

OVERFLOW: WHY SO MANY WOMEN IN NT PRISONS?

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INTRODUCTION

The Northern Territory holds a unique position in the nation's contemporary society and history, including with respect to women in the criminal justice system. In one of the most famous miscarriages of justice known to Australian courts, Lindy Chamberlain was found guilty of the unlawful killing of her baby daughter, to be exonerated years later, after having spent years in prison. The case of *Secretary v The Queen*¹, contributed significantly to the development of the law around battered woman syndrome in Australia. In that case, the Northern Territory Court of Criminal Appeal found that self defence was properly raised in the situation where Helen Secretary, after 8 years of violence against herself and her children, shot her husband as he was sleeping after he had threatened to kill her upon waking. Helen Secretary was ultimately not found guilty of any offences in relation to this.

The Northern Territory now has the unenviable position of being the leader in the rate of female imprisonment, which is disproportionately affecting the female Aboriginal and Torres Strait Islander community. This paper researches whether or not this increase corresponds with an increase in indictable crime by females being seen in the Northern Territory Supreme Court.

THE STATISTICS

Nationally, imprisonment rates are growing and have been over many years. The Northern Territory (NT) figures are nothing short of breathtaking.

In the March quarter of 2015, the national daily average imprisonment rate was 194 prisoners per 100,000 adults in the population. In the NT the 2015 March quarter figures published by the ABS was 904 prisoners per 100,000 adults.²

At 30 June 2014 the national rate was 185.6.³ The NT rate was 829.4 per 100,000 adults. The next highest was WA with 264.6. The lowest was Tasmania at 112.⁴

At 30 June 2004 the national rate was 157 prisoners per 100,000 adults. This rate, at that time, represented a 43% increase from 1994. The NT imprisonment rate was still the highest, but it was at 513.⁵

In just 10 short years, in the Northern Territory, the imprisonment rate went from 513 per 100,000 adults to 904 per 100,000 adults.

¹ (1996) 5 NTLR 96

² Australian Bureau of Statistics, 4512.0 - Corrective Services, Australia, March Quarter 2015

³ All imprisonment rates are quoted per 100,000 adults, in accordance with the Australian Bureau of Statistics reporting.

⁴ Australian Bureau of Statistics, 4517.0 - Prisoners in Australia (2014) (ABS 2014)

⁵ Australian Bureau of Statistics, 4517.0 - Prisoners in Australia (2004) (ABS 2004)

This could foreshadow the rate of increases we can expect to see in women's imprisonment rates, if the reasons for the increase are not properly understood, and addressed.

Women prisoners

At 30 June 2014 the national rate of female imprisonment was 28.1. The NT rate of female imprisonment was 127.9 per 100,000. Next in line was WA with 47.9. The lowest was Tasmania with 15.7.⁶

In the Northern Territory the increase in the 12 months between 30 June 13 to 30 June 14 of the female prison population was 27%, compared with men at 16%.⁷

At 30 June 2004, the national rate of female imprisonment was 21 prisoners per 100,000 adult population. The results published were not broken down by jurisdiction by gender at that time.⁸

Indigenous prisoners

The persons most affected by the Northern Territory situation are Aboriginal and Torres Strait Islanders (ATSI). Nationally ATSI people are 27%, whereas in the NT they are 86% of prisoners.⁹

Indigenous women prisoners

It is difficult to find statistics that identify the rates for ATSI women in particular.

It is a common theme in Australian academic literature on women offenders that data does not capture intersectional disadvantage. Statistics are recorded by gender, and by race, but not both. It makes it difficult to capture indigenous women as a group. However, on the basis of the general statistic, and a review of women's offending in the Supreme Court, it is clear that the NT increase in female offenders is disproportionately affecting Indigenous women.

The most important factor in an increase in women's offending?

This research shows that the increasing women's prison population is at least partially due to increased perpetrating of indictable crime by women.

Men are still the vast majority of offenders at 92%, and women at 8%. Such a figure must be kept at the forefront of investigations searching for reasons for any increase in women's offending. The imprisonment rates in the NT, as well as reflecting particular policing and sentencing practices, also reflect the exceptionally high rates that Aboriginal women are victim/survivors of family and domestic violence.

Perhaps the most obvious way to address increased offending by women will be to address male violence against women and children, particularly in a family and domestic violence context. Significant work is being undertaken nationally in this area. This NT specific research on female offenders supports that this focus must continue. It acts as a preventative measure against female offending. This is discussed below.

⁶ ABS 2014

⁷ ABS 2014

⁸ ABS 2004

⁹ Australian Bureau of Statistics, 4517.0 – Prisoners in Australia (2014)

WOMEN IN NORTHERN TERRITORY PRISONS

How is the NT criminal justice system treating these same women, so disproportionately highly represented as victims, when they become perpetrators of crime?

There are many possible contributing factors to an increased female prison population:

- An overflow of violence and criminal behaviour with the adoption by women of male offending behaviour and patterns. For example, the normalization of violence as a response to conflict (given the sheer volume of extreme violence experienced or witnessed), or more than that, a way of survival, of an attempt to rise out of victimhood, in an environment consumed by male violence: 'perpetrate or perish';
- The even more prescriptive mandatory sentencing regime for violent offending introduced in 2013;
- Changing police practices detecting a greater number of women offenders as a by-product of police being more responsive to family violence;
- Mandatory reporting of family violence, introduced in 2009;
- Changes to bail legislation making it more difficult to get bail, leading to more women on remand;
- The NT Emergency Response in 2005 and its increased police presence in remote communities leading to more offences being detected¹⁰;
- New alcohol restriction measures leading to breaches of mandatory treatment orders, and Alcohol Protection Orders.

Many of these factors would lead to an increase in Magistrates' Court (referred to as the Court of Summary Jurisdiction in the Northern Territory) appearances and sentencing for lower level offending, but may not affect the Supreme Court in the same way. Data collection for the Magistrates' Court is far more difficult because of the volume of matters processed, and lack of published decisions and sentencing remarks.

This research started with a review of offending and sentencing in the Supreme Court for the period 1 January 2010 to 30 June 2015, as well as the Northern Territory Court of Criminal Appeal decisions involving female offenders in this same period. This mainly tests the first theory listed above, and may provide at least a partial explanation of the increase in females imprisoned.

