



Incarceration Rates of Aboriginal and Torres Strait Islander Peoples

Submission by

Legal Aid Western Australia to the Australian Law Reform Commission

2017

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INTRODUCTION

1. Legal Aid Western Australia (Legal Aid WA) provides legal services to people throughout Western Australia.
2. In the 2016-17 financial year, Legal Aid WA provided the following legal services to people identifying as Aboriginal or Torres Strait Islander:
 - 11,966 duty lawyer services
 - 4,541 legal advice or legal task (minor assistance) services
 - 2,418 grants of legal aid were approved for representation in a criminal law, family law or civil law matter
3. Western Australian prisons have the highest rate of Aboriginal over-representation in Australia with Aboriginal people comprising 3% of the general population but 40% of the prison population.¹
4. This over-representation also occurs with arrest rates, and contact with the criminal justice system such as being in police custody².
5. Aboriginal offenders in comparison to non-Aboriginal offenders may be more likely to be imprisoned if convicted, convicted if charged with a criminal offence, refused bail if charged with a criminal offence and are more likely to be charged with an offence.³
6. The rates of Aboriginal imprisonment compared to non-Aboriginal imprisonment has increased since 1991.⁴

¹ Kelly M, Tubex H 'Stemming the tide of Aboriginal Incarceration' (2015) 17(2), *The University of Notre Dame Law Review*, 1.

² Broadhurst, R.G., Ferrante, A., Loh, N., Reidpath, D. & Harding, R.W. 1994, *Aboriginal Contact with the Criminal Justice System in Western Australia: A Statistical Profile*, Crime Research Centre, The University of Western Australia.

³ Weatherburn D, J Holmes, 'Re-thinking Aboriginal over-representation in prison' (2010) *Australian Journal of Social Issues* 45(4) 561.

⁴ Hilde Tubex, 'The Revival of Comparative Criminology in a Globalised World: Local variances and Aboriginal Over-representation' (2013) 2(3), *www.crimejusticejournal.com*, 62.

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7. Since the year 2000, the rate of imprisonment for Aboriginal people has increased by over 57% with Aboriginal youths comprising over 50% of juveniles in detention.⁵
 8. According to the 'Save the Children' report Aboriginal youth are 26 times more likely to be incarcerated than non-Aboriginal young people.
 9. Most of those young Aboriginal people in detention have not yet been sentenced.⁶
 10. Western Australia had the highest rate of Aboriginal young people in detention on an average night in the June quarter of 2016 at 64 per 10,000. The rate ratio was 54 times the rate of non-Aboriginal young people in Western Australia, compared with the lowest rate ratio in Victoria of 11, in States and Territories for which the rate ratio could be calculated.⁷
 11. This is consistent with all the recent statistics, such as those provided in Amnesty International's report of *A Brighter Tomorrow, Keeping Indigenous Kids in the Community and Out of Detention in Australia*, published May 2015.⁸
 12. Justice reinvestment strategies used in the US state of Texas have shown that there can be dramatic reductions in the growth of prison populations and large savings to government through:
 - a. Increasing program places for substance abuse treatment (outpatient, in prison and post-release) and mental health treatment; and
 - b. Expanding diversion options in the probation and parole system such as by providing additional beds for technical violations of supervision, transitional

⁵ Addressing Aboriginal Imprisonment National Symposium Discussion Paper November 2015.

⁶<http://www.theage.com.au/national/locking-up-Aboriginal-kids-costs-236-million-a-year-20160316-gnkgfq.html>

⁷ Australian Institute of Health and Welfare, *Youth detention population in Australia 2016* (December 2016) Australian Institute of Health and Welfare <<http://aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129557685>>.

⁸ Amnesty International Australia, *A Brighter Tomorrow Keeping Indigenous Kids in the Community and Out of Detention in Australia* (May 2015) Amnesty International Australia <http://web.archive.org/web/20160707144425/http://www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf>.

treatment and substance abuse treatment.⁹

13. The positive work being undertaken by justice agencies in Western Australia includes the provision of youth engagement officers by the Western Australia Police, law reform to provide the option of community service work in lieu of payment of a fine, the development of a reconciliation action plan by the Department of Justice - Corrective Services and the additional resources being provided to deal with drug addiction.

PART 1. INTRODUCTION TO THE INQUIRY

14. Legal Aid WA welcomes the opportunity to provide submissions to this important Inquiry. The responses in our submission follow the structure of the ALRC Discussion Paper released on 19 July 2017.

PART 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.

15. Legal Aid WA generally supports the idea behind this proposal. There is nothing currently in the *Bail Act 1982* (WA) that specifically considers issues that arise out of a person’s ‘Aboriginality’.

Proposal 2–2

State and territory governments should work with peak Aboriginal and Torres Strait

⁹ Justice Centre, The Council of State Governments, <https://csgjusticecenter.org/jr/tx/>

Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.

16. Legal Aid WA endorses this proposal to better develop the way Aboriginal people are supported when granted bail and diversion options. Legal Aid WA recognises that the use of bail hostels is an effective alternative to custody.
17. Bail hostels may be used for transitional accommodation for people leaving prison and could also potentially be used as accommodation for the purpose of parole.
18. Such hostels are used for this purpose in the UK where hostels¹⁰ offer rehabilitative services and mental health support and utilise curfews and regular drug and alcohol testing. There are also rehabilitation activities at hostels including art courses, physical activities, excursions and programs focusing on skills such as cooking and budgeting.
19. In the UK, activity programs for each resident are tailored to meet the needs of the resident with the aim of reducing reoffending and assisting people on parole in their reintegration into the community.
20. In the UK such hostels also provide sex offender treatment and drug and alcohol rehabilitation.
21. A similar system, that is culturally appropriate, could be adopted in Western Australia to support prisoners in their reintegration back into the community with a view to reducing the rate of reoffending.

Further considerations

Reducing the number of Aboriginal accused in remand custody

22. In regional areas there is a need for greater police discretion in handling breaches of

¹⁰ Where they are named Approved Premises.

bail where the breaches are minor. The following example outlines the issue:

CASE STUDY 1

A child in regional Western Australia was in breach of his curfew because he was playing basketball at the local basketball court at 8 pm in preparation for the upcoming basketball carnival. He was remanded in custody for a week as he was not suitable for the bail hostel. A flight needed to be chartered to bring him to Kununurra and staff needed to come from Perth to Kununurra to collect him and bring him to Perth on a commercial flight for a week. After he was sentenced, the staff needed to accompany him back to Kununurra.

23. The example demonstrates the disadvantage to the individual and the cost to the State of a strict approach to breaches of bail conditions.

24. To reduce the number of Aboriginal people in remand custody it is recommended that:
 - a. Police training should encourage the use of court attendance notices rather than arrest.
 - b. Bail conditions be kept to a necessary minimum after arrest to avoid an accused being in breach of bail conditions and therefore going into remand custody.
 - i. Legal Aid WA recognises that bail conditions such as 'not to consume alcohol' are common and often give rise to further issues affecting Aboriginal people. Legal Aid WA recognises that the reasoning behind this condition is understandable, however in practice it results in the police being given the additional power to conduct breath analysis tests on Aboriginal people, where the outcome of the breach results in the person being taken into custody simply because of the alcohol consumption. The person is then remanded in custody, independently of any consideration of whether they were likely to commit another criminal offence and/or attend court on their next court date. This time spent in custody for such offences, or further remanded in custody time, if bail is revoked, only serves to normalise the prison experience for Aboriginal clients, which in turn undermines the effectiveness of the sentence of a term of

imprisonment as a deterrent.

- ii. Legal Aid WA recognises that some Magistrates require letters from the chairperson of an Aboriginal community stating that a person is welcome in that particular community, if that community is being proposed as a place of residence in a bail application. Legal Aid WA recognises that these letters are difficult to obtain due to time constraints, and communication difficulties. As a result this requirement has become an impediment to the granting of bail, which accused people with proposed bail addresses in non-Aboriginal communities do not experience.

25. Bail protocols should be established to permit a warning system for minor breaches of bail conditions, particularly by young accused.¹¹

Bail to Aboriginal communities

26. It is a common practice in the Pilbara that if a bail application includes a proposal for a client to reside in an Aboriginal community, then written permission must first be provided to the court from that community.

CASE STUDY 2

An Aboriginal woman in her 30's was remanded in custody having been charged with committing violent offences against her partner, at whose hands she had suffered many years of abuse. When a bail application was made, the presiding Magistrate was willing to grant the woman bail to return to the remote Aboriginal community where she had lived most of her life and to where many of her own family members remained. However before bail would be formally granted, a letter from the community that stated that she was welcome to return had to be provided to the Court. The woman's lawyer was in regular contact with the coordinator of the community, but the coordinator could not give a firm indication of the next time the directors of the community would all be meeting, and therefore

¹¹ The use of bail protocols and notification to a Justice Reinvestment Team has been identified as a method for reducing the number of Aboriginal children in custody in Bourke, NSW: Thompson, G., *Backing Bourke, Four Corners* (ABC Television program, 19.09.16) ('*Backing Bourke*').

when such a letter could be provided. Due to the additional time the woman was spending remanded-in-custody waiting for permission to be forthcoming, the bail application was amended, with the proposed place of residence being a regional centre. Bail was granted for the women to live in the regional centre, at which place she lacked her own strong family supports. Within a short time she was located by her partner (the complainant in her matters) and more violent offences occurred.

27. It is acknowledged that Magistrates are imposing this requirement in bail conditions because the Aboriginal communities in question are isolated and without a permanent police presence. Therefore there are concerns about the disruption to communities if certain individuals are to go there whilst on bail.
28. However, as highlighted in the case study, as this has been an ad hoc requirement of individual Magistrates, there have been no official (and or timely) mechanisms in place to ensure that permission from the community could be provided to the court when it was required at the time of the bail hearing. In effect Aboriginal people wishing to reside on bail in these communities faced an additional barrier to being granted bail, which non-Aboriginal people, wishing to reside in other non-Aboriginal small communities, did not experience.

Using diversion programs

29. There should be a greater emphasis on diversion before entry into the justice system.
30. In our experience Aboriginal young people are more likely to be arrested and less likely to be cautioned for minor offences. In particular, once a young person has had contact with the justice system, police rarely issue cautions or refer to the Juvenile Justice Teams (JJT). Diversion is seen as not working by the police, and the offender is seen as “prolific”, even if the nature and seriousness of the offending has diminished.
31. Legal Aid WA submits that diversion should not be seen as a “one off” occurrence. We frequently encounter young people on relatively minor charges such as shoplifting or breaking car windows to look for property to steal, minor trespass offences (in abandoned houses, for example) which would be more appropriately dealt with by diversion rather than by the court. Once a young person has been cautioned or referred to the JJT, diversion is regarded by law enforcement authorities , and sometimes by particular Magistrates as not having “worked” or

had the desired effect of stopping offending, and so is not considered again.

32. To ensure that diversion away from the court is successful, culturally appropriate programs must be available for Aboriginal youth. They should not just be a modified version of what is in place for non- Aboriginal children. Local communities and Aboriginal elders must be consulted and involved in the design and operation of diversion programs. Practical consideration should be given to outreach at all levels of the criminal justice system. Many young people fail to attend meetings or appointments because of practical considerations such as:
- i. They do not have transport. Frequently there is no licensed driver available to take them to appointments. Catching public transport is only an option when they have the fare, and when it is accessible.
 - ii. They do not have a carer who is available to be part of the process. Many of our clients are cared for by their grandparents. Their parents may be unwell, have mental health issues or be incarcerated, and so they are unable to care for their children. The grandparents frequently have health problems and are also caring for many young children, getting them to and from school and trying to get them to court. It is very difficult for them to focus on a timetable driven by appointments for one child when they are taking others to hospital or school.
 - iii. They do not know the area in which the meeting is to be held, or the environment is not familiar to them. Youth Justice Services are in four hubs across the metropolitan area. Sometimes these offices are in suburbs a long way from the young person's home and it takes a bus and a train or two buses to get there. Very local outreach contact points make for easier access. Often the meetings are held in an office environment which is alienating to the young person.

Using Magistrates for bail applications rather than Justices of the Peace

33. Legal Aid WA submits that bail applications in regional areas should be heard by Magistrates through use of video link facilities rather than having Justices of the Peace (JPs) determine such applications.

