public interest
ADVOCACY CENTRE

Submission to Australian Law Reform Commission re Incarceration Rates of Aboriginal and Torres Strait Islander Peoples

31 August 2017

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in New South Wales. Established in 1982, PIAC tackles systemic issues that have a significant impact on disadvantaged and marginalised people. We ensure basic rights are enjoyed across the community through litigation, public policy development, communication and training.

Our work addresses issues such as:

- homelessness;
- access for people with disability to basic services like public transport, education and online services;
- Indigenous disadvantage;
- discrimination against people with mental health conditions;
- access to energy and water for low-income and vulnerable consumers;
- the exercise of police power;
- the rights of people in detention, including the right to proper medical care; and
- government accountability, including freedom of information.

PIAC is funded from a variety of sources. Core funding is provided by the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government for its Energy and Water Consumers Advocacy Program and from private law firm Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, donations and recovery of costs in legal actions.

PIAC's work on Incarceration of Aboriginal and Torres Strait Islander Peoples

PIAC is a strong advocate for justice for Aboriginal and Torres Strait Islander Australians, and has a long history of legal and policy work relating to the ongong issue of the over-incarceration of Aboriginal and Torres Strait Islander peoples. This includes:

- a 2015 submission to the Finance and Public Administration References Committee's inquiry into *Aboriginal and Torres Strait Islander experience of law enforcement and justice services*[1]
- a 2012 paper on *The criminalisation of conduct: Indigenous youth in the criminal justice system*,[2] and

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[1] PIAC, Submission to the Finance and Public Administration References Committee re its *Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services*, 30 April 2015, available at https://www.piac.asn.au/wp-content/uploads/15.4.30_piacs_submission_to_the_finance_and_public_administration_committee_inquiry_atsi_experience_of_law_enforcement_and_justice.pdf

[2] PIAC, *The criminalisation of conduct: Indigenous youth in the criminal justice system*, 2012, available at https://www.piac.asn.au/wp-content/uploads/12.02.01_the_ciminalisation_of_conduct_lb_-_scan_-_no_cover.pdf

- a 2009 submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' *Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system*.[3]

PIAC has a number of projects that are closely linked to the subject matter being considered by the current inquiry. This includes our Indigenous Justice Project, supported by the law firm Allens, which works in partnership with organisations and communities to identify public interest issues that impact Aboriginal and Torres Strait Islander clients, and conduct advocacy, strategic litigation and policy work to address these wrongs.

It also includes our work on Policing and Detention issues, in which PIAC works to address the over-representation of vulnerable groups, including Aboriginal and Torres Strait Islander people, in the criminal justice system. As part of this project, PIAC aims to ensure that police use their powers, particularly the power of arrest, lawfully and appropriately, and we hold police accountable, including through litigation to challenge inappropriate, unlawful or unjust treatment.

Finally, PIAC operates the long-standing Homeless Persons' Legal Service (HPLS), which addresses the legal needs of homeless people and plays an active role in reducing homelessness. As part of this project we work closely with government and service providers on issues relating to homelessness, including groups that are disproportionately affected by homelessness, such as Aboriginal and Torres Strait Islander people.

[3] PIAC, A better future for Australia's Indigenous young people: Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system, 22 December 2009, available at https://www.piac.asn.au/wp-content/uploads/09.12.22-PIAC-IndigenousYouthSub.pdf

Recommendations

From Chapter 2 Bail and the Remand Population

Recommendations

- *Recommendation 87 of the RCIADIC should be implemented in full.*
- *Powers of arrest (such as those found in s 99 of LEPRA) should expressly provide that arrest and detention must be an option of last resort.*
- *Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should contain clear guidance to police to the effect that arrest is to be used as a measure of last resort and to encourage diversion of suspected offenders away from the criminal justice system including by use of court attendance notices where appropriate.*
- *Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should expressly state that detention should be as a last resort and for the shortest period of time (in line with Convention on the Rights of the Child).*
- *That legislation governing criminal procedures (which in NSW includes the provisions of LEPRA, the Children (Criminal Proceedings) Act, the Young Offenders Act and the Bail Act) should be summarised in internal police policies and procedures (including the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) to (i) reinforce the message that arrest and detention should be a last resort and (ii) provide clear guidance as to the procedure police officers must follow, in accordance with law, when confronted with suspected offending by young people.*
- *Bail laws should expressly provide that arrest for breach of bail is a sanction of last resort (including in section 77 of the NSW Bail Act).*
- *Bail laws should expressly provide that police officers must have regard to a person's age when determining what action should be taken for breach of bail (again including in section 77 of the NSW Bail Act)*
- *In consultation with community, consideration should be given to further trials of the 'breach reduction strategy*[4] *in communities with large populations of Aboriginal and Torres Strait Islander people.*
- *Police policies and training should be clarified to ensure that the policing of bail conditions, and particularly curfew conditions, is lawful (which in NSW means properly authorised by the enforcement condition regime set out in section 30 of the Bail Act) and is not oppressive or counter-productive.*

[4] Australian Law Reform Commission, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper 84, July 2017, 2.69.

1.1 Chapter 2 Bail and the Remand Population

Since 2005, PIAC has maintained a practice in police accountability, predominantly through a referral partnership with the Aboriginal Legal Service NSW/ACT.

PIAC's casework arises from a number of systemic issues:

- unlawful arrests and arrests not being used as a last resort;
- excessive and inappropriate bail monitoring;
- the overuse of stop and search powers, particularly in public places; and
- reliance on the Suspect Target Management Plan (STMP) policy to justify the excessive use of police powers such as personal searches and home visits.