The research method had some limitations. It involved reviewing Supreme Court sentencing remarks, which do not necessarily consistently address the criteria being considered in the research. Some sentencing remarks are not published for reasons unknown, and so this research does not definitively capture all female offenders in the relevant period. Other matters to note include that the NT has only two levels of court dealing with crime: the Court of Summary Jurisdiction and the Supreme Court. As a small jurisdiction, one or two matters with multiple co-offenders in one year can affect figures and data more than elsewhere.

¹⁰ For example, changes in policing (including an increase in police stations in remote communities) as part of the NT Intervention which commenced in 2007/2008 lead to an extraordinary increase in minor traffic prosecutions. For further information, see Anthony, T & Blagg, H 'Addressing the "crime problem" of the Northern Territory Intervention: alternate paths to regulating more driving offences in remote Indigenous communities (2012), *Report to the Criminology Research Advisory Council*

What did the research show?

The research showed that that indictable crimes being committed by women have increased, for which women are serving periods of imprisonment. Violent offending, illicit drugs and property offending are the leading offence types. The overflow effect appears to be in operation. However, the research has tried to find some explanation for this overflow. If justice is to be done to women offenders, extreme caution needs to be exercised before an assumption is made that women are now just emulating male criminal behaviour.

On the face of offence types committed, there could appear to be similarity in male and female offending, especially with respect to violent offending. However, upon further analysis of female offending and offenders, this similarity is less apparent. This is expanded upon below.

The total number of women's sentences reviewed from the research period was 189. From 1 January 2010 to 30 June 2015 the numbers of women being sentenced in the Supreme Court has nearly doubled, although there was a peak in 2012 at 46.¹¹ 26 women have been sentenced by the Supreme Court in the first half of 2015, meaning that 2015 is set to exceed the peak in 2012 if women continue to be sentenced at the same rate in the last 6 months.¹²

OFFENCE TYPE

Nationally, in 2014, the most common offence type for female offenders were acts intended to cause injury (20%), illicit drugs (17%) and offences against justice procedures (11%).¹³

In the NT, over the reporting period, the offence types for female offenders in the Supreme Court were acts intended to cause injury (53%), illicit drugs (15%) and property offending (excluding fraud) (14%), serious driving offences (9%), breaches against justice procedures (5%) and fraud (4%). In the 5.5 year research period, there was only one woman sentenced for sexual offending, which was against a child, in 2013. This figure on sexual offending by women is consistent with national statistics. It is not prevalent offence-type for women.

In terms of increases in the research period, acts intended to cause injury steadily increased, with a peak in 2012. Illicit drug offences increased, but with some fluctuations. Property offending went from 0 cases in 2010 and 2011, to 9 in 2014, and 6 for the first half of 2015. Interestingly was the increase in arson related offending, with 5 women sentenced for arson related offending in the first half of 2015.

Fraud, dangerous driving and reckless endangerment offending, and offences against justice procedures fluctuated from year to year, without a noticeable increase or decrease.

These figures demonstrate that serious violent offending is becoming more prevalent, but in the Northern Territory, illicit drug offending and property offending is also on the rise.

This is partially consistent with research carried out on female offending nationally between 1995 and 2002.¹⁴ The research looked at 6 different hypotheses that might explain, or contribute to an

¹¹ NB: Research of each year ran in calendar years, i.e. from 1 January to 31 December.

¹² In 2010: 23 (but one offence had four co-offenders); 2011: 20; 2012: 46 (one offence had three co-offenders); 2013: 37; 2014: 38; 2015 to 30 June 15: 26

¹³ Australian Bureau of Statistics, 4517.0 – Prisoners in Australia (2014)

explanation for the increase in female prisoners nationally. It found the primary reason for the increase was the increasing number of violent offences being committed by women, including for robbery and homicide, but with assaults increasing only marginally. However, it differed from the NT experience in that non-violent crimes such as drugs, property and deception offending decreased significantly in that period.

It was found the increase may have also been partially, but not significantly explained, by there being an increase in Indigenous women offending. The study found it was not explained by the increasing numbers of women on remand, an increasing number of recidivist female offenders, changing age profile of prisoners – i.e. a cohort of more criminal 18 to 25 year old women, nor any increase in the length of sentences being handed down.

This increase in violent indictable crimes by women in the NT is explored further below.

CHARACTERISTICS OF WOMEN OFFENDERS

Victimisation rates

The stand-out issue when considering the characteristics of female offenders in the NT is the high rate of prior victimization, as children or adults or both. Not only are NT imprisonment rates breathtaking, NT rates of violence against women are equally breathtaking, and absolutely shocking. Aboriginal and Torres Strait Islander women were 34.2 times more likely to be hospitalized for non-fatal family violence-related assaults in 2012-13.¹⁵ If you are an Aboriginal or Torres Strait Islander living in a remote area, the rate for hospitalization for non-fatal assaults is 1510.6 per 100,000 population, compared to 197.1 per 100,000 population in a major city.¹⁶ Aboriginal and Torres Strait Islander people are victims of homicide at five times the rate of non-Indigenous Australians.¹⁷ The homicide rate is greatly increased for Aboriginal and Torres Strait Islander women in remote and regional areas (of particular relevance in the NT).¹⁸

This paper is not advocating for women offenders to be treated as victims per se, for two primary reasons. Firstly, it ignores the aspect of the women being survivors. It fails to do justice to female offenders by failing to treat them as people who can be agents of their own change.

Secondly, the NT research shows that often the victims of women offenders are females whom it would be fair to assume (based on the above figures) have traumatic backgrounds similar to the offender. This means that the victim group is also a vulnerable group deserving of the full protection of the law.

¹⁴ Gelb, K 'Women in Prison – Why is the rate of incarceration increasing', Paper presented at the *Evaluation in Crime and Justice: Trends and Methods Conference*, Australian Institute of Criminology and Australian Bureau of Statistics, 24 – 25 March 2013.

¹⁵ Overcoming Indigenous Disadvantage 2014, COAG Targets & Headline Indicators, 4.96

¹⁶ Overcoming Indigenous Disadvantage 2014, COAG Targets & Headline Indicators, 4.96

¹⁷ Overcoming Indigenous Disadvantage 2014, COAG Targets & Headline Indicators, 4.96

¹⁸ 10.4 per 100,000 population in remote areas, 5.0 per 100,000 in regional areas and 2.1 per 100,000 in major cities: Overcoming Indigenous Disadvantage 2014, COAG Targets & Headline Indicators, 4.96.

The NT Court of Criminal Appeal regularly has to balance these complex, and often competing, issues in sentencing. It clearly stated the relevant principles in respect of Aboriginal male offenders committing crimes against Aboriginal women and children in *Spencer v The Queen*¹⁹.

