

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

Organisation: Aboriginal Legal Service (NSW/ACT) Limited

Date Received: 28 February 2020



ALS

Aboriginal Legal Service (NSW/ACT) Limited

ABN: 93 118 431 066

The Hon Matthew Mason-Cox
Chairperson
Joint Committee on Children and Young People
NSW Parliament
Macquarie Street
SYDNEY, NSW 2000

28 February 2020

Dear Chairperson

**Submission to the Inquiry into Support for the Children of Imprisoned Parents
in New South Wales**

The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') welcomes the opportunity to provide this submission to the Inquiry into the Support for the Children of Imprisoned Parents in NSW.

The ALS is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT. The ALS currently undertakes legal work in criminal law, children's care and protection law and family law. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as referral to further support services.

We provide this submission based on our direct involvement with and representation of Aboriginal and Torres Strait Islander people who interact with the justice system. The submission is also informed by the work of Professor Thalia Anthony, Faculty of Law, University of Technology Sydney. The ALS has been collaborating with Professor Anthony over the past year on a research project that is shedding more light on the experiences of Aboriginal women in custody, most of whom are mothers.

We would be happy to elaborate on any of the matters raised in this submission if that would assist the Committee with its work on this important Inquiry.

Sincerely

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KEY POINTS

- Children whose parents are imprisoned are significantly more likely to have a disrupted education, unstable housing, be placed in care, experience poorer health outcomes and increased contact with the criminal justice system.
- The imprisonment rate of Aboriginal people in NSW has more than tripled since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). Aboriginal people make up 25% of the prison population but 3.4% of the NSW population.
- More than 30% of women in custody are Aboriginal and 80% of these women have children and/or extended care responsibilities. On average, their length of custody ranges from 7 ½ weeks (remand) to 6 months (sentenced).
- One fifth of Aboriginal children in NSW experience maternal incarceration.
- The offending profile of Aboriginal women before the courts and in custody shows a high rate of breach of justice and property related offences. There are alternatives to full time imprisonment that are not being effectively used for relatively low level offending.
- The emphasis should be on diverting people, particularly mothers, from custody at every stage of the criminal justice process. Prison should be a last resort. Measures to consider include:
 - Make greater use of warnings, cautions and court attendance notices as alternatives to arrest.
 - Invest in diversion initiatives for Aboriginal women, including programs with housing for women and children, which are designed and run by or in partnership with Aboriginal women.
 - Amend bail legislation to specifically consider the impact of remand on children, as well as other relevant cultural issues and obligations.
 - Remove overly punitive consequences for breaches of bail conditions and ensure greater use of warnings for technical breaches.
 - Invest in Aboriginal community controlled organisations to ensure sentencing reports are able to be prepared and delivered by Aboriginal community members.
 - Prioritise investment in community based sentences, particularly in rural and regional areas.
 - Ensure the availability of rehabilitative programs for all who enter places of detention, including those held on remand and those serving short sentences.
 - Develop culturally appropriate programs specific to the needs of Aboriginal women in prison, and ensure they are available for women held on remand and serving short sentences, as well as those serving longer terms.
 - Increase investment in prevention, early intervention, diversionary and rehabilitation programs/services for Aboriginal people who are released from prison.

Executive Summary

The Committee has been asked to consider the impact on children of imprisoned parents and the adequacy of policies and services to assist them. The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') seeks to shed light on some of the impacts on children, especially as a result of the imprisonment of Aboriginal and Torres Strait Islander women who are mothers, mostly single mothers, to young children. Indigenous prisoners are more likely (54%) than non-Indigenous prisoners (43%) to have dependent children.¹ This figure is up to 80% for Indigenous mothers in prison.²

The policy advocated by the ALS is directed towards reducing imprisonment of Aboriginal and Torres Strait Islander people, with a particular focus on Aboriginal mothers, in order to mitigate against the adverse, and sometimes tragic, consequences that flow from a term of imprisonment for children. The best policies to support children will be those that seek to do three things:

- Divert parents, particularly mothers, from prison custody whenever possible;
- Address the underlying factors that contribute to offending (such as unstable housing, poverty, trauma, child protection interventions and the lack of rehabilitation services and healing programs and ongoing access); and
- Support children to maintain contact with parents and caregivers in custody.

This submission focuses primarily on the need to divert and support Aboriginal women but many of its recommendations apply equally to Aboriginal men.

Background to the relevant work of the ALS

The ALS is an Aboriginal community controlled organisation providing legal advice and court representation to Aboriginal men, women and children in NSW and the ACT. We have a proud history and almost 50 years' experience in advocating for the fundamental human rights of Aboriginal and Torres Strait Islander people and their communities. We have over 220 staff working across 24 metropolitan, regional and remote offices across NSW and the ACT. The majority of the

¹ Australian Institute of Health and Welfare, *The Health of Australia's Prisoners* (2015) 32.

² Human Rights Law Centre and Change the Record, *Over-represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-imprisonment* (Report, 2017) 13; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 21 [3.16].

work carried out by the ALS is in the criminal jurisdiction. We also perform vital work in the areas of care and protection and family law and tenancy law.

The ALS makes this submission as the organisation that provides legal representation to many of the Aboriginal parents who are imprisoned, and that acts on behalf of many Aboriginal families in care and protection proceedings. This submission is also informed by the work of Professor Thalia Anthony, Faculty of Law, University of Technology Sydney. The ALS has been collaborating with Professor Anthony over the past year on a research project that is shedding more light on the experiences of Aboriginal women in prison, most of whom are mothers.

