

NSW Bar Association submission to the
Australian Law Reform Commission Inquiry into the Incarceration Rates of
Aboriginal and Torres Strait Islander Peoples – Discussion Paper 84

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INTRODUCTION

1. The New South Wales Bar Association (**the Bar Association**) welcomes the opportunity to make a submission to the Australian Law Reform Commission in relation to Discussion Paper 84 “Incarceration Rates of Aboriginal and Torres Strait Islander Peoples” (**the Discussion Paper**).
2. By resolution dated 8 June 2017, the Council of the Bar Association (**Bar Council**) established a Joint Working Party on the Over-representation of Indigenous people in the NSW Criminal Justice System (**the Joint Working Party**), consisting of four members of each of the Human Rights Committee, the Criminal Law

Committee and the Indigenous Barristers' Strategy Working Party, as well as a number of external members with relevant expertise and knowledge.¹

3. The Joint Working Party's terms of reference require it, inter alia, to consider policy and programs, including legislative and administrative measures, to address the over-representation of Indigenous people in the NSW criminal justice system. The Joint Working Party was also tasked to assume responsibility for developing a submission to the ALRC's Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander peoples. This submission in relation to Discussion Paper 84 was prepared by the Joint Working Party, and adopted by Bar Council.

GENERAL PRINCIPLES AND COMMITMENTS

4. The Bar Association has approached the proposals and questions in the Discussion Paper consistently with the principles enunciated in the Law Council of Australia's *Policy Statement on Indigenous Australians and the Legal Profession* (February 2010)², having regard in particular to the following:
 - that Indigenous Australians have been subject to significant dispossession, marginalisation and discrimination, and continue to experience widespread disadvantage, including in the areas of housing, health, education, employment, access to justice and participation in the political, economic, social and cultural life of the nation;
 - the particular cultural, linguistic, economic and geographic barriers that confront Indigenous Australians seeking legal assistance and access to justice;
 - that Indigenous Australians are significantly and unacceptably over-represented in Australian prisons and the criminal justice system;
 - that Indigenous Australians, like all Australians, have a right to equality before the law, individualised justice, due process before the law and to be free from discrimination of any kind, in particular that based on their Indigenous origin or identity;
 - that Indigenous Australians, like all Australians, have the right to physical and mental integrity, liberty and security of person;
 - that Indigenous Australians have the right to self-determination and to recognition and protection of their distinct culture and identities, as provided

¹ The external members include the Hon Bob Debus; Professor Megan Davis; Sarah Hopkins, Chair, Just Reinvest NSW; the Hon Judge Stephen Norrish QC; and the Hon Judge Dina Yehia SC.

² Authorised by LCA Directors Law Council of Australia, 28 November 2009.

under, inter alia, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Declaration on the Rights of Indigenous Peoples;

- that Indigenous Australians, through their representatives, have a right to be consulted about and participate in decision-making concerning legislative and policy changes affecting their rights and interests; and
 - the importance to Indigenous Australians of alternative justice models which involve greater participation of the Indigenous community.
5. In approaching the proposals and questions in the Discussion Paper, the Joint Working Party has likewise recognised and sought to apply the following commitments made by the Law Council in its *Policy Statement on Indigenous Australians and the Legal Profession*:
- promoting, as a matter of the highest priority, methods for reducing the over-representation of Indigenous Australians in the criminal justice system;
 - promoting the development of alternative justice models involving greater participation of the Indigenous community, such as restorative justice models, Indigenous courts and community justice groups;
 - promoting the provision of Indigenous interpreter services and the training of Indigenous interpreters;
 - promoting substantive equality for Indigenous Australians before the law, including effective measures to ensure continuing improvement of their economic and social conditions and to ensure they are able to maintain and strengthen their institutions, cultures and traditions;
 - promoting the right of Indigenous Australians to understand and be understood in legal proceedings, at all times through the use of plain English and, where necessary, through the provision of interpreter services and other appropriate means acceptable to the individuals concerned;
 - challenging legislation, policies and practices that discriminate against and violate the human rights of Indigenous Australians, and impede substantive equality before the law;
 - working in partnership with Indigenous communities and organisations to promote Indigenous Australians' rights and interests, respect for Indigenous Australian cultures, knowledge, perspectives and practices, and the reinvigoration and strengthening of Indigenous legal systems, laws and institutions;

- promoting the economic and social empowerment of Indigenous Australians to overcome the economic and social disadvantages to which they have been, and continue to be, subject and supporting them in developing a capacity to participate fully in the broader Australian community, where they so choose.
6. Generally, in relation to the Discussion Paper, the Bar Association strongly supports the role of Indigenous controlled organisations in the provision of criminal justice related programs and in addressing the incarceration rates of Aboriginal and Torres Strait Islander people. There is a compelling case for the central involvement of Aboriginal and Torres Strait Islander organisations in relation to bail support, diversion, female offenders, non-custodial and community sentencing options, community corrections, mental health and drug and alcohol services. It is essential that such organisations be adequately resourced, structurally integrated and available in urban, regional and rural areas.
 7. Generally, as well, the Bar Association cannot emphasise too strongly the intolerable lack of accessible drug and alcohol rehabilitation programs in regional, semi-remote and remote areas. There are even fewer that are culturally appropriate, or that are designed in consultation with and seek to address the particular requirements of Aboriginal and Torres Strait Islander communities. The almost complete absence of such programs in many parts of NSW presents a tremendous hurdle for offenders and for the courts in seeking to avoid custodial options or assist in the supervision of offenders.
 8. Finally, the Bar Association notes with particular concern that current funding arrangements for Aboriginal and Torres Strait Islander legal services has not kept up with increased demand and the cost of service delivery. It is obvious that manifestly unacceptable incarceration rates of Aboriginal and Torres Strait Islander people cannot even begin to be addressed without adequate, consistent and reliable funding of legal services. The Bar Association urges the importance of federal funding to facilitate uniformity, and to address cross-jurisdictional issues which arise, for example, in the case of the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) lands. The Bar Association also supports the fundamental premise of Justice Reinvestment that a fiscal mechanism is required to support the long-term and sustainable funding of early intervention, crime prevention and diversionary measures.

PROPOSALS AND QUESTIONS

1. BAIL AND THE REMAND POPULATION

Proposal 2-1 *The Bail Act 1977 (Vic)* has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the *Bail Act*. Other state and territory bail legislation should adopt similar provisions. As with all other bail considerations, the requirement to consider issues that arise due to the person's Aboriginality would not supersede considerations of community safety.

9. The Bar Association considers bail law reform to be one of the most important areas requiring attention in order to reduce the incarceration rates of Aboriginal and Torres Strait Islander people.
10. The Bar Association strongly supports the introduction of provisions in bail laws, such as those in Victoria, which require courts to consider issues which arise due to the person's background as an Aboriginal and Torres Strait Islander person. However, there is a significant risk that such provisions will be given lip-service and make no practical difference in individual cases. In the experience of the Bar Association, it is the combination of many thousands of such individual cases which results in the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. It is therefore submitted that stronger, and in some cases special, measures need to be taken. These should include not only measures which would result in more Aboriginal and Torres Strait Islander people being granted bail, but measures which would result in fewer breaches of bail resulting from unrealistic conditions setting up Aboriginal and Torres Strait Islander people (in particular) to fail.
11. Possible measures which the Bar Association commends to the ALRC include the following:
 - (a) **While retaining community safety as a primary consideration on bail, excluding the possible repetition of minor offences (i.e. other than serious or violent offences) from consideration of community safety:** As is recognised in the Discussion Paper, Aboriginal and Torres Strait Islander defendants are often at risk of committing (and particularly being charged with) minor offences.
 - (b) **Precluding courts from refusing bail on the basis of the unavailability of suitable or adequate accommodation, other than in exceptional circumstances where there is a real and substantial risk of serious**

offending: In relation to children without adequate accommodation, the Bar Association considers this to be a child welfare issue, rather than a matter for the criminal justice system, and should not result in Aboriginal and Torres Strait Islander children being refused bail.³

Precluding the imposition of bail conditions which are unrealistic and/or unduly onerous, such as curfews and non-association orders, except where such orders may be justified by a real and substantial risk of serious offending. In relation to non-association orders, the court should be required to take into account, in determining whether such an order should be made, the harshness of non-association orders where they interfere with the kinship and community relationships of Aboriginal and Torres Strait Islander persons. Whilst the Bar Association recognises that it is a difficult and sensitive issue, and the protection of victims and children will always be a primary consideration, this suggestion also applies to defendants charged with domestic violence offences. Courts should make assessments of individual cases and make such orders as are required to protect the particular victim and children. Courts should not adopt an arbitrary, "one size fits all" approach of, for example, excluding the defendant from the family home or precluding any form of contact, including with children, in every case. This consideration also applies to the making of Apprehended Domestic Violence Orders.

Further, there should be a requirement that proper enquiry be made by an authority independent of the police for reporting to the court or to an "authorised officer" as to the availability of suitable accommodation and other support for bail purposes. There should also be appropriate funding of "bail houses" or non-custodial remand centres as alternatives to remand custody.

- (c) **Removing any financial impediment for acceptable persons or sureties for bail where the amount of money deposited or promised is \$1,000 or less:** In NSW at least, many Aboriginal and Torres Strait Islander people are granted bail on condition that an acceptable person deposit cash or agree to forfeit a certain amount of money. However, many remain in custody for days or weeks until that condition is fulfilled. Usually the amount is less than \$1000. Court registry staff regularly require the person (for example an aunt or grandmother of the accused) to prove that any cash is their money, or that they have the capacity to pay the amount promised before allowing the person to sign the bail undertaking. The only acceptable proof of this seems to be a bank statement showing that the relevant amount has been in the person's account for seven days. This is an arbitrary

³ Although there are serious issues, past and present, in relation to Aboriginal and Torres Strait Islander children and child welfare authorities, which issues require consideration and redress, these issues are outside the ALRC's terms of reference.

requirement and often leads to accused people languishing in custody for a week or more. This is especially so with people on low incomes who often withdraw all their money all at once to avoid ATM fees. There is no reason to require anything more of a surety than a statutory declaration that any cash has not come from the accused person or from proceeds of crime and that they have not been indemnified by the accused. Of course, where very large amounts of money are deposited or promised, it will be necessary to require more stringent proof of the source of the money and/or the person's capacity to pay.

- (d) **Requiring anyone who has been granted bail but has not been released to bail to be brought back before the court within a maximum of three business days:** Often people are granted bail on conditions which are not met, including sureties as discussed at (c) above. This particularly affects Aboriginal and Torres Strait Islander accused people. Whatever the nature of the unmet condition, the court which granted bail should review the situation. It may be that the condition is no longer necessary or another condition, which can be met, can be substituted.
- (e) **Precluding police from conducting "curfew checks" at the home of a defendant:** When curfews are enforced by the attendance of armed police, often in the middle of the night, this is likely to have a destructive effect on the family of the defendant and of the relationship between police and the Aboriginal and Torres Strait Islander community.
- (f) **Community safety ought to be a primary consideration on bail:** In the case of summary offences and indictable offences being prosecuted summarily, the likelihood of the person attending court is of less importance than the need to minimise deprivation of the liberty of persons, and in particular Aboriginal and Torres Strait Islander people. The Bar Association submits that, except where there is a real and substantial risk of flight from the jurisdiction (and not simply a risk of failure to appear in court), the likelihood of attendance be removed from consideration of bail for such offences. In many summary jurisdictions (such as NSW), a person who fails to attend before a magistrate will simply be found guilty of the offence and, if a fine is not an appropriate penalty, a warrant will be issued for their arrest. Recognition of community safety as a primary consideration on bail is unlikely to have an adverse impact upon the administration of justice. Unless a person's failure to attend was for good reason, or they have a clearly meritorious defence, it is unlikely that any conviction entered in their absence would be quashed.
- (g) In addition to the possible measure identified above in paragraph (f), **the laws in the various jurisdictions could be amended so that when a court finds a person guilty in their absence, the first step would be an**

adjournment to a particular date for sentence. A notice would then be sent to their last known address and their last known legal representative, and a warrant issued if the person later fails to attend on the date appointed for sentence.