PIAC has advised and represented hundreds of people with false imprisonment, assault, battery, trespass and malicious prosecution claims against police arising from these and other issues.

The vast majority of clients referred to the police accountability project are young Aboriginal people and many live in regional or remote communities. Many clients are particularly vulnerable and face challenging circumstances such as mental illness, drug and alcohol misuse and unstable care arrangements.

To date, PIAC has assisted over 160 Aboriginal and Torres Strait Islander clients in relation to complaints and claims regarding unlawful police conduct. The case work generated from the project has also provided a basis for PIAC's systemic advocacy and law reform on police powers and the broader operation of the criminal justice system in NSW, particularly as it affects Aboriginal and Torres Strait Islander young people.

PIAC's comments are limited to the laws and legal frameworks including legal institutions and law enforcement (police, courts, legal assistance services and prisons) that contribute to the incarceration rate of Aboriginal and Torres Strait Islander peoples and inform decisions to hold or keep Aboriginal and Torres Strait Islander peoples in custody specifically in relation to:

- arrest;[5]
- remand and bail;[6] and

factors that decision makers take into account when considering arrest and remand and bail such as:

- the degree of discretion available to decision makers;7 and
- incarceration as a last resort.8

We note that our comments are restricted to laws and legal frameworks within New South Wales given this is where our police accountability clients predominantly reside.

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5 Australian Law Reform Commission inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples, Terms of Reference, 1.1 iv.

6 As above, Terms of Reference, 1.1 v.

7 As above, Terms of Reference, 1.2 iii.

8 As above, Terms of Reference, 1.2 iv.

Legal frameworks and factors decision makers take into account when considering arrest and incarceration as a last resort

Arrest and incarceration as a last resort

In PIAC's submission, the role of police officer discretion in deciding what action to take when confronted with suspected offending in contributing to the rate of incarceration of Aboriginal and Torres Strait Islander people cannot be overstated.

This impact of the exercise of police discretion was well acknowledged by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). In relation to Aboriginal young people, the RCIADIC noted:

> While recognising that many of the issues facing Aboriginal people in general also face Aboriginal youth in particular, I wish to make the point here that police and Aboriginal youth relations are a critical juncture in the entry of Aboriginal youth into the juvenile justice system and often, consequently, into the criminal justice system.[9]

And further:

> The police decision to arrest a juvenile marks the point of entry into the juvenile justice system from whence it is often difficult to disentangle oneself. As David Alcock pointed out in his background paper:
>
> > The 'necessity' to arrest is the first stage in what can often be a particularly difficult situation. One need only mention the consequent charges of assault police, resist arrest, escape lawful custody that can flow simply from the police decision to arrest.[10]

The RCIADIC made numerous recommendations in relation to ensuring that discretion to arrest and detain Aboriginal and Torres Strait Islander people was exercised as a last resort. For example:

> Recommendation 87: That:
> a. All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders;
> b. Police administrators should train and instruct police officers accordingly and should closely check that this principle is carried out in practice;[11]
>
> Recommendation 92: That governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.[12]

In relation to Aboriginal and Torres Strait Islander young people, the RCIADIC made the following specific recommendation:

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9 Royal Commission into Aboriginal Deaths in Custody at 14.4.14.
10 Royal Commission into Aboriginal Deaths in Custody at 14.4.16
11 Royal Commission into Aboriginal Deaths in Custody.
12 Royal Commission into Aboriginal Deaths in Custody.

> Recommendation 239: That governments should review relevant legislation and police standing orders so as to ensure that police officers do not exercise their powers of arrest in relation to Aboriginal juveniles rather than proceed by way of formal or informal caution or service of an attendance notice or summons unless there are reasonable grounds for believing that such action is necessary. The test whether arrest is necessary should, in general, be more stringent than that imposed in relation to adults. The general rule should be that if the offence alleged to have been committed is not grave and if the indications are that the juvenile is unlikely to repeat the offence or commit other offences at that time then arrest should not be effected.

In one particular report, the Commissioner Johnston noted:

> In my report of inquiry into the death of Craig Karpany, I emphasised the instance of the role of supervising officers in relation to arrests:
>
> > …What is required, I think, is that the atmosphere inside the police force be such that not arresting (other than where that is essential) is regarded as good intelligent policing; that a tough policy of arresting whenever you can is not regarded as good policing.[13]

PIAC's experience

In PIAC's experience, the principle of arrest as a last resort is not routinely adhered to by NSW police officers in deciding what action to take when confronted with suspected offending, particularly in relation to Aboriginal and Torres Strait Islander young people.

Our case work shows police exercising their discretion to arrest (*Law Enforcement (Power and Responsibilities) Act 2002* (NSW) (LEPRA) s 99) and continuing the arrest (LEPRA s 105) when circumstances of a person clearly indicate that a warning, caution or court attendance notice would have been more appropriate and desirable.

The failure by police to routinely consider alternatives to arrest and adhere to the principle of arrest as a last resort, particularly in relation to young people, is, in our view, a significant contributor to incarceration rates of Aboriginal and Torres Strait Islander people.

Relevant legal frameworks in NSW

In PIAC's submission, the principle of arrest and detention as a last resort is not sufficiently embedded in the legal frameworks guiding the practices and decision making of police officers in NSW.

In 2013, section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (LEPRA) was amended to remove the explicit reference to arrest being for the purpose of bringing a person before the Court.

The current section 99 of LEPRA provides police officers with power to arrest a person without a warrant. A police officer must suspect on reasonable grounds that a person is committing or has committed an offence and be satisfied that arrest is reasonably necessary having regard to one or more of the reasons set out in s 99 (1)(b) of LEPRA.

