

29 May 2020

Commissioners

Royal Commission into Violence, Abuse,
Neglect and Exploitation of People with Disability

By email: DRCEnquiries@royalcommission.gov.au

Dear Commissioners,

Response to the Criminal Justice System Issues Paper

1. Women's Legal Service NSW (WLS NSW) thanks the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability for the opportunity to comment on the Criminal Justice System Issues Paper.
2. 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.
3. WLS NSW has an Indigenous Women's Legal Program (**IWLP**). This program delivers a culturally safe legal service to Aboriginal women in NSW and has been operating for over 19 years. We provide an Aboriginal legal advice line, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women.
4. An Aboriginal Women's Consultation Network guides the IWLP. It meets quarterly to ensure we deliver a culturally appropriate service. The members include regional community representatives and the IWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.



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5. WLS NSW is a member of the Victims of Crime Interagency convened by NSW Victims Services. We are also a member of Corrective Services Women's Advisory Council, advising on issues relating to women in prison.
6. WLS NSW has significant expertise in working with victims-survivors of sexual and family violence, child abuse and child sexual abuse. This work includes helping victims-survivors to access the criminal justice system in response to such violence as well as accessing other supports for victims-survivors, including Victims Support. It also includes working with criminalised women, many of whom have a disability and have been criminalised as a result of a failure to correctly identify the predominant victim and aggressor. The disability is often a psychological disability arising from complex trauma relating to childhood and adult experiences of sexual and domestic and family violence primarily perpetrated by male perpetrators. In some cases, the women we work with in prison may have a cognitive impairment and/or a physical disability.

Recommendations

7. In summary, we recommend
 - 7.1 Intermediaries be available for adult witnesses whose ability to communicate is affected by a disability.
 - 7.2 The addition of a new victims support payment called a Disability and Domestic and Family Violence Crisis payment.
 - 7.3 The appointment of more Victims Support Approved Counsellors, particularly in regional, rural and remote areas and increased remuneration of counsellors.
 - 7.4 Access to counselling for victims-survivors in prison.
 - 7.5 The proposed reforms to the NSW Victims Support Scheme do not proceed and instead the scheduled comprehensive review of the *Victims Rights and Support Act 2013* commence immediately with proper consultation.
 - 7.6 Fund the services providing Legal Education and Advice in Prison (LEAP) program for women in custody to undertake a pilot project with Corrective Services, Family and Community Services and relevant support services to provide intensive early legal advice, social support and case management to pregnant women in custody and women with primary carer responsibilities prior to entering custody, including women with disability, with a focus on family preservation and restoration.

- 7.7 Courts are better informed about the pathways to prison for women as a result of child sexual abuse, sexual assault and family violence.
- 7.8 Victims-survivors are supported to address their trauma.
- 7.9 Need for specialised disability support in custody and as people with disability transition into the community, including an Additional Support Unit for women in custody.
- 7.10 Greater consideration of social framework evidence about family violence to be included in criminal trials, including the social entrapment framework.
- 7.11 The imprisonment of women and particularly pregnant women and women caring for children should be as a last resort.

Supports for women with disability to access the justice system

Witness intermediaries

8. The Royal Commission into Institutional Responses to Child Sexual Abuse acknowledged the important role of interpreters and witness intermediaries to assist in the collection of the best evidence available.¹
9. We commend the use of witness intermediaries for child victims-survivors and child witnesses in prosecutions of child sexual abuse matters in NSW.
10. We agree with the comments of Professor Cooper that all people have a right to participate in the justice system, and that witness intermediaries can facilitate this participation for certain vulnerable witnesses.²
11. The introduction of an intermediary scheme is also important to reduce the traumatic impact of giving evidence on survivors of child sexual abuse. This is consistent with the Royal Commission's commitment to reform that supports survivors to seek criminal justice responses. While intermediaries are impartial and are not to act as support people, their role should include informing the Court and legal practitioners about the witness' needs, informing the Court if the witness becomes distressed, and ensuring the witness understands what is happening. These functions are likely to make the process of giving evidence less distressing for survivors. We note that evaluation of the

¹ Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, p25.

² Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Consultation Paper* (2016), 381.

intermediary program in the United Kingdom found that intermediaries 'helped witnesses cope with the stress of giving evidence'.³

12. WLS NSW supports the use of intermediaries not just for child witnesses, but for adult witnesses whose ability to communicate is affected by a disability. There is no principled reason to not extend witness intermediaries to adult survivors with disabilities, especially noting the Royal Commission's findings that girls with a disability are "*significantly more likely to be victims of abuse.*"⁴ It is important that access to the criminal justice system is facilitated for these survivors who often do not report until they are adults.

