

The Senate

Finance and Public Administration
References Committee

Aboriginal and Torres Strait Islander
experience of law enforcement and justice
services

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List of Recommendations

Recommendation 1

8.28 The committee recommends that the Commonwealth Government adequately support legal assistance services, and that specifically funding should focus on:

- **community legal education for Aboriginal and Torres Strait Islander people;**
- **outreach workers to assist Aboriginal and Torres Strait Islander people; and**
- **interpreters for Aboriginal and Torres Strait Islander people in both civil and criminal matters to ensure that they receive effective legal assistance.**

Recommendation 2

8.29 The committee recommends that the Commonwealth Government take all necessary steps in the development and implementation of a plan for the collection of consistent national data on all aspects of Indigenous incarceration placed on the agenda for the next meeting of the Council of Australian Governments Law, Crime and Community Safety Council.

Recommendation 3

8.30 The committee recommends that the Commonwealth Government, prior to the next Council of Australian Governments meeting, explicitly state the measures it is putting in place to assist states and territories to develop, implement and meet Indigenous justice targets.

Recommendation 4

8.31 The committee recommends that the Department of Health prepare a communication plan for those working in areas such as the criminal justice field, to accompany the release of the National Fetal Alcohol Spectrum Disorders (FASD) Diagnostic Tool.

Recommendation 5

8.32 The committee recommends that the Commonwealth Government, through the Council of Australian Governments, work with states and territories, to develop and implement guidelines for the appropriate management of offenders diagnosed with Fetal Alcohol Spectrum Disorders.

Recommendation 6

8.33 The committee recommends that the Commonwealth Government continue to fund initiatives which promote the National Health and Medical Research Council's guidelines that for women who are pregnant, planning a pregnancy or breastfeeding, not drinking alcohol is the safest option.

Recommendation 7

8.34 The committee recommends that the Commonwealth Government contribute to the development of justice reinvestment trials at sites in each state and territory.

Recommendation 8

8.35 The committee recommends that much greater attention is given to Aboriginal led, managed and implemented justice reinvestment programs such as the Bourke Project and Yirriman, and that the Commonwealth Government support Aboriginal led justice reinvestment projects.

Recommendation 9

8.36 The committee recommends that the Commonwealth Government work with the states and territories in supporting programs which strengthen families and communities through a focus on early intervention and support.

Recommendation 10

8.37 The committee recommends that administrative responsibility for Family Violence Prevention Legal Services be returned to the Attorney-General's Department.

Recommendation 11

8.38 The committee recommends that the Council of Australian Governments task the Council of Australian Governments Law, Crime and Community Safety Council to review state laws such as mandatory sentencing which have a disproportionate effect on Indigenous Australians in order to quantify the effects and report to the Council of Australian Governments.

Chapter 1

Introduction

Referral

1.1 On 4 March 2015, the Senate referred the following matter to the Senate Finance and Public Administration References Committee for inquiry and report by 10 August 2015:

Aboriginal and Torres Strait Islander experience of law enforcement and justice services, with particular reference to:

- (a) the extent to which Aboriginal and Torres Strait Islander Australians have access to legal assistance services;
- (b) the adequacy of resources provided to Aboriginal legal assistance services by state, territory and Commonwealth governments;
- (c) the benefits provided to Aboriginal and Torres Strait Islander communities by Family Violence Prevention Legal Services;
- (d) the consequences of mandatory sentencing regimes on Aboriginal and Torres Strait Islander incarceration rates;
- (e) the reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles;
- (f) the adequacy of statistical and other information currently collected and made available by state, territory and Commonwealth governments regarding issues in Aboriginal and Torres Strait Islander justice;
- (g) the cost, availability and effectiveness of alternatives to imprisonment for Aboriginal and Torres Strait Islander Australians, including prevention, early intervention, diversionary and rehabilitation measures;
- (h) the benefits of, and challenges to, implementing a system of 'justice targets'; and
- (i) any other relevant matters.¹

1.2 The reporting date was subsequently extended to 25 August 2016.²

Conduct of the inquiry

1.3 The inquiry was advertised in *The Australian* newspaper and on the committee's website. The committee invited submissions from individuals, organisations and government departments by 30 April 2015.

1 *Journals of the Senate*, No. 81, 4 March 2015, pp 2245-2246.

2 *Journals of the Senate*, No. 99, 22 June 2015, p. 2744; *Journals of the Senate*, No. 123, 9 November 2015, p. 3308; *Journals of the Senate*, No. 131, 30 November 2015, p. 3518; and *Journals of the Senate*, No. 138, 22 February 2016, p. 3749.

1.4 The committee received 51 public submissions as well as confidential submissions. A list of individuals and organisations which made public submissions, together with other information authorised for publication by the committee, is at Appendix 1.

1.5 The committee held public hearings in Perth on 4 August 2015, Sydney on 23 September 2015 and Canberra on 4 April 2016. The committee also held a hearing in Darwin on 16 February 2016 for its inquiry into the Commonwealth Indigenous Advancement Strategy tendering processes, where it also received evidence in relation to this inquiry. A list of the witnesses who gave evidence at the public hearings is available at Appendix 2.

1.6 The inquiry was not completed when the Senate and the House of Representatives were dissolved on 9 May 2016 for a general election on 2 July 2016. When parliament resumed, the committee met and recommended to the Senate that the inquiry continue in the 45th Parliament with a reporting date of 13 October 2016. This recommendation was agreed by the Senate.³

1.7 Submissions, additional information and the Hansard transcript of evidence may be accessed through the committee website at: www.aph.gov.au/senate_fpa.

Context of the inquiry

1.8 This inquiry is preceded by a number of other relevant inquiries, including:

- Senate Legal and Constitutional Affairs References Committee, *Access to Justice*, 8 December 2009;
- House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, 20 June 2011;
- House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm – inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, 29 November 2012;
- Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, 20 June 2013; and
- Productivity Commission, *Access to Justice Arrangements*, 3 December 2014.

1.9 The committee does not seek to duplicate the work of any of these previous inquiries. Where relevant, this committee has referred to the evidence, conclusions and recommendations of those inquiries.

3 *Journals of the Senate*, No. 7, 15 September 2016, p. 225.

Structure of the report

1.10 The inquiry's terms of reference are addressed in the following chapters:

- Chapter 2 – describes the four main government legal assistance services; the Commonwealth funding for each service, and the adequacy of funding for those services;
- Chapter 3 – discusses the unmet legal needs of Aboriginal and Torres Strait Islander people and outlines some of the barriers to access to legal assistance services;
- Chapter 4 – covers the imprisonment rate of Aboriginal and Torres Strait Islanders; discusses the adequacies of the statistical and other data collected and made available about Aboriginal and Torres Strait Islander justice issues, and considers the inclusion of justice targets in the Closing the Gap measures;
- Chapter 5 – sets out the factors driving the overrepresentation of Aboriginal and Torres Strait Islander people in the prison population;
- Chapter 6 – discusses some of the current programs in the criminal justice system which have been specifically developed for Aboriginal and Torres Strait Islanders, or which address issues which are pertinent to Aboriginal and Torres Strait Islander people;
- Chapter 7 – considers the alternatives to imprisonment, including consideration of the merits of justice reinvestment; and
- Chapter 8 – sets out the committee's views and recommendations.

Acknowledgements

1.11 The committee thanks those who made submissions and appeared at hearings.

Chapter 2

Legal assistance services

2.1 There are four main government-funded legal assistance service providers:

- Legal Aid Commissions (LAC) provide services to most people receiving publicly-funded legal assistance, with a focus on providing legal assistance to disadvantaged Australians. LACs provide assistance in criminal, family and civil matters.
- Community Legal Centres (CLCs) are community based, not-for-profit organisations, which assist people who cannot afford a private lawyer but who cannot obtain a grant of legal aid. CLCs are diverse organisations, with some offering generalist services, while others target specific areas of law or particular client groups (for example, women or young people). CLCs provide mainly civil and family legal assistance.
- Indigenous legal assistance providers (formerly Aboriginal and Torres Strait Islander Legal Services (ATSILS)) deliver legal assistance services to Aboriginal and Torres Strait Islander people through targeted, culturally competent legal assistance services. Main areas of law are criminal law matters, with some services in family and civil law as funds permit. The majority of outlets are in regional and remote areas.
- Family Violence Prevention Legal Services (FVPLS) provide services specifically to Aboriginal and Torres Strait Islander victims of family violence or sexual assault, with the aim of preventing, reducing and responding to incidents of family violence and sexual assault. FVPLS operate primarily in regional and remote areas. Services primarily include family violence orders, child protection, victims compensation and family law and child support where it relates to family violence.¹

2.2 The National Association of Community Legal Centres (NACLC) stated that while the nature, purpose, work and capacities of these providers is complementary they are not interchangeable.² Similarly, the Productivity Commission noted that each of the four types of services provide 'specialised but complementary roles'.³ Figure 1 is a comparative table of the four legal assistance providers.

1 Productivity Commission, *Access to Justice Arrangements*, 2014, Vol 2, pp 667-670; and the Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services*, Working Paper 2: Evaluation of legal assistance services, Prepared for the Australian Government Attorney-General's Department, June 2013, pp 2-5.

2 *Submission 42*, p. 3.

3 Productivity Commission, *Access to Justice Arrangements*, 2014, Vol 2, p. 667.

Figure 1: Government-funded legal assistance providers 2012-13⁴

	Legal aid commissions (LACs)	Community legal centres (CLCs)	Aboriginal and Torres Strait Islander legal services (ATSILS)	Family violence prevention legal services (FVPLS)
Where are they located?	8 LACs <ul style="list-style-type: none"> • In all states and territories • Metropolitan, regional and remote services including regional offices 	200 CLCs <ul style="list-style-type: none"> • In all states and territories • Mainly in metropolitan and regional areas 	8 ATSILS <ul style="list-style-type: none"> • One in each state, two in NT; ACT serviced by NSW • Majority of outlets in regional and remote areas 	14 FVPLS <ul style="list-style-type: none"> • In all states and territories except ACT and Tasmania • Service 31 high need regional, rural and remote areas
What are their objectives?	<ul style="list-style-type: none"> • Provide access to assistance for the vulnerable and disadvantaged • Provide the community with improved access to justice and legal remedies 	Contribute to access to legal assistance services for vulnerable and disadvantaged members of the community and/or those whose interests should be protected as a matter of public interest	Deliver legal assistance and related services to Aboriginal and Torres Strait Islander people	Provide legal services and assistance to Aboriginal and Torres Strait Islander victims of family violence and sexual assault
Who do they target	<ul style="list-style-type: none"> • State and territory communities • Focus on vulnerable and disadvantaged people 	<ul style="list-style-type: none"> • Local communities (with outreach) except specialist CLCs who service their state/territory community • Those who do not qualify for legal aid focusing on the vulnerable and disadvantaged 	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person	Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person, who is a victim of family violence or a child at risk of family violence and in need of protection

2.3 Submissions emphasised the importance of these services in providing legal assistance for Aboriginal and Torres Strait Islander people. For example, NALCLC stated:

Legal assistance providers play a crucial role in the Australian legal system for vulnerable and disadvantaged members of the community and are vital to ensuring access to legal assistance for Aboriginal and Torres Strait Islander peoples.⁵

4 Productivity Commission, *Access to Justice Arrangements*, 2014, Vol 2 p. 668 and Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services – Final Report*, June 2014, p. 3.

5 *Submission 42*, p. 3. See also Indigenous Legal Need Project, *Submission 19*, p. 7; Legal Aid NSW, *Submission 36*, p. 7.

2.4 In particular, in relation to Aboriginal and Torres Strait Islander people the Productivity Commission noted:

Aboriginal and Torres Strait Islander Australians often have complex legal needs and face substantial barriers in accessing legal assistance. The nature and complexity of their civil law needs means that specialist legal assistance services remain justified.⁶

2.5 National Legal Aid noted that ATSILS and FVPLS are the primary providers of legal assistance services to Aboriginal and Torres Strait Islander people due to those services being culturally competent.⁷

2.6 NACLC indicated its policy and 'firm belief':

[T]hat the most appropriate providers of legal services for Aboriginal and Torres Strait Islander peoples are the specifically dedicated ATSILS and FVPLS staffed and managed, as far as is possible, by Aboriginal and Torres Strait Islander people.

Aboriginal and Torres Strait Islander peoples have experienced, and continue, to experience, historical marginalisation from mainstream services, and generally prefer to and feel culturally secure in attending Aboriginal and Torres Strait Islander specific services. Importantly, both ATSILS and FVPLS offer community-controlled culturally safe services to Aboriginal and Torres Strait Islander peoples.⁸

2.7 Mr Peter Collins, Director of Legal Services, Aboriginal Legal Service of Western Australia, stated that Aboriginal and Torres Strait Islander people have a preference for the specialist legal assistance providers:

Aboriginal people come to [Aboriginal Legal Services] because they feel comfortable; it is culturally appropriate. They are much more reluctant to go to Legal Aid, for those reasons.⁹

2.8 Both NACLC and National Legal Aid noted that CLCs and LACs also provided services to Aboriginal and Torres Strait Islander people. As NACLC explained:

There will be occasions when ATSILS and FVPLS are unable to assist a client because of real or perceived conflict, lack of resources, or because it is a specialist area of law that is outside their practice expertise. It may also be the case that in some matters, particularly in smaller communities, a person may not wish to consult, or be seen to consult a particular legal service where other members of family or community attend or work. It is therefore important that Aboriginal and Torres Strait Islander people have the choice to access other, culturally appropriate legal assistance providers if they so wish.

6 Productivity Commission, *Access to Justice Arrangements*, 2014, Vol 2, p. 761.

7 *Submission 37*, p. 2.

8 *Submission 42*, p. 3.

9 *Committee Hansard*, 4 August 2015, p. 20.

As a result, CLCs provide vital culturally appropriate services to Aboriginal and Torres Strait Islander peoples.¹⁰

2.9 At the public hearing in Canberra, Ms Elizabeth Quinn, Assistant Secretary, Legal Assistance Branch, Attorney-General's Department (AGD), noted:

While the Commonwealth funds Indigenous legal assistance providers separately to provide these culturally-appropriate services for Indigenous people, mainstream legal assistance services are also assisting Indigenous people. For example, in year-to-date reporting, 12.9 per cent of the representation services provided by the legal aid commission and community legal centres in New South Wales were to Indigenous people. It is interesting to note that [according to the 2011 census, 2.9 per cent of the New South Wales population is Indigenous]...The Indigenous representation by mainstream legal assistance services in other states and territories does vary. However, in all states and territories these mainstream services are providing ongoing representation services, including grants of legal aid, to Indigenous people.¹¹

Commonwealth funding for legal assistance services

2.10 Commonwealth, state and territory governments provide the bulk of funding for all of the four legal assistance services.

National Partnership Agreement on Legal Assistance Services

2.11 In 2010, the Council of Australian Governments (COAG) agreed to establish the National Partnership Agreement on Legal Assistance Services (NPA), a four year agreement between the Commonwealth and the states and territories.¹²

2.12 The NPA was established:

[T]o support a holistic approach to the reform of the delivery of legal assistance services by legal aid commissions, community legal centres, Aboriginal and Torres Strait Islander legal services and family violence prevention legal services.¹³

2.13 The initial NPA was extended until 30 June 2015¹⁴ and subsequently replaced with a new NPA for the period 1 July 2015 to 30 June 2020.¹⁵

2.14 The stated objective of the NPA is:

10 National Association of Community Legal Centres, *Submission 42*, p. 4. See also National Legal Aid, *Submission 37*, p. 2.

11 *Committee Hansard*, 4 April 2016, p. 26. See also correspondence from Ms Elizabeth Quinn, Assistant Secretary, Legal Assistance Branch, Attorney-General's Department (AGD) to the Committee Secretary, 8 April 2016 clarifying evidence given at the public hearing on 4 April 2016.

12 *National Partnership Agreement on Legal Assistance Services*, 2010, p. 3.

13 *National Partnership Agreement on Legal Assistance Services*, 2010, p. 2.

14 See Budget Measures Budget Paper No. 2, 2014-15, p. 61.

15 *National Partnership Agreement on Legal Assistance Services*, 2015, p. 3.

[A] national legal assistance sector that is integrated, efficient and effective, focused on improving access to justice for disadvantaged people and maximising service delivery within available resources.¹⁶

2.15 The NPA also lists the outcomes to be achieved:

(a) legal assistance services are targeted to priority clients with the greatest legal need;

(b) legal assistance service providers collaborate with each other, governments, the private legal profession and other services, to provide joined-up services to address people's legal and related problems;

(c) legal assistance services are appropriate, proportionate and tailored to people's legal needs and levels of capability;

(d) legal assistance services help people to identify their legal problems and facilitate the resolution of those problems in a timely manner before they escalate; and

(e) legal assistance services help empower people to understand and assert their legal rights and responsibilities and to address, or prevent, legal problems.¹⁷

2.16 The NPA provides \$1.3 billion, over five years, in Commonwealth funding for LACs and CLCs.¹⁸ The Commonwealth Government is providing \$257.1 million for the NPA for the 2016-17 financial year.¹⁹ While this is an increase of \$6.2 million from the 2015-16 financial year, the forward estimates indicate that there will be a decrease of \$8.4 million from the 2016-17 figure over the period 2017-18 to 2019-20.²⁰

16 *National Partnership Agreement on Legal Assistance Services*, 2015, p. 3.

17 *National Partnership Agreement on Legal Assistance Services*, 2015, p. 2.

18 *National Partnership Agreement on Legal Assistance Services*, 2015, p. 2. The 2010 NPA focussed on specific arrangements for the delivery of Commonwealth funded services by State and Territory LACs, see *National Partnership Agreement on Legal Assistance Services*, 2010, p. 4.

19 Budget 2016-17, *Budget Paper No. 3*, p. 71.

20 Budget 2016-17, *Budget Paper No. 3*, p. 71. See J. Murphy and M. Brennan, *Legal aid and legal assistance services*, Parliamentary Library Budget Review 2016-17.

Financial year	\$million
2015-16	250.9
2016-17	257.1
2017-18	248.7
2018-19	252.9
2019-20	256.8

Table 1: Commonwealth funding for the National Partnership on legal assistance services²¹

2.17 Indigenous legal assistance providers will continue to be funded directly by the Commonwealth Government.²²

2.18 In answers to questions on notice, the AGD stated:

Available Commonwealth funding to legal aid commissions, community legal centres and Indigenous legal assistance providers is distributed between states and territories using evidence based funding allocation models. There is a model for each of the three legal assistance programmes.²³

2.19 The NPA provides guidance on the prioritisation of legal assistance services to be delivered by LACs and CLCs:

The legal assistance priority client groups recognise people whose capability to resolve legal problems may be compromised by circumstances of vulnerability and/or disadvantage. People who fall within the priority client groups are more likely to experience legal problems, less likely to seek assistance and/or less able to access services for a range of reasons.

Legal assistance service providers should focus their services on people experiencing financial disadvantage.²⁴

21 Source Budget 2016-17, *Budget Paper No. 3*, p. 71.

22 See Senator the Hon George Brandis QC, Attorney-General, *Attorney-General's Portfolio Budget measures 2015-16*, Media release, 12 May 2015, available at: www.attorneygeneral.gov.au/Mediareleases/Pages/2015/SecondQuarter/12-May-2015-Attorney-General%27s-Portfolio-Budget-measures-2015-16.aspx (accessed 19 November 2015).

23 Attorney-General's Department, answers to questions on notice, received 13 April 2016, p. 1. The Attorney-General's Department provided a document explaining the allocation models for legal aid commissions and community legal centres and a document explaining the Indigenous legal assistance provider funding allocation model, see Attorney-General's Department, answers to questions on notice, received 13 April 2016, Attachment A and Attachment B.

24 *National Partnership Agreement on Legal Assistance Services*, 2015, Schedule B 'Commonwealth priorities and eligibility principles', p. B-1.

2.20 The NPA also states that where appropriate, legal assistance service providers should also plan and target their services to people who fall within one or more of the priority client groups. The priority client groups include Indigenous Australians.²⁵

2.21 The NPA also sets out 'General Principles' as to Commonwealth service priorities:

Commonwealth funding should be directed to the delivery of front-line services and focused on meeting the legal needs of priority clients.

Commonwealth funding should not be used to lobby governments or to engage in public campaigns. Lobbying does not include community legal education or where a legal assistance service provider makes a submission to a government or parliamentary body to provide factual information and/or advice with a focus on systemic issues affecting access to justice.

Legal assistance service providers should deliver timely intervention services to resolve clients' legal problems sooner, or prevent them from arising altogether.

Family or civil law disputes should be resolved through alternative dispute resolution processes rather than through litigation, where appropriate.

Legal assistance service providers should consider whether other services (legal as well as non-legal) may be relevant to a client's needs and make referrals to these services where appropriate. Suitable collaborative arrangements should be established for this purpose.²⁶

2.22 While only LACs and CLCs are funded under the NPA:

[T]he principles set out in [the NPA] are relevant for the broader sector, including Indigenous legal assistance providers and family violence prevention legal services.²⁷

Legal Aid Commissions

2.23 In addition to Commonwealth funding, LACs receive funding from state and territory governments.²⁸ In its submission, National Legal Aid provided a breakdown of LAC funding for the 2013-14 financial year:

The legal aid commissions are funded by each of the Commonwealth and the State/Territory Governments. Nationally, Commonwealth funding to legal aid commissions for the financial year 2013-14 was \$213.047 million, State/Territory funding was \$283.764 million with a further \$85.883 million from trust [and] statutory interest funds.²⁹

25 *National Partnership Agreement on Legal Assistance Services*, 2015, Schedule B 'Commonwealth priorities and eligibility principles', p. B-1.

26 *National Partnership Agreement on Legal Assistance Services*, 2015, Schedule B 'Commonwealth priorities and eligibility principles', p. B-2.

27 *National Partnership Agreement on Legal Assistance Services*, 2015, p. 2.

28 National Legal Aid, *Submission 37*, p. 1.

29 *Submission 37*, p. 4.

2.24 The NPA provides that Commonwealth funding for LACs 'will be used for Commonwealth law matters only', except in certain state law matters which are connected with family law proceedings and 'in discrete assistance or community legal education'.³⁰

Community Legal Centres

2.25 Funding for CLCs varies, as the Productivity Commission noted:

Some CLCs receive sizeable proportions of their revenue from government funding, while others receive very little or no funding and are largely or entirely staffed by volunteers. Those CLCs that receive government funding, can do so from a wide variety of government departments and agencies.³¹

2.26 While noting the Commonwealth, state and territory government funding of CLCs, the Productivity Commission continued:

CLCs are also able to access funding from other sources, including fee income, fundraising, philanthropic donations, seeking contributions from clients and other government funding outside the [Community Legal Services Program].³²

Indigenous legal service providers

2.27 In correspondence to the committee, Mr Chris Moraitis PSM, Secretary, AGD, noted that AGD administers the Indigenous Legal Assistance Program, under which the eight ATSILS are funded.

2.28 In 2014-15, total Commonwealth funding for the Indigenous Legal Assistance Program was \$74.311 million.³³ In the 2015-16 Budget, the Indigenous Legal Assistance Program received \$72.978 million.³⁴ Table 2 sets out the funding for Indigenous Legal Assistance Program for the 2016-17 Budget and the forward estimates.

30 *National Partnership Agreement on Legal Assistance Services*, 2015, p. 11. 'Discrete assistance' is defined as 'information, referral, legal advice, non-legal support and legal task'.

31 Productivity Commission, *Access to Justice Arrangements*, 2014, Vol 2 p. 689.

32 Productivity Commission, *Access to Justice Arrangements*, 2014, Vol 2 p. 689. From 2015-16 the majority of funding previously provided to the Attorney-General's Department for community legal services will be provided through the National Partnership Agreement on Legal Assistance Services, see Portfolio Budget Statements 2015-16, *Attorney-General's Portfolio*, p. 30.

33 Correspondence from Mr Chris Moraitis PSM, Secretary, Attorney-General's Department, to the Secretary of the Senate Finance and Public Administration References Committee, dated 5 May 2015.

34 Portfolio Budget Statements 2015-16, *Attorney-General's Portfolio*, p. 33.

	2016-17 Budget \$'000	2017-18 Forward Estimate \$'000	2018-19 Forward Estimate \$'000	2019-20 Forward Estimate \$'000
Indigenous Legal Assistance Program	73,585	69,099	68,992	69,890

Table 2 2016-17 Budget and forward estimates projections for the Indigenous Legal Assistance Program³⁵

2.29 However, the Parliamentary Library made the following comment in relation to comparing funding between financial years for Indigenous legal services:

[C]hanges to some Indigenous program names [in the 2014-15 Budget], their transfer to the Department of the Prime Minister and Cabinet, subsequent consolidation and the lack of details in relevant portfolio budget papers makes assessing long-term funding trends difficult.³⁶

2.30 In October 2015, an officer of AGD informed a Senate Estimates hearing that 'whilst the Indigenous Legal Assistance Program is 100 per cent funded by the Commonwealth, in every jurisdiction [with the exception of Tasmania] the vast majority of the funds are used on state and territory criminal law matters'.³⁷

2.31 In April 2016, Ms Quinn, AGD, provided some further detail on the distribution of funds to Indigenous legal services providers:

The approach we take with the funding we have is to distribute it in the most equitable way possible, according to various need indicators among the jurisdictions, to our Indigenous legal service providers. We take into account...the disadvantage indicators and population distribution aspects that affect the cost of service provision, like how geographically dispersed a population is and those sorts of factors. There is Commonwealth Grants Commission guidance on unit costs of service delivery. We distribute our funds according to that and then we, through our grant program, determine that the most intensive services should be prioritised towards financially disadvantaged people. That is how we end up with the situation where the majority of this funding is being spent on state criminal matters, because the majority of the clients in need are facing imprisonment or are imprisoned.³⁸

35 Source Portfolio Budget Statements 2016-17, *Attorney-General's Portfolio*, p. 20.

36 J. Murphy and M. Brennan, *Legal aid and legal assistance services*, Parliamentary Library Budget Review 2016-17.

37 Mr Greg Manning, Acting Deputy Secretary, Civil Justice and Legal Services Group, Attorney-General's Department, Senate Legal and Constitutional Affairs Legislation Committee, *Estimates Hansard*, 20 October 2015, p. 82. See also Ms Quinn, Attorney-General's Department, *Committee Hansard*, 4 April 2016, p. 26.

38 *Committee Hansard*, 4 April 2016, p. 27.

2.32 Ms Quinn noted that while Indigenous legal service providers are not funded pursuant to the NPA, they are still required to participate in service-planning meetings:

One of the key reforms we delivered under the new national partnership agreement was the requirement for all jurisdictions to bring all legal service providers and complementary services, as they determined fit, together for service-planning meetings. That is a formal requirement.

...

...While the Indigenous providers are not funded under the national partnership agreement, the requirements on them are exactly the same.

...

...Under the NPA, the state is required to include [Indigenous legal service providers], and, correspondingly, in [the provider's] funding agreements, they are required to participate in the service-planning process. That requires the evaluation of not just the supply and the historic—where we have provided services—but actually looking at demand. We have facilitated the development of some key statistical analysis, some mapping and those sorts of things, from expert providers of that sort of analysis, to facilitate that.³⁹

Family Violence Prevention Legal Services

2.33 In December 2013, responsibility for FVPLS moved from AGD to the Department of the Prime Minister and Cabinet (PM&C), as part of the consolidation of Indigenous Affairs programs into PM&C.⁴⁰

2.34 The establishment of the Indigenous Advancement Strategy (IAS), announced as part of the *2014-15 Budget*, involved the streamlining of more than 150 Indigenous programs into five broad program streams. The FVPLS program was one of the programs streamlined as part of the IAS.

2.35 Ms Antoinette Braybrook, Chief Executive Officer, Family Violence Prevention and Legal Services Victoria, described the effect of these changes:

The [IAS] tender process announced in August [2014]...confirmed that this decision effectively defunds or abolishes the National Family Violence Prevention Legal Service Program. So that \$21 million that was initially allocated to the program no longer exists.⁴¹

39 *Committee Hansard*, 4 April 2016, p. 29.

40 See National Family Violence Prevention Legal Services submission to the Senate Finance and Public Administration References Committee's inquiry into the Indigenous Advancement Strategy tendering processes, *Submission 83*, p. 4.

41 Senate Finance and Public Administration References Committee, Inquiry into Domestic Violence in Australia, *Committee Hansard*, 5 November 2014, p. 38.

2.36 In its submission to this committee's inquiry on the IAS tender processes, the National Family Violence Prevention Legal Services summarised the outcome of the IAS grant round for FVPLSs:

All FVPLSs were successful in their application under the Indigenous Advancement Strategy, including funding secured for the National Secretariat[;]

Nine of the FVPLSs initially received only one year of additional funding, extending significant funding uncertainty and its distressing impacts on staff and victims/survivors[;]

Following further negotiation these funding agreements were extended to two years[;] and

Five FVPLS Units received confirmation that three year funding agreements would be offered[.]⁴²

2.37 The National Family Violence Prevention Legal Services noted that none of its members received an increase in funding from the IAS grant round, or inclusion of CPI.⁴³

Announcement of budget cuts to legal assistance services and reinstatement of funding

2.38 In the *2013-14 Budget*, the government announced an expansion of funding to legal aid commissions with \$21 million to be provided in funding for the 2013-14 and 2014-15 financial years.⁴⁴ Subsequently, the second year of this additional funding was removed in the *2014-15 Budget*, with the government announcing savings of '\$15 million...by partially reducing funding to legal aid commissions as announced in the *2013-14 Budget*'. The savings from this measure was to be redirected to repair the budget and fund policy priorities.⁴⁵

2.39 In the *Mid-Year Economic and Fiscal Outlook 2013-14* (MYEFO 2013-14) the government announced 'savings of \$43.1 million over four years by removing funding support for policy reform and advocacy activities provided to four legal assistance programmes'. The explanation in MYEFO 2013-14 expressly stated that '[f]unding for the provision of frontline legal services will not be affected'.⁴⁶

42 Senate Finance and Public Administration References Committee Inquiry into Commonwealth Indigenous Advancement Strategy tendering processes, National Family Violence Prevention Legal Services, *Submission 83*, p. 5.

43 Senate Finance and Public Administration References Committee Inquiry into Commonwealth Indigenous Advancement Strategy tendering processes, National Family Violence Prevention Legal Services, *Submission 83*, p. 5.

44 *Budget 2013-14 – Budget Measures, Budget Paper No. 2*, p. 90.

45 *Budget 2014-15 – Budget Measures Budget Paper No. 2*, p. 60.

46 *Mid-Year Economic and Fiscal Outlook 2013-14*, p. 119.

2.40 In answers to questions on notice for the Additional Estimates hearings in February 2014, the AGD provided the following break-down of the funding cuts across the four legal assistance programs:

Figure 2: MYEFO 2013-14 funding cuts to legal assistance services⁴⁷

	2013-14 \$m	2014-15 \$m	2015-16 \$m	2016-17 \$m	Total \$m
Legal Aid Commissions	3.5	1	0.999	0.999	6.498
Aboriginal and Torres Straits Islander Legal Services	0.18	1.641	6.036	5.484	13.341
Community Legal Services	0.875	3.499	7.623	7.621	19.618
SUB TOTAL (3 Attorney- General's Department's Legal Assistance programs)	4.555	6.14	14.658	14.104	39.457
Family Violence Prevention Legal Services (appropriation held by Department of the Prime Minister & Cabinet)	0	0.366	1.646	1.645	3.657
LEGAL ASSISTANCE TOTAL (all 4 programs)	4.555	6.506	16.304	15.749	43.114

2.41 On 25 March 2015, the Attorney-General and the Minister Assisting the Prime Minister for Women announced a reversal of the previously announced funding cuts to the legal assistance sector by guaranteeing the current funding levels for the next two years and that the changes that were to take effect from 1 July 2015 would not proceed.⁴⁸ The announcement noted the government's overall contribution of over \$1.327 billion to the legal assistance sector from 2013-14 to 2016-17, which included:

...restoration of \$25.5 million over two years to 30 June 2017, of funding for Legal Aid Commissions, Community Legal Centres and Indigenous legal service providers, builds on our significant commitment to address domestic violence, both in terms of front line services as well as policies that will lead to long term cultural change.

...

This decision will restore funding of \$11.5 million for Indigenous legal assistance over two years.

47 Senate Legal and Constitutional Affairs Legislation Committee, *Additional Estimates 2013-14*, Attorney-General's Portfolio, question 19.

48 Senator the Hon George Brandis QC, Attorney-General, and Senator the Hon Michaelia Cash, Minister Assisting the Prime Minister for Women, *Legal aid funding assured to support the most vulnerable in our community*, Media Release, 26 March 2015 (accessed 19 November 2015).

Since the 2013 election, the government has carefully examined legal assistance funding to ensure that funding is directed to front line services where the need is greatest – such as services providing help to those affected by domestic and family violence.

After considerable consultation with State and Territory Governments and service providers, it has been decided there will be no reduction in Commonwealth funding to Legal Aid Commissions, Community Legal Centres (except Environmental Defenders Offices) and Indigenous legal assistance for the next two years.

The Government will honour the funding until the date on which it would have ended – 30 June 2017.

This announcement provides certainty to the sector while the process of negotiating a new funding agreement continues. The new funding agreement is due to commence on 1 July 2015. Commonwealth Government funding will be sustainable and it will match funding to demonstrated need. It will be fair and efficient.⁴⁹

2.42 While NACLCLC welcomed the restoration of funding, it noted that the announcement did not reverse all the funding cuts. Further NACLCLC stated:

[T]here are a range of unintended consequences arising from the decision that have the potential to negatively impact CLCs across Australia.

As part of the 2015-2016 Federal Budget, funding for CLCs across Australia will drop significantly from 2017-2018 onwards. For example, in total from the Commonwealth CLCs will receive \$40 million in 2015-2016 and \$42.2 million in 2016-2017, however this funding is forecast to [drop] to \$30.1 million in 2017-2018 and \$30.6 million in 2018-2019, a cut in the order of \$12 million per year from 2017-2018.⁵⁰

Adequacy of funding for legal assistance services

2.43 Throughout the inquiry, the committee heard evidence emphasising the inadequacy of funding legal assistance services for Aboriginal and Torres Strait Islander people. For example, at a public hearing in Darwin for the committee's inquiry into the Indigenous Advancement Strategy tendering processes, Mr Jonathon Hunyor, Principal Legal Officer, North Australian Aboriginal Justice Agency (NAAJA) stated:

49 Senator the Hon George Brandis QC, Attorney-General, and Senator the Hon Michaelia Cash, Minister Assisting the Prime Minister for Women, 'Legal aid funding assured to support the most vulnerable in our community', Media Release, 26 March 2015 (accessed 19 November 2015). The \$25.5 million in restored funding comprises: \$11.5 million for the Indigenous Legal Assistance Program; \$12 million for Community Legal Services Program; and \$2 million for the Expensive Commonwealth Criminal Cases Fund. The \$1.327 billion includes the \$1.3 billion for the National Partnership Agreement on Legal Assistance Services discussed above. See also, Senator the Hon George Brandis QC, Attorney-General, *Attorney-General's Portfolio Budget measures 2015-16*, Media release, 12 May 2015 (accessed 19 November 2015).

50 *Submission 42*, p. 6.

It should be seriously beyond dispute that Aboriginal legal services are chronically underfunded. It has been the subject of numerous reports over the years from the Productivity Commission, various parliamentary inquiries and independent reviews. The Law Council of Australia have looked into it. Unfortunately, the calls for increased funding for Aboriginal legal services routinely go ignored. Until those calls are heard, Aboriginal people will not get equal access to legal services or equal access to justice in the Northern Territory—or anywhere, in fact.⁵¹

2.44 Similarly, Mr Peter Collins, Director of Legal Services, Aboriginal Legal Service of Western Australia, advised:

Increasingly, we are finding that [Aboriginal Legal Services (ALSs)] are being forced to contract services because we have not got the money to keep offices open. In the Pilbara, for example, we have recently closed our offices in Roebourne and Newman, and we are not doing a three-week court circuit in Karratha, where...there are often 120 people on the list per day, most of whom are Aboriginal, because we do not have the staff to attend that court. We have an office based in Hedland. There is a magistrate in Hedland who is sitting at the same time as the magistrate who comes in from Perth is sitting in Karratha. They sit for three weeks. You cannot be in two places at the one time. Increasingly there are people appearing in criminal courts, facing serious criminal charges, who are unrepresented. A very significant proportion of those are Aboriginal people. In a nutshell, the funding is desultory.⁵²

2.45 The Allen Consulting Group, in a June 2014 review of the 2010 NPA noted:

The existing legal assistance service infrastructure is increasingly focused on earlier resolution of legal problems and is providing a significant level of service delivery to disadvantaged Australians. This is especially notable in the context of high levels of demand, limited resources and clients who often have complex, entrenched and overlapping legal and non-legal needs.

There is however unmet demand for legal assistance services and the findings of this Review suggest that legal assistance service providers will continue to be challenged to achieve government priorities and meet demand within existing resources.⁵³

2.46 In its 2014 inquiry into Access to Justice Arrangements, the Productivity Commission highlighted unmet legal needs, not specific to Indigenous Australians, and recommended that additional funding was needed to:

- better align the means test used by LACs with other measures of disadvantage;

51 Senate Finance and Public Administration References Committee Inquiry into the Indigenous Advancement Strategy tendering processes, *Committee Hansard*, 16 February 2016, p. 14.

52 *Committee Hansard*, 4 August 2015, p. 24.

53 The Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services: Final Report*, prepared for the Australian Government Attorney-General's Department, p. 43.

- maintain existing frontline services that have a demonstrated benefit to the community; and
- allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted funding.⁵⁴

2.47 The Productivity Commission noted budgetary constraints but argued:

...not providing legal assistance in these instances can be a false economy as the costs of unresolved problems are often shifted to other areas of Australian and overseas studies show that there are net public benefits from legal assistance expenditure.⁵⁵

2.48 The Australian Government's response was released on 29 April 2016. However, a specific response to recommendation 21.4 regarding funding is not evident.⁵⁶ The statement made by the Attorney-General, Senator the Hon George Brandis QC indicated:

The Australian Government is committed to doing what it can to increase funding levels for legal assistance in a tight fiscal environment. This is demonstrated by the \$15 million legal assistance component of the \$100 million Women's Safety Package, and the restoration of \$25.5 million in funding to the legal assistance sector.⁵⁷

2.49 In relation to Indigenous Australians, The Redfern Statement calls for adequate funding of Aboriginal and Torres Strait Islander Community controlled front-line legal services, including:

- immediately reversing planned funding cuts to ATSILS funding, due to come into effect in 2017, and investing in FVPLS to create funding certainty;
- immediately injecting \$18.58 million into the Indigenous Legal Assistance Program per annum, and providing appropriate funding for FVPLS to urgently address unmet civil and family law needs of Aboriginal and Torres Strait Islander peoples;
- supporting policy functions within peak Aboriginal and Torres Strait Islander organisations to allow Community Controlled Organisations with front-line service delivery expertise to inform policy development; and

54 Australian Government, Productivity Commission, Access to Justice Arrangements, Inquiry Report No. 72, 5 September 2014, p. 63.

