The Australian Law Reform Commission

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Re: Incarceration Rates of Aboriginal and Torres Strait Islander People (DP 84 July 2017)

Relevant Terms of Reference

This submission addresses a particular aspect of the Terms of Reference for ALRC’s *Inquiry into the* *Incarceration Rates of Aboriginal and Torres Strait Islander People* (DP 84 July 2017), namely,

* 1b) the ‘**pathways** of Aboriginal and Torres Strait Islander peoples through the criminal justice system’ ; and
* 1e the broader contextual factors contributing to Aboriginal and Torres Strait Islander incarceration including:
	+ the **characteristics of the Aboriginal and Torres Strait Islander prison population**; and
	+ the relationships between Aboriginal and Torres Strait Islander offending and incarceration and **inter generational trauma**, loss of culture, poverty, discrimination, alcohol and drug use, experience of violence, including family violence, child abuse and neglect, **contact with child protection and welfare systems**, educational access and performance, cognitive and psychological factors, housing circumstances and employment.

The impact of s28 Bail Act NSW

I also wish to draw the Committee’s particular attention to the operation **of section 28 of the *Bail Act* (NSW),** which has had a significant and problematic impact on children and young people and which acts to disproportionately disadvantage Indigenous children in Out-Of-Home-care (OOHC)[[1]](#footnote-1). The Act permits a court to impose an “accommodation requirement” when granting bail to a child charged with an offence. Bail is dependent on a child having suitable accommodation. If accomm-odation is not available, the child will not be released. The practical effect of section 28 is that a child without suitable accommodation may be detained in circumstances where a homeless adult,

charged with a like offence would not. I refer the Committee to *The Conversation*[[2]](#footnote-2) for more information.

The intersection between Out-Of-Home Care (OOHC) and Criminal Justice Systems (CJS)

My work examines the interaction of the Out-Of-Home Care (OOHC) and Criminal Justice Systems (CJS). I argue that, as has been reflected in the Parliament’s apologies to the Stolen Generations[[3]](#footnote-3) and the Forgotten Australians[[4]](#footnote-4), the significance of a background of child removal and placement in OOHC is a significant factor in the pathways of people subsequently involved in criminal offending.

I refer the Committee to my submissions and appearances before previous Inquiries into aspects of Indigenous incarceration, such as the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Involvement of Indigenous juveniles and young adults in the criminal justice system*[[5]](#footnote-5) (2010-2011) and the *Royal Commission into the Protection and Detention of Children in the Northern Territory* (2017).[[6]](#footnote-6) I also refer to a recent article published in the Australian and New Zealand Journal of Criminology[[7]](#footnote-7), which sets out the key arguments of relevance to the ALRC’s current Inquiry.

*The intersection of OOHC and the CJS today – my doctoral research*

Approximately one in 10 young people involved with the CJS in NSW have been in OOHC[[8]](#footnote-8). Similar over-representation rates have been reported nationally.[[9]](#footnote-9) As I wrote in a series of articles in *The Conversation*[[10]](#footnote-10), the child welfare system consistently produces poor outcomes for children in care, such that the United Nations has expressed serious concerns at “widespread reports of inadequacies and abuse” within Australia’s care system, and drawn particular attention to the inappropriate placements of children, inadequate screening, training, support and assessment of (particularly) Indigenous carers; placement of Indigenous children outside their communities and the mental health issues “exacerbated by (or caused in) care”[[11]](#footnote-11).

My doctoral research[[12]](#footnote-12) explored the intersection between OOHC and subsequent appearances before the NSW Children’s Court. The thesis included a quantitative methods analysis of 180 files held by the criminal jurisdiction of the NSW Children’s Court (Parramatta). On average, each file contained approximately 50 documents, including police facts sheets, arrest information, bail conditions, pre-sentence reports, health, education and psychological/psychiatric reports and character references. This material was analysed to identify children’s pathways through the justice system, from police cautions and warnings, the imposition of bail conditions, and sentencing practices, including referral to alternative sentencing programs such as the Youth Drug and Alcohol Court (YDAC).

