

Submission  
No 43

**INQUIRY INTO HIGH LEVEL OF FIRST NATIONS  
PEOPLE IN CUSTODY AND OVERSIGHT AND REVIEW OF  
DEATHS IN CUSTODY**

**Organisation:** Australia's National Research Organisation for Women's Safety  
**Date Received:** 20 August 2020

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# ANROWS

AUSTRALIA'S NATIONAL RESEARCH  
ORGANISATION FOR WOMEN'S SAFETY  
*to Reduce Violence against Women & their Children*

## NSW Legislative Council

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### **Re: Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody**

Dear the Honourable Adam Searle MLC

ANROWS thanks the Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody for the opportunity to respond to the Inquiry into the high level of First Nations people in custody and oversight and review of deaths in custody.

ANROWS is an independent, not-for-profit company established as an initiative under Australia's *National Plan to Reduce Violence against Women and their Children 2010–2022* (the National Plan). Our primary function is to provide an accessible evidence base for developments in policy and practice design for prevention and response to violence against women, nationally. Every aspect of our work is motivated by the right of women and their children to live free from violence and in safe communities. We recognise, respect and respond to diversity among women and their children, and we are committed to reconciliation with Aboriginal and Torres Strait Islander Australians.

Primary (core) funding for ANROWS is jointly provided by the Commonwealth and all state and territory governments of Australia. ANROWS is also, from time to time, directly commissioned to undertake work for an individual jurisdiction, and successfully tenders for research and evaluation work. ANROWS is registered as a harm prevention charity and deductible gift recipient, governed by the Australian Charities and Not-for-profit Commission (ACNC).

The information provided below is focused on the first of the Inquiry's terms of reference: a) *The unacceptably high level of First Nations people in custody in New South Wales*. It draws on evidence from rigorous peer-reviewed research, including relevant ANROWS research. We would be very pleased to assist the Committee further, as required. Please note that some information, clearly identified below, is provided under embargo until the research report is released in late October/early November 2020. Therefore, ANROWS requests this submission not be made public, or at a minimum, the relevant section be redacted, until mid-November.

Yours sincerely

**Dr Heather Nancarrow**

Chief Executive Officer

20 August 2020

## Response to terms of reference

ANROWS research offers national insights into the high rates of First Nations (Aboriginal and Torres Strait Islander) people in custody. As is consistent with our remit, we have focused our attention in this submission on women and their children. All of the evidence below is in response to:

*(a) the unacceptably high level of First Nations people in custody in New South Wales*

It reflects our expertise in regard to the terms of reference and focuses on strategies to: reduce incarceration of First Nations peoples, particularly women; effectively respond to trauma, including intergenerational trauma associated with the impacts of colonisation, in rehabilitation and post-release support; and provide the social supports needed to address criminogenic factors.

### **Our recommendations are summarised as follows:**

- Recognise gendered differences when designing and implementing prison policies and programs, including post-prison support to reduce risk of re-incarceration.
- Place more emphasis on whole-of-family and whole-of-community approaches to family violence interventions, including early intervention for teenagers, in recognition of the effects of intergenerational trauma. For First Nations women who have been incarcerated, this focus should facilitate reconnection with children upon release and support around parenting.
- Implement better screening and health coordination within the prison context, including screening for complex trauma, other mental health conditions, foetal alcohol spectrum disorder (FASD) and brain injuries.
- Increase the supply of public housing for Aboriginal and Torres Strait Islander communities.
- Include Aboriginal and Torres Strait Islander women with lived experience of imprisonment in service program governance, design and delivery, including through the use of participatory action research to drive pilot programs within community-driven organisations.
- Recognise the importance of continuity of services, case management, pre-release planning and throughcare. These services should be available to those on short sentences or on remand.
- Develop and fund culturally relevant diversion and prison initiatives, such as the Kunga Stopping Violence Program and the Miranda Project.
- Consider Gladue reports, or similar, to ensure systemic inequality and alternatives to imprisonment are considered in sentencing and for bail applications for Indigenous offenders.
- Ensure there is clear accountability for decision-making about whether a protection order should be applied for, or granted.
- Supplement legislation, policy and procedures around identifying the person most in need of protection with training and support that ensures police and judicial officers have the skills and resources to make accurate assessments when applying for, and granting, protection orders.
- Recognise the link between domestic and family violence (DFV) and sexual violence and behaviours that lead to contact with the criminal justice system, particularly in judicial decision-making, including sentencing. This could be done, for example, by legislating the use of a social entrapment framework.