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.

12. The Bar Association strongly supports this proposal, as well as any initiatives to make bail support, residential bail accommodation and diversionary options more frequently and widely available. Such measures are needed for all Aboriginal and Torres Strait Islander communities in metropolitan, regional and remote areas, and should involve Aboriginal and Torres Strait Islander people in their development and day to day running. Facilities need to be properly funded and have a realistic number of places available. Facilities which can take female defendants and their children are particularly lacking in most areas, and, along with facilities for juveniles, should be prioritised.

The remand population

13. Although there is no mention of the issue of the remand population in the Discussion Paper, the Bar Association submits that consideration ought to be given by the ALRC to the classification of people on remand. Corrective Services throughout Australia endeavour to keep sentenced inmates and defendants on remand separate from each other – for good and long accepted reasons. Sentenced inmates are generally classified based upon the nature of their offences, their conduct in custody and their risk of escape. The Bar Association understands that defendants on remand are generally not classified, but held in maximum security.⁴
14. Defendants on remand range from young people charged with their first offence, some of whom will ultimately be acquitted, to hardened criminals who have previously been convicted of very serious offences. Early classification of defendants on remand would help minimise, in particular, the danger to young Aboriginal and Torres Strait Islander people in custody of being exposed to brutality, corruption and the normalisation of prison life and a life involving prison. In combination with the availability of appropriate programs (see Proposal 5-1), the Bar Association submits that this may reduce recidivism and the repeat entry of young Aboriginal and Torres Strait Islander people (in particular) into the prison system. [See also [67] to [69] below.

⁴ This is certainly the case in NSW.

15. The Bar Association also submits that Corrective Services Departments in all States and Territories should conduct at least monthly, preferably fortnightly, audits as to the identity and place of detention of Aboriginal and Torres Strait Islander people in custody on remand who are bail refused or unable to meet bail conditions. These Departments should provide monthly, or fortnightly, “print out” information (such as is currently provided in the Northern Territory) to prosecuting authorities, Aboriginal Legal Aid and other Legal Aid Services as to the identity of such people in custody either bail refused and/or unable to enter bail granted. Each person not able to enter bail ordered should be automatically subject of a “gaol delivery” to the court of relevant jurisdiction, at least monthly, to permit re-examination of existing bail conditions. Welfare or Probation or Parole officers employed by Corrective Service Departments should regularly enquire of Aboriginal and Torres Strait Islander people in custody on remand as to issues relevant to their bail situation and assist communication of relevant information or concerns to nominated legal representatives and/or family members. This is in addition to the suggestion at 11(d) above, as a final safety net.

2. SENTENCING AND ABORIGINALITY

Question 3-1 Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders? If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

16. In relation to Question 3-1, the Bar Association submits that State and Territory governments should legislate, as a matter of urgency, 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. The legislation should introduce provisions as to the purposes of sentencing in each State and Territory that specifically recognise:

- (a) a purpose of sentencing as “ameliorating the overrepresentation of Aboriginal and Torres Strait Islander peoples in custody”;
- (b) a purpose of sentencing of “reparation for harm done by the offending to victims or to the community” rather than current purposes relating to recognition of the harm done to the victim of crime and the community;
- (c) a purpose of sentencing of “restoration of harmony within Aboriginal and Torres Strait Islander communities”, noting that the latter is an important

part of dealing with crime and resolution of disputes in Aboriginal and Torres Strait Islander communities; and

(d) a purpose of sentencing of “providing equal justice in sentencing decisions”.

17. This would provide a legislative framework for restorative justice to complement the current purposes of sentencing. [See also [27] to [29] below.

18. The Bar Association submits that systemic and background factors must be considered by courts sentencing Aboriginal and Torres Strait Islander peoples for the following reasons:

(a) First, in order that there is a fuller understanding of the impact of those factors on the offender’s life.

(b) Second, consideration of those factors should operate as a check before any sentence of imprisonment is imposed.

(c) Third, the factors may assist in informing the type, length and structure of the sentence, thereby promoting both proportionality and individualized sentencing.

(d) Fourth, individual relevant factors will no longer be assessed in a vacuum, they will be assessed within their relevant historical context.

(e) Fifth, the systemic factors can shed light on the reasons for the offending behaviour and may assist in an assessment of moral culpability.

(f) Sixth, an understanding of the systemic factors may be relevant to considerations of deterrence and other purposes of punishment.

19. The Canadian cases of *R v Gladue* [1999] 1 SCR 688 and *R v Ipeelee* [2012] 1 SCR 433 support the above, as do the Australian cases of *Neal v The Queen* (1982) 149 CLR 305 at 326 and *R v Fernando* (1992) 76 A Crim R 52 at 62.

20. Additionally, there is a role for sentencing judges to play in remedying injustice against Aboriginal and Torres Strait Islander people and reflection within the criminal justice system that the starting point is one of an unequal position insofar as the systemic factors are concerned. Legislative provision for mandatory considerations would promote proportionate and individualised sentences that reflect the circumstances of both the offence and the offender. The introduction of such a legislative approach would promote equality before the law by promoting sentencing that is appropriate and adapted to the differences that pertain in the case of Aboriginal and Torres Strait Islander people.

21. Such a legislative approach would also ensure that where appropriate and early guilty pleas are entered and sentencing is undertaken at an early stage, the factors are recognised despite there being no time or facilities to gather evidence particular to an offender such as through a Gladue report. This may also avoid people being held in custody on remand awaiting the preparation of such reports.

22. The Bar Association submits that legislation should provide that:

“A court must recognise and take into account, without diminution in weight, when determining an appropriate sentence for an individual Aboriginal or Torres Strait Islander person that such peoples are:

- (a) over-represented in the jail population,
- (b) have a cultural history of dispossession and colonisation;
- (c) have far worse whole life indicators than the non-Indigenous population in so far as health, mental health, life expectancy, mortality rates, suicide and self-harm rates, educational attainment, home ownership and employment are concerned;
- (d) (particularly in the case of female offenders), often suffering from trauma and complex trauma resulting from isolation, family and sexual violence and child removal.”

23. Such legislation should also provide that the provisions are mandatory and applicable, not dependent on the extent of Aboriginality or whether the community is urban or remote. They should be applicable for all offences, including serious offences, offences of violence and offences resulting in physical harm. They should be applicable to recidivist offenders, when there is a lengthy criminal record and where there is prevalence of the offence. It should also be set out in legislation that there is no necessity for a causal link to be shown between any or all factors and the offending conduct. The Canadian experience has shown that there is a necessity for this to be in legislative provisions to avoid a lack of clarity or misinterpretation of the provisions such as occurred between the 1999 decision of *Gladue* and the 2012 decision of *Ipeelee*.

24. The Bar Association also submits that there should also be a legislative direction in each State and Territory to the effect that “a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders, that no penalty other than imprisonment is appropriate”.

25. Another legislative approach which warrants consideration is s 718.2(e) of the *Criminal Code of Canada* which provides:

“All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal [Aboriginal and Torres Strait Islander] offenders.” (emphasis added)

26. There must also be legislative reform to permit greater discretion in setting non-parole periods rather than mandated, presumptive or mathematically set minimum terms of imprisonment. [See also [43] to [49] below].

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?

27. In relation to Question 3-2, the Bar Association considers that State and Territory governments should legislate to provide for reparation and restoration as a sentencing principle. Purposes of sentencing should include “reparation for harm done by the offending to victims and the community” and “restoration of harmony within Aboriginal and Torres Strait Islander communities, and restoration of offenders to their communities”. [See also [16] to [26] above].
28. These principles would serve to focus attention on repairing the harm caused by the offending and, in the appropriate case, be an effective way to foster dialogue between victim, offender and appropriate community members. A process that allows for an offender to take responsibility for his/her actions in a meaningful way would promote an understanding of how the behaviour has affected others, taking action to repair the harm where possible and making the changes necessary to avoid such conduct in the future.
29. Restorative justice also represents a validation of values and practices of many indigenous communities. Its inclusion as a sentencing principle would recognise those values and practices, and promote engagement with the community in an effort to impose sentences that facilitate rehabilitation, reduce recidivism and increase compliance with court orders, thereby ensuring the protection of the community.

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?

30. The overwhelming experience of the Bar Association for New South Wales sentencing courts is that reports provided for sentencing purposes include very

little, if any, information about cultural and historical factors relating to the offender and their community.

31. Community Corrections reports in New South Wales provide a brief outline of the offender's subjective circumstances. The reports rarely provide information about the unique systemic, social and historical circumstances that are often relevant and necessary to place the individual offender's case into its proper context and to assist the sentencing judge in determining the appropriate penalty and the structure of any term of full-time imprisonment.
32. The absence of such information can present a difficulty for a sentencing judge that cannot be overestimated. Without such information, a sentencing judge is constrained in his/her ability to take into account material relevant to the individual being sentenced. Gladue style reports (specialist reports) provide information to judicial officers that establish the relevance of an offender's Indigenous community circumstances. The availability of such information furthers the interests of equality and individualised justice.
33. The Bar Association considers that State and Territory Parliaments should legislate, as a matter of urgency, to make it mandatory for a sentencing judge to order and be provided with a Gladue style report before a sentence of imprisonment is imposed on an Aboriginal or Torres Strait Islander offender. State and Territory Governments should provide adequate funding to ensure that the reports are provided to the courts. A mandatory report as a prerequisite to a custodial sentence is not a novel concept. Such a requirement has existed for many years in NSW for the sentencing of juveniles.⁵
34. The Joint Working Party also noted the development of the Bugmy Evidence Project in NSW that will provide an evidentiary foundation for proper consideration of systemic, social and historical circumstances that will be relevant to sentencing in individual cases.

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?

35. The Bar Association considers that specialist sentencing reports (Gladue reports) provide information to judicial officers that will otherwise often be unavailable. Such information is necessary to contextualise the offender's conduct and/or assist the court by providing information about community programs and initiatives that can be utilised in formulating an appropriate sentence.

⁵ See s 25 of the *Children (Criminal Proceedings) Act 1987* (NSW).

36. Specialist reports delve into complex issues of a historical and cultural nature such as intergenerational trauma and intergenerational alcohol and drug addictions, family violence and abuse, child welfare removal, underlying developmental or health issues such as FASD, education and employment levels in the offender's community.
37. Specialist reports are distinct from presentence reports in that their fundamental purpose is to identify material facts which exist only by reason of the offender's Aboriginality. By providing the historical and cultural context, a judicial officer is better able to understand the individual's conduct, his/her immediate and broader personal and family history and the factors relevant to structuring a sentence that addresses the conduct in a more meaningful way.
38. Courts in Australia are, in accordance with the principle in *Neal v The Queen*⁶ "bound to take into account...all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group". A failure to take into account the unique systemic circumstances of Aboriginal and Torres Strait Islander offenders thwarts the pursuit of equality and individualised justice.⁷
39. To explain how such a report may operate in practice, consideration of parts of the case of Mr Bugmy, cast in the context of his community such as may have been outlined in a Gladue report, may assist. There was evidence in Mr Bugmy's case that he had said there had been over-policing and discrimination against him and his family, and that he had negative attitudes towards authority figures. Placed in the context of Mr Bugmy's Wilcannia community, this perception of Mr Bugmy's can be properly appreciated. That context included matters such as the "*legacy of profound distrust towards police*" given the high number of Indigenous youths and adults in custody and the empirical accounts of this in the Wilcannia community.⁸ It also included the community history of negative interaction with the police in Wilcannia as documented in the both the inquiry into the death in custody of Mark Anthony Quayle and the *Bringing Them Home* Report.⁹ Another fact was that Mr Bugmy, who was aged in his thirties, had experienced the effects of several deaths in his immediate and close family. The systemic factor of lower life expectancy for non-Aboriginal and Torres Strait Islander Australians could have been put into the proper context of Wilcannia where the life expectancy for an Indigenous man is not

⁶ (1982) 149 CLR 305 at 326.