On the same day that the High Court handed down its decision in *Bugmy v R*²⁰ which considered the relevance of the deprived background of an Aboriginal offender (discussed below), it also handed down its decision in *Munda v State of Western Australia*.²¹ *Munda* considered the relevance of the offender's Aboriginality in the context of sentencing an Aboriginal male from remote Western Australia for the manslaughter of his Aboriginal partner. The majority decision made it clear that, despite the principles adopted in *Bugmy*, there was no justification for Aboriginal offender to be viewed as less serious than non-Indigenous offenders, and being raised in a socially dysfunctional environment is relevant to moral culpability, but must be balanced with the seriousness of the offending²². The need, in sentencing, to give appropriate weight to protection of the community, and in the case of Aboriginal victims, a very vulnerable section of the community, was referred to a number of times in the majority judgement.²³

Nonetheless, whilst requiring complex balancing, the rates of victimization of female offenders cannot and should not be ignored if justice is to be done to these offenders, their victims and the community at large.

In 2012, the Australian Centre for the Study of Sexual Assault (ACSSA) looked at the rates of women offenders who were also victim/survivors of childhood and adult sexual and other abuse.²⁴ It did not specifically focus on Indigenous women.

The salient points of the ACSSA research relevant to this paper were:

- in the general community just over 1 in 4 women have experienced childhood sexual abuse, and around 1 in 6 women have experienced adult sexual assault since the age of 15;
- there is a paucity of research regarding victimization rates of women offenders, but that what research had been done showed rates of victimization either as adults or children between 57% to 90%;
- these types of figures are likely underestimates because of the underreporting in the collection of statistics, particularly and especially in the case of indigenous women; and
- being a victim of childhood sexual abuse means a women is more likely to be an adult victim of sexual or other violence.

The paper describes the profound consequences of being a victim/survivor of childhood abuse, adult abuse or both, which is now understood to affect development of the personality and give rise to a

¹⁹ [2005] NTCCA 3

²⁰ *Bugmy v R* (2013) 302 ALR 192

²¹ *Munda v State of Western Australia* (2013) 249 CLR 600

²² *Munda* paras [53] to [55] per French CJ, Hayne, Crennan, Keifel, Gageler and Keane JJ

²³ *Munda* paras [19], [29], [37], [41], [46], [53] – [55] per French CJ, Hayne, Crennan, Keifel, Gageler and Keane JJ

²⁴ Stathopoulos, M (2012) Addressing women's victimisation histories in custodial settings, *Australian Centre for the Study of Sexual Assault issues*,

complex trauma response²⁵ which continues into and throughout adulthood. It typically manifests with mental illness or disturbance (particularly borderline personality disorder, major depression and post traumatic stress disorder), as well as physical illness, intellectual and cognitive impairment and substance abuse. Someone who has suffered complex trauma is more likely to experience difficulties with exploitative and abusive relationships, lack of social connection, parenting with primary care of dependent children, unemployment, lower education levels, housing instability, aggression, impulsiveness, shame, self-blame and low self-esteem. These are factors which may constitute a pathway to offending.²⁶

A specific study of indigenous women as victims and offenders noted that rates of underreporting of victimization are likely to be greater amongst Indigenous women, as well as a paucity of research specific to Indigenous women offenders²⁷ When considering the nexus between offending and victimization, reference was made to studies that found high rates of women offenders drawing a link between their experience of abuse, and criminal offending.²⁸

The NT research showed the following in the relevant period:

- 51% of female offenders before the Supreme Court were recorded as having a background of victimization, whether as a child, adult or both;
- 23% had a recognized mental illness or disorder; and
- 7% had intellectual or cognitive impairment.

Given what is outlined above, and what is known about the extraordinary rates of victimization of Indigenous women, these figures are concerning, and appear too low. Some of the reasons this may occur are: failures of defence counsel to outline such information in sentencing submissions; the Supreme Court failing to find that such information is sufficiently relevant to warrant special mention in sentencing remarks; failures to obtain expert opinion about the person's history of trauma, mental illness or disturbance, and intellectual or cognitive impairment.

There is a risk that, in the Northern Territory where backgrounds of significant trauma and deprivation are common place, what really should be considered extraordinary becomes normalized, and fails to take on the significance that it should. There is also the risk of inadequate access to the expertise required to properly diagnose and describe people's backgrounds because of the difficulty and expense involved with getting such services to regional and remote areas.

Whatever the reason, in the Northern Territory Supreme Court at present, this failure could be quite seriously jeopardizing the understanding of female offending and offenders, the justice system response and consequently the achievement of justice for the offender, victims and community at large. It also appears to be at odds with the current High Court principles on sentencing of Indigenous offenders, which emphasizes the importance of individualized justice, and the effects of profound deprivation

²⁵ Ibid. The paper refers to the fact that post-traumatic stress disorder (PTSD) is not seen '*...as accurately capturing the effects of chronic and/or poly victimisation. A useful construct in understanding the complex and interrelated social, physical and emotional sequelae of child sexual abuse is **complex trauma***' (p 5).

²⁶ Ibid. p 6 - 7

²⁷ Bartels, L (2012), Violent offending by and against Indigenous women, *Indigenous Law Bulletin*, (Vol 8, Issue 1, p 19)

²⁸ Ibid, p 20

being relevant when an offender is sentenced, the relevance of which, the High Court found, does not diminish over time.²⁹ How the case law is developing in the NT around women offenders is discussed below.

Substance abuse problems (current or historical)

For female offenders in the NT who reported substance abuse problems, alcohol is still the leading substance abused by women offenders by a large margin (60%), followed by cannabis (21%), methamphetamine or amphetamine (12%). Volatile substance abuse was only 3% of those reporting substance abuse problems.

It is obviously important to take account of this when a Government and community focus at the moment is on the increasing prevalence of methamphetamine abuse. This focus should not detract from a continued focus on the detrimental effect of alcohol in the Northern Territory.

Race

Unfortunately, like much of the Australian research that already exists, this research method was unable to definitively state the racial profile of female offenders in the NT. This is of particular importance in the NT, which has such a disproportionately high representation of Aboriginal and Torres Strait Islanders in the prison population when both genders are considered, when compared with the proportion of Aboriginal and Torres Strait Islander people in the general population. Race was often, but not reliably referred to in sentencing remarks, so whilst it is fair to state that the research showed a strong likelihood that Aboriginal and Torres Strait Islander women are being disproportionately highly represented in the offenders before the Supreme Court, specific and reliable statistics were not obtained.

