Incarceration Rates of Aboriginal and Torres Strait Islander Peoples

(Discussion Paper 84)

Australian Law Reform Commission

12 September 2017

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About Change the Record

Change the Record is a coalition of leading Aboriginal and Torres Strait Islander, human rights, legal and community organisations calling for urgent and coordinated national action to close the gap in imprisonment rates of Aboriginal and Torres Strait Islander people and cut disproportionate rates of violence experienced by Aboriginal and Torres Strait Islander people, particularly women and children.

Change the Record is overseen by a Steering Committee, made up of leading Aboriginal and Torres Strait Islander, human rights and community organisations, including:

- ANTaR
- Amnesty International
- Australian Council of Social Service
- Federation of Community Legal Centres (Vic)
- First Peoples Disability Network (Australia)
- Human Rights Law Centre
- Law Council of Australia
- National Aboriginal Community Controlled Health Organisations
- National Aboriginal and Torres Strait Islander Legal Services
- National Aboriginal and Torres Strait Islander Women's Alliance
- National Association of Community Legal Centres
- National Congress of Australia's First Peoples
- National Family Violence Prevention Legal Services Forum
- Oxfam Australia
- SNAICC – National Voice for Our Children
- Sisters Inside
- Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos
- Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission

The Change the Record Coalition Co-Chairs are Antoinette Braybrook, CEO of the Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria), and Convenor of the National Family Violence Prevention Legal Services Forum ('National FVPLS Forum'), and Cheryl Axleby, CEO of the Aboriginal Legal Rights Movement Incorporated, and Co-Chair of the National Aboriginal and Torres Strait Islander Legal Services (NATSILS).

Executive Summary

The Australian Law Reform Commission (ALRC) has identified significant factors that contribute to disproportionately high rates of incarceration of Aboriginal and Torres Strait Islander people in Australia. Many of these factors are driven by inequality and ongoing, systemic disadvantage faced by Aboriginal and Torres Strait Islander people.

Commonwealth, State and Territory governments must make concerted and consistent efforts to address a number of factors contributing to Aboriginal and Torres Strait Islander peoples' over-representation in prisons. Change the Record (CTR) has called for national action, through the Closing the Gap framework and collaboration between all Australian jurisdictions. The CTR *Blueprint for Change*, along with the following recent reports, outline a systematic approach to addressing these challenges:

- *Over-represented and Overlooked*, a report on Aboriginal and Torres Strait Islander women's over-representation in the justice system, prepared with the Human Rights Law Centre
- *Indigenous Incarceration: Unlock the facts* on the costs of these high rates of incarceration of Aboriginal and Torres Strait Islander people, and the economic and social benefits of reducing the over-incarceration of Aboriginal and Torres Strait Islander people, prepared with PricewaterhouseCoopers and PwC's Indigenous Consulting unit (PIC).

CTR commends the above reports to the Commission.

There are several examples of successful reforms to draw from within Australia, such as principles for sentencing, bail decisions, and diversionary options. Culturally appropriate support, delivered by Aboriginal and Torres Strait Islander community controlled organisations, is vital for Aboriginal and Torres Strait Islander people at all stages of the justice system.

CTR recommends the introduction of *Gladue*-style reporting in sentencing. Reports to the court by qualified Aboriginal and Torres Strait Islander staff that can identify the unique experiences of an Aboriginal and Torres Strait Islander person and advise the court of culturally appropriate rehabilitative options. This has the opportunity of providing stronger contextualisation of the individual's circumstances.

A number of alternative sentencing options need to be developed, particularly community-based options alongside the reduction of custodial sentencing for minor offences. Aboriginal and Torres Strait Islander communities need to be supported to engage with these options and provide support to both offenders and victims/survivors.

A number of specific reforms proposed in the Discussion Paper would have a significant impact on Aboriginal and Torres Strait Islander people at risk of imprisonment. These include decriminalisation of minor offences such as offensive language, and imprisonment for unpaid fines. Changes to parole revocation for non-compliance can also have a significant benefit for Aboriginal and Torres Strait Islander people and communities. CTR supports several of these proposals in the Discussion Paper; supported proposals are outlined below.

Engagement of Aboriginal and Torres Strait Islander people in the justice system needs to be supported by community-led efforts such as Aboriginal Justice Agreements and protocols with police and courts to underpin engagement. Aboriginal and Torres Strait Islander community controlled organisations, particularly Aboriginal and Torres Strait Islander Legal Services and Aboriginal Family Violence Prevention Legal Services, need

to be sufficiently resourced to meet community needs and enable community-driven solutions.

There are a number of underlying drivers of Aboriginal and Torres Strait Islander peoples' over-representation in the prison system. Systemic disadvantage and ongoing inequality need to be addressed through prevention and early intervention. The high rates of Aboriginal and Torres Strait Islander children in child protection systems, particularly children removed from parental care, is a key driver of engagement in youth justice and subsequent adult correctional systems.

Governments need to take a systematic approach to reducing the over-representation of Aboriginal and Torres Strait Islander people among the prison population in Australia. This needs to involve nationally agreed targets subjected to monitoring, with targets for sufficiently resourcing Aboriginal and Torres Strait Islander community organisations to meet these goals. At present there is inconsistent investment and commitment to reducing the over-representation of Aboriginal and Torres Strait Islander people in prisons. CTR recommends that the ALRC makes a clear statement to governments that collaboration and consistency is essential to changing outcomes for Aboriginal and Torres Strait Islander peoples.

In addition, as reflected in the dual goals of the Change The Record Campaign, given the prevalence of family violence against Aboriginal and Torres Strait Islander peoples (predominantly women), any efforts to reduce the over-representation of Aboriginal and Torres Strait Islander people must necessarily go hand in hand with action to reduce rates of violence against Aboriginal and Torres Strait Islander people. Justice Targets should be established to monitor and work towards both of these aims.

Supported proposals

CTR supports the following proposals outlined in the Discussion Paper:

ALRC Proposal 2–1

The Bail Act 1977 (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the Bail Act.

Other State and Territory bail legislation should adopt similar provisions.

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

ALRC Proposal 2-2

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

ALRC Proposal 4–1

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

ALRC Proposal 5–1

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

ALRC 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.

ALRC Proposal 5–4

Parole revocation schemes should be amended to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.

ALRC Proposal 6–1

Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.

ALRC Proposal 6–2

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

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

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

ALRC Proposal 7–1

To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services.

Proposal 10–1

Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.

ALRC Proposal 11–1

Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.

ALRC Proposal 11–3

State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

Recommendations

Sentencing and Aboriginality

1. That State and Territory governments legislate to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing. This should be reflected as a sentencing factor.

2. That States and Territories reform sentencing legislation to include consideration of reparation and/or restoration as a sentencing principle.

3. That State and Territory governments work with Aboriginal and Torres Strait Islander representatives and organisations, including representatives of existing Aboriginal and Torres Strait Islander sentencing courts, to determine whether, and how, to adopt processes for *Gladue*-type reports in sentencing.

Sentencing Options

4. That Commonwealth, State and Territory governments review, with a view to abolishing, provisions that impose mandatory or presumptive sentences.

5. That State and Territory governments review the use of short sentences and develop alternatives to custodial sentences for minor offences.

Prison Programs, Parole and Unsupervised Release

6. That the ALRC undertakes a comparative review of current investment in programs for men and women in prison in each State and Territory with a view to assessing access to and equity in the provision of support services and programs to address offending behaviour.

Fines and Driver Licences

7. That offensive language and other minor public order offences are decriminalised.

8. That courts and recovery agencies are given discretion to avoid imposing driving license suspension where it is likely to have significant effects such as limiting the person's ability to attend employment, access health services, or support their children.

Alcohol

9. That Commonwealth, State and Territory governments increase investment in programs and services that address the underlying causes of alcohol abuse.

Female Offenders

10. That Commonwealth, State and Territory governments adopt and resource the 18 recommendations of the the *Over-Represented and Overlooked* report.

11. That State and Territory governments invest in diversion initiatives for Aboriginal and Torres Strait Islander women, including programs with housing for women and children, which are designed and run by or in partnership with Aboriginal and Torres Strait Islander women. Programs should ensure eligibility for women facing multiple charges and who have criminal records.

12. That COAG works in partnership with Aboriginal and Torres Strait Islander peak organisations to develop a fully resourced national plan of action or partnership agreement directed towards addressing Aboriginal and Torres Strait Islander over-imprisonment and violence rates.

13. That Federal, State and Territory governments should work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies, to forge agreement through COAG to set the following justice targets:

    i. Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040, with an interim target of halving the gap by 2030; and

    ii. Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to close the gap by 2040.

14. That the process to develop national justice targets identifies sub-targets to resource Aboriginal and Torres Strait Islander community controlled organisations that deliver front line services to assist to meet these justice targets.

