Kimberley Community Legal Services Inc.

Submission to the Australian Law Reform Commission Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples

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Part 1: Introduction

1.1. About KCLS

KCLS is an independent, not-for-profit community legal centre, providing free legal services to Aboriginal communities and others in need across the Kimberley.

KCLS started from the efforts of a group of Kimberley women who recognised a need for a specialist women's legal service to help families dealing with domestic violence. Twenty years later, we have grown to be one of the most respected and effective civil law services in Australia, providing essential legal and support services to all families and communities who need us across the Kimberley region. Every year, our lawyers and client advocates help hundreds of people across the Kimberley keep their homes, manage their finances, be safe from violence, hold their families together, and get fair treatment under the law. Our services include legal advice and representation on most civil law matters, intensive tenancy and family violence support, financial counselling, community education and law reform advocacy.

From our offices in Kununurra and Broome, we regularly visit 14 other towns and communities across the region. We go where our clients are, and we actively involve our client communities in decisions about how we work. We work for whoever needs us, without discrimination or narrow eligibility requirements. Our practice is client-centric, holistic and embedded in the community and region in which we work. KCLS is dedicated to justice and a better life for current and future generations of all Kimberley people.

1.2. Structure of this Submission

This submission focusses on key areas of KCLS's work which are particularly relevant to factors affecting Aboriginal imprisonment rates in the Kimberley. We particularly draw on:

- Our practical experience in the Kimberley assisting Aboriginal clients
- Civil law issues associated with criminal matters including during imprisonment
- Our West Kimberley Regional Prison Outreach Program
- Case studies conveying the lived experiences of our remote-living Aboriginal clients

The submission has three parts. Part 1 is introductory, Part 2 addresses five topics in the ALRC Discussion Paper ('DP'), and Part 3 concludes our submission.

The key submissions in Part 1 relate to:

- Justice for Aboriginal people in the Kimberley and in Australia
- Rethinking assumptions to stop the Indigenous poverty to prison pipeline
- The importance of readily available criminal justice statistics
- How civil law can help reduce Indigenous incarceration

Part 2 addresses the following topics in the ALRC Discussion Paper (DP):

- DP Topic 5: Prison Programs, Parole and Unsupervised Release
- DP Topic 6: Fines and Driver Licences
- DP Topic 10: Aboriginal Justice Agreements
- DP Topic 11: Access to Justice
- DP Topic 12: Police Accountability

Part 3 includes a compiled list of the recommendations KCLS makes throughout this submission. We hope that the ALRC will adopt these recommendations in its final report.

1.3. Case Studies from the Kimberley

Case Study AA

Client AA is an elderly man who receives a Centrelink Disability Support Pension. He asked KCLS to assist him with his debts. KCLS made inquiries and discovered that Client A has a significant amount of rent arrears and tenant liability debts owed to both the Housing Authority and Community Housing, as well as a significant amount of unpaid fines. A large proportion of his Centrelink payments are deducted to pay off these debts. The Broome County Sheriff advised us that a warrant would be issued for Client AA's arrest if his repayments fell below a certain amount. KCLS advised Client A that it would take many years to pay off his debts.

Client A previously lived in Broome, but wished to move to another community several hundred kilometres away. He could not apply for a Housing Authority house in that community because he still owed large debts to the Housing Authority, and because the waiting list for housing with the Housing Authority in that community is seven to eight years long. As he is living on a Disability Support Pension and a significant amount is deducted, he is unable to afford market rental rates. As a consequence, Client AA is homeless.

In this situation, Client AA is seriously considering choosing to go to prison to work off his fines. It has become a choice between homelessness with no prospect of getting a house for many years, or spending time in prison where he would receive a bed and meals, and would work off his fines at a much faster rate than he otherwise could, at approximately $250/day. It is unacceptable that for vulnerable people such as Client AA, imprisonment is normalised and may appear preferable to his other severely limited options. The fact that he is attracted to the option of imprisonment strongly suggests that alternative options for clearing fines are required.

This submission draws strongly on case studies gathered from KCLS's client base. These examples provide an accessible illustration of the realities of life for many people in the Kimberley region.

A typical KCLS client:

- Is a long term Centrelink recipient
- Is a public, social or community housing tenant
- Has rent means-tested against income (and income of others living in the home)
- Has rent and various other expenses directly deducted from Centrelink via Centrepay
- Is in arrears, or at risk of falling into arrears, on bills for essential services, debts, etc
- Has no savings and no prospect of being able to save in future
- Has no or low prospects of employment
- Has chronic health conditions
- Experiences multiple sources of stress, including physical violence
- Has family and kinship obligations that require assistance is given when requested

KCLS considers it vital that the ALRC hears and considers these lived experiences, so that those most affected by the outcomes of this inquiry are kept at the forefront throughout the process.

1.4. Civil Law and Reducing Indigenous Incarceration Rates

KCLS provides assistance in civil law matters. Experience and research confirm that Indigenous people have multiple, complex, civil law needs,[1] which, for many KCLS clients, exist within a framework of inter-linking problems involving social, economic and structural disadvantage.

Civil and criminal law legal issues for Aboriginal people are often interrelated and this applies to all stages in the criminal law process from occurrence and charging to outcomes and penalties. It is our view that focusing on civil law may help create change.[2]

1. Because civil and criminal law issues are often deeply interrelated, improving access to civil law legal assistance for Indigenous people should be a critical strategy to reducing Indigenous incarceration rates.

[1] Group, Kalico Consulting for the WA Collaborative Services Planning, Legal Need in Western Australia a preliminary review of legal need and legal assistance services (2017); Allison, Fiona, Melanie Schwartz and Chris Cunneen, The civil and family law needs of Indigenous people in WA: A Report of the Indigenous Legal Needs Project (Cairns Institute, James Cook University, 2014); *James Cook University*;

[2] For example:; S; Comumarelos C, Macourt D, People J, et al. 'Legal Australia-Wide Survey' (2012) 7 *Law and Justice Foundation;* Schwartz M, Cunneen C, 'Civil and Family Law Needs of Indigenous People in NSW: The Priority Areas' (2009) 32(3) *UNSW Law Journal* 725.Allison F, Cunneen C, Schwartz M, submission No 105 to Productivity Commission, *Access to Justice Arrangements*, 19 November 2013; Allison F, Cunneen C, Schwartz M, 'Access to justice for Aboriginal People in the northern territory' (2014) 49(2) *Australian Journal of Social issues* 219;

1.5. Justice for Aboriginal People in the Kimberley and in Australia

Many Aboriginal people in the Kimberley have strong views about the reasons for extraordinarily high levels of contact with the criminal justice system, including youth and adult corrections. These reasons centre on the historical and ongoing treatment of Aboriginal people.

Bernadette Atuahene's description of property-induced invisibility coincides with the views of many Aboriginal people in the Kimberley about what has occurred:

> [T]he widespread or systematic confiscation or destruction of real property with no payment of just compensation executed such that dehumanization occurs; the act is perpetrated by the state or other prevailing power structure(s), and adversely affects powerless people or people made powerless by the act such that they are effectively left economically vulnerable and dependent on the state to satisfy their basic needs.[3]

For generations, the law of the state has been complicit in denying justice to Aboriginal people in the Kimberley. Law has not protected Aboriginal people from the state, dominant economic interests or majoritarianism.[4]

A common discourse heard by KCLS from Aboriginal people in the Kimberley is that the state and society are the root causes of disproportionate rates of Aboriginal incarceration and contact with the criminal justice system. Indigenous incarceration is seen as 'a white thing', in that it is produced by white injustices towards Aboriginal people.

Non-Indigenous society in Australia has taken many steps along various paths to reconciliation. Acceptance of responsibility for the appallingly disproportionate incarceration rates of Aboriginal people of the Kimberley, and of Indigenous peoples in other jurisdictions, is another important step in this process.

The decolonisation of criminal law and justice in the Kimberley, and in Australia, requires justice on the broadest scale for Indigenous peoples. The solutions are not the responsibility of criminal justice systems, but of Australian leaders and society.

1.6. Rethinking Assumptions to Stop the Indigenous Poverty-to-Prison Pipeline

One of the themes in this submission, and no doubt many others which the Commission will receive, is that the circumstances of many Aboriginal people creates enormous dilemmas for criminal law and justice. The case studies in our submission speak to these kinds of dilemmas in the Kimberley.

The marginalisation, poverty and Third World living conditions of many Aboriginal people in the Kimberley is a mismatch for a criminal justice system which largely assumes that offenders will have sufficient means, in terms of income, savings or property, to enable them to pay fines. Many

[3] Bernadette Atuahene, From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility, 60 SMU Law Review. 1419 (2007)

[4] Some additional references are outlined at Attachment 1

Aboriginal people in the Kimberley can't pay fines. The issue isn't a question of budgeting, it is a matter of poverty, illness and distress.

Regimes which financially penalise Aboriginal people who already have no realistic financial capacity, are unrealistic and bound to have unintended effects. For example, fines can easily result in penalty escalation including imprisonment, with adverse effects for the individual defendants and communities as well as being uneconomic for the taxpayer and unsuccessful in policy terms.

The ALRC is in an excellent position in this Inquiry to strongly focus on how the criminal justice system operates as part of a pipeline connecting Aboriginal people's poverty to prison.

2. Corrections policy should be informed by better empirical evidence on the causes and behavioural responses to corrections measures, including the possibility that penalties for a wide range of conduct have little or no deterrent value on some Aboriginal populations.

1.7. Criminal Justice Statistics

Comprehensive criminal justice statistics for regions, and for the state, are not available in accessible forms in Western Australia. Publicly available, current, high quality, well analysed and well explained statistics are an essential aspect in a serious approach to address Indigenous overrepresentation in the criminal justice system including patterns in relation to Indigenous incarceration. While statistics only tell part of any story, statistics are relevant to evidence based policy, public awareness, monitoring and evaluation.

If NSW and Victoria are used as a standard regarding public availability of criminal justice statistics - Western Australia is far behind. Compared to these States, criminal justice statistics in Western Australia are hard to locate, are less current, provide less detail and lack detail by region and locality,

There is no Western Australian equivalent to the NSW Bureau of Crime Statistics and Research[5] ('BOCSAR') which is a Bureau within the NSW Attorney-General's Department. There is also no Western Australian equivalent to Crime Statistics Victoria ('CSV') established *Crime Statistics Act 2014 (Vic), specifically tasked with '*the publication and release of crime statistics, research into crime trends, and the employment of a Chief Statistician for that purpose'.[6] BOSCAR and CSV include a specialist and extensive focus on crime statistics relating to domestic and family violence as well as the different kinds of personal protection restraining orders. WA statistics should, but do not, meet these standards.

Additionally:

- Court statistics published by the WA DOJ are not broken down by region or by location within regions[7]

[5] http://www.bocsar.nsw.gov.au/
[6] *Crime Statistics Act 2014 (Vic) ss.* https://www.crimestatistics.vic.gov.au/ and https://www.crimestatistics.vic.gov.au/family-violence-data-portal/family-violence-data-dashboard/magistrates-court
[7] Department of Justice statistics are currently at: http://www.correctiveservices.wa.gov.au/about-us/statistics-publications/default.aspx

- Some WA Police statistics are searchable publicly on the web by location (such as Kununurra). [8] However this is currently limited to six pre-nominated crime categories. Unlike statistics through BOSCAR, users can not select additional or detailed crime categories
- The WA Department of Corrections is publishing quarterly statistics regarding adult prisoners in custody, adult offenders managed in the community, young people in detention and young people managed in the community. With the exception of young people in detention, where the only facility in WA is the Banksia Hill Detention Centre, the quarterly reports do not contain statistics by facility or by region[9]

Until March 2016, the WA Department of Corrections published monthly Quick Reference Statistics which stated the total prison population by institution, by Aboriginality and non-Aboriginality.[10] This enabled monitoring of trends by location, including overcrowding - being a key human rights indicator. For example the total capacity of West Kimberley Regional Prison of 168 (March 2015, being the last update by the Department of Corrections) compared to a prison population of 203 in January 2016, 222 in February 2016 and 242 in March 2016. The statistics were discontinued when figures were rising and when the prison population was almost 45% above capacity.

Lack of publicly available, high quality corrections statistics can have compounding and cascading effects. This includes failing to bring into account, criminal and civil law legal needs of prisoners and detainees at the locations where they are held. This affects federal and state legal service program planning, resource allocations and hence service levels locally and regionally. Statistics are part of a complex regime which is minimising the legal needs of Aboriginal prisoners and detainees in the Kimberley and in Western Australia.

A lack of comprehensive, readily available statistics for WA regions, including the Kimberley, impairs:

- Monitoring, input and analysis in relation to criminal justice trends
- Human rights monitoring
- Early intervention in relation to problematic trends
- Constructive and effective public and community involvement in crime prevention
- Tailoring and enhancing systems and responses
- Service and program planning, monitoring, targeting and evaluation
- Activities to try to bring more resources into regions e.g. grant applications

3. National standards should be established to enhance public availability of comprehensive criminal justice statistics at national, state, regional and local levels.

4. WA should provide timely, accessible, comprehensive and detailed criminal justice statistics in relation to Aboriginal people, including useful geographic and demographic breakdowns.

[8] https://www.police.wa.gov.au/Crime/Crime-Statistics-Portal/Statistics
[9] http://www.correctiveservices.wa.gov.au/about-us/statistics-publications/statistics/default.aspx
[10] WA Department of Corrections, Adult Prisoners in Custody Quick Reference Statistics – 31 March 2016 (2016)

Part 2: Five Topics from the ALRC Discussion Paper

2.1. DP Topic 5: Prison Programs, Parole and Unsupervised Release

2.1.1. Prisons in the Kimberley

There are two prisons in the Kimberley namely the Broome Regional Prison and the West Kimberley Regional Prison near Derby. There is also one Work Camp, located at Wyndham in the East Kimberley, which is operated by the Broome Regional Prison. There is no youth detention facility in the Kimberley. The only youth detention facility in Western Australia is Banksia Hill Detention Centre in Canning Vale, near Perth. It is problematic that there are no local facilities for youth detainees allowing them to remain closer to their homes and families.

The following gives a brief description of Kimberley prison facilities.

Broome Regional Prison[11]

- Male and female
- Maximum, medium and minimum security levels
- Opened in 1945, the oldest prison in the state
- Total capacity 117 (at 21 October 2015)
- Located in central Broome
- High proportion of Aboriginal prisoners
- Offers education, vocational training, employment for prisoners including supervised community work

West Kimberley Regional Prison[12]

- Male and female
- Medium and minimum security levels
- Opened in 2012
- Total capacity 168 (at 21 October 2015)
- Located
- Operating philosophy which recognises family, community, kinship and cultural responsibilities and connection to country
- Described as a "state-of-the-art facility"
- Day program with "an emphasis on supporting prisoners to develop life, work and decision-making skills to build self-esteem and the abilities necessary for self-determination".

