

Corrective Services NSW
Women's Advisory Council

SUBMISSION

NSW Law Reform Commission Review
Crimes (Sentencing Procedure) Act 1999
Special categories of offenders – Women

About the CSNSW Women's Advisory Council

The CSNSW Women's Advisory Council (the Council) provides an opportunity for sharing of information among government agencies and community organisations which have interests in the well-being of women who are serving a custodial sentence or are under community supervision. The Council is a link between Corrective Services NSW and other government and non-government agencies with a mandate to develop and administer policies and services to women in general and women with specific needs. The Council is a mechanism for drawing attention to significant issues that relate to women in the criminal justice system. Membership is invited from representatives of key areas of relevance to women in custody and under Corrective Services NSW supervision in the community. A list of members is appended to this submission.

The WAC welcomes the opportunity to contribute to the Law Reform Commission's *Inquiry into Sentencing* and provides this submission as an addendum to the preliminary submission to the Commission's Inquiry. As before, the WAC urges that the LRC acknowledge women as a distinct population in the criminal justice system and to consider women's distinct experiences and pathways into custody, which are characterised by high levels of trauma, in making its recommendations for reform

This submission does not purport to reflect and may not necessarily represent the views of CSNSW members of the WAC but are the views of community members.

Submission Summary

This addendum submission focuses on sentencing options and alternatives to imprisonment for female offenders. It emphasises the need for options and access to these for Aboriginal women in particular, in recognition of their long-term and persistent over-representation among the female population in custody in NSW. The WAC feels strongly that children's needs are a major factor when a determination of a woman's sentence is being made.

Further, the WAC urges the Commission to recognise that women's offending pathways are different from male offenders' and are characterised by high levels of dependency - on relationships that are frequently destructive, on alcohol and other drugs and on income support.

Long-term unemployment, self-medication through legal and illegal drug use and experience of violent relationships and domestic violence are acknowledged contributing factors to women's offending. Women offenders are a historically disadvantaged group. As the *2009 NSW Inmate Health Survey* of women in prison¹ reported:

- 45% experienced domestic violence or abuse as an adult
- 80% are current smokers
- 38% consumed alcohol in a hazardous or harmful way in the year prior to incarceration, with 16% showing signs of dependent drinking
- 78% had used an illicit drug and 52% had injected drugs
- 20% have been admitted to a psychiatric unit or hospital
- 27% have attempted suicide
- 45% left school prior to completing year 10 at an average age of 14 years
- 32% were placed in care as children
- 67% were unemployed in the six months prior to incarceration; of these 25% had been unemployed for 10 or more years
- 62% of non-Aboriginal women and 80% of Aboriginal women had been in a violent relationship
- 59% of women had experienced sexual coercion.

The WAC is of the strong opinion that prisons are not suitable places for the vulnerable women who are placed there. As the UK *Corston Inquiry*² into women offenders has found:

- Mental health problems are far more prevalent among women in prison than in the male prison population or in the general population;
- Outside prison men are more likely to commit suicide than women but the position was reversed inside prison ;
- Self-harm in prison is a huge problem and more prevalent in the women's estate;
- Because of the small number of women's prisons and their geographical locations, women tend to be located further from their homes than male prisoners, to the detriment

¹ NSW Justice Health (2011) *Inmate Health Survey 2009*

² The Home Office (2007) *The Corston Report: a report by Baroness Jean Corston of a review of women with particular vulnerabilities in the criminal justice system*, United Kingdom

of maintaining family ties, receiving visits and resettlement back into the community;

- Prison is disproportionately harsher for women because prisons and the practices within them have for the most part been designed for men; and
- Levels of security in prison were put in place to stop men escaping.

The WAC's integral point is that women and girls should not - by virtue of their relatively small numbers and 'risk' to the community - have to compete against limited resources and overwhelming and highly visible needs of male offenders for appropriate diversion, sentences, programs and services.

Moreover, the insistence by the judiciary that justice should be blind to fundamental differences between male and female offenders in order to deliver impartial, just sentencing outcomes is a fallacy. The failure to recognise that women offenders often have different motivations or drivers for their participation in crime than their male counterparts, and the refusal to recognise that gender-specific responses to offending are required at every stage in the process, from diversion, sentencing itself and post-custody options, means that the criminal justice system continues to fail the majority of female offenders and ensures that women's invisibility (and offending) continues.

The WAC notes with concern that this invisibility extends to research undertaken in NSW on women's offending and reiterates Lloyd's query about why so many women are sent to prison when there is little evidence that this will stop their offending:

"...is prison an appropriate punishment for the vast majority of petty offenders? Or do women get sent to prison because men offenders get sent to prison - without any thinking having been done about the differences in the social realities of most women's and men's lives and as to the appropriateness of this form of punishment for most of the women in prison? Fundamental research into women's imprisonment is long overdue. It needs to begin with the question: why do we send women to prison?"³

The WAC notes that the United Kingdom has recently embarked on an approach that specifically highlights the distinct needs of women involved with the criminal justice system, with the

³ Lloyd Ann Doubly Deviant, *Doubly Damned - Society's Treatment of Violent Women*, Penguin Books, United Kingdom 1995 pg 137

establishment of the All Party Parliamentary Group on Women in the Penal System (2011) commissioning several specialist reviews of women and girls' offending.⁴ This is a positive step, for as Carlen has argued, 'Questions about the composition of the female prison population should not only be concerned with the offending histories of women prisoners, they should also query the relationships between classes, racism, genders and imprisonment'.⁵

In NSW however, with the notable exception of the NSW Parliament's Select Committee 2000 *Inquiry into the Increase in the Prison Population*⁶ (which was specifically established to examine women's offending and the-then Government's argument that a new gaol was needed to accommodate the rising numbers) very little gender-specific inquiry into offending has been undertaken. As the Law Reform Commission stated in its 1996 *Inquiry into Sentencing Aboriginal Offenders*, 'Research, policies, programs and correctional institutions focus almost entirely on the needs of the male offender'. Even the Commission, for all its commendable reports, has never conducted a separate specifically-focused investigation into women's offending or women-specific issues in its 40 plus year history.

Issues affecting women in a manner different from the way in which they impact on men have too often been subsumed into general inquiry that purports to be gender-neutral. Examination of the issue of gender has generally been restricted to a discussion of whether sentencers treat women more leniently than male offenders or whether women's offending is becoming more serious (and by inference, more like men's). Yet the NSWLRC found in its 1996 review of *Sentencing* that the former view is 'largely unsubstantiated'⁷ and BOCSAR⁸ found that while female offending is increasing, women's violence is not an out of control epidemic, as it has at times been portrayed. Inquiries into offending have often portrayed women as a homogenous group, just one category of 'vulnerable offenders'. The complexity that flows from multiple layers of disadvantage, such as being female *and* Indigenous *and* a juvenile *and* residing in a regional area *and* possessing a cognitive impairment *and* mental illness *and* being a victim of violence, for example, is ignored in the research literature.

