



4 September 2017

Incarceration Rates of Aboriginal and Torres Strait Islander Peoples  
The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
Sydney NSW 2001

Email: [indigenous-incarceration@alrc.gov.au](mailto:indigenous-incarceration@alrc.gov.au)

Dear Sabina Wynn,

***Re: Discussion paper – ALRC inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples***

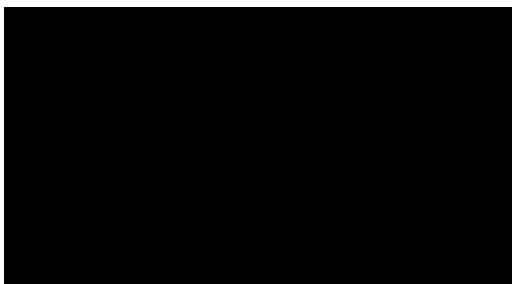
I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (ALS). The ALS thanks the Australian Law Reform Commission (ALRC) for the opportunity to provide a submission in relation to the discussion paper on the incarceration rates of Aboriginal and Torres Strait Islander Peoples.

The ALS is a member of the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) peak body and supports and reiterates the contents of their submission.

Additionally, the ALS is conducting community justice forums to identify justice issues and priorities of Aboriginal and Torres Strait Islander people from communities across NSW and the ACT. These forums are ongoing. ALS has had the opportunity to consider the discussion paper and makes this brief submission, though the ALS will provide more detail in a supplementary submission that will include insights from the forums.

Thank you for the opportunity to contribute to this inquiry.

Yours sincerely,



**Les Turner**  
**Chief Executive Officer**  
**Aboriginal Legal Service (NSW/ACT) Limited**

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# 1 Introduction

ALS notes that the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system is not a new problem. Many of the proposals in the discussion paper reflect recommendations made over 25 years ago by the Royal Commission into Aboriginal Deaths in Custody, which are yet to be fully implemented in NSW, the ACT or other states and territories.

ALS also notes that the inquiry has not focused on youth in the criminal justice system. However it must be recognised that Aboriginal and Torres Strait Islander people have a much younger age profile than the non-Indigenous population. In 2016, more than half of Aboriginal and Torres Strait Islander people were aged under 25 years.<sup>1</sup> In comparison, almost one in three non-Indigenous people were aged under 25.<sup>2</sup> Of significant concern is the fact that more than half of young people in detention in NSW and the ACT today are Aboriginal or Torres Strait Islander.<sup>3</sup> If existing laws and legal frameworks that have resulted in high incarceration rates are not rapidly and radically reformed, we risk losing another generation of Aboriginal and Torres Strait Islander people to the justice system.

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## 2 Bail and the Remand Population

### 2.1 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.**

ALS agrees that the *Bail Act 2013 (NSW)* and *Bail Act 1992 (ACT)* should adopt provisions equivalent to section 3A of the *Bail Act 1977 (Vic)*.

There is currently no provision in the *Bail Act 1992 (ACT)* that requires a bail authority to consider Aboriginality as part of a bail assessment.

Bail authorities in NSW are required to consider Aboriginality as part of a bail assessment. Section 18(1)(k) of the *Bail Act 2013 (NSW)* requires the court to consider the “*special vulnerability or needs*” of an accused person that arise from their being an Aboriginal or Torres Strait Islander person, among other characteristics. ALS notes that the *Bail Act 2013 (NSW)* removed further consideration of Aboriginality that previously existed under the *Bail Act 1978 (NSW)*. Section 32(1(a)(i)) of the previous legislation required a bail authority to consider “*a person’s background and community ties as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person’s ties to extended family and kinship and other traditional ties to place ...*” In the case of a non-Indigenous person, section 31(1(a)) required the bail authority to consider “*the person’s background and community ties, as indicated ... by the history and details of the person’s residence, employment ...*” among other factors. Setting the background and community ties of Aboriginal and Torres Strait Islander and non-Indigenous people against each other in this manner can, on the whole, be viewed as paternalistic. Nonetheless, removal of this section in the current legislation has reduced the factors of Aboriginality to be considered by a bail authority.