[11] Government of Western Australia Department of Justice, 17 October 2016, 'Broome Regional Prison', http://www.correctiveservices.wa.gov.au/prisons/prison-locations/broome.aspx
[12] Government of Western Australia Department of Justice, 17 October 2016, 'West Kimberley Regional Prison', http://www.correctiveservices.wa.gov.au/prisons/prison-locations/west-kimberley.aspx

Wyndham Work Camp (East Kimberley)[13]

- Male only[14]
- Minimum security level only
- Opened in 2011
- Total capacity 40 (at 21 October 2015)
- Located 6km from Wyndham
- Managed by Broome Regional Prison
- Prisoners undertake community work projects
- The Work Camp keeps "suitable East Kimberley prisoners closer to family and country, and provide[s] an alternative custodial option to traditional imprisonment"

Banksia Hill Detention Centre[15]

- Detention centre for young people aged 10-17 years
- The only youth detention centre in WA
- Male and female
- Opened in 1997
- Total capacity 120[16]
- Located at Canning Vale, Perth

2.1.2. KCLS West Kimberley Regional Prison Outreach Program

None of the non-profit legal services in the Kimberley, including KCLS, receive specific funding for civil law prison outreach programs.

In March 2017, the KCLS Broome Office began a regular outreach to the West Kimberley Regional Prison, located near Derby. This is in addition to KCLS's regular fortnightly outreach to Derby, which has been operating since April 2014.

Derby is 220 km from Broome. There are currently no legal services or private lawyers based in Derby, so access to lawyers depends on outreach services. The fortnightly KCLS outreach visits to Derby are done as a day trip, resulting in a round trip of about 450 km. This is due to there being insufficient resources to pay for overnight accommodation or backfill in the Broome office.

Under the West Kimberley Prison Outreach Program, KCLS aims to offer the same civil law outreach services at the prison that it offers to clients in the community. KCLS is the only legal service providing regular civil law outreach to the prison.

[13] Government of Western Australia Department of Justice, 17 October 2016, 'Wyndham Work Cam (East Kimberley)', http://www.correctiveservices.wa.gov.au/prisons/work-camps/wyndham.aspx
[14] Government of Western Australia Department of Justice, 24 May 2017, 'Prisons', http://www.correctiveservices.wa.gov.au/prisons/default.aspx
[15] Government of Western Australia Department of Justice, 21 July 2017, 'Banksia Hill Detention Centre', http://www.correctiveservices.wa.gov.au/youth-justice/youth-detention/banksia-hill.aspx
[16] Find & Connect, 5 September 2014, 'Banksia Hill Detention Centre (1997 -)', https://www.findandconnect.gov.au/ref/wa/biogs/WE01404b.htm

KCLS assists prisoners with a range of civil law issues, with key areas being tenancy, criminal injuries compensation, debt, family law, and care and protection. KCLS hopes to be able to expand the program to include presentations and legal education for prisoners.

Prisoners are referred to KCLS via three pathways, that is by:

- the Prison's Employment Coordinator;
- the NGO Men's Outreach service which makes regular visits to the prison to assist prisonders with non-legal issues; and
- the WA Aboriginal Legal Service, which refer many of their clients to KCLS to address the civil law issues they experience while in prison.

As KCLS does not receive specific funding for the West Kimberley Prison Outreach Program, there are substantial issues with capacity because one lawyer can only see approximately four or five clients each fortnight. Not every prisoner who requests an appointment can be seen, resulting in a triage process. The work back in the KCLS Office arising from the fortnightly visits is substantial.

It is clear that prisoners need culturally accessible, proactive, civil law assistance to enable them to attend to their affairs whilst they are in prison to avoid becoming overwhelmed when released. This also helps develop contacts and service relationships which can be part of a positive approach post release. Providing civil law assistance to prisoners with issues such as evisctions, debts and family issues may significantly reduce compounding factors that may lead to reoffending.

The KCLS program should be expanded and placed on a sustainable footing. To achieve this specific, adequate resources are needed. Accordingly KCLS makes the recommendation below:

5. Governments should guarantee culturally accessible civil law services to all prisoners (including those on remand) as a right.

The following case studies are drawn from KCLS's West Kimberley Regional Prison Outreach Program. They illustrate real issues faced by Aboriginal prisoners, and the assistance they can access through the Outreach Program.

Case Study A

Client A is an Aboriginal man who has been in prison on remand since June. His trial is taking place in September and based on advice from the ALS solicitor assisting him with his criminal matter, he expects a sentence of 6-18 months. He contacted KCLS soon after entering prison regarding a tenancy issue. KCLS received the client's permission to speak with the ALS regarding his expected sentence.

The client, his partner and their children live in public housing where Client A has been the sole tenant. As he is in prison, he has no income but under WA Housing Authority policy he is deemed to be receiving Centrelink. Consequently he has

been falling behind with his rent. If he receives a sentence of more than 6 months, he would be required to vacate the home.

KCLS informed Client A of his options. Either he could remain on the lease and accumulate a debt while he was unable to pay rent in prison, or he could apply to transfer the property solely into his partner's name, where he would become liable for the existing debt of approximately $700 (a 'vacating debt'), and would have no rights to the property upon release from prison. When Client A instructed that he wanted to transfer the property, KCLS ensured that he understood that his partner would have all rights to the property. He agreed and we are now assisting him to transfer the lease.

As Client A contacted KCLS promptly, KCLS was able to assist him before the matter escalated. The client used help from KCLS to help ensure that his family remains housed and he does not accumulate a large debt during his time in prison.

This case study demonstrates the interactions between the criminal and civil justice systems, and between an individual clients' civil and criminal issues. It also demonstrates the ways in which KCLS can successfully assist remandees and prisoners so that they have a more stable situation when they are released, helping them to re-establish themselves and hopefully reducing the factors that may contribute to stress and to reoffending.

Case Study B

Client B is an Aboriginal man who suffers from serious drug and alcohol problems. He has been in and out of prison for the past four years, and for most of his time in prison he has been on remand.

Client B lives in public housing administered by the WA Department of Communities (the Department). Each time he goes into prison, his empty house is broken into and damaged. The Department has tried to evict him for property damage on several occasions while he has been in prison.

This man did not receive any legal assistance until he met with a KCLS solicitor as part of the Prison Outreach Program in the first half of 2017. By this time his tenant liability was up to $20,000, and the success of any appeal was limited by the 12 month period within which to lodge an appeal having passed.

Client B is not always able to give proper instructions due to his substance abuse, which has hampered KCLS's ability to assist him,, however KCLS has managed to provide limited advice which has allowed Client B to retain his current tenancy. This included advice to refuse to sign a vacating form provided to him by the Department. KCLS has also made Client B more aware of his rights and responsibilities. However, KCLS was unable to assist him with his long term tenancy liabilities due to the limitation date for an appeal having passed. These may have been able to be appealed if the client had had access to civil law services from an earlier date.

Case Study C

Client C, has children who came to visit him at the West Kimberley Regional Prison. The Department of Child Protection (DCP) was involved in the care of the children. When the children arrived at the prison, they were told they could not see the client. Client C assumed that this was a decision of DCP or due to a Violence Restraining Order (VRO) that he had in place against his ex-partner. When KCLS looked into the matter, it discovered that it was neither DCP or the VRO but rather the prison's security policy which prevented the children from visiting (note also that there was no VRO in place rather a previous protective bail condition that the client had refused with a VRO). Client C has now applied to the prison to have his children visit him. His application is currently being processed in Perth, and is expected to take two to three months.

This issue has now been dealt with, pending the outcome of Client C's application. However, Client C has requested that KCLS keep his file open as he expects he may need assistance regarding DCP's plans for his children when he is released.

Client C does not understand the DCP's plan regarding his children during his time in prison, despite several visits from DCP staff to explain the situation. Client C has a tendency to agree with statements put to him by authorities. This may be due to cultural reasons, a lack of understanding of the issues and his rights, and/or English language comprehension.

This case study highlights the isolation and lack of communication that prisoners experience, as well as their need for advocacy and interpreters. Without KCLS, there is no one to facilitate communication between the client, prison staff, DCP, and other relevant organisations. This creates confusion and slows down progress on addressing prisoners' issues.

Case Study D

Client D is an Aboriginal man who was a prisoner at the Wyndham Work Camp. He wanted to establish contact with his children, so he could be involved in their lives on his release. His aim was to get his life back on track, and undertook prison programs to improve his chances of employment after he was released.

Client D had good legal prospects of success of re-establishing contact with his children, but low *understanding of the legal criteria and processes involved in his case. Legal assistance from KCLS helped him to proceed in an orderly and steady way, and to reduce the possibility of friction between himself and the children's mother, who were not on speaking terms. Such friction could, in a worst-case scenario, result in police involvement, criminal charges, breach of parole and risk of re-incarceration.*

Case Study E

In around 2011, KCLS began to have contact with Aboriginal people complaining that they had missed out on applying for the Redress WA Scheme. This Scheme

was open for 12 months until 30 April 2009, however many Aboriginal people in the Kimberley did not hear about the Scheme until about 2011 when some people began to receive payments. The Scheme made ex gratia payments to people who were abused or neglected as a child when in State care. Many Aboriginal people who received a payment were also members of the Stolen Generations.

The clients who approached KCLS wanted to put in a late application and instructed that they had not received notice of the Scheme while it was open because they were in prison at the time. Each of the clients was in poor health and had low literacy.

The WA Department of Communities, which administered the Scheme, refused to accept late applications. The Department stated that information was provided in prisons, and therefore prisoners should have known about the Scheme. The clients felt that this was grossly unfair. KCLS assisted clients to make written complaints and seek assistance through their local members of parliament. KCLS has continued to advocate for the WA Redress Scheme to be reopened generally so that these clients, and several hundred other Aboriginal people who also missed out because they did not hear about the Scheme in time, can apply.

This case study highlights that Aboriginal prisoners can be excluded in dramatic ways when they do not have ready and consistent access to civil law services in prison. It highlights that assumptions about how things should work often do not align with how things actually work, and that measures are required to bridge this gap. The absence of civil law services can impede inclusive and effective program implementation and potentially operate as a high risk factor for unintended negative effects, for example by compounding injustice, and promoting alienation, anger and hopelessness.

2.1.3. DP Proposal and Question 5-1: Prison Programs for Short Term Prisoners

DP Proposal 5-1

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

DP 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?

In relation to proposal 5-1 and question 5-1, it is vital that prisoners have access to civil law programs and support to meet their civil law needs while on remand or serving a prison sentence. The above case studies demonstrate the kinds of civil law issues that frequently arise for individuals in prison. Assistance with civil law matters is necessary to minimise the detrimental effects of

imprisonment, to improve prisoners' circumstances when they are released, and to assist people to stay out of prison.

Short-term periods of imprisonment, whether remand or short sentences, tend to have a disproportionately negative impact on the lives of inmates. A major factor is that prison programs are often unavailable, for example to remandees because their charges have not been proven, or because short-term prisoners are released before the program is completed.

The Council of Australian Governments' 2016 'Prison to Work Report' highlights several problems with current prison programs, as well as best practice principles.[17] The report states that "overall, the multiple ways a prisoner can exit corrections systems - directly from court, after a period of remand, as part of work or day release schemes, on parole or at the end of a sentence - can make effective pre and post-release planning difficult". The Report also noted that prisoners who are on remand are often ineligible for prison programs, or are released before the program is completed.

The difficulty planning ahead is apparent especially in case study A above, where the client was on remand and did not know whether he would be sentenced, making it difficult to make legal decisions.

The Report found that best practice includes programs which:

- 'Target multiple drivers of a person's offending as well as employment and education needs',
- 'Match the intensiveness of support to the level of complexity of each prisoner's needs',
- Begin in prison, but continue through prisoners' transition back into the community,
- Are culturally appropriate and delivered in a culturally competent manner,
- Acknowledge the important role of family and community in prisoners' rehabilitation,
- Are run by members of the community, helping to engender a sense of responsibility as well as addressing the underlying problems which lead to offending, and
- Utilise sport, music or IT as an avenue to re-integrate minor offenders back into society.[18]

KCLS further submits that best practice elements of programs that respond to Indigenous prisoners on remand or while serving a prison sentence, include civil law services with assistance continuing, if required, after the client is back in the community.

KCLS's Prison Outreach Program goes some way to addressing this issue by serving clients whilst they are in prison and continuing to provide assistance after the client is released. However, the Program is informal and does not receive specific funding. Civil law programs such as this require formalisation and funding, and should operate in all prisons so that all prisoners have access to this important service.

Other Relevant Prison Programs in the Kimberley

Men's Outreach Service is a not-for-profit organisation providing social support services to vulnerable men in Broome and the Kimberley Region. Men's Outreach Service also operates an outreach service to the West Kimberley Regional Prison, amongst a range of other programs. Many

[17] Council of Australian Governments, 2016, *Prison to Work Report*, <https://www.coag.gov.au/sites/default/files/reports/prison-to-work-report.pdf>
[18] Ibid

of KCLS' prison clients are referred to us through Men's Outreach Service. Programs such as this are important to ensure that prisoners have the support and access to services that they need to deal with their legal issues and improve their lives[19].

6. Civil law services for prisoners whilst in prison and continuing after release is a best practice element of programs that respond to Indigenous prisoners on remand or while serving a prison sentence.

2.1.4. DP Proposal and Question 5-2: Prison Programs for Female Prisoners

DP 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.

DP Question 5-2

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

Aboriginal female prisoners are a cohort in need of particular attention. Many prison programs are unavailable to women due to a lack of female prison staff, and others are not culturally or gender appropriate. Many Aboriginal women prisoners are victims as well as offenders, which is an important consideration in providing appropriate prison programs. Imprisonment of women, and especially of mothers who are the primary carers of children, can cause extraordinary amounts of disruption to family cohesion. Visiting hours for those who are the primary carers of children should be extended to allow for their caretaking responsibilities to be maintained. The following case study illustrates some of these issues.

Case Study F

Client F was serving a sentence as she was both a victim and perpetrator of domestic violence. She was pregnant at the time, and was sent to the Bandyup Women's Prison, located in Perth, which is the only prison facility in WA with a Mother and Baby Unit. Client F gave birth to her baby during her sentence. She gave birth in a Perth hospital, and then she and the baby were returned to Bandyup, where the baby was placed in the prison's nursery. The Department for

[19] http://www.broomechamber.com.au/directory/99631/mens-outreach-service-inc

Child Protection applied for an Until 18 Order for the child. KCLS assisted Client F with this matter.