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[13] Royal Commission into Aboriginal Deaths in Custody at 21.2.26

Section 105 of LEPRA provides that a police officer may discontinue an arrest at any time, such as if the person is no longer a suspect, the reason for the arrest no longer exists, or if it is more appropriate to deal with the matter by issuing a warning, caution, penalty notice, court attendance notice or, in the case of a child, dealing with the matter under the *Young Offenders Act 1997* (NSW) (Young Offenders Act). [14]

Nowhere in LEPRA does it expressly state that arrest and detention are to be used as a sanction of last resort.

There is little published guidance for police officers in relation to the principle of arrest as a last resort.

The *NSW Police Force Handbook* appears to reverse the emphasis, stating that unless an officer cannot satisfy the reasons for arrest set out in section 99 (1)(b) of LEPRA, the officer must consider alternatives to arrest.[15] This approach to arrest is also reflected in the *NSW Police Force Code of Conduct for CRIME*.[16]

In the case of children, the Convention of the Rights of the Child requires that arrest, detention and imprisonment of a child should only be used a measure of last resort and for the shortest appropriate period.[17]

Legislation relating to young people embodies these principles to some degree. Section 7 of the *Young Offenders Act* sets out principles guiding persons exercising functions under the Act to include:

a. The principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence;[18] and
b. The principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.[19]

Further, the *Children (Criminal Proceedings) Act 1987* (NSW) provides that criminal proceedings should not be commenced against a child other than by court attendance notice (CAN).[20] Exceptions to commencement of proceedings by CAN include certain serious offences[21], and whether there are reasonable grounds for believing that the child is unlikely to comply with a CAN or is likely to commit further offences.[22]

The *NSW Police Force Code of Conduct for CRIME* notes that the arrest procedure in section 99 'applies equally to children'.[23] The *NSW Police Force Handbook* sets out the procedure for imposing the least restrictive sanctions for young people by reference to the *Young Offenders Act*

14 LEPRA, s 105 (2).
15 *NSW Police Force Handbook, p. 10-11*
16 *NSW Police Force Code of Conduct for CRIME, 14-15.*
17 Convention of the Rights of the Child, Article 37 (b).
18 Young Offenders Act, s 7 (a).
19 Young Offenders Act, s 7 (c).
20 *Children (Criminal Proceedings) Act 1987* (NSW) s 8(1).
21 *Children (Criminal Proceedings) Act 1987* (NSW) s 8(2)(a).
22 *Children (Criminal Proceedings) Act 1987* (NSW) s 8(2)(b).
23 *NSW Police Force Code of Conduct for CRIME, 14-15.*

and the *Children (Criminal Proceedings) Act 1987* (NSW), including that they entitled to have proceedings commenced by CAN.[24]

Reducing youth crime and diversion of Aboriginal and Torres Strait Islander young people away from the criminal justice system is identified as a priority in the NSW Police Force Aboriginal Strategic Direction 2012-2017[25] and in the NSW Police Force Youth Strategy 2013-2017 (Youth Strategy).[26] The Youth Strategy further identifies directions to address the specific needs of Aboriginal youth.[27]

Recommendations

- *Recommendation 87 of the RCIADIC should be implemented in full.*
- *Powers of arrest (such as those found in s 99 of LEPRA) should expressly provide that arrest and detention must be an option of last resort.*
- *Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should contain clear guidance to police to the effect that arrest is to be used as a measure of last resort and to encourage diversion of suspected offenders away from the criminal justice system including by use of court attendance notices where appropriate.*
- *Police policies and procedures (such as those contained in the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) should expressly state that detention should be as a last resort and for the shortest period of time (in line with Convention on the Rights of the Child).*
- *That legislation governing criminal procedures (which in NSW includes the provisions of LEPRA, the Children (Criminal Proceedings) Act, the Young Offenders Act and the Bail Act) should be summarised in internal police policies and procedures (including the NSW Police Force Handbook and/or NSW Police Force Code of Conduct for CRIME) to (i) reinforce the message that arrest and detention should be a last resort and (ii) provide clear guidance as to the procedure police officers must follow, in accordance with law, when confronted with suspected offending by young people.*

Legal frameworks and factors decision makers take into account when policing bail and incarceration as a last resort

Our comments above in relation to police officers' use of discretion in arrest and detention as a last resort are equally applicable to the discretionary decisions by police in the policing of bail and suspected breaches of bail.

The ALRC Discussion Paper acknowledges that 'police discretion plays a key role in the return to prison of people who breach their bail conditions.'[28]

In relation to young people, the Australian Institute of Criminology identifies that:

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24 *NSW Police Force Handbook, see the 'Young Offenders' section, p. 510.*

25 Aboriginal Strategic Direction 2012-2017, pp 28-30.

26 NSW Police Force Youth Strategy 2013-2017, Objective 4, p, 15.

27 NSW Police Force Youth Strategy 2013-2017, Objective 5, p, 16.

28 Australian Law Reform Commission, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper 84, July 2017, 2.63.

> minimising breaches of bail by young people is an important strategy in minimising levels of young people on custodial remand, since a history of breached bail conditions can influence the outcome of future bail decisions, thereby increasing the likelihood of a young person being remanded in custody.[29]

As noted above, the failure by police to consider alternatives to arrest and detention and adhere to the principle of arrest as a last resort is a significant contributor to incarceration rates of Aboriginal and Torres Strait Islander people. In the context of suspected breaches of bail, our case work shows police:

a. failing to consider the alternatives to arrest, such as issuing a warning or application notice, as required by *Bail Act 2013* (NSW) s 77(1) (the *Bail Act*); and
b. failing to consider other matters in deciding what action to take, such as the triviality of the breach and the circumstances of the individual, as required by *Bail Act* s 77(3).

