

**Submission  
No 6**

**SUPPORT FOR CHILDREN OF IMPRISONED PARENTS IN NEW SOUTH  
WALES**

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**Date Received:** 26 February 2020

**Submission to the Parliament of New South Wales Committee on Children and Young People *Inquiry into the support for the children of imprisoned parents in New South Wales***

***Executive summary***

This submission addresses particular aspects of the Terms of Reference of the NSW Parliament's inquiry into the possible impact on children of imprisoned parents and the adequacy of policies and services to assist children of imprisoned parents in New South Wales, namely:

- What policies exist and what services are available;
- How effective these services are and identifying areas for improvement; and
- Any other related matters.

The Committee's attention is drawn to a key issue that affects hundreds of children in NSW: the placement of the child in the child welfare Out-Of-Home-Care (OOHC) system as a result of parental incarceration. OOHC describes alternate or substitute care arrangements made for children who are unable to live with their own families, for whatever reason, either temporarily or until the child is 18 years of age. OOHC placements may be 'home-based', where placement is in the home of a carer who is reimbursed for expenses in caring for the child: for e.g., in kinship care, foster care, or other home-based care.<sup>1</sup> Other placements include residential or group home care<sup>2</sup>; independent living arrangements<sup>3</sup>; short-term Intensive Therapeutic Transitional Care (ITTC)<sup>4</sup> or a variety of other, emergency or temporary settings including motels, caravan parks and other forms of unregulated accommodation.<sup>5</sup>

<sup>1</sup> **Kinship care** is where the caregiver is a family member or a person with a pre-existing relationship with the child. **Foster care** refers to the situation where care is provided in the private home of a substitute family which receives a payment that is intended to cover the child's living expenses. **Other home-based care** describes arrangements where care is provided in private homes that does not fit into the above categories. Source: The Commonwealth of Australia. Senate. (2005) Protecting Vulnerable Children p78

<sup>2</sup> This type of care involves children being placed in a residential building owned by the jurisdiction, and which are typically run like family homes, with a limited number of children and staffed by around-the-clock resident workers/substitute parents. Some arrangements are less family-like, with children cared for by rostered staff, which may include a live-in carer and off-site staff (for example, a lead tenant or supported residence arrangement). Source: The Commonwealth of Australia. Senate. (2005) Protecting Vulnerable Children p78 Some children may be placed in a residential unit on their own for short periods of time, with direct care is provided by adult shift workers, often unsupervised. Source: Office of the Children's Guardian Review of Residential Care 2017-2018 p4.

<sup>3</sup> Where children are living independently, such as those in private boarding arrangements. Source: The Commonwealth of Australia. Senate. (2005) Protecting Vulnerable Children p78

<sup>4</sup> ITC is a 13 week program designed to transition young people into less intensive types of care and provide clear pathways to permanency. Source: <https://www.facs.nsw.gov.au/families/permanency-support-program/intensive-therapeutic-care-system>

<sup>5</sup> The Office of the Children's Guardian found that in 2016-17, 352 children (just under half of them aged under 12 years of age) were accommodated in motels or other similar emergency accommodation. Source: Office of the Children's Guardian Review of Residential Care 2017-2018 p3.

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

OOHC consistently produces poor outcomes for children.<sup>6</sup> In 2018 the independent Tune review<sup>7</sup> found that despite 'significant government spending', OOHC was 'failing to improve long-term outcomes for children and arrest devastating cycle of intergenerational abuse and neglect'.<sup>8</sup> Interventions were not evidence-based, and not tailored to meet the individual and diverse needs of vulnerable children.

An under-performing OOHC system is not exclusive to NSW: there have been over 25 separate inquiries into child protection and OOHC systems in Australia since 2014.<sup>9</sup> International bodies have also examined Australia's inadequate child welfare system, with the United Nations expressing serious concerns at the 'widespread reports of inadequacies and abuse', stemming from inappropriate placements of children, inadequate screening, training, support and assessment of (particularly) Indigenous carers; placement of Indigenous children outside their communities; and mental health issues 'exacerbated by (or caused in) care.'<sup>10</sup>

Successive governments have acknowledged that the adverse childhood experiences in OOHC can have a long-lasting and devastating impact. This is reflected in the Australian Parliament's succession of national apologies which specifically recognised the harm done to people by the OOHC system: the 2008 *Apology to the Stolen Generations*<sup>11</sup>, the 2009 *Apology to the Forgotten Australians*<sup>12</sup> and the recent 2018 *National Apology to Victims and Survivors of Institutional Child Abuse*.<sup>13</sup> As the apologies acknowledged, for many people, placement in OOHC exposed them to institutional abuse and neglect, criminalisation, the imposition of a

<sup>6</sup> McFarlane, K., (2017) 'The faulty child welfare system is the real issue behind our youth justice crisis' *The Conversation*, 13 February 2017 <https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217> ; McFarlane, K., (2016) 'Nothing to see here: the abuse and neglect of children in care is a century-old story' *The Conversation*, 15 November 2016 <https://theconversation.com/nothing-to-see-here-the-abuse-and-neglect-of-children-in-care-is-a-century-old-story-in-australia-68743>

<sup>7</sup> McFarlane, K., (2016) 'The single biggest reform to child welfare is a re-run of decade-old promises' *The Conversation*, 18 November 2016 <https://theconversation.com/the-single-biggest-reform-to-child-welfare-is-a-re-run-of-decade-old-promises-68822>

<sup>8</sup> Haydar, N. (2018) 'Secret NSW Government report says out-of-home care fails to help vulnerable children', *ABC News*, 12 June 2018, <https://www.abc.net.au/news/2018-06-12/secret-report-shows-out-of-home-care-fails-to-help-nsw-children/9857966>

<sup>9</sup> Australian Human Rights Commission (AHRC) (2018) 'Children's Rights Report 2017', Australian Human Rights Commission, Canberra, ACT, Australia. p17. <https://www.humanrights.gov.au/our-work/childrens-rights/publications/childrens-rights-report-2017>

<sup>10</sup> [http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf)

<sup>11</sup> 'Apology to Australia's Indigenous Peoples' (Commonwealth Parliamentary Debates 13 February 2008).

<sup>12</sup> 'Apology to the Forgotten Australians' (Commonwealth Parliamentary Debates, 16 November 2009).

<sup>13</sup> National Apology to Victims and Survivors of Institutional Child Sexual Abuse (22<sup>nd</sup> October 2018). <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fvotes%2F24afa1ea-4171-4a9b-a806-ad388220b4b0%2F0010;query=Id%3A%22chamber%2Fvotes%2F24afa1ea-4171-4a9b-a806-ad388220b4b0%2F0000%22>

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

criminal record, increased chances of poverty, unemployment and substance abuse, and increased likelihood of incarceration.<sup>14</sup>

A series of Government Inquiries, including the 1991 *Royal Commission into Aboriginal Deaths in Custody*<sup>15</sup>, the 1997 *Bringing them Home Report*<sup>16</sup> and the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Involvement of Indigenous juveniles and young adults in the criminal justice system*<sup>17</sup> have identified the relationship between OOHC and the increased likelihood, for Aboriginal and Torres Strait Islander people, of involvement with the criminal justice system. Similar findings have been made in respect of the OOHC population more generally.<sup>18</sup>

The intersection between the OOHC and criminal justice systems is of particular relevance to this current Inquiry. While people with OOHC experience comprise less than 1% of the NSW population, they are significantly over-represented in the criminal justice system. The need for systemic reform of the OOHC and criminal justice systems has been identified by significant law reform bodies and public inquiries, including the 2017 *Royal Commission into the Protection and Detention of Children in the Northern Territory*<sup>19</sup>, the 2018 Australian Law

<sup>14</sup> Weatherburn, D., (2014) *Arresting Incarceration—Pathways out of Indigenous Imprisonment*. Aboriginal Studies Press 86–7.

<sup>15</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) 52.

