
# Submission of Sisters Inside
# to the
# Inquiry of the Australian Law Reform Commission on
# *Sentencing of Federal Offenders* 2005

[ALRC Issues Paper 29]


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# Introduction

## *Sisters Inside*

Sisters Inside is a community organisation that advocates, strategically, for the collective interests of women in the criminal justice system and provides services to address their more immediate needs. These roles function in a complementary manner - our service provision informs our social change work. Any potential conflict of interest between these two roles is addressed through the division of labour within Sisters Inside - the management structure (including members on the inside) focuses on lobbying and collective advocacy; staff focus on service provision (which may include advocacy for individual women).

This submission should be read in the context of the shared values of Sisters Inside regarding the use of imprisonment as a response to social problems:

> *We believe that prisons are an irrational social response and do not achieve their intended outcomes - they neither "correct" nor "deter" law breaking. In our society, prisons only function to punish and socially ostracise law breakers. This generates alienation and further criminal behaviour. It also explains the disproportionate numbers of people from socially marginalised groups, particularly Aboriginal people, in the prison population.*
>
> *We believe that society should resource prevention of crime through development of progressive social policies, particularly those that value women and children. We need to recognise the long term value of preventative strategies, rather than relying on immediate "outcomes". People who have been through the prison system are best placed to generate realistic solutions to the problems of the criminal justice system. This expertise should be actively valued and encouraged by society. Every member of society is entitled to have their human rights protected. There is no simple solution to how this is best achieved. However, in our society, prisons have been demonstrably unsuccessful in achieving this. Alternative means must be found for protecting society against destructive behaviour.*
>
> *In our view, a key outcome of imprisonment is the social alienation of a wider group than simply prisoners themselves. The children of women in prison are penalised. Children get their sense of belonging and identity from their connections with their closest caregiver(s) and/or kin. Disturbance of this process can have serious consequences in the formation of the adult, including continuation of a pattern of offending in some families. Therefore, it is impossible to consider issues related to women in the criminal justice system without taking account of their children. Further, maintenance of family relationships is critical to women's capacity to reintegrate successfully with the community following release.*

Whilst we hold strong to our commitment to the abolition of imprisonment of women we do not abstain from discussion of reforms aimed at improvement of conditions for women who are currently imprisoned – always keeping in mind that implementation of these reforms should not hinder eventual abolition.

## *Women in QLD Prisons*

In Queensland, there are currently five prisons for women located across the State. They are: Brisbane Women's Correctional Centre (BWCC); Numinbah Women's Correctional Centre (NWCC); Townsville Women's Correctional Centre (TWCC); Helana Jones Community Corrections Centre (HJCCC); and Warwick WCC Program. All women prisoners are incarcerated in those prisons. For the purpose of this submission Sisters Inside calls all five prisons, prisons. We do not differentiate between custodial and community corrections as the issues are relevant to all five prisons.

Women are approximately 6.5% of the Queensland prison population. The numbers of female prisoners has increased by 13% over the last 5 years to 325 in 2003, while the male prison population has remained unchanged[1].

The number of women on community supervision orders has decreased by 39% in the last 5 years, from 4,055 to 2,492, with a similar decline in men on community supervision orders.[2] Community supervision orders include probation, intensive corrections orders, intensive drug rehabilitation (alternatives to imprisonment) and parole, home detention, conditional release (post-imprisonment alternatives).

Approximately 85% of women sentenced to imprisonment in QLD are sentenced to less than two years imprisonment. Most men are serving sentences of less than four years. While 61% of male prisoners had served previous prison sentences, 54% of the female prison population had a prior history of imprisonment. Drug offences accounted for 17% of women in prison but only 7% of men. While 57% of men were convicted of violent offences, only 38% of women were.[3]

According to the Office of Economic and Statistical Research,[4] of the 50,761 female offenders convicted in Queensland courts in 1999-2000, only 15 were convicted of "homicide etc".[5] Of the small proportion of women that have committed offences resulting in death, it is important to understand the minimal risk they pose to society. In many cases, the offences are defensive in the sense that they were a reaction against an abusive partner. In addition, the context of those offences involving violence must be highlighted. Research has found that almost all of the victims who were killed by women prisoners in Queensland were known to the women; the victim was either a husband, de

[1] *Department of Corrective Services Annual Report 2002-2003* Table 1 p.85
[2] *ibid* Table 9 p.89
[3] *ibid* p.3
[4] Table 2.5.1 at www.oesr.qld.gov.au/data/tables/cjsq2000/table_2_5_1.htm
[5] "etc" is not explained, but would include at least manslaughter

facto partner, relative or friend. Killing often occurred in the context of long histories of abuse by partners, or self-defence during arguments or fights. Only a very small percentage were strangers. In contrast, men are less likely to kill immediate family or friends, but twice as likely to kill someone during the commission of another criminal act.[6]

Upon their release from prison, women are less likely than men to be convicted of a subsequent offence, even less so a crime of violence. This suggests that the risk of women offending violently against the community is low. On the whole, such women pose the least threat on release.

The rate of imprisonment for indigenous Queenslanders is 14 times higher than for non-indigenous people in Queensland.[7] At 30 June 2003, indigenous women were 25.3% of the female prison population while indigenous men were 23% of the male prison population.[8] In 2004 Indigenous women were 30% of the population of women in prison an increase of 4.7%.