Direct and indirect impacts of incarceration for Aboriginal children

There is increasing evidence of the deleterious impact on maternal imprisonment, including of Aboriginal women, on children.³ These children are regarded as the hidden or invisible victims of imprisonment.⁴ Children whose parents are imprisoned are significantly more likely to have a disrupted education, unstable housing, be placed in care and experience poorer health outcomes. It is also well established that contact with the child protection system becomes a predictor for juvenile justice and later incarceration (see below). In 2013, the Senate Legal and Constitutional Affairs References Committee acknowledged that children with an incarcerated parent experience trauma from *inter alia* 'the disruption of their family environment, and the difficulties associated with visiting their parent within the prison system'.⁵ Flynn and Eriksson explain that children of an imprisoned parent experience 'isolation, behavioural difficulties at school, anxiety, insecurity, withdrawal, anger, and mental health concerns, as well as the potential for involvement in offending behaviour themselves'.⁶

³ Dowell, Mejia, Preen & Segal, *Maternal incarceration, child protection and infant mortality: A descriptive study of infant children of women prisoners in Western Australia* (2018) 15(6) *Health Justice* 1; Sullivan, Kendall, Chang, Baldry, Zeki, Gilles, Wilson, Butler, Levy, Wayland, Cullen, Jones and Sherwood, *Aboriginal mothers in prison in Australia: A study of social, emotional and physical wellbeing* (2019) 43(3) *ANZ Journal of Public Health* 241-7; Human Rights Law Centre and Change The Record, *Over represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing imprisonment* (May 2017), Australian Law Reform Commission, *Pathways to Justice* (March 2018), 11; 102.

⁴ Brown, Farrier, McNamara, Grewcock, Steel, Quilter, Anthony, Schwartz and Loughnan, *Criminal Laws* (2020) [14.8.8].

⁵ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Report of the Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 22 [3.17].

⁶ Flynn and Eriksson in "Children of Prisoners", in Deckert and Sarre (eds), *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (2017) 437.

The Bar Book Project chapter on Incarceration of a Parent or Caregiver (2019) summarises the consequences of having an incarcerated parent for children:

- Lower development outcomes
- Links to out-of-home care
- Lower educational outcomes and financial hardship
- Adverse impacts on family relationships
- Stigma and social exclusion
- Contact with the criminal justice system
- Trauma
- Distrust of authorities.⁷

These impacts of incarceration are particularly pronounced for Aboriginal children:

Removal and subjugation by imprisonment of one or more parents or kinship family members, and the removal of Indigenous children into State care continues to erode the security that the traditional Indigenous family once provided. Relative to non-Indigenous children in Australia, Indigenous children of the same age face a range of developmental and environmental difficulties independent of parental incarceration, including higher rates of juvenile offending, detention and suicide and lower rates of school completion and employment. These independent difficulties make this group particularly vulnerable when faced with the additional stress of parental imprisonment and may increase the risk of intergenerational criminality as well as intergenerational social exclusion and other poor developmental outcomes.⁸

Aboriginal families have endured many generations of forced separations, resulting in the Stolen Generations, due to discriminatory government policies and practices. This has produced intergenerational trauma among Aboriginal families that is reinforced whenever parents are removed from their families through imprisonment. Imprisonment of parents fractures family bonds, cultural transmission and the growing up of proud Aboriginal children and future leaders.

⁷ For an excellent overview of the effects of incarceration on children, see: The Bar Book Project, *Incarceration of a Parent or Caregiver* (2019). www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book/pdf/BBP_ParentalIncarceration_chapter-Nov2019.pdf

⁸ Dennison, Stewart and Freiberg, 'A Prevalence Study of Children with Imprisoned Fathers: Annual and Lifetime Estimates' (2013) 48 Australian Journal of Social Issues 339, 357.

Overall, prison has adverse effects on the social, cultural and emotional wellbeing of Aboriginal children whose parents are locked up.

For Aboriginal children, the effect of an incarcerated parent may include interventions by child protection authorities that can result in orders to remove the children on an ongoing basis. Placement in out-of-home care is costly to the State but, more importantly, has been shown to contribute to:

- Trauma, alienation and loss of identity⁹ and pride¹⁰
- Cultural dislocation¹¹
- Increased risk of suicide¹² and poor mental and physical health¹³
- Engagement in risky alcohol consumption¹⁴
- Stilted development of skills and learning¹⁵
- Low rates of employment¹⁶
- Contact with the criminal justice system.¹⁷

Imprisonment, even for short periods, places economic pressure on families and entrenches a deprived upbringing for children. Aboriginal women especially, many of whom are single mothers, face short periods of detention with severe consequences. Imprisonment means that they lose jobs,

⁹ Libesman, *Cultural Care for Aboriginal and Torres Strait Islander Children in Out of Home Care*, SNAIC and Barnardos (2011), 53; Cunneen and Libesman, 'Postcolonial trauma: the contemporary removal of Indigenous children and young people from their families in Australia' (2000) 35(2) *Australian Journal of Social Issues* 101.

¹⁰ Ralph, 'The Best Interests of the Aboriginal Child in Family Law Proceedings' (1998) *Australian Journal of Family Law*, Vol. 12, No. 2, 140.

¹¹ Zubrick, Dudgeon, Gee, Glaskin, Kelly, Paradies, Scrine and Walker, 'Social determinants of Aboriginal and Torres Strait islander social and emotional wellbeing', in *Working together: Aboriginal and Torres Strait islander mental health and wellbeing principles and practice*, Australian Institute of Health and Welfare, Canberra (2010) 81; Secretariat of National Aboriginal and Islander Child Care, *Growing Up Our Way: Aboriginal and Torres Strait Islander Child Rearing Practice Matrix* (2011).