34. There is still significant use of JPs to decide bail applications in regional areas. In our experience JPs generally follow the recommendation of police in relation to whether to grant bail or not.
35. Legal Aid WA submits that video-link bail applications should occur daily for both adult and young accused to avoid situations whereby an individual is arrested on the weekend and is refused bail, possibly having to spend up to 48 hours in custody before a bail application can be heard.

Bail hostels as an alternative to custody

36. Legal Aid WA submits that there must be greater use of bail hostels around the State, including in remote and regional areas, to reduce the remand prison population and link bail hostels to alcohol and drug rehabilitation programs provided on site.
37. Bail hostels have the potential to reduce reoffending through regular supervision, support and monitoring of accused.
38. Providing alcohol and drug rehabilitation services at bail hostels could ensure that counselling and treatment programs are commenced at an early stage of the justice system process for people requiring such assistance.
39. This approach saves the remand custody cost to the State, mandates rehabilitation as a condition of release on bail and assists the individual with sentencing in that the individual may be able to demonstrate progress in resolving an addiction problem.
40. An issue prevalent amongst Aboriginal people recently released from prison is a lack of stable accommodation.
41. Many Aboriginal people recently released from prison find it difficult to find

accommodation, which is concerning as there is a significant relationship between being homeless and being re-incarcerated.¹²

42. There is a need for greater support post release from prison for offenders as there is a positive association between having employment, stable housing and staying out of prison.¹³
43. Health issues such as worsening drug use are associated with poor housing and recidivism. Offenders may need support with a range of issues including addiction, mental health issues and homelessness.¹⁴

Altering bail conditions

44. There are numerous problems with current bail conditions which disadvantage Aboriginal youth, including:
- a) Difficulty finding a responsible person for a responsible person undertaking for young people for bail.
 - b) No access to supervised bail (by Youth Justice Services) outside the city.
 - c) Strict requirements for bail for children such as curfews, “present on request” conditions, comply with school attendance, comply with attendance at appointments and other requirements which will result in a breach of bail condition. These are frequently far more onerous than conditions placed on adults. The merger of the welfare aspect of the Children’s Court with the Justice model often results in young people spending longer in custody for breach of requirements of bail, without addressing in any practical way, the cause of the problem.
 - d) “Present on request” curfew checks by police are conducted far more frequently on Aboriginal youth than on non-Aboriginal youth. They can

¹² Baldry, E.D. McDonnell, P. Maplestone and M. Peters (2006) ‘Ex-prisoners, accommodation and State: post-release in Australia’, *Australian and New Zealand Journal of Criminology* 39(1)25.

¹³ Baldry, E.D. McDonnell, P. Maplestone and M. Peters (2006) ‘Ex-prisoners, accommodation and State: post-release in Australia’, *Australian and New Zealand Journal of Criminology* 39(1)29.

¹⁴ Baldry, E.D. McDonnell, P. Maplestone and M. Peters (2006) ‘Ex-prisoners, accommodation and State: post-release in Australia’, *Australian and New Zealand Journal of Criminology* 39(1)31.

occur three times in a night, meaning that the whole family is woken and their lives disrupted. This is a disincentive for family members to take up bail. It is also ironic that in many cases there may also be a condition set by the Metropolitan Youth Bail Service (MYBS), that the young person attend an educational program, but he/she is being woken up to present at the front door to police many times throughout the night.

- e) Conditions of bail must be flexible enough to take into account the young person's need to move without much notice for family issues such as attending funerals, or moving house at short notice due to tenancy or family violence emergencies.
- f) Whenever possible, young people should have access to family and country. There are very limited supports available in regional WA for bail hostels, and there is no supervised bail service the equivalent of MYBS.

PART 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?

- 45. Legal Aid WA recognises that courts generally consider factors affecting Aboriginal and Torres Strait Islander people in sentencing within the context of 'disadvantaged backgrounds' generally. It is submitted that the background factors which are specifically unique to a person's Aboriginality should be appropriately regarded as a separate consideration in the Sentencing Act 1995 (WA). These unique factors could be considered as sentencing principles which better help recognise the circumstances surrounding the individual's background and disadvantage. Restorative justice should be incorporated in sentencing law and specific programs developed for Aboriginal offenders.

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46. We note that in Canada a provision was introduced into the Criminal Code to provide that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention paid to the circumstances of Aboriginal offenders.¹⁵

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?

47. Legal Aid WA supports the introduction of reparation or restoration sentencing models as an alternative option to the current model. Processes which involve reparation or restoration generally promote higher levels of rehabilitation for offenders, greater involvement of the victim, if the victim wishes to be involved, and meaningful punishment for the offender. Further, it is noted that the introduction of any of these reparation or restoration sentencing models should be culturally appropriate for use by Aboriginal people and be less restrictive than current mediation models. Options should be co-designed with peak Aboriginal groups.

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?

48. Legal Aid WA considers that more relevant information can be made available at sentencing for Aboriginal offenders. A major contributing factor to the problem is the inefficient and difficult processes involved in ordering specialist sentencing reports, particularly on issues such as foetal alcohol syndrome disorder (‘FASD’) that show the court how the offender’s background impacts them. The main difficulties that arise are the time it takes to provide these reports, the way the reports convey information about the offender’s cultural and historical background and the funding for these reports.

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?

¹⁵ Susan Haslip, *Aboriginal Sentencing Reform in Canada - Prospects for Success: Standing Tall With Both Feet Planted Firmly in the Air* retrieved from <http://www5.austlii.edu.au/au/journals/MurUEJL/2000/14.html>

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49. Legal Aid WA suggests that specialist sentencing reports when written well, can help convey any impacting factors of the offender's background to the decision maker. It is suggested that the reports should be written by report writers with the appropriate level of cultural awareness training and competence. There should also be further encouragement for the Aboriginal communities to engage in training so that people within the community can write these reports. The reports can best assist the court when the writer has the capacity and ability to include the relevant cultural information.
50. Legal Aid WA submits that the court should be able to obtain reports to consider all aspects of an offender that may be relevant to sentence including psychological reports on post-traumatic stress disorder and other psychological conditions, FASD specialist reports, and neuropsychological reports. These reports would assist in recognising when mental impairment has contributed to the offending and assist in the court considering specifically tailored non-custodial sentences as an alternative to imprisonment. For example, where an offender has FASD, the appointment of a mentor, employed by Corrective Services, may be the best option in stabilising the offender and preventing re-offending.

Question 3–5

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

51. Legal Aid WA submits that the Department of Justice should budget for and fund the preparation of these reports.

PART 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?

52. Legal Aid WA submits that all mandatory sentencing provisions should be reviewed as they have detrimental impacts on the incarceration of Aboriginal people.

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53. Legal Aid WA recognises an anomaly arising out of mandatory sentencing concerning the private discretion of the police opposed to the public discretion of Judges and Magistrates. An example of this discretion that can be exercised between charging an individual with reckless driving escape pursuit which holds a mandatory sentence of imprisonment and dangerous driving when escaping pursuit or reckless driving and fail to stop which have no mandatory sentencing. These three alternatives can be applied to relatively similar fact scenarios and can result in a term of imprisonment being imposed or not, which is at the ultimate discretion of prosecutors and police.
54. The following case study demonstrates problems connected with mandatory sentencing:

CASE STUDY 3

An 18 year old man was charged with burglary and other property offences as a juvenile. Shortly before his eighteenth birthday, he appeared before the President of the Children's Court, breaching a previous Youth Conditional Release Order, for similar offending. He was released on another Youth Conditional Release Order, because of the minor and technical nature of the breach – a burglary in which he had legitimately been at a hotel visiting family, then walked off with other young people to look for cigarette butts. He opened a door to a hotel room, stepped inside, and then withdrew himself from the situation, when he realised the seriousness of what he was doing.

As an eighteen year old, he has recently been charged with another burglary, for kicking the front door of a house, which damaged the door and left it slightly ajar. A group of young people were at the house saying they wanted to break in. The man left immediately, not wanting to get caught up in a burglary offence. That group of young people then committed a burglary and stole items from the house. The man was charged as a party to the offence because he assisted the group to commit the burglary by kicking the door in.

Mandatory sentencing now applies to this man. He will spend at least two years in adult prison – his first time in adult prison – for these two offences, the criminality of which amounts more to trespass or damage – and would be worthy of fines. As a man from the East Kimberley, he is likely to be made eligible for parole, but will very likely serve his full time, as there are limited supports and options available for Kimberley residents to support their parole applications.

This is an example of a case where mandatory sentencing will deliver a punishment that is wildly disproportionate to the criminality of the offending. It risks institutionalising a young man, who has suffered a great deal of childhood trauma and grief, whose mother is living in the East Kimberley and battling the final stages of cancer, and who will be far more likely to benefit from rehabilitation with grief, trauma and substance abuse counselling, than spending the next two years in jail.

Question 4–2

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

55. Legal Aid WA submits that short sentences should be abolished in favour of non-custodial options for the following reasons:
- The damaging effects of imprisonment;
 - The normalisation of imprisonment which undermines the effectiveness of the sentence of a term of imprisonment as a deterrent;
 - The lack of access to programs for short-term inmates;
 - The beneficial effect of offenders being supported in the community; and
 - The lack of disruption to employment, family life and participation in the community.

Question 4–3

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

56. Legal Aid WA considers the best threshold is 6 months' imprisonment to direct courts to consider non-custodial options where a lesser sentence is warranted.

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?

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57. There should not be pre-conditions for this amendment. Corrective services around Australia should have the statutory objective of delivering programs to reduce crime uniformly throughout each State and Territory. Where direct provision of supervision or programme intervention cannot be delivered face to face due to geographical limitation then technology such as Skype or video link technology should be utilised for service provision. Cost savings achieved from avoiding short terms of imprisonment can be reinvested to ensure supervision and program delivery reaches regional and remote offenders.

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.

58. Legal Aid WA endorses this proposal and supports the principle of co-design in the development of options as the best methodology for achieving successful outcomes.

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?

59. Legal Aid WA submits that Magistrates should be allowed to make conditional suspended sentences in all Magistrates' Courts opposed to the current limitations which only allow such orders to be made by specialist courts (because these specialist courts are based in Perth). The sentencing discretion should be able to be exercised throughout Western Australia.
60. Consideration should be given to home detention and weekend detention as sentencing options as alternatives to imprisonment when imprisonment is the only appropriate sentencing option.
61. These options serve a deterrent purpose, are less disruptive to an offender's life, enable the person to continue with employment or education and reduce the costs to the State of imprisonment.

Further considerations

62. Legal Aid WA submits that community based sentencing should be developed utilising co-design principles. Co-design is about engaging consumers and users of products and services in the design process with the idea that it will lead to improvement and innovation. In harnessing the expertise of citizens towards these certain programs in this instance, people of the community as well as the creators of these programs can benefit as active members in the change process. Here the people involved will be much more valued as a co-designer of innovation and this will essentially allow for the effectiveness of such programs.¹⁶
63. Critical to the success of co-design, is for local Aboriginal Corporations to be actively and consistently involved in a community's approach to reducing crime and enhancing community safety. For example, agencies across community sectors like police, health, justice and civil administration, could ask Aboriginal Corporation board members or CEOs to be actively engaged in monthly meetings to discuss how the community is tracking and to discuss prevention and proactive community engagement. Currently, the majority of communities only appear to actively engage Aboriginal Corporations when the community is in crisis. This can be the most ineffective time to engage Aboriginal leaders, because they then also must be focused on crisis managing their community members.
64. A Martu Leadership Program was held where key law agencies, departments and organisations attended. Over 100 people were present for this program held deep on Martu country located in the Western Desert. The Martu endeavour to reduce the rates of Martu people being imprisoned and also to ensure an improved relationship with law enforcement and justice agencies. The visitors were eager to listen and Martu people were enthusiastic to share their ideas.
65. The aim of the Martu Leadership Program is to explore new methods within the criminal justice system which would ensure positive results for the Martu and extended community. Programs discussed included diversion programs, licencing programs, teaching 'whitefellas' about the Martu people, teaching Martu in prison,

¹⁶ Ingrid Burkett, *An Introduction to Co-design* Centre for Social Impact, University of NSW, p3. See Knode at www.knode.com.au.

stronger transition for Martu post-prison, reducing recidivism and learning about court. The Martu people felt as though they were being listened to and as a result respected. This type of program influences new ways of exploring ideas and the foundation of a new relationship with Martu people working closely with local police, lawyers, the Magistrate and prison staff on a range of initiatives.¹⁷

Revising sentencing options for traffic offences

66. Traffic offences cause many problems for people, resulting in imprisonment or detention when they breach court orders such as driving under disqualification.
67. Cumulative suspension of driver's licences exacerbates these problems, and inevitably results in young people who may have had many cumulative disqualifications imposed upon them as children who cannot start their adult life ready to apply for a driver's licence.
68. Unlike penalties for most other offences, the disqualification periods imposed as a result of driving offences remain on a record, and are 'counted' for the purpose of subsequent offences in adult life.
69. Shorter disqualification periods and giving Magistrates more discretion in imposing disqualification would assist in reducing imprisonment for offences of driving under disqualification.
70. Legal Aid WA submits legislative change that enables young offenders to have the opportunity, as part of a community order, or a diversion program, to participate in a driver education and qualification process, including obtaining a learner's permit, and having supervised driving hours. Many young Aboriginal young people know how to drive but don't comply with the licensing requirements, inevitably resulting in a criminal record.
71. Relatively minor offences can result in Aboriginal people being in custody. It should be noted that Mr Ward (Kalgoorlie death in custody) was taken into custody because of traffic offences, and Ms Dhu (death in custody) was in police custody

¹⁷ *Martu on Country Talk about the Criminal Justice System* retrieved from www.kj.org.au/justice-camp-2017

because of non-payment of fines. A record which continues to count into adulthood for traffic matters brings people into detention or custody unnecessarily.