There has been some relatively recent academic literature on female Indigenous offenders in particular, which tries to identify whether increases in women's imprisonment is unduly affecting Indigenous women and reasons for it.

In the Northern Territory in 2010 to 2011, 57% of female offenders sentenced in the Supreme Court, and 75% of women sentenced in the Court of Summary Jurisdiction were Indigenous.³⁰

Baldry and Cuneen³¹ state that of the three groups identified as being particularly vulnerable in rising imprisonment rates, namely Indigenous people, women, and people with mental or cognitive disability, Indigenous women emerge as a common element.³²

²⁹ *Bugmy v R* [2013] HCA 37; (2013) 302 ALR 192 [36], [37], [38], [43], [44]

³⁰ Bartels, L, 'Sentencing of Indigenous Women', *Indigenous Justice Clearinghouse, Research Brief 14, November 2012*, p 2

This paper considered whether or not a bias against Indigenous offenders was evident in sentencing practices, but found that once it was taken into account that indigenous women are more likely to be violent offenders, and repeat offenders, that bias against Indigenous women in sentencing was not indicated.

³¹ Baldry, E & Cuneen, C, 'Imprisoned Indigenous women and the shadow of colonial patriarchy' *Australian & New Zealand Journal of Criminology* (2014, DOI 10.1177/0004865813503351) Online at <http://anj.sagepub.com/content/early/2014/03/17/0004865813503351> The argument of Baldry and Cuneen in this article centres around prisons being the modern versions of colonial, patriarchal institutions traditionally used from the time of settlement for the control of Indigenous people, and now, increasingly, Indigenous women.

VIOLENT OFFENDING

Given the most prevalent indictable crime committed by women in the NT are acts intended to cause injury, the research has further considered characteristics of three violent offences: murder, manslaughter, and unlawfully causing serious harm.³³

Murder & Manslaughter in the research period

Only one female was found guilty of murder in this period, which was in 2012.

There has been a general increase in the number of women sentenced for manslaughter, except in 2014 when there was only one. There were three in the first 6 months of 2015.

In the reporting period there has been:

- 14 women sentenced for manslaughter;
- in 9 of those cases, the victim was the offender's male partner;
- in 11 of those cases, the victim died of stabbing; and
- in 10 cases there was specific reference in the sentencing remarks to the offender suffering domestic violence either at the hands of the victim, other men over the course of her life or both.

The only murder case in the Northern Territory in this period was that of Evelyn Namatjira. This case carries many features that commonly arise in the NT jurisdiction. As this was a murder trial, these features were fully explored, with expert evidence called, and so, provide an excellent case for analysis. The following features were present:

- Ms Namatjira was an Aboriginal woman raised in the remote community of Hermannsburg, and her first language was her tribal language, Arrernte;
- At the time of the killing, the offender was living in Alice Springs in Government housing which was leased in the offender's name but with any number of family members staying there when visiting from 'out bush' often for extended drinking sessions;
- the victim was the offender's sister;
- the death was by stabbing;
- the offender and victim, and witnesses, had been drinking excessive amounts of alcohol;
- the motive was, at first glance, trivial and completely without provocation, but upon evidence from an anthropologist it was found by the trial Judge that the victim's conduct in the lead up to her death substantially mitigated the conduct of the offender, to the extent that exceptional circumstances were found to justify a shorter non-parole period than that presumed to apply;

Whilst this paper does not look further at this issue, the paper makes an interesting and salient point. In practical terms, they highlight the lack of understanding or response to the specific needs of Indigenous women in the criminal justice system. In the course of this, they refer to the New South Wales case of *R v Fernando* (1992) 76 A Crim R 58, and its reference to the male Aboriginal offender, the new 'barbarism' around Aboriginal culture (with Aboriginal men as perpetrators, Aboriginal women and children as victims, and Aboriginal culture as the cause), and the lack of consideration of Indigenous women offenders as a group who could potentially benefit from therapeutic or specialist courts for Indigenous women.

³² Ibid, p 3

³³ *Criminal Code Act* (NT), s 156, 160 and 181.

- Ms Namatjira had chronic disease, acquired brain injury from alcohol abuse and head injuries from numerous blows to the head with weapons over the course of her life, from male partners and male drinking partners;
- She was found to have mild cognitive impairment;
- She was found to experience psychotic symptoms when withdrawing from alcohol, which did not amount to ongoing psychotic illness but represented acute disruption of normal brain function.

It was a case where, because it was a murder trial, expert evidence was called from a neuropsychologist, neurologist, psychiatrist, forensic psychiatrist (for the Crown), and an anthropologist. By virtue of this, it fully explored the circumstances of both the offence and offender, in a way that does not often happen for less serious offending in the Supreme Court and Court of Summary Jurisdiction. In this case, the availability of expert evidence led to the sentencing court being able to find exceptional circumstances, and impose less than the usual non-parole period. The finding of exceptional circumstances was not challenged on appeal. It highlights, though, the potential deficiencies of sentencing where the same level of expert opinion is not sought. It is accepted in this study that it is not possible to have this level of expert evidence called in each case. However, it raises the question about how courts are to do proper justice to offenders and the community in the absence of it, especially in light of the language and cultural differences between the judiciary, practitioners and the defendants (see further discussion below).

Serious harm in the research period

Unlawfully causing serious harm was the most prevalent offence, so was analysed in more detail.

The number of women sentenced for unlawfully causing serious harm was 62 (out of a total 189). The total number of women sentenced for this offence peaked in 2012 with 17. In the first 6 months of 2015, 8 women had been sentenced to unlawfully causing serious harm.

-Victims

The picture with victims is interesting, and perhaps at odds with some of the Australian literature where it is often suggested or assumed that the majority of victims of women offenders are likely to be male partners or ex-partners who have been perpetrators against the offender. In fact, in 53% of cases, the victim was male (40% male partners 68% of whom had a reported background of committing violence against the offender, 13% were other males), and in 47% the victims were female (with an exact 50/50 split between family members or other). However, the research supports the contention that violent offending, even when against other females, is more likely to be precipitated by violence against the offender, such that features of self-defence, or provocation were present more often than not (66% of cases). Anecdotal evidence provided to the author of the study suggested that a lot of Aboriginal females offending against other Aboriginal females is to do with female family members either warning a female complainant off making a complaint to police about an assault by a male family member, or taking retributive action for a female reporting a male offender to the police.³⁴

³⁴ These anecdotal statements were made in the course of a Panel discussion in May 2014 in Alice Springs regarding Women Offenders by a prominent female Aboriginal leader, and a manager of a women's NGO in Alice Springs.