¹² Australian Indigenous Psychologists Association, Submission to the Australian Senate Community Affairs References Committee in its *Inquiry into Suicide in Australia* (2009) 3.

¹³ Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Stolen Generations and Descendants; Numbers, Demographic Characteristics and Selected Outcomes* (2018) xiv

¹⁴ *Ibid* 51

¹⁵ 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), 4.

¹⁶ Aboriginal and Torres Strait Islander Healing Foundation, *Bringing Them Home 20 Years On: An Action Plan for Healing* (Report, 2018) 22

¹⁷ *Ibid*.

stop receiving income, are unable to pay rent and bills that in turn fall into arrears. Housing can be forfeited, including NSW Housing Commission properties after 6 months, and families can be left homeless or forced to move, destabilising children's attachments, child care or schooling and access to services.¹⁸

Imprisonment also attaches an increased risk of death, which has devastating, life-long impacts on children who lose a parent in custody. Children of prisoners who die in custody are denied the opportunity to say goodbye and be with their parent in their final moments. The median age at death for Aboriginal prisoners is 46 years.¹⁹ Aboriginal people who die in NSW prisons are more likely to leave behind young children. For instance in 2017, Mr Whittaker died at Parklea Correctional Centre, was a father of four children and Mr Chatfield who died in Tamworth Correctional Centre was a father of one – all children were under 10-years-old. Of the 99 individual investigations conducted by the Royal Commission into Aboriginal Deaths in Custody (1991), 10 were adult females (a further one was a female youth). Of the 10 female adults, 6 of them had children, with 4 of them having children under the age of 18 years. When the death occurs in contested circumstances, this augments to children's grievances.

Root response to addressing impacts on children: reducing incarceration

Reducing incarceration rates would mitigate the negative impacts of parental imprisonment on children.²⁰

The best policies to support children will be those that seek to do three things:

- Divert parents, particularly mothers, from custody whenever possible;
- Address the underlying factors that contribute to offending (such as unstable housing, poverty and the lack of rehabilitation services); and
- Support children to maintain contact with parents and caregivers in custody.

This submission focuses primarily on the need to divert and support Aboriginal women but many of its recommendations apply equally to Aboriginal men.

¹⁸ See Cunneen, Baldry, Brown, Brown, Schwartz and Steel, *Penal Culture and Hyperincarceration* (2013) 15.

¹⁹ Australian Institute of Criminology, "National deaths in custody program", *Statistical Bulletin* No 13, 2019.

²⁰ Roettger, Lockwood and Denison, *Indigenous people in Australia and New Zealand and the intergenerational effects of incarceration* (Dec 2019), Indigenous Justice Clearinghouse, Research Brief 26.

Problem of Indigenous over-representation in prisons

Nearly 30 years ago, in 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) published its seminal Report drawing attention to the shameful over representation of Aboriginal people in custody. The Commission called for sweeping changes to be made to reverse the inequality, discrimination and unacceptably high rates of imprisonment experienced by Aboriginal people throughout Australia. Specifically, the Report recommended strong measures to divert Aboriginal people from custody, use of imprisonment as a last resort, improved access to health services, housing, education and employment, self-determination for Aboriginal peoples and greater support for Aboriginal community controlled organisations.

When the Royal Commission published its report, 7.8% of people in custody in NSW were Aboriginal. Today, the situation is much worse. Over the last 30 years the rate of Aboriginal imprisonment has more than tripled to the current rate of 25%. The situation is even more alarming for Aboriginal women who now make up 31.2% of the female custody population (remand and sentenced).²¹ To put these statistics in context, Aboriginal people comprise just 3.4% of the NSW population, although the statistic is likely to be lower for adults given the young age of the population.

These disturbing figures point to the continued and manifest failure of government policies and practices to effect positive change and to fully implement both the spirit and letter of the RCIADIC recommendations.

Aboriginal women in custody post-RCIADIC

RCIADIC looked at the overrepresentation of Aboriginal people in custody as a whole and did not specifically consider the situation of Aboriginal women. It did nonetheless note in its investigations into the deaths of the 11 Aboriginal women that they were criminalised for acts such as drinking in public, non-payment of fines, motor vehicle offences, disorderly behaviour, offensive language, failure to give name and address and other “petty crimes”. The criminalisation of these acts disproportionately targeted and harmed Aboriginal women, according to RCIADIC.

²¹ Bureau of Crime Statistics and Research, *NSW Custody Statistics: Quarterly Update December 2019*.

Specific concerns about the over representation of Aboriginal women in custody were raised 12 years later in the 2003 report *Speak Out Speak Strong*.²² At that time Aboriginal women represented 31% of women sentenced to a prison term and on remand. Of these women, 86% were mothers and nearly 30% provided regular care to other children and extended family members. 70% of these women reported that they had experienced sexual assault as children and 44% had been subject to sexual assault as adults.

A further 14 years elapsed and the situation continued to deteriorate. In 2017, the Human Rights Law Centre and Change the Record Coalition published *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*. This Report took an in depth look at Aboriginal women in custody around Australia and found that:

... Aboriginal and Torres Strait Islander women comprise 34 per cent of women behind bars but only 2 per cent of the adult female Australian population. Even more women are cycling in and out of courts and police cells. This is a crisis, carrying with it profound effects for Aboriginal and Torres Strait Islander women their children and communities.

While the vast majority of Aboriginal and Torres Strait Islander women will never enter the justice system as offenders, the lives of those who do are marked by acute disadvantage. The overwhelming majority of Aboriginal and Torres Strait islander women in prison are survivors of physical and sexual violence. Many also struggle with housing insecurity, poverty, mental illness, disability and the effects of trauma... Too often, the impact of the justice system is to entrench disadvantage, rather than promoting healing, support and rehabilitation²³.