55 Australian Government, Productivity Commission, Access to Justice Arrangements, Inquiry Report No. 72, 5 September 2014, pp 30-31.

56 See <https://www.ag.gov.au/LegalSystem/Documents/Government-response-to-Productivity-Commissions-report.pdf> (accessed 5 October 2016). Note: the document indicates that the table lists the recommendations that the Australian Government has implemented, or is in the process of implementing.

57 See <https://www.ag.gov.au/LegalSystem/Pages/response-to-report-into-access-to-justice-arrangements.aspx> (accessed 5 October 2016)

- committing to the development of an evidenced-based long term funding model for the ATSILS, FVPLS and the broader legal assistance sector to ensure funding is targeted at meeting the unmet legal needs of Aboriginal and Torres Strait Islander peoples.⁵⁸

2.50 At the public hearing in Canberra, Ms Quinn, AGD, acknowledged the shortfall in funding:

Our providers certainly keep us very well aware of that aspect and we are very conscious of the fact that the earlier you can intervene in a person's legal problem the better the chances that things do not escalate.

Many people have a series of problems that they are facing, and we know there is evidence to suggest that often a person does not realise they have a legal problem before it has escalated—the example of unpaid fines is a critical one. So I do not dispute the evidence of our providers saying it is very hard to resource that. The issue is, as I said earlier, that around 80 per cent of their services are being directed towards state criminal matters, which leaves very little in terms of their resourcing to be able to deal with the sorts of challenges you are talking about. Legal aid commissions do do quite a bit of that work, as do community legal centres. But, at the end of the day, yes, I cannot dispute the idea that there is not always enough money to go around.⁵⁹

Intergovernmental arrangements

2.51 At the public hearing in Canberra, Mr Nick Parmeter, Executive Policy Lawyer, Law Council of Australia stated that it is not only the lack of funding which is an issue. Noting the numerous previous inquiries on this topic, Mr Parmeter remarked:

A fundamental challenge for policy makers in this area is clearly not a lack of goodwill. We suggest it is the short attention span given to implementing and evaluating recommendations which have come before, the absence of an effective intergovernmental framework for Indigenous justice and the absence of funding to implement it.⁶⁰

2.52 Both the Australian National Audit Office (ANAO) and the Productivity Commission have commented on the effect of state and territory policies on the demand for Commonwealth funding for legal services. The ANAO stated:

[T]he demand for services arises largely from the operation of state and territory laws. In this respect, demand for Indigenous legal assistance services is not in the control of the Australian Government and can be affected significantly by changes made to state and territory laws.⁶¹

58 The Redfern Statement, p. 11.

59 *Committee Hansard*, 4 April 2016, pp 33-34.

60 *Committee Hansard*, 4 April 2016, p. 15.

61 Australian National Audit Office, *Administration of the Indigenous Legal Assistance Program: Attorney-General's Department*, Report No. 22 of 2014-15, p. 16.

2.53 Mr Hunyor, from NAAJA, reiterated this point:

[W]e are funded exclusively by the Commonwealth, from various buckets...when laws in the Territory are changed our funding is not changed to reflect the increasing workload. Things like alcohol protection orders, mandatory sentencing, changes to the bail act or changes to procedure in the courts can impact massively on our workload, and yet there is never any reflection of that in our funding.⁶²

2.54 Ms Polly Porteous, CEO of NACLIC, commented on the funding commitments provided by the governments pursuant to the NPA for CLCs:

The National Partnership on Legal Assistance Services does not require the states and territories to set in stone the amount of money that they are going to give, if any at all. I think that in Western Australia, South Australia, Tasmania and the Northern Territory and to a lesser extent the ACT, just because it is smaller, the state governments in some cases are contributing no money, as in the case of the Northern Territory, or they are contributing such small amounts to the community legal centres that the effect of this reallocation of the bucket of funding is that a lot of legal centres have actually lost funding.⁶³

2.55 On this issue the Productivity Commission recommended:

Given that the policies of State and Territory Governments have a significant impact on the demand for Aboriginal and Torres Strait Islander legal services, especially in relation to criminal matters, State and Territory Governments should contribute to the funding of these services as part of any future legal assistance funding agreement with the Australian Government.⁶⁴

2.56 In terms of a coordinated approach to Indigenous justice issues, Mr Parmeter noted earlier work that state, territory and Commonwealth governments had done in this area in the form of the National Indigenous Law and Justice Framework 2009-2015 (NILJ Framework). The NILJ Framework was prepared by the Council of Australian Governments Standing Committee of Attorneys-General Working Group on Indigenous Justice.⁶⁵ The Framework's stated purpose is to provide:

[A] national approach to addressing the serious and complex issues that mark the interaction between Aboriginal and Torres Strait Islander peoples and the justice systems in Australia.⁶⁶

2.57 The NILJ Framework sets out five interrelated goals:

62 Senate Finance and Public Administration References Committee Inquiry into the Indigenous Advancement Strategy tendering processes, *Committee Hansard*, 16 February 2016, p. 15.

63 *Committee Hansard*, 23 September 2015, p. 32.

64 Productivity Commission, *Access to Justice Arrangements*, 2014, Vol 1, Recommendation 22.4, p. 66.

65 *Committee Hansard*, 4 April 2016, p. 15.

66 National Indigenous Law and Justice Framework 2009-2015, p. 4.

1. improve all Australian justice systems so that they comprehensively deliver on the justice needs of Aboriginal and Torres Strait Islander peoples in a fair and equitable manner
2. reduce over-representation of Aboriginal and Torres Strait Islander offenders, defendants and victims in the criminal justice system
3. ensure that Aboriginal and Torres Strait Islander peoples feel safe and are safe within their communities
4. increase safety and reduce offending within Indigenous communities by addressing alcohol and substance abuse, and
5. strengthen Indigenous communities through working in partnership with governments and other stakeholders to achieve sustained improvement in justice and community safety.⁶⁷

2.58 While each of these goals has associated strategies and actions that could be undertaken, the NILJ Framework explicitly states:

The Framework does not set out to prescribe strategies or actions to be adopted by governments or service providers. Rather it articulates an agreed good practice approach, based on available evidence, that provides government agencies and service providers with a framework from which to identify the most appropriate responses to specific issues at the local, regional, state or territory level. The Framework draws on existing State and Territory instruments such as Aboriginal and Torres Strait Islander justice agreements.⁶⁸

2.59 Mr Parmeter noted:

No funding was attached to [the NILJ Framework's] implementation and the lack of state and territory government buy-in ensured that it lay effectively moribund in the Commonwealth Attorney-General's Department. Recently, responsibility for the framework was transferred to the Prime Minister's department, with no obvious plans for its renewal.⁶⁹

2.60 AGD provided the following information on the NILJ Framework:

The [NILJ] Framework was intended to support the Council of Australian Government's [COAG] agenda to 'Close the Gap' in Indigenous disadvantage, particularly in relation to community safety.⁷⁰

2.61 Noting that the NILJ Framework did not prescribe actions to be adopted by governments or service providers, and was rather an agreed good practice approach, AGD continued:

An external review of the [NILJ] Framework was undertaken by the National Justice and Policing Senior Officers group in 2013. It was then

67 National Indigenous Law and Justice Framework 2009-2015, p. 7.

68 National Indigenous Law and Justice Framework 2009-2015, p. 4.

69 *Committee Hansard*, 4 April 2016, p. 15.

70 Attorney-General's Department, answers to questions on notice, received 13 April 2016, p. 2.

due to be reconsidered in October 2013 but, this item was put on hold. In 2014 the framework was rolled into the broader Indigenous justice item on [COAG's Law, Crime and Community Safety Council agenda (LCCSC)].

[AGD] is advised that no further work has been undertaken by LCCSC on the [NILJ] Framework.⁷¹

2.62 AGD continued, referring to the recently finalised National Strategic Framework for Legal Assistance 2015-20:

The [National Strategic Framework for Legal Assistance 2015-20] promotes a unified and coordinated approach by governments and the legal assistance sector to enhance access to justice for disadvantage people in Australia, and to help focus finite resources towards areas of greatest legal need. The [National Strategic Framework for Legal Assistance 2015-20] is a strategic document that does not link to government funding, or contain reporting requirements or obligations on legal assistance service providers. The [National Strategic Framework for Legal Assistance 2015-20] sits above the Commonwealth's funding agreements for legal assistance services, being the National Partnership Agreement on Legal Assistance Services and individual funding agreements with Indigenous legal assistance providers, adding context and an overarching link between these funding arrangements. Commonwealth, state and territory governments endorsed the [National Strategic Framework for Legal Assistance 2015-20] by majority through the National Justice and Policing Senior Officers Group on 25 September 2015, demonstrating a mutual commitment to legal assistance.⁷²

2.63 The next chapter of the report looks at the areas of unmet legal needs for Aboriginal and Torres Strait Islander people and the barriers to accessing legal assistance.

71 Attorney-General's Department, answers to questions on notice, received 13 April 2016, p. 2.

72 Attorney-General's Department, answers to questions on notice, received 13 April 2016, pp 2-3.

Chapter 3

Unmet legal needs and barriers to legal assistance

Introduction

3.1 This chapter outlines the areas of unmet legal needs for Indigenous people and discusses some of the barriers to Indigenous people accessing legal assistance services, namely:

- a lack of awareness of legal matters;
- geographic barriers;
- a lack of interpreters;
- conflict of interests; and
- a lack of culturally appropriate services.

Unmet legal needs

3.2 The committee heard overwhelming evidence about the legal needs of Aboriginal and Torres Strait Islander people which are not being met. The Indigenous Legal Needs Project (ILNP) referred to the work it has done in 32 remote, regional and urban Indigenous communities in Northern Territory, Victoria, Western Australia and Queensland, as well as a pilot study in eight communities in NSW:

ILNP quantitative data has identified priority areas of Indigenous civil and family law need in ILNP focus communities as housing (tenancy), discrimination, credit/debt (and associated **consumer issues**), **child protection, social security and wills and estates**.¹

3.3 The ILNP outlined how service priorities and geographical reach of the four types of legal assistances service providers combined to result in these unmet needs:

[T]he ILNP has identified that ATSILS and LACs often have some focus on providing criminal rather than civil or family law services beyond city centres, whether that be through their permanent offices or outreach. Community legal centres (CLCs) and [Indigenous] FVPLS may take on more civil and family law work, including outside major centres. CLCs, however, are usually unlikely to be engaging with local Indigenous communities to the same extent as Aboriginal legal services, and the scope of work [Indigenous] FVPLS are able to undertake is in some senses constrained as it must have some connection with family violence. This leaves large geographic areas in which Indigenous people live without any access to civil and family law legal assistance.²

3.4 Submissions and evidence reflected these findings of the ILNP. For example, Victoria Legal Aid (VLA) stated:

1 *Submission 19*, p. 2. Emphasis in original.

2 *Submission 19*, p. 5. See also Public Interest Advocacy Centre, *Submission 17*, pp 6-7.

[T]here is increasing evidence of unmet (or unidentified) legal need experienced by Aboriginal people in Victoria, particularly for civil and family law services. Research commissioned by VLA and the Victorian Aboriginal Legal Service (VALS) on the civil and family law needs of Indigenous Victorians found high levels of unmet legal need in housing, disputes with neighbours, credit and debt, discrimination, child protection, social security, victims compensation and wills. The report found significant difficulties for Aboriginal and Torres Strait Islander Victorians in accessing legal assistance services and highlighted the need for mainstream agencies such as VLA to better engage with Aboriginal and Torres Strait Islander clients.³

3.5 In a joint submission, North Australian Aboriginal Justice Agency (NAAJA) and the Central Australian Aboriginal Legal Aid Service (CAALAS) outlined the lack of civil law services throughout the Northern Territory:

NAAJA civil lawyers travel to remote communities in the Top End at best once a month for one day. CAALAS civil lawyers have even more limited capacity for remote service delivery in Central Australia. There are no other general civil law services operating in these communities and clients otherwise need to travel many hours by road to seek legal assistance. Many people lack the resources to make this journey.

Even if people had better access to our services, our staff do not have capacity to take on more work. In the area of civil law, there are few other options available. The NT Legal Aid Commission can provide only initial legal advice in general civil law matters. Community Legal Services do not provide services to remote communities, are often limited in the areas of law they cover and have no capacity for more clients. The cost of seeking private legal assistance in common civil matters such as tenancy disputes, social security matters, consumer law and debt issues is prohibitive for the vast majority of Aboriginal people in the NT.⁴

3.6 Mr Jonathon Hunyor, Principal Legal Officer, NAAJA, stated that it was very hard to estimate the level of unmet legal need in NAAJA's civil practice:

[T]hat is an area where if we tripled our staff they would all be just as busy as they are today. We go to Wadeye to offer civil services once a month for one day—that is the biggest Aboriginal community in the Northern Territory, and we go there one day a month. If you are not there on that day you have to wait for the next month. The level of unmet need there is absolutely massive.⁵

3.7 Mr Peter Collins, Director of Legal Services, Aboriginal Legal Service of WA (ALSWA), explained that in regional and remote Western Australia, family civil law needs were 'completely unmet':

3 *Submission 35*, p. 2.

4 *Submission 31*, p. 5.

5 Senate Finance and Public Administration References Committee Inquiry into the Indigenous Advancement Strategy tendering processes, *Committee Hansard*, 16 February 2016, p. 14.

We try and do some civil law from our Perth office on an outreach basis where we only have six civil lawyers in the service. They are trying to service the entire state on an outreach basis. You are literally scratching the surface; so in areas in relation to tenancy, discrimination, Centrelink issues, criminal injuries compensation, matters that routinely happen in WA where Aboriginal people are discriminated against by the local hotel, or by the local shopkeeper, or by...some charlatan who comes in and sells them a mobile phone or a car—those sorts of civil law needs are completely unmet, and that is not overstating it. Unless the funding is increased, we are going backwards. We are losing lawyers all the time. We have lost lawyers this year, and that places extraordinary strains and pressures on existing staff, and the people who miss out are blackfellas.⁶

3.8 Mrs Mary McComish, Director of the Daydawn Advocacy Centre, supported Mr Collins' assessment of the situation in Western Australia:

In relation to access to legal services, there are not any, really, for areas of civil law like tenancy, [Department of Child Protection] matters and family law matters. Unfortunately, the Aboriginal Legal Service is not able to provide tenancy legal assistance. Even with other assistance that we try to obtain for our clients, there is a problem in that the Aboriginal Legal Service has more than likely acted for a partner or a relative and therefore is conflicted out of providing legal service to our clients.⁷

3.9 The committee also received evidence going specifically to the unmet needs in relation to family violence law matters. NFVPLS noted that geographic limits meant that there are service gaps:

There are a number of very high needs rural and remote areas that are not among the 31 locations that are currently serviced by FVPLSs, including but not limited to the Torres Strait, Shepparton in Victoria, Halls Creek in WA and the Anangu Pitjantjatjara communities in South Australia. Where FVPLSs have been able to secure additional funding to fill service gaps, the funding is often uncertain and short term. All National FVPLS Members have identified considerable demand for FVPLS specific services in communities where we are currently not resourced.⁸

3.10 The North Australian Aboriginal Family Violence Legal Service (NAAFVLS) stated that several 'relatively large communities' do not have access to legal assistance services offering family violence services:

This means, for example, that alleged perpetrators of family violence in these communities may have access to (criminal) legal assistance services but the alleged victim has no available legal assistance.⁹

6 *Committee Hansard*, 4 August 2015, p. 24.

7 *Committee Hansard*, 4 August 2015, pp 47-48.

8 *Submission 46*, p. 13.

9 *Submission 3*, p. 2.

3.11 At the public hearing in Sydney, Ms Monique Hitter, Executive Director, Civil Law Division of Legal Aid NSW, referred to the recognised problem, and consequences, of unmet civil and family law needs of Indigenous Australians:

In 2008 Legal Aid commissioned a report into the civil and family law needs of Aboriginal communities. Since then there has also been other research [by bodies like the Law and Justice Foundation and the Productivity Commission] which consistently identified that there are very high levels of unmet civil law needs in Aboriginal communities. [This research has] also demonstrated the impact of not addressing those legal problems—problems like debt and fines—and that not addressing those problems leads to more serious problems like family breakdown, removal of children and ultimately incarceration. Those legal problems often come in clusters. The research showed that when you have a housing problem you also often have a debt problem or a social security problem. The problems are also complex. They relate to other kinds of issues like mental health issues or drug and alcohol issues or homelessness. So there is this complex interrelationship between multiple legal problems and other social problems. And we recognised the extent of these problems, but we struggled with providing an effective service to Aboriginal communities to address those problems.¹⁰

3.12 Similarly, the Law Council of Australia (Law Council) set out the effect of these unmet civil law needs:

A major consequence of legal assistance services being under-resourced is that legal problems of disadvantaged people, when they arise, cannot be quickly identified and resolved, and so they remain unresolved until they escalate and multiply. Major areas of civil unmet need for Indigenous people include housing and tenancy disputes, consumer matters, employment disputes, and family law issues. Unresolved legal problems can balloon into more significant issues, including homelessness, family disputes, loss of work or income, alcohol or drug problems and ultimately to criminal behaviour and imprisonment.¹¹

Barriers to legal assistance services

3.13 In its report on the Access to Justice Arrangements, the Productivity Commission outlined in detail the significant barriers that Aboriginal and Torres Strait Islander people face in accessing justice. Those factors include:

- a lack of awareness about family and civil issues;
- communication barriers;
- socio-economic disadvantage and geographic isolation; and
- differences between traditional law and the Australian legal system.¹²

10 *Committee Hansard*, 23 September 2015, p. 26.

11 *Submission 41*, p. 27.

12 Productivity Commission, *Access to Justice Arrangement*, 2014, Vol 2, pp 762-766.

3.14 Barriers to accessing law and justice services were also acknowledged by the Australian National Audit Office (ANAO) in its report on the administration of the Indigenous Legal Assistance Program. Barriers identified by the ANAO included: financial capacity; language barriers; and mainstream services being less culturally sensitive or not delivering services to remote parts of Australia. Other barriers listed included:

...anxiety, lack of familiarity, fear of detention, and reluctance to use available services are seen as further contributors to Indigenous people not fully accessing mainstream legal services. In this setting, a cycle of disadvantage can arise as barriers to justice lead to poorer outcomes and high imprisonment rates, which in turn negatively affects wellbeing, opportunity and community safety – potentially resulting in further engagement with the justice system.¹³

3.15 Submissions to the committee reiterated these factors as barriers to legal assistance services for Aboriginal and Torres Strait Islander people. For example, National Association of Community Legal Centres (NACLC) listed the following factors as barriers:

- intergenerational and multi-faceted disadvantage;
- remoteness;
- lack of awareness;
- language and interpreters; and
- mistrust of government and justice systems.¹⁴

3.16 ALSWA identified additional factors which act as barriers to Indigenous people being able to access legal assistance:

Referring to barriers restricting Aboriginal people from accessing legal assistance services the following can be, but is not limited to: previous unpleasant experiences, lack of awareness, lack of confidence in the legal system, failure of recognition in the Australian legal system of Aboriginal cultures and traditions, lack of available childcare, the location of such services, physical disability, education, lack of internet access, income, and language.¹⁵

3.17 The Law Council noted further factors which affect access to legal assistance services:

13 Australian National Audit Office, *Administration of the Indigenous Legal Assistance Program: Attorney-General's Department*, Report No. 22 of 2014-15, p. 13.

14 *Submission 42*, pp 2-3. See also Redfern Legal Centre, *Submission 30*, p. 4.

15 *Submission 10*, p. 5.

...significant disadvantage faced by many Indigenous communities as a result of unemployment, substance abuse, mental health issues, lack of education, over-crowded housing and family violence.¹⁶

Lack of awareness

3.18 The committee received evidence that one of the barriers to legal assistance services for Aboriginal and Torres Strait Islander people is a lack of awareness that a legal problem existed. As the ILNP explained:

A further significant barrier to Indigenous access to civil/family law justice is the lack of awareness in most Indigenous communities of what civil and family law actually is, how to address relevant issues arising and where to get help to do so.

...

Without sufficient knowledge, Indigenous people are unlikely to take the important first step of identifying issues relating to (for instance) housing, child protection, consumer law or discrimination as legal problems, for which there may be a legal remedy and to which are attached certain legal rights and responsibilities.¹⁷

3.19 Ms Polly Porteous, Chief Executive Officer, NACLCL, highlighted that people will often not be alert to the fact that the initial problem is a legal issue:

[P]eople in general, regardless of whether they are Aboriginal or not, but particularly disadvantaged people, do tend to wait till until the last minute [to seek assistance]. They also do not recognise that it is a legal issue and therefore a lawyer can help. Even when I was a lawyer, when we would talk to people about whatever their legal problem was...they would mention, 'I have got this phone bill thing they are chasing me for.'¹⁸

3.20 As the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) explained, the lack of awareness is compounded by a reluctance to engage with the legal system:

[T]here is a significant lack of awareness and understanding amongst Aboriginal and Torres Strait Islander communities in relation to their legal rights and the avenues that are available to realise them. This means that there is not only a high level of unmet need but also a high level of unidentified need.

The effects of such a lack of understanding about the civil and family law system among Aboriginal and Torres Strait Islander peoples is also exacerbated by resistance to engagement with, and even fear of, civil and family law system services. In the context of the past history of forced removal of Aboriginal and Torres Strait Islander children and the contemporary extent of non-voluntary engagement with the criminal justice

16 *Submission 41*, p. 12.

17 *Submission 19*, p. 5.

18 *Committee Hansard*, 23 September 2015, p. 28.

and child protection systems among Aboriginal and Torres Strait Islander peoples, there is significant resistance to voluntary engagement with government and justice system services.¹⁹

3.21 The ILNP outlined the consequences of failing to address legal issues:

In measuring legal need in Indigenous communities it is necessary to consider not just the regularity with which specific legal issues are experienced, but also the way in which different types of legal problems run alongside each other and, at certain points, come together or coincide, causing legal need to intensify...[The ILNP] has identified numerous instances of Aboriginal and Torres Strait Islander people being affected by multiple legal problems simultaneously, with often one or all of these problems set aside and left unaddressed, for a range of reasons, until perhaps they reach a crisis point such as eviction from a tenancy or escalation to a criminal law matter. This has implications for service delivery, including requiring that legal services expend additional resources on working with Indigenous clients to effectively address need. They must, for instance, spend time 'unpacking' the complexity of the issues in question, they should approach this need holistically and should ensure greater access to legal help as soon as possible after issues arise.²⁰

3.22 Ms Porteous, NACLC, set out one approach to addressing this issue:

All of the research actually shows that instead of waiting until someone approaches the legal service, you actually need to get out into the community health centres, into the hospitals, talking to the GPs, working with welfare services, and try to actually get those front-line welfare workers to talk to clients and say: 'While I am helping you with your housing issues, by the way, can you just answer these questions. Do you have this issue? Do you have that issue?' I think that for Aboriginal people in particular, there is this historical fear of about walking into a legal centre.²¹

3.23 Ms Hitter, of Legal Aid NSW, explained the initiatives that Legal Aid NSW has to encourage engagement so that people are addressing legal problems earlier:

We form relationships with the health services and actually provide a legal service, for example, within the Aboriginal medical service. We have a lawyer embedded in the Aboriginal medical service in Mount Druitt so that when the doctor sees the person and they mention they have a housing issue—'I'm about to get kicked out of my place'—they can say, 'Go and see the lawyer that is in the office next door.' Also, by giving these sorts of pamphlets and postcards, and placing them everywhere in a community, then it is much easier for GP to say, 'You should go and have a chat to these people. They are here every Tuesday and they will sort you out with your fines.'²²

19 *Submission 13*, p. 6.

20 *Submission 19*, p. 3.

21 *Committee Hansard*, 23 September 2015, p. 28.

22 *Committee Hansard*, 23 September 2015, pp 28-29.

Consumer credit/debt matters

3.24 One particular area in which the committee received a number of examples demonstrating how a lack of awareness of legal problems was impacting on some Aboriginal and Torres Strait Islander people was in relation to consumer credit/debt matters. The North Australian Aboriginal Family Violence Legal Service (NAAFVLS) provided the following case study:

[L]egal information on consumer rights, employment, discrimination and credit/debit issues is virtually non-existent in remote communities. The accrual of debt can have serious long-term ramifications. NAAFVLS is aware that members of communities, have no knowledge of how to manage a Telstra contract, and may not know that they must continue payments if their mobile phone is damaged, lost or stolen, which can lead to serious financial and legal consequences. One resident of an isolated community was being harassed by a debt collection service and demands for payment over a six month period regarding payments on a car loan he had taken out some years previously. He owed over \$20,000.00, had recently lost his job, and did not know about his rights under bankruptcy.²³

3.25 The Northern Territory Legal Aid Commission's submission provided information from the commission's outreach project which dealt with consumer credit/debt issues:

Clients at many of the communities visited reported financial stress as a result of debts that they were struggling to repay.

The types and quantity of debts varied from client to client; however, there were common themes amongst some different communities, including:

- Predatory sales practices (Door to door and phone)
- Misleading and deceptive conduct in relation to debt recovery
- Unfitness for purpose (for example phone plan agreements in regions where there is no phone coverage)
- Warranty issues in relation to motor vehicles
- Unserviceable loans which had been approved outside of the remote lending criteria
- Assistance arranging repayment of fines.

In general we encountered poor levels of financial literacy and a lack of access to services that could assist with renegotiating payment rates when clients were suffering financial hardship. Where possible clients are referred to the appropriate consumer protection body.²⁴

3.26 At the public hearing in Sydney, Ms Jemima McCaughan, Executive Director, Civil Law Division, Legal Aid NSW, gave the follow example of consumer leases for household goods:

23 *Submission 3*, pp 2-3.

24 *Submission 29*, pp 24-25.

The example is of two traders who went into communities in western New South Wales. They went door to door selling essential items basically. Yes, it can be a more affordable weekly or fortnightly payment, but we see huge misleading conduct about what they are actually signing up to. Clients often do not understand how much they will pay over the whole contract. There is misleading conduct about what the terms and conditions are around ownership of those goods. Clients are using consumer leases to acquire goods when there is no right to purchase or own those goods at the end of the contract.²⁵

3.27 Ms McCaughan noted, however, that consumers did get to keep those goods at the end of the contract because the traders do not want the goods back at the end of two years. Ms McCaughan also explained to the committee that the lack of an interest rate cap on consumer leases was problematic:

[I]f it is a consumer lease you do not [get the benefit of the 48 per cent interest rate cap]...We have seen loads of contracts where it has been between 300 and 400 per cent of the value of the goods. The clients are never told that. They are not told what the total cost is or what the retail value is, and they have no way of working out what the retail value is because there is no alternative in terms of purchasing those goods in a reasonable vicinity.

...

In the two years we have done work in Aboriginal communities we have assisted approximately 150 clients on consumer lease issues. We were able to get refunds, ownership of the goods and termination of contracts without further liability. It is such a widespread issue.²⁶

Geographic barriers

3.28 Geographic isolation is a major obstacle to Aboriginal and Torres Strait Islander peoples' access to legal services. NATSILS, for example, noted that 21.3 per cent of Aboriginal and Torres Strait Islander people in Australia live in remote or very remote communities, compared to just 1.7 per cent of the non-Indigenous population.²⁷

3.29 The joint submission by NAAJA and CAALAS set out some of the challenges of servicing remote areas:

Many of our clients live in communities or outstations that are hundreds of kilometres by dirt road to the nearest regional centre and can be inaccessible by road for significant parts of the year: particularly in the Top

25 *Committee Hansard*, 23 September 2015, p. 30.

26 *Committee Hansard*, 23 September 2015, p. 30. Ms McCaughan noted that the Australian Securities and Investment Commission has a current review which incorporates consideration of this matter.

27 *Submission 13*, p. 3, citing data from Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage, Key Indicators 2014 Report*, Figure A3.2.

End's 'Wet Season' (roughly December – April). Flooding, storms and cyclones are common challenges in servicing remote communities. Remoteness makes regular face-to-face contact with legal assistance services difficult and often expensive, while also posing a formidable barrier to other services, courts and tribunals that may only be accessed in major centres.

...

With geographical remoteness also comes a lack of basic services or unreliability in those services – such as electricity and telecommunications. The availability of technology such as audio-visual links and services such as Sykpe is limited, the quality of the connections available often poor and as is the quality of communication achieved. Most of our clients do not have landlines but will have mobile phones. However, this does not give them easy access to government and other agencies – the 'free' 1800 or 1300 numbers are not free for mobile phone users.²⁸

3.30 The submission by the National Family Violence Prevention Legal Services (NFVPLS) also emphasised the geographic challenges Family Violence Prevention Legal Services (FVPLS) face in providing legal services:

Geographic issues lead to considerable resource challenges for FVPLSs in the provision of legal services and providing access to justice. The costs of travelling to remote communities are high. Some services are required to charter flights, or spend many hours travelling by road to reach community...

Funding levels mean that some services are only able to visit communities once a month. This results in limited time to spend with individual clients, delays in progressing legal matters with potential safety implications, and impedes the process of building trust between the client and the lawyer.²⁹

3.31 NFVPLS highlighted that face-to-face contact with clients was important and outlined why other forms of communication were inappropriate, particularly with the matters with which FVPLS deal with:

Face-to-face contact allows parties to engage with each other in ways that are not possible through telephone conferencing. Telephone contact may also be inappropriate in the context of family violence, where the subject matter is traumatic, and there is a need to build trust between the lawyer and the client. In addition, many FVPLS clients do not own phones, or can be reliant on limited pre-paid credit. They may need to use pay phones in their communities, where there is little privacy.

Other usual forms of communication, such as email, are often inappropriate. Many clients have little or no access to computers or the internet. Emailed communication, especially when clients are using public or shared computers, may even put the client's safety at risk. Clients may

28 *Submission 31*, p. 4.

29 *Submission 46*, p. 12.

also experience low levels of literacy, making written communication difficult. To address these challenges, lawyers and client support workers are often required to spend many hours driving to communities to contact clients, to advise them about court dates or take advice.³⁰

3.32 Geographic barriers exist not only in remote areas, but also in regional Australia. The Hunter Community Legal Centre (HCLC), which operates in the Newcastle, Lake Macquarie, Hunter Valley, Port Stephens and Great Lakes regions of New South Wales, noted that its clients sometimes have difficulty traveling to HCLC's office:

The HCLC has a large catchment area, with most clients living in rural and regional places. Clients living outside of Newcastle have in the past disclosed to the HCLC that they found it difficult to travel to the Centre's office to complete documents or receive face-to-face legal advice. The HCLC has for the past few years been able to offer outreach legal advice clinics in a number of more remote locations, but more recently looming funding cuts and uncertainty have meant that the Centre has had to reduce the number of outreach clinics, and ultimately will have to cease offering outreach services entirely if current funding levels continue or anticipated funding cuts eventuate.³¹

3.33 To address these geographic barriers, ILNP advocated increased funding for outreach services:

In this context, more funding could be used to extend outreach services, to establish a greater number of permanent legal service offices in regional and remote locations (which also employ more civil and family lawyers), to fund more civil and family law positions in existing legal service offices located outside centres or to fund training and employment of local Indigenous people who could be employed as 'triage workers'. These workers would know 'whether or not there are avenues to address things that appear' in a particular community and could work collaboratively with and for legal services.³²

Lack of interpreters

3.34 Another significant barrier for Indigenous people accessing legal assistance services is a lack of interpreters. As NATSILS explained in its submission:

Central to effective engagement and provision of quality services to Aboriginal and Torres Strait Islander peoples is effective communication. For a proportion of Aboriginal and Torres Strait Islander peoples, this will be unachievable without the assistance of an interpreter. However, there is a

30 *Submission 46*, p. 12.

31 *Submission 22*, p. 6.

32 *Submission 19*, p. 5.

shortage of Aboriginal and Torres Strait Islander interpreter services around Australia to meet this need.³³

3.35 Similarly, the Northern Territory Anti-Discrimination Commission noted:

Other issues affecting access to legal services is the recognition of the need for and availability of professionally trained interpreters to travel with or be available to Aboriginal service providers when they are providing services to Aboriginal people. This is critical to ensure understanding and full participation in the process including the identification of the area of legal need, advice and participation in the Court process or with complaints resolution [processes].³⁴

3.36 The joint submission by NAAJA and CAALAS provided the following information from their lawyer's experiences in servicing Indigenous communities:

In the NT, many Aboriginal people speak English only as a second or third language and require interpreters. In a number of communities that are serviced by NAAJA and CAALAS (including communities like Wadeye, the NT's largest Aboriginal community), almost all people seeking legal assistance require an interpreter. Unfortunately, there is a shortage of appropriately trained and qualified interpreters in Aboriginal languages, including in some of the major language groups.³⁵

3.37 The Hon Wayne Martin AC, Chief Justice of the Supreme Court of Western Australia (WA), indicated that he has repeatedly made representations to the WA state government about properly funding an interpreter service for that state. In terms of the importance of having an interpreter, Chief Justice Martin informed the committee:

The law on that is clear. The process is not fair unless the accused person understands the language in which the process is being conducted and in significant areas of this state there are people who do not have an adequate command of English to understand court processes. They may have an adequate command of English to get by in daily life [but] Productivity they do not have sufficient English to comprehend the court processes. Those people are not being provided with the interpreter services they need, as a result of which a lot of the proceedings being conducted in our courts are invalid. The law on that is clear, so I agree entirely [that it is essential to have access to interpreters].³⁶

3.38 The Chief Justice did acknowledge the difficulties with providing qualified interpreters:

Aboriginal interpretation is very difficult because in the Kimberley, for instance, there are about 30 spoken languages, some from very small language groups. So finding qualified interpreters in those language groups

33 *Submission 13*, p. 7. See also Western Australian Council of Social Service, *Submission 25*, p. 3.

34 *Submission 23*, p. 3.

35 *Submission 31*, p. 3.

36 *Committee Hansard*, 4 August 2015, p. 36.

is the first problem. Finding a qualified interpreter who is not connected with either the victim or the offender is almost impossible. So we have enormous practical difficulties in finding appropriate interpreters who are not disqualified by conflict of interest and reducing resources in this space seems to me to be a step in the wrong direction, but the executive government holds the cheque book.³⁷

3.39 National Legal Aid noted that interpreters were needed not only to enable the taking of instructions and the giving of legal advice, but also for the provision of community legal education to communities.³⁸

3.40 NATSILS also highlighted the importance of having interpreters for hearing impaired Aboriginal and Torres Strait Islander people:

Hearing loss can result in the same communication barriers as those produced by language difficulties and cross-cultural differences. Given the high rate at which Aboriginal and Torres Strait Islander peoples suffer from hearing loss this is an issue that must be addressed[.]³⁹

Conflicts of interests

3.41 The committee also received evidence that conflicts of interests may prevent Aboriginal and Torres Strait Islander people being able to access legal assistance services, as Legal Aid NSW noted:

Conflict of interest remains a significant issue for service delivery in such areas where the [Aboriginal Legal Service] is precluded from providing representation and there are few alternative legal practitioners available to act on behalf of those Aboriginal clients.⁴⁰

3.42 At the public hearing in Sydney, Ms Hitter, Legal Aid NSW, noted that such conflicts arise 'all the time' in small communities where more than one person is involved in a criminal offence.⁴¹ Ms Hitter indicated that in such situations Legal Aid NSW would not leave people unrepresented, but would facilitate some option for legal representation.⁴² Ms Porteous, NACLC, added:

In some regions, there is both the Aboriginal legal centre, the Legal Aid Commission and a community legal centre. So having them does help sometimes when there are those conflicts. But also there are private lawyers. They are still able to get legal aid. It is just that the actual Legal Aid Commission cannot.⁴³

37 *Committee Hansard*, 4 August 2015, p. 36.

38 *Submission 37*, p. 3.

39 *Submission 13*, p. 8. See also Northern Territory Anti-Discrimination Commission, *Submission 23*, p. 3.

40 *Submission 36*, p. 4. See also Hunter Legal Community Centre, *Submission 22*, p. 4.

41 *Committee Hansard*, 23 September 2015, p. 29.

42 *Committee Hansard*, 23 September 2015, p. 29.

43 *Committee Hansard*, 23 September 2015, p. 29.

3.43 In particular, evidence highlighted the importance of the FVPLS, so that women and children were able to access legal assistance services in family violence matters. Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, explained:

ATSILS provide services in rural and remote areas, sometimes where no other legal services exist. However, this often presents issues for clients or the ex-partners of clients as ATSILS are unable to act for both parties, due to a conflict of interest. Women or children who are affected by an issue such as family violence have been denied legal assistance through ATSILS or Legal Aid because those organisations have already represented the perpetrator in previous or related criminal, family or civil matters. This conflict of interest means that, often, FVPLS are the only available legal service for Aboriginal and Torres Strait Islander women and children, where they exist. For this reason FVPLS needs to be adequately funded, even in locations where ATSILS or Legal Aid exist.⁴⁴

3.44 The National Justice Coalition also emphasised this point:

It is important to note the vital importance of having two culturally competent streams of legal assistance services available for Aboriginal and Torres Strait Islander people, particularly in the context of family violence. The existence of conflict of interest issues, which can frequently arise in family violence matters, means that multiple parties are not able to access legal assistance from the same service. FVPLSs provide a vital alternative service, and an avenue through which Aboriginal and Torres Strait Islander victims/survivors of family violence can access culturally appropriate and specialised legal assistance. In effect, the existence of two culturally competent legal assistance services ensures that all parties are able to access culturally competent legal assistance services, as is their right.⁴⁵

A lack of culturally appropriate services

3.45 As noted earlier in this chapter, Aboriginal and Torres Strait Islander people have a preference for Aboriginal and Torres Strait Islander Legal Services (ATSILS) and FVPLSs due to those services being culturally competent. Evidence indicated that a lack of culturally appropriate services may be a barrier to Aboriginal and Torres Strait Islander people accessing legal assistance services. For example, the National Justice Coalition stated:

[M]any Aboriginal and Torres Strait Islander people prefer, but cannot access Aboriginal and Torres Strait Islander community controlled legal services. It is vital that Aboriginal and Torres Strait Islander people be offered the option of a culturally safe legal service (community controlled) to ensure their matter is dealt with in a culturally appropriate way. This is especially important due to the history of trauma and dispossession

44 *Submission 5*, p. 7.