Revise mandatory sentencing options

72. Mandatory sentencing applies to young people in the Children's Court where section 46(5a) Young Offenders Act 1994 (YOA) has been excluded. It applies in WA to the three strikes burglary offences. This is a major contributing factor to the making of detention orders for young Aboriginal people.
73. The definition of home burglary is very broad, and the offence often does not reflect the degree of criminality of the offence. For example, a person who steals a wallet from a table inside a motel unit by reaching through the window, commits a burglary.
74. Most young Aboriginal clients commit offences together. It may be that they are out at night because home is not safe, they are hungry, they are curious or they are simply with the wrong people at the wrong time. Many of them are considered by the police as parties to the offences committed by others simply by virtue of agreeing with police that they were "a lookout", without any plan to commit the actual offence.
75. Whilst the court has the capacity because of the interpretation of "conviction" to impose a detention sentence within the community (Intensive Youth Supervision Order with Detention otherwise known as a Conditional release Order), these are very strict orders for no less than the mandatory one year period. They are frequently breached by young people. A change of address without permission, a failure to report for supervision or program requirements, or the commission of another offence, can trigger breach action.
76. Often, young Aboriginal people are criminalised early, come into the justice system more frequently and are treated more harshly by the mandatory sentencing three strikes provisions.
77. In WA, when young people are sentenced to detention, they are sent to Perth to the Banksia Hill Detention Centre, the only juvenile detention facility in WA. This frequently means that they are transported long distances, away from connections

to family and Country. The Inspector of Custodial Services, Mr Neil Morgan, has recommended that smaller facilities in other locations should be established.

78. The new amendments to restraining order legislation in WA apply to children. A Violence Restraining Order (VRO) or Family Violence Restraining Order (FVRO) can apply. The recent legislative amendments have the potential to cause major problems for Aboriginal young people. If the victim is in a “family relationship” and the perpetrator is convicted of a violent offence involving a family member or in the presence of children, the Court must enquire whether the victim wants an FVRO. As the amendments took effect from 1 July 2017, we are yet to see the full effect of this on our clients, but it could potentially lead to a greater number of breach charges to arise, as most of our clients’ families seek contact even if there has been family violence involving one member, and it is very difficult for them to keep family members separate from one another.

Sex offender diversion

79. A diversion program, to avoid adverse labelling of young offenders, should be available, similar to that currently operating in Victoria, whereby young people charged with sex offences can be completely diverted away from the court to participate in a fully structured program. On completion, the matter is dismissed without attracting a conviction for the purposes of the Victorian equivalent of the Community Protection (Offender Reporting) Act 2004 (WA), and this would avoid the young person being on the sex offender register.

Reporting obligations

80. The current situation with regard to reporting obligations is almost impossible for Aboriginal youth, particularly in the regions, to comply with. Many fail to report or fail to comply with their obligations due to reasons of lack of communication (no telephone, no office), sheer remoteness, family business such as Sorry business, cultural obligations, or simply the need to see other family members and move around, make these obligations particularly onerous and difficult for Aboriginal youth to comply with, resulting in breach and imprisonment.

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81. Laws requiring offender reporting can be particularly onerous for Aboriginal people who are more likely to be transient, live in communities without a police station to easily report to, and are less likely to have access to working mobile phones (with credit) and less likely to keep track of dates in the same way as non-Aboriginal people.

CASE STUDY 4

An Aboriginal man in the north-west of Australia became a reportable offender under WA's Community Protection (Offender Reporting) Act 2004. This man was sentenced to a period of sixteen months immediate imprisonment for the offence that resulted in him becoming a 'reportable offender'. In the decade after his release this man spent at least another three years in prison due to failing to report to police stations when directed to under the Act. On one occasion this man was charged with failing to report to the specified police station on the specified date, despite him having reported to another police station on that same date in accordance with bail conditions for an unrelated matter.

CASE STUDY 5

An Aboriginal man in the north-west of Australia, who suffered from what a neuropsychologist deemed to be 'pervasive cognitive impairments' and 'who would genuinely struggle to understand information that is not stated in very clear simple terms', was required to report to the police station in a small regional town on a particular Thursday. On the Monday of that week, the man went to the police station and informed the person at the counter that he had to go to his community to see family. At that time no police were present for him to speak to and he was told that he should not leave town until he had spoken to a police officer. This man went to his community, believing that he had done what he was required under the law to do, namely notify the police of where he was 'stopping'. The man was charged the following week and was remanded in custody for one night until a bail application was made and his lawyer was able to negotiate with prosecution to have the charge discontinued.

82. Health issues such as worsening drug use are associated with poor housing and recidivism. Offenders may need support with a range of issues including addiction, mental health issues and homelessness.¹⁸
83. Legal Aid WA submits that legislative charges are made to enable police to exercise broader charging discretion if there is breach of a reporting obligation, where a person has a good explanation in relation to breach of the reporting obligation and the police could issue a warning notice instead.

¹⁸ Baldry, E.D. McDonnell, P. Maplestone and M. Peters (2006) 'Ex-prisoners, accommodation and State: post-release in Australia', *Australian and New Zealand Journal of Criminology* 39(1)31.

Culturally appropriate sentencing options

84. Sentencing should always be culturally appropriate and relevant. For example, it may be appropriate for young people to participate in community service work orders which involve working on Country, doing land care programs or participating in training run by Elders.

Other sentencing issues

85. There is a lack of access to diagnostic services of professionals for, e.g. FASD assessment and treatment interventions, particularly in the regions. As the Court of Appeal has indicated in *Churnside v The State of Western Australia* [2016] 146 and in *LCM v The State of Western Australia* [2016] WASCA 164, that FASD must be taken account of in sentencing if it is causally related to the offending, it is vital that the lack of resources in relation to diagnosis and the lack of support within the community is addressed if children are to stay out of detention.¹⁹
86. Programs that have been successful pre and post charging and court sentencing should be fully funded and resourced. They must be culturally appropriate and staffed, wherever possible, by Aboriginal staff.

PART 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.

87. Legal Aid WA endorses this proposal and recognises the difficulty which arises when applying for parole as often Aboriginal offenders, particularly from regional areas, have

¹⁹ FASD is a widespread health issue for young people in detention in WA as illustrated by the Telethon Kids research project: <https://www.telethonkids.org.au/our-research/brain-and-behaviour/disability/alcohol-and-pregnancy-and-fasd-research/banksia-hill-fasd-project/>

<https://www.telethonkids.org.au/news--events/news-and-events-nav/2017/march/1-in-3-young-people/>

difficulty getting parole, often due to programs not being available for them and their parole being rejected due to ‘unmet treatment needs’.

CASE STUDY 6

A 20-year-old Aboriginal man in north-west WA was sentenced to a term of twenty-two months’ imprisonment for two offences of aggravated burglary. At the time of sentencing, the Judge made a parole eligibility order. This man was serving his sentence at a north-west prison, where the vast majority of prisoners are Aboriginal men. When the time came for the Prisoners Review Board to consider whether the man would be released on parole, Adult Community Corrections prepared a report which deemed the man suitable for parole. The Prisoners Review Board refused to grant parole, citing that the man still had unmet treatment needs which were unlikely to be addressed upon release. This position was arrived at despite the man suffering from FASD and having an assessed intellectual functioning capacity of a seven year old. The refusal of parole failed to consider that because there had been no suitable programs available to the man in the prison where he was serving his time that he could meaningfully engage with to address his unmet treatment needs.

CASE STUDY 7

There is one prison facility in the East Kimberley – Wyndham Work Camp. It is a minimum security prison, designed to support prisoners in the last six months of their sentences to prepare to transition back into the mainstream community. Like prisoners on remand, there are no formal programs offered to these prisoners, which is counter-intuitive for a prison designed to support reintegration. For long periods of time, this prison is way below capacity, while other prisons in the state are overflowing. Fortunately, local legal and other community services are welcomed into the prison to offer support and services to individuals who are proactive in preparing for their release. The Wyndham Work Camp should provide its prisoners with educational, housing, financial, employment and legal services and programs to prepare them for reintegration.

88. Health issues such as worsening drug use are associated with poor housing and recidivism. Offenders may need support with a range of issues including addiction, mental health issues and homelessness.²⁰
89. In our experience culturally (or otherwise) appropriate programs are not available to regional prisoners. For example, we are aware that there are no family violence programs on offer at Roebourne Regional Prison due to the Department’s inability

²⁰ Baldry, E.D. McDonnell, P. Maplestone and M. Peters (2006) ‘Ex-prisoners, accommodation and State: post-release in Australia’, *Australian and New Zealand Journal of Criminology* 39(1)31.

to find replacement staff for a maternity leave vacancy.

90. Furthermore, when programs are provided, they are often not suitable for Aboriginal prisoners who may have extremely low levels of English and/or literacy skills.
91. This not only means that the opportunity for rehabilitation is lost, but also that the prisoner will have very little chance of being granted parole.
92. It is suggested that there should be greater transparency, and hence accountability, as to what programs are available in what prisons as part of a regular reporting mechanism by which justice targets can be evaluated.
93. In our experience, another common problem that arises with parole and programs (that could be addressed with programs being available to remand prisoners) is that due to the prolonged lengths of time that prisoners can spend on remand awaiting trial in regional areas of WA, once a person is sentenced and the sentence is back-dated it commonly is only a number of weeks before they may be eligible for parole.
94. However, this means that by the time they are considered for parole, they are found not to have engaged in programs and to still have unmet treatment needs, and therefore parole is denied.
95. Legal Aid WA submits that there should be enhanced resourcing for prisoners to have lawyers and/or other advocates to assist them through the parole application process.
96. This could help ensure that submissions around how 'unmet treatment needs' may be met in the community, while on parole, are put to the Prisoners Review Board.
97. Legal representation should be allowed and a person should have an opportunity to respond to any adverse inference.

Rehabilitation programs

98. Legal Aid WA submits that the Department should make more programs available to offenders in the community to ensure that offenders can access effective

rehabilitation programs outside of prison such as family violence offender treatment, sex offender treatment and alcohol and drug rehabilitation. People on remand should also be able to access programs. This would encourage sentencing Courts to sentence offenders to sentencing options in the community.

99. Men's Behavioural Change programs, relationships counselling, mental health and substance abuse counselling, and other forms of grief and trauma counselling, are critical services for most remote community members. People need to access these services many times in their lives, and over long periods of time, in order to be treated for the impacts of their life experiences. Ideally, these services and programs would be continuously available in communities, accessible on a weekly basis, and in some communities, probably delivered by people who live full time in those communities, because the need for those services demands it.
100. The positive flow-on impacts of having these services readily available in remote communities include:
- Increased likelihood of parole applicants being granted parole to return to their Kimberley homes with appropriate supports;
 - Reduced incidences and greater community understanding of and responsibility for family and domestic violence;
 - Specialist support for and strengthening of men's groups, women's groups and young people;
 - Reduced likelihood of critical mental health events and related police involvement or entry into the criminal justice system;
 - Capacity of the community to respond to mental health and other relationship emergency events through appropriate health supports, instead of Police response being the only available option; and
 - Reduced rates of recidivism because of significantly increased community support for sustainable rehabilitation options.

