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BY: ATSIW

WAC RESPONSES TO QUESTIONS FROM THE ATSIW COMMITTEE

In addition to the evidence presented to the Committee by Kath McFarlane and Mandy Young on 24 June 2010, the Women's Advisory Council submits the following information for the Committee's consideration.

While we have focused on NSW (being the jurisdiction with which we are most familiar), it is nonsensical that debate about the delivery of services to women involved in the justice system is constrained by jurisdictional borders, when most of the issues we raise are common to women across Australia. It is the WAC's hope that the Committee will be able to extrapolate from our local examples of what works, what doesn't and what is needed, to make recommendations of relevance to women Australia-wide.

The WAC's integral point is that women (and juveniles) should not have to compete against limited resources and the overwhelming and highly visible needs of male prisoners for appropriate programs and services. Women should not be required to adhere to programs designed for male participants, if those are inherently irrelevant or unhelpful. This does not lend itself to useful or successful rehabilitation, and ensures that women's invisibility within the criminal justice and corrections systems, continues.

If you require further information, please do not hesitate to contact Kath McFarlane on

Kind regards

Kath McFarlane

On behalf of the Women's Advisory Council (WAC)

1. We know number of Indigenous women in prison increased by 96 per cent between 1999-2000 and 2008-09. Would you like to comment on this trend, and if this trend continues, what do you see would be the short-term and long-term consequences, on children and their carers?

Increasingly, women are going to jail for longer periods for minor crimes, most frequently related to drug and alcohol crimes or theft. The statistics for Indigenous women is even more alarming.

The profile of women in gaol speaks to the degree to which these women are marginalised in society. According to the 2008 NSW Inmate Census by Corrective Services NSW, women represent approximately 7.3% (n =720) of inmates in NSW (n=9859) of which 29% are Aboriginal. Previous research has identified that 30% of women in metropolitan prisons come from the three most disadvantaged Sydney suburbs.

The 2009 NSW Inmate Health Survey sampled women in prison (N=199) and found:

- 45% experienced domestic violence or abuse as an adult
- 80% are current smokers
- 38% consumed alcohol in a hazardous or harmful way in the year prior to incarceration, with 16% showing signs of dependent drinking
- 78% had used an illicit drug and 52% had injected drugs
- 20% have been admitted to a psychiatric unit or hospital
- 27% have attempted suicide
- 49% are mothers of children aged 16 or under
- 45% left school prior to completing year 10 at an average age of 14 years 32% were placed in care as children
- 67% were unemployed in the six months prior to incarceration; of these 25% had been unemployed for 10 or more years
- 66% have been in a violent relationship

[Source: Indig, D et al. (2010). 2009 NSW Inmate Health Survey: Key Findings Report. Justice Health.]

Abuse and subsequent drug use

When we look at the life stories of women within the prison system, the distinctions between offender and victim become very blurred. Their crimes are primarily those of poverty and drug addiction. Research has provided strong evidence of a link between drug and alcohol abuse and physical and sexual abuse in childhood among incarcerated women. Physical and sexual abuse can have a range of negative short and long-term consequences, including running away, poor school success, low self-esteem and prostitution (WA Department of Justice, 2002; Jarvis, Copeland &

Walton, 1995; Browne, Miller & Manguin, 1999; Shaw et al., 1991; Comack, 1996; Marcus-Mendoza, Sargent & Chong Ho, 1994; Fletcher, Rolison & Moon, 1994; Harlow, 1999) .

These studies suggest that the connection between drug and alcohol abuse and criminal offending may be mediated by factors associated with early experiences of abuse, such as psychological distress, trauma, other negative family experiences, and street life. A growing drug dependency may then lead to theft, drug-selling or prostitution to cover the cost of a drug habit, and often to support drug-addicted partners.

Similarly, a NSW study in 2001 found that 70 per cent of women in prison said that they had been abused as children, while 44 percent said that they had been abused as adults. This abuse often led to substance abuse, which in turn led to women committing offences and ending up in the prison system. In 2009, 87 per cent reported experiencing at least one type of abuse as a child or an adult and half of all abuse victims reported four or more types of abuse in their lifetimes (Justice Health Inmate Survey (2009)).

Drug and alcohol abuse and physical and sexual abuse in families of origin, and poor mental health in childhood, are important risk markers for drug dependency, persistent offending and involvement in sex work later in life. Many incarcerated women have children and these children are at risk of repeating the cycle of drug dependency and criminal offending due to their exposure to drug use by their mothers.

[**Note** – All of the above is cited directly from a recent MHCC paper - Mental Health Coordinating Council (2010) *The Psychological Needs of Women in the Criminal Justice System: Considerations for Management and Rehabilitation*. Henderson, C & Bateman J. (2010) MHCC NSW].

It is also noted that non-Indigenous women were more likely than Indigenous women to be regular users of drugs other than cannabis, and more likely to be multiple drug users. Indigenous women, on the other hand, had higher levels of alcohol and cannabis use. The higher prevalence of alcohol use among Indigenous women results in a higher level of alcohol dependency and attributions that their criminal offending was related to alcohol use. [Reference: Johnson, H. (2004). *Drugs and Crime: A Study of Incarcerated Female Offenders*. Research and Public Policy Series No. 63. Australian Institute of Criminology]

2. Describe the safe accommodation options for Indigenous women and children at different contact points with the criminal justice system – victims or youth at risk, offenders, and post-release?

WOMEN

Issues that pre- and post-release programs need to address include:

Post release services

There is an increasing understanding of the vulnerability of Indigenous women to the impact of a lack of post-release resources. Evidence indicates that women are at serious risk of self-harm and

harm from others in the period immediately after incarceration. It is important that rehabilitation be undertaken in prison and continued on release. Rehabilitation is important of itself, but it is also crucial in preventing recidivism. [See Reference: Baldry, E., Ruddock J. & Taylor J. (2008). Aboriginal Women with Dependent Children Leaving Prison Project Needs Analysis Report Homelessness NSW. Commissioned by WSSPAH.]

Housing issues:

Housing has been identified as the most important basic need of women leaving gaols. Some women may be able to access public housing, but this needs to be in place before their release date. Others may not be eligible due to previous problems with the department. These women need support with at least temporary accommodation until they are established and can attempt to access to private housing market. Transition accommodation is perhaps the most important service for women, especially if they have children.

Dealing with Violence:

Effective pre and post release programs should include community based, Indigenous specific programs to help women deal with the effects of violence and to help women develop alternative strategies for coping with violence in the future. People require protection from violent behaviour and alternative structures for prevention and punishment of violent behaviour which provide more than imprisonment with all its risks and consequences. Pre- and Post-release programs should include assistance for past injuries suffered by women, and strategies for dealing with these issues in the future. Where drug and alcohol use, associated with incidents of violence has become problematic programs should address these needs.

Children and Families:

There are 4,000 children with a parent in a NSW prison (Easteal, 1991). Approximately 60% of women in prisons are parents, many being sole carers of young children before their incarceration.

Women need support to maintain contact with their children while they are incarcerated. Where that is not possible, they need to be provided with information as to the well-being of their children. Women need support when they resume contact with their children. They need practical advice on how to deal with family court procedures and Departments of Community services. For eg, the WAC has received advice that foster carers at times refuse to bring children of incarcerated parents to visit in the gaols, apparently out of concerns over restoration plans/individual case plans.

Other issues brought to the WAC's attention include: the lack of rehabilitation centres particularly for methadone, accepting women and children; and the lack of adequate telephone contact between children and incarcerated mothers.

With increasing numbers of children in care, the impact of future health and delinquency is of key importance. As a result of the WAC raising this issue, the NSW DCS has agreed to incorporate questions re oohc (e.g. Have you ever been in out-of-home care?) to the new Family Assessment to provide data for a long-term research project on the care-prison connection [see McFarlane's evidence to the Committee for further information on this issue].

Kinship Obligations:

Aboriginal women in custody are ever-conscious of the impact their absence has on the day to day lives of their families and children. This creates stress on them during the period of their custodial sentence, and creates additional stresses on them when they return home. Programs which are sensitive to the kinship obligations of Indigenous women and supportive of these roles are important.

Indigenous women have identified help with family and community relationships as an issue they want help with. Some women may face another form of dispossession because of the impact of violent relationships on their lives. They may not be able to return to their home community, as a result of their own or other people's violence. In either scenario, women need support to re-enter potentially volatile situations. Pre- and post-release programs need to be sensitive to kinship obligations, and to support Indigenous women to work with their customary obligations and to positively re-integrate into the community in which they will live.

Financial Issues:

As identified by Jumbunna and the Welfare Rights Centre, Centrelink issues may be significant contributing factors to offending and incarceration. Recent research commissioned by the WAC has indicated that Aboriginal women in custody have not been in receipt of Centrelink payments, despite a need for income support. [Reference: Money Talks, Narratives of Aboriginal and non Aboriginal women inmates in New South Wales about their access to income in the community. See too Lawrie, R. (2002) *Speak Out Speak Strong: Researching the Needs of Aboriginal Women in Custody*, Sydney: Aboriginal Justice Advisory Council, available at: http://www.lawlink.nsw.gov.au/lawlink/ajac/ll_ajac.nsf/pages/ajac_publications#13.]

It is the also experience of the WAC that a high proportion of women serving custodial sentences have been convicted of social security fraud. Indeed convictions arising from these prosecutions contribute to the growing numbers of women in prison including women at greatest disadvantage such as those with intellectual disabilities. Current rates of these prosecutions (and pleas of guilty) are also far higher than in other areas of law. Research indicates that there are multiple social and economic factors underpinning social security fraud, in combination with a predominantly rigid and complex system of social security.

