Committee on Children and Young People

Public hearing – 29 April 2021

Responses to questions taken on notice

Community Legal Centres NSW

3 June 2021

Committee on Children and Young People

By email: childrenyoungpeople@parliament.nsw.gov.au

Inquiry into support for children of imprisoned parents in NSW – responses to questions on notice

Dear Committee Members,

Thank you for the opportunity to attend the public hearings held as part of this inquiry on 29 April 2021.

This document includes responses to questions taken on notice by all members of the Community Legal Centres NSW delegation, including Wirringa Baiya Aboriginal Women's Legal Centre (Wirringa Baiya) and Western NSW Community Legal Centre. These responses are informed by advice from the Community Legal Centres NSW Prisoners' Rights Network, provided at its quarterly meeting on 18 May 2021.

1. **Have you had feedback about the use of tablets and audio visual (for family contact during COVID), and any other response you have had from inmates during that time?**

The use of technology to facilitate family contact and communication has had some benefits for people in prison since the outbreak of the COVID-19 pandemic. For parents, having access to iPads in their cells has enabled increased contact with children, including during out of school hours. This is particularly beneficial where it enables parents to participate in their children's daily routines.

However, using technology as a solution to improving contact between children and their parents in prison rests on several assumptions, including that:

1. Everyone on the outside has access to a device and a regular, stable internet connection
2. Everyone has the minimum level of digital literacy to communicate online using Corrective Services systems
3. Children are living with carers who will facilitate contact while their parent is imprisoned
4. Children and young people generally feel comfortable and safe communicating online.

These assumptions do not apply to many people community legal centres work with. Many can't afford devices or regular credit. Others have only intermittent internet access due to where they live, including Aboriginal and Torres Strait Islander people living in remote communities and on missions. Many also have low levels of digital literacy. In some members' experiences, people in prison find the current Corrective Services NSW instructions for online visits difficult to understand and struggle even to make a booking without assistance.

Community Legal Centres NSW
102/55 Holt Street, Surry Hills NSW 2010 Australia
[redacted] | clcnsw@clcnsw.org.au

Community Legal Centres NSW is also concerned about the potential negative impacts a wider roll-out of tech-based communications might have on contact visits for imprisoned parents whose children are in out-of-home care. For example, in Wirringa Baiya's experience, it is already difficult to get funding to bring children in out-of-home care into prisons for contact visits with their mothers in custody. And, as noted in our main submission, there continues to be high levels of stigma around bringing children into custodial environments, including for contact visits. As a result, it is our view that there is a real risk that Department of Communities and Justice (DCJ) caseworkers might seek to limit family contact to tech-based visits. This outcome would not always be in the best interests of children whose parents are in prison.

Lastly, it is often assumed that all children and young people feel comfortable and safe using technology to communicate because they have grown up in a tech-saturated world. However, a recent consultation with young people about their experiences communicating online, conducted by our member organisation Youth Law Australia, suggests that this assumption may not be safely applied to all young people. For example, through the consultation, young people reported concerns about safety and confidentiality when communicating online. Young people also identified 'facelessness' – particularly in custodial settings - as a barrier to open communication. That is, young people feel less safe and less able to communicate openly if they can't see the prison officer who connects their call.

Given the appallingly high rates of incarceration in NSW of Aboriginal and Torres Strait Islander people, including Aboriginal and Torres Strait Islander women, ithese issues are likely to impact them disproportionately. As such, any wider roll-out of tech-based contact facilities must be developed and implemented in close consultation with Aboriginal and Torres Strait Islander people and communities.

For these reasons, it is our strong view that technology should continue to be one of a range of options available for people in prison to contact family members and others outside, It should not be used to replace face-to-face visits, particularly between children and their imprisoned parents.

If access to devices is to be rolled out across NSW prisons to facilitate contact between people in prison and their children, families, friends, and services (including legal services) outside, the NSW Government must:

- Closely consult with Aboriginal and Torres Strait Islander people to identify individual families' communication preferences and needs
- Fund access to devices for children (or their carers) outside prison whose parents go into custody for the purposes of maintaining contact
- Consult with children and young people about their communications preferences and needs, including what measures would help them to feel safe and able to communicate openly during online visits with parents who are in prison
- Ensure that face-to-face visits, including contact visits for children in out-of-home care, remain a real option for children and their parents.