⁴ See for eg its inquiries into *Women in the Penal System: Second report on women with particular vulnerabilities in the criminal justice system*; (2012) *Inquiry on girls: keeping girls out of the penal system and* (2012) *Inquiry on girls: From courts to custody*. London: the Howard League for Penal Reform.

⁵ Carlen. P. and A. Worrall (eds) *Gender, Crime and Justice* p.17

⁶ Accessible at:

[http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/e0f03efd3f66d460ca256cf4002183ed/\\$FILE/Committee%20Report%2019%20July%202000%20-%20Inquiry%20into%20Increase%20in%20Prisoner%20Population.pdf](http://www.parliament.nsw.gov.au/Prod/parlament/committee.nsf/0/e0f03efd3f66d460ca256cf4002183ed/$FILE/Committee%20Report%2019%20July%202000%20-%20Inquiry%20into%20Increase%20in%20Prisoner%20Population.pdf)

⁷ NSWLRC (1996) Discussion Paper 33: Sentencing, at 5.48

⁸ J Holmes, *Female offending: has there been an Increase?* Bureau Brief 46 (NSW Bureau of Crime Statistics and Research, 2010)

The net result is that the criminal justice system is permitted to continue to avoid the reality of many women's experiences, with the result that understanding of the motivation for and drivers of their offending is desperately lacking. As the former Department of Corrective Services (now CSNSW) Women's Action Plan made clear in 1994:

*'The problem is not in the diagnosis of the ailment nor in determining the treatment. What appears to be the main impediment to progress is an implementation lethargy which derives from the marginalisation of women offenders.'*⁹

CSNSW Women's Advisory Council

Chair: Ann Symonds



October 2012

⁹ *Women's Action Plan*, pg 3

NSWLRC Paper 9: Alternative approaches to criminal offending

The nature of women's offending

Minor offending

It has been contended in the past that women are committing more offences, particularly those involving greater degrees of violence, with the result that they are being incarcerated at higher rates. For e.g. in the lead-up to the Select Committee *Inquiry into the Increase in the Prison Population in NSW* it was argued that:

'The "major cause for the sharp increase in the full-time custody of women in the last 18 months is mostly to do with the fact that more women have been caught and convicted for fairly serious crimes'.¹⁰

Yet study after study has shown that the majority of women are imprisoned for non-violent crimes. In 1992 for example, the typical women prisoner was "most commonly in prison for property offences".¹¹ In 1994 The *Children of Imprisoned Parents Inquiry* heard that 'The majority of women are imprisoned for short sentences for non-violent offences'¹² and that 'Women are predominantly in prison for offences against property (fraud, break and enter and theft), prostitution and drug offences...Violent crimes are predominantly committed by men.'¹³ Two years later, the Prison Census showed that the majority of women in full time custody were there for offences against the person (defined as fraud; break and enter and theft and other stealing offences).¹⁴ The NSW Ombudsman's 1997 report into the Mulawa Correctional Centre for women found that 'Quite clearly, the overwhelming majority of females are in prison for non-violent offences, generally property related'¹⁵ and the NSW Parliament concluded in 1999 that 'It is obvious that crimes are predominantly committed by males, particularly crimes of violence or other more serious offences...Overwhelmingly, crime, and violent crime in particular, is committed

¹⁰ Bacon & Pillemar, "A Woman's Place" The Sydney Morning Herald 08.01.00 p.35

¹¹ Easta, Patricia (1992) *The Forgotten Few: Overseas Born Women in Australian Prisons*, Bureau of Immigration Research, Australia

¹² Butler, submission to *The Children of Imprisoned Parents Report 1997* at 142

¹³ Alder, submission to *The Children of Imprisoned Parents Report 1997* at 142

¹⁴ *Prison Census, 1997*

¹⁵ NSW Ombudsman *Mulawa Report (1997)* p.37 - 71.6% of women were imprisoned for non violent property offences

by males."¹⁶

Corrections figures indicate that the majority of women in custody today have been imprisoned for relatively minor, non-violent offences. Figures provided to the WAC by the Corporate Research, Evaluation and Statistics division of NSW Corrective Services show that the three most serious offences amongst the 223 women released in 2011-12 on the expiration of their sentence were: offences against justice procedures (29% of all women released); theft-related matters (23%) and acts intended to cause injury (13%) – see **Table 1**.

Table 1: Offenders released from NSW Correctional centres as sentenced expired in 2011-12 by most serious offence, gender and Indigenous status

Age group	Male		Female		TOTAL
	Male: ATSI	Non-ATSI	ATSI	Non-ATSI	
Homicide and related	4	4		1	9
Acts intended to cause injury	108	151	17	13	289
Sexual assault and related	7	17			24
Dangerous or negligent acts endang. persons	3	16	1	1	21
Abduction, harassment etc.	2	7	1	1	11
Robbery, extortion etc.	5	26		2	33
Unlawful entry with intent/burglary, B&E	30	58	1	5	94
Theft and related	54	118	27	25	224
Fraud, deception and related	4	24	3	3	34
Illicit drug offences	9	48	3	6	66
Weapons and explosives	3	19			22
Property damage and environmental pollution	26	27	5	5	63
Public order offences	19	30	1	3	53
Traffic and vehicle regulatory offences	25	76	7	10	118
Offences against justice procedures etc.	220	395	34	31	680
Miscellaneous offences	10	30	1	2	43
Not recorded	21	70	8	6	105
TOTAL	550	1116	109	114	1889

The most serious offences for the 24 women released on unsupervised parole in 2011-2012 were: offences against justice procedures; fraud, deception and related matters; and illicit drug offences – all 16% each – see **Table 2** overpage.

¹⁶ NSW Parliament, Legislative Council, Standing Committee on Law and Justice, *First Report of the Inquiry into Crime Prevention Through Social Support* December 1999 Report No 12 pgs 26 and 49

Table 2: Offenders released from NSW Correctional centres as unsupervised parole in 2011-12 by most serious offence, gender and Indigenous status

Age group	Male		Female		TOTAL
	Male ATSI	Non-ATSI	ATSI	Non-ATSI	
Homicide and related	-	4	-	-	4
Acts intended to cause injury	21	21	-	1	43
Sexual assault and related	2	6	-	-	8
Dangerous or negligent acts endang. persons	1	5	-	-	6
Abduction, harassment etc.	-	6	-	-	6
Robbery, extortion etc.	4	19	1	-	24
Unlawful entry with intent/burglary, B&E	11	25	2	1	39
Theft and related	6	21	2	-	29
Fraud, deception and related	-	6	1	3	10
Illicit drug offences	1	30	-	4	35
Weapons and explosives	1	5	-	-	6
Property damage and environmental pollution	2	1	1	-	4
Public order offences	3	9	-	-	12
Traffic and vehicle regulatory offences	2	18	-	-	20
Offences against justice procedures etc.	25	68	1	3	97
Miscellaneous offences	3	10	-	-	13
Not recorded	4	42	2	2	50
TOTAL	86	296	10	14	406