Analysis revealed that children in OOHC appeared before the Children’s Court on criminal charges at disproportionate rates compared to children who were not in OOHC. Almost half of the sample (49.5%) had been, or were currently in OOHC. The OOHC cohort had a different and negative experience of the justice system, entering it at a significantly younger age and being more likely to experience custodial remand, than children who had not been in care. While both cohorts shared many of the risk factors common to young offenders appearing before the Children’s Court, the OOHC care cohort experienced significant additional disadvantage within the care environment (termed ‘care-criminalisation’), such that living arrangements designed to protect them from harm instead created the environment for offending. I found that children in OOHC were more likely to be remanded for bail breaches and spend longer in custody than their non-care peers – in part because when these children behave badly, they are more likely to have the police called to monitor and regulate their behaviour. In contrast, similar behaviour occurring in a middle-class suburban home would be unlikely to attract police attention. I also found that many offences arose purely because of the care environment and often resulted after a child had experienced care-specific trauma or abuse, such as sexual exploitation. I concluded that the New South Wales child welfare system is inexorably linked to the manufacturing of delinquency and children's involvement in the criminal justice system.

Indigenous children are particularly over-represented in both the OOHC and CJS systems[[13]](#footnote-13) and bear the impact of intergenerational removal and trauma from past welfare policies as well as the consequences of inadequacies of present policies and practices.

*Intergenerational entrenchment and the CJS*

The ‘intergenerational entrenchment of involvement with the CJS among many Indigenous people has been recognised as one of the risk factors for offending by Aboriginal people’[[14]](#footnote-14) and is reflected in research which has identified significant differences between Indigenous prisoners with OOHC experience and the general adult prison population. (Interestingly, this research is limited in that it applies only with respect to Indigenous prisoners – no comparable research has been conducted into the experiences of the OOHC cohort more broadly). That research found that adult Aboriginal prisoners removed from their families as children experienced significantly worse outcomes with regard to mental health than their non-removed Aboriginal peers.[[15]](#footnote-15) They were also significantly more likely to have been gaoled more than five times and to have been victims of child sexual assault.

As I wrote in my thesis (at p195-196ff), the criminogenic impact of Australia’s child removal practices and subsequent institutionalisation of children has been known for decades. Most of the discussion around care-criminalisation has focused on the impact on Indigenous communities. In 1977 the Department of Aboriginal Affairs[[16]](#footnote-16) noted that approximately 95% of people in NSW and Victoria who sought assistance from the Aboriginal Legal Services on criminal matters had been in care. This over-representation was attributed to the children being separated from the support of the Aboriginal community, the corresponding lack of identity with Indigenous culture and simultaneous alienation from the white community. The Senate Standing Committee on Social Welfare (Australian Senate 1985) observed that welfare intervention was a highly disruptive factor that had set many young Indigenous people on the road to incarceration. ‘It may be conjected’ the Standing Committee wrote, ‘that the process of care, particularly wardship, has a momentum of its own that carries a child through a series of placements and through a series of officers, so that family and kin ties are weakened, personal identity is confused, and self-esteem is low, to the point where anti-social behaviour makes correctional care necessary’.[[17]](#footnote-17)

Dr Roberta Sykes, a radical Aboriginal leader of the 1970s and 1980s, was scathing of the effect of the devastating impact government policies had had on Indigenous communities. ‘Between the efforts of the legal justice system, courts, and welfare agencies’ she wrote, ‘there are numerous country towns where it is possible to find no Black males between the ages of 12 and 16 left in their communities. Under one guise or another, they were removed to institutions or other placements’.[[18]](#footnote-18) She warned that the experience of juvenile institutionalisation ‘pre-conditions many children to accept, and often expect, periods of institutionalisation as adults. It can therefore create long-term destabilising influences for a person for their whole life’.