⁷ "Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice", Anthony, Bartels, Hopkins, Melbourne University Law Review [2015] Vol 39;47.

⁸ As documented in *Factors affecting crime rates in Indigenous communities in NSW: a pilot study in Wilcannia and Menindee* by McCusland and Vivian Community Report, Jumbunna, Indigenous House of Learning, UTS (2009), p 22-25.

⁹ As documented by Commissioner Wootten QC in the *Report into the Inquiry into the Death of Mark Anthony Quayle*, RCIADIC (1991); and also documented in the Report of the National Inquiry into the Separation of ATSI Children from Their Families, *Bringing them Home Report* (1997) at pp 510-513, 517.

67.2 years (the average of the wider ATSI population in 2011 as compared to age 78.7 years for non- Aboriginal and Torres Strait Islander men), but is 36.7 years. This, in turn, contextualizes impacts such as grief from frequent deaths in the Wilcannia community, alcohol use in the community and the impact of the lack of local mental health and grief counselling and substance abuse services.

40. Specialist Gladue style reports would paint the context for a proper understanding of the systemic factors by practitioners and judges who may or may not have such an awareness of Aboriginal and Torres Strait Islander conditions in various regions throughout Australia, or in the particular State or Territory where sentencing is taking place. Such reports provide information as to disadvantage, both historical and contemporaneous, not properly understood, or understood at all by those whose have never suffered disadvantage of the scale endured by Indigenous Australians.

Question 3-5 How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?

41. The Bar Association considers that the preparation of Gladue style reports should be funded by government.
42. Further, such reports should not be categorised as expert reports. Instead, they are reports prepared by Indigenous caseworkers with an understanding of the unique systemic factors relevant to the offender and the offender's community. The caseworker may be qualified in an area such as social work, although such qualifications are not a necessary requirement. The reports should be prepared by caseworkers in Aboriginal or Torres Strait Islander organisations such as Aboriginal Medical Services, Aboriginal Land Councils, or in an independent unit of Aboriginal Legal Services. They should not be prepared by Probation and Parole or Community Corrections type services.

4. SENTENCING OPTIONS

Question 4-1 Noting the incarceration rates of Aboriginal and Torres Strait Islander people:

- (a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and
- (b) which provisions should be prioritised for review?

Question 4-1(a)

43. The Bar Association considers that Commonwealth, State and Territory governments should review provisions that impose mandatory and presumptive sentences with a view to repealing mandatory sentencing provisions.
44. Mandatory sentence regimes place unacceptable restrictions on judicial discretion and undermine the rule of law. They are notably inconsistent with Australia's international obligations, specifically article 9 of the International Covenant on Civil and Political Rights under which their application may amount to arbitrary detention or disproportionate sentencing. The direct deterrent effectiveness of mandatory sentencing is not supported by evidence. The North Australian Aboriginal Justice Agency, NAAJA, reports that people in remote communities generally know very little, if anything, about mandatory sentencing.¹⁰
45. Mandatory sentencing regimes contribute to the increase in the imprisonment rate because they:
- (a) can increase the length of sentences and hence increase the prison population;
 - (b) capture all offenders of the specified conduct rather than consider more appropriate or proportionate alternatives to imprisonment where relevant; and
 - (c) potentially increase the likelihood of re-offending as periods of incarceration can promote recidivism.
46. To the extent that mandatory sentencing schemes achieve some of their aims, the research indicates that they are achieved at a high economic and social cost¹¹. Sixteen percent of Aboriginal or Torres Strait Islander people who entered prison in 2013 were there uniquely for fine default after mandatory sentencing. This is particularly relevant where the cost of keeping one adult offender in gaol is currently up to \$120,000 per year. Under mandatory sentencing laws, an accused is less likely to plead guilty, with the resulting implications for court resources and time spent on contested cases. Contested cases tend to have more serious consequences for Indigenous offenders who are generally less able to meet bail conditions and more likely to wait out a contested case in prison. In NSW in 2008, 72% of all Indigenous prisoners were on remand.

¹⁰ Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing, May 2014.

¹¹ Victorian Sentencing Advisory Council, Sentencing Matters: Mandatory Sentencing, August 2008, p. 1 at <https://sentencingcouncil.vic.gov.au/landing/publications>.

47. The disproportionate impact of mandatory sentencing on Aboriginal and Torres Strait Islander people may also have a detrimental effect on reconciliation.¹² Mandatory sentencing laws may operate to widen the gap between Indigenous and non-Indigenous Australians and to further marginalise Indigenous offenders, in particular young Indigenous offenders in remote areas. Incarceration can lead to an increase in mental illness in Indigenous youths, contributing to feelings of desperation and a greater risk of suicide.
48. Against this background, the Bar Association strongly supports the removal of mandatory sentencing provisions. The issue needs to be addressed at a federal level, noting that the incarceration of Aboriginal or Torres Strait Islander peoples is a serious national social justice problem, and one that engages Australia's international legal obligations.
49. Further, the Bar Association considers that the repeal of mandatory sentencing provisions ought to work in conjunction with the creation of alternative forms of sentencing outcomes, both forms of imprisonment and community-based options. Sentencing courts should be given a high degree of discretion in determining and delivering appropriate sentences. Court should be given multiple sentencing options to give effect to culturally appropriate, individualised justice in sentencing cases.

Question 4-1(b)

50. The Bar Association proposes the following offence types be prioritised for review, noting the pattern of sentencing which shows that these offences disproportionately impact Aboriginal and Torres Strait Islander offenders:

(a) Property offences

This class of offence tends to be over-represented by vulnerable and disadvantaged groups and as a result is often discriminatory in effect against Aboriginal or Torres Strait Islander people. In Western Australia, for example, mandatory prison sentences of one year are imposed under a so-called "three strikes" law for those convicted of home burglaries. The provision can operate arbitrarily where the offence of home burglary covers a wide range of circumstances that might include wandering into a neighbour's home in search of food.

(b) Driving offences

This class of offence demonstrates how metropolitan laws may operate unjustly in remote areas. Often, Aboriginal or Torres Strait Islander community members have longer distances to travel, minimal access to

¹² Law Society of South Australia's Aboriginal Issues Committee, quoted in the Law Council of Australia's Policy Discussion Paper on Mandatory Sentencing.

public transport and face administrative and financial obstacles to obtaining a driving licence. Mandatory minimum penalties for driving while disqualified is not only ineffective in protecting the community from future offences and preventing an offender from re-offending, but also causes a strain on the criminal justice system. [See also [93] below].

(c) Fine default

Imprisonment in default of fine payment is unjust, unfair to poor offenders, expensive and disproportionate in its effect on Aboriginal or Torres Strait Islander offenders. In 2013, 1,358 offenders were imprisoned in Western Australia for fine default only. Sixteen percent of Aboriginal people who entered prison that year did so uniquely for fine default.¹³

51. The Bar Association is aware of the following reported examples of mandatory sentencing laws having anomalous or unjust effects upon, and unfairly targeting Aboriginal or Torres Strait Islander people:

- (a) a 16-year-old with one prior conviction received a 28-day prison sentence for stealing one bottle of spring water;
- (b) a 17-year old first time offender received a 14-day prison sentence for stealing orange juice and Minties;
- (c) an Aboriginal woman and first-time offender received a 14-day prison sentence for stealing a can of beer; and
- (d) Ms Dhu, a mother of four, died two days after being locked up at Western Australia's South Hedland Police Station in August 2014 for unpaid fines totalling \$3,622.

Question 4-2 Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?

Question 4-3 If short sentences of imprisonment were to be abolished, what should be the threshold (eg, three months; six months)?

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?

52. In relation to questions 4-2 to 4-4, the Bar Association considers that short sentences are costly and ineffective in rehabilitating offenders and reducing recidivism, as well as providing only a limited period of incapacitation. People in prison for short periods often do not have access to rehabilitative and other

¹³ Legislative Assembly, Details of Incarceration Figures for Fine Defaulters for the Years 2008 to 2013, Tabled Paper LA2027, 16 September 2014.

programs in custody while at the same time being disconnected from employment, education, family and social connections. Further, the current system provides little supervision or support on release.

53. The Bar Association supports the introduction of statutory guidelines to limit sentences of less than six months to circumstances where the presence of the offender in the community presents a substantial risk to the community, and to provide a range of community-based alternatives to the court such as through an expanded (and different) version of the proposed NSW Intensive Correction Orders (ICO) model.¹⁴
54. The Bar Association suggests the following considerations for an expanded (and different) ICO model:
- (a) include orders to attend rehabilitative programs or violent offender programs as an alternative to the work component. Orders tailored in this way to address the underlying causes of offending will help to capture offenders currently deemed unsuitable for the mandatory work component of an ICO, due mainly to alcohol or drug dependency (forming up to 45% of those offenders assessed for ICO);
 - (b) extend maximum length of an ICO to capture circumstances where a longer prison term is warranted but the offender has demonstrated positive rehabilitation;
 - (c) expansion of ICO availability, requiring significant commitment in recruiting and training a trauma-informed and culturally-competent workforce, as well as investing in the development of local people to ensure a stable and skilled workforce in the longer term; and
 - (d) ICOs and other community based orders should, wherever practicable, be uniformly available throughout Australia including in regional and remote communities.
55. The Bar Association recognises some risk that courts might use the abolition of short jail sentences to impose marginally longer sentences. A seven month sentence may be handed down if a six month sentence is not at the court's disposal. However, recent data suggests that this consequence has not arisen in Western Australia since the repeal of short sentences there.¹⁵

¹⁴ The Bar Association opposes the introduction of ICOs in the form proposed in the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017*.

¹⁵ Don Weatherburn, "Rack 'em, Pack 'Em and Stack 'Em: Decarceration in an Age of Zero Tolerance" (2016) 28(1) *Current Issues in Criminal Justice*.

56. The Bar Association supports legislative provisions which encourage courts to consider community-based and culturally appropriate sentencing options. Courts should be required to provide reasons as to why an eligibility assessment for an ICO and/or other options was not undertaken, and why a term of imprisonment was imposed. Such legislative provisions could be to the following effect:

“All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders with particular attention to the circumstances of individual offenders”.¹⁶

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.

57. The Bar Association strongly supports the proposal that community-based sentences be more readily and uniformly available across Australia. All such programs should be designed, delivered and controlled by Aboriginal people.
58. This proposal is consistent with the recommendations of previous reports, including the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011 report entitled *Doing Time, Time For Doing*. The Bar Association strongly endorses the Committee’s recommendation that the following principles be applied:
- (a) engage and empower Indigenous communities in the development and implementation of policy and programs;
 - (b) address the needs of Indigenous families and communities as a whole;
 - (c) integrate and co-ordinate initiatives by government agencies, non-government agencies, local individuals and groups;
 - (d) focus on early intervention and the wellbeing of Indigenous children rather than punitive responses; and
 - (e) engage Indigenous leaders and Elders in positions of responsibility and respect.
59. The Bar Association further highlights and re-iterates the Committee’s recommendation that the Commonwealth Government establish a new pool of adequate and long-term funding for young Indigenous offender programs, run by

¹⁶ Stephen Norrish QC, ‘Sentencing Aboriginal Offenders – Striving for Equality before the Law’, August 2017.

small-scale community groups operating in local areas. The concept of community-based sentences should include low security, residential 'detention' facilities, supervised and run by corrections departments. These could be in the form of 'halfway' houses for people in the final stages of their sentences but before release on parole, or they may be straight-out alternatives to imprisonment in conventional prisons. They could work in conjunction with corrections-supervised bail support programs to provide accommodation for people on bail. The model should be replicable for suburban, regional and remote communities.

