

14 December 2017

Prof Megan Davis
Family is Culture Independent Review
Locked Bag 9001
Alexandria NSW 1435

By email: submissions@familyisculture.nsw.gov.au

Dear Prof Davis,

Family is Culture Independent Review

1. Women's Legal Service NSW (WLS NSW) thanks the Family is Culture Independent Review of Aboriginal Children and Young People in out-of-home-care (OOHC) for the opportunity to make a submission to the review.
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 sensitive legal service to Aboriginal women in NSW. 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.
5. Members of our Aboriginal Women's Consultation Network have extensive experience engaging with community on the issues of care and protection as well as working within the child protection sector.



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6. The Network members express a sense of frustration and deep disappointment that there have been so many child protection inquiries and reports over the years with a lack of effective response and real change, particularly with respect to addressing the over-representation of Aboriginal and Torres Strait Islander children and young people in OOHC. These include *Bringing them Home*, the 2008 *Special Commission of Inquiry into Child Protection Services in NSW ('Wood Inquiry')*, *FACS Child Protection Legislative Reform Discussion Paper* (2013), The NSW Parliament General Purpose Standing Committee No 2 Child Protection Inquiry (2016), the *Tune Review*.
7. We are hopeful that the Family is Culture Independent Review will result in effective change to improve the child protection system for Aboriginal and Torres Strait Islander children. We see effective family and community engagement as crucial to an effective outcome. However, WLS NSW and the members of our Aboriginal Women's Consultation Network are not well informed of what opportunities families have to be engaged in the Family is Culture Independent Review about their children's cases. We seek further information about how this review will be engaging with families whose children were removed from their care from 1 July 2015 to 30 June 2016. We encourage a greater focus on community education about the review and how families can engage with the review.
8. The Network members call for real accountability for compliance with existing laws and requirements such as the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles and Cultural Care Plans, rather than see any improvements coming from yet further changes in the law.
9. The submission will also focus on the vital need for early legal and social supports for Aboriginal families that are strengths based, culturally safe and trauma informed; the importance of community legal education amongst Aboriginal and Torres Strait Islander communities; the need for safe and affordable housing; alternatives to imprisonment of women and particularly pregnant women and women caring for children.
10. In summary, we make the following recommendations:
 - 10.1 Mechanisms to ensure parents and primary caregivers whose children were removed from their care within the review period, as well as the children themselves, can have their say directly to the independent review;
 - 10.2 A long-term cross-departmental NSW Aboriginal Family Violence Strategy driven by Aboriginal communities and the establishment of a NSW Aboriginal Women's Advisory Group with expertise in domestic violence and sexual assault who meet regularly with relevant Ministers and Departmental secretaries as well as regional networks within Aboriginal communities as recommended by the NSW Women's Alliance;
 - 10.3 FACS be required to present detailed evidence to the Children's Court of the searches made for Aboriginal family as an attachment to the Care and Cultural Plan. This should include dates and times of calls made; copies of letters sent; copies of Chapter 16A requests to relevant agencies such as Centrelink for details of

relatives/community members identified; details of the community members they consulted with and full genograms. Children's Court Magistrates must hold FACS accountable for compliance with this requirement and FACS senior management must hold caseworkers accountable for failing to satisfy the Court that the searches for Aboriginal family have been undertaken properly;

- 10.4 Additional funding for Link Up and local Aboriginal community controlled organisations to ensure this work happens in a timely fashion;
- 10.5 More effective and meaningful consultation with community and better documentation of such consultation. This needs to be developed at a local level with appropriate funding;
- 10.6 Implement the Australian and NSW Law Reform Commissions *Family Violence - A National Legal Response Report* recommendation 19.3, where a viable carer is identified and FACS refers that carer to the family court, FACS should provide supporting evidence about the reasons for the referral to the family court;
- 10.7 Implement the *Bringing them home* recommendations;
- 10.8 Increase long-term, sustainable funding of community led, culturally safe, strengths based and trauma informed parenting and other support programs, such as integrated social and legal services, to help parents address issues that may lead to the removal of their children;
- 10.9 Better community education about FACS' prenatal caseworkers and expand the number of caseworkers in these roles;
- 10.10 Establish accountability mechanisms to ensure that FACS and NGO child protection workers must inform parents if there are issues that may lead to the removal of their children and provide culturally safe and appropriate support to them to address those issues as well as referrals for early legal advice;
- 10.11 Parents and primary caregivers need an enforceable right to services in legislation that are meaningful, available, accessible and at very low or no cost;
- 10.12 Increase funding for specialist and culturally safe women's refuges and emergency accommodation and support services to help victims-survivors of family violence find safe, affordable and permanent housing option, including specialist Aboriginal women's refuges;
- 10.13 Better promotion and implementation of the FACS Housing Pathways policy which prioritises access to social housing if a parent can provide evidence which demonstrates that the lack of appropriate accommodation is impacting their ability to have children restored to their care;
- 10.14 Establish accountability measures to ensure FACS and NGO child protection services conduct regular meaningful reviews of OOHC and guardianship placements,

including reviews of Cultural Care Plans, with input from affected children, parents, carers and other people significant to the child or young person;

- 10.15 Establish specialist teams within FACS focused on restoration with a contact line available for parents;
- 10.16 Imprisonment of women, and particularly pregnant women and women caring for children, should be as a last resort. Flexible and accessible, non-custodial alternatives to prison should be available, including in rural, regional and remote areas;
- 10.17 Increase the availability of programs that support mothers and children to live together in prisons, wherever it is safe and appropriate to do so. Where these programs are not available, mothers and children should be supported to maintain a connection;
- 10.18 Increase the availability and funding of support programs for pregnant women and women with children in custody to address their trauma, mental health and drug and/or alcohol issues. Increase the provision of appropriate referrals prior to a mother's release from custody to ensure she and her children have access to safe and affordable housing and other supports;
- 10.19 State/territory and federal governments should provide funding for specific legal services targeted to women in prison, including Aboriginal and Torres Strait Islander women, and particularly for civil and family law matters.

Terminology

11. The term "early support" is used instead of "early intervention". "Early support" is intended to mean being offered strengths based, client-centred, trauma informed, culturally safe support at the earliest opportunity when an issue of child safety is identified. Concerns have been raised by community members about the connotations associated with the term "intervention" for Aboriginal and Torres Strait Islander people. The term "support" is preferred as it suggests a more collaborative strengths-based approach.

Human Rights Framework

12. Child Protection must be considered within a human rights framework.
13. It is imperative that the child protection system is consistent with the principles set out in the *Convention of the Rights of the Child* ('CROC'). This includes:
 - 13.1 that the best interests of the child¹ and protecting a child from harm² are of paramount importance;

¹ *Convention on the Rights of the Child*, ratified by Australia on 17 December 1990, Article 3(1)

² CROC, Articles 3(2), 3(3), 19.