The WAC refers the Committee to the NSW Sentencing Council's recommendations and findings regarding prisoners and debt. [Reference: Effectiveness of Fines as a sentencing option – see Appendix].

Employment, Education and Training:

There is an absence of consistent data in relation to educational background of prisoners available. On the issue of employment and education programs within the prison, Margaret Cameron of the Australian Institute of Criminology, notes that 'no formal consideration has been given to the needs of ATSI women.' A recent survey of NSW women noted that 84% of the women said they would like to work on release.

Access to health services:

The high incidence of health problems among Aboriginal women is an indicator that pre and post release programs should target the health needs of Aboriginal women. The high incidence of deaths in custody attributable to natural causes indicates an urgent need for better health care while in custody, and better health care on release. There is also a specific need to address drug abuse among Indigenous women.

JUVENILES

Juvenile diversionary schemes

Options for diversion include verbal and written warnings, formal cautions, victim-offender or family conferencing, or referral to formal or informal community-based programs. All Australian states and territories offer some form of diversionary programs for juveniles, and some offer diversion for adults.

Safe house model with early offenders to try and prevent them entering Juvenile Justice centres -For example, the Tirkandi Inaburra Aboriginal Cultural and Development Centre, which is an Aboriginal community run centre offering Aboriginal boys aged 12-15, is a culturally-based residential early intervention program aimed at reducing future contact with the criminal justice system by strengthening the boys' cultural identity, self-esteem and resilience.

Early intervention with young people, with families and with communities in order to identify and negate risk factors for offending in young people, could be beneficial. Research indicates that there are a number of indicative risk factors associated with young people who offend. These risk factors include a number of family components, such as family conflict, abuse and parent criminality. Risk factors also include peer and community components, such as delinquent peers, gang membership, poverty, community disorganisation and the availability of drugs.

However, unfortunately not enough work has been done on this. Many of the existing options are ones that run on historical models, and funded agencies are traditionally refuse to change their model.

For example, children in out of home care, and many young Aboriginal children, are homeless and are continually 'offered' accommodation that they continually flee, despite a long history of this inevitable outcome, such as residential home, group homes, and refuges. It is acceptable practice in NSW (and presumably in other jurisdictions) to refer young people in oohc to SAAP services, designated homelessness services, as children approach the leaving care age of 16 years.

An alternative model was presented by the USA organisation the Rand Corporation, to the NSW Parliamentary Inquiry into Juvenile Offenders (see <http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/BEFD25E1E2AB98E0CA25704C0081B630>) It was viewed as the most cost effective and successful model available, and involved placing children in oohc in their own rental accommodation and supporting them through various issues such as schooling, shopping, getting and maintaining jobs and the like. This model was

however, rejected by the Committee on the basis that the children would be exposed to too many risks, such as missing school, money management, drugs and alcohol, sexual exploitation, inability to maintain health and hygiene, diet etc – although these risk factors are already commonly experienced by the majority of client groups in question.

When viewed from this perspective, many of the programs on offer appear to be designed more for administrative ease and control over clients, especially financial control, rather than teaching clients to be independent.

Perversely then, many such programs, whether they be homelessness services, or half way houses consider themselves successful when the client last a certain period of time in residence, despite the fact many leave into further periods of homelessness, or into other unrelated though still welfare models of service provision.

This is particularly concerning in light of evidence provided to the WAC that support services frequently discriminate against women offenders, refusing or limiting access to services, partly due to a lack of understanding of client group and needs.

3. What strategies would have the biggest impact in reducing incarceration of Indigenous women and youth?

Remand:

Of the total number of women in full-time custody, over 30% are on remand. This is approximately 230 women. There is evidence that high numbers of women who are remanded in custody are released at sentencing because of back-dated sentences.

The WAC understands that the NSW Department of Corrective Services NSW is considering a trial of electronic bracelets for bail refused persons, and has urged that preference be given to women, especially Aboriginal women who are the sole carers of dependent children. Targeting women for this initiative would recognise the exceptional circumstances of women and would ensure the least disruption to families, who often suffer extensive disruption when an accused is incarcerated.

Sentencing: Exceptional circumstances' criteria

In current sentencing legislation family circumstances are considered only if 'exceptional circumstances' are recognised as a relevant factor. Imprisonment may have profound impact on dependents e.g. a four month sentence for a minor crime can result in loss of accommodation, family break up, loss of care of elderly and/or disabled who then need to go into care.

The WAC is deeply concerned about this issue, and urges that the Committee recommend that the judiciary exercise 'exceptional circumstances' legislation during sentencing, particularly where circumstances of children and other dependents will have to undergo major change upon the parents' incarceration.

The Dec 2009 Sentencing Council-funded report by Janet Manuell, the Fernando Principles on sentencing Aboriginal offenders (previously provided to the Committee) indicates how judicial practices have attempted to adjust for the needs of Aboriginal people – through development of

Circle Sentencing, Koori Court and other initiatives in Canada. An evaluation has shown that Koori sentencing models have not reduced recidivism but are valued for the positive, although slow, process of increasing the engagement of Aboriginal communities in criminal justice. In Victoria there have been successes because programs have been integral to the options e.g. Circle sentence + programs.

Sentencing: Piloting abolition of short prison sentences

The NSW Sentencing Council recommended that abolition of short prison sentences should be piloted for Aboriginal female offenders throughout all of NSW, and that such a pilot should be carefully monitored and evaluated.

The Council noted that data provided by NSW DCS on the characteristics and size of the population serving prison sentences of 6 months or less, indicated that almost a quarter are Aboriginal. It found that women are serving short sentences primarily for public order offences and fine default, and noted concerns that many of these women serving short prison sentences are unable to access counselling or courses, and that community based sentencing options, in place of short prison sentences, would allow for flexibility in service provision and links to ongoing treatment in order to address underlying issues.

The Council acknowledged that the same sentencing *principles* should be applied to Aboriginal offenders, but that the Aboriginality of an offender *is nevertheless relevant* to explain or throw light on the particular offence and the circumstances of the offender.⁴⁹ Judicial education and cultural awareness programs therefore have an important role to play.

It noted that there was clear evidence to show that alternatives to prison specifically targeted to Aboriginal offenders (such as the Circle Sentencing Pilot) have an extraordinary positive effect on reducing re-offending, and that any general reform to prison sentences of 6 months or less should be clearly articulated with current policies specifically developed for Aboriginal people. The development of alternative sentencing options to short prison sentences clearly involves criminal justice intervention programs.

The over-representation of Aboriginal women in correctional facilities, in particular, and the shorter sentences that they serve indicates that non-custodial sentencing alternatives are not being utilised for them.

The WAC notes that Indigenous women are more likely to be serving their current prison sentence for a violent offence (57 per cent compared to 21 per cent of non-Indigenous women), and less likely to be serving a sentence for property (21 per cent compared to 35 per cent) or drug offences (two per cent compared to 18 per cent). [Reference: Johnson, H. (2004). *Drugs and Crime: A Study of Incarcerated Female Offenders*. Research and Public Policy Series No. 63. Australian Institute of Criminology]. This has obvious implication for any attempts to reduce the impact of short custodial sentences for Indigenous women. On past practice, Govts are unlikely to permit violent offences to be included in any sentence reduction or abolition scheme.

The WAC also notes that the Sentencing Council's recommended trial was dependent on consideration of the success of the Western Australian abolition of short sentences project – which was deemed not to have been successful. However, it is noted further that recent discussion of

sentencing practices and prison numbers in the UK has led to that's Government consideration of the abolition of short custodial sentences.

Sentencing: Enhanced community sentencing options

On 21 March 2010 23% of Home Detainees were women; this equates roughly with their level of representation among CSNSW clients in the community. Of the total of 2791 women under CSNSW supervision in the community, 34 were on Home Detention. Home Detention is currently available only in Sydney metropolitan area

The WAC understands that the NSW DCS is considering a proposal to extend Work Release to a third stage that would include Home Detention. The WAC is concerned to ensure that that sentenced women are adequately represented in the proposed Work Release 3 model that includes Home Detention at the end of a sentence, and has asked that DCS set targets for women to be included in this program (seeking in fact that in the initial phase of this new model for Work Release 3 that more women than men be offered places). As over 50% of women in custody have children participation in the program would greatly assist the reintegration of families and reduce the pain of separation.

The WAC refers the Committee to the NSW Sentencing Councils' reports , *How Best to Promote Consistency in the Local Court*, 2004 and *The Effectiveness of Fines as A Sentencing Option*, for further consideration of this issue (see Appendix).

Greater community -support eg mental health

Approximately 1800 women are received into custody in NSW per annum. *An Evaluation of the NSW Court Liaison Services* by BOCSAR in 2009 states that drug use, histories of abuse and psychiatric disorders are characteristic of women offenders (74% had had psychotic episodes in the year prior to their court appearance). The 2009 Inmate Health Survey showed the higher representation of women among inmates who, prior to their incarceration, had had mental health treatment, been admitted to a psychiatric unit and attempted suicide or self-harmed.

Assisting the courts to recognise mental illness and organise court-ordered treatment in a community setting is now recognised as a valuable alternative to incarceration. The Mental Health Court Liaison Officer model of support for offenders with histories of drug misuse could benefit from expansion.

The WAC has supported NSW Justice Health's bid to increase numbers of Mental Health Court Liaison Officers and would urge the adoption / expansion of similar programs nationwide.

Reforms to the fines and driving licence schemes whereby non-payment of fines leads to licence loss and subsequent involvement in the criminal justice system.