60. The Bar Association refers to the following examples of community-based, culturally appropriate programs devised and controlled by Aboriginal and Torres Strait Islander people:

- (a) **Yiriman Project:** an on-country cultural program conceived and developed by Elders in the Kimberley. The project established an organisation targeting 'at risk' Indigenous youth through provision of activities such as 'back to country' bush trips, and through introduction to and ongoing communication with service provider workers to family groups. Service providers include Nindilingarri Drug Alcohol & Mental Health, the Department of Child Protection, Standby Suicide Response and Headspace.
- (b) **Kimberley Ranger Network:** comprised of 13 ranger groups and employing Indigenous land and sea managers to undertake cultural and natural resource projects. As a proven job model with high retention and attendance rates of Indigenous rangers, the Kimberley Ranger Network provides a template whereby a fully resourced corrective ranger program can be linked with established teams. This would provide a pathway to rehabilitation where individuals at risk of incarceration and recidivism would be closely mentored by their own skilled coordinators and put on a trajectory towards accredited training in a variety of jobs.
- (c) **Datjala Work Camp:** a low security work camp in the remote community of Nhulunbuy intended to educate, train, employ and support Indigenous offenders. The camp accommodates open-security male prisoners who have been sentenced or are on remand. All prisoners are required to follow a strict regime which includes giving back to the community through community enhancements, maintenance and beautification projects.
- (d) **Tribal Warrior Program:** a Redfern-based mentoring program which is a grass roots community, holistic exercise, assistance and referral program designed to help Aboriginal and Torres Strait Islander youth of all ages. Tribal Warrior Aboriginal Corporation mentoring, in association with the Clean Slate Without Prejudice, is run in partnership with the Redfern Local Area Police Command, and is designed to help recidivism rates in jail –

“meaning we want our youth to stay out of jail through commitment to the program and learning discipline during physical training – the program is so successful that the local police have reported a decrease of 70% in crime in the area!”.

- (e) **Youth Justice Residences:** a New Zealand-based initiative creating safe and secure residences where young people can be supported to re-establish their lives. Rooms, meals and clothing are provided as well as educational and sporting facilities. Individualised plans are devised to address social, health and school needs. Residents work with social workers and families to plan re-integration prior to leaving the residence, including preparation for going back to school, entering a training course or applying for jobs. A similar model could be established in Australia not only for youth but for young offenders generally.

61. Other community-based alternatives to full-time imprisonment include:

- (a) custodial settings within or near communities, such as group residences under Corrective Services supervision;
- (b) appointment to remote communities of Aboriginal and Torres Strait Islander Probation and Parole Officers, who are from the community, to provide local supervision and support to offenders;
- (c) suspended sentences to be supervised by the community, not by Community Corrections; and
- (d) community supervised work programs in conjunction with local government authorities.

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?

- 62. The Bar Association supports legislative reform to encourage and allow courts to recognise that the systemic and background factors affecting Aboriginal and Torres Strait Islander peoples may require more subtle remedies than the criminal law can provide by way of imprisonment.
- 63. Culturally appropriate, tailored sentencing has the capacity to target the underlying cause of an individual’s criminality and to meet the same in a proportionate manner. Building a sentence around an individual’s circumstances may render the sentencing outcomes more realistic and achievable, particularly as the offender is provided with some form of indirect ownership over his or her own sentencing outcomes.

64. The Bar Association refers to and repeats the proposal outlined in answer to Question 4-4, namely that Australia-wide legislation should require courts to give specific consideration to a range of community-based options and, where necessary, to provide reasons as to why an eligibility assessment for an ICO or other options was not undertaken, and why a term of imprisonment was imposed.

The Bar Association agrees that there should be more flexibility to allow for greater “mix and match” sentencing combinations, and that more courts should have discretion to add in various sentencing components when considering an appropriate mix of penalties. Currently in NSW, for example, an offender is unable to be subject to an ICO with a good behaviour bond, or to serve community service as a condition of a good behaviour bond.

65. The benefits of suspended sentences are a subject of controversial debate. The Bar Association recognises that suspended sentences do have the capacity to provide a “last chance” option to a court before imprisonment, and to act as a blunt and inflexible tool if breached. It therefore proposes that where they exist, they should be accompanied by a legislative gradation in breach outcomes. There should not be a “one size fits all” consequence for breach of a suspended sentence. State suspended sentences could also be conditional upon entering a bond to be of a longer period than the term of imprisonment suspended to allow extended supervision. This option is available under Commonwealth legislation, and in some, but not all, States and Territories.

5. PRISON PROGRAMS, PAROLE AND UNSUPERVISED RELEASE

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

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?

66. The Bar Association supports Proposal 5-1.

Remand classification

67. The Bar Association proposes a review of current remand classifications to allow for more individualised risk assessments, with the aim of minimising the over-classification of prisoners in high and medium security facilities. Prisoners over-classified in this way are subject to more onerous conditions than may be necessary, including higher levels of security, restrictions on personal property, visit

entitlements and other 'privileges' for individuals, as well as having reduced access to rehabilitative programs.

68. In 2002, the Aboriginal Justice Advisory Council (AJAC) found that 11% of Aboriginal defendants who are refused bail are either found not guilty or have their case dismissed, and that 45% of Aboriginal remandees do not receive a custodial sentence when their matters are finalised (often because they have already served a period of remand in custody as great or even greater than the ultimate penalty for the offence).
69. In a context where Aboriginal and Torres Strait Islander peoples are over-represented in remand, it is relevant to highlight the considerable social and psychological costs of even a short time in prison. Imprisonment can result in the loss of a job, of significant relationships and of the legal custody of children. Prisons can present an unnatural social environment with physical dangers, overcrowding, uncertain periods of confinement and a lack of structured activity, all of which require adjustment and contribute to boredom, inactivity and subsequent risk of suicide, self-harm and assault. A graded remand classification may go some way toward minimising the impact of these risks on the disproportionately high number of Aboriginal or Torres Strait Islander remandees.

Remand and short-term sentence programs

70. The Bar Association considers that too many opportunities to engage with offenders are being lost because many offenders spend the majority of their time in custody on remand or serving sentences of less than six months. There is an almost complete absence of rehabilitative programs for remand prisoners and those serving short sentences anywhere in Australia.
71. Remandees, and particularly first-time remandees, are as a group considered to be at the highest risk of self-harm and suicide and are apt to be suffering the effects of substance abuse or withdrawal symptoms. The Bar Association supports the prioritisation of achievable, short-term programs focused on the immediate needs of this discrete prison population, such as drug and alcohol counselling, prevention of harm and the provision of structured activities.
72. This year in NSW, rehabilitation programs for short term sentences have been introduced. High Intensity Program Units will focus on delivering intensive services, treatment programs and release planning activities for more than 1200 inmates serving sentences of six months or less. The NSW Government will invest \$13 million in 2017-18 on the program.

Transitional support and release programs

73. The Bar Association further considers that greater emphasis should be put on the transition from prison to the community through support and release services. Such

services should be provided in a culturally appropriate manner to Aboriginal and Torres Strait Islander prisoners, with appropriate links to the family and community before release and connections are established for accommodation, emotional support, counselling where required and employment and educational opportunities.

74. The 'Throughcare' program of the North Australian Aboriginal Justice Agency (NAAJA) is a culturally-relevant service that provides Indigenous offenders with individually-tailored re-integration support during the critical transition from custody into the community. The program begins with an offender's initial contact with correctional services and continues until the offender has successfully re-integrated with the community. A case management plan is designed for each client, and includes developing insights into their offending, getting them back to their homes and community, assisting them to comply with any court orders and making sure their mental and physical health is taken care of. The highly practical and individualised, high-contact support has resulted in fewer instances of re-offending, especially in the critical period after prisoners are released.
75. The Bar Association considers that there should be adequate funding for independent Throughcare services throughout Australia which work in conjunction with the offender and his or her legal representatives and corrections.

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.

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

76. The Bar Association supports proposal 5-2. In New South Wales, the Northern Territory and South Australia, Indigenous women are 21 times more likely to be imprisoned than non-Indigenous women.¹⁷ [See also below at [112] to [114].
77. This is a much greater over-representation than for men. Indigenous women generally serve shorter sentences than their non-Indigenous counterparts and are more likely than non-Indigenous women to be on remand.
78. Against this background, a recent review of good practice in women's corrections highlighted that corrections systems tend to be organised around the needs of male

¹⁷ Calla Wahlquist, 'Australia must address soaring female Indigenous imprisonment rate – report', *The Guardian* (online), 15 May 2017, <https://www.theguardian.com/australia-news/2017/may/15/soaring-female-indigenous-imprisonment-rate-obstructing-closing-the-gap-targets-report>.

prisoners, with special provisions for women being “added on”.¹⁸ The Bar Association considers it vital to ensure that programs do not merely replicate male-oriented or non-Indigenous-oriented initiatives, but are both gender-sensitive and culturally appropriate. Programs should be designed to account for factors specific to female prisoners, such as:

- (a) women's role as primary parent – recognising that criminal justice sanctions are likely to have more disruptive consequences, and that crime prevention responses need to take family and maternal responsibilities into account;
- (b) high rates of family violence experienced by Aboriginal and Torres Strait Islander women;
- (c) the disadvantaged status of Aboriginal and Torres Strait Islander women based on all key indicators; and
- (d) recognise that this population group has greater needs than most other groups, requiring “more intensive and multi-dimensional services if there is to be an impact on their over-representation”.¹⁹

79. The Bar Association considers that programs must address mental health issues and provide Aboriginal and Torres Strait Islander women with skills to reconnect with their families, as well as educational and work opportunities. Programs must also account for immediate issues often facing female remandee prisoners, including collecting children from school that day, longer term care of the children, vacant accommodation and lapsed rental, personal property unattended, high levels of anxiety, drug withdrawal, access to bail and chronic health needs.²⁰

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

Question 5-3 A statutory regime of automatic court ordered parole applies in NSW, Queensland and SA. What are the best practice elements of such schemes?

80. The Bar Association supports proposal 5-3. The Bar Association notes that in NSW, for example, there is a court ordered parole for all sentences of three years

¹⁸ Bartels and Gaffney, ‘Good Practice in Women’s Prisons: A literature Review’, 2011.

¹⁹ Victorian Department of Justice 2006. *Victorian Aboriginal Justice Agreement—Phase 2* (AJA2). [http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/11ome/Your+Rights/Indigenou+s+Victorians/Aboriginal+Justice/JUSTICE+-+Victorian+Aboriginal+Justice+Agreement+Phase+2+\(2006\)](http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/11ome/Your+Rights/Indigenou+s+Victorians/Aboriginal+Justice/JUSTICE+-+Victorian+Aboriginal+Justice+Agreement+Phase+2+(2006)).

²⁰ Hon Dennis Mahoney, QC, *Western Australian Inquiry into the Management of Offenders in Custody and in the Community*, November 2005.

or less. The advantage of court ordered release is that it provides a degree of certainty about the length of the detention period which enables the opportunity to plan for release on parole. Parole allows prisoners a higher degree of participation, and therefore ownership, over important decisions affecting their lives. This system should work in conjunction with parole authorities and Throughcare assistance to maximise a person's chances of breaking the offending cycle when they are ultimately released.