- 13.2 that children have the right to participate in decisions that affect them;³
 - 13.3 that children have the right to maintain relations and have contact with their family except if it is contrary to the child's best interests;⁴
 - 13.4 that children have the right to cultural identity, to maintain cultural identity and to participate fully in cultural life;⁵ and
 - 13.5 that children have the right to periodic review of their placement in out-of-home-care.⁶
14. *CROC* defines a child as a person below the age of eighteen years. Where a parent is younger than eighteen years of age, the principles of *CROC* will apply not only to that parent but also to their child/ren. In these circumstances, it is important to ensure that the rights of both the parent and child are upheld in accordance with *CROC*.
15. *CROC* also requires State Parties to “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities”⁷ and the right of the child to benefit from social security.⁸
16. It is also accepted that it is generally in the best interests of the child to be placed with family. In the case of domestic violence, a form of gender violence,⁹ the state has a responsibility to protect victims, namely children and their mothers, and bring perpetrators to account.¹⁰
17. Australia's human rights obligations to eliminate violence against women are outlined in the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* ('CEDAW') ratified by Australia on 28 July 1983 and *CEDAW Committee General Recommendation No 12 (General Recommendation No 12)*, *CEDAW Committee General Recommendation No 19 (General Recommendation No 19)* and *CEDAW Committee General Recommendation No 35* which updates *General Recommendation No 19*.

³ *CROC* Articles 9(2), 12.

⁴ *CROC*, Articles 8, 9(3).

⁵ *CROC*, Articles 30, 31, 20(3), 29(1)(c); *International Covenant on Civil and Political Rights (ICCPR)*, ratified by Australia on 13 August 1980 Article 27; *International Covenant on Economic, Social and Cultural Rights & (ICESCR)* ratified by Australia on 10 December 1975, Articles 1, 3, 15; *Declaration on the Rights of & Indigenous Persons (DRIP)*, Australian Government formally expressed support for the DRIP on 3 April 2009, Articles 3, 5, 8, 11, 12, 14, 15, 31.

⁶ *CROC*, Article 25.

⁷ *CROC*, Article 18(2).

⁸ *CROC*, Article 26.

⁹ Domestic violence is also acknowledged as gendered violence in s9(3)(b) of the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*. &

¹⁰ *General Recommendation No 19*, para 24(b), 24(t); Due diligence obligations outlined in: Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5*, CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33.

18. *General Recommendation No 19* makes it clear that gender-based violence is a form of discrimination within Article 1 of *CEDAW*¹¹ and Article 2 of *CEDAW* obliges state parties to legislate to prohibit all discrimination against women.

Holistic response

19. It is important that child protection reform not occur in isolation. It is imperative that it is part of a holistic response which includes: a focus on justice reinvestment; alternatives to custody for women offenders;¹² supporting parents suffering from the effects of trans-generational traumas and disenfranchised grief; responding to homelessness; and the *National Plan to Reduce Violence against Women and their Children 2010-2022 (National Plan)* and the NSW jurisdictional plan.

20. This is particularly important given there is a correlation between OOHC the criminal justice system and homelessness.¹³

21. In 2009 Kath McFarlane examined 111 NSW Children's Court criminal files¹⁴ and found that 34% of young people appearing before the court were, or had been, in OOHC, and that children in care were 68 times more likely to appear in the Children's Court than other children. McFarlane also identified that many of these children and young people were charged with assault against OOHC staff or damage of their OOHC property.¹⁵ Further, 26% of the care cohort and overall sample were female and 60% of the female care cohort were Aboriginal or Torres Strait Islander.¹⁶

22. Consistent with the principles of self-determination we also call for a long-term cross-departmental NSW Aboriginal Family Violence Strategy driven by Aboriginal communities as recommended by the NSW Women's Alliance. This should include:

A NSW Aboriginal Women's Advisory Group with members having expertise in sexual assault and domestic and family violence ... [who] meet regularly with relevant Ministers and Departmental Secretaries to ensure Aboriginal people have ongoing opportunities to contribute to the development and implementation of the NSW Aboriginal Family Violence Strategy and any other strategies or policies relating to the women of NSW. Regional networks within Aboriginal communities also need to be established to ensure ongoing

¹¹ CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para 7.

¹² See *Corrective Services NSW Women's Advisory Council submission in response to the NSW Law Reform & Commission Review Crimes (Sentencing Procedure) Act 1999 Special categories of offenders – Women*, October 2012 accessed on 26 July 2016 at: http://www.womenslegalnsw.asn.au/downloads/law-reform/2013_WAC_LRCNSW_Specialcategoryofoffenders_Women.pdf (WLS NSW is a consultant member of the Corrective Services NSW Women's Advisory Council and contributed to this submission).

¹³ Australian Institute of Health and Wellbeing, *Children and young people at risk of social exclusion: Links & between homelessness, child protection and juvenile justice*, Canberra 2012.

¹⁴ McFarlane examined 111 Children's Court criminal matter files heard at Parramatta Children's Court on specific days, chosen at random, from a six month period between June and December 2009.

¹⁵ K McFarlane, K., 'From care to custody: Young women in out-of-home care in the criminal justice system', *Current Issues in Criminal Justice*, Vol 22(2), 2010 p 346.

¹⁶ Ibid.

conversations about sexual assault and DFV which will feed through to the NSW Aboriginal Advisory Group.¹⁷

Recommendation 2:

A long-term cross-departmental NSW Aboriginal Family Violence Strategy driven by Aboriginal communities and the establishment of a NSW Aboriginal Women's Advisory Group with expertise in domestic violence and sexual assault who meet regularly with relevant Ministers and Departmental secretaries as well as regional networks within Aboriginal communities.

Upholding Aboriginal and Torres Strait Islander Child and Young Person Placement Principles

23. We continue to remain concerned about poor practice in the implementation of the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles which are central to the *Care Act*.
24. We acknowledge the work of the President of the Children's Court in seeking to improve practice. We also acknowledge the introduction of the new Care and Cultural Plan in January 2017. However, further work is required.
25. Members of our Aboriginal Women's Consultation Network have raised concerns about the lack of a meaningful and effective process of searching for Aboriginal family and the need for greater accountability to ensure this happens. We have been told when matters are transferred from FACS to NGOs, it is frequently the case that no information is received about Aboriginal family or when a child has an Aboriginal parent and a non-Aboriginal parent often the genogram focuses exclusively on the non-Aboriginal side of the family. In these circumstances when further inquiries are made by the NGO and Aboriginal family members are identified and their details provided to FACS we have been told they are not pursued. When FACS is asked why family members have not been pursued they respond they phoned the family member but they did not get back to them.
26. Our Aboriginal Women's Consultation Network also calls for more effective and meaningful consultation with community and better documentation of such consultation. This needs to be developed at a local level with appropriate funding.
27. We also acknowledge the important work of Grandmothers Against Removal ('GMAR'). We refer to the Guiding Principles for strengthening the participation of local Aboriginal communities in child protection decision-making developed by GMAR, New England FACS District Office and the NSW Ombudsman.
28. To ensure greater accountability we support the following recommendations by our Aboriginal Women's Consultation Network:

¹⁷ NSW Women's Alliance, *Submission to the Blueprint for the domestic and family violence response in NSW*, Recommendation 9. WLS NSW is a member of the NSW Women's Alliance.