2. **How widely is the LEAP program used?**

- **In FY 2019-2020 LEAP provided 263 advices and 173 ongoing legal services**
- **In FY 2020-2021 (to date), LEAP has provided 248 advices and 129 ongoing legal services.**

These data have been collected from the three community legal centres that deliver services to prisoners through the LEAP program (Women's Legal Service NSW, Wirringa Baiya Aboriginal Women's Legal Centre and Western Sydney Community Legal Centre).

The service data for 2020-21 are down due to the COVID-19 pandemic and the resultant changes to service delivery in community legal centres and in prisons. Prisons and other custodial settings closed to all visitors during the pandemic and there are fewer women in custody in total due to bail and sentencing decision deferrals and a reduction in the number of people refused bail. There has also been significant inmate movement between different settings. For example, during the pandemic the number of women at Emu Plains Correctional Centre decreased from about 180 to 25.

As noted in submissions made to the inquiry by Women's Legal Service NSW and Wirringa Baiya, and by Community Legal Centres NSW in its pre-Budget submission to the NSW Government, **the LEAP program receives no dedicated funding from government** or any other source.

It is also important to note **that these data (like any) are subject to limitations and the raw numbers do not tell the full story**. There are several reasons for this. Across the community legal centre sector, data capture is primarily used to identify and resolve legal ethical issues, like conflicts of interest, and to report against service delivery targets to funding bodies. Each centre captures and enters LEAP data into a national database administered by Community Legal Centres Australia (CLASS). While there is some consistency across data capture and entry practices, there are also some differences. Like any database, CLASS also has limitations. Extracting data as it relates to LEAP clients has been particularly complicated.

People accessing LEAP regularly move in and out of custody, and between different custodial settings. Many also receive multiple instances of advice and ongoing legal services to address their often complex civil and family law needs. This means that data extracted on services provided at specific locations and times may not present a full picture of the service delivered through LEAP.

Further, the data does not reflect the amount of time spent on each matter nor the complexity of legal issues with which people accessing LEAP present. Centres also regularly assist people in custody by providing legal information, non-legal casework services and referrals. Legal services delivered through LEAP include legal tasks, representation, and large case files. Task work involves work completed within reasonably short time frames. Large case files can typically remain open for 12 months or more and involve numerous contacts with a client.

Often, women supported through the program have multiple children, with each cared for through different arrangements (including DCJ or family placements). This can further complicate people's legal issues as they relate to their children. Some have lower levels of literacy and higher levels of trauma or mental health needs than those not in custody. And

many LEAP clients continue to seek services over long periods of time, often disclosing past traumas that raise further legal issues as their relationships with solicitors and non-legal support workers develop.

Finally, working with people in prison creates an additional administrative burden for service providers. For every task completed, there may be phone appointments to arrange, letters to the Governor to write (for every letter written to a person in prison) and last-minute appointment cancellations due to people being transferred within or between prisons or prison lock downs.

All these factors make working with people in prison time-consuming and challenging. To adequately meet the legal needs of people in prison, the LEAP program needs an immediate, dedicated funding injection, which is guaranteed over the long-term.

3. **How can the best interests of children be considered in bail and sentencing decisions? Would it be appropriate to amend the *Bail Act 2013* (s18) or the *Crimes (Sentencing Procedure) Act 1999* (s21A) so that there is an express requirement to consider the interests of children if the person being sentenced is a primary caregiver? Could there be a reverse onus that a person with caring responsibilities for children should not be incarcerated unless the court determines that this is a proportionate response in all the circumstances? Any other suggestions?**

Community legal centres believe strongly that imprisonment should be imposed as a sentence of last resort. We note that under s5(1) of the *Crimes (Sentencing Procedure) Act 1999,* a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. However, subsection (4) provides that a sentence of imprisonment that does not comply with the requirements of section 5 is not thereby invalidated. In effect, this gives limited force to the legislative requirement for imprisonment to be imposed only as a last resort.

In our members' experience, this limited requirement that imprisonment be imposed as a sentence of last resort continues to be inconsistently applied to different groups within the community. This can be seen in the continuing over-representation within the NSW prison population of Aboriginal and Torres Strait Islander people, people with mental ill-health, people with cognitive disability and people who use drugs. .