## **Women’s imprisonment rates are rising faster than men’s**

In recent decades, women’s imprisonment rates have generally soared much faster than men’s (Human Rights Law Centre & Change the Record Coalition, 2017). In the fiscal year ending 30 June 2018, the number of female prisoners rose by 10 percent compared to a rise of just 4 percent for male prisoners (Australian Bureau of Statistics [ABS], 2018a). In the last three decades, the number of Aboriginal and Torres Strait Islander women in prison has more than doubled (Human Rights Law Centre & Change the Record Coalition, 2017). In 2016, while Aboriginal and Torres Strait Islander women made up 2 percent of the adult population of Australia,<sup>1</sup> they comprised 34 percent of all women imprisoned nationally (ABS as cited in Human Rights Law Centre & Change the Record Coalition, 2017).

With Australia in the midst of a global pandemic, there may have been changes to this overall trend in women’s imprisonment rates. In New South Wales, for example, policies put in place to decrease the size of the adult prison population to limit the spread of COVID-19 have seen a bigger reduction in incarcerated women (18.7%) than incarcerated men (9.4%) between 15 March and 10 May 2020 (Bureau of Crime Statistics and Research [BOCSAR], 2020). Despite this, women’s imprisonment remains a pressing issue.

Research indicates that First Nations women serve shorter sentences than other incarcerated women, for behaviours that are classified as minor offences. These minor offences include traffic infringements, shoplifting and non-payment of fines (ANROWS, 2020; Bevis, Atkinson, McCarthy, & Sweet, 2020; Human Rights Law Centre & Change the Record Coalition, 2017). First Nations women are over-represented in the remand (untried) prison population because they are often incarcerated for parole or bail violations, due to insecure housing or employment, or because they have a history of previous convictions (also commonly for minor offences; ANROWS, 2020; Human Rights Law Centre & Change the Record Coalition, 2017). With the majority of the COVID-19-related decline in New South Wales’ adult prison population (21.2%) coming from the remand population, policy changes applied to prisoners on remand to prevent the spread of the infection, have meant a reduction (11.3%) in the number of Aboriginal and Torres Strait Islander people incarcerated in New South Wales between February and May 2020 (BOCSAR, 2020).

## **There are links between violence against women and imprisonment**

There are well-established links between women’s experiences of domestic, family and sexual violence and imprisonment. High numbers (around 70–90%) of women in custody have experienced abuse (Johnson, 2004; Justice Health & Forensic Mental Health Network, 2017). Studies of Australian prison populations have estimated that 75–90 percent of incarcerated Aboriginal and Torres Strait Islander

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<sup>1</sup> At the time of the ABS 2016 census, Aboriginal and Torres Strait Islander residents, a figure which includes children, represented 3.3 percent of the Australian population (ABS, 2018b).

women have been victims of sexual, physical or emotional abuse, with most First Nations women experiencing multiple forms of abuse (Australian Law Reform Commission [ALRC], 2017). Women can become caught in cycles of imprisonment and experiencing violence, with the violence exacerbating the risk and effects of imprisonment, and the imprisonment increasing the risk and effects of violence (ANROWS, 2020).

