Incarceration Rates of Aboriginal and Torres Strait Islander Peoples

Legal Aid NSW submission to the Australian Law Reform Commission

September 2017

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Table of Contents

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are socially and economically disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 32 community legal centres and 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Practice and private practitioners. The Criminal Law Practice covers the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

The Prisoners Legal Service (**PLS**) provides representation in hearings at the State Parole Authority and reviews of segregation directions. The PLS also provides general legal advice and minor assistance to prisoners by way of a visiting advice service to most gaols and responding to letters and telephone calls from or on behalf of prisoners.

The Civil Law practice provides legal advice, minor assistance, duty and casework services to people through the Central Sydney office and 13 regional offices. Its Human Rights Group specialises in the areas of human rights, discrimination, false imprisonment and judicial review. Its Civil Law Service for Aboriginal Communities (**CLSAC**) provides dedicated civil law services to Aboriginal people across NSW through a regular presence in 18 rural and remote communities, a service to Aboriginal women at Silverwater Correctional Centre and a telephone advice line for Aboriginal clients. CLSAC provides advice and representation services as well as community legal education.

The Aboriginal Services Unit ensures that Legal Aid NSW responds to the legal needs of Aboriginal people in a culturally appropriate and comprehensive manner. It works in partnership with Aboriginal people and communities to identify their legal needs, provides legal education to communities and provides specialised cultural competency training for staff and key partners.

Legal Aid NSW welcomes the opportunity to make a submission to the Australian Law Reform Commission. We have drawn on the experience of lawyers working in each of the above areas in preparing this submission. Case studies have been de-identified to protect the confidentiality of clients. Should you require any further information, please contact:

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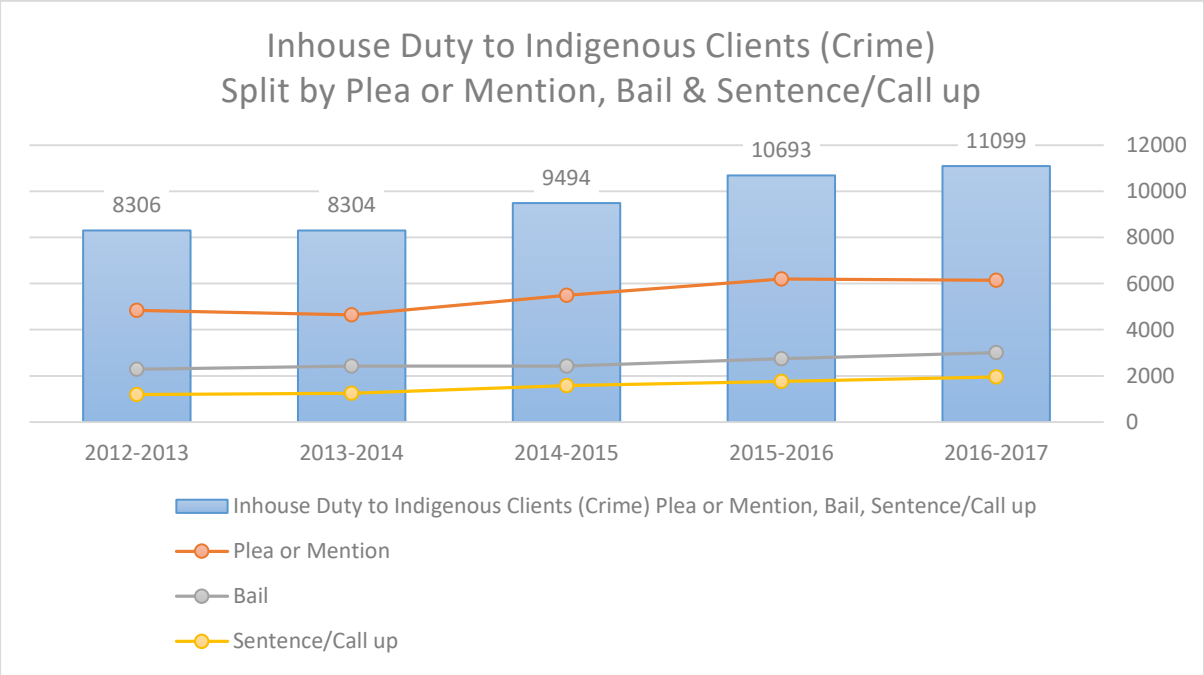
Introduction

Legal Aid NSW welcomes the opportunity to make a submission to the Australian Law Reform Commission's (**ALRC**) Discussion Paper, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*.

Legal Aid NSW has extensive experience providing legal assistance to Aboriginal clients. We recognise that the legal needs of Aboriginal people are often complex, encompassing not only criminal law, but also civil and family law and a range of social and cultural issues. Aboriginal people make up approximately 11.5 per cent of the clients in Legal Aid NSW's criminal law practice and the same proportion of our entire (criminal, civil and family law) practice. We work in close partnership with the Aboriginal Legal Service (NSW/ACT) (**the ALS**), in accordance with the organisations' joint Statement of Commitment. As indicated in Figure 1, the duty services provided by our in-house lawyers to Aboriginal and Torres Strait Islander clients have increased over the last 5 years by 33%.[1]

Figure 1: Legal Aid NSW service provision to Indigenous clients



The increased demand on Legal Aid NSW's criminal service by Aboriginal and Torres Strait Islander clients has occurred in the context of a reduction in funding of the ALS over recent years, and recent research indicating that increased rates of Indigenous

[1] From 8,306 to 11,099. This includes a 65 % increase in duty service for sentence / call up (from 1,182 to 1,950), and a 27 % increase in duty services for plea or mention: Atlas Report dated 25 August 2017

incarceration in NSW are due to changes in the criminal justice system response to offending, rather than any increased offending levels by Indigenous people.[2] An increasingly punitive approach to criminal justice in NSW is unlikely to reduce rates of Indigenous incarceration.

Legal Aid NSW considers that wholesale change is required in the culture and attitude of the criminal justice system. There must be a move away from punitive approaches that emphasise incarceration, monitoring and control, and towards healing and trauma-informed approaches that strive towards rehabilitation, reintegration and reconciliation. Criminal justice reforms should be undertaken in a broader legal framework which emphasises early intervention, access to justice by Indigenous people and the diversion of resources from imprisonment to investment in social supports that can help reduce crime and the number of people entering the prison system.[3] Indigenous communities and agencies should be resourced to effectively participate in all stages of the criminal justice process, consistent with their rights to access to justice and non-discriminatory treatment before the law.[4]

The following submission responds to the questions and proposals in the Discussion Paper. At the outset, we note that the link between child protection, out-of-home care (**OoHC**) and juvenile and adult incarceration is well established. While Legal Aid NSW agrees with the ALRC's suggestion of a national review of the laws and processes operating within the care and protection systems of the states and territories[5] we would urge the present inquiry to consider the potential impact of any of its ultimate recommendations on young Indigenous people.

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[2] Don Weatherburn and Jessie Holmes *Indigenous imprisonment in NSW: a closer look at the trend* (2017) BOCSAR Crime and Justice Statistics Issue paper No. 126. This research notes that the increase in Indigenous imprisonment between 2012 and 2016 is a result of: (1) an increase in the number of Indigenous defendants charged with criminal offences, especially those in the categories of stalking/intimidation, breaching a section 9 bond and breaching a section 12 bond; (2) an increase in the proportion of convicted Indigenous offenders receiving a prison sentence for the offence of stalking/intimidation; and (3) an increase in the length of time being spent on remand by Indigenous defendants refused bail, in large part because of a growth in court delay in the NSW District Criminal Court.

[3] Legal Aid NSW's submission to the Finance and Public Administration Reference Committee Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services (2015). In 2008, Legal Aid NSW commissioned the first state-wide, Aboriginal-specific assessment of non-criminal legal need. The *Report into the Civil and Family Law Needs of Aboriginal People in NSW* identified priority areas of civil and family law need in Aboriginal communities including child protection, housing, consumer rights, credit and debt, discrimination, social security and employment law. The Report also highlighted how multiple legal problems can occur at the same time and escalate, including into the criminal jurisdiction. The high levels of unmet civil law needs in Aboriginal communities have also been identified by work of the NSW Law and Justice Foundation and the Productivity Commission.

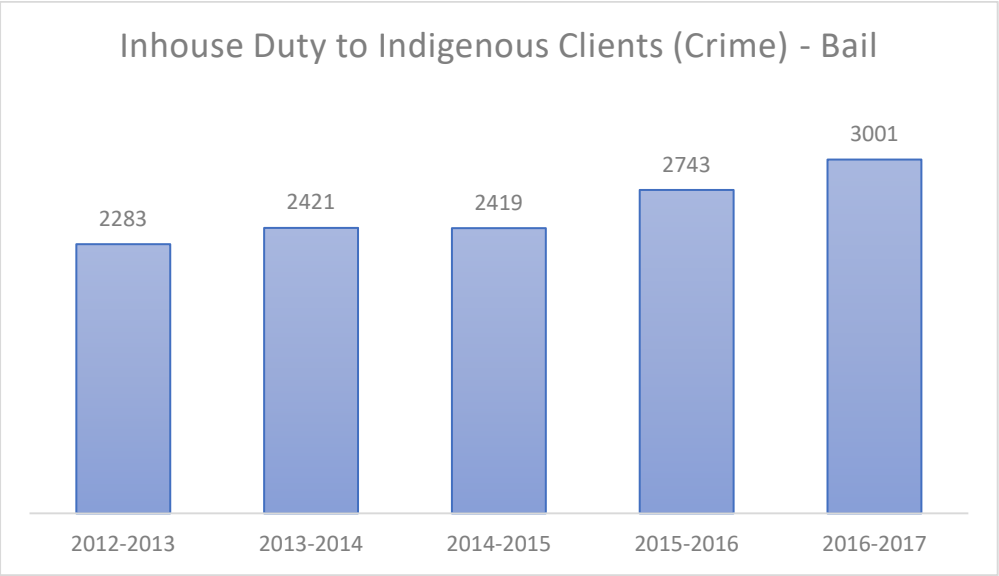
[4] Reflected in the United Nations Declaration on the Rights of Indigenous Peoples. Article 40 provides that Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.

[5] ALRC *Incarceration rates of Aboriginal and Torres Strait Islander Peoples (*2017) DP 84 [1.24]

Chapter 2 Bail and the remand population

As indicated in Figure 2, services provided by Legal Aid NSW lawyers to Aboriginal clients in bail matters have increased in the last five years by 31 per cent.[6]

Figure 2: *Legal Aid NSW service provision to Aboriginal and Torres Strait Islander clients*



Legal Aid NSW considers that significant reductions to the Indigenous remand population could be made by:

- reforms to the Bail Act 2013 (NSW) (**Bail Act**) to ensure that bail decisions are based on the risk of failing to appear or reoffending, rather than on the offence with which the person has been charged (the 'show cause' provisions) are discussed further below)

- removing or limiting the prohibition on multiple release applications under section 74 of the Bail Act

- reducing the frequency of arrest and remand for trivial breaches of bail conditions (discussed further below)

[6] From 2,283 in 2012-13 to 3,001 in 2016-17

- increasing the availability of bail hostels and rehabilitation options in both city and regional areas (discussed further below in response to Proposal 2–2), and

- reducing the time spent on remand by reducing court delays.[7]

Show cause provisions

Legal Aid NSW supports amendments to the Bail Act to restore discretion to judicial officers to grant bail in appropriate circumstances.

Currently the 'show cause' provisions in sections 16A and 16B of the Bail Act require a person accused of certain offences to show cause why his or her detention is not justified. This amounts to a reversal of the onus of proof[8] and is contrary to the presumption of innocence. The practical effect of this is that the show cause provisions apply when a person is charged with a 'serious indictable offence' while on bail or parole. The definition of serious indictable offence is very broad. It includes any offence punishable by five years or more, including larceny, damage property, stalk/intimidate and stealing a motor vehicle. This means that an Indigenous person bailed for a minor offence, if subsequently charged with stealing from a shop, will be bail refused unless they can rebut the presumption against bail. Despite BOCSAR research indicating otherwise,[9] our solicitors have observed an increased rate of bail refusals since the 'show case' provisions commenced in January 2015, particularly in certain courts. In our experience, the show case provisions of the Bail Act have undone any benefits that were achieved under the risk assessment based scheme recommended by the NSW Law Reform Commission in 2012.[10]

Legal Aid NSW considers that judicial officers should be required to take a consistent approach in relation to all bail applications: there should be a presumption in favour of liberty, and an accused person should be released if, after an assessment of any bail concerns, there are no unacceptable risks of the person failing to appear, committing a serious offence, endangering others or interfering with witnesses or evidence, or if those risks can be addressed by the imposition of bail conditions.