Recommendation 3:

FACS be required to present detailed evidence to the Children's Court of the searches made for Aboriginal family as an attachment to the Care and Cultural Plan. This should include dates and times of calls made; copies of letters sent; copies of Chapter 16A requests to relevant agencies such as Centrelink for details of relatives/community members identified; details of the community members they consulted with and full genograms. Children's Court Magistrates must hold FACS accountable for compliance with this requirement and FACS senior management must hold caseworkers accountable for failing to satisfy the Court that the searches for Aboriginal family have been undertaken properly.

Recommendation 4:

Additional funding for Link Up and local Aboriginal community controlled organisations to ensure this work happens in a timely fashion.

Recommendation 5:

More effective and meaningful consultation with community and better documentation of such consultation. This needs to be developed at a local level with appropriate funding.

The need for culturally safe and responsive practice with Aboriginal communities

29. It is highly concerning that Aboriginal and Torres Strait Islander children are removed at the rate of almost ten times that of non-Indigenous children.¹⁸ We note with concern that the second most common substantiation type for the removal of children in Australia is neglect.¹⁹
30. Through our advice and casework, we have seen and had reported to us examples of poor cultural competence and little understanding of family and culture in Aboriginal and Torres Strait Islander communities, including by FACS and NGO child protection workers.
31. There are many things to consider in determining what is best for the child including issues such as identity, belonging, community, country connection and wellbeing. A nuanced approach to judgment about child wellbeing should be applied.
32. FACS' Practice Standards require "*culturally responsive practice with Aboriginal communities*".²⁰ A 2016 Evaluation of Practice First – a child protection service delivery

¹⁸ Australian Institute of Family Studies, *Children and Care Resource Sheet* (June 2015), <https://aifs.gov.au/cfca/publications/children-care>

¹⁹ Australian Institute of Health and Welfare, *Child Protection* at: <http://www.aihw.gov.au/child-protection/>

²⁰ Department of Family and Community Services (FACS), *Care and Protection: Practice Standards*, 7, https://www.facs.nsw.gov.au/_data/assets/file/0018/332244/practice_standards.pdf

model – found that less than half the FACS workers surveyed felt they understood the Practice Standards and Practice Framework.²¹

33. Community members express concern about the way Aboriginal and Torres Strait Islander child-rearing practices are judged from the dominant viewpoint and can be misconstrued as neglectful or as exposing children to risk or harm. For example, not having much food in the fridge may be misconstrued as neglect when the practice is that multiple family and community members provide food for children rather than just the parents. Further, where sleeping on mattresses may be a normal part of life, this can be misconceived as inappropriate sleeping arrangements.²²
34. The *Bringing them home – National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* report called for national standards for Aboriginal and Torres Strait Islander children. These standards include a presumption that it is in the best interests of the child to remain within his or her Indigenous family, community and culture (Rec 46a) and that best interests considerations are paramount (Rec 47). Further, in determining best interests of an Aboriginal and Torres Strait Islander child other factors must be considered including the child's need to maintain contact with family, community and culture; the significance of Indigenous heritage and a child's future well-being; the views of the child and his/her family; the advice of an accredited Indigenous organisation (Rec 46b). Removal of Aboriginal and Torres Strait Islander children from their families and community should only be as a last resort (Rec 48).
35. Many of our Aboriginal clients reflect on the impact of being forcibly removed from their families on their lives, including telling us that they themselves are a member of the Stolen Generations or they have family members who are part of the Stolen Generations.
36. We also believe that it is extremely important to acknowledge that the impact of the Stolen Generations extends not only to those children who were removed but there has been, and continues to be, trans-generational traumas experienced by the children, grandchildren and extended family members of the Stolen Generations.
37. In addition to the trauma experienced as a result of loss of identity, belonging, community, country connection and impact on wellbeing, many have also experienced trauma as a result of sexual and/or physical abuse which occurred following the forced removal of children from their families.

²¹ Parenting Research Centre of the University of Melbourne and the Social Policy Research Centre of the University of New South Wales (2016), *Practice First Evaluation Report – Prepared for NSW Department of Family and Community Services*, p3

https://www.facs.nsw.gov.au/_data/assets/pdf_file/0003/412662/Full-report-Practice-First-Evaluation-Final-Report.PDF

²² See also Secretariat of National Aboriginal and Islander Child Care (SNAICC) (2016), *Stronger Safer Together: A reflective practice resource and toolkit for services providing intensive and targeted support for Aboriginal and Torres Strait Islander families*, p29

https://www.dss.gov.au/sites/default/files/documents/11_2016/snaicc_stronger_safer_together_report.pdf

38. There are also concerns expressed by Aboriginal and Torres Strait Islander people that core values, such as sharing, caring and respect have been fractured as a result of dispossession of land and country and forced removal of children from their families.
39. With the forced removal of Aboriginal and Torres Strait Islander children from their families, many of these children did not have the opportunity to learn parenting skills from their own parents, aunties, uncles and grandparents. It is therefore essential that parents have access to strengths-based, trauma-informed, culturally safe parenting programs.