There is emerging evidence that a high percentage of Aboriginal women incarcerated for violent crime have undiagnosed disability, or a possible diagnosis of complex trauma (Human Rights Law Centre & Change the Record Coalition, 2017). A recent ANROWS research report, *Kungas' trauma experiences and effects on behaviour in Central Australia*, is centred upon the life experiences of Aboriginal women who were incarcerated for alleged violent offences in Central Australia (Bevis et al., 2020). This research found that almost all of the women who participated in the study had endured violence by an intimate partner prior to entering prison (Bevis et al., 2020). By exploring the life events that led to their incarceration, the research demonstrated the critical need for services that can effectively respond to the trauma of women's lives and prevent future incarceration (Bevis et al., 2020). This research also highlighted the extent of disability among the women in the program, and the way it was seemingly invisible in justice responses to the women. One stakeholder observed:

In all the time I was there I would say 20 percent of the women had FASD [foetal alcohol spectrum disorder], or an acquired brain injury from the repeated beatings. I was told because she is so brain-damaged she can't give evidence against him and so therefore, police say they can't charge him. Now why does a woman have to give evidence when there is evidence from hospital, medical services, and other services that he has severely beaten her repeatedly so that she has an acquired brain injury from his beatings? ... All the women I worked with in KSVP [Kunga Stopping Violence Program] had experienced high levels of violence on them before they committed a crime. (Quoted in Bevis et al., 2020, p. 53)

Special attention needs to be paid to women whose disabilities are a direct result of living with sustained violence, which is sometimes not easily identified because it is compounded by other life experiences (Dyson, Frawley, & Robinson, 2017). There is need to improve the appropriate diagnoses of complex trauma, FASD and acquired brain injury for First Nations people (Bevis et al., 2020). Improvements should include providing continuity of care at all levels, including the coordination of care for women who have undiagnosed permanent disability and complex trauma (Bevis et al., 2020; Salter et al., 2020). Indicative findings from forthcoming ANROWS research led by Professor Marcia Langton show that imprisoned First Nations men are also affected by the misinterpretation of neurological conditions and mental health disorders. Addressing this issue may reduce the high rates of Aboriginal and Torres Strait Islander people in custody in general (Langton, Eastman, O'Neill, Cheesman, & Rose, in press).

## **Rehabilitation requires specifically designed programs**

Women's experiences/backgrounds and needs differ greatly from men's, but most prison programs are designed with a male prisoner in mind. Rehabilitation is less likely when there are limited trauma-informed programs in prisons specifically designed for Aboriginal and Torres Strait Islander women (Bevis et al., 2020; Blagg et al., 2020). Programs like the five-year-old Kunga Stopping Violence Program, which currently provides trauma-informed pre-and post-release support to Aboriginal and Torres Strait Islander women in the Alice Springs Correctional Centre, represent an opportunity for alternatives to custodial sentences (Bevis et al., 2020). There is a strong need for diversionary programs for First Nations women and, in particular, young women, so people who have already been brutalised by the system (through oppression and colonisation) are not further separated from their families and communities, and traumatised by incarceration (Bevis et al., 2020).

Post-release, Aboriginal and Torres Strait Islander women face additional barriers and risks, from the lack of alternative housing to a reluctance to seek help from authorities and other services (Bevis et al., 2020; Day, Casey, Gerace, Oster, & O'Kane, 2018). This can affect their vulnerability both to violence and to re-incarceration. Incarcerated Aboriginal and Torres Strait Islander women are twice as likely as non-Indigenous women to have been imprisoned previously, and have a higher risk of being re-imprisoned after release (Human Rights Law Centre & Change the Record Coalition, 2017). The strong intersection between homelessness/insecure housing and imprisonment, for example, drives the need for specific programs to support First Nations women upon release from prison. Studies have shown that First Nations women, particularly those with dependent children, are the least likely of any prison population to find appropriate accommodation upon release (ALRC, 2017; ANROWS, 2020). Research conducted into First Nations women released from prison in New South Wales and Victoria between 2001 and 2003 found that none of these women were able to find stable family accommodation, with half of the women remaining homeless nine months after their release (ALRC, 2017; ANROWS, 2020). Rehabilitation for First Nations women requires continuity of services, case management, pre-release planning and throughcare (continuous, coordinated and integrated management of offenders), including for those on remand (Bevis et al., 2020).