The WAC refers the Committee to the NSW Sentencing Council's recommendations and findings regarding prisoners and debt, and the intersection of licence suspension and custody [Reference: Effectiveness of Fines as a sentencing option – see Appendix].

Indigenous ownership and delivery of services and programs

Criminal conduct by Indigenous women must be viewed as a symptom and offenders as victims. Links must be drawn and holistic models developed and supported which address the connections between culture, drug use, alcohol use, separation from family, violence, poverty, spiritual needs, housing, health, boredom through unemployment, race discrimination and gender discrimination.

The MHCC has noted that Indigenous people are already constructing, reconstructing and participating in programs and models for dealing with criminal justice issues. These include community policing, night patrols, Community Justice Panels and Groups, circle sentencing, and participation in courts such as the Nunga court (SA), Murri court (Qld) and Koori court (Vic).

Programs have now been developed and evaluated, particularly around family violence for women, men and children, and Indigenous participation in drug court trials. These indicate that it 'is very important to give responsibility back to the community, through the case management, future planning and post release programs and services. The community must also be properly supported in these initiatives'.

Indigenous people have looked to new models and in so doing, look to the past for answers. One example is the development of restorative justice models to deal with violent behaviour within communities. Restorative justice models engage community, victim and offender. The victim's rights to safety and security are paramount, and the participation of Indigenous Elders is essential. This approach has been considered by the Indigenous Services Unit of New South Wales Corrective Services with the view of developing a similar initiative for Aboriginal women in New South Wales.

Delivery of specific services for Indigenous women (and juveniles)

Indigenous women are disadvantaged by the lack of services designed for them. This is an example of intersectional discrimination. It is a consequence of a rights and policy structure which identifies groups of needs and rights holders such as women and Indigenous people, but fails to provide for the needs of people who dwell at the intersection of these groups.

The MHCC has noted that there should also be recognition that community extends into gaols. Elders recognised this long ago and have been visiting the large numbers of incarcerated Indigenous people for many years. The many successful programs (such as CDEP) now running in communities could be adapted for Indigenous women in gaol. For many women, gaol is a time of reflection and a time where culturally appropriate programs would be extremely beneficial.

About the CDEP Program

CDEP program assists unemployed Indigenous people. Operating mainly in remote areas, the CDEP program aims to help Indigenous job seekers find and keep jobs.

CDEP providers will work in partnership with Employment Service and Indigenous Employment Program providers. Working together to deliver integrated services at the local level means CDEP and Employment Service providers can offer a better range of employment and support services that lead to real jobs for Indigenous job seekers. Employment Service providers work in partnership with individual job seekers to develop

Employment Pathway Plans. These plans include what participants can do under the CDEP program to help get a job.

Two 'streams' of assistance

Under the CDEP program, there are two main ways ('streams') that CDEP providers assist Indigenous job seekers. These streams are called 'Work Readiness' and 'Community Development'.

- Work Readiness Services—helps job seekers to develop their skills, improve their chances of getting a job, and move to work outside of the CDEP program.
- Community Development—focuses on supporting and developing Indigenous communities and organisations.

JUVENILES

Best practice principles for juvenile diversion and Indigenous youth

1. Viable alternatives to detention.

Diversion requires the provision of a wide-range of viable community-based alternatives to detention. Diversion programs should be adequately resourced to ensure they are capable of implementation, particularly in rural and remote areas. Diversion should be adapted to meet local needs and public participation in the development of all options should be encouraged. There should be adequate consultation with Indigenous communities and organisations in the planning and implementation stages.

2. Availability

Diversionary options should be available at all stages of the criminal justice process including the point of decision-making by the police, the prosecution or other agencies and tribunals. Diversion should not be restricted to minor offences but rather should be an option wherever appropriate. The decision-maker should be able to take into account the circumstances of the offence. The fact that a juvenile has previously participated in a pre-court diversionary program should not preclude future diversion. A breach of conditions should not automatically lead to a custodial measure.

3. Criteria

Agencies with the discretionary power to divert young people must exercise that power on the basis of established criteria. The introduction, definition and application of non-custodial measures should be prescribed by law.

4. Training

All law enforcement officials involved in the administration of juvenile diversion should be specifically instructed and trained to meet the needs of young people. Justice personnel should reflect the diversity of juveniles who come into contact with the system.

5. Consent and participation

Diversion requires the informed consent of the child or his or her parents. Young people should be given sufficient information about the option. They should be able to express their views during the referral process and the diversion process. Care should be taken to minimise the potential for coercion and intimidation of the young person at all levels of the process.

6. Procedural safeguards

Diversionary options must respect procedural safeguards for young people as established in CROC and the ICCPR. These include direct and prompt information about the offences alleged, presumption of innocence, right to silence, access to legal representation, access to an interpreter, respect for privacy of the young person and their family and the right to have a parent or guardian present. A child should not acquire a criminal record as a result of participating in the scheme.

7. Human rights safeguards

CROC also requires that the best interests of the child be a guiding factor; the child's rehabilitation and social reintegration be promoted, with attention to their particular vulnerability and stage of maturation; the diversionary option applies to all children without discrimination of any kind, including on the basis of race, sex, ethnic origin and so on; the diversionary option is culturally appropriate for Indigenous children and children of ethnic, religious and cultural minority groups; and the diversionary option is consistent with prohibitions against cruel, inhuman or degrading punishment.

8. Complaints and review mechanisms

The child should be able to make a complaint or request a review about the referral decision, his or her treatment during the diversionary program and the outcome of his or her participation in the diversionary option. The complaint and review process should be administered by an independent authority. Any discretion exercised in the diversion process should be subject to accountability measures.

9. Monitoring

The diversionary scheme should provide for independent monitoring of the scheme, including the collection and analysis of statistical data. There should be a regular evaluation conducted of the effectiveness of the scheme. In reviewing options for diversion, there should be a role for consultation with Indigenous communities and organisations.

10. Self-determination

The right to self-determination is also central for Indigenous peoples in the context of criminal justice issues. Article 1 of the ICCPR and Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) assert that all peoples have the right to self-determination. RCIADIC prescribed self-determination as being necessary for Indigenous people to overcome their previous and continuing, institutionalised disadvantage and domination. [11] The Bringing them home report recommended that self-determination in relation to juvenile justice issues be implemented through national framework and standards legislation.

[Reference : Australian Human Rights Commission (2003). *Issue 2: Specific issues relating to the administration of justice – Indigenous women; public order laws; mandatory sentencing schemes; and best practice for diversion of Indigenous juveniles.*]

Programs within Juvenile Justice

There is a need to ensure that educational and vocational programs delivered through the Juvenile Justice system are easily accessed by young people who wish to participate. It is essential that a diverse range of programs is offered in each centre.

4. Are programs available to Indigenous women in prison satisfactory?

Often not. They are often limited by poor design (ie being assessed on risk criteria designed for non-Indigenous males rather than Indigenous females), and plagued with problems arising from a client group representing small numbers (especially when compared with what is frequently seen as the overwhelming needs of male prisoners), with complex needs, often serving very short periods in custody, with little community or family support. Additionally, these programs need to be delivered across a wide geographical area.

Eg1: The NSW Government runs a **Mothers and Children program** in NSW prisons. However, only twenty-one women had access to the full-time program between 1996 and 2000. [Reference: Lees, R (2001. *Stop the Womens Jail Anti-Prisons Resource Kit* . Justice Action NSW]. A woman lucky enough to qualify faces an un-enviable 'choice' - to keep her child in a prison environment or face the pain of separation for them both.

Incidentally, a version of this program was intended to be established in juvenile detention centres (where a very high proportion of the female detainees have children) but was abandoned after community concern about children in detention. Consequently, the children of young prisoners have no recourse but to be placed in out of home care, with all its attendant risks.

Eg 2: Link-Up provides a support program for prisoners who are members of the Stolen Generation or who have suffered from the impact of family dislocation due to historical events. Link-Up searches for family members of prisoners and successfully finds family members with whom the prisoners are able to establish. Family support is acknowledged as the most successful way for the prisoners to return to the community. While accepted as a valuable program by the NSW Government, the program is currently only available to male Aboriginal prisoners., due to lack of funding.

Over a third of women in custody are Aboriginal, a higher over-representation than their male counterparts. They also have the highest recidivism rate, higher than non-Aboriginal women, Aboriginal and non-Aboriginal men. The WAC recently supported Link-Up to obtain funding for a female case worker so that the much needed and important work of reconciling Aboriginal women with their families can commence.

Eg 3: Lack of sex offender programs

There are no specialized female offender programs for incarcerated female sex offenders in Australia or for such offenders in the community. A recent NSW Sentencing Council report (Penalties for Sexual Offences) noted DCS advice that it 'remains committed to developing a sex offender program for women but has currently prioritised the development of the program for sex offenders with intellectual disabilities and the Deniers program'.

Eg 4: Impact of experience of childhood and adulthood sexual assault is not understood

The WAC is concerned that the impact of sexual trauma on women's life courses and links with offending; has not been adequately explored or provided for in terms of program delivery in custody. At the WACs request, the NSW DCS has commissioned The Australian Centre for the Study of Sexual Assault (ACSSA) to undertake further examination of this issue – including what treatment/support is efficacious in addressing this trauma, in the general community and for women in custody and women offenders in the community; what is the appropriate context for their delivery; and what are the impacts of sexual trauma histories on women's capacity to participate and benefit from offence-related programs?

Eg 5: Information gaps at court and prison reception

After court, many women, particularly Aboriginal women, do not comprehend the sentences they have been given. For eg, the Legal Education Assistance Program (LEAP) offered by Wirringa Baiya, Women's Legal Service and Hawkesbury-Nepean Women's Legal Service in SWCC, EPCC, Dillwynia, reported that 1 in 4 women don't know what their sentence is or who represented them.

