INDIGENOUS WOMEN IN AUSTRALIAN CRIMINAL JUSTICE: OVER-REPRESENTED BUT RARELY ACKNOWLEDGED

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I Introduction

It is now two decades since the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') delivered its final report, which documented the substantial over-representation of Indigenous people in prisons and police custody, and provided detailed analysis of the underlying factors that contributed to that over-representation and to deaths in custody. That work was, of course, of enormous significance, and was intended to lay the groundwork for wholesale change, both within the criminal justice system and beyond it, to redress those factors. As we know, those aims have not been met, and in fact, as documented by numerous studies and reports, the situation of Indigenous over-representation in the criminal justice system and especially in prisons has been heightened. For instance, in its *Overcoming Indigenous Disadvantage* report the Productivity Commission noted that in relation to 'social indicators such as criminal justice, outcomes [for Indigenous people] have actually deteriorated.'[1]

It is well known too, that concerns have been raised about the limitations of RCIADIC in its consideration of Indigenous women.[2] As Marchetti stated, 'the official RCIADIC reports lacked a gender-specific analysis of the problems that had the most harmful impact on Indigenous women: family violence and police treatment of Indigenous women.'[3] The failure to attend sufficiently to the ways in which racialised and gendered social relations intersect with criminal justice means that the specific positioning and experiences of Indigenous women is overlooked or assumed within a universalising approach to Indigenous experience based largely, in fact, on the experiences of men.[4]

As examined in Part II of this paper, the failure to attend to the criminalisation and incarceration of Indigenous women[5] continues today in policy, criminal justice practices, service delivery and research. I also document activist efforts to redress this neglect by challenging authorities on the basis of systemic discrimination experienced by women in prison and Indigenous women in particular.

In Part III, I provide some data on the current position of Indigenous women in the criminal justice system. This is not a straightforward task as standard sources rarely report data for Indigenous women. The paucity of data concerning Indigenous women continues notwithstanding the many reports that have criticised this failure, and specific recommendations that have been made to redress the problem.[6] However, while this picture is partial, it is clear that the level of over-representation has become worse since RCIADIC, that patterns are uneven across jurisdictions, and that the needs and interests of Indigenous women are too rarely recognised.

In Part IV, I turn to two examples of initiatives that have been taken in New South Wales ('NSW') intended to reduce offending rates and to make the criminal justice system more responsive to Indigenous people. The first is the Magistrates Early Referral into Treatment Program ('MERIT'), which is a diversion program tied to bail for defendants with substance abuse problems. A similar program exists in Queensland. It draws in part on therapeutic jurisprudence, and its objectives include providing access to treatment at an early stage as a condition of bail in order to prevent reoffending and to improve health and other outcomes. The second is the adoption of sentencing principles that are to be considered in relevant circumstances involving Indigenous offenders; the so-called *Fernando* principles.[7] In considering these, I review the available evidence to consider the implications of these

developments for Indigenous women and the limitations inherent in their use.

I have chosen these examples because they operate at two different stages of the criminal justice process: pre-trial diversion and sentencing. MERIT is not an Indigenous-specific program, but given its focus on local courts and its wide availability across NSW, it has been seen as having great promise in responding to Indigenous offenders.[8] Reforms to sentencing are commonly considered to have a key contribution to make in reducing over-representation. The *Fernando* principles are specific to Indigenous offenders, but contrast significantly from the approach to sentencing Indigenous people adopted in Canada. I draw on Canadian experience to examine the extent to which Indigenous women have benefited from such sentencing developments.

II Failing to Attend to the Needs of Indigenous Women: A Recurring Theme

While belated attention has begun to be paid to research and programs directed towards the victimisation of Indigenous women – some of which recognise the overlap between victimisation and offending – there has been little attention given to the criminalisation of Indigenous women and their needs and interests within criminal justice. For instance, a recent review of diversion programs for Indigenous women notes a dearth of specific programs for Indigenous women and little data on women's participation in Indigenous programs, or in generic ones. Of the few specific programs that had been developed, some were short-term and lacked ongoing funding, and few had been evaluated.[9] An examination of effective treatment programs for Indigenous people charged with violent offences concludes that there is insufficient published research to allow conclusions to be drawn about programs for Indigenous women.[10] A positive review of the Boronia Pre-release Centre for Women in Western Australia ('WA'), designed to be 'women-centred', notes that 'areas for improvement include the needs of Aboriginal women', and expresses 'regrets that good women-centred practices have not spread into the rest of the custodial system, particularly for Aboriginal women, whose conditions and services are of a particularly low standard'.[11] The development of post release programs has also failed to recognise the needs of Indigenous women.[12]

The observations by successive Social Justice Commissioners Dr William Jonas and Tom Calma, in their reports of 2002 and 2004, remain apposite: there is an 'apparent invisibility of Indigenous women to policy makers and program designers in a criminal justice context, with very little attention devoted to their specific needs and circumstances'.[13]

A Intersectional and Systemic Discrimination

Indigenous women are vulnerable to intersectional discrimination; that is, a compounding of discrimination in specific ways brought about by race and gender (and other social categories), within the criminal justice system. Social Justice Commissioners Jonas and Calma have noted that Indigenous women are not served by programs designed for Indigenous men, or for women generally.[14]

Concerns about the treatment of Indigenous women within the criminal justice system and the failure to recognise their needs and circumstances have not been confined to Australia. In Canada, in 2001, a complaint was lodged to the Canadian Human Rights Commission ('CHRC') by the Canadian Association of Elizabeth Fry Societies (CAEFS) and the Native Women's Association of Canada, in coalition with other activists, on the basis of discrimination against women prisoners. The grounds for the complaint included. inter alia, the inadequacy of community based release options, including those for Aboriginal women, the inappropriate classification system used, and inadequate and inappropriate placements of women with cognitive and mental disabilities.[15] The CHRC undertook a systemic review with reference to federally sentenced women[16] and found that 'the Canadian government is breaching the human rights of women prisoners by discrimination on the basis of sex, race and disability'.[17] Nineteen recommendations were made, which were directed towards bringing Correctional Services Canada into compliance with the *Canadian Human Rights Act*.[18]

