



Law Council
OF AUSTRALIA

Incarceration Rates of Aboriginal and Torres Strait Islander Peoples

(Discussion Paper 84)

Australian Law Reform Commission

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
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- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia acknowledges the assistance of its Indigenous Legal Issues Committee, the Law Society of South Australia, the Law Society of Western Australia, the Law Institute of Victoria, the Law Society of New South Wales and the New South Wales Bar Association in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) is grateful for the opportunity to provide a submission in response to the Australian Law Reform Commission (**ALRC**) Discussion Paper on the *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (**Discussion Paper**).
2. Despite garnering national attention, the Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) and the significant work undertaken in the 25 years following, the continuing over-representation of Aboriginal and Torres Strait Islander demonstrates a worsening national crisis.
3. Recently published data by the Australian Bureau of Statistics highlights the catastrophically and disproportionately high imprisonment rates of Aboriginal and Torres Strait Islander people. The average daily number of Aboriginal and Torres Strait Islander prisoners during the June quarter 2017 was 11,411 persons (an increase of 7 per cent from 2016.¹ Aboriginal and Torres Strait Islander prisoners represented 28 per cent of the total full-time adult prisoner population during the June quarter 2017,² whilst only accounting for about 2-3 per cent of the total Australian population aged 18 years and over.³
4. Significantly, the imprisonment rates of Aboriginal and Torres Strait Islander women are increasing at alarmingly high rates. From the June quarter 2017 to the June quarter 2017, the average daily number of Aboriginal and Torres Strait Islander women in prison increased by 11 per cent and the imprisonment rate increased by 8 per cent from 461.7 prisoners per 100,000 adult female Aboriginal and Torres Strait Islander population to 496.6.⁴
5. Bail and parole laws play a substantial role in imprisonment rates of imprisonment for Aboriginal and Torres Strait Islander people. Bail conditions such the availability of suitable or adequate accommodation tend to disproportionately affect Aboriginal and Torres Strait Islander people, particularly in remote locations. Bail and parole laws and principles must be reviewed to ensure that they are adaptable to the experience of many Aboriginal and Torres Strait Islander people and issues resulting from severe disadvantage are not the reason for refusal. Consideration of issues that arise due to the person's Aboriginality will go some way to reducing the disproportionate level of Aboriginal and Torres Strait Islander people refused bail or parole and preventing the imposition of inappropriate conditions. However, it is also important that practical solutions and alternatives to refusal, such as bail hostels and safe houses for parolees, are developed.
6. Mandatory sentencing laws often adversely affect those who are financially disadvantaged, young or suffering from mental health conditions as such laws do not allow for consideration of specific circumstances. Aboriginal and Torres Strait Islander people are disproportionately represented in these groups and often disproportionately affected by mandatory sentencing schemes. The Law Council

1 Australian Bureau of Statistics, *Corrective Services, Australia, June quarter 2017*, cat no 4512.0, 2017, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>>.

2 Ibid.

3 Australian Bureau of Statistics, *Census of Population and Housing: Australia Revealed, 2016*, cat no 2024.0, 2017, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0>>.

4 Australian Bureau of Statistics, *Corrective Services*, above n 1.

suggests that all Australian governments review and replace laws that impose a mandatory sentence.

7. The deprivation of liberty through imprisonment is the most severe punishment that can be imposed in Australia's legal system. However, it is currently overused in cases of minor offending. The Law Council suggests that governments review and replace laws that allow for imprisonment of less than six months and expand the availability of diversion programs. Short-term imprisonment is highly costly and is ineffective in preventing future offending as it does not provide an appropriate opportunity for offenders to address the underlying issues of their offending through rehabilitation programs. However, the Law Council does recommend that short-term imprisonment be available in limited circumstances where a person poses an unacceptable risk to the community (for example, if domestic violence is likely to reoccur). In these circumstance, ongoing support and programs that continue beyond the term of imprisonment should be available.
8. Sentences of imprisonment for relatively minor offences, including driving offences, unpaid fines and offensive language should be abolished. These laws disproportionately affect disadvantaged people, including Aboriginal and Torres Strait Islander people, and can result in punishment that is disproportionate to the offence.
9. Diversion is a key element in reducing the rates of imprisonment of Aboriginal and Torres Strait Islander people. Current diversion programs are often not uniformly available across jurisdictions, particularly in rural and remote areas. Australian governments must work together with Aboriginal organisations and communities to ensure that diversionary options are available to judges when sentencing, particularly in cases of minor offending.
10. The Law Council recognises the consistent theme throughout the Discussion Paper of self-determination and Aboriginal and Torres Strait Islander led solutions. The Law Council supports engagement with Aboriginal and Torres Strait Islander organisations and communities at all stages of the development, implementation and evaluation of programs and policies to address the overimprisonment of Aboriginal and Torres Strait Islander people. Research has consistently demonstrated that programs and policies that incorporate the culture of Aboriginal and Torres Strait Islander people and are based on local community knowledge and understanding are critical in developing effective solutions and generating positive outcomes.⁵
11. The incarceration rates of Aboriginal and Torres Strait Islander people are a national issue requiring a national response. Australian governments must work together in a cooperative and coordinated manner, drawing on the input of peak Aboriginal and Torres Strait Islander organisations at every stage if this issue is to be addressed. The Law Council and its Constituent Bodies have long advocated for national 'justice targets' to be included in the Council of Australian Governments' *Closing the Gap* strategy. Too often, discussion is focused on spending as a sign of progress in this area. Rather success should be measured by the outcomes achieved. Justice

5 See eg, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (2016), 3.18-3.20; Janet Hunt, 'Partnerships for Indigenous Development: International Development NGOs, Aboriginal Organisations and Communities' (Working Paper No 7, Centre for Aboriginal Economic Policy Research, 2010); . See also Tom Calma, 'Evaluating the external forces which exert an influence on government policy direction' (Paper presented at Collaborative Indigenous Policy Development Conference, Brisbane, 27-28 June 2006); Reconciliation Australia, *Justice Reinvestment: Community-led Solutions a Smarter Approach* (September 20, 2016) <<https://www.reconciliation.org.au/news/justice-reinvestment-community-led-solutions-a-smarter-approach/>>.

targets are likely to refocus programs designed to prevent over-incarceration on outcomes rather than inputs and encourage better evaluation to ensure that spending is correlated to progress.

12. Part of the issue in designing and evaluating the progress of programs and policies designed to close the gap in indigenous imprisonment is the limited availability of comprehensive and cross-comparable data. Current statistical reports provide only a small snapshot of a much more complex problem and are likely to be under-identifying the extent of interaction with the criminal justice system by Aboriginal and Torres Strait Islander people. The Law Council recommends that all Australian governments, through COAG, commit to establishing and appropriately funding a central body to coordinate the collection, evaluation and reporting of criminological data.
13. The Law Council acknowledges the links between broader issues including *inter alia* health, unemployment and housing issues which are linked to offending and imprisonment of Aboriginal and Torres Strait Islander people. Addressing root causes of interaction with the justice system is a critical component of strategies to address the over-imprisonment of Aboriginal and Torres Strait Islander people. Where possible, justice programs should be connected to and work in conjunction with broader services.
14. The Law Council would be pleased to discuss its comments further with the ALRC, should it assist.

Introduction

15. The Law Council's submission has been informed by the discussions held around the Law Council's Indigenous Imprisonment Forum (**Forum**) held on 26 November 2015 and the recommendations arising in the [Communique](#) from that event.
16. The submission is also informed by the ongoing work of the Law Council's [Justice Project](#). In particular, the Consultation Papers regarding Aboriginal and Torres Strait Islander Peoples and Prisoners and Detainees.
17. The Law Council has responded specifically to the ALRC's Questions and Proposals that relate to the law and the justice system. Other Questions and Proposals have been left to other organisations with expertise in those areas.

2. Bail and the Remand Population

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.

As with all other bail considerations, the requirement to consider issues that arise due to the person's Aboriginality would not supersede considerations of community safety.

18. The Law Council supports the recommendation in Proposal 2-1 that each state and territory implement a legislative provision similar to s 3A of the *Bail Act 1977* (Vic).

19. Anecdotally, the Law Council understands that refusal of bail or parole is often used a form of punishment and that conditions are not being adapted to account for the particular circumstances of many Aboriginal and Torres Strait Islander people.
20. A standalone provision which requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', will likely promote consistency of consideration of issues specific to the experience of many Aboriginal and Torres Strait Island people and will help alleviate the imposition of inappropriate bail conditions that may lead to recidivism.
21. Section 3A was overwhelmingly supported by stakeholders in the 2017 Review of Victoria's Bail System (**Victorian Bail Review**).⁶ In its submission to that Review, the Law Institute of Victoria recommended that s 3A be retained and that further guidance and associated training be developed for police, court registrars, magistrates and bail justices on the implementation of this section.⁷ The Law Council suggests that guidance material and training opportunities be made available to support the effective operation of provisions similar to s 3A when introduced more broadly. This training and material should go beyond just 'cultural awareness' and explore the modern manifestations of historical factors and highlight the social, political and economic position of Indigenous Australians in the context of offending behaviours.

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.

22. The Law Council supports Proposal 2-2. However, the Law Council notes that further options, and more consistency in the availability of options, are needed to support a greater number of Aboriginal and Torres Strait Islander people to receive bail and comply with bail conditions. A provision requiring consideration of culture alone may not be enough to facilitate a grant of bail where the person still requires support.⁸
23. Bail laws have become more and more restrictive in most States and Territories, leading to an increase in the amount of Aboriginal and Torres Strait Islander people held on remand.⁹ In New South Wales (**NSW**) proceedings for breach of bail have risen rapidly in recent years and are a major driver of the increase in the size of the juvenile remand population.¹⁰

6 Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017) [4.82].

7 Law Institute of Victoria, Submission to the *Review of Victoria's Bail System* (31 March 2017) [15]-[16].

8 Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017).

9 Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, *End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia* (2017) <<http://un.org.au/2017/04/03/end-of-mission-press-conference-and-end-of-mission-statement-by-the-un-special-rapporteur-on-the-rights-of-indigenous-peoples-victoria-tauli-corpuz-on-her-visit-to-australia/>>.

10 Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 96, citing NSW Law Reform Commission, *Bail*, Report No. 133 (2012) ('*Arresting Incarceration*').

24. Aboriginal and Torres Strait Islander people are disproportionately affected by bail laws and restrictions.¹¹ These laws include a presumption against bail in a range of areas, such as for people who have breached bail in the past,¹² and when suitable or adequate accommodation or support is not available. The Law Council is aware of anecdotal evidence of over-prescriptive bail conditions setting up people to fail. One such bail condition is the condition 'not to consume alcohol' in circumstances in which the person is highly unlikely to be able to comply and unable to access clinical support to assist them to detox. These types of bail conditions are undesirable as they can have a compounding effect. Not only may a person return to prison for breaching their bail conditions in the initial circumstances, if they reoffend in the future they may be unable to obtain bail due to a history of breach.
25. These laws can result in Aboriginal and Torres Strait Islander people spending significant periods on remand for relatively minor offences.¹³ Alternatives must be further developed and where currently operating, must be expanded and properly funded.
26. One example, is the introduction of 'bail hostels' which are residential premises used to accommodate defendants as a condition of their bail. Bail hostels are used in the United Kingdom, but have not been widely implemented in Australia. Weatherburn has noted that bail hostels are likely to better serve the Aboriginal and Torres Strait Islander community because they provide a means of keeping defendants in the community rather than in prison who would 'either lack any permanent accommodation of their own, or cannot be safely returned to that accommodation.'¹⁴ Furthermore, bail hostels can provide an opportunity to address underlying causes of offending behaviour by providing supervision and treatment which may, in turn, increase the likelihood of compliance with bail conditions.'¹⁵
27. The benefits of Aboriginal and Torres Strait Islander-led solutions are well documented.¹⁶ Outcomes for Aboriginal and Torres Strait Islander people will 'only improve once practical gains in Aboriginal self-determination about children and families [and communities] are achieved'.¹⁷ Governments must work with Aboriginal controlled organisations to identify service gaps and must ensure that Aboriginal and Torres Strait Islander-controlled organisations are adequately resourced to participate in this important consultative process which can be resource intensive for non-profit organisations.