Access to Justice Issues

15. That Commonwealth, State and Territory governments ensure sufficient and sustainable funding for ATSILS and FVPLSs, including reversing planned funding cuts to ATSILS, and:

    - meet existing demand for services, including culturally save prevention and intervention programs;
    - address unmet legal need regardless of geographic location; and
    - develop models of holistic support and case management for women.

Police Accountability

16. That State and Territory governments implement strengthened, systematic training for all police officers at all levels to improve cultural awareness and family violence sensitivity, led by, and in consultation with, Aboriginal organisations with frontline expertise assisting Aboriginal victims/survivors of family violence.

17. That police and courts in each State and Territory develop guidance materials and ensure that police and judicial officers are regularly educated by Aboriginal and Torres Strait Islander people about:

    - the gendered impacts of colonisation and systemic discrimination and disadvantage; and
    - how these impacts contribute to Aboriginal and Torres Strait Islander people's over-imprisonment.

18. That Commonwealth, State and Territory governments develop mechanisms for independent investigation of complaints and allegations regarding police conduct.

Other Relevant Issues for Consideration

19. That Commonwealth, State and Territory governments work with Aboriginal and Torres Strait Islander communities and organisations to develop a national plan of action on youth justice with clear targets and ongoing monitoring of progress.

20. That COAG commissions a national review of care and protection systems for vulnerable children, particularly as they relate to Aboriginal and Torres Strait Islander children and families.

Introduction

A Message from CTR's Co-Chairs

The Change the Record Coalition (CTR) was established in recognition of the fact that the rates at which Aboriginal and Torres Strait Islander people are experiencing violence and being put in prison has reached a crisis point. These issues are some of the most pressing social justice challenges facing Australia. These issues are devastating lives and come at an enormous cost – both socially and economically – affecting not only the individual, but also their family and whole community. It is clear that a different approach and urgent action is needed.

Change the Record has been calling for a shift towards investing in early intervention, prevention and diversion initiatives. These are smarter solutions that increase safety, address the root causes of violence against women, cut reoffending and imprisonment rates, and build stronger and safer communities.

The current piecemeal approach isn't working. We need a comprehensive, co-ordinated and holistic approach, which involves leadership and partnership from the Federal, State and Territory governments to shift more investment into preventative and early intervention approaches.

We know many of the solutions are already there. Now we need to make it happen, and do so in a way that empowers Aboriginal and Torres Strait Islander people, communities and services to drive these solutions.

To date, CTR's work has included the development and publication of three key reports:

CTR's *Blueprint for Change*: Our comprehensive *Blueprint for Change* (2015) was developed by CTR member organisations and is informed by substantial on-the-ground experience and expertise. It has been developed by leading Aboriginal and Torres Strait Islander organisations in conjunction with legal, human rights and community organisations. The CTR Blueprint for Change contains 12 overarching principles and within each principle a number of key policy priorities. These principles and policy solutions are identified throughout this submission. A full copy of the Blueprint for Change is contained at Appendix 1.

***Over-Represented and Overlooked* report:** in May 2017, the Human Rights Law Centre and CTR released *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment*. The report focuses on the over-imprisonment of Aboriginal and Torres Strait Islander women. It calls for system-wide change and outlines 18 recommendations to redress racialised and gendered justice system outcomes.

Indigenous Incarceration: Unlock the Facts: in May 2017, PriceWaterhouseCoopers produced in partnership with CTR and the Korin Gamadji Institute the *Unlock the Facts* report. The report contributes new economic modelling that shows the cost to the Australian economy of Indigenous incarceration is almost $8 billion ($7.9 billion) per year and rising. If nothing is done to address disproportionately high rates of Indigenous incarceration, this cost will rise to $9.7 billion per year in 2020 and $19.8 billion per year in 2040 (section 3). Closing the gap between Indigenous and non- Indigenous rates of incarceration would generate savings to the economy of $18.9 billion per year in 2040.

We commend these reports to you, and key information and recommendations from these reports are identified throughout this submission.

About this Submission

CTR welcomes the ALRC inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (Inquiry) and the opportunity to provide this submission.

This submission does not address all of the specific questions and proposals – only the ones where CTR has relevant experience and expertise and has developed a clear position.

2. Bail and the Remand Population

Consideration of Background Factors

ALRC Proposal 2–1

The Bail Act 1977 (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the Bail Act.

Other state and territory bail legislation should adopt similar provisions.

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

CTR supports the amendment of bail and sentencing laws to ensure that judges must consider the particular circumstances of a case and in particular the social and cultural factors relevant to Aboriginal and Torres Strait Islander peoples. This position is consistent with Policy Solution 7.1 of CTR's Blueprint for Change regarding the need for 'smarter sentencing'. On this basis, the CTR Coalition supports the inclusion in the bail legislation of each State and Territory, of a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality' as provided for in s 3A of the *Bail Act 1977* (Vic).

Victorian cases such as *Re Mitchell*[1] and *DPP v SE*[2] demonstrate how consideration of Aboriginality can empower sentencing authorities to grant bail and develop appropriate conditions that better reflect the experience of the person before the sentencing authority and can reduce the unnecessary remanding of Aboriginal and Torres Strait Islander people. In the case of *DPP v SE,* Bell J noted the 'discriminatory disadvantage and vulnerability [that] may be experienced' by an Aboriginal child with an intellectual disability and how these factors are 'likely cumulate and interact, making accommodation even more necessary'.[3] Consideration of s 3A in this way, amongst other factors, ultimately led to Bell J granting bail to facilitate contact in with SE's family in Queensland.[4]

The Discussion Paper outlines a number of key benefits of requiring consideration of cultural practice and obligations in bail and remand processes. CTR supports this reasoning.

Culturally Appropriate Bail Support and Diversion Options

ALRC Proposal 2–2

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

[1] [2013] VSC 59 (8 February 2013).
[2] [2017] VSC 13 (31 January 2017).
[3] Ibid [28].
[4] Ibid [50].

Proposal 2-2 is consistent with calls by CTR and its members for State and Territory governments to work with peak Aboriginal and Torres Strait Islander organisations to investigate alternative approaches to the current criminal justice system that provide culturally appropriate bail support and diversion options.[5] Aboriginal and Torres Strait Islander organisations are best placed to understand the needs and demands within communities and to develop culturally appropriate responses.

In the context of the over-imprisonment of Aboriginal and Torres Strait Islander women, our *Over-Represented and Overlooked* report identifies that there is a clear need for all levels of governments to work with Aboriginal and Torres Strait Islander women to fill the gap in culturally-competent and gender specific diversion programs, such as bail support and diversionary options linked with accommodation that are designed by and for Aboriginal and Torres Strait Islander women.[6]

Children on Remand

Aboriginal and Torres Strait Islander young people are also overrepresented among young people in custodial remand. On average nearly 60 per cent of all Aboriginal and Torres Strait Islander children in detention in 2015/16 were unsentenced (270 out of 455). [7]

CTR supports ending the detention of children who have not been sentenced to imprisonment. Aboriginal and Torres Strait Islander children are often held in custodial remand solely due to homelessness, or a lack of suitable accommodation and support to comply with bail conditions. These factors need to be addressed to prevent the increasing rates of children being held in detention on remand.

[5] Change the Record Coalition, *Blueprint for Change* (2015) 4.
[6] Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 36.
[7] Australian Institute of Health and Welfare (AIHW) *Youth detention population in Australia 2016* (2016) Bulletin 138. Canberra: AIHW.
Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2017*, Tables s 2 and s 12. The proportion of non-Indigenous young people who were unsentenced rather than sentenced was slightly higher than for Aboriginal and Torres Strait Islander young people (64 per cent) but the rate at which they are in unsentenced detention is 23 times lower.

3. Sentencing and Aboriginality

Consideration of Background Factors

ALRC Question 3–1

Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders? If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

CTR supports a recommendation that State and Territory governments should legislate to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing. This should be reflected as a sentencing factor.

Our *Over-Represented and Overlooked* report calls on State and Territory governments 'to legislate to ensure that historical and systemic factors that have contributed to Aboriginal and Torres Strait Islander people's over-imprisonment inform decisions by courts about whether or not to imprison'.[8]

It was acknowledged in the Canadian case of *R v Ipeelee* that consideration of historical and systemic factors and their continued manifestation in issues such as 'higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal people' (these issues are also common to the experience of Aboriginal and Torres Strait Islander peoples in Australia) provides sentencing judges with context for assessing specific information provided to the court about the particular offender's circumstances, rather than being the basis for automatically justifying different sentences for Aboriginal and Torres Strait Islander offenders.[9]

Anthony, Bartels and Hopkins note that:

> *Properly understood, the Canadian approach involves two steps: first, the taking of judicial notice with respect to the experience of Aboriginal Canadians as a group, including the experience of overincarceration; and second, consideration of the extent to which the offender's individual circumstances can be understood by reference to this group experience.*[10]

CTR agrees with the position expressed by Anthony, Bartels and Hopkins that the Canadian approach, if implemented in Australia, would not be 'antithetical to individualised justice' as suggested by the High Court in *Bugmy v The Queen* (**Bugmy**),[11] but rather would allow and promote 'equal justice'.[12] During a speech given in 2014, Justice Rothman argued that to consider the '200 year history of dispossession from their own land; exclusion from society; discrimination; and disempowerment … is an application of

[8] Ibid 45.
[9] [2012] 1 SCR 433 [60].
[10] Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2016) *Melbourne University Law Review* 47, 68.
[11] [2013] HCA 38 [41].
[12] Anthony, Bartels and Hopkins, above n 9, 53.

equal justice; not a denial of it'.[13] Prior to *Bugmy* in the case of *R v Fuller-Cust*, Eames JA (dissenting) argued that '[t]o ignore factors personal to the applicant, and his history, in which his Aboriginality was a factor, and to ignore his perception of the impact on his life of his Aboriginality, would be to sentence him as someone other than himself'.[14]

Such contextualisation of the particular material facts relevant to and individual before the court for sentence, is likely to ensure that sentences are cultural-safe and designed to assist that person overcome their underlying issues.