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[7] In 2015, BOCSAR reported that between 2007 and 2014 trial delay in the NSW District Criminal Court increased by 44% for those on remand. This meant an average of 300 days between committal for trial and case finalisation for people on remand: Don Weatherburn and Jacqueline Fitzgerald, *Trial court delay and the NSW District Criminal Court* (2015) BOCSAR Crime and Justice Bulletin no. 184

[8] Bail Amendment Bill 2014, Second Reading Speech, The Hon Brad Hazzard MP, Attorney General, 13 August 2014

[9] A BOCSAR study found that the new Bail Act and the show cause provisions (combined) did not have an effect on the proportion of all defendants refused bail: Thorburn, H. (2016) *A follow-up on the impact of the Bail Act 2013 (NSW) on trends in bail* (Bureau Brief No. 116). Sydney: NSW Bureau of Crime Statistics and Research

[10] Available at http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-133.pdf

Limits on multiple applications for bail

Legal Aid NSW is concerned that section 74 of the Bail Act, which limits multiple applications for bail for the same offence (with limited exceptions) contributes to unnecessary and lengthy remand periods for Aboriginal accused. When the equivalent provision was introduced into the Bail Act in 2007, there was a significant increase in the time young people spent on remand.[11] Legal Aid NSW is concerned that section 74 creates an incentive for an accused to postpone their first (and likely only) bail application to maximise the chances of release. The provision also means that if the court identifies a problem in a bail application and refuses bail, there is limited opportunity to cure the deficiency in a subsequent application.[12]

There is a limited exception to the restriction on multiple applications in respect of young people, but only where the previous application was made on a first appearance. Legal Aid NSW submits that the Bail Act should require the court to refuse to hear applications that are frivolous and vexatious, but should otherwise provide the court with broad discretion to hear repeat applications. In the alternative, section 74 should only apply when the court has already heard two applications.[13]

A statutory requirement to consider issues arising due to Aboriginality

Proposal 2–1 The *Bail Act 1977* (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the *Bail Act*.

Other state and territory bail legislation should adopt similar provisions.

Legal Aid NSW supports this proposal. Currently the Bail Act requires bail authorities to consider 'any special vulnerability or needs the person has including being an Aboriginal or Torres Strait Islander person'.[14] In our experience, this section is generally not relied on by lower courts in NSW to grant bail.[15] The provision does not adequately ensure that a person's cultural background, ties to family and place, and cultural obligations are taken into account when bail is determined.

[11] NSW Law Reform Commission *Bail* (2012) [19.17]. Statistics are not available regarding the impact of the provision on adults.
[12] NSW Law Reform Commission *Bail* (2012) [19.18]
[13] As recommended by the NSW Law Reform Commission *Bail* (2012) Recommendation 19.1
[14] Section 18(1)(k)
[15] Note however two decisions of the Supreme Court of NSW where initial decisions to refuse bail have been overturned, including by reference to the defendant's Aboriginality: *R v Alchin,* NSWSC, McCallum J, 16 February 2015 and *R v Wright*, NSWSC, Rothman J, 7 April 2015

Bail conditions that do not take into account such factors can mean that an Aboriginal person is unable to comply with both the bail conditions and their cultural obligations. For example, bail conditions often fail to take into account the mobility of Aboriginal people, who are likely to have family connections in more than one town.

Non-association orders can be especially problematic for Aboriginal people, because of the importance of extended family in Aboriginal culture. These orders can restrict contact with family networks, preventing Aboriginal people from maintaining relationships, performing responsibilities to family members, or attending funerals.[16] Breach of conditions can lead to arrest and revocation of bail, and will be considered in any future consideration of bail.[17]

Bail conditions should address risk

Legal Aid NSW is concerned that defendants are burdened with onerous bail obligations that do not directly address their risk of reoffending or failing to appear. Section 20A of the Bail Act provides that a bail condition may only be imposed if it is, among other factors:

- reasonably necessary to address a bail concern,
- appropriate,
- no more onerous than necessary to address the bail concern, and
- reasonably practicable for the accused person to comply with the condition.

However, our solicitors observe that courts impose bail conditions such as curfews, place restrictions and daily reporting requirements in circumstances where the conditions do not appear to address specific bail concerns. Some magistrates impose sureties in the absence of demonstrated concerns that the defendant will fail to appear. Compliance with bail conditions can be vigorously monitored by police, with the result that people are breached and remanded for behaviour that is unrelated to any risk of reoffending. The case studies of Edward and Donna below highlight our concerns about this approach to monitoring of bail conditions of vulnerable defendants.

Services that mitigate bail risks

Proposal 2–2 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.

[16] NSW Law Reform Commission *Bail* (2012) [11.54]
[17] *Bail Act 2013* (NSW) s 18(1)(f)

Legal Aid NSW supports this proposal. Significant reductions in the number of Aboriginal people held on remand could be achieved by making culturally appropriate bail support services, such as bail hostels and rehabilitation beds, available throughout the state. We list some of the diversionary options available to Aboriginal people in our answer to Question 11–1. These services are not able to meet the demand, and further investment is required.

The recently launched 'Make a Plan' initiative in New South Wales allows defendants who are subject to an Apprehended Domestic Violence Order (**ADVO**) to meet with an Aboriginal Client and Community Support Officer to develop a tailored strategy to comply with their ADVO.[18] They will be offered SMS reminders to help them stay on track and a follow-up call to check on their progress. This service will be particularly helpful for those whose literacy problems or cognitive disability means that they may not remember or understand the conditions of their ADVO. It is an example of a program that relies on support, rather than surveillance, to prevent an individual's further contact with the criminal justice system. Such an approach could be replicated with regard to conditions on bail and other court orders.

Services to remanded inmates

Bail support services not only create opportunities to avoid remand and reduce incarceration, but also create valuable opportunities for accused people to address addictions and other problems while their motivation is high. However, there are too many barriers to accessing treatment services. There is insufficient capacity in the services, meaning long wait times, and there are a variety of administrative barriers**.**

In NSW, such barriers include the Corrective Services NSW's policy limiting access for remanded prisoners to assessment for community based drug and alcohol programs. In 2016 Corrective Services NSW changed its policy so that assessment reports for residential rehabilitation programs can now only be undertaken following a guilty plea to assist in identifying sentencing options, or where the inmate has been remanded for the purpose of a Supreme Court bail determination.

The current policy significantly reduces the ability of inmates to access appropriate treatment in a residential rehabilitation program. Practical issues arise where an accused tries on their own to be assessed for a program. In the experience of Legal Aid NSW solicitors, an accused who has an initial phone assessment and is then required to provide further information to the rehabilitation facility such as criminal history report may not be helped by Services and Program Officers. This results in the accused automatically being found unsuitable. They may also be required to phone the facility each week to maintain

[18] The Hon Mark Speakman MP, Attorney General, the Hon Pru Goward MP, Minister for Prevention of Domestic Violence and Sexual Assault, the Hon Adrian Piccoli MP, *'World first' project to reduce impact of domestic violence in Aboriginal communities* Media release, 16 August 2017

their place on a waiting list. The cost alone of such calls may be prohibitive for some accused. The following case study illustrates these issues:

Case Study: Graeme

Legal Aid NSW acted for Graeme, an Indigenous man with long-term drug and alcohol dependence. He was charged with a number of offences related to domestic violence in August 2016. He was bail refused and pleaded guilty to the charges at his first appearance in the Local Court. A court-ordered drug and alcohol assessment identified Graeme as suitable for a long term residential rehabilitation program. He was accepted into a facility, but with an expected wait time of approximately six weeks. Graeme was told he must call the facility three times a week between 10am and 4pm to maintain his position on the waiting list.

By November 2016, Graeme had run out of jail money and was unable to keep calling the facility three times a week. During that time, his brother committed suicide, and Graeme was refused leave by Corrective Services NSW to go to the funeral. He only called the facility once a week, and so lost his place on the program. At his solicitor's request he was placed back on the waiting list, but at the bottom of the list and with an expected wait time of more than three months. A further bail application was refused. By December 2016 Graeme had progressed to the top half of the list. By the end of January 2017 however, he gave up trying to get into the program and proceeded to be sentenced. While the sentence he received was backdated, he had spent 5 months on remand with no access to a much needed rehabilitation program.

Legal Aid NSW submits that such barriers could be addressed through:

- revising the current Corrective Services NSW's policy with respect to alcohol and drug rehabilitation assessments reports
- the re-introduction of dedicated alcohol and drug workers in prisons
- measures to facilitate access by Legal Aid NSW staff and rehabilitation service providers to prisoners on remand to assist with assessment processes, and
- the establishment of a free call service to rehabilitation providers.

Policing bail conditions

Legal Aid NSW agrees with the observation in the Discussion Paper that there is a need for balance between surveillance and engagement in respect of enforcement of bail conditions.[19] We provide the following examples where we consider police discretion could have been exercised differently:

Case Study: Edward

Edward is an Aboriginal young person in care of the Minister, and a client of Legal Aid NSW. He was granted bail on the condition that he reside with SK. There was no enforcement condition. In the next two weeks, police did 14 'bail compliance checks' at SK's home. SK repeatedly asked police not to come at night.

Edward was taken into custody on an unrelated charge, and granted bail three months later. New bail conditions included a curfew of 8pm to 6am, and the following enforcement condition:

'You are to go to the front door of your home at [time specified] for a curfew check if told to do so by a police officer, between the hours of 8pm and 10pm, no more than 1 time per day and/or not more than 3 times per week.'

Police conducted one bail compliance check outside of the enforcement condition hours on 4 November 2015 at 1:25am. Legal Aid NSW then sent a letter to police advising that any implied licence for NSW Police to enter to do curfew checks outside the terms of the enforcement condition is revoked. Police did not attend after that.

Case Study: Donna

Legal Aid NSW received an inquiry from a worker at a support service whose client, Donna, was an Aboriginal woman whose bail condition required her to live at a particular address. Donna was experiencing domestic violence at this address and spoke to police about her intention to live elsewhere. The police officer she spoke to said she would be arrested if she breached her residence condition.

[19] At [2.70]

Bail and young indigenous people

Legal Aid NSW suggests that the impact of bail laws on young Indigenous people should be considered as part of this inquiry in light of the potential consequences of a young person breaching bail.

The Legal Aid NSW Children's Legal Service (**CLS**) is concerned about the policing of bail conditions, particularly where people with largely minor previous offences are targeted. In the experience of CLS solicitors, children are often released on bail subject to onerous conditions such as curfews, requirements to be in the company of a parent, requirements to follow the directions of a parent, and place restrictions. Because of the stringency of such conditions, the likelihood they will be breached is increased. Bail conditions that require an Indigenous young person to live with a parent may fail to recognise kinship relationships and the way childcare is shared among relatives. The young person may be breached if police do a curfew check and the person is at the home of a grandmother, aunt or uncle rather than with the parent.

In our experience, bail compliance checks in relation to young people have increased in the last ten years. As a result, the CLS has witnessed a dramatic increase in the number of bail breach matters coming before the Children's Court. The criminalisation of children's problematic behaviour in this way exposes them to the adult criminal justice system and reduces their chances of being granted bail in the future.

The CLS has found the problem of welfare-based bail conditions to be particularly acute for children who are in out-of-home care (**OoHC**). Young people with cognitive or mental health impairments are more likely to be placed in care as a consequence of the problematic behaviour resulting from their impairment. In this context, the police and the justice system are increasingly being relied upon in lieu of adequate behaviour management, especially in relation to children with complex needs. For example, a common bail condition imposed on children in OoOH is the condition to 'obey the directions of carer'. As a result, the CLS regularly sees children who are reported to the police for breaching bail by carers and being subsequently arrested for demonstrating the type of behaviour that, if they were living in a functioning family environment, one might expect would be dealt with without police intervention. We address this issue further below in the context of the use of ADVOs in respect of children in OoHC.

Chapter 3 Sentencing and Aboriginality

A statutory requirement to consider systemic and background factors

Question 3–1 Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders? If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

Legal Aid NSW considers that courts should be expressly required to pay particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders. We agree with the suggestion of the ALS that this should be by way of an amendment to the factors that the court is already required to take into account in section 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (**CSPA**). The ALS has proposed the following as a factor that a sentencing court should take into account:

> *the character, general background (with particular attention to the circumstances of Aboriginal offenders), offending history, age, physical and mental condition of the offender (including any cognitive or mental health impairment)*.[20]

Legal Aid NSW considers that, the phrase 'with particular attention to the circumstances of Aboriginal offenders' could, and should, be interpreted in a way that is consistent with individualised justice and the High Court's reasoning in *R v Bugmy*.[21] Specialist sentencing reports that place the offender's situation in its historical and cultural context, including colonisation, dispossession, loss of language, and the impact of the stolen generations, would be valuable in ensuring that all relevant information regarding a particular offender is before the court.

Reparation or restoration as a sentencing principle

Question 3–2 Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?

[20] NSW Law Reform Commission *Sentencing* (2012) [17.18]. The NSW Law Reform Commission gave some support to this approach in its Recommendation 17.1.
[21] *Bugmy v R* [2013] HCA 37 [36]

Legal Aid NSW considers that reparation should not be regarded as one of the purposes of sentencing. It is already a factor to be taken into account under section 21A(3)(i) of the CSPA. In addition, the *Victims Rights and Support Act 2013* (NSW) provides for compensation to victims and restitution from offenders independently of the court sentencing process. The introduction of reparation as a purpose of the CSPA may affect the already established mechanism of the Victims Compensation Tribunal and may lead to the offender being punished twice in relation to the same conduct.

Making information available to courts

Question 3–3 Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?

Question 3–4 In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?

Question 3–5 How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?

As noted in response to Question 3–1, Legal Aid NSW supports the proposal for specialist sentencing reports regarding cultural and historical factors assist to provide relevant information to the court that relate to offenders and their communities. We support the development of the 'Bugmy Evidence Library' by the ALS. We consider that, as far as practicable, these reports should be developed by Indigenous organisations and communities, with support from other agencies and Government.

Chapter 4 Sentencing options

Mandatory or presumptive sentences

Question 4–1 Noting the incarceration rates of Aboriginal and Torres Strait Islander people:

(a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and

(b) which provisions should be prioritised for review?