11 Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 95.

12 See, eg, *Bail Act 2013* (NSW) s18.

13 Weatherburn, *Arresting Incarceration*, above n 10, 96.

14 Ibid 95.

15 Ibid 95.

16 See for example, Reconciliation Australia, *Justice Reinvestment: Community-led Solutions a Smarter Approach*, above n 5>.

17 Philip Cummins et al, Parliament of Victoria, *Report of the Protecting Victoria's Vulnerable Children Inquiry* (2012) vol 2, 273.

3. Sentencing and Aboriginality

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?

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.?

28. The Law Council supports a recommendation that legislative reform across Australian jurisdictions be undertaken 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. The Law Council suggests that specific legislative direction would provide clearer direction to the courts to allow for individual circumstances in sentencing.
29. The Bar Association of New South Wales (**NSW Bar**) has made detailed responses to Questions 3-1 and 3-2 in its submission to this inquiry. The Law Council has had the benefit of considering the NSW Bar's submission and agrees with its responses to these questions.

Current preclusion of customary law or cultural practice in sentencing

30. The Law Council notes that under the *Crimes Act 1914* (Cth) in the cases of federal criminal offences¹⁸ and criminal offences in the Northern Territory,¹⁹ the court must not:

take into account any form of customary law or cultural practice as a reason for:

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or

(b) aggravating the seriousness of the criminal behaviour to which the offence relates.²⁰

31. In the case of *R v Wunungmurra*, Justice Southwood noted that s 91 of the *Northern Territory National Emergency Response Act 2007* (Cth) (the precursor to ss 16A and 16AA of the *Crimes Act*):

might be considered unreasonable or undesirable because it precludes a sentencing court from taking into account information highly relevant to determining the true gravity of an offence and the moral culpability of the offender, precludes an Aboriginal offender who has acted in accordance with

18 *Crimes Act 1914* (Cth) s 16A.

19 *Ibid* s 16AA.

20 *Ibid* ss 16A and 16AA.

*traditional Aboriginal law or cultural practice from having his or case considered individually on the basis of all relevant facts which may be applicable to an important aspect of the sentencing process, distorts well established sentencing principle of proportionality, and may result in the imposition of what may be considered to be disproportionate sentences,*²¹

32. In order to give effect to an express requirement for courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples in the federal and Northern Territory contexts, ss 16A and 16AA should be removed.

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?

33. The Law Council notes that sentencing courts currently do not have sufficient information available regarding the offender's background including cultural and historical factors that relate to the offender and their community.
34. In the *Bugmy v The Queen* (**Bugmy**) decision, the Court noted that
*... in any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.*²²
35. The Law Council understands that there is currently no ready access to such evidentiary material. If State and Territory legislation is reformed on similar terms to the Canadian *Criminal Code* (or to require consideration of Aboriginality as a factor in sentencing), then such information material may become a sentencing requirement. Even if such legislative reform does not take place, the Law Council supports the implementation of *Gladue* style reporting.
36. The Law Council is aware that Aboriginal Legal Service (NSW/ACT) (**ALS (NSW/ACT)**) has established the Bugmy Evidence Project, to gather and develop community by community reports about locations with high populations of Aboriginal people.²³ These reports will provide narrative and statistical information about Aboriginal communities in NSW, where the essential aim of the project is to provide background community evidence supporting an individual's personal experience in that community, which is often of social disadvantage. It is intended that the library will be freely available for use by lawyers and individuals facing court proceedings. The Law Society of New South Wales (**LSNSW**) advises that the ALS (NSW/ACT) is expecting to launch the library next year with between five and 20 community

²¹ [2009] NTSC 24 (9 June 2009) 180 (Southwood J) [25]. In this case Southwood J, determined that the exclusion of customary law and cultural evidence in sentencing is relevant only to the seriousness of an offence, but may be admissible in relation to the character of the offender, likelihood to reoffend and prospects for rehabilitation. See also Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2016) *Melbourne University Law Review* 47, 59; Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 200; Russell Goldflam, 'The (Non-)Role of Aboriginal Customary Law in Sentencing in the Northern Territory' (2013) 17(1) *Australian Indigenous Law Review* 71.

²² (2013) 249 CLR 571 [41].

²³ Aboriginal Legal Service (NSW/ACT), *Justice for Aboriginal People and Communities: Annual Report 2015-2016*, 21.

reports. The Project will develop organically from there to cover additional communities.

37. The Bugmy Evidence Project is not aimed at providing individualised reporting about the community for a person facing court (in contrast to Canadian *Gladue* reports), but it coheres with that style of reporting and would inform and assist any future *Gladue* reporting project.
38. It is critical that Aboriginal and Torres Strait Islander legal, health and community organisations be consulted in relation to the information gaps that currently exist, and how best to put that information before the courts. Law Council suggest that the following information would benefit the court:
 - community profiles (such as those being prepared by the Bugmy Evidence Project) noting the importance of ensuring that evidence of intergenerational trauma, and how particular families and communities may be affected by, for example, the experience of the Stolen Generations, is made available to the court;
 - where there is a history of trauma or deprivation, assessments by an Aboriginal mental health professional or mental health professional who has undergone cultural competence training to properly assess the impact of the trauma, identify any Indigenous specific mental health issues and culturally appropriate treatment and support; and
 - other information contained in *Gladue* reports, in particular, information in respect of community-based rehabilitation and alternatives to imprisonment.
39. The following information on *Gladue* reports provided by an Aboriginal caseworker with the Aboriginal Legal Services of Toronto who authors *Gladue* reports is instructive:

It serves two purposes: first, it highlights the unique systemic factors that may have brought a particular Aboriginal offender before the court. Second, it provides information regarding community-based rehabilitation that may or may not be culturally appropriate.

Some of the unique systemic factors include impacts of residential school, child welfare involvement, dislocation, substance abuse and discrimination just to name a few. Each report is unique as it reflects an Aboriginal offender's life experience. Some of these factors may run deep into an Aboriginal offender's life and may have caused them to cope negatively by way of substance abuse, for example.

Based on the information collected and after discovering and/or determining an Aboriginal offender's underlying issues, a Gladue caseworker is able to suggest culturally appropriate (where available) programming to assist in rehabilitation. This is made by way of recommendation for the court's consideration when crafting an appropriate sentence.

For the most part, Gladue reports have been authored by an Aboriginal. An Aboriginal report writer has a better understanding of the unique circumstances faced by Aboriginal people and, more often than not, shares those experiences in common with the Aboriginal offender. This generally

*allows a report writer to build rapport with an Aboriginal offender quite quickly.*²⁴

40. The Law Council notes that the ACT government will be trialling specialised sentencing reports for Aboriginal and Torres Strait Islander offenders, similar to *Gladue* reports, in an attempt to acknowledge the intergenerational disadvantage that can lead to offending behaviours.²⁵ This trial follows a Legal Aid ACT report on specialised sentencing reports, commissioned by the ACT government.²⁶

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?

41. See answer to Question 3-3.

Question 3–5

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

42. The Law Council strongly recommends that if *Gladue* style reports are implemented, they should be prepared by properly resourced independent bodies. The reports should be prepared, at a minimum, with significant input from Aboriginal or Torres Strait Islander people and should particularly be informed by members of the communities in question.
43. The Law Council does not support a model where the reports are prepared by the government departments responsible for corrections. However, it will be important to ensure that there is some practical interaction between reports prepared by other departments (such as those responsible for young offenders) and any *Gladue*-type report. Consideration should be given to whether there should be one report in these circumstances, which includes a *Gladue* component, or whether there should be two separate reports. One useful example of reports of this nature is in the New Zealand Youth Court where the report is prepared by an independent person, who takes the role of a 'community' or 'cultural' or 'family' advocate.²⁷
44. The Law Council suggests consideration of the experience of Ontario Canada in respect of appropriate models for the funding and preparation of specialist sentencing reports. For example, the Law Council understands that Legal Aid Ontario (LAO) is one source of funding for the preparation of these reports (that are prepared by Aboriginal Legal Services of Toronto and Aboriginal organisations in a

24 Chad Kicknosway, *Gladue Reports: not just a sentencing report* (13 March 2015) Legal Aid Ontario <<http://blog.legalaid.on.ca/2015/03/13/gladue-reports-not-just-a-sentencing-report/>>.

25 Gordon Ramsay MLA and Shane Rattenbury MLA, 'Sentencing reform to target recidivism' (Media Release, 6 February 2017).

26 Michael Inman, 'ACT set to trial sentencing reports for indigenous offenders, like Canada's Gladue reports', *Canberra Times* (online), 7 August 2017 <<http://www.canberratimes.com.au/act-news/act-set-to-trial-sentencing-reports-for-indigenous-offenders-20170803-gxofi1.html>>.

27 For more information see a paper by the then Principal Youth Court Judge for New Zealand, Judge Andrew Becroft: Judge Andrew Becroft, 'The Rise and Rise of Lay Advocates in Aotearoa New Zealand' (Speech delivered at the National Youth Advocates/Lay Advocates Conference, Auckland, 13-14 July 2015) <<https://www.youthcourt.govt.nz/assets/Documents/Publications/Youth-Court-the-rise-rise-of-lay-advocates-in-New-Zealand.pdf>>.

number of localities throughout Ontario²⁸), and that a *Gladue* member panel has been established by LAO. Membership of the panel requires certain levels of training and cultural competence.²⁹ Members of that panel are authorised to bill five additional hours in making submissions on behalf of Aboriginal offenders.³⁰

4. Sentencing Options

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?

- 45. The Law Council strongly opposes mandatory sentencing in all circumstances. Mandatory sentencing regimes impose unacceptable restrictions on judicial discretion and independence, disproportionately affect particular social groups - including Aboriginal and Torres Strait Islander people - and undermine fundamental rule of law principles. Please see the Law Council's [Policy Discussion Paper on Mandatory Sentencing](#), which outlines the Law Council's position in detail.
- 46. There are a number of factors a judge is required to take into account in sentencing, including the impact of the crime on the victim, the legislation which prescribes the offence and sentencing guidelines. Mandatory sentencing schemes seek to eliminate the factors that can be considered in determining an appropriate sentence. Such schemes operate on the principle that where an offence is committed an automatic mandatory minimum sentence is justified, regardless of the particular circumstances of the offender, the manner in which the offence occurs and the specific victim affected.
- 47. Mandatory sentencing schemes create arbitrary outcomes that are often not proportionate to the crime, and undermine the fundamental principle of equality before the law. Former Australian Human Rights, Mr Tim Wilson, has argued that mandatory sentencing 'is an incremental stake stabbed in the heart of the foundations of our liberal democracy because it assumes that a centralised government with less information can make better decisions about individual cases than decentralised courts with more information'.³¹ The Law Council agrees with these sentiments.
- 48. The Discussion Paper highlights a number of circumstances in which mandatory sentences have been imposed on Aboriginal or Torres Strait Islander people for relatively minor or trivial offences. Mandatory sentencing laws adversely affect those who are financially disadvantaged, young or suffering from mental health conditions. Aboriginal and Torres Strait Islander people are disproportionately

28 See Legal Aid Ontario, *Aboriginal identity: Gladue report programs* <<http://www.legalaid.on.ca/en/info/ASIQ-currentGladuereportprograms.asp>>.