Recommendation 1

That State and Territory governments legislate to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing. This should be reflected as a sentencing factor.

Reparation or Restoration as a Sentencing Principle

ALRC Question 3–2

Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?

The CTR Coalition supports the reform of sentencing legislation, where not already done so, to specifically require consideration of reparation or restoration as a sentencing principle. Restoration and reparation are important components of justice in many Aboriginal or Torres Strait Islander cultures and may lead to more culturally appropriate sentencing. (See also Part 11 of this submission discussing diversionary options.)

Recommendation 2

That States and Territories reform sentencing legislation to include consideration of reparation and/or restoration as a sentencing principle.

Specialist courts and sentencing processes, such as Koori, Nunga and Murri courts, circle sentencing and Aboriginal Sentencing Conferences, offer the opportunity to engage Aboriginal and Torres Strait Islander Elders in sentencing processes, and to incorporate therapeutic responses to offending. Providing a legislative basis for these specialist mechanisms can strengthen the implementation of restorative and reparative justice principles in sentencing Aboriginal and Torres Strait Islander offenders.

[13] Justice Stephen Rothman, 'The Impact of Bugmy & Munda on Sentencing Aboriginal and Other Offenders' (Speech delivered at the Ngara Yura Committee Twilight Seminar, 25 February 2014) 10 cited in Anthony, Bartels and Hopkins, above n 9, 53.
[14] (2002) 6 VR 496, 520 cited in Anthony, Bartels and Hopkins, above n 9, 62.

Gladue-Style Reports

ALRC Question 3–3

Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?

ALRC Question 3–4

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

ALRC Question 3–5

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

Our *Over-Represented and Overlooked* report identifies that courts often sentence Aboriginal and Torres Strait Islander offenders without sufficient information. Current mechanisms for obtaining the relevant background information via pre-sentence reports are unsuitable as they often do not contextualise offending in light of historical and systemic factors (including intergenerational trauma and socio-economic disadvantage) and further fail to examine culturally safe sentencing options.[15]

The Canadian system involving *Gladue*-type reports allows qualified Aboriginal and Torres Strait Islander staff to identify the unique experiences of an Aboriginal and Torres Strait Islander person (i.e. removal from parents, institutional care, discrimination, lack of education, homelessness, poverty or substance abuse) and to advise the court of culturally appropriate rehabilitative options which are informed by holistic consideration of historical and systemic factors.[16]

Aboriginal and Torres Strait Islander specific sentencing processing, such as the Murri Courts and Community Justice Groups, when available currently provide cultural context including crucial information about historical and systemic factors.[17]

Recommendation 17 of our *Over-Represented and Overlooked* report calls on State and Territory governments to 'work with Aboriginal and Torres Strait Islander representatives and organisations, including representatives of existing Aboriginal and Torres Strait Islander sentencing courts, to determine whether, and how, to adopt processes for *Gladue*-type reports in sentencing'.[18] CTR proposes that the ALRC make a recommendation along similar lines.

Recommendation 3

That State and Territory governments work with Aboriginal and Torres Strait Islander representatives and organisations, including representatives of existing Aboriginal and Torres Strait Islander sentencing courts, to determine whether, and how, to adopt processes for *Gladue*-type reports in sentencing.

[15] *Over-Represented and Overlooked*, above n 6, 46.
[16] Ibid.
[17] Ibid.
[18] Ibid 47.

4. Sentencing Options

Mandatory Sentencing

ALRC Question 4–1

Noting the incarceration rates of Aboriginal and Torres Strait Islander people:

(a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and

(b) which provisions should be prioritised for review?

CTR is opposed to mandatory or presumptive sentences and suggests that the ALRC make a recommendation in its Final Report calling on Commonwealth, State and Territory governments to review with a view to abolishing provisions that impose mandatory or presumptive sentences.[19]

Recommendation 4

That Commonwealth, State and Territory governments to review, with a view to abolishing, provisions that impose mandatory or presumptive sentences.

Short Sentences of Imprisonment

ALRC Question 4–2

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

ALRC Question 4–3

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

ALRC Question 4–4

Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?

In many instances, short term imprisonment is unnecessary and only serves to contribute to entrench disadvantage and further involvement in the criminal justice system. Many provisions providing for short-term sentences (for example, imprisonment for minor theft offences) should be reviewed with a view to abolition.

However, CTR does not support a blanket abolition of short-term sentencing. In certain circumstances, short term sentences can serve an important community safety purpose; for example, a short prison sentence may provide sufficient time for a victim/survivor of

[19] *Blueprint for Change*, above n 4, 11, principle 7.

domestic violence to extricate themselves from the circumstances surrounding the trauma, for example, by moving homes or seeking counselling or other support.

However, short prison sentences alone are not sufficient to address the safety of victims/survivors of family violence, or to reduce the likelihood of perpetrators continuing to use violence. A number of best practice elements should be incorporated in combination with the reduction of short prison sentences:

- increased capacity of Aboriginal and Torres Strait Islander community organisations to provide support services to both victims/survivors and perpetrators
- building the capacity of courts to work safely with Aboriginal and Torres Strait Islander victims/survivors of family violence, including understanding the barriers facing Aboriginal and Torres Strait Islander victims/survivors
- ensuring that Aboriginal and Torres Strait Islander victims/survivors have support to have their voice heard in the process
- increasing the use of judicial monitoring of perpetrators to ensure the ongoing safety of victims/survivors, and compliance by perpetrators with court mandated programs
- use of improved risk information specific to family violence risk prior to sentencing, including information provided by specialist Aboriginal and Torres Strait Islander perpetrator programs

The specialist Barndimalgu Court based in Geraldton, WA, and other specialist courts, involve a number of the above elements which could be further developed. Strengthening the capacity of Aboriginal and Torres Strait Islander community controlled organisations to provide appropriate support (to both offenders and victims/survivors) is a critical element that is needed to ensure the safety and engagement of Aboriginal and Torres Strait Islander communities.

Alternatives to custody including diversion schemes and community-based service orders should be expanded to ensure that where imprisonment is unnecessary, sentencing authorities are able to direct an offender to services and supports that address underlying issues.[20] Each Australian jurisdiction should ensure that culturally appropriate alternatives to custody are, to the extent possible, uniformly available.

In circumstances in which short-term sentences are considered necessary, a number of options should be explored to ensure culturally and gender sensitive programs are available to prisoners (see discussion in Part 5).

Furthermore, State and Territory governments should review current use of custodial sentencing, with a view to exploring the best use of a range of options to address offences, such as:

- use of alternative detention options such as home detention for short sentences
- development of community-based accommodation in order for detention to be undertaken through community corrections supervision
- reviewing the types of offences for which short sentences are applied, and considering non-custodial penalties for these sentences

[20] Ibid.

- decriminalising certain minor offences (e.g. see Part 6 of this submission).

Recommendation 5

That State and Territory governments review the use of short sentences and develop alternatives to custodial sentences for minor offences.

Availability of Community-Based Sentences

ALRC Proposal 4–1

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

ALRC Question 4–5

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

Proposal 4-1 is reflective of consistent calls by CTR for State and Territory governments to work with peak Aboriginal and Torres Strait Islander organisations to investigate alternatives to custodial sentences.[21] Aboriginal and Torres Strait Islander community controlled organisations have the unique capacity to provide culturally appropriate services, and are able to develop localised, tailored solutions that have the support of the community.

Access to culturally appropriate and quality diversion programs is an essential step towards reducing the over-imprisonment of Aboriginal and Torres Strait Islander peoples. The literature recognises that mainstream diversion and healing programs that courts refer offenders to do not have equitable participation rates or outcomes for Aboriginal and Torres Strait Islander peoples.[22]

This highlights the need for more appropriate and more effective programs that are more responsive to the needs and circumstances of Aboriginal and Torres Strait Islander peoples. Many rural, regional and remote communities lack adequate services. Aboriginal and Torres Strait Islander communities require further resourcing to build capacity to deliver culturally appropriate services in their own communities. Collaboration with peak Aboriginal and Torres Strait Islander organisations is essential to achieve this.