ALS does not support Aboriginality being considered as one of a number of special vulnerabilities as in the current legislation. The *Bail Act 2013 (NSW)* should instead adopt a standalone provision as in the Victorian legislation. The *Bail Act 1992 (ACT)* should adopt a similar standalone provision.

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<sup>1</sup> Australian Bureau of Statistics, *Census of Population and Housing* (2016),

<sup>2</sup> *Ibid.*

<sup>3</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2015-16*, Bulletin 139 (March 2017).

## 2.2 Proposal 2–2

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

ALS agrees with this proposal. Aboriginal and Torres Strait Islander organisations are the most valuable source of information on service gaps for Aboriginal and Torres Strait Islander people. This includes local organisations and peak organisations. Additional resources should be allocated to support local organisations to develop the infrastructure required to provide services in their communities, as well as to the peak bodies which coordinate them.

### ***Key gaps in service provision and support infrastructure***

ALS is currently conducting community justice forums on this proposal and will identify gaps in service provision and support infrastructure in further detail in the supplementary submission. ALS solicitors have identified a lack of suitable and stable bail accommodation across NSW and the ACT as a key gap, and this is discussed in this submission below.

#### ***Bail houses***

ALS recommends long-term resourcing for bail accommodation, or ‘bail houses’, for Aboriginal and Torres Strait Islander people across NSW and the ACT.

Indigenous defendants in NSW are more likely to be refused bail than non-Indigenous defendants.<sup>4</sup> Of particular concern is the high number of defendants refused bail for offences that do not carry penalties of imprisonment. The lack of suitable and stable housing is a key barrier to an individual being granted bail. Furthermore, a lack of suitable and stable accommodation disproportionately impacts Aboriginal people seeking bail.<sup>5</sup>

A bail house provides a safe, supportive, and supervised short-term housing arrangement for an individual who is eligible for bail, but may not be granted bail due to a lack of suitable and stable accommodation. Bail houses can provide a bail address for the full-duration of bail, or can act as an initial form of accommodation until other suitable and stable accommodation can be found.

Bail houses can also prevent or reduce breaches of bail conditions. Bail conditions frequently impose a ‘reside as directed’ condition on an individual. In NSW, for example, courts can impose a condition ‘requiring the accused person to reside at the relevant accommodation while at liberty on bail’ under s. 28(6)(a) *Bail Act 2013 (NSW)*. This can be a difficult condition for Aboriginal people where an individual is required to reside in unsuitable accommodation. For example, meetings on the development of a diversionary framework for Aboriginal defendants in the ACT indicated that young people were breaching bail conditions because ‘it is not safe for them to stay where they’re required.’<sup>6</sup> In addition, the bail address provided by the court may not be culturally appropriate as it fails to give adequate consideration to care and living arrangements as understood in some Aboriginal communities. As described by an ALS solicitor during a study of crime rates in Western NSW, “... kids often reside with their mothers, grandparents and sometimes uncles and aunties. They are given a bail address by the court but find that they are in breach after a couple of days because someone else is looking after them.”<sup>7</sup>

ALS recommends the ALRC review the ‘Bail Supportive Housing Program’ introduced by the Canadian Government in Ontario. Key features of the Program include:

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<sup>4</sup> New South Wales Law Reform Commission, 2012 *Bail*, Report No 133, 60.

<sup>5</sup> Victoria Apted, Rachel Hew and Tanya Sinha, 2013 *Barriers to Parole for Aboriginal and Torres Strait Islander People in Australia*, University of Queensland Pro Bono Centre, 12.

<sup>6</sup> Kelly Richards and Lauren Renshaw, 2013 ‘Bail and remand for young people in Australia: A National research project’, *Research and Public Policy Series 125*, Australian Institute of Criminology, 66.

<sup>7</sup> Ruth McCausland and Alison Vivian, 2009 *Factors affecting crime rates in Indigenous communities in NSW: a pilot study in Wilcannia and Menindee: Community Report*, Jumbunna Indigenous House of Learning Research Unit: University of Technology, 24.