29 See Legal Aid Ontario, *Gladue panel standards* <http://www.legalaid.on.ca/en/info/panel_standards_gladue.asp>.

30 Sébastien April and Mylène Magrinelli Orsi, 'Gladue Practices in the Provinces and Territories' (Report, Research and Statistics Division, Department of Justice, Canada, 2013) 21 [6.5.3].

31 Australian Human Rights Commissioner, *Queensland Law Society Mandatory Sentencing Policy Paper Launch*, 4 April 2014.

represented in these groups and often disproportionately affected by mandatory sentencing schemes.³² For example, research following the introduction of a mandatory sentencing scheme for certain assault offences in the Northern Territory in 2008 found that although there were few differences in sentencing outcomes for repeat offenders, Aboriginal and Torres Strait Islander males were 68 times more likely to be convicted of, or come into contact with the justice system for, this kind of offence.³³

49. Further, in the Law Council's view, there is a lack of convincing evidence to suggest that the justifications often given for mandatory sentences – retribution, effective deterrence, incapacitation, denunciation and consistency – achieve the set aim. Instead, mandatory sentencing regimes can produce unjust results with significant economic and social costs without a clear and directly attributable corresponding benefit in crime reduction.

Question 4–2

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

50. The Law Council supports the abolition of shorter sentences except in circumstances where the offender poses an unacceptable risk to the community. Short term sentences are highly costly³⁴ and are highly ineffective in providing rehabilitation and preventing recidivism as rehabilitation programs are more often than not available to short-term prisoners.³⁵
51. Alternatives to full-time custody are not available uniformly throughout much of Australia, particularly in rural areas.³⁶ This must be addressed in conjunction with any moves to remove short-term imprisonment as a sentencing option. The Law Council is concerned that if short prison sentences were abolished without the introduction of uniformly available diversionary sentencing options, offenders may be sentenced to longer periods of imprisonment or forced into inappropriate alternatives.
52. Some organisations advise the Law Council that absolute abolition of sentences of six months or less would remove a sentencing option that may be appropriate in certain circumstances. For example, in cases of domestic violence, a short period of imprisonment for the offender may give the victim sufficient time to extricate themselves from the circumstances of the abuse.

32 See, eg, Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission No 5 to Senate Finance and Public Administration References Committee, Parliament of Australia, 2016, 5.

33 Stephen Jackson and Fiona Hardy, 'The Impact of Mandatory Sentencing on Indigenous Offenders' (Speech delivered at Sentencing Conference 2010, National Judicial Conference, Canberra 6 & 7 February 2010) p. 3.

34 The total net operating expenditure (including capital costs) per prisoner per day in 2015-16 was \$283.19 (or approximately \$103,000 per year): Productivity Commission, *Report on Government Services 2017* (7 February 2017) vol C, ch 8, table 8A.18.

35 Council of Australian Governments, *Prison to Work Report* (9 December 2016) 41.

36 For example, in NSW alternatives to imprisonment including home detention and Intensive Corrections Orders are not available state-wide: New South Wales Law Reform Commission, *Sentencing* (2013) 201.

Question 4–3

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

53. The Law Council supports a threshold of 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?

54. Whether or not short-term imprisonment is abolished, non-custodial alternatives to prison must be made uniformly available throughout states and territories, including in regional and remote areas. During consultations for *The Justice Project*, the Law Council has been informed that in remote areas such as Far West New South Wales and regional Western Australia, certain sentencing options (including Intensive Corrections Orders and home detention) are not available.³⁷

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.

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?

55. The Law Council has had the opportunity to review the submission of the NSW Bar and supports its recommendations in relation to Proposal 4-1 and Question 4-5, including:
- legislative reform to encourage and allow courts to recognise that the systemic and background factors affecting Aboriginal and Torres Strait Islander peoples;
 - legislative reform across all Australian jurisdictions to require courts to give specific consideration to community-based options and alternatives to imprisonment and, where necessary, to provide reasons as to why other options were not imposed and why a term of imprisonment was imposed; and
 - legislative reform to allow greater flexibility in tailoring a sentence to the specific circumstances of an offender.
56. When implementing new diversion options and programs governments must work closely with Aboriginal and Torres Strait Islander organisations and communities as they are best placed to advise on the specific circumstances of Aboriginal and Torres Strait Islander communities and how diversionary options can most effectively be implemented in those communities.

³⁷ See also, New South Wales Law Reform Commission, *Sentencing* (2013) 201.

5. Prison Programs, Parole and Unsupervised Release

Proposal 5–1

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

57. The Law Society supports Proposal 5-1 and notes that its implementation would require the allocation of additional resources.
58. COAG in its report, *Prison to Work*, identified that many Aboriginal prisoners on remand or serving sentences do not have adequate access services and programmes to assist them once the term of remand or imprisonment has finished.³⁸ As a result many prisoners do not have structured activity during the day to help them prepare for release, but still face the same problems that led to incarceration such as 'lack of housing, unstable family relationships, drug and alcohol abuse, poor levels of literacy [and] no job'.³⁹

59. The *Prison to Work* Report notes that:

Availability of evidence-based services to support a prisoner to transition to the community is scarce and where there are services of this kind available, the ability for ex-prisoners to access them is limited. Services may be unavailable due to small intake sizes, provider capacity, prison overcapacity or geographical isolation. Services may be available but potential clients are not aware of, or referred to, them, sometimes because of the lack of connections between services. Services are also rarely rigorously tested to measure their impact, making it difficult to gauge if they have a positive, negative or no impact at all.

*Prisoners returning to remote communities face particular barriers in accessing services. They face an added layer of isolation and are more likely to be returning to a family and community context that may have contributed to their offending. The lack of specialised services in remote areas can have particularly significant consequences for those with additional needs, such as disabilities or cognitive impairment.*⁴⁰

South Australia

60. The Law Society of South Australia (**LSSA**), has advised of a lack of availability of projects and programs for remand prisoners in the Adelaide Remand Centre. The Society advises that many of remandees are Aboriginal men who alleged to have committed domestic violence offences who have been refused bail under section 10 A of the *Bail Act 1985* (SA), very many of whom are Aboriginal, serve time in custody on remand, and plead guilty on the first available opportunity. They are often released after a period of weeks or months on remand, with their family lives, their working lives and their social and cultural lives having been completely disrupted. It is those people who particularly need programs directed to cessation of domestic violence.

38 Council of Australian Governments, *Prison to Work Report* (2016), above n 35, 41.

39 Ibid.

40 Ibid.

61. LSSA also notes concern that prisoners are being denied from the opportunity to apply for parole because they have not fulfilled their requirements for rehabilitation programs. This results in many prisoners remaining imprisoned well beyond the end of the non-parole period.

Victoria

62. The Law Institute of Victoria notes that Victoria does not have a spent conviction scheme, making it difficult for people to gain employment if they have a criminal record, even if they have the required skills and qualifications. The LIV has been a strong advocate for a spent conviction scheme in Victoria and recognises the profound impact that it has on the Aboriginal community in Victoria.⁴¹

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?

63. Through *The Justice Project*, the Law Council has identified the following best practice elements of programs for those prisoners held on remand or serving short sentences:
- (a) **Effective early assessment that addresses the causes of imprisonment from the time of reception to prison:** Prison, even for a short period of time can be a circuit breaker for many people from the issues that have led them to being imprisoned or remanded for example, poverty, lack of housing, mental health conditions or lack of employment.⁴² It is critical that programs identify these issues and provide an ongoing program for addressing designed to address those issues in the short and long term.

The Reception Transition Triage (**RTT**) program provided by Corrections Victoria, on reception into prison (including on remand), seeks to 'to identify and address immediate transitional needs that without intervention would escalate or compound'.⁴³ The type of assistance provided by the RTT program includes: housing support, debt reduction, remand transitional assistance and assistance reorganising child support.⁴⁴
 - (b) **Individualised case management:** For Aboriginal and Torres Strait Islander people in short-term imprisonment, it is critical that programs are individualised and culturally sensitive. Historical marginalisation and the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples, can significantly impact the success of a program for an Aboriginal and Torres Strait Islander person.⁴⁵ As such, Aboriginal and Torres

41 Law Institute of Victoria, *Spent Conviction Scheme* (2015).

42 Anne Grunseit et al, *Taking Justice into Custody: The Legal Need of Prisoners* (Law and Justice Foundation of New South Wales, 2008) 277.

43 Corrections Victoria Commissioner, *Commissioner's Requirement – Transitional Support and Preparation for Release* (January 2016) 4.

44 Ibid 4-5.

45 Pascoe Pleasance et al, *Reshaping legal assistance services: building on the evidence base* (Law and Justice Foundation of New South Wales, 2014), 139.

Strait Islander specific services and other specialised bodies that can provide culturally competent services are best placed to suit the needs of this group.⁴⁶

- (c) **Joined-up services:** Those in prison often face multiple problems, this is even more the case for Aboriginal and Torres Strait Islander people in prison who face disproportionately high levels of poverty, health problems and disability.⁴⁷ Effective programs provide integrated support and involve effective communication between the various support providers (legal, health and broader human services).
- (d) **On-going support:** Those on remand or imprisoned for a short period, generally do not have sufficient time during their incarceration to effectively address long term issues, it is therefore vital to ensure that services and support continue post release for a period of at least six months.

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?

- 64. The Law Council notes that Aboriginal and Torres Strait Islander female prisoners are more likely to be:
 - mothers;
 - victims of sexual or family violence; and
 - serving short sentences.
- 65. As such programs for Aboriginal and Torres Strait Islander women must be culturally safe and led by or in partnership with Aboriginal and Torres Strait Islander community controlled organisations with expertise in supporting victims/survivors.
- 66. The Law Council supports Change the Record's recommendation that the ALRC undertake a comparative review of current investment in programs for men and women in prison in each State and Territory with a view to assessing access to and equity in the provision of support services and programs to address offending behaviour.

46 Productivity Commission, *Access to Justice Arrangements*, 11 November 2013, 766.

47 See, eg, Pleasance et al, above n 45, 42; Christine Coumarelos et al, *Legal Australia-Wide Survey* (Law and Justice Foundation of New South Wales, August 2012), xxi.

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?

67. Automatic parole for sentences of three years or less was introduced in NSW on the recommendation of the 1978 Royal Commission into NSW Prisons.⁴⁸ Under this system, parole is often automatic for minimum terms of less than three years but at the discretion of the NSW State Parole Authority for longer sentences with the onus on the prisoner to establish suitability.⁴⁹ In addition to New South Wales, court ordered parole now exists in South Australia and Queensland.⁵⁰
68. In Great Britain a review of parole in 1988 (the Carlisle Report)⁵¹ concluded that it was both unworkable and wrong to try to operate a selective parole system for short sentence prisoners. The report led to the *Criminal Justice Act 1991* (UK) which limited discretionary parole to the release of offenders serving longer terms. Remission was abolished and replaced with automatic parole at 50 per cent for sentences of less than four years and discretionary release for offenders serving terms of imprisonment of more than four years. The *Corrective Services Act 2006* (UK) adopted the common theme that emerged in consultation that a gradual and supervised release of prisoners was desirable and should maximise a prisoner's rehabilitation and integration. Many of the people consulted during the review of the previous legislation favoured automatic release on parole at the point in time nominated by a sentencing court or after statutory determined period for prisoners serving short sentences.⁵²
69. The New South Wales Law Reform Commission (**NSWLRC**) recently considered parole and determined that a mixed parole system of automatic parole and discretionary parole (decisions made by the Parole Authority) should be retained in New South Wales. The Commission identified that nearly all stakeholders supported retaining a mixed parole system in New South Wales. The Commission found that lower risk offenders should receive automatic parole, saving the Parole Authority the unnecessary workload and requirement for more resources. The mixed system should be based upon risk, ensuring that high risk offenders (with longer sentences) receive the intensive resources required in their decision making and low risk offenders (sentences under three years) receive less attention and fewer resources.⁵³

48 New South Wales, Royal Commission into New South Wales Prisons, *Final Report* (1978) ('Nagle Report').

49 New South Wales Corrective Services, *Fact sheet 4 – NSW Parole* (March 2017).

50 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Penalties and Sentences Act 1992* (Qld) s 160B(3); *Correctional Services Act 1982* (SA) s 66.