45 *Submission 40*, p. 7.

experienced by Aboriginal and Torres Strait Islander people. Greater investment in community controlled services is needed to address this.⁴⁶

3.46 To this end, a number of submissions strongly advocated for the adequate resourcing of ATSILSs and FVPLSs.⁴⁷ For example, Mr Gooda stated:

It is particularly important that ATSILS and FVPLS be adequately resourced because Aboriginal and Torres Strait Islander people need not just any legal services, but culturally competent legal services. There are many complex factors involved in the contact between Aboriginal and Torres Strait Islander people and the justice system.⁴⁸

3.47 In particular, in relation to FVPLSs, Mr Gooda argued:

FVPLS are particularly important for Aboriginal and Torres Strait Islander women and children because of the disproportionate rates of family violence they experience. ATSILS specialise in providing criminal law assistance and therefore women and children facing family violence situations rely on the targeted and specialised legal services of FVPLS rather than ATSILS. FVPLS have the cultural competence as well as the specific expertise in family violence, and even more specifically, family violence in in Aboriginal and Torres Strait Islander communities.⁴⁹

3.48 While ATSILSs and FVPLSs are dedicated providers of legal assistance services to Aboriginal and Torres Strait Islander people, other legal assistance services are also available. To this end, National Legal Aid indicated its commitment to 'working with Aboriginal and Torres Strait Islander organisations to ensure coordination of service delivery to Aboriginal and Torres Strait Islander communities and to providing services that are as culturally appropriate as possible'.⁵⁰

3.49 Community Legal Centres (CLCs) also highlighted the work that they are doing to provide culturally appropriate services.⁵¹ At the public hearing in Sydney, Ms Nancy Walke, Director, National Association of Community Legal Centres, spoke about the work she did in her previous position at the Northern Rivers Community Legal Centre:

...I am not a solicitor. I am a Bundjalung woman and there are 13 communities in the Bundjalung nation that we serve, which is fairly widespread.

46 *Submission 40*, p. 4.

47 See, for example, National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Submission 13*, pp 5 and 6-7; Victoria Legal Aid, *Submission 35*, pp 3-4; Kingsford Legal Centre, *Submission 38*, p. 9.

48 *Submission 5*, p. 7.

49 *Submission 5*, p. 7. See also Indigenous Legal Needs Project, *Submission 19*, p. 9; Northern Territory Anti-Discrimination Commission, *Submission 23*, p. 3.

50 *Submission 37*, p. 5.

51 See for example Kingsford Legal Centre, *Submission 38*, p. 3.

[The legal access] program was funded for 12 hours a week, which is not much. We went out to communities, following the cultural protocols, talking to people there, having a yarn, asking them what they needed, and then we provided a program that those people needed. We would go in with a solicitor, and I would go because they knew me, until they got to know the solicitor. The centre itself has changed over the years. We have cultural awareness every year and the solicitors there are culturally competent to deal with Aboriginal people. The environment is friendly and includes all the things that Aboriginal people feel comfortable with, like art and pamphlets specifically for them.

One of the problems was that we never really ever had time. We needed time, and that meant more staff and more hours having an Aboriginal person there. The other thing is that the centre has, built into their strategic plan, issues for Aboriginal people, and they actually do work with their strategic plan in that respect. So not only do we have specific programs that have Aboriginal people in it; we also have non-Aboriginal jobs that are staffed by Aboriginal people. For example, our front-desk person is Aboriginal. She talks to everybody, of course, but it is really nice for people to come in and know that there is someone there who will understand what they want.⁵²

Chapter 4

Imprisonment of Aboriginal and Torres Strait Islanders

Introduction

4.1 Aboriginal and Torres Strait Islander people are significantly overrepresented in the Australian prison system. This chapter gives a brief overview of the imprisonment rates for Aboriginal and Torres Strait Islander Australians and considers the adequacy of statistical information on Indigenous imprisonment rates. The chapter concludes with a discussion on the inclusion of justice targets in the Closing the Gap measures.

Imprisonment of adults

4.2 In 2015, Aboriginal and Torres Strait Islander people made up approximately two per cent of the total Australian population aged 18 years and over. However, at 30 June 2015, Aboriginal and Torres Strait Islander prisoners accounted for just over a quarter (27 per cent or 9,885 prisoners) of the total Australian prisoner population (36,134 prisoners).¹

4.3 The total number of Aboriginal and Torres Strait Islander prisoners at 30 June 2015 represented a seven per cent increase in numbers (or 620 prisoners) from 30 June 2013, when there were 9,265 Aboriginal and Torres Strait Islander prisoners.²

4.4 Of the total of 9,885 Aboriginal and Torres Strait Islander prisoners, 90 per cent (8,859 prisoners) were male.³ This is comparable to the overall Australian prisoner population, where males accounted for 93 per cent of all prisoners.⁴

Imprisonment rates

4.5 As at 30 June 2015, the imprisonment rate for Aboriginal and Torres Strait Islander people was 13 times greater than the imprisonment rate for non-Indigenous

1 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. The total prison population of 36,134 prisoners includes both sentenced and unsentenced prisoners. In all states and territories with the exception of Queensland, persons remanded or sentenced to adult custody are aged 18 years and over. Persons under 18 years are treated as juveniles in most Australian courts and are only remanded or sentenced to custody in adult prisons in exceptional circumstances. In Queensland, 'adult' refers to persons aged 17 years and over.

2 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

3 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

4 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

Australians.⁵ The Aboriginal and Torres Strait Islander imprisonment rate was 1,951 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population, compared with 153 prisoners per 100,000 adults for the non-Indigenous population.⁶

4.6 Appendix 3 of this report sets out a table of the annual ratio of Indigenous prisoners to non-Indigenous prisoners, by state and territories, for 2005-2015.⁷ The data shows that while the ratio of Indigenous prisoners might vary year on year, over the period 2005-2015, in the majority of states and territories there has been a general upward trend in the ratio of Indigenous prisoners.

4.7 Western Australia has the highest imprisonment rate for Aboriginal and Torres Strait Islander people, with 3,067.4 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population, which is 17 times the imprisonment rate for non-Indigenous Australians in that state (180.8 prisoners per 100,000 adults for the non-Indigenous population).⁸

4.8 The Australian Capital Territory's imprisonment rate for Aboriginal and Torres Strait Islander people was 14.1 times the rate for the non-Indigenous population,⁹ and in the Northern Territory, the imprisonment rate for Aboriginal and Torres Strait Islander people was nearly 14 times the rate for the non-Indigenous population.¹⁰

4.9 The Northern Territory had the greatest proportion of prisoners identifying as Aboriginal and Torres Strait Islander, with 84.4 per cent (1,344 prisoners).¹¹ Western Australia had the second highest proportion of Aboriginal and Torres Strait Islander

5 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. The figures used in relation to imprisonment rates are the age standardised rates. Age standardisation adjusts the crude imprisonment rate to account for age differences between populations. The differing age profiles between Aboriginal and Torres Strait Islanders and the non-Indigenous population (the former having a much younger population) means that using crude rates may lead to erroneous conclusions being drawn about variables that are correlated with age, see Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

6 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

7 This data is extracted from the Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

8 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

9 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. In 2015, the imprisonment rate for Aboriginal and Torres Strait Islanders in the ACT was 1,473.9 prisoners per 100,000 adults and for the non-Indigenous population the imprisonment rate was 101.5 prisoners per 100,000 adults. However, as the table in Appendix 3 demonstrates, there is greater variability year to year in the ratio of Indigenous prisoners in the ACT than in other states and the NT.

10 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. In 2015, the imprisonment rates in the NT were 2,471.1 prisoners per 100,000 Aboriginal and Torres Strait Islander population compared with 179.6 prisoners per 100,000 adults for the non-Indigenous population.

11 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

prisoners with 38 per cent (2,113 prisoners), followed by Queensland (31.5 per cent, 2,306 prisoners) and then New South Wales (24.1 per cent, 2,864 prisoners).¹²

Nature of offences

4.10 The most common offence or charge for which Aboriginal and Torres Strait Islander prisoners were in custody were acts intended to cause injury (33 per cent or 3,309 prisoners) followed by unlawful entry with intent (15 per cent of 1,506 prisoners). The most common offence or charge for the non-Indigenous prisoner population was illicit drug offences (17 per cent or 4,453 prisoners) and acts intended to cause injury (17 per cent or 4,333 prisoners).¹³

4.11 Acts intended to cause injury was the most common offence or charge for both male and female Aboriginal and Torres Strait Islander prisoners (34 per cent for males and 31 per cent for females), followed by unlawful entry with intent (15 per cent for males and 14 per cent for females).¹⁴

4.12 In terms of reoffending behaviour, just over three quarters of Aboriginal and Torres Strait Islander prisoners (77 per cent) had been imprisoned under sentence previously, compared to half of non-Indigenous prisoners (50 per cent).¹⁵

Length of sentences

4.13 In terms of sentenced prisoners, at 30 June 2015, the median aggregate sentence length for Aboriginal and Torres Strait Islander prisoners was two years, compared with three and a half years for non-Indigenous prisoners. The median expected time to serve for Aboriginal and Torres Strait Islander prisoners was 1.2 years, compared with 2.1 years for non-Indigenous prisoners.¹⁶

4.14 For unsentenced prisoners, at 30 June 2015, the Australian Bureau of Statistics states:

The median time spent on remand by Aboriginal and Torres Strait Islander unsentenced prisoners was 2.2 months, compared to 3.0 months for non-Indigenous unsentenced prisoners.¹⁷

4.15 Mr Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, made the following observations on the sentence lengths for Aboriginal and Torres Strait Islander people:

Aboriginal and Torres Strait Islander prisoners, particularly women, tend to be serving shorter sentences than non-Indigenous prisoners, indicating that

12 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

13 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

14 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

15 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

16 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

17 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

sentences of imprisonment are being imposed on Indigenous people for more minor offences.¹⁸

4.16 The UNSW Law Society also referred to some research on the sentences received by Indigenous women:

[I]ndigenous women are more likely to receive a custodial sentence for minor offences compared to other non-Indigenous women in prison. The types of offences committed by Indigenous women are generally associated with severe poverty relating to 'non payment of fines, shop lifting, driving and alcohol related offences.' [I]ndigenous women are twice as likely to be in custody than non-Indigenous women, with good order offences being their most serious crime accounting for 54 per cent.¹⁹

Young people

4.17 Aboriginal and Torres Strait Islander young people (aged 10-17) are also overrepresented in the juvenile justice system. The Australian Institute of Health and Welfare (AIHW) reported that on an average day in 2014-15, there were 5,600 young people aged 10 and older who were under supervision (either in their communities or in secure detention facilities) in Australia due to their involvement or alleged involvement in crime.²⁰

Although less than 6% of young people aged 10-17 in Australia are Indigenous, more than 2 in 5 (43%) young people under supervision on an average day in 2014-15 were Indigenous. This proportion was higher in detention, where more than half (54%) were Indigenous.²¹

4.18 In terms of the rate of Indigenous young people under supervision, the AIHW stated:

In 2014-15, the rate of Indigenous young people aged 10-17 under supervision on an average day was 180 per 10,000 compared with 12 per 10,000 for non-Indigenous young people. Indigenous young people were therefore about 15 times as likely as non-Indigenous young people to be under supervision on an average day.²²

18 *Submission 5*, p. 5. See also Law Council of Australia, *Submission 41*, p. 12.

19 *Submission 14*, p. 18.

20 Australian Institute of Health and Welfare (AIHW), *Youth justice in Australia 14-15*, Bulletin 133, April 2016, p. 1. Young people can be charged with a criminal offence if they are aged 10 and older. The upper age limit for treatment as a young person is 17 in all states and territories except Queensland, where the limit is 16. However, some young people aged 18 and older are also involved in the youth justice system. This may be due to the offence being committed when the young person was aged 17 or younger; the continuation of supervision once they turn 18; or their vulnerability or immaturity. Young people may be supervised either in their communities or in secure detention facilities. See AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 3.

21 AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 7. References to tables and figures have been removed from this quote.

22 AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 7.

4.19 In Western Australia, an Indigenous young person was 27 times as likely as a non-Indigenous young person to be under supervision on an average day. In the Northern Territory an Indigenous young person was 17 times as likely as a non-Indigenous young person to be under supervision on an average day and in Queensland an Indigenous young person was 16 times as likely.²³

4.20 Looking at the rates of imprisonment of youth in unsentenced and sentenced detention, the AIWH stated that Indigenous youth were 28 times more likely to be in sentenced detention, and 25 times more likely to be in unsentenced detention in the June 2015 quarter.²⁴

4.21 In terms of comparison by age and gender:

On average, Indigenous young people under supervision were younger than non-Indigenous people. This was the case for both males and females. In 2014-15, about half (49%) of all Indigenous young people under supervision on an average day were aged 10-15, compared with almost one-third (32%) of non-Indigenous young people.

Similar proportions of Indigenous and non-Indigenous young people under supervision were male (80% and 83%, respectively).²⁵

The adequacy of statistical information

4.22 In relation to the adequacy of statistical information and data collected and made available by the various levels of government in relation to Aboriginal and Torres Strait Islander justice issues, Mr Gooda observed:

There is a substantial amount of data available which tells us that Aboriginal and Torres Strait Islander people are represented disproportionately as offenders and victims in the criminal justice system. However, the many gaps in research and data mean that we do not have all the information needed to know what works from a policy perspective.²⁶

4.23 Witnesses and submissions identified a range of data gaps in relation to the statistical information currently collected. For example, Mr Nick Parmeter, Executive Policy Lawyer, Law Council of Australia, commented:

Currently, we do not have reliable or consistent figures on the number of times unique individuals enter or leave the corrections system in a given year, or aggregate numbers of the receptions and releases. The absence of

23 See AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 8.

24 AIHW, *Youth detention population in Australia 2015*, Bulletin 131, December 2015, p. 12. Young people may be detained in secure detention facilities while they are unsentenced—that is, while awaiting the outcome of their court matter, or while awaiting sentencing after being found or pleading guilty. They may also be in sentenced detention when they have been proven guilty in court and have received a legal order to serve a period of detention, see AIHW, *Youth detention population in Australia 2015*, Bulletin 131, December 2015, p. 4.

25 AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 9. References to tables and figures have been removed from this quote.

26 *Submission 5*, p. 7.

flow data means that the true state of imprisonment may be significantly worse than we currently believe to be the case.²⁷

4.24 Professor Julie Stubbs of the Australian Justice Reinvestment Project, noted:

Data on the involvement of Indigenous women in the criminal justice system is limited, since criminal justice sources typically report with respect to women or Indigenous people, but not Indigenous women per se. Data is particularly poor concerning police and prosecutorial practices, which underpin criminalisation.²⁸

4.25 Submissions identified the issue of determining Indigenous status as a fundamental flaw in data collection processes. Researchers from the Australian Institute of Criminology commented specifically on this issue in relation to collecting data on deaths in custody:

An ongoing issue in maintaining deaths in custody data, and other criminal justice data more generally, is the determination of an individual's Indigenous status. The manner in which Indigenous status is determined varies between different states and territories and sometimes between agencies within a state or territory. While most agencies use self-reporting of Indigenous status based on a standard question developed by the Australian Bureau of Statistics ('ABS'), others rely on an officer's educated, but still subjective judgment of physical appearance.²⁹

4.26 The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) also identified the recording of Indigenous status as an issue in relation to data collection:

NATSILS notes with concern that Victoria still records the ethnicity of offenders and victims by "racial appearance" which means the ethnic identification of a person in the subjective opinion of the attending police officer. In the offending statistics provided by Victoria, by far the greatest number of recorded ethnicities is 'unspecified'. For example, in 2013/2014 the total number of assaults proceeded against 'Aboriginal and Torres Strait Islander people' was 1,599.59 The total number of assaults proceeded against by people of 'unspecified' racial ethnicity was 6,732.60 It is submitted that this is likely to indicate that police find categorising people based on perceived ethnicity problematic, which indeed it is for very obvious reasons. It also means that Victoria's statistics are invalid in this regard.³⁰

4.27 NATSILS, among others, also highlighted the need for data to be disaggregated in other ways:

27 *Committee Hansard*, 4 April 2016, p. 16.

28 *Submission 12*, Attachment 1, p. 59.

29 *Submission 12*, Attachment 1, p. 76.

30 *Submission 13*, pp 18-19.

NATSILS is also concerned about the paucity of data of people with mental illnesses, disabilities and cognitive impairments in the justice system. Despite the high prevalence of disability it remains an untold story not only in justice, but in all other areas that determine social outcomes for Aboriginal and Torres Strait Islander people such as education, employment and housing. The absence of available data makes evaluation and policy on this very crucial issue difficult.³¹

4.28 NATSILS recommended:

Western Australia, Victoria, Tasmania and Australian Capital Territory record more consistent and detailed data relating to Aboriginal and Torres Strait Islander people. This will help to inform measured, evidenced based policy on criminal justice issues.³²

4.29 Mr Gooda also commented on the gaps in data collection in this area:

One of the critical gaps in our knowledge of the justice system is regarding people with cognitive impairment. We know that people with cognitive impairment are overrepresented in the criminal justice system, and Aboriginal and Torres Strait Islander people with such disabilities are particularly over-represented.' However, we do not know specifically how many people in Australian prisons have intellectual disabilities or cognitive impairments.³³

4.30 Aside from the issue of recording Indigenous status, submissions referred to other specific gaps in relation to the statistical information relating to Aboriginal and Torres Strait Islander justice issues. Mr Gooda identified deficiencies in data collection including:

- a need for culturally appropriate data collection;³⁴ and
- more reliable information on the effectiveness of diversion programs for Aboriginal and Torres Strait Islander offenders.³⁵

Data collection in Western Australia

4.31 Some submissions particularly criticised the collection of data in Western Australia. Western Australia Council of Social Services (WACOSS) and Amnesty International were both highly critical of the Western Australian Department of Corrective Services' data collection and provision of statistical information. In its submission Amnesty International provided the following summary of its concerns:

The Western Australian Government has failed to collect and make available relevant disaggregated statistical data to allow for such analysis

31 *Submission 13*, p. 19.

32 *Submission 13*, p. 19.

33 *Submission 5*, p. 8.

34 *Submission 5*, p. 7.

35 *Submission 5*, p. 8.

within the justice sector or by those who wish to monitor and offer potential solutions from outside government.

Amnesty International encountered considerable difficulties in obtaining disaggregated statistical data about the experience of Aboriginal young people in the Western Australian youth justice system. This is due to gaps in disaggregated data available publicly; standard data not having been provided to national studies on youth justice; and incomplete information being provided in response to Amnesty International's requests for data and information.

A representative of the Department of Corrective Services told Amnesty International that problems with data were currently affecting their own capacity to plan for programs. As the state with the highest rate of over-representation of Aboriginal young people in detention, Western Australian must improve its collection and dissemination of disaggregated data in order to adequately understand where the system is failing Aboriginal young people.³⁶

4.32 Amnesty International continued:

The situation has further deteriorated recently. Weekly statistics and monthly graphical reports about the number of young people in detention, previously published by the Department of Corrective Services, have not been provided since June 2014. The 2013–14 annual report of the Department of Corrective Services deviates from the format used in previous years and provides less information that is disaggregated by Indigenous status (for example relating to the referral to Juvenile Justice Teams).³⁷

4.33 The Aboriginal Family Law Services (WA) also commented on data collection in WA:

Data related to the prevalence and impact of any policy related to Aboriginal people in WA to date tends to be piecemeal and is not evidence based. This has resulted in unreliable data that does not clearly state the issues that impact on Aboriginal communities. Therefore, strategies being developed to address issues impacting on Aboriginal people at best can only be tentative and exploratory in nature. There is an urgent need for all organizations working in the Aboriginal arena, be they government or non-government to collect accurate data related to any programs and services provided in order to determine strategies to be employed.³⁸

36 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 19.

37 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 19. See also Western Australian Council of Social Services, *Submission 25*, Attachment 1, p. 50.

38 *Submission 15*, p. 16.

Deficiencies in the Juvenile Justice National Minimum Data Set

4.34 Amnesty International also commented on the deficiencies in the Juvenile Justice National Minimum Data Set (JJ NMDS). The JJ NMDS is a joint project between the Australian Juvenile Justice administrators and the Australian Institute of Health and Welfare (AIHW). The AIHW website explains further:

In Australia, the states and territories are responsible for juvenile justice and there is marked diversity in terms of legislation, policy and practices among jurisdictions. The JJ NMDS provides nationally consistent data on young people's experience of juvenile justice supervision, both in the community and in detention

...

The first report containing data from the JJ NMDS was released in February 2006 and covered 2000–01 to 2003–04. Annual reports have subsequently been published[.]³⁹

4.35 Amnesty International noted:

There are inconsistencies and gaps between states and territories in data relating to contact with the youth justice system. The Juvenile Justice National Minimum Data Set (JJ NMDS) is a valuable dataset but does not include state and territory data on police diversions, nor does it incorporate data on arrests or unsupervised court orders. The data is also not linked to information on adult contact with the justice system, so it is difficult to track rates of recidivism as a longer term trend through entry of young people into the adult system.

Disappointingly neither the Western Australian nor Northern Territory governments – with the highest rates of Indigenous youth over-representation in detention in the country – have provided standard data to the JJ NMDS since 2008–09.⁴⁰

4.36 In its submission, the AIHW noted that Western Australia recently committed to the provision of JJ NMDS in future collections. Further, in 2013-14, AIHW included non-standard data supplied by Western Australian and the Northern Territory in annual reporting, where possible.⁴¹

4.37 At the public hearing in Perth, Ms Tammy Solonec, Indigenous Rights Manager, Amnesty International, stated that the solution goes further than Western Australia and Northern Territory contributing to the JJ NMDS:

39 See Australian Institute of Health and Welfare website, *Juvenile Justice National Minimum Data Set (JJ NMDS) background*, available at: <http://www.aihw.gov.au/youth-justice/jj-nmds-background/>. The following information is collected for the JJ NMDS: Characteristics of young people under juvenile supervision: age, sex, Indigenous status, age at first supervision; Supervised orders: order start and end dates, end reason, order type; Detention periods: start and end dates, end reason and detention type.

40 *Submission 39*, p. 14.

41 *Submission 9*, p. 2.

But, even if they did contribute, that dataset only collects the data for children in custody—the corrective services data. What we really need is an integrated form of data that also brings in the police data so we can determine what type of offending they are doing and really address the underlying causal factors. That is our best recommendation to the government as to how to target diversion and give judges options: to really get the data right in the first place.⁴²

4.38 AIHW noted that information from the JJ NMDS may be enhanced through data linkage, which can be a cost-effective way of improving or developing new information:

Some linkage projects with the JJ NMDS data have been undertaken, allowing for analysis of young people who access multiple community services...

In addition to the JJ NMDS national and jurisdictional data sets, which contain data on service-provision programs and may be suitable for data linkage include child care, education, homelessness, housing, health services and disability services.⁴³

Role of the Commonwealth

4.39 Ms Solonec emphasised the importance of integrating corrective services data and police data and the role of the Commonwealth Government:

We actually need that integration to occur. That is something we are seeking. We have been working with the Department of Corrective Services and the WA police. It looks like the WA government, in particular, is quite far off having an integrated system of data. But we think that the federal government is in a fantastic position to exercise its leadership to ensure that the Northern Territory and Western Australia comply with these data requests and to actually push all of the states and territories to integrate their data so that, as well as collecting the data from corrective services, we are collecting the data from police. We think that if we were able to get that data, especially in a national standardised format, we could start to really get a good picture of what is happening and really address the underlying causal factors in a strategic way, which is not happening at the moment.⁴⁴

4.40 At the public hearing in Canberra, Ms Esther Bogaart, Director, Legal Assistance and Women's Safety Section, Attorney-General's Department (AGD), noted the Commonwealth has taken a role in developing a national data set manual for the legal assistance sector. Ms Bogaart confirmed that this manual only applied to the provision of legal services by legal assistance services.⁴⁵ In relation to the collection of data on incarceration rates, Ms Bogaart indicated that she was aware that the

42 *Committee Hansard*, 4 August 2015, p. 4.

43 *Submission 9*, p. 2.

44 *Committee Hansard*, 4 August 2015, p. 7.

45 *Committee Hansard*, 4 April 2016, p. 30.

Australian Bureau of Statistics 'has done some work on consistent data collection in the criminal justice space'.⁴⁶

4.41 The committee pressed officers from AGD to identify which department or government body should have ownership of this issue to ensure that there is consistent and standardised data about incarceration rates. Ms Elizabeth Quinn, Assistant Secretary, Legal Assistance Branch, AGD, stated:

I am unclear that there would be a single, logical owner. I understand that ideally you would look to the Commonwealth when eight jurisdictions are doing things differently. I am not sure in the space that we are talking about that there is a logical Commonwealth lead on it, but obviously the Commonwealth has an extremely strong vested interest in the ultimate outcome—which is justice as a whole and Indigenous justice as a key issue. I would think that where we are headed in the data standardisation work [in relation to the provision of legal services], that that becomes the obvious next step that we would be looking—I do not want to say 'leading' because the endgame that you are talking about may be beyond our grasp—but our liaison is with the departments of justice in each state and territory. I think that is an important link, and their being at the table for this sort of data standardisation[.]⁴⁷

4.42 Ms Quinn subsequently advised that the Council of Australian Governments (COAG) Law, Crime and Community Safety Council (LCCSC) would be an appropriate forum for the discussion and negotiation on the standardisation and collection of data.⁴⁸ AGD provided the following information about the LCCSC and its agenda:

The [LCCSC] agenda is comprised of issues identified and sponsored by members. The [LCCSC] consists of ministers with responsibility for law and justice, police and emergency management. Each Australian state and territory, the Australian Government and New Zealand Government is represented by a maximum of two ministers.

A LCCSC member would need to sponsor an item for it to be listed on the agenda.⁴⁹

Justice targets

4.43 In 2008, COAG agreed to six targets to address the disadvantage faced by Indigenous Australians. The targets were:

- close the gap in life expectancy within a generation (by 2031);
- halve the gap in mortality rates for Indigenous children under five by 2018;

46 *Committee Hansard*, 4 April 2016, p. 30.

47 *Committee Hansard*, 4 April 2016, p. 30.

48 *Committee Hansard*, 4 April 2016, pp 30-31.

49 Attorney-General's Department, answers to questions on notice, received 13 April 2016, p. 1.

- ensure access to early childhood education for all Indigenous four year olds in remote communities by 2013;
- halve the gap in reading, writing and numeracy achievements for children by 2018;
- halve the gap for Indigenous students in Year 12 (or equivalent) attainment rates by 2020; and
- halve the gap in employment outcomes between Indigenous and other Australians by 2018.⁵⁰

Background

4.44 Since the introduction of these Closing the Gap targets, there has been ongoing support to include a target to address the overrepresentation of Aboriginal and Torres Strait Islander peoples as both offenders and victims in the criminal justice system, referred to as a 'justice target', in these measures.⁵¹

4.45 In 2009, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Tom Calma AO, stated that the 'emphasis on health, education and employment all speak to a vision of strong Indigenous communities'.⁵² However, Dr Calma continued:

[I]t is a serious omission that no formal targets were set at that point to close the gap in imprisonment rates...

The problem is...that you will not be able to meet these [health, education and employment] targets if you continue to have such a high proportion of the Indigenous population caught up in the criminal justice system because imprisonment compounds individual and community disadvantage.⁵³

4.46 While Dr Calma was of the view that the Closing the Gap targets in themselves would lead to an improvement in life changes and, consequently, a reduction in imprisonment rates, he noted 'this could take a generation at the very least [and for] this reason, specific justice targets are needed now'.⁵⁴

4.47 In June 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in its report *Doing Time – Time for Doing*, noted that the Standing Committee of Attorneys-General (SCAG) were working on justice targets for possible inclusion in the Closing the Gap strategy and recommended:

50 Council of Australian Governments website, Closing the Gap in Indigenous Disadvantage, available at: www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage (accessed 26 November 2015).

51 Australian Human Rights Commission, *Social Justice and Native Title Report 2014*, pp 117-118.

52 Australian Human Rights Commission, *Social Justice Report 2009*, p. 53.

53 Australian Human Rights Commission, *Social Justice Report 2009*, pp 53-54.

54 Australian Human Rights Commission, *Social Justice Report 2009*, p. 54.

[T]hat the Commonwealth Government endorse justice targets developed by [SCAG] for inclusion in the Council of Australian Governments' Closing the Gap strategy. These targets should then be monitored and reported against.⁵⁵

4.48 In July 2011 SCAG met and Ministers discussed the unacceptable rates of incarceration of Indigenous Australians and referred to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Committee's report and recommendations. SCAG agreed to the following:

(a) to significantly reduce the gap in Indigenous offending and victimisation and to accurately track and review progress with a view to reviewing the level of effort required to achieve outcomes [and]

(b) to ask First Ministers to refer to COAG the possible adoption of justice specific Indigenous closing the gap targets, acknowledging that in many instances their relative occurrence are due to variable factors outside the justice system.⁵⁶

4.49 In June 2013, the Senate Legal and Constitutional Affairs References Committee, in its report on the *Value of a justice reinvestment approach to criminal justice in Australia*, noted SCAG's agreement of July 2011 and recommended:

[T]he Commonwealth Government refer to [COAG] the establishment of justice targets for Aboriginal and Torres Strait Islander people as part of the Closing the Gap initiative, directed to reducing the imprisonment rate of Aboriginal and Torres Strait Islander people.⁵⁷

4.50 In August 2013, the then Minister for Indigenous Affairs, the Hon Jenny Macklin MP, announced that the Australian Labor Party was committed to developing three new targets for inclusion in the Closing the Gap Strategy, including a justice target:

The new [justice] target will help to focus national effort to address high rates of offending and victimisation in Indigenous communities.

The target will be developed through a reference group of key Indigenous stakeholders, and in discussions with state and territory governments.⁵⁸

4.51 The then Shadow Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, indicated that the Coalition would provide bipartisan support for the

55 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, June 2011, pp 23-25, 40.

56 Standing Committee of Attorneys-General, *Communiqué*, 21 and 22 July 2011, p. 2 (accessed 1 December 2015).

57 Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, pp 122-123, 125.

58 The Hon Jenny Macklin MP, Minister for Indigenous Affairs, *Closing the Gap*, Media release, 9 August 2013 (accessed 1 December 2015).

proposed new Closing the Gap justice target. Despite offering support for the new target, Senator Scullion cautioned:

I am worried if we get too many targets they will lose their impact and then we could lose focus.⁵⁹

4.52 Despite this bipartisan commitment prior to the last federal election, there has been no progress in this policy area. In the *Social Justice and Native Title Report 2014*, Mr Mick Gooda, the current Aboriginal and Torres Strait Islander Social Justice Commissioner included the response from Senator Scullion, who is now the Minister for Indigenous Affairs, on the reasons why justice-related targets have not been developed:

- The Government considered the inclusion of additional targets in the Closing the Gap framework, including a justice-related target. The Council of Australian Governments agreed to a new target on school attendance at its meeting in May this year.
- The Government does not support the development of more targets than have already been agreed at this time. It considers that the adoption of too many targets may result in a loss of impact and focus for the existing targets.
- The Government is focused on making a practical difference on the ground to the lives of Indigenous Australians. Getting children to school and adults to work is the most effective approach to improving community safety and reducing incarceration.
- The Government will seek to engage with State and Territory governments, Indigenous communities and other stakeholders about what else can be done to achieve better justice-related outcomes.⁶⁰

4.53 At the Senate Finance and Public Administration Legislation Committee's estimates hearing in February 2016, Minister Scullion further explained the reasons that the Government does not support a justice target as part of the Closing the Gap targets:

I think there is a very valid reason for having a target in the justice area, and it is exemplified by the excellent work that the Northern Territory is doing. The Northern Territory government has a justice target—an incarceration justice target. It also has a victim target. I think it is quite a sophisticated way of having the approach. Why should it have that and not [the Commonwealth]? We have absolutely no control. We are not a part of the justice system. The courts are controlled at that level. All of those things are controlled at that level. We can have activities in that area.

Under COAG, I think the Northern Territory government's having the target is the place where those targets should be. It is foolish to say, 'Well, the Commonwealth should adopt a target. Let's have another target.' And then we would all have a bit of a lunch break. That is it. Everyone is happy.

59 Senator the Hon Nigel Scullion, Shadow Minister for Indigenous Affairs, *Labor's Indigenous Affairs plans short on results*, Media release, 9 August 2013 (accessed 1 December 2015).

60 Australian Human Rights Commission, *Social Justice and Native Title Report 2014*, p. 117.

They have called for a target. We have said we will have a target. But it is a nonsense if we are saying, 'We're going to go and do that,' yet we have absolutely no responsibility. We have no legislative process; we have nothing. That is not to say that we cannot do what we are doing now and have a much better working relationship with the states and territories to do whatever we can within our purview, such as ensure we are moving our employment processes towards the jails, and to ensure that we are using world-best practice, that franchised approach to what the states and territories are doing.

Certainly, through this COAG in the next round, as the Prime Minister indicates, we need to ensure that those people have the levers have the targets, but we need to be working very closely with them to ensure that whatever the Commonwealth can contribute in this regard we will. It is not about targets being a problem; it is about who owns the targets. We have no levers. The states and territories have them all. The Northern Territory government is an exemplar in this area, and we should ensure that the remainder of the jurisdictions who have these levers adopt the targets in the same way as their partner in COAG the Northern Territory has done.⁶¹

4.54 Minister Scullion concluded:

Wherever the Commonwealth government can assist, we will. But it is silly to start saying we will give ourselves a target. That undermines the credibility of Closing the Gap. It undermines the credibility of proper targets that we should be held to account for. Of course we will continue to work with the various jurisdictions to provide the very best outcomes in all areas of outcomes for our first Australians.⁶²

Support for justice targets

4.55 In his submission, Mr Gooda referred to the *Social Justice and Native Title Report 2014*, in which he had outlined the case for targets as a performance measurement tool in public policy:

Targets encourage policy makers to focus on outputs and outcomes, rather than just inputs. It is not enough for governments to continue to report on what they do and spend, especially if that appears to be making little positive difference. Targets move us towards accountability and ensure that tax payer's money is being spent in a results-focused way.⁶³

4.56 Mr Gooda explained that it is not targets in the Closing the Gap strategy in and of themselves which lead to changes:

[B]ut the enhanced level of cooperation at the Council of Australian Governments level and targeted increases in funding. However, without the

61 Senate Finance and Public Administration Legislation Committee, *Estimates Hansard*, 12 February 2016, p. 43.

62 Senate Finance and Public Administration Legislation Committee, *Estimates Hansard*, 12 February 2016, p. 43.

63 *Submission 5*, Appendix B, p. 31.

[Closing the Gap] targets in place to guide this work, and a mechanism whereby the Prime Minister annually reports to Parliament against these targets, there is a real risk that our progress would stall.

[The Closing the Gap targets] have made the gap between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians visible. This is exactly what needs to happen on the issue of overrepresentation with the criminal justice system as victims and offenders. I would argue that most Australians know little about this problem, but many would be alarmed at the statistics. Raising the profile of the issue through targets can help build sustained pressure for improvement.⁶⁴

4.57 Mr Gooda strongly urged a return to the pre-election commitment to develop justice targets.⁶⁵ Other submissions also argued for the inclusion of a justice target in the Closing the Gap strategy. For example, Public Interest Advocacy Centre argued:

The current targets in the Closing the Gap framework relate to life expectancy, child mortality, education and employment. The exclusion of justice targets ignores an important indicator of improvement in the current target areas. It also ignores the fact that the disadvantage experienced by Aboriginal and Torres Strait Islander people is multi-layered. For example, for an Aboriginal or Torres Strait Islander young person, reaching a higher level of education, which will impact on whether that young person undertakes university studies and employment, both of which are factors which have been shown to reduce the likelihood he will end up in the criminal justice system. Excluding justice targets is to leave out a significant chunk of policy that must relate to and interact with other policies seeking to address Aboriginal disadvantage.⁶⁶

4.58 The National Association of Community Legal Centres (NACLC) stated:

NACLC considers that justice targets are a vital tool in attempts to address the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system and would facilitate measurement of government initiatives against clear targets. The inclusion of a justice target in the Closing the Gap would also strengthen and support the necessary commitment to justice reinvestment strategies.⁶⁷

4.59 The Indigenous Legal Needs Project submitted:

[J]ustice targets provide benefit by establishing a clear focus and a greater degree of accountability for governments and the work they are undertaking in a justice context. Developing specific justice targets provides measurable outcomes towards which government and others can work in attempting to reduce Indigenous contact with the justice system. Any system of targets

64 *Submission 5*, Appendix B, p. 32.

65 *Submission 5*, Appendix B, p. 37.

66 *Submission 17*, pp 18-19. See also Tenancy WA, *Submission 32*, p. 14; Amnesty International, *Submission 39*, pp 15-16.

67 *Submission 42*, p. 10.

must also, however, incorporate relevant civil and family law-related targets, including given the link the ILNP has identified between Indigenous over-representation and unmet need in these areas.⁶⁸

4.60 National Justice Coalition cautioned that '[j]ustice targets alone will not solve the problem of over-representation of Aboriginal and Torres Strait Islander people in the justice system'.⁶⁹ However:

[Justice targets] are a crucial starting point and tool to drive coordinated action and significant policy focus in this area. Additionally, the implementation of justice targets would provide an important accountability mechanism, raising the profile of the issue which in turn would lead to sustained pressure for improvement.⁷⁰

4.61 NATSILS indicated it had continuously advocated for the introduction of justice targets.⁷¹ In terms of the development of justice targets NATSILS noted:

In order for justice targets to be meaningful they will need broad-based buy in from key Aboriginal and Torres Strait Islander organisations. This should be accompanied by a detailed plan as to how such targets will be achieved. ...NATSILS believes that this plan should embrace the principles and initiatives of justice reinvestment. This approach should entail partnering closely with Aboriginal and Torres Strait Islander organisations (such as NATSILS), in order to incorporate Aboriginal and Torres Strait Islander people as part of the solution to their negative contact with the justice system.⁷²

4.62 The National Justice Coalition recommended that justice targets be aimed at reducing Aboriginal and Torres Strait Islander incarceration rates and creating safer communities, through reduced rates of violence against Aboriginal and Torres Strait Islander people. The National Justice Coalition recommended that justice targets be established which seek to both:

- Close the gap in rates of imprisonment by 2040; and
- Cut the disproportionate rates of violence to at least close the gap by 2040 with priority strategies for women and children.⁷³

4.63 Amnesty International supported these dual targets which include both reduced victimisation and reduced incarceration:

68 *Submission 19*, p. 11.

69 *Submission 40*, p. 18.

70 *Submission 40*, p. 18.

71 *Submission 13*, p. 23.

72 *Submission 13*, pp 23-24.

73 *Submission 40*, p. 18. See also Amnesty International, *Submission 39*, p. 15; Law Council of Australia, *Submission 41*, p. 28.

