Law Council
OF AUSTRALIA

Draft Report—Review of the National Agreement on Closing the Gap

Productivity Commission

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The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.au.

Acknowledgements

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Introduction

Focus of the Review

1. The Law Council is grateful for the opportunity to provide input to the Productivity Commission's Review of the National Agreement on Closing the Gap (the **review**).[1] The Law Council has long supported the Closing the Gap framework. It particularly welcomed the inclusion of Socioeconomic Outcomes linked to the justice sector, which were added to the refreshed National Agreement on Closing the Gap (the **National Agreement**) in July 2020.

2. The present draft report sets out the Productivity Commission's findings and recommendations on the ongoing implementation of the National Agreement in 2023.

3. Under the terms of the National Agreement, the Productivity Commission is required to undertake a comprehensive review of progress every three years.[2] As the National Agreement was concluded in 2020, this is the first review process undertaken.

4. The Productivity Commission has explained that its 'focus' for the review is the four Priority Reforms under the National Agreement (as opposed to the Socioeconomic Outcomes).[3] The Priority Reforms are areas for joint national action aimed at changing the way governments work, in order to accelerate improvements in the lives of Aboriginal and Torres Strait Islander people.[4] In short, all Australian Governments and the Coalition of Peaks (the Parties under the National Agreement) have agreed to:

   - strengthen and establish genuine formal partnerships and shared decision-making (**Priority Reform 1**);
   - build the Aboriginal and Torres Strait Islander community-controlled sector (**Priority Reform 2**);
   - transform government organisations to improve accountability and better respond to the needs of Aboriginal and Torres Strait Islander people (**Priority Reform 3**); and
   - improve and share access to location-specific data and information to enable Aboriginal and Torres Strait Islander communities to make informed decisions about their futures and the policies, programs and government organisations operating in their regions (**Priority Reform 4**).[5]

5. The Law Council accepts that the Priority Reforms are a sensible starting point for review of the National Agreement. It notes the Productivity Commission's assertion—which is borne out in the structure of the National Agreement—that the Priority Reforms are intended to drive improvements in Socioeconomic Outcomes.[6]

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[1] Productivity Commission, *Review of the National Agreement on Closing the Gap—Draft Report* (July 2023) <https://www.pc.gov.au/inquiries/current/closing-the-gap-review/draft> ('**Draft Report**').
[2] Ibid, 49, [121]-[124]: 'C. Productivity Commission Review'.
[3] Draft Report, 25.
[4] *National Agreement on Closing the Gap* (July 2020) 5.
[5] Ibid, 5-20.
[6] Draft Report, 25.

General Remarks on the Draft Report

6. The Law Council strongly supports the major findings, recommendations and observations set out in the draft report. The draft report provides an accurate assessment of the lack of progress in changing, at a systemic and structural level, the approaches and operations of governments to issues affecting Aboriginal and Torres Strait Islander people and communities. The Law Council commends the Productivity Commission's frank approach in setting out its major findings, as illustrated in the following excerpt from the executive summary of the draft report:

> *The Productivity Commission's first review of the Agreement shows that governments are not adequately delivering on this commitment. Progress in implementing the Agreement's Priority Reforms has, for the most part, been weak and reflects a business-as-usual approach to implementing policies and programs that affect the lives of Aboriginal and Torres Strait Islander people. Current implementation raises questions about whether governments have fully grasped the scale of change required to their systems, operations and ways of working to deliver the unprecedented shift they have committed to.*
>
> *It is too easy to find examples of government decisions that contradict commitments in the Agreement, that do not reflect Aboriginal and Torres Strait Islander people's priorities and perspectives and that exacerbate, rather than remedy, disadvantage and discrimination. This is particularly obvious in youth justice systems.*
>
> *Without stronger accountability for its implementation across all government organisations, the Agreement risks becoming another broken promise to Aboriginal and Torres Strait Islander people.*[7]

7. The National Agreement was a significant and welcome development in efforts to close the gap. The identification and articulation of Priority Reform areas, and the recognition that governments must address the Priority Reforms to meet the Socioeconomic Outcomes, was a critical conceptual step, as was the acknowledgment of the need for genuine partnerships and shared decision-making.