The New South Wales Law Reform Commission Inquiry into Bail recommended that legislation should expressly specify that police officers consider a range of factors when considering what action to take when faced with a suspected breach of bail, including that arrest should be as a last resort.[30] In relation to young people, the NSW Law Reform Commission also specifically recommended that police officers should expressly consider a person's age when determining what action to take for suspected breach of bail.[31]

Recommendations

- *Bail laws should expressly provide that arrest for breach of bail is a sanction of last resort (including in section 77 of the NSW Bail Act).*
- *Bail laws should expressly provide that police officers must have regard to a person's age when determining what action should be taken for breach of bail (again including in section 77 of the NSW Bail Act)*
- *In consultation with community, consideration should be given to further trials of the 'breach reduction strategy'[32] in communities with large populations of Aboriginal and Torres Strait Islander people.*

Policing bail conditions and proactive policing (STMP)

The experience of PIAC's clients reflects that as set out at 2.67 of the Discussion Paper. That is, our young Aboriginal clients, their family, communities and legal representatives regularly report a sense of them being targeted and harassed by police.

One particular issue that has arisen in the context of unwarranted police harassment is a complaint of repeated and excessive bail compliance checks, particularly in respect of bail conditions concerning curfews.

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29 Australian Institute of Criminology, *Bail and remand for young people in Australia,* at 80.
30 New South Wales Law Reform Commission, *Bail*, Report 133 (2012) Recommendation 15.2 (1)(b)(iii).
31 New South Wales Law Reform Commission, *Bail*, Report 133 (2012) Recommendation 15.2 (1)(b)(iv).
32 Australian Law Reform Commission, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper 84, July 2017, 2.69.

The concern is that increased contact with the police, by way of frequent attendance at residential premises to check on curfew compliance, leads to increased and unnecessary contact with the criminal justice system and increased risk of incarceration and further criminalisation of young people.

A related concern is the inconsistent approach taken by Local Area Commands in NSW relation to policing of bail conditions concerning curfews.

In our view, the bail enforcement regime set out in section 30 of the *Bail Act* is intended to cover directions by police officers to persons subject to a curfew – meaning that, in order to direct that person to present to the front door for the purpose of checking compliance, an enforcement order needs to be in place (otherwise it is unlawful).

Many of our clients report police officers attending private residences in the early hours of the morning, often more than once a night, and several times a week, in order to check compliance with a curfew without an enforcement condition in place. In our experience, many police officers believe that they do not require an enforcement condition in order to direct a person to the door in order to check compliance with a curfew.

The bail enforcement regime provides important safeguards around the policing of bail conditions. For example, an enforcement condition can only be imposed by the Court in circumstances where it is reasonable and necessary having regard to the history of the person granted bail (including their criminal history), the likelihood of the person committing further offences, and the extent to which compliance with the enforcement conditions may unreasonably affect other persons.[33] Further, it is for the Court to decide the kind of directions that can be given to the person at liberty on bail and the circumstances in which the direction may be given, to ensure that compliance with the direction is not unduly onerous.[34]

Recommendation

Police policies and training should be clarified to ensure that the policing of bail conditions, and particularly curfew conditions, is lawful (which in NSW means properly authorised by the enforcement condition regime set out in section 30 of the Bail Act) and is not oppressive or counter-productive.

The STMP

Another practice engaged in by law enforcement which undoubtedly leads to increased rates of incarceration of Aboriginal and Torres Strait Islander people in New South Wales, and particularly youth, is the use of 'proactive' policing strategies such as repeated stops and searches and move on directions, area profiling and use of the Suspect Target Management Plan (STMP).

The ALRC Discussion Paper notes the use of the STMP by the NSW Police Force.[35] The ALRC Discussion Paper raises the STMP in the context of policing of bail conditions. In our experience

33 Bail Act, s 30 (5).
34 Bail Act, s 30 (4).
35 Australian Law Reform Commission, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Discussion Paper 84, July 2017, 2.67.

this is not necessarily an accurate representation of when the STMP is utilised by police. To the contrary, many of our clients subject to the STMP, are not on bail and have rather been identified as being at risk of reoffending.

Concerns about the use of the STMP as a policing strategy against Aboriginal and Torres Strait Islander youth include:

a. Many young people placed on the STMP have a history of only minor offending;
b. Some police officers mistakenly believe they have the right to stop and search people placed on the STMP;
c. STMP targets experience disruption to their home life, families and relationships when they are visited regularly at home by police;
d. Targeting young Aboriginal people under the STMP is an inappropriate strategy to reduce the risk of re-offending of young Aboriginal people.

Responses to specific proposals in Discussion Paper

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.

PIAC supports this proposal and suggests that bail legislation also includes a reference to a person's age. We recommend that guidelines accompany legislative change so that police officers have guidance as to how a person's Aboriginality should guide their discretion when making bail decisions.

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.

PIAC supports this proposal in principle.

1.2 Chapter 3 Sentencing and Aboriginality and Chapter 4 Sentencing Options

PIAC acts for a relatively small number of Aboriginal and Torres Strait Islander clients in the context of sentencing through the Homeless Persons' Legal Service. This is primarily with respect to homeless people, including people living on the street, people in sheltered, crisis and long-term assisted accommodation, 'couch surfers' and people in danger of losing their housing.