Women are also incarcerated for relatively brief periods of time. Over 96% of the women released in 2011-2012 had spent less than 12 months in custody. Slightly more Aboriginal women had spent less than 12 months in custody than their non-Indigenous peers, at over 97%. This is fairly consistent with the situation for men, with just over 93% of men released in the same period having served less than 12 months in custody. Conversely, fewer Aboriginal men had served less than 12 months in custody than the non-Indigenous cohort. See **Table 3**

Table 3: Offenders released from NSW Correctional centres as sentenced expired in 2011-12 by time served, gender and Indigenous status

Time served	Male		Female		TOTAL
	Male ATSI	Non-ATSI	ATSI	Non-ATSI	
12 months or less	511	1044	106	109	1770
<i>Percent</i>	92.9	93.5	97.2	95.6	93.7
More than 12 months	39	72	3	5	119
<i>Percent</i>	7.1	6.5	2.8	4.4	6.3
TOTAL	550	1116	109	114	1889

The WAC is concerned that although the NSW prison population is falling (in 2011 the population decreased by over 3% from 10,293 to 9,945) and while encouragingly, the ratio of female to male offenders has also decreased (from 7.4% to 7.0%) the most disadvantaged are still over-

represented in NSW prisons. According to the 2011 CSNSW Inmate Census¹⁷ the over-representation of Aboriginal women has **increased** to 30.2% of the female population (compared to 22.5% among the male population). The number of Aboriginal women in prison (nationwide) increased by 96 per cent between 1999-2000 and 2008-2009.¹⁸

The WAC is concerned that **increasingly women - particularly Aboriginal women - are going to gaol for longer periods, generally for minor crimes most frequently related to drug and alcohol offences or theft.**

The WAC is also deeply concerned that initiatives designed to assist the increasing number of Aboriginal women in custody have not had an effect. Approximately a third of women in custody are Aboriginal, a higher over-representation than their male counterparts. They also have the highest recidivism rate, higher than non-Aboriginal women, Aboriginal and non-Aboriginal men. In 2011 the WAC supported Link-Up to obtain funding for a female case-worker so that the much needed and important work of reconciling Aboriginal women with their families can commence. Regrettably, due to problems in that agency, a female worker has not been employed and it is understood that no agency is currently providing the essential services that Link-Up was previously funded and authorised to provide. This is a matter of grave concern.

Notwithstanding the minor nature of their offending and the relatively brief period of time spent in custody, women appear to be disproportionately represented on higher security classification while in custody. According to figures provided by CSNSW, 15% of the women released due to sentence expiry in 2011-2012 had been classified as 'high' security. Another 11.4% had been classified as 'med-high' – see **Table 4**.

Table 4: Offenders released from NSW Correctional centres as sentenced expired in 2011-12 by LSI-R, gender and Indigenous status

Age group	Male ATSI	Male Non-ATSI	Female ATSI	Female Non-ATSI	TOTAL
HIGH	47	71	11	10	139
MEDHI	145	187	20	23	375
MED	94	240	15	21	370
MEDLO	9	62	5	4	80
LOW	1	15	0	1	17
No LSI-R	254	541	58	55	908
TOTAL	550	1116	109	114	1889

17 CSNSW Corporate Research Evaluation and Statistics Inmate Census 2011

18 The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Committee, 2010

These figures suggest that women are being classified as higher security than their offences and sentence length would warrant. Advice provided to the WAC by its consultant members¹⁹ has also raised a concern that women are being held in high security facilities when they are not classified as high security offenders. Accordingly, it is recommended that only high security offenders be held in high security facilities.

In 1997 NSW prison staff gave evidence to a Parliamentary Inquiry that 'of a prison population of over 200, only 15 women needed to be incarcerated at Mulawa for their own safety and the safety of the community.'²⁰ Given the similar backgrounds and offending patterns of women 15 years later, it is difficult to know why increasing numbers of women are being placed in custody, particularly for relatively minor matters. Given this, it is imperative that alternatives to custody that are relevant and effective and able to be utilised by women are developed and implemented across NSW.

Lack of adequate programs in custody

As we advised in our preliminary submission, the delivery of programs in custody is problematic for women, comprising as they do a group with small numbers with complex needs, serving short periods. Delivery of evidence-based treatment programs may not be viable, given the low numbers of women in the non-metro gaols and that participation in treatment programs is not effective for those assessed as low risk of reoffending.

The difficulty in accessing programs is exacerbated by the overwhelming needs of male prisoners which have historically overshadowed the need for female-specific programs and the needs of women in prison. As a result, programs that might be able to provide some rehabilitative assistance to incarcerated women are not provided for women in non-metro locations. As the NSW Sentencing Council's 2012 review of high-risk violent offenders found that there were no programs yet available for female offenders.²¹ There is no program equivalent to the Violent Offenders Treatment Program and its follow-up maintenance support for women. CSNSW has been in development phases of a women's program for a prolonged period.

¹⁹ Advice provided by Women's Legal Services NSW, a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. The WLS provides regular advice clinics in Sydney metropolitan women's correctional centres as part of the Legal Education and Advice in Prison project and is a consultant member of the Women's Advisory Council (WAC).

²⁰ NSW Parliament (1997) Standing Committee on Social issues, *Children of Imprisoned Parents Report* at 29-36

²¹ NSW Sentencing Council (2012) *High-Risk Violent Offenders*, NSW

As the NSW Sentencing Council²² has also identified, there are no specialised female offender programs for incarcerated female sex offenders in Australia or for such offenders in the community. The WAC is concerned that despite CSNSW's statement that it 'remains committed to developing a sex offender program for women' its prioritisation of the 'development of the program for sex offenders with intellectual disabilities and the deniers program' has meant that four years later, there is still no female-focused sex offenders program.

Given the lack of custodial-based programs addressing specific offending needs, alternatives to custody would seem to be the obvious option for women, who are characteristically low risk, particularly for those who may have histories of minor offences whose antisocial behaviour can only be addressed through assistance/guidance in pro-social activities in the community. Mentoring support is increasingly available and can work alongside community-based support services and monitoring agencies.

Women's recidivism rates

Figures provided by CSNSW indicate that the recidivism rate for women is slightly below the national average of 45%, at 41.6%. While it is not the country's highest, the WAC submits that nevertheless much more needs to be done to address recidivism. The WAC is advised by its consultant members 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.

Recidivism is also reduced via programs which support the transition from custody into the community, such as the Women in Prison Advocacy Network's pilot mentoring program.²³ Access to safe and secure housing on release is also an important factor.

Counselling and trauma

The WAC has long advocated for the need for women in prison to be given the opportunity to address their trauma, as this is another factor that may contribute to recidivism. One way to address trauma is through counselling.