51 Home Office (1988) *The Parole System in England and Wales: Report of the Review Committee* (Chairman: Lord Carlisle of Bucklow QC) (Cmnd 532) London: HMSO cited in *Parole Board for England and Wales, 40 years*, Parole Board for England and Wales Annual Report and Accounts 2006/07 (2007), 10.

52 Department of Corrective Services, *Review of the Corrective Services Act 2000: Consultation Report for the Minister of Police and Corrective Services* (Department of Corrective Services, 2005), 18.

53 New South Wales Law Reform Commission, *Parole* (Report 142, 2015) 36.

70. Based on the above experience in NSW and the UK, the Law Council recommends the introduction of automatic parole for those serving short-terms of imprisonment, while maintaining a system of discretionary parole for those serving longer terms of imprisonment.

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.

71. The Law Council supports Proposal 5-4. Allowing for consideration of time spent on parole, is likely to be effective in reducing unnecessary imprisonment by ensuring that total imprisonment for those who breach parole does not exceed what is proportional to the original offence and breach. As identified in the Discussion Paper, breach of parole conditions can result in the revocation parole, and can result in the person completing a full term of imprisonment in addition to the time spent subject to parole conditions. Where breaches are minor, this is unnecessarily harsh and results in periods of imprisonment disproportionate to the offences/breaches.

6. Fines and Driver Licences

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.

72. The Law Council supports this proposal.
73. The purpose of an infringement system is to provide a simple and efficient mechanism to dispose of low-level minor infractions without the need for formal adjudication.⁵⁴
74. Fine default imprisonment can be broken down into three categories:
- imprisonment solely on the basis on continued fine default;⁵⁵
 - imprisonment following failure to comply with a community service order (or alike) imposed following fine default;⁵⁶ and
 - imprisonment for a secondary offence (for example, driving without a licence after the licence was lost for continued failure to pay a fine).⁵⁷
75. The imprisonment of persons in default of payment of fines is an unjust and disproportionate punishment. Further, the principle of equality before the law

54 See, eg, Infringement Management and Enforcement Services (Victoria), *Annual Report on the Infringements System 2015–16* (2016) 4.

55 See, eg, Fines, *Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

56 See, eg, *Fines Act 1996* (NSW) s 87.

57 Mary Spiers Williams and Robyn Gilbert, *Reducing the unintended impacts of fines* (Current Initiatives Paper 2, Indigenous Justice Clearinghouse, January 2011) 5.

demands that 'the system should strive to avoid grossly unequal impacts on offenders with differing resources and sensitivities'.⁵⁸

76. Fine default imprisonment disproportionately affects the disadvantaged. For example, the Morgan Review of *Fine defaulters in the Western Australian prison system*, found that '[p]eople with lower-paying or nonprofessional jobs and the unemployed make up a high proportion of incarcerated fine defaulters'.⁵⁹

77. The Morgan Review also determined that fine default imprisonment in Western Australia disproportionately affects Aboriginal women:

*Across the whole review period, Aboriginal women comprised only 15 per cent of total prisoner receptions but 22 per cent of fine default receptions. Furthermore, Aboriginal people comprised 64 per cent of female fine defaulters and only 38 per cent of male fine defaulters.*⁶⁰

78. The Law Council understands that the Western Australian Government is moving to abolish fine default imprisonment in Western Australia but notes that as recently as late-September 2017, police were continuing to imprison people for unpaid fines.⁶¹

79. As imprisonment statistics generally record final or most serious offences, statistics are limited in regard to:

- imprisonment following failure to comply with a community service order imposed following fine default; and
- imprisonment for a secondary offence (such as driving without a licence).

However, it is likely that disadvantaged groups are also affected by these issues.

80. The Law Council submits that imprisonment for fine default disproportionately affects Aboriginal and Torres Strait Islander people, including young people. It is known that Aboriginal and Torres Strait Islander people are over-represented as fine recipients, whilst their financial capacity, itinerancy, social isolation and low levels of literacy impact their susceptibility to escalating fine debt and enforcement measures.⁶² Imprisonment for a failure to pay fines has a tendency to criminalise and exacerbate poverty and disadvantage, and does not address the underlying causes of offending.

58 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) [7.05], citing Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th ed, 2010) 99–100, 239–259.

59 Neil Morgan, *Fine defaulters in the Western Australian prison system* (Office of the Inspector of Custodial Services, Government of Western Australia, 3 April 2016) 14.

60 Ibid v.

61 On 27 September 2017, a 35-year-old Noongar woman (and mother of five Children) was arrested for \$3,900 in unpaid fines related to a dispute over an unregistered dog in 2012. Police had been called to the woman's residence to respond to a call made about a violence by a family member: Calla Wahlquist, 'Aboriginal woman jailed for unpaid fines after call to police', *The Guardian* (online), 29 September 2017 <<https://www.theguardian.com/australia-news/2017/sep/29/aboriginal-woman-jailed-for-unpaid-fines-after-she-sought-police-help>>; Victoria Laurie, 'WA Attorney-General John Quigley to act on jail for fine defaults', *The Australian* (online), 30 September 2017 <<http://www.theaustralian.com.au/national-affairs/wa-attorneygeneral-john-quigley-to-act-on-jail-for-fine-defaults/news-story/a821ba9cce19cfc4826eccc88248f834>>.

62 Legislative Assembly of New South Wales Committee on Law and Safety, *Driver Licence Disqualification Reform Report 3/55* (2013) [3.68].

Question 6–1

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

81. Once a person enters the infringements system, particularly Aboriginal people, it can be very difficult for them to exit without incurring escalating fine debts and other enforcement measures. Issuing an infringement does not address the underlying causes of offending behaviour and is often an inappropriate mechanism for deterrence.
82. WEstjustice has identified the adverse impacts that infringements regime can have on young people, in particular Aboriginal and Torres Strait Islander young people. Without access to the funds required to pay for travel to and from school, the threat of incurring fines for travelling without a valid ticket can result in young Aboriginal and Torres Strait Islander children failing to attend school.⁶³ Some students are forced to stay at home until they can afford their travel fare, starting the cycle of educational disadvantage.⁶⁴ For others, homelessness may be the result, with some children being thrown out of home for incurring fines.⁶⁵
83. In 2015-16, approximately 160,000 warnings were issued across all Victorian agencies, in contrast to the five million fines that were issued.⁶⁶ This demonstrates that discretionary powers are being overlooked in favour of monetary fines. Some offences involve a subjective judgment on the part of the issuing officer, creating potential for discriminatory and selective enforcement.⁶⁷
84. Recent reforms in Victoria now provide the Director of Fines Victoria with the discretion to determine that a registered infringement fine is not to be enforced against a person when '...it is unlikely that the outstanding amount of the registered infringement fine would be recovered'.⁶⁸ It is inefficient, costly and burdensome on the limited available resources to have officers issuing fines to disadvantaged persons that are subsequently withdrawn by Fines Victoria based upon their disadvantage.
85. The Law Council proposes that there should be greater use of the discretion available to issuing officers and that written cautions should be issued in the first instance for most offences. Training and guidelines for issuing officers should be strengthened to include identification and evaluation of an individual's circumstances, with referrals rather than infringements available as an alternative outcome.

63 Su Robertson, *Fare Go: Myki, Transport Poverty and Access to Education in Melbourne's West*, (WEstjustice, 2016), 11.

64 Ibid.

65 Ibid 7.

66 Infringement Management and Enforcement Services, above n 54, 8.

67 Bernadette Saunders and Anna Eriksson, *An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System: Towards a Best Practice Model* (Monash University, 2014) 8.

68 *Fines Reform and Infringements Act 2016* (Vic) s 11; *Fines Reform Act 2014* (Vic) s 20.

Question 6–2

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

86. Current infringement systems do not consider the income of an individual in relation to the fine issued. This may produce outcomes which are grossly disproportionate. The imposition of fixed penalty fines has a differential impact on people experiencing financial hardship when compared to wealthier members of the community. For example, a fine imposed on a child is likely to have a more adverse impact than on an adult who has steady and consistent income.⁶⁹
87. Indexing fines as proportionate to a persons' income has provided some evidence of higher compliance rates. A program known as the 'day-fine' system has been implemented in a number of European countries. This involves a sliding scale which ranks the severity of offences by the use of day-fine units. The fine is calculated by multiplying the number of day-fine units by one sixtieth of the offender's average monthly income.⁷⁰ Since the implementation of this system, these states have seen a significant increase in the payment of fines, resulting in a corresponding decrease in the imprisonment rate due to defaulting.⁷¹ Surveys by Youthlaw further suggest that fines are more likely to be paid if it is affordable to do so.⁷²
88. To overcome the difficulty in assessing a persons' income at the time of issue, fines could be imposed at the standard rate as a matter of course, with the provision for disadvantaged defendants to provide evidence of their income by way of a tax assessment or Centrelink statement. Upon confirmation of their income, such persons would be provided with a reduced penalty.

Question 6–3

Should the number of infringement notices able to be issued in one transaction be limited?

89. The NSWLRC notes that Aboriginal people are known to spend a large portion of their time in public spaces, often for a range of reasons linked to disadvantage (for example, due to a lack of suitable housing, experience of family violence or the consequences of drug and alcohol misuse by family members).⁷³ The mere increased visibility of Aboriginal people immediately makes them more prone to police interaction and susceptibility to infringement penalties.⁷⁴
90. The Law Council recognises that unacceptable behaviour needs to be addressed and appropriately denounced. However, what may begin as a fine for a minor

69 Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Notices in Victoria* (Sentencing Advisory Council, 2014), 320.

70 Edwin Zedlewski, *Alternatives to Custodial Supervision: The Day Fine* (US Department of Justice, 2010) 3.

71 Beth Midgley, 'Achieving Just Outcomes for Homeless People Through the Court Process' (2005) 15 *Journal of Judicial Administration* 2, 82, 106.

72 Youthlaw, *Young People and Fines Survey: Overview of Results* (Youthlaw 2013), 2.

73 New South Wales Law Reform Commission, *Penalty notices* (Report 132, 2015) 379.

74 Ibid 379-80.

indiscretion can result in multiple infringement notices issued based upon a person's emotional response to the primary penalty.

91. The sentencing principle of totality is relevant to this issue. The aggregate punishment imposed on a person must be just and appropriate in light of the totality of their offending behaviour. This 'limitation upon excess'⁷⁵ is designed to prevent the imposition of a crushing sentence that can induce a feeling of hopelessness and destroy prospects for rehabilitation and reform.⁷⁶ Importantly, unlike terms of imprisonment, fines cannot be made 'concurrent' and the totality of multiple infringement notices can cause substantial hardship and despair for vulnerable members of the community.
92. The Law Council does not support the limitation of the number of infringement notices able to be issued in one transaction. However, consideration could be given to imposing a limitation upon the total monetary value of penalty notices issued. This would likely allow the issuing agency to accurately record the offenders' behaviour and infringement history, whilst providing a monetary penalty that is manageable, reducing the likelihood of further enforcement action.

Question 6–4

Should offensive language remain a criminal offence? If so, in what circumstances?