- 24 hour housing, support and supervision for bail clients, provided by on-site staff
- 20 beds for both men and women.
- Support programs that form part of the accommodation service, such as life-skills, education programs, and referral to counselling and housing agencies
- Dedicated Indigenous staff positions to provide culturally appropriate support programs and case management
- An Aboriginal Bail-Program Supervisor tasked with building relationships with Aboriginal communities and organisations.<sup>8</sup>

ALS recommends the ALRC consider the utility of the program in Australia. ALS notes it is not an Aboriginal specific initiative. If such an initiative were to be considered in NSW and the ACT, ALS recommends the program include Aboriginal specific bail houses in appropriate communities. This includes specific accommodation for Aboriginal women who may be in particular need of bail accommodation due to histories of family and sexual violence.

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## 3 Sentencing and Aboriginality

### 3.1 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?**

ALS supports legislative reform in NSW and the ACT that requires the court to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders.

As noted at 3.70, the NSW Law Reform Commission in its *Report on Sentencing* (No. 139) recommended that the NSW wait until after the High Court decision of *Bugmy v The Queen* [2013] HCA 36 ('Bugmy') became available to consider amending legislation to this effect. As the decision in Bugmy has now been handed down, the ALS submits that NSW and other state and territory governments give careful consideration to this issue.

The ALS wrote to then NSW Attorney General Mr Greg Smith SC on 9 December 2013 requesting that the NSW government amend legislation to this effect. This request was made after the decision in Bugmy. The ALS reiterates its view that:

*[t]he pursuing of reasonable, orthodox and inexpensive policy responses such as the one proposed are in our view, crucial to the maintenance of the moral legitimacy of our institutions in light of the disastrous problems confronting our Aboriginal communities. It is in our view no longer possible for parliaments to not make such efforts to respond to the situation.<sup>9</sup>*

**If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?**

ALS submits that there should be a sentencing principle in s. 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which acknowledges the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples. This sentencing principle should recognise the following as unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples:

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<sup>8</sup> See Ministry of the Attorney General, Ontario, 'Ontario making criminal justice system faster and fairer in Eastern Ontario' (Media Release, 25 January 2017); Ministry of the Attorney General, Ontario, 'About Ontario's plan for faster, fairer criminal justice' (Media Release, 1 December 2016);

<sup>9</sup> Aboriginal Legal Service (NSW/ACT), Letter to Attorney General Greg Smith SC MP (9 December 2013).

- history of dispossession of land
- history of paternalistic attitudes and policies imposed by government; and
- removal of children

There should also be a sentencing factor in the *Crimes (Sentencing Procedure) Act 1999* (NSW) which acknowledges the principles set out in Bugmy.

Further, there should be a new provision in the *Crimes (Sentencing Procedure) Act 1999* (NSW) directed towards encouraging diversion, which would require the court to make inquiries in relation to the availability of intervention programs and allowing for time to engage in therapeutic programs.

### 3.2 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?**

ALS is currently conducting community justice forums and will include any input it receives on this question in the supplementary submission.

### 3.3 Question 3–3 and 3-4

**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?**

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

ALS does not consider that courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender’s background.

#### *Pre-sentence reports*

NSW and the ACT do not expressly require Aboriginality or cultural background as matters to be taken into account by the authors of pre-sentence reports. ALS considers that the provision of pre-sentence reports could assist courts when determining the appropriate sentence for Aboriginal and Torres Strait Islander offenders by including consideration of the factors referred to in 3.2 above. However it has been the experience of the ALS that, at present in NSW and the ACT, there is a lack of culturally competent pre-sentence report writers. This has resulted in actuarial assessments of risk being relied upon in pre-sentence reporting.

The ALS submits that pre-sentence reports should not be produced by court or government representatives. These reports should be prepared by local Aboriginal and Torres Strait Islander people with the requisite level of cultural experience to understand and articulate the factors affecting Aboriginal or Torres Strait Islander people offenders described in 3.2.