Early holistic support for Aboriginal and Torres Strait Islander parents

40. A number of years ago Mudgin-Gal Aboriginal Corporation developed the "Healthy Family Circle" program in partnership with Relationships Australia. This program had a number of components. One component was to encourage young Aboriginal women from the community to participate in the Playgroup Facilitators Training Course, a certificate course offered through TAFE. This course, run by SDN Children's Services Inc and Connect Redfern, helped build the women's skills and understanding about parenting skills and early childhood development and provided "*positive behavioural modelling for parenting and childcare*" that could be implemented in the women's own families and communities. Some of the women gained employment in the area of early childhood.²³
41. In addition to programs like Healthy Family Circle such awareness and early support and prevention work could take the form of, for example, coffee mornings where Aboriginal mothers could gather together in their local community to yarn about a range of issues in a supportive environment, such as getting their children to preschool and where they can go in the community for help. Such programs would support Recommendation 36 of the *Bringing them home report* that the Council of Australian Governments provide adequate funding to relevant Indigenous organisations in each region to establish parenting and family wellbeing programs.
42. We note that FaCS has developed a prenatal program in at least three local districts in NSW which engages and supports mothers during their pregnancy. We have had positive engagement with the programs and have found them to be both responsive and proactive in assisting our clients. We welcome supportive programs that are strength based. However, little is known about this program. We recommend that there be better community education about these programs, including to seek to address the fear within Aboriginal and Torres Strait Islander communities that by engaging with services children will be removed from their parents' care.
43. There are a number of specific prevention and early support services for Aboriginal and Torres Strait Islander families such as programs under the Aboriginal Child, Youth and Family Strategy, services under the Aboriginal Maternal and Infant Health Strategy and

²³ See Mudgin-Gal Aboriginal Corporation, *Seeding Hope* at: <http://www.redfernfoundation.org.au/mudgingal.pdf>

Aboriginal Child and Family Centres.²⁴ However, the 2017 NSW Parliamentary Inquiry into Child Protection heard from stakeholders that there are a number of barriers which prevent Aboriginal peoples from accessing such services, including the fear that engagement in early support services may lead to the removal of their child.²⁵

44. The 2017 NSW Parliamentary Inquiry into Child Protection recommended (Rec 18):

*That the NSW Government commit to working across NSW with Aboriginal communities, as well as Aboriginal organisations such as Grandmothers Against Removals, to provide a far greater degree of Aboriginal self-determination in decisions on supporting families, child protection and child removals.*²⁶

Community Legal Education

45. An important part of the work of our Indigenous Women's Legal Program (IWLP) is in community development and community legal education. A key component of this is focused on raising awareness within the Aboriginal community about the importance of early access to free legal advice. This is particularly important in the child protection context.

46. For example, where a viable carer is available a matter could be diverted to the family law courts rather than waiting for the matter to escalate to the Children's Court and the removal of a child from their family. The benefit in these circumstances is there is an increased likelihood that the child will stay with family members instead of going into "care". The IWLP team play a vital role in conveying this message to communities.

47. Furthermore, consistent with the Australian and NSW Law Reform Commissions recommendation, where a viable carer is identified and FACS refers that carer to the family court, FACS should provide supporting evidence about the reasons for the referral to the family court.²⁷ We argue this should include a mother who has been the victim of domestic violence and who is taking protective action through the family courts, for example, by applying for no contact or supervised contact orders.

48. We submit that in many cases this could result in safer arrangements for children, reduced trauma (noting the trauma associated with a child's removal) and is a better use of state and federal resources as opposed to the costs of removing a child from his/her family and assuming him/her into care.

49. Access to plain English publications is also important. In responding to the need in the community for accessible information about what to do when your child is removed from

²⁴ NSW Parliament Portfolio Committee No. 2 – Health and Community Services (2016), *Report of the & Child Protection Inquiry*, 127 <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2396>

²⁵ Ibid.

²⁶ Ibid xiii.

²⁷ ALRC and NSWLRC, *Family Violence – A National Legal Response*, ALRC Report 114, October 2010, Recommendation 19.3.

your care WLS NSW has produced two booklets – *Dealing with FACS: Top 10 tips* and *Help! FACS has removed my children. What can I do?*

Recommendation 6:

Implement the Australian and NSW Law Reform Commissions *Family Violence – A National Legal Response Report* recommendation 19.3, where a viable carer is identified and FACS refers that carer to the family court, FACS should provide supporting evidence about the reasons for the referral to the family court

Evidence of prior alternative action, service provision and strengthening “best endeavours”

50. Section 63 of the *Children and Young Persons (Care and Protection) Act 1998* (‘the Care Act’) outlines the requirement for evidence of prior alternative action:

(1) *When making a care application, the Secretary must furnish details to the Children’s Court of:*

(a) *the support and assistance provided for the safety, welfare and well-being of the child or young person, and*

(b) *the alternatives to a care order that were considered before the application was made and the reasons why those alternatives were rejected.*

(2) *The Children’s Court must not:*

(a) *dismiss a care application in relation to a child or young person, or*

(b) *discharge a child or young person who is in the care responsibility of the Secretary from that care responsibility,*

by reason only that the Children’s Court is of the opinion that an appropriate alternative action that could have been taken in relation to the child or young person was not considered or taken.

(3) *Subsection (2) does not prevent the Children’s Court from adjourning proceedings.*

51. It has been the experience of several of our clients that FACS did not contact them to offer early support and the opportunity to address issues of concern prior to the sudden removal of their child. It is particularly traumatic when babies are removed from their mother’s care in hospital immediately after birth.

52. While we recognise that there are times when child safety necessitates the emergency removal of children from their primary caregivers, the fact that there are so few consequences for failure to undertake “prior alternative assistance” before taking this step means there is a lack of accountability of FACS and NGO child protection services.

53. “Prior alternative action” must include parents/primary caregivers being provided formal written notification of the issues of concern that need to be addressed, referral for early legal advice and a plan developed with the parents/primary caregivers about how the issues will be addressed, including parents/primary caregivers being provided assistance to engage with relevant services.

54. Section 8(c) of the *Care Act* states that one of the key objects of the Act is to provide parents with *"appropriate assistance ...in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment"*.
55. One of the principles of the *Care Act* outlined at Section 9(c) is that the least intrusive action must be taken in any decision about protecting a child or young person from harm and promoting that child or young person's development.
56. Yet while parents and primary caregivers can ask for support²⁸ there is currently no obligation to provide support.²⁹ FACS and NGO child protection services are only required to use "best endeavours" to comply with the request.³⁰
57. Parents and primary caregivers need an enforceable right to services in legislation that are meaningful, available, accessible and at very low or no cost to them.
58. As raised above there is an intergenerational fear amongst Aboriginal and Torres Strait Islander communities of having children taken. It is important that if parents and primary caregivers reach out for support they receive a response which is culturally safe, trauma-informed and strengths based.
59. Recommendation 43b of the *Bringing the home* report relating to self-determination includes reference to:
- Every Indigenous community [being] entitled to adequate funding and other resources to enable it to support and provide for families and children and to ensure that the removal of children is the option of last resort.*
60. The 2008 Special Commission of Inquiry into Child Protection Services in NSW ('*Wood Inquiry*') found that the key to reducing risk to children is *"sufficiently resourcing flexible prevention and early intervention services so as to reduce the numbers of children and young people who require the state to step in to keep them safe"*.³¹ For decades advocates have been calling for better resourcing of child protection.³²

²⁸ Section 21(1) of the *Care Act* states *"A parent of a child or young person may seek assistance from the Director-General in order to obtain services that will enable the child or young person to remain in, or return to, the care of his or her family"*.