The Commission's attention is drawn to Australia's acceptance of Universal Periodic Review (UPR) recommendation 86.82 that all victims of violence have access to counselling and assistance with recovery. It is noted that in the past there have been very limited if any

²² NSW Sentencing Council (2008) *Penalties for Sexual Offences*, NSW

²³ See *The Report: The Pilot WIPAN Mentoring Program 2009-2011*, WIPAN, August 2012 at 6 accessed on 2 October 2012 at: http://www.wipan.net.au/publications/WIPAN_The_Report_Pilot_Mentoring_Program_2009-2011-OK.pdf

counselling services for female victims of violence in prison despite many women in prison being survivors of domestic violence or sexual assault.

The WAC was instrumental in leading to the pilot counselling program for prisoners at Dilwynnia and Wellington Correctional Centres which commenced in November 2011 and April 2012 respectively. The demand for counselling has resulted in an increase in services from two to three days a week at Wellington Correctional Centre, one to two days a week at Dilwynnia Correctional Centre. Positive feedback and preliminary results show that the counseling is addressing unmet needs and is not creating upset as expected among some CSNSW staff. Given the positive results to date, the WAC encourages expansion of the service to all prisoners who would like access to it, following completion of the pilot in May 2013.

Diversion

As stated in the Introduction to the Sentencing Question Paper 9, *[a] key part of diversion and deferral is to attempt to connect people with services that will help them to address the direct and indirect causes of their offending (9.4).*

The WAC takes this as the first principle in its approach and response to Question 9. maintaining its support for diversionary programs and related initiatives covered in its preliminary submissions (PSE17 and PSE19). While it is acknowledged that custody is justified for serious cases, the majority of women in custody in NSW are charged with or sentenced for minor offences, as discussed above.

As stated in our preliminary submission, effective diversion from custody requires the provision of a wide-range of viable community-based alternatives to detention. Diversion programs should be adequately resourced to ensure they are capable of implementation in rural and remote areas. Diversion should be adapted to meet local needs and public participation should be encouraged in the development of all options. Deep consultation with Aboriginal communities and organisations in the planning and implementation stages is essential. Diversionary options are needed at all stages of the criminal justice process including the point of decision-making by police, the prosecution or other agencies and tribunals.

Diversion should **not** be restricted to minor offences but should always be an option. The decision-maker/sentencer should be able to take into account the circumstances of the offence. The fact that a woman has previously participated in a pre-court diversionary program should not preclude future diversion. A breach of conditions should not automatically lead to a custodial term.

Agencies with discretionary power to divert women from the criminal justice system must exercise that power on the basis of established criteria. The introduction, definition and application of non-custodial measures should be prescribed by law.

All law enforcement officials involved in the administration of diversion should be specifically instructed and trained to meet the needs of women. Justice personnel should reflect the diversity of women who come into contact with the system.

Women on Community Orders

On 6 October 2011 the number of women on community orders was 2465 or 15% of all offenders supervised in the community by NSW DCS (the figure has remained fairly steady over the past five years). In 1999 then Deputy Chief Magistrate Gilmore reviewed the historical limitations placed on courts by the lack of alternative community options. His Honour noted that:

*'Before these welfare organisations were available to offer assistance, the courts had few options to provide any diversion from the criminal justice system. It was clear in many cases, particularly with homeless drunks and vagrants, that time in a residential environment was necessary so they could dry out and improve their physical condition. Only gaols offered such an environment at the time.'*²⁴

Significantly, none of the organisations cited by His Worship specifically deal with female offenders. Indeed, most welfare agencies, whether inadvertently or otherwise, actively discourage female clients. The lack of suitable community options then means that women are remanded into custody when alternatives would properly have been used by the judiciary had they been available. Former NSW Corrective Services Commissioner Tony Vinson has argued that a lack of alternatives plays a major part in directing people into gaol, as

*'some sentencers in remote rural areas believe that, in the absence of appropriate alternatives, they are obliged to impose prison terms. Authentic increases in relevant court support services could save some (Aborigines) from needless sentences.'*²⁵

Almost a decade ago, the NSW Sentencing Council reported that although all forms of community based sentencing options are legislatively available across the State, in reality geographic limitations exist that mean that community sentencing options are not available for

²⁴ Gilmore, "Sentencing Options in the Local Courts of NSW" 23.06.99, Law Society Seminar

²⁵ Vinson, Tony "Aborigines facing hard Labor" Sydney Morning Herald, 7.07.99 pg 19

women²⁶ purely because of where they live. The 2006 NSW Parliamentary Inquiry into community-based sentences²⁷ confirmed this finding, noting that unsupervised bonds were the only community-based sentence available throughout NSW.

A lack of feasible community-based sentencing alternatives has particular implications for offenders whose offending may result from the lack of services in the community, for young offenders and people serving relatively short sentences of imprisonment which in part may be the result of the lack of available alternatives.

In order to present realistic diversionary, community-based sentencing options, care needs to be taken to ensure that the programs are suitable for women, especially those with myriad complex needs or caring responsibilities, such as child care. As research by McFarlane et al (2011:60 unpublished) has indicated, community-based sentencing options that on the surface may be suited to women, may in fact be denied to some offenders, even when the relative minor nature of the offending should otherwise exclude a custodial sentence. McFarlane's study of juvenile offenders before Parramatta and Dubbo Children's Courts has found that young offenders with an intellectual disability experienced difficulty in being assessed by Probation and Parole staff as suitable for community-based options - and for a minority of the cohort, their intellectual disability was specifically cited as precluding them from consideration for a Community Service Order. Likewise, young women with child care responsibilities, young people with drug and alcohol addiction (2011:62) and homeless youth (2011:70) were assessed as 'unsuitable' for a community service order.

Women have often missed out on community-based alternatives to custody. For example, although periodic detention was often given as an example of a sentencing alternative that was specifically able to be utilised by women with child-care responsibilities,²⁸ both the NSW Legislative Council Standing Committee on Law and Justice report on community-based options²⁹ and the NSW Sentencing Council report on Periodic Detention³⁰ found that women had limited access to this form of sentencing, particularly in regional areas. For example, of the 724 people on periodic detention orders at 30 June 2006, only 60 (8.3%) were female. The lack of utilisation of the scheme for female offenders was a factor in the NSW Sentencing Council's reasoning and recommendation that the scheme be abandoned.

26 NSW Sentencing Council (2004) *How Best to Promote Consistency in the Local Court*

27 NSW Legislative Council (2006) Standing Committee on Law and Justice *Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations* Final Report

28 Judicial Commission of New South Wales *Bench Book*

29 NSW Legislative Council (2006) Standing Committee on Law and Justice *Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations* Final Report

30 NSW Sentencing Council (2007) *Review of Periodic Detention*

Home detention - often presented as being widely available to women - is available to female offenders only if they live in the Sydney metropolitan area. Despite this geographical restriction, women comprise approximately 17% of those serving this form of sentence. CSNSW has advised that this equates roughly with their level of representation among CSNSW clients in the community. However, the artificiality and arguable discrimination in having a sentencing option that is available to only a proportion of otherwise eligible offenders simply because of geography, is unacceptable.