<sup>16</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 164.

<sup>17</sup> See for e.g., the Public Hearing, Thursday, 24 June 2010

<http://www.aph.gov.au/binaries/hansard/reps/commttee/r13210.pdf> and Roundtable, 28 Jan 2011, see pg 15-16; 26-27; 35-37

<http://www.aph.gov.au/binaries/house/committee/atsia/sentencing/hearings/28%20january%202011.pdf>

<sup>18</sup> See for example, the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (1997). *Seen and Heard: Priority for Children in the Legal Process: Report of the National Inquiry into Children and the Legal Process*, Report No 84. Sydney Australia; and the series inquiries conducted by the Community Affairs References Committee *Inquiry into Out of Home Care* (2015)

[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Out\\_of\\_home\\_care](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Out_of_home_care);

*Protecting Vulnerable Children: A national challenge: Second Report on the inquiry into children in institutional or out-of-home care* (2005); *Forgotten Australian: A report on Australians who experienced institutional or out-of-home care as children* (2004); and *Lost Innocents and Forgotten Australian Revisited: report on progress with the implementation of the recommendations of the Lost Innocents and Forgotten Australian Reports* (2009).

<sup>19</sup> The *Royal Commission into the Protection and Detention of Children in the Northern Territory* Final Report Pt 3B Recommendation 41.5: The Northern Territory Government develop compatibility between the child protection and youth justice data systems for the efficient exchange of information: ‘Dr Katherine McFarlane, a Senior Lecturer at Charles Sturt University, told the Commission that there is a general lack of understanding about the connection between care and the criminal justice system across Australia, and that research on out of home care status in the criminal justice system is particularly lacking’. <https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-3B.pdf>

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

Reform Commission,<sup>20</sup> and the 2018 Queensland Family and Child Commission.<sup>21</sup> As the Law Council of Australia stated:

the 'links between these systems is so strong that child removal into out-of-home-care and juvenile detention could be considered as key drivers of adult incarceration.'<sup>22</sup>

Many children of prisoners become enmeshed in the justice system once they enter OOHC, with devastating long-term consequences including homelessness, a disrupted or discontinued education, and incarceration. This is a transgenerational cycle: many of the parents in prison were themselves looked after, so too were their grandparents. Many of the children taken into care following parental imprisonment will follow this same path, with young women in care likely to become pregnant and then have their child removed while they themselves are still in the care system. This risk is exacerbated if the young woman is involved in the justice system while in care. Research also indicates that for women in particular, the removal of their child precipitates their incarceration, rather than the incarceration leading to child removal, as is often assumed. It is the intergenerational intersection of these systems that has the most significant and negative impact on children of prisoners.

I also wish to draw the Committee's attention to the following related factors:

- the potential impact on children of incarcerated parents of the recent amendments to *Children and Young Persons (Care and Protection) Act* 1998. Particular reference is recommended to the work of the US' journalist and commentator Nell Bernstein<sup>23</sup> regarding the impact of the *Adoption and Safe Families Act* (ASFA) on prisoner-child relationships and the severing of parental rights; and
- the need for changes to the 'exceptional circumstances' requirement that applies when sentencers consider the impact of a custodial sentence on a person's

<sup>20</sup> The Australian Law Reform Commission (ALRC) (2018) *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* found that the 'links between these systems is so strong that child removal into out-of-home-care and juvenile detention could be considered as key drivers of adult incarceration' Recommendation 15.1: 'Acknowledging... the recognised links between out-of-home care, juvenile justice and adult incarceration, the Commonwealth Government should establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children' <https://www.alrc.gov.au/news-media/media-release/pathways-justice-indigenous-incarceration>

<sup>21</sup> Queensland Family & Child Commission (2018) *The criminalisation of children living in out-of-home care in Queensland* <https://www.qfcc.qld.gov.au/sites/default/files/The%20criminalisation%20of%20children%20living%20in%20out%20of%20home%20care%20in%20Queensland.pdf>

<sup>22</sup> The Australian Law Reform Commission (ALRC) (2018) *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* at 485.

<sup>23</sup> Bernstein, N. (2005) *All Alone in the World: Children of the Incarcerated*. The New Press, USA.

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

dependents, such as their children. In relation to this issue I recommend to the Committee the work of Oxford University's Dr Shona Minson on maternal sentencing and children's rights.<sup>24</sup>

I would be pleased to discuss any aspect of this submission with the Committee. It is informed not only by my academic research on the care-crime intersection and my professional experience as an advisor to the NSW government and various non-government agencies on prisons, the OOHC system, sentencing and the Children's Court, but also by my personal experience as a family member of a child placed in care due to parental incarceration.

Yours faithfully,

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<sup>24</sup> See for e.g., Minson, S (2020) *Maternal Sentencing and the Rights of the Child*. Palgrave Macmillan. England.

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

### ***Lack of information regarding OOHC and children of incarcerated parents***

Fifteen years after it was estimated that approximately 38,000 Australian children have a parent in custody,<sup>25</sup> 'there is no official data on the number of children with an imprisoned parent (or parents) across Australia'<sup>26</sup> and 'no consistent approach to funding and no assurance that all children of prisoners have access to support programs.'<sup>27</sup> Although children may be placed in OOHC because of parental incarceration, the number affected in this way is unknown for this information is not collected at a state, territory or national level.

The lack of NSW-specific information about children of incarcerated parents who are in OOHC was complained of over 20 years ago, with the NSW Parliament *Inquiry into Children of Imprisoned Parents* reporting with incredulity that that 'there are no available data regarding how many children are State wards because their primary carer is in prison.'<sup>28</sup>

The pressing need for information about the experiences and outcomes of these children has also been raised by other NSW inquiries<sup>29</sup> and have remained an area of critical concern for a number of community and law reform organisations<sup>30</sup> in the intervening decades. The Committee's attention is drawn to the continuity of issues examined in these reports, and in

<sup>25</sup> Quilty, S. 'The Magnitude of Experience of Parental Incarceration in Australia' [online]. *Psychiatry Psychology and Law*, Vol. 12. No. 1 June 2005:256-257

<sup>26</sup> Queensland Productivity Commission (2019) *Final Report: Inquiry into Imprisonment and Recidivism*. Brisbane, Queensland. pg 148.

<sup>27</sup> National Children and Youth Law Centre (2011) Submission to the Child Rights Taskforce *Listen to Children: Child Rights NGO Report 2011* p 16. Sydney. Australia  
[http://www.childrights.org.au/\\_data/assets/pdf\\_file/0014/14405/Listening-to-children-Report-2011-colour.pdf](http://www.childrights.org.au/_data/assets/pdf_file/0014/14405/Listening-to-children-Report-2011-colour.pdf)

<sup>28</sup> New South Wales Parliament, Legislative Council Standing Committee on Social Issues (1997) *Inquiry into Children of Imprisoned Parents*. Sydney, NSW. pg 57.  
<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5517/Compiled%20report.pdf>

The Government response is also significant and can be accessed at  
<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/GovernmentResponse/5517/Government%20Response%20March%201998.pdf>

<sup>29</sup> NSW *Women in Prison Task Force* report (1985); *Royal Commission into Aboriginal Deaths in Custody, Regional report of the Inquiry into New South Wales, Victoria and Tasmania* (1991); NSW Law Reform Commission (LRC), *People with an Intellectual Disability and the Criminal Justice System* [Report 80] (1996); NSW Legislative Council Standing Committee on Law and Justice, *Crime Prevention through Social Support: Second Report* (2000); NSW Legislative Council, *Select Committee Inquiry on the Increase in Prisoner Population* (2001).