The overall health status of women in prison is of great concern. Hepatitis C infection is at a rate of 45% and the reported history of women prisoners injecting drugs is 92.3%. Indeed even the Department of Corrective Services itself admits: "Women prisoners are characterised by lower levels of general and functional health, especially for issues related to mental health."[9]

85% of women prisoners are mothers and the majority of them had primary responsibility for raising at least some of their children prior to incarceration.

Historically, women have been over-represented in psychiatric facilities and under-represented in the prison system. However, with the closure of psychiatric institutions and increasingly overtaxed and under-resourced community based services, Queensland is now witnessing a marked increase in the number of women with cognitive and mental disabilities who are being criminalised. Studies on, or about, women in prison indicate that women prisoners have a significantly higher incidence of mental disability including schizophrenia, major depression, substance use disorders, psychosexual dysfunction, and antisocial personality disorder, than the general community. In addition, incarcerated women have a much higher incidence of a history of childhood sexual abuse and severe physical abuse than women in the general population.[10]

Unfortunately, there is a general lack of data substantiating the numbers of women prisoners with mental disabilities. According to some sources 30 to 50% of women in prison have a

[6] CAEFS Human Rights Submission 2003.
[7] *ibid* p.1
[8] *Department of Corrective Services Annual Report 2002-2003* Table 2 p.86
[9] Hocking B.A., Young M., Falconer, T., and O'Rourke P.K. (2002) *Queensland Women's Prisoners Health Survey,* Department of Corrective Services: Queensland.
[10] Kilroy, D., "When Will You See the Real Us? Women in Prison," *Women in Prison Journal* ,October 2001 and Hocking B.A., Young M., Falconer, T., and O'Rourke P.K. (2002) *Queensland Women's Prisoners Health Survey,* Department of Corrective Services: Queensland

learning disability, while others suggest that it is more like 15 to 20%. Department of Corrective Services state that 57.1% of women in Queensland prisons have been diagnosed with a specific mental illness.[11]

Women prisoners in Queensland come from a wide range of backgrounds and experiences in terms of their age, social and economic position, culture and ethnicity, and sexual preferences. They include women who have spent much of their life on the street or in institutions, older first-time offenders, those with families and children, single women, and those with special physical and health needs. As a whole, the population is very diverse - more so than the much larger male prison population. Many women prisoners are identified as having high levels of need for programs and services, including mental health needs. The types of mental health problems are different for women than men. Many problems experienced by women prisoners can be linked directly to past experiences of early and/or continued sexual abuse, physical abuse and assault. Overall, women outnumber men in all major psychiatric diagnoses.[12]

## *Discrimination against women in QLD Prisons*

A copy of our June 2004 submission to the QLD Anti Discrimination Commissioner's *Inquiry into the Discrimination on the Basis of Sex, Race and Disability Experienced by Women Prisoners In Queensland* has already been provided to the ALRC for this reference and we are pleased to note references to it in Issues Paper 29.

The following are summaries of some of the main areas in which we have identified serious, systemic and ongoing discrimination against women in Queensland prisons:

### Security classification

Women in Queensland prisons – and particularly Aboriginal and Islander (ATSI) women, culturally and linguistically diverse (CALD) women and women with mental and physical disabilities - are consistently over-classified, ie subjected to security measures that are unnecessary and oppressive.

There are insufficient low and open security facilities for women prisoners in QLD and an oversupply of high security beds – which are inappropriately filled with women prisoners who pose little or no security threat. There is no obligation in place, nor any effort made, to ensure that prisoners in QLD are classified and accommodated in the least restrictive environment possible.

"Risks" and "needs" of QLD prisoners – for the purpose of assigning security classification – are currently determined by the QLD Department of Corrective Services (DCS) using a risk assessment tool called the "Offenders Risk Needs Inventory" (ORNI).

[11] Hocking B.A., Young M., Falconer, T., and O'Rourke P.K. (2002) *Queensland Women's Prisoners Health Survey,* Department of Corrective Services: Queensland.
[12] Hannah-Moffat, K., & Shaw, M. Taking Risks: Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women, 2001, Government of Canada: Status of Women Canada.

ORNI is supposed to be an objective means of determining risks and needs through examination of "domains" including criminal history; education/employment; financial; family/ marital; accommodation; social interactions; health; and driving.

Sisters Inside contends that ORNI is not objective because it assesses factors such as "low educational level, poor employment history, a childhood that lacks family ties, physical problems and mental problems".[13] thereby translating factors of social disadvantage into "risks". A prisoner who presents with a history of social disadvantage is assessed as a greater risk. For example, if a prisoner is assessed as having been the victim of spousal abuse or was unemployed at the time of arrest, she will be identified as having a "risk" in those areas. A prisoner who lives in a high crime area (a socially and economically disadvantaged area) will have a risk identified. A woman with a psychiatric diagnosis will have a "risk" in that area. Factors recorded as "risks" attract "points". A woman with a "high score" will therefore attract a higher security classification.

**2005 Review of QLD *Corrective Services Act***

The DCS is currently undertaking a review of the *Corrective Services Act* 2000 (CSA 2000) and has proposed the abolition of the current security classification system, with its five security classifications of maximum, high, medium, low and open, and replace it with two classifications only: secure and open custody. They also propose to abolish the requirement for six monthly reviews of prisoners' security classification.

In our view the proposal to abolish variegated classification and replace it simply with "secure" and "open" appears to us to be abandonment by the DCS of any attempt to provide a sentence structure within which prisoners can work to prepare themselves for a safe and successful return to the community.

According to its terms of reference, the efficiency and effectiveness of the *CSA* 2000 in relation to offender rehabilitation and reintegration is one of the four major areas that the current legislative review is required to examine. However the DCS has not issued a discussion paper that addresses rehabilitation nor any assessment of the various incarnations of "sentence management" that have been in place in recent years.