The Report noted that 80% of women in custody were mothers and that many also cared for the children of others. It went on to highlight the devastating and long lasting impact of custody on the children of these women.

The growing number of Aboriginal and Torres Strait Islander women entering prisons has concerning implications for the generations to come. Children whose mothers spend time in prison are more likely to have a disrupted education, poor health and unstable housing – factors that heighten the risk of a young person entering child protection or justice systems. Aboriginal and Torres Strait Islander children

²² Lawrie, *Speak out speak strong: Rising imprisonment rates of Aboriginal women* (2003) 24 *Indigenous Law Bulletin* 5.

²³ Human Rights Law Centre and Change the Record, *Over represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over imprisonment* (2017), 4-5.

*are already grossly over-represented in child protection systems across Australia. Once in the child protection system, the risks of entering the criminal justice system increase considerably. For example, recent data published by the Australian Institute of Health and Welfare indicates that young people on child protection orders are 27 times more likely to be under a youth justice supervision order in the same year.*²⁴

To understand why so many Aboriginal women were in custody, the Report looked at their offending patterns and found that these women were:

- nearly twice as likely as non-Indigenous women to have been imprisoned previously, which in turn means a higher risk of being re-imprisoned;
- charged and prosecuted at high rates for minor offending, such as public order offences, driving and vehicle offences and shop-lifting offences;
- more likely to be imprisoned for acts intended to cause injury than non-Indigenous women;
- more likely to be in prison serving shorter sentences than non-Indigenous women;
- being imprisoned on remand in growing numbers; and
- at greater risk of being unable to pay fines and comply with bail and parole conditions and community sentencing orders.²⁵

The strong message of the Report was that a shift away from ‘tough on crime’ approaches is urgently needed, including non-punitive approaches to low level offending. In particular, the report urged a rethink in relation to breaches of bail and other justice orders, which constitute criminal offences and can culminate in short terms of imprisonment.

The Report also drew attention to the acute lack of diversion options for Aboriginal women. It strongly recommended that governments amend criminal procedure, laws and policies to require police, lawyers, courts and corrections officers to prioritise diversion options for Aboriginal women at all stages of the criminal process.

These recommendations have been echoed in a recent report of the NSW Inspector of Custodial Services titled ‘Women on Remand’. Noting that Aboriginal women are disproportionately more

²⁴ Ibid, 13

²⁵ Ibid, 12

likely than their non-Aboriginal counterparts to be incarcerated and more likely to be mothers and primary care givers to children, the Inspector stated:

*Women who are Aboriginal...should be provided with specialised diversion programs to prevent their incarceration.*²⁶

Aboriginal women in custody in NSW today: statistics

Fast forward to 2020 and Aboriginal women are 32.9% of the female sentenced population and 28.6% of the remand population²⁷. Overall, they represent 31.8% of women in custody.

To understand what these statistics represent, it is important to understand the offending, remand and sentencing profiles of Aboriginal women. These profiles show a preponderance of relatively minor offences, particularly offences related to driving, breach of bond, drug possession and property.

The following statistics were provided by the Bureau of Crime Statistics and Research. The most prevalent offence is drive while licence suspended or disqualified, followed by possession of illicit drugs (more than 50% of these charges relate to cannabis).²⁸

Retail theft charges also figured highly and almost all (92%) were in the lowest category (ie under \$2000).²⁹

Female Aboriginal Defendants – top 5 proven charges – BOCSAR 2018

Offence	Women
1. Drive while licence suspended disqualified	513
2. Possess illicit drugs	415
3. Common assault (ie not a serious assault resulting in injury)	411
4. Breach of bond supervised	335
5. Theft from retail premises	319

²⁶ Inspector of Custodial Services, *Women on Remand*, (2020) 17, 120

²⁷ Bureau of Crime Statistics and Research, *NSW Custody Statistics, Quarterly Update December 2019*

²⁸ Information provided by BOCSAR June 2019 and January 2020.

²⁹ Information provided by BOCSAR, February 2020.

The offences for which Aboriginal women were mostly commonly remanded in custody related to various forms of assault, drug possession and property.

Top 5 offences for Aboriginal women on remand in December 2019

Offence	Women
1. Acts intended to cause injury	37
2. Theft	13
3. Break and enter	12
4. Drugs	10
5. Robbery	9

The average length of stay for Aboriginal women on remand is 7 ½ weeks (46.8 days) which is a very significant time to be separated from young children³⁰. In many cases, women who are held on remand do not receive a custodial sentence when finally dealt with by the court:

During 2016-17, ... almost half of women (46.4%) were released without custodial sentence. Only about a third of all women on remand received custodial sentences. A significant proportion of women were given a community-based order (48.6%) or had already served their sentence whilst on remand (2.6%).³¹

The primary reason for Aboriginal women being *sentenced* to a term of imprisonment was for breach of a justice order (such as a community based order). Once again, property related offences ranked highly.