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101. According to research conducted by Weatherburn, Snowball and Hunter alcohol and drug abuse are a leading factor for the contact Aboriginal people have with the justice system.²¹
 102. There is a need for rehabilitation programs to be tailored to the specific needs of Aboriginal prisoners in the context of their culture to ensure effective rehabilitation of Aboriginal prisoners.
 103. Aboriginal prisoners are more likely to respond to rehabilitation programs that are culturally appropriate and delivered by Aboriginal people in reducing over-representation of Aboriginal people in prison.
 104. Legal Aid WA lawyers practicing in regional areas have noted that in Roebourne Prison where the majority of prisoners are Aboriginal, there have been instances where the prison programs were run for Aboriginal people without appropriate interpreting services resulting in a lack of understanding of the program. Without completing programs, prisoners are disadvantaged in applying for parole in that it is likely to be refused.

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?

105. Legal Aid WA suggests that the best practice elements of programs must be linked to the factors that contribute to the offending behaviour, and link people into programs at an early stage to prevent longer periods of offending or it becoming more serious in nature.

Proposal 5-2

There are few prison programs for female prisoners and these may not address the needs of Aboriginal and

²¹ Hunter B, Snowball L & Weatherburn D, 'The economic and social factors underpinning Aboriginal contact with the justice system: results from the 2002 NATSISS survey' (2006) 10, *Crime and Justice Bulletin*.

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.

106. Legal Aid WA endorses this proposal and as indicated above supports programs being developed in accordance with co-design principles.

Question 5–2

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

107. Legal Aid WA suggests that the programs should be linked to the factors contributing to the offending behaviour, including intergenerational trauma. Programs must be culturally and gender appropriate to ensure the best response possible. It is further suggested that the programs use plain English (unless an interpreter is required) and facilitators of the programs should ideally be appropriate community representatives to promote a more engaging program e.g. a female facilitator when speaking to female victims and likewise, a male facilitator when speaking to male offenders about family violence.
108. Dr Clarke Jones and Dr Jill Guthrie have conducted a study into prison programs for Aboriginal offenders and recommended:²²
- Justice reinvestment be implemented as a policy;
 - Prison programs for Indigenous offenders must be culturally relevant and reflect the experiences of Indigenous people;
 - There be increased employment of Aboriginal officers in the justice system, cultural awareness training for staff and support for Aboriginal cultural practices;
 - Programs should support learning improvement, communication, and coping with negative influences;
 - Specific programs should be developed for Aboriginal women;
 - Community based programs for Aboriginal offenders should be further developed;
 - Programs should also be available for people in remand custody; and

²² Jones, C and Guthrie, J, Efficacy, accessibility and adequacy of prison rehabilitation programs for Indigenous offenders across Australia *The Australasian Institute of Judicial Administration* (Melbourne, June 2016), pp64-65.

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- Programs dealing with family violence be designed and implemented.

109. Legal Aid WA agrees that the Department of Justice - Corrective Services “has a responsibility to ensure that programs in prisons target specific treatment needs, focus on their rehabilitation, and help minimise the time they are incarcerated.”²³

Proposal 5–3

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

110. Aboriginal offenders face difficulty in being granted parole due to limited resources and the consequential lack of suitable prison rehabilitation programs. Greater use of automatic parole would assist in reducing the number of Aboriginal people in prison. Legal Aid WA suggests that offences should be categorised as automated or discretionary parole depending on the level of seriousness of each offence.

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?

111. Legal Aid WA considers that it is a positive development to make greater use of automatic parole release for prisoners who have been sentenced to imprisonment below a certain number of years (such as 5 years as in South Australia) and where the offending has not involved sexual offending or serious violence (as in Queensland). This ensures that offenders can prepare for release certain of a release date and ensure that offenders are supervised in the community upon release.

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.

112. Legal Aid WA agrees with the proposal generally.

²³ M. Wilson, J Jones, T Butler, P Simpson, M Giles, E. Baldry, M Levy and E Sullivan et al “Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia” *SAGE Open* January- March 2017 1-16 at page 11 and include intensive violence prevention programs (p11).

Further considerations

113. In Queensland, if a court sentences an offender to 3 years or less in prison, and the offender is not convicted of a sexual offence or serious violent offence, it will set a parole release date at sentencing. However, if a court sentences an offender to 3 years or more in prison or they are convicted of a sexual or serious violent offence, it can set a date for the offender to become eligible to apply for parole.²⁴
114. In New South Wales, if an offender is sentenced to 3 years or less parole will be ordered by the court and therefore will be automatic. For offenders who are sentenced to more than 3 years imprisonment parole is not automatic and orders for release to parole will be made by the Parole Authority.²⁵
115. In South Australia, offenders who are sentenced to less than 5 years are entitled to be released on parole automatically at the end of their non-parole period.²⁶ Some prisoners²⁷ serving sentences of less than 5 years will still have to apply to the Parole Board for release to parole. However whether release on parole is automatic or by application, only prisoners who accept the conditions of parole determined by the Parole Board²⁸ will be released on parole.²⁹

Location of places of custody

116. There is a need for places of custody to be closer to where prisoners ordinarily live. For example there is a need for a youth detention centre in the Kimberley.
117. Presently, the only location for detention of youth offenders is in Perth, thousands of kilometres away from the Kimberley. This results in significant detriment by removing young people from their families and communities.

²⁴ Queensland government, Sentencing, Probation and Parole retrieved from <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/sentencing-probation-and-parole/applying-for-parole>

²⁵ Legal Aid NSW Update on Parole and State Parole Authority July 2012

²⁶ *Correctional Services Act 1982 SA*, s66(1).

²⁷ Convicted of sexual or serious offences as per section 66.

²⁸ *Correctional Services Act 1982 SA*, s68(4))

²⁹ Legal Services Commission of South Australia, Release of Sentenced Prisoners, retrieved from <http://www.lawhandbook.sa.gov.au/ch33s05s03.php>

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118. There are very significant costs associated with transporting young people from the Kimberley in order for them to be detained. The majority of these young people are detained on remand, and many of them ultimately are not sentenced to terms of immediate detention. The money spent on these costly detentions could more efficiently and effectively be spent on shorter periods of detention in a Kimberley facility, and rehabilitation programs during and after detention.
119. It is noted that the Young Offenders Act 1994 (WA) prescribes that the criminal justice system should be primarily aiming to rehabilitate and decrease disruption to the lives of young people, and to divert them away from the justice system and detention if at all possible.
120. A local detention facility would enable young offenders to access the support of family visiting them in person whilst they are detained, to decrease the risk of depression and anxiety caused by being away from Country and ensure that young offenders are returned to their families more quickly once issues of bail are resolved.
121. These detention centres ideally would employ local Kimberley people to work with younger Kimberley people and would offer support programs that are underpinned by cultural and community values.

Cultural awareness training and engagement

122. Cultural awareness training of judicial officers and staff in local Aboriginal culture is important to improve understanding of the diverse cultures and requirements within Aboriginal communities.³⁰
123. Legal Aid WA suggests that cultural awareness training of judicial officers may help to illustrate the practical impact of orders imposed by the court and promote positive engagement of offenders with court programs.
124. Cultural awareness training may also assist in ensuring that the way Aboriginal

³⁰ McCausland R, Alison Vivian, 'Why do some Aboriginal Communities Have Lower Crime Rates Than Others? A Pilot Study' (2010) *The Australian and New Zealand Journal of Criminology* 43(2) 327.

people are spoken to in court, and sentencing remarks are tailored, serve to provide a more inclusive court process and criminal justice system.

125. Mobile 'needs based' court programs should be considered for regional areas as a means by which the factors underlying criminal offending may be addressed.³¹

Cultural awareness generally

126. The WA Department of Justice - Corrective Services' Reconciliation Action Program is a very positive development with the objective of increasing Aboriginal employment within the Department, the establishment of Aboriginal Service Committees to ensure programs are culturally sensitive and cultural competency programs for staff. Interpreters should be employed in prisons to allow Aboriginal prisoners to participate in support and rehabilitation programs.
127. Evidence suggests that there is an underlying need for the criminal justice system to embrace Aboriginal culture and provide the opportunity for Aboriginal offenders to serve orders supervised by other Aboriginal people to avoid community orders being breached.³²
128. The Department of Justice working in partnership with Aboriginal run intervention programs such as Nowanup in the south of Western Australia should continue and be expanded upon.
129. The social disadvantage as a result of imprisonment extends to the offender's family and other close associates which may in turn impact the community as a whole. Isolation from familiar places, friends and family members may result in depression, anxiety and emotional withdrawal. This is particularly so for Aboriginal people in terms of a connection to community and culture for well-being, as indicated by a recent study from Yawru.³³

³¹ The West Kimberley may be an area that could implement a mobile 'needs focused' court due to the range of Aboriginal services in the area that would have the potential to assist.³¹

Blagg H, Tulich T and Bush Z, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia' (2015) *Alternative Law Journal* 40(4) 260.

³² Broadhurst et.al. op cit

³³ Available at: <http://www.sbs.com.au/topics/life/health/article/2016/10/10/community-wellbeing-best-measured-ground-yawru-example>.

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130. Consideration should be given to creating an Aboriginal Services Unit with similar functions to the Aboriginal Services Unit in the Department for Correctional Services in South Australia including the employment of Aboriginal Liaison Officers and the holding of Prevention of Aboriginal Deaths in Custody Forums regularly to achieve better outcomes in reducing reoffending in particular. The forums provide an opportunity for Aboriginal prisoners to communicate issues important to them. This Unit could oversee the provision of programs that are culturally competent as recommended below.
131. In-house social workers in prisons in South Australia and the Aboriginal Liaison Officers provide considerable support to Aboriginal prisoners and their families that seems to help shape prison culture in a positive way to contribute to lower incarceration rates and lower rates of suicide, for example, by encouraging family visits, and by being alert to mental health issues. The forums and employment of staff with this focus in WA prisons may end up being cost effective if it leads to prison being a more positive experience and better outcomes on release with reduced re-offending.

Promoting parole readiness

132. It is recommended that there be a particular focus on the early provision of rehabilitation programs to Aboriginal offenders to assist in them being considered for parole.
133. It is also recommended that transitional officers engage with prisoners at an earlier point in time to assist with organising accommodation and multiple stakeholder support for prisoners upon their return to the community, and provide assistance maintaining the contact that prisoners have with their families.

Mentally impaired accused

134. Legal Aid WA submits that there should be a policy objective of ensuring that mentally impaired accused on custody orders are progressed towards return to the community as soon as possible through the allocation of this responsibility to relevant staff, stakeholder engagement and through the Department of Justice appearing at Mentally Impaired Accused Review Board meetings to report on

progress made towards this objective.

135. A significant proportion of the people on custody orders due to mental impairment are Aboriginal.
136. Legal Aid WA submits that there should be a person in the Department of Justice - Corrective Services dedicated to progressing such accused from prison back into the community through determining programs which may assist the person in prison and networking with relevant agencies to seek funding, accommodation and support for the person to transition back into the community on conditional release orders.
137. The current system has accused spending many more years in prison without conviction than people who have been convicted at great expense to the State and at great social and emotional cost to the individual.
138. Approximately 60% of adolescents with FASD have had issues with the law³⁴. FASD is disproportionately diagnosed in Aboriginal people and is increasingly seen to be a significant barrier to preventing fair treatment of Aboriginal children in the criminal justice system.³⁵
139. As a result of this disorder sufferers may be more likely to go along with the scenarios put to them by the police due to their suggestibility,³⁶ and have impaired memory function which disadvantages them in relation to being seen as a credible witness³⁷. Sufferers of the disorder also commonly have issues in relation to payment of fines, and recognising consequences of actions which poses an additional disadvantage to their experience in the criminal justice system.

³⁴ Fast D, Conry J, and Loock C, 'Identifying Foetal Alcohol Syndrome Among Youth in the Criminal Justice System' (1999) *Developmental and Behavioural Paediatrics* 20(5) 370.

³⁵ Blagg H, Tulich T and Bush Z, 'Diversionary Pathways for Indigenous Youth with FASD in Western Australia' (2015) *Alternative Law Journal* 40(4) 260.