The discussion paper suggests that classification of prisoners into the two categories would be based purely on security considerations: risk of escape; risk to the community; and risk to the security of the prison.

The discussion paper does not specify how these risks will be assessed. If new risk assessment tools are to be adopted we submit that it would be wise, in light of previous failures, to examine them very carefully.

The discussion paper, whilst acknowledging that Queensland's use of open security is one of the lowest in Australia (16.4% of the average daily prisoner population as compared with the Australian average of 27.3%) it does not provide any information

[13] Risk Needs Inventory Assessment, Department of Corrective Services 2004

regarding the number of beds currently available in an open custody setting in QLD. Our observation is that capital expenditure in corrections in QLD has recently been focussed almost exclusively on the provision of high and maximum security accommodation.

## Non-custodial sentencing options and post-prison community-based release

Non-custodial alternatives to imprisonment, and post-prison community based orders, have become extremely unpopular with the Queensland Government and hence with their Department of Corrective Services in recent years.

As we have previously mentioned, the number of women on community supervision orders in Queensland has decreased by 39% in the last 5 years, from 4,055 to 2,492, with a similar decline in men on community supervision orders.[14]

The number of community corrections orders issued in Queensland fell by 11% between 2001/02 and 2002/03 despite an 11% increase in the prison population. In 1998/99, 70% of all prisoners were in secure custody, 13% were in open custody and 8% were in community custody. By 2002/03, 83% were in secure custody, 11% were in open custody and only 5% were in community custody.[15]

**We note (at page 49 of IP29) that 25% of federal prisoners convicted of social security offences and 21% of those convicted of financial crimes were located in Queensland. We submit that this probably reflects the disproportionate use of custodial penalties for non-violent offences in Queensland – although the paucity of data on sentences and their administration makes it impossible to properly evaluate sentencing practices and trends.**

There is only one community correctional centre, or "half-way house", for women prisoners in Queensland. There are also very few other accommodation options for women – particularly ATSI women – leaving QLD prisons.

QLD Community Corrections Boards require women to have achieved low or open security classification and to have suitable accommodation before they will release them to PPCBR (parole, home detention etc). As a result, women are likely to serve their entire sentence in secure custody without access to PPCBR.

Women with mental disabilities are further discriminated against in this regard because of the practice of the CCB's of refusing to grant PPCBR to mentally ill prisoners.

[14] *ibid* Table 9 p.89
[15] Department of Corrective Services (Queensland), *Strategic Plan 2004-2008* (2004)

## Strip searching

Strip searches are mandatory following all contact visits at the Brisbane Women's Correctional Centre. Strip searching indirectly discriminates against women – the effect on women prisoners is disproportionately greater than the effect on men and the requirement is not reasonable in the circumstances.

The enormity of these assaults is exacerbated by the fact that the overwhelming majority of women prisoners are survivors of sexual abuse and incest. Even when carried out by women, strip searches are still assault. They re-traumatise already traumatised women and they function to demoralise and control prisoners in a cruel manner.

## Solitary confinement

In our experience, and that of our clients, there is currently little practical difference between administrative, punitive or "therapeutic" segregation, or solitary confinement, of women in QLD prisons. Most women prisoners experience solitary confinement as punishment – even if it goes by another name – and many prison officers and managers also use it as such.

Our gravest concern is with the use of solitary confinement as a response to behaviours associated with mental disturbance and mental illness. We know, through our extensive casework, that mentally ill and severely emotionally distressed prisoners are the ones most likely to be placed in solitary – by prison officers and managers who are challenged by their behaviours and unable to manage them in any other way. This means that women – who suffer disproportionately in prison from mental illness and severe emotional distress – are also disproportionately suffering long bouts of damaging solitary confinement.

Mental illness and severe emotional distress should not be "treated" by security personnel and solitary confinement – they should be treated by mental health professionals in a health setting. We submit that the millions expended on purpose-built segregation units would be better spent on adequate mental health services in Queensland prisons.

## Access to programs

Women prisoners do not have adequate recreation or adequate programs, including educational and skill-based programs. The small numbers of women prisoners has been a justification for the failure to focus on the particular requirements of women prisoners. Correctional policies and practices applied to women are an adaptation of those considered appropriate for men - women are the correctional afterthought. It is clear that the programs provided to women prisoners are not comparable in quantity, quality, or variety to those provided to male prisoners.

Aboriginal women have identified the need for Aboriginal run courses and programs that would prepare them for release as well as supporting them to cope with the day to day stress, boredom and loneliness of prison life.

Culturally and linguistically diverse (CALD) women found that, in general, contact with prison program staff was not easy. Prison management attempt to overcome language problems through the use of other women prisoners as interpreters is an inadequate strategy to deal with language barriers.

# Preliminary issues

## *Lack of data on sentencing*

We are extremely disappointed that this review, like others before it, is so hampered by the lack of data on sentencing, administration of sentences (and particularly non-custodial sentencing) and the outcomes of various sentence types in Australia (eg breaches, returns to custody, recidivism rates etc).

We note with concern, for example, at page 119 of IP29 that "there are no definitive data concerning the frequency with which courts use non-custodial options for federal offenders".

In the absence of this data, how is it possible to ascertain whether certain federal offenders are more likely to go to prison in one state than in another? How can we compare the severity of the penalties meted out by the various state and territory courts?

We submit that the collection and analysis of sentencing data should be an urgent priority.

