

NATIONAL FAMILY VIOLENCE PREVENTION
LEGAL SERVICES

WORKING TO ACHIEVE IMPROVED JUSTICE OUTCOMES FOR ABORIGINAL AND TORRES STRAIT ISLANDER
VICTIMS/SURVIVORS OF FAMILY VIOLENCE AND SEXUAL ASSAULT

***Australian Law Reform Commission Inquiry into the
Incarceration of Indigenous Australians
Comments on the Draft Terms of Reference***

13 January 2017

Section One: Overview

The National Family Violence Prevention Legal Services Forum (National FVPLS Forum) welcomes the opportunity to contribute to the development of the terms of reference (ToR) for the Australian Law Reform Commission (ALRC) Inquiry into the incarceration of Indigenous Australians.

The National FVPLS Forum generally welcomes the draft ToR. However, we strongly recommend greater prioritization of and more explicit reference to Aboriginal and Torres Strait Islander (hereafter 'Aboriginal') women within the ToR for this inquiry, due to the urgent need to address the disproportionate and rapidly increasing rate of Aboriginal women's incarceration.

Despite comprising only 2% of the national population, Aboriginal women are now the fastest growing group of prisoners in Australia, representing more than one third of the total prison population.¹

It is clear that the intersectional and intergenerational experiences of Aboriginal women are underlying factors behind the causes of Aboriginal women's incarceration.² These causes are very often different to the causes of imprisonment of Aboriginal men. It is therefore critical that the ToR allow for thorough examination of the complex barriers and unique needs of Aboriginal women across metropolitan, regional, rural and remote settings. This includes the relationship between family violence and criminalisation for Aboriginal women, the impact of marginalisation and systemic discrimination against Aboriginal peoples, and cycles of poverty, child protection and violence as causal and contextual factors increasing Aboriginal women's vulnerability to criminalisation and incarceration.

Accordingly, the National FVPLS Forum makes the following six recommendations for inclusion in the ToR as specific and stand-alone components for investigation and review:

1. Prioritisation of Aboriginal women as the fastest growing prison population;
2. The relationship between family violence against Aboriginal women and incarceration;
3. Impact of marginalisation and barriers to accessing justice;
4. Cycle of poverty, child protection, violence and incarceration;
5. Systemic discrimination and bias; and
6. Funding for Aboriginal Community Controlled Organisations.

Additionally, the National FVPLS Forum has a preference for the language of "Aboriginal and Torres Strait Islander" women/people/communities rather than "Indigenous".

¹ F VPLS Victoria Submission to the *Victorian Royal Commission into Family Violence*, pg. 18-19. Available: <http://www.fvpls.org/images/files/FVPLS%20Victoria%20submission%20to%20Royal%20Commission%20-%20FINAL%20-%202015Jul15.pdf>

² Royal Commission into Family Violence, Volume V, Report and Recommendations, Chapter 34 Women in Prison, pg. 240, March 2015. Available: <http://www.rcfv.com.au/MediaLibraries/RCFamilyViolence/Reports/Final/RCFV-Vol-V.pdf>

Section Two: Recommendations for inclusion in the Terms of Reference

1) *Prioritisation of Aboriginal women as the fastest growing prison population*

The disproportionate and rapidly escalating rates of Aboriginal women's incarceration (as outlined above) should be reviewed as a priority, independently of Aboriginal men's experiences of criminalisation. Alongside the prioritisation of Aboriginal women, there are additional factors to embed into the Inquiry, including the:

- review of data and data capturing systems. There is a significant lack of data around Aboriginal women's experiences within the justice system, underlying causes and inter-related factors;
- impact of intellectual or physical disability on Aboriginal women, including the lack of diagnosis and how this impacts upon Aboriginal women's experience with the justice system; and
- diversity of experiences across metro, regional, rural and remote areas. The experiences of our clients across the National FVPLS Forum indicate that each cohort experiences unique and significant barriers to accessing their legal rights regardless of their location. The commonality of their experience remains that they are women who identify as being Aboriginal.