-Other factors

The vast majority (63%) were stabbings, mostly with a knife, but sometimes with improvised weapons like a stick or broken glass bottle and 29% with a stick, nulla nulla or a bar. It would be interesting to compare whether knives are as prevalent with male offenders. One reason for prevalence is obviously access. However, given the high rate of self-defence or provocation involved, it could suggest use because there is a need to bring a dispute to an end with an extreme act, i.e. the more vulnerable an offender is, the more likely she is to try to bring the dispute to an end with the introduction of a weapon that can overpower a more physically powerful person or group.

In 76% of the cases, the offenders were intoxicated with alcohol at the time of offending.

In terms of the criminal histories of the offenders, just over half had never previously been convicted of violent offending (23% first time offenders, 29% prior convictions but without violence), and just under half had prior convictions for violent offending (45%).

The research did not look specifically at the number of cases where family hardship was found to mitigate sentencing. However, it did not stand out as a sentencing trend, contrary to what was expected to emerge in the case of female offenders.

What points can be drawn from an analysis of serious harm offending?

The analysis shows:

- Offending often occurs in the context of family violence in its broader context (whether there is a violent male partner involved on the sidelines, or an historical family dispute);
- Aboriginal women are disproportionately offending;
- It appears likely that when women are perpetrating violence, the number of times provocation or self defence features is greater than with male offenders. However, this needs more in depth research, given the research did not include a comparison of male and female offending.

Drawing from this, the reasons for women's offending will not just be answered by reference to battered woman syndrome, because the research shows that other females are victims in 47% of cases. Having reference to what the literature shows regarding victimization rates, the effect of complex trauma must be considered to understand the context of the offending.

In a Victorian study that compared differences in sentencing outcomes for male and female offenders, it was found that in the higher Victorian courts women were being sentenced to imprisonment more often and for longer periods, because there had been an increase in serious offending. However, a key conclusion of the study, which incorporated Magistrates', County and Supreme Courts, was that women were still less likely to be sentenced to imprisonment than men, and for lesser periods, but that the disparity was justifiable for legitimate reasons including the seriousness of the offending, criminal histories and history of victimization, rather than a gender bias per se.³⁵ This is consistent with what was found in the NT study regarding characteristics of the female offender.

NT SENTENCING LAW

³⁵ Gelb, Dr K, 'Gender Differences in Sentencing Outcomes' *Sentencing Advisory Council*, (2010)

Adult offenders are sentenced under the *Sentencing Act*. The purposes of sentencing are prescribed, following which the matters to which the court may have regard are set out.³⁶ There are no provisions, like those that exist in Canada and New Zealand, specifying any special or specific consideration that is to be given to Aboriginal defendants. The sentencing discretion is fairly broad within these parameters.

However, consistently with other States and Territory legislatures, there has been a trend for some time in the Northern Territory to make sentencing more prescriptive. The justification is the emphasis it brings to formal equality in sentencing, by lessening the impact of individualized factors and judicial discretion. For example, the mandatory sentencing regime for violent offences has been broadened and section 16AA of the *Crimes Act* 1914 (Cth)³⁷ specifies that customary law and cultural practice cannot be used to aggravate or mitigate criminal conduct when an offender is sentenced, or an order made in relation to that offender.

The NT case law is now clear that gender, in and of itself, is not a basis that justifies different sentencing.³⁸ This fits with the legislative trend focusing on formal equality before the law. As an example, *The Queen v Tulloch*³⁹ (*Tulloch*) was a Crown appeal against the sentence of an adult woman charged with maintaining a sexual relationship with a male child. In the original sentencing remarks, the sentencing Judge did not refer to the gender of the offender and victim specifically as being relevant to sentencing. The Judge described at some length the significant damage done to the victim by the relationship. He quoted the NT Court of Criminal Appeal (NTCCA) in *R v GJ* which emphasizes the purpose of this type of legislation being:

‘to protect young persons from entering into sexual relations before they are mature enough to do so and to have weighed up the possible consequences. Another is to deter older persons, especially men, from taking advantage of the immaturity of the young in order to satisfy their lust or in order to exercise control over their victims’.⁴⁰

However, the Judge took into account that ‘...the youth was a willing participant in the relationship and that he was not, for example, in the situation of a family member, stepchild, school student or other young person with whom you stood in a particular relationship or relationship of influence’⁴¹. Clearly, the statement must be understood in the context of describing aggravating features which are commonly present in offences of this type, but were not present in this case. However, it is somewhat at odds with the earlier comments highlighted above. The NTCCA, on the appeal, made it clear that a

³⁶ *Sentencing Act* (NT) s 5

³⁷ *Crimes Act* 1914 (Cth), 16AA: In determining the sentence to be passed, or the order to be made, in relation to any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for: (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

³⁸ For the recent NT Supreme Court case law on gender and sentencing, see: *The Queen v Nagas* (1995) 5 NTLR 45; *FG v Peach* (2003) 177 FLR 206; *Midjumbani v Moore* [2009] NTSC 27; *The Queen v Tulloch* [2013] NTCCA 6

³⁹ [2013] NTCCA 6

⁴⁰ *R v GJ* (2005) 196 FLR 233 at 241

⁴¹ *The Queen v Kristy Louise Tulloch*, Transcript of Proceedings, 25 January 2013, SCC 21123971

child of any gender cannot consent, and if there is an appearance of consent, that it is not a mitigating factor.⁴²

The NTCCA determined that this was an appropriate case to make it clear that the gender of offenders and victims in cases of this type is irrelevant.⁴³ It applied the Victorian Court of Appeal decision of the *DPP v Ellis*⁴⁴ which allowed an appeal against a sentence of an adult female charged with sexual offending against a male child. In the *Ellis* case it was found the lenient sentence could only be explained by the sentencing Judge having an '*unconscious sympathy with a female offender or a belief that no real harm had been done to the victim*', and further, '*unintentionally violated the rule of equality of the law*'.⁴⁵

Perhaps in *Tulloch*, the principle set out in *Ellis* was adopted for the purpose of clarifying that the words '*especially men*' in *R v GJ* did not justify lesser sentences for women by virtue of gender. Whereas, those words '*especially men*', could be interpreted simply to be an acknowledgment of the fact that it is a prevalent offence for men, but not women.

