



Submission to the Australian Law Reform  
Commission Discussion Paper: *Incarceration Rates  
of Aboriginal and Torres Strait Islander Peoples*

September 2017



40  
years

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For further information please contact:

Julie Edwards, CEO, Jesuit Social Services

03 9421 7600

[julie.edwards@jss.org.au](mailto:julie.edwards@jss.org.au)

## Who we are

Jesuit Social Services works to build a just society by advocating for social change and promoting the health and wellbeing of disadvantaged people, families, and communities.

Jesuit Social Services works where the need is greatest and where it has the capacity, experience and skills to make the most difference. Jesuit Social Services values all persons and seeks to engage with them in a respectful way, that acknowledges their experiences and skills and gives them the opportunity to harness their full potential.

We do this by working directly to address disadvantage and by influencing hearts and minds for social change. We strengthen and build respectful, constructive relationships for:

- **Effective services** – by partnering with people most in need and those who support them to address disadvantage
- **Education** – by providing access to life-long learning and development
- **Capacity building** – by refining and evaluating our practice and sharing and partnering for greater impact
- **Advocacy** – by building awareness of injustice and advocating for social change based on grounded experience and research
- **Leadership development** – by partnering across sectors to build expertise and commitment for justice.

The promotion of **education, lifelong learning and capacity building** is fundamental to all our activity. We believe this is the most effective means of helping people to reach their potential and exercise their full citizenship. This, in turn, strengthens the broader community.

Our service delivery and advocacy focuses on the following key areas:

- **Justice and crime prevention** – people involved with the justice system
- **Mental health and wellbeing** – people with multiple and complex needs and those affected by suicide, trauma and complex bereavement
- **Settlement and community building** – recently arrived immigrants and refugees and disadvantaged communities
- **Education, training and employment** – people with barriers to sustainable employment.

We commenced our engagement in the Northern Territory in 2007 and have offices in Darwin and Alice Springs. In Central Australia, we support the Eastern and Central Arrernte people in a number of ways to better their situation and have more control over their lives. As part of this work, we provide community capacity building support through the Stronger Communities for Children program in the remote communities of Atitere, Bonya, Engawala and Santa Teresa; are involved in a Men's Behaviour Change program in Alice Springs in partnership with Tangentyere Council and the Alice Springs Women's Shelter, and are a member the Northern Territory-wide Making Justice Work campaign to promote evidence-based approaches to community safety in order to respond more effectively to crime in the community. We also provide capacity building support in a number of other locations, including Wadeye, and work in a similar way in New South Wales (Mount Druitt and Bourke). In March 2017, we commenced a youth justice group conferencing program in the Darwin region, funded by the Department of Territory Families and in partnership with the Danila Dilba Health Service.

For nearly 40 years, we have accompanied people involved, or at risk of becoming involved, in the criminal justice system. In Victoria we work with people to prevent and divert involvement in the justice system and support people exiting prison and youth justice facilities. This includes the Corrections Victoria Reintegration Program in North and West Metropolitan Melbourne (Reconnect), the African Australian Community Transition program, Next Steps and Perry House residential programs, the Youth Justice Community Support Service, Youth Diversion Pilot Program and Group Conferencing.

Jesuit Social Services also delivers Barreng Moorop in partnership with the Victorian Aboriginal Childcare Agency and the Victorian Aboriginal Legal Service. This program provides intensive support to First Nations children (aged 10–14 years) who are at risk of engagement in the justice system, or are engaged with Victoria Police.

Research, advocacy and policy are coordinated across all program and major interest areas of Jesuit Social Services. Our advocacy is grounded in the knowledge, expertise and experiences of program staff and participants, as well as academic research and evidence. We seek to influence policies, practices, legislation and budget investment to positively influence participants' lives and improve approaches to address long term social challenges. We do this by working collaboratively with the community sector to build coalitions and alliances around key issues, and building strong relationships with key decision-makers and the community.

Our Learning and Practice Development Unit builds the capacity of our services through staff development, training and evaluation, as well as articulating and disseminating information on best practice approaches to intervening with participants across our programs.

*We acknowledge the Traditional Custodians of all the lands on which Jesuit Social Services operates and pay respect to their Elders past and present. We express our gratitude for their love and care of the land and all life.*

## Introduction

Jesuit Social Services welcomes the opportunity to respond to the Australian Law Reform Commission Discussion Paper: *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*.

We believe all Australians should have access to the opportunities in life that will enable them to flourish – to complete their education, to get a job, to access safe and affordable housing, to raise their children in safe communities and to see the next generation thrive.

Prison should always be used as a last resort, and prevention and diversion should be prioritised. There is a place for incarceration in society, but there is no doubt that vulnerable and marginalised people are more likely to end up incarcerated. The more disadvantaged a person is – whether in relation to educational achievements, health, mental health, family violence or trauma – the more likely the person is to enter the justice system.<sup>1</sup>

We believe the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system is a national disgrace. More than two decades ago, the report of the Royal Commission into Aboriginal Deaths in Custody was tabled in the Federal Parliament. It prompted cries of shame and promises to do better; however, little has improved and many areas have gone backwards.

As the Discussion Paper highlights, efforts to reduce the high incarceration rates of Aboriginal and Torres Strait Islander people must seek to encompass healing and strengthen self-determination. Until these issues are addressed, the over-representation in the justice system is likely to continue.

This Inquiry provides another valuable opportunity to enact real change. If properly implemented it is our view that many of the proposals in the discussion paper would help make a tangible difference to the lives of Aboriginal and Torres Strait Islander peoples in, or at risk of entering, the justice system.

Our submission offers feedback on a number of the suggestions raised in the discussion paper that are relevant to our work, with a particular focus on the Northern Territory and Victoria, based on our grounded experience and advocacy in these two very different jurisdictions. Before responding to the specific proposals, we would like to highlight some of the critical issues that particular communities face in addressing crime.

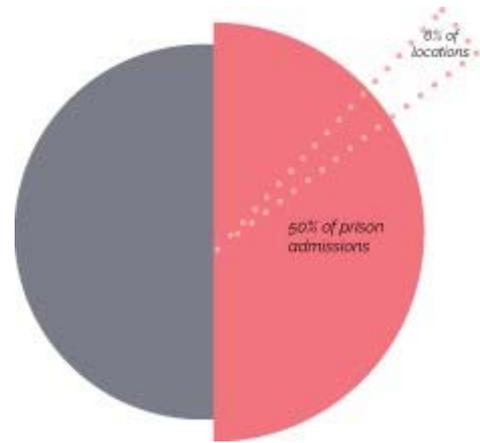
### *Entrenched disadvantage*

In 2015, Jesuit Social Services along with Catholic Social Services Australia released the findings of its fourth *Dropping off the Edge Report (DOTE)*,<sup>2</sup> which found that complex and entrenched disadvantage continues to be experienced by a small but persistent number of locations in each state and territory across Australia. These communities experience a web-like structure of disadvantage, with significant problems including unemployment, a lack of affordable and safe housing, low educational attainment, and poor quality infrastructure and services.<sup>3</sup>

Across Australia, this entrenched disadvantage is demonstrated by:

- Those living in the 3 per cent most disadvantaged post codes in New South Wales being 3 times as likely to experience long term unemployment.<sup>4</sup>
- An individual in the 3 per cent most disadvantaged post codes in Tasmania being 50 per cent more likely to have had some form of personal contact with the criminal justice system.<sup>5</sup>
- Just 25 per cent of locations in the Northern Territory accounted for 47 per cent of the highest disadvantage rankings.<sup>6</sup>

There is a clear link between locational disadvantage and high crime rates.<sup>7</sup> Taking Victoria as an example, DOTE 2015 revealed the prominence of criminal justice indicators in the profile of Victoria's disadvantaged areas.<sup>8</sup> It found that 6 per cent (42) of postcodes in Victoria accounted for half of all prison admissions (see graphic on right). This highlights the often localised nature of crime, as well as the role of disadvantage as an underlying cause of offending. By working to produce solutions targeted at the needs of specific disadvantaged communities, place-based approaches can help reduce crime.