8. However, governments have been slow to link these conceptual commitments to practical reforms. The Law Council agrees with the views expressed in the draft report that the level of transformation that must happen within Australian Governments to achieve the Socioeconomic Outcomes is still to occur, and, in some instances, backwards steps have been taken. The Law Council has also received feedback from its constituent bodies that the draft report is an accurate reflection of the experiences of their members, particularly those working for Aboriginal Legal Services.

9. The requirements of the National Agreement are urgent. Aboriginal and Torres Strait Islander peoples have been subject to dispossession, discrimination and significant breaches of human rights across multiple areas, historically and in contemporary Australia, not least in the treatment of persons in contact with the criminal justice and child protection systems. These practices and impacts continue in the present day, including through the policies of governments and public institutions, extending cycles

[7] Draft Report, 2.

of intergenerational trauma, disrespect and injustice, and contributing to broader socioeconomic disadvantage and barriers to wellbeing and improved life expectancy.[8]

10. The Law Council emphasises that contact with the legal and justice system takes place within, and is necessarily affected by, this broader context. The experience of Aboriginal and Torres Strait Islander people within this system itself produces poorer indicators of wellbeing across population groups. The Law Council notes, for example, the results of a recent study published in 2020, which provide further evidence of an 'incarceration gap' within Aboriginal and Torres Strait Islander populations.[9] That is, substantial disparities across a number of important health and socio-economic markers were observed among Aboriginal and Torres Strait Islander men based on lifetime incarceration status. The study is evidence of the fact of incarceration itself as a risk factor affecting other indicators of wellbeing, such as educational outcomes, labour force participation and rates of substance misuse.

11. The Law Council has previously drawn out the complex push-and-pull between contact with the criminal justice and child protection systems, and broader socioeconomic factors including significant health impairments, cognitive disabilities, mental health and communication disorders, income percentile, and education and workforce engagement. This includes in its recent submissions to the Australian Human Rights Commission on *Youth Justice and Child Wellbeing Reform* and a proposed *National Anti-Racism Framework*;[10] its submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group and associated policies in support of raising the minimum age of criminal responsibility;[11] and its comprehensive *Justice Project* published in 2018, which was a national review into the state of access to justice in Australia for people experiencing significant disadvantage.[12]

12. The Law Council has also long called for more urgent and effective action to be taken to ensure that the recommendations from multiple consultations, inquiries and reports over the past thirty-five years—particularly with respect to the over-incarceration of

[8] Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) <https://lawcouncil.au/resources/submissions/inquiry-into-the-application-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-in-australia>. See also Law Council of Australia, 'Aboriginal and Torres Strait Islander People', *Justice Project* (Final Report, August 2018) <https://lawcouncil.au/justice-project/final-report>.

[9] LJ Ashford, SM Shepherd, B Spivak, et al, 'Closing the Incarceration Gap: Assessing the socioeconomic and clinical indicators of Indigenous males by lifetime incarceration status' (2020) 20:710 *BMC Public Health* 1 <https://pubmed.ncbi.nlm.nih.gov/32423391/>.

[10] Law Council of Australia, Submission to the Australian Human Rights Commission, *Youth Justice and Child Wellbeing Reform* (24 July 2023) <https://lawcouncil.au/resources/submissions/youth-justice-and-child-wellbeing-reform>; Law Council of Australia, Submission to the Australian Human Rights Commission, *Concept Paper for a National Anti-Racism Framework* (11 February 2022) <https://lawcouncil.au/resources/submissions/concept-paper-for-a-national-anti-racism-framework>.