Australian activist group Sisters Inside followed the Canadian lead and lodged a formal complaint with the Anti-Discrimination Commission Queensland ('ADCQ'), seeking a review on the basis 'that "women prisoners experience direct and indirect discrimination on the grounds of sex, race, religion and impairment"'.[19] The ADCQ reported in 2006 with 68 recommendations and noted both 'a strong possibility of systemic discrimination occurring in the classification of female prisoners, particularly, those who are Indigenous'[20] and that the 'absence of a community custody facility in North Queensland … is a *prima facie* instance of

direct discrimination'.[21] Among other concerns, the report questioned the validity of a risk assessment tool in use, and found that Indigenous women were among those likely to be assessed as high-risk using such measures.[22] Indigenous women were commonly in prison for shorter sentences, but they were over-represented in secure custody, and were less likely to receive release-to-work, home detention or parole, and had higher recidivism rates.[23]

A similar complaint lodged in the Northern Territory ('NT') resulted in a report by the NT Ombudsman, who also raised concerns about systemic discrimination and made 67 recommendations. Notwithstanding the requirement in the *Standard Guidelines for Corrections in Australia* that '[t]he management and placement of female prisoners should reflect their generally lower security needs but their higher needs for health and welfare services and for contact with their children',[24] the Ombudsman found

> a lack of resources, poor planning, outdated and inappropriate procedures and a failure to consider women as a distinct group with specific needs. This had resulted in a profound lack of services, discriminatory practices, inadequate safeguards against abuse and very little in the way of opportunities to assist women to escape cycles of crime, poverty, substance abuse and family violence.[25]

Both reports emphasise the need to attend to *substantive* equality, rather than formal equality:

> Preventing discrimination requires addressing differences rather than treating all people the same. Indigenous women need equal opportunities to benefit from safe and secure custody, rehabilitation and reintegration back to their community. This requires the provision of correctional services that address their unique needs. A proactive approach is required by correctional services to look at new models and programs. Equality of outcomes for Indigenous women will not occur if they are simply expected to fit into and try to benefit from existing correctional services and programs that mostly have been developed for non-Indigenous male prisoners.[26]

Anti-discrimination actions have been lodged in other Australian jurisdictions,[27] but Kilroy and Pate report that there have been few outcomes for criminalised women.[28]
Recent reports to United Nations ('UN') bodies have also taken up concerns about women in the Australian criminal justice system, especially Indigenous women. The non-governmental organisation submission to the UN Committee on the Elimination of Racial Discrimination noted the substantial growth in the Indigenous women's prison population and expressed concerns about the inadequacy of health and other services for women in prison.[29] It also highlighted unsafe prisoner transport practices, and the damaging effects of mandatory sentencing in the NT and WA. The Australian Human Rights Commission ('AHRC') submission to the Universal Periodic Review at the UN Human Rights Council also noted the growth in the number of Indigenous people in custody,[30] and the distinct human rights issues affecting women in prison, who are subject to strip-searching.[31] The report's recommendations include that Australia 'expedite ratification of the Optional Protocol to [the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[32]] and the establishment of a National Preventive Mechanism for places of detention'.[33]

In 2010, the UN Special Rapporteur on the Rights of Indigenous Peoples advised that the government fully implement the recommendations of RCIADIC,[34] and, importantly, also made a separate recommendation that '[t]he Government should take immediate and concrete steps to address the fact that there are a disproportionate number of Aboriginal and Torres Strait Islanders, especially juveniles and *women* in custody'.[35] The separate recognition of Indigenous women is important, because while RCIADIC continues to provide a significant, unrealised, foundation for reform, it does not provide an adequate basis for addressing the criminalisation of Indigenous women.

III The Criminalisation and Incarceration of Indigenous Women

Data on the involvement of Indigenous women in the criminal justice system is limited, since criminal justice sources typically report with respect to women *or* Indigenous people, but not Indigenous women per se. Data is particularly poor concerning police and prosecutorial practices, which underpin criminalisation.

A Policing and Indigenous Women

(i) Arrest

The most recent National Aboriginal and Torres Strait Islander Social Survey data (2008) indicate that more than

one-third of Indigenous women (35.2 per cent) and men (40.7 per cent) reported having been arrested in the past five years. While percentages fell in 2008 in almost every jurisdiction compared to earlier surveys in 1994 and 2004, they continue to be substantial.[36] The figures were similar for NSW (30.6 per cent of women, 37 per cent of men) and Queensland (30.1 per cent women, 40 per cent men) but higher in WA (45.6 per cent of women, 44.1 per cent of men).

There is scant data on incidents recorded by police that involve offending by Indigenous women, but the evidence indicates that patterns differ markedly for Indigenous women as compared to non-Indigenous women. Bartels presents data from three jurisdictions comparing offence rates per 100,000 for Indigenous and non-Indigenous women; rates for Indigenous women in NSW, South Australia ('SA') and the NT were 9.3, 16.3 and 11.2 times higher respectively. In each state the disparity been Indigenous and non-Indigenous rates was greater for women than for men.[37]

In WA, police arrests of Indigenous women over the period 1996 to 2006 *increased*, while the arrests of non-Indigenous women *declined*.[38] Among women arrested, 'the Indigenous proportion increased from 29.4 per cent in 1996 to 44.5 per cent in 2006'; the proportion of Indigenous men among those arrested increased to a lesser extent over that period from 18 per cent in 1996 to 26 per cent in 2006. The Indigenous proportions for all female arrestees were 'consistently and significantly higher than for all male arrestees'.[39] Increases in Indigenous arrests were attributed to 'increases in offences against the person and justice and good order offences, especially since 1999'.[40] Indigenous women were most likely to be arrested for disorderly conduct (19 per cent), breach of a justice order (14 per cent) or assault (19 per cent).

Court data available from two jurisdictions confirms that Indigenous women are commonly charged with offences of disorderly conduct, assault and, in WA, breach of a justice order. Bartels cites court data for NSW (from 2001) and WA (from 2008), and in both jurisdictions, Indigenous women were particularly over-represented for the categories 'acts intended to cause injury' and 'public order', and in WA were also over-represented for 'offences against justice procedures'.[41] Recent NSW research intended to identify ways of reducing Indigenous contact with the court does not report separately for women. However, findings indicated that road traffic and motor vehicle regulatory offences accounted for a quarter of all Indigenous appearances in the NSW Local Courts, and that 11 per cent were for breaches of justice orders such as bail, apprehended violence orders, or parole. The study noted the need for further examination of the rates of breach of orders, and for assistance to be provided to aid compliance with orders.[42]

Changing police practices can have a substantial impact on the custodial system; one of the first studies to quantify this effect was recently undertaken in NSW. Researchers found that a 10 per cent increase in police arrests results in an estimated 4.57 per cent increase in the full-time prison numbers for women one month later, with ongoing effects at a cost of $2.2 million.[43] And of course, this does not begin to account for the human costs to the individuals involved, or to their families and communities.