<sup>30</sup> See the position statement *Keeping Women out of Prison* for more information on the views of a number of organisations about what is needed to assist children of prisoners  
<https://sydneycommunityfoundation.org.au/whats-on/news/keeping-women-out-prison-position-statement-launched> The position statement was launched at the visit to NSW of the UK's Baroness Corston, author of *The Corston Report 2007*, who was invited to present about her findings and the resulting changes to the UK justice system. The position statement was updated recently at a fundraiser / awareness raiser for SHINE (formerly the Children of Prisoners Support Group) which was held at the NSW Parliament  
[https://sydneycommunityfoundation.org.au/sites/default/files/public/KeepingWomenOutofPrison\\_PositionPaperUpdate\\_2017\\_SydneyCommunityFoundation.pdf](https://sydneycommunityfoundation.org.au/sites/default/files/public/KeepingWomenOutofPrison_PositionPaperUpdate_2017_SydneyCommunityFoundation.pdf)

particular, to the often-repeated need for children of incarcerated parents to be regarded as a distinct group in terms of data collection, policy development and research.

The omission is perplexing, for the academic literature published in the last 20 years has confirmed the submissions of advocates expressed to the 1997 Parliamentary Inquiry. Research has established that a history of being raised outside the family unit is a key predictor of anti-social behaviour across someone's lifespan<sup>31</sup>, and studies examining the importance of family relationships, contact and reunification as a means of reducing recidivism are widespread.

The ties to children, and the visiting and ongoing relationships with children while parents are in gaol, is widely considered to be one of the major factors influencing rehabilitation, and a mitigation of re-offending risks.<sup>32</sup> The Queensland Productivity Commission ('the QPC') is one in a long line of independent inquiries to identify the importance of maintaining prisoners' relationships with their family. The QPC recommended that:

'government should amend prisoner admission processes to better identify...children (of incarcerated parents) and ensure that supports are available for them. Further, the government should explore ways in which the operation of correctional facilities can better help maintain family relationships.'<sup>33</sup>

Similar recommendations have been made in the UK by Lord Farmer<sup>34</sup>, whose comprehensive review of the literature and effective practice in reducing recidivism identified that prisoners' families are an important asset in reducing the likelihood of reoffending and intergenerational crime.

The government agency most able to provide information and a concerted, coordinated policy response to the challenges faced by children of incarcerated parents, particularly those children placed in OOH, is the Department of Communities and Justice ('the DCJ'). However, while the DCJ has a range of mechanisms in place that could yield useful information about numbers and needs, this information is not collected in a systemic manner, and does not appear to influence agency of government policy in a consistent, reviewable way.

<sup>31</sup> Jaffee, Moffitt, Caspi and Taylor (2003) *Child Development*, 74(1), 109-126

<sup>32</sup> A non-exhaustive list of publications relating to children of incarcerated parents can be located on the AIFS website, at <https://aifs.gov.au/cfca/bibliography/prisoners-and-their-families>

<sup>33</sup> Queensland Productivity Commission (2019) Final Report: Inquiry into Imprisonment and Recidivism. Queensland. pg xxi. See specifically Recommendation 33 (at pg iv).

<sup>34</sup> Farmer, Lord (2017) The Importance of Strengthening Prisoners' Family Ties to Prevent Reoffending and Reduce Intergenerational Crime. The Ministry of Justice. London, England.



A (non-exhaustive) list of some of these mechanisms include:

- **The NSW Corrective Services ('NSWCS') Inmate Survey Questionnaire ('the ISQ')** - The ISQ is administered to all people admitted to a correctional facility. It focuses on prisoners' children only to the extent of satisfying authorities that the prisoner has made appropriate arrangements for the care of those children during the period of imprisonment. The ISQ is designed to indicate individual prisoner risks and needs, and to provide a mechanism whereby individuals can alert NSWCS to potential red flags in either their immediate day-to-day care, longer-term health or post-release issues, and to any risk factors that that individual may present within the prison environment. While analysis of the ISQ has the potential to provide rudimentary information about the characteristics of the prison population, it is rarely used for this purpose, and to date, has not been regarded by NSWCS as a comprehensive, data collection tool.<sup>35</sup>
- **The New South Wales Inmate Census** - The Census has been conducted annually as part of the *National Australian Prison Census* since 1982.<sup>36</sup> It does not include any information regarding prisoners' parenthood status, child-care arrangements or OOHC status.
- **The NSW Families Handbook**<sup>37</sup> ('the Handbook') - NSWCS has joined with the Community Restorative Centre to produce the Handbook, which is available on the NSWCS website. It is 'an important guide for families and friends of people who are incarcerated. It provides valuable information about the criminal justice system, keeping in contact with someone in custody and the type of support services that exist for inmates in custody and their families in the community.'<sup>38</sup> However, the Handbook is not a publication that contains statistics or information on the number of children affected by parental incarceration, placed in OOHC, or information about the outcomes for children in these situations.
- **NSWCS Research Evaluation and Statistics Unit** – Since 1970, the CRES 'has been continuously responsible for undertaking research, evaluation and statistics for Corrective Services NSW and other government and external agencies...includ(ing) descriptive and evaluative studies into correctional programs which have informed

<sup>35</sup> I am currently conducting an analysis of NSWCS ISQ data relating to the OOHC background of prisoners in NSW. This analysis is due for publication in 2020-21. My understanding of the ISQ and NSWCS use of it is informed by conversations arising from that research project.

<sup>36</sup> <https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/related-links/publications-and-policies/corrections-research-evaluation-and-statistics/nsw-offender-census.aspx>

<sup>37</sup> <https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/support-families-community/families-handbook.aspx>

<sup>38</sup> <https://www.correctiveservices.justice.nsw.gov.au/Documents/fh-families-handbook-complete.pdf>

correctional practices and policies. While it has produced several reports that include demographic information including basic data on the number of prisoner-parents, some studies regarding women in custody, and a series of publications based on visitor surveys to NSW prisons which include information about visit conditions and experiences,<sup>39</sup> there have been no recent studies specifically undertaken into the experiences of children of prisoners, prisoners' OOHC background, or the consequences or issues for prisoner-parents.<sup>40</sup>

CSNSW does publish snapshot figures relating to children of prisoners, but these are contained in pamphlets generally produced on request (for eg., to the Women's Advisory Council or SHINE), and do not convey an accurate picture of children's care arrangements. For example, recent statistical snapshots detail the number of children living with relatives, and the number of children in foster care, without indicating that children in both categories may be in statutory OOHC. The pamphlets also are limited by definitional issues regarding dependent children, and do not adequately capture the range of extended family relationships of Indigenous communities.

- **NSWCS Child Protection Co-Ordination and Support Unit ('the CPCSU')** - the CPCSU is primarily a risk-assessment and management unit that 'ensures CSNSW meets its legislative responsibilities under the *Children and Young Persons (Care and Protection) Act 1998* as well as those contained in the *NSW Government's Interagency Guidelines for Child Protection Intervention*. These primarily relate to ensuring children and young people in Corrective Services' NSW care are safe from harm and that when a child is identified as being at significant risk of harm it is reported to the Department of Family and Community Services. The CPCSU also develops policies relating to the safety and well-being of children under 18 years of age who visit correctional centres and manages the CSNSW Child Contact Assessment Program (CCAP)...which requires inmates who have or have had a child-victim (or those bail-refused with an alleged child-victim) to formally apply to receive visits from children.<sup>41</sup>
- **NSW Corrective Services' Family Matters Strategy 2018-2021 ('the Strategy')** - The Strategy sets out a number of research priorities focused on families of prisoners. It is premised on the idea that pro-social, supportive and supported family connections can assist prisoners to lead law-abiding lives in custody, and after release. It notes that almost half of the prison population is a parent/carer of at least one child,

<sup>39</sup> [https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/related-links/publications-and-policies/corrections-research-evaluation-and-statistics/Research\\_Publication.aspx](https://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/related-links/publications-and-policies/corrections-research-evaluation-and-statistics/Research_Publication.aspx)

<sup>40</sup> One of the most informative publications was a literature review conducted on the impact of imprisonment and family separation, published in 1980.