Other commentators noted that for Indigenous women in particular, ‘the devastating effects of this institutionalisation and forced adoption of Aboriginal infants and children are still, and will continue to be, a major factor in Aboriginal over-imprisonment for both sexes for a long time to come’[[19]](#footnote-19). The pathway from child welfare homes to subsequent institutionalisation in prison for Indigenous people was confirmed by the findings of the *Royal Commission into Aboriginal Deaths in Custody.* Of the 99 people whose deaths in State custody had been investigated by the Royal Commission, 43 had ‘experienced childhood separation from their natural families through intervention by State authorities, missions or other institutions’[[20]](#footnote-20). So too, the Human Rights and Equal Opportunity Commission’s *Bringing Them Home* report viewed childhood removal as a significant cause of delinquency, ‘both in distinctive horror and its capacity to breakdown resilience and render a victim perpetually vulnerable’[[21]](#footnote-21) . Citing the Australian Bureau of Statistics, HREOC noted that forcibly removed people were twice as likely to have been arrested more than once in the past five years and that one in five removed people had had this experience. In 2011 the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs also lamented the ongoing exodus from care to gaol. The Committee noted evidence ‘linking young people who have lived in OOHC to future offending behaviour and detention’ and observed that up to a third of children who have grown up in care are in the juvenile justice system[[22]](#footnote-22). The ‘intergenerational entrenchment of involvement with the criminal justice system among many Indigenous people and communities’ concluded the Parliamentary Committee, is a risk factor for offending[[23]](#footnote-23).

A lack of statistical data has also impeded analysis of the significance of the OOHC cohort amongst offending populations. This parallels the Indigenous experience. According to Dr Don Weatherburn (2014) who has headed the NSW Bureau of Crime Statistics and Research (BOCSAR) for over a quarter of a century, when the *Royal Commission into Aboriginal Deaths in Custody* (RICIDIC 1991) began its hearings, there were ‘no national data archives on the rates of Indigenous and non-Indigenous involvement in various types of crime, or on rates of arrest, bail refusal, diversion from prison or recidivism. In short’ Dr Weatherburn stated, ‘there were virtually no data that could be used to test competing hypotheses about the causes of over-representation’. In his view, ‘matters could not have been worse from the standpoint of a disinterested and objective enquiry into the causes of Aboriginal over-representation in prison’[[24]](#footnote-24).

While Indigenous status is now collected and reported on at various stages of the CJS, the nexus between the tremendous rate of Indigenous over-representation in the child protection and OOHC systems and subsequent incarceration rates has rarely been commented upon. Yet the ‘the impact of ‘colonisation, dispossession and the separation of children from their families’ has played ‘an enormous role’ in Aboriginal over-representation in custody[[25]](#footnote-25).

As the official apologies by both State and Commonwealth Governments have conceded, child removal often occurred for spurious reasons (see for example, CPD 13 February 2008; CPD 16 November 2009; and CPD 21 March 2013). Moreover, many Aboriginal families had previously been affected by the seizure and placement of their wages into a government-administered ‘trust fund’[[26]](#footnote-26). While the NSW government has apologised for the subsequent ‘loss’ of trust monies[[27]](#footnote-27), my research indicates that the significance of the trust monies scandal has not been fully appreciated in the context of Australia’s child removal policies. Rather than merely losing their wages, some Aboriginal families subsequently lost their children. I postulate that with their parents unable to show they possessed lawful means of support, children were removed by the authorities as a consequence of the poverty imposed through the government confiscation of Aboriginal wages.