Mandatory sentences

Legal Aid NSW agrees that provisions imposing mandatory or presumptive sentences should be reviewed. In New South Wales, these include removing mandatory penalties of driving licence disqualification for certain traffic offences. As the Discussion Paper notes at [6.75], mandatory disqualification provisions have a disproportionate impact on Aboriginal people, who often live in areas with poor public transport and where there are few licensed drivers.[22] In New South Wales, the driver licence disqualification framework has contributed to the over-representation of Aboriginal people in the criminal justice system, with more than 14 per cent of those sentenced and almost a third of those imprisoned for unauthorised driving identifying as Aboriginal.[23] We welcome the recent introduction of legislation reforming driver disqualification laws in NSW to enable courts to consider the early lifting of lengthy disqualification periods after a minimum of two to four years (depending on the circumstances of their case).[24] The reforms will also provide for automatic and minimum disqualification periods rather than mandatory disqualification periods. This will allow a court to consider the individual circumstances of each case when deciding the outcome.[25]

[22] A study conducted by the ALS found that of 264 Aboriginal clients charged with drive while disqualified and sentenced between 2006 and 2012, 46 per cent were given a sentence of imprisonment, while for all people convicted in New South Wales between April 2008 and March 2012, only 15% were imprisoned: Aboriginal Legal Service (NSW/ACT) *Drive while disqualified: sentencing in the Dubbo region of NSW 2006-2012*, 2012

[23] The Hon Mark Speakman, Attorney General, Second Reading Speech to the Road Transport Amendment (Driver Licence Disqualification) Bill 2017

[24] Details of the reforms are available here: http://www.justice.nsw.gov.au/Pages/Reforms/driver-licence-disqualification.aspx.

[25] See Road Transport Amendment (Driver Licence Disqualification) Bill 2017, introduced 12 September 2017

Legal Aid NSW also refers to its recent submission to the NSW Government's Statutory Review of the "one punch laws" in the *Crimes Act 1900* (NSW), in which we argued that mandatory penalties are particularly inappropriate for manslaughter offences.[26]

Presumptions in sentencing

Legal Aid NSW considers that presumptions in sentencing unnecessarily fetter judicial discretion, and interfere with the capacity of the courts to impose appropriate sentences that are tailored to the objective facts and subjective features of the case. In particular, we are opposed to presumptions against the use of certain sentencing options when a person is convicted of certain offence categories. Such presumptions interfere with the capacity of the courts to impose an appropriate penalty in the individual circumstances of a case, and but can have a disproportionate impact on Aboriginal offenders. Depending on an offender's criminal history, legislative presumptions and exclusions can operate to effectively require a sentencing court to impose full time imprisonment.

In this context, Legal Aid NSW is concerned about the proposed expansion of the list of offences which will preclude an offender from being sentenced to an Intensive Correction Order (**ICO**) under Division 2 of Part 5 of the CSPA.[27]

Short sentences

Question 4–2 Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?

Question 4–3 If short sentences of imprisonment were to be abolished, what should be the threshold (eg, three months; six months)?

Question 4–4 Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?

Legal Aid NSW notes the findings of a NSW Bureau of Crime Statistics and Research (**BOCSAR**) 2002 study that short term sentences (that is, terms of 6 months or less):

[26]Available at http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0016/26134/Legal-Aid-NSW-Submission-to-Statutory-Review-of-ss25A-and-25B-of-the-Crimes-Act.pdf

[27]A summary of the excluded offences is available here: http://www.justice.nsw.gov.au/Documents/Reforms/sentencing-factsheet.pdf. See also Legal Aid NSW's submission to the NSW Sentencing Council's *Statutory Review of Intensive Correction Orders* December 2015, 6

- impact disproportionately on Aboriginal and Torres Strait Islander offenders. Approximately 20 per cent of those serving short prison sentences are Aboriginal or Torres Strait Islander;
- if abolished, would reduce the Indigenous prisoner population by approximately 13 per cent (between 12% and 15%).[28]

More recent research by BOCSAR has found that the number of Indigenous offenders receiving a prison sentence could be reduced by more than 500 a year if half of those offenders currently given a short prison sentence for assault, assault occasioning actual bodily harm and justice procedure offences, were instead placed on an Intensive Correction Order or Home Detention. [29]

Notwithstanding these statistics, this issue is a complex one. It should not be approached without considering evidence that in New South Wales, community based sentences of home detention and ICOs are in fact rarely, if ever, used for Indigenous offenders convicted of the very offences that explain recent increases in Indigenous incarceration rates in this jurisdiction.[30] The NSW Government has recently announced reforms to abolish home detention, suspended sentences and community service orders. If steps are not taken to ensure ICOs and other remaining community based sentences are available to indigenous offenders, including those in regional and remote NSW, Legal Aid NSW is concerned that the objectives of any legislative reform in respect of short sentences would be subverted. If that were the case, a court may be compelled to impose longer prison terms.

On balance, Legal Aid NSW considers that consideration should be given to introducing a legislative presumption in favour of sentences of under 6 months being served in the community, subject to evaluation and monitoring of the pending sentencing reforms in NSW and once targets for Indigenous participation in community based programs pursuant to sentences have been formulated and achieved. Without these measures, abolition or reform of short sentences in NSW would be premature.

[28] NSW Bureau of Crime Statistics and Research, *The impact of abolishing short term prison sentences* (2002) Crime and Justice Bulletin no. 73

[29] Weatherburn, D. & Holmes, J. (2017) *Indigenous imprisonment in NSW: A closer look at the trend* (Bureau Brief No. 126) Sydney: NSW Bureau of Crime Statistics and Research

[30] That is: assault causing actual bodily harm, Intimidation/ Stalking, Common Assault, Breaching a section 12 Bond, Breaching an AVO and Breaching a section 9 Bond. In 2015 no Indigenous offender convicted of any of these offences received a home detention order and with one exception, less than two per cent received an ICO.

Community based sentences

Proposal 4–1 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.

Legal Aid NSW supports this proposal. We welcome the recent announcement, as part of sentencing reforms in NSW, of additional funding for Correctives NSW to provide increased supervision for offenders in the community. While measures to increase community based interventions are welcomed, they should focus on rehabilitation and reintegration, rather than monitoring and control. Flexibility and the exercise of discretion not to formally breach an offender who is serving a community based order will be crucial if these reforms are to reduce rates of Indigenous incarceration: in our view a significant number of mandatory core conditions of ICOs are onerous and arguably set participants up for failure. Some of our Indigenous clients are illiterate or semi-literate and live quite unstructured lives, which makes adhering to these onerous conditions even more difficult. Legal Aid NSW is concerned that the onerous conditions available in respect of ICOs, coupled with the strict approach to supervision and breaches, has the potential to undermine the overall objectives of community based sentencing.

Question 4–5 Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?

Yes. In the context of this question, Legal Aid NSW is concerned about the proposed abolition of suspended sentences, home detention orders and community services orders in NSW. Particularly in rural and regional areas, where community-based sentences are often not available, suspended sentences have provided an alternative to imprisonment of Indigenous offenders.

Chapter 5 Prison programs, parole and unsupervised release

The rate of return to prison of offenders released from custody is higher in NSW than all other jurisdictions except the Northern Territory.[31] As noted by BOCSAR's Don Weatherburn:

- the vast majority (81 per cent) of Indigenous offenders in prison have been previously imprisoned,
- a fixed percentage reduction in the rate of return to prison can be shown to produce a much larger reduction in the rate of imprisonment than the same percentage reduction in the number entering prison for the first time,
- a 20 per cent reduction in the rate of re-imprisonment of Indigenous offenders would reduce the NSW Indigenous prison population by 600.[32]

Bearing these statistics in mind, Legal Aid NSW considers that significant reductions in reoffending and incarceration rates of Indigenous prisoners in NSW could be achieved by:

- Additional resourcing of therapeutic prisons programs throughout NSW prisons,
- making evidence-based and culturally appropriate prison programs available to people held on remand,
- the establishment of targets for participation of Indigenous offenders in both mainstream and specialist prison programs proportionate to Indigenous imprisonment rates,
- expanding the Community Offender Support Programme (**COSP**) to enable culturally suitable supported accommodation and programs to be established beyond the Sydney metropolitan area, and

[31]NSW Parliamentary Research Service *Reducing adult reoffending* Briefing Paper No 2/2015 (available at: https://www.parliament.nsw.gov.au/researchpapers/Documents/reducing-adult-reoffending/Reducing%20adult%20reoffending.pdf), Page 5

[32] *Disadvantage, disempowerment and Indigenous Over-representation in Prison* Paper presented to the Children's Court Section 16 Meeting, October 2014

- establishing throughcare and transitional programs (for example, modelled on the North Australian Aboriginal Justice Agency's Throughcare Project) directed to both offending behaviour and underlying needs of offenders, in particular housing.[33]

We address each of these suggestions in the following section. At the outset, we note the Terms of Reference of the ALRC Inquiry do not extend to consideration of juvenile detention. We note that concerns arose in 2016 in NSW in relation to a behaviour change program operated by Juvenile Justice NSW. We refer to our recent submission on this issue to the Australian Human Rights Commission.[34]

Prison programs

Proposal 5–1 Prison programs should be developed and made available to accused people held on remand and people serving short sentences.

Legal Aid NSW agrees that prison programs should be available to people on remand and serving short sentences. Short periods of custody are valuable opportunities to assist people to address drug and alcohol addictions, to learn life skills and to address literacy and numeracy problems.

In the experience of Legal Aid NSW solicitors, inmates on remand are willing to participate in programs relevant to offending even prior to a plea or finding of guilty. Their participation in such programs can be put forward to a sentencing court as evidence of an offender's willingness to address their offending behaviour and likely good prospects of rehabilitation. However, as previously noted, there are both practical and policy-based barriers to accessing such programs.

For example, while custodial employment may be available, the EQUIPS Domestic Abuse Program and the EQUIPS Addiction program are the only programs relevant to offending of which we are aware that are available to inmates on remand. It is hoped that the newly developed High Intensity Program Units in NSW will provide a holistic custodial environment in which inmates serving short sentences are able to work, address their offending behaviour and prepare for release. We welcome the recent announcement that two such units will focus on the specific needs of Aboriginal and Torres Strait Islander women.[35]

[33] NAAJA has prison-based support workers helping offenders with parole, and community based case managers who help offenders get ready to leave prison and support them in the community.
[34] Legal Aid NSW submission to the Australian Human Rights Commission, *OPCAT in Australia: Consultation Paper* (2017) http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0007/27385/OPCAT-in-Australia-Legal-Aid-NSW-submission-to-AHRC-final.pdf
[35] See: The Hon David Elliott, Minister for Corrections, *Investment in reducing Adult Reoffending* Media Release 23 June 2017

Legal Aid NSW also submits that educational programs should be offered to all inmates, regardless of their remand status. We are concerned that moves towards the privatisation of Corrective Services NSW's educational programs in 2016 will further limit access to education for Indigenous inmates. The Legal Aid NSW Prisoners Legal Service (**PLS**) often hears from remandees who do not have access to education (or even a library) in certain correctional centres. Given the poor rates of literacy among inmates, particularly Aboriginal and Torres Strait Islander inmates, the Intensive Learning Centres available in some NSW correctional centres should be expanded.

We also consider there is a need for improved pre-release case management for prisoners on short sentences. The PLS often speaks to inmates who are serving short sentences[36] with a parole period who do not speak with Community Corrections until very close to their "automatic" release date. In some cases, this may be only a few weeks before their earliest possible release date. The absence of post-release planning for these inmates is particularly concerning where they are referred to short-term temporary accommodation upon release.

Question 5–1 What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander peoples held on remand or serving short sentences of imprisonment?

At the outset, Legal Aid NSW acknowledges the observation in the Discussion Paper that evidence of the effectiveness of Indigenous-specific diversionary programs in reducing rates of recidivism is currently lacking.[37] By contrast, therapeutic prison programs including drug interventions and the use of cognitive behaviour therapy, have demonstrated positive impacts on re-offending rates.[38]

In our view, measures are urgently required to address the limited availability of mainstream programs for all prisoners, as well as specialised programs for Indigenous prisoners, who suffer from significantly higher rates of mental and cognitive disability than non-Indigenous prisoners.[39]

The dearth of available programs has been confirmed by a recent audit of therapeutic programs in prisons undertaken by the Audit Office of NSW (**the Auditor's Report**) which has found that:

[36] That is, less than three years
[37] At [5.15], citing COAG's 2016 *Prison to Work report*
[38] L Roth *Reducing adult reoffending* NSW Parliamentary Research Office Briefing Paper No 2/201, 13
[39] Baldry, E., McCausland, R., Dowse, L. and McEntyre, E. 2015 *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. UNSW, Sydney. https://www.mhdcd.unsw.edu.au/

- 75 per cent of prisoners who needed programs did not complete them before their earliest parole release date

- Program resourcing at the prison level is inadequate to meet increased demand

- The mix of available programs may be out of step with the needs of some prisoners

- Corrective Services NSW does not collect robust and comparable information on program quality and outcomes

- Corrective Services NSW has not systematically evaluated its therapeutic programs to confirm they are effective in reducing reoffending.[40]

The Auditor's Report observed that the 20 per cent increase in the NSW prison population between 2011–12 and 2015–16 has placed a significant strain on resources. While more programs are being delivered, the overall proportion of prisoners receiving them before release has not. Prisoner case management is not performed in a timely and consistent way, resulting in prisoners missing opportunities to be referred to programs, particularly if they have shorter sentences.[41]

The Auditor's Report recommended that Corrective Services NSW:

- Implement a systematic approach to the use of convictions, sentencing and case management data to ensure that gaps in program offerings can be identified and addressed;

- Clearly establish program delivery staff resourcing benchmarks, based on individual prison profiles, that would meet demand and ensure prisoners receive timely assessments, comprehensive case management and relevant programs before the earliest date they can be released;

- Establish consistent program quality and outcomes performance indicators at the prison-level, and monitor and respond to these quarterly;

- Develop and implement a detailed forward program of independent evaluations for all prison-based therapeutic programs.

