



Submission to the Inquiry into children affected by parental incarceration

Legal and Social Affairs Committee, Victorian Parliament

April 2022

About us

Change the Record is Australia's only First Nations-led national justice coalition. We are comprised of organisations with legal and human rights expertise, and community controlled organisations that deliver essential legal, health and family violence prevention services around the country. Our mission is to end the mass incarceration of and disproportionate rates of family violence experienced by Aboriginal and Torres Strait Islander peoples.

This submission has been endorsed by **Djirra**, an Aboriginal Community-Controlled Organisation providing specialist, culturally safe and holistic assistance to Aboriginal and Torres Strait Islander people, predominantly women, who are experiencing or have experienced family violence and/or sexual assault in Victoria.

Our Submission

The mass incarceration of First Nations peoples in Australia is an urgent human rights crisis and an affront to the right of Aboriginal and Torres Strait Islander children to grow up safe in their families and culture. Incarceration causes immense harm to those imprisoned and to their loved ones left outside, particularly the dependent children of imprisoned people.

Despite making up 0.8% of the Victorian population at the last Census¹, First Nations peoples make up 10.6% of the Victorian prison population². The proportion is higher for First Nations women, at over 11% of the female prison population. Nationally, incarcerated First Nations peoples are more likely than non-Indigenous people to have dependent children³, and it's estimated that on average 80% of First Nations women in custody are mothers.⁴ 31% of First Nations people entering prison in 2018 had experienced a parent being in prison during their childhood, compared to 11% of non-Indigenous prison entrants.⁵

Having a parent in prison harms a child's development, health and wellbeing and increases their chance of living in poverty and precarious housing. It places a child at higher risk of interaction with child removal systems, particularly the children of single mothers. A child is also placed at higher risk of interaction with the youth justice system, where children as young as 10 can be arrested and imprisoned in Victoria. In addition to necessary reform of the Victorian criminal legal system as it affects adults, the age of criminal responsibility must be raised to at least 14 years of age to keep children out of a system that reproduces itself through punishment and harm.

First Nations communities know what programs work to keep their communities strong and safe, but are rarely given the control and resources to implement self-determined solutions. Much research and policy work has already been done regarding the harm caused by carceral responses to crimes of poverty and disadvantage; the causes and drivers of mass incarceration of Aboriginal and Torres Strait Islander adults and children; and the efficacy of community-based non-carceral responses to offending.

Change the Record has produced several reports and policy documents aimed at decarceration of and ending violence against Aboriginal and Torres Strait Islander adults

¹ 2016 ABS Census data summary - [Aboriginal and Torres Strait Islander Population - Victoria](#).

² Australian Bureau of Statistics, 2021, [Prisoners in Australia](#), data table 21.

³ Australian Institute of Health and Welfare, 2019, [The health of Australia's prisoners 2018](#), p164.

⁴ Bartels, L., 2012, *Painting the Picture of Indigenous Women in Custody in Australia*, QUT Law Review, Vol.12 No.2.

⁵ AIHW, op. cit.

and children. Our work emphasises the importance of investing in First Nations communities and Aboriginal Community-Controlled Organisations to provide community-led early intervention and prevention programs and support services; shifting control and resources away from the criminal legal system and into community-based alternatives to policing and prisons; ending the disproportionate poverty and housing precarity experienced by First Nations peoples; and the fundamental need for governments to genuinely commit to enabling Aboriginal and Torres Strait Islander self-determination and to addressing and redressing ongoing colonisation, dispossession and systemic racism.

Fundamental to supporting the children of people who are incarcerated is keeping parents out of the criminal justice system and ensuring alternatives to prison, services and supports are accessible, culturally appropriate and well-resourced.

We don't seek to reproduce our expository work in this submission, and instead draw the Committee's attention to previous publications and submissions and their recommendations so they are on the record.

We attach:

- Change the Record's *'Blueprint for Change'*, updated for 2022, containing detailed recommendations and 12 overarching principles for reducing incarceration of First Nations peoples and violence against First Nations women and children.
- Change the Record and the Human Rights Law Centre's 2017 report *'Over-represented and Overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment'*
- Change the Record's 2021 report *'Pathways to Safety'*, where we discuss the drivers of and community-based solutions to violence against First Nations women and children.

We also encourage the Committee to consider as relevant to its work the [Victorian Aboriginal Legal Service's submission](#) (see in particular recommendations 62-64) and [Djirra's submission](#) (see in particular recommendations 17-19) to the recent inquiry into

Victoria's Criminal Justice System, and the [NSW Aboriginal Legal Service \(NSW/ACT\)'s submission](#) to the NSW Legislative Council's Committee on Children and Young People's 2019 inquiry into 'Support for Children of Imprisoned Parents in New South Wales'.

Recommendations:

Recommendation 1

When a parent or carer of a dependent child is in contact with the criminal legal system at any stage, ensure the best interests of the child and the potential impact of police, court and prison decisions on that child are the primary consideration. This should include consideration of the lasting damage caused by separating the child from their parent/s.

Recommendation 2

Implement Bangkok Rule 64⁶, with an expanded scope to all parents and primary caregivers: "non-custodial sentences for women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taken into account the best interests of the child or children, while ensuring the appropriate provision has been made for the care of such children".

Recommendation 3

Implement the Victorian Aboriginal Legal Service, Human Rights Law Centre, Fitzroy Legal Service, Flatout⁷ and Djirra's call⁸ to urgently fix Victoria's bail laws by:

- Repealing the reverse-onus provisions in the bail laws;

⁶ *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, available at <<https://www.tijbangkokrules.org/en/about-bangkok-rules>>.