[Dual targets] would ensure a focus on outcomes that ultimately improve community safety while also recognising the reality that there is significant overlap between Indigenous offenders and victims of crime.⁷⁴

74 *Submission 39*, p. 15. See also Law Council of Australia, *Submission 41*, p. 28.

Chapter 5

Reasons for high Indigenous imprisonment rates

Introduction

5.1 Both the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) and the Aboriginal Legal Service of Western Australia (ALSWA) stated that the reasons for the high imprisonment rates for Aboriginal and Torres Strait Islander persons are 'well documented'.¹ Further, ALSWA commented that the reasons 'have been repeatedly examined by numerous federal and state inquires'.² ALSWA, among others, summarised these factors as follows:

[T]he reasons fall into two main categories. The first category are underlying factors that contribute to higher rates of offending (eg, socio-economic disadvantage, impact of colonisation and dispossession, stolen generations, intergenerational trauma, substance abuse, homelessness and overcrowding, lack of education and physical and mental health issues). The second category is structural bias or discriminatory practices within the justice system itself (ie, the failure to recognise cultural differences and the existence of laws, processes and practices within the justice system that discriminate, either directly or indirectly, against Aboriginal people such as over-policing practices by Western Australia Police, punitive bail conditions imposed by police and inflexible and unreasonable exercises or prosecutorial decisions by police).³

Socio-economic factors

5.2 In his submission, Mr Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, stated that 'it is well understood that extreme levels of poverty and disadvantage faced by Aboriginal and Torres Strait Islander peoples lead to the high incarceration rates'.⁴ Mr Gooda continued:

The bigger picture cannot be ignored: the history of colonisation and dispossession has had enduring effects on Aboriginal and Torres Strait Islander communities and individuals. For example, there is a strong correlation between having a family member removed and arrest and incarceration. The high rate of imprisonment is occurring in the context of poor health, inadequate housing, high levels of family violence, and high levels of unemployment.⁵

1 See National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Submission 13*, p. 16; and Aboriginal Legal Service of Western Australia, *Submission 10*, p. 21.

2 *Submission 10*, p. 21.

3 *Submission 10*, pp 21-22. See also National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Submission 13*, p. 16; and Chief Justice Wayne Martin, *Committee Hansard*, 4 August 2015, p. 30.

4 *Submission 5*, p. 4.

5 *Submission 5*, pp 4-5.

5.3 Mr Gooda referred to the work of Dr Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research, who argued that there are four key risk factors for involvement in the criminal justice system:

- poor parenting (particularly child neglect and abuse);
- poor school performance/early school leaving;
- unemployment; and
- drug and alcohol abuse.⁶

5.4 Available data shows that Indigenous Australians fair significantly worse than non-Indigenous Australians in regard to these four critical factors which influence involvement in crime.⁷ These factors have interrelated detrimental impacts and can be seen as forming a vicious cycle:

Parents exposed to financial or personal stress, or who abuse drugs and/or alcohol are more likely to abuse or neglect their children. Children who are neglected or abused are more likely to associate with delinquent peers and do poorly at school, which in turn increases the risk of involvement in crime. Involvement in crime increases the risk of arrest and imprisonment, both of which further reduce the chances of employment, while at the same time increasing the risk of drug and alcohol abuse. And so the process goes on, a vicious cycle of hopelessness and despair transmitted from one generation of Aboriginal people to the next.⁸

5.5 Reiterating these points, the Law Council of Australia has also outlined the main factors that have been identified as increasing the risk of Indigenous Australians' involvement in crime:

These include criminogenic needs such as substance abuse, overcrowded living environments, unemployment, and poverty. A number of commentators have noted the impact that substance abuse and high levels of unemployment play in the over-representation of Indigenous Australians in prison. Indeed, it has been suggested that "alcohol is a factor in up to 90% of all Indigenous contact with the criminal justice system." A lack of education, or poor school attendance, has also been identified as a factor that increases the risk of offending later in life. High levels of mental illness and disadvantage within a number of Indigenous communities have also been found to increase the risk of Indigenous Australians becoming involved in crime.⁹

6 *Submission 5*, p. 5.

7 Weatherburn, D., *Arresting Incarceration – Pathways out of Indigenous Imprisonment*, Aboriginal Studies Press, 2014, p. 86.

8 Weatherburn, D., *Arresting Incarceration – Pathways out of Indigenous Imprisonment*, Aboriginal Studies Press, 2014, pp 86-87.

9 Law Council of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, submission to the Senate Legal and Constitutional Affairs References Committee for its inquiry into the value of a justice reinvestment approach to criminal justice in Australia, 22 March 2013, p. 15.

5.6 High rates of imprisonment may also lead to the idea that incarceration is a 'rite of passage' within Indigenous communities. As Chief Justice Wayne Martin, of the Supreme Court of Western Australia (WA) explained:

For kids in the leafy western suburbs of [Perth], being sent to detention would be a horrendous prospect. It would be unthinkable. It would bring shame on their family. It would just be their worst nightmare. For Aboriginal kids, it does not have the same effect, because their cousin is in there, their brother has been there and their father has been in prison. It just does not hold the same threat, the same effect, the same effective sanction. Tragically, in some communities, Aboriginal kids see it as just what you do, one of the things that you do as part of growing up—that you end up in detention or prison—because so many family members have been there.¹⁰

5.7 The committee focussed its inquiry on two specific socio-economic factors:

- the impact of fetal alcohol spectrum disorders; and
- strict tenancy policies leading to overcrowding, inadequate housing and homelessness.

Fetal Alcohol Spectrum Disorders

5.8 The socio-economic factors contributing to the high incarceration rates of Aboriginal and Torres Strait Islander people are well-known, including the impact of alcohol abuse. On this point, the committee heard evidence about the increasing awareness of Fetal Alcohol Spectrum Disorders (FASD) and the possible contribution of these disorders to the incarceration of Indigenous offenders.

5.9 In a submission to the inquiry Professors Elizabeth Elliott AM and Jane Latimer, on behalf of the Lililwan Project, provided the following explanation of FASD:

FASD are a group of conditions that may occur when women drink alcohol during pregnancy. Alcohol injures the brain of the developing embryo and fetus and children may demonstrate a range of lifelong behavioural, learning and medical problems.¹¹

5.10 Professors Elliott and Latimer outlined the impairments that may affect a person with FASD:

The impact of alcohol on the brain is substantial – it affects cognition (IQ), memory, executive function, gross and fine motor function, language, behavior, mood and impulse control.¹²

5.11 Gilbert+Tobin Lawyers (Gilbert+Tobin) noted:

The adverse effects of FASD exist along a continuum, with the complete Fetal Alcohol Syndrome (FAS) at one end of the spectrum and incomplete

10 *Committee Hansard*, 4 August 2015, p. 39.

11 *Submission 48*, p. 2.

12 *Submission 48*, p. 2.

features of FAS, including more subtle cognitive-behavioural deficits with no physical features at the other. FASD characteristics change over a person's lifespan and vary from one person to another. The effects of FASD can range from mild impairment to serious disability.¹³

5.12 Gilbert+Tobin added:

[W]ithout a proper diagnosis and early intervention, secondary symptoms (also referred to as secondary disabilities) may be triggered in a person with FASD, including mental illness, dependence on others, disengagement from school, employment problems, inappropriate sexual conduct, alcohol and drug misuse, trouble with the law and legal confinement (in prison or mental health facilities).¹⁴

5.13 Professor Elliot emphasised the importance of evidence-based prevention programs for FASD:

Prevention must be the key because it is too late once the horse has bolted. We can optimise outcomes but we cannot reverse that brain injury. We need evidence-based prevention programs. This involves controlling drug and alcohol use and also improving social disadvantage in communities. We definitely need clinician training. There is a lack of awareness of the impact of alcohol use in pregnancy across Australia, so we need screening tools and diagnostic tools. We are currently developing those with some federal funding.¹⁵

5.14 On the efforts to prevent FASD, Professor Elliott commented:

There is not political will around alcohol in this country. We are amongst the highest consumers in the world. We have our cricketers—our role models—wearing advertising for alcohol. We have alcohol sponsorship of sport. We have children exposed to alcohol at a young age. We have pubs that are open all day and all night. In vulnerable towns like Alice Springs you can get grog cheaply at any time of the day or night. We know what works. We know that we should restrict advertising and promotion, we should increase taxation and pricing, and we should decrease opening hours.¹⁶

Prevalence of FASD

5.15 Amnesty International noted that there is no official diagnostic tool for FASD in Australia, meaning there is little evidence available about the prevalence of the

13 *Submission 49*, p. 4.

14 *Submission 49*, pp 4-5.

15 *Committee Hansard*, 23 September 2015, p. 7.

16 *Committee Hansard*, 23 September 2015, p. 8.

disorders.¹⁷ Professor Elliott indicated that screening and diagnostic tools are currently being developed and this is being funded by the Commonwealth Government.¹⁸

5.16 Professor Elliott explained that the diagnosis for FASD is one of exclusion:

[I]f I see a child I have to make sure that they do not have some other chromosome or abnormality or some sort of syndrome—that they have not had meningitis, they were not extremely pre-term, they have not had head injuries et cetera. And I have to take into account early-life trauma and social circumstances et cetera. But the diagnosis is made through a combination of alcoholic exposure, presence of facial features and growth deficit and then neurodevelopmental problems across about 10 domains of impairment. They will include things like memory, IQ, communication, adaptive behaviour and social communication, and motor skills. We really have to tick at least three of those boxes in addition to alcohol exposure to make that diagnosis, and that usually requires assessment by a paediatrician, definitely a psychologist and sometimes a speech therapist, an occupational therapist and a physiotherapist. Ideally you would have a multidisciplinary team, or access to that team, that is able to give you an assessment, and you can then look at the child in toto and see whether they...tick the boxes.¹⁹

5.17 Professors Elliott and Latimer presented some of the results of their work on the prevalence of FASD in the Fitzroy Valley of WA:

In the Lililwan Project we assessed every 7 and 8 year old residing in any of the 45 very remote communities in the Fitzroy Valley. Similar to non-indigenous women, we found that 55% of Aboriginal mothers drank alcohol during their pregnancy. However 87% drank at high risk levels - commonly 10 or more drinks, 2 or more times each week. Using conservative diagnostic criteria we found that approximately 20% (or 1 in 5 children) had a FASD, one of the highest prevalence rates worldwide.²⁰

5.18 At the public hearing in Sydney, Professor Latimer provided a comparison for the findings of the Lililwan Project in the broader Australian context:

We did our study in the Aboriginal communities [of the Fitzroy Crossing] because those are the women that invited us to come and were honest in telling us about their alcohol consumption. We reported one of the highest prevalence rates in the world, and people were shocked. They could not believe it. There was just alarm and concern. Yet, if we had done a prevalence study in metropolitan Sydney, all the information from overseas suggests that we would have had a prevalence of somewhere between two to five per cent of children falling on the FASD spectrum. There would be absolute alarm and concern about that. But it is because we have started

17 *Supplementary Submission 39*, Amnesty International Australia, *A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia*, May 2015, p. 29.

18 *Committee Hansard*, 23 September 2015, p. 7.

19 *Committee Hansard*, 23 September 2015, p. 10.

20 *Submission 48*, p. 3.

with Aboriginal communities that people think that that is where all the concern is. There is no doubt that those remote communities are high-risk communities. I think that once you start looking across metropolitan Sydney and some of the urban areas people will be shocked to see the impact that alcohol is having on the next generation.²¹

FASD and the criminal justice system

5.19 Professor Latimer described how the symptoms and behaviours of a person with a FASD increase the likelihood of interaction with the processes of the criminal justice system:

[I]n effect, a child or adult may never understand the differences between right and wrong or the consequences of their actions and may not learn from experiences. Due to their impaired cognition and memory, they may not be able to accurately recollect past events and thus may not be deemed a reliable witness. They may confess to something they do not have the capacity to remember. Their poor memory might mean that they forget to come to court or do not recognise the importance of such. They might make a false confession because they are very easily led and keen to please. Their poor impulse control, their aggressive behaviour and their frequent reoffending are common behaviours in this vulnerable population that often results in contact with juvenile justice systems and may lead to incarceration.²²

5.20 In its November 2012 report, *FASD: The Hidden Harm*, the House of Representatives Standing Committee on Social Policy and Legal Affairs, noted the evidence it received on international research demonstrating the high prevalence of youth and adults with FASD in the criminal justice system:

The Alcohol and Other Drug Council of Australia (ADCA) cited statistics from the National Organization on Fetal Alcohol Syndrome in the US, which stated that 61 per cent of adolescents and 58 per cent of adults with FASD in the US have been in trouble with the law, and that 35 per cent of those with FASD over the age of 12 had been incarcerated at some point in their lives. Another US study found that 60 per cent of people with FASD have been in contact with the criminal justice system.²³

5.21 In terms of the prevalence of FASD among the prison population in Australia, the joint submission by the North Aboriginal Justice Agency and the Central Australian Aboriginal Legal Aid Service, referred to statistics from Tennant Creek:

The [Legislative Assembly of the Northern Territory's Select Committee on Action to Prevent FASD] cited a study conducted by the Aboriginal Health Service in Tennant Creek in 2011, Anyinginyi Health Aboriginal Corporation, in conjunction with a Tennant Creek Youth Service

21 *Committee Hansard*, 23 September 2015, p. 8.

22 *Committee Hansard*, 23 September 2015, p. 1.

23 House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm*, November 2012, p. 137. See also Gilbert+Tobin Lawyers, *Submission 49*, p. 5.

organisation into FASD. The health service used the Canadian Medical Association's to screen 220 clients for FASD and found 70% exhibited one or more indicator for FASD, and of those youth, all had been recidivist offenders in the criminal justice system.²⁴

5.22 There does not appear to be further data on the prevalence of FASD among people in prison, or otherwise in contact with the criminal justice system in Australia. However, Gilbert+Tobin referred to anecdotal evidence in Australia that suggests people with FASD are over-represented in the Australian legal system:

The First Peoples Disability Network, for example, has stated that it is not uncommon to meet Aboriginal people who are either in jail or who are in contact with the criminal justice system who it would appear have some form of FASD. Similarly, Legal Aid NSW has noted that the behaviours that are symptomatic of FASD are what bring people with FASD to the attention of the criminal justice system.²⁵

5.23 On this point, Professor Latimer stated:

[I]n our opinion, many Aboriginal and Torres Strait Islander people who come into contact with the justice system do so because they have a health condition associated with developmental delay; namely one of the foetal alcohol spectrum disorders. Mandatory sentencing regimes are inappropriate for this population of Aboriginal and Torres Strait Islander people because they fail to acknowledge that the FASD should be managed by health professionals rather than the justice system.²⁶

5.24 During a Senate Legal and Constitutional Affairs References Committee's inquiry in 2013, Dr Raewyn Mutch, a Post-Doctoral Research Fellow with the Telethon Institute for Child Health Research, commented on the negative aspects of detention for a young person with FASD:

If someone has a high sensory drive, which is quite common among children and youth with FASD, they may have behaviours as a result of that—sensory seeking behaviours—which may make them invade people's personal body space or reach for substances. But, if you put someone with a high sensory drive like that in lockdown for 12 or 18 hours a day, that is not going to help them at all. That is going to upregulate them; it is not going to calm them down.

...

Some of the routine management protocols for dealing with youth do not necessarily work with people with this type of neurocognitive impairment. If that were understood then they would be managed differently, and if they

24 *Submission 31*, p. 14.

25 See Gilbert+Tobin Lawyers, *Submission 49*, pp 5-6. See also House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm*, November 2012, pp 136-139.

26 *Committee Hansard*, 23 September 2013, p. 2. Mandatory sentencing regimes are discussed later in this chapter in the context of structural bias.

were managed differently then the outcome would be more effective and more helpful.²⁷

5.25 Dr Mutch continued:

Similarly, they do not respond to punitive measures. They do not understand punitive measures; they respond to positive measures. They do not necessarily respond to sequential instructions; they need singular instructions. They do not understand the fact that they have done something wrong on a Saturday morning and they get punished for it on Monday; they will not understand that. They do not necessarily generalise their learning. If they learn in the morning how to do something and then in the afternoon they do not replicate that, that behaviour is presumed to be wilful, naughty and purposeful, but in fact it is not. The underlying brain behaviour is that they did not understand or they cannot remember and generalise.²⁸

Previous inquiries

5.26 As can be seen from the evidence above, this inquiry is not the first time that a parliamentary committee has considered the issue of FASD and the incarceration of Indigenous offenders. The work and recommendations of those previous committees has significantly contributed to the recognition of FASD and the impact that it has on incarceration and provides the context for the current policy framework. Appendix 4 summarises the work and recommendations in this area from the following inquiries:

- House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011;
- House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012;
- Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013; and
- House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015.

Current situation

5.27 In answers to questions on notice the Department of Health provided the committee with an update on the current status of the National FASD Action Plan.²⁹ The Commonwealth Government is spending \$9.2 million on FASD-related programs

27 Senate Legal and Constitutional References Committee, Inquiry into the value of a justice reinvestment approach to criminal justice in Australia, *Committee Hansard*, 17 April 2013, p. 5.

28 Senate Legal and Constitutional Affairs References Committee, Inquiry into the value of a justice reinvestment approach to criminal justice in Australia, *Committee Hansard*, 17 April 2013, p. 5.

29 See Department of Health, *Answers to questions on notice: Question No. 1*, received 8 April 2016.

and initiatives, including \$500,000 on the finalisation and dissemination of the National FASD Diagnostic Tool, which will be ready for release in mid-2016.³⁰ The Department of Health stated:

The utilisation of the soon-to-be finalised diagnostic tool will assist the Department in improving data collection regarding prevalence.³¹

5.28 The Department of Health also indicated that issues regarding improvements to data collection are also the focus of discussions of the FASD Technical Network.³²

5.29 The Commonwealth is also providing a number of projects to support pregnant woman with alcohol dependence, including:

- Funding of \$414,000 to the Foundation for Alcohol Research and Education to further promote and evaluate the What Women Want to Know Project. This project is due to cease in June 2016.
- Funding of \$118,745 to National Drug and Alcohol Research Centre to evaluate the best practice resource for drug and alcohol dependent women. This project is due to cease in June 2016.
- Funding of \$145,000 to NOFASD Australia to provide services to individuals and families affected by FASD to 30 June 2016.³³

5.30 In terms of specific measures targeted to prevent and manage FASD in Indigenous communities, the Department of Health noted \$4 million had been provided for the following project:

The Menzies School of Health Research has been contracted to develop a FASD Prevention and Health promotion resource. The resource was developed by the Ord Valley Aboriginal Health Service. The resource will be rolled out nationally through the New Directions: Mother and Babies Programme. Services will be provided with training and support as part of the implementation. An evaluation will also be undertaken.³⁴

5.31 In terms of increasing awareness regarding the effect of consuming alcohol during pregnancy, the Department of Health stated:

The Foundation for Alcohol Research and Education (FARE) and *DrinkWise* have each been funded by the Department to promote the 2009 National Health and Medical Research Council (NHMRC) Australian Guidelines to Reduce Health Risks from Drinking Alcohol (Alcohol Guidelines) message that for women who are pregnant, planning a pregnancy, or breastfeeding, not drinking is the safest option.³⁵

30 Department of Health, *Answers to questions on notice: Question No. 1*, received 8 April 2016.

31 Department of Health, *Answers to questions on notice: Question No. 7*, received 8 April 2016.

32 Department of Health, *Answers to questions on notice: Question No. 7*, received 8 April 2016.

33 Department of Health, *Answers to questions on notice: Question No. 1*, received 8 April 2016.

34 Department of Health, *Answers to questions on notice: Question No. 1*, received 8 April 2016.

35 Department of Health, *Answers to questions on notice: Question No. 4*, received 8 April 2016.

5.32 Funding to *Drinkwise* was for 2011-12 to 2012-13 to:

[D]evelop 'point of sale' information for consumers at liquor retailers, clubs, pubs and hotels to supplement and to explain the new consumer messages on alcohol labels. The project was designed to engage retailers and producers in providing responsible messages to consumers about reducing harmful drinking, particularly during pregnancy and to promote and explain the pregnancy warning label on alcohol products.³⁶

5.33 Funding of \$595,000 was provided to FARE's 'What Women Want to Know Project' for the 2011-12 to 2012-13 period:

[W]ork with health professionals to support their role in raising awareness and to have meaningful conversations with women about the risks of consuming alcohol during pregnancy and to give the consistent message that no alcohol is the safest option when planning a pregnancy, during pregnancy and while breastfeeding.³⁷

Tenancy issues

5.34 Homelessness, inadequate housing and over-crowded housing, are part of the broader social and economic disadvantage which have the potential to contribute to higher rates of Aboriginal and Torres Strait Islander people in incarceration. Given this, evidence to the committee highlighted the disproportionate impact that policies such as WA's Disruptive Behaviour Management Strategy, or 'three strikes' policy, have on homelessness of Aboriginal and Torres Strait Islander people:

The three strikes policy is contributing to higher rates of eviction for Western Australian tenants in comparison to other states, and high rates of eviction from public housing for Aboriginal people. We understand that 402 households who received strikes have been moved on from their Department of Housing home in the 3 years from May 2011 – May 2014. Half of these evictions resulted from proceedings for 3 strikes, the other half of the evictions arose from terminations for rent arrears, tenant liability, water bills. Our understanding is that tenants who receive strikes are scrutinised for other grounds of terminations as well. In our view this is not consistent with an approach of seeking to sustain tenancies.³⁸

5.35 Tenancy WA's submission continued:

The issue of over crowding and cultural obligation to accommodate family members in need is seriously compounded by the disruptive behaviour management strategy, commonly referred to as 'three strikes'. Three strike evictions of Aboriginal tenants has a real propensity to snowball. If one

36 Department of Health, *Answers to questions on notice: Question No. 4*, received 8 April 2016.

37 Department of Health, *Answers to questions on notice: Question No. 4*, received 8 April 2016. The Department of Health notes that a further \$414 000 in funding was provided to FARE for the period 2013-2014 to 2016-2017 for the continuation of the 'What Women Want to Know Project', although this program is due to cease in June 2016, see *Answers to questions on notice: Question No. 1 and 4*, received 8 April 2016.

38 TenancyWA, *Submission 32*, p. 10.

family is evicted for three strikes, often they then seek accommodation with extended family. The family who take them in are then in violation of the [WA Department of Housing's] overcrowding policies and are also more at risk of having strikes for noise and disturbance complaints. Too often this leads to further evictions, and further homeless people seeking accommodation with extended family. The argument that people should not put themselves at risk of strikes and eviction by taking in family members (who might otherwise be homeless) fails to take into account the cultural obligations and expectations that exist amongst Aboriginal families, and fails to acknowledge the very real risks to children living on the streets.³⁹

5.36 Tenancy WA noted the link between homelessness and incarceration, and also stated '[h]omeless adults may commit crimes for the purposes of being incarcerated'.⁴⁰ Tenancy WA provided the following case study:

In the worst example, we know of 6 tenants of the same extended family who all had their tenancies terminated. Each termination worsened the overcrowding at other family member's households, and the evictions snowballed. Some of these clients are now in prison.⁴¹

5.37 At the public hearing in Perth, Mrs Mary McComish, Director of the Daydawn Advocacy Centre, informed the committee that often the tenants have a defence:

Yet we find when we sit down and talk to them that they have a defence; they can defend these actions: it was not their fault that there was disruptive behaviour, because relatives had come around and smashed up the house, or a violent ex-partner had come over and smashed up the house, or they had gone away up north for a funeral and someone else had moved into the house unknown to them and caused trouble with the neighbours and caused complaints.

These eviction applications can be defended, but they turn into big trials; they are big matters. They are not just small matters in the magistrate's court. You need legal expertise and quite a lot of work and preparation. I am very concerned that a lot of people are being evicted from their homes needlessly, that they could be defended and that it is leading to all these other ripple-effect consequences that we see in incarceration rates and other Aboriginal disadvantage.⁴²

5.38 Mrs McComish also emphasised that the strikes are not able to be appealed:

If you have a high water bill or a tenant liability bill, you can appeal to their three-tier appeal system, but if you have a strike that you do not think is fair or right you cannot appeal. It is just a very strict policy.⁴³

39 *Submission 32*, p. 11.

40 *Submission 32*, pp 6-7.

41 *Submission 32*, p. 11.

42 *Committee Hansard*, 4 August 2015, p. 48

43 *Committee Hansard*, 4 August 2015, p. 49.

Structural bias

5.39 In his submission, Chief Justice Martin commented on 'systemic discrimination' which contributes to the overrepresentation of Indigenous people in incarceration:

The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people. Aboriginal people are also significantly over-represented amongst those who are detained indefinitely under the Dangerous Sexual Offenders legislation. So at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.⁴⁴

5.40 Chief Justice Martin explicitly stated that he did not accept 'that the people in the system are racist'. However, Chief Justice Martin did observe 'there are nevertheless tilts in the system which work significantly against Aboriginal people and which I think have contributed to their overrepresentation'.⁴⁵

5.41 As noted in Chapter 4, the imprisonment rate for Aboriginal and Torres Strait Islander people varies between the different jurisdictions. Chief Justice Martin's comments relate to the overrepresentation of Indigenous people incarcerated in WA, which has the highest imprisonment rate for Aboriginal and Torres Strait Islander people at 17 times the rate for non-Indigenous people. In relation to the variation in overrepresentation between different jurisdictions, NATSILS stated:

Crime statistics (e.g., rates of arrest and rates of imprisonment) [do not] measure prevalence of crimes or who are responsible for committing those crimes. Instead crime statistics measure the rate and/or demographics of those people who are caught and punished for criminal behaviour.

If higher rates of offending among Aboriginal and Torres Strait Islander people were the sole cause of higher incarceration rates then there should be no difference in the rate of overrepresentation between different states and territories.⁴⁶

5.42 The remainder of this chapter considers some of the structural biases which contribute to the overrepresentation of Indigenous Australians in prison, specifically:

- mandatory sentencing regimes;

44 *Submission 1*, pp 8-9.

45 *Committee Hansard*, 4 August 2015, p. 31.

46 *Submission 13*, p. 16.

- the refusal of bail and the imposition and enforcement of onerous bail conditions; and
- over-policing.

The effect of mandatory sentencing regimes on Indigenous incarceration rates

5.43 The Law Council of Australia (Law Council), in a discussion paper, provides the following definition of mandatory sentencing:

Mandatory sentencing regimes direct courts as to how they must exercise their sentencing powers. These laws require offenders to be automatically imprisoned – or in some cases detained for a minimum prescribed period for particular offences.⁴⁷

5.44 The types of offences which attract a mandatory sentence vary among jurisdictions in Australia. The Law Council provided the following summary as at May 2014:

- Western Australia for repeat adult and juvenile offenders convicted of residential burglary, grievous bodily harm or serious assault to a police officer;⁴⁸
- the Northern Territory for murder, rape and offences involving violence;
- New South Wales for murder of a police officer or where a person dies as a result of an assault and the offender was intoxicated;
- Queensland for certain child sex offences, murder, and motorcycle gang members who assault police officers or are found in possession or trafficking in firearms or drugs;
- South Australia for certain serious and organised crime offences and serious violent offences;
- Victoria for an offence of intentionally or recklessly causing serious harm to a person in circumstances of gross violence; and
- the Commonwealth for certain people smuggling offences.⁴⁹

5.45 Submissions and witnesses outlined a number of objections to mandatory sentencing regimes. For example, the Law Council listed the following concerns:

- potentially results in harsh and disproportionate sentences where the punishment may not fit the crime;

47 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing, May 2014*, p. 9.

48 Since May 2014, the Western Australian Parliament has passed the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* which introduced mandatory minimum penalties of up to 15 years for people who committed a serious crime, such as rape or murder, during an aggravated burglary, see Law Council of Australia, *Submission 41*, p. 14.

49 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing, May 2014*, p. 9. Since May 2014, WA has passed legislation expanding the mandatory sentencing regime in that state, namely the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA), which is discussed further later in this chapter.

- potentially increases the likelihood of recidivism;
- wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole;
- dangerously displaces direction to other parts of the criminal justice system, most notably law enforcement agencies and prosecutors;
- results in significant economic costs to the community; and
- is not consistent with Australia's commitments under the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child*.⁵⁰

5.46 Some submissions argued that there is no evidence that mandatory sentencing regimes work as a deterrent. For example, NATSILS stated:

[I]n places in Australia where mandatory sentencing schemes are applied there is a lack of evidence as to whether they actually achieve the desired deterrent effects. In general however, there is little evidence that longer prison sentences are effective in deterring would-be criminals, especially disadvantaged and vulnerable persons, because higher penalties are highly unlikely to influence persons with mental impairment, alcohol and/or drug dependency or those who are socially and economically disadvantaged.⁵¹

5.47 The UNSW Law Society commented that 'mandatory sentencing undermines the essential role of judicial discretion in sentencing'.⁵² The UNSW Law Society continued:

Judicial discretion in sentencing allows for a non-arbitrary judgement to be made about the appropriateness of sentence after the offence has been committed, with knowledge of the full circumstances. Mandatory sentencing reverses this principle. Parliament, often motivated by "tough on crime" political aims, prescribes the punishment of the offence before it has even taken place, leaving no room for the individuality of circumstances to mitigate sentence.⁵³

Disproportionate impact on Indigenous people

5.48 Submissions noted the disproportionate impact that mandatory sentencing regimes have on Indigenous people. For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda, stated:

Mandatory sentencing regimes, particularly those which prescribe imprisonment for property offences as in Western Australia and the Northern Territory, have a disproportionate impact on disadvantaged, vulnerable people. Further, they impact on 'low level' offenders

50 *Submission 41*, pp 12-13.

51 *Submission 13*, p. 14. See also: Queensland Association of Independent Legal Services, *Submission 8*, p. 14.

52 *Submission 14*, p. 5.

53 *Submission 14*, p. 5.

disproportionality, as more serious offenders would be sentenced to imprisonment regardless of the mandatory sentencing laws.

It is therefore unsurprising that mandatory sentencing has a disproportionate impact on Aboriginal and Torres Strait Islander people, in particular young people.⁵⁴

5.49 The National Association for Community Legal Centres argued:

...mandatory sentencing laws are arbitrary and undermine basic rule of law principles by preventing courts from exercising discretion and imposing penalties tailored appropriately to the circumstances of the case and the offender. Of particular concern is the disproportionate impact of such laws on Aboriginal and Torres Strait Islander peoples in light of the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.⁵⁵

5.50 Liberty Victoria, in outlining its opposition to mandatory sentencing, also referred to the disproportionate impact on Indigenous people:

Mandatory sentencing rails against long held principals of taking into account an accused's circumstances in sentencing and the value of judicial discretion. This will have a particularly deleterious effect on those impacted by mental health issues and histories of gross disadvantage. Further, mandatory sentencing disproportionately [a]ffects Aboriginal and Torres Strait Islander people both as a result of the over representation of these groups in the justice system but in terms of the prevalence of ongoing systemic and social disadvantage leaving these communities on the very fringes of society. There is little to no evidence to suggest that high police presence reduces rates of crime, yet Aboriginal communities continue to experience greater policing. Further, there is no evidence to support the deterrent effect or the beneficial impact of mandatory sentencing.⁵⁶

5.51 Redfern Legal Centre used the example of mandatory sentencing legislation in NSW for alcohol-fuelled violence to illustrate the disproportionate impact:

We have concerns that the recent introduction of mandatory sentencing laws in NSW targeting alcohol related violence in the Sydney CBD will have an unintended disproportionate impact on the ATSI community due to the high rates of alcohol related violence within this community. In 2010, [Bureau of Crime Statistics and Research] NSW noted that alcohol was a factor in a high proportion of assaults committed by Indigenous offenders. The introduction of mandatory custodial sentences for assaults committed under the influence of alcohol is therefore highly likely to have a significant impact on rates of incarceration of Indigenous offenders. These concerns reflect many of the concerns put forward by Indigenous Legal Assistance

54 *Submission 5*, p. 5.

55 *Submission 42*, p. 8.

56 *Submission 44*, p. 3.

schemes at the time the proposed laws were introduced, as well as forming part of the basis for the Law Society's opposition to the scheme.⁵⁷

5.52 In its policy discussion paper on mandatory sentencing, the Law Council provided a number of examples which it described as 'anomalous or unjust cases where mandatory sentencing has applied':

- a 16-year-old with one prior conviction received a 28-day prison sentence for stealing one bottle of spring water;
- a 17-year-old first time offender received a 14-day prison sentence for stealing orange juice and minties;
- a 15-year old Aboriginal boy received a 20-day mandatory sentence for stealing pencils and stationery. He died while in custody; and
- an Aboriginal woman and first-time offender who received a 14-day prison sentence for stealing a can of beer.⁵⁸

5.53 Several submissions noted the United Nations has recommended that Australia abolish mandatory sentencing due, partly, to the discriminatory impact on Indigenous Australians.⁵⁹

Western Australia

5.54 In September 2015, the WA Parliament passed legislation expanding the mandatory sentencing regime for that jurisdiction. Prior to the passage of that legislation, Ms Tammy Solonec, Indigenous Rights Manager, Amnesty International, summarised for the committee the proposed new laws in WA:

One of the reasons we are really concerned about the home burglary bill before the WA parliament is it will extend mandatory sentencing to 16- and 17-year-olds. That will be three years of detention if it is considered in the circumstances of 'aggravated'. Aggravated can be in circumstances when it is with a whole bunch of kids, which we know a lot of kids are doing.⁶⁰

5.55 Ms Solonec gave the following example of the potential operation of the proposed law:

If this law goes through, a 16-year-old girl who is pressured by an older boyfriend to stand guard but does not do anything wrong—she is caught up in all of that—will be mandatorily detained for three years, which means she spends at least one year in an adult prison. That could be her first

57 *Submission 30*, p. 6

58 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing*, May 2014, p. 11.

59 See, for example, Mr Mick Gooda, Aboriginal and Torres Strait Islander Justice Commissioner, *Submission 5*, p. 6; Amnesty International, *Supplementary Submission 39, A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia*, May 2015, p. 17; National Justice Coalition, *Submission 40*, p. 9; Law Council of Australia, *Submission 41*, p. 12.

60 *Committee Hansard*, 4 August 2015, pp 6-7.

offence. There would be no mitigating circumstances taken into account because it is mandatory sentencing.⁶¹

5.56 Ms Solonec outlined her concerns with the proposed law:

So we have real concerns about that. Western Australia is the only jurisdiction that has these tough laws. And, surprise, surprise, we are the jurisdiction that locks up more kids than anywhere else.⁶²

There is a real need to look at that. I think there is a real need to look at these particularly young children. For a start, 10- or 11-year-olds should not be in prison at all under the convention. Secondly, they are so vulnerable—they are babies. They do not need to be put into jail with older kids. We really do need strategies for those younger children.⁶³

5.57 NATSILS outlined the anticipated impact of the bill:

It has been stated by the Western Australian Corrective Services Commissioner that as a consequence of these amendments it is anticipated that an extra 60 juveniles and 208 adults over three years will be imprisoned or detained at a cost of \$93 million dollars.⁶⁴

5.58 NATSILS continued:

NATSILS is gravely concerned that the vast majority of these will be Aboriginal and Torres Strait Islander people and that the extension of mandatory sentencing laws will only serve to increase the already unacceptable level of overrepresentation of Aboriginal and Torres Strait Islander peoples in custody in Western Australia.⁶⁵

5.59 Chief Justice Martin informed the committee there is 'very good reason to believe that the [new] mandatory sentencing legislation...will have a significant effect upon incarceration rates, particularly amongst juveniles'.⁶⁶

Unintended consequences of mandatory sentencing

5.60 Chief Justice Martin also spoke about 'unintended consequences' of mandatory sentencing legislation, specifically: the non-reporting of offences; the downgrading of charges; and fewer guilty pleas in court. Chief Justice Martin gave the following examples to illustrate his point:

I will give you an example from the mental health area...When the assaulting the public officer legislation was introduced, there was enormous concern within that community of mental health carers. They were very concerned about notifying police of violent behaviour on the part of the

61 *Committee Hansard*, 4 August 2015, p. 7.

62 *Committee Hansard*, 4 August 2015, p. 7.

63 *Committee Hansard*, 4 August 2015, p. 7.

64 *Submission 13*, p. 15.

65 *Submission 13*, p. 15.

66 *Committee Hansard*, 4 August 2015, p. 32.

family member that they were caring for in case the police turned up and were then assaulted as a result of which the family member would stare down the barrel of a mandatory sentencing term. So it discourages reports.

Secondly, it results in the downgrading of charges so that I am sure that the low number of charges of assaulting a public officer over the last three years has come about because police, when they are reviewing the charge, say, 'This is not an appropriate case for a mandatory sentence, so we'll forget the assault on the public officer.' So the offender is not actually being charged with the offence that best suits the conduct to avoid the consequences.

The third consequence is that there are many fewer pleas of guilty in relation to offences covered by mandatory sentencing. That has two consequences: first of all, it increases the stress on victims who then have to participate in a trial process they would not otherwise have to participate in; and, secondly, it puts a lot of stress on the system, because we have to undertake a lot of trials that we would not have to undertake.⁶⁷

5.61 The National Aboriginal Family Violence Prevention Legal Services Forum noted that the prospect of mandatory sentencing may deter reporting in cases of family violence:

In the context of family violence, mandatory sentencing can have significant adverse impacts on victims. For example, there is a risk that mandatory sentencing could deter reporting from Aboriginal and Torres Strait Islander victims/survivors due to pressures from their community not to report a perpetrator who would be imprisoned as a result. Rather than a focus on imprisonment, a greater emphasis should be placed on early intervention and prevention activities that focus on education before offending begins and/or escalates.⁶⁸

Bail laws

5.62 Submissions and witnesses provided evidence on the refusal of bail, strict bail conditions and stringent enforcement of bail conditions and the impact on the incarceration rates of Aboriginal and Torres Strait Islanders, and in particular on young offenders.

5.63 According to the Australian Bureau of Statistics, at 30 June 2015, Aboriginal and Torres Strait Islander people accounted for 27 per cent of all unsentenced prisoners.⁶⁹ Law Council of Australia noted:

67 *Committee Hansard*, 4 August 2015, p. 32.

68 *Submission 46*, p. 23.

69 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. See also the joint submission of the North Australian Aboriginal Justice Agency and the Central Australian Aboriginal Legal Aid Service, which states: 'The overwhelming majority of NT prisoners are serving short sentences or are in custody having been refused bail. One-quarter of prisoners are unsentenced or on remand having been refused bail', *Submission 31*, p. 9.

