ABORIGINAL WOMEN IN CUSTODY:
A FOOTNOTE TO THE ROYAL COMMISSION

by Adrian Howe

This is a re-publication of a piece first published by the *Aboriginal Law Bulletin* (as the ILB was then named) in 1988, with the citation of (1988) Volume 1 No 30 *Aboriginal Law Bulletin*. With 2016 marking the 20-year anniversary since the Royal Commission into Aboriginal Deaths in Custody, we thought it an apt time to look back at the commentary that was published at the time.

> There can be no redress for Aboriginal women prisoners until Aborigines are identified as a nation who are culturally different. As indigenous people of this country we have been forced to gradually become bicultural since early colonial settlement.
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> Without this recognition, it will remain the case that Aboriginal Women, and Aboriginal people generally are born to be institutionalized.
> —NSW Task Force on Women in Prison, Report (1985)
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> Wherever a gaol sentence for Aboriginal women is being considered, maximum consideration should be given to alternatives to imprisonment.
> —NSW Task Force, Recommendation No. 79.
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> The wagelessness, poverty, ill-health, poor housing and unsuitable education which 'celebrates' white culture are all present in the court room in the person of the Aboriginal defendant. They are legacies of the civilising mission 'and cannot be magicked' away by minor law reforms, liberal magistrates, or dedicated representatives... they are the outward signs of the fundamental racism of Australian society ...
> —Greta Bird (1987)

Whatever the outcome - however much of a 'whitewash' it turns out to be - the Muirhead *Royal Commission on Aboriginal Deaths in Custody* will be a landmark event in the history of white criminal injustice to Australian Aborigines. Already it has given the lie, in this Bicentennial year, to that celebration farce, by focussing media and public attention on the harsh realities of life and, too frequently death, for Aborigines detained in white custody. By exposing grossly discriminatory police practices and sentencing processes, the commission will provide irrefutable evidence for those who still need it of the racism of the Australian criminal justice and penal systems. In the process, it will not only uncover still more evidence of the appalling conditions which exist in Australian prisons in general: it will create a further impetus for thinking about alternatives to the well-documented over-criminalisation of Aboriginal people.[1] Moreover, even if the commission fails to widen its terms of reference to encompass all relevant issues such as the socio-economic circumstances surrounding Aboriginal deaths in custody,[2] its proceedings will, hopefully, ensure that the over-representation of Aborigines at all stages of the criminal justice system is recognized for what it is: a product not merely of discriminatory policing and sentencing practices, but of the fundamental racism of Australian society.[3]

Yet for all this, there is one dimension of white criminal injustice which remains largely unexplored—that of the imprisonment of Aboriginal women. How many Aboriginal women have died in custody? Nita Blankett, denied a proper inquest after her death in a West Australian jail, is one. However, the stereotypical Aboriginal prisoner—the Aborigine at greatest risk of being imprisoned—is a male aged between 20 and 29. It is Aboriginal males in this age group who are at greatest risk of death in custody and who are, consequently, the focus of the national inquiry. But while it is now well established that Aboriginal people are amongst the most imprisoned in the world[4] it is well to remember that some of these people are women. We can all share the hope of Alice Dixon that the royal commission will 'shed as much light as possible on the truth'[5] about the death of her son Kingsley Dixon in Adelaide jail and on other Aboriginal deaths in custody.

Yet we need to remember that Aboriginal women are not only in the forefront of the struggle to bring public attention to the deaths in custody of their male relatives - they have themselves been grossly over-criminalised. This article is necessarily brief - a footnote

to the main event: the deaths in custody of Aboriginal men - for when we turn the spotlight on Aboriginal women prisoners, the focus blurs. We know so little about them.

