communities to deal with the social problems that contribute to the appalling indicators.

We need to prioritise and ensure frontline services that are not only resourced to respond to crisis but can develop preventative programs that engage the community in winding back the ravages of drug and alcohol abuse, the scourge of family violence and welfare dependency.

For the vast bulk of our people the legal system is not a trusted instrument of justice. It is a feared and despised processing plant that propels the most vulnerable and disabled of our people towards a broken and bleak future.

Surely as a nation we are better than this" 206

The quote above is from Senator Patrick Dodson, a Yawuru man and one of the RCIADIC Commissioners in a speech to the National Press Club in 2016. His speech was delivered just prior to taking office as a Senator, and he used the forum to lament the situation for Indigenous people since RCIADIC has worsened and called for a formal engagement between Indigenous Australia and the Parliament to create a new approach.<sup>207</sup>

For Indigenous women in the Northern Territory, 28 years after RCIADIC, their situation is worse. Incarceration rates continue to grow, and successive governments have failed to address the crisis. If anything, the Northern Territory government continues to blatantly disregard the key recommendations of RCIADIC relating to the principle of imprisonment as a last resort through paperless arrests, mandatory sentencing, the NT Bail Act, lack of sentencing options and the continued 'tough on crime' mentality.

The government also fails to recognize and respect the ways Indigenous women as caregivers and cultural custodians can offer more to the wellbeing of family and community if they remain in-community rather than being incarcerated. If more government expenditure was invested in justice reinvestment programs that encouraged alternative sentencing initiatives, the result could be both economically beneficial and socially

<sup>&</sup>lt;sup>207</sup> Gordon, M (2016) Patrick Dodson makes impassioned plea for 'a smarter form of justice' Retrieved from https://www.smh.com.au/politics/federal/patrick-dodson-makes-emotional-plea-for-action-on-aboriginal-incarceration-20160413-go52vi.html



<sup>&</sup>lt;sup>206</sup> Dodson, P (2016) Speech to National Press Club quoted in Viviani, M (2016) Indigenous women and their incarceration for minor crime Retrieved from http://www.acw.org.au/Aboriginal-women-and-their%20ncarceration-for-petty-crime.pdf



favourable. These types of investments could also potentially aid in breaking the intergenerational cycle of trauma and offending.

The data available is deficient, but it does tell us that we face an alarming situation that continues to get worse. To date, attempts to address the situation have only served to exacerbate the issue, and it is time to consider new approaches to policy and legislative development. For effective, targeted policies and laws that address the circumstances of distinct cohorts, that cohort must be a party to the design process. Indigenous women are owed a voice in the choices that affect their lives and the lives of their children and community.

'Building Communities Not Prisons' is the name of the policy direction for the Australian Capital Territory. Rather than investing in the expansion of prisons, the government is redirecting funds into justice reinvestment initiatives.<sup>208</sup> This type of major reform and paradigm shift in approach is essential to confronting the upward trend of Indigenous female incarceration.

While the reforms articulated in this paper are especially relevant to the overlooked needs of Indigenous women, most of them would also have the desirable effect of helping Indigenous men as well, who are affected by many of the same dynamics leading to over-incarceration. It is time the Northern Territory and Commonwealth governments find the courage to place people before politics and heed the words contained in the 2008 Apology to Australia's Indigenous Peoples:

"A future where we embrace the possibility of new solutions to enduring problems where old approaches have failed." <sup>209</sup>

<sup>&</sup>lt;sup>209</sup> Parliament of Australia (2008) Apology to Australia's Indigenous peoples Retrieved from http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F20 08-02-13%2F0003%22



<sup>&</sup>lt;sup>208</sup> Bartels. L (2019) Australian governments should follow the ACT's lead in building communities, not prisons. Retrieved from https://theconversation.com/australian-governments-should-follow-the-acts-lead-in-building-communities-not-prisons-111990