[In] several jurisdictions, a very high proportion of Indigenous prisoners are being held on remand for lengthy periods of time, indicating that bail laws in those jurisdictions may be significantly inflating the rate of imprisonment.⁷⁰

5.64 Chief Justice Martin noted the factors taken into account in the decision of whether or not to grant bail contribute to Aboriginal and Torres Strait Islander people being overrepresented in this category of prisoners:

There is no doubt about that, because the criteria we do use, like prior offending, like stable employment, like a stable place of residence, like mental health issues—all of those criteria result in Aboriginal people being overrepresented amongst those who are denied bail, and move-on notices are much more often issued to Aboriginal people than to non-Aboriginal people.⁷¹

Young offenders

5.65 Specifically in relation to young offenders, NATSILS observed that there have been:

An increasingly rigid approach to bail which has had a particularly discriminatory effect on Aboriginal and Torres Strait Islander young people, causing an increase in the number of Aboriginal and Torres Strait Islander young people on remand[.]⁷²

5.66 Amnesty International provided the following data on the refusal of bail for Indigenous youth:

Indigenous young people are also more likely than non-Indigenous young people to be held in detention on remand due to inadequate bail accommodation options and other factors. On average 57 per cent (250 out of 437) of all unsentenced young people in detention from June 2013 to June 2014 were Indigenous.⁷³

5.67 In a factsheet, Balanced Justice outlined the negative impact that being denied bail had on young people:

[C]hildren held in remand report feeling isolated and frustrated by the experience of being denied bail and held on remand; they feel as if they have already been found guilty[.]⁷⁴

5.68 The Public Interest Advocacy Centre (PIAC) referred to work by the Australian Institute of Criminology (AIC):

70 *Submission 41*, p. 16. See also Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 5*, Appendix A, p. 28.

71 *Committee Hansard*, 4 August 2015, pp 30-31.

72 *Submission 13*, p. 18.

73 *Submission 39*, p. 11.

74 See Queensland Association of Independent Legal Services, *Submission 8*, Attachment: Balanced Justice, *Detention and bail for children*, p. 2.

In a study of bail conditions imposed on young people across all Australian jurisdictions, the Australian Institute of Criminology found that bail conditions were unduly onerous, difficult for young people to adhere to and often appear 'arbitrary and unrelated to the young person's offending'.

...

Excessive monitoring of bail conditions was also reported to the AIC, which found an Australia-wide practice of 'overzealous policing of young people's bail compliance and in some cases, a 'zero tolerance' approach to bail breaches'.⁷⁵

5.69 The committee also received a number of examples of stringent bail compliance checking leading to 'technical breaches' of bail conditions. Ms Solonec, provided the following example to illustrate the impact of policing of bail conditions in WA:

We had one situation with a family up in Broome where the boy was put on a curfew which was quite inflexible. The family chose to take him up to One Arm Point for Christmas. The boy did not have a choice. He went with the family, which breached his bail, and he was then sent down to Perth, to Hakea, to a men's prison. It was not even his fault. There needs to be better communication and there needs to be a little bit more flexibility, especially if you are looking at the Christmas period and weekends and especially if the child does not have a say in a lot of these things and they are detained as a result.⁷⁶

5.70 Ms Solonec also gave evidence about the 'heavy enforcement' of curfews:

[W]e have heard these mainly coming from the Kimberley where police will ensure that the child is complying with the curfew by staying in their house. They will knock on the doors of the house, shine torches through the windows and insist that the child present themselves at all forms of the night, waking up all of the household members, including children and elderly people.⁷⁷

5.71 Ms Solonec stated that these practices were discouraging people from becoming the 'responsible adult' necessary in order for a child to get bail:

We had one family say that they did not want the boy who was on bail to be left with them, because the police kept coming around the house and harassing everyone. These sorts of conditions are preventing responsible persons from taking the children. They then either have to find a bail hostel—which there are not many of—or the kids come down to Perth to detention. That is a real issue.⁷⁸

5.72 Balanced Justice cited a similar scenario which occurred in New South Wales:

75 *Submission 17*, pp 11 and 12.

76 *Committee Hansard*, 4 August 2015, p. 5.

77 *Committee Hansard*, 4 August 2015, p. 5.

78 *Committee Hansard*, 4 August 2015, pp 5-6.

In NSW a young girl was arrested for breaching a bail condition which required her to be home by 9.00 p.m. She was arrested as she was making her way home when the train pulled in at five minutes past nine. She spent at least a month in custody, even though when convicted she did not receive a custodial sentence for the shoplifting charge. The young girl gave up her schooling after these events.⁷⁹

5.73 In its supplementary submission, Amnesty International commented on the consequences of these bail condition breaches:

A representative of the ALSWA in Broome noted that by the time Aboriginal young people attend court, bail conditions mean they may have already received a punishment far greater than the offence could attract, or that an adult would attract for the same offence. An example given by another ALSWA lawyer was where a young person is arrested for stealing goods below the value of \$1000, for which detention is not an option, released by police on bail with a curfew, which would not be imposed on an adult. The curfew is vigorously monitored and the young person is then arrested for failing to comply with it and could ultimately end up in detention on remand.⁸⁰

5.74 Further, Balance Justice noted:

It is important to note that there is no evidence that monitoring, arresting and detaining young people for breaches of their bail condition reduces re-offending among juvenile offenders. The more likely outcome of a 'breach offence' is the further criminalisation of the child and an increased likelihood of the child being placed in custody, thereby further entrenching the child in the criminal justice system.⁸¹

5.75 However, Chief Justice Martin argued that there have been some positive steps taken recently in relation to bail for young offenders in WA:

Accommodation is now available [in the Pilbara, Kimberley and the Goldfields] for children who intersect with the law so they are not now being flown to Perth and put in detention simply because there is nowhere safe for them to live.

In the metropolitan area there is another programme for children which involves looking very hard to locate a responsible adult who then provides appropriate care and supervision.⁸²

79 Queensland Association of Independent Legal Services, *Submission 8*, Attachment: Balanced Justice, *Detention and bail for children*, p. 3.

80 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 36.

81 Queensland Association of Independent Legal Services, *Submission 8*, Attachment: Balanced Justice, *Detention and bail for children*, p. 2.

82 *Submission 1*, p. 12.

Over-policing

5.76 In its submission, the Redfern Legal Centre (RLC) noted that over-policing was a key cause of the high incarceration of Indigenous people. RLC stated that policies which target individuals granted noncustodial sentences, such as good behaviour bonds and the targeting of those on bail through frequent bail compliance checks, can result in higher levels of arrest, contributing to higher incarceration rates.⁸³ At the public hearing, Mr David Porter, Senior Solicitor, RLC, referred to one such policy, New South Wales' Suspect Target Management Plan (STMP):

The STMP is a policy rather than legislation. It is an internal police policy. [The police] formulate a list of targeted offenders within any catchment area. They do not need to apply for any extra powers. They have been given sufficient discretionary powers under legislation that they can provide someone with an overwhelming level of attention, and the primary purpose is to get that person off the streets and it does not really matter what for. That is the way in which the policy is framed.⁸⁴

5.77 RLC's submission explained the impact of the STMP policy:

[STMP] encourages the targeting of previous offenders, including those on good behaviour bonds or other alternatives to imprisonment, as well as increasing bail compliance checks, in order to increase efficiency within the policing system. While we recognise that prioritising previous offenders improves the efficiency of police resources, it is our observation that there has been no differentiation between those who have been convicted of minor offences, such as property or traffic offences, and those convicted of violent offences. This has led to individuals on good behaviour bonds for minor offences feeling harassed, negatively affects their relationship with police, and increases the risk of further offending and incarceration through breach of conditions.⁸⁵

5.78 RLC noted that the anecdotal evidence of their clients reporting increased use, and overuse, of proactive police powers is reflected in statistics collected by the NSW police:

Between 2000 and 2010 the use of the 'move on' power increased from 22,531 to 77,391[;]

Between 2005 and 2010 the number of bail compliance checks grew from 3541 to 88,617[;]

Between 2000 and 2010 the number of person searches increased from 18,238 to 200,132.⁸⁶

83 *Submission 30*, p. 6.

84 *Committee Hansard*, 23 September 2015, p. 53.

85 *Submission 30*, pp 6-7.

86 *Submission 30*, p. 7.

5.79 The Public Interest Advocacy Centre (PIAC) also described changes to policing practices in recent years which have contributed to the increasing contact Aboriginal and Torres Strait Islander people have with the criminal justice system:

In PIAC's experience, this shift to a proactive policing model has had a largely detrimental impact on Aboriginal and Torres Strait Islander people, drawing them into the criminal justice system when it is unnecessary, leading to largely irreversible and adverse consequences for the individual, his or her family and indeed whole communities. It has also continued to cement the precarious relationship between Aboriginal young people and adults with the police officers in their communities. Aboriginal Australians report a high level of discrimination across a range of settings, with one of the highest occurrences being when interacting with police, security people, lawyers or in a court of law. The very perception of discrimination has an impact on Aboriginal and Torres Strait Islander people's well being; research has shown that just a perception can lead to changes in job seeking behaviour or dropping out of the work force. Discrimination can also be linked to negative health outcomes.⁸⁷

5.80 At the public hearing in Perth, Mr Peter Collins, Director of Legal Services, Aboriginal Legal Service of WA, outlined how the police 'move on' powers, in concert with Prohibited Behaviour Orders, can disproportionately impact on Indigenous people:

There are also the laws that are passed in this state, in particular move-on laws which enable police to move people on from an area for up to 24 hours. Those laws were introduced in 2005. A breach of a move-on law is punishable by jail. There is also what is called the Prohibited Behaviour Orders [PBO] Act, which came into operation in 2011. That act allows courts to ban people from engaging in otherwise lawful activity—for example, entering a certain area, say the Perth CBD, associating with certain individuals or engaging in otherwise lawful conduct; for example, drinking alcohol. A breach of a PBO, as we call them, is also punishable by jail. These laws have been used to target the most vulnerable Aboriginal people in Western Australia: the homeless, those with acute alcohol and drug problems, the mentally ill, those with cognitive impairments, and on it goes.⁸⁸

5.81 Mr Collins provided the committee with the following example:

In 2013 I acted for a man who had been homeless in Perth for 16 years. He lives on the streets in and around Perth CBD and the Northbridge area, which adjoins the CBD. He is a chronic alcoholic, he is a solvent sniffer and he sniffs paint, glue and petrol on a daily basis and has done so for 20 years. He is wholly reliant on the services provided by those organisations that assist homeless people and provide those services in the Perth CBD and Northbridge. He is highly reliant upon them to live. The PBO was made against him and it proposed that he be banned from entering

87 *Submission 17*, p. 15.

88 *Committee Hansard*, 4 August 2015, p. 20.

the Perth CBD and Northbridge areas. At the time of the application for the PBO, he had been issued with 463 move-on notices since 1 January 2006. When I told him that the PBO would, if granted, ban him from entering Northbridge, his answer was, 'But that's where I live.' He fell asleep in court and snored loudly during the proceedings for the PBO. He had earlier been unable to complete an affidavit that the ALS wanted to compile on his behalf because he could not stay awake for long enough to complete it.⁸⁹

89 *Committee Hansard*, 4 August 2015, p. 21.

Chapter 6

Current Programs

Introduction

6.1 Much of the evidence the committee received during this inquiry has been reflective, focussing on underlying issues in the provision of legal assistance services and the factors driving Indigenous incarceration rates. In contrast, this chapter focusses on examples of the positive programs operating across the criminal justice system – from pre-incarceration to post-incarceration – which are either specifically targeted at Indigenous offenders, or have a high rate of Indigenous participation.

Fines and infringements

6.2 Submissions noted the disproportionate impact that incarceration for non-payment of fines had on Aboriginal and Torres Strait Islanders people. The UNSW Law Society, particularly referred to the impact on Indigenous women:

Fine defaulting is a substantial cause for the rising rate of incarceration for Indigenous women. In Western Australia, the number of Indigenous women in prison for fine defaults escalated by 576 per cent since 2008. Alarmingly, two thirds of women serving a custodial sentence for fine defaults are Indigenous. The policy operates disproportionately on those most vulnerable, particularly Indigenous women and only exacerbates poverty and disadvantage, It furthermore fails to deter fine defaulting or gather fine revenue.¹

6.3 The UNSW Law Society referred to the case of Miss Dhu, an Aboriginal woman who died while in custody after being detained for an unpaid fine.²

6.4 At the public hearing in Canberra, Mr Nick Parmeter, Executive Policy Lawyer, Law Council of Australia, noting the 'sometimes tragic outcomes' of imprisonment for 'a relatively trivial indiscretion', stated that there are 'obvious alternatives to imprisonment for fine defaults', citing NSW's Work and Development Order (WDO) program.³ At the public hearing in Sydney, Ms Monique Hitter, Executive Director, Civil Law Division, Legal Aid NSW, explained the WDO program:

What the program involves is: if you are vulnerable and disadvantaged—essentially, if you are on a benefit of any kind—and you have an unpaid fine, you can work off that unpaid fine by attending counselling or drug and alcohol treatment or mental health treatment or doing voluntary work and paying that fine off at \$30 an hour[.]

1 *Submission 14*, p. 19.

2 *Submission 14*, p. 19. See also Chief Justice Wayne Martin, *Submission 1*, p. 11.

3 *Committee Hansard*, 4 April 2016, p. 16. See also National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Submission 13*, p. 18.

...

People can do gardening, cut people's hair or do anything. They can volunteer or receive counselling or treatment and, while they are doing that, they are working off their fines. In a sense they are doing something that is going to benefit them as individuals and, at the [same] time, they are reducing their fine debt.⁴

6.5 In its submission, Legal Aid NSW noted:

Approximately twenty-five percent (25%) of all fines and WDO advice and minor assistance services to individuals were provided to Aboriginal clients in 2013-2014.⁵

6.6 Ms Hitter stated that the program had led to a huge reduction in unpaid fines, particularly in some Aboriginal communities in remote and regional areas:

While you are on a work and development order, you also get your licence back immediately, which is cancelled if your fines are underpaid. Driving without a licence is also a very common way of Aboriginal people being incarcerated. This program allows people to work off their fines, get their licence back, get to work, drive their kids to school and reduce the debt. That has had a huge impact.⁶

6.7 Ms Jemima McCaughan, Executive Director, Civil Law Division, Legal Aid NSW, explained the relative simplicity in setting up a WDO for a client:

[B]ecause the Work and Development Orders program is a partnership between Legal Aid, State Debt and the Department of Justice we have a much more functional relationship with State Debt. There is a State Debt advocacy line. If I am working out in an Aboriginal community, all I need to do is ring that phone number and I can get those driver sanctions lifted immediately and get someone on a time-to-pay arrangement immediately. You can also get stays while you try and organise a Work and Development Order. So you might be able to say to a person who is having drug and alcohol issues, 'Let's get you into a treatment program and then you can work off your fine in that way.['] In the three months that it takes us to do that, there is a stay on any enforcement proceedings in that process...

[T]he other incentive is that often the clients are getting benefits and engaging in support services that they did not know existed. Because people are making the links to those services, they are getting support services that they would not have otherwise had. That is a huge benefit to them and to society.⁷

6.8 In terms of the impact of the WDO program on incarceration rates, Ms Hitter emphasised:

4 *Committee Hansard*, 23 September 2015, p. 34.

5 *Submission 36*, p. 8.

6 *Committee Hansard*, 23 September 2015, p. 34.

7 *Committee Hansard*, 23 September 2015, p. 35.

[In New South Wales] there is no longer any relationship between unpaid fines and incarceration in that direct way.⁸

6.9 On this issue, Ms McCaughan stated:

The escalation into crime in New South Wales for fines is around things like, if there are unpaid fines, there are then driver sanctions and then you get arrested for driving whilst unlicensed or disqualified. And that happens time and time again. Because you have no way of paying for the fines...that leads to incarceration. So it is still a criminal offence rather than the fines that lead directly to the incarceration.⁹

6.10 Since the establishment of the WDO program \$44 million worth of fines have been waived, of which \$9 million has been in Aboriginal communities.¹⁰

Custody Notification Service

6.11 The Custody Notification Service (CNS) is a 24-hour telephone legal advice service for Aboriginal people taken into custody by the police in NSW and the ACT. The Aboriginal Legal Service (NSW/ACT) (ALS) website explains how the service operates:

Under NSW law, Police must contact the ALS whenever they have taken an Aboriginal person into custody.

The Police phone our CNS, and the Aboriginal person receives early legal advice from an ALS lawyer, ensuring their fundamental legal rights are respected and less Aboriginal people are imprisoned.

The ALS lawyer also asks the Aboriginal person: RU OK? Often, the answer is no. Threats of self-harm or suicide are common. Concerns about access to medication are common. Notifications of injuries sustained that need to be examined by a health professional are common.

Our CNS lawyers are trained to carefully respond to these concerns, including notifying custody Police who partake in appropriate duty of care.

Our CNS lawyers can also contact the person's family and an Aboriginal Field Officer, ensuring parental or family concern for that person's whereabouts and health are minimised.¹¹

6.12 The CNS was set up in 2000 as a response to the Royal Commission into Aboriginal Deaths in Custody. Until July 2016 there had not been an Aboriginal death in a police cell in NSW since the CNS was established. In July 2016, the CNS was not

8 *Committee Hansard*, 23 September 2015, p. 35.

9 *Committee Hansard*, 23 September 2015, pp 35-36.

10 Ms Monique Hitter, Executive Director, Civil Law Division, Legal Aid NSW, *Committee Hansard*, 23 September 2015, p. 34.

11 Aboriginal Legal Service (NSW/ACT) website, *Custody Notification Service*, available at: www.alsnswact.org.au/pages/custody-notification-service (accessed 10 March 2016).

notified and an Aboriginal woman died in police custody. An internal police investigation was launched and the matter will be examined by the NSW coroner.¹²

6.13 At the public hearing in Sydney, Mr David Porter, Senior Solicitor, Redfern Legal Centre, described the CNS as a 'powerful tool', however:

[I]t still faces opposition by some officers because, concomitant with notifying the ALS that the person is in custody, that person gets to speak to an ALS solicitor and they get informed of their legal rights, which are that they do not need to answer any questions, and that sometimes frustrates the officer involved.¹³

6.14 In terms of the cost of the CNS and the volume of calls received, a media release from ALS states:

The cost to run the CNS is nearly the same as holding two juveniles in detention for one year, yet the CNS assists over 15,000 Aboriginal people each year with early legal advice and an RU OK welfare check.

...

The CNS receives over 300 calls per week at a per unit cost of \$32 per call with ALS lawyers working 24/7 to provide the service, without attracting penalty rates.

...

The phone line costs \$526,000 per annum to support six lawyers working around the clock and one administration officer.¹⁴

Funding uncertainty

6.15 In June 2015, the ALS campaigned to 'Save the CNS' as government funding had not been renewed for the service.¹⁵ The Acting Chief Executive Officer of ALS, Mr Kane Ellis, stated that an application for funding through the Indigenous Advancement Strategy had been rejected and attempts to gain further grant funding had been 'ignored'.¹⁶ Mr Ellis continued:

[The CNS] gives vulnerable Aboriginal men, women and children access to an experienced lawyer for timely legal advice which is crucial given the

12 Sarah Gerathy, 'Rebecca Maher: Family friend calls for answers about death in custody at Maitland', ABC News, 17 August 2016.

13 *Committee Hansard*, 23 September 2015, p. 52.

14 Aboriginal Legal Service (NSW/ACT), 'Save the Custody Notification Service (CNS) and prevent Aboriginal deaths in police cell custody', Media release, 3 June 2015 (accessed 10 March 2016).

15 Aboriginal Legal Service (NSW/ACT), 'Save the Custody Notification Service (CNS) and prevent Aboriginal deaths in police cell custody', Media release, 3 June 2015 (accessed 10 March 2016).

16 Aboriginal Legal Service (NSW/ACT), 'Save the Custody Notification Service (CNS) and prevent Aboriginal deaths in police cell custody', Media release, 3 June 2015 (accessed 10 March 2016).

already shamefully high rates of Aboriginal over-representation in the criminal justice system.¹⁷

6.16 On 1 July 2015 it was reported that the Minister for Indigenous Affairs committed \$263,000, of the annual operating budget but the NSW Government was resisting the call to fund the remainder of the \$500,000 budget. The NSW Attorney-General stated that 'the Commonwealth has historically funded the CNS and they are sidestepping their responsibility'.¹⁸ ALS noted that the funding was sufficient for the CNS to operate for a further six months.¹⁹

6.17 On 1 December 2015, the Minister for Indigenous Affairs announced a further \$1.8 million in funding for the CNS, which enables to service to operate until 30 June 2019.²⁰

Expansion to other jurisdictions

6.18 In his media release of 1 December 2015, the Minister noted:

All states and territories have arrangements in place to notify an Aboriginal legal service when an Aboriginal or Torres Strait Islander person is taken into custody. But in the case of NSW, this is specifically mandated under its own statute books and as such, it beggars belief the NSW Government won't fund the CNS.²¹

6.19 In June 2015 it was reported that Western Australia would be introducing a Custody Notification Service.²² In February 2016, the Deaths in Custody Watch Committee noted there was disappointment at the nature of the CNS which was subsequently introduced into Western Australia:

Aboriginal and Torres Strait Islander people held in prisons or police lock-ups in Western Australia will be able to request access to a 24-hour hotline that will connect them with the Aboriginal Visitors Scheme (AVS), a support and counselling service that is primarily staffed by Aboriginal people.

17 Aboriginal Legal Service (NSW/ACT), 'Save the Custody Notification Service (CNS) and prevent Aboriginal deaths in police cell custody', Media release, 3 June 2015 (accessed 10 March 2016).

18 Sarah Whyte, Fergus Hunter, 'The fight to save phone line helping prevent Aboriginal deaths in Custody', *The Canberra Times*, 1 July 2015.

19 Aboriginal Legal Service (NSW/ACT), 'CNS funded for six months', Media release, 6 July 2015 (accessed 10 March 2016).

20 Senator the Hon Nigel Scullion, Minister for Indigenous Affairs, *\$1.8m for NSW Custody Notification Service*, 1 December 2015.

21 Senator the Hon Nigel Scullion, Minister for Indigenous Affairs, *\$1.8m for NSW Custody Notification Service*, 1 December 2015.

22 Calla Wahlquist, *Indigenous people in West Australia's prisons to get 24/7 legal advice*, *The Guardian*, 25 June 2015 (accessed 10 March 2016).

The government says the expanded scheme will effectively act as a custody notification service and will reduce the potential for self-harm or suicide among in custody.

But long-time campaigners in this area, including relatives of Aboriginal people who have died in custody, said the announced measure was a 'disappointing reductionist version' of the type of service they had been promised.²³

6.20 Mr Porter, Redfern Legal Service, described the NSW model for the CNS, which is run by one organisation, which has a state-wide catchment as the 'gold standard'.²⁴

In prison programs

New South Wales

6.21 At the public hearing in Sydney, Dr Anne-Marie Martin, Assistant Commissioner, Offender Management and Policy, Corrective Services New South Wales informed the committee:

[W]e have a number of services and program staff—around 300—who provide a range of fundamental support to people who are received into custody. They do not provide any legal advice, but they enable offenders to receive legal assistance of some kind, in addition to providing a range of services and programs to assist in adjusting, understanding their order and addressing offending behaviour.²⁵

6.22 Mr Adam Schreiber, Principal Manager, Aboriginal Strategy and Policy Unit, Corrective Services New South Wales, spoke about the Yetta Dhinnakkal Centre, in Brewarrina, which teaches offenders about rural skills, and includes a cultural component.²⁶ Mr Schreiber explained the program has been on hold over the last 12 to 18 months due to uncertainty of the centre:

Now we are actually looking at rewriting the program itself with the involvement of the local community through some of the roles and positions we have there. We have two Aboriginal-specific positions. One is in service provision. It looks at the compendium programs and providing a service around welfare and reintegration back into the community. The other position is a cultural position. It is engaging with the local community and providing advice on what we actually provide for the inmates around the program. That is just about to be rewritten.²⁷

6.23 Mr Schreiber also spoke about the Kariiong Correctional Centre:

23 Deaths in Custody Watch Committee, *Indigenous prisoners in policy custody get 24-hour counselling hotline*, 18 February 2016 (accessed 10 March 2016).

24 *Committee Hansard*, 23 September 2015, p. 52.

25 *Committee Hansard*, 23 September 2015, p. 19.

26 *Committee Hansard*, 23 September 2015, p. 43.

27 *Committee Hansard*, 23 September 2015, p. 43.

[That centre] is predominantly for young adult Aboriginal offenders with short sentences. It is looking at programs around addressing their offending behaviour. Obviously there is a cultural side with that.²⁸

6.24 Dr Martin explained that the corrections service had recently taken over the Kariong Correctional Centre:

[W]e have put adults into that centre. The priority group under our former minister...included young adult Aboriginal inmates—that is, 25 years and under. We have started a community engagement program around that program. The nature of that program is an intensive program for inmates with sentences under two years to be there for up to four months of intensive assessment and education to try to move people. We have a high churn of people taking up maximum security beds, particularly young Indigenous men—there is a real cycling in and out. The aim is to try to work intensively with a group and push them out more into minimum security areas, where they can then start to do more community-based programs and work. As it stands, we tend to keep them in locations where that cannot happen.²⁹

6.25 Dr Martin continued:

If we can engage them in positive lifestyle-type programs as well as education, and then push them on into other centres where there is more meaningful work and activities, we hope that will lead to some sort of skill development that they value and enjoy, and that they engage in ongoing work post-release and try to reduce their coming back into custody.³⁰

6.26 Dr Martin also noted that there were funds for an Elder from the community to regularly come into the centre and for more Indigenous-based programs to be run at the centre.³¹

6.27 Mr Schreiber also referred to a building and construction program, the Gundi program:

That is predominantly Aboriginal—up to 40 Aboriginal offenders—teaching building and construction. We are now just engaging with Aboriginal Housing to provide houses to be built through the year so that there is a constant flow of work to be done. It will teach them everything from plumbing and electrical right through. They get those skills and then we look to getting them into employment on release.³²

6.28 In addition, Corrective Services New South Wales run art programs. As Mr Schreiber noted, these types of programs are not aimed at addressing offending behaviour:

28 *Committee Hansard*, 23 September 2015, p. 43.

29 *Committee Hansard*, 23 September 2015, p. 22.

30 *Committee Hansard*, 23 September 2015, p. 23.

31 *Committee Hansard*, 23 September 2015, p. 23.

32 *Committee Hansard*, 23 September 2015, p. 43.

We have the Girrawaa program, which is at Bathurst Correctional Centre. They do production items so that they can actually earn some money upon release. On top of that they do their own art work and look at helping them to set themselves up in their own business upon release—having their own profiles on the internet and selling their own artwork online.

We have the Nurra Warra Umer program, which is very similar to that but in a maximum security environment in Goulburn. Again, it involves production items, and they do their own art. That was originally set up because of an incident we had there back in [about] 2003...It was to ensure that, because of the environment Goulburn has, the offenders got out of the yard to do something and gain some skills. They go from there across to the Girrawaa program, at Bathurst. Also, we are just now setting one up in Broken Hill. It can be a flow-on when they come through the classification process.³³

6.29 Mr Schreiber also noted the Aboriginal Elders program, the Pinta Kulpi program:

[W]hich is an elders program around the state, so each centre can engage with the local community and the local lands council. We have those elders come in and provide advice. That is where we can engage with them.

...

We normally bring them in once a week or once every fortnight through the centre, and through the centre's budget. They bring them in to provide cultural advice or any specific advice to management as well as offenders.³⁴

6.30 Corrective Services New South Wales also has a number of mentor positions made up of people from the local community and involved with the local land council, who provide cultural advice on what can be done to assist offenders.³⁵

Post release

Moorditj Ngoorndiak

6.31 In March 2015, the Wirrpanda Foundation, in partnership with the Department of Corrective Services and the Youth Justice Board, launched the Moorditj Ngoorndiak longitudinal mentoring program (MN), which focuses on reducing recidivism of Indigenous youth in Western Australia (WA). The Wirrpanda Foundation's submission explained further:

Moorditj Ngoorndiak (MN) is a pilot program aimed at re-engaging Aboriginal boys aged 12-19 in contact with the youth justice system with education, employment and community and ultimately reduce recidivism. The program delivers intensive individual mentoring which is culturally appropriate for participants and their families:

33 *Committee Hansard*, 23 September 2015, p. 43.

34 *Committee Hansard*, 23 September 2015, pp 47-48.

35 Mr Adam Schreiber, Principal Manager, Aboriginal Strategy and Policy Unit, Corrective Services New South Wales, *Committee Hansard*, 23 September 2015, p. 44.

The program offers a robust approach to mentoring that connects participants – pre and post release from detention [at the Banksia Hill Detention Centre (BHDC) in Perth] – and their families to services.³⁶

6.32 The pre-release phase of MN aims to develop strong relationships between the participants and their Aboriginal role models. The mentors visit BHDC twice a week to run a fitness session and a cultural learning session. At the public hearing in Perth, Mr Walter McGuire, Moorditj Ngooandjak Program Mentor, Wirrpanda Foundation, explained that the pre-release phase of the program was also used to engage with a participant's family:

Whilst they are inside, we talk to them, we identify their families, we speak with their families and we also try and help the families with the issues they have—with employment such as [the Vocational Training and Employment Centre (VTEC)] that is there, and the Deadly Sista Girlz program that is there for the young ladies in the schools. We have one of our Aboriginal Nyungar ladies also working in the program. She speaks to the grandmothers and mothers at home about any issues. We try to help them and give them advice or bring them to the people who may help and assist.³⁷

6.33 Mentors also attend each participant's Youth Admission and Review Meeting (YARM), prior to release from BHDC:

This is an opportunity for all relevant stakeholders to come together and discuss the young person's time at BHDC and develop a plan for their release. When we first [began] attending the YARMs, the young person, their guardian and the [Aboriginal Welfare Officers (AWOs)] were not present. We believe it is essential that the young person is present for discussions regarding their progress and future and just as vital a guardian attends as they will play a key role in helping the young person with their Supervised Release Order (SRO). Furthermore the Aboriginal staff at BHDC have a wealth of knowledge about the young people that are being referred to the program, and offer great insight into their time in BHDC and the issues they face.³⁸

6.34 The post-release phase of the program is aimed at continuing to build capacity in the participants, and reduce the likelihood of recidivism.

Regular and consistent engagement with the participants will allow for mentors and local community services to focus on each participant and their family holistically by providing Individual Care Plans.³⁹

6.35 The Wirrpanda Foundation submission emphasised the importance of developing participants' connection with their culture through the MN program:

36 *Submission 47*, p. 1.

37 *Committee Hansard*, 4 August 2015, p. 15.

38 *Submission 47*, p. 4

39 *Submission 47*, p. 2.

Both [pre-release and post-release] phases aim to build proud Aboriginal and Torres Strait Islander men with good spirit, by helping them discover the strong spiritual connection to country and culture many Aboriginal people have. It is important for our young people to practice culture on country to build the strength in their Aboriginal identity and be blessed with the 'good spirit' of the land which gives you a healthy body and mind to make good decisions.⁴⁰

6.36 The Wirrpanda Foundation submission described 'cultural camps' as a way of building cultural identity:

In these cultural camps, local elders of the region will be engaged to attend and share traditional stories, knowledge of the land and bush foods. Participants will be encouraged to challenge themselves, take part in problem solving, co-operate with others in a team environment and connect to country. This component is included in the MN program due to our stakeholders and community elders all affirming the importance of connection to culture and country in building capacity in young Aboriginal people to partake in positive and healthy life pathways. The camps are an opportunity for personal healing and nurturing the strong connection to the land Aboriginal people have.⁴¹

6.37 At the public hearing in Perth, Mr Edward Brown, a MN Program Mentor with the Wirrpanda Foundation, explained the impact of the cultural camps:

The first question you ask another Aboriginal person is, 'Where are you from,' and 'Where are your family from.' Some of these young men could not answer that for me and my alarm bells started ringing straight away. It goes back to that cultural identity and building who they are and where their families come from. It is very important not just with Aboriginal identity but also for any human being's identity. During my exposure with the foundation, I have had the opportunity to take a couple of young men on some cultural camps—to take them fishing and down to the country where I grew up—and I could see the brightness on one young man's face when he hooked a fish—just the simple thing of hooking a fish. He shouted and shouted at me for about five minutes. I said, 'Pull the fish in then. Don't shout at me, pull it in!'⁴²

6.38 Mr Dale Kickett, MN Program Manager, Wirrpanda Foundation, emphasised that MN was not just about reducing recidivism:

This pilot program, for us, is not really about how successful we can be at keeping these boys out. It will be in the end, but it is more about finding every little issue, problem, with all the people we are dealing with—not just the boys who are reoffending but the system that puts them there and their families.⁴³

40 *Submission 47*, p. 2.

41 *Submission 47*, p. 3.

42 *Committee Hansard*, 4 August 2015, pp 13-14.

43 *Committee Hansard*, 4 August 2015, p. 16.

6.39 Mr Kickett provided the following example of some of the issues confronting the Wirrpanda Foundation as it develops the MN program:

We want more to be done on the educational side of things. Some of these boys, you have got to understand, have been most of their lives in and out of a detention centre. Some of them start at 10 or 12. We were in there yesterday looking at footy photos, and there are the same boys in them every year—the same ones coming back. A lot of those young men's education is within the confines of the Banksia Hill Detention Centre. Education does not seem to be a big deal in there. Nobody is pushing it or making it exciting for them. Some of these young fellows, or young men—16, 17, 18—have severe numeracy and literacy problems. That is just another thing that we have got to fix up. Do we go in and try to change the education system in Banksia Hill? I do not know. Is it going to be too disruptive for us if we do that or highlight other issues and problems in there, where we could open a can of worms or someone could prevent us from getting more access?⁴⁴

6.40 Mr Kickett pointed out that the challenges continue once offenders return home:

It makes it doubly hard when the boys' family homes and structures are not conducive to getting up in the morning, going to school or going to work. So it is left to us and our small resources to pick the boys up most times. We have to walk a fine line to do that as well, because we do not want them to become dependent on us, as they have done with many other organisations.⁴⁵

6.41 Mr Kickett indicated that the MN program is evolving all the time and it will continue to evolve:

We had a designed program that looked a hell of a lot different even after a couple of hours in Banksia Hill. It continues to change to this point and it will probably change again after we have stopped talking in here. When we walk out, we will be saying, 'We'll do this and that.' It will be forever changing. At this stage for us in this area, with some of the individual issues and problems, drugs and alcohol could take quite a while in itself to address. And we talk about literacy and numeracy. Some blokes [are] 10 years behind. The issues and problems of one person are not, 'Okay, he needs to learn how to read and write. Let's fix that next week.' It is just not that easy.⁴⁶

6.42 In terms of the length of the pilot program, Mr Kickett stated:

We get funded just under \$300,000 to run our program. There are four of us in that program. We need the best people to help run this program with just under \$300,000, and we have been told it costs about \$300,000 or just over

44 *Committee Hansard*, 4 August 2015, p. 16.

45 *Committee Hansard*, 4 August 2015, p. 16.

46 *Committee Hansard*, 4 August 2015, p. 16.

to keep one of these boys in Banksia per year. So you have to understand we are running on a shoestring, and we have got extra funding for this through moneys coming from elsewhere...

We are going to have quite a few teething problems throughout this period, and we are trying not to upset other organisations in what we are doing, because we want to work closely with them all. Our common goal is to keep these boys out of prison. As we teach our boys through our fellas, our culture is a culture of free people, not incarcerated people. On the length of that program, we have a pilot program that is supposed to run over 12 months. Corrective services have been very supportive in saying, 'Let's not call this a pilot program; as long as we keep progressing, let's see how we go.' In length, it will probably be until we run out of money, which we do not have a whole lot of. When our money runs out, that will probably determine how long we run this pilot program.⁴⁷

Aboriginal client service officers

6.43 Corrective Services New South Wales has Aboriginal client service officers (ACSOs) who ensure that post-release offenders engage with services and programs in the community. There are 18 ACSO positions across New South Wales.⁴⁸ Mr Jason Hainsworth, Acting Assistant Commissioner, Community Corrections, Corrective Services New South Wales, described the role of the ACSOs as 'to work with the local communities engaging with the families [and] elders'.⁴⁹

6.44 The committee also heard that it was possible that ACSOs may engage members from the Aboriginal Elders program, or the local land council, to be involved in working with offenders post-release.⁵⁰

6.45 Mr Jason Hainsworth, Acting Assistant Commissioner, Community Corrections, Corrective Services New South Wales, referred to other work by ACSOs developing and supporting programs within the community:

A lot of things do get coordinated on a local level, so it is not a formal, head office driven process. We do have circumstances where, for example, I am aware of a program recently being set up for Indigenous males at a remote community where we were not able to provide the service, so the client services officer worked with the local community around establishing somebody that could come in and provide this support program for the offenders in the local community there. That sort of stuff happens all the time, but it is very ad hoc—which I think it needs to be—working with the

47 *Committee Hansard*, 4 August 2015, p. 16.

48 Mr Schreiber, Corrective Services New South Wales, *Committee Hansard*, 23 September 2015, p. 48.

49 *Committee Hansard*, 23 September 2015, p. 23.

50 Mr Schreiber, Corrective Services New South Wales, *Committee Hansard*, 23 September 2015, p. 48.

client service officers and the local community corrections manager and working out what the local need is at that particular point in time.⁵¹

51 *Committee Hansard*, 23 September 2015, p. 23.

Chapter 7

Alternatives to imprisonment

Introduction

7.1 Submissions to the inquiry argued that traditional punitive responses to law and order are not working.¹ Despite the enormous cost of imprisonment both economically and socially, evidence suggests that incarceration does not have a positive impact on crime rates.² This is particularly the case for Indigenous Australians, as demonstrated by the fact that in 2014, 77% of Indigenous Australians in custody were recidivist.³ There is a need, therefore, to consider more effective solutions to addressing Indigenous imprisonment rates. In this chapter, the committee discusses the merits of prevention, early intervention, diversionary programs and justice reinvestment.

Prevention

7.2 Recognising that socioeconomic factors play a critical role in whether a person commits a crime, prevention is about working with communities to address the underlying factors which cause crime. This involves engaging those who are showing signs of antisocial behaviour with preventative programs.⁴

7.3 Ms Andrea Smith, Strategy and Communications Officer from the Western Australia Aboriginal Family Law Service, described the importance of engaging with people before their behaviour becomes criminal:

Before people reach criminal activity, there are usually a lot of factors in their lives that lead to that behaviour. For us, they can be issues particularly around experience of domestic violence in childhood and out-of-home care as well as a result of the domestic violence that their parents may experience. Then there are some important links between those two factors and contact with or experience of offending behaviour and contact then with detention centres, leading into criminal behaviour in adult life. For us, those are important factors to prevent and avoid the need for legal assistance services later down the track. For us, it is around preventing those factors before they happen.⁵

7.4 The Hon Wayne Martin AC, Chief Justice of the Western Australian (WA) Supreme Court noted that 'an ounce of prevention is worth a pound of cure':

1 *Submission 1*, p. 10, *Submission 25*, p. 46, *Submission 39*, p. 15, *Submission 40*, p. 15, *Submission 41*, p. 27.