#### *Gladue reports and the Bugmy Evidence Project*

In addition to changes to pre-sentence reporting, ALS supports the incorporation of *Gladue* style reporting in NSW and the ACT. These reports must be underpinned by legislative change directing the court to consider the factors described in 3.1 when sentencing Aboriginal and Torres Strait Islander offenders. *Gladue* style reports would increase the information available to a sentencing court on the background of an individual and their community, and of available community-based rehabilitation options. This would increase the focus of the sentencing process on addressing the needs of the individual and the community, and reduce existing over-reliance on assessments of risk.

The ALS has established the Bugmy Evidence Project to develop reports on communities with significant populations of Aboriginal people in NSW and the ACT. These reports will provide narrative and statistical information on these communities. The aim of the project is to provide evidence of disadvantage and discrimination at a community level, where it exists or has existed, to support an individual's experience in that community. It is intended that the library will be freely available for the use of the legal profession and the judiciary.

ALS recommends that community reports prepared through the Bugmy Evidence Project be used by the court as part of any *Gladue* style reporting. In addition, where there is evidence that an individual has experienced trauma or deprivation, assessments by an Aboriginal mental health professional or mental health professional that has undergone cultural competency training must be included in *Gladue* style reports to assess the impact of the trauma and identify culturally appropriate treatment and support. Finally, information on culturally appropriate, community-based rehabilitation and alternatives to custody must also be included in *Gladue* style reports.

### 3.4 Question 3-5

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

ALS recommends the ALRC consider the approach to preparing and funding *Gladue* reports in Ontario, Canada. Legal Aid Ontario provides funding for the preparation of the reports by local Aboriginal organisations (including Aboriginal Legal Services Toronto<sup>10</sup>). Membership of the panel requires certain levels of training and competence.<sup>11</sup> Members of that panel are authorised to bill five additional hours in making submissions on behalf of Aboriginal offenders.<sup>12</sup>

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## Sentencing options

### 3.5 Question 4-1: Mandatory sentences

**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**

ALS strongly recommends that all governments review provisions that impose mandatory or presumptive sentencing. Mandatory or presumptive sentencing regimes fetter judicial discretion and can result in unjust sentences.

(b) **which provisions should be prioritised for review?**

Provisions that unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander people should be prioritised for review.

### 3.6 Questions 4–2, 4–3 and 4–4: Short sentencing

**Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result? If short sentences of imprisonment were to be abolished, what should be the threshold (e.g., three months; six months)? 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?**

ALS does not support abolishing short sentences as a sentencing option in NSW and the ACT.

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<sup>10</sup>Legal Aid Ontario, *Aboriginal identity: Gladue report programs*, (2017) <http://www.legalaid.on.ca/en/info/ASIQ-currentGladuereportprograms.asp>

<sup>11</sup>Legal Aid Ontario, *Panel standards: Gladue*, (2017) [http://www.legalaid.on.ca/en/info/panel\\_standards\\_gladue.asp](http://www.legalaid.on.ca/en/info/panel_standards_gladue.asp)

<sup>12</sup> *Ibid.*

Abolishing short sentences of imprisonment presupposes that those sentences would be replaced by non-custodial alternatives to imprisonment. Non-custodial alternatives to imprisonment are not uniformly available across NSW or the ACT. It is the experience of ALS that diversion and rehabilitation programs to support non-custodial alternatives to imprisonment are particularly lacking in regional and remote areas of NSW and the ACT.

ALS is concerned that abolishing short sentences would remove a sentencing option that may be appropriate in certain circumstances where an alternative to custody is not available. It may result in the unintended consequence of offenders receiving a disproportionate period of imprisonment. If a minimum threshold of imprisonment is legislated, where non-custodial alternatives are not available the courts may apply the minimum threshold rather than a shorter sentence that is proportionate with the seriousness of the crime.

Instead of abolishing short sentences, ALS considers that steps should be taken to reduce the imposition of short sentences of imprisonment by increasing the availability of non-custodial alternatives to imprisonment.