⁷ Human Rights Law Centre et al, 24/3/2022, 'Inquiry a wake-up call for Andrews government to fix bail laws', media release.

⁸ Djirra, 2021, [Submission to the Victorian parliamentary inquiry into Victoria's Criminal Justice System](#), p6. .

- Creating a presumption in favour of bail for all offences, with the onus on the prosecution to demonstrate that bail should not be granted due to there being a specific and immediate risk to the physical safety of another person or the person posing a demonstrable flight risk;
- Inserting an explicit requirement in the bail laws that a person must not be remanded for an offence that is unlikely to result in a sentence of imprisonment; and
- Repealing the offences of committing an indictable offence while on bail, breaching bail conditions and failure to answer bail.

And, in addition, amend bail and sentencing laws and processes to ensure that:

- Historical and systemic factors contributing to Aboriginal and Torres Strait Islander people's over-imprisonment are taken into account in all bail and sentencing decisions involving Aboriginal and Torres Strait Islander people.
- Informed consideration is given to the impact of imprisonment, including remand, on dependent children.

Recommendation 4

Review laws and policies to identify those which unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander peoples, with a view to decriminalising minor offences and implementing alternative non-punitive responses to low level offending.

Recommendation 5

Invest in culturally appropriate bail support and diversion initiatives for First Nations women, including programs with housing for women and children, which are designed and run by or in partnership with First Nations women. Programs should ensure eligibility for women facing multiple charges and who have criminal records.

Recommendation 6

Develop consistent data collection systems that track Aboriginal and Torres Strait Islander people's trajectory through the criminal legal system. Systems should ensure that data is disaggregated, including on the basis of race, sex, gender identity, intersex status, age, disability, socio-economic status and family responsibilities.

Recommendation 7

Resource Aboriginal Community-Controlled Organisations to collect, own and analyse their own data to inform solutions to violence and disadvantage, consistent with commitments in the National Agreement on Closing the Gap.

Recommendation 8

Work in partnership with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies to support the identification and development of place-based 'Justice Reinvestment' sites.

Recommendation 9

Increase funding and support for Aboriginal and Torres Strait Islander community-led prevention and early intervention efforts to reduce violence against women and offending by women.

Recommendation 10

Ensure the Victorian Aboriginal Legal Service and Djirra are adequately and sustainably funded to:

- Meet existing demand for services, including culturally-safe and specialist prevention and early intervention programs;
- Address unmet legal need regardless of geographic location; and
- Develop models of holistic support and case management for women.

Recommendation 11

Victoria police adopt education, training and recruitment practices that promote more appropriate police responses to Aboriginal and Torres Strait Islander women both as victim/survivors of violence and offenders.

Recommendation 12

Ensure that Victoria police protocols and guidelines prioritise the protection of, and provision of support to, Aboriginal and Torres Strait Islander women and children subject to violence. Responding to an incident of family violence should never be used as an opportunity to act upon an outstanding warrant against a victim/survivor of violence.

Recommendation 13

Victoria police prioritise developing partnership programs with First Nations communities that aim to build trust and respect between police and young people. Programs should include gender-specific responses for girls and young women.

Recommendation 14

Police and courts develop guidance materials and ensure that police and judicial officers are regularly educated by Aboriginal and Torres Strait Islander people about:

- The gendered impacts of colonisation and systemic discrimination and disadvantage; and
- How these impacts contribute to Aboriginal and Torres Strait Islander people's over-imprisonment.

Recommendation 15

Raise the minimum age of criminal responsibility to at least 14 years of age.

Recommendation 16

Embed Aboriginal and Torres Strait Islander decision-making into all phases of the child protection system. This should include:

- Making family decision-making processes available to all families at the earliest opportunity;
- Community-based child safety structures to drive prevention strategies;
- Legal, counselling and support services provided to parents and children at the earliest opportunity to assist in their engagement in the child protection system; and
- Monitoring child well-being and input into decision-making about children's welfare.

Recommendation 17

Permanently amend the *Children, Youth and Families Act 2005 (Vic)* to allow the court to extend Family Reunification Orders to beyond current prescribed time limits. These limits disproportionately impact women in prison as contact with children is often ceased or significantly reduced .

Recommendation 18

Ensure specialist Aboriginal Community-Controlled Organisations such as Djirra are adequately resourced to provide First Nations women exiting prison with culturally safe, holistic legal and non-legal support to assist with family reunification on release.⁹

Recommendation 19

Establish a mandatory Aboriginal and Torres Strait Islander child protection notification and referral system, modelled on the Custody Notification Service.¹⁰

Recommendation 20

Support the development of holistic, integrated community- controlled early years' child and family services in all communities in need.

⁹ See: Djirra, 2021, [Submission to the Victorian parliamentary inquiry into Victoria's Criminal Justice System](#), p17-18.

¹⁰ See: Change the Record, 2021, *Pathways to Safety*, p16.

Recommendation 21

Invest in culturally appropriate and community-controlled social and emotional wellbeing services and alcohol and drug treatment services.

Recommendation 22

Invest in evidence-based, culturally-tailored men's behaviour change programs that promote and enhance safety, funded in addition to services for victim/survivors.

Recommendation 23

Implement First Nations-led strategies to increase access to safe housing, including long term secure funding for specialist homelessness services, financial assistance and access to affordable, appropriate housing in cities, towns and rural areas.

We thank the Committee for the opportunity to provide this submission, and would welcome the opportunity to engage further.

Yours sincerely,

Sophie Trevitt

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