Recommendation 1

We support the use of intermediaries for adult witnesses whose ability to communicate is affected by a disability.

Access to Victims Support for people with disability

13. If a person has suffered an act of violence in NSW and an injury they may be entitled to Victims Support.
14. In the 2016 Statutory review of the *Victims Rights and Support Act 2013 (NSW) (VRSA)* Community Legal Centres NSW (of which Women's Legal Service NSW is a member) advocated for a number of improvements to the Victims Support scheme, including increasing the accessibility of supports to people with disability as outlined below.

Disability and Domestic and Family Violence Crisis payment

15. People with Disability Australia have raised the important issue of the need for the NSW Victims Support Scheme to be more responsive to the needs of victims-survivors of violence with a disability.
16. Disability support, for example, for attendant care in a refuge or for an Auslan or sign interpreter, is very expensive. The cost of such support may be a barrier to leaving situations of domestic violence.

³ Joyce Plotnikoff and Richard Woolfson, The 'Go-Between': Evaluation of Intermediary Pathfinder Projects' (funded by Office for Criminal Justice Reform UK), 60-61.

⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 1* (2014), 112.

17. Victims-survivors of violence with a disability may currently be able to claim such expenses as immediate needs. However, this means they would likely have to choose between these expenses and for example, clothing and furniture.
18. During the 2016 statutory review of the scheme, People with Disability Australia (PWDA) proposed the addition of a new victims support payment called a Disability and Domestic and Family Violence Crisis payment.
19. They proposed this payment should be modelled on the Victorian Family and Domestic Violence Crisis Response Initiative, which is:
 - 19.1 A maximum of \$9000 over 12 weeks;
 - 19.2 Available for women with disability and/or women whose child/ren have disability (however, this should be guided by self-identification of disability in collaboration with a domestic and family violence service provider, in line with World Health Organisation definition);⁵ (though PWDA recommends this should extend to all victims of domestic violence with disability where act of violence took place in NSW)
 - 19.3 Covers the standard array of disability supports, including: personal care, Auslan or sign language interpretation, assistance providing care for children, assistance with meal preparation, shopping, etc
20. Given the National Disability Insurance Scheme (NDIS) does not provide a crisis response service the need for a Disability and Domestic and Family Violence Crisis payment is all the more important.
21. If the NDIS is unable to provide the required assistance before the end of the 3-month period, the Disability and Domestic and Family Violence Crisis payment should be available for up to an additional 3 months.
22. This payment should be a separate payment and not included in the \$5,000 maximum amount for immediate needs, \$30,000 maximum amount for economic loss or in the recognition payment. Victims of crime with a disability should not be required to choose between needs. Rather their varying needs should be adequately met.
23. WLS NSW endorses this recommendation.

⁵ World Health Organisation, Definition of disabilities accessed on 13 July 2016 at:
<http://www.who.int/topics/disabilities/en/>

24. Implementation of this recommendation would be consistent with the objects of the *Victims Rights and Support Act*⁶ and the NSW Domestic and Family Violence Justice Strategy to ensure the justice response is “*an accessible system*” including for people with disability.⁷
25. In addition to raising this during the statutory review of the *VRSA* we have raised this in consultations relating to the development of the Disability Justice Strategy. This recommendation is still to be adopted.

Recommendation 2

The addition of a new victims support payment called a Disability and Domestic and Family Violence Crisis payment.

Access to counselling for victims-survivors

26. We are concerned by the long delays in victims-survivors accessing counselling, including victims-survivors with a disability.
27. We believe a significant cause of delay is the insufficient numbers of Victims Services Approved Counsellors, particularly in regional, rural and remote areas.
28. Some contributing factors to this could be what we understand to be a lengthy process of approving counsellors, insufficient remuneration and the need to take more proactive steps in recruiting Approved Counsellors.

Recommendation 3

The appointment of more Victims Support Approved Counsellors, particularly in regional, rural and remote areas and increased remuneration of counsellors.