2 *Submission 13*, p. 20.

3 *Submission 13*, p. 21.

4 *Submission 8*, p. 10.

5 *Committee Hansard*, 4 August 2015, p. 22.

Nowhere is that more true than in the justice system. So if we can identify people at risk and communities at risk.

...

[we can focus] resources on changing the conditions that put those people in the criminal justice system...⁶

7.5 Victoria Police have identified that a disproportionate number of persons in custody are Indigenous. As a result, Victoria Police are working to prevent Indigenous incarceration. The focus is now on communication between police and Indigenous elders, engaging with the youth communities, increasing the number of Australian and Torres Strait Islander Police employees and improving internal training:

Victoria Police partners with the Grampians Regional Justice Advisory Committee as part of the annual Murray River Marathon, in which a police and a Koori youth team compete. The objective is to engage with at risk youths and create a diversion from concerning behaviour.

In Mildura and Swan Hill a Koori Youth Cautioning and Diversion Program has been developed to support the use of cautioning as an alternative to other criminal justice options for Koori youths, and to improve the experiences of initial contact between Koori youths and the police.⁷

Early Intervention

7.6 Early intervention strategies seek to identify and address the sociological contributors to criminal behaviour including a lack of community support, financial disadvantage, poor physical and mental health and low literacy rates.⁸

7.7 Ms Tammy Solonec, Indigenous Rights Manager, Amnesty International spoke about the 'SHINE' early intervention school program which targets children who are truant or disruptive at school:

When we talk about diversion, we think about that at the court stage or the police stage—so they have got into trouble and can be diverted. But with early interventions prior to that, like with the Shine program that you are talking about, if a kid is starting to truant at school and things are going badly then you want to get in right there. You want to be able to help that child right there. We think that there does need to be separate strategies for the younger children—perhaps strategies for them in how to say 'no' if they are being pressured into doing things with older children. I think we have to accept that Aboriginal kids hang around with their cousins, brothers and sisters a lot of the time. A lot of things are done in group activities.⁹

6 *Committee Hansard*, 4 August 2015, p. 38.

7 *Submission 27*, p. 5.

8 WA Parliament Community Development and Justice Standing Committee inquiry '*Making our prisons work*': An inquiry into the efficiency and effectiveness of prisoner education, training and employment strategies (November, 2010), p. 100.

9 *Committee Hansard*, 4 August 2015, pp 6 and 9.

7.8 Professor Elizabeth Jane Elliott AM, Paediatrics and Child Health, at the University of Sydney Clinical School, discussed the Fitzroy Valley and the early intervention training programs they are working to implement. Professor Elliott and colleagues are looking at a 'positive parenting program' to assist parents with children who have disruptive behavioural issues. Leaders in the region are also looking at interventions to assist children in the classroom as well to cope with impulse control:

[T]here has been quite a lot of training and education across the professional groups during our study—police, teachers and health professionals who come in contact with his children. I think in this community we are seeing changes.¹⁰

7.9 The National Association of Community Legal Centres (NACLC) indicated that Community Legal Centres (CLCs) use a range of early intervention and preventative strategies such as:

...community legal education and community development, individual skill building, systemic advocacy and law and policy reform activities that assist individual clients, as well as disadvantaged and vulnerable groups in the community, including Aboriginal and Torres Strait Islander people.¹¹

7.10 However, NACLC commented that 2014 Commonwealth funding agreements will now include clauses amending the definition of 'core legal services' to clarify that this does not include law reform or policy advocacy. NACLC indicated that:

...while not explicitly preventing CLCs from undertaking this work, failure to provide Commonwealth funding for these activities has had and will continue to have an impact on the ability of CLCs to engage in this work, to the detriment of the most vulnerable and disadvantaged members of the community, including Aboriginal and Torres Strait Islander peoples.¹²

Diversion programs

7.11 Several witnesses advocated for diversion programs to provide the judiciary with the option to divert offenders from the criminal justice system into educational programs.¹³ The aim of a diversion program is to empower the offender and provide them with the resources to stop future criminal offending.

Aboriginal controlled diversion programs

7.12 In 2006, the Western Australian Law Reform Commission (the Commission) in its *Final report on Aboriginal Customary Laws*, indicated its strong support for the development of Aboriginal-controlled diversionary programs, particularly those which were determined by a 'community justice group'. The Commission explained how it envisaged such diversionary programs would operate:

10 *Committee Hansard*, 23 September 2015, p. 4.

11 *Submission 42*, p. 8.

12 *Submission 42*, p. 9.

13 *Committee Hansard*, 4 August 2015, Ms Tammy Solonec, p. 4, Mr Chris Twomey, p. 44, WA Supreme Court Chief Justice, Wayne Martin, p. 33.

[W]here a community justice group exists, the members of the group may decide to deal with a possible breach of Western Australian criminal law. This approach would mean that there is no involvement in the criminal justice system at all...

For Aboriginal children who have committed minor offences, the Commission strongly encourages a community justice group to deal with the matter without recourse to the criminal justice system. For serious offences, such as violence or sexual assault, the Commission considers it is vital that Aboriginal people are fully informed of their rights under Australian law and supported by criminal justice agencies to report the offence and have it dealt with by the criminal justice system.¹⁴

7.13 The Commission recommended:

That the Western Australian government establish a diversionary scheme for young Aboriginal people to be referred by the police to a community justice group.¹⁵

7.14 Amnesty International Australia and the Kimberley Aboriginal Law and Culture Centre (KALACC) noted that the Commission's recommendation on Aboriginal owned or controlled diversion programs had not been implemented:

According to the Department of Corrective Services, of the programs available to the courts prior to sentencing and as part of community-based orders, "none ... is currently Aboriginal owned or controlled, however they are designed to be culturally appropriate to address the over-representation of Aboriginal young people in the criminal justice system."¹⁶

7.15 Submissions and witnesses argued for investment in Aboriginal owned and controlled justice programs. For example, Chief Justice Martin made this point:

We have to encourage Aboriginal communities to take responsibility for their members and to empower them and provide them with the resources they need to live up to that responsibility. I think that far too often we have been imposing solutions on Aboriginal communities, doing too much talking and not enough listening.¹⁷

7.16 Ms Solonec, Amnesty International, informed the committee:

14 Law Reform Commission of Western Australia, Final Report, Aboriginal Customary Laws, *The interaction of Western Australia law with Aboriginal law and culture*, September 2006, pp. 202-203.

15 Recommendation 50, p. 204. [Recommendation 17 of the WALRC's report dealt with the establishment of community justice groups.]

16 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 5. See also Kimberley Aboriginal Law and Cultural Centre, *Submission 6*, p. 1.

17 *Committee Hansard*, 4 August 2015, p. 33. See also Chief Justice Wayne Martin, *Submission 1*, p. 15; *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 5.

We have found that Aboriginal people respond well to programs that are run by Aboriginal people, particularly when children are led by elders and able to go out to their country and connect with their culture and identity. A lot of the programs which focused on building up an Aboriginal person's identity, particularly a young person's identity, really helped steer them onto the right path so that they would not repeat offend.¹⁸

7.17 Mr Wesley Morris, Coordinator of KALACC, acknowledged that there is still a role for the criminal justice system, however:

What we need is investment in Aboriginal owned and controlled justice programs. We do not want to own the whole situation. There are some very troublesome young people who do deserve to be behind bars and who deserve to be incarcerated, and that is the role of government. But where we are talking about preventative programs and young people who have made poor life decisions there should be a community empowerment model.

As long [as] government thinks that it can solve those community issues then we will continue to have these problems.¹⁹

The Yiriman Project

7.18 The 'Yiriman Project', established in WA in 2000 is an intergenerational, cultural program, conceived and developed by Elders from four Kimberley language groups. The Yiriman Diversionary Project is an intensive cultural immersion program that focuses on the concept of returning to country:

Believing in the power of their own Culture and of Country to heal their own young people, the Elders began taking young people out on to Country, travelling over Country by foot, camel or vehicle, teaching and speaking in language, visiting ancestral sites, storytelling, engaging in traditional song and dance, preparing young people for ceremony and law practices, teaching traditional crafts, tracking, hunting, and preparing traditional bush tucker, practicing bush medicine, and passing on knowledge to the younger generations.²⁰

7.19 The Yiriman Project has carried out several diversionary programs including:

In 2009 at Fitzroy Crossing, Magistrate Bob Young bailed 15 boys to attend an intensive diversionary program run by the community Elders of the Yiriman Project, following a spike in youth offending in the community. The camp took place at Mt Pierre and Kupartiya pastoral stations in the Kimberley, was led by local Elders and involved traditional knowledge transfer, work and counseling by drug and alcohol, educational and vocational counselors over nine weeks...

18 *Committee Hansard*, 4 August 2015, p. 4.

19 *Committee Hansard*, 23 September 2015, p. 39.

20 Yiriman Project website, *Yiriman Story*, available at: www.yiriman.org.au/yiriman-story/ (accessed 29 March 2016).

A similar 10-week diversionary bush trip occurred in 2010 in partnership with Magistrate Col Roberts. It occurred at the remote community of Jilgi Bore.²¹

7.20 In its submission the Australian Human Rights Commission referenced the Children's Commissioner Megan Mitchell's comments from the Children's Rights Report 2014:

The Yiriman Project aims to 'build stories in young people' and keep them alive and healthy by reacquainting them with country.'²²

7.21 Amnesty International, quoting from the Productivity Commission's Overcoming Indigenous Disadvantage Report 2014, outlined that the Yiriman Project:

...builds young people's confidence and improves their self-worth, and is considered to have helped curb suicide, self-harm and substance abuse in the participating communities.²³

7.22 The committee was informed that the Yiriman Project's core funding does not come from justice funding, rather:

...the core funding that we receive at the moment for Yiriman comes from the Department of Social Services and from the Commonwealth Department of Health under the National Suicide Prevention Program.²⁴

7.23 Amnesty International noted the lack of funding for these types of projects:

The first camp run by the Yiriman Project was run without any funding, drawing entirely on the limited resources and in-kind contributions of KALACC staff and the Elders. The second camp run by the Yiriman Project was a one-off grant from the Federal Government. Despite repeated applications, the Yiriman Project has not secured any funding from the Department of Corrective Services to deliver programs in the youth justice space.²⁵

7.24 Mr Morris, KALACC, informed the committee that the funding future for the Yiriman Project looked more positive:

Just in the month of August, with the princely sum of \$20,000, we ran three camel walks in conjunction with the Fitzroy Crossing police. That was

21 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 29.

22 *Submission 5*, p. 8.

23 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 30, quoting from Productive Commission, *Overcoming Indigenous Disadvantage Report 2014*.

24 *Committee Hansard*, 23 September 2015, p. 38.

25 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 30.

funded by a small \$20,000 grant from the Western Australian police service. Two weeks ago we received from the Western Australian Department of Corrective Services, through its Youth Justice Board, a draft grant agreement worth \$440,000 which will be for the years 2016 and 2017. That will enable us to scale up our youth justice offerings into the future.²⁶

The Balund-a Program

7.25 The Balund-a Program in Tabulam is known by participants as a 'wall-less prison.' The post-arrest diversionary program for adult male offenders aims to reduce recidivism by enhancing offender's skills within a cultural and supportive community environment:

Following acceptance into the program offenders participate in structured programs within a culturally sensitive framework. Programs address specific areas of risk to assist on improving life skills and reintegration into the community, for example, cognitive based programs, drug and alcohol, 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.²⁷

7.26 Mr Adam Schreiber, Principal Manager of the Aboriginal Strategy and Policy Unit, Corrective Services New South Wales, discussed the Tabulam correctional centre, which he described as 'a last-chance opportunity before [people] enter into custody—from the courts'.²⁸ Offenders are required to engage in alcohol and other drug programs to address their offending behaviour. Mr Schreiber outlined the success of the Indigenous program:

We have a great connection with the local community, with a number of our staff having been placed in that area. We have service provision. We have an Aboriginal service and programs officer. On top of that we have 4.5 Aboriginal mentor positions made up of people from the local community and involved with the local lands council, who provide cultural advice on what we can do to assist offenders.²⁹

26 *Committee Hansard*, 23 September 2015, p. 38.

27 NSW Government Justice, *Balund-a (Tabulam)*, available at www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/Community%20Corrections/offender-management-in-the-community/balund-a_tabulam.aspx (accessed 31 March 2016).

28 *Committee Hansard*, 23 September 2015, p. 43.

29 *Committee Hansard*, 23 September 2015, p. 43-44.

Justice reinvestment

7.27 The committee received evidence contending that prisons do not reduce crime or resolve the drivers of crime and imprisonment rates are dramatically increasing.³⁰ The committee heard that justice reinvestment is an alternative to imprisonment, without compromising the safety of victims/survivors.³¹

7.28 There is no single accepted definition of the term justice reinvestment.³² However, justice reinvestment essentially refers to a policy approach to criminal justice spending, whereby funds ordinarily spent on keeping individuals in prison, are diverted to the development of programs and services that aim to address the underlying causes of criminal behaviour in communities that have high levels of incarceration.³³

7.29 Justice reinvestment has also been described as a form of preventative financing:

...through which policy makers shift funds away from dealing with problems 'downstream' (policing, prisons) and towards tackling them 'upstream' (family breakdown, poverty, mental illness, drug and alcohol dependency).³⁴

7.30 Justice reinvestment is a collaborative partnership between government and community that uses the following steps:

- Identify communities

'Justice mapping' involves conducting analysis of data and trends affecting incarceration rates in particular communities, including identification of the areas producing high numbers of prisoners and the factors driving growth in prison populations.

- Develop options to generate savings

Development of both legislative and policy based options to reverse the rates of incarceration and increase the effectiveness of spending in the criminal justice arena.

30 *Submission 24*, p. 24, *Submission 41*, p. 12, *Submission 43*, p. 3, *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 36.

31 *Submission 46*, p. 9.

32 See University of New South Wales, Australian Justice Reinvestment Project, *Fact sheet: Justice Reinvestment Basics*, available at <http://justicereinvestment.unsw.edu.au/node/71>, (accessed 31 March 2016); and Law Council of Australia submission to the Senate Legal and Constitutional Affairs References Committee's inquiry into the value of a justice reinvestment approach to criminal justice in Australia, *Submission 78*, p. 5.

33 Law Council of Australia submission to the Senate Legal and Constitutional Affairs References Committee's inquiry into the value of a justice reinvestment approach to criminal justice in Australia, *Submission 78*, p. 5.

34 *Submission 12*, p. 5.

- Quantify savings to reinvest

The savings from the changes are quantified and reinvested back into communities which have high incarceration rates through programs and services that address the underlying causes crime.

- Measure and evaluate impact on identified communities

All stages of the process are evaluated in order to ensure the sustainability of the reforms.³⁵

Examples of overseas justice reinvestment

7.31 Justice reinvestment was initially developed and implemented in the United States (US)³⁶ and has been introduced in various forms in the United Kingdom (UK) and New Zealand.³⁷

Justice reinvestment in the US

7.32 Over the past decade several jurisdictions in the US have been trialling justice reinvestment which:

...have realised millions of dollars of savings in corrections budgets in the USA through reduced levels of imprisonment. Some of these savings have been reinvested in capacity building and crime prevention projects in communities that produce high numbers of offenders.³⁸

7.33 Critical to the US success is the presence of a strategic body monitoring and quantifying outcomes:

In the US, an example of a justice reinvestment advisory body is The Council of State Governments Justice Centre. The Justice Centre is [a] bi-partisan not-for-profit organisation funded by a combination of Federal, State and private philanthropic funds. Its functions are to:

- Identify communities for a JR approach
- Support community based strategy development, including advising on what evidence-based initiatives will reduce offending/re-offending, increase community safety, and address disadvantage
- Build the capacity of the community to implement the JR strategy and initiatives
- Monitor and quantify the social and economic outcomes.³⁹

35 University of New South Wales, Australian Justice Reinvestment Project, *Fact sheet: Justice Reinvestment Basics*, available at <http://justicereinvestment.unsw.edu.au/node/71>, (accessed 31 March 2016); and *Submission 11*, pp 9-11.

36 Australian Human Rights Commission, *Social Justice and Native Title Report 2014*, p. 103.

37 *Submission 41*, p. 24.

38 *Submission 12*, p. 6.

39 *Submission 11*, pp 11-12.

7.34 The trials have resulted in a reduction in imprisonment and re-offending rates.⁴⁰ The US experience is commonly used as an example of the positive effects of justice reinvestment. The Law Council of Australia (Law Council) reported that:

Connecticut, Georgia, Texas, Michigan, North Carolina, South Carolina, Pennsylvania, Rhode Island, Wisconsin and Colorado all implemented legislative changes to reduce the propensity for re-admission following parole violations and breaches of probation, which generated substantial cost-savings (\$50 million in Connecticut alone). That money was then reinvested in mental health and substance abuse treatment programs, community-based pilots and other evidence-based programs proven to increase the average time between release and re-offending.⁴¹

7.35 The Law Council also indicated that:

The most remarkable achievement of any US State has been in California. In 2003, the State's prison population had [soared] and a report released that year found that 70 per cent of the state's parole population returned to prison within 18 months. As a result of policies implemented between 2010 and 2013, the state's prison population fell by 2.1 per cent and parole population reduced by 63 per cent.⁴²

7.36 The Law Council noted that these apparent successes, while useful for evaluation purposes, should be viewed cautiously:

Whilst the reductions in Michigan's and Texas' prisoner population have been described by some commentators as evidence in support of justice reinvestment, other commentators have adopted a more cautious approach, noting that "true correctional savings have been difficult to document and even more problematic to capture," and that the "impact on offending or recidivism from the reinvestment of these savings into community-based crime prevention strategies will take a lot longer to emerge."⁴³

Justice reinvestment in the UK

7.37 Justice reinvestment has also been trialled in the UK in an attempt to reduce incarceration rates:

... [it] comes in part as a response to the fact that growing imprisonment rates are hugely expensive at a time of fiscal stringency, yet provide very little return in addressing high recidivism rates, and indeed may be counter

40 Law Council of Australia, *Submission 41*, p. 5. Note: In 2006 the Council of State Governments Justice Centre began promoting justice reinvestment and by 2014, 14 US States had implemented it in some form (see *Submission 41*, p. 22).

41 *Submission 41*, p. 23.

42 *Submission 41*, pp 23-24.

43 Law Council of Australia submission to the Senate Legal and Constitutional Affairs References Committee's inquiry into the value of a justice reinvestment approach to criminal justice in Australia, *Submission 78*, p. 9.

– productive and criminogenic, contributing to social breakdown and crime.⁴⁴

7.38 The Law Council, informed the committee that in the UK it was concluded that:

[T]here is a need for decentralisation of justice policy and empowerment of local government authorities or governance structures, which are better placed to identify the factors driving re-offending behaviour. For example, in areas with higher rates of homelessness, mental illness and drug problems, there is scope for increasing the rate of diversion for young offenders and reducing reliance on custodial sentencing for those who could be offered greater community-based support.⁴⁵

Justice reinvestment in NZ

7.39 The committee heard that in NZ, alternative 'justice models', such as Maori courts and family group conferencing had been in existence since the 1970s.⁴⁶ These alternative justice reinvestment models incorporate components of traditional justice and are culturally sensitive.

7.40 In 1999 NZ adopted an 'Integrated Offender Management' corrections policy which aimed for a greater involvement of Maori cultural leaders in managing recidivism. More recently:

NZ adopted a Framework for Reduction of Maori Re-offending: "The new range of targeted interventions has included the provision of new kaupapa Maori programming, where inmates are able to access and participate in aspects of Te Ao Maori: te reo [Maori] language programmes, general education in tikanga, and Maori arts such as carving and weaving."⁴⁷

7.41 NZ prisons have established 'Maori focus units,' therapeutic programs, designed to address rates of reoffending among Indigenous people.⁴⁸ The New Zealand Department of Corrections has commented:

Participants reported development in tikanga Māori and strengthened cultural identity, and psychometric testing showed positive progressions in offenders' thinking patterns.⁴⁹

Previous senate inquiries

7.42 The committee notes that justice reinvestment has previously been considered in great detail during previous Senate committee inquiries. In 2009 the Senate Legal

44 *Submission 12*, p. 6.

45 *Submission 41*, p. 24.

46 *Submission 41*, p. 24.

47 *Submission 41*, p. 24.

48 *Submission 41*, p. 24.

49 New Zealand Department of Corrections 'Maori Focus Units' <https://www.hrc.co.nz/your-rights/social-equality/our-work/fair-go-all/maori-focus-units/> (accessed 23/03/2016).

and Constitutional Affairs References Committee held an inquiry into 'Access to Justice'. The committee made 31 recommendations, one of which, Recommendation 21, dealt with justice reinvestment:

In conjunction with Recommendation 1, the committee recommends that the federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system.⁵⁰

7.43 In 2010 the then government noted the recommendation and suggested that:

The approach proposed for the justice reinvestment pilot programs appears to be seeking to deliver similar benefits to many of the crime prevention and diversionary projects funded under Section 298 of the *Proceeds a/Crime Act 2002* (Cth) and the now closed National Community Crime Prevention Programme. It may be possible that lessons from relevant projects funded under these programs could be used to inform consideration of the potential effectiveness of justice reinvestment programs.⁵¹

7.44 In 2013, the Senate Legal and Constitutional Affairs References Committee held an inquiry into the 'value of a justice reinvestment approach to criminal justice in Australia'. During the inquiry, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda advocated for justice reinvestment to be trialled more broadly in the community:

I believe that Justice Reinvestment also provides opportunities for communities to take back some control. If it is to work properly it means looking at options for diversion from prison but more importantly, it means looking at the measures and strategies that will prevent offending behaviour in the first place. The community has to be involved and committed to not only taking some ownership of the problem but also some ownership of the solutions...I think we need to change the narrative from one of punishment to one of community safety. Funding people to go to prison might make people feel safer, but a far better way would be to stop the offending in the first place, and Justice Reinvestment provides that opportunity.⁵²

7.45 The committee made nine recommendations, including that the 'Commonwealth adopt a leadership role in supporting the implementation of justice

50 Senate Legal and Constitutional Affairs References Committee, *Access to justice*, December 2009 p. xxiii. Recommendation 1 of the report was: The committee recommends that the federal, state and territory governments jointly fund a comprehensive national survey of demand and unmet need for legal assistance services in Aboriginal and Torres Strait Islander communities, with particular identification of rural, regional and remote communities and Indigenous women's needs, to be jointly undertaken with state/territory legal aid commissions, community legal centres, Aboriginal legal services, National Legal Aid and the Law and Justice Foundation NSW.

51 Government response to Senate Legal and Constitutional Affairs References Committee Report 'Access to Justice', December 2009, p. 21.

52 See Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, p. 44.

reinvestment, through the Council of Australian Governments' and 'the Commonwealth commit to the establishment of a trial of justice reinvestment in Australia in conjunction with the relevant states and territories, using a place-based approach, and that at least one Indigenous community be included as a site'.⁵³

7.46 The committee understands that a justice reinvestment approach to criminal justice has garnered broad interest across a range of stakeholder groups. However, to date, the government has not provided a response to the recommendations of the Senate Legal and Constitutional Affairs References Committee in its 2013 report.

Justice reinvestment in Australia

7.47 In Australia, justice reinvestment has also been suggested as an approach to address the high rates of Indigenous incarceration.⁵⁴ The Aboriginal and Torres Strait Islander Social Justice Commissioner noted in his 2014 Social Justice and Native Title Report that:

There are persuasive arguments for trialling this approach in the Aboriginal and Torres Strait Islander contexts given the high levels of overrepresentation and disadvantage faced by these communities. The principles of a justice reinvestment approach include localism, community control and better cooperation between local services. These also align with what we know about human rights-based practice in Aboriginal and Torres Strait Islander service delivery.

Beyond these reasons, the reality is that if we were to map the locations with the highest concentrations of offenders, many of these locations would have very high numbers of Aboriginal and Torres Strait Islanders living in them.⁵⁵

7.48 While acknowledging that there is still some uncertainty about how a justice reinvestment approach would operate in Australia, the Law Council noted the benefits, particularly in Indigenous communities:

Despite having a greater understanding of the underlying causes of Indigenous involvement in the criminal justice system, governments at both the state and federal level continue to struggle with how best to address this serious social issue. Justice reinvestment has been suggested by some advocates as an approach that may provide a framework for addressing this issue. In fact, several aspects of this approach have been described as being beneficial to Indigenous offenders and their communities. These include the ability of a justice reinvestment approach to focus on community building through crime prevention as opposed to the weakening of communities through imprisonment; and the ability of justice reinvestment to address the multiple underlying causes of offending. Another benefit of justice reinvestment is its ability to provide sustainable sources of funding for

53 Recommendations 5 and 6, Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, p. xi.

54 *Submission 44*, p. 4.

55 Australian Human Rights Commission, *Social Justice and Native Title Report 2014*, p. 108.

culturally appropriate community programs such as Indigenous healing programs and residential drug and alcohol programs.⁵⁶

7.49 NACLCL considered a justice reinvestment approach to be 'a crucial element of addressing the high levels of imprisonment of Aboriginal and Torres Strait Islander peoples'.⁵⁷ NACLCL explained:

One of the key elements in any solution focussed on addressing over-representation in the criminal justice system is to address disadvantage, including through approaches such as justice reinvestment which seek to divert funding from prisons to community programs. Accordingly NACLCL strongly supports investment in community-based and led programs that seek to address the issues and disadvantage underlying offending behaviour.⁵⁸

7.50 NACLCL added that to introduce a justice reinvestment approach:

- the Commonwealth Government must play a leadership role in encouraging state and territory governments to adopt justice reinvestment strategies;
- additional research, funding and pilot programs are an important step, and
- justice reinvestment approaches must be tailored to the needs of the particular community and must involve Aboriginal and Torres Strait Islander peoples and communities in determining how such approaches are implemented in communities.⁵⁹

7.51 Trials of justice reinvestment have begun in some Australian communities. While still in its infancy, these programs have been met with support and have been hailed as 'a grass roots solution to a grassroots problem'.⁶⁰

Bourke

7.52 Bourke, a small remote town in New South Wales, has an Indigenous population of 30 percent who belong to over 20 language groups.⁶¹ The Bourke Aboriginal Community Working Party (BACWP), led by Mr Alistair Ferguson, approached Just Reinvest NSW in October 2012 to commence a justice reinvestment program in the region:

In late 2012 Just Reinvest NSW began working with the Bourke community to develop a Justice Reinvestment approach. This was as a

56 Law Council of Australia submission to the Senate Legal and Constitutional Affairs References Committee's inquiry into the value of a justice reinvestment approach to criminal justice in Australia, *Submission 78*, p. 15.

57 *Submission 42*, p. 9.

58 *Submission 42*, p. 9.

59 *Submission 42*, pp 9-10.

60 *Submission 33*, p. 6.

61 *Submission 5*, p. 21.

response to community concerns over the lack of detailed outcome-driven evaluations of the numerous programs delivering services into Bourke and the short-term nature of the funding allocated by government for these programs. In order to provide effective programs and services, the Bourke community has identified a critical need for a framework that will provide long-term, sustainable funding.⁶²

7.53 Ms Sarah Hopkins, Chairperson of Just Reinvest NSW outlined that the Bourke program emerged as a:

...response to the community's concerns over the level of youth offending and what they perceived as an urgent need for a coordinated and effective approach to early intervention, crime prevention and diversion...⁶³

7.54 One of the key aims of the Bourke justice reinvestment model is:

[To] convince all tiers of Government to shift policy and spending from incarceration and services which are currently not effectively utilized in the community, to be reinvested into programs which address the underlying causes of youth crime and meet community need.⁶⁴

7.55 At the public hearing in Canberra, Mr Gooda commented on the unique process undertaken in Bourke:

We decided to work with the community in a real and meaningful way. We did not start off with a plan; we just started talking to people. My role out there was to chair community meetings as an independent person from outside of Bourke. We spent about 18 months doing that, just talking to people, the community talking amongst themselves, before they were ready to make their first foray into change.⁶⁵

7.56 Having utilised a lengthy process of consultation Mr Gooda reflected on the positives of the Bourke program:

I think the key to what is happening at Bourke is that the Bourke community runs it, the Bourke community owns it, and they are the ones that coordinate all the service providers.⁶⁶

7.57 In evidence to the committee, Ms Hopkins reiterated this point:

In terms of our engagement with community, Mick Gooda and I went to Bourke on many occasions, having some small meetings, then larger meetings and then we met at the TAFE hall with, I think, 60 community members there. It took a long time to gain the trust and to allow the community to take the lead. Mick was always very clear: we would not return to Bourke unless we were invited, and nothing would be formulated

62 *Submission 11*, p. 1.

63 *Committee Hansard*, 4 April 2016, p. 8.

64 *Submission 22*, pp. 46-47.

65 *Committee Hansard*, 4 April 2016, p. 2.

66 *Committee Hansard*, 4 April 2016, p. 2.

in terms of a plan. He used to call 'plan' the 'P-word'. There was nothing we formulated in terms of a plan unless the community were driving it. I think there is an idea of a new way of doing business to create that trust. It needs to happen.⁶⁷

7.58 The Bourke project has collected an extensive amount of data to not only understand a person's passage through the criminal justice system but how the community manages in terms of offending, diversion, bail, sentencing, punishment and recidivism.⁶⁸ Data has also been collected on early life outcomes, education, employment, housing, healthcare (including mental health), child safety and drugs and alcohol. As a result:

They have identified and the government is now implementing a number of cross-sector initiatives or 'circuit breakers'...including three justice circuit breakers addressing breaches of bail, outstanding warrants and the need for a learner driver program in Bourke.⁶⁹

7.59 However, at the public hearing in Canberra, Ms Hopkins indicated that the acquisition of data to understand the situation and be able to monitor it effectively as one of the greatest challenges of the project:

Access to data, the process of obtaining data, updating data, getting the right data and going back and forward has been very onerous, time consuming and complex. Without having a position resourced to be able to do that on behalf of the community, I would not think it is possible.⁷⁰

Cowra Justice Reinvestment Project

7.60 Dr Jill Guthrie from the Australian National University is leading an exploratory study in the NSW community of Cowra to evaluate the theory, methodology and potential use of a justice reinvestment approach to addressing crime. Dr Guthrie's study has a particular focus on the imprisonment of Cowra's young people (indigenous and non-indigenous).⁷¹

7.61 Dr Jill Guthrie explained the focus of the research:

This study is a conversation with the town to explore what are the conditions, the understandings, the agreements that would need to be in place in order to return those juveniles who are incarcerated in detention centres away from the town, back to the town, and to keep those juveniles who are at risk of incarceration from coming into contact with the criminal justice system.

67 *Committee Hansard*, 4 April 2016, p. 11.

68 Justice reinvestment in Bourke, <http://www.justreinvest.org.au/justice-reinvestment-in-bourke/> (accessed 6 April 2016).

69 Justice reinvestment in Bourke, <http://www.justreinvest.org.au/justice-reinvestment-in-bourke/> (accessed 6 April 2016).

70 *Committee Hansard*, 4 April 2016, p. 10.

71 Reducing Incarceration using Justice Reinvestment: an exploratory case study, <http://ncis.anu.edu.au/cowra/>, (accessed 23/03/2016).

Participation in the project by the Cowra community has enabled the team to identify issues underlying the incarceration of its young people. Specifically, community groups and organisations have been consulted throughout the project to assist in identifying effective alternatives to prison which ought to be invested in, such as holistic and long-term initiatives, and better integrated services. Young people will also be interviewed about their experiences and suggestions for change.⁷²

7.62 The Cowra research aims to build an evidence base for justice reinvestment that may be used for future advocacy.⁷³

South Australia

7.63 In 2015 South Australia began to look at addressing the over-representation of Aboriginal people in the criminal justice system. The South Australian Government has committed to implementing justice reinvestment trials:

Port Adelaide has been selected as a potential trial area. In order to get it right from the start, we need to consider what the community might think about it and how it might work.

In July and August 2015, the Attorney-General's Department (with support from PwC's Indigenous Consulting (PIC)) began consultation with community members, service providers, government, non-government organisations and others about what a trial justice reinvestment project could look like for Port Adelaide. Further work is being undertaken to refine the scope of the trial and further [engagement] process.⁷⁴

Australian Capital Territory

7.64 In 2010, the ACT Government entered into a formal 'Aboriginal and Torres Strait Islander Justice Agreement' (from 2010-2013) with the ACT's Aboriginal and Torres Strait Islander elected body as a step towards addressing the over-representation of indigenous persons in incarceration.⁷⁵

7.65 The ACT's current partnership (committed to from 2015-2018) seeks to continue the work of the original agreement in addressing:

Aboriginal and Torres Strait Islander over-representation in the ACT justice system, as both victims and offenders, and to reduce the incarceration rate of Aboriginal and Torres Strait Islander people in the ACT. It seeks to improve justice outcomes for Aboriginal and Torres Strait Islander people

72 *Submission 5*, p. 26.

73 *Submission 5*, p. 25.

74 South Australia Attorney-General's Department 'Justice Reinvestment', <http://www.agd.sa.gov.au/initiatives/more-our-initiatives/justice-reinvestment> (accessed 22/03/2016).

75 *Submission 50*, p. 1. The Agreement was in response to a joint report launched in 2008 by the ACT Council of Social Services/Aboriginal Justice Centre entitled *Circles of Support: Towards Indigenous Justice: Prevention, Diversion and Rehabilitation*..

in ACT through the development and implementation of policies and programs that have long-term benefits for the local community.

It is clear that traditional approaches to reducing incarceration do not work, or do not work as effectively, in relation to the incarceration of Aboriginal and Torres Strait Islander people.⁷⁶

7.66 The ACT is also working on reducing the offences for which people can be incarcerated and providing an option for imprisonment to be served in the community (an intensive correction order):

Combined with other justice reform program initiatives, such as a proposed bail support program, the ACT Government has committed to reducing the incarceration rate.⁷⁷

76 *Submission 50*, p. 5.

77 *Submission 50*, p. 5.

Chapter 8

Committee view and recommendations

8.1 The work of this committee and the evidence it has received has been preceded by many other inquiries. The committee acknowledges what one witness described as 'Aboriginal justice inquiry fatigue'.¹ However, in the committee's view, these inquiries do serve an important purpose. While there is, naturally, a focus on the lack of resources for legal services for Aboriginal and Torres Strait Islander people and the increasing incarceration rate, the committee has also heard evidence of programs helping to prevent contact with the criminal justice system, and efforts to divert and rehabilitate offenders from prison. There is certainly more work to do, but the committee believes that there is also positive work being done.

Adequacy of resources for legal assistance services

8.2 Evidence to the committee reiterates what has been found in previous inquiries: the funding for legal assistance services is inadequate. This means not only is more funding needed for the Indigenous-specific services of Indigenous legal service providers and the Family Violence Prevention Legal Services, but also for Legal Aid and Community Legal Centres which also offer valuable assistance to Aboriginal and Torres Strait Islander people.

8.3 The current breadth and depth of unmet legal needs for Aboriginal and Torres Strait Islander people is completely unsatisfactory. As the committee heard, in large areas of Australia, Aboriginal and Torres Strait Islander people have no access to any legal assistance for civil and family law matters. The result is that simple legal matters 'remain unresolved until they escalate and multiply....legal problems can balloon into more significant issues...and ultimately to criminal behaviour and imprisonment'.²

8.4 The broad issue of unmet legal needs, not specific to Indigenous Australians, was recognised by the Productivity Commission in 2014 and it recommended additional funding to address pressing gaps in services.³ The committee notes that this specific recommendation was not addressed in the government response. The committee agrees with the rationale expressed by the PC and believes it is particularly applicable to Indigenous Australians, that 'not providing legal assistance...can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending...'⁴

1 Mr Wes Morris, Coordinator; *Committee Hansard*, 23 September 2015, p. 37.

2 Law Council of Australia, *Submission 41*, p. 27.

3 Australian Government, Productivity Commission, *Access to Justice Arrangements, Inquiry Report No. 72*, 5 September 2014, p. 63.

4 Australian Government, Productivity Commission, *Access to Justice Arrangements, Inquiry Report No. 72*, 5 September 2014, pp 30-31.

8.5 The committee notes the call in the Redfern Statement for the Australian Government to adequately fund Aboriginal and Torres Strait Islander community controlled front-line legal services which would include reversing funding cuts to Aboriginal and Torres Strait Islander legal services funding due to occur in 2017 and investing in Family Violence Prevention Legal Services to ensure funding certainty,⁵

Barriers to legal assistance

8.6 The committee considered a number of barriers to accessing legal assistance services. As evidence to this committee demonstrated, a lack of awareness about legal problems can have significant effects for Aboriginal and Torres Strait Islander people.

8.7 The committee commends the work that is being done by legal service providers, such as Legal Aid New South Wales (NSW), in forming relationships with health services to assist in identifying legal problems. The committee also heard that outreach workers can play a significant role in breaking down those barriers to accessing legal services.

8.8 The committee was concerned by the evidence that it received regarding the lack of interpreters available to assist Aboriginal and Torres Strait Islander people to access legal assistance services. It is critical that interpreters be made available in order for clients to engage with, and for services to provide, legal advice. In particular, the committee notes the evidence of The Hon Wayne Martin AC, Chief Justice of Western Australian Supreme Court (WA), that criminal proceedings are invalid unless the accused person understands the language in which the process is being conducted.

8.9 While it is clear that more money is needed for legal assistance services generally, the committee is strongly of the view that there needs to be a focus on funding for community legal education, outreach workers and interpreters. A focus on more education and early intervention would help prevent people becoming involved in the criminal justice system.

Imprisonment of Indigenous people

8.10 The committee is discouraged to see the continual upward trend in the incarceration rates of Indigenous people. The committee agrees with so much of the evidence that it received that the structural biases within the system are impacting heavily on Indigenous people. As has been borne out in previous inquiries, and was again highlighted in this inquiry, mandatory sentencing regimes, harsh bail laws and proactive policing impact on Indigenous incarceration rates.

8.11 However, the committee also acknowledges that this particular issue is complicated by the fact that the criminal justice system is the responsibility of states and territories, and so there are limited actions available to the Commonwealth Government to address increasing incarceration rates.

5 Redfern Statement, p. 11.

Mandatory sentencing

8.12 Noting the limitation of the Commonwealth, the committee received concerning evidence about the effect that state laws such as mandatory sentencing have on Indigenous incarceration rates. The committee notes the persuasive evidence on this issue from Chief Justice Martin who indicated that the mandatory sentencing legislation in WA 'will have a significant effect upon incarceration rates, particularly amongst juveniles'.⁶

Data

8.13 The data available on Indigenous incarceration rates lacks granularity. While broad trends are discernible, there is a lack of disaggregated data and the collection of data by states and territories is inconsistent. In particular, the committee agrees with the observations about the limitation of data in respect of the imprisonment of Indigenous women.

