

**Submission
No 119**

**INQUIRY INTO HIGH LEVEL OF FIRST NATIONS
PEOPLE IN CUSTODY AND OVERSIGHT AND REVIEW OF
DEATHS IN CUSTODY**

Organisation: Women's Legal Service NSW

Date Received: 15 September 2020

15 September 2020

Mr Adam Searle MLC

Chair

Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

Parliament House, Macquarie Street

Sydney NSW 2000

By email: First.Nations@parliament.nsw.gov.au

Dear Chair,

**Inquiry into the High Level of First Nations People in Custody
and Oversight and Review of Deaths in Custody**

1. Women's Legal Service NSW (**WLS NSW**) thanks the Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (**the Committee**) for the opportunity to comment on the Inquiry into the high level of First Nations People in custody and oversight and review of Deaths in Custody (**the Inquiry**).
2. WLS NSW acknowledges the overwhelming and disproportionate harm and loss experienced by First Nations people in both the criminal justice system and the child protection system, which is recognised as a key contributor to the criminalisation of First Nations people. We also acknowledge the guidance, bravery, dignity and resilience of the many First Nations women who have allowed us to walk beside them as they navigate imposed colonial laws and policies.
3. WLS NSW welcomes the Committee's focus on the high level of First Nations people in custody and the oversight and review of Deaths in Custody. These issues have been scrutinised for decades¹ with no visible improvement in the experiences of criminalised First Nations people. First Nations women in particular, are now more likely to be arrested and incarcerated.
4. A genuine commitment and priority to First Nations led reforms is long overdue. We need to move beyond law and order thinking to healing and reparations. All laws, policies and procedures must be continually reviewed and amended to ensure that they are culturally safe, inclusive of First Nations laws and customs, committed to self-determination and not perpetuating further harm through structural racism.
5. Our submission predominately responds to the Terms of Reference:
 - 1 (a) the unacceptably high level of First Nations people in custody in New South Wales, and
 - 1 (e) any other related matter.

¹ *Royal Commission into Aboriginal Deaths in Custody*, 1991, <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>, accessed 14 September 2020.

6. In summary, we recommend:

- 6.1 The Committee look to the Aboriginal Legal Service NSW/ACT (**ALS NSW/ACT**) for leadership on reforming criminal laws and practices and overhauling the mechanisms for oversight and review of deaths in custody. At a minimum this must include the establishment of a First Nations led independent body with investigative powers, including the power to enter custodial environments to collect evidence.
- 6.2 Entrenching principles of truth telling, self-determination and restorative justice in all actions, with reference to the recommendations from the *Final Report of the Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples*.²
- 6.3 The immediate establishment of a Walama Court, centring Elders' cultural authority and community based holistic support, as called for by leading First Nations lawyers and academics and recommended by the *Special Commission of Inquiry into the Drug Ice*.³
- 6.4 Raising the minimum age of criminal responsibility to a minimum of 14 years of age. Statistics highlight the significant overrepresentation of First Nations children and young people in the criminal justice system. In 2018-19 First Nations children and young people in NSW were 13 times more likely to be under youth justice supervision.⁴ The rate ratio is even higher for detention and on an average day in 2018-19, First Nations children and young people in NSW were 16 times more likely to be in detention.⁵
- 6.5 The Committee recognise and respond to the unique and specific ways in which First Nations women are criminalised and harmed and provide for the equitable inclusion of First Nations women in all consultations, reviews and processes.
- 6.6 The establishment of a specialised criminal legal service for First Nations women, which is sexual, domestic and family violence informed, trauma informed and committed to creating holistic, safe pathways for First Nations women to heal and end criminalisation.
- 6.7 The incarceration of First Nations women, and particularly pregnant women and women with caring responsibilities for children, should be as a last resort.
- 6.8 Building safer, stronger communities to reduce the high rates of contact with police and the courts, using models like Just Reinvest NSW, which focus on the underlying community disadvantages that result in criminalised behaviours and post code injustice.⁶

² Final Report of Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, November 2018,

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Constitutional_Recognition_2018/ConstRecognition/Final_Report/section?id=committees%2Freportjnt%2F024213%2F26675, accessed 7 September 2020.

³ <https://www.smh.com.au/national/first-nations-lawyers-call-for-urgent-action-on-walama-court-20200804-p55igq.html>, accessed 4 September 2020; *Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants*, January 2020, Recommendation 61, <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/The-Drug-ice-1546/05-Report-Volume-3.pdf>, accessed 8 September 2020.