We support the view that courts need to take into account a person's Indigenous background in setting an appropriate sentence. We also see value in improving access to, and funding for, detailed reports about Indigenous offenders to assist courts in their sentencing deliberations.

However, in terms of answers to specific questions posed in Chapters 3 and 4 (regarding Sentencing and Aboriginality, and Sentencing Options, respectively) we defer to the expertise of and submissions from Aboriginal Legal Service NSW and other Indigenous-specific legal services.

1.3 Chapter 5 Prison Programs, Parole and Unsupervised Release

As noted in the introduction, one of the areas of PIAC's work that is particularly relevant to this inquiry is the Homeless Person's Legal Service, including its policy work looking at the contributing factors to homelessness, including the homelessness of Aboriginal and Torres Strait Islander (ATSI) people in NSW.

The following discussion examines the interaction between imprisonment and homelessness, before responding to the specific questions posed in this Chapter.

The close relationship between recent prison experience, housing crisis, homelessness, and socio-economic disadvantage has been confirmed in several Australian studies over the last fifteen years. Casework data from the HPLS Solicitor Advocate also suggests that there is a strong causal relationship between previous experiences of imprisonment, homelessness and further re-offending. From July 2010 – June 2016, the HPLS Solicitor Advocate has provided court representation to 511 people. Of these 5.8% were ATSI.

- Of the 511 people represented, 37.6% had previously been in prison;
- Of those who were ATSI, 40% had previously been in prison (compared to 37.4% of non-ATSI defendants).

While these figures indicate that a slightly higher proportion of ATSI clients had previous experience of prison, the cyclical relationship between homelessness and exiting prison affects ATSI people in a disproportionate way for the following reasons:

1. ATSI people have four times the rate of homelessness for non-ATSI people, making up 9% of the total homeless population (despite making up only 2.5% of the whole Australian population).[36]
2. ATSI people make up 28% of the Australian prison population.

The particular factors that result in the close causal relationship between exiting prison and homelessness are highly relevant to ATSI people given the over representation of ATSI people in both the prison population and homelessness population.

[36] Australian Institute of Health and Welfare (AIHW) (2017), Homelessness – A profile for Aboriginal and Torres Strait Islander people,

Aboriginal people and homelessness

According to the NSW specialist homelessness services data from the Australian Institute of Health and Welfare (AIHW) of the total number of clients of NSW specialist homelessness services:

- 25% identified as ATSI descent;
- Of those clients experiencing repeat homelessness, 27% identified as ATSI descent.[37]

People of ATSI descent are more likely to experience homelessness due to systemic and generational disadvantage. Aboriginal and Torres Strait Islander people are disproportionately represented in the risk factors for homelessness:

- Unemployment rates among Aboriginal people are around three times that of non-Aboriginal Australians;
- Aboriginal young people are more likely to be unemployed than their non-Aboriginal peers;
- The average income of Aboriginal people is 60% of the national average;
- Aboriginal women are more likely to experience domestic and family violence;
- Aboriginal young people represent around a third of children and young people in out-of-home care;
- Aboriginal people are more likely to be imprisoned;
- Aboriginal young people are detained at a notably higher rate than non-Aboriginal young people.[38]

Given the cyclical relationship between homelessness and prison the over-representation of ATSI people in the homeless population and in the population most affected by the risk factors of homelessness, ATSI people are at a higher risk of imprisonment due to factors of housing instability and homelessness than non-ATSI people.

Homelessness and exiting prison

Given the over-representation of Aboriginal and Torres Strait Islander people in the prison population, ATSI people are at high risk of encountering the difficulties and barriers in securing and maintaining accommodation that are common amongst people exiting prison. They are also at high risk of facing the barriers faced by ex-prisoners in reintegrating into the wider community, including the risks of reoffending and returning to prison.

People exiting prison face considerable barriers and problems in securing and maintaining accommodation. A number of factors present as barriers for ex-prisoners integrating into the wider community, including:

- discrimination and stigmatisation as offenders;
- the effects of institutionalisation;
- accumulated debt prior to and during the term of imprisonment;
- loss of tenancy or relationship breakdown while in custody;

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37 AIHW (2015), *2014-15 NSW specialist homelessness services data*, AIHW.

38 NSW Government (2016), *Foundations for Change – Homelessness in NSW*, Discussion Paper, NSW Government September 2016, 24.

- recidivism and repeated episodes of imprisonment;
- social isolation after exiting prison, and returning to pro-criminal associations;
- lack of access to and eligibility for public housing.[39]

In 2003, research undertaken on behalf of the Australian Housing and Urban Research Institute[40] sought to provide an understanding of the housing needs and circumstances of persons being released from prisons in NSW and Victoria. This project involved interviews with a sample of people about to be released from prisons in NSW and Victoria, with subsequent interviews at three months and then six months post-release. In total, there were 194 participants (130 male, 64 female) from New South Wales and 145 participants (122 male, 23 female) from Victoria, all of who were interviewed pre-release and followed up post-release. At the nine-month post-release interview, 238 participants remained in the study (145 in NSW, 93 in Victoria).

The study concluded:

- Ex-prisoners were more likely to return to prison if they
    - had been in prison before and had been on remand or serving a short sentence;
    - were homeless or transient post-release;
    - did not have accommodation support or they felt the support was unhelpful;
    - suffered from alcohol and other drug problems; or
    - were in debt.
- The strongest predictors of ex-prisoners being re-incarcerated were found to be high levels of transience in the immediate post-release period (moving more than twice within a three-month period) and/or experiencing worsening problems with heroin use.
- Indigenous participants were particularly vulnerable to homelessness and lack of integration.