In the event that amendments are made to abolish short sentences, ALS recommends that there must be uniform pre-conditions in NSW and the ACT that ensure non-custodial alternatives to imprisonment are available.

### **3.7 Proposal 4-1: Availability of community-based sentencing options**

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

ALS agrees with this proposal. As in Proposal 2-2, additional resources should be allocated to support peak Aboriginal and Torres Strait Islander organisations to undertake this activity.

### **3.8 Question 4-5: Flexibility to tailor sentences**

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

ALS agrees that legislative reform is required to allow judicial officers greater flexibility to tailor sentences.

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## **4 Prison programs, parole and unsupervised release**

### **4.1 Proposal 5-1**

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

ALS agrees with this proposal. Additional resources for prison programs will be required to support additional program attendees.

### **4.2 Question 5-1**

**What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander prisoners held on remand or serving short sentences of imprisonment?**

ALS is currently conducting community justice forums on this question and will respond in the supplementary submission.

### **4.3 Proposal 5-2**

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

ALS agrees with this proposal.

#### **4.4 Question 5–2**

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

ALS is currently conducting community justice forums on this question and will respond in the supplementary submission.

#### **4.5 Proposal 5–3 and Question 5–3: Automatic parole**

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

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

ALS notes that NSW has a statutory regime of automatic court ordered parole for offenders sentenced to a term of imprisonment less than three years. The ACT has a system of 'discretionary parole', as described by the ALRC. The ALS recommends that the parole system in the ACT is amended to include automatic court ordered parole, reflecting the position in NSW.

#### **4.6 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.**

ALS notes that in NSW time spent on parole counts toward the head sentence (Option 1 as described by the ALRC). In the ACT time spent on parole does not count toward the head sentence, and must be served again in prison if parole is revoked (Option 2 as described by the ALRC). The ALS recommends that the parole revocation scheme in the ACT is amended to abolish this requirement, reflecting the position in NSW.

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## **6 Fines and Drivers Licences**

### **6.1 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.**

ALS agrees with this proposal.

### **6.2 Question 6–1, Question 6–2 and Question 6–3**

**Should lower level penalties be introduced, such as suspended infringement notices or written cautions? Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how? Should the number of infringement notices able to be issued in one transaction be limited?**

Infringement-related debt entrenches disadvantage experienced by many ALS clients. ALS recommends that: lower level penalties should be introduced, including suspended infringement notices and written cautions; the number of infringement notices able to be issued at one time should be limited; and total penalties payable by any one person should be limited.

### **6.3 Question 6–4**

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

ALS recommends that offensive language be repealed as a criminal offence in NSW and the ACT.



#### **6.4 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?**

ALS will include any input it receives through the community justice forums that relates to this proposal in the supplementary submission.

#### **6.5 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.**

ALS will include any input it receives through the community justice forums that relates to this proposal in the supplementary submission.

#### **6.6 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.**

ALS recommends that the NSW government continue the NSW Work or Development Order (WDO) scheme and that the ACT government should introduce work and development orders based on the NSW WDO scheme.

The ALS notes that eligibility for the WDO scheme is limited to people who have a mental illness, intellectual disability or cognitive impairment; are homeless; are experiencing acute economic hardship; or have a serious addiction to drugs/alcohol/volatile substances, ALS supports the suggestion made by Legal Aid NSW to expand eligibility via acute economic hardship to include Abstudy recipients and victims of family and domestic violence, with consideration given to including gambling addicts.<sup>13</sup>

The availability of WDO sponsored work-sites in regional and remote areas of NSW and the ACT is patchy. ALS recommends the ALRC consider an ‘incentive scheme’ of some nature to encourage work-sites in regional and remote locations to sponsor WDO placements.

#### **6.7 Question 6–7**

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

ALS recommends removing the enforcement measure of driver licence suspension as a result of fine default.

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<sup>13</sup> Aboriginal Legal Service of Western Australia (ALSWA), *Addressing fine default by vulnerable and disadvantaged persons: Briefing paper* (August 2016), 11-12.