(ii) Police Custody

Data reported by RCIADIC demonstrated that Aboriginal women were 'massively disproportionately detained by police compared to non-Aboriginal women'.[44] However, there is little recent data to consider current levels of police custody. The last police custody survey was in 2002; it indicated that levels of Indigenous over-representation in police custody had declined somewhat, but remained high. The authors noted that 'strategies to reduce Indigenous incidents of police custody are meeting with varying degrees of success in each jurisdiction'.[45] It is thus significant to note that in NSW, a reduction in over-representation rates resulted from the increased use of custody for non-Indigenous people and was *not* the result of fewer Indigenous people in custody, since Indigenous custody levels had remained stable.[46]

Nationally, Indigenous women accounted for 23 per cent of Indigenous people in police custody in 2002, but the report provided no further detail.[47] For Indigenous people, public drunkenness accounted for one-in-five custody incidents, either on the basis of an arrest, or in jurisdictions where public drunkenness has been decriminalised on the basis of 'protective custody'.[48] The most common offence categories for Indigenous people in custody were assault, and public order (which includes public drunkenness and other offences). A report by the Social Justice Commissioner in 2002 had raised particular concern that Indigenous women comprised nearly 80 per cent of all cases where women were detained in police custody for public drunkenness, but it is not possible to determine whether this pattern has continued.

B Patterns in Women's Incarceration

The limited data available differs in the way in which trends in Indigenous women's imprisonment are measured and described, for instance, by reference to the number, percentages and population rates over differing time frames. However, whatever measure is used, it is clear that the level of over-representation of Indigenous women in prison is markedly greater now than in 1991 at the time of the RCIADIC final report.

In 1991, there were 104 Indigenous women incarcerated in Australia,[49] but by 2010 the average daily number had risen to 643.[50] The Productivity Commission notes that the Indigenous women's imprisonment rate has increased at a greater rate than other groups; from 2000–2010 there was a 58.6 per cent increase in Indigenous women's imprisonment as compared to 35.2 per cent for Indigenous men,[51] 3.6 per cent for non-Indigenous men and 22.4 per cent for non-Indigenous women.[52] The growth since 2000 builds on a substantial increase in Indigenous women's imprisonment throughout the 1990s.[53] Based on national figures, at June 2010 Indigenous women were 21.5 times more likely to be imprisoned than non-Indigenous women, while Indigenous men were 17.7 times more likely to be imprisoned than non-Indigenous men.[54]

Table 1 demonstrates that growth in the number of Indigenous women imprisoned has continued over the past five years in most jurisdictions, with marked variations across jurisdictions. The three states with the highest number of Indigenous women in custody are NSW, Queensland and WA. Together they account for approximately 83 per cent of Indigenous women in custody in Australia. The proportion of women in prison constituted by Indigenous women ranges from a low of 6.3 per cent in Victoria to a high of 82 per cent in the NT; for NSW it is 28.8 per cent, Queensland 27.1 per cent, and WA 51.5 per cent.[55]

The very marked differences in rates of imprisonment between Indigenous and non-Indigenous women in each jurisdiction are evident from Figure 1 (as at 2010) (see over), with WA demonstrating the greatest disparity.

As evident from Table 2 (see over), there has been some fluctuation in rates over the past five years, but the overall national pattern is one of increase. NSW and WA are notable for having imprisonment rates for Indigenous women that are consistently above the national rate, and while the most recent NSW data departs from the trend in showing a decline from 2009 to 2010, the NSW rate remains substantially above the national level. Tables 1 and 2 also demonstrate substantial increases in the numbers and rates of Indigenous women incarcerated in recent times in Queensland, SA and the NT.

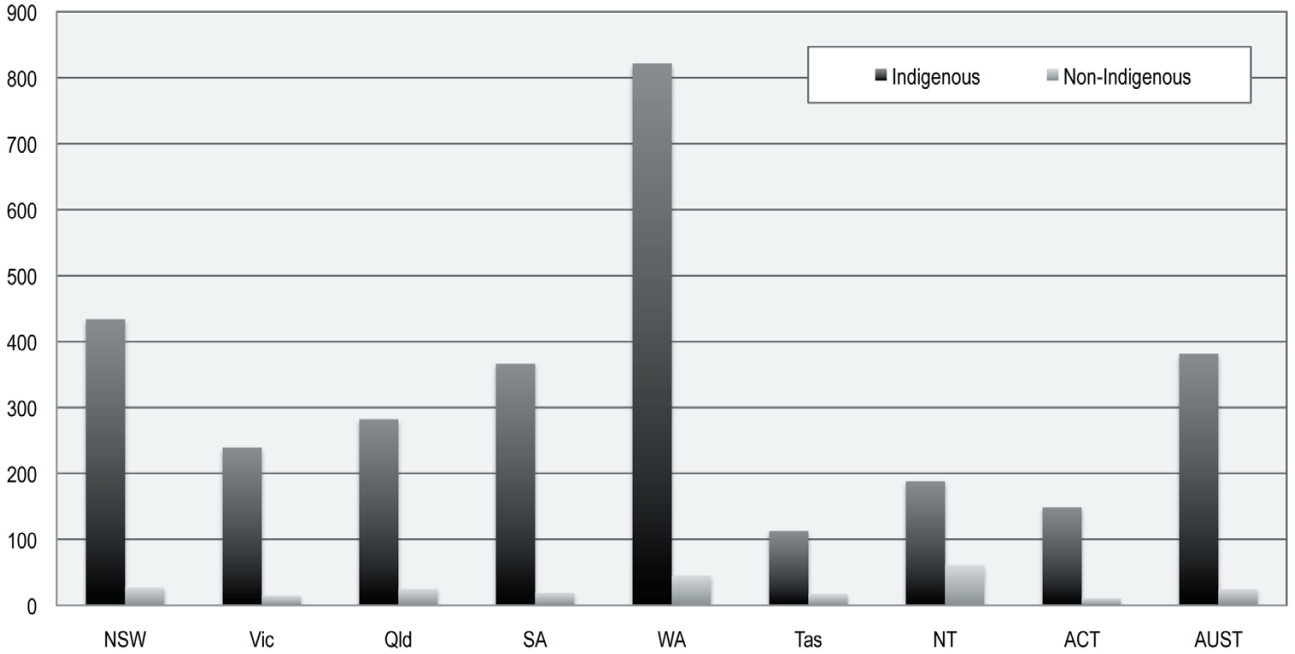
The substantial variations in incarceration rates and penal practices across Australia indicate the need for specific attention to jurisdictional differences and localised practices.[56] The available data are considered in more detail with specific reference to NSW.