In 2012, PIAC undertook a consultation project exploring the experiences and difficulties faced by people who have recently exited the prison system into situations of housing crisis or homelessness. This project involved consultation interviews with 26 people who exited prison in the previous two years into situations of housing crisis or homelessness.[41]

Twenty-three participants indicated that they had been in prison on more than one occasion. Fourteen participants indicated that their most recent term of imprisonment was for less than 12 months. Eight participants said that their most recent term of imprisonment was for more than two years.

Over a third of participants indicated that on the night they were released from prison they slept rough, or had some other form of primary homelessness. Other responses also indicated a form of homelessness such as couch surfing, short-term emergency or temporary accommodation, supported accommodation, transitional accommodation, boarding house accommodation, or

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39 Willis, Matthew and Makkai, Toni (2008), 'Ex-Prisoners and Homelessness: Some Key Issues', PARITY, Volume 21, Issue 9, October 2008, 6-7.

40 Dr Eileen Baldry, Dr Desmond McDonnell, Peter Maplestone and Manu Peeters, 'Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration?', AHURI Final Report No. 46, August 2003

41 Schetzer, Louis (2013), *Beyond the Prison Gates – The experiences of people recently released from prison into homelessness and housing crisis*, Public Interest Advocacy Centre, July 2013.

staying with friends and family. All participants were either currently homeless, or had experienced homelessness in the previous three months.

Participants identified some particular difficulties securing stable accommodation following release from prison. Commonly recurring themes include:

- The temporary nature of most accommodation options;
- The lack of social housing in NSW, the lengthy waiting list for public housing, and frustration negotiating processes and procedures to access social housing or community housing;
- Lack of availability of crisis accommodation options for people leaving prison, with many services having no beds available – "everything's full";
- Discrimination on the basis of being an ex-prisoner, particularly from boarding houses;
- Inability to afford private rental accommodation or boarding house accommodation;
- Not having identification to enable access to social security payments to pay for accommodation;
- Being paroled to crisis or temporary accommodation services which did not have available accommodation, thus placing them in breach of parole;
- Lack of support services or accommodation services.

Participants identified various factors that presented difficulties for them in reintegrating into the community, and particularly presenting obstacles in securing stable accommodation. Commonly recurring themes in this regard include:

- The risk/temptation to reoffend, due to difficulties in fitting into society, lack of accommodation options, lack of independent living skills;
- Disconnection from society, institutionalisation and lack of living skills;
- Feeling isolated from friends and community support networks; being exposed to bad influences making reoffending an easy option;
- Having previous legal and criminal problems resurface unexpectedly;
- For women, feeling unsafe and vulnerable to abuse or harassment;
- Difficulty finding employment;
- Difficulties associated with alcohol or substance addiction;
- Mental illness.

The most important issue identified was the importance of pre-release exit planning for prisoners, and the need for consistent, integrated case-management for people released from prison which commences pre-release and continues post-release. In addition, the need for access to appropriate welfare support prior to release, as well as comprehensive information regarding available accommodation and support services post-release, were common suggestions for improvement.

A strong theme that emerged was the need for more community-managed, supported transitional accommodation for ex-prisoners, more crisis accommodation, more affordable accommodation, and more social housing. Participants identified a range of difficulties with accessing

accommodation, including problems of availability, affordability and discrimination on the basis of criminal and prison history.

Several consultation participants spoke about the importance of stable, safe housing in terms of reintegrating back into the community and moving away from a life of reoffending and returning to prison. Their comments suggest that for people recently released from prison, housing and stable accommodation are often seen as important symbols of hope and promise for a new life, where one can move away from a life of disadvantage, re-offending and repeated periods of incarceration.

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

PIAC supports this proposal. In particular, people on remand and/or serving short sentences need access to programs that help to organise post-release housing.

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?

PIAC is not in a position to respond broadly about the best practice elements of remand and/or short prison sentence programs, although we reiterate our comment from Proposal 5-1, that any such programs must include elements which assist with access to post-release housing.

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.

PIAC supports this proposal.

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

PIAC is not in a position to respond broadly about the best practice elements of these programs, although we again express the view that such programs must include plans for post-release housing/housing support, including to prevent recidivism, and above all to aid rehabilitation into the community.

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

PIAC supports-in-principle this proposal.

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?

PIAC is not in a position to respond broadly about the best elements of such schemes. However, we express some concern about one of the major limitations of the scheme as it operates in NSW.

As the Discussion Paper notes on page 101:

> Court ordered parole may be revoked before release due to unsuitable post-release accommodation, or because plans in relation to post-release accommodation have not, or

cannot, be made. This is a major hurdle for many Aboriginal and Torres Strait Islander prisoners.

Aboriginal and Torres Strait Islander people should not be imprisoned at disproportionate rates, and for greater periods of time, simply because of a lack of housing options post-release. This means that additional funding must be provided by State and Territory Governments for programs in these areas.

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.

PIAC strongly supports this proposal.

1.4 Chapter 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 fine.

PIAC supports this proposal. We note that this proposal is based on a long history of reports and reviews that have recommended the removal of imprisonment being automatically imposed for the default of payment of a fine (including the Royal Commission into Aboriginal Deaths in Custody, and the 2012 NSW Law Reform Commission Review of Penalty Notices).

We are also aware of the particular issues faced by homeless people in this area, including Aboriginal and Torres Strait Islander homeless people, who may accumulate large, and unpayable, amounts in fines, and consequently are exposed to potential imprisonment.