81. The Bar Association also notes that in NSW there exists a recently developed pre-release "override mechanism". This usually operates where a prisoner's inability to locate satisfactory housing and accommodation options results in the delay or block of their release.
82. The Bar Association considers that administrative over-rides of court ordered parole should be avoided.
83. The Bar Association also suggests that States and Territories should consider and give effect to prisoners' progression through the classification system, and where possible include work release and/or weekend leave prior to the expiration of the non-parole period. There should also be consideration of other forms of low security detention models for prisoners approaching release, for example, corrections supervised half way houses.

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.

84. The Bar Association supports proposal 5-4.
85. The Bar Association also considers that, in a similar vein, parole authorities should have the flexibility to be able to reconsider or defer consideration of parole to meet the individual needs of prisoners. In NSW, for instance, if the parole authority rejects an application for parole, there is a mandatory 12 month deferral period before the issue of parole can be reconsidered. This is costly, ineffective in reducing recidivism and raises significant questions of procedural fairness.²¹ It should be noted that in NSW, revocation of parole requires consideration of the time spent out of custody being included when calculating the time to be served in custody on revocation.

²¹ Policy Paper, Just Reinvest NSW.

Provisions impacting parole decisions

86. The Bar Association notes that NSW, like other jurisdictions, has developed legislative measures to extend a prisoner's time in custody after the expiration of their sentence and/or to provide close community supervision of offenders after the expiration of their sentences. Whilst some of these provisions may be necessary because of community safety issues, they also have an indirect impact on parole decisions. Previously, parole authorities were often minded to release prisoners on parole even if for a short period prior to the conclusion of their sentence, so as to provide some form of supervision on their release and to assist with their adjustment to life in the community.
87. In the experience of the Bar Association, there now appears to be a pattern for parole authorities not to grant parole at all in anticipation of these detention and supervision powers being exercised after the expiration of sentences. This is a detrimental development that both increases the number of prisoners in prison at any given time and the length of time that they are spending in jail.

Responses to parole breaches

88. The Bar Association proposes a graded system of responses to breaches of parole. A "one size fits all" consequence for breaches of parole, no matter how minor, often leads to unfair outcomes. Due recognition must be given to the fact that a significant number of problems which arise whilst a prisoner is on parole do so because of inadequate funding for proper, pro-active community case management and supervision.
89. Additionally, parole should not be routinely revoked simply because a parolee has fresh, unproven, charges. Revocation of parole is particularly unnecessary and premature where the court dealing with the charges has granted bail. In NSW, the usual practice with parolees with fresh charges is to revoke parole and return them to custody, regardless of whether they are on bail. If the only reason for revocation is the fresh charges and they are ultimately acquitted, the revocation is often rescinded and they are released. This contributes very significantly to the "revolving door" of entry and exit from prison, and to the disruption of rehabilitation, family life, employment and accommodation.
90. Consideration should be given to other forms of release to allow for a gradual and stable transition coupled with monitoring and supervision. Back-end home detention, residential rehabilitation and "halfway house" options should be introduced and teamed with the increased use of work release and weekend leave.
91. The Bar Association points to the example of the Balund-a Program, a residential diversionary program for Indigenous adult male offenders in northern NSW who can be referred to the program by Community Corrections staff when revocation of parole or community-based order is being considered. The name roughly translates

as, "be good now you have a second chance down by the river". Offenders participate in structured programs within a culturally sensitive framework, addressing specific areas of risk to assist in improving life skills and re-integration into the community, for example cognitive based programs, drug and alcohol programs, anger management, education and employability, domestic violence, parenting skills and living skills. Cultural activities include excursions to sacred sites, music, dance and art. Elders employed by the program provide support and assist residents to recognise, restore and value cultural links with their land and history.

6. FINES AND DRIVER LICENCES

92. The Bar Association strongly supports any reforms which prevent incarceration, directly or indirectly, solely as a result of the non-payment of fines. Deprivation of liberty for this reason is not compatible with a modern, civilised society and has a manifestly disproportionate impact upon Aboriginal and Torres Strait Islander people. Fines are a debt and should only be enforced as such.

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.

93. The Bar Association strongly supports Proposal 6-1, but submits that it should include repealing provisions which are an indirect path to incarceration; for example, where a community service order (CSO) can be imposed for non-payment of fines and imprisonment can then be imposed for failure to complete the CSO. Any alternatives to payment should be voluntary and not lead to the possibility of imprisonment.

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

94. The Bar Association supports the introduction of penalties lower than fines, such as suspended fines and written cautions.

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

95. Yes. The Bar Association considers that the quantum of fines should be strictly limited, both for infringement notices and in court, for people who are at the lowest level of income. There should be a cap on the individual amount, the amount imposed in one transaction and a cap on the total amount of fine debt which such a person can owe. The capacity of minors and those on government benefits to pay

is extremely limited, and it is likely that in many cases the cost of enforcement exceeds the amount successfully recovered. The caps should be set at very low levels: no more than about \$200 for any individual fine. It may be that one "penalty unit", in jurisdictions which have penalty units, would be appropriate.

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

96. Yes. See the Bar Association's answer to Question 6-2.

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

97. No. The Bar Association considers that societal attitudes to language have changed to such a degree that the continued existence and prosecution of this offence tends to bring the law into disrepute. Historically, the offence has been used disproportionately against Aboriginal and Torres Strait Islander people, and it is likely to continue to be so used. There is no justification for its retention. Other existing laws provide protection from verbal threats and intimidation.

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?

98. No. The Bar Association does not consider that offensive language should be a criminal offence. However, if it is to remain an offence, the issuing of infringement notices is preferable to arrest or requiring attendance at court. In this event, the level of penalties should be extremely low, at most a tenth the current rate in NSW of \$500 for minors or people on government benefits. Further, alternatives such as cautions and suspended fines should be mandatory for first offenders or those who have not committed such an offence for, say, five years. The right to elect to dispute the matter in court should remain.

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.

99. Yes. The Bar Association supports alternatives to court ordered fines. However, the alternatives should be either voluntary or no more onerous than fines. A community service order (CSO) is a high level of sentence, being a direct alternative to imprisonment. There is a danger that work orders will become de facto CSOs. None of the alternatives should lead to prison in the event of non-compliance: see in relation to Proposal 6-1 above.

Proposal 6-2 Work and Development Orders were introduced in NSW in 2009. They enable a person who cannot pay fines due to hardship, illness, addiction, or homelessness to discharge their debt through:

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

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

100. The Bar Association supports Proposal 6-2, so long as the alternatives are voluntary and that non-compliance cannot result in imprisonment.

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

101. Yes. The Bar Association considers fines to be a monetary debt that should be recovered as such. Non-payment of fines should never be enforced by suspension or cancellation of driver's licences or vehicle registration. This type of enforcement has a disproportionate impact on marginalised communities such as Aboriginal and Torres Strait Islander communities, in particular in rural areas, and leads to secondary offending and imprisonment.²²

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?

102. The primary position of the Bar Association is that this mechanism of enforcement should be abolished. However, if retained, mechanisms should be available through both the courts and recovery agencies to waive suspension and grant licences for particular purposes. There should be no mandatory period of disqualification for driving whilst a licence has been suspended for fine default.²³

²² See Part 5 of the NSW Sentencing Council's interim report from October 2006: "The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices". http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Projects_Complete/Fines/interim_report_on_fines.pdf

²³ There has been a recent announcement about reforms to disqualifications in NSW (which are yet to be implemented): <http://www.justice.nsw.gov.au/Pages/Reforms/driver-licence-disqualification.aspx>

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

103. Yes. The Bar Association considers there to be a need for permits in regional areas where there is no, or limited, public transport. The licences should, at the least, operate for particular defined purposes such as travelling to and from work, medical and necessary appointments.

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

104. The Bar Association considers that, in consultation with appropriate Aboriginal and Torres Strait Islander organisations, governments should focus upon providing driver training and assisting Aboriginal and Torres Strait Islander people obtain a licence, including through alternative methods of testing competency which do not necessarily rely upon literacy. People detected driving while unlicensed should be required to undergo training for a licence, rather than facing mandatory disqualification from becoming licensed.
105. Further, the Bar Association recognises that whilst fine default is one pathway to licence suspension, disqualification and imprisonment, disqualification for traffic offences is another very significant pathway. Accordingly, the Bar Association considers that there ought to be reform to laws requiring mandatory periods of disqualification with mandatory accumulation such as currently apply in NSW. It is not uncommon for people in their teens or early twenties to be disqualified for more than ten or fifteen years. This is harsh, unrealistic and often leads to a disregard for the disqualification and thus to incarceration.
106. Accordingly, the Bar Association considers that there should be an end to mandatory minimum, or automatic, periods of disqualification for offences associated with licence use, such as suspension, cancellation, unlicensed, and disqualification. Many Aboriginal and Torres Strait Islander persons are convicted and disqualified for a mandatory minimum of two years accumulated on top of an existing disqualification, when the offender has never previously committed an offence of drink/drug driving or driving in a reckless/dangerous or negligent manner. Mandatory periods of disqualification for driving offences have the same injustices associated with mandatory sentencing, discussed above at [46] to [47].
107. Further, the Bar Association considers that the maximum total term of any continuous period of disqualification should be capped at three years. Anyone deserving a period of longer than three years should be disqualified until the court

otherwise orders. There should then be a system of licence restoration (available after three years) upon the person either demonstrating rehabilitation or remaining free of relevant offending for some significant, but defined, period (say 5 years).

7. JUSTICE PROCEDURE OFFENCES-BREACH OF COMMUNITY-BASED SENTENCES

Proposal 7-1 To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services.

108. The Bar Association supports Proposal 7-1. In addition, strategies should be considered to ensure that community-based sentence orders are realistic and properly tailored to the individual offender.

109. Further, the Bar Association refers to and repeats its submissions in relation to Proposal 4-1.

110. The Bar Association notes, in particular, the emphasis placed by the recent “Hamburger Report” for the need for a holistic government and community approach that “empowers Indigenous people to be part of the solution to their gross over-representation” within the criminal justice system:

“Working with communities means empowering communities to help themselves. It means bringing everyone to the table – not just the policy makers or service providers but representatives of all sections of the community. It means working within an appreciative framework, recognising that there is something or things that work well in every community, helping the community to identify and build on those strengths. It also means working with the community and providers of services and programs to achieve a joined-up approach to service delivery in, and with, the community.”²⁴

8. ALCOHOL

²⁴ Report of the Review of the Northern Territory Department of Correctional Services, July 2016 (The “Hamburger Report”).

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?

Question 8-2 In what ways do banned drinker's 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?

111. The Bar Association defers to the expertise of other organisations and individuals in relation to Questions 8-1 and 8-2, other than to note the importance that any alcohol related accords or programs must be the subject of proper consultation with the Aboriginal and Torres Strait communities concerned, and implemented only with their free, prior and informed consent. Such an approach to the rights of indigenous peoples is required by international human rights jurisprudence, in particular the rights recognised in the United Nations Declaration on the Rights of Indigenous Peoples, and the jurisprudence of the UN Committee on the Elimination of Racial Discrimination.