³⁶ Douglas H, 'The Sentencing response to defendants with foetal alcohol spectrum disorder' (2010) *Criminal Law Journal* 34 (4) 222.

³⁷ Roach K and Bailey A, 'The Relevance of Foetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing' (2009) 42 *University of British Columbia Law Review* 1, 21.

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140. There is a need to stabilise children with this disability through the use of a therapeutic environment. Unless programs are developed for offenders with FASD, there will continue to be an increase in incarceration rates of people with FASD.³⁸
141. A program that may assist with this issue would be to have diversion options for young offenders to offer a pathway out of crime and avoid the negative aspects of the criminal justice system.³⁹
142. The following case study illustrates the present difficulties faced by mentally impaired accused in Western Australia:

CASE STUDY 8

A young Aboriginal man from a remote East Kimberley community, suffers Foetal Alcohol Spectrum Disorder, and as a result is severely impaired in his cognitive functioning. Since about the age of 13, he has been repeatedly arrested and charged by Police for committing stealing and burglary offences, always in company with other young people, who are less impaired than him or cognitively able. These offences have never been at the high end of the scale in terms of seriousness.

Although his participation in this type offending has seemed to increase as he has grown older, he remains as suggestible and vulnerable to peer direction as he has always been. Despite regular submissions by defence counsel not to have this young person subject to bail conditions, he continues to be released on bail with conditions he is not cognitively able to understand – for example curfew conditions, when he cannot read or understand time and dates in a meaningful way. He consequently continues to have warrants issued for his arrest, and continues to experience high levels of confusion and distress when arrested on warrants because he has missed Court dates or travelled away to another town or community with his family.

³⁸ Douglas H, 'The sentencing response to defendants with foetal alcohol spectrum disorder' (2010) *Criminal Law Journal* 34 (4)228.

³⁹ Satya S and R.B Barson, 'A contemporary snapshot of two issues upon which the RCIADIC report commented: Youth Justice and the over-incarceration of Aboriginal young people, and alcohol-related offences and offending' (2011) *Australian Indigenous Law Review* 15 (1) 88.

Further, he continues to be found unfit to stand trial, and his matters continue to be dismissed, followed by his unconditional release. Local Police will not read the medical reports prepared about him in order to increase their understanding of his cognitive function, or to assist them to develop other ways of dealing with him. The Police view is that they are obliged to charge him, even though they know his charges will eventually be dismissed. There are no social supports available for him because he cannot be subject to youth corrections orders. Disability Support Services (DSS) will not proactively engage with him - their view is that his family must actively engage with DSS in order for him to be supported. Sadly, this young man's family has limited capacity to engage, because of their own complex range of personal issues.

Recently, in finalising the last set of charges against him, the young man's defence counsel and a proactive youth justice officer, worked with the family to explore other options. They supported a referral to a social and emotional wellbeing program run by the local Aboriginal health service. This is a one on one mentor program that is very flexible to adapt to an individual's needs, and may assist the young man to be proactively engaged in his community and family life, without becoming caught up in antisocial behaviour. This option was not and could not be provided by the criminal justice system – it is a health system program, which may well prevent further involvement in the criminal justice system for a young person with complex mental health needs.

This case highlights the need for much more sophisticated education within the WA Police Force around how FASD affects a person's cognitive functioning, and a cultural shift in the value of using health experts to support their community management of FASD sufferers. This case also highlights the need for a more flexible and medically supportive judicial approach to managing FASD sufferers within the structures of the court system. This case highlights the need for broader community engagement with intellectually impaired people, especially young people, to prevent them from being caught up in antisocial behaviour, and to surround them in the community with more structured positive opportunities for education and pro-social activities. When these people are fit to stand trial and sentenced, the sentencing options available need to be flexible enough to require them to engage in prosocial activities, but also to recognise that their impairment makes it unreasonable or impossible for them to strictly comply with our traditional requirements on community orders

PART 6. FINES AND DRIVERS 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.

143. Legal Aid WA supports this proposal and recognises the vulnerability and disproportionate negative impact that fines enforcement has on Aboriginal people, especially Aboriginal women.
144. Legal Aid WA recognises that imprisonment as a result of defaulting fines normalises imprisonment, undermining the effectiveness of the deterrence element of the sentence of a term of imprisonment, and detracting from the policy position that a sentence of imprisonment should be a last resort.

Further considerations

145. Aboriginal women are by far the most likely cohort to be imprisoned for fine default. Aboriginal women comprise 15% of total prisoner receptions but 22 % of fine default receptions.⁴⁰
146. Aboriginal people comprised 64% of female fine defaulters and only 38% of male fine defaulters.⁴¹

Question 6–1

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

147. Legal Aid WA generally supports any alternatives to fines which disproportionately have a negative impact on Aboriginal people.

⁴⁰ Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System*, 2016, v

⁴¹ *Ibid.*

Question 6–2

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

148. Legal Aid WA recognises that for many people in vulnerable circumstances fines and penalties reach a point where they are impossible to pay. For this reason it is suggested that penalties under infringement notices be reduced especially if the recipient is on social welfare. Set penalty offences are often very high and are not flexible at all. Legal Aid WA suggests that certain penalties should either be capped at a realistic and fair amount, or be subject to different rates according to whether a person is in receipt of social security or in paid employment.

Question 6–3

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

149. Legal Aid WA generally supports the number of infringement notices able to be issued in one transaction being limited.

Question 6–4

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

150. Legal Aid WA supports the decriminalisation of offensive language. Legal Aid WA recognises that matters which have a component of using offensive language are generally charged under the offence of disorderly conduct. Legal Aid WA also suggests that in the appropriate circumstances the police should use move on notices as an alternative to charging someone with disorderly conduct (which results in the imposition of a penalty).

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?

151. Legal Aid WA considers that it is better to avoid requiring people to attend court and use infringement notices, and so does not support requiring such matters to be required to be dealt with in court. This avoids an adverse labelling effect of people considering themselves to be a “criminal” and the stress of having to appear in court.

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.

152. Legal Aid WA is supportive of the development of alternatives to fines such as suspended fines and work and development orders.

Proposal 6–2

Work and Development Orders were introduced in NSW in 2009. They enable a person who cannot pay fines due to hardship, illness, addiction, or homelessness to discharge their debt through:

- **community work;**
- **program attendance;**
- **medical treatment;**
- **counselling; or**
- **education, including driving lessons.**

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

153. Legal Aid WA endorses this proposal and contends these methods serve as an appropriate, practical and therapeutic option for many people.

Question 6–7

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

154. Legal Aid WA supports the removal of mandatory disqualification of driver licenses. Currently under fines enforcement scheme in WA it is very easy for people to have their licence suspended due to non-payment of a fine which often leads to further offending of driving without a license and eventually imprisonment. Fine suspension can lead to a vicious cycle of a person being under fine suspension initially, who then drives under that fine suspension and then is charged with that offences and then may drive under court suspension and ultimately may be imprisoned for driving under court suspension. The fine suspension system is complex. Mail is sent to the last known address of people which disadvantages

people who are mobile or do not have stable accommodation. It is difficult to make inquiries about licences generally with fine suspension, demerit point suspension and court suspension all administered separately making it difficult for people without good access to operational telephones to ascertain the status of their licence.

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?**

155. Legal Aid WA agrees with the suggestions in the above examples.

Question 6–9

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

156. Legal Aid WA supports the introduction of regional driver permit schemes due to a lack of transport alternatives in remote and regional areas. Legal Aid WA recognises that Aboriginal people living in remote and regional areas are more disadvantaged as a result of mandatory license suspension schemes and the impact of the licence suspension is detrimental to their circumstances of living in a remote location.

Question 6–10

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

157. Legal Aid WA considers that drivers licence programs should be delivered on a regular basis in regional areas.

158. Legal Aid WA suggests there should be a broadening of the factors that can be considered for granting of extraordinary drivers licences to take into account remoteness and cultural factors

such as funeral attendances, lore and cultural obligations.

Further considerations

Personal service of suspension orders and applications for removal of disqualification

159. All suspension orders for non-payment of fines or court imposed suspensions should be personally served, instead of being posted to the last known address of a person as it is common in the Aboriginal community for people to move residences regularly, and live with a number of other people hence making post an unreliable option of informing a person of their suspension. Consequently, people continue driving without knowledge of their suspension which results in further penalties.
160. The loss of the licence may have an extreme impact on the welfare of people in regional areas including that a person is not able to seek work or access services. It is a common occurrence for Aboriginal clients in regional and remote areas to have cumulative licence disqualifications on top of a life disqualification. It would be a helpful reform if applications to apply for the disqualifications to be lifted could be done on the one application, and have the matter heard in the Magistrates Court instead of the District Court due to the Magistrates Court having a greater understanding of regional and remote factors.

PART 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.

161. Legal Aid WA supports this proposal.

Further considerations

Prohibited Behaviour Orders (PBOs)

162. In 2010, the Aboriginal Legal Service of Western Australia ('ALSWA') made a submission on the *Prohibited Behaviour Orders Bill (WA) 2010* for the Western Australian Parliament. The submission outlined a number of concerns ALSWA had about the disproportionately detrimental effects of PBOs on Aboriginal people. In 2014, following the enactment of the legislation ALSWA compiled a second submission updating the Parliament on the actual effects of the legislation on Aboriginal people.
163. The enforcement of PBOs meant that Aboriginal interaction with the justice system increased.
164. 52% of all PBO applications were made against Aboriginal people despite Aboriginal people comprising only about 3.5% of the Western Australian population.
165. Statistical data indicates that 56% of respondents to PBOs were homeless.
166. 64% of the PBOs prohibited the respondent from the entertainment and tourism areas of Perth CBD, Northbridge or East Perth.
167. However, this means that respondents cannot access welfare services such as homeless support, most of which are located in the CBD.
168. 65.3% of respondents had mental health issues. 52.3% of respondents had some sort of cognitive impairment
169. Cognitive impairment and mental health issues contribute to a severe lack of understanding of the conditions of a PBO.
170. Lack of understanding can also result in breach of the conditions, which in turn may result in more court interaction and punishment.

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171. Legal Aid WA submits that due to the disproportionate impact on Aboriginal people, the use of PBOs be discontinued.

PART 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?**

172. Legal Aid WA supports reducing the harm that alcohol has on Aboriginal and Torres Strait Islander communities and measures to control alcohol abuse such as liquor accords and plans to restrict full strength alcohol. Alcohol restrictions have made a big difference in Halls Creek for example with full strength alcohol only being available from the hotel. The seriousness of offending has substantially reduced. Night patrols supporting people affected by alcohol being assisted to return home or obtain shelter are also a useful approach.
173. Legal Aid WA also recognises the need to avoid black market sales of alcohol and avoid restrictions only applying to Aboriginal people.

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?

174. Legal Aid WA supports such restrictions but recognises the need to guard against the development of black market provision of alcohol.

PART 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?

175. Legal Aid WA suggests that in circumstances where a female prisoner is a victim of abuse or has experienced intergenerational trauma, that these experiences be addressed at sentencing and the sentencing options available be tailored to the needs of the offender.
176. A recognition of the connection between drug use and abuse would be helpful in sentencing.
177. Interdepartmental collaborative program support development to facilitate stable housing, drug rehabilitation or psychiatric rehabilitation or other supports to assist offenders could be helpful in reducing future offending.

Further considerations

178. Aboriginal women are the fastest growing prisoner population in Australia. Western Australia has the highest imprisonment rate in Australia relative to population size. Aboriginal and Torres Strait Islander women made up 46.5% of adult female prison population as at 31 March 2017.⁴²
179. Most of these women in prison are mothers and carers. Most are also survivors of physical and sexual violence.
180. It is a common issue for Aboriginal female prisoners from remote and regional areas to have difficulty in maintaining ongoing relationships with family and their children because regardless of their security rating, they are most commonly required to serve at least part of their sentence 'out of Country'⁴³.

⁴² Department of Corrective Services, 'Adult Prisoners in Custody Quarterly Statistics' (31 March 2017) 6.

⁴³ Wilson, M, Jones, J, and Gilles, M, 'The Aboriginal Mothers in Prison project: an example of how consultation can inform research practice' (2014) *Australian Aboriginal Studies* 31.