We note that the ALRC, in conjunction with the AIC, is planning to analyse anonymised data on federal sentencing in order to identify any inconsistency across the federal system. We submit that such analysis is critical to the success of any future reviews of sentencing for federal offences.

## *Discrimination and human rights in Australian prisons*

We note that the Australian Government has responsibility, under Australian and international law, to ensure that its citizens do not suffer discrimination on the basis of their sex, race or disability[16] and that there is a special responsibility in this regard in relation to federal prisoners entrusted to the custody of state and territory governments.

Similarly, as is noted in Chapter 3 of IP29, the Australian Government also bears responsibility for protecting the human rights of its prisoners, for example ensuring that:

[16] For example, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Elimination of All Forms of Racial Discrimination (CERD).

- No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. [17]

- All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.[18]

- The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.[19]

In our view the routine strip-searching of women prisoners in QLD and the over-use of maximum security facilities and solitary confinement (particularly for women with mental disabilities) are regular, routine and serious abuses of human rights which must be addressed urgently.

## *Mechanisms for federal oversight of prisons*

We submit that the current ALRC reference on federal sentencing provides an opportunity to put in place mechanisms that will give the Australian Government the ability to properly oversee the sentencing and treatment of its prisoners in state and territory courts and prisons, and to address discrimination, human rights and other issues related to their imprisonment and that of all prisoners in Australia.

**It is unacceptable that the Australian Government does not currently monitor administration of federal sentences nor even maintain a list of people serving federal sentences. In our view this is an abdication of the responsibility of the Government for its prisoners.**

**In 2004 Sisters Inside advocated to the Department of Immigration and Ethnic Affairs on behalf of Cornelia Rau who was wrongfully detained in the Brisbane Women's Correctional Centre in the mistaken belief that she was an unlawful non-citizen. In our view, the failure of DImEA to take responsibility for the welfare of this mentally ill prisoner (including her inappropriate placement in solitary confinement) is illustrative of the failure of the Australian Government to take responsibility for all its prisoners.**

We do not believe that the existing, individual and complaints-based, mechanisms available via the Human Rights and Equal Opportunity Commission and the Commonwealth Ombudsman are sufficient to ensure that Australian prisons comply with the international and national standards that apply to them. What is required is consistent and ongoing oversight on a systemic basis by specialised authorities.

Therefore, we support the establishment of:

[17] Article 7 of the International Covenant on Civil and Political Rights (ICCPR)
[18] Article 10, ICCPR
[19] ibid

**3-1** An expanded jurisdiction for the Federal Court so that it can hear appeals from all federal sentences;

**10-7** A National Sentences Database;
**16-1**

**10-8** A Federal Sentencing Council;

**12-4** A Federal Prisons Inspectorate; and

**13-3** A Federal Parole Board.

# IP 29 Questions

## *3-1 Federal Court Jurisdiction*

***Should the jurisdiction of federal courts be expanded to deal more generally with federal criminal matters? If so, should such jurisdiction be extended: to trials and appeals; to all federal criminal matters or a limited class of them; or to lower or higher courts in the federal hierarchy?***

We support expansion of the jurisdiction of the Federal Court to enable the Court to hear appeals on federal sentences. We believe this would provide a mechanism by which consistency of sentencing in federal cases nationwide could be improved. The Federal Court would become a repository of knowledge on federal sentencing practice and state and territory courts would be obliged to consider that their sentences may be subject to scrutiny by the Federal Court.

We are concerned (although there is insufficient data to prove it beyond doubt) that Queensland courts are more likely to impose custodial sentences for non-violent offences by women (such as social security and other fraud) than other jurisdictions. The fact that 25% of federal prisoners convicted of social security offences and 21% of those convicted of financial crimes were located in Queensland (at page 49 of IP29) appears to bear out this observation.

We submit that imprisonment should not be a sentencing option in these crimes of poverty - but whilst it remains an option it should only be used in a tiny minority of cases and Queensland prisoners should be able to have recourse to the federal court to appeal sentences that are manifestly excessive or inappropriate in comparison with those handed down in other states and in other cases.

## *3-2 Federal Prisons*

***Are the current arrangements by which the states and territories provide correctional services and facilities for federal offenders satisfactory? Should the Australian Government establish correctional services or facilities for federal offenders or particular classes of federal offenders?***

We do not support the establishment of federal prisons – either for federal offenders generally or for particular classes of offenders, such as alleged "terrorists".

We are opposed to the establishment of prisons generally, and to the extension of existing prisons.

We have had considerable contact with women prisoners and their advocates in Canada, where there is a two-tier prison system – with Federal and Provincial prisons – and we do not think that system works well for a number of reasons including the placement of prisoners a great distance away from their families and communities.

## *4-2 Transfer/location of prisoners*

***Are the current arrangements by which federal offenders generally serve their sentence in the jurisdiction in which they were prosecuted satisfactory? If not, what arrangements would be preferable?***

We submit that prisoners should be permitted to choose the jurisdiction in which they will serve their federal sentence – on the basis of the location of their work, home, family, community or other support systems, and on the basis of the options available in that jurisdiction for completion of the sentence (for example availability of community service options, periodic detention etc).

This would reduce the volume of transfer requests that are made following sentencing and provide a more rational basis for choice of jurisdiction than simply the geographical location of the offence.