A need for explanation of individuals' sentences has been identified – specifically, when & who should provide legal advice, mode/s of communication; court proformas, information from and details of lawyers who represented women. AVL/Video Court Link a major issue as offenders frequently do not understand what the judge has said and have no assistance. They are confused about what's happening and the outcome.

Similarly, the WAC has identified that that women in custody do not know about appeals and how to lodge them; correctional centre staff have raised this as an information gap.

Eg 6: Medicare access by women in custody

The lack of services available for women in custody with histories of experience of sexual assault trauma, specifically issues of access to MBS psychology (and other) services for inmates, was presented to the recent Senate Inquiry Hearings into Suicide (Senators Adams, Boyce, Furner, Moore and Siewert (Chair) were present).

Essentially, 'whilst convicted persons are eligible for Medicare benefits whilst in goal, the Health Insurance Act 1973 precludes them from accessing these benefits on the grounds that they have access to other services provided by arrangement with a government authority (either through Justice Health or Corrections in NSW). Whilst some psychological services are provided through Corrections in NSW, they do not fulfil the need as evidenced by the Justice Health Inmate Survey 2009, which shows very high rates of mental illness particularly in women. The WAC recommends the expansion of psycho-educational groups and evidence based individual interventions to be provided in gaol, the shortage of clinicians in Corrective Services to be supplemented by the Commonwealth agreeing to provide MBS psychological services to inmates.' Jenna to update WAC at next meeting.

5. What do you think are the barriers to a coordinated response to Indigenous issues across Commonwealth government departments?

[For CSA Issues see reference : Young M (2010). *Breaking the Silence: Creating the Future, Addressing Child Sexual Assault in Aboriginal communities in NSW*. NSW Attorney General's Department]

Researchers have found that that a whole of government approach to capacity building allowed Indigenous Australians to develop their corporate governance capabilities. But conceptual limitations saw the notion of whole of government being used more as a management tool than an instrument of governance that could potentially address the long-standing political claims of Indigenous New Zealanders and Australians. As a result, the jurisdictional governance issues central to indigenous desires for greater devolution of decision-making authority were not adequately addressed.

[See reference : Humpage, L. (2005). *Experimenting with a while of Government Approach. Policy Studies*. Volume 26, Issue 1 March 2005 , pages 47 – 66]

Additionally, there is widespread unwillingness to recognise their own agencies involvement in creating problems in the first place. This sees the high level of mistrust of the agency by the client group continue, for there is no acceptance on behalf of the agency of their role, believing that an apology at some time in the past is all that is needed.

An example was given in the evidence of McFarlane to the ATSIA Committee in relation to the theft of monies, and wholesale mismanagement of the Aboriginal Trust Funds, which have had incredible knock on effects. For example, people had their children removed because they appeared to "have no visible means of support"; were unable to acquire housing or education, or any number of different things that would have allowed them to progress in life by obtaining capital, and passing on wealth to their children.

Perhaps just as significantly for a people who have suffered wholesale repression and intergenerational punishment, being proceeded with before the courts for the most minor of infractions- even when Government finally accepted the total failure of the Trust Fund scheme, no individual was held accountable, and even though theft of funds is believed to occur, no criminal theft or fraud investigations were commenced.

ADDITIONAL QUESTIONS ASKED BY THE COMMITTEE

6. What are the essential elements of safe housing for Indigenous juveniles, why current safe housing options are not appropriate, and what should be the alternatives to detention for those juveniles on remand – a number of witnesses have called for more bail houses, but are they appropriate?

Considerably more research needs to be done on this issue before making fundamental changes to a system that is currently poorly understood. This would be required simply to measure the impact and outcomes of such a fundamental change to the system. For eg, what are the pathways for children entering the system? Simple analysis of the crimes does not provide any real detail concerning the pathway, if as my research is showing, non government service providers appear to be a very important pathway, using the criminal justice system in lieu of proper policy and case management practices.

Crimes such as malicious damage, theft, assault, not comply with court orders etc can hide the reality that agencies are not fulfilling their obligations, and are cost shifting their responsibilities. For example, a NSW 'discussion paper' was recently released by FONGA (Forum of Non Government Agencies) *Releasing the Pressure on Remand*, called for the creation of Bail Hostels, yet this paper failed to recognise that the majority of the agencies who wrote the paper represent agencies whose practices actually compel children in care into the criminal justice system in the first place. This has been commented upon periodically - for example by the Community Services Commission, with little effect upon their service delivery or policies.

While Bail hostels would be an appropriate response to your question, given the very high number of children who are remanded in custody, who at court hearing are found not guilty, or even if guilty- are immediately released, this potentially valuable option (particularly for children in the care of the State), need to be managed correctly. Issues for consideration about correct or appropriate management need to balance issues of who the service provider of the bail hostel actually is. Failure to do so could entrench the criminal justice system further into their adhoc management regimes for controlling and punishing the children in their custody and care, while also suppling those agencies with additional funding sources, and greater coercive powers over the children's lives. This could be seen by some as rewarding bad behaviour, and placing into the hands of already powerful institutions, the ability to engage in abusive practices against the children they are meant to assist.

APPENDIX : NSW Sentencing Council Reports

<http://www.lawlink.nsw.gov.au/lawlink/scouncil>

Relevant reports re Indigenous and female offenders.

1. Sentencing Aboriginal offenders in NSW:

Released in February 2010, this report provides a comprehensive review of the development of the current common law principles in relation to sentencing Aboriginal offenders against a backdrop of increasing rates of imprisonment of Aboriginal offenders in NSW. The report identifies various reasons for the overrepresentation of Aboriginal offenders in NSW prisons and examines alternative sentencing models and criminal justice strategies from this and other jurisdictions.

2. Sentencing for Alcohol-related offences:

Examines the current principles and practices governing sentencing for offences committed while an offender is intoxicated, as well as those principles and practices governing sentencing for alcohol-related violence, including violence offences where a glass or bottle is used as a weapon (commonly known as 'glassing').

3. Periodic Detention:

The Council was requested to evaluate the advantages and disadvantages of periodic detention when compared with other sentencing options, whether the scheme should be modified or replaced with an alternative sentencing option, and whether the scheme was compatible with the direction outlined in the State Plan, Priority R2: Reducing re-offending. Published in December 2007.

Particular Categories of Offender

Female offenders

3.20 Several submissions drew attention to the limited availability of periodic detention, particularly in regional areas, for female offenders, as did the NSW Legislative Council Standing Committee on Law and Justice report.

3.21 The Inmate Census figures provide some measure of the disproportionate availability of this option for female offenders, in that of the 724 persons subject to periodic detention orders at 30 June 2006, only 60 (8.3%) were female.⁹⁹ This is slightly higher than the 6.1% of female detainees identified in the NSW Department of Corrective Services snapshot study of those detainees who commenced periodic detention in 2003-2004, discussed above.

3.22 The Council recognises that there may be other reasons for the disparity suggested from these raw figures considered alone, including differences in the overall proportion of female to male offenders receiving custodial sentences and in the nature of the offence committed. However, it appears likely that the limited number of periodic detention centres (Bathurst, Mannus, Tomago, Wollongong and Norma Parker) catering for women is a significant factor in the limited use of periodic detention for female offenders.

Aboriginal offenders

3.23 One submission noted that Aboriginal offenders constitute a much smaller proportion of the periodic detention population when compared with the overall Aboriginal offender population in correctional facilities. The NSW Legislative Council Standing Committee on Law and Justice cited the 2005 Inmate Census figures, which showed that only 6.9% of offenders in periodic detention centres identified as Aboriginal or Torres Strait Islanders while such group comprised 17.1% of all offenders in correctional centres. In contrast with the figures provided for female detainees, this figure is slightly lower than the 8.4% of detainees identified in the NSW Department of Corrective Services snapshot study of detainees who commenced periodic detention in 2003-2004. 3.24

3.24 The Chief Magistrate suggested that this under-representation may be due to the Aboriginal communities' geographical location, as well as the eligibility restrictions which exclude offenders if they have ever served a sentence of full-time custody of six months or longer. The fact that many facilities are not accessible by public transport is also a contributing factor, given that a large proportion of this grouping are unlicensed or disqualified from driving.

3.25 The Aboriginal Justice Advisory Council (AJAC) noted the extent to which Aboriginal people are still overrepresented in prisons, and underrepresented in relation to the imposition of periodic detention. Despite the custodial nature of periodic detention, the AJAC submitted that periodic detention should be a necessary option for Aboriginal offenders, since, if applicable, it is preferable to full time custody.

3.26 The Judicial Commission specifically included a reference to the suitability of periodic detention as a sentencing option for Aboriginal people in the Equality Before the Law Bench Book, noting its suitability for women with child care responsibilities.

3.27 The principle documents guiding the implementation of Aboriginal justice initiatives in NSW are the *2004 NSW Aboriginal Justice* and the *2005 Two Ways Together: NSW Aboriginal Affairs Plan*. These reports aim to provide some strategic directions for Aboriginal people within the justice system. One of the major aims of the initiatives identified in these documents is to "ensure that criminal justice processes act to reduce offending behaviours to reduce the number of Aboriginal defendants proceeding through the criminal justice system". AJAC suggested that this potentially opens up the possibility that the Aboriginal community could supervise the community service component of a periodic detention sentence. The Council notes that Aboriginal Community Justice Groups have been established throughout the State to support the rollout of Circle Sentencing, and considers that this additional role would potentially fit well with the stated aims and objectives of these groups.