Top 5 offences for Aboriginal women– sentenced and in prison December 2019

Offence	Women
1. Justice Procedure	51
2. Acts intended to cause injury	45
3. Theft	21
4. Break and enter	17
5. Robbery	10

The average length of stay for Aboriginal women (sentenced only) is approximately 4 months (116.8 days), and the average length of stay for Aboriginal women who were held on remand and subsequently sentenced to imprisonment is approximately 6 months (188.1 days).³²

³⁰ BOCSAR, *NSW Custody Statistics Quarterly Update December 2019*

³¹ Inspector of Custodial Services, *Women on Remand* (2020) 32

Aboriginal women in custody in NSW today: their voices and stories

While helpful, statistics do not paint a complete or accurate picture of Aboriginal women in custody. For that we need to listen to the voices of the Aboriginal women themselves. Over the last 12 months, Professor Thalia Anthony, with researchers Gemma Sentence and Michelle Toy and with the support of the ALS and Aboriginal women's services, has been visiting prisons across NSW to listen to the stories of over 160 Aboriginal women. These women have been asked about their experiences in sentencing and in the criminal justice system.

Professor Anthony found high numbers of Aboriginal mothers who were refused bail or sentenced for shoplifting, driving while licence suspended and breach of orders. One mother conveyed that after she had dropped her three children off to child care and school, she had attended court expecting to receive a fine for driving with a suspended licence. Instead, she had been sentenced to prison for almost three months. This woman told Professor Anthony, *"I was shocked when they sent me to prison. It's my first time for a small offence (driving unlicensed) and they have never given me an ICO or a CCO"*. Another mother with 4 children under the age of 10 had been denied bail and remanded for 5 months for an offence of shoplifting. This was her first time in prison. Another illustrative example is of a mother who was transported 600 kilometres from her hometown to prison for breaching an Apprehended Violence Order that was originally instigated after she called police in an attempt to protect herself from family violence. Finally, a number of women spoke about breaching court orders due to family and child caring responsibilities. One Aboriginal mother conveyed:

We all do have kids and we want to get out and stabilise ourselves and get our kids back, but it's hard to do anything with our criminal record as well, but we try and we try, we all try, it'll never be enough for them...you continue to breach ...you gotta do this, you gotta do that...

A prevailing theme in the narratives provided by Aboriginal women about their sentencing and bail applications is that they feel that being Aboriginal contributes to the likelihood of imprisonment. One Aboriginal woman stated: *"I talk to other [non-Aboriginal] girls in my cell and we get much tougher sentences for minor offences like stealing, driving or breach."* They expressed that courts fail to understand their circumstances and only see them as a reflection of a criminal record. Other

³² BOCSAR, *NSW Custody Statistics Quarterly Update December 2019*

women told the researchers, *"I'm a mother, sister and daughter and a victim a long time before I was an accused"; "We aren't just bad people doing bad things, we are black women who have been victims."* Aboriginal women projected despair and a sense of resignation about their fate: *"We are left out of any chance of bail or an ICO or even appeals. I usually plead guilty regardless just to get the 25% reduction because I know my Aboriginality does not work in my favour."*

The women were also very clear about what needs to change in the court system to prevent high levels of imprisonment. This includes having the courts show *"some understanding of what we've gone through"*. They expressed the desire for more Koori courts *"where there are our people who understand"*. They also emphasised the need for *"pre-sentence and post sentence advocacy and access to services and support networks whilst awaiting sentence"*. One woman decried, *"I've been in the system over the years, but they've done nothing for the women."*

The concerns of Aboriginal women in prison also relate to broader structural issues. One woman lamented the lack of housing that keeps her in the system: *"I keep coming back for the last 15/16 years and it's sad. I don't want to keep coming back, I'm over it, but one of my main, big, big problems is housing, there is nothing for us, there is no housing."* Aboriginal mothers said that they needed more time in community through rehabilitation services being made available for them and their families. For one Aboriginal mother, she stated that the emphasis should be on helping Aboriginal mothers: *"We want better outcomes for those of us who have children and to get the right help and support and services within the community"*. Another mother stated: *"I think that if there were more opportunities for Aboriginal women like counselling – more rehab choices and more support out in the community things would change."*

CHANGING THE SYSTEM TO SUPPORT ABORIGINAL CHILDREN AND THEIR PARENTS

The patterns and problems highlighted above have persisted for decades. They will continue to persist, and worsen, until governments commit to the deep and necessary changes that are required. And while they persist, more and more children will be separated from imprisoned parents, placed in care arrangements, experience the trauma of separation, have disrupted home lives and education, experience poorer health outcomes and, in many cases, grow into young people and adults who interact frequently with the criminal justice system.

Many, many reports, starting with RCIADIC, have said exactly what needs to change and their most crucial recommendations have been ignored. RCIADIC envisaged a future where there would be:

- strong measures to divert more Aboriginal people from custody,
- use of imprisonment as a last resort,
- improved access to health services, housing, education and employment,
- self determination for Aboriginal peoples, and
- greater support for Aboriginal community controlled organisations.

This submission strongly endorses all those aims and recommends that diversion from custody be considered at every stage of the criminal justice system.

Warnings and cautions

Governments must shift away from punitive and law enforcement focused approaches and prioritise prevention, early intervention and diversion from the criminal justice system.

The need for diversion rather than incarceration was most recently emphasised in the report by the NSW Inspector of Custodial Services.

..[T]here is a need to ensure that diversionary programs are available for women that can help them avoid short and disruptive periods of incarceration. Women who are Aboriginal...should be provide with specialised diversion programs to prevent their incarceration.³³

The first opportunity at which diversion should be considered is the point of arrest.

When an offence is allegedly committed, Police may respond in a number of ways. They may arrest the person if they are satisfied that the arrest is reasonably necessary for any one or more of the following reasons:

- to stop the person committing or repeating the offence or committing another offence
- to stop the person fleeing
- to enable enquiries to be made to establish the person's identity
- to ensure that the person appears before a court in relation to the offence
- to obtain property in the possession of the person that is connected with the offence
- to preserve evidence of the offence
- to prevent the harassment of, or interference with, any person who may give evidence in relation to the offence³⁴

³³ NSW Inspector Of Custodial Services. Women on Remand, (2020) 17.