9. FEMALE OFFENDERS

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

112. The Bar Association recognises that the imprisonment of female offenders poses complex issues that often do not have simple solutions. Women are overwhelmingly the sole or primary carers of children. The removal of women from the family can result in a fracturing of the family unit, sometimes resulting in children being placed in care and loss of government housing.
113. These issues become more complex and urgent in the case of Aboriginal and Torres Strait Islander female offenders. There are at least three reasons why this is so:

- (a) First, the incarceration of Indigenous women is the fastest growing segment of the prisoner population, with Indigenous women 21 times more likely to be imprisoned than non-Indigenous women.²⁵
- (b) Secondly, it is not only the female offender who suffers while incarcerated. Eighty percent of Indigenous women in prison are mothers.²⁶ When an Indigenous woman is incarcerated, there is often a significant disruption in the family and an increased risk the children will end up in the child protection system or potentially in the criminal justice system. The impact of the separation of Indigenous children from their families and communities is irrefutable. The incarceration of Indigenous women, often the primary or sole carers compounds the trauma. The *Bringing Them Home* report²⁷ found that the effects on children of separation from the primary carer can have serious long-term consequences on these children's lives. Separation of children at a young age results in depression, trust and self-worth issues, choice of inappropriate partner, difficulties parenting their own children and unresolved trauma and grief.²⁸ This separation fractures families and results in children who are more likely to have disrupted education, poor health and unstable housing.²⁹ This ultimately creates conditions entrenching the cycle of disadvantage.³⁰
- (c) Thirdly, Indigenous women are central to the well-being of the community and are often the drivers of initiatives aimed at improving health, literacy, employment and the general harmony in the community. Removing Indigenous women by incarcerating them can impact on the community as well as the family unit.

114. Against this background, the Bar Association considers that the following reforms should be considered as a matter of urgency:

- (a) A court shall not sentence an Aboriginal or Torres Strait Islander person to a term of imprisonment in connection with an offence unless a (specialist) Gladue report, prepared in accordance with the regulations, has been tendered in evidence and copies of the report have been given to the offender and any other person appearing in the proceedings and the court has taken into account the matters contained in the report and any

25 Calla Wahlquist, 'Australia must address soaring female Indigenous imprisonment rate – report', *The Guardian* (online), 15 May 2017, <https://www.theguardian.com/australia-news/2017/may/15/soaring-female-indigenous-imprisonment-rate-obstructing-closing-the-gap-targets-report>.

26 Anthony, above n 2, 13.

27 *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*.

28 Ibid.

29 Anthony, above n 2, 13.

30 Wahlquist, above n 3.

submissions made in relation to those matters. [See also [35] to [40] above].

- (b) When sentencing an Aboriginal or Torres Strait Islander woman to a term of imprisonment, a court must pay particular attention to the impact on her children and any evidence of intergenerational trauma caused by a history of removal and separation.
- (c) Strengthening diversionary programs by ensuring the availability of culturally appropriate and community led programs. There must be residential rehabilitation programs with specific programs for women which provide stable, safe and secure housing and allow for the accommodation of their children. The diversionary programs must have an understanding of the unique issues faced by indigenous women that include issues such as homelessness, sexual and physical violence, poverty, lack of education, substance abuse and systemic racism.

10. ABORIGINAL JUSTICE AGREEMENTS

Proposal 10-1 Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.

115. The Bar Association supports Proposal 10-1.

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?

116. The Bar Association considers that the Commonwealth Government should develop justice targets as part of the review of the *Closing the Gap* policy.

117. The Bar Association notes that Aboriginal Justice Agencies have attempted to address the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system. They were part of the response to recommendation 188 of the Royal Commission into Aboriginal Deaths in Custody³¹, requiring governments to negotiate with appropriate Aboriginal organisations and to ensure that the self-determination principle was applied in the design and implementation of policies and programs affecting Aboriginal people.³²

³¹ Royal Commission into Aboriginal Deaths in Custody, *Final Report*, 1991.

³² Fiona Allison and Chris Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People' (2010) *Sydney Law Review* 645 at 650.

118. Other more general State policy approaches have had as their highest priority, the reduction of Aboriginal incarceration rates.³³ Yet, far from improving, Indigenous incarceration rates in NSW (as elsewhere) have deteriorated.

119. *Closing the Gap* sets targets in relation to the reduction in child mortality, improvement in early childhood education, school attendance, literacy and numeracy, Year 12 attainment and improvement in employment outcomes.³⁴ The Bar Association endorses such targets as providing a basis for measuring success or failure against broader strategic goals and for keeping government agencies accountable, including by way of independent evaluation.

120. The Australian Human Rights Commission *Social Justice Report 2009* recommended that criminal justice targets be set and integrated into the *Closing the Gap* agenda.³⁵ The Bar Association considers that justice targets are also likely to contribute, over time, to a more consistent implementation of strategic plans and to facilitate a comparative analysis of the effectiveness of programs in different States and regions.

121. Allison and Cunneen have noted that the progressive dismantling of Indigenous representative bodies has increased reliance upon departmental or agency self-reporting.³⁶ In that environment, justice targets assume greater importance as they are likely to improve accountability and transparency. The NSW Auditor-General's Performance Audit of the Two Ways Together – NSW Aboriginal Affairs Plan May 2011 (**Two Ways Audit**), noted (at page 3) that there were some 250 targets, indicators and measures set at various times and that:

“Over the course of the Plan, changes in these performance measures and the complexity of governance and reporting processes that supported them has made long term evaluation more difficult. It has contributed to a lack of accountability for results against changing targets. Agencies have not been held accountable for achieving them.”

The Bar Association strongly supports the setting of justice targets as a means of improving the accountability of State and Territory agencies by making it more difficult to change their own performance measures during the course of programs and to provide clarity and consistency in reporting.

³³ Ibid at 650. See also NSW Auditor-General's Performance Audit of the Two Ways Together NSW Aboriginal Affairs Plan May 2011 pages 17, 25, 26 and 28.

³⁴ See Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Closing the Gap Prime Minister's Report 2017 (Closing the Gap)* at pages 23, 36, 38, 43 and 53.

³⁵ See *Social Justice Report 2009*, Chapter 2 “Justice Reinvestment – a new solution to the problem of Indigenous over-representation in the criminal justice system”, at 2.5 recommendation 2.1 on page 56.

³⁶ Allison and Cunneen at 652.

122. Generally, justice targets could encompass the following matters:

- (a) reduction in the overall rate of Aboriginal and Torres Strait Islander imprisonment and detention, and specifically for women and juveniles;
- (b) reduction in the rate of Aboriginal and Torres Strait Islander people coming into contact with the criminal justice system, and specifically women and juveniles;
- (c) reductions in the rate of domestic violence in Aboriginal and Torres Strait Islander communities;
- (d) implementation of child protection programs;
- (e) the availability and funding of justice reinvestment initiatives including:
 - (i) analysis and mapping – identifying the location of offenders and calculating the cost of imprisonment.³⁷ An offence targeting project to analyse the pattern of offending in local Aboriginal communities was identified as one of a number of existing initiatives in the New South Wales Two Ways Together Plan 2003-2012;³⁸
 - (ii) the provision of diversion programs, particularly in rural and remote areas;
 - (iii) culturally secure programs;³⁹
 - (iv) community justice mechanisms;⁴⁰
 - (v) programs for the assistance of Aboriginal and Torres Strait Islander victims of crime;
 - (vi) diversionary and sentencing options for driving offences;⁴¹
- (f) the provision and funding⁴² of Aboriginal and Torres Strait Islander legal services particularly in those metropolitan areas with large Aboriginal and Torres Strait Islander populations and in rural and remote areas, and the availability of such services both to offenders and to victims of crime;⁴³

³⁷ Ibid at 4 and 14.

³⁸ *Two Ways Audit* at 25.

³⁹ See *Social Justice Report 2009*, Chapter 2, at 2.4(c) on page 47.

⁴⁰ Ibid at 2.4(f) on page 51.

⁴¹ This issue has been the subject of a report by the NSW Auditor-General “Improving Legal and Safe Driving Among Aboriginal People” (2013). Fines and driver licences are the subject of separate proposals but should also be encompassed in justice targets.

⁴² Including adequate funding of technological infrastructure: see [163] below.

⁴³ See Australian Human Rights Commission *Social Justice and Native Title Report 2013* Chapter 1 at 1.2 (g) on page 58.

- (g) Aboriginal and Torres Strait Islander representation in justice related employment including police, corrective services, courts and Attorneys-General departments;
- (h) the provision of cultural competency training to relevant government criminal justice agencies and the provision of support to local Aboriginal and Torres Strait Islander community groups to provide training about the local Aboriginal and Torres Strait Islander environment;⁴⁴ and
- (i) the provision by all State, Territory and Federal police forces of programs and courses/seminars on Aboriginal and Torres Strait Islander cultural and societal issues.⁴⁵

11. ACCESS TO JUSTICE ISSUES

123. The Bar Association notes the following substantive reports produced by the Productivity Commission in the area of access to justice for Aboriginal and Torres Straits Islander people:

- *Access to Justice Arrangements* (2014);⁴⁶ and
- *Overcoming Indigenous Disadvantage* (2016 edition).⁴⁷

124. In addition, the Law Council of Australia's Justice Project released a detailed Consultation Paper into access to justice issues for Aboriginal and Torres Strait Islander People in August 2017 (**the Access to Justice Consultation Paper**).⁴⁸

125. Each of these reports contains detailed and up to date research and analysis of access to justice issues for Aboriginal and Torres Strait Islander peoples. This submission sets out some broad responses to the ALRC's proposals and questions. The Bar Association commends the above reports to the ALRC as sources of deeper research and analysis than it can provide in the timeframe available.

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.

126. The Bar Association strongly supports Proposal 11-1.

⁴⁴ This was a specific recommendation of the Two Ways Audit: see recommendation 5 at 4.

⁴⁵ See recommendations 214-233 of the Royal Commission into Aboriginal Deaths in Custody, and paragraph [175] below.

⁴⁶ Productivity Commission, Inquiry Report No 72 (5 September 2014), Volume 2.

⁴⁷ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (2016).

⁴⁸ Law Council of Australia, *Justice Project: Aboriginal and Torres Strait Islander People*, Consultation Paper (2017).

127. The Bar Association supports the proposal for the establishment and increased provision of interpreter services for those speaking Aboriginal or Torres Strait Islander languages.
128. The Bar Association agrees with the comments of the Chief Justice of Western Australia, Wayne Martin AC, that the law is clear that an accused person must be able to understand the language in which the court process is conducted in order for the accused to receive a fair trial. Interpreters are needed at all stages of the criminal justice system from assisting police during the investigation stage to gather evidence, to legal practitioners providing advice to Aboriginal and Torres Strait Islander accused people, to court proceedings, corrections and probation and parole.
129. In addition to those matters listed in the Discussion Paper at [11.15], the Bar Association recognises the difficulties in the provision of such services due to:
- (a) the large number of Aboriginal and Torres Strait Islander languages spoken by relatively small numbers of people;
 - (b) the absence or limited provision of literacy education in Aboriginal and Torres Strait Islander languages; and
 - (c) the lack of access of those in remote areas to training to become interpreters and translators.
130. The Bar Association notes with deep regret that despite the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs recommending in 1992 that “a separate national interpreter service for Aboriginal and Torres Strait Islander languages to ensure that people have reliable access to trained interpreters and translators”, no such service has been established. A very similar recommendation was made by the same Committee in its 2011 report:

Recommendation 25

The Committee recommends that the Commonwealth Attorney-General’s Department, in partnership with state and territory governments, establish and fund a national Indigenous interpreter service that includes a dedicated criminal justice resource and is suitably resourced to service remote areas. The Committee recommends that initial services are introduced in targeted areas of need by 2012 with full services nationwide by 2015.

131. Needless to say, a full-service national Indigenous interpreter services has not been established.

132. The Bar Association also recognises that in addition to the specific needs of Aboriginal and Torres Strait Islander people who speak traditional languages as a first language, there are many Aboriginal and Torres Strait Islander people in remote, rural and urban areas who use English in a way which is different to the way non-Indigenous people speak the language. That issue is acknowledged in the Discussion Paper at [11.15], and it calls for a response through:

- (a) increased cultural awareness training for police, lawyers, court staff and judicial officers including increased funding for the provision of such training; and
- (b) resourcing for the qualifying of a linguistics expert where an Aboriginal or Torres Strait Islander litigant's use of English is important to the resolution of the dispute.