### *Engaging and empowering communities*

The social fabric of communities can play an influential role in buffering the worst effects of disadvantage<sup>9</sup>, with community factors being shown to influence mental health levels in children<sup>10</sup>, education and levels of safety and crime<sup>11</sup>.

The impacts of trauma (including neglect and exposure to violence) on children are severe and have lasting consequences, with altered brain growth and psychological functioning shown to be linked to trauma<sup>12</sup>. There are long-term social costs associated with this, including mental health issues and other chronic health problems, criminality, homelessness, substance misuse and abuse and intergenerational transmission of abuse. It is estimated that child abuse and neglect in Australia cost almost \$5 billion per year, including interventions and the associated long-term human and social costs<sup>13</sup>.

As the *Uluru Statement from the Heart*<sup>14</sup> put it:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future. These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness. We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

Further, as David Brown<sup>i</sup> says:

While day to day criminal justice issues are largely the responsibility of state governments, recent developments at a federal level indicate the centrality of developing mechanisms that give Indigenous people a voice in their own governance, to any attempt to address their conditions of marginality, disadvantage and over imprisonment.

In this context, responding to the over-incarceration of Aboriginal and Torres Strait Islander peoples in the justice system needs a focus on healing and self-determination, so that Aboriginal and Torres Strait Islander peoples can have a voice and control over addressing issues that affect them as well as strengthen their families and communities through greater connection to culture and tradition. This involves a long-term, whole-of-government approach that is built on trusting, strong relationships with

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<sup>i</sup> David Brown is Emeritus Professor in the Faculty of Law, University of New South Wales, Australia, and Adjunct Professor at the School of Justice, Queensland University of Technology, Australia. He is co-author of *Justice Reinvestment: Winding Back Imprisonment* with Chris Cunneen, Melanie Schwartz, Julie Stubbs and Courtney Young.

Aboriginal people, organisations and communities. A community capacity building approach provides a framework to bring together the government, community organisations, Aboriginal organisations and Aboriginal communities. Through this partnership, the strengths of Aboriginal and Torres Strait Islander peoples can be bolstered to increase protective factors and prevent contact with the justice system.

Fundamentally, changes are needed to build local capacity and enable Indigenous communities to have control over the decisions that affect them. In order to tackle entrenched disadvantage and the over-incarceration of Aboriginal and Torres Strait Islander peoples, we believe efforts must be focused on two key areas, which are intrinsically linked:

1. A multi-layered, cooperative and coordinated strategy that is owned and driven by the community.
2. Place-based structures, plans and resources targeted to our most vulnerable communities to effectively break the web of disadvantage.

### *A new approach*

A new approach is needed so we do not continue to fail the communities that bear the greatest burden of disadvantage. A sustained long-term commitment across the government, community and business sectors is urgently required to resolve this complex problem.

Jesuit Social Services calls on all Governments, in partnership with the community, to act immediately to put in place appropriate structures, plans and resources targeted to our most vulnerable communities to effectively break the web of disadvantage.

We need a multi-layered, cooperative and coordinated strategy that is owned and driven by the community. It must involve all layers of government and the business and community sectors, reflecting shared responsibility and joint commitment to resolve this entrenched problem. This strategy must take account of the unique characteristics and circumstances of local communities and be sustained over the long term. It must be:

- **Targeted** – The response must be targeted or concentrated to specific areas that meet the most severe criteria for disadvantage.
- **Tailored** – The policies, programs and approach to dealing with disadvantage in a community must be unique to that community's needs, tailored to their particular circumstances, based on the unique linkages between indicators in that area and supplemented by informed audits of existing programs in that locality.
- **Integrated and cooperative** – The response needs to acknowledge that disadvantage in one dimension of life (e.g. unemployment) reinforces disadvantage in other areas (e.g. household income). Effective responses to reducing disadvantage must address the multiple and interrelated causes and exacerbating factors that underpin the entrenched nature of disadvantage experienced by communities. Effective responses therefore involve cooperation between government and departmental portfolios, integrated community initiatives and coordination between different levels of government.
- **A long term horizon** – DOTE 2015 demonstrates that not only is entrenched disadvantage persistent across time but that short-term policies do not work in addressing the experience of disadvantage among communities. A long-term, bipartisan commitment is vital to prevent communities from dropping off the edge.

- **Community owned and driven** – Community leaders must be engaged to drive sustained change. A new approach must recognise the strength within communities and work with them to build capacity, generate action, attract external resources and maintain direction and energy. There is a well-documented history of the benefit of ‘aid’, disconnected from the strengthening of specific community capacities, tapering off and disappearing once external inputs cease.
- **Engaged at the individual, community and national levels** – Research into the outcomes people experience in life demonstrates that individuals are affected by their own capabilities and opportunities, their family circumstances, their community, and the broader social and economic environment. Any effective change in the outcomes for individuals must therefore include action across these three domains of life: individual, community and macro environment.

We call on Australian Governments (federal, state and territory), in partnership with the community, to act immediately to put in place appropriate structures, plans and resources targeted to the most vulnerable communities to effectively break the web of disadvantage.

## Responses to Discussion Paper

### 2. Bail and the Remand Population Proposal

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

Jesuit Social Services supports this proposal.

***Proposal 2–2 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.***

Jesuit Social Services supports this proposal.

### 3. Sentencing and Aboriginality

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

Yes, we believe this is essential and should be embedded as a sentencing principle in the respective Sentencing Acts of each Australian jurisdiction, as per Section 718.2(e) of the Canadian *Criminal Code*. This would ensure courts are mindful of the intergenerational trauma Aboriginal people face, systemic disadvantage, and that they safeguard against discrimination faced by Aboriginal people in the criminal justice system. Section 718.2(e) directs a sentencing judge to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to

victims or the community” for all offenders, with “particular attention to the circumstances of Aboriginal offenders.”<sup>15</sup>

***Question 3–2 Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?***

Jesuit Social Services supports the proposal that restoration be included as a sentencing principle.

There are highly effective group conferencing programs in isolation around Australia. For example, a KPMG evaluation of Jesuit Social Services Youth Justice Group Conferencing program in 2010 found that 80 per cent of program participants had not reoffended after two years,<sup>16</sup> compared with over half of the young people who had been in youth detention going on to reoffend.<sup>17</sup> However, there is no national accreditation process to ensure people facilitating group conferences meet high quality standards or have the same level of training. There is a need to establish a consistent approach in relation to the importance of restorative justice group conferencing, through national accreditation and the establishment of restorative practice networks than enable practitioners to collaborate and share learnings with one another.

Respective Sentencing Acts should use consistent language in terms of encouraging offenders to be held accountable and to take responsibility for their actions, to support victims to have a voice in the criminal justice system, and for actions to be taken to make amends for harm caused to them and the community. This would ensure an embedded understanding across Australia of the importance of restorative principles and approaches in responding to offending.

In relation to Aboriginal offenders, this would provide the impetus for the increased use of Aboriginal dispute resolution mechanisms to be used as part of the criminal justice process.

