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Subject: Australian Response to Questionnaire
Working Group on Discrimination Against Women in Law and in Practice
Lessons Learned, Challenges and Opportunities

This response includes input from Australian federal authorities, and does not include data from Australian State or Territories Governments.

Part I – Justice System

1. What are the main causes for women coming into conflict with the law and facing the associated deprivation of liberty, including pre-trial detention? Which are the groups of women who are most vulnerable and why? Please list the types of offenses for which women, or any particular group of women, are typically charged with, including administrative offenses.

The Australian Attorney-General’s Department’s Federal Offenders database indicates that as at 18 September 2018, the total number of women incarcerated in Australian prisons for committing a Commonwealth offence is 82. Of the 82 offenders, 79% have been convicted of drug related offences. The remaining offenders were convicted of financial, tax and social security, migration and people trafficking offences.

*Indigenous Women*

Women in Australian prisons (Indigenous and non-Indigenous) have been found to suffer from social disadvantage, under-education, under-employment, histories of family and relationship violence (including sexual abuse), high incidence of mental illness, and alcohol and substance addictions. Studies focusing specifically on Indigenous women in prisons have reported these same underlying factors.

Indigenous women form a small percentage (2.2%) of Australian women but make up around 34% of the Australian women in prison population.

The Australian Bureau of Statistics publishes a range of data relating to prison populations, including a breakdown of offences committed by Indigenous and non-Indigenous inmates, however, there is no gender specific data available in this particular category. The most common offence categories for Indigenous people (both male and female) in custody were assault, and public order (which includes public drunkenness and other offences).

The states and territories, which are responsible for their respective criminal justice systems, including the administration of police, courts and corrections, collect data on the number of Aboriginal women convicted, but they do not publish data on the types of offences for which they are being convicted.

Studies trying to identify offence type for Indigenous women have used unpublished police and court data. This data is state-based and difficult to compare due to differences in what data is collected. One study on type of offences amongst Indigenous women uses unpublished police and court data from 2010 – 2012. This study reports that when like offences are grouped together, vehicle and traffic offences are the most common for Indigenous women, followed by assault. Most vehicle and traffic offences do not result in detention.

1. Please indicate if there are cases of women facing detention in relation to civil law suits and identify the particular groups of women mostly affected.

No response.

1. What are the main challenges for women’s access to justice, including, for example, the availability and quality of legal representation, the ability to pay for bail, and the existence of gender stereotyping and bias in judicial proceedings?

The Australian Government is committed to providing legal assistance to the most vulnerable members of the community to help them resolve their legal problems. The *National Partnership Agreement on Legal Assistance Services 2015-202*0 (NPA) provides Australian Government funding to legal aid commissions and community legal centres. The *Indigenous Legal Assistance Program* (ILAP) provides Australian Government funding to Aboriginal and Torres Strait Islander Legal Service providers to deliver this assistance.

The Australian Government is providing over $1.77 billion between 2015-2020 for frontline legal services, including $1.3 billion to legal aid commissions and community legal centres through the NPA and $370 million to Aboriginal and Torres Strait Islander Legal Service providers through the ILAP. Both the NPA and the ILAP seek to improve access to justice for disadvantaged people through the provision of legal assistance services to people whose capability to resolve legal problems may be compromised by circumstances of vulnerability and/or disadvantage. Each of the respective funding arrangements for legal aid commissions, community legal centres, and Aboriginal and Torres Strait Islander legal services sets out priority client groups towards which service providers should plan and target their services.

The Australian Government is working with state and territory governments to improve support for Aboriginal and Torres Strait Islander female prisoners. This includes support for funding the co-design of an enhanced model of Adult Through-Care for Aboriginal and Torres Strait Islander Australians exiting prison. Investment of $3.6 million over two years to enhance the existing Commonwealth funded prisoner through-care model and $10.6 million over three years for a youth-specific through care model. Both models will include specific consideration of the needs of Aboriginal and Torres Strait Islander women and girls to transition successfully out of prison, break the cycle of offending and reduce their recidivism rates.

1. What have been the main drivers for the increasing or decreasing of the female prison population in your country in the past decade? To what extent are non- custodial measures used, in accordance with the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)?