TABLE 1: AVERAGE DAILY NUMBER OF INDIGENOUS WOMEN IN FULL-TIME CUSTODY, 2006–2010

Year	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
2006	194	13	114	24	134	8	23	1	512
2007	209	15	115	29	175	7	32	1	584
2008	213	17	115	28	143	8	36	3	561
2009	226	19	123	31	165	7	39	2	612
2010	210	26	136	34	187	7	41	2	643
Per cent change 2006-2010	8.2	100.0	19.3	41.7	39.6	-12.5	78.3	100.0	25.6

Source: Adapted from Lorena Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series Report No 107, Australian Institute of Criminology, July 2010); Australian Bureau of Statistics, *Corrective Services: Australia, March Quarter 2011*, Report No 4512 (2011).

FIGURE 1: FULL-TIME CUTSODY RATES 2010:
INDIGENOUS AND NON-INDIGENOUS WOMEN (RATES PER 100,000)



Source: Adapted from Lorena Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series Report No 107, Australian Institute of Criminology, July 2010); Australian Bureau of Statistics, *Corrective Services: Australia, March Quarter 2011*, Report No 4512 (2011).

TABLE 2: INDIGENOUS WOMEN IN FULL-TIME CUSTODY, 2006–2010 (RATE PER 100,000 ADULT INDIGENOUS POPULATION)

Year	NSW	Vic	Qld	SA	WA	Tas	NT	ACT	Aust
2006	463.9	145.0	270.8	291.3	628.1	149.4	124.9	78.3	346.2
2007	473.2	150.1	265.9	343.9	836.9	137.9	159.1	71.4	380.1
2008	466.9	163.1	254.6	316.1	666.7	137.1	177.8	235.4	354.8
2009	492.1	186.9	266.2	343.5	731.4	121.2	189.4	198.2	379.2
2010	434.1	239.4	281.9	366.0	821.7	112.8	191.1	148.8	381.6
Non-Indigenous rate 2010	27.0	14.5	24.7	19.2	45.4	61.1	62.4	10.5	24.4

Source: Adapted from Lorena Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series Report No 107, Australian Institute of Criminology, July 2010); Australian Bureau of Statistics, *Corrective Services: Australia, March Quarter 2011*, Report No 4512 (2011); data for 2007 and 2008 were updated by the ABS in this publication to take the 2006 census into account.

C Characteristics of Indigenous Women in Custody

Women prisoners in general have been described as 'victims as well as offenders', who 'pose little risk to public safety'.[57] Compared with other women inmates, Indigenous women are more likely to be victims of violent crime[58], and they 'almost universally have been subjected to social and economic hardship'.[59] The majority are mothers.[60] They commonly have poorer physical and mental health than other inmates and are over-represented among those considered 'at risk'.[61]

In most Australian jurisdictions Indigenous women serve much *shorter* sentences than non-Indigenous women. For instance, as measured by median sentences, Indigenous women's sentences nationally were around half as long as those for non-Indigenous women; they were around one-third in NSW, SA and the NT.[62] Bartels suggests this may indicate that they are being incarcerated for 'more trivial' offences.[63] Evidence indicates that the profile of offences for which Aboriginal women are incarcerated differs from that of non-Aboriginal women. For instance, a WA study of women in prison also indicates that Aboriginal women were serving sentences for *less* serious offences than non-Aboriginal women, and were more than twice as likely to be serving a sentence of 12 months or less; by contrast, non-Aboriginal women were over-represented in the more serious offence categories.[64]

Based on national data for 2007–08 and as measured by their 'most serious offence', of all women imprisoned Indigenous women constituted:

- 55 per cent for acts intended to cause injury;
- 40.3 per cent for road traffic and motor vehicle regulatory offences;
- 37.9 per cent for break and enter;
- 36 per cent for robbery and extortion;
- 33.5 per cent for offences against justice and good order;
- 28.2 per cent for theft; and
- 27.3 per cent for public order (although the overall numbers were small).[65]

The substantial over-representation of Indigenous women for offences related to 'acts intended to cause injury' has been noted in several reports, and deserves greater attention. Links with alcohol have been identified,[66] and concerns have been raised that some of these offences are committed in response to domestic violence.[67] A recent WA report found that approximately 60 per cent of assaults for which Aboriginal women were in custody involved partners, family, friends or acquaintances as victims, and that most were committed while intoxicated.[68] Given evidence suggesting that increasing Indigenous imprisonment levels in part reflect greater law enforcement activity,[69] it is possible that some of these remaining matters relate to charges of assault police.[70] It is also notable that Bartel's study indicates that 67 women (20 of whom were Indigenous) were incarcerated for 'road traffic and motor vehicle regulatory offences'; the use of imprisonment for these offences is troubling and needs further investigation.

Data also indicate that Indigenous women are much more likely than other women in prison to have been imprisoned previously. National figures indicate that 65 per cent of Indigenous women had prior adult imprisonment as compared with 35 per cent for non-Indigenous women.[71] A WA study found that a staggering 91 per cent of all Aboriginal women in prison had served a prior sentence and that 48 per cent of Aboriginal women in custody in WA had served more than five previous terms of imprisonment.[72] This WA study also sheds some light on the offence of breach of order; over two-thirds of Aboriginal women had as a current offence a breach of an order, most commonly bail, and the breaches were typically due to re-offending rather than non-compliance.[73] NSW research on Indigenous recidivism does not address gender, but recommends investing in drug and alcohol treatment programs and vocational training, and investigating further the circumstances in which orders are breached as strategies towards reducing recidivism.[74]