8.14 The committee notes that, pursuant to the current National Partnership Agreement on Legal Assistance Services there has been increased action by the Commonwealth Government, particularly within the Attorney-General's Department, regarding data on legal assistance services. However, the committee believes that more should be done regarding the collection of consistent and standardised data on incarceration rates for Indigenous people. While the committee received evidence that it is difficult to have a 'single, logical owner' of such a task,⁷ it seems obvious to the committee that the Council of Australian Governments (COAG) Law, Crime and Community Safety Council is the body to drive policy and actions in this area. The committee therefore recommends that the Commonwealth Government take all necessary steps to have the development and implementation of a plan for the collection of consistent national data on all aspects of Indigenous incarceration placed on the agenda for the next meeting of the Law, Crime and Community Safety Council.

Justice targets

8.15 The committee notes the strong support for justice targets to form part of the Closing the Gap measures. The committee also notes the Coalition parties, despite supporting such targets prior to the last election, have, in government, backed away from that commitment.

8.16 The committee accepts the Minister for Indigenous Affairs' statement that the Commonwealth Government is going to work with states and territories, which have the responsibility in this area, to assist them to put in place justice targets and the measures to meet those targets. However, the committee notes that the communiqué from the most recent COAG meeting, does not demonstrate sufficient action or urgency by the Commonwealth Government to specifically address the development,

6 *Committee Hansard*, 4 August 2015, p. 32.

7 Ms Elizabeth Quinn, Assistant Secretary, Legal Assistance Branch, Attorney-General's Department, *Committee Hansard*, 4 April 2016, p. 30.

implementation and meeting of justice targets by the states and territories.⁸ The committee recommends that the Commonwealth Government outline the explicit steps that it is taking to assist the states and territories on justice targets.

Fetal Alcohol Spectrum Disorders

8.17 The committee notes the release of the Australian Guide to the diagnosis of FASD which includes the Australian FASD Diagnostic Instrument.⁹ In the committee's view, the release of the Guide and Diagnostic Instrument should be accompanied by a communication plan to inform those in the criminal justice field working with offenders who may have FASD of its release.

8.18 The committee anticipates that the release of the Guide and Diagnostic Instrument will result in an increase in the diagnosis of FASD, particularly among those coming in contact with the criminal justice system. To this end, the committee recommends the Commonwealth Government to work with the states and territories to develop guidelines for the appropriate management of offenders with FASD.

8.19 Obviously, with FASD, prevention is better than cure. In this respect, the committee was disappointed that there appears to be limited ongoing promotion of the National Health and Medical Research Council's guidelines that for women who are pregnant, planning a pregnancy or breastfeeding, not drinking alcohol is the safest option. In the committee's view, the Commonwealth Government should continue to fund community-wide promotion and education of this message.

Current programs

8.20 The committee was impressed with two of the initiatives being carried out in NSW, namely the Work and Development Order (WDO) and the Custody Notification Service (CNS).

8.21 In the committee's view, the WDO operating in NSW offers a way in which to address minor indiscretions, without exacerbating poverty and disadvantage. While the committee acknowledges that the non-payment of a fine in NSW, in and of itself, does not lead to imprisonment, the WDO could still represent a workable alternative in other jurisdictions where unpaid fines can result in imprisonment.

8.22 With regards to the CNS, the committee understands that some form of CNS operates in all states and territories. In NSW, the committee notes that since its introduction in NSW in 2000, until July 2016, there had been no deaths of Aboriginal people in custody. The committee notes the tragic outcomes in July 2016 when the CNS was not notified and an Aboriginal woman died in police custody. An internal police investigation was launched and the matter will be examined by the NSW

8 See COAG Communiqué, 1 April 2016, p. 3. Available at: www.coag.gov.au/sites/default/files/COAG_Communique.pdf.

9 Australian Government, Department of Health, Australian Guide to the diagnosis of Fetal Alcohol Spectrum Disorder (FASD), April 2016.

coroner.¹⁰ The committee considers that this underscores the critical importance of this service.

Diversion and rehabilitation

8.23 Part of the committee's focus in this inquiry was to look at what is working – those projects demonstrating positive outcomes either in diverting Aboriginal and Torres Strait Islander people from prison or assisting them post-release so that they do not return to prison.

8.24 In particular, the committee was interested in those programs being run by Aboriginal controlled or operated organisations. To this end, evidence about the Yiriman project in the Fitzroy Crossing region of WA and the work of the Wirrpanda Foundation through its Moorditj Ngoorndiak Program were certainly positive stories. However, the committee is also cognisant that one of the challenges for these programs is the uncertainty of funding, which in turn means that successful programs are ad hoc and can lose traction.

Justice Reinvestment

8.25 The committee is impressed by the work being done on the justice reinvestment project in Bourke. The Bourke project is clearly an example of the positive outcomes which can be achieved with a community-led process.

8.26 The committee believes, that following from the progress seen at Bourke, the Commonwealth Government should assist in the development of similar programs at trial sites in all states and territories. The committee is cognisant that there is no 'plan' from Bourke which can be used to model other sites, however, the process developed for Bourke can be rolled out to other trial sites. The committee understands that it would take some time to develop similar programs at other sites, as the community needs to be given sufficient time to consult, develop and implement a program.

8.27 While the committee understands that funding for the project at Bourke is predominantly from non-government sources, the committee also notes that the Commonwealth Government provided one-off additional funding of \$20,000 to support the Bourke justice reinvestment project.¹¹

Recommendation 1

8.28 The committee recommends that the Commonwealth Government adequately support legal assistance services, and that specifically funding should focus on:

- **community legal education for Aboriginal and Torres Strait Islander people;**

10 Sarah Gerathy, 'Rebecca Maher: Family friend calls for answers about death in custody at Maitland', ABC News, 17 August 2016.

11 See Senate Legal and Constitutional Affairs Legislation Committee, Attorney-General's Department's answer to question on notice No. 63, Budget Estimates 2015.

- outreach workers to assist Aboriginal and Torres Strait Islander people; and
- interpreters for Aboriginal and Torres Strait Islander people in both civil and criminal matters to ensure that they receive effective legal assistance.

Recommendation 2

8.29 The committee recommends that the Commonwealth Government take all necessary steps in the development and implementation of a plan for the collection of consistent national data on all aspects of Indigenous incarceration placed on the agenda for the next meeting of the Council of Australian Governments Law, Crime and Community Safety Council.

Recommendation 3

8.30 The committee recommends that the Commonwealth Government, prior to the next Council of Australian Governments meeting, explicitly state the measures it is putting in place to assist states and territories to develop, implement and meet Indigenous justice targets.

Recommendation 4

8.31 The committee recommends that the Department of Health prepare a communication plan for those working in areas such as the criminal justice field, to accompany the release of the National Fetal Alcohol Spectrum Disorders (FASD) Diagnostic Tool.

Recommendation 5

8.32 The committee recommends that the Commonwealth Government, through the Council of Australian Governments, work with states and territories, to develop and implement guidelines for the appropriate management of offenders diagnosed with Fetal Alcohol Spectrum Disorders.

Recommendation 6

8.33 The committee recommends that the Commonwealth Government continue to fund initiatives which promote the National Health and Medical Research Council's guidelines that for women who are pregnant, planning a pregnancy or breastfeeding, not drinking alcohol is the safest option.

Recommendation 7

8.34 The committee recommends that the Commonwealth Government contribute to the development of justice reinvestment trials at sites in each state and territory.

Recommendation 8

8.35 The committee recommends that much greater attention is given to Aboriginal led, managed and implemented justice reinvestment programs such as the Bourke Project and Yirriman, and that the Commonwealth Government support Aboriginal led justice reinvestment projects.

Recommendation 9

8.36 The committee recommends that the Commonwealth Government work with the states and territories in supporting programs which strengthen families and communities through a focus on early intervention and support.

Recommendation 10

8.37 The committee recommends that administrative responsibility for Family Violence Prevention Legal Services be returned to the Attorney-General's Department.

Recommendation 11

8.38 The committee recommends that the Council of Australian Governments task the Council of Australian Governments Law, Crime and Community Safety Council to review state laws such as mandatory sentencing which have a disproportionate effect on Indigenous Australians in order to quantify the effects and report to the Council of Australian Governments.

8.39 Since the committee concluded the evidence gathering period of the inquiry, the committee notes that on 28 July 2016, the Prime Minister announced that there will be a Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory. The committee welcomes this decision and the appointment of two Royal Commissioners, The Honourable Margaret White AO and Mr Mick Gooda.¹²

Senator Jenny McAllister
Chair

12 The Hon Malcolm Turnbull MP, Prime Minister of Australia, 'Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory, Joint Press Release with Senator the Hon George Brandis QC, the Attorney-General, 28 July 2016.

Additional and dissenting comments from government senators

Introduction

1.1 Government Senators acknowledge that Aboriginal and Torres Strait Islander people, particularly Indigenous youth, are overrepresented in the criminal justice system. The reasons for the high rates of Indigenous incarceration are complex and multi-faceted but in large part stem from broader issues of Indigenous disadvantage.

1.2 The Minister for Indigenous Affairs, Senator the Hon. Nigel Scullion has reaffirmed that the government is committed to working with jurisdictions to address areas of disadvantage affecting Indigenous Australians which increase the likelihood of a person being exposed to the criminal justice system:

I am committed to reducing Indigenous offending, victimisation and incarceration by tackling the drivers of crime, including alcohol and drug misuse, poor educational outcomes and disconnection from employment. States and territories are responsible for their criminal justice systems, including policing. However, this, like many issues, needs governments to work together to ensure that we get better outcomes.¹

Closing the gap

1.3 Government Senators note that since the establishment of the 'Closing the Gap' campaign 10 years ago, there has been progress in improving some Indigenous outcomes and these are:

...built on the combined efforts of successive governments, business, community and most importantly, Aboriginal and Torres Strait Islander people themselves. But it is undeniable that progress against targets has been variable, and that a more concerted effort is needed.²

1.4 On 10 February 2016 the Prime Minister, the Hon. Malcolm Turnbull MP informed parliament that the government is committed to 'Closing the Gap' for Indigenous Australians.³ The Prime Minister recognised:

The Prime Minister of the day tables the Closing the Gap report as a report card of our nation on our combined efforts. This shared responsibility falls to each and every single Australian, Indigenous and non-Indigenous, every level of government and every business and organisation. With each report we have an opportunity to assess where we must redouble our efforts and

1 Senator the Hon. Nigel Scullion, Minister for Indigenous Affairs, *Senate Hansard*, 13 September 2016, p. 12.

2 Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf, (accessed 2 September 2016)

3 The Hon Malcolm Turnbull MP, Prime Minister, *House of Representatives Hansard*, 10 February 2016, pp 1171-1175.

derive better value from the admittedly finite resources of government. State and territory governments are necessary partners. Between this year's report and the next one, I will work to ensure we are better tracking progress across the jurisdictions so we can target our efforts and accelerate outcomes. A key driver of progress has to be economic empowerment through employment, through entrepreneurship and through the use of our human capital.⁴

1.5 In his speech on 10 February 2016, the Prime Minister recognised the issue of Indigenous incarceration:

Indigenous Australians represent three per cent of the Australian population, yet they represent a staggering 27 per cent of the prison population. The Indigenous adult imprisonment rate is increasing. When young Aboriginal and Torres Strait Islander men see jail as a rite of passage, we have failed to give them a place in our society, in our community, and an alternative pathway where they can thrive. There is a vicious cycle of young Indigenous people being placed into prison, reoffending, and then returning to prison. We know the power of employment—the power of a job—as a circuit breaker in that dreadful cycle. Senator Scullion, the Minister for Indigenous Affairs, and Senator Cash, the Minister for Employment, are working across jurisdictions and portfolios, working with Aboriginal and Torres Strait Islander communities to develop a blueprint for supporting, and then transitioning, people from prison to work, to security and to prosperity.⁵

Indigenous incarceration rates

1.6 Government Senators are concerned that the imprisonment rate for Aboriginal and Torres Strait Islanders is 13 times greater than the imprisonment rate for non-Indigenous Australians.⁶ The rates of Indigenous youth in detention as outlined by the Australian Institute of Health and Welfare are particularly concerning:

Close to half (45%) of young people aged 10–17 under youth justice supervision on an average day in 2013–14 were Indigenous, despite comprising only about 6% of young people aged 10–17 in Australia. In detention, this proportion was even greater, at 58%.⁷

1.7 However, the Commonwealth Government recognises its jurisdictional limitations in the criminal justice area:

Primary responsibility for criminal justice rests with the state and territory governments, which deliver a range of programmes to reduce incarceration

4 The Hon Malcolm Turnbull MP, Prime Minister, *House of Representatives Hansard*, 10 February 2016, p. 1174.

5 The Hon Malcolm Turnbull MP, Prime Minister, *House of Representatives Hansard*, 10 February 2016, pp 1174-1175.

6 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

7 AIHW, *Youth justice in Australia 2013-14*, Bulletin 127, April 2015, p. 7. References to tables and figures have been removed from this quote.

and re-offending. The Australian Government is working with state and territory governments to ensure its investment complements their efforts and leads to real improvements in Aboriginal and Torres Strait Islander people's lives.⁸

1.8 While criminal justice is primarily a state issue, as noted above, the government is committed to working with jurisdictions to reduce the rates of Indigenous incarceration.

Recognising the reasons for Indigenous incarceration

1.9 Addressing Indigenous disadvantage is key to reducing imprisonment rates. The Queensland Association of Independent Legal Services explained how disadvantage contributes to incarceration:

As identified in the Royal Commission report, one of the biggest factors contributing to overrepresentation by Aboriginal and Torres Strait Islander people in prison is disadvantage. People who are or have been in prison are typically from highly disadvantaged backgrounds and Aboriginal and Torres Strait Islander people are the most disadvantaged group in Australia.⁹

1.10 The committee heard from witnesses such as The Hon Wayne Martin AC, Chief Justice of Western Australia who noted that:

Aboriginal people are significantly over-represented amongst the most marginalised and disadvantaged people within our society, and it is the most marginalised and disadvantaged people within our society who are much more likely to commit crime.¹⁰

1.11 Dr Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Adjunct Professor with the School of Social Science and Policy at the University of New South Wales explained that disadvantage forms a cycle of exposure to the criminal justice system:

Parents exposed to financial or personal stress, or who abuse drugs and/or alcohol are more likely to abuse or neglect their children. Children who are neglected or abused are more likely to associate with delinquent peers and do poorly at school, which in turn increases the risk of involvement of crime. Involvement in crime increases the risk of arrest and imprisonment, both of which further reduce the changes of employment, while at the same time increasing the risk of drug and alcohol abuse. And so the process goes

8 Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf, (accessed 2 September 2016), p. 51.

9 *Submission 8*, p. 4.

10 *Submission 1*, pp 7-8.

on, a vicious cycle of hopelessness and despair transmitted from one generation of Aboriginal people to the next.¹¹

1.12 The University of NSW Law Society also outlined that disadvantage increases the likelihood of criminal offending. This is particularly prevalent with Indigenous juveniles, who are:

...disadvantaged when it comes to education, health care and employment and thus more likely to experience domestic violence, to be taken into state care and even to engage in offending behaviours.¹²

Addressing disadvantage

1.13 In 2009, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Tom Calma AO, confirmed the need for a multifaceted approach to tackle Indigenous disadvantage.¹³

1.14 The Australian Justice Reinvestment Project argued that indigenous incarceration cannot be considered independently of broader targets to minimise disadvantage as they are intrinsically interlinked.¹⁴ The Prime Minister's 'Closing the Gap' report showed that improvements in one area can positively impact another:

For example, providing children with a healthy start to life will give them the best chance of academic success which will, in turn, have positive flow-on effects for employment opportunities.¹⁵

Health

1.15 Chief Justice Martin recognised the importance of addressing health disadvantage early:

We know the first three years of a child's life are absolutely critical for their future, so we have to improve health and nutrition in those important years in Aboriginal children's lives.¹⁶

1.16 The Australian Institute of Health and Welfare outlined that Indigenous Australians have poorer health than other Australians.¹⁷ They are more likely to live

11 Weatherburn, D, *Arresting Incarceration-Pathways out of Indigenous Imprisonment*, Aboriginal Studies Press, 2014, pp 86-87.

12 *Submission 14*, p. 11, see also Roz Parker, 'Aboriginal and Torres Strait Islander mental health: an overview' In Nola Pudie, Pat Dudgeon and Roz Walker (eds), *Working together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice*. (Commonwealth of Australia, 2010).

13 Australian Human Rights Commission, *Social Justice Report 2009*, p. 54.

14 *Submission 12*, Attachment 1, p. 28.

15 Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf, (accessed 2 September 2016), p. 5.

16 *Submission 1*, pp 17-18.

with poor health, experience disability and the life expectancy of Indigenous Australians is approximately 10 years less than non-Indigenous Australians.¹⁸

1.17 The reasons for this disparity include social and economic disadvantages, health behaviours, such as smoking and poor diet, and access to health services. The Australian Institute of Health and Welfare expanded on health disadvantage:

Indigenous Australians have been disadvantaged across many areas of life which continue to affect their health today. Disadvantages such as poor education, unemployment, low income, discrimination and poor quality housing are often referred to as the 'social determinants of health'. Social determinants can affect health outcomes both directly and indirectly.

For example, a direct effect might be where a person on a low income is not able to afford, and therefore benefit from, health services with high out-of-pocket costs. Indirectly, social factors may increase a person's likelihood of engaging in risky health behaviours such as smoking and/or excessive alcohol consumption¹⁹

1.18 Professor Sir Michael Marmot, President of the World Medical Association, Director of the Institute of Health Equity and a leading researcher on health inequality issues has commented on the links between health and criminal offending:

The social conditions in which people are born, grow, live, work and age are strongly determinative both of risk of ill health and of the likelihood of engaging in civil disorder.

Health and inequalities in health are closely linked to the conditions in which we raise our children, the education we get, the neighbourhoods we live in, the work we do, whether we have the money to make ends meet, our social relationships and our care for the elderly.²⁰

1.19 The 'Closing the Gap' Report acknowledges that an early focus on health will have positive effects later in life:

17 Australian Institute of Health and Welfare, *Indigenous Health*, <http://www.aihw.gov.au/australias-health/2014/indigenous-health/>, (accessed 2 September 2016).

18 Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf, (accessed 2 September 2016), p. 3.

19 Australian Institute of Health and Welfare, *Indigenous Health*, <http://www.aihw.gov.au/australias-health/2014/indigenous-health/>, (accessed 2 September 2016). Between 2009 and 2013 48 percent of Indigenous mothers smoked during pregnancy, three point seven times the rate for non-Indigenous mothers. Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf, (accessed 2 September 2016), p. 10.

20 Boyer Lectures, *Health Inequality and the causes of the causes*, <http://www.abc.net.au/radionational/programs/boyerlectures/>, (accessed 5 September 2016).

Ensuring Aboriginal and Torres Strait Islander children have a positive start to life will strengthen their opportunities later in life.²¹

1.20 In 2014 the government established the Indigenous Australians' Health Programme by consolidating pre-existing health funding streams.²² The government established the National Aboriginal and Torres Strait Islander Health Plan 2013-2023 (The Plan). The Plan was developed to improve overall health outcomes by:

Provid[ing] an overarching framework which builds links with other major Commonwealth health activities and identifies areas of focus to guide future investment and effort in relation to improving Aboriginal and Torres Strait Islander health.²³

Fetal Alcohol Spectrum Disorders

1.21 As noted in the majority report, Fetal Alcohol Syndrome Disorders (FASD) is an issue in Indigenous communities which may contribute to indigenous incarceration.

1.22 Chief Justice Martin drew the attention of the committee to the issue of FASD in the criminal justice system:

The disadvantage can start before children are born, when too many contract Foetal Alcohol Spectrum Disorder (FASD). We know that in the north of this State FASD is now a significant problem in our criminal justice system.²⁴

1.23 A report by the House of Representatives Standing Committee on Social Policy and Legal Affairs recognised FASD as a contributing factor to incarceration rates in Indigenous communities and emphasised the need for early intervention:

The Committee is convinced of the necessity and benefit of early intervention to improve the life outcomes of individuals born with FASD. Without a diagnosis, or with the wrong diagnosis, the treatment of individuals with FASD by their families, educators, physicians and society in general can inadvertently cause great damage and lead to severe secondary disabilities such as mental illness or substance abuse which may

21 Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf, (accessed 2 September 2016), p. 6.

22 This included: primary health care base funding; child and maternal health activities; Stronger Futures in the Northern Territory (Health); and the Aboriginal and Torres Strait Islander Chronic Disease Fund. See the Department of Health, *Indigenous Health*, <https://www.health.gov.au/Indigenous> (accessed 2 September 2016).

23 The Department of Health, *National Aboriginal and Torres Strait Islander Health Plan 2013-2023*, <https://www.health.gov.au/internet/main/publishing.nsf/Content/natsih-plan>, (accessed 2 September 2016).

24 *Submission 1*, p. 17.

then lead on to incarceration. Early intervention is critical to unlocking a better future.²⁵

1.24 The Australian Institute of Health and Welfare also pointed out the interaction between FASD and the justice system:

A high proportion of young people and adults with FASD come into contact with the criminal justice system. Memory difficulties, inability to plan, and failure to recognise the consequences of their actions mean that fines might not be paid and probation orders and good behaviour bonds breached.²⁶

1.25 On 25 June 2014, the government announced \$9.2 million for the National Fetal Alcohol Spectrum Disorders Action Plan to address the harmful impact of FASD on children and families.²⁷ The FASD Technical Network was also established in September 2014 to advise the Department of Health on the activities under the FASD Action Plan.²⁸

1.26 Professor Elizabeth Elliott AM, Paediatrics and Child Health, University of Sydney Clinical School, informed the committee that FASD screening and diagnostic tools were being developed.²⁹

1.27 In mid-2016 the National FASD Diagnostic Instrument was released. The diagnostic instrument is designed to assist Australian's health professionals with identifying and diagnosing FASD.³⁰

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- 25 House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012. p. 110.
- 26 Australian Institute of Health and Welfare, *Fetal Alcohol Spectrum disorders: a review of interventions for prevention and management in Indigenous Communities*, February 2015, <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129550296>, (accessed 5 September 2016).
- 27 Senator The Hon Fiona Nash, Minister for Regional Development and Minister for Regional Communications, 'Government Funds National Strategy to Target Fetal Alcohol Spectrum Disorders', 25 June 2014.
- 28 Senator The Hon Fiona Nash, Minister for Regional Development and Minister for Regional Communications, 'Government Funds National Strategy to Target Fetal Alcohol Spectrum Disorders', 25 June 2014. See also Department of Health, *Answers to questions on notice: Question No. 1*, received 13 and 21 April 2016.
- 29 *Committee Hansard*, 23 September 2015, p. 7. *Supplementary Submission 39*, Amnesty International Australia, *A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia*, May 2015, p. 29.
- 30 Australian Guide to the Diagnosis of FASD, *diagnosing FASD*, <http://alcoholpregnancy.telethonkids.org.au/about-fasd/diagnosing-fasd/> (accessed 6 September 2016). See also Department of Health, *Answers to questions on notice: Question No. 1*, received 13 and 21 April 2016.

Education

1.28 The government recognises that improving educational outcomes for Indigenous Australians is another area that will reduce contact with the justice system. Senator the Hon Minister Nigel Scullion has emphasised this point:

Without a proper education Indigenous children are more likely than not to be on a path towards welfare dependency, interaction with the justice system, poor health, poor housing and little hope for the future that other Australians enjoy.³¹

1.29 The Law Council of Australia also emphasised this link:

A lack of education, or poor school attendance, has also been identified as a factor that increases the risk of offending later in life.³²

1.30 In 2015 the Australian Government endorsed the National Aboriginal and Torres Strait Islander Education Strategy:

Under the Strategy, education ministers have agreed to a set of principles and priorities that will inform jurisdictional approaches to Aboriginal and Torres Strait Islander education.³³

1.31 Through the Indigenous Advancement Strategy (IAS) the government is continuing to target Indigenous educational disadvantage:

The Indigenous Advancement Strategy (IAS) Children and Schooling Programme is providing \$222.3 million in 2015-16 for a number of projects that support Aboriginal and Torres Strait Islander young people to increase engagement and retention in education, training and employment, and diversionary programmes to encourage re-engagement.³⁴

1.32 Further, the government is working to better integrate services to support vulnerable children and families transition to school:

From 2016-17, the Government is investing \$10 million annually through the *Community Childcare Fund* to integrate early childhood, maternal and child health and family support services with schools in a number of disadvantaged Indigenous communities. The focus is on supporting

31 Senator the Hon. Nigel Scullion, Minister for Indigenous Affairs, *Senate Hansard*, 13 September 2016, p. 10.

32 Law Council of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, submission to the Senate Legal and Constitutional Affairs References Committee for its inquiry into the value of a justice reinvestment approach to criminal justice in Australia, 22 March 2013, p. 15.

33 Department of Education and Training, *National Aboriginal and Torres Strait Islander Education Strategy*, <https://www.education.gov.au/national-aboriginal-and-torres-strait-islander-education-strategy>, (accessed 5 September 2016).

34 Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf, (accessed 2 September 2016), p. 23.

Aboriginal and Torres Strait Islander families so their children make a positive transition to school.³⁵

Employment

1.33 The North Australian Aboriginal Family Violence Legal Service argued that Indigenous employment opportunities directly affect the rates of criminal offending.³⁶ The Public Interest Advocacy Centre Ltd also supported this view:

Poor socioeconomic factors, such as poor education attainment and consequent unemployment, are strong determinants of Aboriginal offending.³⁷

1.34 Just Reinvest NSW commented that Aboriginal and Torres Strait Islander Australians are more likely to be from regional areas where there are fewer opportunities to gain employment:

Undoubtedly this contributes to re-offending within the cohort and should be considered against the fact that the rate of prisoners returning to prison in NSW remained above the national average in 2012-13.³⁸

1.35 During the election the government announced:

We are committed to creating more opportunities for Indigenous businesses and, in turn, employment. We want to encourage Indigenous innovation, which creates a pipeline of opportunity.

Indigenous businesses are 100 times more likely to hire Indigenous Australians than non-Indigenous businesses, which is why we are creating an environment where Indigenous business and innovation can grow and prosper.³⁹

1.36 The plan to improve Indigenous business opportunities involves:

- delivering a tax cut for Australia's small businesses
- establishing a \$115 million Indigenous Entrepreneurs package, including:
 - \$90 million for an Indigenous Entrepreneurs Fund
 - \$23.1 million for Indigenous Business Australia's Indigenous Business Development and Assistance Programme

35 Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf, (accessed 2 September 2016), p. 13.

36 *Submission 3*, p. 4.

37 *Submission 17*, p. 6, Centre for Economic Development of Australia, *Addressing entrenched disadvantage in Australia*, April 2015, <http://adminpanel.ceda.com.au/FOLDERS/Service/Files/Documents/26005~CEDAAddressingentrencheddisadvantageinAustraliaApril2015.pdf>, p. 73 (accessed 6 September 2016).

38 *Submission 11*, p. 7.

39 Liberal, *The Coalition's Policy to Develop Indigenous Business Opportunities*, <https://www.liberal.org.au/coalitions-policy-develop-indigenous-business-opportunities>, (accessed 2 September 2016).

- \$1.9 million for the development of the Indigenous business sector strategy
- building on the early success of our commitment to three per cent of Government procurement coming from Indigenous businesses
- building on the Employment Parity Initiative to generate even greater opportunity for Indigenous businesses.⁴⁰

1.37 In February 2016 the Prime Minister hosted the 'Prime Minister's Reception for Indigenous Innovators and Entrepreneurs'. This event brought together young Indigenous businesses and innovators with corporate leaders.⁴¹

1.38 In addition, the Indigenous Procurement Policy was launched on 1 July 2015 and in the first 11 months of operation awarded 1070 contracts valued at \$229 million to 284 indigenous businesses.⁴²

Community Development Program

1.39 In July 2015 the government introduced the Community Development Program (CDP), to replace the Remote Jobs and Community Programme:

The CDP is an essential part of the Australian Government's agenda for increasing employment and breaking the cycle of welfare dependency in remote areas of Australia.⁴³

1.40 Minister Scullion commented that early evidence shows that the CDP program is producing positive outcomes:

The CDP is already proving to be a success, with the number of jobseekers placed into activities up 50 per cent since the start of the programme. About 66 per cent of jobseekers have been placed into activities – up from 45 per cent on July 1.⁴⁴

1.41 Building on the increased participation in the CDP program, Minister Scullion outlined reforms the government is making to enhance the progress made:

Under these reforms, there will be more local decision-making by providers who know the jobseekers and have closer connections to what is going on in communities.

40 Liberal, *The Coalition's Policy to Develop Indigenous Business Opportunities*, <https://www.liberal.org.au/coalitions-policy-develop-indigenous-business-opportunities>, (accessed 2 September 2016).

41 The Hon Malcolm Turnbull MP, Prime Minister, Speech to Young Indigenous Businesses and Entrepreneurs, 9 February 2016.

42 See <http://www.dpmpc.gov.au/indigenous-affairs/economic-development/indigenous-procurement-policy-ipp> (accessed 21 September 2016)

43 Department of Prime Minister and Cabinet, *The Community Development Programme (CDP)*, <https://www.dpmpc.gov.au/indigenous-affairs/employment/community-development-programme-cdp>, (accessed 6 September 2016).

44 Senator Scullion, *CDP reforms to drive employment outcomes*, 2 December 2015, <http://www.nigelscullion.com/media-hub/indigenous-affairs/cdp-reforms-drive-employment-outcomes>, (accessed 2 September 2016).

Payments will be made weekly so remote jobseekers have immediate access to their money and feel the financial impact of not turning up to activities straight away – not weeks down the track...

...Remote job seekers will also be able to earn more income on top of their welfare payments. Until they reach the minimum wage, their income support will depend on their participation in CDP activities, rather than income thresholds, taper rates and work credits. This simple system will make it easier to move between income support and intermittent work, which is typical in many remote areas.⁴⁵

1.42 The government is committed to enhancing the CDP programme to assist Indigenous employment:

The Australian Government will continue to establish economic development opportunities for Indigenous businesses and native title holders. Recent amendments to the Government's procurement policy have encouraged government departments to increase their use of Indigenous businesses in their supply chain. This new approach has resulted in new contracts with Indigenous businesses conservatively valued at around \$36 million between July and December 2015. Meanwhile, opportunities for Indigenous land owners and native title holders to leverage their land assets for economic development will be explored, in line with the recommendations of the COAG investigation into Indigenous land administration and use.⁴⁶

Funding

Indigenous Advancement Strategy

1.43 The government is committed to closing the gap on disadvantage and achieving better results for Aboriginal and Torres Strait Islander Australians. In 2015, the government changed the way Indigenous programs are funded through the Indigenous Advancement Strategy (IAS) which involved the streamlining of more than 150 Indigenous programs into five broad program streams.

1.44 The IAS ensures funding is more flexible and better designed to meet the aspirations and priorities of individual communities. As noted by Minister Scullion at the time:

If we keep doing as we have done, we will get the same result. For the first time in decades we have had a holistic look at the myriad of services and projects being funded to ensure future funding is geared towards achieving

45 Senator Scullion, *CDP reforms to drive employment outcomes*, 2 December 2015, <http://www.nigelscullion.com/media-hub/indigenous-affairs/cdp-reforms-drive-employment-outcomes>, (accessed 2 September 2016).

46 Department of the Prime Minister and Cabinet, *Closing the Gap Executive Summary, How is the Australian Government Responding*, <http://closingthegap.dpmc.gov.au/executive-summary.html>, (accessed 2 September 2016).

change on the ground that improves the lives of individuals and communities.⁴⁷

1.45 The results show the number of Aboriginal organisations funded has increased:

In total, 46 per cent of funded organisations are Indigenous and 55 per cent of funds under the IAS round is going to Indigenous organisations.⁴⁸

1.46 In comparison:

...under previous arrangements, fewer Aboriginal organisations were funded – in fact, only about 30 per cent of grant funded organisations were Aboriginal and Torres Strait Islander organisations as at December 2014.⁴⁹

1.47 The increase in the number of Indigenous organisation receiving support and funding reflects the government's commitment to ensuring that services are delivered by Indigenous organisations where possible:

...which we know are more likely to employ Aboriginal and Torres Strait Islander people. They are also much closer to and in-tune with the communities they serve.⁵⁰

1.48 The government outlined that as a consequence of the IAS:

...in addition to a focus on early childhood education and learning at school, we have assisted around 50 Indigenous Australians into a job every day under the Indigenous Advancement Strategy. That is over 1,300 new employment opportunities each month.⁵¹

Community safety

1.49 IAS also supports programs focused on improving community safety

47 Senator the Hon Nigel Scullion, *\$860 Million Investment through Indigenous Advancement Strategy Grants Round*, Wednesday 4 March 2015, <http://www.nigelscullion.com/media-hub/indigenous-affairs/860-million-investment-through-indigenous-advancement-strategy-grants-r> (accessed 6 September 2016).

48 Senator the Hon Nigel Scullion, 'IAS grant round investment totals \$1 billion', *Media release*, 27 May 2015.

49 Senator the Hon Nigel Scullion, *Greens not telling whole story on IAS funding*, Tuesday 5 May 2015, <http://www.nigelscullion.com/media-hub/indigenous-affairs/greens-not-telling-whole-story-ias-funding> (accessed 2 September 2016). Note: On 13 September 2016, the minister advised the Senate that approximately 55 percent of funds for programs are going to Aboriginal and Torres Strait Islander organisations, see Senator the Hon. Nigel Scullion, Minister for Indigenous Affairs, *Senate Hansard*, 13 September 2016, p. 10.

50 Senator Nigel Scullion, *Greens not telling whole story on IAS funding*, Tuesday 5 May 2015, <http://www.nigelscullion.com/media-hub/indigenous-affairs/greens-not-telling-whole-story-ias-funding> (accessed 2 September 2016).

51 Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf, (accessed 2 September 2016) p. 3.

The Australian Government is working with 360 organisations across the country to improve community safety as part of the Indigenous Advancement Strategy: Safety and Wellbeing Programme. This includes:

- reducing substance misuse and harm through the delivery of alcohol and other drug treatment services
- crime prevention, diversion and rehabilitation through the delivery of prisoner rehabilitation and other justice-related activities
- violence reduction and victim support through the provision of legal services and family safety activities, particularly for women and children
- improved wellbeing and resilience activities to foster social participation or reduce antisocial behaviour through social and emotional wellbeing counselling activities
- creating safe and functional environments through community night patrols.⁵²

Legal services

1.50 On 25 March 2015, the Attorney-General and the Minister Assisting the Prime Minister for Women announced a reversal of the previously announced funding cuts to the legal assistance sector, guaranteeing funding levels for the next two years and that the changes that were due to take effect from 1 July 2015 would not proceed. This means the government will contribute over \$1.327 billion to the legal assistance sector from 2013-14 to 2016-17.⁵³

1.51 In addition, since the 2013 election the government has examined legal assistance funding to ensure it is directed to front line services where the need is greatest.⁵⁴

1.52 On 1 July 2015 the National Partnership Agreement on Legal Assistance Services (NPALAS) commenced. NPALAS provides Australian Government funding to states and territories to distribute to legal aid commissions and now also community legal centres. Over five years it will provide \$1.3 billion.⁵⁵ For 2016-17:

52 Department of the Prime Minister and Cabinet, *Closing the Gap, Prime Minister's Report*, http://closingthegap.dpmc.gov.au/assets/pdfs/closing_the_gap_report_2016.pdf ,(accessed 2 September 2016) p. 51.

53 Senator the Hon George Brandis QC, Attorney-General, and Senator the Hon Michaelia Cash, Minister Assisting the Prime Minister for Women, *Legal aid funding assured to support the most vulnerable in our community*, *Media Release*, 26 March 2015 (accessed 19 November 2015).

54 Senator the Hon George Brandis QC, Attorney-General, and Senator the Hon Michaelia Cash, Minister Assisting the Prime Minister for Women, *Legal aid funding assured to support the most vulnerable in our community*, *Media Release*, 26 March 2015 (accessed 19 November 2015).

55 Senator The Hon George Brandis QC, 'New National partnership on legal assistance services', *Media release*, 1 July 2015.

...the Australian Government will provide \$257.1 million funding for legal aid services and legal assistance services through the NPALAS. This is an increase of \$6.2 million from 2015–16.⁵⁶

1.53 In March 2016, the Attorney-General advised the Senate:

Under the terms of the national partnership agreement, legal aid funding will increase from \$207.95 million in 2015-16, the first year of the agreement, to \$219.941 million in 2019-20.⁵⁷

1.54 The Attorney-General has confirmed that:

In addition to the significant funding contribution under the national partnership agreement, the Australian Government will continue to directly fund Indigenous legal assistance providers, delivering on the Government's ongoing commitment to improving law and justice outcomes for Indigenous Australians.⁵⁸

1.55 Government Senators note specific measures to assist Indigenous Australians:

The Government has allocated \$350 million over five years to provide culturally appropriate legal assistance services to support Indigenous people to effectively access justice.⁵⁹

1.56 In addition, \$15 million from the Australian Government will support 12 specialist domestic violence units with the first, the South West Sydney Domestic Violence Unit, being launched on 7 March 2016.

The Government has provided \$1.05 million over three years to establish the South West Sydney Unit to assist women who are experiencing, or at risk of experiencing, domestic and family violence.

The Unit will help women access legal advice and representation, as well as other services such as financial counselling, tenancy assistance, trauma counselling, and emergency accommodation. They will work closely with the local Women's Domestic Violence Court Advocacy Service and other legal and non-legal support services.

This pilot program is part of the Government's \$100 million Women's Safety Package, the 12 specialist units are being established in

56 Legal Aid and Legal Assistance Services

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201617/Legalaid

57 Senator The Hon George Brandis QC, Answer to question on notice, 16 March 2016, *Senate Hansard*, p. 2112.

58 Senator The Hon George Brandis QC, 'New National partnership on legal assistance services', *Media release*, 1 July 2015.

59 Senator The Hon George Brandis QC, 'New National partnership on legal assistance services', *Media release*, 1 July 2015. See also: See Senator the Hon George Brandis QC, Attorney-General, *Attorney-General's Portfolio Budget measures 2015-16*, *Media release*, 12 May 2015, available at: www.attorneygeneral.gov.au/Mediareleases/Pages/2015/SecondQuarter/12-May-2015-Attorney-General%27s-Portfolio-Budget-measures-2015-16.aspx (accessed 19 November 2015).

metropolitan, rural and regional locations across Australia with high rates of domestic and family violence.