93. The Law Council notes that there has been extensive commentary on the adverse relationship between Aboriginal and Torres Strait Islander people and the police. Consequently, the imposition of a fine or arrest for an offensive language charge can instigate an emotional response, exacerbating any public order problem and potentially resulting in further charges being laid.
94. The flow on effects for a vulnerable or disadvantaged person, including Aboriginal and Torres Strait Islander people, receiving a monetary fine for subjective and discretionary offences is significant. It has been found that, in NSW, when issued with an infringement notice, nine out of every ten Aboriginal and Torres Strait Islander people failed to pay the fine on time.⁷⁷ Fine defaulters then become subject to more serious fine enforcement measures, increasing the possibility of secondary offending, and ultimately become entrenched within the fines enforcement system.⁷⁸
95. The Law Council supports the repeal of the offence of offensive language. Only language that is so grossly offensive as to amount to vilification or intimidation ought to be criminalised. Until the offence is repealed the Law Council conditionally supports the retention of the availability of penalty notices subject to improved training, additional operational guidelines and a reduction in the amount of the penalty imposed.

75 *R v Patison* [2003] NSWCCA 171 (15 July 2003) 58 ('Giles JA').

76 *R v MAK* [2006] NSWCCA 381 (30 November 2006) [17].

77 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) vi.

78 NSW Law Reform Commission, *Penalty Notices*, above n 73, xxi.

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?

96. As noted above, the Law Council supports the decriminalisation of offensive language and as such supports the removal of offensive language provisions from criminal infringement notice schemes.
97. If decriminalisation does not occur, the Law Council does not support offensive language provisions be removed from criminal infringement notice schemes. Although, ensuring all offensive language offences must be heard before a court would improve procedural transparency, identify missed opportunities for discretion and scrutinise arbitrary enforcement by police, to do so would place significant resource strains upon an already stretched court system and the legal aid services available. Whether Aboriginal people are physically able to attend court and whether they understand the potential consequences of failing to appear requires further attention.

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.

98. The Law Council supports greater provision of alternative penalties to court ordered fines.

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:

- 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.

99. The NSW Government introduced a Work and Development Orders (**WDOs**) scheme in response to findings that drivers licence laws were disproportionately affecting people experiencing disadvantage, specifically Aboriginal and Torres Strait Islander people.⁷⁹

⁷⁹ Weatherburn, *Arresting Incarceration*, above n 10, 97, citing NSW Department of Attorney General and Justice, *A fairer fine system for disadvantaged people* (2011).

100. WDOs have been shown to be effective in reducing the number of Aboriginal and Torres Strait Islander people sent to prison for relatively minor offences including, driving while their license was disqualified or suspended.⁸⁰
101. The Law Council supports the recommendation that State and Territory governments introduce schemes based on the NSW WDO model.

Question 6–7

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

102. The Law Council supports amendments to fine default statutory regimes to remove driver licence suspension as an enforcement measure. Licence suspension is the most common method through which low-level offences resulting in fines escalate to imprisonment. Furthermore, this type of enforcement has a disproportionate impact on marginalised communities such as Aboriginal and Torres Strait Islander communities. Alternative options such as the WDO scheme in NSW are often available and provide a more appropriate response to the non-payment of fines. Alternative options should be expanded in each jurisdiction and implemented more frequently.

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?

103. The LSNSW has identified the recent NSW Legislative Assembly Committee on Law and Safety Report on *Driver Licence Disqualification Reform*.⁸¹ The report provides a clear summary of the legislation and current arrangements in NSW for dealing with unauthorised driving offences and provides recommendations for reform to the current legislative regime.
104. The Law Council supports the recommendations of this report.

Question 6–9

Is there a need for regional driver permit schemes? If so, how should they operate?

105. The Law Council supports the introduction of regional driver permit schemes. Qualification for such permits could be limited to those people who live in remote

80 INCA Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component* (May 2015) <http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0018/25218/WDO-Final-Evaluation-Report-May-2015.pdf>.

81 Committee on Law and Safety, Legislative Assembly, Parliament of New South Wales, *Driver Licence Disqualification Reform* (Report 3/55, 2013).

areas without public transport and require a vehicle for defined purposes such as travelling to and from work or medical appointments.

Question 6–10

How could the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities be improved?

106. The Law Council commends the work of the George Institute for Global Health in respect of its “Driving Change” program which provides community based driver licensing support in 12 locations across NSW. Funded by AstraZeneca's Young Health Programme, Transport for NSW and NSW Health, the program has assisted more than 400 Aboriginal people across NSW to gain their driver licence by working in partnership with local community organisations.⁸²
107. Not only is this issue pertinent to the rates of incarceration of Indigenous people, it is a key issue in relation to closing the life expectancy gap. Australian data from 2010 shows that Aboriginal and Torres Strait Islander people are almost 1.5 times more likely to be seriously injured, and almost three times as likely to die, from road traffic injury compared with other Australians.⁸³

7. Justice Procedure Offences—Breach of Community-based Sentences

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.

108. The Law Council supports this proposal. Research has consistently demonstrated that outcomes for Aboriginal and Torres Strait Islander people are better if the initiatives are Aboriginal-led and owned.⁸⁴

82 George Institute for Global Health, ‘Funding boost for Driving Change’ (Media Release, 12 August 2016) <<http://www.georgeinstitute.org.au/media-releases/funding-boost-for-driving-change>>.

83 Henley G, Harrison J: “Injury of Aboriginal and Torres Strait Islander people due to transport, 2003-04 to 2007-08,” *Australian Institute of Health and Welfare; 2010* cited in the George Institute for Global Health, “Driving Change: new initiatives to unlock doors for young Aboriginal people”, *Media Release*, 10 May 2013, available online; <http://www.georgeinstitute.org.au/media-releases/driving-change-new-initiative-to-unlock-doors-for-young-aboriginal-people>

84 See, eg, Fiona Allison and Chris Cunneen, ‘The Role of Indigenous Justice Agreements in improving legal and social outcomes for Indigenous people’ (2010) 32 *Sydney Law Review* 645.

8. Alcohol

Question 8–1

Noting the link between alcohol abuse and offending, how might state and territory governments facilitate Aboriginal and Torres Strait Islander communities, that wish to do so, to:

- (a) develop and implement local liquor accords with liquor retailers and other stakeholders that specifically seek to minimise harm to Aboriginal and Torres Strait Islander communities, for example through such things as minimum pricing, trading hours and range restriction;
- (b) develop plans to prevent the sale of full strength alcohol within their communities, such as the plan implemented within the Fitzroy Crossing community?

Question 8–2

In what ways do banned drinkers registers or alcohol mandatory treatment programs affect alcohol-related offending within Aboriginal and Torres Strait Islander communities? What negative impacts, if any, flow from such programs?

109. The Law Council does not seek to respond to Questions 8-1 and 8-2 except to note that any initiatives regarding alcohol should be the subject of substantial consultation with Aboriginal and Torres Strait Islander organisations and communities throughout the process including at the design, implementation and evaluation phases. It has been highlighted throughout the Consultation phase of *The Justice Project* that interventions and initiatives aiming to reduce alcohol-driven issues in Aboriginal and Torres Strait Islander communities are most effective when community driven.⁸⁵ The Law Council has heard that where such community design and support is not involved, intervention may lead to further issues (eg causing negative family relationships between restricted and non-restricted persons).

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?

110. As noted earlier in this submission, the number of women in prison and, in particular, the number of Aboriginal and Torres Strait Islander women, has increased at an alarming rate.⁸⁶ The increasing imprisonment rate of Aboriginal women has a corresponding impact on the increase of Aboriginal children in out-of-home care.
111. Aboriginal women are vulnerable to intersectional discrimination (a compounding of discrimination in specific ways brought about by race, gender and other social categories) within the criminal justice system. They experience higher numbers of

85 See also Dennis Gray and Edward Wilkes, Closing the Gap Clearinghouse, *Reducing Alcohol and other Drug Related Harm* (Resource sheet no 3, December 2010).

86 Australian Bureau of Statistics, above n 1.

dependent children, higher rates of mental health disorders, and experience higher rates of family and sexual violence, homelessness and recidivism. The impact of colonisation, racism and the stolen generation has caused deep intergenerational trauma.⁸⁷

Specialist programs and responsive services for Aboriginal women

112. The complex needs experienced by Aboriginal women require culturally appropriate and meaningful services. Previous Social Justice Commissioners Jonas and Calma have noted that Aboriginal women are not served by programs designed for Aboriginal women.⁸⁸ The assumption that Aboriginal women will use services designed for Aboriginal men or for designed for non-Aboriginal women is problematic.⁸⁹ Aboriginal women have been described as invisible to policy makers and program designers in a criminal justice context, with very little attention devoted to their specific needs and circumstances.⁹⁰
113. Aboriginal women also experience particularly high levels of family violence but are under-represented in formal reporting of such abuse, arguably due to their experience of racism in the criminal justice system and fear of child protective services and state intervention.⁹¹ This lack of attention to the distinct needs of Aboriginal women and their children marginalises them and entrenches inequities in service delivery, leading to intersectional discrimination.⁹² Engaging in services designed by Aboriginal controlled organisations, such as the Family Violence Prevention Legal Service's (FVPLS) Koori Family Violence Support workers in the Magistrates' Court, will increase Aboriginal women's engagement and provide culturally sensitive support.

Adequate Housing

114. In a study on Aboriginal women in prison, *Speak Out Speak Strong*,⁹³ most of the Aboriginal women who were interviewed (representing half of the Aboriginal women prisoners at the time) were single mothers with a number of children; were responsible for children other than their own; had a prior conviction as an adult; were using alcohol or drugs at the time of their last offence with a strong connection between their alcohol or drug use and offending behaviour; and had long and

87 Eileen Baldry, Desmond McDonnell, Peter Mapstone and Manu Peeters, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39 *Australian and New Zealand Journal of Criminology* 1, 20-34; Chris Cunneen, *NSW Aboriginal Justice Plan*, Discussion Paper (2002); Rowena Lawrie 'Speak Out Speak Strong: Rising Imprisonment Rates of Aboriginal Women' (2003) 5 *Indigenous Law Bulletin* 24; Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2002* (2003) Human Rights and Equal Opportunity Commission Sydney.

88 Julie Stubbs, 'Indigenous Women in Australian Criminal Justice: Over-Represented but Rarely Acknowledged' (2011) 15 *Australian Indigenous Law Review* 47, 48.

89 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2003) 168.

90 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004* (2005).

91 Public Interest Advocacy Centre and Wirringa Baiya Aboriginal Women's Legal Centre *Discrimination... Have you got all day? Indigenous women, discrimination and complaints processes in NSW* (2001) 11.

92 Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice Report 2004* (2005).

93 Rowena Lawrie, *Speak Out Speak Strong: Researching the Needs of Aboriginal Women in Custody* (Aboriginal Justice Advisory Council, 2003).

serious histories of abuse.⁹⁴ Along with other research,⁹⁵ family violence was identified as one of the most serious forms of abuse these women faced when in the community.⁹⁶ Finding stable, suitable, supported housing to allow Aboriginal women to live safely with their children and dependants upon release was their key concern but in their experience, the most difficult problem to resolve.⁹⁷ It was argued that this transition needed Aboriginal managed rehabilitation and housing options.⁹⁸

115. Confirming the *Speak Out Speak Strong* findings, the most severely disadvantaged amongst all participants in Baldry et al's (2006) NSW and Victorian post-release study were Aboriginal women.⁹⁹ These women experienced the highest rates of recidivism and homelessness in the sample studied. They came from, and after prison returned to, a very small cluster of highly disadvantaged suburbs or towns, and moved frequently within these same disadvantaged areas. A lack of suitable housing was found to be a fundamental problem and a predictor of their return to prison.

116. Access to adequate housing is a growing and serious issue in Australia. Aboriginal women exiting prison who have children face extreme difficulty in establishing a home where they can live with their children post-release.¹⁰⁰ Children of imprisoned parents are at a higher risk of homelessness and disrupted childhoods than other young people.¹⁰¹

117. International human rights law recognises that every person has the right to adequate housing. Article 11 of the International Covenant on Economic, Social and Cultural Rights, which Australia is a party, states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right.