3.28 The importance of addressing offending within the indigenous community, inter alia, by more relevant sentencing practices, is highlighted by the circumstance that although indigenous Australians account for about 2.5% of the Australia population, they account for about 21% of the prison population...

4. Sexual offences - penalties for:

Released in August 2008, this report examines whether the penalties currently attaching to sexual offences in New South Wales are appropriate. The Council looks at whether there are any gaps or anomalies in the current framework of sexual offences and penalties and offers suggestions as to how these might be addressed. Volume 3 of this report was released in May 2009.

...3.27 The New South Wales model of Circle Sentencing, which is available in relation to Aboriginal offenders and which actively engages the Aboriginal community in the process, also involves a form of restorative justice, although it is not available in relation to sexual offences,¹ and is not a true diversionary program.²

3.28 Circle Sentencing in Canada has been characterised by a tendency to resist any judicial imposition of firm eligibility criteria. Accordingly, some communities in Canada permit sexual offences to be dealt with by way of Circle Sentencing.³

3.29 While the recent New South Wales evaluation published by the NSW Bureau of Crime Statistics and Research suggested that participation in Circle Sentencing has no effect on the frequency of offending by participants, the time taken to re-offend, or the seriousness of reoffending, it did note that there was nothing in the analysis to suggest that the process was not meeting its other objectives, such as strengthening the informal social contacts that exist in Aboriginal communities that may have a crime prevention value. The report suggested that consideration be given to combining Circle Sentencing with other programs (eg cognitive behavioural therapy, drug and alcohol treatment, and remedial education) that have been shown to alter the risk factors for further offending.

3.30 It has been suggested, on the basis of the Canadian model, that Circle Sentencing with its healing and holistic approach could be a feasible and appropriate option to address the issue of child sexual abuse within Australian Aboriginal communities since the victims tend to be related to or know their offender.

3.31 It may be a means of encouraging a greater disclosure of such offences, and if combined with a therapeutic intervention, it could possibly reduce the risk of recidivism, inter alia, by focusing the offender's mind on the dynamics of sexual abuse and its unacceptability. Its benefits include the participation of the Aboriginal community in the process, introduction of cultural aspects, victim empowerment and ultimate acceptance of wrongdoing by the offender.

This could potentially have a greater significance for sexual offending within the familial environment than for other forms of property or violence-related offending. However, a trial would need to be conducted to determine whether this is so.

¹ Criminal Procedure Act 1986 (NSW) s 348(2)(b): 'An intervention program may not be conducted in respect of any of the following offences: ... an offence under Division 10 (Offences in the nature of rape, offences relating to other acts of sexual assault etc) or 15 (Child prostitution and pornography) of Part 3 of the Crimes Act 1900'

² Potas, I. et al, 'Circle Sentencing in New South Wales: A Review and Evaluation' (Judicial Commission of New South Wales and Aboriginal Justice Advisory Council, 2003) 3.

³ Heino, L., 'Circle Sentencing: Part of the Restorative Justice Continuum' Plenary; and Spiteri, M., 'Sentencing Circles for Aboriginal Offenders in Canada: Furthering the Idea of Aboriginal Justice Within a Western Justice Framework' (Papers presented at the Dreaming of a New Reality, the Third International Conference on Conferencing, Circles and other Restorative Practices, Minneapolis, 9 August 2002).

3.35 (The Council) is ... of the view that consideration should be given to relaxing the bar on entry to diversionary/restorative justice programs for first offenders facing potential charges for less serious sexual offences, with each case being considered on its own merits by reference to the subjective circumstances of the offender, his or her acceptance of guilt, and prospects of rehabilitation.

Risk Prediction

Use with specific populations

4.49 Also of importance in the context of risk prediction is the fact that the overwhelming majority of research in the area of sexual offending relates to adult males⁴ and is predominantly derived from research undertaken in North America. This raises potential issues, for example in relation to the assessment of risk in relation to populations such as Indigenous offenders, juvenile offenders and female offenders.

Aboriginal offenders

4.50 In a report published in 2004, Allan and Dawson raised a number of potential issues surrounding the practice of generalising research conducted on specific populations in North America to Indigenous offenders in Australia, a practice they describe as 'inappropriate'.⁵ Specifically, they argue that the available actuarial instruments have not been validated in the Australian Indigenous population and cite a number of possible limitations.

4.51 In response to these concerns, an instrument known as the 3-Predictor model was developed and trialled among Indigenous sex offenders in Western Australia. While initial trials indicate that this instrument may be more reliable than those developed for non-Indigenous offenders, the authors have identified limitations arising from the fact that the study was retrospective and used a relatively small sample, and observed that 'the instrument cannot necessarily be used in other areas in Australia'.

Female offenders

4.52 The major concern with the assessment of risk in female sex offenders is that invariably the samples are small. In a recent study, for example, the sample comprised only eleven women. While some development work has been undertaken in this area, no instrument has yet been fully validated in the context of female offenders.

PART D: PROGRAMS TARGETING SPECIFIC NEED POPULATIONS

6.37 The Council notes that there is continuing debate about the desirability of developing separate programs for individual subgroups of offenders, or of adding specific modules to

⁴ Beech, A., Fisher, D. and Thornton, D., 'Risk Assessment of Sex Offenders' (2003) 34(4) Professional Psychology: Research and Practice 339, 347.
59. Allan, A. and Dawson, D., 'Assessment of the Risk of Reoffending by Indigenous Male Violent and Sexual Offenders' (Trends and Issues in Criminal Justice, Australian Institute of Criminology, 2004).

⁵ Allan, A. and Dawson, D., 'Assessment of the Risk of Reoffending by Indigenous Male Violent and Sexual Offenders' (Trends and Issues in Criminal Justice, Australian Institute of Criminology, 2004)

existing programs to prepare potential participants for the mainstream program. DCS has advised the Council that it is moving generally towards the latter approach, in recognition of the fact that different cultural factors and criminogenic needs may require longer and different forms of work with some groups.

Aboriginal offenders

Custodial programs

6.38 Aboriginal prisoners convicted of sexual assault and related offences comprise 10% of the Aboriginal prisoner population Australia-wide. 49 Sexual assault was the most serious offence for 8% of Aboriginal prisoners, compared with 20% for non-Aboriginal prisoners.⁶

6.39 There are currently no Aboriginal-specific sex offender treatment programs in correctional facilities in New South Wales. DCS has advised that its CUBIT program has an identified Aboriginal Special Projects Officer, whose role includes motivating high risk Aboriginal sex offenders, supporting the delivery of treatment at CUBIT, and assisting in the reintegration of offenders into Aboriginal communities.

6.40 DCS has advised that Aboriginal offenders are currently commencing, and more importantly completing, CUBIT at an increasing rate in recent years.

6.41 The effectiveness of sex offender programs targeting Aboriginal offenders in Australia is currently unknown, there having been no relevant evaluation. The international literature, however, suggests that different treatment outcomes will arise for Aboriginal and non-Aboriginal offenders unless Aboriginal specific programs are provided. The involvement of Aboriginal staff and local community

members in program development and delivery has been reported as being an important element.

6.42 DCS has stated that while cultural factors are known to affect offenders' readiness for programs and while it is acknowledged in the literature that Aboriginality can affect the extent to which an offender engages in a program, there are mixed opinions as to whether specific offence related programs should be designed for Aboriginals or whether readiness and responsivity issues should be separately addressed whilst allowing the Aboriginal offenders to attend generic programs.

6.43 DCS has an extensive list of programs and services that address Aboriginal offenders and rehabilitation generally. It also created a range of Aboriginal-identified positions whose role is to motivate, work with and assist the re-integration of Aboriginal offenders.

6.44 A recent report by the Australian Institute of Criminology cited the planned development of the Categorical Deniers Program, and the 'use of open groups which offenders can leave or join depending on their individual therapy needs', as examples of Departmental practice which had: improved the participation and treatment outcomes for Indigenous sex offenders ... (by overcoming) some of the difficulties (they) often face with the level of disclosure typically required by offending programs.⁷

⁶ Willis, M. and Moore, J., 'Reintegration of Indigenous Prisoners' (Research Paper No 90, Australian Institute of Criminology, 2008), 21.

⁷ Willis, M. and Moore, J., 'Reintegration of Indigenous Prisoners' (Research Paper No 90, Australian Institute of Criminology, 2008), 70.

6.45 The Council notes that the Aboriginal Child Sexual Assault Taskforce (ACSAT) thought that 'voluntary participation (in sex offender treatment programs) coupled with a culturally irrelevant program' would mean 'that most Aboriginal people would choose not to take part'. Accordingly, it recommended 'an Aboriginal-specific sex offender treatment program be developed'.⁸

6.46 ACSAT also identified a lack of programs within correctional facilities that provided for Aboriginal adult survivors of child sexual assault. The report found that while some services are offered to women who disclose a history of child sexual assault, men who make similar disclosures are offered no services or support, beyond being encouraged to work on the issue once released. Although the literature has noted that victims of child sexual assault do not necessarily go on to become sex offenders, and that it is still unclear whether a history of child sexual abuse is a significant predictor of sexual recidivism in adulthood, ACSAT recommended that a model be developed and funded to provide sexual assault counsellors/program coordinators in both male and female correctional facilities for sex offenders who were themselves victims of child sexual assault.

6.47 DCS has advised that it does not support this proposal on the basis that 'the prison environment is not an appropriate setting for offenders to address their (own) experience of child sexual assault'.