Recommendation:

1. A new point should be inserted into the ToR as follows:

Disproportionate and escalating rates of Aboriginal women's incarceration including:

- the prevalence, nature and experiences of criminalisation of women in metropolitan, regional, rural and remote locations;
- the underlying causes and inter-related factors;
- the impact of intellectual and/or physical disability; and
- Review of existing data and data capturing systems with a focus on Aboriginal women.

2) *The relationship between family violence against Aboriginal women and incarceration*

There is a strong link between experiences of family violence and the over-incarceration of Aboriginal women. Research demonstrates that an overwhelming majority of women in prison have experienced family violence.³ While experiencing family violence is not a direct cause of Aboriginal women's incarceration, it is a precursor to a range of conditions that can lead to imprisonment. The consequences of family violence, which disproportionately affect Aboriginal women and their children, are far reaching, resulting in disability, health problems, drug and alcohol misuse, homelessness, unemployment and increased vulnerability to factors leading to incarceration.⁴ Indeed,

³ See Australian Institute of Family Studies, *Addressing women's victimisation histories in custodial settings* (2015) Canberra, Australian Government, available at <http://www.aifs.gov.au/acssa/pubs/issue/i13/i13b.html>; K. P. Moloney, B. J van den Bergh & L.F. Moller 'Women in Prison: The central issue of gender characteristics and trauma history' (2014) 123 *Public Health*, 426-430; Holly Johnson, *Drugs and Crime: A Study of Incarcerated Female Offenders*, Research and Public Policy Series (2014) No. 63, Canberra, Australian Institute of Criminology; WIPAN (2014) *Women in Prison - Primary Document for a Public Forum surrounding Women in Prison* being hosted by WIPAN, Community Justice Coalition (CJC) and the International Commission of Jurists (ICJ) at NSW Parliament House on 13 August 2014, 16. Kilroy, D. *The over-representation of Aboriginal and Torres Strait Islander women in prison*, *Sister's Inside*, April 2013, 3.

⁴ FVPLS Submission to the Victorian Government's *Victorian Gender Equality Strategy*, pg.6. Available: <http://www.fvpls.org/images/files/Submission%20A%20Victorian%20Gender%20Equality%20Strategy%20FVPLS%20Victoria%20FINAL.pdf>

one NSW study found that over 80% of female Aboriginal prisoners reported that their incarceration was an indirect result of their victimisation.⁵

The impact of family violence on women's incarceration therefore needs to be a key focus and priority area for review within the ToR for this Inquiry.

Importantly, it must be acknowledged that Aboriginal women experience family violence by men from all cultural backgrounds. The Inquiry therefore needs to ensure that when analysing the links between violence and incarceration, this is not framed as an 'Aboriginal issue'.

Recommendation:

1. Family violence should be a key priority and considered as a stand-alone causal issue within this inquiry.
2. A new sub-bullet point should be inserted into point 9 of the ToR ("broader contextual factors") as follows:
 - Experiences of family violence and its relationship to criminalisation and incarceration for both victims/survivors and perpetrators.

3) Impact of marginalisation and barriers to accessing justice

Aboriginal victims/survivors of family violence, predominantly women, face multiple and complex barriers to accessing justice which contributes to spiraling rates of incarceration. This needs to be reviewed as a distinct component and driver of Aboriginal women's incarceration and over-representation. Mainstream services and the legal system often lack appropriate interpreters or provide inadequate support for low levels of literacy. Without clear lines of communication to ensure Aboriginal clients understand their legal rights, the legal issue before them and its possible consequences, minor offences can escalate. In States where language barriers do not feature, Aboriginal clients still face extensive barriers to accessing the justice system including, for example, cultural inaccessibility of court systems and services, poor police responses, fear of child removal, failure by police and court services to appropriately identify a client's Aboriginality and refer them to culturally appropriate services such as ACCOs. The unique barriers faced by Aboriginal women to accessing justice must also be part of this inquiry.