Researchers have also begun analysing sentencing patterns in order to determine whether the increasing over-representation of Indigenous women within prison is attributable to harsher sentencing. In a study of sentencing in the *higher* courts of WA, Bond and Jeffries found that Indigenous women were *less* likely to be sentenced to imprisonment than non-Indigenous women.[75] However, their recent research in Queensland, which analyses results for Indigenous people and not women specifically, found differences between sentencing in the higher and lower courts. Once other relevant sentencing factors were controlled, there were no differences in the likelihood of a prison sentence for Indigenous and non-Indigenous people in the higher courts; however, in the lower courts Indigenous people were *more* likely to be sentenced to imprisonment.[76]

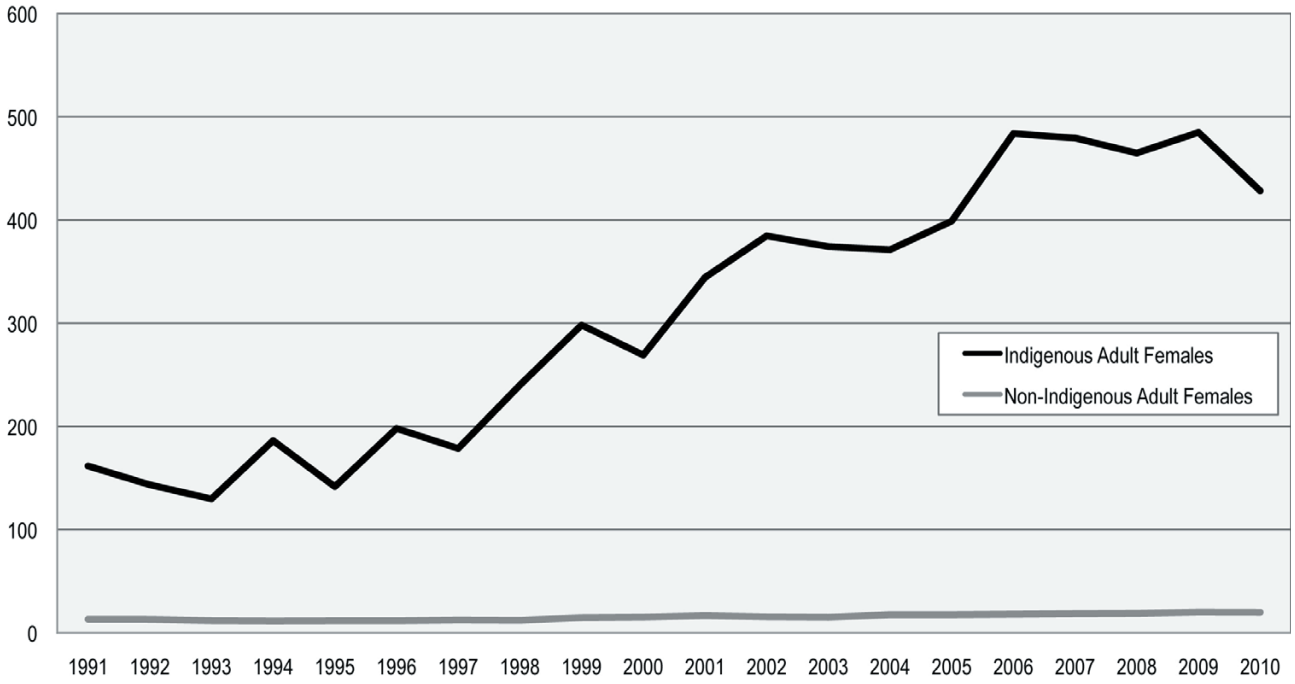
The authors suggest that one interpretation of their findings is that because time-poor magistrates in the lower courts are 'required to make sentencing decisions quickly with minimal information about defendants … there may be greater judicial reliance on stereotypical attributions about offenders.'[77] In both higher and lower courts being on remand and having a prior record increased the likelihood of imprisonment.

More work is needed to understand the sentencing of Indigenous women, especially in the lower courts, which incarcerate the majority of people, particularly those given lesser sentences. However, these findings, together with the different offence profiles of Aboriginal and non-Aboriginal women, suggest that in addition to sentencing we also need to understand better police practices and bail decision-making that bring Indigenous women before the courts and into custody.

D Bail and Remand for Indigenous Women

The data presented above do not distinguish between sentenced and unsentenced inmates, and again there is little data specific to unsentenced Indigenous women. The Australian Bureau of Statistics ('ABS') reports that at 30 June 2010, 22 per cent of Indigenous offenders were unsentenced compared with 21 per cent for non-Indigenous offenders, but does not provide data for Indigenous women.[78] However, several sources have noted that increases in the remand population have been significant in driving the increase in prison populations generally. The NSW Select Committee into the Increase in Prison Population found in 2001 that the increase in the remand population was '*the* most significant contributing factor'.[79] A more recent study by Fitzgerald notes that the growth in the number of Indigenous women remanded in custody in NSW has been greater than that of

FIGURE 2: NSW WOMEN'S CRUDE FULL-TIME CUSTODY RATES: 1991–2010, (PER 100,000 ADULTS)



Source: Corrective Services NSW, data provided to the author.

those who are sentenced.[80] Since 2002, Indigenous women have constituted between 20 and 30 per cent of the women's remand population in NSW.[81]

E Indigenous Women in Custody in NSW

At the time of the final RCIADIC report, there were 47 Aboriginal women in full-time custody in NSW; by June 2010 that number had risen to 209.[82] Figure 2 shows the growth in the NSW Indigenous women's imprisonment rate per 100,000 from 161.6 in 1991 to 428.3 in 2010, as compared to that for non-Indigenous women (13.1 in 1991 to 19.8 in 2010).[83] In 1998, the Indigenous women's imprisonment rate surpassed the rate for non-Indigenous men for the first time; by 2010, the Indigenous women's imprisonment rate had grown to more than one-and-a-half times that for non-Indigenous men (276.0 per 100 000).

At June 2009 the rate of remand in NSW was:

- 111 per 100,000 for Aboriginal women; and
- six per 100,000 for non-Aboriginal women.

For sentenced inmates the NSW imprisonment rate was:

- 379 per 100,000 for Aboriginal women; and
- 14 per 100,000 for non-Aboriginal women.