The WAC's preliminary submission to this Inquiry had advised that CSNSW was considering a proposal to extend Work Release to a third stage that would include Home Detention, thereby allowing sentenced women to be released from detention after serving a proportion of their sentence in custody. The WAC had requested that CSNSW set targets for women to be included in this program (seeking in fact that in the initial phase of this new model for what was termed Work Release 3 that more women than men be offered places). This was justified on the basis that as approximately 59% of non-Aboriginal women and 69% of Aboriginal women in custody have children, participation in the program would greatly assist the reintegration of families and reduce the trauma of separation. Regrettably, the WAC now understands that the initiative has stalled. We therefore urge the Commission to recommend that CSNSW reconsider this proposal as a matter of priority.

The WAC notes that sentencing options that may seem gender-neutral may in fact have a discriminatory or particularly disadvantageous outcome for women. For example, while fines may seem a benign sentencing option, the poor employment histories of women offenders (67% of women were unemployed in six months prior to incarceration, compared with 50% male offenders (IHS 2009) indicates a level of hardship that would have a major impact on capacity for repayments. Moreover, duration of unemployment is longer for women than men; women are substantially more likely than men to have been unemployed for five years, 44% to 30% respectively, prior to incarceration (IHS 2009). The WAC refers the Commission to the NSW Sentencing Council's recommendations and findings regarding prisoners and debt, and the intersection of licence suspension and custody.³¹

It is recommended that this sentencing option must specifically examine their appropriateness for female offenders. For example, the *Fines Amendment (Work and Development Orders) Bill 2011* which established Work Development Orders, has been shown to be successful in assisting people in hardship who are unable to pay fines. However, its impact on women is relatively

³¹ NSW Sentencing Council (2008) *Effectiveness of Fines as a sentencing option*.

unknown. More information is sought on whether women in regional and remote areas, those with mental health issues or disabilities, and those with dependents, are able to participate.

Note that the WAC has commissioned a *gender analysis of community-based sentencing options to determine:*

- *current access and participation by eligible women, particularly Aboriginal women*
- *identification of areas where lack of availability may be resulting in use of custody*
- *action to be taken to address barriers to access.*

The WAC-commissioned study will be an introduction to the issues and contributing factors, gaps and needs. The WAC requests that the Sentencing Council undertake a more detailed and extensive analysis with concrete proposals for change and development.

Question 9.1

Should an early diversion program be established in NSW? If so, how should it operate?

The Women's Advisory Council strongly supports the establishment of an early diversion program for women in NSW and stresses that flexibility and state-wide access are essential in any scheme.

The WAC supports the establishment and expansion of existing diversionary options. As stated in our preliminary submission, we are of the view that increased access to Court Referral of Eligible Defendants Into Treatment (CREDIT) and other diversionary options would assist in reducing the over-representation of Aboriginal women in custody. For this reason the WAC proposes that CREDIT be expanded from its current locations in Tamworth and Burwood to include Dubbo and outer western Sydney where there are high populations of Aboriginal offenders and where Aboriginal and mainstream services already exist.

The WAC recommends that:

- *CREDIT, MERIT and other diversionary options be established at locations where high numbers of offenders are located, such as in outer western Sydney and in areas where such options would enable magistrates to divert offenders who, in the past, would have served time for minor offences.*
- *The Council also recommends that MERIT and other programs be available to offenders with other addictive problems, including alcohol and gambling problems.*

An *Evaluation of the NSW Court Liaison Services* by BOCSAR in 2009 states that drug use, histories of abuse and psychiatric disorders are characteristic of women offenders (74% had had psychotic episodes in the year prior to their court appearance). The 2009 Inmate Health Survey showed the higher representation of women among inmates who, prior to their incarceration, had had mental health treatment, been admitted to a psychiatric unit and attempted suicide or self-harmed.

Assisting the courts to recognise mental illness and organise court-ordered treatment in a community setting is now recognised as a valuable alternative to incarceration. The Mental Health Court Liaison Officer model of support for offenders with histories of drug misuse could benefit from expansion. The WAC has supported Justice Health's bid to increase numbers of Mental Health Court Liaison Officers and would urge this to be adopted as a recommendation of the LRC.

Recommendation

The Commission supports the increase in numbers of Mental Health Court Liaison Officers.

9.18

Does the Women's Advisory Council support the redesigning of the caution system so that police prosecutors may play a greater role? This would extend the option for more serious offences to be dealt with by way of a caution.

The following are comments on models outlined in the Sentencing Question Paper 9.

At 9.28 the Adult Diversion Scheme (New Zealand) is discussed. This enables police prosecutors to apply for an adjournment in order for the person to participate in a diversionary program with a view to avoiding a criminal conviction. The WAC believes that it is of critical importance in establishing an equivalent scheme, that the design of conditions, intended to target reasons for offending, suit the needs and capacities of the individual and her/his circumstances and location.

The WAC prefers the Victorian Criminal Justice Diversion Program (at 9.33) that does **not** require a guilty plea and includes the option to adjourn matters for up to 12 months. This provides opportunities for participants to undertake a range of activities that address their offending behaviour or related circumstances.

However it is noted (at 9.34) that offences involving driving a vehicle while under the influence of alcohol or drugs are not eligible under the Victorian scheme. The WAC recommends inclusion of

this offence to enable targeted treatment and program intervention that is not guaranteed in custodial settings. Avoiding a conviction is highly desirable for rehabilitation; a criminal record can be a major barrier to employment that endures for years and unjustifiably extends the punishment beyond its original intention.

The Council is **not** supportive of the Conditional Cautions (England and Wales) and the necessity for a guilty plea to be entered that may be used if a breach occurs. A hierarchy of sanctions would need to be carefully designed to provide support at levels commensurate with the circumstances of the breach, to avoid precipitate incarceration.

Recommendation

Offences involving driving a vehicle while under the influence of alcohol or drugs be eligible within a cautioning system to enable targeted treatment and program intervention that is not guaranteed in custodial settings.

Opportunities for Diversion - Women on Remand

Of the total number of women in full-time custody, CSNSW figures provided to the WAC indicate that over 30% (approximately 230 women) are on remand. According to Bartels³² it is not possible to extrapolate from the most recent ABS data what proportion of Indigenous female prisoners are on remand, rather than serving a sentence. However, BOCSAR's recent findings suggest that one-quarter of the increase in the NSW Aboriginal imprisonment rate was due to a greater proportion of Aboriginal defendants being refused bail, as well as an increase in the time they spent on remand.³³ A survey of Indigenous women in NSW prisons in 2002 found that 70 percent had been refused bail and noted that 'a significant proportion of Aboriginal women are always remanded to custody, which raises many issues concerning access to bail, accommodation, parenting and health'.³⁴ Advice provided by CSNSW has indicated that the Aboriginal female remand rate can fluctuate anywhere between 25–31 percent at any given time.