However, we agree with the caution expressed by the Discussion Paper where it notes that 'to remove the option for prison is to remove a "short and sharp" option for people without the means to discharge their fine debt',[42] and that therefore alternative options must be available to ensure that fines do not simply accrue further for vulnerable individuals.

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

PIAC supports-in-principle the introduction of lower level penalties, including suspended infringement notices and/or written cautions. However, we are concerned about the potential for these lower level penalties to be used by police in a wider range of circumstances, rather than as an alternative to a 'higher level' penalty (such as an infringement notice).

This could bring even more people into unnecessary, formal contact with the criminal justice system, thus defeating the overall purpose of such a reform. Therefore, we suggest that if these penalties are introduced and/or expanded, they should be reviewed to ensure that they are not simply being used in addition to other penalties, instead of in substitution for them.

[42] ALRC Discussion Paper, para 6.30, page 113.

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

PIAC supports-in-principle the imposition of a limit on the monetary penalties received under infringement notices, and believes further consideration should be given to the recommendation of the NSW Law Reform Commission that infringement notices should not exceed 25% of the maximum court fine for that offence.

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

PIAC strongly supports this proposal, which would lead to punishment being more appropriate to a particular set of circumstances.

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

PIAC believes that offensive language should not remain a criminal offence. This position is at least partly based on the disproportionate use of CINs for this offence with respect to Aboriginal and Torres Strait Islander people. As noted in the Discussion Paper:[43]

> [T]he NSW Ombudsman found that 11% of CINs for offensive language in 2008 were issued to Aboriginal and Torres Strait Islander people [and that] [m]ore recently, it was reported that the proportion had risen to 17%.

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?

If offensive language is not abolished as a criminal offence (see question 6-4, above), PIAC does not support it being subject to criminal infringement notices or being dealt with by the courts in the first instance. Instead, we believe that, given the extremely low level of 'offending' that forms this offence, it should be dealt with via the use of cautions as the primary punishment.

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?

and

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;**

[43] Ibid, para 6.47, page 119.

- **Counselling; or**
- **Education, including driving lessons.**

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

PIAC believes that there is an obligation on, and urgent need for, state and territory governments to provide alternative penalties to court ordered fines. Specifically, we agree with Proposal 6-2 that Work and Development Orders should be introduced in all jurisdictions, although there are also improvements that could be made to ensure they are culturally appropriate for Aboriginal and Torres Strait Islander people.

This is based on our experience of the operation of the NSW scheme to date.

The Work and Development Order (WDO) scheme has proven to be an effective mechanism for helping individuals manage and reduce their debts. For many clients of PIAC's Homeless Persons' Legal Service, access to the WDO scheme has allowed them to resolve their fines debt while engaging in meaningful activities that promote positive outcomes, such as volunteer work or health treatment.

However, the WDO scheme is not suited to all individuals as paying off a substantial debt would require a regular commitment over an extended period of time. Consideration should be given to the additional barriers to participation that are faced by Aboriginal and Torres Strait Islander people who may have family and cultural commitments that require them to spend their time across two or more locations.

Two key strategies could be adopted that would help make the scheme more accessible on a wider scale:

a) To ensure that culturally appropriate options are available to participants, Aboriginal and Torres Strait Islander community controlled organisations should be supported to become participants in the WDO scheme in New South Wales, and in other jurisdictions where the scheme is adopted. Additional resources may be required to allow those organisations to provide appropriate support to participants, and to meet the ongoing administrative and reporting requirements of their own participation in the scheme.
b) The process for temporarily suspending and then reinstating a WDO should be streamlined. This would make it easier for individuals with complex life circumstances to take part, and to continue with their participation following a break (which may be due to a health condition, family commitment, unstable housing, etc).

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

PIAC supports-in-principle the removal of driver licence suspensions as an enforcement measure for fine default.

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?**

and

Question 6-9 Is there a need for regional driver permit schemes? If so, how should they operate?

and

Question 6-10 How could the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities be improved?

PIAC is not in a position to comment on Questions 6-8, 6-9 or 6-10.

1.5 Chapter 9 Female Offenders

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

As indicated in response to Chapters 3 and 4, PIAC only has a relatively small involvement in the context of sentencing for Aboriginal and Torres Strait Islander people (primarily in the context of people accessing the Homeless Person's Legal Service). In that case, we defer to the expertise of organisations such as the Aboriginal Legal Service NSW in their views about these issues. However, we do express the broad view that there should be greater input from Aboriginal and Torres Strait Islander women's services in crafting non-custodial alternatives, in preparing reports to courts, and in providing other expertise.

1.6 Chapter 10 Aboriginal Justice Agreements

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

Yes, PIAC believes that Closing the Gap should include justice targets. As we submitted to the Finance and Public Administration References Committee's *Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services*:[44]

[44] PIAC, Submission to the Finance and Public Administration References Committee re its *Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services*, 30 April 2015, pp 18-19, available at https://www.piac.asn.au/wp-content/uploads/15.4.30_piacs_submission_to_the_finance_and_public_administration_committee_inquiry_atsi_experience_of_law_enforcement_and_justice.pdf

PIAC believes that 'justice targets' must be included in the list of targets, which were established by the Council of Australian Governments in 2008. The current targets in the Closing the Gap framework relate to life expectancy, child mortality, education and employment. The exclusion of justice targets ignores an important indicator of improvement in the current target areas. It also ignores the fact that the disadvantage experienced by Aboriginal and Torres Strait Islander people is multi-layered. For example, for an Aboriginal or Torres Strait Islander young person, reaching a higher level of education, which will impact on whether that young person undertakes university studies and employment, both of which are factors which have been shown to reduce the likelihood he will end up in the criminal justice system. Excluding justice targets is to leave out a significant chunk of policy that must relate to and interact with other policies seeking to address Aboriginal disadvantage.

