

Sorry for Your Loss: Indigenous Women and Girls and the Criminal Justice System

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The death of Aboriginal and Torres Strait Islander women and girls in custody in Australia remains an untold story. Part of that silence goes back to the Royal Commission into Aboriginal Deaths in Custody which failed to deal specifically with issues relating to women. At the time, it was clear there was something very particular and very wrong with the situation of Aboriginal and Torres Strait Islander women in the criminal justice system. Almost half of all women taken into police custody in Australia were Indigenous: a simple fact which in itself should have demanded immediate investigation.

In particular, Aboriginal and Torres Strait Islander women were being taken into police custody for minor public order offences (in Western Australia 97% of women in police custody for drunkenness were Indigenous). In addition, Aboriginal and Torres Strait Islander women often found themselves in prison for minor offences. At the time of the Commission, nearly two thirds of Indigenous women who were in gaol in WA were there because they could not pay a fine.

There were many commonalities among the Aboriginal women who died in custody at the time of the Royal Commission. Nine of the 11 women were in police custody (rather than gaol) at the time of their death. Most were being held for minor, victimless offences, for example, public drunkenness, fine default or offensive language. The only sentenced female prisoner at the time of death was incarcerated for motor vehicle related offences. The young Aboriginal girl who died in juvenile detention in Queensland was in custody for trying to escape the welfare authorities, and more than half the women who died in custody had been removed from their families as children.

Not one of the eleven women could be categorised as a 'serious offender'. There was potential for all the women to have been offered alternatives to custody. None of the women was incarcerated at the time of death for violent offences or property offences. In the majority of cases the 'crime' might have been treated as a public health issue rather than criminal problem.

Many of the women were being constantly and punitively punished because of poverty and alcohol addiction. For example, Barbara Yarrrie at the age of 16 years was placed in a maximum security adult women's prison in Brisbane for failing to pay a fine for under-age drinking. Fay Yarrrie and Barbara Tiers were imprisoned for lengthy periods simply for vagrancy.

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Today, over twenty five years later since the publication of the Royal Commission, the issue of Indigenous women's over-representation in detention remains to a large extent unchanged. Nearly all of the recent deaths in detention involving Indigenous women—for example the recent deaths in detention of Ms Dhu, Ms Maher, Ms Mandijarra, and many others—bare resemblance with the circumstances of those women whose deaths were investigated as part of the original RCIADIC.

Like those deaths investigated as part of the Royal Commission, most deaths also occurred in police custody and most involved minor, victimless offences such as fine default, public drunkenness and offensive language. Like those deaths investigated as part of the Royal Commission, all occurred in circumstances that were deemed by the coroner to be 'preventable'.

In fact there has been a significant increase in imprisonment of Indigenous women over recent decades. While the general female prison population has been increasing, the rate of increase for Indigenous women has been much greater. The proportion of Indigenous women prisoners increased from 21 per cent of all women prisoners in 1996, to 30 per cent in 2006, and to 34 per cent in 2017.ⁱ Put another way, in 1991 when the Royal Commission published its findings there were 121 Indigenous women in prison, by the end of June 2017 the number was 1,136.ⁱⁱ The rate of Indigenous women's imprisonment in 2017 was 484 per 100,00—which is higher than the non-Indigenous male rate and more than 20 times higher than the non-Indigenous women's rate.ⁱⁱⁱ

A large proportion of these women continue to be incarcerated for minor offences such as fine default. This is especially the case in Western Australia, where one in seven admissions between 2008 and 2013 were for the exclusive reason of 'paying down' fines.^{iv} There were also more than 13,000 cases over the same period involving offenders behind bars for an unrelated matter who also elected to 'pay down' their fines while serving the term.^v

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Statistics, however, only go part way in explaining the full story of Indigenous women's deaths in detention. These figures often mask over certain realities in the criminal justice and health systems. For example, these figures do not capture the many 'near misses'—that is, when an inmate almost dies because of assault, illness or injury while in custody. These incidents do not trigger the usual reporting mechanisms or investigations associated with a death in custody.

The figures and analyses of the criminal justice system rarely capture the meaning and circumstances of those Indigenous women who die of 'natural causes'. And yet racism and unconscious bias appear as common threads in nearly every case of death in police and prison detention.

The figures rarely capture the story of 'crossover kids'—Aboriginal boys and girls in out of home care who are disproportionately represented among the youth detention population and also as victims of crime.

The figures do not capture the many cases of missing and murdered Indigenous women. Indigenous women are disproportionately represented among the lists of missing persons, for example, however Indigenous status is rarely recorded among police or official statistics.

It is an often-overlooked fact, for example, that Indigenous women are disproportionately represented as victims of crime. This is true for Indigenous women, and especially so for Indigenous girls. Indigenous women are rarely afforded equal protections and equal treatment by the law or by law enforcement more generally. This is sometimes due to shortcomings in the police investigations into missing and murdered Indigenous women and girls. This was the case, for example, in relation to the case of the murders of three Aboriginal young people in the Bowraville in the early 1990s^{vi} and the case of the murders of two Aboriginal girls in Bourke in 1987.^{vii} In each case the initial police investigation into these deaths were affected to varying degrees by racism and unconscious bias.^{viii} In addition to compounding grief and trauma for the victims' families, these shortcomings and errors in the collection of evidence create significant challenges for families in securing a verdict of guilty against the perpetrators.

In addition to these shortcomings in official figures and statistics, sometimes the language of statistics and level of analysis used to discuss deaths in custody make us lose sight of something more fundamental. We are talking about people – people with families and friends, people who loved and were loved, people who died prematurely, often in brutal circumstances.

References

ⁱ Cunneen, C. (2018) 'Indigenous Women and Criminal Justice' in Behrendt, L. *et al* (2018) *Indigenous Legal Relations*. Melbourne: Oxford University Press.

ⁱⁱ Australian Bureau of Statistics (2017) *Criminal Courts Australia 2015-16*, Catalogue no. 4513.0, ABS, Canberra.

ⁱⁱⁱ Cunneen, C. (2018) 'Indigenous Women and Criminal Justice' in Behrendt, L. *et al* (2018) *Indigenous Legal Relations*. Melbourne: Oxford University Press.

^{iv} Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 June 2013, 1263 (J.M Francis, Minister for Corrective Services).

^v *Ibid* 1262.

^{vi} Larissa Behrendt (2013) *Innocence Betrayed*. Sydney: Lavarch Productions.

^{vii} Rosemary Neill (2018) 'Deaths of Bourke Teen Girls Revisited Amid Search for Answers' *The Australian* (3 March 2018) <https://www.theaustralian.com.au/news/inquirer/deaths-of-bourke-teen-girls-revisited-amid-search-for-answers/news-story/bbd2fa9a631e3572bea6e083559c45d8>

^{viii} New South Wales Police Force (2018) 'Police Cultural Competency and Anti-Bias Training: Lessons from Bowraville' (police training video).