133. The Bar Association notes the important work of the NT Aboriginal Interpreter Service (AIS) operated by the NT Government which has over 30 interpreters on staff, and more than 400 casual interpreters in 100 languages and dialects. Nonetheless, according to the Northern Australian Aboriginal Justice Agency (NAAJA), this service is severely strained by the demands of the criminal justice system in the NT. The Law Council's Access to Justice Consultation Paper reveals that:

- (a) there remains a scarcity of Indigenous language interpreters and, of those available, there are few trained and qualified to the professional level required for legal assignment;⁴⁹
- (b) the Australian Government has not implemented its 2008 commitment to develop a national framework for the provision of Indigenous language interpreters as a part of National Partnership Agreement on Remote Service Delivery;⁵⁰ and
- (c) scarcity of Indigenous interpreters means that cases are often adjourned to enable lawyers to obtain proper instructions and this leads to increased periods of detention for Indigenous defendants.⁵¹

⁴⁹ Productivity Commission, *Access to Justice Arrangements*, p 780.

⁵⁰ Council of Australian Governments (2008).

⁵¹ NAAJA, *Review of the National Partnership Agreement on Legal Assistance Services Briefing Paper* (7 June 2012).

134. The Bar Association acknowledges the additional \$1.6m announced in June 2017 by the Commonwealth Indigenous Affairs Minister to National Accreditation Authority of Translators and Interpreters (NAATI), but notes that NAATI is an organisation with a core focus on issuing accreditations for practitioners who wish to work as translators and interpreters and is not an employer of translators and interpreters.⁵² NAATI has been particularly active since 2012 in the NT working with the AIS and operates an 'Indigenous Interpreting Project' in South Australia, Western Australia and Queensland. The success of NAATI's Indigenous Interpreting Project appears to be important and worthwhile, but limited, as it has issued 96 accreditations to Indigenous interpreters over a 5 year period from 2012.
135. A properly devised national program of interpreters may be able to make use of technological advances to provide interpreter services not just on a face-to-face basis but also via, telephone, AVL and Skype where interpreter services are limited.
136. Accordingly, the Bar Association strongly supports the expansion of interpreter services to establish a fully resourced, properly co-ordinated and professional interpreter service on a national basis.

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?

Specialist Courts and Diversion Programs

137. There are over 50 adult and children's Aboriginal and Torres Strait Islander sentencing courts in Australia operating under various legislative arrangements.⁵³ The objectives of these courts include increased Indigenous participation in court processes, the provision of a culturally appropriate sentencing context, reduced recidivism and engendering greater trust between communities and judicial officers.⁵⁴
138. The Bar Association strongly supports the existence of such courts and encourages their greater adoption, implementation and resourcing.
139. In order for Aboriginal and Torres Strait Islander courts to have a beneficial effect on recidivism rates, victims, offenders and the public, they must be able to operate in an integrated fashion with other measures which are specific to Aboriginal and Torres Strait Islander offenders.

⁵² <https://www.naati.com.au/information/what-we-do/>.

⁵³ Elena Marchetti, "Access to Justice for Aboriginal and Torres Strait Islander People", 15th National Family Law Conference Paper, Tasmania 14-17 October 2012.

⁵⁴ Kathleen Daly and Elena Marchetti, *Innovative Justice Processes: Restorative Justice, Indigenous Justice and Therapeutic Jurisprudence* (21 Feb 2011), 13, 18.

140. The effectiveness of an Aboriginal and Torres Strait Islander court is affected by its ability when sentencing an offender to take into account matters which are specific to Aboriginal and Torres Strait Islander people and applicable to the offender. Effectiveness will also be influenced by the availability of diversionary and other community run programs appropriately tailored for and operated by Aboriginal and Torres Strait Islander people.
141. Circle Sentencing in NSW is available in only limited parts of the State, and is hampered by the limited availability or absence of community controlled diversion programs.
142. The Bar Association notes that the implied criticism of Circle Sentencing at [11.28] of the Discussion Paper, and based on NSW BOCSAR's statistical evaluation looking only at recidivism rates, ignores some other important aspects of the process such as the effects of the process on the offender and on the victim. The beneficial effects of the Victorian Koori Courts have been recognised as "more engaging, inclusive and less intimidating". Researchers have argued that a focus on recidivism can be reductive, and that it should be considered as one measure of success out of a number of goals.⁵⁵ The beneficial effect of any specialist court will be undermined if the only sentencing option is incarceration in the general prison system.
143. The Bar Association considers that any evaluation of the reduction of recidivism rates must be nuanced. The period over which the evaluation takes place, the nature of the re-offending and the length of time before re-offending occurs are relevant variables. It should also be noted that whilst circle sentencing gives Aboriginal and Torres Strait Islander people direct involvement in the sentencing of indigenous offenders (a necessary feature of a specialist court), such involvement by itself does not necessarily lead to a reduction in re-offending. Specialist Aboriginal and Torres Strait Islander courts must also have available to them specialist programs, a capacity for continued court monitoring after sentence and the resources to conduct drug testing. There is nothing in the BOCSAR evaluation of circle sentencing to suggest that circle sentencing is not meeting a number of important objectives, such as, for example, strengthening the informal social controls that exist in Aboriginal and Torres Strait Islander communities which may have a crime prevention value that cannot be quantified.
144. Further, the evidence available from evaluation of the NSW Drug Court is that the approach taken to sentencing there (features of which are adopted by the NSW Walama Court proposal) has reduced recidivism rates. BOCSAR and the Centre for

⁵⁵ Elena Marchetti "Nothing Works? A Meta Review of Indigenous Sentencing Court Evaluations" (2017) 28 *Current Issues in Criminal Justice* 3, 257-276 at 261 and footnote 462 of Law Council of Australia Justice Project: Aboriginal and Torres Strait Islander People Consultation Paper (2017) p 62.

Health Economics Research and Evaluation (**CHERE**) completed an evaluation of the Drug Court in 2008. When the Drug Court and control group were compared on an as-treated basis, members of the Drug Court group were found to be 37% less likely to be re-convicted of any offence, 65% less likely to be re-convicted of an offence against the person, 35% less likely to be re-convicted of a property offence and 58% less likely to re-convicted of a drug offence.

145. Likewise, feedback from judicial officers sitting in the Victorian Koori Court (established in 2008) is that there has been success in reducing recidivism rates and significant increase in compliance with court orders.
146. NSW has operated a Youth Koori Court in Parramatta since 2014, as part of the Children's Court, for 10 to 17 year old Aboriginal people or Torres Strait Islander children. Offenders must have pleaded guilty and consent to their matter being dealt with by the Koori Court. They are assessed for suitability by the Koori Court Officer. The Youth Koori Court has the same powers as the Children's Court, but operates through a two-stage model. Those at the Koori Court include the child's parents and supporters, the Magistrate, elders, a Juvenile Justice Officer, a Koori Court officer and the police prosecutor. The child is given an opportunity to talk about his or her feelings. If accepted into the program, the child is referred to a Youth Koori Court Conference where the child's needs are identified and strategies are identified to ensure the child stays "out of trouble". Those matters include support to stay at school, improvement of cultural awareness, stable accommodation and any health (including drug) issues.⁵⁶
147. The Bar Association notes that the NSW Attorney General is currently considering the establishment of a Koori Court (**the Walama Court**) as part of the District Court of NSW. The proposal has been put forward by the Chair of the Working Group for a NSW District Koori Court, her Honour Judge Dina Yehia SC. The proposal is not dissimilar to the Youth Koori Court, and follows a similar process of assessment by a Koori Court Officer (during which the offender is bail refused). A "Sentencing Conversation" would occur around a table between the Judge, the Elders, the Koori Court Officer, the offender and his or her legal representative, a Crown Prosecutor or solicitor from the DPP, a community corrections officer and the victim (with a discretion to allow others to participate). At the Sentencing Conversation, a program is determined for the offender other than full-time custody.
148. The proposed Koori Court would impose such a program only where (normally) no period of custody (or further custody) would be imposed or where a sentence for the offence with a non-parole period of three years or less would have been imposed. The program imposed would have the following elements:

⁵⁶

http://www.childrenscourt.justice.nsw.gov.au/Documents/Youth%20Koori%20Court%20A4_Accessible.pdf

- (a) suspension of the sentence and release of the offender to undertake the program;
- (b) engagement with a three-phase program of high supervision, medium supervision and then low supervision;
- (c) supervision involving breath-testing and urinalysis and progress appearances in the Koori Court;
- (d) imposition of sanctions for the breach of program requirements with a certain number of breaches leading to a limited period of incarceration; and
- (e) each program will have a suitable cultural component to engender cultural pride and respect and strengthen the offender's understanding of his or her cultural belonging.

149. The program would not be available for those sentenced to serve a period of imprisonment with a non-parole period of more than three years. The Bar Association supports the implementation of the NSW Walama Court proposal.

150. The Bar Association agrees with the ALRC's identification of the key elements of such specialist courts at [11.42] – [11.49] of the Discussion Paper.

151. The Bar Association makes two particular comments about progress in NSW of specialist courts. First, the coverage of Circle Sentencing and the Youth Koori Court is limited. For example, the Youth Koori Court operates in Parramatta and does not yet have a strong presence in regional NSW. Second, proper qualitative and quantitative evaluation of such programs is needed so as to assist with both assessment and adjustment of such important initiatives.⁵⁷

152. Further, the Bar Association notes that the Productivity Commission considers diversionary programs to be “a swift and economically efficient response to offending, aimed at reducing re-offending and the negative labelling and stigmatisations of contact with the criminal justice system”.⁵⁸ The Wan, Moore and Moffatt 2013 NSW BOCSAR review of diversionary programs indicated that for all people who went through a diversionary program there was a 17.5% lowering of custodial penalties.⁵⁹ The Bar Association strongly supports the

⁵⁷ See Kathleen Daly and Proietti-Scifonni, *Defendants in the Circle: Nowra Circle Court, The presence and Impact of Elders and Re-offending* (School of Criminology and Justice, 2009), at 107.

⁵⁸ Overcoming Indigenous Disadvantage 2016, 11.19.

⁵⁹ *The Impact of the NSW Young Offenders Act (1997) on likelihood of custodial order* Crime and Justice Bulletin No 166 (NSW BOCSAR, January 2013).

expansion of diversionary programs such as the NSW Magistrates Early Referral into Treatment drug diversion program and the Victorian Court Integrated Services Program (CISP).

153. More generally, as well, there is a need for more widespread roll-out of other specialist courts such as drug courts across all jurisdictions to provide proper and equitable access to Aboriginal and Torres Strait Islander people.

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.

Indefinite detention when unfit to stand trial

154. The Bar Association strongly supports Proposal 11-2.

155. Section 23(1) of the *Mental Health (Forensic Provisions) Act 1990* (NSW) requires that where, at a special hearing, a Court finds on the limited evidence available that an accused person committed an offence then the Court must indicate whether “if the special hearing had been a normal trial of criminal proceedings against a person who was fit to be tried ... it would have imposed a sentence of imprisonment” and, if so, it must nominate a term being “the best estimate of the sentence the Court would have considered appropriate if the special hearing had been a normal trial of criminal proceedings”. That term is known as a “limiting term”.