## *5-1 Equality of treatment of federal prisoners*

***Should federal law relating to the sentencing, imprisonment, administration and release of federal offenders aim for equality between federal offenders serving sentences in different states and territories, or between all offenders within the same state or territory? What principles or values should inform this choice? Should the choice be expressed in federal legislation? Should different approaches be taken to different issues in sentencing?***

Queensland has the lowest cost per prisoner per day in secure custody in Australia. It costs only $148 to accommodate a prisoner in a secure facility per day in Queensland, compared with a national median cost[20] of $241 (Productivity Commission 2004). Queensland also has the lowest community corrections costs in Australia at $7 per prisoner per day compared with a national average of $10.[21]

This is only one indicator of the disadvantages suffered by federal prisoners incarcerated in QLD prisons in comparison with other Australian states and territories.

20 ie. the midpoint between the highest and lowest unit costs in Australia.

21 Productivity Commission, Review of Government Service Provision (2004)

We submit that federal law should aim for equality *both* between federal offenders serving sentences in different states and territories *and* between all offenders within the same state or territory.

We submit that the principles and values that should inform the law are those set out in the relevant international human rights instruments to which Australia is a signatory (mentioned above) as well as

- UN *Standard Minimum Rules for the Treatment of Prisoners* (UNSMR),
- UN *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment*
- UN *Standard Minimum Rules for Non-custodial Measures* (The Tokyo Rules); and
- *Standard guidelines for corrections in Australia* 1996 (SGCA).

We submit that these guidelines, none of which have the force of Australian law, are currently violated regularly in Queensland prisons. For example, the following clauses of the SGCA are largely disregarded in Queensland prisons:

> ***1.8*** *There must be no discrimination in any aspect of correctional programs on the grounds of race, colour, gender, marital status, physical or mental impairment, language, religion, political or other opinion, national or social origin, property, birth or other status, except as it is necessary in properly meeting the needs of a disadvantaged individual or group.*
>
> ***5.10*** *The major principle when classifying prisoners must be to place them at the lowest level of security for which they qualify, taking into account the needs of the individual prisoner, and the need to separate each category of prisoners, while at the same time ensuring their continued safe custody.*
>
> ***5.33*** *Prolonged solitary confinement, corporal punishment, punishment by placement in a dark cell, reduction of diet, sensory deprivation and all cruel, inhumane or degrading punishments must not be used.*

We submit that a "bill of rights" for Australian prisoners, based on these instruments, should be incorporated into federal law.

## *7.4 Ancillary orders*

We submit that legislative reform is required to address the current situation whereby persons convicted of social security offences are obliged to repay social security overpayments in addition to any fine, imprisonment or other penalty imposed by a court.

Ex-prisoners experience being subject to Centrelink debt collection procedures following their release from prison as "double punishment" for the same crime.

We submit that the debt collection process, which often includes deductions from social security entitlements, is also destructive to the resettlement process.

We submit that the sentencing process should provide that judges and magistrates *must* consider the issue of reparation for social security offences and include any reparation as part of the sentence for the offence – and that the imposition of reparation orders – in social security and other matters - should only be considered where it would not impact negatively on the resettlement and community reintegration of a person sentenced to imprisonment (ie they should not be imposed on people in poverty).

## *7-5 – 7-8 Non-custodial options*

***What non-custodial options should be available in the sentencing of individual and corporate federal offenders?***

***What are the principles upon which non-custodial sentences should be considered or imposed? Should there be greater flexibility as to how non-custodial sentences are to be served?***

***What should be the consequences of failing to comply with an order for a non-custodial sentence, such as a fine or a community service order? Should failure to comply with a non-custodial order ever result in a custodial sentence? See also Questions 7–9 and 12–5.***

***What custodial options should be available in the sentencing of federal offenders?***

We submit that the full range of non-custodial options currently available in all Australian jurisdictions should be available for federal sentencing, so that there is consistency across the federal jurisdiction.

We submit that the federal government should actively encourage and participate in the development of new, flexible and innovative non-custodial options and refinement of non-custodial sentencing and the, in line with the UN *Standard Minimum Rules for Non-custodial Measures* (The Tokyo Rules) which provide, inter alia, that:

> *2.3 In order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of non-custodial measures, from pre-trial to post-sentencing dispositions. The number and types of non-custodial measures available should be determined in such a way so that consistent sentencing remains possible.*

*2.4 The development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated.*

We submit that the failure of Australian jurisdictions, and particularly Queensland, to pay adequate attention to community corrections, non-custodial options are inadequately evaluated and under-used, or used inappropriately – resulting in ultimate incarceration for "unsuccessful" completion.

We agree with the ALRC that home detention is *not* a non-custodial option but should be considered a custodial sentence – and we will deal with that issue under custodial options, below.

We submit that women, and particularly women who are primary carers for children, women with mental illness and ATSI and CALD women, have special needs that must be taken into account in relation to non-custodial sentences – especially such sentences that involve the performance of community service orders or other programs. Care must be taken to ensure that the orders that are imposed on women are possible considering their circumstances – and support such as childcare, interpreter services etc should be provided – so that non-custodial orders do not automatically become custodial because of the impossibility of a woman complying with the order.

We support the proposal that the magnitude of fines imposed should be linked to the capacity of the person being sentenced to pay. Imprisonment for failure to pay fines is the cause of the unnecessary and destructive imprisonment of thousands of poor women, and particularly ATSI women.

## *10-2 Consistency vs discretion in sentencing*

***What are the most effective methods of striking a balance between the exercise of discretion in sentencing an individual offender and the need for reasonable consistency in sentencing persons convicted of the same or a similar federal offence in like circumstances?***

Sisters Inside does not support the introduction of mandatory sentencing provisions or "sentencing grids".