If a police officer cannot satisfy one of these conditions for an arrest, they must consider an alternative to arrest such as a:

- warning
- caution
- penalty notice
- Field or Future CAN, or
- in the case of a child, dealing with the matter under the Young Offenders Act 1997

The extent to which Police actually exercise alternatives to arrest is largely unknown as this data is not routinely collected, analysed or published by the Bureau of Crime Statistics and Research.

Arrests in NSW have continued to climb. There was a 14% increase in the number of Aboriginal people brought before NSW courts for various offences from 2014-2019. In 2018-19 the most common principle offence for an Aboriginal defendant was breach of a justice order. More than 50% of these breaches were for breach of a bond.³⁵ As BOCSAR has observed, *it would be of particular interest... to know how many of the breach offences included under justice procedure offences involve breaches of conditions, as opposed to further criminal offences*³⁶.

The high prevalence of breach of justice orders strongly suggests that more work is needed to ensure the conditions imposed on offenders (such as bond conditions) are reasonable, appropriate and understood.

The ALS strongly recommends that the NSW Government:

- **Amend criminal procedure laws and policies to require police, lawyers, courts and corrections officers to prioritise diversionary options for Aboriginal women at all stages of the criminal process.**
- **Collect, analyse and publish data about the extent to which police exercise alternatives to arrest.**

³⁴ *Law Enforcement (Powers and Responsibilities) Act 2002* s99

³⁵ Bureau of Crime Statistics and Research *Criminal Court Statistics June 2019*.

³⁶ Bureau of Crime Statistics and Research, *What's causing the growth in Indigenous imprisonment in NSW?* August 2016, p10

- Ensure diversion is encouraged where there has been previous low level offending or a significant break in offending.
- Ensure diversion initiatives address the underlying issues of offending – through counselling, referrals to drug and alcohol and other supports.
- Prioritise diversion initiatives for Aboriginal women, including programs with housing for women and children which are designed and run by or in partnership with Aboriginal women and Aboriginal Community Controlled Organisations.
- Ensure conditions for diversion are appropriate to the individual's circumstances (eg care giving responsibilities) and reasons for offending.
- Monitor diversion– where there have been obstacles to complying with conditions, there should be scope for second opportunities, particularly if the individual is dealing with multiple personal issues.

Bail and sentencing

Once a person is arrested, police must next consider whether the person should remain in the community, or should be remanded in custody.

In NSW, the number of Aboriginal people refused bail increased by a staggering 238% from 2001-2015.³⁷ This trend has showed no signs of abating as the latest BOCSAR custody statistics indicate there was a 26% increase in the number of Aboriginal people held on remand from 2015-19³⁸.

28.6 % of women on remand are Aboriginal and the majority of these women are mothers. The average length of stay for women held on remand is 48 days which is a significant amount of time to be separated from their children.

When women are taken into custody, even for short periods on remand, the impacts can be life altering, long term and intergenerational; disconnection from family and community, children taken into child protection, housing and employment lost....

Given the high number of Aboriginal of Aboriginal and Torres Strait Islander women in the justice system who are primary carers, there is a need for greater consideration of the impact of not granting bail on dependent children. Bail support and diversionary options linked with

³⁷ Ibid, p8.

³⁸ Bureau of Crimes Statistics and Research , *Custody Statistics Quarterly Update December 2019*. Fourth quarter for 2019 was compared to fourth quarter of 2019.

*accommodation, designed by and for Aboriginal and Torres Strait Islander women, are required...*³⁹

Since the 1991 report of the Royal Commission into Aboriginal Deaths in Custody, many other reports have called for changes to bail law, policy and practice to address the over representation of Aboriginal people on remand.⁴⁰

The ALS strongly recommends that the NSW Government:

- **Amend bail legislation to consider any matter relating to a person's Aboriginal identity, culture or heritage. Courts should be required to consider a broad range of factors including connections with and obligations to extended family (eg impact of remand on children), traditional ties to place, mobile and flexible living arrangements, and any other relevant cultural issue or obligation.**
- **Provide additional support services to ensure the availability of accommodation options and stable housing to help Aboriginal people to meet the conditions of bail and community based orders.**
- **Remove overly punitive consequences to breaches of bail conditions, particularly those that involve technical breaches or low level offending.**
- **Ensure that warnings are issued for technical breaches of bail rather than immediate arrest and remand.**
- **Work with peak Aboriginal organisations to identify service gaps and deliver and develop the infrastructure required to provide culturally appropriate bail support and diversion options**

Post-bail, sentencing provides the next opportunity to reduce the incarceration rates of Aboriginal peoples.

³⁹ Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) pp 5 and 46

⁴⁰ See for example: NSW Law Reform Commission, *Bail* (2012) Report 133, paras 11.47-11.80; Change the Record, *Blueprint for Change* (2015); Australian Law Reform Commission *Pathways to Justice: An Inquiry into the Incarceration rate of Aboriginal and Torres Strait Islander Peoples* (2017), Report 133, Chapter 5; Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, (2017); Law Council of Australia, *The Justice Project* (2018)

Once again, numerous reports have already identified the reforms that are necessary if governments are serious about closing the justice gap and reducing the high rates of Aboriginal peoples in custody⁴¹.

The Australian Law Reform Commission noted that:

Sentencing decisions are crucial in determining whether a person goes to prison and for how long. The sentencing decision may be affected by the seriousness of the offence and any subjective characteristics of the offender, including criminal history.

