Committee on Children and Young People
Public hearing – 29 April 2021

Responses to questions taken on notice
Aboriginal Legal Service

Support for Children of Imprisoned Parents
Questions on Notice – Keisha Hopgood, Aboriginal Legal Service

Q1. Intensive Correction Orders & Community Service Orders and the like - Have you had experience with that and how that is being used in the system to divert both men and women from gaol?

In our experience, it appears that Intensive Correction Orders (ICOs) are being imposed more frequently than Suspended Sentences were, more clients are being assessed as suitable for an ICO by Community Corrections and some clients who would ordinarily receive a sentence of imprisonment are being given opportunities on an ICO . However, it is our view that clients can receive longer ICOs than a sentence of imprisonment would have been if imposed for the offence. Further, in our experience ICOs are sometimes imposed in matters that shouldn't reach the threshold for a custodial penalty, and some of these clients end up in custody when the ICOs are revoked. We note that for clients with complex needs, including intellectual disabilities or mental health concerns, the strictness of ICO conditions can be difficult to comply with.

Advocating for an ICO can be hampered by a lack of supporting documentation, which can be difficult to gather in local court matters, particularly with mentally ill clients or clients in custody. Further, while a community service order condition can be helpful in advocating for an ICO, many of our clients are found unsuitable for community service due to mental health issues, drug dependency or geographical location.
In our experience it appears that in courts that service fresh custodies, there is still a reliance on short-fixed prison sentences or aggregate sentences rather than ICOs. Non-custody courts appear more willing to consider an ICO or community-based order.

Q2. Just a further question, if I could, Chair. I am just conscious of the advocacy that you have to ensure that those short-term sentencing—that there is an alternative to that, rather than have a woman in custody and separated from her child. If the justice system deems that that is the safest space for the child—that they should be separated—how then do you see a reconciliation there? How can we deal with that and still have a connection with the mother and child in some way?

(continuing on from above) If you have a woman who is sentenced to less than 12 months in prison, the advocacy through some of the groups, including what I heard you say earlier, was that it is important to have that connection still with the child. But if the courts see that it is not safe for the child to have that physical connection with the mother, what is another way that they can still connect, given that a young infant cannot really react to an AVL visit, for example?

In our experience, an order that there be no physical contact between a mother in prison and her child most commonly follows a submission by the Department of Communities and Justice that visits are not safe for the child because of the prison environment. Ensuring visiting spaces are family orientated, having regular family visiting days across all prisons and appropriately resourcing Shine for Kids to support family visits would address this concern.

Q3. We have had other submissions suggesting that section 21A of the sentencing Act should be amended, which talks about the aggravating and mitigating factors of the sentence. The very clear proposal was to include as one of the mitigating factors that should be taken into account the fact that a defendant has parenting responsibilities and is a caregiver, to ensure that at least at some point there is a consideration of the best interests of the child. Do you have any view on that?

I might just invite you to have a look at the submission from Yfoundations, which actually sets that out, and then ask whether or not the ALS would be willing to take on notice how they thought that could be best included in the legislation. One option would be it could just join that long list of mitigating factors in the sentencing Act. The other option would be it would be a standalone provision that actually expressly incorporated the best interests of the child and the rights of children in the sentencing process. I would just be interested on what the ALS's thoughts were in how it could be best incorporated.

As stated, the ALS strongly supports legislative amendment to the Crimes (Sentencing Procedure) Act 1999 (NSW) ('the Act') to require consideration of the fact that a defendant has parenting responsibilities. The ALS' view is that, at a minimum, this should be a factor for consideration under s21 of the Act. However, the ALS supports its inclusion as a standalone provision in the Act. A standalone provision would appropriately position the consideration of parenting responsibilities and the probable impact of parental incarceration on dependent children, as of significant importance in the sentencing exercise. Such a provision could specifically provide courts with the power to reduce penalties in consideration of this factor, such as is provided in sections 22A and 23 of the Act.

The wording of any legislative change would require further consultation to ensure that it had its desired effect, for example, we note that a bare reference to 'the best interests of the child' could lead to a paternalistic interpretation that resulted in increased separation and further intergenerational trauma. The ALS strongly supports the development of guidelines to accompany and support the application of any new provision.

Q4: The ALS budget—do you have a separate budget to deal with care and protection matters or is that just coming out of the ALS pie?

The ALS receives funding and then must determine where that funding is allocated across many competing considerations within both Crime and Care and Protection.