## **Incarcerating First Nations mothers has intergenerational impacts**

An estimated 80 percent of Aboriginal and Torres Strait Islander women in prisons are mothers (Sherwood & Kendall, 2013). Incarcerating First Nations mothers can potentially fracture the mother-child relationship (Perry, 2013). Incarcerating First Nations mothers can lead to children suffering emotional and behavioural impacts, as well as experiencing poor health, insecure housing and disrupted education, all of which heighten the risk of the young person entering child protection or justice systems (Bevis et al., 2020; Sherwood & Kendall, 2013), compounding the intergenerational effects of trauma.

The intergenerational impacts of incarceration are keenly felt by Aboriginal and Torres Strait Islander women. They cause distress during incarceration that compounds the existing impacts of incarceration:

One woman worried about the welfare of her three children who were unsupervised, living in a town camp in Alice Springs away from their home community where their extended family resided. She was anxious about their wellbeing, fearful the whole time she was in prison, worried and stressed for the wellbeing of her daughters. (Bevis et al., 2020, p. 38)

There is a strong need for sentencing to develop holistic approaches tailored to women's circumstances as both offenders and DFV victims/survivors that include culturally safe, trauma-informed, individualised solutions. Solutions for First Nations people need to be focused upon harms that extend beyond protecting the community from the perpetrator, and recognising the community harm done by the perpetrator's actions. They must also consider broader harms, like the long-term, cumulative, intergenerational effects of female Indigenous DFV victims/survivors and perpetrators being removed from their families and communities, and the impact their removal has on women's care-giving in their communities (Human Rights Law Centre & Change the Record Coalition, 2017). Whole-of-family approaches can also help to address the real fear and risk of child removal (Blagg et al., 2020). To achieve meaningful change to the rate of incarceration of First Nations women will require a whole-of-family and whole-of-community, trauma-informed approach to justice.

Offering alternatives to imprisonment based upon insights about the role of women in Indigenous communities is in line with National Outcome 3 of the [\*National Plan to Reduce Violence against Women and their Children 2010-2022 \(the National Plan\)\*](#): Indigenous communities are strengthened (Council of Australian Governments [COAG], 2011). It is also in line with Australia's National Priority Two, outlined in the [\*Fourth Action Plan\*](#) of the National Plan: support Aboriginal and Torres Strait Islander women and their children (COAG, 2019).

## **Misidentification plays a role in women's imprisonment**

Existing ANROWS research has established that an increasing issue that contributes to women's imprisonment is the misidentification of the predominant aggressor (Day et al., 2018; Bevis et al., 2020). As one study participant indicated:

The male judge who sentenced me spoke wrong way about me. He said I was really dangerous, not a responsible person, and not a responsible person for my children. He did not listen to my history and why I did things, I wouldn't just be violent for nothing. That judge should have listened to my story and given me help in prison—given me rehab and counselling. I am a young woman, and not a violent person until violence is done to me. (Quoted in Bevis et al., 2020, p.40)

Treating victims of violence as perpetrators undermines their confidence in the legal system, denies the victim/survivor appropriate support, and can make them less likely to report violence enacted against them in the future.

Evidence is also growing about the inappropriate and increasing use of domestic violence law against women who are victims of DFV and who use violence in resistive or retaliatory ways. This leads to cross-applications for domestic violence orders (DVOs) and cross-orders made by courts, particularly when the DVO is police-initiated (ANROWS, 2020). As Nancarrow (2019, p. 39) points out, “Cross-DVOs result from notions of mutual domestic violence, and victims are consequently re-victimised by the justice system, which inadvertently colludes with perpetrators in coercive control.” Cross-DVOs mean predominant aggressors can—as a form of systems abuse—call the police about the victim breaching their DVO. Cross-DVOs can also mean that if a woman subject to a DVO uses violence in resistive or retaliatory ways, she can be arrested—even if she was the one to initially contact the police for help because the perpetrator was breaching their DVO (Douglas & Fitzgerald, 2018). A breach of a DVO is a criminal offence, and women who are charged with breaches risk incarceration. In this way, the civil DVO system can enmesh First Nations women within the criminal legal system (Nancarrow as cited in Douglas & Fitzgerald, 2018).