Recommendation:

A new sub-bullet point be inserted into point 4 of the ToR ("legal institutions and legal frameworks") as follows:

- Impact of marginalisation and barriers to accessing justice, including systems based issues such as access to culturally safe legal representation, lack of interpreters, police responses, identification of Aboriginality and associated referral practices by police and court services.

⁵ NSW Aboriginal Justice Advisory Council, *Holistic Community Justice: A proposed response to Aboriginal family violence*, 2001, page 7 available at <http://pandora.nla.gov.au/pan/25329/20020709-0000/www.lawlink.nsw.gov.au/ajac.nsf/pages/family+violence+discussion+paper.pdf>

4) Cycle of poverty, child protection, violence and incarceration

Aboriginal people often face significant and multiple layers of disadvantage. Mapping the trajectory and the intergenerational nature of Aboriginal women’s incarceration should be included in the ToR. This cycle takes the following form (and is not always linear):

Disadvantage – Family Violence – Child Protection – Youth Justice - Incarceration

Nationally, Aboriginal and Torres Strait Islander children are 9.5 times more likely to be in out-of-home care than non-Aboriginal children.⁶ In Victoria, family violence is a cause in up to 90% of cases involving Aboriginal children and out-of-home care.⁷ Aboriginal children who experience out-of-home care are more likely to engage with the youth justice system.⁸

This cycle needs to be clearly mapped out both within a law reform context and associated practice and policy change context across legal and Government sectors. A holistic and intersectional approach needs to be taken as part of the Inquiry linking in the service sector to better address underlying cycles of incarceration.

Recommendation:

A new sub-bullet point should be inserted into point 7 of the ToR (“the effect of laws and legal frameworks”) regarding:

- Mapping the trajectory and the intergenerational nature of Aboriginal women’s incarceration.

5) Systemic discrimination and bias

A long history of systemic discrimination via the White Australia policy, the Stolen Generation and other racially discriminatory policies has resulted in entrenched bias and discrimination against Aboriginal people. A majority of Aboriginal women have had poor interactions with institutions such as police and the courts, and this deeply affects trust and confidence that the system works.⁹

The level of systemic discrimination across the justice system has a significant impact upon Aboriginal women including over-representation due to the disproportionate impacts of increasingly punitive law and order policies, Aboriginal women’s trust in the justice system, and the lack of access to diversionary measures and/or de-escalation of issues including fines.

⁶Family Matters Campaign Report “Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal” Available: http://www.familymatters.org.au/wp-content/uploads/2016/12/Family_Matters_Report_2016.pdf

⁷ Commission for Children and Young People, 2016, ‘Always was always will be Koori children - systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria, p 47, available at <http://www.cyp.vic.gov.au/downloads/always-was-always-will-bekoori-children-inquiry-report-oct16.pdf>

⁸ Commission for Children and Young People, 2016, ‘Always was always will be Koori children - systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria, p 144, available at <http://www.cyp.vic.gov.au/downloads/always-was-always-will-bekoori-children-inquiry-report-oct16.pdf>

⁹ Submission to Senate Inquiry into Access to Legal Services; Aboriginal and Torres Strait Islander experiences of law enforcement and justice systems, pg. 6. May 2015 Available: <http://www.fvpls.org/images/files/FVPLS%20Victoria%20Submission%20to%20Legal%20Assistance%20Senate%20Inquiry%20-%20final.pdf>

Recommendation:

A new sub-bullet point should be inserted into point 4 of the ToR (“legal institutions and law enforcement”) regarding:

- the relationship between systemic bias and discrimination and Aboriginal incarceration rates.

6) Funding for Aboriginal Community Controlled Organisations

The Inquiry should examine the impacts of gaps and funding shortages in the community/legal sectors, most especially Aboriginal Community Controlled legal services, which have undermined Aboriginal self-determination and access to culturally safe legal assistance.¹⁰ Access to culturally safe legal assistance and supports forms a critical component in preventing the over-incarceration of Aboriginal people and over-representation of Aboriginal people within the justice system more broadly. Funding allocations at both a National and State level have historically been ad hoc and inadequate, with short term funding agreements exacerbating uncertainty across the sector and impacting vulnerable people who have no alternative due to financial hardship. As an example, FVPLSs have faced funding uncertainty and a lack of ongoing sustainable funding since our inception.