The Victorian Koori Court model embraces aspects of restorative justice and could be further adapted to operate in a way that assists the offender to take accountability and integrate back into the community. The objective of the Koori Court is to ensure greater participation of the Aboriginal community in the sentencing process through the roles played in that process by the Koori Elders or Respected Persons and others such as the Koori Court Officer. The Koori Court Officer is the first entry point where an offender’s background and heritage is established.

The Koori Court aims to:

- Increase Koori ownership of the administration of the law.
- Increase positive participation by Koori offenders.
- Increase the accountability of the Koori offenders, families, and community.
- Encourage defendants to appear in Court.
- Reduce the amount of breached court orders.
- Deter offenders from re-offending.
- Increase community awareness about community codes of conduct and standards of behaviour.
- Explore sentencing alternatives prior to imprisonment.<sup>18</sup>

A Koori Court’s relative informality, together with the opportunity it provides for the cultural needs of Koori offenders to be taken into account, mean that it is more responsive to Aboriginal and Torres Strait Islander offenders than traditional court models. The Koori Court model could be strengthened by including a greater emphasis on restorative practice and its potential for helping offenders understand the impact of their behaviour on victims. A nuanced approach incorporating a range of restorative justice interventions such as community or family group conferencing could be utilised to ensure the Koori Court model is both responsive to the cultural

needs of Aboriginal offenders, and well equipped to prevent re-offending, repair harm and increase victim satisfaction.

**Question 3–3 Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender’s background, including cultural and historical factors that relate to the offender and their community?**

**Question 3–4 In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?**

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

In our view courts do not have sufficient information at present. Pre-sentence reports do not explore the cultural background of the offender, systemic issues (such as Stolen Generation issues) that may affect an offender, issues of intergenerational trauma, possible cultural-specific healing options and ceremonies/Law processes that may be appropriate for an offender. Additional information relating to the cultural background of the offender is required to better inform the courts of factors contributing to offending unique to Aboriginal and Torres Strait Islander peoples.

There is need for detailed reports similar to the Canadian *Gladue* reports model. These reports are written by Aboriginal people, provide detailed cultural background information and historical factors, and provide the sentencing court with specialist information that enables it to harness culturally-relevant rehabilitative supports to then tailor a sentence to the individual that balances punishment and rehabilitation. The ACT Government is currently developing a trial of sentencing reports for Aboriginal and Torres Strait Islander offenders based off the *Gladue* model.

As with the example of the Aboriginal Legal Services of Toronto, these reports should be prepared by highly trained Aboriginal staff, employed by Aboriginal community-controlled organisations, who understand and are part of the local community that they are writing about. They should be funded by state and territory governments as an alternative, or in addition to, the court obtaining a pre-sentence report.

## **4. Sentencing Options**

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

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

Jesuit Social Services strongly believes that judicial discretion must be tailored to the particular circumstances of the individual, and we should increase opportunities for culturally-relevant sentencing options.

In the Northern Territory, provisions for review should include mandatory sentencing for assaults, property offences, drug offences, sexual offences, and breach of domestic violence order offences.

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

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

**Question 4–4 Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?**

Abolishing short sentences has merit, but requires further consideration in terms of the possible implications. For example, the unintended consequence of sentence tariffs increasing to the mandatory minimum is a significant risk (as occurred in Western Australia with minimum 6 months sentences).

If short sentences of imprisonment were to be abolished, there should be pre-conditions as to the availability of a comprehensive range of community sanctions as non-custodial alternatives to prison, with a requirement that these be uniformly available in regional and remote areas and all states and territories. The bench could also be required to give reasons whenever an alternative to prison disposition is not appropriate.

On our recent #Justicesolutions tour throughout Europe and the United States, Jesuit Social Services learnt of Norway's approach towards short sentences and custodial alternatives. For those with a sentence of two years or less in Norway, they will be sent to a low security prison – they could walk out of such a facility, the doors to their rooms (not 'cells') aren't locked, they have unsupervised visits, take responsibility for various aspects of their lives (e.g. getting themselves up on time), and have varying degrees of opportunity to move outside the prison for particular purposes (sometimes with staff, sometimes without). Our #Justicesolutions tour report is available at <https://jss.org.au/justicesolutions-expanding-the-conversation/>

**Proposal 4–1 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.**

In Northern Australia, there are currently no Aboriginal justice programs. These are urgently needed. These should include:

- The utilisation of Aboriginal-specific court processes (such as the Koori Court model).
- Law and Justice Groups in regional and remote areas (such as the Kurdiji in Lajamanu and Ponki Mediators in the Tiwi Islands).
- Sentencing options such as for Aboriginal offenders to be placed in the custody and under the supervision of Elders in the community (for example, to undertake a Law Process)
- Aboriginal offenders being ordered to reside and remain at an outstation for a period of time, under the supervision and tutelage of Elders and required to participate in rehabilitative or healing program(s) whilst residing there.

The Northern Territory has no therapeutic jurisprudence courts. There is urgent need for these types of courts, especially in relation to alcohol and other drugs, domestic violence, and also mental health. Drug Courts in Victoria and the proposed domestic violence court in Alice Springs are examples of such initiatives.

The Northern Territory has no adult diversion program. There are excellent interstate and international models, such as in South Australia, New Zealand and Canada, that should be urgently considered, especially for 18-24 year olds and highly vulnerable adult offenders (such as those with cognitive impairment).

A number of jurisdictions across Australia, including the Northern Territory, have no restorative justice processes for adult offenders. There has recently been funding provided by the NT Government for youth justice group conferencing. In March 2017, Jesuit Social Services commenced a pre-sentence, youth justice group conferencing program under section 84 of the *Youth Justice Act*. This has already

seen almost 30 young people referred. All young people referred have been Aboriginal, and cultural safety and ensuring a culturally strengthening process (e.g. by engaging Aboriginal elders in group conferences) is a paramount consideration in convening group conferences. Jesuit Social Services has conducted one pilot group conference for a very complex adult offender which was successful in linking him in with necessary supports. In our view, there is enormous scope for court-referred adult justice group conferencing in the Northern Territory.

Australian jurisdictions should follow the lead of New Zealand and require that all persons found guilty of serious criminal offences must be considered and, if appropriate, have their sentencing adjourned for them to participate in a pre-sentence group conference prior to being sentenced.

There is significant opportunity for the 'Sentenced to a Job' program to be re-defined as a non-custodial sentencing option. As no non-custodial equivalent of this program exists in the Northern Territory at present, offenders only have access to it if sentenced to imprisonment. An offender could be placed under community-based supervision to participate in a work or training program prior to being sentenced.

***Question 4–5 Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?***

There is a need for legislative reform to allow judicial officers greater flexibility to tailor sentences. At present in the Northern Territory, judicial officers can use Griffiths remands<sup>ii</sup> to adjourn sentencing for rehabilitative tasks to be completed. But this can lack transparency and clarity, in terms of how the Griffiths remand process - which adjourns a court proceeding to enable rehabilitation prior to sentencing – impacts sentencing principles, especially for members of the public. Legislative provisions would provide structure and clarity to the judicial monitoring process. A possible provision could be:

Court may adjourn the matter for a period not exceeding 6 months for the defendant to complete a rehabilitative plan as agreed by the Court. If at the completion of the adjourned period the defendant had completed part or all of the plan, the court may take this into account in determining the appropriate sentence.

## **5. Prison Programs, Parole and Unsupervised Release**

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

Jesuit Social Services supports this proposal.

Prison programs for people on remand and serving short sentences are particularly essential in the Northern Territory where, in 2016, over one quarter of prisoners were on remand, and 39 per cent of sentenced prisoners were serving sentences of less than a year.<sup>19</sup> Likewise, in Victoria 28.9 per cent of adult prisoners as of 30 June 2016 were on remand, and 26 percent were serving a sentence of less than 1 year.<sup>20</sup> Time spent on remand is too often a missed opportunity to provide people with support to address their offending behaviour and underlying needs.