Upcoming ANROWS research, “Accurately identifying the ‘person most in need of protection’ in domestic and family violence law”, will shed more light on systems abuse and coercive control by looking at the misidentification of the aggrieved and respondent in cases of domestic and family violence (Nancarrow, Thomas, Ringland, & Modini, in press). The mixed-method project conducted a national desktop review of relevant police and court policies and procedures, and a national comparison of quantitative data on the use of protection orders and DFV-related charges, by gender and Indigeneity. It also included an in-depth qualitative component examining the perspectives of police, magistrates, service providers and women with lived experience of being misidentified as perpetrators of domestic and family violence, to improve accurate identification of the person for whose protection a civil court order should be made. The research identifies strategies to improve police and court practice in regard to identifying the person most in need of protection. It is expected to be published in late October or early November 2020, following a three-week embargo period. In accordance with the agreement we have with our funders (the Commonwealth and all state and territory governments), the following results of this research are provided in confidence until the embargo is lifted.

Indicative findings of this research highlight that Aboriginal and Torres Strait Islander peoples are over-represented as respondents on DFV protection orders, and are also over-represented in charges for breaching DFV protection orders. From a policy standpoint, while all Australian jurisdictions have tools to assess risk, no jurisdiction currently has tools to help police to assess patterns of coercive control that would detect which party is the perpetrator, and which party is using violent resistance to ongoing abuse. Policing also tends to be incident-based and retrospective, rather than pattern-based and future-focused. This means that police often make fast assessments on who is the primary aggressor in a single incident, rather than



considering the pattern of behaviour carefully, and protecting the person most at risk of future harm (Nancarrow et al., in press, under embargo).

Contributing to the problem of misidentification of the primary aggressor is a pervasive lack of trust in women's reports of violence. With 42 percent of Australians agreeing that women commonly use false allegations as a way of getting back at men (Webster et al., 2018), not being believed is a significant issue for women reporting violence against themselves. Women who use violence may not conform to the male-defined, "ideal victim" stereotype of passive, submissive and chaste (Nancarrow, 2019). As gendered attitudes about distrusting women intersect with ongoing societal and systematic racism, First Nations women are particularly vulnerable to decisions based upon stereotypes about the use of violence, and what an "ideal victim" should look like (Nancarrow et al., in press, under embargo).

This research indicates there needs to be clear accountability for decision-making about whether a protection order should be applied for, or granted (Nancarrow et al., in press, under embargo). In the current system, police take out initial orders or make applications for orders, and defer to the court's expertise to make a decision on the appropriateness of the order. However, the court then tends to defer back to police when it comes to a final decision. Improvements could be made by undertaking a system audit to identify who has the capacity to make a careful assessment of whether a protection order is required. Legislation about identifying the person most in need of protection alone cannot fix these issues, nor can greater policy and procedure guidance for police and judicial officers. Both need to be supplemented with training and support that ensures police and judicial officers are resourced and skilled, with sufficient time and expertise to make accurate assessments to ensure that protection orders are necessary (Nancarrow et al., in press, under embargo).

## **Applying a social entrapment framework could help**

In 2017, the Australian Law Reform Commission recommended that "Indigenous Experience Reports" be prepared for Aboriginal and Torres Strait Islander offenders appearing for sentencing in superior courts (ALRC, 2017). Drawing upon the work of the Victorian Aboriginal Legal Service Co-operative Limited (VALS) who termed them "Aboriginal Community Justice Reports", these reports are a means of presenting information about the unique systemic and background factors that may have an impact on Aboriginal and Torres Strait Islander peoples being sentenced. Established in partnership with relevant Aboriginal and Torres Strait Islander organisations, the reports set out background information about the First Nations person, their family and community, including their experiences of systemic racism, to account for their social, cultural, emotional and physical needs.

This notion is supported by the ANROWS research report, *Innovative models in addressing violence against Indigenous women*, which discusses Gladue reports (Blagg et al., 2018). Mandated in some Canadian territories, Gladue reports are used in sentencing or when considering bail for Indigenous offenders. They require sentencing judges to consider systemic factors that may have brought the

particular offender before the courts, as well as all possible alternatives to imprisonment (Blagg et al., 2018). This research also highlights the need for court interventions (not just prison services) to be trauma-informed, with accompanying triage for disabilities, problematic use of alcohol and other drugs, trauma, housing and mental health (Blagg et al., 2018). However, evidence shows that understanding the accused's experiences of systemic racism when DFV is involved is important even before the matter reaches sentencing.