Let us start with what we do know. The most recently published national prison census for the year 1986 indicates that in that year there were 70 Aboriginal and Torres Strait Islander women, 400 non-Aboriginal women and 82 'unknowns' in Australian female prisons (the unknowns include 78 women prisoners in Queensland which refuses to supply data). Aboriginal women then, constitute 12.6% of the total female prison population in 1986, compared to 10.6% in 1985, when there were 53 Aboriginal women prisoners, compared to 363 non-Aboriginal and 82 'unknowns'. Alternatively Aboriginal women were being imprisoned at a rate of 150 per 100,000, compared to 9.3 per 100,000 non-Aboriginal women in 1986. In contrast, the figures for 1983 were 83 Aboriginal women as opposed to 5 non-Aboriginal per 100,000. Thus, while the numbers of both groups have increased significantly, the rate of imprisonment of Aboriginal women has remained constant over that period at 16 times that of non-Aboriginal women. The statistics also show that Western Australia still has the highest rates of imprisonment of Aboriginal women. In 1983 Aboriginal women comprised 44 % of female prisoners in that state; in 1986 they were 44.5% (41 of the total 92).[6]

We know too, that Aboriginal women are still being over-criminalised for minor offences. For example, studies in the 1970s showed that Aboriginal women were being imprisoned in disproportionate numbers for drunkenness and disorderly conduct offences. Sentencing patterns indicated that Aboriginal men and women were far more likely than non-Aborigines to receive a prison sentence for minor offences rather than such alternatives as fines, probation and dismissals.[7] Similarly studies of imprisonment in the 1980s reveal that Aborigines are still over-represented in prisons for 'street offences' such as drunkenness, abusive language and vagrancy, and for non-payment of fines for such offences. Indeed, today's picture of adult Aboriginal crime has been found to be similar to that described by Elizabeth Eggleston in the 1960s. Then, the 'Aboriginal offence par excellence' was drunkenness: 20 years later statistics show that 80% of adult Aboriginal crime consists of 'order' offences such as drunkenness and indecent language.[8]

It is, however, important to recognise that most studies of Aborigines and criminal justice are in fact studies of Aboriginal men. For example, in one such study, the stereotypical Aborigine is presented as a man arrested for vagrancy, whose elder sons are arrested for trespass, and whose younger sons are arrested for 'break and enter'. The Aboriginal woman's role? She's his wife who issues a maintenance summons.[9] Sometimes the significance of gender to the construction of Aboriginal criminality is made explicit. According to Richard Bradshaw, for example, defendants appearing on charges of 'possess, consume or supply liquor' - an offence unknown outside Aboriginal communities - are 'almost exclusively male'.[10]

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Yet occasionally, we catch glimpses of Aboriginal women. One recent study of fine default in NSW found that Aboriginal women were significantly over-represented in a sample of women imprisoned for fine default. Another study of the operation of the supposedly liberalised NSW *Intoxicated Persons Act* in north-west NSW found that it had not substantially reduced the high number of Aborigines and of Aboriginal women in particular from being detained in police cells.'[11] Alternatively, the most recent prison statistics (for 1986) reveal that 11 (16%) Aboriginal women are imprisoned for homocide compared to 52 (13%) non-Aboriginal women and nine (13%) Aboriginal women as against 10 (2.5%) non-Aboriginal women are imprisoned for assault.[12] But these statistics must be considered in context, for, generally speaking, Aboriginal women, even those charged with offences against the person, could not be said to be consistently violent.[13]

This is about the extent of the published (and/or obtainable) information on Aboriginal women's imprisonment. As the 1985 NSW Task Force Report on women's imprisonment noted in its chapter on Aboriginal women, 'no research information or clear policy is available specifically on Aboriginal women and the criminal justice system'. Consequently, the Task Force's major recommendation in this area was that funds be sought for a research project on Aboriginal women and imprisonment in Australia, and that this research be controlled by Aboriginal organisations and undertaken preferably by Aboriginal women. On the basis of interviews with Aboriginal women, the Task Force made a number of recommendations which provide some insights into the current situation of Aboriginal women prisoners in NSW. Regarding police, for example, the Task Force recommended that the Police Aboriginal Unit review its policy and procedures in relation to Aboriginal women; that the Aboriginal Police Liaison Unit be expanded regionally and be subject to review by and maximum participation of Aborigines, and that Aborigines be given increased representation in the Unit.[14]

Regarding sentencing, the Task Force expressed concern at the 'current lack of knowledge of Aboriginal culture and customs amongst judges and magistrates' and recommended that this problem be addressed. In particular, it recommended that courts be better informed of alternative community-based organisations which could assist with accommodation for Aboriginal women seeking bail or assistance with drug and alcohol problems; that the community services order scheme be expanded to towns with a high population of Aborigines and that Aboriginal women be placed on community service orders within Aboriginal organisations. Most crucially, 'maximum consideration should be given to alternatives to imprisonment' whenever a gaol sentence for Aboriginal women is being considered.[15]

Thus, while the Task Force did not document the harsh realities of Aboriginal women's imprisonment, it did provide important information about the specific disadvantages of Aboriginal women prisoners in NSW.