While Aboriginal men's remand and custodial rates were 16.5 times those on non-Aboriginal men, the remand rates for Aboriginal women were 19.5 times, and sentenced rates 27.2 times, those of non-Aboriginal women.[84]

In 1991, the number of Aboriginal women on remand in NSW prisons was eight; by 2007, this had increased to 61, although it declined somewhat to 43 by 2010. The number of non-Aboriginal women on remand also grew over the same period, although to a lesser degree.[85]

Fitzgerald examined the growth in the number of Indigenous prisoners over the period 2001 to 2008, which was greater for remandees than for sentenced prisoners (72 per cent compared to 56 per cent); no details were provided by gender.[86] She found that the increase in the remand population was due to *an increase in the proportion of people remanded in custody overall* (from 12.3 per cent in 2001 to 15.4 per cent in 2007), and for each of the offence categories that were most common for remandees; that is, the increase did not reflect a change in the offence profile to more serious offences, but rather *harsher bail decisions*. The mean time in custody also increased from 3.3 months in 2001 to 4.2 months in 2008.[87]

Steel's research has demonstrated that NSW has tightened bail laws substantially over the last two decades, and that the NSW Parliament has introduced many more punitive amendments to the *Bail Act* than have been put in place in any other jurisdiction.[88] Such approaches are clearly at odds with the recommendations of RCIADIC and other strategies intended to reduce Indigenous incarceration, since they not only contribute to higher numbers on remand, but also may make conviction and incarceration more likely.[89]

In considering the increasing rate of Indigenous women's incarceration over time depicted in Figure 2, it is striking to note that in fact *fewer* Indigenous people appeared in NSW courts in 2007 than in 2001. However, the percentage found guilty was higher, especially for those charged with offences against justice procedures which increased by 33 per cent. The percentage of those convicted who received a custodial sentence also increased, especially for offences against justice procedures (from 17.7 per cent to 27.6 per cent). However, while the mean length of sentence increased for some offences, for offences against justice procedures it actually went down,[90] which suggests perhaps that more offences of lesser seriousness were resulting in incarceration. Fitzgerald found that 'the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending itself.'[91]

F Deaths in Custody

The last comprehensive analysis of the deaths in custody of women was undertaken by Collins and Mouzos, who examined the period of 1980–2000.[92] They found that the deaths of Indigenous women were distinctive in several respects. Deaths of Indigenous women accounted for 32 per cent of all female deaths in custody as compared with Indigenous men, who accounted for 18 per cent male deaths in custody.[93] Half of Indigenous women were found to have died of natural causes as compared with 20 per cent of non-Indigenous women and 38 per cent of Indigenous men, and the most common cause of death for both of the latter groups was self inflicted.[94] Indigenous women were much more likely to be in custody for good order offences as their most serious offence (54 per cent); this was almost double

the percentage for non-Indigenous women (28 per cent) and much higher than the percentage for Indigenous men (19 per cent).[95] Most Indigenous women died in police custody (79 per cent); this was not the case for non- Indigenous women (37 per cent) or Indigenous men (42 per cent) the majority of whose deaths occurred in prisons. They note that the final report of the RCIADIC also found that the Indigenous women whose deaths they had investigated had a 'high incidence of good-order offences in [their] criminal histories'.[96]

Indigenous deaths in custody have decreased over time, and despite increases recorded in the last five years, remain lower than they were in the mid-1990s.[97] However, a recent series of articles written by Inga Ting for *Crikey* has documented increases of 'nearly 50%' in deaths in prisons in NSW and Queensland over the past decade.[98] Ting also documents ongoing concerns about failures by correctional authorities to implement recommendations from the RCIADIC and from subsequent coronial inquiries. According to Ting, in the nine years to 2009 'NSW Coroners documented more than 60 cases in which bureaucratic bungling, a failure or absence of policy, breaches of procedure or lack of communication between government agencies contributed to the death' and that 'deaths could have been avoided had custodial and health authorities exercised proper duty of care and adhered to policies implemented as a result of Royal Commission recommendations.' Numerous breaches of RCIADIC recommendations were identified.[99]

Due to the lack of available data, it is difficult to track trends in the deaths of Indigenous women. However, Ting has identified three deaths of Aboriginal women in recent years in NSW prisons (in 2004, 2005 and 2009), one of whom was an Aboriginal transgender (male-to-female) inmate.[100] All three were on remand and two were known to have made previous suicide attempts.[101] The remand period is known to be a time of risk: the RCIADIC found that 30 per cent of deaths were of people who were unsentenced.[102] As Cunneen has noted, '[t]he current tragedy is that so many of the circumstances leading to deaths in custody identified by the RCADIC are still routine occurrences.'[103]

IV Redressing Over-representation?

The data reviewed above indicate that there are notable differences in trends in the criminalisation and incarceration of Indigenous women between jurisdictions, and point to the role of harsher laws, policies and practices as exacerbating the levels of over-representation of Indigenous women in custody. Fitzgerald's research indicates that in NSW harsher bail decisions, higher conviction rates and longer sentences have been driving trends. In this part of the paper I examine two recent developments in NSW. The first, MERIT, is a mainstream program operating in local courts, designed to divert offenders into treatment programs with the reduction of re-offending as one of its objectives. The second, the *Fernando* principles, are an Indigenous specific set of sentencing principles intended to assist judges in relevant cases.

A Bail-based Diversion: The MERIT Program

The Magistrates Early Referral into Treatment program operates in more than 60 courts across NSW and offers eligible adults charged with an offence who have a substance abuse problem access to drug treatment prior to entering a plea and while on bail. A small number of courts also offer treatment for alcohol abuse. Magistrates are provided with a report on the defendant's participation, which may be taken into account at sentencing. It is 'the largest mainstream program that diverts adult defendants into treatment' and has been described as a 'highly appropriate intervention program for Aboriginal defendants'.[104] It has been found to be associated with 'improvements in dependence and psychological distress as well as general and mental health'.[105]

MERIT was reviewed by the NSW Auditor-General in a report which considered whether eligible Aboriginal people were getting access to the program, and whether the program was meeting their needs (although the review did not specifically deal with the needs of Aboriginal women). While referrals of Aboriginal people to the program have increased somewhat over time, they remain low: in 2007–08 only 427 of an estimated 19,000 Aboriginal defendants were referred, and only 273 participated.[106] An evaluation of the program found that over time the rate of Aboriginal people being *accepted* into the program decreased, while the rate for non-Aboriginal people remained the same. This decrease was found to coincide with a change to the *Bail Act*, which made it more difficult for repeat offenders or those who had previously breached bail to be released to bail. It was also said that some Aboriginal people were not accepted into the program because they were charged with assault, as the program excludes those who have committed serious violent offences.[107]