156. Such a Court has the discretion to order the commencement of a limiting term taking into account time served or to order the later commencement of a limiting term (where it is to be served consecutively or partly consecutively and partly concurrently): s 23(5). In doing so, the Court may take into account that a limiting term is not subject to (the benefit of) a non-parole period. However, the Bar Association considers that it would be fairer for the Court to take into account what non-parole period would have been imposed if the trial had been a normal trial. Further, the Court currently does not take into account that the person did not have the opportunity to avail themselves of any discount for a plea of guilty. The system could be made fairer and periods of incarceration reduced by requiring courts to factor in both what non-parole period would have been imposed and the discount for an early plea of guilty when setting a limiting term for an unfit person.

157. Section 23 is aimed at setting a temporal limit to the period which a person who has been unfit to be tried spends in a mental health facility (or other place of imprisonment). Such a person ceases to be a “forensic patient” on the expiration of the limiting term. However, that does not mean they are necessarily given their liberty. It is open to the Mental Health Review Tribunal to classify the person as an

involuntary patient under s 53(1), so that his or her effective period of detention is extended. Detention in a mental health facility may continue past the cessation of the limiting term, under the provisions of the *Mental Health Act 2007* (NSW) which govern involuntary patients in the civil (or non-forensic) system.

158. The Bar Association otherwise supports the continuation of such a statutory regime, and the introduction of similar schemes in other States and Territories, but recognises that it is but one of a number of ways in which the indefinite detention of Aboriginal and Torres Strait Islander people suffering from mental illness in the criminal justice system can be limited. It is trite that there are very high rates of mental illness of those incarcerated in both correctional centres and the forensic mental health system. That applies to both the Indigenous and non-Indigenous prison populations. The provision of mental health services to those in prison (by Justice Health in NSW) is severely constrained by low resources and high demand for psychiatrists, psychologists, medical practitioners and mental health nurses.

159. The Bar Association considers that Aboriginal and Torres Strait Islander people suffering from mental illness are entitled to culturally appropriate and targeted health treatment whilst incarcerated in mental health facilities and correctional centres in order to aid their early release. An improvement in the provision of mental health care is likely to aid stabilisation of the mental illness of inmates while incarcerated, leading to earlier dates for release on parole and a smoother transition back into the community.

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

Provision of legal services and supports

160. The Bar Association notes that the Productivity Commission has comprehensively reviewed this area in its report entitled *Access to Justice Arrangements* (2014), and that the current ALRC inquiry does not purport to traverse the ground covered in that report. It is sufficient to observe that funding uncertainty in this area since 2013 has been destructive of long term arrangements for the provision of legal services to Aboriginal and Torres Strait Islander peoples, including the ongoing employment of legal practitioners experienced in the area.

161. The Productivity Commission has noted that current funding arrangements have not kept up with increased demand and the cost of service delivery.⁶⁰ The majority of funding of Aboriginal and Torres Strait Islander Legal Services is directed towards casework and duty lawyer services in criminal matters, with criminal

⁶⁰ Access to Justice Arrangements, p 802.

matters making up 83% of their work in 2012-2013.⁶¹ The funding shortage has resulted in biased provision of legal services towards criminal work (where people are at risk of incarceration) with a detrimental effect upon important civil work, such as in family and civil law including family violence and child protection. As a result, the Productivity Commission has recommended that an additional \$200m is needed recurrently to fund such civil legal services.⁶² The Bar Association submits that the critical work of Aboriginal and Torres Strait Islander Legal Services cannot take place without adequate funding. The adverse effects on other areas of legal need draws Aboriginal and Torres Strait Islander people back into a cycle of impoverishment and disadvantage and in many cases, violence.

162. The funding of legal services must include adequate funding of technological infrastructure to provide Aboriginal and Torres Strait Islander detainees and prisoners speedier and comprehensive access to advice and services by Audio Visual Link facilities and capability.
163. The Bar Association supports the introduction (or the reintroduction) of the practice of the Commonwealth (and some State and Territory practice) in the 1980s and 1990s⁶³ of the mandatory requirement that a legal aid impact statement (or report)⁶⁴ be prepared for the purpose of informing Commonwealth, State and Territory Governments in Cabinet and Executive decision making of the effects upon Aboriginal Legal Services and Legal Aid Commissions of any proposed changes or reforms to criminal justice programs, legislation, procedures and/ or practices that will potentially impact upon their capacity to provide legal services and the efficiency of those services.
164. In its 2010 Concluding Observations on Australia, the United Nations Committee for the Elimination of All Forms of Racial Discrimination called for “an increase in funding for Aboriginal legal aid in real terms, as a reflection of its recognition of the essential role that professional culturally appropriate Indigenous legal and interpretive services play within the criminal justice system”.⁶⁵ The UN Special Rapporteur on the Rights of Indigenous Peoples has expressed the same view.⁶⁶

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.

⁶¹ Law Council of Australia *Justice Project: Aboriginal and Torres Strait Islander People Consultation Paper* (2017) p 26, Access to Justice Arrangements, p 679.

⁶² Productivity Commission Access to Justice Arrangements, p 63, recommendation 21.4.

⁶³ Legal Aid for the Australian Community-National Legal Aid Advisory Committee-July 1990; p 96

⁶⁴ Op cit, p 362.

⁶⁵ 77th Session: UN Doc CERD/C/AUS/CO/15-17.

⁶⁶ Victoria Tauli-Corpuz, *End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia* (2017).

Custody Notification Service

165. The Bar Association strongly supports Proposal 11-3.
166. Clause 37 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) mandates that the police custody manager immediately informs a representative of the Aboriginal Legal Service that a person is detained in respect of an offence and the place he or she is detained. The provision was introduced as a result of recommendations of the Royal Commission into Aboriginal Deaths in Custody.⁶⁷ Its implementation in the NT has led the Federal Minister for Indigenous Affairs, Nigel Scullion MP, to say that:
- “The evidence is over 15 years, now some 300 calls a day over a 24-hour period have resulted in no deaths in custody.”⁶⁸
167. The Custody Notification Service (CNS) is operated by the Aboriginal Legal Services which provide lawyers ‘on call’ for members of the NSW Police Force to contact when an Aboriginal person is taken into custody so that the detainee can speak with a lawyer. The importance of such calls for young Aboriginal and Torres Strait Islander people is immense. ALS solicitors provide those detained with both legal advice, as well as a check on their welfare. There is direct evidence available that ALS solicitors are able to influence police decisions as to bail and the use of other mechanisms which limit the need to detain the person in custody until they can be taken before a magistrate. They are an effective and resource efficient way in which to reduce detention of Indigenous people in police custody.
168. Two critical aspects of the CNS are whether police actually use the service, and whether the service is adequately resourced. First, while clause 37 is a regulatory requirement, its implementation should be enhanced through integration of the requirement to use the CNS into arrest procedural documents and by mandatory reporting by the police of contacts with the CNS as against Indigenous detainees. Aboriginal woman Ms Rebecca Maher was arrested for being drunk in public in Maitland NSW in 2016 in the early hours of the morning, and then found dead in her cell at 6.00am. No call was made to the ALS by the NSW Police until 24 days after her death, according to media reports. Hers was the first death in custody in NSW for 16 years.
169. Second, the availability of a lawyer through the CNS could be enhanced by greater resourcing for the call centre receiving calls – currently likely to be only one person at a time in NSW.

⁶⁷ Royal Commission into Aboriginal Deaths in Custody, *Final Report*, 1991.

⁶⁸ NSW Indigenous custody notification service gets federal funding lifeline”, *The Guardian*, 1 July 2015

170. The CNS currently has funding of \$1.8m in NSW to June 2019, but the Commonwealth has indicated that it would prefer the service be funded by the NSW Government.⁶⁹
171. The Bar Association considers that the CNS is a vital part of criminal justice initiatives in NSW for the protection of those arrested and reduction of persons in custody, and commends its implementation by legislative requirement in other jurisdictions.

12. POLICE ACCOUNTABILITY

Question 12-1 How can police work better with Aboriginal and Torres Strait Islander communities to reduce family violence?

172. The Bar Association considers that police should be encouraged to enter into genuine and meaningful collaborations with communities to reduce family violence, such as the Domestic Violence Home Visiting Program in Bourke.
173. In 2013, Bourke was ranked highest in NSW for domestic violence related assaults. The Bourke Tribal Council made it a priority area of action in its strategy *Growing our Kids up Safe Smart Strong*. In consultation with Maranguka, the Bourke Local Area Command implemented the home visiting program in 2016. The program involves the police visiting the home of perpetrators of domestic violence following a domestic violence incident, with a member of the community for a check-in, the purpose of the visit being both supervisory and supportive. The police and the Aboriginal community in Bourke are working together in partnership to reduce family violence. In doing so, they have created an environment of support for families. Repeat Victim Assaults have reduced from 45 in the second half of last year, to a total of 28 in the first half of this year (Bourke LAC).
174. Further, the Bar Association considers that all State, Territory and Federal police forces should be required to report to their relevant Minister on the character, quantity and coverage of programs and courses/seminars on Indigenous cultural and societal issues, as recommended by the Royal Commission into Aboriginal Deaths in Custody in recommendations 225 and 228 of its final report.⁷⁰

⁶⁹ ABC News Online, "Indigenous custody notification hotline saved as Federal Government steps in with funding", 2 December 2015.

⁷⁰ Royal Commission into Aboriginal Deaths in Custody, *Final Report*, 1991.

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?

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

175. The Bar Association considers that there would be value in such reporting.

Question 12-4 Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcomes evaluations; and put succession planning in place to ensure continuity of the programs?

176. The Bar Association considers that there should be such requirements.

177. Additionally, police should be required to share crime data to support communities in developing strategies and initiatives to reduce offending behaviours.

Question 12-5 Should police be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia, where they have not already done so?

178. Yes

Question 12-6 Should police be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place?

179. Yes

13. JUSTICE REINVESTMENT

Question 13-1 What laws or legal frameworks, if any, are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples?

180. The Bar Association considers that the Justice Reinvestment Initiative (JRI) in the United States provides useful examples of legal frameworks to support justice

reinvestment initiatives for Aboriginal and Torres Strait Islander peoples in Australia.

181. Through JRI, 24 states have enacted a package of legislative and policy reforms to address the specific factors influencing their prison populations, including:
 - (a) amending sentencing laws;
 - (b) reforming pre-trial practices;
 - (c) modifying prison release practices; and
 - (d) strengthening community corrections.
182. Reform packages to provide the legal framework for justice reinvestment initiatives have:
 - (a) established data collection and reporting requirements;
 - (b) created oversight panels to monitor progress;
 - (c) required that future legislative proposals include a fiscal impact statement;
and
 - (d) made directions regarding the calculation of savings and reinvestment or those savings in evidence-based crime reduction strategies.
183. The Bar Association considers that similar State and Territory reform packages should be considered to support existing and proposed justice reinvestment initiatives in Australia. In NSW Just Reinvest has been running a successful program in Bourke for some years (**the Maranguka Project**). Particular consideration should also be given to the establishment of a national statutory body to formalise efforts to fund, coordinate, evaluate and disseminate information about State and Territory, and local justice reinvestment efforts.
184. Implementation of justice reinvestment reforms in Australia would require specific legislative and administrative provisions in relation to bail, sentencing, parole and Community Corrections (Probation and Parole) supervision to permit or facilitate participation in particular programs and reporting as requirements of participation in particular programs.
185. In relation to specific recommendations regarding legislative and policy frameworks required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait islander peoples, the Bar Association endorses the submission of Just Reinvest NSW to the ALRC in this Inquiry.
186. Finally, in reiterating the importance of adequate funding as referenced throughout this submission, the Bar Association supports the fundamental premise of Justice Reinvestment that a fiscal mechanism is required to support the long-term and

sustainable funding of early intervention, crime prevention and diversionary measures.

Dated: 15 September 2017