[21] Ibid 6, principle 1.
[22] See PWC report page 24.

5. Prison Programs, Parole and Unsupervised Release

Availability of Prison Programs

ALRC Proposal 5–1

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

ALRC 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?

CTR strongly supports the proposal for prison programs to be developed and made available to accused people held on remand and people serving short sentences. Time in prison, no matter how short, can have a devastating impact on the lives of remandees or short-term prisoners. However, remand and short sentences can provide an opportunity for relatively early intervention to address issues before they escalate to a point where longer term sentences may be a possibility. This opportunity is often missed as the many programs are not offered to those on remand or serving short-term sentences.

The Prison to Work Report acknowledged that although remandees and those serving short sentence face similar issues to those serving longer sentences (for example, unemployment, lack of housing, drug and alcohol dependency, etc), access to programs to address these issues is limited.[23]

Based on our Blueprint for Change, CTR recommends that the following best practice elements form part of any programs intended to assist Aboriginal and Torres Strait Islander peoples held on remand or serving short sentences address the issue which may have led them to detention:

- access to Aboriginal and Torres Strait Islander specific services designed by and for Aboriginal and Torres Strait Islander people, and where possible, in the first instance provided by Aboriginal community-controlled organisations;[24]
- detailed initial assessment upon reception and individualised case management throughout and after incarceration to ensure that program participation and support services are tailored to the unique experiences of each person and to ensure that opportunities to assist the person are not missed;
- capacity to provide support and assistance across multiple interlocking issues; and
- 'throughcare' or 'wrap-around opportunities' that allow participants to continue to access programs and support services following release.[25]

[23] Council of Australian Governments, Prison to Work Report (2016) 19.
[24] *Blueprint for Change*, above n 4, 14, policy solution 12.2.
[25] Ibid 14, policy solution 12.2.

Prison Programs for Female Prisoners

ALRC 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.

ALRC Question 5–2

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

Our *Over-Represented and Overlooked* report highlights the impact that even short periods in incarceration can have on Aboriginal and Torres Strait Islander women.[26] Although the report focuses on diversion programs and alternatives to prison, many of the principles identified are equally applicable to programs available to Aboriginal and Torres Strait Islander female prisoners during incarceration.

The circumstances facing many Aboriginal and Torres Strait Islander female prisoners significantly differ from other prisoner cohorts. These prisoners are more likely to be:

- mothers;
- victims of sexual or family violence; and
- serving short sentences.

The interplay of these factors requires culturally and gender specific solutions.

As identified in the Discussion Paper, many Aboriginal and Torres Strait Islander women offenders are victims/survivors of family and/or sexual violence. On this basis, prison programs developed for these women must be trauma-informed, culturally safe and led by or in partnership with Aboriginal and Torres Strait Islander community controlled organisations with expertise in supporting victims/survivors.[27] Responding effectively to violence against women as an underlying cause of their offending is a key component of addressing ongoing offending.

The Discussion paper also identifies the high proportion of Aboriginal and Torres Strait Islander women in prison who are mothers (up to 80%). Failing to help female prisoners address issues such as drug or alcohol dependency or lack of suitable housing, which may prevent mothers from reconnecting with their children post-custody can be a significant factor in future offending. Prison programs must accommodate family and cultural responsibilities and assist incarcerated mothers to meet the conditions necessary to regain custody following release and provide a stable and suitable for those children going forward.[28]

The fact that women are more likely to be imprisoned for short periods means that the best practice elements identified above are particularly relevant when designing programs to support Aboriginal and Torres Strait Islander women in prison.

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[26] *Over-Represented and Overlooked*, above n 6, 15.
[27] Ibid 17.
[28] Ibid 35.

Recommendation 6

That the ALRC undertakes a comparative review of current investment in programs for men and women in prison in each State and Territory with a view to assessing access to and equity in the provision of support services and programs to address offending behaviour.

Parole Revocation Schemes

ALRC Proposal 5–4
Parole revocation schemes should be amended to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.

The CTR Coalition in the Blueprint for Change argues that unnecessary imprisonment should be eliminated.[29] One example of unnecessary imprisonment occurs when minor breaches of parole conditions result in a 'restarting of the clock' such that time spent on parole is not factored into the total sentence time. As such the CTR Coalition supports the introduction of a nationally consistent approach (modelled on the NSW, Queensland, SA and WA approaches) which removes requirements for the time spent on parole to be served again in prison if parole is revoked.

[29] *Blueprint for Change*, above n 4, 12, principle 8.

6. Fines and Driver Licences

ALRC Proposal 6–1

Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.

CTR strongly supports the abolition of provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.[30]

ALRC Question 6–1

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

ALRC Question 6–2

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

ALRC Question 6–3

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

Monetary penalties, often imposed for relatively minor offences such as offensive language, unreasonably and disproportionately criminalise vulnerable people including Aboriginal and Torres Strait Islander people. CTR supports reforms that:

- provide alternatives to infringement notices including suspended infringement notices or written cautions;
- limit the monetary penalties received under infringement notices; and
- limit the number of penalty notices issued for infractions of the same type in the same interaction.

The example of Ms X in the Discussion Paper demonstrates how relatively minor offences (such as use of offensive language) can compound to a point where they can have a significant and disproportionate impact on the person's life.

ALRC Question 6–4

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

ALRC Question 6–5

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

[30] Ibid.

The CTR Coalition supports the decriminalisation of offensive language offences as well as other minor public order offences, such as public drunkenness.[31] This is consistent with the recommendations of the Royal Commission into Aboriginal Deaths in Custody.[32]

These offences are often symptomatic of serious underlying issues affecting offenders, including, poverty, history of trauma, mental health conditions or alcohol/drug dependency. Therefore, responses to instances of use of offensive language, public drunkenness and minor driving offences, require support-focused responses that seek to address rather than penalising disadvantage.

Recommendation 7

That offensive language and other minor public order offences are decriminalised.

ALRC Question 6–6

Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.

ALRC Proposal 6–2

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

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

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

The CTR Coalition strongly supports the implementation of a work and development order scheme based on the NSW model for vulnerable and disadvantaged fine defaulters in all Australian jurisdictions including as an alternative to court ordered fines.

Recommendation 14 of the *Over-represented and overlooked* Report States that:

> *State and territory governments develop Work and Development Order schemes modelled on the NSW scheme, in partnership with Aboriginal and Torres Strait Islander community representatives and organisations. The scheme should be available both as a response to fine default and as an independent sentencing option. Family violence survivors should be eligible for the scheme and breach of a Work and Development Order should not result in further penalty.*

As noted above, offences for which infringement notices are issues are often symptomatic of serious underlying issues affecting offenders. This is also the case offences in which courts impose fines. Courts will often impose fines out of necessity, in the absence of rehabilitation and diversion programmes. Expansion of work and development order schemes will provide greater opportunities for offenders to be directed to programs that

[31] Ibid 12, policy solution 8.1; *Over-Represented and Overlooked*, above n 6, rec 3.
[32] Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, 28, recommendations 80-1, 85.

provide support such as medical treatment, counselling and education which can address rather than compound underlying issues.

ALRC Question 6–7

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

ALRC Question 6–8

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

(a) recovery agencies be given discretion to skip the licence suspension step where the person in default is vulnerable, as in NSW; or

(b) courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?

As noted in the Discussion Paper, licence suspension can have a serious impact on those who are simply unable to pay fines, particularly people in remote areas. The CTR Coalition therefore support reforms to ensure that recovery agencies and courts have discretion to avoid imposing license suspension where it is likely to have a significant flow on effects, such as limiting the person's ability to attend employment, access health services or support their children.

Recommendation 8

That courts and recovery agencies are given discretion to avoid imposing driving license suspension where it is likely to have significant effects such as limiting the person's ability to attend employment, access health services, or support their children.

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

ALRC Proposal 7–1

To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services.

CTR strongly supports Proposal 7-1 and particularly welcomes the need to engage with Aboriginal and Torres Strait Islander organisations. CTR's Policy Solution 8.5 identifies the need to "move away from strict compliance models in regards to both parole and bail condition breaches, particularly relating to technical breaches or low level breaches."

On a related note, CTR also highlights the need for community-based sentences to adopt community justice approaches, as reflected in Principle 9 and Policy Solutions 9.1 and 9.2 of the Blueprint for Change. Therapeutic and restorative justice approaches that are community-led and involve the support of an individual's own family are also less likely to lead to technical breaches.

The availability of and access to culturally appropriate services and supports is also an essential aspect of reducing breaches of community-based sentences. The direct involvement of Aboriginal and Torres Strait Islander organisations to identify gaps and build the necessary infrastructure will play a major role in reducing breaches of community-based sentences.