⁴ Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19*, May 2020, p. 9, at <https://www.aihw.gov.au/getmedia/a5a364b9-fe69-4d02-9c93-1965a69a3d93/aihw-juv-132.pdf.aspx?inline=true>, accessed 4 September 2020.

⁵ *Ibid.*

⁶ <https://www.justreinvest.org.au>, accessed 7 September 2020.

About Women's Legal Service NSW

7. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
8. Since 1995 WLS NSW has provided a statewide First Nations Women's Legal Program (**FNWLP**). This program delivers a culturally safe legal service to First Nations women, including regular engagement with communities across NSW. We provide a First Nations legal advice line, casework services including a specialised family law service to assist First Nations women access the family law courts, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for First Nations women.
9. An Aboriginal Women's Consultation Network guides the FNWLP. It meets quarterly to ensure that we deliver a culturally safe service. The members include regional community representatives and the FNWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.
10. For more than a decade WLS NSW has also provided culturally safe, specialised, family and civil law advice, casework and education services to hundreds of criminalised women across NSW, including women defending Apprehended Violence Orders, women in custody, women under supervision in the community and to women post release from custody.
11. We work in partnership with Wirringa Baiya Aboriginal Women's Legal Centre and the Western Sydney Community Legal Centre to provide the Legal Education and Advice in Prison (**LEAP**) for women, which is a family and civil law program in the four Sydney women's correctional centres. WLS NSW is also available as a free phone call for advice in other correctional centres around the state. LEAP prioritises access for First Nations women. This work is unfunded and provided from core WLS NSW (and the partner community legal centre) resources and is always under threat.⁷ The majority of referrals are made by Corrective Service NSW staff.
12. We also provide advice, casework and culturally safe services to young women in Youth Justice detention or under community supervision. Additionally, many of the clients that we work with in adult correctional centres are in the vulnerable 18-24 year age range, with recent youth detention and/or child protection experiences.
13. WLS NSW is also an active member of key stakeholder groups relating to the needs and experiences of prisoners and their families and communities, including:
 - 13.1 Corrective Services NSW Women's Advisory Council.

⁷ The Law Council of Australia recognised the service gap in funding for specific legal services targeted to women in prison, particularly for civil and family law matters in its consultation paper on prisoners and detainees, as part of the Justice Project: Law Council of Australia, *The Justice Project: Prisoners and Detainees Consultation Paper*, August 2017, 3, 37-40: <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Prisoners%20and%20Detainees.pdf> accessed 7 September 2020.

- 13.2 Social and Cultural Resilience of Aboriginal Mothers in Prison Project.
- 13.3 Corrective Services NSW Legal Practitioners Consultation Group.
- 13.4 Women's Justice Network Board.
- 13.5 Community Legal Centres New South Wales Prisoner's Rights Working Group.
- 13.6 Australia's National Research Organisation for Women's Safety (ANROWS) Misidentification of Domestic and Family Violence Aggrieved/Respondents in Australia Reference Group.
- 13.7 New South Wales Legal Assistance Forum Prisoner's Forum and Prisoner's Legal Information Team.
- 13.8 Trans and Gender Diverse Criminal Justice System Advisory Council.

The criminalisation of First Nations women

14. First Nations women are the fastest growing prison population in NSW and represent about 32% of all women in custody in NSW.⁸ This percentage has not varied during the COVID-19 pandemic period. As at March 2020, there were 942 adult women in custody, 307 of whom were First Nations women.⁹ As at June 2020, there were 831 adult women in custody, 266 of whom were First Nations women.¹⁰ First Nations men represent about 25% of all men in custody in NSW.¹¹
15. The majority of women in custody have complex histories of sexual and physical violence starting in childhood.¹² The rates of previous victimisation are highest for First Nations women, with some studies suggesting that up to 90% of First Nations women in custody are survivors of family violence and other violence.¹³ First Nations women are also 35 times more likely to be hospitalised due to family violence related assaults, than non-First Nations women.¹⁴
16. These statistics are reflected in our work and it is extremely rare for us to work with criminalised First Nations women who have not been sexually or physically assaulted. More typically our First Nations clients will have experiences of multiple perpetrators and endured significantly more serious injuries than our non-First Nations clients. They are more likely to have been raised in poverty and experience family violence, systemic racism, addiction, cognitive impairment, homelessness, unemployment,

⁸ BOCSAR, *New South Wales Custody Statistics*, NSW Prison Statistics, (Total Female and Aboriginal Female rows) at https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx, accessed 31 August 2020.