Recommendation:

A new sub-bullet point should be inserted into Point 7 of the ToR (“the effects of laws and legal frameworks”) as follows:

- The impacts of funding decisions and practices for legal services and ACCOs.

¹⁰ Evaluation Report of the Aboriginal Family Violence Prevention and Legal Service Victoria’s Early Intervention and Prevention Program compiled by Barabara Karashan with funding from the Lord Mayor’s Charitable Foundation, 2014. Hard copy report available at FVPLS Victoria’s head office.

Appendix 1: About the National FVPLS Forum and our member organisations

The National FVPLS Forum is made up of 14 member organisations. The National Convenor, Antoinette Braybrook, is also the CEO of member organisation FVPLS Victoria.

About National FVPLS Forum

The National FVPLS Forum is comprised of 14 Family Violence Prevention Legal Services (FVPLSs) member organisations across the country that provide culturally safe legal assistance and support to Aboriginal and Torres Strait Islander victim/survivors of family violence – predominantly women and children. They also deliver essential community legal education and early intervention and prevention activities. The Forum was established in May 2012 and aims to work in collaboration across its member FVPLS services to increase access to justice for Aboriginal and Torres Strait Islander victims/survivors of family violence.

Member organisations:

1. Aboriginal Family Violence Prevention and Legal Service Victoria (Melbourne HO, Mildura, Gippsland, Barwon South West)
2. Aboriginal Family Legal Service Southern Queensland (Roma)
3. Binaal Billa Family Violence Prevention Legal Service (Forbes)
4. Central Australian Aboriginal Family Legal Unit Aboriginal Corporation (Alice Springs HO, Tennant Creek)
5. Family Violence Legal Service Aboriginal Corporation (Port Augusta HO, Ceduna, Pt Lincoln)
6. Many Rivers Family Violence Prevention Legal Service (Kempsey)
7. Marninwarnitkura Family Violence Prevention Unit WA (Fitzroy Crossing)
8. Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service (Alice Springs, NPY Tri-state Region)
9. North Australian Aboriginal Family Legal Service (Darwin, Katherine, Top End)
10. Queensland Indigenous Family Violence Legal Service (Cairns HO, Townsville, Rockhampton, Mount Isa, Brisbane)
11. Southern Aboriginal Corporation Family Violence Prevention Legal Service (Albany)
12. Thiyama-li Family Violence Service Inc. NSW (Moree HO, Bourke, Walgett)
13. Warra-Warra Family Violence Prevention Legal Service (Broken Hill)
14. Aboriginal Family Law Services Western Australia (Perth HO, Broome, Carnarvon, Kununurra, Geraldton, Kalgoorlie, Port Hedland)

Appendix 2: Further information from FVPLS submissions

In addition to the comments and recommendations contained in this submission, we refer the ALRC to the following National FVPLS Submissions:

- Submission to the Senate Inquiry into access to legal assistance services (June 2015);¹¹ and
- Submission to the Senate Inquiry into domestic violence and gender inequality (March 2016).¹²

We also refer the ALRC to FVPLS Victoria's Policy Paper Series June 2010 which includes:

- Paper 1: Strengthening law and justice outcomes for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault and women and children: National policy issues – A Victorian Perspective;
- Paper 2: Strengthening on-the-ground service provision for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault in Victoria; and
- Paper 3: Improving accessibility of the legal system for Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault.¹³

¹¹ Available at:

http://www.nationalfvpls.org/images/files/NFVPLS_Submission_to_Inquiry_into_Access_to_Legal_Assistance_Services_FINAL.pdf

¹² Available at:

http://www.nationalfvpls.org/images/files/National_FVPLS_Forum_submission_to_the_gender_inequality_and_family_violence_inquiry.pdf

¹³ All available at: <http://www.fvpls.org/Policy-and-Law-Reform.php>