Other barriers to Aboriginal defendants gaining access to the program identified by the Auditor-General were: the paucity of alcohol-specific programs;[108] the fact that while solicitors were a key point of referral, many defendants did not have legal representation;[109] the 'disproportionate impact' of eligibility criteria and the location of courts on Aboriginal defendants;[110] and 'the generally poor level of engagement and communication with Aboriginal defendants'.[111] For instance, '[a] standard, case plan approach is used by MERIT teams to develop the treatment program for clients.' However, it was found that 'this approach did not recognise any special needs Aboriginal participants may have or recognise alternative treatment models that may be more suitable for Aboriginal clients.'[112] These issues may also underlie the finding that one-in-three Aboriginal people referred to the program do not accept.[113]

The evaluation found that completion rates for Aboriginal people (50 per cent) were less than for non-Aboriginal people (60 per cent), and that the most common reason for non-completion for both groups was being breached by the staff for non-compliance.[114] Outcome data was not reported by gender.[115] One hopeful finding reported by the Auditor-General was that after an 'Aboriginal Practice Checklist' was trialled at several locations, completion rates for Aboriginal clients had increased to approximately 64 per cent.[116]

A further evaluation of MERIT focused on women, and found that at entry to and exit from the program, 'women had significantly poorer general and mental health scores than men'.[117] A higher proportion of women (22 per cent) than men (13 per cent) in the program were Aboriginal, but the findings did not otherwise distinguish between Aboriginal and other women.[118] However, women were reported to be less willing than men to participate in the program due to family responsibilities and concerns about 'the mandatory child protection obligations' of staff, and were less likely to complete the program than men often due to a failure to attend. They were reported to have more complex commitments and higher rates of 'co-morbid chronic mental health disorders and trauma' than men, which constituted 'a significant barrier to female participation.'[119] The authors noted the need for such programs to be more responsive women's needs.

These reports demonstrate that the potential benefits of the programs are diminished or unavailable to Aboriginal women because standardised, mainstream programs have not anticipated their needs. The development of the Aboriginal Practice Checklist for MERIT seems to offer promise, but it too may prove to be inadequate if it does not explicitly consider the additional barriers that Aboriginal women face in accessing and completing the program.[120] The high levels of victimisation among Aboriginal women are likely to affect some women's capacity to participate and will require attention to their safety. The competing demands of child care and other familial responsibilities also mean that location and transport are very significant considerations and make regular attendance difficult. Together with the fear of mandatory child protection reporting, these are formidable obstacles to Aboriginal women's participation. Further, a checklist is not an adequate substitute for the involvement of Aboriginal people in developing and delivering appropriate programs and services.

B Sentencing: The *Fernando* Principles

Several reports in NSW have recommended the trial of the abolition of short-term sentences, especially for Indigenous women, in recognition of the damaging effects of imprisonment, the evidence reviewed above that Indigenous women commonly serve shorter sentences, lack of access to programs for short-term inmates and the likelihood that short sentences serve little rehabilitative purpose, and the need to overcome Indigenous over-representation.[121] However, these recommendations have not been acted on. The sole Indigenous-specific sentencing initiative has been the development of common law principles guiding the sentencing of Indigenous offenders.[122]

The so-called *Fernando* principles were articulated by Wood J in *R v Fernando*. The decision sets out sentencing principles that may be relevant to Aboriginal offenders in certain circumstances, with particular reference to alcohol abuse and violence, while not establishing Aboriginality as a mitigating factor per se. A thorough review was undertaken by Janet Manuell SC for the NSW Sentencing Council, but did not address gender specifically.

Manuell found that the principles were not always applied and were seen as applicable in only a very narrow range of circumstances.[123] The potential ambit of the principles has been read down in subsequent appellate decisions. For instance, other commentary points to decisions that seem to turn narrowly on questions of whether a person is 'Aboriginal enough', and whether the principles might

apply to Aboriginal people in urban settings.[124] Research undertaken for this paper identified six cases in which the *Fernando* principles had been considered or applied to women defendants, and no real elaboration of how the principles might relate to women.[125] In two of these cases the *Fernando* principles were found not to apply.[126]

An interesting point of contrast has been the Canadian statutory provision, *Criminal Code* Part XXIII section 718.2, which provides that in sentencing 'all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders.*' This was considered in *R v Gladue,*[127] in which the Supreme Court of Canada described the over-representation of Indigenous people in Canada as a crisis, and recognised systemic discrimination in the criminal justice system. The Court found that

> [t]he remedial component of the provision consists not only in the fact that it codifies a principle of sentencing, but, far more importantly, in its direction to sentencing judges to undertake the process of sentencing Aboriginal offenders differently, in order to endeavour to achieve a truly fit and proper sentence in the particular case.[128]

The provision 'amounts to a restraint in the resort to imprisonment as a sentence, and recognition by the sentencing judge of the unique circumstances of aboriginal offenders.'[129] Canadian governments have subsequently developed a system of community-based justice programs including the Aboriginal Justice Strategy.

The Canadian approach to sentencing demonstrates a focus on substantive equality,[130] which is not limited to redressing any evidence of discriminatory sentencing. Indeed, in a manner consistent with the approach adopted in the RCIADIC, Aboriginal over-representation in the Canadian criminal justice system is understood to have complex roots arising from the legacy of colonisation, factors that are seen as relevant in sentencing.[131] However, the Canadian developments have been somewhat controversial. For instance, Stenning and Roberts criticise the approach on several grounds, including that they find no evidence of discrimination in sentencing, and, they argue, because it 'violates a cardinal principle of sentencing (equity) relevant to all'.[132] In reply, Rudin and Roach argue, inter alia, that the intent of the provision is to reduce over-representation in prison and is not to limited to redressing any discrimination in sentencing, that Aboriginal defendants are distinguishable from other disadvantaged defendants by reference to the impact of colonisation, and that Stenning and Roberts mistakenly adhere to formal equality when Canadian law instead favours substantive equality.[133]

An approach founded on substantive equality has not been endorsed in the NSW context, where the clear preference lies with formal equality.[134] For instance, the NSW Law Reform Commission (NSWLRC) specifically rejected 'legislative prescription' of sentencing principles on the basis that it 'would add nothing to the existing common law'. By contrast with the recognition by the Canadian Supreme Court of systemic discrimination in the criminal justice system, the NSWLRC commission noted only that 'the *potential* for discrimination against Aboriginal offenders still exists,' but at the same time rejected 'the notion that this would be overcome by a legislative statement of sentencing principles.'[135] The Sentencing Council also dismissed the Canadian approach, stating a preference for the present Australian position which 'does not offend the basic principle that the same sentencing principle apply irrespective of the offender's identity or membership of an ethnic or racial group'.[136]

The rejection of an approach founded on substantive equality by two eminent NSW bodies is regrettable, since, as in Canada, there are clear policy reasons for endorsing such an approach.[137] However, as in Canada, it may require legislative action to bring it about, perhaps an unlikely outcome in an era of punitive populism.