[11] Law Council of Australia, Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, *Review of the Age of Criminal Responsibility* (2 March 2020) <https://lawcouncil.au/resources/submissions/council-of-attorneys-general-age-of-criminal-responsibility-working-group-review>; Law Council of Australia, *Policy Statement on the Minimum Age of Criminal Responsibility* (17 December 2019); Law Council of Australia, *Policy Statement Addendum on Responses to Children under the Minimum Age of Criminal Responsibility* (25 June 2022) <https://lawcouncil.au/resources/policies-and-guidelines/policy-statement-minimum-age-of-criminal-responsibility>.

[12] Law Council of Australia, 'Aboriginal and Torres Strait Islander People', *Justice Project* (Final Report, August 2018) <https://lawcouncil.au/justice-project/final-report>.

First Nations peoples—are considered, implemented and progressed by governments.[13]

13. The Law Council endorses the conclusion of the draft report that stronger mechanisms for government accountability are needed to drive change, including:

    (a) positioning Aboriginal and independent bodies—such as state and territory representative bodies, Voices to State Parliaments, Treaty process bodies, justice commissions, and the independent mechanisms—to identify good and bad practices under the National Agreement and advocate for improved policies, programs and services;

    (b) better resource and value the unique skills and knowledge of Aboriginal Community-Controlled Organisations (**ACCOs**);

    (c) considering changes to government commissioning processes and contracting, to ensure that only service providers with the capability to provide culturally safe services are selected;

    (d) embedding clearer responsibility for driving action within the public sector. For example, this might occur by:

        (i) ensuring that responsibility for improving the public sector's cultural capability and relationships with Aboriginal and Torres Strait Islander people is included in the performance frameworks of relevant public sector CEOs, and senior executives, as appropriate;

    (e) establishing or enhancing sector-specific accountability mechanisms (such as Aboriginal and Torres Strait Islander Children's Commissioner roles);

    (f) include a statement on Closing the Gap in key government agencies' annual reports;

    (g) publishing meaningful implementations plans, reports and documents with agreed-upon actions that are substantive and critical to achieving the objectives of the National Agreement;

    (h) publishing all documents developed under the National Agreement to improve transparency and make it easier to assess progress, including the stocktakes, partnership agreements, expenditure reviews, evaluations, and other documents that have been developed under the National Agreement;

    (i) appointing an organisation with dedicated resourcing and staffing to lead data development under the National Agreement and effectively and meaningfully track progress; and

[13] See, eg, Law Council of Australia, *Justice targets are just a wish list* (media release, 31 July 2020) <https://lawcouncil.au/media/media-releases/justice-targets-are-just-a-wish-list>; Law Council of Australia, *Royal Commission into Aboriginal Deaths in Custody requires urgent action 30 years on* (media release, 14 April 2021) <https://lawcouncil.au/media/media-releases/royal-commission-into-aboriginal-deaths-in-custody-requires-urgent-action-30-years-on>; Law Council of Australia, *Time for a Government response to Pathways to Justice Report* (media release, 25 March 2021) <https://lawcouncil.au/media/media-statements/time-for-a-government-response-to-pathways-to-justice-report>; Law Council of Australia, *Justice gap must be bridged* (media release, 17 March 2022) <https://lawcouncil.au/media/media-releases/justice-gap-must-be-bridged>; Law Council of Australia, *2022 Federal Election: Call to Parties* (April 2022) <https://lawcouncil.au/media/media-releases/justice-gap-must-be-bridged>.

(j) making provision for designated Aboriginal and Torres Strait Islander leadership roles across public watchdogs (e.g., as ombudsman and commissioners). As noted in the draft report, there are numerous government authorities and regulators that are designed to provide accountability in particular sectors, including community services complaints commissioners, children's commissioners, sector-specific ombudsman, and occupational regulators. However, there are concerns that, even where these exist, they are not working well for Aboriginal and Torres Strait Islander people.