<https://www.correctiveservices.justice.nsw.gov.au/Documents/research-and-statistics/RD002.pdf>

<sup>41</sup> <https://www.correctiveservices.justice.nsw.gov.au/corrective-services/correctional-centres/child-protection>

recognises that some prisoners may have limited or no pro-social or family support and seeks to prioritise a research agenda that examines the:

- Factors leading to children of incarcerated parents being disproportionately represented in prisons;
- Impact on children of offender resettlement into family settings;
- Community attitudes to resettling inmates into the community; and
- Effectiveness of mentoring and other support mechanisms on desistance for offenders with no or limited pro-social network support.

The finalised *Strategy* commits to ‘examin(ing) further the impact and incidence of out of home care placement on inmates and their children<sup>42</sup>, however, I am unaware of any specific initiatives, data collection, or procedural/policy changes that CSNSW has undertaken or commissioned in response to this issue.<sup>43</sup>

The Committee’s attention is drawn to the fact that NSWCS has failed to comply with previous NSW Parliamentary Committee’s recommendations that research be conducted into prisoners’ experience of OOHC. For example, in 2001, the NSW Parliament’s *Select Committee on the Increase in Prisoner Population* recommended that:

‘the Department of Corrective Services undertake a research project to focus on the needs of former State wards<sup>44</sup> and care leavers in the prison system. The research project should identify the numbers of former State wards and care leavers in the prison system.’<sup>45</sup>

CSNSW policies agree that families are ‘an important source of support for inmates while in prison and a motivating force to desist from reoffending’.<sup>46</sup> Yet there is little practical

<sup>42</sup> State of New South Wales. Department of Justice. (2018) *Family Matters Strategy (2018-2021)* <https://www.correctiveservices.justice.nsw.gov.au/Documents/families-strategy.pdf> at p13

<sup>43</sup> I reviewed the draft *Strategy* at the request of CSNSW, and recommended that greater attention be paid to three separate but connected cohorts: prisoners with direct childhood experience of OOHC; prisoners with familial/intergenerational experience of OOHC; and prisoners whose own child/ren have experience of OOHC. In 2018 I was invited to present to the CSNSW Family & Community Committee on the importance to the correctional system of identifying and understanding both the OOHC background of prisoners, and the consequences of children of incarcerated parents’ OOHC experience. At the conclusion of the presentation I was informed that NSWCS was not intending to take any further action regarding the OOHC cohort until the results of my pre-existing, unfunded research project examining the OOHC experience through NSWISQ data, referred to previously in this submission, was complete.

<sup>44</sup> ‘State wards’ was then the terminology in use. It equates to ‘careleaver’, ‘care-experienced’ or OOHC, as is more commonly used today.

<sup>45</sup> NSW Parliament, *Select Committee on the Increase in Prisoner Population* (2001) Recommendation 1: at pxviii. See too p25-26

<sup>46</sup> NSW Corrective Services Draft *Family Strategy* (2018).

evidence of the translation of this philosophical approach in practice, particularly in relation to maintaining relationships between children and their incarcerated parents. At times, as observed by the Inspector for Custodial Services, agency policies work against each other in practice. This is seen in the NSWCS *Female Placement Guide (Offender Classification & Case Management)*, which despite the commitments made in the *Family Matters Strategy*, fails to prioritise the need for incarcerated women to be placed near family and children. The result is that women, particularly those on remand, may be placed considerable distances from their support networks, family and friends.<sup>47</sup> The Inspector noted that this makes visits from family less likely, and reported that maintaining contact with their families was one of the major issues women encountered while in custody. The Inspector concluded that this disruption to family support could be detrimental to women's reintegration prospects.

The apparent lack of agency interest in the issues affecting prisoners with OOHC experience is particularly concerning given successive governments' stated commitment to reducing recidivism and the factors that lead to offending behaviour. In 1989, the *Human Rights Commission (Burdekin Inquiry)* reported:

What is of deep concern is the connection between those children who are brought in because they are in need of care and protection in the traditional sense and who commit offences. In 1981 a departmental report found that a great majority of those children were likely to offend more than once. **In that time there was a 160% higher probability that children who had been committed to the care of the department would reoffend than those who had not.**<sup>48</sup>

It could be assumed that this statistic would engender some interest amongst corrections and youth justice departments. It has not. There remain no specific programs or plans targeting the OOHC cohort in prison, notwithstanding the international research which has identified that people with OOHC experience may have different needs and risks compared to non-OOHC prisoners and research that has established that a history of being raised outside the family unit is a key predictor of anti-social behaviour across someone's lifespan.<sup>49</sup>

The Community Services arm of the DCJ also does not collect nor publish information on parental imprisonment, notwithstanding the fact that children with familial exposure to the

<sup>47</sup> NSW Government. Inspector of Custodial Services (2020) *Women on Remand*. Sydney, NSW. p16.

<sup>48</sup> The Human Rights Commission. *Report of the National Inquiry into Youth Homelessness (The Burdekin Inquiry)* (1989) see Chapter 10 'Children in the care of the State' at 10.16 p112

<sup>49</sup> Jaffee, Moffitt, Caspi and Taylor (2003) *Child Development*, 74(1), 109-126

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

criminal justice system face a very real risk of being placed in OOHC<sup>50 51 52</sup> and research indicating that parental incarceration is a tipping factor for placement in the care system.<sup>53</sup> This represents a lost opportunity to address the needs of, and examine the outcomes for, children with incarcerated parents in OOHC, through, for example, the seminal *Pathways Of Care* study<sup>54</sup> currently being conducted by the agency in partnership with the Australian Institute of Family Studies and the United States' University of Chicago's Chapin Hall Center for Children.

Other government agencies do collect and publish information which potentially includes data relating to children of incarcerated parents and /or the OOHC experience. For example, over the past 20 years the Justice Health Forensic Mental Health Network *Patient Health Surveys* have represented 'a comprehensive epidemiological snapshot of prisoner health at approximately five yearly intervals'.<sup>55</sup> The latest report presents results from data collected in 2015. The surveys are point of time data collections, and present an important but rudimentary, analysis of the issues of Indigenous childhood removal, membership of the Stolen Generations, intergenerational experience of OOHC and prisoners' childcare arrangements. More detailed consideration of the policy and practice issues arising from the identification of the OOHC experience, to date has not been forthcoming.<sup>56</sup>

Despite an increasing recognition that the accelerated pathways from care to the criminal justice system requires further investigation, research and action therefore, there remains a lack of programs, crime-prevention resources and recidivism tools that identify or provide for

<sup>50</sup> NSW Government. Inspector of Custodial Services (2020) *Women on Remand*. Sydney, NSW. p16.

<sup>51</sup> Kilroy, D. (2016). 'Women in Prison in Australia. Paper presented at the Current Issues in Sentencing Conference Canberra, 6-7 February 2016.

<sup>52</sup> Grunseit, A., Forell, S., and McCarron (2008) *Taking justice into custody: the legal needs of prisoners*. The Law and Justice Foundation. Sydney, NSW. <http://lawfoundation.net.au/report/prisoners>; [http://www.lawfoundation.net.au/ljf/site/articleIDs/4DC35D5AOC06F1C4CA25748D00131D8C/\\$file/TakingJusticeIntoCustody.html](http://www.lawfoundation.net.au/ljf/site/articleIDs/4DC35D5AOC06F1C4CA25748D00131D8C/$file/TakingJusticeIntoCustody.html) ;

<sup>53</sup> Phillips, S. and Bloom, B. (1998) 'In whose best interest? The impact of changing public policy on relatives caring for children with incarcerated parents' *Child Welfare*. 77(5):531-541

<sup>54</sup> NSW Department of Family and Community Services, Australian Institute of Family Studies, Chapin Hall Center for Children University of Chicago (2015) *Pathways of Longitudinal Study: Outcomes of Children and young People in Out-of-Home Care in NSW*. NSW Department of Family and Community Services (FACS). Sydney, NSW. The POCLS baseline study did not contain information on how many children entering OOHC had familial contact with the criminal justice system, and although it provided detailed analysis relating to children in OOHC's relationship with their birth families, the extent and impact of contact with families on behaviour, and a raft of other issues, it did not include information on whether children were visiting or had access to their incarcerated parents or other family members.