Legal Aid NSW supports these recommendations and urges the ALRC to consider them in its present inquiry. We also suggest that consideration be given to the introduction of

[40] Audit Office NSW *Therapeutic Programs in Prisons* (May 2017)
[41] For example, the Auditor's Report found that 27 per cent of prisoners with more than six months to serve had not completed an assessment required to determine eligibility for an EQUIPS program in the past four years.

targets, or quotas, for Correctives NSW to ensure the number of places in programs available to Indigenous prisoners is commensurate with Indigenous incarceration rates. A necessary pre-requisite to expansion of prison programs is an increase in appropriately trained staff, including psychologists, to run programs. Consideration should also be given to the impact on recidivism of Indigenous specific programs.[42]

Whether introduced as part of mainstream or specialist programs, best practice elements of programs that could respond to Aboriginal and Torres Strait Islander prisoners held on remand or serving short sentences of imprisonment would entail:

- the consistent involvement of local Aboriginal and Torres Strait Islander representatives and organisations in the delivery of programs, to enable relevant and culturally appropriate avenues for post-release support to be identified;

- a holistic approach, based on the program for sentenced inmates run by the Bolwara Transitional Centre;

- adoption of a trauma-informed approach. This would particularly benefit Indigenous prisoners, many of whom are members, or are descendants of members, of the Stolen Generation. Their trauma is different to that of the non-Indigenous population. It is compounded by the intergenerational trauma that Indigenous people and communities carry as a result of past government policies which sought to displace family and culture. Further, the mental health of many Indigenous inmates is deeply affected by their sense of disconnection with culture and community while in prison. In our experience, specialist counselling and psychological therapy are not available to inmates, particularly in respect of grief counselling and Post-Traumatic Stress Disorder. Options for telephone counselling are also limited due to time limited phone calls, a lack of privacy and the taping of phone calls. While correctional centres recognise NAIDOC celebrations, Sorry Day and occasionally other cultural events, more regular and ongoing cultural activities could be introduced under a trauma-informed framework for male and female offenders.

[42] Such as those offered in Aotearoa, New Zealand, whose Corrections Department delivers rehabilitation programs to inmates through Maori Focus Units and Pasifika Focus Units. An evaluation in 2009 found relatively small but positive changes in terms of reduced reconvictions and re-imprisonments for thee Units: see www.corrections.govt.nz/resources/research_and_statistics/maori_focus_units_and_maori_therapeutic.html See further New Zealand Department of Corrections website, 'Specialist units': http://www.corrections.govt.nz/working_with_offenders/prison_sentences/employment_and_support_programmes/rehabilitation_programmes/specialist_units.html

Proposal 5–2 There are few prison programs for female prisoners and these may not address the needs of Aboriginal and Torres Strait Islander female prisoners. State and territory corrective services should develop culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners.

Question 5–2 What are the best practice elements of programs for Aboriginal and Torres Strait Islander female prisoners to address offending behaviour?

We support Proposal 5.2. The present lack of programs for female inmates in NSW correctional centres is particularly concerning given that many Indigenous women are, or have been, victims of domestic violence, are mothers and carers in their communities, and will face the removal of their children upon incarceration.[43] In this context we consider the Mothers and Babies program at Emu Plains, under which female inmates can keep their children with them in prison, should be expanded, and a quota introduced for Indigenous females inmates.

Again, Legal Aid NSW considers programs for indigenous female prisoners should be founded on and include:

- A holistic approach to offenders and their offending behaviour in order to identify and address the causes of offending.

- Pre-release preparation: in our experience, these programs are only available to inmates with longer sentences. We consider the Bolwara Transitional Centre Program for Aboriginal women in custody is beneficial, as it provides a staged incentivised reintegration and throughcare program. However, programs such as Bolwara are only available to inmates with longer sentences, certain classifications and are limited to metropolitan areas.

- A strengths based, culturally appropriate approach to address the criminogenic and other needs of Aboriginal women. Such approach can be seen in programs such as the Miranda Project (run by the Community Restorative Centre), Rosa Co-ordinated Care (based in Nowra), the WEAVE Creating Futures Justice Program and the Miruma residential diversionary program in Cessnock for female offenders

[43] Noted on page 97 of the Discussion Paper.

with mental health and drug and alcohol abuse issues.[44] Legal Aid NSW would welcome the expansion of these programs.

Parole

In addition to making prison programs available to inmates on remand and serving short sentences, Legal Aid NSW considers there is an urgent need to make prison programs available to people serving long sentences, particularly where release on parole is conditional upon completing behaviour change programs. The lack of such programs has impacts harshly on those prisoners who may be subject to the NSW high risk offender scheme. If such inmates are unable to complete such programs, their chance of being incarcerated beyond their sentence under the high risk offender scheme is increased.

In New South Wales certain sex offenders must complete Custody-Based Intensive Treatment (**CUBIT**), but the waiting list to undertake the program is long and some people wait more than two years to commence the program. It is experience of the PLS that the number of inmates who are refused parole because they cannot access programs in custody before their earliest release date is increasing. Some clients are refused parole because of behaviour that is, arguably, a result of inadequate support and management in custody. This is illustrated by the following case study:

Case Study: James

Legal Aid NSW acted for James, an Aboriginal man with serious psychiatric issues, post-traumatic stress disorder, intellectual impairment and a suspected acquired brain injury. James also suffered from physical ill-health including deafness in one ear, painful scoliosis of the spine and Hepatitis C. His childhood was marked by trauma and deprivation, and included violent abuse by his father and sexual abuse while in State care. James instructed us that he did not receive psychological counselling, or consistent help from an Aboriginal support worker while he was in custody. He further instructed that his physical conditions were either not being treated, or were being treated inadequately.

[44] The 11 bed facility opened in April 2011 and, to end June 2012, has had 53 women commence the program. Of the 53, three women returned for a second time and have now been successful in their return to the community. There has been an approximately 60% success rate for this complex group remaining in the community for two years: http://www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/programs/women-offenders/miruma.aspx.

For the majority of his time in custody, James was held in segregation and quasi-segregation and therefore had very limited access to rehabilitation programs. He was placed in the Individual Violent Offenders – Intervention Program but found that this program offered no therapeutic intervention and increased his sense of isolation. He was also managed by the Personality and Behavioural Disorders Unit but was not offered psychological support by that unit. He was moved between jails every six weeks. A psychiatrist observed that the amount of time James spent in segregation was 'an extreme stressor likely to aggravate…an individual's psychiatric or psychological condition'.

James was refused parole on the basis that 'his behaviour in custody needs to improve significantly'.

Indigenous communities' involvement in the parole process

Legal Aid NSW welcomes the recent announcement of reforms to improve management of parole in NSW so that Community Corrections Officers will be given greater discretion to manage less serious breaches of parole before, or instead of, referring offenders to the State Parole Authority.

To ensure that such discretion is exercised so as to facilitate the maintenance of parole, it is vital that those officers who supervise Indigenous offenders in the community are culturally competent and that their work is informed by trauma-informed practice. Community Corrections staff working with Indigenous offenders should be cognisant of the significant disadvantage and complex issues of inter-generational trauma facing Indigenous Australians, and have a close understanding of the individual circumstances of any offender they are supervising, including their familial and community circumstances. We address this issue further below in respect to **Chapter 11 Access to Justice issues**.

Corrective Services NSW staff should also work in close partnership with the relevant community in developing local initiatives that respond to local needs and capacity, including in respect of post-release employment and reintegration of Indigenous offenders. Such approach would be consistent with the recommendation of the Royal Commission into Aboriginal Deaths in Custody that there be greater involvement of and Aboriginal organisations in correctional processes.[45]

In our view, such involvement should go beyond consultation with relevant Indigenous agencies or advisory bodies. Aboriginal communities should be empowered to actively

[45] Recommendation 187

participate in supervision of Indigenous parolees. In this context, we note the positive impacts on rates of breach and revocation of supervised orders in areas where Aboriginal Client Service Officers are employed by Community Corrections.[46] Such roles promote important and valuable relationships between stakeholders in particular communities. Lessons can be also be learnt from the use of Aboriginal Community Supervision Agreements in Western Australia, under which participating Aboriginal communities manage the supervision of offenders resident in those communities.[47]

There should also be improved training in and awareness of the issues and challenges facing Indigenous communities amongst those agencies involved in the determination and management of parole, including the State Parole Authority, prisons guards and Community Corrections Officers. Such training should address cross cultural communication issues as well as issues affecting inmates with mental health conditions, cognitive impairment and acquired brain injury. This issue is addressed further below in our response to Chapter 11.

Post sentence detention and supervision

The *Crimes (High Risk Offenders) Act 2006 NSW* (**HRO Act**) was originally intended to apply to 'a handful of high-risk, hard-core offenders who have not made any attempt to rehabilitate whilst in prison'.[48] Since then, the Act has been amended twice to apply to a significantly wider range of offenders; further expansion of the scheme was announced by the NSW Government in May 2017.[49]

The HRO Act impacts particularly harshly on Indigenous offenders. Of the 107 offenders subject to an extended supervision order (**ESO**) or continuing detention order (**CDO**), 27 per cent are Indigenous.[50] We note, with concern, that recent recommendations for broadening of the scheme have been acknowledged by the NSW Department of Justice as likely to result in "somewhat more offenders being given a CDO than currently".[51]

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[46] See http://www.correctiveservices.justice.nsw.gov.au/Documents/annual-reports/009_Offender_Management_in_the_Community.pdf

[47] Parriman and Daley, *Aboriginal Community Supervision Agreements in Western Australia*, Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference (October 1999)

[48] The Hon Carl Scully MP, Minister for Police, Second Reading Speech to the Crimes (Serious Sex Offenders) Bill 2006: Extract from NSW Legislative Assembly Hansard and Papers Wednesday 29 March 2006

[49] Justice NSW *Stronger management of high risk offenders to enhance community safety* Factsheet – May 2017

[50] Justice NSW *Review of the Crimes (High Risk Offenders) Act 2006 (NSW)* Review Report, May 2017, 7

[51] Ibid, 30

The Supreme Court commonly attaches up to 60 detailed conditions on ESOs.[52] Many ESO breaches are unintentional and are trivial or technical in nature, yet are met with very harsh penalties under section 12 of the Act.[53] The conditions attached to ESOs can indeed sometimes contribute to reoffending, as the following case study demonstrates.

Case Study: David

David is a young Aboriginal man from a small regional community. He had been in and out of custody since his teenage years, often being housed far from his family in rural NSW. Upon release from prison he was placed on an ESO for five years. David wanted to return and live with his parents in rural NSW. This accommodation was declined on the basis that Ronald would not have access to Forensic Psychology Services (located at Surry Hills). He was instead directed to live at the Long Bay Community Offender Support Program (COSP) close to Long Bay Correctional Centre. David obtained full-time employment for the first time. Despite otherwise being compliant with his ESO, David was not afforded the opportunity to travel and visit his family and community at any time in the 12-18 months since the ESO was made. He was subsequently housed in hotel accommodation in the Sydney CBD. His absence from family, community and country played a significant role in David's feelings of isolation during this period. Since the making of the ESO in 2015, David has been charged with breach of his ESO on four occasions, each time for single incidents of drug use, and returned to custody. Other than breaching his ESO, David has not committed any other offences.

The Supreme Court of NSW has suggested that the high risk offenders scheme may conflict with three of the recommendations of the Royal Commission into Aboriginal Deaths in Custody.[54] In that case, the Court noted the limited availability of COSP facilities beyond metropolitan Sydney, an option that necessarily involves removing offenders from their country, their people and their family.[45] The Court was compelled to order the continued detention of Mr Bugmy, where "*the simple fact is that there is no accommodation available for him at all and certainly none where it is practicable for Community Corrections to provide him with adequate support and supervision*."[55]

[52] See, for example, *State of NSW v Kamm* [016] NSWSC 1

[53] For example, in the case of *State of NSW v Carr* a young, intellectually disabled Indigenous offender was incarcerated five times after the ESO was made, not for committing independent crimes, but because he had breached the conditions of his ESO. One offence arose because Mr Carr returned a positive result for cannabis use, resulting in a three month sentence of full time imprisonment. In that case, the Supreme Court noted that "it is inconceivable that a person in this day and age would otherwise be incarcerated for using cannabis: *State of NSW v Carr* [2014] NSWSC 1348

[54] *State of New South Wales v Bugmy* [2016] NSWSC 1128, [48]-[51]

[55] At [43]

Given the significantly high proportion of Indigenous people against whom orders under the HRO Act are routinely sought and granted, Legal Aid NSW submits that:

- the HRO Act should be amended to require the Supreme Court to take into account that an offender is Indigenous where that is relevant to determinations under the Act,[47] and
- the COSP should be expanded to enable culturally suitable supported accommodation and programs to be established beyond the Sydney metropolitan area.

Proposal 5–3 A statutory regime of automatic court ordered parole should apply in all states and territories.

Question 5–3 A statutory regime of automatic court ordered parole applies in NSW, Queensland and SA. What are the best practice elements of such schemes?

Proposal 5–4 Parole revocation schemes should be amended to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.

Legal Aid NSW supports proposals 5–3 and 5–4.

Legal Aid NSW is concerned that parole conditions (like conditions on bail and community-based sentences) can be overly strict, rigid, and focussed on monitoring. Most parole breaches are for fail to reside as required by the parole conditions. Parole conditions should be culturally appropriate and be designed to support rehabilitation and reintegration.