Response

National Transformation

14. A commitment to the principle of self-determination and evidence-based, culturally safe solutions is critical to addressing the inequality faced by Aboriginal and Torres Strait Islander people across Australia, including within the justice system. As the Law Council expressed in its most recent Call to Parties, this is a national shift in perspective that requires national leadership.[14]

15. It will require widespread structural reform in both the inward- and outward-facing operations of government decision-makers, and agencies, towards a culture based in human rights principles and, in particular, embedded in respect, protection, and fulfilment of Indigenous rights. This will necessitate education, truth telling, and two-way learning, to understand diverse perspectives and experiences, including of the law and the justice system, address racism and unconscious bias, and to counter contemporary issues such as the rapid spread of misinformation and disinformation and the oversize impact this can have on marginalised and minority groups.

Human Rights Principles

16. At its core, Closing the Gap is an acknowledgment of the failure to respect, protect and fulfil the rights of Aboriginal and Torres Strait Islander people to the same standard as the rest of the Australian population generally. The 'gaps' referred to within the framework are differences in health and life expectancy and other significant indicators of basic social, economic, and cultural wellbeing.

17. Some of the Socioeconomic Outcomes under the National Agreement directly align with recognised international human rights, such as Outcome 9, which reflects the social, economic and cultural right to an adequate standard of living, including adequate housing.[15] Similarly, Outcome 15 echoes the wording of Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**),[16] reflecting the right of all Indigenous peoples to maintain a distinctive relationship with their lands and waters.[17]

18. Other Socioeconomic Outcomes implicate human rights principles in terms of the circumstances they are seeking to address or the actions that will be required for achievement. As an example, relevant to Outcome 12 ('Aboriginal and Torres Strait Islander children are not overrepresented in the child protection system'), the principle

[14] Law Council of Australia, *2022 Federal Election: Call to Parties* (April 2022) <https://lawcouncil.au/media/media-releases/justice-gap-must-be-bridged>.
[15] *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('**ICESCR**'), art 11.
[16] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) ('**UNDRIP**').
[17] Ibid, art 25.

that, in all actions concerning children, the best interests of the child shall be a primary consideration.[18]

19. Still other areas identified under the Socioeconomic Outcomes represent increased risk and likelihood of Aboriginal and Torres Strait Islander people being subject to breaches of human rights. For example, the political landscape to which Outcomes 11 and 12 refer—that Aboriginal and Torres Strait Islander children and adults are some of the most incarcerated people in the world—has resulted in significant breaches of the human rights of these cohorts within settings of police custody, correctional facilities and youth detention centres, as recognised by Royal Commissions, independent inquiries, coronial inquests, and courts.[19]

20. As such, the failure to close the gap may be seen as indicative of a broader failure in Australia to adopt an approach in public culture and public discourse generally—and more specifically in law and policy making—that is steeped in widespread appreciation and understanding of human rights.

[18] *Convention on the Rights of the Child*, GA Res 44/25, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('**CRC**'), art 3.1.