<sup>55</sup> [https://www.justicehealth.nsw.gov.au/publications/2015\\_NHPS\\_FINALREPORT.pdf](https://www.justicehealth.nsw.gov.au/publications/2015_NHPS_FINALREPORT.pdf)

<sup>56</sup> Along with my colleague John Murray, I drafted the OOHC questions which were adopted into the CorrectionsHealth 2001 *Inmate Health Survey* (as it was then known) and was a childhood care advisor to the report <https://www.justicehealth.nsw.gov.au/publications/inmate-health-survey-2001.pdf> . With Mr Murray and UNSW Kirby Institute colleagues, I am currently working on a project analysing the Network Patient Health Survey results in relation to the OOHC experience.

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

care as a distinct criminogenic risk factor or as a measure of vulnerability.<sup>57</sup> For example, the NSW Police Force does not record OOHC status at the time of arrest, and justice divisions have not conducted research or implemented crime prevention programs that specifically target the OOHC population.

## **The significance of OOHC for children of incarcerated parents**

### ***Young people's involvement in the justice system***

While people who have been in OOHC comprise less than 1% of the NSW population, they are significantly over-represented in the criminal justice system, with approximately one in 10 young people involved with the NSW criminal justice system having lived in OOHC.<sup>58</sup>

My doctoral research<sup>59 60</sup> identified that children in OOHC:

- are disproportionately represented before the NSW Children's Court;
- are younger at entry to the justice system; and
- move more quickly to harsher sanctions than children without care experience.

While both cohorts shared many of the risk factors common to young offenders appearing before the Children's Court, the OOHC cohort experienced significant additional disadvantage within the care environment ('care-criminalisation'), such that living arrangements designed to protect them from harm instead increased the likelihood of criminalisation and exposure to the justice system. Indigenous children, who are particularly over-represented in both the care and justice systems, bore the impact of intergenerational removal and trauma from past welfare policies as well as the consequences of inadequacies of present policies and practices.<sup>61</sup>

<sup>57</sup> McFarlane, K. (2017) 'Improving data collection to better support children in out-of-home-care at risk of offending, *Child Family Community Australia* <https://aifs.gov.au/cfca/2017/10/18/improving-data-collection-better-support-children-out-home-care-risk-offending>

<sup>58</sup> Ringland, C., Weatherburn, D., and Poynton, S. (2015) *Can child protection data improve the prediction of re-offending in young persons?* BOCSAR Contemporary Issues in Crime and Justice. Bulletin No 188 <http://www.bocsar.nsw.gov.au/Documents/CJB/Report-2016-Can-child-protection-data-improve-the-prediction-of-reoffending-in-young-persons-cjb188.pdf>

<sup>59</sup> McFarlane, K. (2015). *Care-criminalisation: The involvement of children in out of home care in the NSW criminal justice system*. (Doctor of Philosophy), University of New South Wales, Sydney. Retrieved from <https://researchoutput.csu.edu.au/ws/portalfiles/portal/9319354> McFarlane, K. (2017) 'Care-criminalisation: the involvement of children in out-of-home care in the NSW criminal justice system'. *The Australian and New Zealand Journal of Criminology*. August 8, 2017 DOI: <https://doi.org/10.1177/0004865817723954>

<sup>60</sup> McFarlane, K. (2017) 'Care-criminalisation: the involvement of children in out-of-home care in the NSW criminal justice system'. *The Australian and New Zealand Journal of Criminology*. August 8, 2017 DOI: <https://doi.org/10.1177/0004865817723954>

<sup>61</sup> See too: Davis, M (2019) *Independent Review of Aboriginal Children in OOHC: Family Is Culture*, Sydney, NSW

My doctoral research also identified that children in OOHC had a much higher rate of familial involvement in the criminal justice system than children with no care experience.<sup>62</sup> However, while children of incarcerated parents are particularly vulnerable to abuse and exploitation, including 'physical, verbal and or sexual abuse while their mothers / carers are in prison...with estimate(s) that 80% of prisoners children are subject to such treatment'<sup>63</sup> this was seldom discussed in material presented to the Court.

Consistent with findings from a study set in the Melbourne Children's Court,<sup>64</sup> there was no distinctive response from either the child welfare or the justice system that acknowledged, let alone addressed, the long-term nature of the problems experienced by this group. The issue of parental separation due to incarceration was often alluded to only in passing, and reports contained very little information regarding the support or assistance that a child had received to address the grief and confusion that could arise from separation. This is concerning given the obvious psychological impact such events could have on children and the likely connection with their offending behaviour. For example, although the loss of a parent or sibling to imprisonment could include substantial interruptions in children's care through displacement from home, placement in insecure or unsafe accommodation, social isolation, unresolved grief and fear over the arrest and removal process and an increased likelihood that children will become offenders and end up in custody themselves, little information was presented on strategies or procedures that had been implemented to address this risk.

My findings regarding the particular vulnerability of NSW children in OOHC to involvement in the criminal justice system have since been replicated in respect of children in OOHC in the

<sup>62</sup> McFarlane, K. (2015). *Care-criminalisation: The involvement of children in out of home care in the NSW criminal justice system*. (Doctor of Philosophy), University of New South Wales, Sydney. Retrieved from <https://researchoutput.csu.edu.au/ws/portalfiles/portal/9319354> at p126

<sup>63</sup> Sisters Inside (1996) *Kids of Mums in Jail*: Report No 1. Brisbane, Queensland.

<sup>64</sup> Sheehan, R., and Borowski, A. (2013) *Australia's Children's Courts: Today and Tomorrow*. Springer Press. Australia

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

Northern Territory<sup>65</sup> Queensland<sup>66</sup> South Australia<sup>67</sup> and Victoria.<sup>68 69 70 71</sup> International research has also confirmed my contention that long-standing and interconnected processes of institutional victimization and criminalization (for example, through maltreatment, multiple placements, abusive residential cultures, social disadvantage and psychological harm) increase the likelihood of a child transitioning from OOHC to custody.<sup>72 73</sup>

### ***Incarcerated parents – previous OOHC history***

The lack of information held by and published by NSW authorities regarding children of incarcerated parents is particularly concerning given the histories of intergenerational OOHC and custodial experience common to many prisoners.

At least 85% of Australian women prisoners are victims of abuse, many have experienced childhood trauma and most have experienced multiple incidents and forms of violence throughout their lives. Incarcerated women 'often have backgrounds of social disadvantage

<sup>65</sup> *The Royal Commission into the Protection and Detention of Children in the Northern Territory* Final Report Pt 3B <https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-3B.pdf>

<sup>66</sup> The State of Queensland. Queensland Family and Child Commission (2018) *The criminalisation of children living in out-of-home care in Queensland*. Brisbane, Queensland.

<sup>67</sup> Government of South Australia. Office of the Guardian for Children and Young People and Training Centre Visitor (2019) *A Perfect Storm: Dual status children and young people in South Australia's child protection and youth justice systems Report 1*. Adelaide, South Australia.

<sup>68</sup> Victoria Legal Aid (2016) *Care Not Custody: A new approach to keep kids in residential care out of the criminal justice system*. Melbourne, Victoria. [www.legalaid.vic.gov.au/carenotcustody](http://www.legalaid.vic.gov.au/carenotcustody)

<sup>69</sup> Sentencing Advisory Council (2019) *Crossover Kids: Vulnerable Children in the Youth Justice System*. Sentencing Advisory Council. Melbourne, Victoria.