Aboriginal and Torres Strait Islander offenders are more likely to have prior convictions and to have served a term of imprisonment than non-Indigenous offenders. Aboriginal and Torres Strait Islander offenders may have also experienced trauma that is unique to their Aboriginality. This could include, for instance, direct or indirect experience of the Stolen Generation, loss of culture, and displacement. Aboriginal and Torres Strait Islander peoples who have experienced this type of trauma may distrust police and government agencies...

For reasons of fairness, certainty, and continuity in sentencing Aboriginal and Torres Strait Islander offenders, the majority of stakeholders to this Inquiry supported the introduction of provisions requiring sentencing courts to take a two-stepped approach. First, to take into account the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples, then to proceed to review evidence as to the effect on that particular individual offender. The ALRC recommends the introduction of such provisions⁴².

The ALRC specifically recommended that:

State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.

State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal

⁴¹ See footnote 13, as well as NSW Law Reform Commission, *Sentencing*, (2013) Report 139.

⁴² ALRC, *Pathways to Justice: An Inquiry into the Incarceration rate of Aboriginal and Torres Strait Islander Peoples* (2017), Report 133, Chapter 6

*and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means*⁴³

The ALRC also strongly supported increasing the availability of community based sentences for Aboriginal offenders and the provision of greater support to mitigate against breach.⁴⁴ Community based sentences have been shown to be more effective in reducing reoffending than a short term of imprisonment.⁴⁵ One significant benefit of community based sentences is that they allow parents to maintain care for, or contact with their children, obviating the need for children to be exposed to a prison environment.

The ALS acknowledges that the NSW Government has taken steps to increase the availability of community based orders. However, a lack of community based sentencing options in regional and remote areas means that many Aboriginal people are denied access to them. Further, the conditions Aboriginal people are required to meet frequently do not take account of their unique circumstances, leading to breach and incarceration. It is highly significant that the most common principal offence for which Aboriginal people are sentenced is the offence against justice orders⁴⁶.

It is also vital that community based orders accommodate family and cultural responsibilities, especially for women:

*For Aboriginal and Torres Strait Islander women with child care responsibilities, court orders that require fulltime participation in diversion programs may set them up for failure. Programs should accommodate family and cultural responsibilities and be available to women in their communities, to prevent women being forced to choose between family connections and responsibilities and complying with conditions of diversion. Diversion programs that are not designed by, or in partnership with, Aboriginal and Torres Strait Islander women, and that have onerous requirements, may do more harm than good – they may be perceived as another instance of unhelpful state intervention, compromising the likelihood of success and potentially causing distress or reinforcing distrust in the system.*⁴⁷

⁴³ Ibid. Para 6.114

⁴⁴ Ibid. Chapter 7

⁴⁵ BOCSAR, *Intensive Corrections Orders versus short prison sentences: A comparison of reoffending*, (2017)

⁴⁶ BOCSAR *Criminal Court Statistics 2018*

⁴⁷ Human Rights Law Centre and Change the Record, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, (2017) p35.

The Law Council of Australia also commented on the particular need to accommodate the care responsibilities of women diversion and sentencing:

*Policies and laws should prioritise diversionary options for women, community-based prevention and early intervention support programs that facilitate healing, holistic family support programs, education and training programs, bail reform, specialist family violence courts and culturally safe programs for women in prison and exiting prison. Sentencing considerations could also be reviewed to enable the impact of a primary caregiver's imprisonment on children and dependents to be considered.*⁴⁸

The ALS strongly recommends that the NSW Government:

- **Prioritises investment in community based sentencing in regional and remote areas**
- **Extends the availability of Koori courts to adults in NSW.**
- **Requires courts to consider Aboriginal identity (which includes kinship ties and parental responsibilities) and impacts of colonisation as sentencing factors.**
- **Invests in Aboriginal community controlled organisations to ensure sentencing reports are able to be prepared and delivered by Aboriginal community members.**
- **Works with Aboriginal organisations to identify unmet need and develop culturally appropriate community based sentences, with a particular emphasis on the delivery of community based sentences in rural and remote locations.**

Custody

There have been few studies that have examined the experience of mothers and children in a custodial environment. One report that studied the experience of Aboriginal women in prison in Australia made the important point that many previous studies did not acknowledge the extended kinship ties and mothering role of Aboriginal women to both biological children and children in their extended family and community. As a consequence, studies routinely under report the number of children directly affected by the imprisonment of Aboriginal women.⁴⁹

⁴⁸ Law Council of Australia, *Justice Project: Aboriginal and Torres Strait Islander People*, (2018) p5.

⁴⁹ Sullivan et al, *Aboriginal mothers in prison in Australia: A study of social, emotional and physical wellbeing*, Australian and New Zealand Journal of Public Health, (2019) Vol 43, Issue 3 , p 241.

A further report that specifically considered residential programs for mothers and children in NSW prisons identified some of the barriers to participation in these programs, as well as their shortcomings. Importantly, it concluded that:

As always, early intervention and diversionary programmes which focus on family functioning, housing, education and employment are needed for vulnerable pregnant women, mothers and children....Reversing Australia's soaring rate of female imprisonment as an urgent priority would mitigate the impact of many issues raised [in this paper]⁵⁰.

Aboriginal women in custody are almost invariably on remand or sentenced to short terms. The average time in custody ranges from 7 ½ weeks for women on remand to just over 6 months for women held on remand and then sentenced to imprisonment. This means they are frequently ineligible to access programs that may benefit both them and their children.