We submit that it is inappropriate to place sentencing decisions in the hands of politicians, subject as they are to the short-term imperatives of "law and order" politics.

Whilst the judiciary is not unaffected by ill-informed media campaigns around individual und unusual crimes, our experience has been that, because they deal with the full range of individual cases, they are more responsive to the reality for individual defendants.

As we have previously stated, our view is that consistency is better achieved by establishing better data collection and analysis and by ensuring that federal prisoners have access to a federal mechanism for review of their sentences.

## *10-7 National database on federal sentences*

***Should a comprehensive national database be established on the sentences of federal offenders, for use by judges, prosecutors and defenders in federal criminal matters? Does the database operated by the Judicial Commission of New South Wales provide an appropriate model?***

In line with our previous comments about data collection and analysis - we strongly support the establishment of a national database on federal sentences – to improve consistency, appropriateness and effectiveness in federal sentencing.

## *10-8 Federal sentencing council*

***Is there a need to establish a federal sentencing council to promote better and more consistent decisions in the sentencing of federal offenders? What functions should such a body have, and how should it be structured and constituted?***

We support the establishment of a federal sentencing council, hosted in the Australian Institute of Criminology, tasked with providing research and advice (see database above) to the Australian Government and the Australian public. We do not support the UK model of a sentencing council with power to influence the outcomes of individual cases through the issuing of sentencing guidelines.

## *12.4 Federal prison inspectorate*

***Should a body, such as an inspectorate or office of federal offenders, be established to oversee the management of sentences being served by federal offenders? If so, what functions should such a body have, and how should it be structured and constituted?***

We support the establishment of a Federal Prison Inspectorate and extension of the jurisdiction of the Commonwealth Ombudsman so that the Ombudsman can deal with complaints from federal prisoners in state and territory prisons.

It is vital that such an inspectorate must be, and be seen to be, independent of correctional authorities. It should work closely together with other *independent* inspection and

complaints bodies in the states and territories (ie those that report to state and territory parliaments) but not with correctional authorities.

It should report directly to the Australian Parliament, via the Commonwealth Ombudsman.

## *13-2 Presumptive/automatic parole*

***Under what circumstances, if any, should automatic parole be provided to federal offenders?***

We are very disappointed that IP29 refers to post-prison community based release (such as parole) as "Early Release from Custody" (IP29 Chapter 13) thus perpetuating the community misunderstanding of the nature and purpose of post-prison release.

Many people, including correctional personnel, journalists and politicians, refer to community corrections orders as "early release". This is a serious misnomer. Community-based orders form an important part of a prisoner's sentence and should be recognised as such.

Prisoners on community-based orders are subject to a range of restrictions on their freedom ranging from the very restrictive Release to Work orders through Home Detention and Parole. Many prisoners find these restrictions and requirements even more difficult than the time they spent in prison - they have far greater responsibilities and the temptations to indulge, for example in past addictions, are all around them.

We submit that federal sentencing legislation should clarify that a sentence consists of a period of incarceration followed by a number of decreasingly restrictive community-based orders. This would answer the uninformed criticisms of those who complain that "prisoners serve less than half their sentence".

In line with this view, we submit that all sentences should include automatic parole. The current federal system, with its automatic parole for prisoners serving under 10 years, is closer to best practice, in this regard, than the current QLD system, under which Community Corrections Boards are under ever-increasing political pressure not to grant post-prison community based release.

As we have mentioned, the use of parole-type orders, has been on a steep decline in QLD in recent years. As in the federal system, however, there is a dearth of publicly available data on the "stretching" of custodial sentences in QLD.

## *13-3 – 13-6 Federal parole decisions*

***Is the Commonwealth Attorney-General, or his or her delegate in the Attorney-General's Department, the most appropriate person to make decisions in relation to parole and release on licence of federal offenders? Should this function be delegated to state and territory parole boards or should an independent federal body be established to carry out this function?***

***Should the criteria taken into consideration in granting or refusing parole and release on licence for federal offenders be made public? If so, should they be set out in Part IB of the Crimes Act 1914 (Cth)? What criteria should be included?***

***What information should be available to the authority making decisions on parole and release on licence of federal offenders? How should that information be obtained and presented? Should federal offenders have the opportunity to appear personally to make submissions in relation to these decisions? Should legal representation be available?***

***What further provision, if any, should be made for review or appeal of decisions relating to parole and release on licence of federal offenders?***

As set out above, we support presumptive or automatic parole as part of all sentences of imprisonment.

If, however, discretionary parole is maintained, we submit that decisions on community release are decisions which affect liberty and therefore very high standards of procedural fairness are required in order to meet the requirements of natural justice.

We submit that this decision should be made by a panel of experts and community members – a Federal Parole Board – not by a departmental officer acting as the AGD's delegate.

We do not support delegation of this function to state and territory parole boards – because the current inconsistencies in approach would be perpetuated.

We submit that the right to appear in person and make oral submissions should be afforded to all prisoners applying for community release and we refer tot he following administrative law cases on circumstances in which a right to appear in person is mandatory in support of this submission:

- Where the credibility or veracity of an applicant is at issue (*Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551 @ 568)

- Where personal charcteristics are at issue (*Excell v Harris* (1983) 51 ALR 137)

- Where the allegations are grave (*Ansell v Wells* (1982) 32 ALR 41@63)
- Where persons to be heard cannot express themselves effectively and cannot obtain professional assistance (*Goldberg v Kelly* 397 US 255 (1970)

We submit that illiterate, mentally disabled, ATSI and CALD prisoners are severely disadvantaged if decisions are made affecting their liberty "on the papers" and with no right to personal appearance. This is of particular relevance for the many non-English speaking federal prisoners held in QLD prisons on fisheries, drug trafficking and other border-related offences.