<sup>70</sup> Baidawi, S., and Sheehan, R., (2019) *Cross-over kids: Effective responses to children and young people in the youth justice and statutory Child Protection systems*. Report to the Criminology Research Advisory Council. Canberra, Australia

<sup>71</sup> Victorian Commission for Children and Young People. (2019) *In our own words: Systemic Inquiry into the lived experience of children and young people in the Victorian out-of-home-care system*. Melbourne, Victoria <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-In-Our-Own-Words.pdf>

<sup>72</sup> Prison Reform Trust (PRT). (2016). *In care, out of trouble: How the life chances of children in care can be transformed by protecting them from unnecessary involvement in the criminal justice system. An independent review chaired by Lord Laming*. London.

<sup>73</sup> Stanley, E. (2016). 'Silencing the Violations in State Care', *New Zealand Sociology* 31(1): 9-29.



Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

including...histories of out-of-home care'.<sup>74 75</sup> These experiences have often shaped their offending behaviour and the reasons why they are in prison.<sup>76 77 78 79 80 81</sup> For many women:

'Too often, a multi-generational, vicious cycle is well established...Women were in care as children...They were imprisoned in youth prisons...They progressed to adult prisons...Whilst in prison, their children were taken into care...These children have subsequently been criminalised'.<sup>82</sup>

According to the *2015 Network Patient Survey* (p24), approximately 14% of NSW prisoners were placed into care before the age of 16 years, with significantly more women (23.9%) than men having this background.

Another 14% of respondents said their parents had been placed in care themselves before the age of 16 years (p25) and some 18% of prisoners' children have experience of the care system (p30).<sup>83</sup> Previous OOHC experience is particularly pronounced for Indigenous women, who also report high rates of both transgenerational care experience and parental incarceration.<sup>84 85 86</sup>

<sup>74</sup> NSW Government. Inspector of Custodial Services (2020) *Women on Remand*. Sydney, NSW. p10

<sup>75</sup> Colvin K, *The Women and Poverty Report 'More than half - less than equal'*, Victorian Council of Social Services, October 2001, p.15.

<sup>76</sup> Kilroy, D. (2016). 'Women in Prison in Australia. Paper presented at the *Current Issues in Sentencing Conference* Canberra, 6-7 February 2016.

<sup>77</sup> Flat Out (2015). Submission to the *Royal Commission into Family Violence*, Kensington: Flat Out Inc.

<sup>78</sup> Women in Prison Advocacy Network (2012). *The Long Road to Freedom: the Report, Women affected by domestic violence and the criminal justice system*. Sydney: WIPAN.

<sup>79</sup> Domestic Violence Research Group (1994). *The Women Behind the Walls*. Brisbane: Domestic Violence Research Group.

<sup>80</sup> Easteal, P. (2001). *Less than Equal: Women and the Australian Legal System*. Oxford: Butterworths.

<sup>81</sup> Aungles, A. (1994). *The Prison and the Home*, Sydney: Institute of Criminology.

<sup>82</sup> Kilroy, D. (2016). 'Women in Prison in Australia. Paper presented at the *Current Issues in Sentencing Conference* Canberra, 6-7 February 2016.p6

<sup>83</sup> The *Network Patient Survey* reported that over 3.6% of prisoners' children were living with a foster family or had been adopted. Another 13.3% were living with a relative other than a parent, and 1.5% were living on the streets, in an institution or in juvenile detention. It is likely that many of these children were living in some form of OOHC.

<sup>84</sup> Justice Health and Forensic Mental Health Network. *Network Patient Health Survey Report-Aboriginal People's Health Report 2015*. Malabar (AUST): JH&FMHN; 2017.

<sup>85</sup> Lawrie R. *Speak out speak strong: Researching the needs of Aboriginal women in custody*. Aust Indig Law Report. 2003;8:81-4 - over 50% of the Indigenous women reported they were members of the Stolen Generations.

<sup>86</sup> Sullivan,E., Kendall, S., Chang, S., Baldry,E, Zeki, R, Gilles, M., Wilson, M., Butler, T., Levy, M., Wayland, S., Cullen, P., Jones, J., and Sherwood, J. (2019) 'Aboriginal mothers in prison in Australia: a study of social, emotional and physical wellbeing' *Australian and New Zealand Journal of Public Health*.

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

As the Senate Community Affairs References Committee (2004) *Inquiry Australians who experienced institutional or out-of-home care as children*<sup>87</sup> has identified:

‘The difficulties with establishing and maintaining relationships, the inability for many to provide secure and stable family environments for raising children, feelings of shame and fear of rejection about their childhood history can become cyclical. Each new generation, lacking a sense of security and parental role models, is unable to provide these vitally necessary foundations for the next generation.’

### ***Differences between care-experienced and other prisoners***

Very little Australian research has been conducted on the differences between adult prisoners with care experience and those without. The limited research undertaken in NSW has identified significant differences between Indigenous prisoners with OOHC experience and the general Indigenous prison population. For example, Indigenous prisoners removed from their families as children are significantly more likely to have been subjected to childhood sexual assault, to have attempted suicide and be imprisoned on more than five previous occasions.<sup>88</sup> Indigenous people removed from their families have also been found to have almost double the imprisonment rate of people who were not removed.<sup>89</sup>

Research has also established that:

- Prisoners with care-experience are disproportionately represented amongst NSW inmates with complex support needs; and
- are significantly more likely to have earlier and more police contacts than those with no care-experience.

Internationally, the Scottish Prison Service<sup>90</sup> has identified discrepancies between prisoners with OOHC experience and other inmates in terms of offending rates, patterns of drug and

<sup>87</sup> The Commonwealth of Australia. Senate Community Affairs References Committee (2004) *Forgotten Australians: A report on Australians who experienced institutional or out-of-home care as children*. Canberra, ACT. pg149-150

<sup>88</sup> Egger SJ, Butler T. The long-term factors associated with removal from parents amongst indigenous prisoners in NSW. *Aust N Z J Public Health*. 2000;24:454-5.

<sup>89</sup> Submission 80, p.2 (Corrections Health Service) cited on p173 of the Community Affairs References Committee *Protecting vulnerable children: A national challenge Second report on the inquiry into children in institutional or out-of-home care* March 2005. Noting the HREOC *Bringing Them Home* report which identified that Indigenous children were removed for welfare reasons which in most jurisdictions were not subject to legal review, NSW Corrections Health (now the Justice Health and Forensic Mental Health Network) has previously expressed concern at the fact that 82% of the removed Indigenous prisoners were removed before the age of 10 years, suggesting that juvenile justice proceedings were not a primary reason for children to be placed in care.

<sup>90</sup> Carnie, J., and Broderick, R. (2012) *Prisoners who have been in Care as ‘Looked After Children*. 13th Survey Bulletin. Scottish Prison Service Strategy Unit. Scotland; Carnie, J., Broderick, R., and McCoard, S. (2014a) *Key themes from the 14th series of the Prisoner Survey*. Scottish Prison Service Research, Strategy and Innovation

alcohol use and mental health characteristics. Compared to other prisoners, the care-experienced cohort had:

- higher rates of drug, alcohol and nicotine dependency and illegal drug use in custody;
- poorer mental health;
- poorer numeracy and literacy skills;
- greater likelihood of both pre and post-custodial homelessness; and
- were more likely to have witnessed parental or carer violence.

Prisoners with care experience also had significantly different criminal histories. For example, they were more likely to have:

- both carried and to have injured someone with a knife;
- received a custodial sentence as a result of breaching a community sentence; and
- to have been incarcerated on multiple occasions both on remand/under sentence.