The Australian Attorney-General’s Department’s Federal Offenders Database indicates that at this time last year there were 155 female federal offenders incarcerated in Australia. Of the 155 offenders, 57% were convicted of drug-related offences and 35% were convicted of financial, tax and social security-related offences. The remaining offenders were convicted of a range of offences, including proceeds of crime, child pornography, migration and people trafficking and civil aviation offences.

Ten years ago there were 57 female federal offenders incarcerated in Australian prisons for committing offences against the Commonwealth. Of the 57 female offenders, 93% were convicted of drug related offences.

*Indigenous Women*

The increase in the number of sentences and sentenced women in Australian Prisons in the past two decades has been largely attributed to the increasing incarceration rate of Indigenous Australian women. In 1991, there were 104 Indigenous women incarcerated in Australia, by 2010 the average daily number had risen to 643. Research suggests the presenting reasons for this growth are lifestyle, in particular problematic alcohol and drug use and financial social stress, which are correlated with higher rates of offending, in particular violent offences.

The implementation of the Bangkok Rules in Australian prisons in relation to Aboriginal and Torres Strait Islander women prisoners is a matter for states and territories as it is the state and territory governments which are responsible for their respective criminal justice systems, including the administration of police, courts and corrections.

The Australian Government is committed to supporting the state and territory governments to address the over-representation of Indigenous Australians in prison, including ensuring the particular needs of Aboriginal and Torres Strait Islander women in prison are better meet.

The Australian Government’s investment through the Indigenous Advancement Strategy’s Safety and Wellbeing programme includes funding for specific activities to support Aboriginal and Torres Strait Islander girls and women by addressing their specific experiences of the justice system, as both offenders and victims. This includes crime prevention activities for girls and support for women exiting prison to reintegrate into their families and communities.

The Australian Government will also consider the findings of the *Wiyi Yani U Thangani* (Women’s Voice’s) consultation process being led by the Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar. Consultations are taking place with Indigenous women and girls throughout 2018 exploring their challenges, priorities and aspirations. The Commissioner is consulting throughout 2018 and will deliver her report to Government in mid-2019. It is anticipated the consultation report will provide recommendations on the specific needs, challenges and aspirations of Aboriginal and Torres Strait Islander women and girls, including the impact of contact with the justice system on outcomes experienced. Increasing incarceration of Indigenous women has already been identified as a key challenge, with concerns around the lack of culturally appropriate support, rehabilitation and healthcare services within prisons, and the need for better supports to reconnect with their family and community. We are exploring options for the Commissioner to visit Geneva doe the 41st Session of the Human Rights Council (HRC41), to present her report to the international community.

*Humanitarian Settlement*

Australia’s Humanitarian Settlement Program (HSP) helps address the challenges that women who are humanitarian entrants may face in accessing justice in Australia. As part of the HSP, entrants participate in an orientation program that includes a topic dedicated to the law in Australia with a focus on the rights of women and children and how to access legal services.

Part II – Other Institutions

1. What other institutions outside the justice system exist in your country wherein women and girls are institutionalized on grounds such as care, correction, protection and prevention against potential harms, etc.? Please list the groups of women and girls who are most concerned in each situation.

No response.

1. Please explain the decision-making process for the institutionalization of women and girls in each situation, including the role of women and girls themselves in the decision on institutionalization. Please highlight any good practices in terms of enabling women to exercise agency within institutional systems, with due respect to their rights?

No response.

Part III – Forced Confinement in Private Contexts

1. What forms of forced confinement of women and girls exist in a private or social context sanctioned by family, community or group of individuals such as abduction, servitude, guardianship and “honor” practices, trafficking, home detention, “witch camps”, widowhood rites, etc.?

*Women with Disability*

Some women with disability may be subject to seclusion, a regulated restrictive practice defined in section 6 of the Commonwealth National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules (2018) (the Rules) as: ‘the sole confinement of a person with disability in a room or a physical space at any hour of the day or night where voluntary exit is prevented, or not facilitated, or it is implied that voluntary exit is not permitted’.