The final report of the NSW Parliament Select Committee inquiry into the high rates of First Nations people in custody and oversight and review of deaths in custody (released in April 2021) received and endorsed evidence from multiple sources that Aboriginal and Torres Strait Islander women are the fastest growing prison population in NSW (see pp. 31 – 32). Many are mothers and many have a complex history of domestic violence, abuse, and trauma. Our members, including Women's Legal Service NSW and Wirringa Baiya Aboriginal Women's Legal Service, regularly see the devastating impact that the incarceration of mothers, particularly Aboriginal mothers, has on families.

Requiring courts to consider people's parenting responsibilities when making bail or sentencing decisions, would help to address the high rates of incarceration of Aboriginal and Torres Strait Islander women, and reduce the devastating impact imprisonment has on

families and communities (including increased risk of contact with the child protection system and child removal).

Case study: Tanya (not her real name)

Wirringa Baiya solicitors met Tanya at a LEAP outreach at Emu Plains Correctional Centre. Tanya has a seven-year-old daughter. Before going to prison, she was homeless and couch-surfing with her daughter. Tanya has a lengthy history of drug use, mental ill-health, and homelessness. When she went into custody her daughter remained in the care of the people they had been staying with.

Tanya received papers from the Department of Communities and Justice (DCJ) while in custody, which she believed were to appoint her friends as guardians for her daughter. Wirringa Baiya liaised with the local DCJ worker and found out that Tanya's friends had advised they could not look after the child anymore, Tanya's daughter had been placed into temporary care and DCJ was seeking orders allocating parental responsibility to the minister. The next court date was less than two weeks away.

Very quickly, Wirringa Baiya arranged for a solicitor to appear for Tanya at court and completed a Legal Aid application form with her to secure ongoing representation. (Legal Aid had sent her two copies of the application in custody but didn't provide any assistance completing the form – which can be daunting as it's 16 pages long and requires knowledge of the matter).

Tanya is facing serious armed robbery charges and is still on remand with no known release date. She wants her daughter back in her care when she's released, and she's hoping to be released to a six-month residential rehab program. She has no one she can ask to take care of her child while she's imprisoned. Tanya's is a tragic case of the disproportionate consequences of the incarceration of mothers, with her daughter potentially being under the care of the Minister until she turns 18.

Requiring courts to consider people's parenting responsibilities when making bail and sentencing decisions is also consistent with international law. Article 3 of the UN Convention of the Rights of the Child states:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Further, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), call on member states to recognise and address the gender-specific characteristics and needs of women in prison. In particular, the rules recommend member states develop gender-specific options for diversionary measures and pretrial and sentencing alternatives that take account of the history of victimisation of many women offenders and their caretaking responsibilities (Rule 54). In particular, the Rules recommend that non-custodial sentences should be preferred for pregnant women and women with dependent children, with custodial sentences being considered only when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of their children.

For these reasons, **we support amendments to s18 of the *Bail Act 2013* and s21A of the *Crimes (Sentencing Procedure) Act 1999*** that would require courts to consider a person's caring responsibilities for children (for whom they are primary or sole carer) when making bail and sentencing decisions.

However, **we also note serious concerns within our sector that, unless carefully crafted, there is a risk that perpetrators of domestic and family violence could manipulate such provisions**. To mitigate such risks, any amendments would need to include or be accompanied by safeguards to ensure that:

- The onus is on defendants to demonstrate they have genuine role in and primary caring responsibilities for children (and not just parental responsibility)
- Granting bail or non-custodial sentences would not expose children or their primary carer (most often the mother) to danger or domestic violence.
- Judicial officers and criminal lawyers who don't usually practice in Family Law and Children's Court matters receive adequate training to properly interpret and apply the 'best interests of the child' principles.

Finally, Community Legal Centres NSW notes that on its own, requiring courts to consider a person's caring responsibilities when making bail or sentencing decisions, will do little to address the appallingly high rates of incarceration of Aboriginal and Torres Strait Islander people in NSW and across Australia and the devastating consequences for children, families and communities.