***Question 5–1 What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander peoples held on remand or serving short sentences of imprisonment?***

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<sup>ii</sup> Griffiths Remand is a common law power originally referred to in the High Court case: *Griffiths v The Queen* (1977) 137 CLR 293. Griffiths remand enables the judge or magistrate to adjourn the proceedings for up to 12 months to enable the offender to undertake rehabilitation prior to sentencing. Griffiths Remand is not used in all jurisdictions in Australia.

Mainstream prison programs are often run inconsistently and in a culturally inappropriate way (for example, without interpreters, female facilitators delivering sessions to men). There needs to be a fundamental overhaul so that the default position is that programs are designed by Aboriginal people for Aboriginal people. Intergenerational trauma must be understood, offending behaviours must be addressed, and programs should be offered consistently and with the ability to follow people as they move location. There is an opportunity to employ highly skilled Aboriginal people to provide counselling and healing programs for remandees and those serving short sentences.

***Proposal 5–2 There are few prison programs for female prisoners and these may not address the needs of Aboriginal and Torres Strait Islander female prisoners. State and territory corrective services should develop culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners.***

Jesuit Social Services supports this proposal.

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

As previously stated, there needs to be a fundamental overhaul so that the default position is that programs are designed by Aboriginal people for Aboriginal people. Intergenerational trauma must be understood and addressed. There is an opportunity to employ highly skilled Aboriginal people to develop and deliver female-specific counselling and healing programs. There is also a need for age-specific programs that are developmentally appropriate for young Aboriginal women, as well as programs that are designed and delivered to engage with families and build the capacity of parents.

In our 2017/18 Submission the Victorian State Budget available at <https://jss.org.au/submission-to-the-201718-victorian-state-budget/>, we called for:

- Funding ongoing cultural awareness training for all staff in prisons, and those delivering services to prisoners.
- Funding identified positions in prisons for Aboriginal and/or Torres Strait Islander case managers to work with prisoners.
- Strengthening the capacity of Aboriginal Community Controlled Organisations to work within the justice system.
- Funding a continuum of support for Aboriginal prisoners from pre-release to post-release that is built on trusted relationships with a single Aboriginal Community Controlled Organisation to provide consistent, culturally appropriate support exiting prison.

We believe these recommendations have broad application and relevance across Australia.

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

Automatic court ordered parole is urgently needed in the Northern Territory. It is often the case that at the point of sentence, a court sentences a person on the *understanding* that that person will have access to certain programs and rehabilitative supports whilst in prison. However, in our experience, these programs and supports are frequently not available. That then leads to many Aboriginal people having their applications to the Parole Board deferred, and remaining in custody, because they have not undertaken courses or programs that they have had no opportunity to access, through no fault of their own.

Automatic court-ordered parole would ensure that Correctional Services work to the timeframe ordered by the court. It would hold them accountable to provide programs prior to a person's release. This would, of course, need to be adequately resourced to ensure effective implementation.

As well as automatic court-ordered parole, there is significant need for judicial monitoring of Aboriginal parolees using therapeutic jurisprudence techniques, such as those used in jurisdictions like Oakland in the United States. This would provide the necessary ongoing support for parolees to assist them on their road to rehabilitation.

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

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

Jesuit Social Services agrees with the proposal to abolish requirements for the time spent on parole to be served again in prison if parole is revoked. This is double punishment and operates as a disincentive to Aboriginal people electing to undertake parole as opposed to serving 'full time' in jail.

## **6. Fines and Driver Licences**

***Proposal 6–1 Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.***

Jesuit Social Services supports this proposal.

***Question 6–6 Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.***

Yes, we believe governments should provide alternative penalties.

***Proposal 6–2 State and territory governments should introduce work and development orders based on the NSW Work and Development Orders model.***

Jesuit Social Services supports this proposal.

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

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

Jesuit Social Services supports this proposal.

## **8. Alcohol**

***Question 8–2 In what ways do banned drinkers registers or alcohol mandatory treatment programs affect alcohol-related offending within Aboriginal and Torres Strait Islander communities? What negative impacts, if any, flow from such programs?***

Too often, alcohol abuse is unnecessarily responded to punitively, increasing the likelihood of entrenchment in the justice system. There are a number of mechanisms that see people, disproportionately Aboriginal and Torres Strait Islander peoples, punished for excessive drinking.<sup>21</sup> In the Northern Territory these triggers include paperless arrests, mandatory sentencing, alcohol protection orders and mandatory alcohol treatment.

We welcome the recent abolition of Alcohol Protection Orders and mandatory treatment orders in the Northern Territory, but remain concerned about the retention of paperless arrest laws.

### *Paperless arrests*

Introduced under the previous NT Government in 2014 as a means to respond to disorderly and drunk behaviour in public spaces, paperless arrests enable police to arrest a person who has committed or is about to commit an 'infringement notice offence', and hold them for up to four hours or until they are no longer intoxicated.<sup>iii</sup> Previously, these offences were dealt with by an on-the-spot fine. This means that while a court is unable to imprison a person, police are able to detain them for up to four hours or until they are no longer intoxicated. This exertion of police power has been exercised discriminately, with 70 per cent of people locked up in the first seven months being of Aboriginal and Torres Strait Islander background.<sup>22</sup> Despite the death of Kumanjayi Langdon and the coroner's harsh criticism of the scheme, the High Court deemed the policy lawful. The High Court did, however, place limitations on police by asserting the need to release someone as soon as reasonably practical, following a decision by police as to what action is to be taken. In practice, the scheme unnecessarily encourages arrest and detention, with inadequate oversight as to the application of the law. Detention of any kind must always be used as a last resort and certainly should not be the default response to public drunkenness.

## **9. Female Offenders**

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

#### *The life experiences of women*

The justice system has traditionally been structured for male prisoners and has failed to recognise and respond appropriately to the unique needs of women. A gendered approach is required to meet the needs of this cohort. As a 2013 federal parliamentary inquiry<sup>23</sup> noted:

Factors contributing to female incarceration include poverty, poor education outcomes, unstable housing, domestic violence and/or sexual abuse and trauma. Women who have been incarcerated have a higher chance of substance abuse, mental health problems, debts and poor credit rating and socioeconomic disadvantage.

The current detention of young girls in Alice Springs in the watch-house or transfer to Darwin Youth Detention Centre is unacceptable. The conditions in which the girls are being detained are highly inappropriate for both their age and developmental needs. This setting is not child-appropriate or conducive to healthy adolescent development.

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<sup>iii</sup> Infringement notice offences include a range of offences, but in particular include public order offences such as consuming liquor at a regulated place in a designated area, or offensive conduct.

The transfer of the girls to Don Dale Youth Detention Centre is a traumatic process placing them at an extreme distance from their families and country, with next to no capacity to maintain these connections from Darwin.

For those on remand, given the lack of appropriate custodial housing options, greater effort must be made to find appropriate accommodation, review their eligibility for bail while they are awaiting a sentence, or more quickly process their cases through the courts.

Jesuit Social Services welcomes funding from the NT Government for supported bail accommodation and would hope that appropriate accommodation for females in Alice Springs is determined and implemented as soon as practicable.