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181. Despite the growing over-representation of Aboriginal women, research in this area has been limited.⁴⁴
182. Moreover, available information neglects to consider Aboriginal women as a separate group with a unique set of circumstances and needs. Analysis tends to focus on Aboriginal people *or* gender as a group, yet rarely the intersection of the two.⁴⁵
183. Intersectionality has been defined as “the connection between aspects of identity, such as race, gender, sexuality, religion, culture, disability and age.”⁴⁶
184. It is suggested that an intersectional approach is critical, as further disadvantage occurs when indivisible aspects of identity are considered in isolation from each other.⁴⁷
185. The very specific needs and circumstances of Aboriginal women have often been ignored in the criminal justice system, and this appears to be an over-arching factor contributing to their overrepresentation in this area.

Contributors to imprisonment

186. The Human Rights Law Centre identifies the needs of Aboriginal and Torres Strait Islander women being overlooked as a critical factor in the over representation of these women in Australian prisons. Our justice system identifies the needs of ‘women’ and ‘Indigenous people’, but fails to recognise the specific needs of those who occupy the overlap between these.⁴⁸

⁴⁴ Wilson.M, Jones, J, and Gilles, M, ‘The Aboriginal Mothers in Prison project: an example of how consultation can inform research practice’ (2014) *Australian Aboriginal Studies* 31.

⁴⁵ Bartels, Lorana --- "Painting the Picture Of Indigenous Women In Custody In Australia" [2012] QUTLawJJI 10; (2012) 12(2) Queensland University of Technology Law and Justice Journal 1

⁴⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2002 (Human Rights and Equal Opportunity Commission, 2002) (ATSISJC 2002) 98.

⁴⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2002 (Human Rights and Equal Opportunity Commission, 2002) (ATSISJC 2002) 98.

⁴⁸ Human Rights Law Centre, ‘Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women’s growing over-imprisonment’ (May 2017) 11. See also Julie Stubbs, ‘Indigenous Women in Australian Criminal Justice: Over-represented but Rarely Acknowledged’ (2011) 15 *Australian Indigenous Law Review* 47.

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187. Issues relating to substance abuse have been identified as a major contributing factor in Aboriginal offending.⁴⁹
188. There is a crucial relationship between the exposure of Aboriginal women to family violence and their incarceration.⁵⁰
189. Further evidence demonstrates that serious mental health issues are evident in the majority of Aboriginal women in prison.⁵¹ Acknowledgment of this issue is crucial in attempting to reduce recidivism among Aboriginal women and therefore reducing their over-representation in prisons.
190. Preventative action and funding to address the abovementioned issues is essential.
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191. The MERIT Program (The Magistrates Early Referral into Treatment Program) that is offered in certain courts across NSW, offers access to drug treatment prior to entering a plea and while on bail. Reports on the defendant's participation in the program are provided to a Magistrate and may be taken into consideration at sentencing.
192. The possible benefits of such a program will be diminished, however, if it fails to take into account the specific barriers experienced by Aboriginal women. Such barriers that can reduce the likelihood of access to and completion of the program are said to include: issues relating to child care/family, location and available transport; fears of women in relation to mandatory child protection reporting by staff; and high levels of victimisation of Aboriginal women resulting in additional attention required for their safety.⁵³

⁴⁹ Bartels, Lorana --- "Painting the Picture Of Indigenous Women In Custody In Australia" [2012] QUTLawJJI 10; (2012) 12(2) Queensland University of Technology Law and Justice Journal 1, 12.

⁵⁰ Lorana Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Research and Public Policy Series No 107, Australian Institute of Criminology (AIC), 2010).

⁵¹ Larissa Behrendt, Chris Cunneen and Terri Liebesman, *Indigenous Legal Relations in Australia* (Oxford University Press, 2009)

⁵² Human Rights Law Centre, 'Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment' (May 2017) 6.

⁵³ Julie Stubbs, 'Indigenous Women in Australian Criminal Justice: Over-represented but Rarely Acknowledged' (2011) 15 *Australian Indigenous Law Review* 47, 57.

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193. Prisons for women should provide a respectful and dignified prison environment where women are empowered to make meaningful and responsible choices. Services and programs for Aboriginal women should reflect Aboriginal culture, traditions and beliefs, including outdoor areas for cultural gatherings including building fire pits for the preparation and cooking of traditional foods and shelters to gather and grieve.⁵⁴ Work camps are a good alternative to prison for Aboriginal people who would struggle in a custodial environment.⁵⁵
194. The following case study is illustrative of some of the difficulties facing Aboriginal women as leading to imprisonment:

CASE STUDY 9

An Aboriginal woman from a remote East Kimberley town was charged and convicted of driving whilst under court suspension in 2012 and 2013. She was sentenced to terms of imprisonment. Since her release, she has been charged and convicted of numerous similar offences, and placed on suspended imprisonment orders, accumulating additional mandatory licence suspensions each time. She now has 17 prior convictions for this type of offence, most of which have not featured any aggravating circumstances. Mandatory sentencing laws mean her licence suspensions will remain in place until 2023.

This woman has not driven carelessly or dangerously and on most occasions, she was driving in order to complete domestic and child-care tasks, like grocery shopping, taking children to school or medical appointments. Two of her children have disabilities and require complex, full-time care. There is no public transport in her town, and only one taxi, which is unaffordable. For most of the year the extreme weather prevents her from walking, particularly with her two high-needs children, the two kilometres into town to complete day to day tasks. Her husband works away in order to afford to support their family with special needs.

She is not eligible for an extraordinary driver's licence. Judicial officers are reluctant to imprison her for her continued offending, because of the impact it will have on her children, but she has recently been charged again for driving without a licence, within weeks of receiving her last term of suspended imprisonment. The

⁵⁴ Grant, E., Designing Carceral Environments for Indigenous Prisoners, *Advancing Corrections Journal*, 2016; (1) : 26-47, p35.

⁵⁵ Ibid, p35.

Magistrate is left almost with no choice but to immediately imprison her and there is no light at the end of the tunnel for her to get her licence back and break her cycle of offending.

This case study highlights the need for legislative reform in regards to extraordinary driver's licences. Extreme hardship and the huge need for extraordinary licences in regional and remote areas, can be caused by pre-existing medical issues of family members, even when it does not relate to medical emergencies.

PART 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.

195. Legal Aid WA supports this proposal on the basis that Aboriginal Justice Agreements will encourage target setting to reduce the rates of imprisonment.

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?

196. Legal Aid WA supports this idea of justice targets. The targets should encompass reducing the rates of imprisonment; increasing the rate of parole; reducing recidivism rates and increasing the rate of program participation.

PART 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.

197. Legal Aid WA supports this proposal for the reasons set out below.

Availability of and access to language and sign interpreters

198. All Aboriginal people, particularly in remote and regional Australia, should have access to an appropriate interpreter, at all stages of their involvement in the criminal justice system, from police interviews through to court proceedings.

199. The recent WA decision overturning the conviction of murder of Gene Gibson, highlights how easy it is to be pressured into confessions, or to be misunderstood.⁵⁶

200. In our experience there is a lack of interpreters for Aboriginal people whose first language is not English.

201. All participants in the criminal justice system, as well as Department of Communities staff should have cultural awareness training that includes content about Aboriginal English and the relevant language group of any of the Aboriginal people they are assisting or dealing with.

202. Because police do not use interpreter services to serve restraining orders on people who are bound by them or people protected under them, this contributes to frequent breaches of those orders.

203. People in the East Kimberley are frequently remanded in custody for minor breaches of bail conditions or restraining orders because they do not understand the orders imposed on them or their consequences.

204. There should be greater use of Aboriginal interpreting services in regional areas for explaining the conditions of bail and restraining orders and for police interviews.

205. There is a need for greater funding of interpreting services for Aboriginal people

⁵⁶ *Gibson v Western Australia* [2017] WASCA 141

particularly in regional and remote areas so that an accused speaking an Aboriginal language can have the use of an interpreter at each stage of the criminal justice system including in court proceedings.

206. There is also a need to train justice system staff in recognising when an Aboriginal language interpreter should be utilised.
207. The Department of the Attorney General in the Northern Territory provides free training to organisations dealing with Aboriginal clients in relation to identifying interpreting needs.
208. This type of training in Western Australia is only provided on a considerable cost per person basis, which community agencies do not have funding for.
209. Investing in interpreting services may lead to an overall reduction in costs by preventing delays in court proceedings that occur due to the lack of interpreting services.
210. Legal Aid WA lawyers working in regional and remote areas have identified instances where the interpreting service relied upon may only consist of one interpreter who lives hundreds of kilometres away from where the court sits and who has no access to transport and cannot be contacted.
211. The result is that if that interpreter fails to attend, this causes delay as the regional courts operate on a circuit basis only.
212. This also means that people have to be re-listed and spend extra time in custody where they may have otherwise been found not guilty and allowed to return to their community.
213. As a result of the lack of interpreters, the court is often unaware of the extent to which a person is able to understand the proceedings and can result in the proceedings being conducted in a manner that has a negative impact on an

Aboriginal person's ability to fairly and efficiently negotiate the criminal justice system.⁵⁷

CASE STUDY 10

Recently an Aboriginal female client pleaded not guilty to a number of serious offences in the Magistrates Court in the Pilbara. The matters were adjourned to a trial allocation date and an Aboriginal interpreter was ordered by the court. No interpreter was present at the next court date and a request for an interpreter was made again. At the next court date there was still no interpreter present. Finally, at the third appearance an Aboriginal interpreter was available and instructions were taken and the matters were able to progress. In the matter described, the Aboriginal interpreter finally engaged knew the client since she was a young child and provided information about the client from her own knowledge rather than acting purely as an interpreter.

214. In remote Aboriginal communities, where there are only a few, or no Aboriginal language interpreters, the risk of significant miscarriage of justice increases dramatically. People resort to using unregistered, unqualified and unregulated interpreters, such as family members in the community.
215. Not using interpreters in court results in people not understanding orders made by the court resulting in breaches of orders particularly because they do not understand the consequences of the breach, or their conditions.
216. Legal Aid WA submits that:
- a. There be more funding for Aboriginal language interpreting services to provide an equivalent service to what is available in the Northern Territory;
 - b. There be more interpreters employed on a full time basis; and
 - c. Interpreters be provided with more training.

⁵⁷ *Addressing Aboriginal Imprisonment National Symposium Discussion Paper*, Law Council of Australia, 18.

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?

217. Legal Aid WA considers that diversionary options could be strengthened by providing police with more statutory alternatives to charging offenders with criteria as to when the alternatives should be pursued, the alternatives being resourced (alcohol and drug treatment, shelters, psychiatric treatment or hostels, disability support or hostels) and also providing courts with further options to divert offenders out of the justice system to similar alternatives.

Provision of culturally meaningful and accessible court therapeutic justice programs

218. So as to avoid the issue of ‘net-widening’ and the potential for breaches of bail on non-attendance at a “check-in” day on a therapeutic justice program, it is recommended that the Department of Justice takes a culturally sensitive view of court programs. It is recommended that the court programs are run in such a manner that is both meaningful and accessible for Aboriginal people who find themselves in the court system. Through a less formal structure, that allows greater flexibility, a greater cultural appreciation and a focus on program referral, this type of court process would establish an environment that makes cultural and social sense for Aboriginal offenders.

219. One recommendation is the involvement of Aboriginal Elders in the operation of the court proceedings and advice on sentencing, as seen in the previous Kalgoorlie-Boulder Community Court model. Through the participation of Aboriginal Elders and members of the offender’s family, the system would benefit from a culturally respected voice which would contribute to a message of encouragement for the offender to change their behaviour as well as understand the implications such behaviour has had on the community at large.

220. Whilst a Community Court model maintains the option to send offenders to jail, an emphasis on program referral would enable a shift in the mindset from long-term management to short-term problem solving. This would assist the individual offender in receiving sentences that are appropriate to their background as well as their needs which in turn would contribute to a more beneficial experience and

reduce their potential for re-offending.

221. In the 2009 Aboriginal Legal Service WA (ALSWA) submission to the then Department of the Attorney General regarding Aboriginal Community Courts, a number of successes of the community-court model were outlined. Namely, reduced recidivism, increased respect from Aboriginal people for the legal system, as well as increased respect for panellists and community Elders.⁵⁸ Many of these were attributable to the time allowed to understand the circumstances and background of the offender in order to provide sentencing options that were appropriate to such circumstances.⁵⁹ Additionally, it was a common occurrence that the Elder(s) sitting on the panel were well acquainted with the offender, their family and their social situation and this assisted in informing the court. Furthermore the submission noted the difference in remorse and shame shown in the presence of an Elder as opposed to a Magistrate, which highlights the level of cultural respect Aboriginal people hold so strongly.⁶⁰ Conclusively, the ALSWA firmly believed in the success of such court programs and confident that such models have scope for real empowerment of Aboriginal communities in WA.⁶¹

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.