There is evidence that high numbers of women who are remanded in custody are released at sentencing because of back-dated sentences. This is a particular concern to the WAC, for:

'Remand inmates, just under one half of whom are likely to be in custody for the first time, under a legal presumption of innocence but subject to the rigours of a severe environment

³² Bartels, L. (2010) *Indigenous Women's offending patterns: A literature review*, Australian Institute of Criminology Research and Public Policy Series Report No 107, Canberra.

³³ Fitzgerald (2009) *Why are Indigenous imprisonment rates rising?* Bureau of Crime Statistics and Research, Crime and Justice Statistics Issue Paper 41

³⁴ Lawrie, R. (2002) *Speak Out Speak Strong*, Aboriginal Justice Advisory Council (AJAC)

*while preparing for trial or awaiting sentence, form an extremely vulnerable segment of the prison population.*³⁵

This is an area in which remarkably little research has been conducted, and so the extent and reasons for this trend are unexplored. Changes to the *Bail Act* may reduce the frequency of this occurrence and provide the opportunity for redirection of funding towards programs and support services in the community, such as Special Circumstances Courts and other approaches that could be made widely available.

The WAC supports a justice reinvestment approach, which would be of particular relevance to the population of women in custody, particularly Aboriginal women, who serve repeat short sentences - cost effective, less socially damaging and enabling more effective programs and support to be available in the community. This would have the flow-on effect of community-building instead of exacerbating family and community dysfunction.

The WAC had previously advised the Commission that CSNSW was considering a trial of electronic bracelets for bail refused persons and that the WAC had urged that preference be given to women, especially Aboriginal women who are the sole carers of dependent children. It was argued that targeting women for this initiative would recognise the exceptional circumstances of women and would ensure the least disruption to children and families, who often suffer extensive disruption when an accused is incarcerated. This would contribute to the avoidance of intergenerational offending³⁶. It is now understood that regrettably, the trial is on hold due to competing priorities.

While the WAC is very conscious that care needs to be taken that such a trial would not lead to net-widening, the failure to pursue the trial at all is misguided. It is certainly possible that electronic bracelets could be prevented from being used as a first resort or automatic response to women applying for bail who would not otherwise be considered a risk of flight or non-attendance at court. If, however, the trial was used only as a means of ensuring that women who would otherwise spend time in custody on remand can be diverted from the custodial system, it would be well worth pursuing.

³⁵ NSW Ombudsman (1997) *Mulawa Report* at pg 37

³⁶ Former manager HIV and Health Promotion Unit, Dept. of Corrective Services, Gino Vambucca, in 'The Lifestyles Unit: Minimum Attitude' *Talkabout* July 1997, pg 16-17

Opportunities for Diversion – Mothers in Custody

As the 2010 *CEDAW NGO Report* acknowledges, studies suggest that the majority of female prisoners in Australia are mothers of dependent children who are most likely to be under the age of 12.³⁷ Prisoners often report difficulties in maintaining a relationship with their children while in prison.³⁸

When sentencing and considering diversionary options decision makers should take special account where the offender is the primary carer of a child or children. The circumstance would require a procedure to identify the offender as a primary carer. The most appropriate way to do this would be in the pre-sentence report.

If a mother is imprisoned for a non-violent crime then wherever possible, her children (to at least 6 years of age) should be able to live with her. We note this currently occurs very successfully at Emu Plains Correctional Centre for minimum-security women. The WAC recommends the expansion of this facility to other prisons and for higher security mothers.

It is conceded that there may be intervening acts resulting in children being separated from their primary carer which are not just the result of incarceration. For example, a child may be placed in the care of a parent who will not facilitate a relationship between the child and the mother while the mother is in prison. We therefore recommend that steps be taken as quickly as possible once a primary carer is incarcerated to make arrangements for dependent children to live with their mothers while in prison.

If her children cannot live with her while she is in prison every effort should be made to develop and implement policies and procedures which support the maintaining of a relationship between the mother and child.

Consultant members to the WAC have provided anecdotal evidence that in some cases, women (who have been victims of domestic violence and assault) are choosing not to see their children because of the re-traumatisation they experience as a result of the strip searches they experience after visits. The need for strip-searching is questioned in such circumstances, particularly when we understand that it is not an effective way to address the issue of contraband. This is one example of where prison policies and procedures should be developed and implemented to support the maintaining of a relationship between the mother and child. A

³⁷ See Rosemary Woodward, 'Families of Prisoners: Literature Review on Issues and Difficulties' (Occasional Paper No 10, Department of Family and Community Services, 2003) 5 cited in *CEDAW NGO Report – Australia*, YWCA and WLS NSW, July 2009 at 8 (38) accessed on 2 October 2012 at: http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/YWCA_Australia46.pdf

³⁸ *CEDAW NGO Report*, Note 3 at 8 (38).

precedent exists - in the UK, automatic strip-searching on reception was recently ended.³⁹

We are also aware of instances when a mother has been incarcerated and her child/children has/have been left in the care of a violent partner while she is in prison as outlined in case-study below. The mother loses her housing which includes housing for the children; upon release the mother must have the children in her care before she is eligible for this housing again. It is submitted that it is not in the best interests of a child to live with a violent parent.

Case study 1

Rochelle⁴⁰ experienced severe domestic violence by her partner of ten years, David. The violence was witnessed by their four children. Rochelle never contacted police as David controlled her movements and she felt they wouldn't believe her. Consequently, there were no records of the violence taking place. When she attempted to leave the relationship, the violence escalated. She began using a combination of drugs and alcohol to self-medicate.

Rochelle was sentenced to a term of imprisonment and her four children were placed in the care of David. When Rochelle was released she had difficulty finding somewhere to live. She was told she was not eligible for family sized public housing because the children were not in her care. She moved into a share house with a friend. Because she did not have appropriate housing it made it harder to have her children returned to her.

The WAC believes that the following case study, provided by a WAC member, illustrates many of the difficulties women face when giving birth in custody, and attempting to negotiate the bureaucratic path in order to maintain contact with their children:

Case Study 2

A young 26 year old mother was remanded in custody when pregnant with The second birth took place at Nepean Hospital - two female wardens were present, and two male wardens were in the room where she was breast feeding her baby for the first time. She was cuffed to the bed by her leg, nursing staff interceded when the warden wanted to handcuff the mother, with the nurse pointing out she would not be able to hold her baby and breastfeed. The father of the child was not allowed to be present at the birth (he was present in the hospital but not in the birth unit) and the mother was given no information as to why this decision was made. The father was a co-offender but this would not have precluded him from being able to be present at the birth. The oldest child (2 years of age) became distressed and confused as to why his father could not come and see his mother and new baby brother. Approximately two hours after the birth the baby was handed over to the grandmother and mother returned to gaol. The mother attempted to express breast milk for her baby with help of a Justice Health nurse. However, her breast milk dried up as mother was transported to Court for sentencing and wardens refused to allow her to take a breast pump and she was away from the gaol for most of the day.