8. Alcohol

ALRC Question 8–1

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

(a) develop and implement local liquor accords with liquor retailers and other stakeholders that specifically seek to minimise harm to Aboriginal and Torres Strait Islander communities, for example through such things as minimum pricing, trading hours and range restriction;

(b) develop plans to prevent the sale of full strength alcohol within their communities, such as the plan implemented within the Fitzroy Crossing community?

ALRC Question 8–2

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

Questions 8-1 and 8-2 of the Discussion Paper focus on supply reduction. CTR supports the focus in the Discussion Paper on the need for communities to own the solutions, but submits that a much more holistic approach must be taken that focuses on education and prevention. While some measures, such as local liquor accords and alcohol management plans, have a potential role to play, it is clear that much more government investment must be provided for services and programs that address the underlying causes of alcohol abuse, rather than measures that seek to stem the tide.

Recommendation 9

That Commonwealth, State and Territory governments increase investment in programs and services that address the underlying causes of alcohol abuse.

9. Female Offenders

CTR welcomes the specific and detailed consideration given to female offenders in the Discussion Paper. Aboriginal and Torres Strait Islander women are the fastest growing group of prisoners in Australia and represent more than one third of the female prison population. Given the unique factors contributing to the over-representation of Aboriginal and Torres Strait Islander women, and the particular impacts of incarceration on women, it is appropriate that this Inquiry pay particular attention to these issues.

CTR's detailed position on reducing the over-imprisonment of Aboriginal and Torres Strait Islander women is detailed in the *Over-Represented and Overlooked* report. We are particularly pleased to see this report receive detailed reference in the Discussion Paper.

The report calls for system-wide change and outlines 18 recommendations to redress racialised and gendered justice system outcomes. The central thrust of the report is a focus on addressing the underlying causes of imprisonment, including especially family violence. This principle is reflected in CTR's Blueprint for Change, with Policy Solution 5.6 being to "fund the development of culturally-appropriate early intervention and prevention programs targeted at women experiencing multiple needs".

Recommendation 10

That Commonwealth, State and Territory governments adopt and resource the 18 recommendations of the the *Over-Represented and Overlooked* report.

Diversionary options

ALRC Question 9–1

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

Recommendation 12 of the *Over-Represented and Overlooked* report calls on "state and Territory governments to invest in diversion initiatives for Aboriginal and Torres Strait Islander women, including programs with housing for women and children, which are designed and run by or in partnership with Aboriginal and Torres Strait Islander women. Programs should ensure eligibility for women facing multiple charges and who have criminal records."

The report (p. 35) encourages investment in diversionary programs that could meet the needs of Aboriginal and Torres Strait Islander women including those that involve 'treatment, healing, family support, education and training programs that target the root causes of offending' as well as 'restorative justice processes … that aim to directly engage the offender with the consequences of their offending and repairing the harm'. The ability for judicial officers to refer Aboriginal and Torres Strait Islander women to diversionary programs should be available at all stages of the criminal justice system.

Any changes to laws and legal frameworks must take into account the particular experiences and situation of Aboriginal and Torres Strait Islander women. These include:

- the fact that 80% of Aboriginal and Torres Strait Islander women in prison are mothers – diversionary options and criminal justice process must therefore give proper consideration to situation of children and impacts that prison and/or diversionary options would have on children;

- the fact that 90% of Aboriginal and Torres Strait Islander women in prison have been victims of violence – diversionary options must therefore acknowledge this fact and be appropriate to supports victims/survivors of violence and build their strength and resilience;

- approaches that address the underlying causes of offending.

The availability of and access to appropriate, quality, culturally safe diversionary programs necessitates that adequate funding is provided to Aboriginal and Torres Strait Islander organisations to deliver these services. In addition to appropriate programs that address the underlying causes of offending, broader supports and services also need to be supported such as access to appropriate accommodation.

Recommendation 11

That State and Territory governments invest in diversion initiatives for Aboriginal and Torres Strait Islander women, including programs with housing for women and children, which are designed and run by or in partnership with Aboriginal and Torres Strait Islander women. Programs should ensure eligibility for women facing multiple charges and who have criminal records.

10. Aboriginal Justice Agreements

Aboriginal Justice Agreements

Proposal 10–1

Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.

CTR strongly supports Proposal 10-1. Aboriginal Justice Agreements are an important manifestation of the right of self-determination.

The *Unlock the Facts* report identifies self-determination as a key element to reducing the rates of Aboriginal and Torres Strait Islander incarceration.[33] Community involvement in the design and delivery of programs is repeatedly recognised throughout the literature, and must go beyond mere consultation. Community control and ownership is essential for strategies to address the high rates of incarceration to be successful, and Aboriginal Justice Agreements are a valuable tool in formalising and institutionalising the principle of self-determination and the direct role of Aboriginal Community Controlled Organisations.

The *Over-Represented and Overlooked* report on women's imprisonment also contains specific recommendations for State and Territory governments to develop and implement long-term community-led AJAs.[34] In addition to AJAs at the State and Territory level, CTR also recommends that COAG develop, in partnership with Aboriginal and Torres Strait Islander peak organisations, a fully resourced national plan of action or partnership agreement directed towards addressing Aboriginal and Torres Strait Islander over-imprisonment and violence rates.[35]

Recommendation 11

That COAG works in partnership with Aboriginal and Torres Strait Islander peak organisations to develop a fully resourced national plan of action or partnership agreement directed towards addressing Aboriginal and Torres Strait Islander over-imprisonment and violence rates.

Justice Targets

ALRC Question 10–1

Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?

A key overarching recommendation contained in CTR's Blueprint for Change is the development of national justice targets. As the Closing the Gap strategy demonstrates,

[33] See PWC report page 34 onwards

[34] Recommendation 4 (pp 26 – 27)

[35] See women's imprisonment report recommendation 5. (pp 26 – 27)

the existence of targets makes the gap that exists between Indigenous and non-Indigenous Australians, and any progress or lack thereof, clearly visible. The use of such targets, and other benchmarks and indicators, encourages a focus on outcomes. In the case of Closing the Gap, targets have also helped build cooperation and secure investment in an attempt to achieve outcomes.

The setting of targets, together with the collection of data and monitoring and evaluation, is essential to holding governments to account. Targets encourage a culture of continuous reflection and improvement in the way the criminal justice system accommodates Aboriginal and Torres Strait Islander people's interests.

Establishing a Closing the Gap justice target could lead to better cooperation, long term strategies and investments, a focus on outcomes, and greater accountability to help drive a reduction in the rates of Indigenous incarceration in Australia.

As proposed in the CTR Blueprint for Change (p 5) and the Women's Over-Imprisonment Report (p 27), Federal, State and Territory governments should work with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies, to forge agreement through COAG to set the following justice targets:

iii. Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040, with an interim target of halving the gap by 2030; and
iv. Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to close the gap by 2040

Forming part of the development of justice targets should be the identification of sub-targets that, among other aspects, focus on the importance of resourcing Aboriginal and Torres Strait Islander community controlled organisations, which deliver front line services that would assist in meeting an identified Justice Target.

Establishing a Closing the Gap justice target could lead to better cooperation, long term strategies and investments, a focus on outcomes, and greater accountability to help drive a reduction in the rates of Indigenous incarceration in Australia.

Recommendation 12

That Federal, State and Territory governments work in partnership with Aboriginal and Torres Strait Islander communities, their organisations and representative bodies, to forge agreement through COAG to set the following justice targets:

i. Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040, with an interim target of halving the gap by 2030; and
ii. Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to close the gap by 2040.

Recommendation 13

That the process to develop national justice targets identifies sub-targets to resource Aboriginal and Torres Strait Islander community controlled organisations that deliver front line services to assist to meet these justice targets.

11. Access to Justice Issues

Interpreter Services

ALRC Proposal 11–1

Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.

CTR supports ALRC Proposal 11-1, which is reflective of Policy Solution 8.3 in the CTR Blueprint for Change (p 12). Policy Solution 8.3 calls on government to increase the availability of interpreters for legal and other services, particularly in remote and regional areas.

At present, there is a growing unmet need for highly trained interpreters in numerous Aboriginal and Torres Strait Islander languages. The provision of interpreters is crucial to ensure access to justice for Aboriginal and Torres Strait Islander people, particularly those who do not speak English as a first, second or third language and are unfamiliar with police investigations and court procedures.

Poor communication at a person's first point of contact with the criminal justice system can have enormous implications. When language and communication difficulties go undetected, particular actions can be mistaken for indications of guilt during police interviews or in the court room. Alternatively, poor communication may result in a defendant having no comprehension of the proceedings taking place before them. This is particularly common where interpreters are used in complicated court proceedings. Inadequately trained interpreters may lack the necessary skills or level of experience required to adequately interpret for Aboriginal and Torres Strait Islander clients.

Interpreter services should be developed in cooperation with Aboriginal and Torres Strait Islander communities if they are to meet the objective of providing culturally appropriate services.

Diversion Options

ALRC Question 11–1

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

Diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples are a much more effective pathway to preventing future interaction with the justice system than a fine or imprisonment.