KCLS was unsuccessful because Client F could not show that she could provide safety for the child after she was released from prison. Client F was transferred to Derby prison, and was referred to the Kununurra branch of Alcohol Anonymous for ongoing support with her substance abuse issues. This did not turn out to be an effective referral, but at the time there were limited options.

With respect to best practice elements for programs to address offending behaviour for female Aboriginal prisoners in WA, Chris Trotter and Catherine Flynn, in their literature review of this subject, found that: "…..women have specific needs which are often different to those of men. In particular the research refers to relationship and family issues including parenting, mental health, housing and drug use. There is also some evidence that addressing the specific needs of women may help to reduce their recidivism and improve their wellbeing".[20]

Trotter and Flynn identified the following as being particularly effective:[21]

- Work skills (showed a 30% decrease in recidivism rates in a community based setting)
- An arts based education and training program run in 2011 in WA with 30 indigenous women, post-conviction, had a high completion rate (80%) resulting in a 20 % decrease in recidivism which was better than prison based interventional programs
- Programs which address multiple issues (drug abuse, family violence)
- Family focused interventions regarding the quality of relationships with family members and children who are not in prison

KCLS submits, of particular importance are civil law services for Aboriginal female remandees and prisoners. This help can serve a multitude of purposes depending on the particular situation. For example: helping to manage issues in relation to the care and wellbeing of children, avoiding debt increases whilst in jail; retaining a tenancy; planning for safety upon release; and increasing connections with legal and other services to provide a range of support post-release.

2.2. DP Topic 6: Fines and Driver Licences

Due to the problematic fine default scheme in WA, the non-payment of fines and infringement notices forms a significant link in the chain which leads to the gross overrepresentation of Aboriginal people in prison. This scheme systematically disadvantages Aboriginal people due to the disproportionate impact which fines have on them. The Law and Justice Foundation of NSW highlighted the problematic paradox of fines, which is that 'people who are socially or economically

[20] Ibid, p. 3

[21] Chris Trotter and Catherine Flynn, Literature Review Best Practice with Women Prisoners, Monash University Criminal Justice Research Consortium, Department of Justice & Regulation - Corrections Victoria, 2016, http://assets.justice.vic.gov.au/corrections/resources/a80ff529-6074-40c4-8881-684bf4385dbf/literature_review_best_practice_with_women_offenders.pdf

disadvantaged are more vulnerable to attracting fines and less likely to have the means and capacity to pay them'[22]. This can often mean that fines accumulate, despite a person having no means to pay them off, forming a significant barrier to building a more stable life. In WA, the use of driver's licence suspensions and incarceration as enforcement schemes ensures that this cycle of fine default and disadvantage continues. KCLS views reform of the fine default scheme in WA as being imperative to reducing the overrepresentation of Aboriginal people in incarceration.

2.2.1. DP Proposal 6-1: Fine Default and Imprisonment

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.

Fine default can happen accidentally and without a person being aware of it, as shown by the following case study:

> *Case Study G*
>
> *Client G resides in an Aboriginal Community near Fitzroy Crossing. He receives his post c/- the Post Office as do many Aboriginal people who reside in communities in the Kimberley where there is no postal delivery to residences. Client G had fines in excess of $20,000 incurred over a long time. He had entered into a repayment agreement and set up Centrepay deductions from his Centrelink benefit. At the time the Centrepay deductions were set up Client G's Centrelink payments were subject to Income Management. Client G was subsequently taken off Income Management and was receiving a Disability Support Pension (DSP). At the time the transfer was made, all Client G's Centrepay deductions were cancelled. Client G does not believe he was ever notified of this and to the best of his knowledge he was still making regular payments towards his fines.*
>
> *Client G came to see KCLS to find out how much his fines were. KCLS made inquiries with the local Sheriff and was advised that, at the time of the inquiry, Client G's fines were approximately $17,000 and there was no current repayment agreement in place. The Sheriff also advised that given the quantum of the fines, unless a repayment agreement was implemented immediately, it was likely a warrant would be issued for Client G's arrest. Client G was understandably distressed at this information. KCLS assisted Client G to reinstate his Centrepay deductions which avoided the warrant being issued.*
>
> *The suspension of the repayments was a result of an administrative process internal to Centrelink that was not communicated to Client G, or not communicated appropriately having regard to his literacy and general comprehension of English language, or the issues related to receiving post by checking at the Post Office. Had Client F not contacted KCLS when he did, a warrant for his arrest would have been issued and Client F would have been incarcerated.*

[22] Law and Justice Foundation of Nsw South Wales, *Fine but not fair: Fines and disadvantage,* (February 2009) 1.

Imprisonment is authorised under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA), which provides that a warrant of commitment may be issued if an offender is not eligible for a work and development order (WDO), does not comply with a WDO or has a WDO cancelled in relation to them.[23] The registrar also has discretion to issue a warrant of commitment if he or she is satisfied that it would be the most successful method of enforcement.[24]

Between 2006 and 2015, 3,301 Aboriginal people were imprisoned solely for fine default.[25] KCLS submits that imprisonment is a grossly disproportionate punishment for fine default and wholly inconsistent with the principle of incarceration as a last resort, enshrined in sentencing legislation.[26] For our clients, fine default is not an intentional decision but rather the result of inability to pay due to financial hardship and other circumstances of disadvantage. This offence simply does not carry the requisite level of culpability to justify a term of imprisonment. Moreover, the large number of people that continue to be imprisoned each year for fine default demonstrates that imprisonment is not an effective deterrent.[27]

Imprisonment for fine default continues to penalise Aboriginal people for their disadvantaged position in society. Despite constituting 3.8% of the Western Australian population,[28] 44.2% of people imprisoned for defaulting on fines are Aboriginal.[29] In 2013, 16% of Aboriginal people in prison were there for fine default.[30] Considering the gross overrepresentation of Aboriginal people in Western Australia's prison system, this number is significant. Aboriginal women are the most vulnerable group to imprisonment for fine default,[31] constituting 64% of female fine defaulters.[32] In fact, 73% of women who are imprisoned for fine default are unemployed.[33] As such, it can be seen that imprisonment for fine default continues to penalise the most vulnerable and disadvantaged groups in society.

The continued imprisonment of fine defaulters is not only inequitable but also costly and burdensome on prisons. A warrant of commitment allows for a fine defaulter to 'cut out' their fines simultaneously at a rate of $250 per day.[34] Yet, even the cheapest cost per day to the government for imprisoning a fine defaulter is $305 per day at Hakea prison, where fine defaulters make up 48.9% of prison receptions.[35] In Broome Regional Prison, this cost is much higher at $1,450.13 on average per day.[36] The continuation of this policy is logically incoherent and draws public money away from more therapeutic measures.

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[23] *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53(1).
[24] Ibid s 55D(1).
[25] Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (April 2016) 12.
[26] *Sentencing Act 1995* (WA) ss 6(4), 86; *Young Offenders Act 1994* (WA) s 7(h).
[27] Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (April 2016) ii.
[28] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.
[29] Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (April 2016) 12 [table 3].
[30] Paul Papalia CSC, *Locking in Poverty,* WA Labor Discussion Paper (November 2014) 5.
[31] Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (April 2016) ii, iv.
[32] Ibid v.
[33] Ibid.
[34] Ibid.
[35] Ibid 10, 17.
[36] Ibid.

KCLS submits that provisions enabling imprisonment for fine default in WA should be removed. This measure is solely punitive and does nothing to improve or address a defaulter's inability to pay. Alternative enforcement measures that align with this principle are explored under proposal 6-2.

7. Governments should abolish all provisions in fine enforcement statutes that provide for imprisonment for fine default.

2.2.2. DP Question 6-1: Lower Level Penalties

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

No penalty or no-legal-consequence written cautions are preferable to penalties which risk serving no positive purpose but still carry the risk of penalty escalation in the event of default or a further relevant infringement.

Additionally, all arbitrary minimum penalties are problematic because while equitable in a formal sense they are not equitable in a substantive sense, given differences in the financial and other circumstances of different defendants.

In general terms penalty de-escalation is required. This includes:

- Removing or reducing mandatory minimums,
- Removing or reducing ways in which previous minor matters 'count'
- Using other suitable methods to avoid penalties being imposed and penalty escalation including day fines (referred to at DP 6-6) in suitable cases.

8. Mandatory minimum penalties should be replaced by contextual fine regimes, which would provide for reduced fines or alternative sanctions for those who are unlikely to be able to pay the fine.

9. Penalty de-escalation is needed to avoid relatively minor matters, such as fines, being escalated through fine default to more serious penalties, disproportionate to the original offence.

2.2.3. DP Question 6-2: Money Penalties and Infringement Notices

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

In the Kimberley monetary penalties under infringement notices are often unaffordable for Aboriginal people on low incomes for reasons previously outlined.

Alternatives, which do not involve incarceration, are needed to overcome this problem. A number of measures are discussed below.

2.2.4. DP Question 6-3: Infringement Notices per Transaction

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

Yes.

Infringement notices can be issued under 86 pieces of legislation in WA by various authorities.[37] Aboriginal people are susceptible to being issued with infringement notices due to a range of cultural and socio-economic factors, including their relative disadvantaged position in society.

Many of our clients have difficulty complying with civil and administrative processes due to English language and literacy comprehension skills (ie English may not be their first language) These issues can create a lack of confidence in navigating administrative processes, such as registering to vote, procuring photo identification or registering a car. Remoteness, costs and lack of access to technology can further hinder compliance with administrative processes. Failure to comply with these processes can often lead to an infringement notice being issued, which itself requires a variety of complex legal and administrative procedures to organise payment.

Most fine defaulters who are imprisoned have multiple fines.[38] One reason Aboriginal people are particularly susceptible to being issued with multiple infringement notices is that the parcel of infractions and offences, which give rise to the issuance of infringement notices, directly penalise those who, for cultural reasons, or due to disadvantage and homelessness, have to conduct their lives in public places.[39]

A second reason is the link between driver's licence suspension and fine default, which can lead to an accumulation of infringements arising off the back of one infringement.

KCLS clients face significant financial disadvantage and are simply unable to pay the significant penalties which result from these parcels of fines. In these circumstances, cutting fines out in prison is often seen as the best option. This increases and normalises contact with the criminal justice system and prisons.

2.2.5. DP Question 6-4: Offensive Language

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

KCLS supports the decriminalisation of offensive language. Under section 74A of the *Criminal Code Act Compilation Act 1913 (WA)*, it is a criminal offence to use 'insulting, offensive or threatening language' in a public place, in sight or view of a public place or in a police station or lock-up.[40] This offence is punishable by a court-imposed fine of up to $6,000 or a criminal infringement notice,

[37] *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) schedule 1.
[38] Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (April 2016) 19.
[39] Ibid 3.
[40] *Criminal Code Act Compilation Act 1913 (WA)* 74A.

requiring the payment of $500.[41] The persistence of offensive language as a criminal offence is archaic and absurd. Language that would once have been regarded as offensive is no longer perceived as taboo and certainly its use is not seen as capable of justifying a $500 to $6,000 fine.

For Aboriginal people, the homeless and other disadvantaged groups the imposition of such a fine is tantamount to a prison sentence in WA. Yet, these groups continue to be more vulnerable to incurring fines of this nature, due to fact that they often must conduct their affairs in public places.[42] Moreover, many Aboriginal people have a different cultural understanding of public places to other sections of the community, shaped by their historical exclusion from urban indoor spaces and the significance of certain places.[43] The increased visibility of Aboriginal people can lead to them being targeted by police.[44]

The targeting of Aboriginal people is aided by public order offences, which are used by police to regulate public spaces, by moving perceived 'anti-social' groups along.[45] Unfortunately, the racist stereotype of Aboriginal people as deviant continues to persist in communities,[46] with various reports citing public concern about Aboriginal peoples' presence in public spaces being dangerous or bad for business as reasons police need to move them along. Police themselves may also harbour these negative perceptions, as a result of the historical and persisting antagonism between Aboriginal people and police officers. As such, public order offences are often used as 'an oppressive mechanism of control'.[47]

Given this, it is problematic that what constitutes offensive language is not defined in the legislation and accordingly, in any given situation, police, who are often the sole witness and 'victim', have discretion to lay charges or not.[4849] This further demonstrates the structural issues which attend to this offence, as it often is not enforced to protect the community at large, but rather the sensibilities of an arresting officer. It is worth noting that offensive language infringements are so often imposed in conjunction with infringements for resisting arrest and assaulting a police officer that it has colloquially become known as the 'trifecta'. This charging pattern indicates that issuing an infringement for offensive language often escalates matters and results in serious penalties that are disproportionate to the 'offending' act.[50]

Due to the disproportionate impact of Offensive Language infringements on Aboriginal people, KCLS supports the decriminalisation of this offence.

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[41] Ibid; *Criminal Code Act Compilation Regulations 1913* (WA) schedule 1. .
[42] Law and Justice Foundation, 'Fine but not fair: Fines and disadvantage' (Justice Issues, paper 3, November 2008) 3.
[43] Rob White, 'Indigenous Young Australians, Criminal Justice and Offensive Language' (2002) 5(1) *Journal of Youth Studies* 21, 25.
[44] Ibid.
[45] Ibid 28.
[46] Ibid 25.
[47] New South Wales, Victoria and Tasmania, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) 145.
[48] Christine Feerick, 'Policing Indigenous Australians: Arrest as a method of oppression' (2004) 29(4) *Alternative Law Journal* 188, 190.
[49] Elyse Methven, 'Dirty words? Challenging the assumptions that underpin offensive language crimes' (Paper presented at The Australian and New Zealand Critical Criminology Conference 2012, University of Tasmania, 12-13 July 2012) 98.
[50] Christine Feerick, 'Policing Indigenous Australians: Arrest as a method of oppression' (2004) 29(4) *Alternative Law Journal* 188, 191.

2.2.6. DP Question 6-5: Offensive Language Provisions

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

As noted above, infringement notices can be issued under the Criminal Code in WA. Under the 2011 amendment, which took effect in 2015, offenders pay a penalty, which is significantly less than the maximum fine able to be issued by the court and the offence does not appear on the person's criminal record. Whilst this saves time for police and courts and presents a beneficial reduction in sentence and stress for solvent offenders, if a person is unable to pay the $500 fine then they have two options: default on the fine and potentially end up in prison, or go to court.