[19] See, eg, *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) <https://apo.org.au/node/30017>; Human Rights and Equal Opportunity Commission, *Bringing them Home—Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997) <https://humanrights.gov.au/our-work/bringing-them-home-report-1997>; *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017) <https://www.royalcommission.gov.au/child-detention/final-report>; Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 27 March 2018) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>; Law Council of Australia, *Statement on High Court ruling of unlawful use of force in Don Dale* (media statement, 3 June 2020) <https://lawcouncil.au/media/media-releases/statement-on-high-court-ruling-of-unlawful-use-of-force-in-don-dale>; *Binsaris v Northern Territory* [2020] HCA 22; *CRU by Next Friend CRU2 v Chief Executive Officer of the Department of Justice* [2023] WASC 257, [7]; Darya Zadvirna and Jake Sturmer, 'Youth detainees at Banksia Hill subjected to unlawful confinement on a "frequent basis", WA Supreme Court finds', *ABC News* (online, 11 July 2023); Aboriginal Legal Service Western Australia, *Supreme Court of WA Declares that Lockdowns at Banksia Hill Detention Centre are Unlawful* (media statement, 25 August 2022) <https://www.als.org.au/supreme-court-declares-lockdowns-at-banksia-hill-unlawful/>; Committee against Torture, *Concluding observations on the sixth periodic report of Australia*, CAT/C/AUS/CO/6 (5 December 2022); Committee on the Elimination of Discrimination against Women, *Concluding observations on the eight periodic report of Australia*, CEDAW/C/AUS/CO/8 (25 July 2018); Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Australia*, CRC/C/AUS/CO/5-6 (1 November 2019); Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia* (26 December 2017); Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, E/C.12/AUS/CO/5 (11 July 2017). See also, Australian Human Rights Commission, *Human Rights and Aboriginal and Torres Strait Islander Peoples* (Information Sheet) <https://humanrights.gov.au/sites/default/files/content/letstalkaboutrights/downloads/HRA_ATSI.pdf>. See also Law Council of Australia, *Royal Commission into Aboriginal Deaths in Custody requires urgent action 30 years on* (media release, 14 April 2021) <https://lawcouncil.au/media/media-releases/royal-commission-into-aboriginal-deaths-in-custody-requires-urgent-action-30-years-on>.

21. The Law Council has long called for the reinstatement of a robust human rights framework in Australia, and, in particular, the development of a federal human rights Act.[20] It has also called for the domestic application of the UNDRIP,[21] as discussed further in the next section.

22. Parliamentary committees are presently reviewing each of these proposals.[22] The Law Council strongly encourages all parliamentarians to closely consider the reports of these respective committees when they are released, in the context of the long-term and conceptual impact that such proposals may have in contributing to Closing the Gap.

23. Given the systemic nature of the issues facing Aboriginal and Torres Strait Islander peoples, comprehensive legal and policy reform across federal, state and territory jurisdictions is required. Without a legal and policy framework based in human rights, breaches of human rights in Australia, particularly of marginalised groups, are likely to remain 'disturbingly routine'.[23]

[20] See, eg, Law Council of Australia, *Federal Human Rights Charter* (Policy Position, November 2020) <https://lawcouncil.au/resources/policies-and-guidelines/federal-human-rights-charter>; Law Council of Australia, Submission to the Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (3 July 2023) <https://lawcouncil.au/resources/submissions/inquiry-into-australia-s-human-rights-framework>; Law Council of Australia Submission to the Australian Human Rights Commission, *Free and equal: An Australian conversation on human rights* (13 November 2019) <https://lawcouncil.au/resources/submissions/free-and-equal-an-australian-conversation-on-human-rights>. See also Law Council of Australia, Submission to the Australian Human Rights Commission, *Concept Paper for a National Anti-Racism Framework* (11 February 2022) <https://lawcouncil.au/resources/submissions/concept-paper-for-a-national-anti-racism-framework>.

[21] Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) <https://lawcouncil.au/resources/submissions/inquiry-into-the-application-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-in-australia>. See also Law Council of Australia, *2022 Federal Election: Call to Parties* (April 2022) <https://lawcouncil.au/media/media-releases/justice-gap-must-be-bridged>.

[22] Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (online, 15 March 2023) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>; Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Inquiry into the UN Declaration on the Rights of Indigenous People* (online, 2 August 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Aboriginal_and_Torres_Strait_Islander_Affairs/UNDRIP>.

[23] Law Council of Australia, Submission to the Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (13 November 2019) 16 <https://lawcouncil.au/resources/submissions/free-and-equal-an-australian-conversation-on-human-rights>, quoting George Williams and Daniel Reynolds, 'Out on a Limb: Australia's Troubling Exceptionalism on Human Rights' (2017) 38 *Law Society Journal* 40, 40.