Therapeutic and restorative processes, such as Koori, Nunga and Murri courts, drugs courts and healing circles, are ways in which the criminal justice system can help to rebuild relationships and deliver positive outcomes for the entire community. Conversely, a lack of alternative community-based sentencing options in regional and remote areas has

resulted in people being sentenced to a term of imprisonment which they would not have received had they lived in a metropolitan area where such alternatives are routinely available. Not having alternative sentencing options means that imprisonment is often the only choice the court can make, regardless of whether the circumstances warrant it. This is a significant contributing factor to the growth of imprisonment rates.

As stated in the CTR Blueprint for Change, State and Territory governments should:

- support the development and implementation of culturally competent and specialist courts, such as Koori, Nunga and Murri Courts and Drug Courts (CTR Policy Solution 9.1);
- support the development and implementation of community-led therapeutic and restorative justice approaches including healing circles and youth conferencing (CTR Policy Solution 9.2);
- end custodial sentencing for low level offences, expand diversion schemes and community-based service orders, and ensure equitable access by Aboriginal and Torres Strait Islander people to non-custodial sentencing options (CTR Policy Solution 8.1);
- reduce unnecessary remand by expanding bail accommodation, case management for remand and other bail support programs (CTR Policy Solution 8.2); and
- move away from strict compliance models in regards to both parole and bail condition breaches, particularly relating to technical breaches or low level breaches (CTR Policy Solution 8.5).

In order to ensure their success, diversionary programs and alternatives to prison must be culturally-specific and, where appropriate, gender-specific.

In the design of such diversion programs, certain barriers must be addressed to ensure greater accessibility and participation of Aboriginal and Torres Strait Islander people. These include rural or remote living, substance misuse issues and/or co-existing mental illness and criminal history.

In relation to the almost 80% of Aboriginal and Torres Strait Islander women in the criminal justice system who are mothers, programs should accommodate family and cultural responsibilities and be available to women in their communities. As stated in the Women's Over-Imprisonment Report (p. 19), in recognition of the high percentage of women offenders being victims/survivors of family and/or sexual violence, justice system responses should be trauma-informed, culturally safe and led by or in partnership with Aboriginal and Torres Strait Islander community controlled organisations with expertise in supporting victims/survivors. Courts should also be encouraged to hand down non-custodial sentences for mothers with dependent children, or other primary care-givers, when the offender is not considered a danger to society.

Young people should have access to best practice and culturally appropriate therapeutic programs, and opportunities to address their offending behaviour, in order to reduce their overrepresentation in detention.

Indefinite Detention

ALRC Proposal 11–2

Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.

A critical issue with legislation in this area is the lack of judicial discretion to make appropriate orders. For example, in Western Australia, under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ('the CLMIA Act (WA)') a court dealing with a person who has been found to be unfit to stand trial has one of two options: indefinite custody or unconditional release. In contrast, a mentally impaired accused who is acquitted on account of unsoundness of mind may be placed on a community-based order, conditional release order or an intensive supervision order.

However, the court must impose an indefinite custody order for a mentally impaired accused, who has been acquitted on account of unsoundness of mind, if the offence committed is listed in Schedule 1 of the CLMIA Act (WA). While Schedule 1 includes offences such as murder, manslaughter and sexual penetration, it also includes offences such as assault occasioning bodily harm and criminal damage. This lack of judicial discretion is a major obstacle to the courts making appropriate orders, as appropriate outcomes will seldom be reached by either of the extreme options of unconditional release or indefinite detention. This can be compared with legislation in Victoria where there are no mandatory orders for mentally impaired accused under criminal legislation. Instead, treatment, custodial and judicial monitoring orders are at the court's discretion. Likewise, in South Australia, the courts have wide discretionary powers to make appropriate orders.[36]

Access to Legal Services

ALRC Question 11–2

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

Aboriginal and Torres Strait Islander community controlled legal services (i.e. ATSILS and FVPLSs) are the preferred providers for Aboriginal and Torres Strait Islander peoples – ATSILS are funded specifically for criminal law matters and FVPLSs provide specialist support to Aboriginal and Torres Strait Islander victim/survivors.

For Aboriginal and Torres Strait Islander people facing criminal charges, ATSILS are the preferred and in many instances the only legal aid option.. The ATSILS play a crucial role in utilising cultural strengths and building the capacity of individuals, families and communities – a key determinant in preventing violence, reducing offending, dismantling barriers to justice and reducing social isolation. The demand for ATSILS services continues to grow.

[36] *NATSILS' Submission to the Senate Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia April, 2016, pg12.*

Despite the critical need and rising demand for ATSILS services, the amount of real funding provided to the ATSILS has been declining since 2013, while the cost of providing services has risen. In the 2017-18 Federal Budget, the Government restored funding cuts to ATSILS of $16.7 million over the forward estimates. However, after 2020, ATSILS will be subject to funding cuts as a result of the Government's 2013 ongoing savings measure. These cuts will have a major impact on highly vulnerable Aboriginal and Torres Strait Islander peoples and impact upon the ability of ATSILS to deliver services that ensure Aboriginal and Torres Strait Islander people are equal before the law and have access to a fair trial.

The failure of successive governments to sustainably fund Aboriginal and Torres Strait Islander community controlled legal services reflects the gross inequality in our legal system that contributes to Aboriginal and Torres Strait Islander over-imprisonment.

Aboriginal and Torres Strait Islander community controlled legal services must be properly and sustainably funded. As recommended in the *Over-represented and Overlooked* Report, the Federal government, together with State and Territory governments where appropriate, should:

- permanently reverse planned funding cuts to the Aboriginal and Torres Strait Islander Legal Services; and
- adequately and sustainably fund ATSILS and FVPLSs to:
  - meet existing demand for services, including culturally-safe specialist prevention and early intervention programs;
  - address unmet legal need regardless of geographic location; and
  - develop models of holistic support and case management for women.

In order to address the most pressing gaps in services (for both Indigenous and non-Indigenous people), the Productivity Commission recommended Australian, State and Territory governments provide an additional $200 million per year to civil legal assistance.

Recommendation 15

That Commonwealth, State and Territory governments ensure sufficient and sustainable funding for ATSILS and FVPLSs, including reversing planned funding cuts to ATSILS, and:

- meet existing demand for services, including culturally save prevention and intervention programs;
- address unmet legal need regardless of geographic location; and
- develop models of holistic support and case management for women.

Custody Notification Service

ALRC Proposal 11–3

State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

CTR supports ALRC Proposal 11-3, which is reflective of the recommendations of the *Over-represented and Overlooked* Report, which calls for State and Territory governments, in consultation with the ATSILS, to introduce custody notification laws that make it mandatory for the police to notify ATSILS of any Aboriginal and Torres Strait Islander person taken into custody.

A custody notification service ensures that an Aboriginal or Torres Strait Islander person receives legal advice delivered in a culturally sensitive manner at the earliest possible opportunity. This prevents those being detained from acquiescing to police demands in a manner which could jeopardise subsequent court proceedings. Further, notification requirements provide an opportunity for an Aboriginal or Torres Strait Islander person being detained to receive a culturally sensitive welfare check, and assurance that where medical attention may be required, it is provided with immediacy.

ATSILS must be properly resourced to respond to notifications with legal and welfare checks and custody notification systems should be reviewed regularly.

12. Police Accountability

Family Violence

ALRC Question 12–1

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

The continuing impact of the Stolen Generation, and ongoing contemporary experiences of discrimination and barriers to accessing justice, mean that the reporting of family violence is particularly difficult for many victims, or those witnessing family violence. Given the strained relationship between Aboriginal and Torres Strait Islander people and authority organisations such as the police or government welfare departments, it is understandable that Aboriginal and Torres Strait Islander people are wary of making reports that, whilst they may have the immediate impact of safety, may have the longer-term impact of breaking up a family, putting children into out-of-home care, sending someone into custody, becoming homeless or other impacts.

There are significant issues of trust between Aboriginal and Torres Strait Islander people, the police and government services. Whether it is a poor (trivialising, judgmental, disbelieving or minimising) response or lack of follow up after a report of family violence, or a heavy-handed response from a government agency when a family seeks help, Aboriginal people find they are either facing a lack of support in the most serious of cases, or excessive interventions in other situations.

There must be changes in the way that police interact with Aboriginal and Torres Strait Islander people and communities, including improved cultural awareness, with the aims of building trust, promoting safety and reducing crime. As such, CTR recommends:

1. Prioritising responding to Aboriginal and Torres Strait Islander women's victimisation

There is a clear need for police protocols that require officers to prioritise responding to Aboriginal and Torres Strait Islander women's victimisation. As recommended in the *Over-represented and Overlooked* Report, State and Territory police should ensure that police protocols and guidelines prioritise the protection of, and provision of support to, Aboriginal and Torres Strait Islander women and children subject to violence. Responding to an incident of family violence should never be used as an opportunity to act upon an outstanding warrant against a victim/survivor of violence.