222. Legal Aid WA strongly endorses this proposal. In Western Australia, persons on custody orders often spend many years in custody beyond that which they would have spent in custody had they entered a plea of guilty to the offence(s) for which they were charged. The practical effect of this is that those persons are being punished more severely as a consequence of their mental impairment than those without mental impairment as a result of their being unfit to stand trial or acquitted on account of unsoundness of mind. This is particularly problematic for those

⁵⁸ ALSWA, 2008/0065 to Department of the Attorney General, Aboriginal Community Courts Kalgoorlie-Boulder and Norseman, 16 June 2009, p4

⁵⁹ Ibid.

⁶⁰ Ibid 18, p5

⁶¹ Ibid, 18, p9

deemed unfit to stand trial in the context of there being no trial or special hearing in which to test the prosecution case.

223. Persons with cognitive or psychiatric impairment find it particularly distressing having no set date for release. Prisons normally structure sentence plans so as to prepare a prisoner for release. Without a set date for release, persons on custody orders do not have the opportunity to participate in these sentence plans. Further, persons with mental impairments are often deemed unsuitable for programs within the prison as a consequence of their mental impairment.
224. It is Legal Aid WA's submission that, when a custody order is made, it should be a compulsory requirement of the governing legislation that a maximum duration for the order must be specified on the order, which should equate to no longer than the non-parole period that would have been applicable if the mentally impaired accused had been convicted of the offence for which they were charged.
225. It is recommended that legislation dealing with mentally impaired accused charged with criminal offences should:
- a. Allow for a special hearing to determine the criminal responsibility of an accused who has been found mentally unfit to stand trial.
 - b. Provide that custody orders should only be imposed when all other options have been ruled out.
 - c. Provide that custody orders should continue for no longer than the non-parole period that would have been applicable if the mentally impaired accused had been convicted of the offence for which they were charged.
 - d. Give the judiciary discretion to impose a community program order for a person acquitted on account of unsoundness of mind or unfit to stand trial, to enable the person to be treated and or supervised as such a person may not be capable of complying with a standard community order.
 - e. Allow for additional disposition options in order to ensure ongoing support and treatment can be provided to mentally impaired accused.
 - f. Encourage diversion away from the justice system where appropriate.

Question 11–2

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

226. Legal Aid WA considers that the following matters need to be considered in relation to access to legal services:

Funding

227. Funding is an important factor that is lacking in this area. The access to appropriate funding would essentially increase the access to interpreters to assist offenders in their court appearances. There is a fundamental need to build more capacity in the criminal justice system which is only achievable through increases to funding levels.

Remoteness of communities

Circuit courts and transportation

228. Operating courts on circuit is the preferable way of ensuring that accused attend court.
229. Aboriginal people who live remotely from towns and communities where agencies are regionally based are at a huge disadvantage. They do not have the same levels of access to services as people who do not live remotely.
230. In our experience, people sentenced to community orders and subject to program and supervision requirements, often have limited supervision and contact with their corrections officers. If they are in a remote community, their supervision is likely to be by telephone, which is fraught with risks of miscommunication, lack of interpreter assistance, and risks of not attending for supervision due to things like Sorry business and lore time. Damaged communication infrastructure caused by weather events compounds these difficulties. The level of supervision for people in remote communities is not conducive to providing the support on orders that is intended to facilitate rehabilitation and compliance.
231. Extending circuits to remote communities is particularly useful. For example between 22 to 25 August 2016 the Magistrates Court recently travelled on circuit to the remote communities of Punmu and Kunawarritji where clients frequently have difficulty attending court due to the large distances they must travel. Many clients do not have a driver's licence or access to a motor vehicle and arrest warrants are frequently issued when clients fail to attend court due to issues with transport. The communities are policed by two police officers based in Jigalong community (718km from Punmu and 893km from Kunwarritji).

232. Attendance at circuit courts is labour intensive and expensive – especially given the time out of the office for legal staff and the distances travelled. Increased funding would ultimately increase the availability and access to legal services.
233. Where regional courts have closed it is important that regional accused in those areas be supported to attend court at the new location such as through the provision of either a dedicated bus service or through the subsidisation of bus transportation.
234. Aboriginal clients face difficulties in regional areas where local courts have been closed.
235. Both the Coolgardie and the Roebourne Courthouses have closed, which has resulted in transport issues for a number of clients.
236. Regional towns such as Coolgardie and Roebourne have very limited public transport.
237. As it currently stands, there are no public transport options from Coolgardie to Kalgoorlie.
238. Between Roebourne and Karratha there is only limited transport which is in the form of the town bus which runs a few days a week.
239. One case example demonstrating the problem is as follows:

CASE STUDY 11

A client from Ngurrawaana, a remote Aboriginal community, where the most convenient court used to be Roebourne, now has to travel to Karratha for her court matter. There have been a number of appearances in relation to her charges with the client arriving late for court due to transportation difficulties in getting to

court, contributing to the delay in resolving the matter.

Availability of and access to legal assistance

240. The provision of Aboriginal Justice Program Open Days ('open days') involving the Registry of Births, Deaths and Marriages and the Department of Transport to help Aboriginal people in regional areas obtain identification and driver's licences is a very positive development.
241. It is recommended that this program continue on a more regular basis and there be more advertising of the open days.
242. Identification difficulties faced by Aboriginal people often stems from situations where children were born outside of a hospital, and have not obtained a birth certificate.
243. Without having a birth certificate, Aboriginal people struggle with obtaining identification to gain access to social security, a bank account, or to mail, or to apply for a driver's licence or to be identified at court.
244. This difficulty impacts on access to money to pay bills or to pay for accommodation.
245. A lack of identification may result in child offenders being sent to adult prisons in regional areas due to the difficulty in ascertaining the correct age of a person in the absence of a birth certificate.
246. Whilst there is communication between staff members through organisations such as the Aboriginal Justice Program and members in the local community, there is still a need for the Open Days to be more widely advertised.
247. Wider advertising would also benefit those individuals who know they can get help for driver's licences and fines matters, but who do not know they can also get assistance with getting birth certificates.

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248. There have been occurrences when open days fall upon the same days as community events impacting on the number of people attending.
249. It would be helpful if open days went from occurring twice a year to once each quarter.
250. Further it would be useful if fees for providing birth certificates are routinely waived in cases of financial hardship.
251. Access to legal representation in reducing imprisonment is demonstrated by the following case example:

CASE STUDY 12

An accused appeared unrepresented in a video link in a regional court to breaching a restraining order for the third time in two years, warranting a period of imprisonment unless it is established that it would be unjust to do so under the relevant legislation. Had the accused been represented a lawyer could have argued that it would be unjust to imprison on the basis that some of the contact with the protected person was in the context of arranging access to the accused's son and was by telephone and text only.

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.

252. Legal Aid WA supports this proposal.

PART 12. POLICE ACCOUNTABILITY

Question 12–1

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

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253. Legal Aid WA emphasises the importance of cultural awareness training for all police officers and staff, especially where this training is delivered by Elders in the community, and is specific to the local area.

Recognise community engagement and crime prevention

254. There needs to be greater recognition in the key performance indicators for the management of police officers to acknowledge any good work done by officers in community engagement and crime prevention
255. Police and Citizens Youth Clubs have been a very important community engagement strategy engaged in by the police.
256. The number of community policing services provided could be used as a performance indicator.
257. One type of community policing service which may assist with reducing family violence is to have a counsellor or health worker accompany a police officer to have periodic contact with family violence victims and perpetrators to offer help such as referral to substance abuse treatment or family violence prevention counselling to specifically target family violence.⁶²

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?

Improved cultural attitudes and training in law enforcement

258. All agencies involved in law enforcement and Justice should have compulsory cultural awareness training and ideally, training in cultural competency.

⁶² This type of service was one of the 'justice reinvestment' initiatives referred to in *Backing Bourke*.

259. In our experience, there exists a lack of awareness of the rights of the young person and education around the role of the “responsible adult”, usually a family member who must be present when a young person is interviewed by police. For example, police stopped the mother of one of our clients from trying to insist that her son did not want to proceed with an interview. Police instead told her that she could not interfere.
260. Additionally, our experience tends to show that there may be a lack of training of police in relation to appropriate questioning of Aboriginal people: what their answers may mean, giving “space” and time for them to answer without prompting or bullying, and in dealing with Aboriginal people with FASD, intellectual disabilities and mental health problems.
261. Police should consider working with local Aboriginal corporations and groups and individuals who are important stakeholders in these towns and communities, to establish local advisory groups.
262. These groups could identify local issues and local solutions, taking into consideration the significance of the local culture. These advisory groups should not be created in response to a major incident, but instead should be established as a community policing and sustainable initiative. The officer in charge of the local police station should have the responsibility of the creation and running of the group.

CASE STUDY 13

In 2005, two WA police officers, including one Aboriginal Police officer, were based at a multi-functional police facility in a chaotic remote East Kimberley Aboriginal community of about 400 people. The community was struggling with children petrol-sniffing and attempting suicides, high rates of domestic violence, alcohol usage on community land and cannabis abuse issues. The local police were hugely overworked, with only the capacity for reactive policing. The community appeared to be out of control. Local community members approached the police and offered their assistance. Together, they established a team of wardens and a local advisory group to tackle these issues. The wardens were local Aboriginal community members, appointed by police to assist police work in the community. The advisory group comprised a mix of Elders and respected

community members, and representatives of community agencies like youth services, local administration office, child protection, the local church and health. The police worked in tandem with these groups to build positive, preventative initiatives in the community. The community took ownership of its issues and responsibility for solutions. Within six months, the rates of petrol-sniffing were reduced to almost zero, domestic violence and other crime rates were greatly reduced. The community was a much safer place to live and community members and police were genuinely connected and respected.

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?

263. Legal Aid WA recommends the following to assist the police in gaining an understanding of the needs of communities:

Use of Aboriginal community liaison officers/ community police officers

264. Aboriginal community liaison officers are useful in assisting police acting in a culturally appropriate way and in promoting good communication with Aboriginal communities.⁶³

265. The provision of police officers to engage with 'at risk youth' in Western Australia is a positive development.

266. There should also continue to be Aboriginal community liaison officers in Western Australia to ensure good communication between regional police officers and local Aboriginal communities.

267. The Northern Territory Police Service has appointed Indigenous

⁶³ McCausland R, Alison Vivian, 'Why do some Aboriginal Communities Have Lower Crime Rates than Others? A Pilot Study' (2010) *The Australian and New Zealand Journal of Criminology* 43(2) 318.

Community Police who work alongside the officers of the NT Police in remote Aboriginal communities.

268. In comparison, in WA's remote East Kimberley Aboriginal communities, there are two police officers stationed at a multi-functional police facility, with no Aboriginal colleagues to work alongside them and within the community.

269. If created, these positions could have a positive impact in assisting police to deliver proactive programs and events in these communities, enhancing the community's respect for them and targeting local criminal law and civil law issues and solutions.

270. In around 2006, the recently retired WA Police Commissioner insisted that all Aboriginal Police Liaison Officers (APLO) be progressed through the WA Police Academy to become Constables. This was a huge change in roles and responsibilities for those people working as APLOs and they were not appropriately supported in this transition. A significant number of Senior APLOs left Western Australian Police, which we consider was a huge loss to the community. The APLO program was discontinued. Now, there are very few Aboriginal Police Officers in local police stations across Western Australia. Instead, there are Community Relations Officers (CROs) whose powers appear to be very limited. With the previous APLO program, police had the opportunity to genuinely connect with Aboriginal communities.

Cultural awareness training specific to region

271. Each police officer should receive cultural awareness training on Aboriginal culture generally and also in relation to the local area where they will be undertaking police work.

272. There should also be training on using an Aboriginal language interpreter.

273. Appropriate cultural awareness training ensures that police officers are culturally sensitive and aware of local traditions and customs to ensure they have the cooperation and support of the local Aboriginal community.

274. The cultural awareness training should include the involvement of local Aboriginal community members to ensure effective services are provided with a view of improving cultural awareness and community engagement.

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?