The court emphasized that punishment, denunciation and general deterrence had to be paramount in *Tulloch's* case, and so, the appeal was allowed and the sentence increased from 2 years 6 months suspended after 6 months for a period of 3 years, to 4 years suspended after 18 months for a period of 2 years 6 months.⁴⁶

What is interesting about this case is that the NT research showed that female sexual offending against children is relatively rare. There was only one case in the entire research period. This lack of prevalence could potentially provide a basis for less weight to be given to the more punitive sentencing purposes, including general deterrence, in the case of female offenders.

In *Ellis's* case, the Victorian Court of Appeal did not decide on how prevalence should affect sentencing of females, and Callaway J specifically mentioned that he did not express any opinion about whether or not general deterrence should be given less weight for female offenders committing certain categories of offences.⁴⁷ The Court of Appeal confirmed the principle that male and female offenders should be treated equally *solely* on the basis of gender extended beyond sexual offences, but explained that there are differences between male and female offenders which may legitimately affect the sentencing, and the law does not require an '*artificial transposition, treating men as if they were women or women as if they were men*'.⁴⁸

In the NT, the NT Court of Criminal Appeal in 1995, in a robbery case, *R v Nagas*, made specific observations about the relevance of prevalence and gender.⁴⁹

The same observations have not been made in cases subsequent to *R v Nagas*. In 2003, the Supreme Court in *FG v Peach* sentenced a mother charged with sexual offending against her daughter, incited by

⁴² [2013] NTCCA 6 at [31]

⁴³ *Tulloch* at [32]

⁴⁴ (2005) 153 A Crim R 340

⁴⁵ *Ellis* at para [8] per Callaway JA at 345

⁴⁶ *Tulloch* at [34]

⁴⁷ *Ellis* at footnote 12, page 346

⁴⁸ *Ellis* at para [11] per Callaway AJ at 346

⁴⁹ *The Queen v Nagas* (1995) 5 NTLR 45 p 55

a violent male partner. The Supreme Court applied the family hardship principles set out in *R v Nagas*, but did not make any reference to the observations on gender and prevalence in that case. The issue of prevalence as between male and female offenders was not addressed in *Tulloch* by the sentencing Judge, or the NTCCA on appeal.

This research does not comprehensively review reasons why the distinction between prevalence of male and female offending in particular types of offences is not made. Clearly, the primary reason is formal equality in sentencing. Another reason, for sexual offences against children, in particular, is likely to be the better understood consequences of such abuse on child victims, which are substantial and continue into adulthood (e.g. complex trauma responses), regardless of the gender of the offender or victim. However, in properly recognizing those consequences to victim/survivors as adults in sentencing the perpetrators, how does the court then deal with the same victims who offend as adults (whatever the type of offence)? Is there a point at which someone's background of complex trauma becomes less relevant? This comes back to the discussion about victimisation. Victimisation is closely related to considerations of prevalence both in relation to individual offenders, and offence types.

This is a particular tension that should be given careful consideration for women offenders in the Northern Territory. The implementation of the High Court principles in the case of *Bugmy*, which emphasise individualised justice in sentencing, have not yet been comprehensively considered and applied in the Northern Territory Court of Criminal Appeal.

What is interesting is that the principles in *Bugmy* are still emphasizing formal equality before the law, and in that sense, there is, on the face of it, consistency with the approach of the NT legislature, and NT Supreme Court. However, the High Court approaches it from an angle which appears different from that in the NT. For example, the High Court stated:

'There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.'⁵⁰

The High Court then goes on to clarify that:

'An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.'⁵¹

In explaining the reasoning for this principle, and the way in which a person's Aboriginality should be taken into account in sentencing, Brennan J is quoted:

'The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all

⁵⁰ *Bugmy v R* (2013) 302 ALR 192 [36]

⁵¹ *Bugmy* [37]

material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.⁵²

By virtue of this, it appears that membership of a gender, with the material facts that exist only by reason of being of that gender, must be taken into account, and the cross-sectional facts which may exist of being of a particular gender, in a particular ethnic group. The NTCCA is yet to consider the application of *Bugmy* in the Northern Territory. It will be particularly interesting to see how it develops in relation to the sentencing of Aboriginal women.

Court of Criminal Appeal decisions in the research period

The research considered all Northern Territory Court of Criminal Appeal decisions involving female offenders in the reporting period (1 January 2010 to 30 June 2015). The total of Northern Territory Court of Criminal Appeal decisions involving female offenders was nine.

Given what is outlined above an interesting and, respectfully, disappointing feature of this review is that of eight cases heard by the Court of Criminal Appeal, four were Crown appeals against sentence⁵³, three of which were successful.⁵⁴ Two were defence appeals against conviction⁵⁵, and 2 were defence appeals against sentence⁵⁶.

Some of the CCA cases dealt specifically with issues of gender, victimization and violence. An important case related to gender of offenders, *The Queen v Tulloch*, is discussed above. Two further cases are discussed below.

In *The Queen v Buttery*⁵⁷ the Crown appeal against sentence was dismissed. Ms Buttery was found guilty of the manslaughter of her male ex-partner, where she arranged for her son and others to kill him. The sentencing Judge found features of battered woman syndrome, and a 3 year period of severe and extreme provocation before around a month of less severe violence from the victim. This was reflected in the sentence of 8 years head sentence, with a non-parole period of 4 years. The NTCCA said:

'The sentencing of offenders who themselves are victims and who commit crimes against those who have victimized them is often complex and difficult. This case is a good example of the tensions in the sentencing process in such a situation. In our view, however, the sentence imposed struck the correct balance'.⁵⁸

In *The Queen v Duncan*⁵⁹ the Crown appealed on grounds of manifest inadequacy, and against the finding of exceptional circumstances in the context of mandatory sentencing. In many respects, this

⁵² *Neal v R* (1982) 149 CLR 305 at 326

⁵³ This is an interesting point in and of itself regarding Crown appeals. In the recent High Court case of *Munda*, discussed above, Bell J, in a dissenting judgment where she stated she would have allowed the appeal, she referred to the High Court's principles regarding Crown appeals laid down in *Griffiths v The Queen*, including that prosecution appeals should be a rarity *Munda* para [87 - 88] per Bell J, 628

⁵⁴ *The Queen v Tulloch* [2013] NTCCA 6; *The Queen v Buttery* [2014] NTCCA 3; *The Queen v Duncan* [2015] NTCCA 2; *The Queen v Rudd* [2015] NTCCA 3;