Female offenders

6.48 Based on pooled data from the UK, USA, Canada, Australia, and New Zealand, it has been suggested that female sex offenders account for 4% to 5% of all sex offenders.⁹ It has been suggested that it is likely that the official figures do not reflect the actual incidence of such offending and that there is a degree of under-reporting.¹⁰⁶⁵

Female-specific programs

6.52 Due to the paucity of research, few treatment programs have been developed to specifically address the needs of this group.⁷⁴ The differences between female and male sex offenders suggest that standard treatment programs developed for males may not be appropriate.⁷⁵ Consequently, research into whether there is a case for gender-specific programs, that address the offence-related factors of female offenders is urgently needed.

6.53 There are no specialized female offender programs for incarcerated female sex offenders in Australia or for such offenders in the community. DCS advised that it 'remains committed to developing a sex offender program for women but has currently prioritised the

⁸ Aboriginal Child Sexual Assault Taskforce, 'Breaking the Silence: Creating the Future: Addressing Child Sexual Assault in Aboriginal Communities in NSW' (NSW Attorney Generals' Department, 2006), 228.

⁹ Hanson, K. and Cortoni, F., 'A Review of the Recidivism Rates of Adult Female Sexual Offenders' (Report No 169, Correctional Service of Canada, 2005).

¹⁰ Mathews, R., Hunter, J. and Vuz, J., 'Juvenile Female Sexual Offenders: Clinical Characteristics and Treatment Issues' (1997) 9 *Sexual Abuse: A Journal of Research and Treatment* 187 cited in Nathan, P. and Ward, T., 'Females Who Sexually Abuse Children: Assessment and Treatment Issues' (2001) 8 *Psychiatry, Psychology and Law* 44.

development of the program for sex offenders with intellectual disabilities and the Deniers program'.⁷⁶

5. Effectiveness of Fines as a sentencing option:

The Council was asked to consider the effectiveness of fines as a sanction, and the consequences for those who do not pay them. The Council was specifically directed to examine the use of driver license sanctions to enforce fine default, and to explore any possible connection to increased imprisonment rates arising out of sections 25 and 25A of the *Road Transport (Driver Licencing) Act 1998*. The Interim Report was published October 2006.

• Licence Sanctions and Secondary Offending

The Council was concerned at a number of issues which spanned both court and agency practice, including:

- The excessive or indiscriminate use of licence or vehicle or RTA business sanctions, with the adverse consequences attaching thereto (including a reduction in many cases of the offenders' ability to pay the fine or penalty) particularly where used in relation to debts arising by reason of fines or penalties for nondriving offences, and where they effectively constitute a double penalty that is not directed to the improvement of road safety; and

Young people

- The absence of any differentiation between suspension or cancellation of a licence by way of a sanction for the non-payment of a fine or debt, and that which results from the commission of a serious driving offence, particularly in circumstances where the offender is subsequently charged with driving while suspended or unlicensed.

...2.62 Other submissions highlighted the inevitable relationship between a young person's inability to obtain a drivers licence as a result of fines accumulated as a child, together with the subsequent likelihood of secondary offending and possible imprisonment.¹¹⁶⁵ For example, Magistrate Hamilton of Dubbo Local Court noted that it is not uncommon for people to come to court unlicensed for things accumulated while they are juveniles. Youth and people with no prior traffic matters are coming before court, he stated, primarily because of unpaid fines.^{12 66}

2.63 The Commission for Children and Young People¹³⁶⁷ noted the existence of laws that protect juveniles who commit minor crimes. For example, section 210 *Criminal Procedure Act* allows a court to use children's criminal sentencing options when dealing with juveniles on traffic offences, including restricting courts from imposing a sentence of imprisonment on a young person found guilty of a traffic offence.

The Commission submitted that the present law provides an ineffective deterrent that is especially onerous for young people, and was vehemently opposed to the idea of imprisonment as punishment for young people who do not pay fines, regardless of the circumstances.

2.64 The Shopfront Legal Centre recommended that the *Fines Act* be amended so that a fine defaulter cannot be imprisoned for a fine incurred for an offence committed when under

¹¹ Submission 3: Snr Children's Magistrate Scott Mitchell; Submission 4: NSW Commission for Children and Young People; Submission 13: Shopfront Legal Centre; Submission 15 Youth Advisory Council; Submission 20: Youth Justice Coalition.

¹² In consultation Dubbo Local Court, 7 August 2006.

¹³ Submission 4: NSW Commission for Children and Young People.

the age of 18, irrespective of their later offences. This would require an amendment to section 92(2) of the Act.

2.65 The Council notes that the Department of Juvenile Justice has advised that it is not aware of any juvenile sentenced to detention for fine default, although a number of its clients in custody or under community supervision do have fines – either for unrelated matters or imposed concurrently with their term of incarceration. The Department advised that in 2004/05, 1589 fines (worth \$283,877) were imposed on Departmental clients.¹⁴

Aboriginal People

2.67 Submissions noted that while fines may be an effective sentencing option for those with the means and inclination to pay and an interest in avoiding consequent drivers licence sanctions, fines are not very effective for people on limited incomes who cannot afford to pay them.¹⁵

2.68 The Council was advised that the clients represented by Aboriginal Legal Services and the Legal Aid Commission are universally poor, generally either in receipt of social security benefits or receiving no income at all. This is supported by research conducted by the Aboriginal Justice Advisory Council (AJAC) which found that 42 percent of the Aboriginal women surveyed stated that they did not receive a formal income, including any social or welfare payments, prior to entering gaol, indicating a significant level of poverty among Aboriginal women that is not being addressed through the current welfare system.¹⁶

2.69 However, as the Western Australia Law Reform Commission has recently identified, the extent of indigenous poverty may not be reflected in the level of fine imposed on Aboriginal people.¹⁷

It was further submitted that the practice of imposing court costs for each offence rather than imposing a single penalty for all minor offences heard at once, adversely impacts upon impecunious Aboriginal offenders.¹⁸ Imposed without a real attempt to examine the financial circumstances of each defendant, fines may only serve to further increase indirectly the incarceration rate of Aboriginal people.¹⁹

Traditional practices

2.70 It was submitted that the high fines or penalties associated with traditional Aboriginal practices such as fishing means that a single offence can impose a significant financial burden and lead quickly to default.⁷⁵ For example, shucking abalone carries a fine of 50 penalty units or \$550, while possessing in excess of the fish bag size incurs up to 100 penalty units or a \$1100 fine.

2.71 The Council notes that the lack of community-based sanctions for such offences has been the subject of adverse comment by AJAC⁷⁶ and that the NSW *Fisheries Management Act* is the subject of a constitutional challenge on the basis that it contravenes the free exercise of Aboriginal spiritual and religious beliefs and practices.

¹⁴ Submission 31: NSW Department of Juvenile Justice.

¹⁵ Submission 18: South Eastern Aboriginal Legal Service (SEALS).

¹⁶ Lawrie, Rowena *Speak Out Speak Strong: Researching the needs of Aboriginal women in custody*, Aboriginal Justice Advisory Council, 2002.

¹⁷ The Western Australian Law Reform Commission Discussion Paper: *Aboriginal Customary Law* (2005).

¹⁸ Submission 18: South Eastern Aboriginal Legal Service (SEALS).

¹⁹ Submission 19: Coalition of Aboriginal Legal Services (COALS).

Driving without a licence

2.72 Aboriginal people are also at a risk of incurring substantial fines arising from driving without a licence. According to consultations, driving unlicensed is a far more prevalent offence in each of the regions visited than other driving offences. The offence is especially common among young people, who as they are seldom working, lack the means either to pay for a licence or the fine imposed for not having a licence.²⁰

2.73 According to the Western Aboriginal Legal Service (WALS) an unpaid fines or penalties history means Aboriginal people have no chance of gaining a licence, and so they do not even apply.²¹

2.74 Other significant barriers to gaining a licence identified in submissions²² include:

- the lack of valid identification (many people do not have a birth certificate and lack awareness of how to obtain one);
- lack of funds to pay for driver knowledge handbooks or driving lessons;
- limited literacy and computer literacy levels; and
- high levels of illiteracy.

2.75 The almost complete lack of access to roadworthy vehicles in which to learn to drive and an absence of licensed drivers willing to provide the 50 hours driving practice required by the NSW graduated licensing scheme is also a significant impediment to young Aboriginal people gaining a licence. The remoteness and lack of transport however, means that they will drive anyway, running the risk of incurring serious driving-related charges.²³ 80

2.76 In consultations conducted throughout the State, participants were united in their assertion that if the risk of serious driving offences is to be averted, much more needs to be done to ensure young Aboriginal people obtain and retain their drivers licence, for example, by introducing greater flexibility in the enforcement system.

Inflexible hierarchy of default sanctions

2.77 It was submitted that the inflexible hierarchy of fine default sanctions negatively impacts on Aboriginal people. The imposition of driving sanctions for fine default in areas where limited or unreliable public transport means people will drive regardless, may lead to consequent driving offences being committed. This lengthens an offender's criminal history, which in turn results in the imposition of progressively harsher penalties until imprisonment is inevitable.²⁴

²⁰ Submission 18: South Eastern Aboriginal Legal Service (SEALS).

²¹ Aboriginal Justice Advisory Council (AJAC) *Caught Hook Line and Sinker: Incorporating Aboriginal Fishing Rights into the Fisheries Management Act* NSW 2003

²² In consultation, Aboriginal Legal Service Solicitor Rebecca Simpson, Lismore 12 July 2006

²³ In consultation, the Mid North Coast Correctional Centre Community Offender Services, Kempsey, 6 July 2006

²⁴ Submission 19: Coalition of Aboriginal Legal Services (COALS).