As such, we support the full suite of law reform recommendations advocated by the Aboriginal Legal Service NSW/ACT (ALS) which most relevantly include:

- Adopting ambitious state-based Justice targets, as part of the development of the NSW Closing the Gap jurisdictional plan, to end the overimprisonment of Aboriginal people within 10 years
- Removing targets for 'proactive' policing strategies, which disproportionately impact Aboriginal and Torres Strait Islander people, and other people of colour and culturally diverse groups
- Developing a stand-alone legislative provision on Aboriginality in the *Bail Act 2013* modelled on s3A of the *Bail Act 1977* (Vic)
- Abolishing the offence of offensive language, by immediately repealing section 4(A) of the Summary Offences Act 1998 (NSW)
- Decriminalising the use and possession for personal use of prohibited drugs, investing in drug and alcohol rehabilitation and treatment services, and establishing a regional drug court
- Funding the establishment of the Walama Court.

Further detail on these and the ALS's other recommendations to address the over-incarceration of Aboriginal and Torres Strait Islander men, women and children is available in its submissions to the Administrative Review of the *Bail Act 2013* and to the Legislative Council Select Committee Inquiry into high rates of incarceration of First Nations people and oversight and review of deaths in custody. In our view, these recommendations are critical to improving outcomes for children whose parents are or have been in prison.

We also commend to the Committee the recommendations from the Select Committee's final report, including:

- **Recommendation 4:** The NSW Bureau of Crime Statistics and Research conduct research into the growing number of First Nations women in custody, with a view to identifying the factors and causes of this trend
- **Recommendation 5:** The NSW Government ensure long-term funding for post-release support programs for women who have been in prison, including expansion to rural, regional and remote areas.
- **Recommendation 6:** The NSW Government urgently expand the number of post-release housing beds for First Nations women coming out of prison to support women and their children find long-term housing.
- **Recommendation 14:** The NSW Government expressly legislate in the *Law Enforcement (Powers and Responsibilities) Act 2002* and the *Children (Criminal Proceedings) Act 1987* that the arrest, detention, or imprisonment of a person should be used only as a measure of last resort and for the shortest appropriate period of time.

4. **Have you got any other comments on the implementation of the recommendations of a 1997 report into children of imprisoned parents—on how far we have or have not come? Is there anything in particular that we should be deeply concerned about—particular recommendations not having been implemented?**

The executive summary of the NSW Parliament's 1997 Report into children of imprisoned parents, states:

> *A basic premise adopted by Committee Members throughout this Inquiry is that children should not be punished or unnecessarily disadvantaged for the wrongdoing of their parents. In reality this has been the indirect consequence of policies dealing with parents who commit criminal offences. In the past, children have been overlooked and ignored at all stages of their parent's involvement with the criminal justice and penal systems. In recent times they have been separated from their parents, often forced to move from their familiar environment, and suffer the stigma and loss associated with having a parent in gaol. Many children are put into the substitute care system, become wards of the state, and can ultimately end up homeless or involved in the juvenile justice system. Reunification with a parent who is released from gaol is often traumatic and unsuccessful.*
>
> *This Report identifies that one of the main reasons why children of prisoners are such a marginalised group is that they have rarely, if ever, been considered in government policy. Despite their vulnerability there has been little examination of their needs by a range of government departments and agencies including police, courts, corrective services, juvenile justice, community services and education.*

Unfortunately, this statement would not be out of place in the executive summary of the current inquiry's final report. In our view, the 1997 report made numerous useful recommendations, very few of which have been implemented fully. We are concerned by how little progress appears to have been made in the 20+ years between the 1997 inquiry and this one.

As such, while we welcome the renewed interest in this very important issue, we are concerned that unless governments begin to take seriously and implement the recommendations that have already been made in relation to addressing the needs of people in prison and their children, this inquiry may have little fruitful outcome.

We note that some of the 1997 recommendations are not relevant to the current inquiry's terms of reference (e.g. those relating to conditions and services available in immigration detention facilities operating in NSW at the time). However, while our review of the 1997 Report's findings and recommendations has been necessarily brief, we urge the government to consider and implement those that remain relevant. These include recommendations related to maximising the use of diversionary measures for Aboriginal and Torres Strait Islander people and pregnant women in the criminal legal system, the provision of drug and alcohol treatment and rehabilitation and other health services to people in prison, and the provision of adequate post-release services and supports, including access to housing, income support, employment and family reunification services. We particularly urge the Committee to recommend and the NSW Government to adopt the 1997 Report's first three recommendations, all of which relate to the need for robust data about the needs of people in prison and their children, including direct consultation with children and young people and the organisations that support them, as well as the collection of quantitative statistical and demographic data. Specifically:

1. The Premier direct the Office of the Status of Children and Young People [now the Office of the Advocate for Children & Young People] to consult regularly with relevant government and non-government organisations to develop policies and initiatives to meet the needs of children of imprisoned parents.
2. The Minister for Community Services establish and maintain a data system on all children whose parents are in prison and who are in the substitute care system or are wards of the state. The data system should be used to assist the Department of Community Services in formulating practical and sensitive policies for this group of children.
3. The Minister for Corrective Services collect data on the number of inmates in prison who are parents. Such data should be used to establish appropriate policies and practices that facilitate contact between these inmates and their children.

As these recommendations make clear, the collection of adequate and accurate data about the number of people in prison who are parents is critical to designing and implementing appropriate policies, programs, and services for them and their children. In our members' experiences, this data is still not routinely captured, with even the Department of Communities and Justice unable to state definitively how many people currently in NSW prisons are parents.

Ensuring adequate and accurate data about people who are parents in prison and their children is also consistent with the Bangkok Rules cited earlier. For example, Rule 68 recommends UN State Members:

> *organize and promote research on the number of children affected by their mothers' confrontation with the criminal justice system, and imprisonment in particular, and the impact of this on the children, in order to contribute to policy formulation and programme development, taking into account the best interests of the children.*

5. **You know that in the prison system the prisoners actually do a lot of internal work that produces an income stream, be it internal services or providing goods that they manufacture in prison that they sell to external parties. I think it amounts to something in the order of about $430 million every year of real benefit to Corrective Services NSW. What do you think about the idea of using a percentage of that money—let us take 5 per cent, 10 per cent—and actually investing that into services that support prisoners in prison; indeed, further to that, their transition out of prison and things of that nature that are more, if you like, designed to assist those who produce the income in the first instance.**

Community Legal Centres NSW strongly supports adequate investment in rehabilitation and support services to people while they are in prison and post-release, including supports for their children and families. However, it is our firm view that such investment should be made directly by government and not subsidised by the wages earned by people in prison.

Currently there is very little transparency around the wages individual people in prison earn. However, we understand that for many types of work the rate is less than $10 a day. At the same time, Corrective Services charges prisoners higher than market rates to 'buy back' everyday goods through the prison system.

Case Study: Carly (not her real name)

Carly has been a LEAP client for over six years. She is currently at Clarence Correctional Centre and works in the kitchen. For the time she spends working she receives $30 a week.

She puts $20 on her phone account, which leaves her $10 to 'play with'. Carly tells Wirringa Baiya solicitors that with this she is able to buy a couple of packets of chips and maybe a soft drink.

Carly's mother had been putting money into her account from her own Disability Support Pension payment. She is no longer able to do this as she has had extra vet expenses.

The situation can be most pronounced for women in prison, who often receive less support from friends and families outside prison than men. During our consultations with the sector on this inquiry, Wirringa Baiya noted that Aboriginal and Torres Strait Islander women in prison rarely receive 'top ups' from friends or relatives outside. In contrast, research indicates that men continue to be supported financially by women (mothers, grandmothers, and partners) while they are in prison. These women often have to dip into their own limited funds to give extra to the inmate. This has detrimental effect on women on the outside and their children.

In combination, these factors mean many people leave prison with limited financial resources of their own. In our members' experiences, people exiting prison often receive little to no financial support from Corrective Services or other government agencies. This contributes to the cycle of homelessness, poverty, and re-incarceration, which many people who have spent time in prison experience.

In our view, it is unethical for the government to profit so substantially through underpaying people for the work they do in prison and over-charging them for everyday goods. Instead, the NSW Government should increase wages for people who work or study while in prison, so they have access to adequate financial resources to purchase goods while in prison and

to reintegrate into the community when they are released. In addition, rehabilitation, reintegration, and reunification services should be provided directly and adequately funded by government.

Instead, the government should seek to deliver budget savings by investing in decarceration strategies and justice re-investment initiatives, which have demonstrated delivery of benefits to communities and savings to governments.

If you have questions or need further input, please contact our Policy & Advocacy Manager, Emily Hamilton, via [redacted] or [redacted].

Yours sincerely,

[redacted]

Tim Leach
Executive Director
Community Legal Centres NSW