²⁹ Section 22 outlines the Director General's obligations to respond, though section 22(2) states the Director-General is not required *"to take any action other than assessing the request for assistance"*.

³⁰ Section 18(1) the *Care Act*

³¹ The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection*, November 2008, Executive Summary p i.

³² Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, ALRC Report 84, November 1997 at 17.6

61. The value of investing in early support is also well documented in the research commissioned by the Department of Family and Community Services as part of the Targeted Earlier Intervention Reforms³³ and Their Futures Matter.³⁴

62. The 2016 NSW Parliamentary Inquiry into Child Protection found that:

*The Department [FACS] should be working more effectively with these families to identify whether support services can be provided to address child protection concerns after they have been identified. In this regard, there should be a focus on identifying whether restoration of that child is possible, assuming any safety concerns are adequately addressed.*³⁵

63. In cases where parental substance abuse has been identified as a contributing factor it is important to recognise that substance dependency may arise from past trauma and violence.

64. A trauma informed response to “prior alternative action” is therefore required. This requires much more than just providing a list of services to which a parent or primary caregiver is encouraged to access – which in our view does not constitute “prior alternative action”.

65. Rather, a trauma informed response to “prior alternative action” means, for example, every effort should be made to develop a range of accessible treatment programs to provide parents with a genuine opportunity to address their alcohol and/or drug misuse, including any underlying catalysts. A key component of this is identifying parents as “in need of services/support” rather than viewing them as perpetrators or bad parents.³⁶ Research clearly identifies that a significant obstacle for parents to enter into and complete treatment programs is motivation.³⁷ If there was a cultural shift towards support rather than surveillance and punishment, parents are likely to feel more able to engage with treatment services.

³³ Australian Research Alliance for Children and Youth (2015), *Better Systems, Better Chances: A review of research and practice for prevention and early intervention*

http://www.community.nsw.gov.au/_data/assets/pdf_file/0008/335168/better_systems_better_chances_review.pdf See also, Neha Prasad & Marie Connolly, *Factors that affect the restoration of children and young people to their birth families*, published by ABSEC, ACWA and the NSW Government 2013: http://www.community.nsw.gov.au/_data/assets/pdf_file/0014/320036/literature_review_on_restoration.pdf

³⁴ NSW Government (2016), *Their Futures Matter: A new approach – Reform directions from the Independent Review of Out of Home Care in New South Wales*

https://www.facs.nsw.gov.au/_data/assets/file/0005/387293/FACS_OOHC_Review_161116.pdf

³⁵ NSW Parliament Portfolio Committee No. 2 – Health and Community Services (2016), *Report of the Child Protection Inquiry*, 70 <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2396>

³⁶ Northern California Training Academy, *The importance of family engagement in child welfare services*, June 2009 p6-7 accessed at <http://academy.extensiondlc.net/file.php/1/resources/LR-FamilyEngagement.pdf>

³⁷ Northern California Training Academy, Note 36 p 8.

66. Little effort is made to help mothers engage in support services. Barriers to engaging with support services are often not addressed. In our experience, barriers include: shame; case workers' judgmental attitudes; that where early support plans are used they are generally developed in a context of power imbalance and are seen as an evidence gathering exercise which will result in punitive consequences such as the removal of child(ren) from their mother rather than as genuine support; and fear that children will be removed.
67. In our experience, when women seek support and/or services from FACS or non-government organisations working in child protection these are often not available or not provided in a timely manner.³⁸ The lack of access to services is exacerbated for women in regional, rural and remote areas. Where services are available women often need to travel long distances which may not be accessible by public transport. The cost of getting to appointments can create financial stress.
68. Another barrier is that where support may be available it may be in the form of a pilot program.³⁹ While recognising the value of pilot programs and the importance of building the evidence through evaluation of such programs it is vital that there is long-term, sustainable funding for early support services. This would acknowledge that it takes time to build trust and that trust is undermined if effective programs are not continued beyond pilots.
69. In the context of domestic violence, it is often the case that rather than holding the perpetrator (often the father) to account, the mother is punished for not acting in a so-called "protective manner".
70. This can be explained by the different professional approaches used in responding to domestic violence in criminal, child protection and family law contexts which can result in conflicting messages.
71. For example, in the family law courts the focus is on balancing a meaningful relationship with both parents and protecting the child from harm. While amendments to the *Family Law Act* came into effect on 7 June 2012 prioritising safety over a meaningful relationship, the presumption of equal shared parental responsibility remains the starting point.
72. In contrast, the child protection context focuses on protecting children. It is often the case that if a mother is unable to leave a violent relationship within a suggested and often arbitrary timeframe, she will be viewed as failing to act protectively. It is therefore the mother who is unfairly seen as responsible for dealing with the consequences of violence

³⁸ This is consistent with the *Keep Them Safe Evaluation*, an evaluation of the first 5 years of the NSW Government's Keep Them Safe child protection policy developed in response to the 2008 *Wood Inquiry*, which found that many families with children at risk of significant harm "continue to be provided with fragmentary services or in some cases, no service at all". Social Policy Research Centre, *Keep Them Safe Evaluation: Final Report*: NSW Department of Premier and Cabinet, June 2014 p55(57) at: http://www.keepthemsafe.nsw.gov.au/_data/assets/pdf_file/0006/166281/KTS_Outcomes_Evaluation_Final_Report.pdf

³⁹ See the *Keep Them Safe Evaluation* p84 (86).

in a child protection context.⁴⁰ This view fails to recognise that when a woman leaves a relationship, it is one of the most dangerous times of the relationship and requires planning and support. This view also fails to acknowledge that some women remain with a violent partner in order to protect their children as they fear what will happen if their children are left unsupervised with the alleged perpetrator.

73. "Prior alternative action" should include FACS and NGO child protection workers making effective referrals of parents and/or primary caregivers to early legal advice and other support. This has been a key discussion focus of the Safe Home for Life Care and Protection Legal Update meetings attended by FACS and legal assistance service providers over the last few years. Concerns have been raised by legal assistance service providers about the low use of early support tools (a form of prior alternative action) such as parent responsibility contracts and parent capacity orders. We understand information about referrals for early legal advice has been included in FACS internal casework practice manual and flyers have been developed and provided to every FACS district. However, WLS NSW receives very few referrals from FACS.
74. There is a need for cultural change within FACS and the child protection sector so that workers understand the importance of parents receiving social and legal support at an early stage, to promote the safety of the children, inform parents and primary caregivers of concerns and how to address the risks of the children being removed from their families.
75. If funded, community legal centres are well placed to develop and provide a model of practice which would include a lawyer, a non-legal support worker who could provide case management and intensive support and specialist workers, such as Aboriginal and Torres Strait Islander specialist workers to help respond to the over-representation of Aboriginal and Torres Strait Islander children in OOHC.