While few academics have explored the issue of whether OOHC is linked to offending, care status - defined as direct childhood removal from the natural family *and/or* secondary family membership of the Stolen Generations (my emphasis) – has been shown to be a significant factor in predicting the likelihood of contact with the CJS[[28]](#footnote-28). For example, Mukherjee et al., (1998)[[29]](#footnote-29) found that removal from the family as a child was strongly associated with likelihood of arrest for both Indigenous males and females, with removed adults significantly more likely to be arrested compared with those Indigenous people who had not been removed. Hunter’s (2001) analysis of NATSIS data, including Indigenous respondents aged 13 years and over, found that removal had a smaller but nonetheless significant effect in predicting overall likelihood of arrest in the preceding five years (although it played no role on an individual’s probability of being arrested for a specific offence, in this case, assault).[[30]](#footnote-30) The Australian Bureau of Statistics (ABS) has noted that respondents aged 15 and over who had been removed from their natural family were 1.3 times as likely to be charged by police than those who had never been removed[[31]](#footnote-31). Weatherburn, Snowball and Hunter (2006) also found that being a member or a family member of the ‘Stolen Generations’ increased the likelihood of being charged by police.[[32]](#footnote-32) A subsequent study by the same authors, focusing on Indigenous arrest frequency, found that being a member of the Stolen Generations increased the risk of arrest but, along with a number of other predictive factors, did not have a significant effect on the number of arrests an individual experienced[[33]](#footnote-33).

The significance of the intersection between the OOHC and CJS has had long term intergenerational repercussions that are being felt today. It may be, as Dr Weatherburn has speculated, that the ‘deliberate removal of Indigenous children from their natural families…may have contributed to the rise in Indigenous arrests.’ This view is premised on the fact that ‘children removed from their families during the 1950s and 1960s would have been reaching their crime-prone years during the 1970s and 1980s’. While the evidence for this proposition is currently quite poor, this is a reflection of the failure to collect accurate statistics and data, rather than on the argument itself. As Dr Weatherburn has stated, ‘there are no time series or panel studies showing that changes in...offending over time are strongly linked to changes in the rate at which…children were removed from their natural families…the data required to do this simply does not exist’[[34]](#footnote-34).

Further research on the impact of intergenerational child removals and the subsequent inter-generational trauma inflicted on successive generations is urgently required if the root causes of Indigenous disadvantage and over-representation in the juvenile and adult prison systems are to be understood. This Committee is urged to make such a recommendation.

I would be pleased to discuss any aspect of this submission with the Committee at its convenience.

Yours sincerely,

Dr Kath McFarlane

4th September 2017

1. Children in the care of the State by virtue of a Children’s Court order, who may reside in foster care, kinship care with relatives or reside in residential care with other children or alone, with care provided by paid staff. [↑](#footnote-ref-1)
2. McFarlane, K., (2016) ‘NSW Bail laws mean well but are landing homeless kids in prison’ *The Conversation*, 16 December 2016 <https://theconversation.com/nsw-bail-laws-mean-well-but-are-landing-homeless-kids-in-prison-68490> [↑](#footnote-ref-2)
3. ‘Apology to Australia’s Indigenous Peoples’ (Commonwealth Parliamentary Debates 13 February 2008). [↑](#footnote-ref-3)
4. ‘Apology to the Forgotten Australians’ (Commonwealth Parliamentary Debates, 16 November 2009). [↑](#footnote-ref-4)
5. House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Involvement of Indigenous juveniles and young adults in the criminal justice system*. Public Hearing, Thursday, 24 June 2010 <http://www.aph.gov.au/binaries/hansard/reps/commttee/r13210.pdf> . See too Roundtable, 28 Jan 2011, see pg 15-16; 26-27; 35-37

<http://www.aph.gov.au/binaries/house/committee/atsia/sentencing/hearings/28%20january%202011.pdf> and Written submission, on behalf of the Women’s Advisory Council (WAC), especially in relation to Indigenous juveniles, pp11 onwards

<http://www.aph.gov.au/binaries/house/committee/atsia/sentencing/subs/sub106.pdf> [↑](#footnote-ref-5)
6. *Royal Commission into the Protection and Detention of Children in the Northern Territory* (2017). Public Hearing, Friday, 2nd June 2017 <https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/transcripts-2017/Transcript-2-June-2017.pdf> . See too Exhibit - Statement