The Task Force made a number of other recommendations, notably that:

- the Probation and Parole Service develop a policy in relation to Aboriginal women;
- the Department of Corrective Services upgrade Aboriginal representation on its staff;
- probation and parole officers consult with the Aboriginal community about pre-sentence reports;
- Aboriginal groups be encouraged to visit Aboriginal women in gaol;
- an education programme focussing on Aboriginal studies be developed for these women;
- the library include material appropriate to Aboriginal women's needs;
- more minimal security classifications be made available for all women and for Aboriginal women in parlicular.[16]

Thus, while the Task Force did not document the harsh realities of Aboriginal women's imprisonment, it did provide important information about the specific disadvantages of Aboriginal women prisoners in NSW. Implementation of its recommendations has been slow in that state: by August 1987 an Aboriginal welfare officer had been appointed to Mulawa and efforts had been made to increase Aboriginal representation on the custodial and non-custodial staff. But further research on the special needs of this critically under-privileged group was still being considered at that stage. Until that research is undertaken, the Task Force Report remains the most comprehensive account of Aboriginal women's imprisonment in Australia today.

It is therefore important to note that although the Task Force felt 'constrained by the lack of research on the number of Aboriginal women in custody, the circumstances of their imprisonment, and the extent to which alternatives to imprisonment were considered by the courts, it had no hesitation in asserting that Aborigines were 'among the most imprisoned people in the world'. This conclusion was based on a number of studies demonstrating 'alarming' rates of Aboriginal and Aboriginal women's detention in police cells and 'massive discrepancies' in sentencing of Aborigines. Consequently, most of the Task Force recommendations were aimed at reducing the number of Aboriginal women imprisoned—an aim which was consistent with its overall recommendation in relation to women in the prison system: namely that *imprisonment be a sentence of last resort, that this be a sentencing maxim and that it be enshrined in legislation*.[17]

Following this approach, the question of Aboriginal women's imprisonment could be placed in the context of current demands for sentencing reforms to reduce prison populations in Australia. For example, last year the Victorian Sentencing Committee asserted (in its discussion of sentencing of women) that: 'It is fundamental to any just system of sentencing that there not be discrimination against various classes of offender'. Clearly on the evidence we have, Aboriginal women are being discriminated against. Again, a 1987 Law Reform Commission Discussion Paper on Sentencing sought submissions as to whether Aboriginality should be included as a mitigating factor in sentencing and whether special sentencing options should be available for Aboriginal offenders.[18] Clearly. Aboriginal imprisonment rates demand that they should. In this connection, it is significant that Victorian Aboriginal Legal Services are currently considering introducing an Aboriginal community justice model in which Aboriginal communities would he represented in criminal proceedings against Aborigines.[19]

Ultimately, however, sentencing reform is not the solution to the problem of Aboriginal imprisonment. As David Bites has warned: 'The problems of Aboriginal' crime and punishment largely stem from generations of profound social and economic deprivation which leads to loss of identify, despair and alcoholism'. Consequently, lasting solutions to the problem of 'unacceptably high Aboriginal imprisonment rates' are not found in the restructuring of correctional services or sentencing options.[20] Nor will decriminalisation of Aboriginal offences such as public drunkenness change their imprisonment rate, as studies of the impact of its decriminalisation in NSW and SA have shown.[21] In the

final analysis, the rate of Aboriginal imprisonment and deaths in custody will not change until we deal with the crucial issue: *white construction of black criminality*.