Indigenous Rights and Self Determination

24. Respecting the principle of self-determination and its manifestation in practice means recognising and respecting the independent leadership of Aboriginal and Torres Strait Islander people and communities on the political, economic, social, and cultural matters that affect them.

25. The principle of self-determination underpins the UNDRIP,[24] which is the comprehensive human rights standard informing the way governments should engage with and protect the rights of indigenous peoples.[25] It is also a right of all peoples generally under article 1 of both the International Covenant on Civil and Political Rights (**ICCPR**) and International Covenant on Economic, Social and Cultural Rights (**ICESCR**), to which Australia has committed as a signatory.[26] Australia announced its formal support for the UNDRIP on 3 April 2009. However, more than a decade on, it is yet to implement its standards and protections domestically in a comprehensive manner.[27]

26. Members of the Law Council's expert advisory Indigenous Legal Issues Committee have suggested that, notwithstanding the significance of self-determination as a globally recognised principle, there is little evidence that self-determination is well understood or recognised across Australian governments and parliaments generally.[28]

27. The Law Council emphasises in this respect the findings of the draft report that:

> *Too many government agencies are implementing versions of shared decision-making that involve consulting with Aboriginal and Torres Strait Islander people on a pre-determined solution, rather than collaborating on the problem and co-designing a solution.*[29]

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[24] UNDRIP, art 3: 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' See also Report of the Expert Mechanism on the Rights of Indigenous Peoples, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination*, UN Doc A/HRC/48/75 (4 August 2021) 5.

[25] For further information on the meaning of self-determination as it is recognised under the ICCPR, ICESCR, and UNDRIP—and on the status of the UNDRIP under international law—see, eg, Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of caves at the Juukan Gorge* (21 August 2020) 31-46; Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) 6-13; Law Council of Australia, Submission to the Australian Human Rights Commission, *Concept Paper for a National Anti-Racism Framework* (11 February 2022) 26-32.

[26] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('**ICCPR**'); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('**ICESCR**'). For further information, see footnote 25 above.

[27] Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) <https://lawcouncil.au/resources/submissions/inquiry-into-the-application-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-in-australia>. See also Law Council of Australia, *2022 Federal Election: Call to Parties* (April 2022) <https://lawcouncil.au/media/media-releases/justice-gap-must-be-bridged>.

[28] Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) <https://lawcouncil.au/resources/submissions/inquiry-into-the-application-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-in-australia>.

[29] Draft Report, 3.

28. In 2018, as part of the refresh process leading to the National Agreement, the Law Council submitted to what was then the Council of Australian Governments (**COAG**) that substantive progress under the Closing the Gap strategy:

> *… will require a commitment to principles of self-determination, and a recognition that government must negotiate and co-design … with Aboriginal and Torres Strait Islander community controlled organisations.*[30]

29. It further emphasised that:

> *… community involvement in the design and delivery of programs is important. This requires more than mere consultation and requires a recognition that 'Indigenous Australians must have control, ownership and involvement in the solutions'. While it is critical that Aboriginal and Torres Strait Islander people continue to be consulted across the various targets, consultation must be meaningful with resulting action. Most importantly, Aboriginal and Torres Strait Islander people must be empowered in decision making so as to allow self-determination and community-led change.*[31]

30. The Law Council articulated in this submission to COAG that Closing the Gap might usefully be framed around UNDRIP rights and principles:

> *The Law Council's view is that respecting the principle of self-determination and its manifestation in practice by empowering communities and individuals, is critical. The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) provides a comprehensive base for the full participation of Indigenous peoples in the broader society in which they live or by which they may be governed, as well as a mandate for self-determination. The Declaration places the responsibility on Member States to 'provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving First Nations peoples of their integrity as distinct peoples or ethnic identities, or of their cultural values'. The principle of self-determination requires Indigenous participation in decision making, and it is submitted that the Close the Gap strategy should build on and contribute to this goal of Aboriginal and Torres Strait Islander empowerment.*[32]