Recommendation 7:

Implement the *Bringing them home* report recommendations.

Recommendation 8:

Increase long-term, sustainable funding of community led, culturally safe, strengths based and trauma informed parenting and other support programs, such as integrated social and legal services, to help parents address issues that may lead to the removal of their children.

Recommendation 9:

Better community education about FACS' prenatal caseworkers and expand the number of caseworkers in these roles.

⁴⁰ L Radford and M Hester, *Mothering through domestic violence*, Jessica Kingsley Publishers, London, 2006 p 143.

Recommendation 10:

Establish accountability mechanisms to ensure that FACS and NGO child protection workers must inform parents if there are issues that may lead to the removal of their children and provide culturally safe and appropriate support to them to address those issues as well as referrals for early legal advice.

Recommendation 11:

Parents and primary caregivers need an enforceable right to services in legislation that are meaningful, available, accessible and at very low or no cost.

Access to safe and affordable housing

76. The 2014 *Keep Them Safe Evaluation Report* found a continued urgent need for safe and affordable housing.⁴¹
77. Given that victims-survivors of family violence may need to leave their home at very short notice there will also always be a need for emergency accommodation and women's refuges. It is important that there are culturally safe specialist women's services, including specialist Aboriginal women's refuges.
78. Women with children who are experiencing family violence are often in a difficult position. Women who stay in violent relationships often do so to protect their children from the perpetrator rather than leaving their children alone with the perpetrator. Yet children who are exposed to family violence are at risk of being removed by FACS. If women leave violent homes with their children, children are also at risk of removal as a result of homelessness. Once children are removed, inappropriate housing can be a barrier to restoration due to a lack of safe and affordable housing options.
79. The current FACS Housing Pathways policy is that a parent may be considered for priority access to social housing if she/he can provide evidence which demonstrates that *"the lack of appropriate accommodation is impacting their ability to have children restored"*.⁴² However, we have heard from community members that assessments of social housing applications appear to be based on the parent's current circumstances, such as whether a child is in their care at the time.
80. We also seek clarification regarding the policies of the Aboriginal Housing Office ('AHO') relating to prioritising victims-survivors of family violence and their children and providing appropriate accommodation when, for example, a parent is seeking to have their children returned to their care, subject to providing appropriate housing. These policies are not easily accessible on the AHO website.

⁴¹ *Keep Them Safe Evaluation Report*, p84 (86).

⁴² NSW Department of Family and Community Services (2016), *Priority access to social housing and evidence requirements*, <http://www.housingpathways.nsw.gov.au/additional-information/factsheets/child-protection-caseworker-factsheet>

81. Access to safe and affordable housing when leaving prison is key to reducing recidivism. This is discussed below in the section on the over-representation of Aboriginal and Torres Strait Islander women in custody.

Recommendation 12:

Increase funding for specialist and culturally safe women's refuges and emergency accommodation and support services to help victims-survivors of family violence find safe, affordable and permanent housing options, including specialist Aboriginal women's refuges.

Recommendation 13:

Better promotion and implementation of the FACS Housing Pathways policy which prioritises access to social housing if a parent can provide evidence which demonstrates that the lack of appropriate accommodation is impacting their ability to have children restored to their care.

Role of caseworker

82. Research shows that family restoration is facilitated by more frequent contact with the caseworker, particularly where that parent feels that *"their involvement in case planning and services is valued and respectful of their potential to keep their children safe, provides them with the information they need to successfully advocate for themselves and their children, and enables them to access the services and resources they need to achieve reunification"*.⁴³
83. Consistency of caseworker is also important.⁴⁴
84. It is therefore important that caseworkers are well qualified and experienced and receive the necessary ongoing training, supervision and support to undertake their work and efforts be made to retain and support competent casework staff.⁴⁵

Annual reviews of OOHC & guardianship placements

85. Under Article 25 of the *Convention on the Rights of the Child* children have the right to periodic review of their placement. Failure to provide such reviews amount to breaches of Australia's international human rights obligations.
86. Section 150(2)(b) of the *Care Act* requires a review of out-of-home care placements within 2 months of a final order being made for a child aged under 2 years and thereafter every 12 months or within 4 months of a final order being made if the child is not less than 2 years old and thereafter every 12 months.

⁴³ Child Welfare Information Gateway, *Family reunification: What the evidence shows, Issue Brief* June 2011 p6-7 accessed at www.childwelfare.gov/pubs/iissue_briefs/family_reunification/family_reunification.pdf

⁴⁴ C Potter and S Klein-Rothschild, "Getting home on time: Predicting timely permanence for young children", *Child Welfare*, 2002, 81(2) p135.

⁴⁵ C Potter and S Klein-Rothschild, Note 44 p146.

87. Section 150(4) provides “a review is to be conducted in accordance with guidelines prepared by the Children’s Guardian”.
88. The Guidelines prepared by the Children’s Guardian require the participation of children in the review and also recommend the participation of parents/step parents, and “people significant to the child or young person”.⁴⁶
89. It would be helpful to better understand the review process. For example, does FACS speak with the child? Does FACS speak with the parents and the carers? Is there an opportunity to consider restoration to parents? Is there an opportunity to review the effectiveness of the Cultural Care Plan? Consideration should be given to the reviews being conducted independently of FACS.
90. It is also important to have review mechanisms for guardianship orders.
91. Good quality reviews can be helpful and play an important role in validating the important role of the relative carer, promoting a collaborative approach by carers and FACS and responding to any issues the child wishes to raise. *Kinship Care in NSW – Finding a Way Forward*, also supports this view.⁴⁷ It is important therefore that reviews are carried out by experienced staff with good training and supervision and knowledge of the issues relevant to the particular placement.

Recommendation 14:

Establish accountability measures to ensure FACS and NGO child protection services conduct regular meaningful reviews of OOHC and guardianship placements, including reviews of Cultural Care Plans, with input from affected children, parents, carers and other people significant to the child or young person.

Funding and Specialisation

92. We welcome the focus of *Their Futures Matter* particularly on family preservation and restoration and specific funding to work with Aboriginal and Torres Strait Islander families. It is important to acknowledge that this work is resource and time intensive and the funding for such programs needs to reflect this.
93. We understand that under the new funding model restoration, adoption and guardianship is allocated the same base funding. If family preservation and restoration are to be genuinely prioritised this should be reflected in funding allocations above guardianship and adoption.