There have been calls for justice targets to address the problem of Aboriginal involvement in the criminal justice system from a number of government, parliamentary and independent bodies. The National Congress of Australia's First Peoples, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs and the Aboriginal and Torres Strait Islander Social Justice Commissioner have all called for justice targets to be implemented.[45] PIAC believes justice targets set a measurable goal that ensures accountability of successive governments and has the potential to positively impact the legislative and policy development processes.

PIAC accordingly urges the Committee to recommend that the current position taken by the Australian Government, rejecting the need for justice targets, [46] be reassessed in light of overwhelming support for their inclusion in the Closing the Gap strategy.

In terms of what the targets should encompass, PIAC suggests they should recognise the overall issue of over-incarceration of Indigenous Australians, as well as the specific issue of the disproportionate detention of Aboriginal and Torres Strait Islander young people in juvenile justice (particularly given the consequences of interactions with juvenile justice on other targets, such as health and education).

Given the scale of the gaps that exist in both areas (overall, and juvenile justice), PIAC also suggests that a medium term and a long-term target should be introduced for each. The goal for closing the gap in overall incarceration is extended because of prison sentences currently being served. For example:

- Halve the gap in juvenile justice detention rates by 2022
- Halve the gap in overall incarceration rates by 2022
- Close the gap in juvenile justice detention rates by 2027, and
- Close the gap in overall incarceration rates by 2032.

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45 National Congress of Australia's First Peoples, *National Justice Policy*, February 2013, at page 11; House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing,* above, note **Error! Bookmark not defined.**, at page 22; Aboriginal and Torres Strait Islander Social Justice Commissioner Annual Report, above note **Error! Bookmark not defined.**, at page 117;

46 See Gordon, M "Indigenous Affairs Minister Nigel Scullion Rejects justice targets for Indigenous Affairs", 19 November 2014, *Sydney Morning Herald Online*, available at http://www.smh.com.au/federal-politics/political-news/indigenous-affairs-minister-nigel-scullion-rejects-justice-targets-for-indigenous-people-20141119-11pykc.html.

1.7 Chapter 11 Access to Justice Issues

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

There are a variety of ways in which the availability of and access to legal services can be increased, but one of the most fundamental is sufficient, and sustainable, funding.

While PIAC, and the community legal sector generally, welcomed the recent decision by the Commonwealth Government to not proceed with planned funding cuts to the sector, this decision does not mean that community legal services are adequately funded.

As noted in the ALRC Discussion Paper on page 203, the Productivity Commission's Access to Justice report estimated that 'the additional cost of *adequately* supporting this sector [the legal services sector and those organisations servicing the Aboriginal and Torres Strait Islander community] would amount to around $200 million per year' (emphasis in original).

Therefore, one key way to increase of availability and access to Aboriginal and Torres Strait Islander legal services would be for the Commonwealth and State and Territory governments to increase funding to the legal assistance sector, particularly Aboriginal and Torres Strait Islander Legal Services.

1.8 Chapter 12 Police Accountability

Question 12-3 Is there value in policy publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours?

Yes. As noted in the discussion under Chapter 2 (above), NSW Police have proposed strategies contained in documents such as the NSW Police Force Aboriginal Strategic Direction 2012-17 and the NSW Police Force Youth Strategy 2013-17 relating to the diversion of Aboriginal and Torres Strait Islander people (and young people in particular) from the criminal justice system. In our view, it is essential that reporting on strategies such as these is made public so that progress can be monitored and stakeholders can engage in providing feedback and evaluation. In particular, reporting on these strategies should refer to any other relevant policies or practices that impact upon these strategies.

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?

Yes. PIAC supports the documentation of these policies, as well as their regular monitoring and evaluation. This is both best practice, and will help to ensure that any programs that are undertaken are effective, and continue to remain relevant to the circumstances. Where they are

not (effective or relevant) these resources should be redirected to other programs and initiatives aimed at reducing offending behaviours.

However, PIAC believes that the most important of these three suggestions is to ensure that succession planning is in place to provide continuity of these programs. The temporary, inconsistent or sporadic implementation of programs, no matter how well designed, can lead to significant problems in their outcomes as well as contributing to (understandable) distrust from Aboriginal and Torres Strait Islander communities with respect to future programs.

1.9 Chapter 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?

PIAC is not in a position to comment on specific new laws or legal frameworks that are necessary to facilitate justice reinvestment projects at this stage.

However, we have consistently advocated for the funding and implementation of justice reinvestment projects, including in our 2015 submission to the Senate Finance and Public Administration References Committee Inquiry into *Access to Legal Services*:[47]

> PIAC 'strongly supports programs and policies both within and external to the criminal justice system that rely on justice reinvestment theory. However, it should also be borne in mind that it is imperative that community service organisations, which generally are the core service providers of such programs, are adequately resourced.

We also reiterate our support for the Maranguka Project in Bourke, being run by Just Reinvest NSW in partnership with local Aboriginal communities.

[47] PIAC, Submission to the Finance and Public Administration References Committee re its *Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services*, 30 April 2015, p18, available at https://www.piac.asn.au/wp-content/uploads/15.4.30_piacs_submission_to_the_finance_and_public_administration_committee_inquiry_atsi_experience_of_law_enforcement_and_justice.pdf