<https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/evidence-2017/evidence2june/Exh-489-000.pdf> and Exhibit – CV <https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/evidence-2017/evidence2june/Exh-489-001.pdf> [↑](#footnote-ref-6)
7. McFarlane, K. (2017) ‘Care-criminalisation: the involvement of children in out-of-home care in the NSW criminal justice system’. *The Australian and New Zealand Journal of Criminology*. August 8, 2017 DOI: <https://doi.org/10.1177/0004865817723954> [↑](#footnote-ref-7)
8. <http://www.bocsar.nsw.gov.au/Documents/CJB/Report-2016-Can-child-protection-data-improve-the-prediction-of-reoffending-in-young-persons-cjb188.pdf> [↑](#footnote-ref-8)
9. <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129554443> [↑](#footnote-ref-9)
10. McFarlane, K., (2017) ‘The faulty child welfare system is the real issue behind our youth justice crisis’ *The Conversation*, 13 February 2017 <https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>

McFarlane, K., (2016) ‘NSW Bail laws mean well but are landing homeless kids in prison’ *The Conversation*, 16 December 2016 <https://theconversation.com/nsw-bail-laws-mean-well-but-are-landing-homeless-kids-in-prison-68490>

McFarlane, K., (2016) ‘The single biggest reform to child welfare is a re-run of decade-old promises’ *The Conversation,* 18 November 2016 <https://theconversation.com/the-single-biggest-reform-to-child-welfare-is-a-re-run-of-decade-old-promises-68822>

McFarlane, K., (2016) ‘Nothing to see here: the abuse and neglect of children in care is a century-old story’ *The Conversation*, 15 November 2016 <https://theconversation.com/nothing-to-see-here-the-abuse-and-neglect-of-children-in-care-is-a-century-old-story-in-australia-68743>

McFarlane, K., (peer review of) Cashmore, J. and Libesman, T. (2016) ‘FactCheck Q&A: are Indigenous children ten times more likely to be living in out-of-home care?’ *The Conversation* 22 February 2016

<https://theconversation.com/factcheck-qanda-are-indigenous-children-ten-times-more-likely-to-be-living-in-out-of-home-care-54825> [↑](#footnote-ref-10)
11. <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf> [↑](#footnote-ref-11)
12. McFarlane, K. (2016) ‘Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system’