Community based sanctions

2.78 The lack of appropriate infrastructure in areas where Aboriginal communities tend to reside mean that alternatives to fines, driver licence sanctions or imprisonment may not be available.²⁵

2.79 The NSW Sentencing Council has previously noted that the lack of viable community-based sanctions has a disproportionate effect on Aboriginal people, and may account in part, for the over-representation of Aboriginal people serving short custodial sentences.²⁶

2.80 In recognition of the adverse impact on Aboriginal communities, the Dubbo Circle Sentencing Court deliberately attempts to stay away from imposing fines on offenders. The Circle Elders advised that fines impact negatively on an offender's family and wider community, who share the financial burden of repayments and suffer the consequences of licence loss upon default. As a consequence, the imposition of a fine tends to impede the reunification of families, jeopardising the Circle's primary objective of achieving an offender's rehabilitation.²⁷

2.81 According to a recent review of Circle Sentencing in NSW, Circles imposed fines relatively rarely – in only 2 of the 13 offences analysed. A community service order was seen as more appropriate.²⁸ 85 The case studies indicate that Circle may provide a useful way to incorporate solutions to outstanding fines for Aboriginal offenders.

Impediments to payment

2.82 Data limitations (discussed elsewhere in this Report) have meant that the Council has been unable to determine conclusively the extent to which Aboriginal people are more likely to default on fine payments than others in the community. What is certain is that Aboriginal offenders are confronted with a number of impediments to successful payment of their fines or penalty notices.

2.83 Illiteracy, for example, presents an extremely problematic barrier to payment, particularly when the fine or penalty may stem from fairly inconsequential offences (such as riding a bike without a helmet). Unable to read the penalty notice, unlikely to seek legal or financial advice or assistance, and lacking the means to pay, the matters invariably accumulate until fine default licence sanctions apply.²⁹ Itinerant lifestyles and homelessness increase the likelihood of fine accumulated debt and may account in part, for the reportedly high proportion of Aboriginal people convicted in their absence.

2.84 Historically, the imposition of fines on Aboriginal offenders has been a major factor in the over-representation of Aboriginal people in the prison population. As one of the driving motivators behind the overhaul of the NSW fines regime was to eliminate imprisonment for

²⁵ Submission 19 Coalition of Aboriginal Legal Services (COALS); Legislative Council, Standing Committee on Law and Justice Legislative Council, Standing Committee on Law and Justice 'Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations' *Final Report* March 2006.

²⁶ NSW Sentencing Council, *How Best to Promote Consistency in the Local Court*, 2004 at 58ff; NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less: Final Report*, 2004 at 15.

²⁷ In consultation, Dubbo Circle Sentencing elders Paul Taylor and Russell Ryan, and Project Officer Ken Clark, 7 August 2006.

²⁸ The NSW Judicial Commission and the Aboriginal Advisory Council, *Circle Sentencing in New South Wales- A Review and Evaluation*, 2003

²⁹ Submissions 50 and 52 'On the Road' Lismore Driver Education Program; Submission 7: former Chief Magistrate His Honour Judge (now Justice) Price; in consultation Yaegul Yelgun CDEP, Lismore; Kempsey Local Court; Richmond Valley Local Council; Dubbo Police; Broken Hill Police.

fine default, 89 it would be of major concern if people can eventually find themselves imprisoned as a result of relatively minor offences for which imprisonment was considered inappropriate in the first place. Submissions argued that if fines only serve to increase the incarceration of Aboriginal offenders, even though indirectly, then they are rendered wholly ineffective as a sentencing option.³⁰

Rural and remote areas

“The impact of the use of fines is very different, both in Aboriginal communities and for low income workers in rural areas. The capacity to manage a fine is very, very different, particularly if it is tied to driving offences, where there is a big link. In the urban area, there is more leeway, because people can utilise public transport, if they buy a ticket - and a lot of our folk often don't. In the rural area, by and large, there is nothing, particularly in Aboriginal communities in more isolated areas, so it compounds.”³¹

2.100 The Council undertook several consultations in four regional areas: Kempsey, Lismore, Dubbo and Broken Hill. Participants noted the definite disadvantage faced in the country in terms of restricted sentencing options and in the potentially harsh practical consequences of drivers licence and vehicle sanctions for the non-payment of fines, particularly those unrelated to motor vehicle offences.

2.101 It was stated that particular problems arise in rural areas by reason of the absence of public transport and the need to drive to maintain a job or to respond to emergencies. The loss of a licence through fine default further reduces the capacity to pay a fine and the inevitable result is an escalation of the offender's financial and family difficulties, which is only compounded if the offender continues to drive and becomes involved in secondary offending.

2.102 Discussions with judicial officers and court staff also suggested that there may be a relationship between geography and the penalty amount imposed. The Council was advised that magistrates from metropolitan areas tend to impose harsh fines for the first year that they preside in regional areas, and that they then gradually reduce the penalty severity as they grow to appreciate the financial reality of rural life.

2.103 In order to test this hypothesis the Council has asked the NSW Bureau of Crime Statistics and Research to determine whether fine amounts for particular offences vary according to region.

Community-based sanctions

2.104 The Sentencing Council has commented on the availability of community-based sanctions in its report on consistency in sentencing in the Local Court.³² 105 The Council found that geographic limitations exist despite all forms of community based sentencing options being legislatively available across the State. While theoretically available, in practice, alternatives to fines are limited.

³⁰ Karras, M, E McCarron, A Gray & S Ardasinski, *On the edge of justice: the Justice Foundation, No Home, No Justice? The Legal Needs of Homeless People in NSW*, Sydney 2005.

³¹ In consultation, Barry Bell, Principal Advisor Families and Community, Department of Corrective Services, 21 June 2006.

³² NSW Sentencing Council, *How Best to Promote Consistency in the Local Court*, 2004.

2.105 The limitations on the availability of alternative sentencing options increases disparity in sentencing outcomes between different geographic areas throughout the State. The ability to achieve the purposes of sentencing in respect of a given case is adversely affected, which raises equity and fairness issues for the particular offender as well as holding longer term implications for the public at large. The desirability of consistency in approach is also undermined because not all magistrates are able to consider the full range of sentencing options. Consequently, residents of rural areas may receive more severe sentences than residents of Sydney metropolitan areas.

2.106 The recent Parliamentary Inquiry into community-based sentences confirmed the Council's findings, noting that the only community-based sentence available throughout NSW is unsupervised bonds.³³ This has particular implications for those offenders whose offending behaviour may result from the lack of other services in the community; people in full-time custody serving relatively short sentences of imprisonment, which may be in part the result of the lack of available alternatives; and young offenders.

2.107 Although alternatives to full-time imprisonment can help to prevent offenders from entering a lifetime of crime, the Council notes that the Department of Juvenile Justice has advised that the options for non-custodial sentences for juveniles (such as referral to a Youth Justice Conference or community based supervision) is limited in remote areas, although available in other areas of NSW.³⁴

2.108 The Council also notes recommendation 243 of The Australian Law Reform Commission / Human Rights & Equal Opportunity Commission, Report No: 84 *Seen and heard: Priority for children in the legal process*, 1997, which urged greater development and use of community-based sentencing alternatives for juvenile offenders.

PART 5: LICENCE SUSPENSION FOR FINE DEFAULT - Use in NSW

5.1 Current NSW legislation provides for the suspension and cancellation of driver licences as part of the infringement enforcement system. This power applies both in respect of those who offend against roads and traffic legislation, and in respect of those who default on fines and penalties unrelated to driving offences.

5.2 As discussed in Part Four at para 4.13, under the *Fines Act 1996*, the RTA, when directed by the SDRO, can; suspend or cancel driver licences; cancel vehicle registrations; or suspend dealings with the fine defaulter.

5.3 Similar measures exist across most other Australian states and territories.

Fail to alleviate any of the causes of failure to pay

5.19 It was submitted that the sanction fails to address any of the causes of failure to pay, in that the fine defaulter must still pay the outstanding debt (at least in part) in order to regain his or her licence.

The circumstances which gave rise to the default, such as poverty, are not addressed by the imposition of a sanction that actually serves to decrease the likelihood that an offender will

³³ Legislative Council, Standing Committee on Law and Justice Legislative Council, Standing Committee on Law and Justice *'Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations'* Final Report March 2006.

³⁴ Submission 31: Jenny Mason, NSW Department of Juvenile Justice.

be able to pay the fine, by removing the means of transport to work if not a tool of, employment.

May exacerbate the cause of failure to pay

5.20 In fact, the sanction may actually exacerbate the causes behind failure to pay the original fine, especially for those needing to drive for employment where licence remains suspended or cancelled.

5.21 Licence suspension impacts on an offenders' ability to keep his or her job, which in turn reduces the likelihood that the original fine will be paid. It also impact on people's future employability, by removing the means to gain employment in (especially) regional areas. The lack of licence itself serves as a negative signal to employers, seen as another strike against job seeker with little work history and low skills.

5.22 The CDEP in Lismore, for example, advised that although some CDEP participants are very well trained and have done all the education or training courses possible, they still are unemployed as they do not have a licence, and, because they have outstanding debt, they have no chance of obtaining one.

5.23 In contrast, if people have a licence, especially if they are Aboriginal, they can obtain employment because having a licence is rare in such communities.

5.24 This is consistent with the research findings that licence loss has a significant negative impact on employment. For example, many low-income teens and adults with no record of serious traffic offences lost their driving privileges (and access to work) for failure to pay fines and forfeitures.

Interaction with the criminal justice system

5.25 The imposition of licence sanctions for fine default can result progressively in an accelerating or excessive interaction with the criminal justice system with its progression through further driving offences, escalating to drive while disqualified offences, as well as offences involving take and use vehicle, and eventually to imprisonment; and mandatory disqualifications and habitual offender declarations.