Access to counselling for victims-survivors in prison

29. A high proportion of women in prison have been victims of violent crime prior to coming into custody. The 2015 Network Patient Health Survey found that 70.8% of female inmates in NSW had been involved in at least one abusive relationship and a

⁶ *Victims Rights And Support Act 2013*, section 2 and section 17

⁷ Department of Justice, *NSW Domestic and Family Violence Justice Strategy* at 12 and 20.

significant number of female inmates had been subjected to at least one form of sexual violence.⁸

30. Access to counselling is important to help victims-survivors address trauma and to reduce recidivism.
31. After the successful piloting of counselling in prisons, counselling was to be available by 2019 to all victims-survivors who requested it in all women's correctional centres, with the intention of also rolling out to all male correctional centres. We welcomed this.
32. However, we are particularly concerned by the suspension of counselling opportunities for victims-survivors in custody during COVID-19 and the recent news of anticipated changes which will remove dedicated counsellors attached to each correctional centre and youth detention centre and require appointments on request.
33. Prior to COVID-19 there were difficulties in providing a continuity of counsellor for women in prison who were moved to another correctional centre or exiting prison.
34. Further, despite a NSW Government commitment to never privatise women's prisons in NSW, the Clarence Correctional Centre is due to open soon with over 300 women to be accommodated there. It is not clear what access women held in this correctional centre will have to Victims Support Approved Counsellors.

Recommendation 4

Access to counselling for victims-survivors in prison.

Proposed reforms to Victims Support

35. On 20 April 2020, the NSW Commissioner Victims Rights announced significant systemic changes to the NSW Victims Support Scheme they were due to start 5 days later, immediately after 5pm on 24 April 2020. These reforms were announced without any consultation, including with the Victims Advisory Board or Victims of Crime Interagency, bodies specifically established for that purpose.

⁸ Justice Health and Forensic Mental Health Network, *2015 Network Patient Health Survey Report*, Sydney, 2017, p72 (74).

36. In response to community concerns, the Commissioner paused implementation for 2 weeks to enable consultation with those raising concerns. Community Legal Centres NSW wrote to the Commissioner providing an alternative proposal.⁹
37. There has been a further pause in implementation, with feedback due to the Commissioner by 29 May 2020. The Commissioner has indicated she will make a decision after this.
38. If implemented, the changes will deny many victims-survivors of violence in NSW access to support they have a right to and need. They do so by shifting the burden from Victims Services onto victim-survivors to:
 - 38.1 Collect their own evidence of violence and injury before being able to submit a claim for victims support
 - 38.2 Find an approved counsellor to help them in their recovery
 - 38.3 Submit evidence online
 - 38.4 provide identification documents
39. The Commissioner is considering accepting applications without the requirement of all evidence to be attached at the time of filing so victims-survivors are not statute barred if a time limit is approaching. This is important as the NSW Victims Support Scheme has strict time limits. There is no discretion to apply for victims support out of time. However, the focus of the reforms seems to continue to be on victims-survivors collecting their own evidence without Victims Services support.
40. Every barrier put in a victim's-survivor's way will deter them from accessing support.
41. We fear many victims-survivors, including people with a disability, forced to collect their own evidence or find their own counsellor will just give up due to the impact of complex trauma, literacy and language issues (including digital literacy), lack of access to a computer or the internet, and cost.

⁹ Community Legal Centres NSW, Letter to Commissioner Victims Rights, 1 May 2020 accessed at: <https://www.wlsnsw.org.au/wp-content/uploads/Letter-to-Commissioner-Victims-Rights-010520-fa.pdf>

42. The Government-commissioned report on the previous NSW Victims Compensation scheme noted victims-survivors were supported to make applications. It recommended this support continue under any new scheme.¹⁰
43. When the Victims Support scheme was introduced in 2013 the hallmark of the reforms was said to be its accessibility.
44. There would no longer be a need to pay legal fees to lawyers or costs of gathering evidence because case co-ordinators were being appointed within Victims Services and Victims Services would take on the role of collecting the evidence for victims-survivors.
45. It is vital that Victims Services continues to play this important role and is adequately funded to do so.
46. The NSW Charter of Victims Rights requires a victim-survivor have access to welfare, health, counselling and legal assistance "*responsive to the victim's needs*".¹¹
47. The Royal Commission into Institutional Responses to Child Sexual Abuse makes several recommendations about the need to provide appropriate support for people with disability.¹²
48. Over 80 organisations and 320 individuals have signed an Open Letter to the Commissioner Victims Rights calling for the proposed reforms to Victims Support not to proceed. The letter calls instead for the comprehensive review of the *Victims Rights and Support Act 2013* (NSW), which is required to take place anytime from May 2019 to May 2021 to commence immediately with proper consultation.¹³
49. We support considering ways of improving the NSW Victims Support scheme. Where available one form of evidence should be sufficient to establish an act of violence and injury. The requirement of two forms of evidence for financial assistance for economic loss and recognition payment is inconsistent with trauma informed practice as it requires people to repeat their story of violence. It is well established that having to repeat