⁹ Ibid.

¹⁰ Ibid.

¹¹ BOCSAR, *New South Wales Custody Statistics*, NSW Prison Statistics, (Total Male and Aboriginal Male rows) at https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx, accessed 31 August 2020.

¹² Australia's National Research Organisation for Women's Safety, *Women's imprisonment and domestic, family, and sexual violence: Research synthesis* (ANROWS Insights, 03/2020), at <https://www.anrows.org.au/publication/womens-imprisonment-and-domestic-family-and-sexual-violence/>, accessed 31 August 2020; M Stathopoulos and A Quadara, *Women as offenders, Women as victims: The role of corrections in supporting women with histories of sexual abuse*, A report for the Women's Advisory Council of Corrective Services NSW, 2014, at <https://www.correctiveservices.justice.nsw.gov.au/Documents/women-as-offenders-women-as-victims-the-role-of-corrections-in-supporting-women-with-histories-of-sexual-assault.pdf>, accessed 31 August 2020.

¹³ Australian Law Reform Commission, *Pathways to justice: Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples*, 28 March 2018, at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/11-aboriginal-and-torres-strait-islander-women/drivers-of-incarceration-for-aboriginal-and-torres-strait-islander-women/>, accessed 31 August 2020.

¹⁴ Productivity Commission Steering Committee for the Review of Government Services, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009) 26.

mental illness and poor literacy. They have had early and ongoing contact with police, child protection authorities and other state interventions.

17. Our clients regularly identify and express sadness and anger that their offending, mostly drug and property offences, relates to their desperate attempts to find some relief from the constant psychological and physical pain of years of violence that they and their families and communities have suffered. This is the heart of criminalisation and injustice for First Nations women. Raped, flogged, addicted, homeless and locked up.

Compounding harm through misidentification as aggressors

18. We are extremely concerned about the number of women in custody who have been misidentified by police and the courts as offenders. There is growing evidence that at least half of female perpetrated domestic violence occurs in circumstances where the women are the persons most in need of protection but have been misidentified as aggressors.¹⁵
19. First Nations women are therefore more likely to be both victim-survivors of violence and misidentified as perpetrators of violence. Misidentification is an avoidable tragedy. The NSW Coroner has commented on *“the importance of viewing domestic violence holistically, as episodes in a broader pattern of behaviour rather than as incidents in isolation of one another”*.¹⁶ The Domestic Violence Death Review Team has recommended the NSW Police Force reviews how it captures data on domestic violence so that police can *“view the incident holistically and in the context of the history of the parties and relationship”* and *“make informed decisions as to what action to take in the context of the incident they are dealing with”*.¹⁷
20. Any such holistic assessment will also require a commitment to trauma informed, sexual, domestic and family violence informed, culturally safe, LGBTIQ+ aware and disability aware practices. Women have told us that they have not disclosed information relevant to the context of their arrest, for example, they have been sexually assaulted prior to their alleged offending, but unable to disclose this to police, lawyers, psychologists or courts due to a range of factors such as shame, fear and culture or not being offered the opportunity to speak with a female officer or practitioner.
21. Barriers to reporting are even more significant for First Nations women, as they face deeply entrenched shame, racism in policing, legal and child protection responses, fear of retaliation, family and community pressure, concern that confidentiality will be breached through community connections and lack of culturally safe services and practice frameworks.¹⁸

¹⁵ H Boxall, C Dowling and A Morgan, Female perpetrated domestic violence: Prevalence of self-defensive and retaliatory behaviour, *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology No 584, Jan 2020 at https://www.aic.gov.au/sites/default/files/2020-05/ti584_female_perpetrated_domestic_violence-v2.pdf, accessed 31 August 2020; J Mansour, *Women Defendants to AVOs: What is their experience of the justice system*, Women's Legal Service NSW, 2014, at: <http://www.wlsnsw.org.au/wp-content/uploads/womendefAVOsreport.pdf>, accessed 31 August 2020; J Wangmann, L Laing & J Stubbs, Exploring gender differences in domestic violence reported to the NSW Police Force, *Current Issues in Criminal Justice*, 2020, <https://doi.org/10.1080/10345329.2020.1745136>, accessed 8 September 2020; note also Australia's National Research Organisation for Women's Safety forthcoming report on *Misidentification of domestic and family violence aggrieved/respondents in Australia*, <https://www.anrows.org.au/project/misidentification-of-domestic-and-family-violence-aggrieved-respondents-in-australia/>, accessed 7 September 2020.