We believe applicants for community release should be permitted to appear personally, in their own clothes and outside the prison context so as to avoid sub-conscious prejudice on the basis of their incarceration.

We also believe there should be a right to legal representation in applications for community release, or at least the ability to permit this in cases where there are special circumstances or legal points at issue or where the prisoner is disadvantaged by educational level, illiteracy, mental disability or CALD or ATSI status.

## *13-9 – 13-10 Revocation of parole/return to custody/street time*

***Is the law and practice in relation to automatic revocation of federal parole or licence satisfactory? Should 'street time' be deducted from the balance of the sentence to be served and, if so, should this be provided for in federal legislation to ensure a consistent approach across all jurisdictions?***

***Should federal legislation include a list of options available in relation to federal offenders who have failed to comply with the conditions of a parole order or licence? What options should be included? Should the list be exhaustive?***

We submit that "street time" should be consistently deducted from the balance of all sentences following a return to custody. In our view, time spent under community supervision should be considered part of a sentence and credited as such. This has been the approach under QLD law since 2000.

In our experience, in QLD, many women are returned to custody, with no effective right of appeal or review, for very minor breaches of post-prison community-based orders. We submit that return to custody should be a last resort in response to breach of an order, and that procedural fairness should be observed in recognition that the liberty of a citizen is at stake in the decision.

We suggest that the approach to failures to comply with post-prison release orders should be guided by the UN *Standard Minimum Rules for Non-custodial Measures* (The Tokyo Rules), as follows:

> *14.1 A breach of the conditions to be observed by the offender may result in a modification or revocation of the non-custodial measure.*

*14.2 The modification or revocation of the non-custodial measure shall be made by the competent authority; this shall be done only after a careful examination of the facts adduced by both the supervising officer and the offender.*

*14.3 The failure of a non-custodial measure should not automatically lead to the imposition of a custodial measure.*

*14.4 In the event of a modification or revocation of the non-custodial measure, the competent authority shall attempt to establish a suitable alternative non-custodial measure. A sentence of imprisonment may be imposed only in the absence of other suitable alternatives.*

*14.5 The power to arrest and detain the offender under supervision in cases where there is a breach of the conditions shall be prescribed by law.*

*14.6 Upon modification or revocation of the non-custodial measure, the offender shall have the right to appeal to a judicial or other competent independent authority.*

We submit that a list of alternatives to return to custody could usefully be included in the legislation, however that list should not be exhaustive and parole authorities should be encouraged to use flexible and innovative approaches to avoid return to custody where possible.

## *14-1 Mental disability*

***What concerns arise in relation to the operation of the provisions of Part IB of the Crimes Act 1914 (Cth) dealing with mental health or intellectual disability? In particular, do any concerns arise in relation to: (a) fitness to be tried; (b) the options available for sentencing or the making of alternative orders (including the detention of persons acquitted because of mental illness); or (c) the interaction of federal, state and territory laws in this area? How might these concerns be addressed?***

Sisters Inside uses the term "mental disability" to refer to intellectual disabilities, psychiatric disabilities and learning disabilities. Due to the difficulty in providing an accurate statistical profile of women prisoners with mental disabilities in the prison system, we offer a narrative description of some of the factors that are known about women prisoners with disabilities.

The institutional warehousing of persons with disabilities is no longer an acceptable practice. The recognition that people can and do benefit from community services has rendered the likelihood of institutionalisation more remote. In addition, for those with mental disabilities, institutions have been replaced by antipsychotic drugs, which are

supposed to offer a more humane alternative to long-term hospitalisation. As a result, the provision of community-based services is now recognized as the preferred approach.

Although community integration is promoted as a highly valued principle, relentless cuts to social and health programs over the last two decades have decimated any real hope for progress offered by this principle. Currently, the shortage of adequate community resources causes many persons, particularly those with mental disabilities, to fall through the cracks of the system. In too many cases, society responds to the attempts of such persons to survive by characterising their behaviour as criminal, labelling them as criminal 'offenders', and institutionalising them in the criminal justice system. Social and economic challenges such as homelessness, unemployment, social isolation, malnutrition and substance abuse further compound the plight of people with mental disabilities. As a result prisons are increasingly becoming the default placement for people with mental disabilities.

Historically, women have been over-represented in psychiatric facilities and under-represented in the prison system. However, with the closure of psychiatric institutions and increasingly overtaxed and under-resourced community based services, Queensland is now witnessing a marked increase in the number of women with cognitive and mental disabilities who are being criminalised. Studies on, or about, women in prison indicate that women prisoners have a significantly higher incidence of mental disability including schizophrenia, major depression, substance use disorders, psychosexual dysfunction, and antisocial personality disorder, than the general community. In addition, incarcerated women have a much higher incidence of a history of childhood sexual abuse and severe physical abuse than women in the general population.[22]

Generally, the prison system is ill equipped to provide the services and supports required by women with mental disabilities.

Some women with mental disabilities may have difficulty understanding prison rules if they are not fully explained. It is not uncommon for prison staff to respond to such a circumstance with some form of punishment or by placing the woman in physical restraints or segregation – such as a crisis support unit. Such responses often exacerbate rather than alleviate the woman's symptoms.

The trend to incarcerate persons with mental disabilities in prisons has caused advocates for the mentally disabled to say that the "clock is being turned back to the 19th century".[23] Indeed, the spectre of institutionalisation common in previous days may very well be reinventing itself in today's prisons.