¹⁰ PricewaterhouseCoopers, *NSW Attorney General and Justice Review of the Victims Compensation Fund*, 12 July 2012, p69-70 accessed at: https://www.victimsservices.justice.nsw.gov.au/Documents/tp_report-pwc-vcf-review.pdf

¹¹ Section 6.3 of the *Victims Rights and Support Act 2013 NSW*

¹² See for example, Royal Commission into Institutional Responses to Child Sexual Abuse, Final report, 2018, Recommendation 9.1 to 9.9, accessed at:

https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_recommendations.pdf

¹³ Open Letter to Commissioner accessed at: <https://www.clcnsw.org.au/open-letter-proposed-changes-nsw-victims-support-scheme>

your story of violence can be harmful to victim-survivors. Where a person has experienced domestic violence, sexual assault, child abuse or child sexual abuse - that is the injury. They should not be required to provide further evidence of injury. These are two simple ways to improve the Victims Support scheme which benefit victim-survivors and also would also increase efficiencies.

Recommendation 5

The proposed reforms to the NSW Victims Support Scheme do not proceed and instead the scheduled comprehensive review of the *Victims Rights and Support Act 2013* commence immediately with proper consultation.

Our work with women in the criminal justice system

50. While we do not practice in criminal law, WLS NSW has significant expertise in working with criminalised women, including women with disability.
51. Our specialist legal services include the Legal Education and Advice in Prison (LEAP) program for women in custody which was established in 2009 and received the 2009 NSW Law and Justice Foundation Community Legal Centre Award. WLS NSW works in partnership with Wirringa Baiya Aboriginal Women's Legal Centre and Western Sydney Community Legal Centre (formerly Hawkesbury Nepean Community Legal Centre) to deliver the LEAP program in metropolitan prisons in Sydney. This program was established due to the high levels of unmet need amongst women in custody for civil and family law services, many of whom have experienced child sexual abuse, sexual assault and family violence. LEAP addresses unmet legal need by providing and facilitating access to civil and family legal services for incarcerated women.
52. We also respond to telephone calls from women in custody across NSW.
53. LEAP does not receive any dedicated funding and operates from the core resources of the services.¹⁴
54. LEAP provides culturally appropriate services to Aboriginal and Torres Strait Islander women through the Indigenous Women's Legal Program based at WLS NSW

¹⁴ 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), p4 (5) accessed at: <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Prisoners%20and%20Detainees.pdf>

and Wirringa Baiya Aboriginal Women's Legal Centre. The service is provided by women solicitors who are also domestic violence and trauma informed.

55. Since 2009, LEAP has provided legal advice to hundreds of women in prison, many of whom need assistance in the areas of family violence, sexual assault, family law, care and protection, housing and victims support.
56. Many of the legal issues of clients of LEAP intersect and relate to the care of children. For example, sexual and family violence are risk factors for the removal of children from their parents/primary caregivers care. Family violence is a leading cause of homelessness and a lack of safe and affordable housing can leave women at risk of imprisonment. Further, once children are removed from their mother's care, accessing safe and affordable housing for the mother and children can be challenging and impact on whether children are restored to their mothers/primary caregivers. This highlights the need for early legal advice and support as a preventative measure, to help address issues which may leave women at risk of imprisonment to reduce this risk and the need to support mothers and children so children can remain safely in the care of their mothers.
57. Further, access to legal services in prison is essential to help reduce the risk of prisoners re-offending and being re-incarcerated. This is because imprisonment often exacerbates civil law and family law issues which may be interconnected with the criminal law issues. This can prevent the successful reintegration of people after they are released.¹⁵

Recommendation 6

Fund the services providing Legal Education and Advice in Prison (LEAP) program for women in custody to undertake a pilot project with Corrective Services, Family and Community Services and relevant support services to provide intensive early legal advice, social support and case management to pregnant women in custody and women with primary carer responsibilities prior to entering custody, including women with disability, with a focus on family preservation and restoration.