118. There is strong evidence that indicates the best solutions are to invest in health and housing support services, so that there is an adequate safety net for people who are vulnerable.¹⁰² Without adequate housing Aboriginal women may be forced into

94 Ibid 25-51.

95 Aboriginal and Torres Strait Islander and Women's Policy Units, *Options for Diversion from Secure Custody for Indigenous Female Offenders* (Queensland Department of Corrective Services Brisbane, 2002) 16.

96 Lawrie, above n 93, 51.

97 Ibid 27.

98 Ibid 69, 74.

99 Eileen Baldry, Desmond McDonnell, Peter Maplestone and Manu Peeters, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39 *Australian and New Zealand Journal of Criminology* 1.

100 Ibid. See also Legislative Council Standing Committee on Social Issues *Children of Imprisoned Parents Report* (NSW Parliament, 1998).

101 Legislative Council Standing Committee on Social Issues, *Children of Imprisoned Parents Report* (NSW Parliament, 1998); Rosemary Woodward 'Families of prisoners: Literature review on issues and difficulties', *Occasional Paper No 10* (Australian Government Department of Family and Community Services, 2003).

102 Lucy Adams, *Churchill Fellowship Report: Addressing the Negative Impact of Laws Regulating Public Space on People Experiencing Homelessness* (2014).

homelessness, making them particularly vulnerable to violence and to police interference, harassment and re-arrest for public order offences.¹⁰³

119. Despite the lack of evidence generally in terms of ‘what works’ to reduce Aboriginal and Torres Strait Islander women’s contact with the criminal justice system,¹⁰⁴ some key principles have been identified. Diversion programs for Aboriginal and Torres Strait Islander female offenders should:

- be culturally and gender specific;
- draw on community knowledge in their design and delivery;
- recognise the significant role of Aboriginal and Torres Strait Islander women in family and community life;
- ensure Aboriginal and Torres Strait Islander women ‘have a stable base—especially in regard to safe and secure housing’;
- allow Aboriginal and Torres Strait Islander women ‘to be with their children and support families to rebuild’;
- deal with experiences of violence, trauma and victimisation—and secondary consequences of these;
- promote and strengthen connection to culture;
- support Aboriginal and Torres Strait Islander women to navigate the complex and fragmented service system; and
- use a wrap-around approach, providing life skills, parenting skills, mental health services, drug and alcohol support and disability support, as required.¹⁰⁵

120. These general recommendations correlate with other studies and the research mentioned above. More attention must be paid to reducing the barriers to effective diversion of Aboriginal and Torres Strait Islander women. There are ties between improving diversion and examining the possibility of current diversionary options to cope with the complexity of the intersectional problems women face. For example, high rates of homelessness and lack of stable housing, compounded by family violence, make it difficult to engage with court and other community-based diversionary initiatives.¹⁰⁶ Multiple charges on a criminal record, or substance abuse and mental health issues can also make them ineligible or too complex for existing diversionary options with strict eligibility criteria. High rates of remand and short sentences can also render many Aboriginal and Torres Strait Islander women ineligible for programs that aim at reducing recidivism.

Improving Data Collection

121. Currently, the most quoted statistics regarding Australia’s prison population are produced by the ABS in the annual *Prisoners in Australia* Reports.¹⁰⁷ To produce

103 Tamara Walsh *No Vagrancy: An examination of the impact of the criminal justice system on people living in poverty in Queensland* (2007) <www.incorrections.org.au/no%20vagrancy.htm> 7.

104 Human Rights Law Centre and Change the Record Coalition, above n 8, 21.

105 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 6–7. See also, Sisters Inside, *The Over-Representation of Aboriginal and Torres Strait Islander Women in Prison* (2013) 2–8.

106 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 60.

107 Australian Bureau of Statistics, *Prisoners in Australia*, cat no 4517.0, 2016, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>>.

these statistics, the ABS conducts a 'census' of all people in prison on the night of 30 June each year.¹⁰⁸ The ABS also produces a quarterly *Corrective Services, Australia* Report which reports on the following statistics: average daily prisoner population; sentenced prisoner receptions; and first day of the month prisoner population.¹⁰⁹

122. However, the Law Council considers these reports provide only a small snapshot of a much more complex problem. At present, it is very difficult to obtain or compare accurate and complete statistics indicating why Aboriginal and Torres Strait Islander people are being imprisoned, why those released are more likely than not to re-offend, how many people enter or leave the corrections system each day, month or year, or what impact imprisonment has on the propensity to commit crime.
123. Currently, statistics produced by the ABS (and by other government bodies such as the Australian Institute of Health and Welfare – responsible for statistic regarding juvenile detainees) do not provide a national accounting of the number of people who enter prison each year, that is, the number of people who enter and leave prison each year. It has been estimated that the 'flow-through' statistics of prisoners in Australia could be as much as double the census statistics.¹¹⁰ It has also been noted that the census statistics understate the numbers of prisoners (sentenced and unsentenced) incarcerated for lesser offences who enter and are released from prison in between census dates, including in particular, the number of Aboriginal and Torres Strait Islander women 'flowing' through prison.¹¹¹
124. Furthermore, due to limitations arising the fact that imprisonment, and therefore currently the statistics regarding imprisonment, is the domain of the states and territories, there are often significant differences in data collection, rendering national collection and the cross-comparison of statistics problematic.
125. This lack of available and comparable data is in stark contrast to other areas of major public expenditure, such as education and health:

*"In other large, state-based systems such as public hospitals and schools, accurate throughput data are readily available to the general public. Yet, despite a recurring public investment of more than \$3 billion a year, equivalent data are not available for Australia's correctional systems."*¹¹²

126. The interplay and effect of these issues is briefly raised in the Discussion Paper:

Although lack of reliable and cross-comparable data in relation to offending and incarceration is an issue affecting Aboriginal and Torres Strait Islander people generally, it is an issue that particularly hinders accurate assessment

108 Ibid.

109 Australian Bureau of Statistics, *Corrective Services*, Australia, June quarter 2017, above n 1.

110 Eileen Baldry and Sophie Russell, 'The Booming Industry continued: Australian Prisons: A 2017 update' (Article, January 2017) <https://www.researchgate.net/publication/312453408_The_Booming_Industry_continued_Australian_Prisons_A_2017_update>, citing Eileen Baldry et al, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39 *Australian and New Zealand Journal of Criminology* 20, 21.

111 Council of Australian Governments, *Prison to Work Report*, above n 35, 49. See also, Eileen Baldry, 'Women in Transition: From Prison to...' (2010) 22(2) *Current Issues in Criminal Justice* 253, 256: Baldry notes that women are significantly less likely than men to be serving prison terms for serious offences, particularly those related to violent and/or sexual crimes - therefore, the proportion of women in prison is likely to be higher when measured in terms of flow throughout a year, than when measured at a specific date.

112 Council of Australian Governments, *Prison to Work Report*, above n 35, 49.

of the needs and pathways of Aboriginal and Torres Strait Islander female offenders.

127. While the case for change in criminal justice and corrections policies is very apparent, the capacity to identify and evaluate policy responses remains limited by the unavailability of comparable data. This is remarkable, given corrections alone costs governments a total of \$3.9 billion annually,¹¹³ which is a fraction of the overarching cost of criminal justice administration and enforcement, as well as the broader costs rippling into the community and government sectors from crime and associated disadvantage.
128. The *Prison to Work Report* recommended that State and Territory governments work with the Commonwealth to share essential de-identified criminal justice data to enable the quantifying of the flow of prisoners through the system,¹¹⁴ and emphasised the significance of statistics of this type in ensuring that programs are effectively designed for the prisoner cohort:

Understanding the difference between the 'snapshot' taken by the Census and the yearly flow of prisoners through the system has implications for the effective planning and design of interventions. For example, while the majority of prisoners in the Census serve long-term sentences for serious offences, the flow of offenders in and out of prisons may consist of persons serving short sentences for lesser offences.

While hospitals and schools can collect data on individuals moving through the system and design interventions accordingly, without a good understanding of the flow of people through the prison system it is not possible to know the number of people received into, released from and returned to custody every year. Knowing how people cycle through the system can help provide a sense of the prisoner population and how to design targeted interventions that are more likely to work.

*From the existing data, it is clear prisoners are falling through the gaps when leaving prison. Without good flow data, and with very little data on the outcomes of ex-prisoners, it is hard to know where effort should be focused and where the system failures are. It is also very difficult to make any observations about how changes to different systems affect outcomes for ex-prisoners.*¹¹⁵

129. The Law Council recommends that all Australian governments, through COAG, commit to establishing and appropriately funding a central body to coordinate the collection, evaluation and reporting on criminological data from police, youth services, legal assistance bodies, prosecuting agencies, courts, corrections, parole supervisors and associated service providers, to develop detailed analysis of effective criminal justice responses. A primary objective of this body would be to inform criminal justice policy development, with the objective of reducing primary offending and recidivism. The data should be capable of informing and supporting local, regional and community controlled programs directed toward these objectives.

113 Productivity Commission, *Report on Government Services 2017*, above n 34, vol C, ch 8, table 8A.1.

114 Council of Australian Governments, *Prison to Work Report*, above n 35, 13

115 Ibid 49.

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.

130. The Law Council supports this proposal.
131. The Law Council notes that Aboriginal Justice Agreements (**AJAs**) in varying forms are currently in place in Victoria and the Australian Capital Territory and have previously been in place in NSW, Queensland, Western Australia and the Commonwealth.¹¹⁶
132. The Victorian AJA clearly demonstrates the effectiveness of implementing an AJA. When evaluated in 2012, the Victorian AJA was found to have provided 'significant improvements in justice outcomes for Koories'.¹¹⁷ Whilst Aboriginal and Torres Strait Islander over-representation in the criminal justice system had increased, the increase was less than would have been expected without AJA Phase 2.¹¹⁸
133. AJA Phases 1 and 2 delivered gross benefits to Victoria of between \$22-\$26 million, and facilitated partnerships and justice programs that would not have otherwise occurred.¹¹⁹ The AJA has been effective in providing for ongoing Aboriginal ownership and participation in strategic policy development. The framework of well-coordinated state, regional and local community based justice structures represents successful application of engagement principles.¹²⁰
134. AJAs are an important initiative that can assist in bringing about a reduction in the high rates of incarceration of Aboriginal and Torres Strait Islander peoples. Victoria's AJA meets the highest standards in terms of Aboriginal and Torres Strait Islander participation, implementation, monitoring and independent evaluation. As at 2016, detention rates of Aboriginal and Torres Strait Islander youth in Victoria was 1.5 per 1,000 well below the national average of 6.8 per 1,000.¹²¹ Substantial government funding has enabled the implementation of a key range of programs, services and initiatives aimed at improving justice outcomes.
135. AJA infrastructures play a critical role in the facilitation of collaborative and effective criminal justice responses, and provide Aboriginal and Torres Strait Islander people

116 Department of Justice (Vic), *The Victorian Aboriginal Justice Agreement Phase 3* (20130; ACT Government, *Aboriginal and Torres Strait Islander Agreement 2015–2018* (2015); The Queensland Government, *The Queensland Aboriginal and Torres Strait Islander Justice Agreement (2000–2011)* (2000); Government of Western Australia, *Western Australian Aboriginal Justice Agreement 2004–2009* (2004); Commonwealth Government, *National Indigenous Law and Justice Framework 2009–2015* (2009).

117 Nous Group and Victorian Department of Justice, *Evaluation of the Aboriginal Justice Agreement – Phase 2* (Final Report, May 2012) 3.