Transition support and throughcare

Legal Aid NSW is concerned about the absence of transition support and throughcare in New South Wales. Our solicitors report that clients have been released without accommodation, arrangements for transport, at night in a country town when there is no train until morning, without medications or prescriptions, and without any treatment for their substance addiction. It is not uncommon for inmates to be released from the Sydney Central Law Courts or the Downing Centre Court complex in their prison greens and with no accommodation arrangements, having received no treatment in custody for their substance abuse and/or mental health issues and at potential risk of reoffending within a short time. The sense of hopelessness that stems from having nowhere to go when released, no plan or purpose, can undermine any attempts to improve an offender's mental health while in prison.

The consequences of inadequate throughcare are illustrated in the *State of New South Wales v Bugmy*.[56] Mr Bugmy was released on parole, with a condition that he not consume alcohol, and to seek assistance for the control of his drug and alcohol abuse 'if so directed'. However, Mr Bugmy was not directed to undertake any drug or alcohol programs, because no such services were available in the town of Ivanhoe where he was living. Mr Bugmy committed a serious offence while drunk on parole.[57]

As noted above, Legal Aid NSW submits that Indigenous communities and agencies should be empowered to participate in every stage of the criminal justice process, including in providing throughcare support. The North Australian Aboriginal Justice Agency's Throughcare Project provides a useful model for New South Wales,[58] as did the *Prisoner Throughcare* program offered by the Aboriginal Legal Service in New South Wales and the Australian Capital Territory until funding of the program ceased in 2014.[59]

[56] [2016] NSWSC 1128, [6]-[7]
[57] *State of New South Wales v Bugmy* [2016] NSWSC 1128, [6]-[7]
[58] NAAJA has prison-based support workers helping offenders with parole, and community based case managers who help offenders get ready to leave prison and support them in the community.
[59] http://www.alsnswact.org.au/pages/prisoner-throughcare

Chapter 6 Fines and driver licences

Various inquiries and reports have highlighted that large fine debt and fine enforcement measures have a crippling effect on vulnerable people, including people on low incomes, prisoners, the homeless, and people with mental illness or cognitive impairments.[60] As the Discussion Paper notes, Indigenous people are over-represented in these groups, are more likely to receive a fine, and are less likely to pay a fine at first instance. Aboriginal and Torres Strait Islander people are therefore more likely to accumulate large fine debt, and be subject to fine enforcement measures, such as driver licence sanctions and garnishee orders. This is consistent with our case work experience: of 153 Aboriginal women leaving custody and assisted by Legal Aid NSW over 12 months, nearly 100 per cent had a fines debt.[61]

Rather than deterring unlawful behaviour, the fine and penalty notice system compounds the social and economic disadvantage faced by many Aboriginal and Torres Strait Islander people. Indigenous people living in rural and remote areas are particularly affected by licence sanctions, as having a licence is usually essential for transport to employment, school, health services, buying essentials and meeting family and cultural obligations. Incarceration can then result from driving while subject to licence sanctions for fine default. As outlined in the Discussion Paper, in 2016, Indigenous people made up 31% of all people imprisoned for driving while suspended or disqualified.[62]

Our submissions to the proposals and questions below are made in the context of these general observations.

Fine default and imprisonment

Proposal 6–1 Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.

[60] NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-Imposed Fines and Penalty Notices, Interim Report* (2006) [3.33]-[3.38]; NSW Law Reform Commission, *Sentencing, Report 79* (1996) [3.45]; R Fox, *Criminal Justice on the Spot: Infringement Penalties in Victoria*, Australian Institute of Criminology (1995) [1.1.4]; Homeless Persons' Legal Service and Public Interest Advocacy Centre, *Not Such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW* (2006); S Clarke, S Forell and E McCarron, 'Fine But Not Fair: Fines and Disadvantage', *Justice Issues*, Law and Justice Foundation of New South Wales (2008); NSW Department of Attorney General and Justice, A Fairer Fine System for Disadvantaged People (2011); NSW Law Reform Commission, *Penalty Notices*, Report 132 (2012).
[61] Legal Aid NSW *Aboriginal Women Leaving Custody: report into barriers to housing* 2015, 32
[62] NSW Bureau of Crime Statistics and Research, NSW Criminal Courts Statistics 2016 (2017) tables 5, 14, cited in the Discussion Paper at p126.

Legal Aid NSW supports this proposal. In New South Wales, a fine defaulter can be imprisoned following breach of a community service order imposed for non-payment of a fine.[63] The Commissioner of Fines Administration may by warrant commit the fine defaulter to a correctional centre. This is not consistent with the recommendation 117 of the Royal Commission into Aboriginal Deaths in Custody, which called for imprisonment as a consequence of a breach of a community service order to be subject to a determination by a magistrate or judge. Recent amendments to the *Fines Act 1996* (NSW) (**Fines Act**) which allow the Commissioner of Fines to enforce a victims restitution order debt provide that Division 6 of the Fines Act, regarding imprisonment, does not apply.[64] We support this exclusion and consider that Division 6 of the Fines Act should be repealed.

Alternatives to infringement notices

Question 6–1 Should lower level penalties be introduced, such as suspended infringement notices or written cautions?

Question 6–2 Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how?

Question 6–3 Should the number of infringement notices able to be issued in one transaction be limited?

Legal Aid NSW would support:

- the introduction and greater use of lower level or alternative penalties to the issue of an infringement notice, and in particular increased and more consistent use of cautions
- greater regulation of the monetary penalties received under infringement notices
- limits on the number of penalty notices able to be issued in one transaction.

While time to pay, the Work and Development Order scheme and the write-off of fine debt are important mitigation measures for vulnerable people, they cannot and should not serve as a substitute for proper 'front-end' regulation of the system. Front end changes are needed to ensure that infringement notices are only issued in appropriate circumstances, and for appropriate amounts, so as to reduce their disproportionate impact on Aboriginal and Torres Strait Islander people.

[63] Section 87 of the *Fines Act 1996* (NSW) (**Fines Act**).
[64] Victims Restitution Orders are made under the *Victims Rights and Support Act 2013 (*NSW).

Cautions

In 2008, NSW introduced legislative amendments to confirm the power of issuing officers to issue a caution instead of a penalty notice.[65] Section 19A of the Fines Act states that a caution may be given if the officer believes:

- on reasonable grounds that a person has committed an offence under a statutory provision for which a penalty notice may be issued, and
- it is appropriate to give a caution in the circumstances.

These amendments were accompanied by Guidelines, issued by the Attorney General, which provide guidance as to when an officer should issue a caution in place of a penalty notice.[66] Under the Guidelines, the matters that should be taken into account when deciding whether it is appropriate to give a person a caution instead of a penalty notice include:

- the person is homeless
- the person has a mental illness or intellectual disability
- the person is a child (under 18).

An officer must have regard to these guidelines when deciding whether to issue a caution or a penalty notice. However, the guidelines do not apply to NSW Police, or to agencies that have issued their own guidelines for the use of cautions.

In 2011, the NSW Law Reform Commission reviewed the NSW penalty notice system and found that:

- some agencies do not issue cautions
- other agencies issue cautions according to guidelines that are not public (in particular, NSW Police) and

[65] The *Fines Further Amendment Act 2008* (NSW), which inserted section 19A into the *Fines Act 1996* (NSW).
[66] These are available at: http://www.justice.nsw.gov.au/justicepolicy/Pages/lpclrd/lpclrd_publications/lpclrd_guidelines.aspx#Caution_Guidelines_a

- cautions could be used much more for vulnerable people in appropriate cases.[67]

We support the following recommendations of the NSW Law Reform Commission in response to these issues:

- All agencies that issue penalty notices should ensure that issuing officers receive training that covers s19A of the Fines Act and the Attorney General's Caution Guidelines (or their own internal caution guidelines), and has a particular focus on *working with vulnerable people (Rec 5.3).*

- The Attorney General's Caution Guidelines should apply to police officers, or alternatively, NSW Police should issue its own, consistent, publicly available, guidelines (Rec 5.5).

The NSW Law Reform Commission also recommended the establishment of a penalty notice oversight body that would, amongst other things:

- work with issuing agencies to support and disseminate best practice, and

- monitor and report publicly on issuing agencies' compliance with legislation and guidelines.[68]

These recommendations have not been adopted. Legal Aid NSW submits that it is essential for governments to address the practice of issuing agencies, through training and proper oversight, in order to mitigate the impact of the penalty notice system on vulnerable groups, including Aboriginal and Torres Strait Islander peoples.

In our response to Chapter 12 we also raise concerns about an unnecessarily heavy-handed approach to minor infringements, and call for increased use of the discretion to caution.

Monetary penalties under infringement notices

The often high and fixed penalties imposed under infringement notices are of concern to Legal Aid NSW. As the Discussion Paper notes, penalty notice amounts are often disproportionate to the seriousness of the offending behaviour, and are higher than what would be imposed by a court for the same offence. Currently, Legal Aid NSW spends a significant amount of time giving advice to people who wish to contest a penalty notice in court: not because they deny the infraction, but because they cannot pay and a court is

[67] NSW Law Reform Commission *Penalty Notices* (2012) Report No. 132, 3
[68] NSW Law Reform Commission *Penalty Notices* (2012) Report No.132, rec 18.1.

likely to impose a lesser fine. This is an inefficient use of our resources and those of the courts.

In response, we would support the NSW Law Reform Commission's proposal that infringement notice amounts should not exceed 25% of the maximum court fine for that offence. We would also recommend reform to ensure that penalty notice amounts are more responsive to the person's ability to pay. A simple reform could establish one rate for people on a Centrelink benefit and people under 18, and another rate for all other infringement notice recipients. Although this would not address the hardship faced by the 'working poor', it would nonetheless be an important step towards a fairer penalty notice system.

Limiting the number of infringement notices able to be issued in one transaction

Legal Aid NSW would also support reforms to minimise the issue of multiple infringement notices in one interaction. This could be achieved through additional guidance to issuing officers, as recommended by the NSW Law Reform Commission, or mandatory legislative stipulation that multiple infringement notices for the same offence may not be issued on the same occasion.

Offensive language

Question 6–4 Should offensive language remain a criminal offence? If so, in what circumstances?

Question 6–5 Should offensive language provisions be removed from criminal infringement notice schemes, meaning that they must instead be dealt with by the court?

Legal Aid NSW considers that offensive language should not be a criminal offence. In our view, the offence is now out of step with community standards regarding language, and, in practice, has very real net-widening effects for Aboriginal and Torres Strait Islander peoples. As Commissioner Wootton commented in the inquiry into the death of David Gundy over twenty years ago:

In this day and age many words that were once considered bad language have now become commonplace and are in general use amongst police no less than amongst other people …. Charges about language just become part of an oppressive mechanism of control of Aborigines. Too often the attempt to arrest or charge an Aboriginal for offensive language sets in train a sequence of offences by that person and others resisting arrest,

assaulting police, hindering police and so on, none of which would have occurred if the police were not so easily "offended".[69]

Although higher courts have held that the offence should be construed narrowly, and that only conduct of a serious nature should attract a criminal penalty, police and Magistrates do not necessarily take a similar approach.[70] For example, in NSW, the Ombudsman has found that Criminal Infringement Notices (**CINs**) for offensive language impact disproportionately on Aboriginal people.[71] Legal Aid NSW solicitors have also observed that police exercise discretion less frequently in cases involving minor offending such as offensive language since they have been able to issue CINs using mobile electronic devices.[72]

We also have concerns about the monetary penalties that attach to this offence. In New South Wales, offensive language carries a maximum fine of $660 if imposed by a court and $500 under a CIN.[73] We consider that $500 is disproportionate both to the seriousness of the offence, and to the court imposed maximum. The NSW Law Reform Commission recommended that penalty notice amounts should not exceed 25 per cent of the maximum that the court could impose.[74] However, these fines are 75 per cent of the maximum. As noted earlier and below, the enforcement of fines, particularly by way of driver licence suspension, has a direct link with incarceration.

If the offence of offensive language is not abolished, or the penalty notice amount significantly reduced, then it should be removed from the CIN scheme. Responsibility for hearing these matters should be returned to the courts, where the full circumstances of the case, the characteristics of the offender, and community standards can be taken into account.[75]

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[69] Royal Commission into Aboriginal Deaths in Custody, National Report, Overview and Recommendations (1991), cited in Robert Jochelson, Aborigines and Public Order Legislation in NSW, Contemporary Issues in Crime and Justice, Bulletin No 34, February 1997, p1.

[70] See Walsh, Tamara, "Offensive Language, Offensive Behaviour and Public Nuisance: Empirical and Theoretical Analyses" (2005) 24(1) *University of Queensland Law Journal* 123.

[71] In the first year of the CIN scheme (2007), 45 per cent of CINs issued to Aboriginal people were for offensive language.[71] The NSW Ombudsman found that after the scheme commenced, there were 1,482 more CINS issued for offensive language and between 495 and 855 fewer charges, compared with the year before– a significant net increase. He also found that only seven Aboriginal recipients elected to have their CIN heard at court, and nine out of 10 failed to pay in time and were referred for enforcement.

[72] See media release, the Hon Troy Grant, NSW Minister for Justice and Police, 1 September 2016 *Mobile Policing Program* available at:
http://www.police.nsw.gov.au/__data/assets/pdf_file/0009/422757/2016-09-01_-_Troy_Grant_med_rel_-_Mobile_Devices_Rolled_Out_to_Frontline_Police.pdf

[73] Section 4A of the *Summary Offences Act 1988* imposes a maximum penalty of six penalty units or 100 hours community service work.