31. It maintains these recommendations today.

32. Governments of all levels should uphold and protect human rights in the context of Aboriginal and Torres Strait Islander peoples' lives and aspirations, as set out in the UNDRIP.[33] The Law Council recently provided the Senate Legal and Constitutional Affairs References Committee with preliminary suggestions of how domestic application of the UNDRIP might be formally pursued in Australia.[34] Under its *Policy*

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[30] Law Council of Australia, Submission to the Council of Australian Governments, *Closing the Gap Refresh* (4 May 2018) 5 <https://lawcouncil.au/resources/submissions/closing-the-gap-refresh>.
[31] Ibid 6, citing Price Waterhouse Coopers, *Indigenous Incarceration: Unlock the Facts* (May 2017).
[32] Ibid, citing UNDRIP, art 8.
[33] Law Council of Australia, *2022 Federal Election: Call to Parties* (April 2022) <https://lawcouncil.au/media/media-releases/justice-gap-must-be-bridged>.
[34] Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) <https://lawcouncil.au/resources/submissions/inquiry-into-the-application-of-the-united-

Statement on Indigenous Australians and the Legal Profession, the Law Council is committed to promoting implementation of this international instrument and awareness of its provisions amongst the Australian legal profession and community, working in partnership with Aboriginal and Torres Strait Islander peoples.[35]

33. The potential of the UNDRIP is to provide an explicit frame of reference, or minimum standards, of engagement and protection, against which practical actions in respect of efforts to close the gap can be designed and assessed.

34. Governments must ensure, in this context, that the concept and process of 'co-design' begins, at the very inception stage of law and policy making, with the meaningful involvement and leadership of Aboriginal and Torres Strait Islander people and communities.

35. The Law Council notes that it is not only the legal or policy outcome, but the processes leading to that outcome, which should comply with the standards contained in the UNDRIP. This includes, in accordance with article 19, that states shall consult and cooperate in good faith and obtain the free, prior and informed consent of indigenous peoples before adopting and implementing legislative or administrative measures that may affect them.[36]

36. Understanding and incorporating the rights contained in the UNDRIP, in all the ways Aboriginal and Torres Strait Islander people encounter the political, economic, social, and cultural apparatus of the State, would provide a principled framework in which to approach the national task of resetting relations and addressing the impacts of colonisation.

Community owned, culturally safe initiatives

37. Aboriginal and Torres Strait Islander people and organisations are best placed to decide the most effective solutions for their communities, and to implement these solutions in a culturally safe manner.

38. However, the resourcing and funding of Aboriginal-led, place-based solutions must be sufficient and sustainable long-term. Governments must invest consistently in ACCOs and in self-determined innovations and initiatives. Such solutions are effective because they are community-driven and, in deriving from community and Country, strength-based. These solutions present a more efficient use of resources and return significant productivity and wellbeing benefits to communities, with community empowerment in turn being a protective mechanism against intergenerational trauma and disadvantage.

39. At the same time, the laws that governments pursue and introduce through parliamentary processes in their respective jurisdictions must not hamstring self-determined efforts for change. It will be counterproductive, for example, if state

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nations-declaration-on-the-rights-of-indigenous-peoples-in-australia>. See also Australian Human Rights Commission, *Implementation of the United Nations Declaration on the Rights of Indigenous Peoples—Declaration Dialogue Series* (2014) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/declaration-dialogue>.

[35] Law Council of Australia, *Policy Statement: Indigenous Australians and the Legal Profession* (February 2010) [16].

[36] See also United Nations Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: recognition, reparation and reconciliation*, UN Doc A/HRC/EMRIP/2019/3/Rev.1 (2 September 2019) [71].

and territory governments continue to introduce and maintain punitive youth justice laws, which disproportionately impact Aboriginal and Torres Strait Islander children.