Wider personal and community effect

5.26 The imposition of licence sanctions also has a wider personal and community effect in the escalation of the problem due to: the accumulation of further fines, victim compensation levies and SDRO enforcement costs (\$50 each time); and the costs of acquiring or reacquiring a licence once the sanction is lifted because of existing requirements for driving tuition and supervision for an extended period.

Impact on marginalised sections of the community

5.28 Licence suspension also has a disproportionate and oppressive affect on marginalised sections of the community including:

- Those living in communities with poor public transport (as elsewhere noted in this Interim Report);
- Social security beneficiaries;
- The young;
- Prisoners; and
- Aboriginal people.

Young People

5.30 While NSW law provides that licences cannot be suspended in response to a fine that was received while the fine defaulter was under the age of 18 years, and that was not a traffic offence, there is still potential for young people above this threshold to be negatively

affected by the loss of their mobility. Moreover, measures applying to fine default necessarily impact young people disproportionately because they are less likely to have an income, assets or savings to pay for fines that are accumulated.³⁵ 20

Prisoners

5.31 For ex-offenders, the lack of a driver's licence itself operates against stability, obtaining a job and establishing family ties.

Aboriginal people

5.32 Virtually all submissions received by the Council noted the disproportionate impact of driving licence sanctions on Aboriginal people.³⁶

5.33 A warning was given concerning the over-representation of Aboriginal people for fine default suspensions by the Aboriginal Legal Services and other social-legal commentators in Western Australia during the debate on the introduction of licence suspensions in that State.³⁷ However, the Government assured the Parliament that the NSW model had not led to a significant increase in the incidence of driving without a licence. Similar concerns were raised in debate in South Australia but again dismissed.³⁸ It does not appear as if those concerns were raised in NSW.

5.34 In 1999, amendments to the WA fines regime were introduced to allow the Sheriff or police to issue work development orders (similar to the Council's proposed Fine Option Order) for Aboriginal defaulters, if the defaulters' financial and social circumstances means licence suspension is ineffective and results in undue hardship. This could only be done if the Sheriff (or police) were satisfied that the offender had no vehicle or licence; had no property for sheriff to seize; and was unlikely to have means to pay or have property in reasonable time.

5.35 The few studies that have examined the impact of licence suspension for fine default have confirmed ongoing and disproportionate Aboriginal representation: in Western Australia, for example, the Aboriginal rate of fine suspension in 1995 was nine times greater than the non-Aboriginal rate and, by 2001, this had increased to eleven times greater.³⁹

Rural and Remote areas

³⁵ Submission 3: Senior Children's Magistrate Mitchell, NSW Children's Court; Shopfront Legal Centre Submission 3; SEALS Submission 18; and Youth Justice Coalition Submission 20.

³⁶ Submission 18: SEALS; Submission 19 COALS; see too The Royal Commission into Aboriginal Deaths in Custody *National Report* 1991; BOCSAR *The scope for reducing indigenous imprisonment rates*, 2001; Ferrante, Anna, 'The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in WA' Crime Research Centre University of WA 2003.

³⁷ Foss MP, *Fines Penalties and Infringement Notices Enforcement Bill* Second Reading Speech, Hansard Legislative Council, page 8500 6 December 1994.

³⁸ 25 August 1998 page 1879

³⁹ Ferrante, *The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in WA*, Crime Research Centre, University of Western Australia, 2003: noting that the majority of Aboriginal fine suspensions were for unpaid court fines (justice and good order offences) and railway infringements (fare evasion).

5.36 The disproportionate impact of a drivers licence or vehicle registration suspension in regional areas as well as in some outlying metropolitan areas, was a core issue in many submissions and consultations. With poor or no public transport, people very often need to drive in order to do grocery shopping, go to work, go to school, visit health professionals and attend compulsory Job Network or Centrelink interviews.

5.37 When people reach this stage of the fine enforcement process, they are placed in the invidious position of having to choose between breaking the law and driving while unlicensed, or losing their job or Centrelink payments. As a result a large number of fine defaulters continue to drive their car. Many of them are then caught driving while their license or car registration is suspended.

5.38 As a result of such breaches, these defaulters accumulate fines totalling several thousands of dollars which compound as enforcement charges, court costs and victims compensation levies, are added. After a certain number of breaches for driving while suspended or disqualified or while unlicensed, the local court has no option but to sentence them to a term of imprisonment. Moreover they risk falling into the category of Habitual Traffic Offenders, with additional automatic periods of disqualification.

...5.44 Licence sanctions have little impact on driving where that is necessary to obtain or hold employment or to access essential services, and yet deprive unlicensed drivers of any realistic opportunity of gaining a licence. People drive regardless of licence restrictions where compliance with the restriction would cause an insurmountable burden, such as getting to a job where there is inadequate or nonexistent public transport; or where it would occasion difficulties in getting children to child care and school.

Part 5: Licence Suspension and Secondary Offending

...5.51 The Sentencing Council was specifically charged with determining whether there has been an increase in imprisonment under ss 25 and 25A *Road Transport (Driver Licensing) Act 1998* (the Act), and as a result of the sanctions for non-payment of fines or penalties.

5.52 Sections 25 and 25A of the Act contains a number of driving offences of:

- Drive whilst unlicensed;
- Drive when never licensed;
- Drive whilst disqualified; and
- Drive whilst suspended.

5.53 Offences of driving an unregistered and uninsured vehicle are contained in the *Road Transport (Vehicle Registration) Act 1997* (the Regulation).

5.54 The Council notes that the NSW Parliamentary Law and Justice Committee attempted to explore the issue, but found that the relationship between fine imposition, default and licence sanctions was extremely complex. Recognising that the situation can escalate to the point where a person is faced with a term of imprisonment, whether community based or not, because of driver licence sanctions, the Committee recommended that the Government undertake a multiagency project to examine the issues relating to fine defaults and drivers licences brought before the Committee during the Inquiry and described in its report.⁴⁰

⁴⁰ NSW Legislative Council, Standing Committee on Law and Justice *Inquiry into community based sentencing options for rural and remote areas and disadvantaged populations* Final Report, March 2006.

Aboriginal over-representation

5.64 It was submitted that Aboriginal offenders were particularly over-represented among those convicted of driving offences following licence suspension for fine default.

5.65 It was suggested that cultural obligations may have contributed to this over-representation: the Council was advised that many Aboriginal people report that they were asked to drive by others, even though they were unlicensed or disqualified, and that the 'kinship bonds' place an obligation on the person such that they cannot refuse the request.⁴¹

5.66 The disproportionate number of Aboriginal people imprisoned for drive while suspended, cancelled or disqualified offences (whether initially incurred through by fine default or for poor or unlicensed driving) is of concern.

5.67 Citing NSW Bureau of Crime Statistics and Research data, the Coalition of Aboriginal Legal Services (COALS), noted that 11 percent of Aboriginal people received custodial sentences for these offences, compared with under 6 percent of the total population. Only 55 per cent of Aboriginal offenders received a fine, compared with 61 per cent of the total number of people convicted.

5.68 While conceding that several factors may account for this discrepancy, including the length of particular offenders' criminal histories, COALS commented that fines "are perhaps not being considered as a sentencing option as often as they should be in relation to Aboriginal people."⁴²⁴¹

5.69 The Council was unable to conclusively determine whether Aboriginal people were more over-represented in secondary offending arising from fine default, as the available data did not distinguish offender characteristics (such as Aboriginality, age or gender).

RTA data on secondary offending

5.73 Data supplied by the RTA does however confirm that secondary offending *has* occurred following the imposition of licence sanctions for fine default.

5.74 Of the almost 108,000 licenses suspended for fine or penalty default in the 12 months to 30 June 2005, approximately 2.5 percent (or over 2750 people) were subsequently convicted of driving while suspended.

5.75 Of this 2.5 percent, over 10 percent (or approximately 290 people) went on to be subsequently convicted of driving while disqualified.

5.76 The available data does not, however, reveal at this stage, which proportion of these people were imprisoned for those offences.

⁴¹ In consultation, Richard Davies Solicitor, Western Aboriginal Legal Service, Dubbo, 7 August 2006; The Richmond Valley Council (in consultation Joanne Petrovic, Community Project Officer, Lismore 12 July 2006. See too: Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268, 289. see too Western Australian Law Reform Commission *Discussion Paper: Aboriginal Customary Law* (2005).

⁴² Keane J & Poletti P, 'Common Offences in the Local Court' (2003) 28 *Sentencing Trends and Issues: Judicial Commission*.

5.77 Accordingly, further study needs to be undertaken by the Council to test whether the existence of sanctions for fine or penalty default has led to an increase in imprisonment under ss 25 and 25AA of the *Road Transport (Driver Licencing) Act*. To complete any such survey, separate statistics would have to be generated and shared with BOCSAR.

Options For Reform

5.119 The Council has identified a number of options geared specifically at the imposition of licence sanctions for fine default.

Restricted licences

5.130 Restricted licenses permit the issuing of a licence that allows the offender to drive for certain specified purposes, such as for work. The Council notes that the SDRO website advises that RTA sanctions may be lifted earlier if:

- a licence is required for medical or employment purposes;
- if the offender lives in a remote locality; or
- if the offender is Aboriginal , lives in a rural community and is in the process of obtaining a driver's licence through a driving school.

5.131 It is also noted however, that despite this, submissions and consultations indicated that this options is rarely granted.

5.132 Regularising through guidelines (and legislative amendment) a system which would allow the issue of restricted licenses during the sanction period, permitting the use of a vehicle for work or identified essential purposes.