## 6.8 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 driver 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?

ALS will include any input it receives through the community justice forums that relates to this proposal in the supplementary submission.

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## 7 Justice Procedure Orders

### 7.1 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.

ALS agrees with this proposal. As stated in Proposal 2-2, additional resources should be allocated to Aboriginal and Torres Strait Islander organisations to identify gaps and develop the infrastructure required to provide the services in their communities.

ALS will include any input it receives through the community justice forums that relates to this proposal in the supplementary submission.

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## 8 Alcohol

### 8.1 Proposal 8–1: Limiting alcohol sales

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?

ALS will include any input it receives through the community justice forums that relates to this proposal in the supplementary submission.

### 8.2 Question 8–2: Banned drinkers registers

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?

ALS will include any input it receives through the community justice forums that relates to this question in the supplementary submission.

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## 9 Female Offenders

### 9.1 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?**

ALS strongly supports reforms to criminal procedure laws and policies in NSW and the ACT that will require police, lawyers, courts and correction officers to prioritise diversionary options for Aboriginal and Torres Strait Islander women at all stages of the criminal process.

ALS is currently conducting community justice forums on this question and will respond further in the supplementary submission.

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## 10 Aboriginal Justice Agreements

### 10.1 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.**

ALS agrees that the NSW government should work with peak Aboriginal and Torres Strait Islander organisations to renew its Aboriginal Justice Agreement (AJA). The ALS notes that NSW previously had an AJA introduced in 2004, but it expired in 2014. ALS notes that the ACT government has an existing AJA.

By setting targets to reduce Aboriginal and Torres Strait Islander incarceration rates, AJAs improve government accountability. By demonstrating the government's intention to work towards addressing incarceration rates, AJAs also increase the confidence of Aboriginal people in the criminal justice system.

ALS recommends that any AJA must provide for appropriately resourced monitoring and evaluation. There has been little evaluation undertaken to assess the effectiveness of AJAs across Australia, or the overall success of Indigenous justice related strategic planning in NSW.<sup>14</sup>

A key focus of any Aboriginal Justice Agreement should be the principle of Aboriginal self-determination.<sup>15</sup> In the event an AJA is re-introduced in NSW it must include participation of local Aboriginal organisations and communities to monitor the effectiveness of the AJA. This would also provide an avenue of independent evaluation, allowing local communities the chance to evaluate the strategies set out under the agreement. In this context, the dismantling over time of Aboriginal representative bodies and its impact upon policy development is a point of particular concern.

ALS is currently conducting community justice forums on this question and will respond further in the supplementary submission.

### 10.2 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?**

ALS recommends the Commonwealth develop justice targets as part of the review of the Closing the Gap policy. ALS, as a member of NATSILS, supports adoption of Change the Record's *Blueprint for Change*. The Blueprint for Change offers a strong framework to address the high rates of over incarceration of and disproportionate rates of violence against Aboriginal and Torres Strait Islander people. This framework includes the following proposal:

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<sup>14</sup> Fiona Allison and Chris Cunneen, 'The role of Indigenous justice agreements in improving legal and social outcomes for indigenous people' (2010) 32 *Sydney Law Review* 645, 651.

<sup>15</sup> *Ibid*, 647-648.

... (b) Set the following justice targets, which are aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander people come into contact with the criminal justice system:

i. Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040;

ii. Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040; with priority strategies for women and children.

In addition, these targets should be accompanied by a National Agreement which includes a reporting mechanism, as well as measurable sub-targets and a commitment to halve the gap in the above over-arching goals by no later than 2030.<sup>16</sup>

ALS also notes that high rates of Indigenous imprisonment are accompanied by disproportionately high levels of expenditure on Indigenous people in the justice system.<sup>17</sup> This expenditure is primarily directed towards policing and corrective services, incurred by state and territory governments.<sup>18</sup> Expenditure on the provision of legal assistance services, incurred by the Commonwealth government, is relatively small.<sup>19</sup> To meet the proposed targets, the Commonwealth government, as well as state and territory governments, must significantly increase resourcing for Aboriginal and Torres Strait Islander legal assistance services. This includes resourcing and collaborating with Aboriginal and Torres Strait Islander organisations to conduct data collection in support of rigorous evaluation against the targets.