³⁹ The Howard League for Penal Reform (2012) Submission to the Justice Select Committee *Inquiry on women offenders*, United Kingdom at 3.

⁴⁰ Rochelle's story is based on the stories of several clients.

Family and friends were transporting children for contact visits weekly but due to difficulties could not sustain this as the mother was at Dillwynia in Windsor and family resided in the Newcastle area. SHINE for Kids became involved and transported children fortnightly. Contact visits were two hours for both children.

As the mother was intending to plead guilty she was assessed for the Mothers and Children's Program at Emu Plains C.C.; she was accepted but could not enter until she was sentenced. Sentencing was adjourned a number of times and she was finally sentenced in November, 2010 (when her baby was 8 months old). The Mothers and Children's Program was prepared to "fast track" entry into the program once mother was sentenced, however, FaCS changed their minds and would not support placement at Mothers and Children's Program and commenced Children's Court proceedings. The mother had made appropriate care arrangements for the children with her mother and sister, and it is unknown why FaCS changed their support of Mothers and Children's Program placement.

her second child. Her first child was born in February 2008 and the second child was born whilst she was in custody in March 2010.

The mother was finally released on probation in March 2011. She worked with a number of social and family support services and is now re-united with her children.

The CSNSW psychologist worked with the mother during her stay at Dillwynia and was treating her for depression, loss, separation and grief issues and the traumatic birth experience.

If this situation is looked at from the baby's perspective, his right to form his first primary attachment to his mother was taken from him. He was also denied the bond and health benefits that develop when a mother breast feeds. His first attachment was developed to his grandmother and aunt. Whilst his mother wanted to give him a good start in life via breastfeeding, this opportunity was denied as Corrective Services did not recognise the mother's need to express milk regularly.

The oldest child had formed a healthy and secure attachment to his mother. On being separated from her he developed trauma-reactive behavioural and emotional difficulties due to the pain and loss when separated for a long period of time from his mother. This included heightened levels of anxiety and confusion, emotional and social withdrawal, sleep disturbance, challenging behaviours (temper tantrums). He developed a sense of abandonment and sadness where his mother was concerned. Although this child was seeing his mother regularly, two hours weekly then fortnightly, this level of contact was inadequate for his developmental needs. From a development perspective this child was too young to understand the concept of incarceration so was unable to comprehend why his mother would not return home. Symptoms of depression were also evident in this child. He became highly anxious when separated from his grandmother, refusing to leave her and wanting to be held and carried.

Bonding and attachment are an important and critical developmental process for children. The first primary attachment forms the template for the formation of relationships as the child moves through life. If this process is undermined or damaged it can have long term consequences for

children and impede their ability to establish healthy and appropriate relationships as adolescents and adults. Psychosocial research has repeatedly found that the disruption of the attachment bond between mother and child is particularly deleterious between the ages of 6 months and 4 years. Therefore, it is reasonable to conclude that if children are forcibly separated from their mothers they suffer permanent emotional, psychological and social damage. Children with these experiences are more likely to experience mental health and alcohol and other drugs problems as adolescents/adults.

For older children, especially those at school age the stigma of having a mother in prison can be socially devastating. In many cases families keep this information "secret" so the child is not rejected or bullied at school.

Children who are separated from their mother due to imprisonment suffer multiple problems associated with their loss. In reviewing the impact of a parent's incarceration on children, Shaw (1990) claimed: *"many of these children, it is clear, may suffer more pain than does their criminal parent in prison or even the original crime victim"*. Research on the impact of a parent's imprisonment on young children has found a range of social, behavioural and psychological impacts on children. In general the following has been noted in cases where children have been separated from the mother due to incarceration: bed wetting, attention seeking behaviour, aggression, wanting to be picked up and reassured constantly, sleep disturbances, depressed mood state and high levels of anxiety, lack of motivation to seek out enjoyment or interest in leisure activities.

Research on women in custody identifies that a considerable amount of distress amongst incarcerated women is a consequence of separation from children and family. Mothers in prison have reported feeling anger, anxiety, sadness, depression, shame, guilt, decreased self-esteem and a sense of loss when separated from their children. According to Hock and Schirtzinger (1992) *"The degree to which the incarcerated mother experiences these types of distress has implications for both the children's emotional development and the mother's mental health"*.

Opportunities for Diversion - Use of 'Exceptional circumstances' during sentencing

The WAC wishes to reiterate our preliminary submission which urged the Commission to promote the use of 'exceptional circumstances' when sentencing is being considered for women with dependent children.

In current sentencing legislation an offender's family circumstances are considered as a relevant factor only if recognised as 'exceptional circumstances'. That is, the offender's situation and caring obligations must substantially exceed the 'normal' experience of other offenders before the court. Family breakdown and the loss of a child to the out of home care system of itself does not constitute exceptional circumstances.

The WAC understands that the judiciary (particularly in the Local Courts where the majority of women appear) seldom exercises 'exceptional circumstances' legislation during sentencing, notwithstanding that the circumstances of children and other dependants will undergo major trauma upon the parent's incarceration. Whether it is due to inadequate legal representation that such arguments are not raised, a view that a relatively short sentence of 6 to 12 months could not constitute hardship on either the offender or her children, or a view that it is an irrelevant consideration or one that would unfairly advantage a female offender, is not known, but it is an issue in need of further examination.

The WAC argues that this sentencing approach is fundamentally flawed and requires reform. Women are the primary carers of children and, increasingly, of other family members. Approximately 59% of women in prisons are parents, with many the sole carers of young children before their incarceration. Data are now being collated by CSNSW on parental status, living arrangements prior to custody, relationship of the incarcerated parent with the child/children's carer in the community as well as the number of children visiting offenders. In the six months between 1 September 2010 and 28 February 2011 **86,300** visits were made by children to prisoners.

Given the negative impact of parental incarceration, particularly for children whose mothers are in custody and particularly for those children who are placed in State care there is a major need to prevent separation of mothers from newborns, children and young people. The impact of imprisonment of a primary care-giver can be severe, resulting in disruption in family living arrangements, multiple and changing caregivers, and unstable school placements. For those babies born in custody who are unable to remain with their mothers, the situation results in disrupted attachment that may lead to long-term behavioural, emotional, relational and educational problems.

Among the most significant long-term impacts on children is the child's increased probability of criminal justice involvement as an adolescent and imprisonment as an adult. According to

McFarlane,⁴¹ a child in out-of-home care (oohc) is 68 times more likely to appear before the NSW Children's Court on a criminal matter than a child with no oohc experience.