The specialist units will also include targeted assistance to Indigenous women, and those facing cultural and linguistic barriers.⁶⁰

1.57 Government Senators emphasise the constrained financial environment we need to work within but note that the government is committed to doing what it can to increase funding levels as evidenced by the \$15 million legal assistance component of the \$100 million Women's Safety Package and the restoration of \$25.5 million in funding to the legal assistance sector.⁶¹

Justice Reinvestment

1.58 Government senators support justice reinvestment in principle and look forward to reviewing the outcomes of the trial underway in Bourke. The government has provided funding for this trial, where during the initial stages:

Several community-led meetings occurred which were well attended by representatives from the Department of the Prime Minister and Cabinet, the NSW Department of Premier and Cabinet, nearly all Departmental heads and senior managers, and peak Government and non-government organisations who have all committed to supporting and participating actively in the Maranguka Justice Reinvestment Project.⁶²

1.59 The first stage of the project has focused on building trust between community and service providers, identifying community priorities and circuit breakers and data collection.⁶³

1.60 At the time the committee spoke with Just Reinvest NSW the project was still in the planning phase⁶⁴ but government senators note a recent program on Four Corners indicates a number of programs are underway.⁶⁵

Justice targets

1.61 Government senators note the discussion about justice targets in the majority report and reiterate the point made by Minister Scullion that the Commonwealth has no legislative jurisdiction over state and territory criminal justice systems.⁶⁶

60 Senator The Hon George Brandis QC, Attorney General, 'New legal service to help women and children', *Media release*, 7 March 2016.

61 See <https://www.ag.gov.au/LegalSystem/Pages/response-to-report-into-access-to-justice-arrangements.aspx> (accessed 5 October 2016)

62 Just Reinvest NSW, *Justice Reinvestment in Bourke*, <http://www.justreinvest.org.au/justice-reinvestment-in-bourke/>, (accessed 6 September 2016).

63 <http://www.justreinvest.org.au/justice-reinvestment-in-bourke/> (accessed 21 September 2016)

64 Ms Sarah Hopkins, Chairperson, Just Reinvest NSW, *Committee Hansard*, 4 April 2016, p. 8.

65 Geoff Thompson and Lisa McGregor, 'Backing Bourke', Four Corners, 19 September 2016, see <http://www.abc.net.au/4corners/stories/2016/09/19/4539321.htm> (accessed 21 September 2016)

1.62 On this point, however, Government senators note the justice targets set by the former Northern Territory government in its Aboriginal Affairs Strategy.⁶⁷

1.63 Instead, the Commonwealth seeks to contribute by engaging with state and territory governments, Indigenous communities and other stakeholders about how to achieve better justice-related outcomes.⁶⁸

Royal Commission

1.64 On 28 July 2016, the Prime Minister announced the establishment of a Royal Commission into the Child Protection and Youth Detention Systems of the Government of the Northern Territory.⁶⁹

1.65 On 1 August 2016, The Honourable Margaret White AO and Mr Mick Gooda were appointed as Royal Commissioners. The Prime Minister indicated:

The Government acknowledges the importance of having Indigenous voices on the Commission given the high number of Aboriginal and Torres Strait Islander children incarcerated in the Northern Territory detention system and who are involved in the child protection system.⁷⁰

1.66 On 10 October 2016, the Attorney-General announced a free legal advisory service for people engaging with the Royal Commission into the Protection and Detention of Children in the Northern Territory. The legal advisory service will be delivered by the North Australian Aboriginal Justice Agency (NAAJA), the Children in Care and Youth Detention Advice Service will receive \$1.1 million from the Australian Government in 2016-17.⁷¹

Conclusion

1.67 In relation to the recommendations in the majority report, Government Senators note that as indicated above, any further funding for legal services is subject to current budgetary constraints. Also as noted above, the government looks forward

66 Senate Finance and Public Administration Legislation Committee, *Estimates Hansard*, 12 February 2016, p. 43.

67 See Northern Territory Government, Office of Aboriginal Affairs, Aboriginal Affairs Strategy, Aboriginal Affairs, Monitoring, Evaluation and Reporting Framework, pp 6-7.

68 Australian Human Rights Commission, *Social Justice and Native Title Report 2014*, p. 117.

69 Malcolm Turnbull, *Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory*, 28 July 2016, <http://www.malcolmturnbull.com.au/media/royal-commission-into-the-child-protection-and-youth-detention-systems-of-t>, (accessed 2 September 2016).

70 Malcolm Turnbull, *Appointments to the Royal Commission into the Child Protection and Youth Detention Systems of the No*, 1 August 2016, <http://www.malcolmturnbull.com.au/media/appointments-to-the-royal-commission-into-the-child-protection-and-youth-de>, (accessed 2 September 2016).

71 Senator The Hon George Brandis QC, Attorney General, 'Legal advisory service for the Royal Commission into the Protection and Detention of Children in the Northern Territory', *Media release*, 10 October 2016.

to the outcomes from the justice reinvestment trial in Bourke and will consider further support based on the evidence that emerges.

1.68 Government Senators note the large workload generated by state and territory criminal law matters for Indigenous legal assistance services and call on state and territory governments to provide more funding for Indigenous legal assistance services.

1.69 Government Senators support the Indigenous Advancement Strategy process being managed by the Department of the Prime Minister and Cabinet which is showing positive results with the number of Indigenous organisations and their funding increasing.

1.70 Government senators note that the criminal justice system is the responsibility of states and territories. Nevertheless, the Commonwealth Government is committed to working with jurisdictions and Indigenous communities to achieve better justice-related outcomes.

1.71 Government Senators also note the positive work by the government in relation to FASD. The FASD Action Plan and Diagnostic Tool will facilitate improved early intervention which will result in better outcomes. Work will continue under the Action Plan, advised by the FASD Technical Network.

1.72 The majority report has not provided any reasoning why the responsibility for Family Violence Prevention Legal Services should return to the Attorney-General's Department and accordingly this recommendation is not supported by Government Senators.

Senator James Paterson
Deputy Chair

Senator Bridget McKenzie

Australian Greens' Additional Comments on Access to Legal Assistance Services

Introduction

1.1 The inquiry into Aboriginal and Torres Strait Islander peoples access to legal services is extremely important. As identified in the Redfern Statement, '[t]he state of access to justice for Aboriginal and Torres Strait Islander people and their over-representation in the criminal justice system is a national crisis.'¹ The Redfern Statement makes a number of urgent calls of the Government. The Australian Greens urge the Government to act on the urgent issues in the calls for action.

1.2 While the majority committee report addresses a number of issues raised throughout the inquiry, the recommendations only go some way to addressing the issues that have been identified during the inquiry. In particular, recommendations 1, 3, 9 and 11 should be strengthened. The Australian Greens also have a number of additional recommendations in relation to consumer credit/debt matters, justice targets, mandatory sentencing and the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

Barriers to legal assistance

1.3 Chapter three of the majority committee report looks at the barriers faced by Aboriginal and Torres Strait Islander peoples accessing legal assistance services.

1.4 One of the barriers identified by submitters and discussed in the majority committee report is the provision of interpreters.

1.5 In its submission to the inquiry, the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) said:

Hearing loss can result in the same communication barriers as those produced by language difficulties and cross-cultural differences. Given the high rate at which Aboriginal and Torres Strait Islander peoples suffer from hearing loss this is an issue that must be addressed[.]²

1.6 In relation to recommendation 1 and interpreters, the majority committee report recommends that:

... the Commonwealth Government adequately support legal assistance services, and that specifically funding should focus on ... interpreters for Aboriginal and Torres Strait Islanders in both civil and criminal matters to ensure that they receive effective legal assistance.³

1.7 This funding should include the provision of interpreters for Aboriginal and Torres Strait Islander peoples with hearing loss and hearing impairment.

¹ Aboriginal and Torres Strait Islander Peak Organisations, *The Redfern Statement*, 9 June 2016, p. 11.

² *Submission 13*, p. 8.

³ Majority Committee Report, p. 119.

Recommendation 1

1.8 The Commonwealth Government provide funding for the provision of interpreters for Aboriginal and Torres Strait Islander peoples with hearing loss and hearing impairment.

1.9 A number of submissions to the inquiry dealt with consumer credit/debt matters, including the submissions from the Northern Australian Aboriginal Family Violence Legal Service (NAAFVLS) and the Northern Territory Legal Aid Commission.

1.10 The NAAFVLS said in its submission:

Isolated communities are often 300 to 1000 km from white community services' advice and assistance, making some legal services entirely inaccessible. For instance, legal information on consumer rights, employment, discrimination and credit/debt issues is virtually non-existent in remote communities. The accrual of debt can have serious long-term ramifications. NAAFVLS is aware that members of communities, have no knowledge of how to manage a Telstra contract, and may not know they must continue payments if their mobile phone is damaged, lost or stolen, which can lead to serious financial and legal consequences. One resident of an isolated community was being harassed by a debt collection service and demands for payment over a six month period regarding payments on a car loan he had taken out some years previously. He owed over \$20,000.00, had recently lost his job, and did not know about his rights under bankruptcy.⁴

1.11 The majority committee report discusses these issues but does not provide a recommendation that directly addresses the need for legal education and legal assistance services that relate to consumer credit/debt matters to Aboriginal and Torres Strait Islander communities.

Recommendation 2

1.12 The Commonwealth Government adequately support legal assistance services, including legal education and advocates, for consumer credit/debt matters.

Imprisonment of Aboriginal and Torres Strait Islander peoples

1.13 Chapter four of the majority committee report discusses imprisonment rates for Aboriginal and Torres Strait Islander peoples and includes a discussion on justice targets being included in the Closing the Gap targets.

1.14 In surmising on justice targets, the majority committee report says:

The committee notes the strong support for justice targets to form part of the Closing the Gap measures. The Committee also notes the Coalition parties, despite supporting such targets prior to the last election, have, in government, backed away from that commitment.

⁴ *Submission 3, 2.*

The committee accepts the Minister for Indigenous Affairs' statement that the Commonwealth government is going to work with the states and territories, which have responsibility in this area, to assist them to put in place justice targets and the measures to meet those targets.⁵

1.15 The Australian Greens are disappointed the report accepts the Government's failure to take leadership on justice targets.

1.16 We accept the criminal justice system is largely the responsibility of states and territories. However, the Commonwealth Government should be taking a leadership role in this space by developing justice targets.

1.17 In his submission, Mr Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner at the time, said:

I understand that, generally, justice-related issues are state and territory responsibilities. However, there are a number of areas, particularly regarding Aboriginal and Torres Strait Islander people's experience of the justice system, in which the Australian Government has a role to play, for example in leadership, coordination and funding.⁶

1.18 In its submission, NATSILS stated:

NATSILS believes that the crisis levels of Aboriginal and Torres Strait Islander peoples' imprisonment demands critical federal government leadership which should include a commitment to justice targets. It is noted, that the safer communities 'building block' of the COAG Closing the Gap Strategy is the only area that does not incorporate specific targets and this is where clear targets on lowering imprisonment and violence against Aboriginal and Torres Strait Islander people should be incorporated. It is argued that the lack of specific targets for justice is a glaring omission which undermines the government's attempts to tackle key priorities such as education and health due to the interrelated nature of these issues.⁷

1.19 The Redfern Statement calls on the Government to '[a]dopt justice targets as part of the Close the Gap framework'.⁸

1.20 The Australian Greens are concerned that recommendation 3 does not call on the Commonwealth Government to develop justice targets for inclusion in the Closing the Gap targets for COAG to consider at its next meeting, especially when there was multiparty commitment for an additional Closing the Gap target relating to justice prior to the 2013 federal election.

Recommendation 3

1.21 The Commonwealth Government develop justice targets for inclusion in the Closing the Gap targets for presentation and adoption at the next COAG meeting.

⁵ Majority Committee Report, p. 117.

⁶ *Submission 5*, p. 2.

⁷ *Submission 13*, p. 23.

⁸ Aboriginal and Torres Strait Islander Peak Organisations, *The Redfern Statement*, 9 June 2016, p.11.

Reasons for high Indigenous imprisonment rates

1.22 Chapter five of the of the majority committee report looks at reasons for high Aboriginal and Torres Strait Islander peoples imprisonment rates.

1.23 The Aboriginal Legal Service of Western Australia (ALSWA) stated in its submission to the inquiry:

[T]he reasons fall into two main categories. The first category are underlying factors that contribute to higher rates of offending (eg, socio-economic disadvantage, impact of colonisation and dispossession, stolen generations, intergenerational trauma, substance abuse, homelessness and overcrowding, lack of education and physical and mental health issues). The second category is structural bias or discriminatory practices within the justice system itself (ie, the failure to recognise cultural differences and the existence of laws, processes and practices within the justice system that discriminate, either directly or indirectly, against Aboriginal people such as over-policing practices by Western Australia Police, punitive bail conditions imposed by police and inflexible and unreasonable exercises or prosecutorial decisions by police).⁹

1.24 The Australian Greens are concerned that the recommendations of the majority committee report addressing the reasons for high imprisonment rates, specifically recommendations 4 and 5, are limited to Fetal Alcohol Spectrum Disorders and do not address the other factors, specifically socio-economic factors, contributing to high imprisonment rates. The Commonwealth Government needs to be addressing the underlying causes of the high rates of imprisonment.

Recommendation 4

1.25 The Commonwealth Government should address the underlying socio-economic causes of high imprisonment rates for Aboriginal and Torres Strait Islander peoples.

For a start, the Commonwealth Government should reinstate the funding that was removed from the Indigenous Advancement Strategy in the 2013-14 Budget.

1.26 In the Redfern Statement, it says:

Aboriginal and Torres Strait Islander people with disability are amongst the most marginalised in Australian society. It is estimated that approximately 45 per cent of Aboriginal and Torres Strait Islander people identify as having some form of disability, with 9.1 per cent having severe and profound disability.¹⁰

1.27 At the recent Perth hearing of the Senate Community Affairs References Committee's inquiry into indefinite detention, Mr Peter Collins, Director of Legal Services for the Aboriginal Legal Service of Western Australia, said:

⁹ *Submission 10*, pp 21-22.

¹⁰ Aboriginal and Torres Strait Islander Peak Organisations, *The Redfern Statement*, 9 June 2016, p.18.

In my estimate, 95 per cent of Aboriginal people charged with criminal offences appearing before the courts have either an intellectual disability, a cognitive impairment or a mental illness. The overwhelming majority of those are undiagnosed and therefore untreated. If they go to jail it is almost impossible to conceive of them being diagnosed in jail; therefore, they are untreated.

1.28 The Australian Greens are deeply concerned with the high number of Aboriginal and Torres Strait Islander peoples with a disability that are interacting with the justice system and it is imperative that the Aboriginal legal services have additional resources and expertise to support Aboriginal and Torres Strait Islander peoples with a disability.

Recommendation 5

1.29 The Government should fund a therapeutic model of justice for Aboriginal and Torres Strait Islander peoples with cognitive and psychosocial disability to address their incarceration rates.

Recommendation 6

1.30 The Commonwealth Government should fund an Aboriginal disability justice program with dedicated disability advocates for Aboriginal and Torres Strait Islander peoples with disability at all points of the policing and justice systems.

1.31 In terms of structural bias, mandatory sentencing is a contributing factor to the incarceration of Aboriginal and Torres Strait Islander peoples.

1.32 We note the contributions outlined in the majority committee report, specifically the following contribution from the National Association for Community Legal Centres that:

[M]andatory sentencing laws are arbitrary and undermine basic rule of law principles by preventing courts from exercising discretion and imposing penalties tailored appropriately to the circumstances of the case and the offender. Of particular concern is the disproportionate impact of such laws on Aboriginal and Torres Strait Islander peoples in light of the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.¹¹

1.33 In his submission, Mick Gooda stated:

Twenty-four years ago, the Royal Commission into Aboriginal Deaths in Custody recommended that governments which had not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort.¹²

1.34 A number of submissions to the inquiry, as noted in the majority committee report, highlighted that the United Nations Committee against Torture recommended

¹¹ *Submission 42*, p. 8.

¹² *Submission 5*, p. 3.

in 2014 that Australia abolish mandatory sentencing somewhat due to the discriminatory impact on Aboriginal and Torres Strait Islander Australians.¹³

1.35 In relation to recommendation 11 and mandatory sentencing, the majority committee report recommends that:

... COAG task the Council of Australian Government's Law, Crime and Community Safety Council to review state laws such as mandatory sentencing which have a disproportionate effect on Indigenous Australians in order to quantify the effects and report to COAG.¹⁴

1.36 The Australian Greens have grave concerns regarding the disproportionate impact of mandatory sentencing laws on Aboriginal and Torres Strait Islander peoples.

Recommendation 7

1.37 The Commonwealth Government work with the States and Territories to repeal mandatory sentencing legislation.

Current Programs

1.38 Chapter six of the majority committee report looks at a number of successful programs providing services to Aboriginal and Torres Strait Islander peoples pre-incarceration through to post-incarceration.

1.39 At the beginning of the chapter there is a discussion of fines and infringements and the effect of incarceration on Aboriginal and Torres Strait Islander peoples for non-payment of fines.

1.40 The Australian Greens note the contributions outlined in the majority committee report regarding the Work and Development Order (WDO) program and are encouraged by the successes this program appears to be having.

1.41 At the public hearing in Sydney, Ms Monique Hitter, the Executive Director of the Civil Law Division of Legal Aid NSW, said:

[S]ince the program has been operating, it has waived \$44 million worth of unpaid fines. In Aboriginal communities the figure is \$9 million. One in five people on a work and development order is Aboriginal, which is huge.¹⁵

1.42 The Australian Greens note the contributions outlined in the majority committee report regarding the Custody Notification Service (CNS) in New South Wales and the Australian Capital Territory in the same chapter. The CNS, which was

¹³ Majority Committee Report, p. 74.

¹⁴ Majority Committee Report, p. 121.

¹⁵ *Committee Hansard*, 23 September 2015, p. 34.

established in response to the Royal Commission into Aboriginal Deaths in Custody, costs \$526,000 per annum and assists over 15,000 Aboriginal people per annum.¹⁶

1.43 Recommendation 9 of the majority committee report deals with ‘supporting programmes which strengthen families and communities through a focus on early intervention and support.’¹⁷

1.44 The Australian Greens would like to see the Commonwealth Government show leadership by investing more in successful programs similar to those outlined above so they can be rolled out across Australia where appropriate.

1.45 Many of the issues raised during the inquiry were previously addressed in the report of the Royal Commission into Aboriginal Deaths in Custody. It is unfortunate that more than 25 years later we are still discussing how to resolve these issues when many of the recommendations of the Royal Commission remain unimplemented. The Government should work with the States and Territories to implement these recommendations.

Recommendation 8

1.46 The Commonwealth investigate alternatives to incarceration for non-payment of fines and work with the States and Territories to implement these alternatives.

Recommendation 9

1.47 The Commonwealth Government and States and Territories implement all remaining recommendations of the Royal Commission into Aboriginal Deaths in Custody.

**Senator Rachel Siewert
Australian Greens**

¹⁶ Aboriginal Legal Service (NSW/ACT), ‘Save the Custody Notification Service (CNS) and prevent Aboriginal deaths in police cell custody’, Media Release, 3 June 2015, http://www.alsnswact.org.au/media_releases/37 (accessed 12 October 2016).

¹⁷ Majority Committee Report, p. 120.

APPENDIX 1

Submissions and additional information received by the committee

Submissions

- 1 Chief Justice of Western Australia
- 2 Legal Services Commission of South Australia
- 3 North Australian Aboriginal Family Violence Legal Service
- 4 Justice Connect
- 5 Aboriginal and Torres Strait Islander Social Justice Commissioner
- 6 Kimberley Aboriginal Law and Cultural Centre
- 7 UTS Law Students' Society
- 8 Queensland Association of Independent Legal Services Inc
- 9 Australian Institute of Health and Welfare
- 10 Aboriginal Legal Service of Western Australia (Inc)
- 11 Just Reinvest NSW
- 12 Australian Justice Reinvestment Project
- 13 National Aboriginal and Torres Strait Islander Legal Services (NATSILS)
- 14 UNSW Law Society
- 15 Aboriginal Family Law Services (WA)
- 16 The Law Society of Western Australia
- 17 Public Interest Advocacy Centre Ltd
- 18 Queensland Family and Child Commission
- 19 Ms Fiona Allison, Prof Chris Cunneen and Ms Melanie Schwartz
- 20 Women's Legal Services NSW
- 21 Legal Aid Queensland
- 22 Hunter Community Legal Centre
- 23 Northern Territory Anti-Discrimination Commission
- 24 Office of the Commissioner for Equal Opportunity
- 25 Western Australia Council of Social Service (WACOSS)
- 26 Top End Women's Legal Service Inc.

- 27 Victoria Police
- 28 Commissioner for Children and Young People Western Australia and the Children's Commissioner Northern Territory
- 29 Northern Territory Legal Aid Commission
- 30 Redfern Legal Centre
- 31 The North Australian Aboriginal Justice Agency (NAAJA) and the Central Australian Aboriginal Legal Aid Service (CAALAS)
- 32 Tenancy Western Australia
- 33 Reconciliation Western Australia
- 34 Community Legal Centres Association (WA) Inc.
- 35 Victoria Legal Aid
- 36 Legal Aid NSW
- 37 National Legal Aid
- 38 Kingsford Legal Centre
- 39 Amnesty International
- 40 National Justice Coalition
- 41 Law Council of Australia
- 42 National Association of Community Legal Centres (NACLC)
- 43 National Welfare Rights Network
- 44 Liberty Victoria
- 45 Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria)
- 46 National Family Violence Prevention Legal Services
- 47 Wirrpanda Foundation
- 48 The Lililwan Project
- 49 Gilbert + Tobin Lawyers
- 50 ACT Government
- 51 Australian Red Cross

Additional information

- 1 Additional document 1, provided by Western Australia Council of Social Service (WACOSS), received 4 August 2015
- 2 Additional document 2, provided by Western Australia Council of Social Service (WACOSS), received 4 August 2015

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- 3 Additional document 3, provided by Western Australia Council of Social Service (WACOSS), received 4 August 2015
 - 4 Additional information provided by Corrective Services NSW, received 22 October 2015
 - 5 Clarification to evidence from Canberra Public hearing, 4 April 2016, provided by the Attorney General's Department, received 8 April 2016

Correspondence received

- 1 Correspondence from the Attorney-General's Department, received 5 May 2015
- 2 Correspondence from the Victorian Court of Appeal, received 21 April 2015
- 3 Correspondence from the Attorney-General's Department SA, received 28 May 2015

Tabled Documents

- 1 Amnesty International, Tabled Document 1, Perth 4 August 2015
- 2 Amnesty International, Tabled Document 2, Perth 4 August 2015
- 3 Western Australia Council of Social Service (WACOSS), Tabled document, Perth 4 August 2015
- 4 Daydawn Advocacy Centre, Tabled document 1, Perth 4 August 2015
- 5 Daydawn Advocacy Centre, Tabled document 2, Perth 4 August 2015
- 6 Attorney-General's Department, Tabled document 1, Canberra 4 April 2016

Answers to Questions on Notice

- 1 Answers to questions taken on notice from Perth public hearing, 4 August 2015, provided by Amnesty International, received 4 September 2015
- 2 Answer to question taken on notice from Sydney public hearing, 23 September 2015, provided by Legal Aid NSW, received 23 October 2015
- 3 Answers to questions taken on notice from Canberra public hearing, 4 April 2016, provided by the Attorney-General's Department, received 13 April 2016
- 4 Answer to question taken on notice following Canberra public hearing, 4 April 2016, provided by the Department of Social Services
- 5 Answer to question taken on notice from Canberra public hearing, 4 April 2016, provided by the Department of Health, received 13 and 21 April 2016

APPENDIX 2

Public hearings

Tuesday, 4 August 2015

*Committee Room 1, Legislative Council Committee Office
Parliament House, Perth*

Witnesses

Amnesty International

Ms Tammy Solonec, Indigenous Peoples' Rights Manager

The Wirrapanda Foundation

Mr David Wirrapanda, Director

Mr Dale Kickett, Moorditj Ngoorndiak Program Manager

Mr Eddie Brown, Moorditj Ngoorndiak Program Mentor

Mr Walter McGuire, Moorditj Ngoorndiak Program Mentor and Vocational Training and Employment Centre Mentor

Mr Jarrad Oakley-Nicholls, Kwinana Program Manager

Aboriginal Family Law Services (WA)

Ms Corina Martin, Principal Legal Officer

Ms Andrea Smith, Principal Policy Officer

Aboriginal Legal Service of Western Australia (Inc)

Mr Dennis Eggington, Chief Executive Officer

Mr Peter Collins, Director, Legal Services

Community Legal Centres Association (WA) Inc.

Ms Helen Creed, Executive Director

Ms Chelsea McKinney, Systemic Advocacy Consultant, WA Association for Mental Health

Chief Justice of Western Australia, the Honourable Wayne Martin AC

Western Australia Council of Social Service (WACOSS)

Mr Daniel Morrison, Chief Executive Officer of Aboriginal Alcohol and Drug Service

Mr Chris Twomey, Director of Social Policy

Ms Vicky Burrows, Project Officer, Reconciliation WA

Wednesday, 23 September 2015
State Library of New South Wales
Dixon Room, Macquarie Street, Sydney

Witnesses

The Lililwan Project

Professor Elizabeth Elliott, University of Sydney
Professor Jane Latimer, The George Institute for Global Health

Dr Don Weatherburn PSM, Director of the NSW Bureau of Crime Statistics and Research and Adjunct Professor, School of Social Science and Policy at UNSW

Department of Justice NSW

Dr Anne-Marie Martin, Assistant Commissioner of Offender Management and Programs
Mr Jason Hainsworth, Acting Assistant Commissioner, Community Corrections

Legal Aid NSW

Ms Monique Hitter, Executive Director Civil Law Practice
Ms Jemima McCaughan, Senior Solicitor Civil Law Service for Aboriginal Communities

National Association of Community Legal Centres (NACLC)

Ms Polly Porteous, Chief Executive Officer
Ms Nancy Walke PSM, NACLC Board Member/ Mirrung Ngu Wanjarri (Aboriginal Women Making Changes) Project Worker, Northern Rivers Community Legal Centre

Kimberley Aboriginal Law and Cultural Centre (KALACC) (via teleconference)

Mr Wes Morris, Coordinator

Corrective Services NSW

Dr Anne-Marie Martin, Assistant Commissioner of Offender Management and Programs
Mr Adam Schreiber, Principal Manager, Aboriginal Strategy and Policy Unit

Redfern Legal Centre

Ms Elizabeth Morley, Principal Solicitor
Mr David Porter, Senior Solicitor

Women's Legal Services NSW

Ms Dixie Link-Gordon, Senior Community Access Officer, Indigenous Women's Legal Program
Ms Helen Campbell, Executive Officer, Women's Legal Services NSW

Tuesday, 16 February 2016
The Litchfield Room
Parliament House, Darwin

North Australian Aboriginal Justice Agency (NAAJA)

Ms Priscilla Collins, Chief Executive Officer

Mr Jonathon Hunyor, Principal Legal Officer

NT Legal Aid Commission

Ms Suzan Cox QC, Director

Ms Seranie Gamble, Outreach Project Manager

Top End Women's Legal Service

Ms Melanie Warbrooke, Senior Solicitor

Ms Caitlin Weatherby-Fell, Solicitor

Monday, 4 April 2016
Senate Committee Room 2S3
Parliament House, Canberra

Witnesses

Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner

Just Reinvest (Bourke)

Ms Sarah Hopkins, Chairperson

Law Council of Australia

Mr Nick Parmeter, Executive Policy Lawyer

Mr Albert Holt, private capacity

Attorney-General's Department

Ms Elizabeth Quinn, Assistant Secretary

Mr Adam Nott, Director, Indigenous Legal Assistance

Ms Esther Bogaart, Director, Legal Assistance and Women's Safety Section

APPENDIX 3

Ratio of Aboriginal and Torres Strait Islanders to Non-Indigenous Prisoners (Age Standardised)¹

Year	NSW	VIC	QLD	SA	WA	TAS	NT	ACT	AUST
2005	8.3	8.7	8.0	11.7	16.9	3.4	10.3	9.4	10.3
2006	9.8	8.0	9.0	11.2	16.7	2.6	11.6	11.3	11.0
2007	9.8	8.0	8.7	12.9	19.1	3.3	12.8	7.9	11.4
2008	10.0	8.3	9.0	11.7	18.1	3.1	12.3	8.7	11.3
2009	10.7	7.9	9.6	13.0	18.3	2.9	11.4	10.2	12.1
2010	10.5	8.9	10.2	13.5	17.0	3.0	10.7	11.7	12.1
2011	11.0	8.7	10.2	13.7	16.5	3.3	11.9	10.2	12.4
2012	11.1	10.8	10.1	13.1	17.9	3.4	13.3	11.0	13.0
2013	11.2	10.3	10.8	12.2	18.5	3.2	16.2	13.9	13.0
2014	11.3	11.1	10.9	12.2	18.1	3.5	15.4	11.7	12.9
2015	11.5	10.9	10.6	12.5	17.0	3.0	13.8	14.5	12.8

¹ Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

APPENDIX 4

Inquiry into Indigenous youth in the criminal justice system

1.1 In June 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (Aboriginal and Torres Strait Islander Affairs Committee) tabled its report on the high level of involvement of Indigenous juveniles and young adults in the criminal justice system. The Aboriginal and Torres Strait Islander Affairs Committee commented:

It is clear from the evidence received that FASD is an issue poorly understood by governments. The significance and rate of FASD in youth across Australia is not known.

It would appear that a significant number of Indigenous people who end up in detention centres and prisons are there partly as a result of the failure of governments to identify FASD as an issue underpinning their offending behaviour. As a result, punitive rather than remedial responses have prevailed.¹

1.2 The Aboriginal and Torres Strait Islander Affairs Committee highlighted the importance of access to accurate and timely assessment and diagnosis of FASD for children, their families and professionals working in the health and criminal justice systems:

Early diagnosis would also mitigate the secondary damages associated with FASD. Diagnosis and support for Indigenous youth with FASD already in contact with the criminal justice system is also important.²

1.3 The Aboriginal and Torres Strait Islander Affairs Committee recommended that the Commonwealth Government urgently address the high incidence of FASD in Indigenous Communities by:

- developing and implementing Foetal Alcohol Spectrum Disorder diagnostic tools and therapies, with a focus on working in partnership with Indigenous health organisations in remote and regional Australia where there is a recognised prevalence of the disorders, and
- recognising Foetal Alcohol Spectrum Disorder as a registered disability and as a condition eligible for support services in the health and education systems.³

1 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011, p. 101.

2 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011, pp 101-102.

3 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011, pp 102-103.

1.4 The Aboriginal and Torres Strait Islander Affairs Committee also recommended a comprehensive inquiry into FASD prevalence, diagnosis, intervention and prevention by the House of Representatives Standing Committee on Social Policy and Legal Affairs.⁴

1.5 The Government response to the Aboriginal and Torres Strait Islander Affairs Committee accepted this recommendation in part.⁵ The Government response noted \$3.2 million investment in the area since 2010, including \$1.7 million for the initiation of the Lililwan Project. New investment on FASD included:

- the development and dissemination of brochures and posters highlighting the 2009 Australian Alcohol Guidelines (National Health and Medical Research Council) message that for women who are pregnant or breastfeeding, not drinking is the safest option;
- the development of screening tools for alcohol use during pregnancy;
- the development of a FASD diagnostic instrument to assist clinicians; and
- an Australian Institute of Health and Welfare scoping study on ways to improve FASD related data collection and reporting.

1.6 In addition, the Government response indicates that the House of Representatives Standing Committee on Social Policy and Legal Affairs will be pursuing an inquiry into FASD.

1.7 However, the Government response states:

The Government does not currently propose to recognise FASD as a registered disability. Access to specialist disability services is currently based on functional needs rather than diagnosis. However, many sufferers of FASD would meet the criteria for eligibility for support services on the basis of functional needs. Support for people with FASD, and their carers, is available through a range of specialist disability services, which are provided by State and Territory Governments under the National Disability Agreement.⁶

Inquiry into prevention, diagnosis and management of FASD

1.8 Following the Aboriginal and Torres Strait Islander Affairs Committee's recommendation, the House of Representatives Standing Committee on Social Policy

4 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011, p. 103.

5 See Government Response to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report: *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, November 2011, pp 13-14.

6 See Government Response to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs report: *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, November 2011, p. 14.

and Legal Affairs (Social Policy and Legal Affairs Committee) inquired into the prevention, diagnosis and management FASD and tabled its report in November 2012.

1.9 In relation to FASD and the criminal justice system, Social Policy and Legal Affairs Committee noted that individuals with FASD may not have their disabilities taken into account by judicial officers. Further:

Due to the broad spectrum of FASD, some people with FASD may fit within current definitions of disability for the purpose of sentencing that takes into account reduced culpability. Others, however, may not, despite having significant impairments that should be considered mitigating factors.⁷

1.10 The Social Policy and Legal Affairs Committee referred to the 'disproportionately frequent interactions' of people with FASD with the criminal justice system, and that 'the system is not designed for people with the type of impairments associated with FASD'.⁸

1.11 The Social Policy and Legal Affairs Committee expressed concern that:

[T]he reduced culpability of individuals with FASD may not be taken into account in judicial courts, resulting in such people being imprisoned instead of treated.

The Committee received compelling evidence that legislating a clear and inclusive definition of disability would remove the confusion around the eligibility of individuals with FASD for support services and ensure equity before the law for defendants with FASD.⁹

1.12 The Social Policy and Legal Affairs Committee made 19 broad ranging recommendations. Those recommendations went to: awareness raising and prevention; diagnosis; and management needs. Specifically in relation to the criminal justice system:

The Committee recommends that the Commonwealth Government recognise that people with Fetal Alcohol Spectrum Disorders have, amongst other disabilities, a cognitive impairment and therefore amend the eligibility criteria to enable access to support services and diversionary laws.¹⁰

7 See House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, p. 136.

8 See House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, pp 137-142.

9 House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, p. 147.

10 House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, p. 148 (Recommendation 19).

1.13 Other recommendations of the Social Policy and Legal Affairs Committee included:

- that the actions set out in the Social Policy and Legal Affairs Committee's report constitute the Commonwealth Government's National Plan of Action for the prevention, diagnosis and management of FASD (Recommendation 1);
- the establishment of an ongoing FASD Reference Group to oversee and advise on the FASD National Action Plan. The Reference Group would consist of a select group of practitioners, professionals and stakeholders who are experts in the prevention and management of FASD and report to the relevant Commonwealth Government Ministers (Recommendation 2); and
- the Commonwealth Government report publicly:
 - within 12 months on the progress of the implementation of a national FASD diagnostic and management services strategy; and
 - within five years on the progress towards eliminating FASD in Australia (Recommendation 3).¹¹

1.14 In July 2014, the Government response to the Social Policy and Legal Affairs Committee's report was tabled. The Assistant Minister for Health, Senator the Hon Fiona Nash, in responding to the report provided the following summary of the Government's position on FASD:

The Government remains very aware of the adverse health impacts FASD has in the Australian community and as such, I was pleased to announce on 25 June 2014 funding of \$9.2 million for the National FASD Action Plan.

This Plan provides \$3.1 million for grants to drug and alcohol services to support alcohol dependant women. It provides \$1.5 million in targeted grants to undertake further research to develop best practice guidelines. The New Directions: Mothers and Babies programme will receive \$4 million. The contract to finalise and disseminate the FASD Diagnostic Tool is now in place and the tool will become available in 2015. The establishment of the FASD Technical Network is nearing completion and I am pleased the Professor Elizabeth Elliott AM has agreed to Chair the Network.¹²

Inquiry into the value of a justice reinvestment approach

1.15 The Senate Legal and Constitutional Affairs References Committee considered FASD as an issue contributing to the high incarceration rate of Indigenous Australians in the course of its inquiry into the value of a justice reinvestment

11 See House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012, p. xvii. Recommendation 16 of the report recommends the development and implementation of a national FASD diagnostic and management services strategy.

12 Government Response to the House of Representatives Standing Committee on Social Policy and Legal Affairs report: *FASD: the Hidden Harm: Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorder*, July 2015, p. 1.

approach to criminal justice in Australia.¹³ The recommendations of the Legal and Constitutional Affairs Committee went specifically to justice reinvestment initiatives.¹⁴

Inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities

1.16 In June 2015, the House of Representatives Standing Committee on Indigenous Affairs (Indigenous Affairs Committee) tabled the report from its inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities, *Alcohol, hurting people and harming communities*.

1.17 The Indigenous Affairs Committee acknowledged the launch of the FASD Action Plan in 2014 as 'a good first step', however:

[T]he committee is concerned that the Action Plan does not address all the key recommendations of the 2012 report *FASD: The Hidden Harm - Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders* by the House Standing Committee on Social Policy and Legal Affairs, in particular the need for prevention strategies that will provide information and education programs and support for pregnant women with drinking problems.¹⁵

1.18 While there had been some progress with the Australian diagnostic tool for FASD, the Indigenous Affairs Committee noted its concern:

[T]hat the rollout and evaluation has been subject to ongoing delays which has meant that [the diagnostic tool] is still not available for health professionals to use.¹⁶

1.19 In relation to FASD and the criminal justice system, the Indigenous Affairs Committee observed:

There was evidence that when the education and criminal justice systems cannot take FASD into account because there is no official diagnosis of a recognised disability, the individual is severely disadvantaged. The requirements for FASD to be considered in the courts are quite stringent and without a diagnosis, FASD cannot be seen to be a mitigating factor in the persons defence.¹⁷

13 Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, pp 36-37.

14 See Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, pp xi-xii.

15 House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015, p. 106.

16 House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015, p. 106.

17 House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015, p. 119.

1.20 The Indigenous Affairs Committee made six recommendations in relation to FASD and Foetal Alcohol Syndrome (FAS), including:

- that the Commonwealth, as a matter of urgency, increase its efforts to ensure that consistent messages:
 - about the risks of consuming any alcohol during pregnancy, and
 - about the importance of supporting women to abstain from alcohol when planning pregnancy, when pregnant or breastfeedingto reduce the risk of FAS and FASD are provided to the whole community (Recommendation 16).
- That the Commonwealth, as a priority, ensure that the National FASD Diagnostic Tool and accompanying resource are released without any further delays (Recommendation 17).
- That the Commonwealth, in consultation with the FASD Technical Network, and relevant organisations from the criminal justice system:
 - develop a model definition for cognitive impairment, and
 - conduct a review of Commonwealth law and policy to identify where eligibility criteria need to change to ensure that people with FAS and FASD and other cognitive impairments can be included (Recommendation 21).¹⁸

18 See House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015, pp xxii-xxiii.