⁴⁶ The Children’s Guardian, *Guidelines for Designated Agencies on the Review of Placements of Children and Young Persons in Out-of-Home Care*, p6

⁴⁷ Ainslie Yardley, Jan Mason, Elizabeth Watson, *Kinship Care in NSW – finding a way forward*, University of Western Sydney, November 2009 p 36-48, 52.

94. It is also vital that the restoration packages include funding to work with parents who do not currently have the children in their care.
95. To ensure parents engaged in the child protection system are aware of the new focus on family preservation and restoration there needs to be greater promotion of these permanency pathways. We also recommend the establishment of specialist teams within FACS focused on restoration with a contact line available for parents. If parents are having difficulties engaging with their caseworker, they should be able to contact this line for further information about how they can work towards restoration.

Recommendation 15:

Establish specialist teams within FACS focused on restoration with a contact line available for parents.

Over representation of Aboriginal and Torres Strait Islander women in custody

96. Aboriginal and Torres Strait Islander women represent 34% of the adult women prison population, at 30 June 2016,⁴⁸ and are the fastest growing group in NSW prisons. It is estimated that around 80% of Aboriginal and Torres Strait Islander women in prisons are mothers.⁴⁹ Prior to their imprisonment, they were often the primary caregiver of their own children as well as the children of extended family members.⁵⁰
97. We are concerned that 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 OOHC.
98. Aboriginal women generally serve shorter sentences, often for minor offences such as driving infringements and non-payment of fines and are more likely than non-Aboriginal women to be on remand.⁵¹ This raises many concerns about the legal system and policing. It is also of great concern that women are being incarcerated because they are poor. It is the experience of our clients that while on remand they are generally not eligible to participate in programs.

⁴⁸ Australian Bureau of Statistics, *Prisoners in Australia 2016* (8 December).

⁴⁹ Human Rights Law Centre and Change the Record Coalition (2017), *Over-represented and overlooked: & the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, p13 <https://www.hrlc.org.au/news/2017/5/10/over-represented-overlooked-report> citing Juanita Sherwood and Sacha Kendall (2013), 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' 46 *Contemporary Nurse: A Journal for the & Australian Nursing Profession* p83, 85.

⁵⁰ Ibid.

⁵¹ Research cited in Mary Stathopoulos, *Addressing women's victimisation histories in custodial settings*, ACSSA, No 13, 2012 p3. See also Peta MacGillivray and Eileen Baldry, "Australian Indigenous Women's Offending Patterns", *Indigenous Justice Clearinghouse*, Brief 19, June 2015 p11 who note "evidence of high & levels of charges and court appearances for vehicle and traffic breaches, justice and shoplifting offences".

99. If there is no statutory risk of significant harm issues for the children and the issue is the absence of the mother when she enters custody, we recommend an alternative pathway than FACS and the Children's Court. This is to reduce the stigma which is associated with Children's Court matters and the stress the mother and children may experience where there are no risk of significant harm issues.
100. We encourage FACS to prioritise their work with pregnant women in custody. This can be a good opportunity to provide meaningful programs and support led by FACS with involvement from Corrective Services.
101. When a child is unable to remain with their mother in custody we support an assessment of *all* placement options as it is the experience of some of our clients in custody that where there are no risk of significant harm issues in relation to the mother, the child may be placed with a violent father or a paternal relative who may alienate the children from the mother.
102. There are additional concerns when the mother and children are Aboriginal or Torres Strait Islander and the father is not. The importance of cultural identity and connections are not necessarily given adequate attention.
103. Once the mother is released from custody she often faces significant difficulty in having the children returned to her care.
104. Additionally, courts are not generally well informed about the pathways to prison for women as a result of family violence, including sexual assault. A high proportion of women in prison have been victims of violent crime prior to coming into custody. The *2009 NSW Inmate Health Survey* found that: 66% of female inmates had been involved in at least one violent relationship and 29% of female inmates had been subjected to at least one form of sexual violence.⁵²
105. 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-survivors of family violence.⁵³
106. As 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*".⁵⁴ As Herman explains, drugs are a coping mechanism, providing relief and a form of escape from reality.⁵⁵

⁵² Devon Idig, Libby Topp, Bronwen Ross, Hassan Mamoon, Belinda Border, Shalin Kumar and Martin McNamara, *2009 NSW Inmate Health Survey*, Justice Health, Sydney 2010 p131.

⁵³ 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.

⁵⁴ Mary Stathopoulos, Note 51 p6.

⁵⁵ Herman cited in Mary Stathopoulos, Note 51 p6.

107. Helping women to address their trauma, including trans-generational trauma as a result of the ongoing trauma experienced as a result of the Stolen Generations, is key to reducing recidivism. Reducing recidivism for mothers in prison is important so as to limit disruption to the care of children.
108. When a vulnerable parent is in custody it is an ideal time to offer treatment and support programs and encourage contact between mothers and children in an environment where they are free of fear and offenders. These programs should also be available to those on remand.
109. We acknowledge and welcome the recent introduction of the High Intensity Program Units for people serving short sentences. We understand these programs will be available for women at Dillwynia Correctional Centre, Wellington Correctional Centre and the Mid North Coast Correctional Centre.
110. We also believe that in sentencing and considering possible diversionary options, greater consideration should be given to 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.⁵⁶ Imprisonment of women and particularly pregnant women or women caring for children should be as a last resort.⁵⁷
111. If a mother is imprisoned, wherever possible, her children under six years of age should be able to live with her. We note this currently occurs very successfully at Emu Plains Correctional Centre through the Mothers and Children program⁵⁸ and recommend this be expanded to other prisons. It is important that both FACS workers and the lawyer for the mother/expectant parent are aware of programs such as the Mothers and Children program and how to make referrals to such programs as well as programs that facilitate transport for contact visits in prisons, for example, Shine for Kids.
112. 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 during the initial time of removal and care planning, this increases the chance of successful restoration.⁵⁹
113. Clients consistently tell us that maintaining a relationship with children while in prison is an important factor that can contribute to reducing recidivism. Similarly, an inability to maintain contact with children contributes to recidivism.

⁵⁶ 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)

⁵⁷ See Ibid, Rule 58, Rule 64.

⁵⁸ For more information about the Mothers and Children's Program see:

http://www.correctiveservices.justice.nsw.gov.au/Documents/Related%20Links/library/womens-handbook-online-version1_Part2.pdf

⁵⁹ Child Welfare Information Gateway (2011), 'Family reunification: What the evidence shows', *Issue Brief June 2011* www.childwelfare.gov/pubs/iissue_briefs/family_reunification/family_reunification.pdf

114. Toohey cites several studies which found children's coping skills were also enhanced and "problematic behaviour" was reduced by maintaining contact with their incarcerated parents.⁶⁰ A 2016 report found that there was no evidence of harm to children residing with their mothers in prison.⁶¹
115. Women tell us they want to be able to access safe, stable long-term housing and long-term drug and alcohol rehabilitation programs. We submit such support would in some cases prevent offending as well as reduce recidivism.
116. It is essential that meaningful and appropriate referrals are made prior to a mother's release from custody to ensure she and her children have access to safe and affordable housing and other supports, such as drug and alcohol counselling or residential programs. Access to rehabilitation programs must be increased, especially in regional, rural and remote areas where access is currently very limited.