[74] NSW Law Reform Commission *Penalty Notices* (2012) Recommendation 4.5

[75] NSW Ombudsman *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (2009) vi

The ability to review or challenge an infringement notice

Although not raised by the Discussion Paper, Legal Aid NSW would also like to raise concerns about the current scheme for the administrative review of infringement notices. We are not confident that the current system provides an effective way of ensuring that penalty notices are withdrawn in appropriate cases, that cautions are issued in appropriate circumstances, or that proportionate penalties are given to disadvantaged people. Our comments on the NSW system are set out below.

In NSW, a person issued with a penalty notice is legally entitled to seek internal review of the notice under the Fines Act.[76] A reviewing agency **must** withdraw a penalty notice if it finds any of the following grounds to be made out:

- the penalty notice was issued contrary to law
- the issue of the penalty notice involved a mistake of identity
- the penalty notice should not have been issued, having regard to the exceptional circumstances relating to the offence
- the person to whom the penalty notice was issued is unable, because the person has an intellectual disability, a mental illness, a cognitive impairment or is homeless: (a) to understand that the person's conduct constituted an offence, or (b) to control such conduct
- an official caution should have been given instead of a penalty notice, having regard to the relevant guidelines under section 19A.

Legal Aid NSW has various concerns with the operation of the current system of internal review.

First, Revenue NSW conducts almost all internal reviews under commercial contracts with local councils and NSW government agencies, including the NSW Police Force. As the state debt collection agency, it is arguable that Revenue NSW has an inherent conflict of interest in this process.

Second, the Revenue NSW guidelines for review, and the decisions it makes on internal review, do not reflect the provisions of the Fines Act, noted above. They consistently refer to "leniency", rather than the legal right of penalty notice recipients to apply for internal

[76] Fines Act, s24A.

review, and to have penalty notices withdrawn if the grounds outlined above are made out.

Third, and arising from the above factors, very few applications for internal review are successful. According to Revenue NSW guidelines, fewer than four per cent of penalties are withdrawn or replaced by a caution as a result of a request for internal review.[77] This is consistent with our casework experience: when Legal Aid NSW advocates on behalf of disadvantaged clients with good cases for lenience or withdrawal of the penalty notice, we rarely have success.

To address these issues, we would recommend that government consider the establishment of an independent body to determine reviews of, or challenges to, infringement notices. An independent body, at arms-length distance from both the issuing agency and the revenue collection agency, could provide an efficient and effective way of determining contested notices. It would be more cost-effective and less stressful than court-election, but would also engender more public confidence than current review processes by the state debt recovery agency. Such a body, could, in particular, have processes and training around grounds for the withdrawal of penalty notices relevant to disadvantaged people. An example of such a body can be found in NSW in the Tolling Customer Ombudsman (**TCO**).[78] Alternatively, the functions and membership of the Hardship Review Board[79] could be expanded to consider applications for internal review of penalty notices lodged by or on behalf of vulnerable people.

If the above courses are not adopted, there should, at a minimum, be:

- amendment of Revenue NSW guidelines to conform with the Fines Act, and
- training for Revenue NSW review officers on applicable review guidelines, working with vulnerable people, and the impact of penalty notices on vulnerable people.[80]

[77] Office of State Revenue *Fines don't just go away* http://www.revenue.nsw.gov.au/sites/default/files/file_manager/br_001.pdf, 18

[78] Which provides independent and impartial resolution of complaints against tolling operators. The TCO scheme has been in operation as a free and alternative dispute resolution process, funded by tolling operators, for over a decade. The scheme operates in Victoria, New South Wales and Queensland. Given the comparatively greater volume and significance of infringement notices, it would seem logical to establish a similar service for disputes over penalty notices, funded by the agencies that obtain revenue from such notices.

[79] The Hardship Review Board currently considers applications for the write-off of fine debt.

[80] See NSW Law Reform Commission *Penalty Notices* (2012) Recommendation 7.4

Work and development orders

Question 6–6 Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.

Legal Aid NSW does not support the use of court ordered work and development orders (**WDOs**). Voluntary participation is an essential element of the WDO scheme, and the activities undertaken for a WDO are agreed between the client and the sponsor (the approved organisation or health practitioner). WDO sponsors may be less willing to work with participants who have not chosen to be part of the scheme. WDO sponsors are also unfunded with limited capacity. It is doubtful the scheme could absorb additional participants who are ordered to undertake WDOs by a court.

In New South Wales, it is possible for a person who is fined to voluntarily enforce the fine for the purposes of entering into a WDO. This option is not well known and awareness should be increased.

Legal Aid NSW would also be supportive of other lower level penalties to court-imposed fines. However, these alternatives should not be onerous, and failure to comply with any alternative should not result in imprisonment.

Proposal 6–2 Work and Development Orders were introduced in NSW in 2009.

They enable a person who cannot pay fines due to hardship, illness, addiction, or

homelessness to discharge their debt through:

• community work;

• program attendance;

• medical treatment;

• counselling; or

• education, including driving lessons.

State and territory governments should introduce work and development orders based on this model.

Legal Aid NSW supports this proposal. In terms of the description provided in the Discussion Paper, we clarify that WDOs are available to people who:

- have a **mental** illness (not any illness)
- have an intellectual disability or cognitive impairment
- are homeless, or
- are experiencing **acute economic** hardship, or
- have a **serious** addiction to drugs, alcohol or volatile substances.[81]

The activities can include:

- unpaid work for an approved organisation
- medical or mental health treatment in accordance with a health practitioner's treatment plan,
- undertaking an educational, vocational or life skills course,
- undergoing financial or other counselling,
- undergoing drug or alcohol treatment,
- if the person is under 25 years of age, undertaking a mentoring program.[82]

The WDO Scheme has helped to lift the burden of unpaid fines for many vulnerable people. It has also encouraged those people to engage with services and has facilitated the recovery of driver licences. However, the scheme relies heavily on support from the non-government sector, and depends on sponsors being available. Capacity can be an issue, particularly in rural and remote areas. Therefore as noted above, a WDO scheme should not be seen as the only answer to concerns regarding the impact of fines on vulnerable people; attention must also be paid to the practices of issuing agencies, and the system for internal review.

We also note that active efforts are needed to successfully engage Aboriginal people struggling with fines. Legal Aid NSW has a specialist WDO Service which assists not-for-profit organisations, government agencies and health practitioners to become sponsors, and conducts specialist clinics and outreach events in regional locations. In the past, Legal

[81] *Fines Act 1996* (NSW) section 99B
[82] *Fines Act 1996* (NSW) section 99A

Aid NSW has also partnered with the ALS to reach Aboriginal people with unpaid fines. Partly because of these targeted efforts, 21 per cent of WDO recipients are Aboriginal people.

Driver licence suspension for fine default

Question 6–7 Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?

Question 6–8 What mechanisms could be introduced to enable people reliant upon driver licences to be protected from suspension caused by fine default? For example, should:

(a) recovery agencies be given discretion to skip the licence suspension step where

the person in default is vulnerable, as in NSW; or

(b) courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?

Legal Aid NSW considers that driver licence sanctions should not be available to enforce non-driving related fines.

The possession of a driver licence, particularly in non-urban areas, is essential for access to employment, education, health services, and to maintain family relationships. As the Law Society submitted in 2009:

> *For reasons such as remoteness, lack of transport, hot climate etc, Aboriginal people will often drive their cars even when they do not have a licence. Public transport is almost non-existent in remote areas and taxis are only available in the large towns. Activities such as shopping, going to the doctors, driving kids to school etc are functions that Aboriginal families participate in as we all do, but the difference is that in these areas, many will drive unlicensed and risk a fine and disqualification and invariably prison.*[83]

Because driver licences are so closely related to independence, employment and social and economic wellbeing, we consider that driver licence suspension should be used only when the person has committed a driving offence. Even in this case, driver licence disqualification should be used sparingly. A BOCSAR study has found that for most driving offences, there is no relationship between the period of licence disqualification for a driving

[83] Law Society of NSW submission to Senate Standing Committee on Legal and Constitutional Affairs *Inquiry into Access to Justice* (2009)

offence and the likelihood of a further driving offence. In the case of speeding offences, longer disqualification periods were associated with a higher risk of re-offending.[84]

Many of our clients have difficulty getting driver licences in the first place, because of administrative barriers, including lack of access to birth certificates and to qualified driving instructors. Many births are not registered, and to apply for one as an adult, several forms of identification are required. Disadvantaged people with literacy problems or cognitive disability find the process prohibitive. The Pathfinders program has successfully assisted 4,700 Aboriginal people to access birth certificates, which then allows them to get a driver licence and access a range of government and community services.[85] We consider that Aboriginal people and people in prison should be able to access a birth certificate without charge.

Habitual traffic offender declarations have been a significant contributor to unlicensed driving and subsequent imprisonment. As noted above, Legal Aid NSW welcomes recently introduced driver licence disqualification reforms which will abolish this scheme, provide greater discretion to a sentencing court in determining disqualification periods and allowing disqualified drivers who have had a two or four year offence-free period to apply to the Local Court for the removal of existing periods of disqualification.

We also support the extension of licensing support services such as Driving Change[86] throughout NSW.

Chapter 7 Justice procedure offences

Proposal 7–1 To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services.

Legal Aid NSW supports this proposal. See further our response to Proposal 4–1.

The ALRC has sought submissions on ways to minimise justice procedure offending by Aboriginal people.[87] In NSW, BOCSAR has found that most of the growth in justice procedure offences results from breach of community based orders and Apprehended

[84] Steve Moffatt, Suzanne Poynton 'The deterrent effect of higher fines on recidivism: driving offences' (2007) BOCSAR Crime and Justice Bulletin No. 106
[85] Pathfinders *National Aboriginal Birth Certificate Program* *http://www.pathfinders.ngo/projects/aboriginal-birth-certificate-project/*
[86] For further details see: http://www.drivingchange.com.au/
[87] Discussion Paper, at [7.39].

Violence Orders (**AVOs**).[88] Legal Aid NSW has noted above that the conditions attached to bail, ICOs and ESOs are often unnecessarily strict and difficult to comply with, particularly for disadvantaged and vulnerable people. Priority should be given to means of encouraging police and courts to attach realistic conditions to bail, AVOs and community-based sentences.

Secondly, efforts should be made to support people to comply with conditions on such orders. We highlight three initiatives that implement this approach:

- The Make a Plan project, discussed in response to Proposal 2–2 above. A clear understanding of the conditions attached to an AVO supports both objectives of improving victims' safety and reducing further contact of an AVO defendant with the criminal justice system

- A recent initiative by NSW Police in Bourke, where police visit the homes of AVO defendants to check whether the conditions are suitable and to encourage the person to undertake behaviour change programs or address underlying alcohol abuse issues. These police officers are often accompanied by a health worker who is well known by the community.[89]

- A current partnership between police, courts and Legal Aid NSW in Dubbo, where police will notify Legal Aid NSW when they are aware that a person has breached, or is about to breach, their bail condition. This means that the person's solicitor can take steps to either encourage compliance with the condition, or seek a variation of bail, where appropriate.

We support a similar approach being taken with regard to community-based sentences, parole and ESOs. As part of this approach, the strengths of Indigenous families and communities should be harnessed to encourage them to support offenders to comply with such orders.

Legal Aid NSW is concerned that several recent legislative developments in NSW may undermine therapeutic approaches to justice procedure offending by Aboriginal people. Recently announced reforms to sentencing laws in NSW contemplate an increased use by courts and Corrective Services NSW officers of curfews and non-association conditions.[90] It is well recognised that conditions of this type can conflict with an Aboriginal or Torres Strait Islander person's cultural obligations and ability to access family and community supports, increasing the risk of breach and consequent imprisonment.

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[88] Don Weatherburn, Stephanie Ramsay *What's causing the growth in Indigenous Imprisonment in NSW?* (2016) BOCSAR Issue Paper No 118

[89] Geoff Thompson, Lisa McGregor, *Backing Bourke* Four Corners 20 September 2016 http://www.abc.net.au/4corners/stories/2016/09/19/4539321.htm

[90] See Department of Justice summary of reforms at: http://www.justice.nsw.gov.au/Pages/Reforms/Sentencing.aspx

Recently introduced laws have also expanded police powers to give move on directions in public places, breaches of which serve to increase contact with the criminal justice system. We are particularly concerned about the potential impact on Indigenous people of:

- The new Part 6B of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), which enables senior police officers to make public safety orders (**PSOs**) prohibiting a person from being present at public events, premises or other areas if the officer believes their presence poses a serious risk to public safety or security, and the PSO is reasonably necessary to mitigate this risk. The power to make PSOs extends to vulnerable persons, including children and persons with impaired intellectual functioning. There are limited safeguards to exercise of the power.[91] Introduced to ostensibly target organised and serious crime, we are concerned that the provisions may instead be used disproportionately against vulnerable individuals. Enforcement of amended consorting provisions of the Crimes Act 1900 (NSW) since 2012 supports that concern.[92]

- The *Sydney Public Reserves (Public Safety) Act 2017* (NSW), which commenced on 9 August 2017. The Act further expands available powers to NSW police to give directions to people in public places.[93] The Act was a response to the camp site of homeless people at Martin Place. The provisions in the Act are not limited to the previous occupiers of the Martin Place campsite, nor are they limited to rough sleepers. They apply to anyone who occupies a public reserve in the City of Sydney in respect of which a proclamation has been made under the Act.