¹⁵ Law Council of Australia, *The Justice Project Final Report - Prisoners and Detainees*, 2018, p21 accessed at: <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Prisoners%20and%20Detainees%20%28Part%201%29.pdf>

Women at risk of imprisonment

58. It is important that courts are better informed about the pathways to prison for women as a result of child sexual abuse, sexual assault and family violence.¹⁶
59. A high proportion of women in prison have been victims of violent crime prior to coming into custody. The 2015 Network Patient Health Survey found that 70.8% of female inmates in NSW had been involved in at least one abusive relationship and a significant number of female inmates had been subjected to at least one form of sexual violence.¹⁷
60. Lawrie's 2003 study of Aboriginal women in NSW prisons found that over 75% of Aboriginal women had being sexually assaulted as a child, just under 50% had been sexually assaulted as adults and almost 80% were victims of family violence.¹⁸
61. Stathopoulos observes, *"the most significant co-occurrence of child sexual abuse sequelae is substance addiction and mental health issues ... [which] is intertwined with mental health problems and pathways to offending"*.¹⁹ As Herman explains, drugs are a coping mechanism, providing relief and a form of escape from reality.²⁰
62. Helping women to address their trauma is key to reducing recidivism.
63. Some girls and women, including women being protective of their pregnancy, tell us that it is safer for them to be in custody, as it is an escape from violence, they can access health care and nutrition and they may be supported to address their addiction to drugs.
64. It is an indictment on our society that some children and women see prison as a safe refuge and that this is accepted amongst this group because they feel they have

¹⁶ Unpaid fines can be a barrier to women and particularly Aboriginal and Torres Strait Islander women reporting family violence to police. For further information see *Women's Legal Service NSW submission to the Australian Law Reform Commission Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples*, 14 September 2017, accessed at: <http://www.wlsnsw.org.au/wp-content/uploads/WLS-NSW-Submission-to-ALRC-inquiry-into-Incarceration-rates-of-Aboriginal-and-Torres-Strait-Islander-Peoples-fa.pdf>

¹⁷ Justice Health and Forensic Mental Health Network, *2015 Network Patient Health Survey Report*, Sydney, 2017, p72 (74).

¹⁸ Lawrie cited in Natalie Taylor & Judy Putt, "Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia," *Trends and Issues in crime and criminal justice*, Australian Institute of Criminology, September 2007, p2.

¹⁹ Mary Stathopoulos et al, 'Addressing women's victimisation histories in custodial settings', *Australian Centre for the Study of Sexual Assault* (2012) 13, p6.

²⁰ Judith Herman, *Trauma and recovery* (Pandora, 1994) cited in Mary Stathopoulos, p6.

nowhere to turn for support and assistance. This is compounded for women in rural and regional areas where there is very limited social housing stock with highly vulnerable people waiting on priority housing lists for many years.

65. In NSW, Aboriginal and Torres Strait Islander women represent 33% of women in prison.²¹ Aboriginal people are incarcerated at 13 times the rate of non-Aboriginal people²² and Aboriginal women are the fastest growing group in NSW prisons.
66. We are also concerned that women and particularly Aboriginal and Torres Strait Islander women and women with disability may not be disclosing their significant histories of being subjected to violence.

Case study

Women in custody, including women with disability, have instructed us that they have not told the police or their legal representatives or the court about the violence they have experienced. This includes violence that is materially relevant to their charges and to their defence. Most commonly this is because they are not comfortable to make disclosures about sexual violence to male professionals.

One older Aboriginal woman told us that she was simply frozen and filled with shame at the thought of telling a young male solicitor about being raped immediately prior to her offending behaviour. The client requested that we provide this information to her lawyer, which we did, but we remained concerned that she may not be able to provide further relevant instructions.

67. It is important that safe spaces are created to enable women to disclose their histories of violence so that Aboriginal and Torres Strait Islander women and women with disability are not silenced and further punished due to being silenced.

Recommendation 7

Courts are better informed about the pathways to prison for women as a result of child sexual abuse, sexual assault and family violence.

²¹ Evann Ooi, 'Recent Trends in the NSW Female Prison Population', *Crime and Justice Statistics*, BoCSaR Issue Paper No 120, January 2018, p 3 accessed at: <https://www.bocsar.nsw.gov.au/Documents/BB/2018-Report-Recent-Trends-in-the-NSW-Female-Prison-Population-BB130.pdf>

Corrective Services NSW, *Facts and Figure Corrections research, Evaluation & Statistics*, March 2013

²² ABS, 4517.0 - *Prisoners in Australia*, 2016

Recommendation 8

Victims-survivors are supported to address their trauma.