Unfortunately, there is a general lack of data substantiating the numbers of women prisoners with mental disabilities. According to some sources 30 to 50% of women in prison have a learning disability, while others suggest that it is more like 15 to 20%. Department of

[22]Kilroy, D., "When Will You See the Real Us? Women in Prison," *Women in Prison Journal* ,October 2001 and Hocking B.A., Young M., Falconer, T., and O'Rourke P.K. (2002) *Queensland Women's Prisoners Health Survey,* Department of Corrective Services: Queensland

[23] Butterfield, R. *Prisons: The Nation's New Mental Institutions* in *CAPT Outreach Magazine*, February 2000.

Corrective Services state that 57.1% of women in Queensland prisons have been diagnosed with a specific mental illness.[24]

The dearth of reliable statistical information makes it difficult to say with any certainty what percentage of women prisoners are considered to have a mental disability.

Women prisoners in Queensland come from a wide range of backgrounds and experiences in terms of their age, social and economic position, culture and ethnicity, and sexual preferences. They include women who have spent much of their life on the street or in institutions, older first-time offenders, those with families and children, single women, and those with special physical and health needs. As a whole, the population is very diverse - more so than the much larger male prison population. Many women prisoners are identified as having high levels of need for programs and services, including mental health needs. The types of mental health problems are different for women than men. Many problems experienced by women prisoners can be linked directly to past experiences of early and/or continued sexual abuse, physical abuse and assault. Overall, women outnumber men in all major psychiatric diagnoses.[25]

Mental disability can also affect women and men differently. Differences include:

- Usually men turn their anger outward while women turn theirs inward;
- Women prisoners are three times as likely to experience moderate to severe depression (68.9%) compared to men prisoners; and
- Men tend to be more physically and sexually threatening and violent while women are more self-abusive and suicidal. Self-destructive behaviours, such as slashing, are not uncommon for women with mental disabilities.

We see, at page 272 of IP29, that the ALRC is interested in hearing if "any issues arise in relation to the availability of rehabilitation programs for mentally ill or intellectually disabled federal offenders during their sentences".

Our experience, as outlined above, is that Queensland prisons are not equipped, at all, to provide programs that are of any assistance to mentally disabled women prisoners.

We submit that mentally disabled women should not be permitted, at law, to be held in prisons but should be accommodated in specialised health facilities – with a therapeutic focus and expertise.

We also point out that mentally disabled prisoners are systematically discriminated against in the QLD correctional system in that they do not have access to post-prison

[24] Hocking B.A., Young M., Falconer, T., and O'Rourke P.K. (2002) *Queensland Women's Prisoners Health Survey,* Department of Corrective Services: Queensland.
[25] Hannah-Moffat, K., & Shaw, M. Taking Risks: Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women, 2001, Government of Canada: Status of Women Canada.

community-based release programs. Tamara Walsh's recent report, *Incorrections: Investigating prison release practice and policy in Queensland and its impact on community safety*, contains reference to a letter which, in our experience, reflects the usual attitude of QLD Community Corrections Boards to applications from prisoners with mental disabilities:

> *Prisoners with impairment are at a distinct disadvantage compared with other prisoners in terms of release. Some prisoners with impairment are excluded from programs, which impedes their progression through the classification system. Indeed, some prisoners with mental illness have been explicitly informed that they will not be recommended for release until their mental illness is inactive. A letter from the QCCB to a prisoner with mental illness was attached to one submission received for this study. This letter notes that the prisoner in question had completed all necessary programs, and that the prisoner had been of good conduct and industry. However, it goes on to say:*
>
> > *'The Board noted that you have been diagnosed with schizophrenia… Difficulties with managing your psychiatric condition appropriately in open custody have resulted in you moving backwards and forwards between secure and open custody over the past several years… Therefore, the Board is not prepared to approve your application for a post prison community-based release order at this time.'*

## *15-1 Children and young people*

***Should federal legislation play a greater role in relation to the sentencing, detention, administration and release of children or young persons convicted of a federal offence? If so, what should that role be?***

We submit that federal legislation should include a definition of "child or young person" that is consistent with the Australian Government's obligations under the international Convention on the Rights of the Child (CROC), ie that a child is a person under the age of 18, and not leave this definition to state and territory law.

In QLD the definition of 'child' in the *Juvenile Justice Act 1992* is a person aged less than 17 years – with the result that 17-year-old children can be, and are, dealt with in the adult court system and incarcerated in adult prisons.

We submit that it is clearly inconsistent and discriminatory that a child may be treated as a legal adult in one, backward, state but not in another.

We agree with ALRC44 that children and young people charged with federal offences should not simply be subject to the criminal law in whichever state or territory jurisdiction they happen to be charged, but should – like adults – be afforded protections under federal law.

We support the development of national standards for juvenile justice (IP29 at para 15.19) as recommended by the ALRC and HREOC in their joint enquiry into children and the legal process.

## *15-2 "Special Needs Prisoners"*

***What issues arise in relation to the sentencing, imprisonment, administration, or release of the following categories of federal offenders: women; offenders with dependants or other significant family responsibilities; Aborigines or Torres Strait Islanders; offenders with a first language other than English; offenders with drug addiction; offenders with problem gambling; and corporations and their directors?***

In this submission we have not separated our consideration of the special needs of specific groups of prisoners, and particularly women, from consideration of the substantive issues. We urge the ALRC, similarly, to take into account of the diverse needs of women and other prisoners when making recommendations on the substantive issues.