¹⁶ NSW Government, *NSW Domestic Violence Death Review Team Report 2015-17*, Sydney, 2017, v.

¹⁷ Ibid, Recommendation 2.1.

¹⁸ J McCalman et al, Responding to Indigenous Australian Sexual Assault: A Systematic Review of the Literature, *Sage Open*, Jan-Mar 2014 at <https://journals.sagepub.com/doi/pdf/10.1177/2158244013518931>, accessed 7 September 2020; Aboriginal Child

Compounding harm through lack of gendered response

22. Because the overwhelming majority of criminalised people are male,¹⁹ legislation, policies and case law are not gendered and fail to acknowledge the specific experiences and needs of women. At the recent Australian Women Lawyers National Conference, The Law Council of Australia president Pauline Wright spoke about women's use of violence when defending themselves from domestic violence:

*"Often male standards are applied where the women are the alleged perpetrators of the crimes of violence. Women face more serious charges than the men would in the same circumstances because women choose, for instance, to use a weapon."*²⁰

23. It has also been identified that the decision in *Bugmy v the Queen* [2013] HCA 38 "does not address gender".²¹ In her analysis of *Bugmy*, Jackson refers to the 2001 Aboriginal and Torres Strait Islander Social Justice Commissioner's report in which Commissioner, Dr William Jonas AM, noting the high rates of incarceration of Aboriginal and Torres Strait Islander women, says:

*"Aboriginal women remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs. This is of critical importance, particularly because of the impact that imprisonment has on Indigenous families and communities (especially through separation from children)."*²²

24. We support the Australia Law Reform Commission's recommendation for the development of 'Indigenous Experience Reports'²³, but such resources must incorporate and reflect the voices and lived experiences of First Nations women. We are aware of the *Bugmy* Bar Book, but note that it contains limited gendered analysis, even in key chapters relevant to First Nations women, such as *Exposure to domestic and family violence* and *Childhood sexual abuse*.²⁴
25. Any response to the high level of First Nations people in custody, must include specific provision to seek the expertise and ongoing guidance of First Nations women, particularly in relation to their experiences of both personal violence and state violence.

Compounding harm through state violence

26. State violence and structural racism is a daily experience for First Nations people. Racial profiling and policies that disproportionately impact First Nations people. Sexual and physical violence in closed

Sexual Assault Taskforce, *Breaking the silence: Creating the future: Addressing child sexual assault in Aboriginal communities in NSW*, NSW Attorney General's Department, 2006, 39.

¹⁹ About 93% of people in custody to June 2020 were male see, BOCSAR, *New South Wales Custody Statistics*, NSW Prison Statistics, (Total 2020 Q2 Male and Female rows) at

https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx, accessed 4 September 2020.

²⁰ <https://www.lawyersweekly.com.au/biglaw/29318-justice-system-biases-target-female-offenders>, accessed 4 September 2020.

²¹ Lucy Jackson, 'Sentencing Indigenous Women After *Bugmy*' (2015) 40(3) *Alternative Law Journal* 73.

²² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, 15

http://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport01/sjreport.pdf, accessed 7 September 2020.

²³ Australian Law Reform Commission, *Pathways to justice: Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples*, 28 March 2018, Recommendation 6-2 at <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>, accessed 7 September 2020.

²⁴ <https://www.publicdefenders.nsw.gov.au/barbook>, accessed 7 September 2020; we also note the development of the *Bugmy* Evidence Project by the ALS NSW/ACT and are hopeful that this will incorporate a gendered analysis of the experiences and needs of First Nations women, see https://www.alsnswact.org.au/the_bugmy_evidence_project, accessed 8 September 2020.

environments and state care. High rates of child removal. Denial of experiences. Dispossession of land. Severing of connections.