118 Ibid 36–7.

119 Ibid 6.

120 Fiona Allison and Chris Cunneen, *Indigenous Justice Agreements; Current Initiatives Paper 4* (June 2013) 4.

121 Ibid 6.

with input into strategic planning. This provides government with a systematic and coherent strategy to address Aboriginal and Torres Strait Islander justice issues, including over-representation and victimisation.¹²²

136. A direct relationship exists between the formulation of an AJA and the existence of an independent, community-based Aboriginal and Torres Strait Islander representative advisory body. Where advisory bodies do not exist, there is less chance that the AJA will be developed, and also less chance that government justice agencies will develop their own strategic policies and initiatives. Without independent Aboriginal and Torres Strait Islander representative bodies, there is likely to be insufficient commitment to develop and drive an AJA.¹²³
137. The most effective AJAs provide for inclusive, ongoing engagement with Aboriginal and Torres Strait Islander communities throughout the entire 'life' of any relevant framework; that is, during the initial design, implementation, monitoring, and evaluation.¹²⁴ Independent, ongoing monitoring and evaluation at a jurisdictional level, providing for maximum Indigenous input, will enhance the effectiveness of AJAs and strategic plans.¹²⁵
138. AJAs are likely to have also led to increased whole-of-government planning directed towards addressing Aboriginal and Torres Strait Islander social disadvantage, relevant to addressing rates of incarceration.¹²⁶ Further, three of the five jurisdictions which have developed an AJA since 2000 have also formulated whole-of-government 'overarching' Aboriginal and Torres Strait Islander strategic policy, covering a broader social and economic framework, with some emphasis upon justice issues.¹²⁷
139. There is an essential link between reducing Aboriginal and Torres Strait Islander over-representation in the criminal justice system, and broader socio-economic factors such as low employment rates, alcohol and drug misuse, poor health and educational attainment. AJAs recognise and acknowledge this.¹²⁸ Negotiated AJAs can take the lead on the subject of Aboriginal and Torres Strait Islander victimisation and are more likely to lead to policies that respect their views.
140. Without an AJA, programs and initiatives addressing incarceration rates become siloed from other agencies and initiatives, and miss out on the joint objectives. This results in lost opportunities and creates the potential for duplicated efforts addressing the same objective. Without an AJA, such programs become vulnerable to changes in government, policy and budget allocations.
141. The Law Council submits that state and territory governments should work with peak Aboriginal and Torres Strait Islander groups, as a matter of urgency, to renew or develop Aboriginal Justice Agreements. As In 2015, the South Australian Council of Social Services called for an agreement to address rising Aboriginal and Torres

122 Ibid 1.

123 Ibid 3.

124 Ibid.

125 Ibid 4.

126 Ibid.

127 Ibid.

128 Ibid 5.

Strait Islander incarceration rates.¹²⁹ In 2016, the Making Justice Work Coalition called on the Northern Territory government to prioritise the creation of an AJA. The creation of a new Aboriginal Justice Agreement for the Northern Territory was announced in July 2017.¹³⁰ This year, the Human Rights Law Centre and the Change the Record Coalition recommended that state and territory governments develop and implement community led justice agreements, with a particular focus on Aboriginal and Torres Strait Islander women in the justice system.¹³¹

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?

142. The Law Council has long advocated for setting justice-specific Closing the Gap targets.¹³² We note further that there is no Closing the Gap target in relation to the justice system – either in relation to rates of incarceration or the experience of victims of crime. In the Communique released following the Forum the Law Council recommended that the Council of Australian Governments (**COAG**) to place ‘reducing Indigenous imprisonment’ as a key item on its ‘Closing the Gap’ agenda and establish specific targets’.
143. In the Social Justice Report of 2009, produced by the Aboriginal and Torres Strait Islander Social Justice Commissioner, it was argued that the expansion of the Closing the Gap targets to include a criminal justice target would address the disproportionate representation of Aboriginal and Torres Strait Islander peoples within the prison system and as victims of crime.¹³³ It was deemed a serious omission that no formal targets were set initially to close the gap in imprisonment rates. Again, the Commissioner in the 2014 Social Justice and Native Title Report, supported the implementation of justice targets.¹³⁴
144. Publications by the Senate Finance and Public Administration References Committee in 2016,¹³⁵ the National Association of Community Legal Centres in 2015,¹³⁶ and the Human Rights Law Centre and Change the Record Coalition in 2017,¹³⁷ have all called upon the development and inclusion of national justice targets as part of the Closing the Gap policy.

129 South Australian Council of Social Services, *Justice or an Unjust System? Aboriginal Over-Representation in South Australia’s Juvenile Justice System* (2015).

130 Natasha Fyles, Attorney-General and Minister for Justice, *Restoring Trust – Launch of the Territory’s First Aboriginal Justice Unit* (Media Release, 5 July 2017).

131 Human Rights Law Centre and Change the Record Coalition, above n 8.

132 See, eg, Law Council of Australia, ‘Law Council and Australian Bar Association welcome commitment to Indigenous justice targets’ (Media Release, 9 August 2013).

133 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2010) 53–4.

134 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (2015) 118.

135 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 55–8.

136 National Association of Community Legal Centres, *Submission No 42 to Senate Standing Committee on Finance and Public Administration: Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (21 May 2015) 18–19.

137 Human Rights Law Centre and Change the Record Coalition, above n 8.

145. The Federal Government has previously rejected justice targets, instead stating that justice outcomes are achieved by addressing the underlying causes of imprisonment, and has characterised over-representation of Indigenous Australians in imprisonment as a State and Territory Government responsibility.¹³⁸
146. The Law Council respectfully disagrees with these positions. In directing the ALRC to undertake the current inquiry the government has recognised that the imprisonment rates of Aboriginal and Torres Strait Islander people is a 'national tragedy' and acknowledged that Australia's laws and legal frameworks are an important factor contributing to over-representation.¹³⁹
147. In order to address this 'national tragedy' Australian governments must work together and in proper consultation with Aboriginal and Torres Strait islander organisations to find and implement effective solutions. The introduction of a justice target in the Closing the Gap framework, accompanied by a considered and properly funded intergovernmental strategy is likely to lead to greater consistency in the implementation of programs across Australia and encourage greater accountability by governments.
148. Significantly, justice targets also focus governments on outcomes rather than inputs.¹⁴⁰ *The Justice Project* has identified serious gaps in the evaluation of programs intended to prevent imprisonment, provide rehabilitation and prevent recidivism. All Australian governments are currently spending vast amounts of money on prisons and prison services.¹⁴¹ However, it is arguable that Australia is getting value for money on this spending. Introducing targets ensures that programs are considered against a measurable target. This is likely to encourage better evaluation of programs and better investment of money currently directed to corrections. Closing the Gap targets will likely contribute to a reduction in the imprisonment rates of Aboriginal and Torres Strait Islander people. However, this is estimated to take a generation, at the very least.¹⁴² Specific justice targets are timely and necessary and provide a tangible means of measuring the impact and effectiveness of government strategies.
149. Victoria is the first Australian jurisdiction to have set a target to close the gap in justice outcomes for Aboriginal and Torres Strait Islander people. Generational targets have been set under Phase 3 of the AJA and the Victorian Aboriginal Affairs Framework. The commitment is to close the gap in the number of Aboriginal people (youth and adult) under justice supervision by 2031. Roles and responsibilities of key stakeholders are detailed, and progress against the key justice indicators and targets will be reported in the annual Victorian Government Aboriginal Affairs Report.¹⁴³

138 See, eg, Dan Conifer, 'Government under pressure to clarify position on Indigenous justice targets', *ABC News* (online), 31 March 2017 <<http://www.abc.net.au/news/2017-03-30/government-pressured-clarify-indigenous-justice-targets-position/8402024>>.

139 Senator The Hon George Brandis QC and Senator The Hon Nigel Scullion, 'ALRC inquiry into incarceration rate of Indigenous Australians' (Media Release, 27 October 2016).

140 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (2014) 119.

141 Productivity Commission, *Report on Government Services 2017*, above n 34.

142 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2010) 53–4.

143 Koori Justice Unit, Victorian Government Department of Justice, *Victorian Aboriginal Justice Agreement Phase 3: A partnership between the Victorian Government and Koori community* (2013) 23, 67.

150. Whilst it has been argued that adding more targets may dilute the original Closing the Gap objectives, the unrelenting rate of Aboriginal and Torres Strait Islander incarceration requires the inclusion of justice targets as a matter of priority.
151. The Law Council submits that justice targets should be developed and included within the Closing the Gap policy. These targets should be informed by the principles of justice reinvestment, ensuring that special consideration is given to areas with high concentrations of Aboriginal and Torres Strait Islander people in prison. Further, targets must address the legal, social and policy factors that underpin increased Aboriginal and Torres Strait Islander imprisonment rates.

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.

152. The Law Council supports this proposal. The lack of interpreter services is a problem that needs urgent resolution, as it can and does lead to inequitable and unjust outcomes for Aboriginal and Torres Strait Islander people.¹⁴⁴ The recent case in which Western Australian Court of Appeal decision unanimously upheld the appeal of a young Aboriginal man, Gene Gibson, and quashed his conviction for manslaughter,¹⁴⁵ demonstrates the injustice that can occur without adequate interpretation services:

*Gene Gibson, who has a cognitive impairment, speaks limited English and whose first language is the traditional Pintupi, did not understand the Court process or the instructions given to him by an interpreter when he entered a guilty plea.*¹⁴⁶

*Gene Gibson's lawyer was under pressure to act fast to obtain a plea deal and told the Court that he was dealing with several homicides and was lacking in resources at the time.*¹⁴⁷ *He had difficulties obtaining a Pintupi interpreter as there were only two available in the entire State, and there were no funds to pay them to travel to Perth.*¹⁴⁸ *An interpreter was finally sought on the day Gene Gibson was to make his plea, but in the appeal hearing it was noted that even with an interpreter, an attempt to translate complex Australian legal concepts into Pintupi, and to have them understood in a short space of time, is unlikely to be effective.*¹⁴⁹

144 Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2016), 2309 [2.3.3.4].

145 David Weber, 'Gene Gibson's lawyer says he felt under pressure to act on manslaughter plea deal', *ABC News*, 5 April 2017 <<http://www.abc.net.au/news/2017-04-05/gene-gibson-appeal-wraps-up-over-josh-warneke-death/8419182>>.

146 Ibid.

147 Ibid.

148 Ibid. See also, Victoria Laurie, 'Indigenous Australian Gene Gibson was lost in translation' *The Australian* (online) April 12 2017 <<http://www.theaustralian.com.au/news/inquirer/indigenous-australian-gene-gibson-was-lost-in-translation/news-story/6ea8c503fadce99928092b73120a95b5>>.

149 Laurie, above n 148.

A Corruption and Crime Commission investigation into the death of the victim exposed systemic failures within Western Australian police, focusing on a series of flawed police interviews, including some with Gene Gibson, without an interpreter.¹⁵⁰ He was interviewed for nine hours, in English, with no interpreter, no lawyer and no proper warnings that he was a suspect.¹⁵¹

153. The Law Council supports the NSW Bar's recommendation that Australian governments work together to establish a fully resourced, properly co-ordinated and professional interpreter service on a national basis.

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?

154. Diversion efforts aim to provide alternatives to imprisonment and can take the form of specific court, alcohol, drug or other programs imposed as bond conditions, a community service educational program or order, or home detention.¹⁵² For example, home detention may be particularly appropriate for an Aboriginal woman who is a sole parent with child care responsibilities.¹⁵³
155. The UN Special Rapporteur on the Rights of Indigenous peoples has stated that, for Aboriginal and Torres Strait Islander people within the Australian justice system, 'the focus urgently needs to move away from detention and punishment towards rehabilitation.'¹⁵⁴ In order to achieve this through diversion, two key reforms are needed.
156. Firstly, policy reform is required to ensure that diversionary options are available in the majority of cases. Too often those living outside major cities are unable to access diversionary options such as specific courts community/home detention or drug and alcohol programs. Governments must adequately fund and support diversionary programs to achieve this goal.
157. Secondly, sentencing laws must be amended to provide more options and greater flexibility to judges to impose diversionary sentences rather than imprisonment. Please see discussion in Part 4.

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.