275. Yes, Legal Aid WA supports this proposal.

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?

276. Yes, Legal Aid WA supports this proposal.

Question 12–5

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

277. Yes. Legal Aid WA supports this proposal.

Question 12–6

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

278. Yes. Legal Aid WA supports this proposal.

PART 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?

Statutory objectives

279. Legal Aid WA recommends that justice and other agencies have statutory objectives supportive of reducing the imprisonment rate in conjunction with an investment in diversionary and rehabilitation programs, with reporting on their performance in their annual reports.
280. Police services should include stated objectives of supporting community policing and diverting offenders away from the justice system into treatment programs relating to drug or alcohol abuse or psychiatric or disability support where appropriate.
281. Government departments with responsibility for health and disability services should have as one of their statutory objectives the support for the diversion of offenders with mental health or intellectual disability away from the justice system into psychiatric rehabilitation beds or supportive accommodation for people with intellectual disabilities.
282. There should be a statutory objective for Corrective Services of aiming to reduce the prison population and increase the number of non-custodial supervision and

program services provided. There should also be a statutory objective of promoting offenders receiving parole as well as supporting offenders who have been released from imprisonment.

Community focussed justice reinvestment and neighbourhood justice centres

283. Localism, community control and better cooperation between local services ensure that justice reinvestment is community led as in Bourke in New South Wales.⁶⁴

284. Legal Aid WA supports developing Neighbourhood Justice Centres in Western Australia to facilitate collaborative relationships between the justice system, agencies and community bodies to try to address the underlying causes of offending, rather than merely responding to crime after it has occurred. Community Justice Centres work in partnership with local organisations and community members to tackle local justice, crime and safety issues, and come up with lasting, local solutions. They also support programs that tackle disadvantage, to provide real and practical benefit to the community. On-site services help individuals to solve justice problems at an early stage including victim support, mediation, specialised mental health, drug and alcohol treatment, counselling, housing support, employment and training support, Aboriginal support services and legal advice.⁶⁵

Further considerations

285. As at 31 March 2016, the rate of imprisonment amongst the Aboriginal adult population in Western Australia was much higher than the rest of the States and Territories. In June 2016, Western Australia had 3,937 Aboriginal prisoners per 100,000 which was less than Northern Territory which had 2,958 per 100,000. This represents a significant increase from 2,472 in 2000.⁶⁶

286. In 2014-2015 Western Australia had an estimated average cost per prisoner per day

⁶⁴ Amnesty International, *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and Out of Detention in Australia* (Amnesty International, Broadway, NSW, 2015), pp27-28.

⁶⁵ The Neighbourhood Justice Centre was established in 2007 and is Australia's only community justice centre. It is located in Collingwood, Melbourne, and serves the City of Yarra: <http://www.neighbourhoodjustice.vic.gov.au/home/>

⁶⁶ Australian Bureau of Statistics (2000) 4512.0 – *Corrective Services, Australia June Quarter 2000*, 25.

of \$359 or \$131,035 per annum⁶⁷ in comparison to the estimated national figure of \$301 or \$109,865 per annum⁶⁸.

287. A justice reinvestment approach has great potential to reduce crime by addressing the factors underlying criminal offending such as alcohol and drug addiction.⁶⁹
288. Many women prisoner are the victims of violence. While in the community Legal Aid WA agrees they need access to well-resourced sources of support such as refuges and Aboriginal family violence support, mediation and legal services so the victims do not become perpetrators (Wilson et al p12). Justice reinvestment has a role to play in this.
289. At Legal Aid WA we have a community legal education officer in our Kununurra Office. Funding to support outreach and community legal education in Aboriginal communities is an important mechanism of facilitating access to justice and linkages with relevant agencies to address disadvantage.

Homelessness

290. Addressing homelessness and unstable accommodation for Aboriginal people is a fundamental step in reducing disadvantage and Aboriginal imprisonment.
291. Alternative, affordable accommodation options for young adults should be explored and established in communities and towns. For example, in addition to family homes, communities and towns should be establishing single men's accommodation and single women's accommodation, or housing that can be rented for share-housing. These types of accommodation options should be equally available to Government housing applicants, and should not be ranked at a lower priority than family housing. There should be separate application streams within Department of Communities - Housing to support those young Aboriginal people trying to establish themselves independently.

⁶⁷ Productivity Commission, *Report on Government Services – Corrective Services* (2016) 8.22 <www.pc.gov.au/research/ongoing/report-on-government-services/2016/justice/corrective-services/rogs-2016-volume-c-chapter8.pdf>

⁶⁸ Productivity Commission, *Report on Government Services – Corrective Services* (2016) Table 8A.7 <www.pc.gov.au/research/ongoing/report-on-government-services/2016/justice/corrective-services/rogs-2016-volume-c-chapter8.pdf>

⁶⁹ Kelly M, Tubex H 'Stemming the tide of Aboriginal Incarceration' (2015) 17(2), *The University of Notre Dame Law Review*, 1.

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292. The definition of homelessness includes living in severely overcrowded houses. Particularly for young single men and women, who are otherwise resigned to living in overcrowded accommodation with family, the lack of alternative accommodation options can increase their likelihood of being incarcerated. Living in overcrowding with family often means a lack of privacy for young single people, an expectation that property is shared, and overwhelming obligations to support the unemployed members of that family, if that single person is working.
293. Alternative accommodation options offer a young person the opportunity for independence and privacy, without necessarily having to be partnered and start their own family. They can choose to live a healthier life, away from negative influences that are often present in overcrowded community homes, such as family violence and drug and alcohol abuse. The opportunity to maintain employment at some distance from the pressure to maintain unemployed family, can save a young, single person from risks of associated depression, anxiety, dropping out of work and then ending up in the criminal justice system.
294. In Western Australia a 'three strikes' policy applies in relation to evictions for disruptive behaviour. This can disadvantage Aboriginal people who have a cultural obligation to accommodate relatives who may have been the subject of eviction from earlier tenancies who have been evicted due to disruptive behaviour. Disruptive behaviour can also be a function of the number of people residing at a particular tenancy. Supporting Aboriginal people in accommodation and assisting them to deal with relatives who need accommodation is an important aspect of ensuring Aboriginal people remain in housing and are not subject to the instability of being homeless and the consequential negative impacts on children, participation in education and employment.
295. The inability to obtain employment is one of the biggest risk factors for offender recidivism. Released prisoners may lack the appropriate attire or knowledge to present themselves reasonably. Education of such factors would encourage and lead to possible employment in higher quality jobs which would decrease the chance of recidivism.⁷⁰

⁷⁰ Justice Reinvestment, Law Society Briefing Papers, *The Law Society of Western Australia*, December 2016.

CONCLUSION AND SUMMARY

296. Legal Aid WA considers that the following represent the key practical issues to be addressed in reducing the incarceration rates of Aboriginal people.
297. Justice agencies continuing on the path of justice reinvestment through resources being redirected from prisons and into substance abuse treatment beds and psychiatric hospital treatment beds to reduce the crime rate through substance abuse treatment and mental health treatment.
298. Providing transitional accommodation which can provide a base for such treatment is an essential component of reducing crime.
299. Such accommodation is necessary to support people who are awaiting the final disposition of their case, people undergoing community based orders and for people to be able to transition back into the community on parole.
300. The provision of police officers to engage with “at risk youth” is a positive development however there should continue to be Aboriginal Community Liaison Officers to ensure good communication between regional police officers and local Aboriginal communities.
301. Acknowledgement of the good work done by police officers in community engagement and crime prevention should be reflected in the development of key performance indicators used by police.
302. A counsellor should accompany a police officer to have periodic contact with family violence victims and perpetrators to offer help such as referral to substance abuse treatment or family violence prevention counselling to reduce family violence
303. There must be greater use of Aboriginal interpreting services in regional areas for explaining conditions of bail and restraining orders and for police interviews.
304. Each police officer should receive cultural awareness training on Aboriginal culture generally and also in relation to the local area where they will be undertaking police work. There should also be training on using Aboriginal language interpreters.
305. Police training should encourage the use of a court attendance notice rather than arrest and to keep bail conditions to a minimum when setting bail after an arrest.

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306. Bail protocols should be established to permit a warning system for minor breaches of bail conditions, particularly by young accused.
 307. Police officers and prosecutors should be given greater discretion to divert minor offenders away from the justice system into counselling and rehabilitation especially where the key factor underlying an offence is one of mental impairment.
 308. It is recommended that the Department of Justice ensure that bail applications in regional areas are heard by Magistrates through use of video link facilities rather than having Justices of the Peace determine such applications.
 309. The Department of Justice's provision of open days to help Aboriginal people obtain identification and driver's licences in regional areas is a very positive development, however, it is recommended that this program continue on a more regular basis and there be greater advertising of open days.
 310. Road traffic law should be reformed to reduce the number of Aboriginal people imprisoned for traffic offences.
 311. It is recommended that there be greater access to Aboriginal interpreting services in courts throughout the State as this would significantly improve both the efficiency of the justice system as well as ensuring appropriate access to justice.
 312. Where regional courts have been closed it is important that accused in the region affected be assisted with travel to attend court at the new location.
 313. Innovations such as SMS court date reminder notifications should be utilised to reduce the number of bench warrants issued.
 314. Training of judicial officers and staff in local Aboriginal culture is important to improve understanding of the diverse cultures and requirements within different Aboriginal communities.⁷¹
 315. Solution focussed court programs should be available throughout the State and specifically aim to promote engagement by Aboriginal offenders in:

⁷¹ McCausland R, Alison Vivian, 'Why do some Aboriginal Communities Have Lower Crime Rates Than Others? A Pilot Study' (2010) *The Australian and New Zealand Journal of Criminology* 43(2) 327.

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- programs linking services to offenders with mental impairment;
 - substance abuse counselling and treatment for offenders committing crime due to substance abuse problems and;
 - family violence prevention programs for family violence offenders.
316. More than one type of solution focussed court program should be available to an offender where there is a need for more than one type of intervention.
317. The use of prohibited behaviour orders should be discontinued on the basis that they have a disproportionate impact on Aboriginal people.
318. The Department of Justice - Corrective Services' Reconciliation and Action Program is a very positive development with the objective of increasing Aboriginal employment within the Department, the establishment of Aboriginal Service Committees to ensure programs are culturally sensitive and cultural competency programs for staff, as well as increasing the use of interpreters in prisons to allow Aboriginal prisoners to participate in support and rehabilitation programs.
319. It is recommended that there be greater use of bail hostels around the State to reduce the remand prison population and link bail hostels to alcohol and drug rehabilitation programs provided on site.
320. It is recommended that bail hostels also be utilised as accommodation for offenders for parole where they do not have other suitable accommodation to assist in offenders having a stable base for parole and the delivery of programs to offenders while on parole.
321. It is recommended that the Department of Justice consider making more programs available to offenders outside of prison to ensure that lower level offenders can access effective rehabilitation programs outside of prison such as family violence offender treatment, sex offender treatment and alcohol and drug rehabilitation. Sometimes, suitable programs are only available to sentenced prisoners (and only in the prison environment).
322. Working with Aboriginal run programs such as Nowanup in the south of Western Australia should continue and be expanded.
323. It is recommended that more intensive rehabilitation programs be made available to prisoners in remand custody to assist in them being considered for non-custodial sentencing options when sentenced.

324. It is recommended that there be a particular focus on the provision of programs to Aboriginal offenders to assist in them being considered for parole.
325. It is recommended that transitional officers engage with prisoners at an earlier point in time to assist with organising accommodation and multiple stakeholder support for prisoners upon their return to the community.
326. There should be a policy objective of ensuring that mentally impaired accused on custody orders are progressed towards return to the community as soon as possible through the allocation of this responsibility to relevant staff, stakeholder engagement and through the Department appearing at Mentally Impaired Accused Review Board meetings to report on progress made towards this objective.
327. Consideration should be given to creating an Aboriginal Services Unit with similar functions to the Aboriginal Services Unit in the Department for Correctional Services in South Australia including the employment of Aboriginal Liaison Officers and the holding of Prevention of Aboriginal Deaths in Custody Forums regularly to achieve better outcomes in reducing reoffending in particular.
328. In pursuing rehabilitation it is necessary for justice agencies to effectively engage with Aboriginal communities through having liaison staff, a well-resourced interpreter service, and cultural competency programs for staff and through effective consultation with communities in the development of crime prevention and treatment strategies.