2. Developing better training and recruitment practices

There is also an urgent need for training and recruitment practices that ensure appropriate responses to Aboriginal and Torres Strait Islander women and that promote Aboriginal and Torres Strait Islander women's participation. The Coroner in Ms Dhu's case called for mandatory, ongoing and location-specific cultural competency training and assessment, with Aboriginal people involved in the delivery of training. Improving police responses will be assisted if Aboriginal and Torres Strait Islander women are employed to work as, and to train, police officers.

3. Improving police responses to victims of family violence

Police need to be less confrontational in their approach to taking out intervention orders on behalf of family violence victims and need to better understand the complexities of Aboriginal communities when dealing with family violence. Engaging other services to support family violence victims during this period is crucial. It is preferable that Aboriginal services be engaged or police should explore with the client and family which services have previously worked or if there are any particular support workers that the victim or family would prefer to engage. The presence of Aboriginal Community Liaison Officers in some police stations is a step forward, but there should be more Aboriginal Community Liaison Officers across States and territories to support the relationships between police and the Aboriginal community.

In addition, clear referral protocols and systems need to be established to ensure that when responding to a victim/survivor of family violence police are routinely asking identifying questions to ascertain Aboriginality and supporting victims/survivors to access services and supports – including legal assistance – from Aboriginal Community Controlled Organisations with expertise assisting victims/survivors of family violence.

The Victoria Police e-learning package, developed in response to recommendations of the Victorian Royal Commission into Family Violence, is one example of a positive initiative taken to improve police responses to Aboriginal and Torres Strait Islander victims/survivors of family violence. Part of the success of this initiative was its close consultation with and inclusion of Aboriginal community members and Aboriginal Community Controlled Organisations. The e-learning package is compulsory for all levels of the police force and, to date, it has been completed by 11,700 police officers across Victoria. It is just the first step in the development of a new family violence education framework and creation of a family violence centre of learning within Victoria Police in order to implement recommendations of the Royal Commission into Family Violence.

Recommendation 16

That State and Territory governments implement strengthened, systematic training for all police officers at all levels to improve cultural awareness and family violence sensitivity, led by, and in consultation with, Aboriginal organisations with frontline expertise assisting Aboriginal victims/survivors of family violence.

Community Engagement

ALRC Question 12–2

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

Police have an enormously important and often difficult role to play in dealing with offending behaviour, responding to family violence and keeping us all safe. However, many communities describe experiences of over- or under-policing, harassment or racism, which can sometimes exacerbate the situation for already marginalised and disadvantaged communities. Changes to the ways police interact with and enforce the law in communities experiencing poverty and disadvantage, as well as a greater level of cultural awareness, can play a vital role in building trust, promoting safety, reducing crime and building stronger communities.

As stated in the CTR Blueprint for Change, to promote changes to the ways police interact with and enforce the law in Aboriginal or Torres Strait Islander communities, State and Territory governments should:

- develop and implement strategies which are aimed at building stronger and collaborative relationships between police and Aboriginal and Torres Strait Islander communities, organisations and their representative bodies. These strategies should improve police interaction with the community and build the capacity of police to respond to family violence, mental health issues and other complex situations, in a culturally safe way (CTR Policy Solution 6.1);

- establish police policies and programs that promote diversion from the criminal justice system. For example, establishing targets and incentivising smart practices, such as referrals to appropriate health or other support services (CTR Policy Solution 6.2);

- implement programs to increase awareness of the prevalence and impact of disability and mental health on offending behaviour/crime/contact with the justice system, and provide options for better policing and judicial administration (CTR Policy Solution 6.3); and

- promote community-based initiatives, such as night patrols, that promote public safety measures and community empowerment (CTR Policy Solution 6.4).

In addition, State and Territory governments should implement strengthened, systematic training for all police officers to improve cultural awareness and family violence sensitivity, led by, and in consultation with, Aboriginal organisations with frontline expertise assisting Aboriginal victims/survivors of family violence.

Finally, as noted in the Women's Over-Imprisonment Report, police and courts in each State and Territory should develop guidance materials and ensure that police and judicial officers are regularly educated by Aboriginal and Torres Strait Islander people about:

- the gendered impacts of colonisation and systemic discrimination and disadvantage; and

- how these impacts contribute to Aboriginal and Torres Strait Islander people's over-imprisonment.

Recommendation 17

That police and courts in each State and Territory develop guidance materials and ensure that police and judicial officers are regularly educated by Aboriginal and Torres Strait Islander people about:

- the gendered impacts of colonisation and systemic discrimination and disadvantage; and

- how these impacts contribute to Aboriginal and Torres Strait Islander people's over-imprisonment.

Oversight of Police

One issue not adequately covered in the ALRC Discussion Paper is the need for independent oversight and monitoring of police. In most instances, the first point of contact between an Aboriginal and Torres Strait Islander person and the justice system is with the police. However, in most Australian jurisdictions there are no independent bodies that exist to receive and investigate complaints about police mistreatment or discrimination. In several State and Territory jurisdictions, police complaints are only dealt with by an internal review.

CTR acknowledges that police have an enormously important and often difficult role to play in dealing with offending behaviour and keeping our communities safe. In order to maintain strong perceptions of fairness and independence, it is vital that independent mechanisms exist to investigate any allegations against police. Adequate independence requires that police complaints processes must be institutionally and hierarchically independent, particularly to avoid any perceptions of collusion or unfairness.

Recommendation 18

That Commonwealth, State and Territory governments develop mechanisms for independent investigation of complaints and allegations regarding police conduct.

13. Justice Reinvestment

ALRC Question 13–1

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

CTR strongly supports 'justice reinvestment' style initiatives that are designed to reduce the imprisonment of Aboriginal and Torres Strait Islander peoples. However, CTR urges caution with respect to the development of specific laws or legal frameworks designed to facilitate justice reinvestment initiatives. The essence of the concept of justice reinvestment is a place-based, community-led approach, which necessarily means that justice reinvestment initiatives are likely to be different in different communities.

Accordingly, the development of any laws or legal frameworks designed to facilitate justice reinvestment initiatives could focus on identifying a number of general principles, rather than the development of specific frameworks. These principles could include:

- ensuring 'bottom up' decision-making which requires that directly affected individuals and communities are directly involved in decision-making;
- a focus on and commitment by government to 'reinvestment' into early intervention and prevention strategies that are designed to address the underlying causes of crime and to empower and strengthen communities;
- ensuring that appropriate data is collected and available to communities; and
- the identification of particular targets (and possibly sub-targets) to reduce imprisonment rates.

The 12 high-level principles contained in CTR's Blueprint for Change reflect an over-arching justice reinvestment style approach that focuses on prevention, early intervention and diversion from prison. Such principles could usefully form the basis of any laws or legal frameworks designed to facilitate justice reinvestment initiatives.

Other Relevant Issues for Consideration

While we acknowledge that the Terms of Reference for this Inquiry focus largely on criminal justice responses, CTR strongly recommends that a number of other important issues should be considered by the ALRC.

A More Holistic Approach

While law reform within the criminal and judicial spheres is clearly needed to make inroads into over-imprisonment, addressing the key drivers of imprisonment of Aboriginal and Torres Strait Islander peoples must be placed in a broader context. As outlined in the *Unlock the Facts* report, the key elements of the approach required are:

1. Self-determination: Like all Australians, Aboriginal and Torres Strait Islander peoples have a right to determine their own political, economic, social and cultural development. Self-determination for Aboriginal and Torres Strait Islander peoples is essential to overcoming disadvantage and includes building connections to culture and a strong role for Aboriginal Community Controlled Originations (ACCOs) in the formation of any solutions.

2. System reform: The key drivers of over-representation of Aboriginal and Torres Strait Islander people in prisons will not be addressed by reform of the criminal justice alone. Instead, whole of system solutions are required across a range of traditional government policy and portfolio areas, including education, health, human services, welfare and justice.

3. Law reform: This includes consideration of changes to laws and legal policy settings which contribute to the overrepresentation of Aboriginal and Torres Strait Islander people in prison – and which forms the major basis of the ALRC's current inquiry.

4. Increased community awareness: Despite landmark reports, inquiries and reviews such as the Royal Commission into Aboriginal Deaths in Custody, the level of understanding in the Australian community of the issues, causes, rates and consequences of overrepresentation of Aboriginal and Torres Strait Islander men, women, children and young people remains limited. In order for change to happen, there needs to be broader community awareness.

5. Initiatives and programs: In addition to broader system level reform, specific initiatives and programmatic responses are required – particularly Aboriginal and Torres Strait Islander community controlled and led initiatives.

While the Discussion Paper canvasses some of these issues, CTR urges the ALRC to adopt a more holistic approach to the change that is needed to reduce Aboriginal and Torres Strait Islander imprisonment rates.