For this reason, criminal infringement notices do not function as a genuine diversionary measure for Aboriginal people. Aboriginal people face significant systemic barriers in engaging with the legal system. From a purely economic standpoint, going to court is prohibitively expensive for Aboriginal people. This is especially so considering that to challenge a criminal infringement notice in court is to risk incurring further penalties. These costs and risks prohibit disadvantaged people from challenging criminal infringement notices.

Accordingly, KCLS is extremely concerned that criminal infringement notices will be used as a way to more harshly penalise Aboriginal people, without court oversight. The availability of criminal infringement notices, especially for public order offences, has the potential to encourage the doling out of penalties that would previously have been dealt with informally. In NSW, in spite of the availability of criminal infringement notices for a wider variety of offences, 83% of criminal infringement notices issued to Aboriginal people were for public order offences.[51] Of the offensive language that was penalised, 70% of it was directed at police and in 19% of cases the police were the sole witness.[52] As discussed above, this is a category of offences in which Aboriginal people are over-represented and targeted. As such, KCLS is concerned that the availability of criminal infringement notices will increase the susceptibility of disadvantaged Aboriginal people to fine default and incarceration.

KCLS is encouraged that the WA Ombudsman is undertaking a review of this system and that its effects will be able to be empirically assessed.

2.2.7. DP Question 6-6: Alternative Penalties to Court Fines

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 (WDOs).

Given the unequal impact that fines have on different people, depending on their socioeconomic status, it is desirable for the courts to have options at their disposal so as to not impose a sentence which is likely to lead to imprisonment. Though the *Sentencing Act 1995* (WA) requires the court to

[51] NSW Ombudsman, *Review of the impact of Criminal Infringement Notices on Aboriginal communities* (August 2009) iv.
[52] Ibid 57.

consider whether a defendant can pay a fine,[53] minimum penalty requirements and incomplete information often mean that this assessment cannot be accurately made in practice.[54] Ideally, magistrates should be provided with information about outstanding and unpaid fines in order to be able to make an assessment about how realistic payment is.[55]

Presently, the court in WA has several alternatives to fines at its disposal, including suspended fines and WDOs.

The court is able to make an order under section 57A of the *Sentencing Act 1995* (WA) that allows a fine to be enforced through a WDO.[56] The court has recourse to this option only once a number of fairly stringent criteria are satisfied. The availability of this option is, therefore, considerably diminished. Of particular concern is the requirement that a WDO is not available unless the offender does not have a vehicle license, and the court is satisfied that the issue of a license suspension order would be unlikely to result in the fine being paid within a reasonable time.[57] KCLS supports the streamlining of criteria to ensure that the only hurdle is inability to pay the fine within 28 days. This will ensure that the court can have recourse to this option even if a time to pay order could enable an offender to pay the fine over a significant period, or if an offender has some personal property which could be seized - these enforcement options enable fines to have a significant impact on the lives of disadvantaged people due to their inability to pay. WDOs are a more equitable option. For the availability of programs under WA's WDO scheme please see discussion under Proposal 6.2.

Suspended fines were only introduced to WA in the *Sentencing Legislation Amendment Act 2016*, which came into force on 1 July 2017. Under this scheme, a court may suspend a fine for a period of up to 24 months and a person will not have to pay the fine if they do not commit an offence within that period.[58]

KCLS supports the fact that if an offence is committed in the suspension period, a more serious sentence is not imposed. Courts are instead encouraged to impose the fine which was suspended if an offence is committed, unless it 'would be unjust to do so in view of all the circumstances that have arisen, or have become known, since the suspended fine was imposed'.[59] If this is the case, then the court may order that only part of the fine be paid or order another suspension period.[60]

This means that suspended fines present a genuine opportunity for impecunious defendants to not have to pay a fine which would only serve to further compound the financial challenges posed by disadvantaged people. Moreover, the Act expressly prohibits the inflation of suspended fines to a larger amount than would be appropriate as a non-suspended fine.[61] This prevents a punitive approach being taken by magistrates.

KCLS is interested to see how often suspended fines are used in practice, especially considering the lack of discretion in the legislation. According to the amended legislation, a fine may be suspended

[53] *Sentencing Act 1995* (WA) s 53.
[54] Mary Spiers Williams and Robyn Gilbert, 'Reducing the unintended impacts of fines' (Current Initiatives Paper 2, Indigenous Justice Clearinghouse, January 2011) 1.
[55] Ibid.
[56] *Sentencing Act 1995* (WA) s 57A.
[57] Ibid s 57A(b)(ii), (c), (d).
[58] *Sentencing Legislation Amendment Act 2016* (WA) ss 60A, 60B.
[59] Ibid s 60E.
[60] Ibid.
[61] Ibid s 60A(2).

in any circumstance where a court is imposing a fine.[62] In our opinion, it would be preferable if courts were directed to consider suspended fines where a defendant is a welfare recipient or otherwise unable to pay the fine. This would enable a more uniform approach to be taken in the imposition of this sentence.

10. Courts should be required to consider suspending a fine where a defendant is a welfare recipient or otherwise unable to pay the fine.

Day Fines

KCLS supports measures such as day fines, which allow for the amount imposed by the fine to be altered according to income levels. 'Day fines' are currently used in multiple European jurisdictions.[63] In this system, an offence is determined to carry a certain amount of penalty units, based on its seriousness, and the value of each penalty unit is adjusted according to the wealth of the offender.[64] This system thereby ensures that offenders are impacted equally by fines.[65] The ALRC has raised the difficulties inherent in such an approach, especially with regard to deeming appropriate fine amounts and properly assessing a person's assets and income and thus their ability to, and the fairness of requiring them, to pay a certain fine.

KCLS believes the scheme could be simplified so that a standard discount rate was available to low income earners or welfare recipients. Criteria for qualification under this scheme could mirror the simplicity of qualifying for a WDO in NSW. This is discussed further below.

2.2.8. DP Proposal 6-2: Work & Development Orders

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.

In WA, despite the existence of a WDO scheme, there is a perverse incentive for fine defaulters to choose to be imprisoned rather than complete one of these orders. In prison, fines can be cut out concurrently at a rate of $250 a day, meaning that a person must only spend the length of time it would take to work off their largest fine in prison.[66] Since these changes were introduced, the average length of stay has reduced from around 40 days to 4.5 days.[67] In contrast, WDOs allow for a

[62] Ibid s 60A(1).
[63] Benedict Bartl, 'The 'day fine'- improving equality before the law in Australian sentencing' (2012) 16 *University of Western Sydney Law Review* 48, 49.
[64] Ibid.
[65] Ibid.
[66] Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (April 2016) iii.
[67] Ibid iv.

person to work off the sum of all their fines at a rate of $300 a day. [68] This will take much longer and is likely to be perceived as much more disruptive to a person's life than a short prison stay.

While there are a variety of enforcement actions available under the fine recoupment scheme in WA, for financially disadvantaged Aboriginal people living in remote communities, many of these options are unavailable, leaving imprisonment and licence suspension as the remaining options.

KCLS has significant concerns about the availability of the WDO scheme in WA. As with vital services, residents of remote communities are significantly disadvantaged by their distance from major centres. While the eligibility requirements for a WDO are minimal in WA – the Registrar may only decide to issue a WDO at the time of issuing an enforcement warrant. As per section 47B of the *Fines, Penalties and Infringement Notices Act 1994* (WA), a WDO requires the offender to report to a community corrections centre within 7 days after the service of the order. [69] The ability of a person in a remote community to travel to a Corrections Centre within 7 days is extremely different than for a person living in the city. Even if it were possible to report to Corrections within this time, Aboriginal people are unlikely to be able to comply with an order due to the limited activities available in regional corrections centres. 45% of Aboriginal people live in regional areas and 24% in remote areas.[70] The difficulties associated with reporting within a short time frame and the lack of available programs in remote communities themselves, serves to prevent many Aboriginal people from carrying out a WDO.

Moreover, in WA a WDO must be personally served or electronically served on a person.[71] If this cannot be done, an alternative such as licence suspension will be enforced..[72] This requirement needs to be rethought, as in practice, it is likely to preclude people without a fixed address, or in remote locations, where internet and telephone services are unreliable, limited or non-existent, from carrying out a WDO.

KCLS believes there is a need for reform of the WDO system in WA. NSW provides a promising model.

The first major advantage of the NSW model is that it ties a person's reason for defaulting on their fine to the availability of a WDO and a WDO is tailored to address these problems. In NSW, there are several grounds for receiving a WDO. A person automatically qualifies as experiencing acute economic hardship if they are receiving a Centrelink benefit.[73] Other qualifying criteria include serious substance addiction, homelessness, mental illness and intellectual disability or cognitive impairment.[74] Verification of these grounds is not onerous and they evidence a genuine attempt to address factors that contribute to someone's inability to pay fines in the first place, rather than functioning as a reaction to the commencement of enforcement action.

For KCLS clients, automatic qualification under the financial hardship requirement due to receiving a Centrelink benefit would be meaningful. It would enable clients who have very little income due to

[68] Ibid iii.
[69] *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 47, 48(2).
[70] Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>.
[71] *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 47(3).
[72] Ibid s 48A(2).
[73] *Work and Development Order Guidelines 2017,* 10.
[74] *Fines Act 1996* (NSW) S 99b(1)(b).

unemployment, caring responsibilities, disability or age to meet their daily living expenses, while simultaneously working off their fines. This would enable people to more quickly work-off their fines, rather than paying small instalments over an extended period and diverting the little money they have away from basic essentials.

Theoretically, the same range of activities is available in WA and NSW. In WA, a WDO must be in relation to a 'community corrections activity'.[75] As in NSW this can include a variety of volunteer work and education or rehabilitation programs. Yet, the major difference between the schemes is that Community Corrections supervises WDOs in WA, while in NSW approved organisations sponsor and work with clients who are subject to these orders.[76] The NSW sponsorship scheme is very effective as it facilitates an individualised, case-management approach for individuals.[77] In the NSW scheme, 78% of sponsors signed up so that they could meet the needs of clients they were already working with.[78] Sponsors often provide services to the client themselves, or alternatively organise a third- party service provider.[79] The case-management model of the NSW scheme is preferable to the punitive model of the WA scheme.

11. The recommendations made by ALSWA in its Addressing fine default by vulnerable and disadvantaged persons: briefing paper August 2016, p. 24 should be adopted.[80]

2.2.9. DP Question 6-7: Licence Suspension

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

In the 2015-16 financial year, 367,086 driver's license suspensions were imposed by the Fines Enforcement Registry in WA.[81] Section 19 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) provides that a licence suspension order may be made if a fine is still unpaid 28 days after a notice of intention to enforce has been issued,[82] whether the unpaid fine related to a driving offence or not. A licence suspension order has the effect of disqualifying someone from holding or obtaining a driver's licence, a vehicle licence or a vehicle licence with respect to a specified vehicle.[83] In WA, the legislative scheme allows licence suspension to be taken before an enforcement warrant is taken out against the defendant.[84] The statutory favouring of this enforcement action is inappropriate for Aboriginal people.

[75] *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 50(1)(a).
[76] Inca Consulting, 'Evaluation of the Work and Development Order Scheme: Qualitative Component' (Report prepared for the NSW Department of Justice, May 2015) 24.
[77] Ibid 2.
[78] Ibid 24.
[79] Ibid 4.
[80] http://www.als.org.au/wp-content/uploads/2015/08/Briefing-Paper-August-2016-signed-1.pdf
[81] Department of the Attorney General, 'Report on Fines Enforcement in the Sheriff's Office of Western Australia 2011/12 to 2015/16', 5 <http://www.department.dotag.wa.gov.au/_files/Fines_Enforcement_Registry_Report_201011_to_201415.pdf>.
[82] *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 19.
[83] Ibid s 19(3).
[84] Ibid s 19(1).

Licence suspensions have a significant impact on our clients at KCLS. For Aboriginal people, a majority of whom live in rural and remote locations,[85] alternative modes of transport are not available and driving is often the only way to get to work or access health and financial services or reasonably priced shops.[86] Licence suspension can also make it more difficult or impossible for someone to pay their fines as it may remove a person's ability to get to their job or find work. The suspension of a vehicle's licence can impact not only the person under whose name it is registered but also other people reliant on that vehicle and at times the whole community.[87]

KCLS believes that licence suspension leads to decreased wellbeing, as it can cause social isolation, particularly for the elderly or disabled. It can also prevent Aboriginal people from performing their cultural obligations, which can often require driving long distances.[88]

For these reasons, Aboriginal people in remote communities will often drive out of necessity, in spite of a licence suspension. This can lead to further penalties being issued. In fact, for 54.1% of people incarcerated in WA for fine default, their most serious and largest fine was for drink driving or driving without a licence.[89] The use of licence suspension as an enforcement measure for fine default can clearly be seen as contributing to the cycle of fine default, incarceration and poverty.

KCLS regards driver's licence suspension as an inappropriate enforcement action against Aboriginal people, especially those living in remote areas. As an administrative penalty, licence suspension is thought to be a simple and cheap measure which will encourage fine defaulters to pay.[90] For those who are unable to pay their fines, however, licence suspension is an illogical enforcement measure, as it has no deterrent effect and does not address the fine defaulter's inability to pay.

KCLS supports the general removal of driver licence suspension as an enforcement action for fine default, particularly in cases where the original fine was not issued in relation to a driving offence. Given the potentially devastating effects of licence suspension on Aboriginal people, the imposition of driver's licence suspensions on fine defaulters who did not receive their original fine for driving infractions is not only disproportionate but unethical. For fine defaulters who have no means to pay their fine, licence suspensions constitute a 'double penalty', which often exacerbates the causes of non-payment and leads to an escalation in fines.[91]

2.2.10. DP Question 6-8: Non-Suspension of Driver Licences

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

[85] Australian Bureau of Statistics, 'Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006' (15 August 2007) <http://www.abs.gov.au/AusstAts/abs@.nsf/lookup/4705.0main+features12006?>.
[86] Law and Justice Foundation of Nsw South Wales, *Fine but not fair: Fines and disadvantage,* (February 2009) 7.
[87] Mary Spiers Williams and Robyn Gilbert, 'Reducing the unintended impacts of fines' (Current Initiatives Paper 2, Indigenous Justice Clearinghouse, January 2011) 4.
[88] Thalia Anthony and Harry Blagg, 'Addressing the 'crime problem' of the Northern Territory Intervention: alternate paths to regulating minor driving offences in remote Indigenous communities' (Report to the Criminology Research Advisory Council, June 2012) 47.
[89] Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (April 2016) 16[table 5] .
[90] Law and Justice Foundation of NSW South Wales, *Fine but not fair: Fines and disadvantage,* (February 2009) 142.
[91] NSW Sentencing Council, 'The effectiveness of fines as a sentencing option: court-imposed fines and penalty notices' (Interim Report, October 2006) xiii.