Dr Kath McFarlane: Submission to the Parliament of New South Wales Committee on Children and Young People 2020 *Inquiry into the support for the children of imprisoned parents in New South Wales*

### **The impact of the Children and Young Persons (Care and Protection) Amendment Bill 2018 on children of incarcerated parents.**

Amendments made pursuant to the *Children and Young Persons (Care and Protection) Amendment Bill 2018* commenced on the 4<sup>th</sup> February 2019. The intended purpose of the legislation was, in part to: ‘reduce the time children spend in out-of-home care (OOHC) by introducing shorter term guardianship orders where the permanency plan is restoration, guardianship or open adoption’.<sup>91</sup>

A number of organisations, including the Aboriginal Legal Service, AbSec, Jumbunna (UTS) and CLC NSW penned an open letter to the government expressing their concerns about the draft legislation<sup>92</sup> and its potential impact on Aboriginal children, families and communities, citing the legacy of government policy of forced adoptions which played a central role in the trauma that led to the National Apologies to the Stolen Generations, the Forgotten Australians, Forced Adoptees and their parents, and most recently, the survivors of child sexual abuse.

The NSWCS Women’s Advisory Council (‘the Council’)<sup>93</sup> wrote to the Minister for Family and Community Services in November 2018 to raise concerns about another potential impact of the legislation: the potential impact on incarcerated parents and their children.

The Council’s objection lay in the two-year maximum time limit for restoration of an assumed child. This objection was based in part, on the lessons learnt in the United States, where similar legislation to the NSW amendments - the 1997 *Adoption and Safe Families Act* (ASFA) – led to a dramatic *increase* in the number of children of incarcerated parents entering the child welfare system. A series of studies have found that these children had minimal chance of being reunited with their parent on release. The ASFA mandated the termination of parental rights for children in care after 15 months within a two-year period: as Bernstein<sup>94</sup> noted, the national average prison sentence for people in state custody was 80 months, with relatively minor offences carrying significant custodial sentences.

As a consequence, incarcerated parents, predominantly, women, had their parental rights terminated en masse.<sup>95</sup> According to U.S. Department of Health and Human Services records for 2006-2016, approximately 1 in 8 incarcerated parents lose their parental rights, regardless

<sup>91</sup> Correspondence to the WAC, from the Minister for Community Services, the Hon. Prue Goward MP dated 08.02.19.

<sup>92</sup> See: <https://www.clcnsw.org.au/nsw-forced-adoptions-open-letter>

<sup>93</sup> Of which I am a long-standing member.

<sup>94</sup> Bernstein, N. (2005) *All Alone in the World: Children of the Incarcerated*. New Press. USA pg148-149

<sup>95</sup> See too: Graham Tebo, Margaret (2006) *The National Pulse* ‘A Parent in prison’ Feb 22 2006 [http://www.abajournal.com/magazine/article/a\\_parent\\_in\\_prison](http://www.abajournal.com/magazine/article/a_parent_in_prison) ;

of the seriousness of their offences. Analysis of three million child-welfare cases nationally found that incarcerated parents whose child was placed in foster care because of their incarceration — but who were not accused of child abuse, neglect, endangerment, or drug or alcohol use — were more likely to have their parental rights terminated than those who physically or sexually assaulted their children.<sup>96</sup>

For many parents, the termination of parental rights and the adoption or placement of their children into permanent substitute care arrangements, occurred due to circumstances out of their control. These circumstances included difficulties in maintaining regular contact from within the correctional environment, whether through phone conversations, letters or visits, with children in the OOHC system; parents' decisions to spare their children from the indignity and trauma of visiting a prison; and reluctance on the part of some carers to facilitate visits to prisons.<sup>97</sup>

The same impediments experienced by incarcerated parents in maintaining contact with their children, especially if those children are in OOHC, has been recognised in various NSW and Australian inquiries, including the NSW Parliament's 1997 *Children of Imprisoned Parents* report. The numerous difficulties for prisoners' seeking to access legal advice and representation in relation to the care and custody of their children, particularly if those children are in OOHC, has also been widely identified.<sup>98</sup>

The Council has since made representations to a number of government agencies and ministers, including the DCJ, requesting that the potential impact on incarcerated parents and their children of the recent amendments be monitored, to ensure that the ASFA impacts are not replicated in NSW. To date however, no assurances have been received that this is being undertaken.

<sup>96</sup> Hager & Flagg (2018) 'How Incarcerated Parents are Losing their children forever' <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever>

<sup>97</sup> The Correctional Association of New York. (2006) Women in Prison Project. 'When "Free" Means Losing your Mother' The Collision of Child Welfare and the Incarceration of Women in New York State' [https://repositories.lib.utexas.edu/bitstream/handle/2152/15159/When\\_Free\\_Rpt\\_Feb\\_2006.pdf?sequence=2](https://repositories.lib.utexas.edu/bitstream/handle/2152/15159/When_Free_Rpt_Feb_2006.pdf?sequence=2)

<sup>98</sup> Grunseit, A., Forell, S., and McCarron (2008) *Taking justice into custody: the legal needs of prisoners*. The Law and Justice Foundation. Sydney, NSW. <http://lawfoundation.net.au/report/prisoners>; Law Council of Australia (2018) The Justice Project Final Report – Part 1: Prisoners and Detainees <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Prisoners%20and%20Detainees%20%28Part%201%29.pdf>

### **Considering the impact on children when sentencing their parents**

Given the negative outcomes for many children that arise when a parent, and particularly a mother, is incarcerated, it would be expected that greater attention would be paid to the impact of sentencing decisions on children.

However, as the NSW Judicial Commission<sup>99</sup> makes clear, ‘the general principle is that hardship to family and dependants is an unavoidable consequence of a custodial sentence and is not a mitigating consideration, unless such hardship is “wholly”, “highly” or “truly” exceptional’. In such circumstances the court may take into account the extraordinary features of a case by: suspending the sentence of imprisonment, shortening the term of sentence and/or reducing the non-parole period. This will depend in each case on the seriousness of the offence, the need for deterrence, and the nature and degree of the impact of the sentence upon the third party.

In practical terms, the requirement for ‘extraordinary circumstances’ to exist before an offender's situation and caring obligations substantially exceed the ‘normal’ experience of other offenders before the court presents a significant hurdle. Family breakdown and the loss of a child to the OOHC system of itself will not constitute exceptional circumstances. The ‘exceptional circumstances’ requirement thus disadvantages women in the sentencing process by discounting the common everyday experience of the majority of female offenders. The criminal justice system thereby tacitly accepts that female offenders will lose their children – it is not an unusual enough outcome to warrant leniency in sentencing. Women are thus disadvantaged by a supposedly impartial sentencing system because their common female experience departs from the common male experience.

It is arguable that while it is not unusual or exceptional for women to have children, it is *exceptional* to have the state causing separation of mother and child where this is against the best interests of the child. As this submission has argued, the placement of a child in the state’s OOHC system can have a negative effect, such that it should constitute ‘exceptional circumstances’.

CSNSW runs a Mothers and Children program in NSW prisons which enables some women to have their children reside with them in custody. While placements are limited, and the program caters only for sentenced, minimum security women, and excludes those with serious AOD and mental health issues, there is evidence that the existence of the program has been used to justify a woman’s incarceration, based on the argument that the child will

<sup>99</sup> The NSW Judicial Commission (2019) *Sentencing Benchbook*  
[https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/subjective\\_matters.html#p10-490](https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/subjective_matters.html#p10-490)

not suffer hardship as it will not be separated from the mother while in custody. The lack of comparable facilities in youth custodial facilities has also led to the court making an order that a juvenile offender be transferred to an adult facility in order to access the Mothers and Babies Unit.

The lack of 'exceptional circumstances' decisions, particularly in the Local Courts where the majority of women appear, may be a consequence of inadequate legal representation where such arguments are not raised, a view that a relatively short sentence of six months could not constitute hardship on either the offender or her children, or a view that it is an irrelevant consideration or one that would unfairly advantage a female offender. Research has identified that 'the extent to which hardship to children is, or should be, incorporated into sentencing decisions varies widely amongst magistrate participants, with no guidelines as to assessing or applying hardship (*Crimes Act, 1914; Crimes Act (Sentencing Procedure), 1999*) or for deciding what makes circumstances 'exceptional'.<sup>100</sup> The researchers found that this resulted in 'inconsistent and unpredictable outcomes for children and families, despite calls for standardisation over the past decade, including recommendations for the inclusion of family impact statements in sentencing.'