⁵⁵ *Vo v The Queen* [2013] NTCA 04; *Namatjira v The Queen* [2013] NTCCA 08

⁵⁶ although two cases were dealing with issues of statutory interpretation of the same sentence

⁵⁷ *The Queen v Buttery* [2014] NTCCA 3

⁵⁸ *Ibid* at [42]

⁵⁹ [2015] NTCCA 2

case typifies how the serious harm offence and offender appear in the research. Ms Duncan pleaded guilty to causing serious harm by stabbing her male partner in the back. It had occurred in the context of an argument, where Ms Duncan had threatened to stab the victim with a pen, following which he kicked her to the chest. The sentencing Judge at first instance accepted the explanation that Ms Duncan had the knife (at a location away from her home) because she had previously self-harmed. The victim was moving away when Ms Duncan obtained her knife and stabbed him once in the back. The stab was deep, and embedded the knife in his back. It was a life threatening injury that required surgery, a blood transfusion and 14 days in hospital. The victim then grabbed Ms Duncan, pulled her to the ground and punched her to the head. Ms Duncan was the one to call police and wait with the victim until police and ambulance arrived. She made immediate admissions, which the sentencing Judge found, to be evidence of genuine remorse (along with other factors).

At the time of sentencing, Ms Duncan was breastfeeding her one year old child, and had stopped drinking. She was a first time offender and was genuinely remorseful. She was sentenced to 18 months imprisonment, suspended after 2 days. The period of suspension was two years, a significant period to have a lengthy period of imprisonment 'hanging over her head'. On appeal she was sentenced to 3 years, suspended after 6 months. It is not clear if she was still breastfeeding her child at the time of being re-sentenced, and whether she had to be separated from the infant child to serve the sentence, as this issue was not referred to in the re-sentencing.

The Court of Criminal Appeal found that the subjective reasons for leniency had incorrectly outweighed the objective seriousness of the offending. It also referred to the prevalence of such offences in the Northern Territory. In accordance with principles earlier set down by the NT Supreme Court⁶⁰, no specific consideration or reference was made to the offender's gender per se. Nor was there any discussion of how gender might affect consideration of prevalence in either the original sentencing, or the Court of Criminal Appeal decision.

The judgment did not set out Ms Duncan's background in a lot of detail, nor did it refer to any relationship evidence as between the victim and offender. However, she was a 19 year old Aboriginal woman whose first language was Gurindji. An interpreter was used at sentencing. She was a teenage mother. She went to school in a remote township only until Grade 6, in which community she was still living. She had never held employment. She had at least one prior incident of self-harm with a knife. Alcohol was involved. Whilst she threatened the victim initially with a pen, he was the first one to actually apply physical force by kicking her to the chest. The reason for the fight appeared to be trivial.

Taking into account what the literature says regarding rates of victimization of female offenders, the effects of complex trauma and the research identifying what appears to be a failure to capture such information in the NT context, this case contains indicators of those factors being at play. In addition to that, reference was not made to the situation with her child upon her serving a term of actual imprisonment. The seemingly trivial explanation given for the initial argument was not further explored as happened in the case of Evelyn Namatjira (mentioned above). The history of self-harm, and possibility of it indicating the presence of mental illness or complex trauma was not expanded upon at first instance, nor was it referred to in the Court of Criminal Appeal decision.

⁶⁰ *Midjumbani v Moore* [2009] NTSC 27 at [35] to [37]

In that context, it is disappointing that the Court of Criminal Appeal decided on a considerably more punitive approach, involving a considerable period of imprisonment, including the minimum sentence, when a lot of the factors outlined in this paper do not appear to have been explored.

This raises another point, which is a point of considerable discomfort, that the majority of legal practitioners, and all of the judiciary, in the Northern Territory are non-Indigenous. The majority of clients they represent, or preside over, are Indigenous and often still very closely tied to their traditional culture, including speaking their tribal language as a first language. Just how well an Aboriginal offender's story is understood, communicated and taken into account, is challenged by this fact both by language, but also by culture. For example, the *Crimes Act* amendment was brought in specifically in the Northern Territory as part of the Northern Territory Emergency Response which was directed at the high levels of violence and dysfunction in Aboriginal communities. There can be no doubt that the cultural and customary law practices referred to are targeted at Aboriginal people. It ignores that this positions Aboriginal cultural and customary law as 'other' and that Anglo-Australian cultural and customary law is the assumed norm.

To illustrate this point, consider the issue of provocation. Provocation is most typically raised in Australian courts when a male harms a female partner over perceived infidelity. It is about the passion of relationships in the heat of the moment, and also, could be said to be based on a cultural norm in Anglo-Australian culture that still subconsciously attaches significance to a female partner as a male's property. However, if this same passion, and underlying sense of property of a female partner, expresses itself differently in an Aboriginal relationship (i.e. by an attack on a family member of the female partner), it may be considered 'cultural', and therefore, of no relevance to sentencing.

This is a complicated and complex issue beyond the scope of this study. However, the comparison of the cases of *Namatjira* and *Duncan* could be perceived as highlighting some of these deficiencies, and an area where there is a significant risk that justice is not properly achieved. Taking into account what has been earlier mentioned about the lack of data regarding intersectional discrimination, Aboriginal women would be particularly vulnerable to this type of injustice.

The following two cases show how two seemingly 'typical' cases of alcohol fuelled violence by an Aboriginal woman against another Aboriginal person was not as 'typical' as first appeared, and where the path of the cases were significantly altered with expert evidence.

In *The Queen v Molly Daeger*⁶¹, Ms Daeger, a traditional Aboriginal lady from a remote South Australian community, caused serious harm to another Aboriginal female who was drinking with her in a public area in the Todd Mall. The argument was over alcohol, and was started by the victim punching another lady, and hitting Ms Daeger on the back with a stick. Ms Daeger then removed a steak knife from her bag (where she kept many utensils because she was living rough) and stabbed her once to the back of the leg. Surgery was required to repair the wound. Ms Daeger was a heavy drinker, following the death years earlier of her non-drinking husband. An interpreter was used in the proceedings. After a review of Ms Daeger's medical records, it became apparent she had received a head injury as a young person. She was having seizures whilst in custody awaiting sentencing. As a result of this, a neuropsychological assessment was ordered by the court, which established that Ms Daeger had significant cognitive impairment. As a result, the court applied the principles set out by the High Court in *Muldrock v The*

⁶¹ *The Queen v Molly Daeger*, Transcript of proceedings, 12 September 2012, SC 21144578

*Queen*⁶² that the punitive aspects of sentencing are to be given less weight in the case of an offender with cognitive impairment.