158. For people found unfit to stand trial, indefinite detention can occur in jurisdictions that do not provide statutory limits on the period of detention, such as Western

150 Weber, above n 145.

151 Laurie, above n 148.

152 Judicial Commission of New South Wales, above n 144, 2309 [2.3.3.4]. 2316 [2.3.6].

153 Ibid.

154 Special Rapporteur, above n 9.

Australia, the Northern Territory and Victoria.¹⁵⁵ The Law Council is advised that defendants, once found to lack legal capacity and consigned to a 'mental health facility' (often within the prison system), have little prospect of demonstrating a change in capacity and effectively remain in custody for an indeterminate period.

159. The Law Council supports an individual assessment of the necessity of detention for each person, taking into consideration their individual circumstances, to avoid detention being arbitrary. Further, a person should only be held in a detention facility (other than a correctional facility) if they are assessed as posing an unacceptable risk of harm to the community, or themselves, and if that risk cannot be met in a less restrictive way.

Question 11–2

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

160. Availability and access to Aboriginal and Torres Strait Islander Legal Services can only be increased with a commitment from both State and Commonwealth Governments to provide sufficient and on-going funding. Currently all funding for Aboriginal and Torres Strait Islander Legal Services is provided by the Commonwealth Government. However, the Productivity Commission has recommended that:

*Given that the policies of State and Territory Governments have a significant impact on the demand for Aboriginal and Torres Strait Islander legal services and family violence prevention legal services, especially in relation to criminal matters, State and Territory Governments should contribute to the funding of these services as part of any future legal assistance funding agreement with the Australian Government.*¹⁵⁶

161. Legal assistance is generally only available to those facing imprisonment and experiencing significant financial difficulty. Legal assistance providers are significantly restrained by policy decisions and funding limitations in their ability to assist people experiencing civil and family legal issues such as housing, employment, and debt. However, the Law Council's *Justice Project* has highlighted the links between civil and family law issues and criminal offending. Addressing other legal issues before they escalate into criminal activity is likely to help to reduce the overimprisonment of Aboriginal and Torres Strait Islander people.
162. As another example of the effect of underfunding, the Law Council understands that the pressures created by persistent under-resourcing have played a key role in the recent structural changes to services implemented by ALS NSW/ACT including withdrawing from providing services to several local and two district courts and ceasing to act for clients at the State Parole Authority (despite the expectation that the number of people requiring representation will increase under forthcoming changes to parole processes in NSW).¹⁵⁷

155 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, 2014) 208. See *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 10; *Criminal Code Act 1983* (NT) sch 1, s 43ZC; *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 27.

156 Productivity Commission, *Access to Justice Arrangements*, above n 46, recommendation 22.4.

157 Aboriginal Legal Service (NSW/ACT), 'ALS Announces New Organisational Restructure' (Media Release, 16 June 2017) <http://www.alsnswact.org.au/media_releases/38>.

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.

163. The Law Council supports this proposal.
164. The LSNSW has made submissions in respect of funding for the ALS NSW/ACT custody notification service, noting that it has been credited with very successfully addressing the rates of Aboriginal deaths in custody in NSW. The LSNSW also note that the custody notification scheme is an example of improved outcomes for Aboriginal people where a RCIADIC recommendation has been implemented.

12. Police Accountability

Question 12–1

How can police work better with Aboriginal and Torres Strait Islander communities to reduce family violence?

165. Family violence has a significant impact on Aboriginal people at vastly disproportionate rates than other cultural groups in Australia.¹⁵⁸ Women are particularly affected by family violence in Australia and are 35 times more likely to be hospitalised when an act of family violence is targeted towards them¹⁵⁹ and 11 times more likely to be killed as a result of a violent assault.¹⁶⁰ Addressing violence against Aboriginal women and children has been identified by the Commonwealth as a national priority¹⁶¹ and is an issue that can be addressed in many ways. The *Third Action Plan of the National Plan to Reduce Violence against Women and their Children 2010-2022*, identifies that early intervention is one of the ways to address family violence.¹⁶² Relevantly, the Victorian Royal Commission's into Family Violence identified that police officers play a vital role in the front-line responses to family violence, and are integral to the broader family violence system.¹⁶³
166. There have been suggestions that cases of family violence in Aboriginal communities be dealt with without the involvement of police and courts.¹⁶⁴ However, the Law Council recognises that there may be occasions where police intervention is crucial, particularly in instances where an individual is being physically harmed. In addition, police presence in family violence is important to ensure that the 'culture of

158 Antoinette Braybrook, *Family Violence in Aboriginal Communities*, 2 DVRCV Advocate 20 (2015) <<http://www.thelookout.org.au/sites/default/files/Family-violence-in-Aboriginal-communities-FVPLS.pdf>>.

159 Steering Committee for the Review of government Service Provision, *Overcoming Indigenous Disadvantage - Key Indicators* (2014), 4.93 table 4A.11.22.

160 Australian Institute of Health and Welfare, *Family Violence Among Aboriginal and Torres Strait Islander people* (2006), 71.

161 Commonwealth Government, *Closing the Gap Campaign: Prime Minister's Report 2017* (2017).

162 Council of Australian Government, *National Plan to Reduce Violence against Women and their Children 2010-2022* <https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf>.

163 Victoria, *Royal Commission into Family Violence* (2016), ch 14, 1.

164 Council of Australian Government, *National Plan to Reduce Violence against Women and their Children 2010-2022*, above n 162.

silence' is broken to avoid criminals gaining power over Aboriginal communities through fear and normalisation of criminal behaviour.¹⁶⁵

167. The Law Council finds there are many ways police can 'work better' with Aboriginal communities to reduce family violence including:

- informing communities of their legal rights and options and how to access support services (whether from police or other domestic violence assistance programs who are experiencing family violence);
- improving police responses and discriminatory practices within police and child protection service; and
- reducing the community pressure not to go to the police in order to avoid increase criminalisation of Aboriginal men.¹⁶⁶

168. The Law Council is of the view that whilst police should have a greater role in working with Aboriginal communities in the ways described above, police interaction and engagement should be balanced to ensure that interactions only arise under warranted circumstances.

Question 12–2

How can police officers entering into a particular Aboriginal or Torres Strait Islander community gain a full understanding of, and be better equipped to respond to, the needs of that community?

169. There should be specialised cultural awareness training both at the Police Academy level and on the ground from the particular community's elders. General human rights and cultural awareness training may also be of assistance.

Question 12–3

Is there value in police publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours?

170. The Law Council considers that there would be value in such reporting as it may encourage further engagement between police and Aboriginal and Torres Strait Islander communities.

Question 12–4

Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcomes evaluations; and put succession planning in place to ensure continuity of the programs?

171. The Law Council supports initiatives of the police to engage with Aboriginal and Torres Strait Islander communities to develop implement and evaluate community-

165 See, eg, Josephine Cashman, The Centre for Independent Studies, *Ending the Violence in Indigenous Communities*, National Press Club Address, November 2016, 17.

166 Antoinette Braybrook, above n 158.

based programs aimed at reducing offending behaviours. These programs should involve rigorous evaluation and documentation.

Question 12–5

Should police be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia, where they have not already done so?

172. The Law Council supports police departments and offices entering into Reconciliation Action Plans (**RAPs**) with Reconciliation Australia. As noted in Reconciliation Australia's report, *The State of Reconciliation in Australia* the five dimensions identified to measure reconciliation in Australia are: race relations; equality and equity; institutional integrity; unity; and historical acceptance.¹⁶⁷ According to Reconciliation Australia these dimensions provide a clear picture of what is required to achieve reconciliation in Australia.
173. The Law Council notes that some police departments in Australia have held reconciliation action plans in the past. For example, Victoria Police introduced an Aboriginal Strategic Plan for 2003-2008 which was focused on achieving practical results through the following key objectives:
- improving safety in custody;
 - improving communication and liaison;
 - improving training and education; improving recruitment;
 - improving crime prevention;
 - improving the response to family violence and child protection; and
 - improving the response to substance misuse within Aboriginal communities.¹⁶⁸
174. Whilst the plan provided a clear objective for Victoria Police to work closely with Aboriginal communities, the Independent Broad-based Anti-corruption Commission (**IBAC**) in Victoria found in a review of the *Aboriginal Strategic Plan 2003-2008* that there was a lack of qualitative data to assess the outcome of the strategic plan, in some instances the plan was beyond the control of Victoria Police, and that greater understanding of Koori culture was required.¹⁶⁹
175. South Australian Police (**SAPOL**) released its most recent Reconciliation Action Plan (May 2017 – July 2020) highlighting SAPOL's commitment to engaging with Aboriginal people to deliver police services and 'create genuine relationships that recognise the importance of reconciliation and acknowledge their cultural rights.'¹⁷⁰ SAPOL's previous RAP consisted of a number of programs aimed to develop

167 Reconciliation Australia, *The State of Reconciliation in Australia – Summary* (2016), <https://www.reconciliation.org.au/wp-content/uploads/2016/02/State-of-Reconciliation-Report_SUMMARY.pdf> 7.

168 Victoria Police, *Aboriginal Advisory Unit Reconciliations Action Plan (2003 – 2008)* <<http://www.reconciliation.org.au/raphub/wp-content/uploads/raps/state/victoria%20police%20rap%202003-2008.pdf>>.

169 Office of Police Integrity Victoria, *Talking Together – Relations between Police and Aboriginal and Torres Strait Islanders: A Review of the Victoria Police Aboriginal Strategic Plan 2003 – 2008*, 10-14 at <<http://www.ibac.vic.gov.au/docs/default-source/reviews/opi/talking-together---relations-between-police-and-aboriginal-and-torres-strait-islanders-in-victoria-.pdf?sfvrsn=8>>.

170 South Australia Police, *Reconciliation Action Plan (2017 – 2020)*, <<http://www.reconciliation.org.au/raphub/wp-content/uploads/2017/05/SA-Police-Innovate-RAP-2017-20-updated.pdf>> 1.

relationships between the police and Aboriginal communities and people. Some of these programs included:

- SAPOL's Blue Light program – an engagement tool providing positive interaction with indigenous youth;
- SAPOL's volunteer program which provides positive engagement with the broader community; and
- a program titled Justice Reinvestment which has provided positive results for the police and community in other jurisdictions.

176. Another feature of SAPOL's action plan is the responsibility it places on itself by meeting deliverables within a certain timeframe to be implemented by key personnel and departments.¹⁷¹
177. The 2016 RAP Impact Measurement Report highlights that Reconciliation Action Plans can have a significant and positive impact in improving reconciliation in Australia. This was certainly demonstrated in Australia's employment sector.¹⁷²
178. The Law Council submits that all police bodies should have a Reconciliation Action Plan with Reconciliation Australia such the one currently featured by SAPOL.
179. The Law Council further submits that RAPs will have a significant impact on the services provided by the police force when engaging with indigenous communities, promote cultural awareness and respect for indigenous communities and aboriginal people, and encourage and promote employment opportunities for Aboriginal people who may wish to join the police force.
180. Any state, territory or Federal police body who has a RAP should ensure that they are appropriately recording and monitoring the RAPs success against any benchmarks or deliverables set under the RAP.

Question 12–6

Should police be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place?

181. The Law Council does not comment on this question.

13. Justice Reinvestment

Question 13–1

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

182. The Law Council supports the implementation of justice reinvestment initiatives more broadly across Australia. The Law Council has had the opportunity to read the Change the Record Coalition's submission to this inquiry and supports its contention that '[t]he essence of the concept of justice reinvestment is a place-based,

171 Ibid 5.

172 Ibid 8.

community-led approach, which necessarily means that justice reinvestment initiatives are likely to be different in different communities’.

183. To support the community based approach, key to the success of justice reinvestment initiatives legal frameworks must be amended to direct offenders and alleged offenders away from imprisonment or remand and into justice reinvestment programs.