(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?

KCLS believes the major failing of the WA scheme is its inflexible application of licence suspensions to fine defaulters, as the first enforcement action, regardless of circumstance. Accordingly, KCLS favours the conferral of discretion on a decision-maker to bypass the licence suspension and undertake other enforcement action.

The NSW scheme, allows the Commissioner to take 'civil enforcement action' (action other than licence suspension) if a licence suspension is 'unlikely to be successful in satisfying the fine' or 'would have an excessively detrimental impact on the fine defaulter'.[92] As it was only implemented this year, it is yet to be seen whether this will have a meaningful impact on fine enforcement.

Due to the specific circumstances of WA, and particularly our clients, KCLS would prefer to see more guided discretion provided for in legislation, which directs the decision-maker to automatically bypass licence suspension in some circumstances. In accordance with the discussion above, KCLS supports a presumption that a driver's licence suspension is unsuitable if:

a) the original fine did not arise out of a driving offence; or
b) the person, who defaulted on their fine, is:
    i) Aboriginal or Torres Strait Islander; or
    ii) Lives in a regional or remote area; or
    iii) Is unable to pay the original fine; or
    iv) Can otherwise demonstrate that they are reliant on their driver's licence

KCLS submits that a presumption against licence suspension is highly appropriate, considering the rationale behind using licence suspension to punish fine default is that it will act as a deterrent and encourage repayment, and this is not the case for impecunious defaulters.

2.2.11. DP Question 6-9: Regional Driver Permit Schemes

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

KCLS supports increased funding of driver training and regional service provision over the establishment of a regional driver's licence scheme. While such a system would address the vastly different driving practices required in regional and urban areas, it would also serve to create a more confusing and elaborate process of licensing than already exists. This may provide greater barriers to Aboriginal people getting a licence. Further consideration needs to be given to how costs barriers can be lessened.

2.2.12. DP Question 6-10: Regional Permit and Licence Programs

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

[92] *Fines Act 1996 (NSW)* s 71.

There are significant barriers preventing Aboriginal people, especially those living in rural and remote communities, from obtaining driver's licences. Obtaining a driver's licence is a costly, bureaucratic process, which requires confidence and English language abilities to handle the variety of forms involved. For Aboriginal people this process can cause anxiety and shame, due to historical distrust of state authorities.[93] Additionally, as the process of acquiring proof of identification is riddled with many of the same bureaucratic roadblocks as procuring a driver's licence, many Aboriginal people do not have sufficient identification.[94]

For Aboriginal people, who often have low literacy levels and for whom English may not be their first language, the driver knowledge test to become a learner driver may be prohibitive.[95] Moreover, in remote communities the test, which is designed for city driving, lacks relevance.[96] The relevance of getting a licence is even further diminished by the fact that it is common practice in many remote communities to drive without a licence. This perceived irrelevance may form an ideological barrier to acquiring a driver's licence. According to Alice Barter:

> The relevance of a driver's licence is different for the Pilbara Indigenous community compared with the mainstream community. There is a sense that you do not need a licence to drive in the bush; not having a driver's licence is the norm and is intergenerational. There is also a lack of understanding as to the purpose of a licence and a lack of respect for 'whitefella' law.[97]

In some communities and regional areas driving without a licence is inconsistently enforced, depending on whether a police officer regards bush tracks as public roads.[98]In addition, many communities have private roads where a license is not required. This contributes to overall confusion about licence laws and how they operate.

In addition to these barriers, in remote communities there is an undeniable issue with service provision. 'Centralised' government processes disadvantage remote communities, which suffer from the tyranny of distance.[99]

Currently, remote access to driver's licensing services is facilitated by the Department of Transport through its Remote Areas Licensing Program, which provides services in the Kimberley, Pilbara, Mid-West and Goldfields regions.[100] This program travels to remote communities and provides theory tests, practical assessments, licence renewals, vehicle licence transfers and WA photo cards.[101] It is positive that the tests administered can be simplified in this program and in some cases are delivered verbally,[102] which is of assistance to those with limited written or English comprehension

[93] Alice Barter, 'Indigenous driving issues in the Pilbara region' (2015) *Proof of Birth* 62, 65.
[94] Patricia Cullen et al. 'Challenges to driver licensing participation for Aboriginal people in Australia: a systematic review of the literature' (2016) 15(134) *International Journal for Equity in Health* 1, 6.
[95] Ibid.
[96] Ibid 6.
[97] Alice Barter, 'Indigenous driving issues in the Pilbara region' (2015) *Proof of Birth* 62, 66.
[98] Ibid 68.
[99] Ibid 65.
[100] Department of Transport, *Remotes Areas Licensing Program* (17 August 2017) <http://www.transport.wa.gov.au/aboutus/remote-areas-licensing-program.asp>.
[101] Ibid.
[102] Ibid.

skills. In 2015-16, the Regional Areas Licensing Program re-issued, transferred or renewed 621 licences and conducted around 700 licensing tests.[103]

As a general principle KCLS views the employment of Aboriginal people by Regional Areas Licensing Program as essential to providing culturally appropriate services.

Another initiative which increases access to licensing services is the Open Justice Days run by the Department of the Attorney General, as part of its Aboriginal Justice Program. Representatives from various government services, including the Department of Transport, Centrelink and Registry of Births, Deaths and Marriages among others, visit remote communities.[104] The programs are extremely valuable as they bring services to remote communities, recognising that it is the Government's duty to service all areas of the state, rather than placing the onus on residents to travel long distances. KCLS strongly supports this program, however notes that funding for this program is still insufficient to ensure regular and consistent delivery.

Additionally, more funding should be provided to Aboriginal corporations and community organisations to provide driver training programs. Existing program have been quite successful. For example, the Red Dirt Driving Academy set up by the Ngarliyarndu Bindirri Aboriginal Corporation (NBAC) in 2011 has assisted 421 people to get learner's permits and 159 to get driver's licences.[105] While this program is fully funded by the NBAC, its success has been so great that prospective participants have long waiting times,[106] as do other existing programs in remote areas of WA.[107]

The Department of Transports' partnerships with third party driver training programs are essential to facilitating better education and access to driver training services for Aboriginal people. These partnerships should, wherever possible, be with local Aboriginal organisations, or involve education and capacity building to enable these programs to be community-run. This would allow for programs to be more culturally appropriate. Increased funding and access to driving programs will assist to break the cycle of unemployment and disadvantage in remote communities.

In addition, these programs could be used as WDO activities, thereby assisting to break the cycle of fine default, licence suspension and incarceration.

12. Funding should be provided to expand the Remote Area Licensing Program and create more partnerships between remote communities and third party driver training programs.
13. Funding should be provided to increase the frequency of Open Justice Day initiatives.
14. Programs should be established to enable Aboriginal communities and community-run organisations to provide driver training programs.
15. Driver training organisations should be included in the WDO scheme.

[103] Department of Transport, *Annual Report 2015-16,* 159 <http://www.transport.wa.gov.au/mediaFiles/about-us/AR_P_Annual_Report_2015_16_excl_financials_updated.pdf>
[104] Department of Justice, *Aboriginal Justice Program* (15 August 2017) <http://www.department.dotag.wa.gov.au/A/aboriginal_justice_program.aspx?uid=8425-1678-2541-0773>.
[105] Ngarliyarndu Bindirri Aboriginal Corporation, *Driving On* (August 2015) <http://www.oric.gov.au/publications/spotlight/driving>.
[106] Alice Barter, 'Indigenous driving issues in the Pilbara region' (2015) *Proof of Birth* 62, 68.
[107] Ibid.

2.2.13. Simplifying Penalties and Extraordinary Driver's Licences

Many KCLS clients with a licence disqualification, have multiple disqualifications and many do not know or correctly understand the details or effect.

A person who is disqualified may have received a conviction resulting in licence disqualification. Alternatively they may have multiple, separate convictions each with a licence disqualification.

The legal framework relating to licence disqualifications is hard to interpret and difficult to explain to clients. Both the provisions and penalty structures should be simplified to facilitate compliance.

Case Study H

Client H has a history of driving offences. He was disqualified from driving for nine months after driving without a licence. When his disqualification period was coming to an end, the client asked court staff when he would be able to drive. The court staff informed him that his period of disqualification had finished. On the basis of this information, Client H drove his car.

Client H was stopped by police, who told him he had one day left of his disqualification. The Magistrate who heard the matter did not want to issue the client with another nine-month disqualification, but had no other options under the relevant legislation.

KCLS assisted Client H to get an Extraordinary Driver's Licence during the second period of disqualification, so that he could look after his partner who suffered from poor health.

Client H had also accumulated 14 demerit points, but had not been served with an Excessive Demerit Point Notice, so was still able to drive. It is likely that he was not served because he lives in a remote Aboriginal community. Once served with this notice, he could face another three months disqualification after his second nine-month disqualification is complete. Further offences could result in imprisonment (s 49(1)(c) Road Traffic Act 1974 (WA)).

Client H does not speak or read English well. His licence situation is very complex, and he does not understand it. Client H would benefit from a simplification of the driving licence and penalty system so that he is able to understand and comply with road rules and court orders, and avoid fines, disqualification and potential imprisonment.

<u>Overcoming Disproportionate Effects of EDLs on Social Exclusion</u>

In WA, an extraordinary driver's licence (EDL) is a conditional licence to drive ordered by a court under the Road Traffic (Authorisation to Drive) Act 2008. Subject to the criteria set out in section 30 of the Act, the Court can grant an EDL for a person to drive in a limited way, whilst still disqualified.

The current criteria can have very harsh effects on Aboriginal people in the Kimberley, making it impossible for them to maintain relationships, and leading to isolation, depression, loss of a sense of self-worth and identity. The current provisions respond to the need to drive to maintain

employment and for urgent medical reasons but not to cultural and other social and familial responsibilities.

KCLS submits that the legislation should be amended to expand the criteria considered by the court to include consideration of:

- The personal circumstances of the applicant;
- The personal circumstances of any family member of the applicant (relevant to section 4 which deals with health, financial burden and employment); and
- Whether refusal to grant and EDL would place the applicant or a person who is a member of the applicant's family into a situation of undue isolation, social exclusion or otherwise unduly impinge upon the psychological, social, emotional or cultural wellbeing of the applicant or the family member

2.3. DP Topic 10: Aboriginal Justice Agreements

2.3.1. DP Proposal 10-1: Renewing the WA Aboriginal Justice Agreements

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.

There is a notable absence of coordination between services in WA aimed at improving justice outcomes for Aboriginal people.

WA's 2004 Aboriginal Justice Agreement ('AJA') was a partnership between justice-related State Government Agencies and the Aboriginal and Torres Strait Islander Commission. It represented a sustained commitment from the government to work in partnership with Aboriginal people and communities, to achieve dedicated justice outcomes that included reducing the over-representation of Aboriginal people in the criminal justice system.[108] The WA AJA expired in 2009.

KCLS submits that the WA Government should work with Aboriginal people to establish a new and ongoing state-wide AJA. An AJA in WA should incorporate civil and criminal law and civil justice objectives and targets, to address the intersecting ways in which criminal and civil justice issues affect Aboriginal people.

Without an AJA, efforts to minimise the overrepresentation of Aboriginal people in WA's criminal justice system will continue to be diminished by the lack of coordination between WA justice programs. An independent evaluation of Victoria's AJA by Nous Group found that, although the over-representation of Koori people in the criminal justice system increased, the projected increase would have been much greater had the AJA not been implemented.[109] More importantly, it was found that the AJA provided a forum by way of which Aboriginal people could participate in and lead the design, delivery and evaluation of justice programs. Such consultation has resulted in more meaningful and enduring partnerships between the Victorian government and Koori communities. Further, services and programs emerging from these partnerships are more responsive to the needs

[108] https://web.archive.org/web/20060824053746/http://www.correctiveservices.wa.gov.au/_files/Aboriginal_Justice_Agreement.pdf
[109] Ibid, 5.

of the communities.[110] The Nous evaluation presents a strong case for the renewal and development of similar frameworks within WA.

Developing a WA AJA

To maximise impact and effectiveness, efforts to renew or develop AJAs must:

- Be accountable;
- Practice subsidiarity; and
- Civil justice, targets and outcomes

Accountability – governance and organisational structure

It is critical that AJAs are led by an independent, community-based, Indigenous representative advisory body.[111] An independent, dedicated and adequately funded leadership body has the capacity to act as a conduit between government and communities, whilst ensuring that that the agreement is kept on the political agenda – putting political pressure on relevant stakeholders, monitoring government responses and holding participating agencies accountable.

This structure would allow for more streamlined and coordinated strategic planning, and provide a mechanism for effective program oversight. Given the large number of stakeholders involved in a state-wide justice agreement, this oversight role is essential.

Subsidiarity

It is imperative for governments to work closely with smaller, independent and on-the-ground advisory units, as:

- This allows for responsive decision making and ensures that partnerships remain culturally responsive and relevant;[112]
- It encourages community engagement and participation;
- It facilitates a bottom-up, rather than top down decision making process which supports self-determination for Aboriginal people; and
- Regional and local governance structures are a valuable channel for communication between government, state-wide peak bodies and local communities.

In the VAJA, regional and local Aboriginal Justice Advisory Councils ('AJAC') played a critical role in ensuring that the partnerships between communities and government were long-lasting and responsive to the diverse needs of various communities.[113] Regional and local AJACs were vital to the development of regional plans that supplemented the state-wide agreement.[114] The Nous Group evaluation of phase II of the VAJA highlighted the strong leadership of regional and local AJACs in

[110] Ibid, 16-21.
[111] Above Fiona Allison and Chris Cuneen, 'The Role of Indigenous Justice Agreement in Improving Legal and Social Outcomes for Indigenous People' (2010) 32 *Sydney Law Review* 645, 656-657.
[112] Larissa Behrendt, Power From the People: A Community-Based Approach to Indigenous Self Determination' (2003) 6(2) *Flinders Journal of Law Reform* 135.
[113] Above Nous Group, 'Evaluation of the Aboriginal Justice Agreement – Phase 2' (Final Report, May 2012).
[114] Ibid.

translating senior level partnerships at the local level and representing regional and local interests to government.[115]

It is important that regional committees established as part of AJAs do not replace or weaken existing governance models in communities.[116] The AJA must incorporate existing mechanisms where possible and establish new structures only where necessary, whilst ensuring financial, logistical and skills-based support for all bodies involved.

Flexibility with regards to the regional governance mechanism must be a central consideration in developing AJAs, as particular details of regional and local bodies would necessarily differ from community to community and region to region. AJAs should therefore provide the infrastructure for appropriate governance mechanisms that are responsive to realities on the ground.