It is suggested that we might adopt a different approach to children of incarcerated parents. England in particular has seen 'huge progress in ensuring that children's rights are observed in adult sentencing decisions'<sup>101</sup> over the past decade. Developed by a coalition of The Judicial College, the Magistrates Association, the Criminal Bar Association, the Law Society and Her Majesty's Prison and Probation Services, the guidance for judicial officers, legal representatives and probation officers regarding the sentencing of primary carers of children includes:

- the 2011 *Sentencing Guidelines* - which specifically mentioned the primary caring responsibilities of defendants as a matter which can be taken into account as personal mitigation in sentencing decisions'<sup>102</sup>
- the 2017 *Imposition of Community and Custodial Sentences Definitive Guideline* – which 'contains guidance on considering dependent children both when a sentence is on the cusp of custody and when a period of imprisonment is the appropriate sentence';<sup>103</sup> and

100 Trotter, C., Flynn, C., Naylor, B., Collier, P., Baker, D., McCauley, K., Eriksson, A. Arias, P, Bartlett, T., Evans, P., Burgess, A., and Blanch, B. (2015). *The Impact of Incarceration on Children's Care: A Strategic Framework for Good Care Planning*. Monash University, Melbourne, Victoria. at p43

<sup>101</sup> Minson, S (2020) *Maternal Sentencing and the Rights of the Child*. Palgrave Macmillan. England at p236.

<sup>102</sup> Minson, S (2020) *Maternal Sentencing and the Rights of the Child*. Palgrave Macmillan. England at p230.

<sup>103</sup> Minson, S (2020) *Maternal Sentencing and the Rights of the Child*. Palgrave Macmillan. England at p230.

- the 2019 *Sentencing General Guideline* - which stated in respect of offenders on the cusp of custody, that 'imprisonment should not be imposed where there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing', and imposed positive duties on sentencers' to consider the effect of the sentence on the health of the pregnant offender and any effect on the sentence on the unborn child.

The Committee's attention is also drawn to the four films and accompanying briefing papers prepared by Dr Minson and the Prison Reform Trust, entitled 'Safeguarding Children when Sentencing Mothers', which is part of the Judicial College's core sentencing materials and is an essential component of the judicial training delivered to sentencers. The material incorporates the experience, voices and perspectives of a range of mothers, children, sentencers, advocates and probation officers regarding the 'breadth and depth of the impacts of maternal imprisonment on children and caregivers' as well as 'clear information about the parametres within which the court can and should consider dependent children when sentencing a primary carer'.<sup>104</sup>

<sup>104</sup> Minson, S (2020) *Maternal Sentencing and the Rights of the Child*. Palgrave Macmillan. England at p231.



## RECOMMENDATIONS:

### Recommendation 1:

Further research on the impact of transgenerational child removal due to parental incarceration, including into the subsequent transgenerational transmission of involvement with the criminal justice system, is urgently required if the root causes of disadvantage and over-representation in the juvenile and adult prison systems are to be understood. This Committee is urged to make such a recommendation.

This Inquiry presents an opportunity for the Committee to recommend that the Department of Communities and Justice:

- collect information on the OOHC status of prisoners in correctional facilities,
- conduct research to aid in better understanding the needs of the cohort, and
- tailor appropriately designed and effective programs to strengthen family and community ties and to reduce recidivism.

It is however, vitally important that programs are not launched without understanding the specific factors impacting on prisoners with OOHC-experience and their families. While generic programs may in fact work, there is also a high risk of iatrogenic outcomes and, without a baseline understanding, the ability to comprehend why programs either succeed or fail, is limited.<sup>105</sup>

The collection of information on OOHC status could also be required at key entry points that could identify opportunities to understand how vulnerable children in need become offenders. For example, while the Australian Government has focused attention on child protection and OOHC policy through the *National Framework for Protecting Australia's Children (2009–2020)*<sup>2</sup> and the *National Standards for Out of Home Care*<sup>106</sup> to 'deliver consistency and drive improvements in the quality of care' provided to children in OOHC, there is scope for greater analysis of the intersection between OOHC and crime.

Collection of OOHC status, in turn, would allow for strategies and programs to be put in place to break the care-crime nexus. Accurate and wide-sweeping demographic data is important in order to determine the criminogenic risks posed to children by OOHC systems designed to protect and provide for them. For example, the collection and collation of jurisdictional custodial data would permit national analysis that would, with the input of the Australian

<sup>105</sup> McCord, J. (2003) 'Cures That Harm: Unanticipated Outcomes of Crime Prevention Programs' in *The Annals of the American Academy of Political and Social Sciences* 587(1); 16-30.

<sup>106</sup> Department of Families, Housing, Community Services and Indigenous Affairs. (2011). *National Standards for Out-of-home Care: A Priority Project under the National Framework for Protecting Australia's Children 2009 – 2020*.

Bureau of Statistics and the Australian Institute of Criminology, inform national standards, policies and programs. Data collection should also include information regarding those involved in the OOHC and protection system in order to inform program development and policy, to alert authorities to their over-representation, and to understand their particular needs in custody.

Comprehending the factors that lead to children in OOHC becoming caught up in the justice system will assist agencies to adapt their practices to respond to children's needs. A better understanding of their experiences of arrest, bail and sentencing will assist to identify effective programs, build community support, ensure children's and communities' safety.

**Recommendation 2:**

That the Department of Communities and Justice monitor the relinquishment or termination of parental rights of incarcerated parents, and the number of guardianship orders and open adoptions made of children of incarcerated parents. That this information be publicly reported annually.

**Recommendation 3:**

That the use of 'exceptional circumstances' when women with dependents are being sentenced be expanded so that imprisonment of a parent is a matter of last resort.

That family histories and current circumstances to be requested in Pre-Sentence Reports supplied to the sentencing court when a matter involves a mother with a dependent child/ren.

That recommends that education and information on women's caring obligations be provided to the judiciary, particularly in the lower courts. The UK's *Safeguarding Children when Sentencing Mothers* may be a suitable model for such judicial education.

**DR KATH MCFARLANE - CV**

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**CURRENT ROLES:**

Director - Kath McFarlane Consulting Pty Ltd

Adjunct Associate Professor, Kirby Institute, UNSW Medicine, University of New South Wales

**PREVIOUS ROLES:**

Associate Professor - Centre for Law and Justice, Charles Sturt University

Acting Director – Centre for Law and Justice, Charles Sturt University

Senior Lecturer – Centre for Law and Justice, Charles Sturt University

Chief of Staff - NSW Government (various portfolios)

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Executive Officer - NSW Children’s Court

Executive Officer - NSW Sentencing Council

Policy Officer – Attorney Generals’ Department

Advisor – NSW Parliament

Solicitor – various roles

Official Visitor - NSW Corrective Services

Community Advocate – various roles

**BOARD MEMBERSHIP**

Justice Health and Forensic Mental Health Network Board

Corrections NSW Women’s Advisory Council

SHINE Research Practice and Advocacy Advisory Group

Mid Nth Coast Community Legal Centre Level–Up OOHHC Steering Committee

Aboriginal Legal Service Bugmy Evidence Project Steering Committee

**THESIS:**

McFarlane, K. (2015). *Care-criminalisation: The involvement of children in out of home care in the NSW criminal justice system*. (Doctor of Philosophy), University of New South Wales, Sydney.

**RESEARCH BOOKS & MONOGRAPHS:**

Butler, A. & **McFarlane, K.** (2009) *Public Confidence in the NSW Criminal Justice System*. NSW Sentencing Council. Sydney NSW

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Greig, H., McGrath, A., and **McFarlane, K.** (2019): 'Taking the wheels off': young people with cognitive impairment in out-of-home care, *Psychiatry, Psychology and Law*, DOI: 10.1080/13218719.2019.1644249 <https://doi.org/10.1080/13218719.2019.1644249>

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