27. First Nations women are further marginalised in specific ways. We hear horrific first-hand accounts from criminalised First Nations women, of being drugged, raped, maimed and tortured. In the same breath they beg for reassurance that we won't tell anyone for fear that they will be disbelieved, mocked, humiliated, ignored or targeted. They carry this pain and harm without support or justice for many years, sometimes forever. There is often a resignation, that this is just what happens to First Nations women. At some point they may engage in criminalised behaviours and then this trauma is overshadowed, misinterpreted and ignored, further entrenching their marginalisation.
28. The statistics speak for themselves; incarceration alone is not reducing reoffending for First Nations women. However, we are concerned that well intentioned alternatives, ranging from community based sentencing options to mandated mental health treatments to intensive family support programs, act to widen the net through seemingly less intrusive surveillance. They create new ways for the state to observe, control and punish. They create more opportunities for people to make mistakes or breach programs and to be transitioned into custodial environments.
29. First Nations people have experienced this kind of surveillance and control since invasion and nowhere feels truly free of the oppression of the state. Alternatives to incarceration must keep this in mind. We do not want people's homes and communities to become their prisons.
30. There must be genuine opportunities to adopt First Nations laws and customs in responding to criminalised behaviours. The state must provide space for First Nations people to lead the way forward, including equitable opportunities for First Nations women to participate.

Compounding harm through lack of culturally safe, trauma informed healing and diversion

31. Helping women to address their trauma is central to reducing recidivism and diverting them from offending and carceral environments. For First Nations women, this trauma is complex and unique. In addition to high levels of sexual violence and domestic and family violence, First Nations trauma includes trans-generational and community trauma arising from the ongoing trauma experienced as a result of colonisation, dispossession and the Stolen Generations. First Nations trauma is the loss of identity, belonging, love, legacy, community and country and the ongoing forced removal of children from their families and communities.
32. First Nations women deserve specialised, culturally safe spaces to heal and address their criminogenic risk factors. These spaces could divert women from incarceration and provide opportunities for women to safely care for children and to be on country in women only communities, based on an Aboriginal Healing Framework.²⁵
33. Prisons do not create spaces to heal. Even the rare opportunities afforded to women in prison to access therapeutic, trauma informed (though not culturally safe) care are disappearing, as the current

²⁵ According to Catherine Caruana, the core characteristics of an Aboriginal Healing Framework include: Indigenous ownership of the program design and evaluation, a holistic and multidisciplinary approach, the centrality of culture and spirituality, the program is informed by history, the use of preventative and therapeutic strategies and the commitment to healing, see C Caruana, 'Healing services for Indigenous people' (September 2010) 17 *Family Relationships Quarterly*.

apparent stalemate between Victims Services and Corrective Services NSW about service delivery looks likely to end, or at least significantly disrupt, access to Approved Counsellors in custody.²⁶

34. If First Nations women are incarcerated, they must be provided with culturally safe supports and programs, as failure to address family and civil law needs can prevent successful reintegration into the community after they are released.²⁷

Compounding harm through removal and loss of children

35. First Nations children in NSW are eight times more likely to be removed from their families and enter care by the age of five years.²⁸
36. It is estimated that around 80% of First Nations women in prison are mothers.²⁹ While many of our criminalised First Nations clients were not the primary caregiver for their children immediately prior to entering custody, they are overwhelmingly concerned about the safety and wellbeing of their children. We observe that in almost every case, domestic and family violence, misidentification and criminalisation have been key contributors to the removal or loss of their children.
37. As a first step, child protection authorities must immediately enhance their understanding of the gendered impact of domestic and sexual violence and specifically how this is experienced in First Nations communities. They must identify the person most in need of protection, hold perpetrators to account and review the context of harm to facilitate the early identification and support of protective caregivers.
38. Incarceration of women and particularly pregnant women and women with caring responsibilities for children must be as a last resort. During sentencing, courts must consider caregiving responsibilities for children and young people, any history of violence experienced and any history of mental health and substance abuse. This is consistent with the United Nations Bangkok Rules.³⁰
39. Flexible and accessible, non-custodial, culturally safe, child inclusive, non-net-widening alternatives to prison must be available throughout NSW, including in rural, regional and remote areas. If women are incarcerated and are pregnant or have pre-school aged children they should be supported, where safe to do so, to care for their children in custody.

²⁶ The combination of COVID-19 restrictions and recent changes to the NSW Victims Support Scheme commencing 1 July 2020 have meant that there has been no access to Approved Counsellors in NSW correctional centres since March 2020, with indications from the Department of Communities and Justice that counselling may no longer be provided moving forward. Information about the benefits of therapeutic counselling in NSW prisons can be found here:

https://www.victimsservices.justice.nsw.gov.au/Documents/eval_counselling-in-prison.pdf, accessed 7 September 2020.