Equally the conditions in Alice Springs for adult women are unacceptable. A recent report by the NT Ombudsman highlights severe inadequacies with the current facility in a number of domains that “cry out for change”<sup>24</sup> including:

- Chronic overcrowding leading to pressure on every aspect of prison operations. Overcrowding has led to further housing and facility issues such as limited access to basic amenities including shelter from harsh weather and access to bathrooms
- Failing to prepare women for transition back into the community post-release because of a lack of access to education and rehabilitation programs
- Limited employment opportunities for women
- The under-identification of health issues among female prisoners and the consequent lack of access to health care in the facility
- A number of issues relating to basic necessities including food, hygiene, clothing and recreational activities
- Inadequate culturally-appropriate supports to understand and navigate the prison system, such as induction provided in languages other than English
- Risks to infants and children housed with their mothers in prison under the current arrangements.

Similar issues are noted in the Victorian Ombudsman’s *Investigation into the rehabilitation and reintegration of prisoners in Victoria*, and Jesuit Social Services internal data<sup>iv</sup> reinforces these trends:

- for women exiting prison, 91 per cent had experienced family violence
- 71 per cent of participants had child protection involvement either as children, parents or both; and
- almost all (98 per cent) participants were receiving Government pensions or benefits.

Similar to the male profile, 57 per cent of participants reported homelessness, 89 per cent reported substance misuse, 59 per cent reported mental health issues, and, despite women’s higher school achievement rates, participation in education or employment remained low. Very different to male prisoners, women we worked with in 2016 who exited prison had far higher rates of education achievement than men (20 per cent of women completed year 12 compared to one per cent of men). This suggests that a tailored approach is required to address the particular characteristics/needs of female offenders.

### *Policy and program responses*

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<sup>iv</sup> Based on Corrections Victoria Reintegration Programs delivered by Jesuit Social Services supporting people exiting prison in 2016

In 2005 the Victorian Government released the *Better Pathways* initiative<sup>25</sup>, aimed at reducing female offending and incarceration rates which had doubled over the previous decade. Despite this integrated strategy, the Victorian female imprisonment rate increased 44.7 per cent between 2006 and 2016, higher than the national average for women, and higher than the increase in the Victorian male incarceration rate.

Strong leadership and collaborative effort across governments is urgently required to address entrenched disadvantage and its influence on women's incarceration rates. As highlighted by the Royal Commission into Family Violence, service systems are fragmented and ill-equipped to respond to the complex support needs of vulnerable women. Innovative changes in policy and practice are required to identify the specific individual and systemic factors impacting women at risk of incarceration, and place them at the heart of a truly integrated approach.

Reversing the trajectory of women's incarceration rates requires consideration of the impacts beyond the lives of women themselves to, most critically, their children. For example, 81 per cent of women exiting prison in Jesuit Social Services' Victorian programs in 2016 were mothers, and having a parent incarcerated is an established risk factor for both child protection and criminal justice involvement. Consideration must also be given to the following vulnerable cohorts:

- Women who have been victims of sexual or physical violence that can play a part in the onset of offending behaviour (noting also that offending may occur in the context of coercive relationships)
- Indigenous women – who are less likely to access mainstream rehabilitation and post-release programs, and are more likely to breach community-based orders and return to prison more frequently.

Women have unique pathways into offending and tailored responses are required at each point of the justice system – including diversion, bail, custody, parole and Community Corrections Orders.

#### *Our advocacy*

As outlined in our submission to the 2016/17 Victorian State Budget, we have called on the Victorian Government to address the specific needs of women leaving prison; in particular, to provide better reintegration and housing options.

Our 2016-17 Submission to the Victorian State Budget is available at <https://jss.org.au/2016-17-victorian-state-budget-responds-to-needs-of-a-growing-population/>

#### *Reintegration pathways*

The Victorian Ombudsman has previously recommended that the Department of Justice and Regulation investigate options to ensure the specific needs of women prisoners are recognised. A small number of male prisoners can access 25 beds at the Judy Lazarus Transitional Centre, which has been found to reduce recidivism and better prepare people for transition back to the community.

This model provides a staged release which has been shown to help people develop the skills and confidence to live in the community. Unfortunately there is no comparable service available to women.

#### *Housing*

The availability of safe, secure and stable housing is a major issue for many in our communities, but particularly for people with mental illness, addictions and other complex needs. We know that 40 per

cent of people exiting prison do so into homelessness<sup>26</sup>, while a University of NSW study on multiple and complex needs found those with complex needs experience greater homelessness and housing disadvantage.<sup>27</sup>

A lack of safe and affordable housing has been identified as a significant criminal justice and public safety issue for women exiting prison, particularly Aboriginal women<sup>28</sup>. Research shows that a high proportion of women who exit prison, including Aboriginal and Torres Strait Islander women, are too often forced to return to unsafe and insecure housing (including family violence situations) due to a lack of affordable housing options<sup>29</sup>, and unstable housing has been found to be the most significant factor affecting return to prison outcomes<sup>30</sup>. Governments must invest in safe and affordable housing options for women exiting prison.

To meet the varying needs of woman exiting prison, a diversity of housing options is critical. Options include transitional, supported living arrangements such as residential programs, lead tenant housing, step down models, and approaches that support individuals' entry into the private housing market through housing first models and head-leasing.<sup>v</sup> It is also important to consider housing options through a gendered lens to ensure women have access to safe, secure, long-term housing.

We call on Governments to expand the range and availability of affordable and appropriate housing options for women exiting prison, such as:

- supported housing models for vulnerable women who require supported living arrangements
  - a dedicated supported housing option for woman on release
  - establishing transitional support facilities and staged release programs for women to support reintegration of female prisoners
- targeted access for woman exiting prison into programs/initiatives funded and being developed as part of family violence housing initiatives.

### *Improving criminal justice processes*

As outlined in the Human Rights Law Centre and Change The Record's report, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*<sup>31</sup>, in contrast to the tough on crime paradigm, state and territory governments should adopt alternative responses to behaviours captured by low level criminal offences. Ways to achieve this include:

- Decriminalising offences like public drinking and offensive language, consistent with the recommendations of the Royal Commission into Aboriginal Deaths in Custody.
- Preventing minor driving offences and vehicle registration offences through programs and services that help women with their licence and car registration, especially women on low incomes and women in regional and remote locations where public transport is lacking. A 'strong association between driver licencing, education and employment' was identified in a recent survey of Aboriginal and Torres Strait Islander people in NSW, indicating the need to

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<sup>v</sup> **Lead tenant** is an out-of-home care placement option providing medium-term accommodation and support to young people aged 16-18 years, who have been placed away from the care of their families by Child Protection (Source: DHHS, Victorian Government). **Head-leasing** occurs when a social housing provider leases a property from a landlord in the private rental market and then subleases it to a person requiring housing assistance. Based on the understanding that housing is a right, the **Housing First model** secures housing as a first step to addressing social issues. It is similar to a head-leasing arrangement, however the individual has no requirement to engage in support services and the housing is permanent.

address barriers to accessing and maintaining a drivers licence, including licence suspension as an enforcement option against people who cannot pay fines.<sup>32</sup>

- Removing breach of bail conditions - such as a young woman missing a curfew - as a criminal offence. Responses should instead focus on an assessment of the appropriateness of bail conditions, along with investment in bail support programs for Aboriginal and Torres Strait Islander women.

## 10. Aboriginal Justice Agreements Proposal

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

Jesuit Social Services supports this proposal and would recommend that state and territory governments develop and implement Aboriginal Justice Agreements (AJAs) based on the ongoing Victorian AJA model, while making adaptations to ensure that the AJA suits their local circumstances. Other jurisdictions should place the Victorian AJA principles of ATSI participation and inclusion at the heart of their AJAs. In addition, all states and territories should develop AJAs that specifically focus on the particular situation of ATSI women in the justice system.