More Focus on Underlying Drivers of Imprisonment

CTR adopts a holistic view to reducing over-imprisonment, which requires examining the key drivers that lead to over-representation in prisons of Aboriginal and Torres Strait Islander peoples. While there are factors that lie within the justice system, addressing the key drivers that lead to offending and contact with the justice system in the first place has the potential for much greater impact in the long-term.

Reducing the rates at which Aboriginal and Torres Strait Islander people are imprisoned requires a system-wide and holistic response, and not an approach that relies largely on criminal justice responses. While initiatives within custodial or justice settings are important and play a role in assisting those who have already come into contact with the justice system, an analysis of the key drivers of the imprisonment of Aboriginal and Torres Strait Islander peoples suggests that a wider range of initiatives is required.

The inquiry must also consider law reform options relating to the underlying causes, including:

- Education, including in particular early childhood education;
- Disability;
- Housing;
- Employment;
- Health;
- Intergenerational trauma;
- Social exclusion and racism;
- Child protection; and
- Family violence and sexual abuse.

These underlying factors must be considered, as well as the additional factors related to the justice system and which form the major focus of the Terms of Reference.

CTR considers that Terms of Reference are sufficiently broad for consideration of these issues to be included by the ALRC.

Youth Justice

While Aboriginal and Torres Strait Islander children make up less than 6% of the nation's young people aged 10-17 years, they make up 54% of children in detention.[37] And while boys make up the vast majority of Aboriginal and Torres Strait Islander children in detention (9 out of 10), Aboriginal and Torres Strait Islander girls are also far more likely to

[37] Australian Institute of Health and Welfare 2017. Youth justice in Australia 2015–16. Bulletin 139. Cat. no. AUS 211. Canberra: AIHW: Aboriginal and Torres Strait Islander children are now 25 times more likely to be locked up than non-Indigenous children. One of out every 35 Aboriginal and Torres Strait Islander boys spent time in prison last year, compared to one out of every 650 non-Indigenous boys. The overrepresentation itself leaves children more vulnerable to mistreatment, but evidence suggests that Aboriginal and Torres Strait Islander children are more likely to experience mistreatment. For example, some of the graves examples of abuse have been from youth detention centres such as Don Dale and Cleveland where respectively around 95 and 87 per cent of all children are Aboriginal or Torres Strait Islander. See also, Commission for Children and Young People, The same four walls: inquiry into the use of isolation, separation and lockdowns in the Victorian Youth Justice System, which finds that while Koori children made up 15 per cent of all children at Malmsbury, they accounted for 30 per cent of this who were isolated, p 56.

be in detention than their non-Aboriginal and Torres Strait Islander classmates,[38] and their needs are often overlooked.

Rather than being given the support they need, too often Aboriginal and Torres Strait Islander children are mistreated, denied support and end up returning to the justice system as adults.

CTR recommends that Commonwealth, State and Territory governments work with Aboriginal and Torres Strait Islander communities and organisations to develop a national plan of action on youth justice addressing the following issues:

- The need to prioritise early intervention and prevention, including access to basic universal services, as well as strengthening Aboriginal and Torres Strait Islander communities and culture
- Ensuring the age of criminal responsibility is at least 12 years in all jurisdictions
- Ceasing detention of children who have not been sentenced, and providing alternative, culturally appropriate bail accommodation
- Working with Aboriginal and Torres Strait Islander Legal Services and Aboriginal Family Violence Prevention and Legal Services to provide sufficient resourcing to meet the need for access to legal services by Aboriginal and Torres Strait Islander young people
- Developing best practice youth detention facilities, including the availability of education, treatment, skill development programs, and other programs to address offending behaviour
- Setting targets to reduce the overrepresentation of Aboriginal and Torres Strait Islander young people in prison

Recommendation 19

That Commonwealth, State and Territory governments work with Aboriginal and Torres Strait Islander communities and organisations to develop a national plan of action on youth justice with clear targets and ongoing monitoring of progress.

Connections Between Child Protection, Out-Of-Home Care, Youth Incarceration, and Adult Incarceration

The connections between child protection, out-of-home care, youth justice, and adult criminal justice involvement are well evidenced and identified in the Discussion Paper. The 'inextricable link'[39] between the child protection and youth justice systems is seen through the increased likelihood of simultaneous contact with both systems[40] and youth

[38] In 2015-16, Aboriginal and Torres Strait Islander girls were 22 times as likely to be in detention as their non-Indigenous peers.

[39] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report* (2017), 2.

[40] Australian Institute of Health and Welfare 2016. *Young people in child protection and under youth justice supervision 2014–15*. Data linkage series no. 22. Cat. no. CSI 24. Canberra: AIHW; Wise, S. and Egger, S. (2007) *The Looking After Children Outcomes Data Project: Final Report*, Australian Institute of Family Studies,

(or adult) criminal justice involvement after leaving care[41]. The subsequent pathway from youth justice to adult criminal justice involvement, including incarceration, and in fact youth detention as a driver of adult incarceration, is concerning and needs to be addressed.

Given the alarming rates of over-representation of Aboriginal and Torres Strait Islander children in child protection systems and in out-of-home care across all jurisdictions,[42] the connections and pathways from child protection involvement and out-of-home care to youth and adult criminal justice involvement are more pronounced for Aboriginal and Torres Strait Islander children.

Evidence regarding youth justice supervision shows a particularly strong relationship between Aboriginal and Torres Strait Islander children in out-of-home care and youth justice supervision – 11.3 per cent of Aboriginal and Torres Strait Islander males in out-of-home were also under youth justice supervision, and 6.6 per cent of Aboriginal and Torres Strait Islander females in out-of-home care were at the same time under youth supervision.[43]

In the context of these connections, in its discussion paper the ALRC recommends a national review into child protection system laws and processes:

> While there are strategies at state level, there has not been a national review of the laws and processes operating within the care and protection systems of the various states and territories. The ALRC considers that such a review would be timely (p. 25).

CTR supports this position and recommends a national review of the laws and processes of each State and Territory's child protection system, particularly as they relate to Aboriginal and Torres Strait Islander children and families. We further recommend consideration and adoption of calls made by the Family Matters campaign, an Aboriginal and Torres Strait Islander-led campaign that seeks to improve Aboriginal and Torres Strait Islander child safety and wellbeing and reduce the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care.[44]

CTR recommends reforms to child protection systems, a re-focusing on prevention and early intervention approaches, and prioritisation of Aboriginal and Torres Strait Islander community controlled services and organisations in a way that will disrupt the connections between child protection and criminal justice involvement and incarceration as key justice reinvestment initiatives. Essentially, an approach that strengthens and supports families so that children are not being placed at risk in the first place is key to diverting children

15; and Katherine McFarlane, *Care-criminalisation: The involvement of children in out-of-home care in the NSW criminal justice system* (2015), UNSW.

[41] Raman, S., Inder, B. and Forbes, C., *Investing for Success: The economics of supporting young people leaving care (*2005), Centre for Excellence in Child and Family Welfare, Melbourne; and McDowall, J., *Report Card: Transitioning from Care* (2008), CREATE Foundation, Sydney; McDowall, J., *Report Card: Transitioning from Care: Tracking Progress* (2009), CREATE Foundation, Sydney.

[42] SNAICC – National Voice for our Children, *The Family Matters Report: Measuring trends to turn the tide on Aboriginal and Torres Strait Islander child safety and removal* (2016), Melbourne, 9; Australian Institute of Health and Welfare 2017. *Child protection Australia 2015–16*. Child Welfare series no. 66. Cat. no. CWS 60. Canberra: AIHW.

[43] AIHW, Young people in child protection and under youth justice supervision 2014-2015 (published 2016) http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129557321

[44] http://www.familymatters.org.au/

from out-of-home care and a pathway to youth and then adult criminal justice involvement and incarceration.

In this regard, we call for improved access to quality, culturally safe, universal and targeted services including early childhood education and care and other family support services, designed and delivered by Aboriginal and Torres Strait Islander community controlled organisations in line with self-determination and following a broad base of evidence demonstrating improved outcomes from Indigenous-led service design and delivery.[45]

Recommendation 20

That COAG commissions a national review of care and protection systems for vulnerable children, particularly as they relate to Aboriginal and Torres Strait Islander children and families.

[45] Australian National Audit Office. (2012). Capacity development for Indigenous service delivery, No 26, Canberra, p17; Cornell, S., and Taylor J. (2000). Sovereignty, devolution, and the future of tribal-state relations, Cambridge: Harvard University, pp6-7 retrieved on 29 September 2016 from: http://hpaied.org/sites/default/files/ publications/PRS00-4.pdf; Denato, R., and Segal, L. (2013). 'Does Australia have the appropriate health reform agenda to close the gap in Indigenous health?', Australian Health Review, 37(2), May, 232; Chandler, M., and Lalonde, C. (1998). Cultural continuity as a hedge against suicide in Canada's First Nations; Lavoie, J. et al. (2010). 'Have investments in on-reserve health services and initiatives promoting community control improved First Nations' health in Manitoba?', Social Science and Medicine, 71(4), August, 717.