Civil justice, targets and outcomes

Civil justice is relevant to reducing both the nature and the extent of contact between Aboriginal people and the criminal justice system. Consequently, AJAs should include relevant civil law targets and outcomes, addressing key factors such as:

- Ready access to appropriate civil law services (including in regional areas) that promote capacity building and address structural inequality
- The critical need for adequate resources based on achieving the intended objectives
- The critical need for services to be delivered by organisations which have the confidence of Indigenous people and communities and that are accountable to both
- The critical need for locally determined, locally relevant indicators, measures, monitoring and evaluation

16. Key civil law targets and outcomes in AJAs should be developed based on locally determined and locally relevant indicators, measures, monitoring and evaluation.

2.3.2. DP Question 10-1: Justice Targets

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?

Targets are commonly considered best practice in policy development and 'encourage policy makers to focus on outputs and outcomes, rather than just inputs'.[117] Similarly, targets are likely to play a critical role in both supporting and informing the work of state-wide AJAs, allowing for a coherent and coordinated response at all levels of government.

[115] Ibid, 18.
[116] Above Larissa Behrendt, Power From the People: A Community-Based Approach to Indigenous Self Determination' (2003) 6(2) *Flinders Journal of Law Reform* 135.
[117] Australian Human Rights Commission, *Social Justice and Native Title Report* (2014) 118.

The introduction of justice targets is likely to have flow-on positive effects on both incarceration rates and health determinants. The issues affecting health and life expectancy of Indigenous people cannot be separated from incarceration rates.

We therefore recommend that justice targets be introduced as part of the review of the Closing the Gap policy. We support the targets proposed by the National Justice Coalition ('NJC'), and suggest these be used as a starting point. The NJC targets are to:[118]

- Close the gap in rates of imprisonment by 2040; and
- Cut the disproportionate rates of violence to at least close the gap by 2040 with priority strategies for women and children.

We note that these targets do not take into account the civil justice needs of Aboriginal people. As argued extensively in this paper, the effects of civil and criminal matters on Aboriginal people are inextricably linked. We propose that civil justice targets be introduced in addition to criminal justice targets. The issues identified above in 2.3.1 - Civil Justice, Targets and Outcomes provide a framework for the types of issues these civil justice targets must address.

With respect to both criminal and civil justice targets, we call upon governments to partner with Aboriginal people, organisations and communities to begin a thorough consultation process to further define the content of these targets.[119]

17. Civil and criminal justice targets should be introduced in the Closing the Gap policy, based on a thorough process of community consultation.

2.4. DP Topic 11: Access to Justice

2.4.1. Civil Law Assistance

Civil law services can help empower Aboriginal people to bring about changes for themselves, their families and communities, and should be viewed as integral to increasing the overall wellbeing of Aboriginal people, including reducing rates of incarceration.

A distinctive aspect of our approach at KCLS is the central and integrated roles of Aboriginal community paralegal workers, client-lawyer collaborative lawyering, narrative advocacy and contextualisation which emphasise the client's lived experience, and reflective practice. KCLS collaborates with clients, community groups and others to talk, learn and evaluate the operation of law, and to press for law reform and structural change.

There is a need to define what kind of legal assistance is involved when we discuss 'civil law'. Civil law legal needs are often described in very broad terms – for example, 'family and civil law' as distinct from 'criminal law'. The problem with this approach for Aboriginal people in the Kimberley is that it expresses little about their particular needs and circumstances. There are often dramatic

[118] Above n 149, 18.
[119] Ibid.

differences between the nature, circumstances, complexities and effects of their legal issues. A family law matter experienced by non-Aboriginal people in a metropolitan area, for example, will be vastly different to a family law matter in the Kimberley. Appendix A provides an outline of the extensive range of issues we have faced working with Aboriginal people in the Kimberley. These include but are not limited to issues around:

- basic human need
- consumer credit and debt
- driving-related issues
- employment
- family
- personal and criminal injuries
- human rights
- insurance
- participation and inclusion
- prison-specific problems
- tenancy and housing
- wills and estates.

Mandatory data collection by Community Legal Centres and other non-profit legal services in Australia has failed to accurately depict the extent to which Aboriginal people face barriers to justice, the nature of such barriers, the types of service provision required by Aboriginal people in remote areas or the ways the legal system needs to adapt to be accessible and effective.

2.4.2. Regional legal service funding models

KCLS is the only legal service in the Kimberley that provides dedicated assistance on the broad range of civil law matters

The WA Aboriginal Family Law Services (AFLS) and Marninwarntikura (Fitzroy Crossing) focus on legal assistance for Aboriginal people experiencing domestic and family violence. The WA Aboriginal Legal Service (ALS), although predominantly involved in criminal matters, provides some civil law assistance and strategic legal interventions in the Kimberley from its head office in Perth. WA Legal Aid undertakes some civil law matters in the Kimberley, focusing on family law and child protection and does some civil law assistance in the Kimberley from Perth.

Most non-profit legal services in the Kimberley also aim to connect people with civil law services available elsewhere, such as via specialist Community Legal Centres (CLCs) in Perth or interstate, private lawyers, and pro-bono partners.

However, the overall picture is of a dramatic shortfall in relation to the levels of unmet civil law legal need in the Kimberley.

Case Study I

Client I lived in a remote community in the Kimberley. He did not have mobile phone coverage, had poor reading skills and spoke Kimberley Kriol. Client I first made contact with KCLS at an Aboriginal Community Justice Program Open Day which KCLS attended.

Client I sought our assistance to apply for Criminal Injuries Compensation. He had major injuries as a result of multiple wounds inflicted by a family member, and was unable to walk unassisted. The family member had been charged, convicted and was serving a term of imprisonment. KCLS took Client I's initial instructions at his home.

Back at the Broome Office, KCLS opened the file and commenced work preparing Client I's draft statement and requesting police and medical information. Due to his location and poor resources, it was very difficult to make and sustain contact with Client I to take further instructions, or go through his draft statement and the material received. When Client I could be reached, he was only available for short periods through the local Community Clinic or Community Office. The delays this occasioned in being able to lodge his claim for significant.

This case study demonstrates the importance of Aboriginal Community Justice Open Days as a way for people in remote communities to connect with civil law services. It also highlights how services such as the Community Clinic, Community Office, School, Art Centre or Community Store are often called upon, without any additional resources to help legal services and clients connect. Networks of paid, supported and supervised community legal contact point positions would fill a major need to facilitate contact, service provision and positive outcomes for Aboriginal people in remote communities.

Case Study J

Clients J are four young men in their twenties who reside in a remote community where there is limited access to internet or telephone services. During an Outreach visit, all four asked if KCLS could assist them to find out the current status and amount of any fines they may owe. After returning to Broome and making inquiries on their behalf, KCLS discovered that, of the four, one client had a warrant of commitment and another had a warrant out for his arrest.

A number of efforts were made to contact the clients, via the only phone in the community, to advise them of the warrants and also to assist them to establish repayment agreements to avoid being taken into custody. Repeated calls went unanswered, or calls were answered by another community resident who could not locate the clients concerned. KCLS was subsequently advised that two of the clients had since left the community to travel to another remote community and there was no way to contact them.

The issues surrounding telephone access, internet access and physical distance resulted in a situation where KCLS was unable to advise these clients about their respective situations and options. This meant that they did not receive advice about how to set up a repayment plan in order to have the warrant withdrawn. The access to justice limitations in this case could result in otherwise avoidable imprisonments.

This case study highlights how KCLS and other legal services can easily lose contact with clients. At any one time KCLS and other legal services may be on the lookout for many people while the people concerned are unaware. A network of part-time paid community legal contact point positions would help address these issues.

18. A targeted increase in resources for civil law services and associated assistance is needed, with priority on establishing resident legal, para-legal and administrative staff in Halls Creek, Derby and Fitzroy Crossing.
19. Paid Aboriginal community liaison positions are needed in many remote communities.

2.4.3. DP Proposal 11-1: Interpreters

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.

The 2011 census revealed that 60 per cent of Aboriginal people in WA speak an Aboriginal language as their primary language.[120] English is a second, third or fourth language for many KCLS clients.[121] Many Aboriginal people in the Kimberley speak, and are fully proficient in Kriol or Aboriginal English, but not in 'standard' English. Aboriginal English and Kriol transforms the meanings of many English words and mixes English words with these different meanings with words and concepts drawn from Aboriginal languages. Due to this, legal services, courts and other agencies may not always realise that an interpreter is needed.[122]

The Aboriginal Benchbook for Western Australian Courts reports that there is a shortage of both accredited Aboriginal interpreters and accredited Aboriginal interpreting training programs in WA, which must be addressed.[123] The need for interpreter services in the Kimberley is not being met through current arrangements. While the Kimberley Interpreting Service (KIS) has 170 accredited interpreters in 40 Aboriginal languages specific to the Kimberley region,[124] KIS operates on a fee for service model, which is a mismatch for funding arrangements for non-profit legal services in the Kimberley.[125] For example, KCLS is not funded to pay for interpreter services and clients are certainly not able to pay. This funding anomaly plays a role in the undersupply of readily available qualified interpreters.[126]

[120] Australian Bureau of Statistics, 'Census of Population and Housing', 2011.
[121] Law Society of Western Australia, *Protocols for Lawyers with Aboriginal or Torres Strait Islander Clients in Western Australia*, 6.
[122] Jay Arthur, *Aboriginal English: a cultural study* (Oxford University Press, 1996) 110; Diana Eades, 'Communication with Aboriginal Speakers of
English in the Legal Process' (2012) 32(4) *Australian Journal of Linguistics* 473, 475; *Gibson v Western Australia* [2017] WASCA 141.
[123] Stephanie Fryer-Smith, 2008, 'Aboriginal Benchbook for Western Australian Courts', 2nd Edition.
[124] 'The Right to a Fair Trial,' Joint ATSILS Submission to the Commonwealth Attorney-General Regarding the Expansion of Aboriginal and Torres Strait Islander Interpreter Services (2011), 15.
[125] Kimberley Interpreting Service, *Rates*, http://www.kimberleyinterpreting.org.au/i_rates.html.
[126] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our land, our languages - language learning in Indigenous communities* (2012), 159.

Due to lack of funding to access interpreter services, many clients resort to family and ad hoc interpreters to provide assistance when required.[127] This gives rise to multiple issues. The most significant is that using a family or community member as an interpreter affects the ability to provide confidential legal advice. Clients may not be inclined to share certain information if family members act as an interpreter. This may be particularly relevant in terms of sensitive legal matters, as well as in the context of Aboriginal cultural and kinship systems, due to avoidance relationships and cultural proscriptions on speaking of certain matters between specific family members.[128] It may also place undue stress on family members.

Additionally, ad hoc interpreters are not trained in understanding and interpreting complicated legal concepts that may arise when a solicitor is giving legal advice, going through options or at court. In legal interviews, difficulty conveying complex information through ad hoc interpreters can be compounded by gender issues and family issues, as some information may be sensitive or forbidden to talk about, or the legal issues may create conflicts of interest within families.

The case study below demonstrates these issues in the context of estates.

Case Study K

Client K was an Aboriginal man from a small community in the central Kimberley, whose parent passed away in a nursing home in the Kimberley Region. Client K sought KCLS's assistance regarding the estate.

Client K contacted KCLS using the phone at the community store. An interpreter was needed, but was not available. Instead one of his aunties acted as a family interpreter, speaking on the phone on behalf of Client K. However, it was unclear whether Client K was completely happy with his aunty being involved, or if it was done out of necessity due to the lack of a professional interpreter. While several attempts were made to talk to the client by himself over the phone, he could not organise a private way of talking. Additionally, while he said he did want his aunt to be involved and help him, the situation was difficult. At his request KCLS interacted mainly with the aunty throughout the matter. It turned out that the matter was resolved once information was obtained from the nursing home.

If the information from the nursing home had been different, it would probably have been necessary to ask the client to travel about 400km in order to meet in person. This took into account that without a budget for interpreters, KCLS did not have the option of arranging for the client to go to the nearest larger community for a private phone call with KCLS with an interpreter involved in person or by phone.

[127] KCLS Kununura staff interview, 12/7/17.
[128] See for example, Caroline Heske, 'Interpreting Aboriginal justice in the Territory' (2008) 33(1) *Alternative Law Journal* 5, 8.

Working without an interpreter

The following case study demonstrates the reality of working as a civil law solicitor in the Kimberley, without adequate access for clients and for KCLS staff to interpreters.

Case Study L

When the WA Government announced the WA Redress Scheme, offering ex gratia payments of up to $80,000 to people who were abused or neglected as children when in state care, KCLS was repeatedly placed in a position of having to work without independent, qualified interpreters.

While this Scheme closed to new applications in 2009, after being open for only 12 months, over subsequent years KCLS has continued to be contacted by Aboriginal people in the Kimberley who didn't hear about it at the time, or didn't understand what it was about. Additionally, from working with many Aboriginal people in relation to the 2012 WA Stolen Wages Reparation Scheme, KCLS become aware of hundreds of Aboriginal people in the Kimberley who didn't know about the WA Redress Scheme when it was open.

The then WA Government effectively refused to accept late applications and subsequently refused to reopen the Scheme arguing that Aboriginal people should have known and people who wanted to apply should have got their application in, on time.

The effect of this was, and continues to be, that lack of Aboriginal interpreters to get the message out to Aboriginal people about the Scheme, and lack of resources for legal services in the Kimberley to work towards the same objective, meant that many Aboriginal people were discriminated against on the basis of aspects such as language, literacy, disability and location.

There is a clear and urgent need for full and free access to interpreters for Aboriginal clients using non-profit legal services in the Kimberley. While the policy emphasis appears to be directed at the criminal system, Aboriginal people with civil law issues also need access to interpreters, and this may assist them to avoid or minimise contact with the criminal justice system

Case Study M

Client M is a senior health worker and Aboriginal elder in a remote community. English is not his first language. He applied for an Extraordinary Driver's License (EDL) for work purposes and this was granted by the Magistrate's Court. Following the grant of the EDL, some administrative steps are required in order to give effect to the Court's order. This includes making a payment and attending at the Department of Transport to obtain a copy of the EDL, which Client M was required to carry on him whilst driving.

Client M had paid the prescribed fee to the Court, but was unaware of the subsequent administrative procedures he needed to comply with in order to obtain the EDL. Believing he

was authorized to drive, Client M was driving from the community to the closest regional centre when he was picked up by police. He was issued an infringement for driving whilst unauthorised and received a further nine month license suspension and a fine of $1000.