The expansion of police powers in recent years means that vulnerable and disadvantaged people, including Aboriginal and Torres Strait Islanders, risk increased interaction with the criminal justice system through breach of public order offences. This is particularly concerning in light of the falling crime rates in NSW.[94]

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[91]Section 87T(2) requires a senior police officer to serve a copy of a PSO made against a vulnerable person on their parent or guardian, but only if it is "reasonably practicable" to do so. A failure to serve the order on a parent or guardian does not invalidate the order.

[92] The NSW Ombudsman's 2016 Report *The consorting law: Report on the operation of Part 3A, Division 7 of the* Crimes Act 1900' remarked on the disproportionately high numbers of Aboriginal people being subjected to the consorting law, both as persons receiving official warnings and those about whom official warnings were made. The Report also found that police applied the consorting law in a way that effectively deterred vulnerable people (including people experiencing homelessness) from spending time in certain public areas and accessing support services.

[93] Under sections 197 and 198 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), police may issue a direction to a person in a public place for the purpose of reducing or putting an end to 'relevant conduct'.

[94] An examination of rates per 100 000 of ten categories of property and violent crime found that seven categories had dramatically decreased during the period 1995-2015. Derek Goh, Stephanie Ramsey *An update of long-term trends in violent and property crime in NSW: 1990-2015* (2016) BOCSAR Issue paper no. 115

Chapter 8 Alcohol

The experience of Legal Aid NSW solicitors reflects the demonstrated links between alcohol use and offending by Aboriginal people. In this submission we have called for the provision of addiction treatment services at all stages of the criminal justice system, including as a WDO activity, as a diversionary measure, while defendants are on bail, on remand or serving a custodial penalty, and post-release. Current treatment services in NSW do not have the capacity to assist people who are motivated to address their addiction, particularly in regional areas.

Legal Aid NSW supports both demand and supply reduction measures, where they are evidence-based and supported by communities. There is evidence that increasing the price of alcohol, reducing trading hours for licensed premises, and reducing the density of alcohol sales outlets are effective approaches to reducing consumption of alcohol.[95] Don Weatherburn has noted that:

> *these strategies 'require close consultation and partnership with Indigenous Australians. The ideal regulatory model is one in which there are statutory controls that enable Aboriginal communities to apply for various restrictions on alcohol, backed up by an enforcement regime which limits the scope for 'sly-grogging' and the risk of drug substitution and/or illegal alcohol production'.*[96]

Restrictions on the supply of alcohol have been introduced in some NSW towns, including Bourke, Wilcannia and Brewarrina. However evaluations of these approaches are not available, and there are concerns that these restrictions have led to an increase in domestic violence and binge drinking.[97]

[95] National Drug Research Institute *Restrictions on the Sale and Supply of Alcohol: Evidence and Outcomes* 2007.
[96] Don Weatherburn, *Disadvantage, disempowerment and Indigenous Over-representation in Prison* (2014) at 12
[97] Ruth McCausland, Alison Vivian, *Factors affecting crime rates in Indigenous communities in NSW: a pilot study in Wilcannia and Menindee Community Report* June 2009, Jumbunna Indigenous House of Learning

Chapter 9 Female offenders

Question 9–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?

Legal Aid NSW agrees that further diversionary options are needed for Aboriginal women who are defendants and offenders. To be available to Aboriginal female defendants, most of whom have dependent children,[98] diversionary options need to take into account the person's care giving responsibilities. They should also incorporate assistance with civil law problems and living skills, such as dealing with Centrelink, banks, the Department of Housing and consumer issues.

Housing post release

Legal Aid NSW welcomes the recognition in the Discussion Paper of the multiple disadvantage faced by Aboriginal female offenders. The following case study highlights these issues.

Case Study: Kayla

Legal Aid NSW assisted Kayla, an Aboriginal woman leaving custody. She advised us that many years earlier she had left social housing because of domestic violence, and became homeless. She applied for social housing at the Department of Housing, indicating that she left her previous tenancy because of domestic violence. Despite this, her application was refused because of a debt she owed to the Department. She was not advised of her right to appeal this refusal. She was given 28 days of emergency housing. She was subsequently homeless for six years and did not have her children with her during that period. She was physically and sexually assaulted during this time. Eventually, she was convicted of criminal offences and incarcerated.

Our recent report, *Aboriginal Women Leaving Custody*, focused on the housing needs of Aboriginal women leaving custody. Of the 153 women we assisted, 67 per cent had a mental illness, 64 per cent had experienced domestic violence, 83 per cent had an addiction to drugs and alcohol, 22 per cent were homeless prior to their incarceration and 86 per cent had been homeless at some stage. Nearly 100 per cent had a fines debt.

[98] Legal Aid NSW *Aboriginal Women Leaving Custody: report into barrier to housing* (2015) 32

Despite the profound disadvantage of the women we assisted, only four were assessed as eligible to receive priority housing post release.[99]

In that report, Legal Aid NSW made a range of recommendations directed to Housing NSW that would assist our Aboriginal female clients to get on the social housing waiting list, remain on the waiting list, and avoid losing their homes during short periods of incarceration. Housing NSW have indicated that they are implementing a number of these recommendations in the Women Leaving Custody Priority Housing Assessment Pilot being conducted at five women's correctional centres as a partnership between Family and Community Services, Corrections NSW and Legal Aid NSW. These recommendations include that Housing NSW:

- extend the period of allowable absence for inmates from three months to six months

- routinely consider whether a closed application is eligible for reactivation before requiring an applicant to make a new application

- assess an applicant's eligibility for priority housing while they are in custody

- when assessing eligibility for priority housing, include a review of the applicant's file and evidence of significant periods of homelessness, which should be sufficient to demonstrate an urgent housing need and an inability to rent in the private market

- refer applicants to care providers to conduct necessary assessments on a bulk-billed basis. If referral cannot take place, consider waiving the relevant document requirement, and

- establish a means by which social housing applicants/tenants and their advocates can easily find out their social housing status. This could be an advocate's hotline, similar to the one operated by Revenue NSW, or an online portal.

The Pilot appears to be having some success in improving outcomes for Aboriginal women leaving custody; however, considerably more work is required. Legal Aid NSW also recommended that Housing NSW:

- assess an applicant's continued need for housing at the time of offer rather than annually

[99] Legal Aid NSW *Aboriginal Women Leaving Custody: report into barriers to housing* (2015) 11

- reserve or quarantine mid-term housing for Aboriginal women released from custody while their applications are assessed and review the documentary evidence required to establish priority housing

- inform tenants of their classification and its implications at the time of asking them to relinquish their tenancy

- place tenants on the priority housing list at the time they relinquish their tenancy to avoid delay in providing housing on release, and

- remove the requirement to rent privately for six months in circumstances where the prospective tenant has demonstrated that it is not possible to comply with this requirement and employ alternative assessments where possible.

However, we understand that Housing NSW is not implementing these recommendations at this time. We consider that implementing these recommendations would significantly improve outcomes for Aboriginal women leaving custody.

A number of recommendations were also directed to Corrective Services NSW, including that it:

- ensure Services and Programs Officers (SAPOs) have the capacity to assist inmates with housing information

- review the current referral pathways to SAPOs to better help inmates receive the assistance they require

- require SAPOs to assess each inmate's social and legal needs and provide appropriate referrals to ensure inmates receive the assistance they need, and

- facilitate communication between support services, government agencies and inmates that reduces reliance on SAPOs.

Legal Aid NSW is not aware whether these recommendations have been implemented.

Legal Aid NSW's Civil Law Service for Aboriginal Communities runs a fortnightly advice and information service at Silverwater Women's Correction Centre which aims to reduce barriers to social housing such as negative classifications and debts. While the service has achieved positive outcomes for its clients, the desperate shortage of affordable housing options for people leaving custody remains the major difficulty.

Victims who are charged with offences

The Legal Aid NSW Domestic Violence Unit (**DVU**) provides duty services to persons in need of protection in ADVO matters in south-west Sydney. We have concerns about the number of women who are victims of domestic violence, but who are themselves charged with domestic violence offences. The DVU does not have significant numbers of Aboriginal clients, but we consider that this is likely to be a problem in Aboriginal communities as well. The problem is a result of the failure of police to correctly determine who the primary perpetrator of violence is, as the following case studies illustrate:

Case Study: Gina

Gina experienced financial, psychological and emotional abuse from George. One day Gina refused to give George money or access to her debit card. George began to kick and punch Gina. Gina screamed at him and threw a glass on the floor. George called the police. When they arrived, George was very calm and said that Gina had mental health issues and was violent towards him. The police made a provisional Apprehended Domestic Violence Order against Gina but did not charge her with any offences. At court, the DVU solicitor took instructions from Gina and made submissions before the court that it was not necessary or appropriate for an interim ADVO to be made. The magistrate agreed and adjourned the matter without an interim ADVO.

Case Study: Celia

Celia was the victim of violence from Harry over a 20 year relationship. They have a child together.

There was an incident at their home and police were called. Harry claimed that Celia scratched his face. Police charged Celia with assault occasioning actual bodily harm and intimidation and applied for an ADVO against Celia. Celia was required to leave the home and could not see her child.

Celia disclosed to the DVU lawyer that she has actually been the victim of serious physical and sexual violence by Harry for years. Celia said that on the night in question, Harry had punched her and tried to take her phone to stop her from calling police. Celia feared for her life and defended herself.

DVU represented Celia in defence of the criminal charges and the ADVO. The evidence confirmed Celia's injuries to her face; and the Triple 000 calls were

played in court. The court accepted Celia's account of violence and dismissed the charges and the ADVO application.

Legal Aid NSW agrees with the conclusion of the Women's Legal Service in their 2014 report that NSW Police should continue to strengthen their policies and procedures around the identification of the 'primary victim' in domestic violence incidents, and provide continuous training about the nature and dynamics of domestic violence.[100]

Chapter 10 Aboriginal justice agreements

Proposal 10–1 Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.

Legal Aid NSW agrees that state and territory governments should work with Aboriginal and Torres Strait Islander organisations to develop Aboriginal Justice Agreements (**AJAs**). As Allison and Cunneen have commented:

> *The loss of Indigenous representative bodies has diminished the opportunity for genuine Indigenous participation in policy development, implementation and independent oversight.*[101]

In this context, AJAs can provide an important mechanism for Aboriginal and Torres Strait Islander participation in the development, establishment, monitoring and evaluation of policy and programs.

If properly framed, AJAs can also provide clear strategic direction and enhance accountability. In this regard, Legal Aid NSW submits that AJAs must set clear and measurable outcomes in order to be effective, and be subject to independent monitoring and evaluation against those outcomes. Aspirational policy frameworks, and/or those with no provision for monitoring and evaluation, are less likely to have practical impact. The National Indigenous Law and Justice Framework 2009-2015, developed by the former Standing Committee of Attorneys General,[102] provides an example of an aspirational

[100] Women's Legal Service, *Women Defendants to AVOs: What is their experience of the justice system?* (2014) 4

[101] Fiona Allison & Chris Cunneen, Indigenous Justice Agreements, Current Initiatives No 4, Indigenous Justice Clearinghouse, June 2013, p2.

[102] Standing Committee of Attorneys-General, National Indigenous Law and Justice Framework 2009-2015 (2010).

framework with no targets or measurable outcomes to facilitate proper monitoring and evaluation.

We also suggest that AJAs should address outcomes across all areas of the criminal justice system, from entry to exit, and for both juveniles and adults.

In NSW, we suggest that government and Aboriginal organisations consider whether efforts should be focussed on local AJAs, rather than necessarily state-wide agreements.

Question 10–1 Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?

Legal Aid NSW supports the adoption of justice targets as part of the Closing the Gap strategy. As former Aboriginal and Torres Strait Islander Social Justice Commissioners have noted, high rates of imprisonment are inextricably linked with the health, education and employment of Aboriginal and Torres Strait Islander peoples.[103] Setting justice targets would acknowledge this interrelationship and interdependency, and the importance of taking a holistic approach to the Aboriginal and Torres Strait Islander policy.

As noted above in relation to AJAs, properly framed targets also provide clear strategic direction for policy and programs, so that governments focus on outcomes, rather than process and inputs. This, in turn, facilitates proper monitoring and evaluation so that governments can be held accountable, and the effectiveness of different policies and programs can be compared across jurisdictions and over time.

In terms of the content of justice targets, we would again encourage a broad approach, which considers all aspects of the criminal justice system, for both victims and offenders, and for both children and adults. For instance, former Commissioner Mick Gooda has argued that:

> *"[Justice targets] need to include obvious indicators such as rates of imprisonment, recidivism and victimisation but to be really successful we need to look more holistically...I would like to see indicators such as involvement with the child protection system, use of diversionary programs, successful transitions to school and employment also considered*.[104]

[103] Professor Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2009* (2009); Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice and Native Title Report 2014* (2014)
[104] Mick Gooda *Social Justice and Native Title Report 2013* (2013), Ch 4

Chapter 11 Access to justice issues

Proposal 11–1 Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.