In the case of *R v Scotty*⁶³ a traditional Aboriginal woman was charged with the murder of an Aboriginal man. In the course of those proceedings, after observations made by a prison doctor whilst Ms Scotty was in custody awaiting trial, it was established that Ms Scotty was a brain damaged woman of low intelligence. On the basis of expert evidence tendered at the trial, much of the evidence of interviews of Ms Scotty by investigating police officers was excluded on the grounds of fairness. Ms Scotty was able to communicate in basic English, and so, the issues with her cognitive impairment may not have been readily apparent, and may have been 'masked' by language and cultural differences between herself, and the investigating police officers.

The relevance is not just that identification of the matters leads to lesser sentences, or exclusion of evidence. The identification of these issues also permitted the criminal justice system to better assist these women with disabilities upon release from prison. This acts as, and gives weight to, considerations of community protection in an arguably more effective way than occurs if the same women do their time and are released back into the community without appropriate supports.

LAW REFORM

The Final Report of the Australian Law Reform Commission '*Family Violence – A National Legal Response*'⁶⁴, considered how family violence backgrounds to offending should be incorporated into sentencing practices. It mainly considered the issues in the context of repeated violent offending by male offenders against women and children. It considered whether, for example, it should formally be an aggravating circumstance built into relevant offences, whether it should be specified as an aggravating feature in sentencing or a non-mitigatory features, and whether it should be legislatively prescribed, or a sentencing guideline.⁶⁵ There was some reference made to how such reforms could unfairly impact women offenders, but it was not referred to in detail. However, the ALRC did not recommend any changes to the law at the present time, without further consideration. The primary recommendation on this particular issue was to educate judicial officers (and practitioners) with the production of a Family Violence bench book.⁶⁶

WOMEN OFFENDERS POST-SENTENCING

There is some Australian literature looking at the impact of current sentencing practices on women offenders, and Indigenous women offenders.

⁶² *Muldock v The Queen* (2011) 244 CLR 120

⁶³ *R v Scotty* (2007) 21 NTLR 9

⁶⁴ ALRC Report 114 (2010)

⁶⁵ In this context, it is interesting to note that in section 188(2) of the *Criminal Code* (NT) it is an aggravating feature if an assault is committed by a male against a female. This research does not explore whether or not this is a circumstance of aggravation in other jurisdictions.

⁶⁶ ALRC Report 114 (2010), Chapter 13. The ALRC also devoted a chapter to homicide defences and family relationships in criminal laws, in Chapter 14, although this is outside the scope of this paper.

In 2012, the Australian Centre for the Study of Sexual Assault⁶⁷ made the point that female offender characteristics are only now starting to be fully researched and understood. It referred to there being an evidence base for stating that female offender characteristics, and pathways to offending, are fundamentally different to men. This means that the justice system, designed to accommodate and deal with male offenders, is not going to meet the needs of female offenders, and consequently, the needs of the community in punishing and rehabilitating female offenders. For example, women offenders are likely to serve shorter periods of imprisonment, less often, and are more likely to be 'high needs' prisoners.⁶⁸

ACSSA argued that if rehabilitation is to be given proper weight in sentencing women, the prison environment presents a key challenge to addressing complex trauma. Women, particularly victim/survivors of abuse, can be re-traumatised by features of the prison environment such as: '*strip searches..., pat searches, surveillance by male staff and surveillance by staff controlling sexual access to their intimate inmate partners*'.⁶⁹ The ASCCA argues that if these features are managed with a focus on trauma-informed practice and a gender responsive framework, a custodial sentence may provide a time of respite, with space to engage in treatment and healing, and therefore provide proper rehabilitation.

In the Northern Territory, clearly such approaches would also need to incorporate the specific needs of Indigenous women offenders.⁷⁰

The research did not review what services are available specific to women, and Indigenous women, offenders in the Northern Territory.

CONCLUSION

Increasing numbers of female offenders, and increasing female imprisonment is an emerging issue. Female offenders present a small, but rapidly expanding group. It presents an opportunity to improve upon the way criminal justice outcomes have developed for men. In summary, some of the key findings of this research are:

- A partial explanation for the increasing female prison population is an increase in females committing indictable crime, and being sentenced in the Supreme Court;
- Serious violent offending is becoming more prevalent, along with illicit drug and property offending (excluding fraud);
- Violent offending is not just being perpetrated by women against violent male partners, females are often victims too. This means that it cannot be simply answered by reference to battered woman syndrome, but needs to incorporate an understanding of the effects of complex trauma on an offender;

⁶⁷ Stathopoulos, M, Addressing women's victimisation histories in custodial settings, (2012) *Australian Centre for the Study of Sexual Assault issues*

⁶⁸ Ibid, p 6 to 8

⁶⁹ Ibid, p 7

⁷⁰ See also: Bartels, L, 'Sentencing of Indigenous women', *Indigenous Justice Clearinghouse* (2012, Brief 14); Bartels, L 'Violent offending by and against Indigenous Women', *Indigenous Law Bulletin* (2012) ILB Vol 8, Issue 1; Stubbs, J, 'Indigenous women in Australian Criminal Justice: Over-represented but rarely acknowledged' (2011) 15(1) AILR 47

- The causing of serious harm by women is more often than not (68% of the time) accompanied by features of excessive self-defence or provocation;
- Victimization rates for female offenders are high, and are likely to be even higher in the female Indigenous population. These rates do not appear to be properly accounted for in the Supreme Court sentences reviewed. This is something about which legal practitioners and courts should be aware. It is a reminder to those who face these stories day-in and day-out not to become inured to the desperate, and extraordinary situation faced by Indigenous women (in particular) in the Northern Territory. The same applies to rates of offenders suffering from mental illness or disturbance, and intellectual or cognitive impairment. A better understanding of complex trauma by practitioners and courts is likely to lead to better justice for women offenders;
- There is a tension between the legislative trend for formal equality in sentencing, and the High Court's confirmation of individualised justice in sentencing, which needs to be carefully addressed in the case of female offenders, if justice is to be done, for the good of the offender, the victims and the community at large.
- Aboriginal women are particularly vulnerable to injustices and failure of individualised justice in the Northern Territory by virtue of gender, language and cultural differences between themselves and their legal practitioners and the judiciary. This must be carefully considered and addressed at all parts of the criminal justice system, from policing, to sentencing, to post-sentencing.