The Inspector for Custodial Services has recently released a report on women on remand.⁵¹ The Inspector's report identifies a number of critical issues for Aboriginal women in custody, including:

- The frequency of transfers between correctional centres seriously affecting the ability of women to maintain contact with their families
- The failure of Corrective Services' policy to prioritise the need for placement near family and children within their guide for female placement
- The lack of opportunities to engage in programs, employment and education, particularly for remandees who are moved frequently, and
- The lack of programs and cultural support to address the specific needs of Aboriginal women.⁵²

Attention should also be paid to the needs of children visiting parents in prison. It is important that children are adequately prepared for the experience of visiting a parent in prison and for child friendly areas to be provided where contact may take place.

The ALS strongly recommends that the NSW Government:

- **Prioritises placement near family and children for Aboriginal women in custody**
- **Ensures the availability of rehabilitative programs for all who enter places of detention, including those held on remand and those serving short sentences**

⁵⁰ Walker, Baldry and Sullivan *Residential programmes for mothers and children in prison: Key themes and concepts* (2019) Criminology and Criminal Justice 1-19 at p16.

⁵¹ Inspector of Custodial Services, *Women on Remand* (February 2020)

⁵² Ibid, see pp 13, 16, 123 and 140

- **Develops culturally appropriate programs specific to the needs of Aboriginal women in prison, and ensures they are available for women held on remand and serving short sentences, as well as those serving longer terms**

Post custody

Once a person has been released from prison, the next challenge is to minimise the risk that she or he will reoffend and be returned to custody. Reoffending data published by BOCSAR shows that 52.6% of sentenced Aboriginal people reoffend within 12 months of their release⁵³.

In 2017, the ALS conducted a series of State wide forums and surveys to inform its response to the Australian Law Reform Commission *Inquiry into the incarceration of Aboriginal and Torres Strait Islander peoples*.⁵⁴

Participants expressed concern at the lack of support for Aboriginal people released from prison. They noted that custodial training and programs do not provide adequate pathways for inmates when they leave prison and return to the community. Mental health, drug and alcohol and housing support services must be provided in community. In addition, participants noted those released from prison require ongoing training or employment to provide for successful reintegration. However these key services are not currently available once Aboriginal people leave prison. As a result, when inmates are released they “go back to the same environment they were in when they went into custody. They get back into the same environment and then end up back in gaol” (Forum attendee).

Participants recommended that Corrective Services NSW staff connect with the local communities of prisoners prior to release. In partnership, staff and the local community can then develop initiatives in community that continue or extend upon existing programs provided in prison, respond to local needs and capacity and increase the likelihood of post-release employment and reintegration of Aboriginal and Torres Strait Islander offenders.

The biggest barrier to successful reintegration is the limited availability of relevant programs, especially the critical lack of rehabilitation and mental health services, particularly in regional NSW.

⁵³ BOCSAR, *Reoffending in NSW Excel Table* (February 2020)

⁵⁴ ALS (NSW/ACT) Submissions to the ALRC *Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander peoples*, Sep and Oct 2017

99% of participants in the ALS survey said there were insufficient rehabilitation services to meet the demand of the Aboriginal community.

The ALS strongly recommends that the NSW Government:

- **Increase investment in prevention, early intervention, diversionary and rehabilitation programs/services for Aboriginal people who are released from prison. Best practice elements include:**
 - **Engaging with prisoners before their release to discuss and adopt post release plans**
 - **Ensuring that prisoners understand release conditions and provide advice about what to do when difficulties arise**
 - **Regular meetings with prisoners who live remotely to provide social work interventions, such as counselling**
 - **Culturally supportive and sensitive approaches**
 - **Supervision and control by Aboriginal community controlled organisations**
 - **Ongoing case management with extended Through care programs**
 - **Access to housing, family violence, drug and alcohol, mental health, Centrelink and child protection support**

An Aboriginal Justice Agreement

In 2018, the Australian Law Reform Commission (ALRC) recommended that:

*All State and Territory governments should renew or develop an Aboriginal Justice Agreement in partnership with relevant Aboriginal and Torres Strait Islander organisations.*⁵⁵

The ALRC said these Agreements should be developed in partnership with Aboriginal and Torres Strait Islander peoples who should be centrally involved in policy development affecting them. The Agreements should include joint and clear justice objectives across government departments, they should provide measureable action plans and they should be independently evaluated.

NSW has an *Aboriginal Justice Agreement* in 2002-03, which was followed by an *Aboriginal Justice Plan 2004-14*. There has been nothing equivalent since that time.

ALS acknowledges that the Department of Justice developed a plan called *Reducing Aboriginal Overrepresentation in the Criminal Justice System 2018-20*. However this Plan was not developed in partnership with Aboriginal community controlled organisations, it has never been made public and

⁵⁵ Australian Law Reform Commission, *Pathways to Justice- Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133), 2018, Recommendation 16-2

there has been no public accountability for the achievement of its objectives.⁵⁶ Importantly, while the Plan acknowledges that the incarceration of Aboriginal women has increased by 29%, it has not specific targets related to Aboriginal women.

Any future plans and agreements in NSW should be designed, implemented and evaluated in partnership with Aboriginal community controlled organisations, consistent with the principles of community control and self-determination that were first advanced by the Royal Commission into Aboriginal Deaths in Custody.

ALS strongly recommends that the NSW Government:

- **Works with peak Aboriginal and Torres Strait Islander organisations to renew its Aboriginal Justice Agreement (AJA).**
- **Ensures a key focus of an AJA is the principle of Aboriginal self determination. Local Aboriginal organisations and communities should be involved in its evaluation.**

⁵⁶ While the ALS was not invited to participate in the development of the Plan, it was subsequently represented on the Steering Committee that oversaw its implementation.