Legal Aid NSW supports this proposal. We consider however that access to justice, including the right to a fair trial and to equal treatment before the law, goes beyond the effective resourcing of interpreter services. Effective participation and equal treatment of Indigenous suspects, witnesses and offenders requires a broader understanding of the complex cross cultural issues that impact Aboriginal people's interactions with the criminal justice system.[105]

Aboriginal communication issues

Those who work in the criminal justice system, including investigating police, prosecutors, Community Corrections officers and the courts should be fully cognisant of Aboriginal modes of communication and the particular challenges faced by Indigenous suspects and offenders when communicating with authority figures. Issues impacting on the Aboriginal people's communication in the criminal justice system include:

- the potential for miscommunication as a result of the differences between Aboriginal and non-Aboriginal English and Aboriginal modes of communication. These result from factors such as the use of silence and gratuitous concurrence.[106] These impacts have been well documented, including by Dr Diana Eades in her evidence to the NSW Standing Committee on Law and Justice's *Report into the Family Response to the Murders in Bowraville*;[107]

- the high levels of hearing loss among Indigenous people;[108]

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[105] Chris Cunneen and Melanie Schwartz *The family and civil law needs of Aboriginal people in New South Wales* (University of Sydney, 2008), p 32

[106] The tendency amongst Aboriginal people to use 'gratuitous concurrence' in interviews, in which the interviewee answers 'yes' to a question (or 'no' to a negative question), regardless of whether or not they actually agree with the question, or even understand it.

[107] Available at: https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5659/Bowraville%20-%20Final%20report.pdf

[108] The Senate Community Affairs References Committee's (**SCARC**) 2010 *Inquiry into hearing health in Australia* found that hearing loss has a strong association with Indigenous engagement with the criminal justice system. The Committee noted the High Court's finding in *Ebatarinja v Deland* (1998) 194 CLR 444, which 'suggests that undiagnosed hearing impairment in a convicted person could, in some circumstances, render that conviction unsafe' (SCARC 2010: 142). The Committee made several relevant recommendations, including that guidelines for police interrogation of Indigenous

- the prevalence of Foetal Alcohol Spectrum Disorder in Indigenous communities.[109] It is well recognised that sufferers of FASD may confess or agree to any statement due to high suggestibility and eagerness to please. Moreover, they may have little understanding of the various legal processes and the gravity of their situation.[110]

In NSW, these issues are partially addressed by the categorisation of Aboriginal and Torres Strait Islander people as vulnerable suspects under the Law Enforcement (Powers and Responsibilities) Regulation 2005 (NSW) and by internal police guidelines as to how interviews with interpreters should be conducted.[111] Further, the NSW Judicial Commission's *Equality before the Law Handbook* provides guidance to courts on language and communication issues specific to Indigenous people, noting:

It is critical that these matters are taken into account so as not to unfairly disadvantage the particular person. Just like everyone else, an Aboriginal person who appears in court needs to understand what is going on, be able to present their evidence in such a manner that it is adequately understood by everyone who needs to be able to assess it, and then have that evidence assessed in a fair and non-discriminatory manner.[112]

Cultural competence

More broadly, Legal Aid NSW considers that access to justice should extend to cultural competence, ensuring those who work with Indigenous communities have training about the local area in which they work, and trauma informed practice, including the trauma of assimilation. All participants in the justice system should also have a broader understanding of contemporary Aboriginal society, customs and traditions, and the historical and social factors which contribute to the position of Aboriginal people today.[113]

Legal Aid NSW has delivered a program of cultural competence across the organisation since 2015. This incorporates:

- One day seminars provided at each practice area's annual conference which is tailored to the specific requirements of legal practitioners representing Aboriginal

Australians in each state and territory be amended to include a requirement that a hearing assessment be conducted on any Indigenous person who is having communication difficulties, irrespective of whether police officers consider that the communication difficulties are arising from language and cross cultural issues (SCARC 2010: Rec 31).

[109] House Standing Committee on Social Policy and Legal Affairs *FASD: The Hidden Harm - Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorde*r (2012)

[110] Ibid, at [5.100]

[111] The NSW Police Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)

[112] https://www.judcom.nsw.gov.au/publications/benchbks/equality/ at [2.3.3]

[113] See further Terri Farrelly and Bronwyn Carlson *Towards cultural competence in the justice sector* (2011) Indigenous Justice Clearinghouse Current Initiatives Paper 3

clients. We have delivered topics on kinship, communication and mental health and disability, assimilation as trauma and trauma informed practice.

- Localised Aboriginal cultural awareness training developed and delivered with local communities to Legal Aid NSW regional offices.

- The provision of kinship workshops to all Legal Aid NSW staff.

Cultural competence can also be advanced by the use of field officers and liaison officers. Legal Aid NSW currently has two Aboriginal Field Officers (**AFOs**). The primary role of an AFO is to encourage and promote culturally appropriate services to Aboriginal clients and Legal Aid NSW staff. Their role also focuses on community engagement, providing support to Aboriginal clients and practitioners at outreach clinics and community legal education programs. AFOs have made a major contribution to ensuring Legal Aid NSW's services are culturally appropriate and responsive, improving links between local Aboriginal communities and Legal Aid NSW's regional offices and increasing the number of Aboriginal people using our services.

Within Legal Aid NSW, the Aboriginal Employment and Career Development Strategy and the Judge Bob Bellear Legal Career Pathways Program aims to increase the cultural competence of Legal Aid NSW and increase access to services in communities. Legal Aid NSW employs approximately 70 Aboriginal and Torres Strait Islander staff (including 20 lawyers) from these programs; six per cent of our workforce is Aboriginal or Torres Strait Islander.

Legal Aid NSW considers that improved awareness through training on cultural competence and cross cultural communication issues would benefit all those who work with Aboriginal people in the criminal justice system – from investigating police to the State Parole Authority and those who supervise community based sentences and parole. Where not already available, such training should be developed and delivered by properly resourced Aboriginal organisations.

Diversionary options and specialist sentencing courts

Question 11–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?

Legal Aid NSW considers that the following diversionary approaches and specialist courts for Aboriginal and Torres Strait Islander people could be effective in addressing Indigenous offending and incarceration rates:

- Koori Courts for adult offenders in selected locations in regional NSW
- Youth Koori Courts in selected locations in regional NSW
- Drug Courts in selected locations in regional NSW[114]
- the expansion of the MERIT program to selected locations in regional NSW
- the expansion of the MERIT program to include individuals suffering from alcohol abuse problems in all locations, and
- the expansion of the MERIT program to include people in custody and those charged with strictly indictable and/or violent offences.

The above initiatives require concurrent commitments to appropriate services and programs, including residential drug and alcohol detoxification and rehabilitation facilities. An audit of available facilities in regional and remote NSW should be undertaken to ensure there are sufficient high quality facilities to meet demand.

Our solicitors report that finding a residential rehabilitation bed for a person who is before the courts is extremely difficult (see, for example, the case study of Graeme, provided in response to Proposal 2–2). Most facilities refuse to assess persons in custody for inclusion in their programs. There is a clear need for expanded services.

Limiting terms

Proposal 11–2 Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.

[114] A review of a variety of programs designed to reduce recidivism found that drug courts were among the three most effective (intensive supervision with treatment and vocational education in prison were the other two): Aos et al (2006) cited in Boris Beranger et al *Reducing Indigenous Contact with the Court System* (2010) BOCSAR Issue paper no. 54

Legal Aid NSW supports this proposal. Limiting terms are provided for in section 23(1)(b) of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

Aboriginal Legal Service

Question 11–2 In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?

Legal Aid NSW has concerns about the underfunding of the ALS. The ALS delivers high-quality, culturally sensitive legal services and effectively advocates for the legal rights of Aboriginal people. Their unique role as a specialist service for Aboriginal people is fundamental to promoting access to justice for Aboriginal people.[115]

For the ALS to continue to fulfil that role, proper funding is essential. The consequences of lack of funding of the ALS are that:

- In many courts, such as Coffs Harbour and Taree, the ALS does not have any office space for its duty lawyers and client conferences.
- Relatively inexperienced practitioners are expected to appear in higher courts, for example, in Supreme Court bail applications.
- Funding for expert reports and briefing counsel is sometimes not available when it is needed.
- The ALS does not have an equivalent policy presence as non-Indigenous legal stakeholder organisations.

The ALS has recently withdrawn its services from all State Parole Authority hearings, as well from 14 Local Courts and two District Courts (at Parramatta and Gosford) in NSW.

With increased Commonwealth Government funding, the ALS would be able to:

[115] Legal Aid NSW and Aboriginal Legal Service (NSW/ACT) *Statement of Commitment* 20 September 2016, available at http://www.legalaid.nsw.gov.au/for-lawyers/news/news-for-lawyers/2013/statement-of-commitment-signed-with-aboriginal-legal-service

- deliver a more comprehensive service to its clients, including hiring specialist workers to provide transition, throughcare and post-release services

- work more closely with communities to develop support systems and prevent reoffending, and work more closely with its most vulnerable clients, including women and children, and

- better train and staff its core legal advice and representation service.

While some of these services can and should also be provided by agencies other than the ALS, Legal Aid NSW emphasises that the ALS has a unique and critical role as a specialist legal service for Aboriginal people. It has a leadership role in policy development as it draws on the strength of culture and community. It should be funded to provide a culturally appropriate and comprehensive service.

Custody notification service

Proposal 11–3 State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

Legal Aid NSW supports this recommendation.

The Aboriginal Legal Service (NSW/ACT) has a custody notification service. However, while the ACT Government provides recurrent funding for this service, the NSW Government does not. As Commonwealth funding is by way of a grant, there is ongoing uncertainty about future funding of the service. Current funding for the custody notification service in NSW is only sufficient to roster one solicitor on the service at any time. With increasing numbers of Indigenous people being detained, there are times when a backlog of notifications builds up and there is a delayed response to the notification. Increased funding is needed for the service to provide a prompt response.

Legal Aid NSW is also concerned that, if enacted, the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (Cth) will water down the current

obligation on police to notify an Aboriginal legal aid organisation prior to questioning an Aboriginal or Torres Strait Islander person in respect of a Commonwealth offence.[116]

Diversion of young people in care

While noting the limited Terms of Reference of the present Inquiry, Legal Aid NSW nevertheless considers that potential reforms to strengthen diversionary options for Aboriginal people cannot be considered in the context of adult offenders alone.

Legal Aid NSW supports the development of a nationally consistent therapeutic care framework for residential OoHC service delivery. The emphasis of such a framework should be on reducing the interaction of police and decriminalising children and young people in residential OoHC.

Many young people in residential OoHC have experienced complex trauma. For young people, the impact of past experiences of trauma can manifest in a range of disruptive and difficult behaviours, often characterised by a limited capacity to regulate behaviours and emotions. For Legal Aid NSW, this has resulted in unnecessary and frequent interaction with the criminal justice system for this group of vulnerable young people. Often these young people come before the Children's Court having been charged for absconding from placement, relatively minor assault charges or property offences that occur in the residential OoHC environment. Legal Aid NSW submits that an over-reliance on ADVOs results in the criminalisation of behaviour that would normally be dealt with as a disciplinary matter if occurring in a family home. This leads to an ongoing cycle of conflict, and the unnecessary criminalisation of a vulnerable young person.

Challenging behaviours need to be managed in the residential OoHC environment in a way that not only supports the young person who is exhibiting the behaviours, but also ensures the safety of all residents and workers. Legal Aid NSW submits that the over-use of police as a behaviour management tool is punitive in nature and inconsistent with a therapeutic response. For a child or young person who has experienced significant trauma, the presence of the police can have an additional harmful impact on the young person.

Legal Aid NSW has led systemic change and advocacy around this issue through our recent work with the NSW Ombudsman's Office in the development of a State wide *Joint Protocol to Reduce the Contact of Young People in Residential Out of Home Care with*

[116] Currently the obligation is for the official to 'immediately' inform the person that a representative of a legal aid organisation will be notified, and to notify such a representative accordingly: section 23H of the *Crimes Act 1914* (Cth). The Bill will alter the obligation, removing the requirement to inform the person 'immediately' and requiring the official to 'take reasonable steps to notify' the organisation. See Legal Aid NSW's submission to Senate Legal and Constitutional Affairs Legislation Committee Inquiry into Bill 2017 http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0016/27403/Legal-Aid-NSW-submission-on-Crimes-Leg-Am-Powers-Offences-Bill-2017-26-June-2017-.pdf

the Criminal Justice System (**the Protocol**).[117] The Protocol sets out guidelines for appropriate responses to young people with challenging behaviours by both the residential OoHC service provider and NSW Police, emphasising a trauma informed response. It is a multi-agency collaborative effort which aims to reduce the frequency of interactions between young people in residential OoHC and the NSW Police. The Protocol has recently been adapted for use in the context of people with cognitive and/or mental health impairments,[118] and provides a useful model of a therapeutic and diversionary approach to Indigenous offending.

Chapter 12 Police accountability

In relation to property, traffic, drug possession and public order offences, Legal Aid NSW has observed that NSW Police do not always appropriately exercise their discretion to warn, caution or issue court attendance notices. Arrest and bail is frequently used when not necessary, and conditions on bail are enforced without attention to the circumstances. Legal Aid NSW repeats its submissions above concerning policing of bail conditions and incorrect identification of primary perpetrators of domestic violence.

Chapter 13 Justice reinvestment

Legal Aid NSW supports the justice reinvestment approach. The redirection of funding from punitive responses to crime into preventative strategies, early diversion and rehabilitation has significant potential for reducing rates of Indigenous incarceration. These approaches are most likely to be successful if they are community-led and supported by a whole-of-government response.

Question 13–1 What laws or legal frameworks, if any, are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples?

In our responses to the proposals and questions in Chapters 2-4, Legal Aid NSW has called for reforms to laws regarding bail and sentencing to provide judicial officers with greater discretion to divert accused or convicted people where appropriate. Such reforms would facilitate a justice reinvestment approach.

[117] The Protocol is available at: http://www.community.nsw.gov.au/__data/assets/file/0010/408691/Factsheet_JP.pdf

[118] See https://www.ombo.nsw.gov.au/news-and-publications/publications/fact-sheets/community-and-disability-services/joint-protocol-fact-sheet