Miranda Project

117. In NSW, the Miranda Project is an example of a diversionary program which helps women to address issues underlying offending, such as alcohol and drug misuse, a lack of financial support and difficulties with emotional self-regulation. It is focused on helping women to connect with the community and increasing their resilience to prevent re-offending.⁶² A specific program is being developed for Aboriginal women in NSW.
118. It is of vital importance that there is adequate funding to ensure such programs are available to women when they need to access them.

Legal Education and Advice in Prison (LEAP) program for women

119. 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 are interconnected with the criminal law issues. This can prevent the successful reintegration of people after they are released.⁶³

⁶⁰ Julie-Anne 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 p33.

⁶¹ 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*, p3 http://assets.justice.vic.gov.au/corrections/resources/b5ef4e77-10e5-4a27-bbfd-9a5c3e9cdb69/mothersandchildren_programs.pdf

⁶² The Miranda Project is an initiative of the Corrective Services NSW Women's Advisory Council and is a project of the Community Restorative Centre. It is modelled on women's centres in the United Kingdom that have been evaluated and found to have positive impacts on women's lives. It is a first for NSW and Australia. See Community Restorative Centre NSW, About the Miranda Project <https://www.crcnsw.org.au/miranda-project/about/>

⁶³ Law Council of Australia, The Justice Project: Prisoners and Detainees Consultation Paper (August 2017), p40 [https://www.lawcouncil.asn.au/files/web-pdf/Justice Project/Consultation Papers/Prisoners and Detainees.pdf](https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Prisoners%20and%20Detainees.pdf)

120. In early 2009, WLS NSW, Wirringa Baiya Aboriginal Women's Legal Centre and Western Sydney Community Legal Centre (formerly Hawkesbury-Nepean Community Legal Centre)⁶⁴ established the Legal Education and Advice in Prison (LEAP) program for women to facilitate access to family and civil law services for women in prison, particularly Aboriginal and Torres Strait Islander women. LEAP provides legal services to the three correctional centres for women in metropolitan Sydney: Silverwater Women's, Emu Plains and Dillwynia. LEAP does not receive any dedicated funding and operates from the core resources of the services.
121. LEAP provides culturally appropriate services to Aboriginal and Torres Strait Islander women through the Indigenous Women's Legal Program based at WLS NSW and Wirringa Baiya Aboriginal Women's Legal Centre. The service is provided by women solicitors who are also domestic violence and trauma informed.
122. As part of the LEAP program WLS NSW is actively working with Corrective Services, including through the Mothers and Children Program to facilitate early legal referrals for mothers and pregnant women in custody.
123. State/territory and federal governments should provide funding for specific legal services targeted to women in prison, including Aboriginal and Torres Strait Islander women, and particularly for civil and family law matters. The Law Council of Australia recognised this service gap in its consultation paper on prisoners and detainees, as part of the Justice Project.⁶⁵

Recommendation 16:

Imprisonment of women, and particularly pregnant women and women caring for children, should be as a last resort. Flexible and accessible, non-custodial alternatives to prison should be available, including in rural, regional and remote areas.

Recommendation 17:

Increase the availability of programs that support mothers and children to live together in prisons, wherever it is safe and appropriate to do so. Where these programs are not available, mothers and children should be supported to maintain a connection.

Recommendation 18:

Increase the availability and funding of support programs for pregnant women and women with children in custody to address their trauma, mental health and drug and/or alcohol issues. Increase the provision of appropriate referrals prior to a mother's release from custody to ensure she and her children have access to safe and affordable housing and other supports.

⁶⁴ In 2016, the Hawkesbury-Nepean Community Legal Centre merged with the Macquarie Legal Centre and Mt Druitt and Area Community Legal Centre to form the Western Sydney Community Legal Centre.

⁶⁵ Law Council of Australia, The Justice Project: Prisoners and Detainees Consultation Paper (August 2017), p5

Recommendation 19:

State/territory and federal governments should provide funding for specific legal services targeted to women in prison, including Aboriginal and Torres Strait Islander women, and particularly for civil and family law matters.

Primary caregivers in prison fully engaging in Children's Court proceedings

124. We often see women who were in custody at the time of the Children's Court proceeding regarding their children. The women tell us they had little if any contact with a lawyer during the Children's Court proceedings. It is imperative that mothers and primary caregivers in custody can fully participate and be kept informed about their Children's Court matters. Lawyers can play an important role in advocating on behalf of their client for family assessment to take place so the child can remain in the care of family while their client is in custody. A lawyer can also draw attention to the pathway of many women to prison as a result of trauma and the programs (if any are available) that their client can undertake while in custody to seek to address their trauma. A lawyer can also advocate to ensure contact between the child and primary caregiver when a child is removed from the care of a primary caregiver.
125. It is incumbent upon FACS and NGO child protection services where they have case management responsibility to keep mothers and primary caregivers, particularly those in custody, informed about their children who are in care, including which FACS office or NGO child protection service has responsibility for the matter and the contact details of the caseworkers. If a pregnant woman from a regional or rural area gives birth in custody in Sydney, a FACS office near the hospital in which the woman gives birth may take temporary carriage of the matter. It may ultimately be transferred to a FACS office in the area in which the carers are located and then to a NGO child protection service. In some instances, there have been four different FaCS offices having carriage of a matter and it has taken the assistance of a lawyer and many months to locate the FACS office and/or NGO child protection service with current carriage of particular matters.
126. If Children's Court proceedings commence while a parent or primary caregiver is in custody or there are additional documents to be served during proceedings while a party is in custody it is vital that parties are either served the documents in person by the FACS caseworker or casework manager or alternatively and less preferred FACS book an audio-visual link to speak to the parties directly. This is important as parties may not understand the documents or process or may find the serving of papers without explanation overwhelming. It is also important that a list of legal services attached to the relevant prison is provided to the party with the documents to facilitate genuine access to a lawyer for parents and primary caregivers in custody.
127. It is also incumbent upon FACS to ensure contact continues with a primary caregiver and their child while a primary caregiver is in custody.

If you would like to discuss any aspect of this submission, please contact Dixie Link-Gordon, Senior Community Access Worker, Janet Loughman, Principal Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

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