Although it is not unusual or exceptional for women to have children, it *is* exceptional to have the state causing separation of mother and child where this is against the best interests of the child. A stark difference between incarcerated mothers and fathers is the care arrangements that are made when parents enter custody. 84% of the children of inmate fathers are cared for in the community by their mothers. Children of incarcerated mothers, however, are cared for by a mere 28% of fathers. The majority are in the care of grandparents (34%), siblings and other relatives (15%). 6% of children of fathers are in the care of Community Services and other care in contrast to 18% of children of mothers. (CRES unpublished data 2011).

Fifty-nine per cent of women in custody are mothers. Of these 47% were carers of their children prior to custody. Based on female inmate population of 624 as of 23 October 2011, this equates to 150 - 180 women. CSNSW runs a Mothers and Children's Program in NSW prisons which enables children under school age to reside with their mothers in custody. There are limited places available. It is the WAC's experience that judicial officers have pointed to the existence of the program as justification for a woman's incarceration, arguing that she will not be separated from her child while in custody. This is not so much a justification as a non-recognition that the program will not be available to many of these women because of restricted locations and because the entry criteria exclude higher security women and those with serious AOD and mental health issues.

The 'exceptional circumstances' requirement disadvantages women in the sentencing process by discounting the common everyday experience of the majority of female offenders. The criminal justice system thereby tacitly accepts that female offenders will lose their children – it is not an unusual enough outcome to warrant leniency in sentencing. Women are thus disadvantaged by a supposedly impartial sentencing system because their common female experience departs from the common male experience. Caselaw indicates just how rare it is that exceptional circumstances are successfully argued, see the Supreme Court case, where both parents were incarcerated, for example, the very exceptional circumstances in *R v Thomas Sam: Manju Sam*. *R v Thomas Sam: Manju Sam* (Number 18)[2009] NSWSC 1003 (28 September 2008)
<http://www.lawlink.nsw.gov.au/scjudgments/2009nswsc.nsf/00000000000000000000000000000000/5cd4f65a67cc162bca25763a0016b74a?opendocument> (sentence) and (appeal)

⁴¹ McFarlane, K. (2010) 'From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System' *Current Issues in Criminal Justice*, Vol 22 No 2

<http://www.caselaw.nsw.gov.au/action/pjudg?jgmtid=150609> The court acknowledged the exceptional circumstances but it does not appear to have made any difference.

Offending is a male-dominated social phenomenon, evidenced by the ratio of males to females in prisons around the globe. Although rates of incarceration of women have increased over the past 10-15 years there is still a major difference between male and female prisoner numbers. It is less common for women to offend and to be sentenced to a community or custody based sentence.

The Council's proposal is supported by the increasing evidence of the major negative impact of separation on the child's emotional and cognitive development and the known intergenerational risk of offending.

The courts have reasoned that the fact of imprisonment almost inevitably leads to hardship for third parties. And justice will not be seen to be even-handed if exceptions are made. See R v Hopley [200] NSWCCA05.

It is said that circumstances must be wholly, truly and highly exceptional for this principle not to be given effect. See:

R v Edwards 91996) 90 ACCrim R510 and 515

R v Day (1998)100 ACCrim R 275

R V Gip, R v Ly (2006) 161 ACCrim R173

Recommendation

The Council recommends that a new sentencing principle be introduced that recognises the special circumstances of mothers with dependent children.

The Council also recommends that education and information on women's caring obligations be provided to the judiciary, particularly in the Local Court as well as the long-term impact of separation on the developing child.

Conclusion

The failure to recognise that women offenders often have different motivations or drivers for their participation in crime than their male counterparts, and the refusal to recognise that gender-specific responses to offending are required at every stage in the process, from diversion, sentencing itself and post-custody options, means that the criminal justice system continues to fail the majority of female offenders and perpetuates the continuing invisibility of women within the system.

The WAC refers to the recommendations for a pilot for the abolition of short prison sentences; a compulsory Drug Treatment Program for women; a Problem Solving Court; and a Complex Needs Panel or equivalent made in our preliminary submission, and draw your attention to the 1997 Standing Committee on Social Issues statement that:

A sentence of imprisonment on a primary carer of children should only be imposed when all possible alternatives have been exhausted. The courts should always seek community-based alternatives, particularly in the case of offenders who have committed non-violent offences.

We ask that the Commission give consideration to the development of general sentencing principles in State law to reflect the circumstances of the offender, the victim and the community, reflecting a commitment of human dignity and equality in our society.

The role of the court and the presiding judicial officer is surely not to simply apply the law but to seek to serve the human rights of offenders and victims, and to protect the community while upholding the rule of law. Questions of application of 'Fernando Principles' or 'Exceptional circumstances' when determining a sentence could best be interpreted in terms of proportionality: balancing the respect for human dignity, acknowledging the law (defined by parliament) allowing 'unelected judges' to consider remedies that admit that in our diverse society some citizens have suffered extreme poverty, neglect, racism and violence. The task of providing alternatives, on a state-wide basis is now before the LRC and its opportunity to advise the government to proceed with reform which recognises human dignity and equality.

See **Attachment A** for a membership list of the Women's Advisory Council and Consultants Group

ATTACHMENT A

Corrective Services NSW Women's Advisory Council	
Members	
Jenna Bateman	Chief Executive Officer Mental Health Coordinating Council
Monique Hitter	Director Civil Law Legal Aid Commission
Helen L'Orange	Past Child Advocate Mothers & Children's Program
Katherine McFarlane	Personal capacity Past Lecturer, Justice Studies / Criminology, Charles Sturt University Past Executive Officer, NSW Children's Court Past Official Visitor
Nicole Lawless	Manager Violence Prevention Coordination Unit Office for Women's Policy Department of Family and Community Services
Carmen Parter	Director Aboriginal Health NSW Health
Christine Robinson	Co-ordinator Aboriginal Women's Legal Service Wirringa Baiya
Ann Symonds	Chair Patron Mothers and Children's Program Patron SHINE For Kids Past patron Guthrie House
Sally Trevena	Canada Bay Council Past Assistant Manager Housing and Homelessness Section NSW/ACT Office Department of Families, Housing, Community Services and Indigenous Affairs
Mandy Young	Manager Domestic and Family Violence Unit Department of Attorney General and Justice

Corrective Services NSW Women's Advisory Council Consultants Group	
Lesley-Anne Davies	Manager Guthrie House
Thea Deakin Greenwood	Solicitor Wirringa Baiya Aboriginal Women's Legal Service
Carolyn Jones	Women's Legal Services NSW Legal Education and Advice in Prison project
Michelle Knight	Yulapanaal Aboriginal Women's Post Release Support Morisset
Vavaa Mawuli	Senior Solicitor Public Interest Advocacy Centre
Geraldine Blinco	Transitional Services Community Restorative Centre
Dr Juanita Sherwood	Professor Australian Indigenous Education UTS
Alison Peters	Director NCOSS

Corrective Services NSW Women's Advisory Council Executive Officer	
Deirdre Hyslop	Principal Advisor Women Offenders