 [https://unsworks.unsw.edu.au/fapi/datastream/unsworks:38185/SOURCE02?view=true](https://unsworks.unsw.edu.au/fapi/datastream/unsworks%3A38185/SOURCE02?view=true) [↑](#footnote-ref-12)
13. In June 2013, there were 18,300 NSW children in care: approximately one third of whom were Indigenous. [↑](#footnote-ref-13)
14. The Parliament of the Commonwealth of Australia (2011) House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*. Australian Government Publishing Service. Canberra Australia at 42. [↑](#footnote-ref-14)
15. Egger, S., and Butler, T. (2000) ‘The Long‐Term Factors Associated with Removal from Parents Amongst Indigenous Prisoners in NSW’. *Australian and New Zealand Journal of Public Health.* vol 24, no 4. [↑](#footnote-ref-15)
16. Sommerlad, E (1977) Aboriginal juveniles in custody: report arising from a National Symposium on the Care & Treatment of Aboriginal Juveniles in State Corrective Institutions, Sydney, 30 May-1 June 1977 / Elizabeth Sommerlad ; in association with Dept. of Aboriginal Affairs. [↑](#footnote-ref-16)
17. Australian Senate Standing Committee on Social Welfare (1985*) Inquiry into Children in Institutional and Other Forms of Care: A National Perspective* at p18. [↑](#footnote-ref-17)
18. Sykes, R. (1989) *Black Majority: An analysis of 21 years of Black Australian experience as emancipated Australia citizens*. Hudson Publishing. Hawthorn Australia at 143. [↑](#footnote-ref-18)
19. Payne, S. (1992) ‘Aboriginal Women and the Law’, in Cunneen C(ed) *Aboriginal Perspectives on Criminal Justice*. Institute of Criminology. Sydney Australia at 66. [↑](#footnote-ref-19)
20. (RCIDIC) *Royal Commission into Aboriginal Deaths in Custody National Report* (1991) [http://www.austlii.edu.au/au/other/IndigLRes/rciadic/index.html at 1.2.17](http://www.austlii.edu.au/au/other/IndigLRes/rciadic/index.html%20at%201.2.17) [↑](#footnote-ref-20)
21. (HREOC) The Human Rights and Equal Opportunity Commission (1997) *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families*. (The Wilson Inquiry). Australian Government Publishing Service. Sydney Australia at 11-114 [↑](#footnote-ref-21)
22. The Parliament of the Commonwealth of Australia (2011) House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*. Australian Government Publishing Service. Canberra Australia at 3.134. [↑](#footnote-ref-22)
23. The Parliament of the Commonwealth of Australia (2011) House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*. Australian Government Publishing Service. Canberra Australia at 42. [↑](#footnote-ref-23)
24. Weatherburn, D. (2014) *Arresting Incarceration: Pathways out of Indigenous Imprisonment.* Aboriginal Studies Press. Canberra. Australia at 23. [↑](#footnote-ref-24)
25. Baker, J. (2001) ‘The scope for reducing indigenous imprisonment *rates’ Contemporary Issues in Crime and Justice No:55* NSW Bureau of Crime Statistics and Research (BOCSAR) Sydney Australia at 1. [↑](#footnote-ref-25)
26. Australian Senate Standing Committee on Legal and Constitutional Affairs (2006) *Unfinished Business: Indigenous Stolen Wages*, Canberra Australia. See too Kidd, R. (2006) *Trustee’s on Trial: Recovering the Stolen Wages*. Aboriginal Studies Press. Sydney Australia [↑](#footnote-ref-26)
27. NSW PD LA) NSW Parliamentary Debates, Legislative Assembly, 11 March 2004: 7163 *Aboriginal Trust Funds* (Carr) [↑](#footnote-ref-27)
28. Wundersitz, J. (2010) ‘Indigenous perpetrators of violence: Prevalence and risk factors for offending’ *Australian Institute of Criminology Research and Public Policy Series*. No 105. Canberra Australia [↑](#footnote-ref-28)
29. Mukherjee, S., Carcach, C., McDonald, D., and Barnes, T. (1998) *National Aboriginal and Torres Strait Islander Survey – Law and Justice Issues*. Australian Bureau of Statistics. Canberra Australia [↑](#footnote-ref-29)
30. Hunter, B. (2001) ‘Factors underlying Indigenous arrest rates’. *NSW Bureau of Crime Statistics and Research* (BOCSAR). Sydney Australia [↑](#footnote-ref-30)
31. Australian Bureau of Statistics. (2004) ‘National Aboriginal and Torres Strait Islander social survey’, 2002. [http://www.abs.gov.au/ausstats/abs@nsf/cat/4714.0](http://www.abs.gov.au/ausstats/abs%40nsf/cat/4714.0) [↑](#footnote-ref-31)
32. Weatherburn, D., Snowball, L., and Hunter, B. (2006) ‘The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey’. *Contemporary Issues in Crime and Justice No:104*. NSW Bureau of Crime Statistics and Research (BOCSAR). Sydney Australia [↑](#footnote-ref-32)
33. Weatherburn, D., Snowball, L., and Hunter, B. (2008) ‘Predictors of Aboriginal arrest: an exploratory study.’ *Australian and New Zealand Journal of Criminology* 41(2):216-235 [↑](#footnote-ref-33)
34. Weatherburn, D. (2014) *Arresting Incarceration: Pathways out of Indigenous Imprisonment.* Aboriginal Studies Press. Canberra. Australia at 151. [↑](#footnote-ref-34)