ALS is currently conducting community justice forums on this question and will respond further in the supplementary submission.

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## 11 Access to Justice Issues

### 11.1 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.**

ALS supports this proposal.

### 11.2 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?**

ALS is currently conducting community justice forums on this question and will respond further in the supplementary submission.

### 11.3 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.**

ALS supports this proposal.

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<sup>16</sup> Change the Record, *Blueprint for Change*, (2015) <https://changetherecord.org.au/policy-framework-blueprint-for-change>, 4.

<sup>17</sup> Australian National Audit Office, *Administration of the Indigenous Legal Assistance Programme*, (2015) Attorney General's Department: Canberra, 26.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

## 11.4 Question 11–2

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

ALS is currently conducting community justice forums on this question and will respond further in the supplementary submission.

## 11.5 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.**

ALS supports the introduction of a statutory custody notification service in all states and territories. This should include a duty on police, on detaining a person in custody, to:

- enquire if that person identifies as Aboriginal or Torres Strait Islander
- contact the Aboriginal Legal Service, or equivalent service, if the person identifies as Aboriginal or Torres Strait Islander
- provide the detained person further opportunities to contact the service, if necessary, based on the circumstances of their detention.

The Custody Notification Service (CNS) was set up in NSW and the ACT in 2000 as a response to the Royal Commission into Aboriginal Deaths in Custody. The CNS is a 24-hour telephone legal advice service operated by the ALS for Aboriginal people taken into custody by the police in NSW and the ACT.

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## 12 Police accountability

### 12.1 Question 12–1

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

ALS is currently conducting community justice forums on this question and will respond in the supplementary submission.

### 12.2 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?**

ALS is currently conducting community justice forums on this question and will respond in the supplementary submission.

### 12.3 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?**

ALS recommends that police publicly report on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours.

ALS is currently conducting community justice forums on this question and will respond further in the supplementary submission.

## 12.4 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?**

ALS recommends that police undertaking programs aimed at reducing offending behaviours are required to complete these activities.

ALS is currently conducting community justice forums on this question and will respond further in the supplementary submission.

## 12.5 Question 12–5

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

ALS recommends that police in NSW and the ACT enter into a Reconciliation Action Plan (RAP) with Reconciliation Australia.

Organisations that have RAPs have reported improved perceptions of Aboriginal and Torres Strait Islanders, increased pride in Aboriginal and Torres Strait Islander cultures and an increase in the number of social interactions their staff and organisations have with Aboriginal and Torres Strait Islanders.<sup>20</sup> These outcomes can only improve the relationship between police in NSW and the ACT and Aboriginal and Torres Strait Islander peoples.

ALS is currently conducting community justice forums on this question and will respond further in the supplementary submission.

## 12.6 Question 12–6

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

ALS recommends that police in all jurisdictions be required to resource and support Aboriginal and Torres Strait Islander employment strategies.

ALS is currently conducting community justice forums on this question and will respond further in the supplementary submission.

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# 13 Justice Reinvestment

## 13.1 Question 13–1

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

ALS supports the introduction of laws and / or legal frameworks that facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples. This includes developing and resourcing community-based programs and initiatives aimed at addressing the underlying causes of crime and resulting in the diversion of Aboriginal and Torres Strait Islander people from the justice system.

ALS auspices Just Reinvest NSW, an independent, non-profit association which aims to convince the NSW government to introduce a policy of justice reinvestment to reduce the number of Aboriginal young people in NSW prisons and adopt a smarter approach to reduce crime and create safer, stronger communities. In 2014 Just Reinvest NSW began implementing one of the first justice reinvestment projects in Australia in partnership with the Maranguka Justice Reinvestment Project in Bourke, NSW.

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<sup>20</sup> Reconciliation Australia, *RAP Impact Measurement Report*, (2016) Reconciliation Australia: Canberra.