Victoria's AJA provides a framework for Victorian justice agencies and the ATSI community to work together to address the complex issues that underpin ATSI over-representation in the criminal justice system. It is a long-term change strategy, to be rolled out in stages over a generation until the gap is closed.<sup>33</sup> The Victorian AJA aims to achieve improved justice outcomes for ATSI peoples by:

- Addressing the ongoing issue of Aboriginal over-representation within all levels of the criminal justice system.
- Improving Aboriginal access to justice-related services.
- Promoting greater awareness in the Aboriginal community of their civil, legal and political rights.<sup>34</sup>

A core principle of Victoria's AJA is maximising participation of the ATSI community in the design, development, delivery and implementation of all justice policies and programs that impact on ATSI peoples.<sup>35</sup> Victoria's AJA seeks to increase participation through community programs, partnerships and place-based partnership projects. The AJA and its programs are delivered through a multi-layered structure of partnerships between the Victorian Government and the ATSI community. Regional Aboriginal Justice Advisory Committees, chaired by senior members of the ATSI community, facilitate community engagement and drive activity on the ground.<sup>36</sup> AJA-funded programs enable communities to deliver regional and local responses to justice-related issues.<sup>37</sup>

Unlike AJAs in all other jurisdictions, the ACT and Victorian AJAs remain in operation. This is significant as AJAs have a positive impact by focusing government attention on the need to work to address ATSI justice issues, and by contributing to a more coherent government focus on those issues.<sup>38</sup> Although rates of ATSI over-representation in the criminal justice in Victoria are still at unacceptable levels, the Victorian AJA has achieved some success. An independent evaluation of Phase 2 found that it had improved justice outcomes for ATSI peoples in Victoria.<sup>39</sup> While progress in decreasing ATSI overrepresentation in the criminal justice system was uneven, the evaluation determined that increases in overrepresentation may have been even greater without intervention. The evaluation also found that the partnership structures created a strong foundation for delivering better ATSI justice outcomes. The gross benefits to Victoria delivered by the AJA were calculated as amounting to \$22m-

26m in the 2009/10 financial year. The evaluation noted that progress towards achieving AJA goals will inevitably be slow, and that there was much yet to achieve.

AJAs have been adopted in the ACT, NSW, Queensland and WA. All have expired except those in the ACT and Victoria. There is some momentum in SA and the NT to introduce AJAs. The NT Government has recently announced that its newly created Aboriginal Justice Unit will lead discussions with peak ATSI bodies with the aim of reaching an AJA.<sup>40</sup> Critically, AJAs must reflect the local concerns and needs of ATSI communities within the relevant state or territory. The difficulty of this task will vary between jurisdictions. For example, WA must seek the perspectives and input of numerous diverse ATSI communities spread over a vast geographical area.

Further limiting factors could include a state or territory government's capacity to facilitate collaboration between government agencies, and between those agencies and key bodies within local ATSI communities. Funding and support would need to be available to these ATSI bodies. Strong and suitable governance structures reflecting the diversity of ATSI communities would also be required.

It is also important that existing and future AJAs acknowledge and focus on the particular situation of ATSI women in the justice system. As female offending is strongly linked to histories of trauma and victimisation, it is crucial to ensure that women's over-representation as victims of crime is addressed. AJAs should include measures that build on the strengths of ATSI women to address offending and experiences of violence.<sup>41</sup> Acknowledging that its previous phases had failed to address justice issues specific to ATSI women, Phase 3 of Victoria's AJA incorporated culturally appropriate diversion programs for ATSI women.<sup>42</sup>

Jurisdictions developing and implementing AJAs must keep in mind the difficulty of measuring the extent to which AJAs contribute to changes in ATSI imprisonment rates.<sup>43</sup> Independent evaluation and monitoring of progress on an ongoing basis is crucial.

***Question 10–1 Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?***

Yes, we believe the Commonwealth Government should develop measurable and strategic justice targets as part of the Council of Australian Governments review of the Closing the Gap policy and in this way deliver a nationally coordinated approach to addressing the overrepresentation of ATSI people in prison.

Targets adopted unilaterally by states and territories are insufficient; all levels of government are responsible for addressing ATSI overrepresentation in the justice system.<sup>44</sup> Justice targets would focus national policy attention on 'closing the gap' when it comes to ATSI incarceration rates while simultaneously providing a cohesive framework for stakeholders across Australia to work to improve life outcomes for ATSI peoples. Adopting justice targets would complement and strengthen efforts to meet existing Closing the Gap targets, particularly those related to health, employment and education.<sup>45</sup>

Justice targets must be accompanied by community-driven solutions to address ATSI offending due to the clear and proven link between offending and social disadvantage.<sup>46</sup> Justice reinvestment could be implemented as an approach to re-direct funding towards such solutions. The Government must make sustained investments to address the root causes of disadvantage within ATSI communities in order to deliver on these justice targets.

These justice targets must be measurable so that Governments can be held accountable to the targets in the long term. They should also be developed in consultation and partnership with ATSI bodies and communities.<sup>47</sup>

Jesuit Social Services supports calls by the Human Rights Law Centre and Change the Record Coalition for the federal government to develop justice targets as part of the Closing the Gap framework. These targets should aim to:

- (a) close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2040; and
- (b) cut disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040, with priority strategies for women and children.<sup>48</sup>

## **11. Access to Justice Issues Proposal**

***Proposal 11–1 Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.***

Jesuit Social Services supports this proposal.

***Proposal 11–2 Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.***

As argued in Jesuit Social Services' response to the Senate *inquiry into the indefinite detention of people with cognitive and psychiatric impairment*<sup>49</sup>, under current Australian schemes, the criminal justice system does not easily adapt and respond to the complex and varied needs of people with cognitive and psychiatric impairment. There is a serious lack of specialised screening and assessment tools, a lack of access to appropriate therapeutic support services, inflexible and inadequate legislative schemes and a lack of appropriate and rehabilitative diversion options. People with cognitive and psychiatric impairments are at increased risk of entrenchment in the justice system if they don't receive the crucial support they need, including interventions to reduce offending. We are greatly concerned that this issue has a disproportionate impact on Aboriginal and Torres Strait Islander people given they are over-represented in both the criminal justice system and amongst people with disabilities.

Jesuit Social Services has serious concerns about how the criminal justice system – at all points – interacts with people with cognitive and psychiatric impairments, particularly regarding indefinite detention.

Jesuit Social Services calls for an end to the arbitrary and indefinite detention of people with cognitive and psychiatric impairments. Detention of people with cognitive and psychiatric impairments should only be used as a last resort and must be suited to the person's circumstances/needs, including specialised, therapeutic programs. Wherever possible, people with cognitive and psychiatric impairments should be supported as part of a health (not punitive justice) response. This will require legislative change (specifically in the Northern Territory), including: repealing mandatory sentencing laws; amendments to bail laws; and amendments to relevant legislation to remove the indefinite detention of people who are deemed unfit to plead.

Jesuit Social Services strongly recommends the introduction of appropriately resourced, accessible and specialised assessment and screening tools at all key points of the justice system (across all Australian jurisdictions). Coupled with this is the need for appropriately resourced and specialised therapeutic

support options both within the community and in prison, including in remote and regional Australia. Diagnosis and appropriate therapeutic support at the earliest opportunity would reduce the likelihood of further contact with the criminal justice system as well as ensuring compliance with Australia's human rights obligations.