The explicit adoption of a substantive equality approach offers a way forward for Indigenous women since it has the potential to bring a more contextual understanding to their experiences as both Indigenous people *and* as women. In 1994, the Australian Law Reform Commission ('ALRC') promoted reforms based on substantive equality, recognising the need to '[place] inequality in the context of disadvantage'. However their recommendations, which included an Equality Act, were not adopted.[138]

While there remain compelling reasons why questions of justice need to be approached through a concern for substantive equality, Canadian experience indicates that this is unlikely to be a sufficient means of redressing Indigenous women's over-representation within the criminal justice

system. Ten years on from *Gladue* the capacity of courts to reduce over-representation of Aboriginal people in the prison system in Canada has been described as 'dismal'.[139] The growth in the percentage of Aboriginal women in the prison system from 2004/2005 to 2008/2009 outstripped that for men, and in '2008/2009, Aboriginal women represented 28 per cent of all women remanded and 37 per cent of women admitted to sentenced custody'.[140]

Toni Williams has argued with respect to the Canadian situation that although the legal principles require that offences by Aboriginal people be considered in context, this contextualisation does not necessarily produce lesser sentences, since those factors can be interpreted differentially, including as indicating that the offender is risky or dangerous.[141] As she goes on to say, 'the *Gladue* decision essentially requires judges to consider the social context of an Aboriginal defendant when passing sentence and assumes that such consideration makes it less likely that an Aboriginal defendant will receive a prison sentence.'[142] There is a tension in that these factors can be seen as reasons for lesser punishment and as markers of risk; 'an individual's experience of hardship or needs may be subordinated to the perceived demands of social protection if that hardship or need is constituted as a risk, as in effect situating the individual among the "dangerous classes"'.[143] For Aboriginal women, she sees a danger that a contextual analysis may see them portrayed 'as over-determined by ancestry, identity and circumstances, thereby feeding stereotypes about criminality that render the stereotyped group more vulnerable to criminalization.'[144]

One possible implication of William's research is that justice practices that have Indigenous legal actors, including circle sentencing and specialist Indigenous courts, may be better placed to undertake such contextual analysis and sentencing. Indigenous justice practices are now well established in some settings in Australia. Several such initiatives have been endorsed by the Productivity Commission as examples of 'things that work'; these include Aboriginal sentencing within the South Australian magistrates courts, the South Australian Aboriginal conferencing initiative in Port Lincoln, and Aboriginal courts such as the Murri court in Queensland and the Koori court in Victoria.[145] However, here too, the need for explicit attention to the intersection of race and gender will arise if Indigenous women's needs are to be met.

V Conclusion

This paper has documented enduring and repeated failures to pay sufficient regard to Aboriginal women. An intersectional analysis that recognises the specific circumstances that contribute to Aboriginal women's criminalisation and incarceration, coupled with an approach to the provision of services and support that focuses on substantive equality is crucial. But it is also not enough. As William's work suggests, an intersectional analysis provides a vital first step in bringing recognition to Indigenous women but does not determine how that recognition is given expression within criminal justice practices. Indigenous women need to be fully involved in shaping the meanings that emerge.

Several recent reports and initiatives have given emphasis to the need to return to RCIADIC as guiding future developments.[146] It is vital that Indigenous women have a voice in determining how best the blueprint provided by RCIADIC can be reconfigured so as to adequately represent their interests.

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136 The NSW Sentencing Council argued:

> The Sentencing Council acknowledges the approach in Canada of special consideration of alternatives to imprisonment for Aboriginal offenders … The Sentencing Council prefers the present common law position in Australia … The common law position in NSW acknowledges the relevance of Aboriginality in sentencing, but does not offend the basic principle that the same sentencing principle apply irrespective of the offenders identity or membership of an ethnic or racial group: 'Abolishing Prison Sentences of 6 Months or Less', above n 121, 16 n 49.

137 Research such as that by Bond and Jeffries in WA (above n 75), which found that higher courts in that jurisdiction may sentence Indigenous women *less* harshly, suggest that some courts may take a more contextual approach to sentencing Indigenous women. However, their mixed findings for Queensland, including harsher sentencing in the local courts, may suggest the need for more explicit consideration of sentencing principles aligned with substantive equality. Moreover, their findings do not negate the argument offered by Rudin and Roach for sentencing provisions explicitly focused on reducing Indigenous over-representation (above n 130).

138 The Australian Law Reform Commission recommended an Equality Act based on substantive equality: Australian Law Reform Commission, *Equality Before the Law: Women's Equaltiy*, Report No 69 (1994) pt II [4.29]; also see generally chs 3, 4.

139 Joanne Martel, Renée Brassard and Mylène Jaccoud, 'When Two Worlds Collide: Aboriginal Risk Management in Canadian Corrections' (2011) 51 *British Journal of Criminology* 235, 251.

140 Donna Calverley, 'Adult Correctional Services in Canada, 2008/2009' (2010) 30(3) *Juristat*, 11–12.

141 Toni Williams, '*Punishing Women: The Promise and Perils of Contextualized Sentencing for Aboriginal Women in Canada*' (2007) 55 *Cleveland State Law Review* 269, 274.

142 Ibid 278.

143 Ibid 273.

144 Ibid 286.

145 Steering Committee for the Review of Government Service Provision, Parliament of Australia, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009) 28.

146 Standing Committee of Attorneys-General Working Group on Indigenous Justice, Parliament of Australia, *National Indigenous Law and Justice Framework 2009–2015* (2010) includes as objective 1.3: 'Ensure that the findings of RCIADIC continue to guide governments, service providers and communities to address current issues in law and justice for Aboriginal and Torres Strait Islander peoples.'