In a recent study, Greta Bird has argued that white Australians' 'construction of Aboriginal criminality can only be understood within a framework of the 200 year process of colonisation, dispossession and marginalization which she calls 'the civilising mission'. She suggests that white Australians might usefully begin the task of confronting the racism exhibited in the construction of Aboriginal crime by constructing our racist practices as crimes. Bird's argument and documentation is persuasive: Aboriginal criminality—their offences against 'good order' (read: white order) —must be considered in the context of 200 years of genocide of the Aboriginal people.[22]

This confrontation with racism, as well as support for Aboriginal demands for Land Rights, a secure economic base, health care and educational opportunity are all necessary, as Matthew Foley has pointed out, if 'a new order in Australian society is to be achieved, free from the poverty and dispossession which lie behind Aboriginal crime and experience of discrimination.[23] But we must not lose sight of criminalised Aboriginal women in all this. For they, in the words of a judge sentencing three Aboriginal women for murder: 'have a feeling of helplessness, hopelessness and purposelessness. Their whole sense of themselves becomes so abused that they lose that natural dignity that Aboriginal women have'. They are 'in limbo: they belong nowhere'.[24] Perhaps one way of ensuring that this least researched, most neglected prison population is not forgotten is to suggest that an Affirmative Action program be implemented for Aboriginal women prisoners. If I may anticipate one objection: it will be said that this would lead to a bifurcated system in which Aboriginal women are seen as the 'softer' option, leaving the men to be dealt with even more harshly than at present. One way of ensuring that this does not eventuate is to extend the affirmative action to Aboriginal male prisoners. In this way white Australians could take one small step - in this their Bicentennial year of shame - to providing long overdue justice to one of the most imprisoned people in the world.

1 See, for example, Matthew Foley, 'Aborigines and the Police' in P Hanks and B Keon-Cohen, Aborigines and the Law (1984).

2 Aboriginal Law Bulletin, October 1987, p.3.

3 G. Bird. The'Civilizing Mission': Race and the Construction of Crime (1987). p.52.

4 ibid. passim. Nita Blankelt is named in a Committee to Defend Black Rights leaflet, National Speaking Tour, September 1986.

5 quoted in The Age, 11 /2/88.

6 National Prison Census: 1986. For 1983 statistics see S. Natty Women in the Prison System (1984). pp.24 and 168.1 am grateful to Anita Scandia of the Australian Institute of Criminology for providing me with relevant statistical data on Aboriginal women in prison. Some of the recent data has not been published-symptomatic. perhaps, of the continuing neglect of Aboriginal women.

7 J. Hartz-Karp, 'Women in Constrains', in S.K.Mukherjee and J.A. Scull, Women and Crime (1981), pp.172-76.

8 Eggleston.Fear, Favour or Affection (1976): Bird. op.cil., pp.1 1 and 45.

9 P Tobin, 'A Meeting of Nations', Legal Service Bulletin, December 1976, p.120.

10 Bradshaw 'Community Representation and Criminal Proceedings', L.S.B., June 1986, p.112.

11 See NSW Task Force on Women in Prison, Report (1985), pp.152-53.

12 Once again I am grateful to Anita Scandia for this unpublished data.

13 NSW Task Force on Women in Prison. Report (1985), p.154.

14 ibid., pp.144-46.

15 ibid., pp.147-150.

16 ibid., pp.9-12.

17 ibid., pp. 143-44 and p.6. See also J. Johnston, 'Women in Prison Programme', Australian Crime Prevention Council Journal, August. 1987; A. Symonds, 'The Treatment of Women Prisoners', in B. Cullen, M. Dowding, J. Griffin, Corrective Services NSW (1988), and A. Howe. 'Equal Justice for Women Prisoners-'Why Settle for Less', Refractory Girl, May 1986, pp.20-23.

18 Discussion Paper, April, 11-387, p.147; Law Reform Commission, Discussion Paper no. 30.

19 Conversation with Mandy Glaister, Victorian Aboriginal Legal Service, 7/2/88.

20 Biles, Prisons and their Problems', in D. Chappell and P Wilson, The Australian Criminal Justice System: The mid 1980s (1986), p.248. See also D.J. Chapman, 'Sentencing Aborigines', L.S.B. Dec. 1976, pp.131-32 and P Kerr. 'Street Offences by Aborigines: A.D.B.Reporl. 1982'. in D. Brown, ed., Policing: Practices, Strategies, Accountability Ind.), pp.38-44.

21 ibid., Task Force Report; Bird, op.cit., p.21.

22 ibid., pp.5. 45-52. See also T. Simpson,'On the Track to Geneva', A.L.B. April 1986, pp.8,9 for a list of white Australia's genocidal practices.

23 Foley op.cil.. p.190.

24 O'Leary J R. V. Herbert, Sampson and Wurrawilya, Case and Comment, Australian Criminal Law Journal. 8, 1984, pp.58-60.