²⁷ Law Council of Australia, *The Justice Project Final Report – Prisoners and Detainees*, 2018, 21

[https://www.lawcouncil.asn.au/files/web-pdf/Justice Project/Final Report/Prisoners and Detainees %28Part 1%29.pdf](https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Prisoners%20and%20Detainees%20Part%201.pdf) accessed 7 September 2020.

²⁸ Family is Culture, *Independent Review of Aboriginal Children and Young People in OOHC*, 2019, 40.

²⁹ Human Rights Law Centre and Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, May 2017, 13 <https://www.hrlc.org.au/news/2017/5/10/over-represented-overlooked-report>, accessed 7 September 2020, citing Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 *Contemporary Nurse: A Journal for the Australian Nursing Profession* 83, 85.

³⁰ *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, E/2010/30 adopted by the UN General Assembly on 21 December 2010, Rule 41(b), <https://undocs.org/A/RES/65/229>, accessed 7 September 2020.

40. We note the evidence that for First Nations women in custody “*keeping their baby is much harder, because of the stigma arising from their disadvantage and from simply being Aboriginal, in a society that stigmatizes Aboriginal people.*”³¹
41. If women are incarcerated and cannot have their children live with them in custody, regular and meaningful contact with children must be arranged as a matter of priority.³²
42. We note that the Family is Culture *Independent Review of Aboriginal Children and Young People in OOHC*, identified a lack of policy guidance about contact between children and young people with incarcerated parents and recommended:
- Recommendation 104: The Department of Communities and Justice should develop policy guidance for caseworkers about the issue of contact with parents in custody. This guidance should include a discussion of the types of contact that can be facilitated between children and incarcerated parents, how to arrange the contact in practice, advice about methods of liaison with correctional services and information about facilities to enable contact in individual correctional centres.*³³
43. Having a parent or primary carer in custody is detrimental to children and young people and is a key indicator for criminalisation. There is a growing understanding that having a mother in custody has a much greater detrimental impact on the development of a child than having a father in custody. Recent analysis of longitudinal, intergenerational, population-based Child Development Study data in NSW, confirmed the intergenerational transmission of antisocial behaviour and criminality and also found that “*maternal history of violent offending had the greatest association with child conduct problems, followed by non-violent offending.*”³⁴
44. There is also evidence that children's coping skills are enhanced and “*problematic behaviour*” reduced by maintaining contact with their incarcerated parents.³⁵
45. Additionally, there is growing evidence that maintaining relationships, particularly with children and young people, is a critical way to reduce women's reoffending. Clients consistently tell us that their children are a prime motivator to “go straight” or to end associations with others who may trigger patterns of risk exposure or offending. This is supported by a 2016 report which found that women who participated in programs that allowed their children to live with them were less likely to return to prison than mothers who were separated from their children.³⁶ It also found that mothers may be “*considerably more motivated to succeed*” in educational and substance misuse programs.³⁷

³¹ Jane Walker et al, “Residential programmes for mothers and children in prison: Key themes and concepts”, *Criminology & Criminal Justice*, 2019, 5.

³² We note the recent engagement of Department of Communities and Justice co-located caseworkers in NSW correctional centres for female prisoners.

³³ Ibid, Family is Culture, *Independent Review of Aboriginal Children and Young People in OOHC*, 2019, 329.

³⁴ S Tzoumakis et al, Parental offending and children's conduct problems, *AIC Trends & Issues in Crime and Criminal Justice*, No 571 March 2019, 8.

³⁵ J Toohey, Children and Their Incarcerated Parents: Maintaining Connections - How Kids' Days at Tasmania's Risdon Prison Contribute to Imprisoned Parent-Child Relationships, *Changing the Way We Think About Change, The Australian and New Zealand Critical Criminology Conference 2012*, 33.

³⁶ University of Melbourne School of Health Sciences, Save the Children Australia Centre for Child Wellbeing and the Vanderbilt University Peabody Research Institute, *Literature Review of Prison-based Mothers and Children Program*, p 3 accessed at: http://assets.justice.vic.gov.au/corrections/resources/b5ef4e77-10e5-4a27-bbfd-9a5c3e9cdb69/mothersandchildren_programs.pdf

³⁷ Ibid, 4.

We would welcome the opportunity to give evidence at a hearing.

If you would like to discuss any aspect of this submission, please contact Carolyn Jones, Senior Solicitor or Gail Thorne and Yasmine Khan, First Nations Women's Legal Program Community Access Workers on

Yours faithfully,

Women's Legal Service NSW

Gail Thorne and Yasmine Khan
First Nations Women's Legal Program
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Philippa Davis
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