For further information, our response to the Senate *inquiry into the indefinite detention of people with cognitive and psychiatric impairment* is available at <https://jss.org.au/senate-inquiry-into-the-indefinite-detention-of-people-with-cognitive-and-psychiatric-impairment-in-australia/>

***Proposal 11–3 State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.***

Jesuit Social Services supports this proposal. This practice currently exists in Victoria however police do not always contact the equivalent service.

## **12. Police Accountability**

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

Jesuit Social Services supports this proposal and believes that police should be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia where they have not already done so.

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

Jesuit Social Services supports this proposal and believes that police should be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place.

## **13. Justice Reinvestment**

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

Jesuit Social Services supports the principle of justice reinvestment as a means of reducing incarceration rates within ATSI communities. While laws and legal frameworks are not required to facilitate justice reinvestment initiatives for ATSI peoples, certain law reforms could improve the effectiveness of such initiatives.

Reforming laws and legal frameworks is not necessary as a pre-requisite to implementing justice reinvestment responses in ATSI communities. Justice reinvestment is a form of preventative financing in which governments redirect resources that are currently spent on incarcerating offenders into community-based programs and services that aim to address underlying causes of criminality.<sup>50</sup> The justice reinvestment approach follows the following methodology:

- Collecting and analysing data to identify vulnerable or highly recidivist communities.
- Identifying drivers of crime and developing policy options aimed at reducing offending and generating savings.
- Quantifying the likely savings, implementing the options, and then reinvesting the savings in the identified communities.

- Rigorously measuring and evaluating the extent to which savings and community justice outcomes have been realised.<sup>51</sup>

While not essential, reforming laws and legal frameworks could help to drive justice reinvestment initiatives.

Reforming laws regarding sentencing and bail, the conditions on which prisoners leave prison, and parole and probation supervision could potentially facilitate a decline in ATSI imprisonment rates as part of a justice reinvestment approach. There may be benefit in legislating for diversion and sentencing options that allow for community-based alternatives to detention, so that justice reinvestment programs are utilised.

While such law reform has proven effective in the United States – a program in Texas helped to decrease prisoner numbers by 1,125 between 2008 and 2010 by making significant alterations to the criminal statutory framework along with a number of other practice changes - communities within Australian jurisdictions would commence from a markedly lower base due to lower incarceration rates and higher investment in community-based rehabilitation programs.<sup>52</sup> Accordingly, law reforms that drove success in US justice reinvestment programs would not necessarily prove as effective in an Australian context.

Specifically, reform or abolition of mandatory sentencing laws – which tend to disproportionately impact upon ATSI people – could drive justice reinvestment initiatives by lowering incarceration rates and thereby freeing up funds for preventative and rehabilitative programs.<sup>53</sup> Laws providing for imprisonment in lieu of unpaid fines should likewise be reformed or abolished.

Laws that ensure government accountability in relation to justice reinvestment initiatives should be embraced. Such laws could take the form of legislation establishing a national coordinating body to build the evidence base, collect data and measure progress to monitor the effectiveness of justice reinvestment in the Australian context – as pledged by the ALP.<sup>54</sup>

Laws introducing and implementing state and territory Aboriginal Justice Agreements could bolster the success of justice reinvestment initiatives by diverting resources into programs primarily funded by AJAs, including community-led diversion programs and local programs aimed at preventing first-time offending.

## Other matters

[Barreng Moorop: A positive example of a restorative justice approach for at-risk young ATSI people](#)

Barreng Moorop offers an example of a responses that effectively contributes to the positive development of ATSI children. It emphasises:

- the importance of restorative justice principles, processes and practice
- a therapeutic approach that responds to the needs of vulnerable children, particularly those in the child protection system who come into contact with the justice system
- an understanding of the particular needs of Aboriginal children and young people who are overrepresented in the youth justice system
- the critical role of education as a protective factor, and the need to ensure vulnerable children's continued engagement in school.

## *Our approach*

Recognising the need to divert vulnerable children away from the youth justice system, Jesuit Social Services delivers the Barreng Moorop program in partnership with the Victorian Aboriginal Legal Service (VALS) and the Victorian Aboriginal Child Care Agency (VACCA). The program is funded by the Commonwealth Government.

Barreng Moorop works with 10-14 year old children, their siblings and their families residing in the North and West metropolitan regions of Melbourne who intersect the criminal justice system. The program provides culturally responsive trauma-informed services to divert young Aboriginal people away from the criminal justice system. Since its inception in 2015, Barreng Moorop has assisted 35 Aboriginal children and their families.

Barreng Moorop works with the whole family and community (where appropriate) to provide a wrap-around response, understanding the composition of Aboriginal families, in which the extended family plays an active role. The responsibility of child care and rearing is shared amongst a range of family members with, in many cases, a multi-generational core of kin providing primary care.

In response, Barreng Moorop works with, and provides support to, family members with the focus of using family, community and culture as a protective factor to divert young people away from the criminal justice system in a manner which is sustainable and genuine.

Barreng Moorop uses trauma informed practice which acknowledges past trauma Aboriginal people have experienced throughout history due to colonisation, loss of culture and connection to land and the removal of children from their families. We note that these factors and the impact of transgenerational trauma plays out in the daily life of many of the Aboriginal children and families we work with.

Outcomes<sup>vi</sup> from Barreng Moorop participants in 2016-17 show that a number of positive improvements were seen including:

- 82 per cent of participants had an improved view of self
- 76 per cent of participants had improved health and wellbeing
- 76 per cent of participants had improved connection with family
- 76 per cent of participants had an improved capacity to set goals
- 65 per cent of participants had improved participation in education or employment.

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<sup>vi</sup> Data sourced from internal participant database measuring improvements against Jesuit Social Services' Our Way of Working outcomes in 2016-17

### Case study: Barreng Moorop

Rachel\* is 13 years old and is on a Permanent Care Order in the care of her extended family member. The family have been involved with Barreng Moorop since September 2015.

Barreng Moorop's work with the family has included:

- Supporting Rachel's extended family member to access and move into a transitional housing property and relocating Rachel to live with her extended family member
- Completing and submitting a public housing application
- Linking Rachel's extended family member in with a doctor to address his health needs
- Working in collaboration with Rachel's school to improve her self-esteem and sense of self
- Providing support to transition Rachel from primary to secondary school and assisting with accessing financial aid to purchase school supplies
- Providing transport so that Rachel can continue to access counselling
- Working with the school, counsellor and Rachel's extended family member, to develop behaviour management strategies to support Rachel to manage her behaviour and interaction with others.
- Providing education about bullying and cyber safety
- Organising care team meetings with all services involved with the family

As a result of Barreng Moorop's work with the family, key outcomes include:

- Rachel has not had further involvement with the police
- The school noted that Rachel's involvement in incidents at school decreased from a couple a day to a couple a week when she moved in with her extended family member
- Rachel has smoothly transitioned to secondary school and is engaged in schooling
- Rachel and her extended family member are currently residing together in transitional housing together and her extended family member has been offered a public housing property
- Rachel's health management has improved, including sexual health awareness, and has continued engagement with counselling
- Rachel is engaged in pro-social activities which has improved her physical health as well as her self esteem
- Rachel has attended holiday camps and met other children her age outside of school
- Contact with extended family is improving
- Rachel's extended family member is receiving Centrelink benefits and Family payments, and has improved health management

\*Not his/her real name

### The age of criminal responsibility

A small number of vulnerable children enter the criminal justice system at a very young age. We know this group is among the most vulnerable in our community and that children first detained between the ages of 10 and 14 are more likely, compared to those first supervised at older ages, to have sustained and frequent contact with the criminal justice system throughout their life<sup>55</sup>. Through Jesuit

Social Services’ experience and research, particularly *Thinking Outside: Alternatives to Remand for Children*<sup>56</sup>, we know that opportunities are still being missed to intervene and divert vulnerable children and young people from the criminal justice system.