Whilst Client M was not incarcerated as a result of this, this case study does highlight the issues facing Aboriginal people who may not have English as their first language, and who do not have access to an interpreter, Aboriginal Court Officer or Aboriginal Liaison Officer.

It also highlights the need to simplify administrative processes to facilitate compliance. In situations such as this, complex administrative processes which are not adequately explained or understood can result in avoidable infringements and penalties.

Funding for NT Aboriginal Interpreter Service ('NTAIS')

The NTAIS is part of the NT Government and one of the biggest employers of Aboriginal people in the NT, with 422 interpreters.[129] It has 98.1 per cent Aboriginal staff across the board, allowing for strong Indigenous governance. During 2008-2014, the NTAIS received $46.7 million dollars in Commonwealth funding through the Closing the Gap Northern Territory National Partnership Agreement and the National Partnership Agreement on Remote Service Delivery.[130] The Service is currently funded through the Commonwealth Indigenous Advancement Strategy, and through the NT Government, which provides $2.5 million annually. These funds operate under a Memorandum of Understanding between the Commonwealth Attorney-General's Department and the Northern Territory Government 'to provide free access to interpreters for Northern Territory law, justice, and health agencies and AGD funded legal assistance service providers … interpreting services are provided by the NTAIS'.[131]

There are no similar arrangements with WA resulting in dramatic differences regarding the availability of interpreters on either side of the NT/WA border. Kununurra is about 50km from the NT border. Many Aboriginal people who live in the East Kimberley have family and other connections on the NT side of the border. Some Aboriginal people who are in Kununurra on a weekly basis, live in the NT. Aboriginal people regularly cross the border at many points.

On the NT side, Aboriginal people going to court or using legal help have what amounts to free access to interpreters through the NTAIS. On the WA side of the border, unless they can use the NTAIS, Aboriginal people do not have free access to Aboriginal interpreters.

The arrangements are clearly inequitable and anomalous.

[129] Malarndirri McCarthy, Northern Territory Government, Committee Hansard, Darwin, 2 May 2012, 2.
[130] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our land, our languages - language learning in Indigenous communities* (2012), 161-162.
[131] Ibid 162; Department of Families, Housing, Community Services and Indigenous Affairs, Submission 141 to *Our land, our languages* inquiry, 9.

WA Law Society Protocols

The first Protocol recommended for lawyers working with Aboriginal clients in WA is to 'assess whether an interpreter is needed,' and if required, 'engage the services of a registered, accredited interpreter from the KIS'.[132] KCLS, with its high percentage of Aboriginal clients, often cannot do this for the reasons set out above.

The Protocols draw on the common law to support the proposition that if 'available interpreter facilities, which were essential to enable the fair trial of an unrepresented person who could neither speak nor understand English, were withheld by the government, a trial judge would be entitled and obliged to postpone or stay the trial and an appellate court would, in the absence of extraordinary circumstances, be entitled and obliged to quash any conviction entered after such an inherently unfair trial'.[133] Kirby P has reiterated the need for interpreters as a due process requirement, '[reinforcing] respect for the rule of law in our society'.[134]

While the provision of interpreters is available to witnesses giving evidence in court under s.30 of the *Evidence Act 1995* (Cth) the onus is on the witness to request an interpreter. Under the criminal law guidelines such as the *Anunga* rules, an interpreter must be present during police interviews if an Aboriginal suspect is not fluent in English and, if this does not occur, the statement obtained may be inadmissible.[135] However, the civil system contains no similar guidelines or protections for Indigenous people, which, if in place may ultimately prevent unnecessary contact with the criminal justice system.

KCLS supports the greater provision of interpreter services for courts and in relation to people seeking and receiving legal help. Interpreters are needed for contacts with all law and justice agencies, including programs and initiatives related to prevention and diversion. Clients can use interpreters to understand and work on resolving issues, reducing spiralling and consistent contact between individuals and the system.

20. Aboriginal people should have access to trained interpreters if needed at all stages of both civil and criminal law processes.

21. A nationwide standard for Aboriginal Interpreters should be established.

[132] Law Society of Western Australia, *Protocols for Lawyers with Aboriginal or Torres Strait Islander Clients in Western Australia*, 6-8.
[133] *Dietrich v The Queen* (1992) 177 CLR 292, 330-331 (Deane J).
[134] *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414, 417 (Kirby P).
[135] *R v Anunga* (1976) 11 ALR 412; Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws,* Report 31 (1986), 22 [554]. See also Justice Dean Mildren, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7 for a greater overview of recommendations associated with working with Aboriginal people in the court system.

2.4.4. DP Question 11-1: Reforms regarding diversion and specialist courts

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

An Aboriginal Justice Advisory Committee (AJAC) structure is needed in WA for Aboriginal people to guide and provide input to Government in relation to diversionary options and issues like specialist sentencing courts

Although recommended by the Royal Commission into Aboriginal Deaths in Custody, and in place for some years, WA does not currently have an AJAC or an Aboriginal Justice Plan. Given the importance of both, we strongly support consultation with Indigenous people in WA about whether an AJAC should now be established by legislation.

We submit that the ALRC should consider the pros and cons of recommending legislated AJACs at the state/territory and federal levels.

Further, in the Kimberley, a full mapping is needed with communities about current diversionary options, gaps and opportunities (for both criminal and civil law issues). In relation to models such as specialist courts, these have lower prospects of being successful unless they are worked through and developed for the particular, local context.

Assumptions about what is culturally appropriate or likely to be wanted or supported by Aboriginal people in the Kimberley must be expressed by Aboriginal people themselves. Maggie Brady's article about non-Aboriginal people making incorrect assumptions on both counts is an important reminder that well intentioned law reform can go off track if Aboriginal people are not directly consulted, heard and understood. [136]

22. The WA Government should consult with Aboriginal people in WA about establishing an Aboriginal Justice Advisory Committee (AJAC) and a WA Aboriginal Justice Plan.
23. The WA government should undertake, potentially with an AJAC, a full mapping with communities of diversionary options in regions including the Kimberley, including gaps and opportunities.

[136] Brady, Maggie, 'Law Reforming Lawyers and Aboriginal Social Controls: The Case of the Western Australian Aboriginal Communities Act' (2013) 17(1) *Australian Indigenous Law Review*

2.4.5. DP Question 11-2: Access to Indigenous legal services

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

The key issue facing availability and access to Aboriginal and Torres Strait Islander Legal Services (ATSILS), or legal services for Aboriginal and Torres Strait Islander people is inadequate funding and appropriate resources to provide quality and effective legal services.

Aboriginal Legal Service WA and ATSILS

ALSs are a critical part of the vanguard for Indigenous self-determination, wellbeing and justice. However, ALSWA lacks the requisite funding to properly deliver its state wide operations, including in the Kimberley. There is a clear need for funding to increase staff in Kununurra and Broome and to establish permanent, staffed, offices in Derby, Fitzroy Crossing and Halls Creek.

WA Aboriginal Family Law Service

The WA AFLS is an incorporated Aboriginal organisation which has permanent offices in Broome and Kununurra. Federal funding conditions for AFLS limits the focus for the legal work to Aboriginal people who are at risk of family or domestic violence, sexual abuse or who are survivors. This is civil law legal work which connects to criminal law and to efforts to reduce Aboriginal incarceration rates.

WA AFLS are highly effective in the work they do, which includes case work and excellent outreach and community legal education (CLE) work. KCLS works closely with AFLS and is very aware that the AFLS is over stretched and grossly under-resourced.

Subject to funding being increased, AFLS is in an ideal position to expand both the nature and range of the legal work it undertakes as well as CLE and community legal empowerment.

WA AFLS should be resourced to substantially increase its operations in Kununurra, Broome and to establish permanent staffed offices in Halls Creek, Fitzroy Crossing and Derby.

Marninwarntikura *Women's* Resource *Centre*

MWRC is an incorporated non-profit Aboriginal organization in Fitzroy Crossing providing numerous community programs including a Family Violence Prevention Legal Service (FVPLS) with one lawyer. The MWRC lawyer is the only lawyer living permanently in Fitzroy Crossing. While the WA ALS had an Aboriginal Court Officer based in Fitzroy Crossing, they had no lawyers based there.

MWRC provides legal help limited to the FVPLS guidelines. MWRC is over stretched in relation to the FVPLS work and more resources are needed. While MWRC has effective collaborative relationship with other non-profit legal services in the Kimberley, this does not address the day by day need for adequate capacity in Fitzroy Crossing which is the hub for about 50 Aboriginal communities in the Fitzroy Valley. Subject to having increased resources MWRC is ideally placed to provide an increased range of legal help and to establish and utilize new relationships and synergies.

Other Legal Services in the Kimberley

KCLS: An overview of KCLS's structure is set out in section 1.1. KCLS provides services across the Kimberley including substantial outreach services to remote communities. KCLS is seriously underfunded and understands that despite its best efforts, there are significant gaps in service delivery due to inadequate staffing and resources, which impacts on the wellbeing of Aboriginal people and efforts to reduce Aboriginal incarceration.

LAWA: The WA Legal Aid Commission (LAWA) has offices in Kununurra and Broome. These offices are often working beyond capacity. While support is provided from the head office in Perth, there is a significant shortfall between the level of need and the services provided. Furthermore, the over flow of clients unable to be serviced by LAWA is often picked up by not-for-profit legal services which further erodes their capacity to provide quality and effective services which can have sustainable and positive outcomes for Aboriginal people.

24. ATSILS and other legal and associated services should be funded to ensure adequate regional coverage.

Aboriginal Court Officers[137]

The Aboriginal Court Officer position is unique to WA. They are Aboriginal people who have the authority to represent Aboriginal clients in certain matters, and to assist with cross cultural communication, legal advice and legal education. This authority arises under s 48 of the *Aboriginal Affairs Planning Authority Act 1972* (WA), with the approval of the Minister for Indigenous Affairs. Aboriginal Court Officers are employed by ALSWA. They do not require any formal qualifications, but receive extensive training and supervision from ALSWA.

There are Aboriginal Court Officers in each of ALSWA's regional offices. Officers are usually local people with knowledge of local languages, cultures and issues. In some remote locations, Aboriginal Court Officers are the only permanent legal service available in the community.

Aboriginal Court Officers are employed by various metropolitan and regional courts, including Broome and Kununurra in the Kimberley Region. This is a relatively recent role, appointed by the Aboriginal Policy and Services at the WA Department of the Attorney-General. Aboriginal Court Officers play a supporting role for Aboriginal offenders and their families during legal proceedings.

While Aboriginal Court Officers provide a vital service and have been very effective in the past, the position is under threat. For example, Fitzroy Crossing's Aboriginal Court Officer has recently retired and it is understood his replacement will be placed in Derby, which is approximately 226 km away. This is serious loss for the Fitzroy Valley peoples and will have a detrimental impact on the nature and effect of people's contact with the criminal justice system.

25. Additional funding, resourcing and support should be provided to maintain and expand the important contribution of Aboriginal Court Officers.

[137] Aboriginal Legal Service of Western Australia, 2016, 'Court Officers', http://www.als.org.au/about/court-officers/.

2.4.6. Dispute resolution including mediation

KCLS submit that dispute resolution is a key area for development in the effort to reduce Indigenous incarceration as disputes between individuals or families can often result in police intervention and bring people in contact with the criminal justice system.

Case Study N

Client N was a traditional owner living in a remote Aboriginal Community. He initially sought assistance from KCLS in relation to a threatened eviction from his house. After taking instructions KCLS realised that the tenancy issue was intimately related to an internal governance issue that had arisen as a result of a family feud. On Client N's instructions KCLS attempted to arrange dispute resolution with the relevant parties. However, there were no suitable or affordable services available. The matter escalated to a law and order issue with the police being called in to keep the peace. There was a perception that the Police were siding with one side of the dispute which created a high risk of escalation, violence, and potential criminal charges. Client N and his family were ultimately forced to leave the community to avoid any further escalation of the issues and to protect his family from further exposure to violence.

Case Study O

A remote community in the Kimberley experienced a period of feuding. Most of the non-Aboriginal people in the community were evacuated as a result. Community services stopped or moved to minimum operation and KCLS and other legal services were asked to postpone outreach visits. There was a law and order response to the feuding, resulting in criminal charges and convictions. Dispute resolution assistance was not available in the lead up and dispute resolution was not a focus in the aftermath. The potential for feuding to recur remains.

These case studies highlight how inadequate access to, or consideration of affordable dispute resolution services may result in a 'law and order' approach, with an accompanying risk of criminal charges and possibly incarceration.

26. Affordable and culturally appropriate dispute resolution services should be funded as a key strategy to reduce escalation of disputes from civil to criminal matters.
27. Dispute resolution should be considered as a first response to civil or family disputes, rather than the current 'law and order approach'.

2.5. Topic 12: Police accountability

2.5.1. DP Question 12-2: Improving Police Understanding of Community Needs

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?

Due to the nature of regional, rural and remote areas, employee retention rates are low. The net impact of this in relation to police officers understanding the needs of a community is clear. With a constantly rotating police force (based on a mandatory 4 year cycle) there is little scope for officers to build meaningful relationships within a community – and, by extension, to gain any real understanding of a community's particular cultural needs.

We recommend that funding be provided to encourage longevity within the local police force. A permanent presence based on genuine relationships would go a long way to ensuring police officers are equipped to respond to the needs of the community. Long standing officers are also in a better position to provide training to incoming recruits.

Further, we recommend police officers in remote communities undertake language immersion courses and intensive professional development to better understand factors that contribute to exorbitant incarceration rates among Aboriginal people and the complex cultural rules of social engagement. Armed with this knowledge, police may be more inclined to use discretion in the issuing of infringement notices.

A culturally informed police force is in a better position to gain the confidence of a community.

> *Case Study P*
>
> *Client P is an elderly Aboriginal woman who was a KCLS client in relation to tenancy issues and other matters. She rented her home through the WA Housing Authority. Her family members and others frequently came to her house, and often alcohol was involved. Client P was on notice that a tenancy termination would be sought if the drinking continued. She had her house declared a Restricted Area under the Liquor Control Act 1988 (WA), which prohibits the possession or consumption of alcohol in the declared area. After the alcohol restrictions became effective, there were still problems with people drinking at the house.*
>
> *Client P did not want to call the police because people might be charged, however if she did not have the family members removed the Housing Authority might move to evict her. Culturally and contextually appropriate dispute resolution was needed to avoid an escalation of the situation, but was not available. Client P moved out to a safe location and instructed that she needed help to tell people they couldn't drink at her home. Three Aboriginal workers, two from KCLS and one from another community service thought that talking could help. They went to the home and talked for a long time with the people who were there. The visitors agreed that they did not want Client P to lose her home. They agreed not to drink at the house any more. These people kept their word and the problems stopped. After about a week Client P moved back home. The situation was resolved without police becoming involved.*

The above case study exemplifies the impact had when local police are unmindful of cultural nuances. Client P was hesitant to call the police, to protect her family members from further contact with the criminal justice system. This left her in a position where she was unable to defend her right to the private enjoyment of her home. Although in this instance, Client L was able to seek assistance elsewhere, additional services are not always available in remote areas. Some difficult situations do not require a standard 'law enforcement' police response. When the risk of a situation escalating in to criminal charges is downgraded, the likelihood of a positive outcome increases.