Screening for disability in prison

68. We acknowledge that there are services tasked with supporting people with disabilities in the criminal justice system, such as Corrective Services' Statewide Disability Services and the Justice Advocacy Service.
69. However many of our clients appear to receive limited specialised disability support in custody or as they transition into the community. This can mean that they are refused bail or parole as there are not appropriate accommodation or financial arrangements in place, including because there has not been a NDIS support needs assessment. It can mean that their disabilities are not identified or identified correctly and behaviours in custody may be perceived as deliberately oppositional or violent without consideration of their disability or range of disabilities. This can result in unjust sanctions for in custody offences or further charges.
70. We also note that Corrective Services provide Additional Support Units to male prisoners with disabilities in three correctional centres, which offer programs and education to address offending behaviours and to develop living and social skills to assist with the transition to community. There are no equivalent services in female correctional centres and the Inspector of Custodial Services in her *Women on Remand* report noted that an Additional Support Unit for women in custody would be beneficial.²³

Recommendation 9

Need for specialised disability support in custody and as people with disability transition into the community, including an Additional Support Unit for women in custody.

Social framework evidence and sexual, domestic and family violence

71. We also believe there is a role for social framework evidence about family violence to be included in criminal trials. We note that such evidence can be used, for example,

²³ Inspector Custodial Services, *Women on Remand*, Feb 2020, p.104-105 accessed at: <http://www.custodialinspector.justice.nsw.gov.au/Documents/women-on-remand.pdf>

in some jurisdictions relating to protection order proceedings²⁴ and can also be used in family law proceedings.

72. In particular, we refer to the framework of social entrapment drawn from the New Zealand Family Violence Death Review Committee and applied in *Transforming legal understandings of intimate partner violence* which explains barriers to women leaving violent relationships.

73. This framework has three dimensions:

1. *The social isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's/survivor's life;*
2. *the lack of effective systemic safety options; and*
3. *the exacerbation of these previous two dimensions by the structural inequities associated with gender, class, race and disability.*²⁵

74. Tarrant et al describes it as follows:

*A social entrapment framing asks us to document the predominant aggressor's pattern of abusive behaviour and understand how it constrains the primary victim's/survivor's ability to resist the abuse, while simultaneously considering the wider operations of power in her life.*²⁶

Recommendation 10

Greater consideration of social framework evidence about family violence to be included in criminal trials, including the social entrapment framework.

Imprisonment of women as a last resort

75. The imprisonment of women and particularly pregnant women and women caring for children should be as a last resort. For children under two years of age, bonding with primary carers is important and can affect the child's personal development. Studies have shown if a mother is able and supported to maintain significant time with her child

²⁴ For example, *Family Violence Protection Act 2008 (Vic)* s 73.

²⁵ Stella Tarrant, Julia Tolmie, & George Giudice, *Transforming legal understandings of intimate partner violence* (Research report 03/2019, Sydney: ANROWS, 2019) p 17.

²⁶ *Ibid*, p17-18.

during the initial time of removal and care planning, this increases the chance of successful restoration.²⁷

76. During sentencing, courts should consider primary caregiving responsibilities for a child/ren, any history of violence experienced and any history of mental health and substance abuse. This is consistent with the United Nations Bangkok Rules.²⁸

77. Rule 64 of the Bangkok Rules stipulates that:

Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.

78. Furthermore, Rule 58 of the Bangkok Rules stipulates that:

Women offenders shall not be separated from their families and communities without due consideration being given to their families and communities. Alternative ways of managing women who commit offences, such as diversionary measures and pre-trial and sentencing alternatives, shall be implemented wherever appropriate and possible.

79. The over-representation of Aboriginal and Torres Strait Islander women in prison is impacting on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care.

80. We are further concerned by the correlation of children in out-of-home-care, homelessness and young people engagement in the criminal justice system.

Recommendation 11

The imprisonment of women and particularly pregnant women and women caring for children should be as a last resort.

²⁷ Child Welfare Information Gateway, 'Family reunification: What the evidence shows', *Issue Brief* June 2011 accessed at: www.childwelfare.gov/pubs/issue_briefs/family_reunification/family_reunification.pdf

²⁸ 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) accessed at: <https://undocs.org/A/RES/65/229>

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Coordinator or Carolyn Jones, Senior Solicitor on 02 8745 6900.

Yours faithfully,

Women's Legal Service NSW

Phiippa Davis

Principal Solicitor