Child offending experts, psychologists and criminologists agree that younger children have rarely developed the social, emotional and intellectual maturity necessary for criminal responsibility before the age of 14 years and also lack the capacity to properly engage in the justice system. Consequently, procedural fairness cannot be assured and criminal justice proceedings fail to guarantee a just response to children’s behaviour. The most effective approach to prevent these children’s trajectories into the justice system is to address the issues driving their vulnerability such as family dysfunction, trauma, abuse and neglect.

In line with international standards embodied in the United Nations Convention on the Rights of the Child and enacted in many overseas jurisdictions<sup>57</sup>, we recommend raising the age of criminal responsibility to the age of 12 (as a minimum) across all states and territories. According to an international study of 90 countries, 68 per cent had a minimum criminal age of 12 or higher, with the most common age being 14 years.<sup>58</sup>

#### Age of criminal responsibility: international comparison

AUS	NZ	CAN	ENG	USA**	FRA	GER	SWE	NED	CHN	JPN
10	10-14*	12	10	6-12	13	14	15	12	14	14

Source: Hazel 2008, *Cross-national comparison of youth justice*, Youth Justice Board for England and Wales.

We recommend putting in place evidence-based approaches to supporting vulnerable children who are below this age. This should include less formal methods of holding them to account, such as restorative justice and family centred approaches as well as preventative measures which target the social and economic factors which lead to anti-social behaviour.

#### Racial Equity Tools

One of the measures being used in the US to address the overrepresentation of minority groups in the criminal justice system is the adoption of ‘Racial Equity Tools’, which Jesuit Social Services was introduced to during meetings with Seattle University and the City of Seattle as part of our recent #JusticeSolutions study tour<sup>vii</sup>.

Racial Equity Tools provide a structure for institutionalising the consideration of racial equity and involve assessing (in several ways and at several stages) racial elements of any new proposals (see Appendix A, which contains an outline of a Racial Equity Tool). The Tool is designed to integrate explicit consideration of racial equity in decisions, including policies, practices, programs and budgets. The tool is both a product and a process. Use of a Racial Equity Tool can help to develop strategies and actions that reduce racial inequities and improve outcomes for all groups, such as lowering the overrepresentation of people of colour in prison.

The Tool recognises that many current inequities in our society are sustained by historical legacies, structures and systems that repeat patterns of exclusion. Without intentional intervention, institutions and structures will continue to perpetuate racial inequities. Seattle’s support for Racial Equity Tools acknowledges that Government has the ability to implement policy change at multiple levels and across multiple sectors to drive larger systemic change.

<sup>vii</sup> See full report here: <https://jss.org.au/justicesolutions-expanding-the-conversation/>

A Racial Equity Tool<sup>viii</sup>:

- proactively seeks to eliminate racial inequities and advance equity
- identifies clear goals, objectives and measurable outcomes
- engages community in decision-making processes
- identifies who will benefit or be burdened by a given decision, examines potential unintended consequences of a decision, and develops strategies to advance racial equity and mitigate unintended negative consequences
- develops mechanisms for successful implementation and evaluation of impact.

The tool can be used at multiple levels to increase impact and effectiveness, such as:

- **government staff:** the routine use of a Racial Equity Tool by staff provides the opportunity to integrate racial equity across the breadth, meaning all governmental functions, and depth, meaning across hierarchy.
- **elected officials:** elected officials have the opportunity to use a Racial Equity Tool to set broad priorities, bringing consistency between values and practice.
- **community organisations:** community based organisations can ask questions of government about use of Racial Equity Tools to ensure accountability. In addition, community based organisations can use a similar or aligned Racial Equity Tool within their own organisations to also advance racial equity.

Racial Equity Tools promote data and evidence-based policy decisions that also target specific geographic areas, critical if we are to address locational, entrenched disadvantage. They promote targeting our responses to the most vulnerable members of society and they encourage governments to recognise the unintended consequences of their decisions and to partner with disproportionately affected communities to achieve long-term positive change.

Racial Equity Tools may be useful in the Australian context, particularly for addressing the over-representation of Aboriginal and Torres Strait peoples in the criminal justice system. Jesuit Social Services believes the unacceptable over-representation of Aboriginal and Torres Strait Islander peoples in the adult and youth justice systems needs to be at the forefront of every debate and decision. There is a need for widespread agreement that any policy, practice or legislative change that has the potential to adversely affect Aboriginal and Torres Strait Islander peoples be thoroughly assessed and reviewed. Racial Equity Tools are a promising mechanism to begin addressing this issue, and also stand to bring benefit to new and emerging CALD communities that may be over-represented in the justice system.

The current proposal in Victoria to build a new youth justice centre is one example of a decision that would benefit from being assessed against a Racial Equity Tool.

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<sup>viii</sup> Two examples of Racial Equity Tools can be found at:

[http://www.seattle.gov/Documents/Departments/RSJI/RacialEquityToolkit\\_FINAL\\_August2012.pdf](http://www.seattle.gov/Documents/Departments/RSJI/RacialEquityToolkit_FINAL_August2012.pdf) and  
[http://racialequityalliance.org/wp-content/uploads/2015/10/GARE-Racial\\_Equity\\_Toolkit.pdf](http://racialequityalliance.org/wp-content/uploads/2015/10/GARE-Racial_Equity_Toolkit.pdf)

## Appendix A: Racial Equity Tool

The Racial Equity Tool is set of six steps and questions:<sup>59</sup>

### Step 1. Proposal

- What is the policy, program, practice or budget decision under consideration?
- What are the desired results and outcomes?
- What does this proposal have an ability to impact?

### Step 2. Data

- What's the data? What does the data tell us?
- Will the proposal have impacts in specific geographic areas (neighborhoods, areas, or regions)? What are the racial demographics of those living in the area?
- What does population level data tell you about existing racial inequities?
- What does it tell you about root causes or factors influencing racial inequities?

### Step 3. Community engagement

- How have communities been engaged?
- Are there opportunities to expand engagement?
- Who are the most affected community members who are concerned with or have experience related to this proposal? How have you involved these community members in the development of this proposal?
- What has your engagement process told you about the burdens or benefits for different groups?
- What has your engagement process told you about the factors that produce or perpetuate racial inequity related to this proposal?

### Step 4. Analysis and strategies

- Who will benefit from or be burdened by your proposal?
- What are your strategies for advancing racial equity or mitigating unintended consequences?
- Given what you have learned from the data and stakeholder involvement, how will the proposal increase or decrease racial equity? Who would benefit from or be burdened by your proposal?
- What are potential unintended consequences? What are the ways in which your proposal could be modified to enhance positive impacts or reduce negative impacts?
- Are there complementary strategies that you can implement? What are ways in which existing partnerships could be strengthened to maximise impact in the community? How will you partner with stakeholders for long-term positive change?
- Are the impacts aligned with your community outcomes defined in Step #1?

### Step 5. Implementation

- What is your plan for implementation?
- Is your plan: realistic? adequately funded? adequately resourced with personnel? adequately resourced with mechanisms to ensure successful implementation and enforcement? adequately resourced to ensure on-going data collection, public reporting, and community engagement?

### Step 6. Accountability and communication

- How will you ensure accountability, communicate, and evaluate results?
- How will impacts be documented and evaluated? Are you achieving the anticipated outcomes? Are you having impact in the community?
- What are your messages and communication strategies that are will help advance racial equity?
- How will you continue to partner and deepen relationships with communities to make sure your work to advance racial equity is working and sustainable for the long haul?

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