The case study is also an example of how Aboriginal leadership can help overcome defaulting to a police response, which in turn feeds into charge and incarceration rates. Local Aboriginal people bring knowledge, skills and capabilities to their jobs which can go unrecognised. It is important for police to draw on a wider knowledge within their roles, relying on the leadership of local people. For example, a justice-focused response may require police to take into account the individuals concerned, their circumstances, backgrounds, needs and connections.

Case Study Q

In the lead up to the funeral of an Aboriginal elder, there was a dispute between family members. The family members were spread between two communities, one in the West Kimberley and one in the East Kimberley. A family member contacted KCLS for legal advice. The problem was that certain family members had control of the funeral, and some actions were viewed as insulting by other family members who did not agree with all the decisions being made. After the funeral, a quarrel broke out at the wake. The police were called, and charges were laid.

As with Case Study P, this case study highlights the need for police to pursue alternative justice responses. Dispute resolution, in this instance, would have been appropriate and prevented ongoing issues between families.

28. Incentives should be provided to encourage police officers to remain in rural, remote and regional communities for a dedicated period, and to reduce the high turnover of police in these areas.
29. Police officers in remote Aboriginal communities should be obliged to participate in language immersion courses and undertake frequent professional development on Aboriginal culture and history.
30. Police officers should be trained in a broader range of strategies to "keep the peace", with criminal enforcement processes being seen as a last resort rather than the default approach.

2.5.2. DP Question 12-3: Public Reporting on Strategies to Prevent Offending Behaviours

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?

Whilst we support the annual reporting of police engagement strategies, programs and outcomes to prevent offending behaviours, we are wary that a solely police-managed report may produce data inconsistent with the lived experience of Aboriginal people in communities. KCLS recommends that, at least within the Kimberley region, it would be valuable to have Aboriginal communities assess the effectiveness and suitability of police initiatives. In this way, the community is empowered to hold police accountable.

For the purposes of such an evaluation, the following practical aspects should be considered:

a) The evaluation should be conducted by a representative Aboriginal body or organisation in a position to reach out to communities, and with capacity to perform qualitative and quantitative assessments at a local level;

b) Aboriginal communities ought to be able to identify their own indicators and processes to assess and report on. Appropriate funding, resources and support should be provided for this purpose; and

c) Consultations should be undertaken in communities about this proposal. Consultations should be managed by Aboriginal organisations – preferably those chosen by Aboriginal communities - and resourced appropriately by governments.

The results of this independent evaluation should be provided to police and included within their annual report. The process for police reporting should complement this independent assessment.

31. Aboriginal communities should have a role in evaluating and reporting on the appropriateness and effectiveness of police engagement strategies.

2.5.3. DP Question 12-4: Police programs to reduce offending

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?

There are a number of identifiable problems and potential unintended consequences of this proposal.

- If insufficient resources are allocated to this endeavour, programs may be inaccurately documented and evaluated.
- The effort to document and evaluate programs could operate against police initiative, spontaneity and responsiveness.

- If the material being documented, reported and evaluated is generated without sufficient input from the community, or without reports being made available to the community, issues around accountability and tokenism will be heightened.

KCLS strongly supports programs to reduce offending which are negotiated with Aboriginal communities. Models should be based on principles of collaborative development, delivery, learning and evaluation with Aboriginal people and encourage and provide opportunities for Aboriginal people in the community to initiate programs with police.

2.5.4. DP Question 12-5: Police and RAPs

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

Despite some indication that a Reconciliation Action Plan ('RAP') was to be developed and launched in 2016, WA Police have not entered into an RAP with Reconciliation Australia.

KCLS believes that WA Police should be encouraged to enter RAPs. The process of developing, launching and promoting RAPs can have educational, attitudinal and operational effects. On an organisational level, a formal recognition of the historic inequity in services provided to Aboriginal people, has the potential to shift perception and make a concrete difference to responses and outcomes for Indigenous people.

32. Police in all jurisdictions including WA should enter into a RAP with Reconciliation Australia.

2.6. Conclusion

KCLS provides assistance in civil law matters and in preparing this submission has drawn from both experience, by way of case studies and research to confirm that Indigenous people have multiple, complex, civil law needs, which, for many KCLS clients, exist within a framework of inter-linking problems involving social, economic and structural disadvantage.

Civil and criminal law legal issues for Aboriginal people are often interrelated and this applies to all stages in criminal law process from occurrence and charging to outcomes and penalties. It is our view that focusing on civil law may help create change.

Part 3: Table of Recommendations

NO.	RECOMMENDATION	TOPIC	PG
1.	Because civil and criminal law issues are often deeply interrelated, improving access to civil law legal assistance for Indigenous people should be a critical strategy to reducing Indigenous incarceration rates.	1.4 Civil Law	6
2.	Corrections policy should be informed by better empirical evidence on the causes and behavioural responses to corrections measures, including the possibility that penalties for a wide range of conduct have little or no deterrent value on some Aboriginal populations.	1.6 Rethinking Assumptions to Stop the Indigenous Poverty-to-Prison Pipeline	7-8
3.	National standards should be established to enhance public availability of comprehensive criminal justice statistics at national, state, regional and local levels.	1.7 Criminal Justice Statistics	8-9
4.	WA should provide timely, accessible, comprehensive and detailed criminal justice statistics in relation to Aboriginal people, including useful geographic and demographic breakdowns.		
5.	Governments should guarantee culturally accessible civil law services to all prisoners (including those on remand) as a right.	2.1.2 KCLS West Kimberley Regional Outreach Program	12

NO.	RECOMMENDATION	TOPIC	PG
6.	Civil law services for prisoners whilst in prison and continuing after release is a best practice element of programs that respond to Indigenous prisoners on remand or while serving a prison sentence.	2.1.3 **DP Question and Proposal 5-1** Prison Programs for Short Term Prisoners	15-17
7.	Governments should abolish all provisions in fine enforcement statutes that provide for imprisonment for fine default.	2.2.1. **DP Proposal 6-1** Fine Default and Imprisonment	19-21
8.	Mandatory minimum penalties should be replaced by contextual fine regimes, which would provide for reduced fines or alternative sanctions for those who are unlikely to be able to pay the fine.	2.2.2. **DP Question 6-1** Lower Level Penalties	21
9.	Penalty de-escalation is needed to avoid relatively minor matters, such as fines, being escalated through fine default to more serious penalties, disproportionate to the original offence.		

NO.	RECOMMENDATION	TOPIC	PG
10.	Courts should be required to consider suspending a fine where a defendant is a welfare recipient or otherwise unable to pay the fine.	2.2.7 **DP Question 6-6** Alternative Penalties to Court Fines	24-26
11.	The recommendations made by ALSWA in its *Addressing fine default by vulnerable and disadvantaged persons: briefing paper* August 2016, p. 24 should be adopted.[138]	2.2.8 **DP Proposal 6-2** Work and Development Orders	26-28
12.	Funding should be provided to the Department of Transport to expand its Remote Area Licensing Program and create more partnerships between remote communities and third party driver training programs.	2.2.12 **DP Question 6-10** Regional Permit and Licence Programs	30-32
13.	Funding should be provided to increase the frequency of Open Justice Day initiatives.		
14.	Programs should be established to enable Aboriginal communities and community-run organisations to provide driver training programs.		
15.	Driver training organisations should be included in the WDO scheme.		

[138] http://www.als.org.au/wp-content/uploads/2015/08/Briefing-Paper-August-2016-signed-1.pdf

NO.	RECOMMENDATION	TOPIC	PG
16.	Key civil law targets and outcomes in AJAs should be developed based on locally determined and locally relevant indicators, measures, monitoring and evaluation.	2.3.1. **DP Proposal 10-1** Renewing the WA AJA	34-36
17.	Civil and criminal justice targets should be introduced in the Closing the Gap policy, based on a thorough process of community consultation.	2.3.2. **DP Question 10-1** Justice Targets	36-37
18.	A targeted increase in resources for civil law services and associated assistance is needed, with priority on establishing resident legal, para-legal and administrative staff in Halls Creek, Derby and Fitzroy Crossing.	2.4.2 Regional Legal Service Funding Models	38-40
19.	Paid Aboriginal community liaison positions are needed in many remote communities.		
20.	Aboriginal people should have access to trained interpreters if needed at all stages of both civil and criminal law processes.	2.4.3**. DP Proposal 11-1** Interpreters	40-44
21.	A nationwide standard for Aboriginal Interpreters should be established.		

NO.	RECOMMENDATION	TOPIC	PG
22.	The WA Government should consult with Aboriginal people in WA about establishing an Aboriginal Justice Advisory Committee (AJAC) and a WA Aboriginal Justice Plan.	2.4.4 **DP Question 11-1** Reforms regarding Diversion and Specialist Courts	45
23.	The WA government should undertake, potentially with an AJAC, a full mapping with communities of diversionary options in regions including the Kimberley, including gaps and opportunities.		
24.	ATSILS and other legal and associated services should be funded to ensure adequate regional coverage.	2.4.5 **DP Question 11-2** Access to Indigenous Legal Services	47
25.	Additional funding, resourcing and support should be provided to maintain and expand the important contribution of Aboriginal Court Officers.		
26.	Affordable and culturally appropriate dispute resolution services should be funded as a key strategy to reduce escalation of disputes from civil to criminal matters.	2.4.6 Dispute Resolution including Mediation	48
27.	Dispute resolution should be considered as a first response to civil or family disputes, rather than the current 'law and order approach'.		
28.	Incentives should be provided to encourage police officers to remain in rural, remote and regional communities for a dedicated period, and to reduce the high turnover of police in these areas.	2.5.1 **DP Question 12-2** Improving Police Understanding of Community	49-50

NO.	RECOMMENDATION	TOPIC	PG
29.	Police officers in remote Aboriginal communities should be obliged to participate in language immersion courses and undertake frequent professional development on Aboriginal culture and history.	Needs	
30.	Police officers should be trained in a broader range of strategies to "keep the peace", with criminal enforcement processes being seen as a last resort rather than the default approach.		
31.	Aboriginal communities should have a role in evaluating and reporting on the appropriateness and effectiveness of police engagement strategies.	2.5.2 **DP Question 12-3** Public Reporting on Strategies to Prevent Offending Behaviours	51
32.	Police in all jurisdictions including WA should enter into a RAP with Reconciliation Australia.	2.5.4 **DP Question 12-5** Police and RAPs	52

Appendix A

The following is an expanded outline of the type and range of issues KCLS works on:

Basic needs

- safety and shelter
- safety from family and domestic violence including within Aboriginal community, kinship and cultural contexts
- financial means, social security including eligibility, overpayments and penalties, reviews and appeals
- access to essential services including water and electricity
- health issues, aspects related to law, or where legal steps can help alleviate
- Identity, rights to identity, culture, language, connection with country links with wellbeing, resilience and inclusion
- cultural rights and responsibilities including connection with country, family and kinship, language, cultural obligations, cultural expectations

Credit and debt

- loans including informal loans, payday lending, secured and unsecured personal loans, mortgage loans
- self-insurer, disability insurance, insurance scams

Consumer

- consumer including credit and debt, predatory lending, scams
- contracts including goods, services, rights and obligations

Driving

- driving licences – understanding, obtaining
- fines and penalties
- applying for extraordinary driving licence (e.g. in order to work, attend medical appointments)

Employment

- employment including wages, conditions, discrimination, unfair dismissal
- access to income through participation in enterprises, arts, formal and informal employment
- superannuation including under payment or non-payment by employers, lost superannuation, hardship access
- worker's compensation referrals

Guardianship, children, family

- adult guardianship, guardianship management of affairs
- child protection including safety, retaining contact and reunification

- carer supports including access to allowances, benefits, subsidies and services
- family law including arrangements for children within Aboriginal kinship, safety, achieving property settlements including arrangements about debts

Historical issues

- access to historical records, including Native Affairs and child protection files
- stolen generations including making complaints, advocacy
- stolen wages / stolen income (relating to Aboriginal people) including making complaints, advocacy
- reparations relating to historical injuries - making complaints, advocacy

Human rights and general

- human rights especially of Aboriginal people, links with numerous areas of law, access to opportunity and wellbeing
- conditionality including disproportionate, unfair or discriminatory conditions e.g. related to access to programs, services, basic income
- complaints including unfair treatment, discrimination, inadequate remedies
- administrative law including timeliness and fairness in decision making
- freedom of information state and federal for access to personal and non-personal information
- discrimination including on basis of Aboriginality, disability, pregnancy in provision of goods and services, direct and indirect (including structural) discrimination
- breach of duty

Injuries

- criminal injuries compensation (victim's compensation)
- personal injuries including accidents, injuries at work (especially unsafe systems) - referral
- rehabilitation including access or continuing access to programs and services

Insurance

- insurance including underinsurance
- claims against WA Housing Authority for loss or damage
- total and permanent disability insurance

Identity and identification

- birth certificates including recording births, correcting birth certificates, obtaining birth certificate (e.g. as a point for identification)
- proof of identity links with numerous issues including wellbeing, culture, meeting administrative requirements (e.g. to help obtain driving permit or licence) and overcoming administrative tangles

Participation and inclusion

- right to express opinions, to seek to be heard, to contribute
- right to complain

Remandees, prisoners

- rights of remandees, detainees and prisoners including human rights, standards, conditions and occurrences within corrections
- attending to legal and other issues regarding their lives while in prison (housing, debts, personal responsibilities etc.)
- preparation for release

Tenancy and housing

- housing including public and private tenancies, public housing allocations
- landlord responsibilities, fitness of premises for habitation, landlord responsible maintenance, rent, tenant responsibilities
- co-tenant issues including non-contribution to rent and utilities, damage to property, informal bond and tenancy transfers
- contamination problems and resulting injuries e.g. asbestos

Wills, estates, inquests

- wills and estates including issues about funerals, dispute resolution
- rights on intestacy, assets of the estate and administration
- inquests, currently relating to Aboriginal youth suicides in the Kimberley

Attachment 1

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