*Human Trafficking and Slavery*

Human Trafficking and Slavery are serious crimes that fundamentally curtail freedom, making them amongst the most grave of human rights violations. Australia’s laws criminalising human trafficking cover a range of behaviours including slavery, and slavery like practices such as sexual servitude or domestic servitude, forced labour, debt bondage, and forced marriage. These offences can have elements of forced confinement for victims.

1. Please identify the groups of women and girls who are most affected by these situations.

*Women with Disability*

Women and girls with disability whose behaviour or actions may place themselves, or others, at risk of harm.

*Human Trafficking and Slavery*

Human Trafficking and Slavery is not limited to any particular country or any particular region in Australia. However, cases identified in Australia have largely involved victims who were trafficked from Asian countries including South Korea, Thailand, Malaysia and the Philippines.

1. What is the role of law and policy (including customary law and authorities) in your country concerning these types of confinement?

*Women with Disability*

The National Disability Insurance Scheme (NDIS) quality and safeguards arrangements seek to achieve the reduction and elimination of restrictive practices (including seclusion) from the NDIS, consistent with the Convention on the Rights of Persons with Disabilities (UNCRPD) and Australian Governments’ commitments under the National Framework for the Reduction and Elimination of Restrictive Practices (2014).

The legislative and policy framework promotes the use of behaviour support strategies, including positive behaviour support, and imposes significant conditions around the use of restrictive practices. For example, a restrictive practice can only be used as a last resort in response to risk of harm to the person with disability or others, after the provider has explored and applied evidence-based, person-centred and proactive strategies, and must be used for the shortest possible time to ensure the safety of the person with disability or others (section 21).

The Rules state that an NDIS provider must not use a restrictive practice that has been prohibited by an Australian State or Territory (section 8) and require that a restrictive practice be authorised in accordance with any relevant State or Territory process in relation to the use of that practice (section 9).

In addition, the Rules require that a person with disability, and their family, carers, guardian or other relevant person, be consulted when a behaviour support plan is being developed. Details of any regulated restrictive practice to be included in a behaviour support plan must also be provided in an appropriately accessible format (section 20).

The Rules and related instruments impose reasonable, necessary and proportionate conditions of registration on NDIS providers, including reporting requirements in relation to the use of restrictive practices, which will give the NDIS Quality and Safeguards Commission visibility of progress made in relation to the reduction and elimination of restrictive practices in the NDIS

*Human Trafficking and Slavery*

The Australian Federal Police (AFP) is one part of a whole of government approach to combating human trafficking, which is led by the Department of Home Affairs. This approach is outlined in *the National Action Plan to Combat Human Trafficking and Slavery* (2015-2019). As the police agency of the Commonwealth, the AFP has a key role in helping implement the four central pillars of Australia’s anti-human trafficking strategy. The AFP’s main role is to detect and investigate cases of human trafficking and then assist in the prosecution of these cases by the Commonwealth Director of Public Prosecutions

The forms of forced confinement that are experienced by clients on the *Support for Trafficked People* Program (Support Program) can include forced marriage, sexual exploitation in a personal setting and domestic servitude. Whilst these forms of forced confinement may be applicable to both men and women on the Support Program, the majority of clients supported by the program since 2009 have been female (86% as at 30 June 2018).

In Australia, forced marriage was criminalised in 2013, and since this time, the number of clients referred to the Support for Trafficked People Program for forced marriage has been increasing. As at 30 June 2018, 247 alleged forced marriage cases had been referred to the Australian Federal Police (since March 2013), and 56 of these cases were referred to the Support Program. In 2014-15, the number of referrals for forced marriage was 7, compared to 2017-18 where the number of referrals for forced marriage was 13. The majority of forced marriage clients on the Support Program are women and young girls. As at 30 June 2018, 53.6% of these clients were 17 years and under in age.

In February 2018, the Australian Government introduced a trial under the Support for Trafficked People Program to allow people who are victims of forced marriage, or at risk of forced marriage, to access assistance without having to participate in a criminal investigation.