The need to understand the experiences of the accused earlier in the matter is demonstrated by a recent ANROWS study of a trial of a woman charged with killing her abusive husband (Tarrant, Tolmie, & Giudice, 2019). This research showed that outdated understandings of intimate partner violence (IPV) and coercive control can lead to a woman's use of defensive force being classed as "unreasonable", and therefore not self-defence (Tarrant et al., 2019). Without a realistic understanding of the safety options available to the woman, which are impacted by the broader structural inequities in her life, it was assumed that the accused failed to utilise other accessible and safe options to escape violence (Tarrant et al., 2019).

ANROWS research proposes that a way of rendering visible patterns of harmful behaviour is through the use of a social entrapment framework (Tarrant et al, 2019). A social entrapment analysis of IPV involves scrutiny at three levels:

1. documenting the full suite of coercive and controlling behaviours
2. examining the responses of family, community and agencies
3. examining structural inequities.

A social entrapment framework can help to integrate different evidence of disadvantage and barriers to help-seeking to better understand the actions of a person experiencing coercive control (Tarrant et al., 2019). This is critically important for women who fight back and aren't the "typical" or "ideal victim"—a group disproportionately made up of Aboriginal and Torres Strait Islander women (Douglas & Fitzgerald, 2018; Nancarrow, 2019). This ANROWS evidence has already informed new provisions (ss 37–39) in the Western Australian *Evidence Act 1906* via the *Family Violence Legislation Reform Act 2020* (WA) that gained assent on 9 July 2020.

## Recommendations

These recommendations are drawn from current ANROWS research evidence, indicative findings of future research, and our recent synthesis: *Women's imprisonment and domestic, family, and sexual violence: Research synthesis* (ANROWS, 2020).

- Recognise gendered differences when designing and implementing prison policies and programs, including post-prison support to reduce risk of re-incarceration (Day et al., 2017).
- Place more emphasis on whole-of-family and whole-of-community approaches to family violence interventions, including early intervention for teenagers, in recognition of the effects of

intergenerational trauma (Bevis et al., 2020). For First Nations women who have been incarcerated, this focus should facilitate reconnection with children upon release and support around parenting.

- Implement better screening and health coordination within the prison context, including screening for complex trauma, other mental health conditions, foetal alcohol spectrum disorder (FASD) and brain injuries (Bevis et al., 2020).
- Increase the supply of public housing for Aboriginal and Torres Strait Islander communities (Bevis et al., 2020).
- Include Aboriginal and Torres Strait Islander women with lived experience of imprisonment in service program governance, design and delivery, including through the use of participatory action research to drive pilot programs within community-driven organisations (Day et al., 2017; Bevis et al., 2020).
- Recognise the importance of continuity of services, case management, pre-release planning and throughcare. These services should be available to those on short sentences or on remand (Bevis et al., 2020).
- Develop and fund culturally relevant diversion and prison initiatives, such as the Kunga Stopping Violence Program and [the Miranda Project](#) (ANROWS, 2020; Bevis et al., 2020; Blagg et al., 2020; Day et al., 2017).
- Consider Gladue reports, or similar, to ensure systemic inequality and alternatives to imprisonment are considered in sentencing and bail applications for Indigenous offenders (Blagg et al., 2018).
- Ensure there is clear accountability for decision-making about whether a protection order should be applied for, or granted (Nancarrow et al., in press, under embargo).
- Supplement legislation, policy and procedures around identifying the person most in need of protection with training and support that ensures police and judicial officers have the skills and resources to make accurate assessments when applying for, and granting, protection orders (Nancarrow et al., in press, under embargo).
- Recognise the link between domestic, family and sexual violence and behaviours that lead to contact with the criminal justice system, particularly in judicial decision-making, including sentencing. This could be done, for example, by legislating the use of a social entrapment framework (Tarrant et al., 2020).

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