Sexual exploitation as a form of trafficking in Australia has historically been identified as occurring in a commercial setting for Support Program clients rather than in a personal setting. Since 2009, 2% of total Support Program clients (as at 30 June 2018) have been identified as being exploited by means of providing sexual services in a personal setting.

Part IV – Migration and crisis situations

1. What are the specific risks of detention and confinement encountered by women on the move in the context of asylum seeking, internal displacement and migratory processes?

No response.

1. What is the policy relating to the administrative detention of women migrants including pregnant women and women with children?

Under section 189 of the *Migration Act 1958* (the Migration Act) if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person. This provision extends to women and minors. However, where detention of a minor is required under the Migration Act, section 4AA(1) of the Migration Act sets out the principle that it will occur only as a measure of last resort.

The decision to restrict a person’s liberty is significant and it is not made lightly. Held detention is a last resort for the management of unlawful non-citizens. The decision to not grant a bridging visa and hence to detain a person, is based on an assessment of risk. The following groups of people will generally not be granted a bridging visa:

* All illegal arrivals – until the health, identity and security risks which they present to the Australian community are resolved;
* Unlawful non-citizens who present unacceptable risks to the community, including persons with adverse security assessments; and
* Unlawful non-citizens who have repeatedly refused to comply with their visa conditions.

The Migration Act provides the Minister with non-compellable discretionary powers to intervene in cases, where appropriate, to place unlawful non-citizens in residence determination under section 197AB of the Migration Act or, where legislative barriers prevent the Department from doing so, to grant a visa under section 195A of the Migration Act. These are both alternatives to held detention and allow the individuals to reside in the community, while they resolve their immigration status.

People in immigration detention are accommodated in facilities most appropriate to their risk, circumstances and needs. It is the Australian Government’s position that children are not held in immigration detention centres, but are accommodated in alternative places of detention or community detention. Based on individual circumstances, families with children and other vulnerable people, including pregnant women, may be placed in the community under residence determination arrangements or may reside lawfully in the community, depending on the level of support required.

The Department of Home Affairs’ [Child Safeguarding Framework](https://bordernet.immi.local/PPCR/Pages/child-safeguarding-framework.aspx) (the Framework) supports and guides departmental staff, ABF officers, contracted service providers and stakeholders to safeguard the wellbeing of families, particularly women and children, in immigration detention and immigration programs.

The Framework, its associated policies and supporting materials assist with the implementation of a range of child safeguarding and wellbeing aims, including to:

* increase knowledge and capability of departmental staff, ABF officers and contracted service providers through policy guidance, training and support from the Child Wellbeing Officers
* increase the understanding and accessibility of child safeguarding policies and protocols for all families, carers and children, taking into consideration their individual needs
* manage child-related incidents, allegations and complaints in a timely and effective manner, ensuring appropriate support is provided, while preserving the self-respect, dignity and wellbeing of the child
* identify, mitigate, prevent, manage, report and follow-up on abuse and risks of abuse to children
* outline methods to encourage best practice and thereby improve consistency across the Department
* prioritise child-safe recruitment and selection practices.

Additionally, the Department of Home Affairs’ responsive health and mental health policies effectively promote the health and wellbeing of persons lawfully detained under the Migration Act. These policies are consistent with, and help implement, Home Affairs’ legislative obligations, detainees’ other legal rights and their human rights and accord with the Royal Australian College of General Practitioners standards in mitigating detainee health risk. The Department of Home Affairs maintains a suite of health polices targeting the particular health and mental health needs of women in immigration detention, including those residing in the community under section 197AB of the Act.

The Department’s contracted Detention Health Service Provider (DHSP) delivers health care to those detainees who provide free and informed consent to treatment. Qualified, registered health care professionals deliver health services with sensitivity to detainee gender and culture.

The DHSP effects positive health outcomes for female detainees across domains of care including: obstetric and perinatal health care; termination of pregnancy; caring for women who have undergone circumcision or female genital mutilation and child protection and cases involving family violence. Importantly, the Department of Home Affairs’ health policies promote women’s health and wellbeing within the context of the Department’s simultaneous efforts to effect lawful, durable immigration pathway solutions for all detainees, with residence in the community the preferred option for women and families, subject to legal, security or other relevant considerations.