40. As the Productivity Commission has noted in its draft report, there are numerous examples of governments implementing laws, policies, and programs counterproductive to—or in some cases directly inconsistent with—their commitments under the National Agreement.[37] The Queensland Law Society has contributed recent examples of such government action, which are set out below at **Annexure A**. This includes amendments to the *Youth Justice Act 1992* (Qld) creating stricter bail and sentencing laws for children and allowing children to be detained in police watch houses and adult prisons.[38]

41. Similarly punitive approaches to youth justice have recently taken place in other jurisdictions. In the Northern Territory, the passage of the *Youth Justice Legislation Amendment Act 2021* (NT) introduced tough new bail laws and expanded electronic monitoring and other powers for police. The Northern Territory Government's advancement of a punitive approach was directly linked to a significant increase in the numbers of children being held in youth detention centres, including on remand before they had been convicted of any offence.[39] This occurred against a backdrop of the Office of the Children's Commissioner Northern Territory condemning the conditions and treatment of children in youth detention centres (in some instances described as 'cage like'),[40] and the broader lapse in implementation of several significant recommendations arising from the Royal Commission into the Protection and Detention of Children in the Northern Territory.[41]

42. In Western Australia, deteriorating conditions within Banksia Hill Detention Centre, and the subsequent decision of the Western Australian Government to move several children to the maximum-security adult prison, Casuarina Prison, continues to have deleterious, even fatal, consequences.[42] The Law Society of Western Australia has

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[37] Draft Report, 34, 67.

[38] See, eg, Queensland Government, *Changes to the Youth Justice Act* (webpage, last updated 25 August 2023) <https://desbt.qld.gov.au/youth-justice/reform/changes-act>.

[39] Office of the Children's Commissioner Northern Territory, *Alice Springs Youth Detention Centre Monitoring Report 2021* (6 October 2021) 4; Jacqueline Breen and Jano Gibson, 'Boy, 10, held on remand in Don Dale as detainee numbers almost double following tougher bail laws in NT', *ABC News* (online, 30 November 2021) <https://www.abc.net.au/news/2021-11-30/nt-don-dale-youth-detention-detainees-surge-10-year-old/100659292>. See also Eddie Cubillo and Thalia Anthony, 'Aboriginal children's lives under threat of increased incarceration: statement by justice advocates in response to Northern Territory punitive policy for young people' (March 2021) for further evidence that the passage of these laws caused concern across the legal and justice community.

[40] Office of the Children's Commissioner Northern Territory, *Don Dale Youth Detention Centre Monitoring Report 2021* (6 October 2021) <https://occ.nt.gov.au/__data/assets/pdf_file/0015/1073112/ddydc-monitoring-report.pdf>; Office of the Children's Commissioner Northern Territory, *Alice Springs Youth Detention Centre Monitoring Report 2021* (6 October 2021) <https://occ.nt.gov.au/__data/assets/pdf_file/0016/1073113/asydc-monitoring-report.pdf>.

[41] See, eg, Law Council of Australia, *Over two years since NT Royal Commission and there has been limited progress for young Indigenous people* (media release, 20 August 2020) <https://lawcouncil.au/media/news/indigenous-incarceration-and-the-northern-territory>.

[42] See, eg, Sarah Collard, 'Indigenous boy, 16, dies a week after being found unresponsive in WA's Casuarina prison', *Guardian Australia* (online, 20 October 2023) <https://www.theguardian.com/australia-news/2023/oct/20/indigenous-boy-16-dies-perth-casuarina-prison-after-being-found-unresponsive>; Miriah Davis, 'Teenage boy found unresponsive at Banksia Hill youth detention', *Nine National News* (online, 12 October 2023) <https://www.9news.com.au/national/serious-incident-at-banksia-hill-youth-detention/337f14be-4b3e-4ced-b059-76ce4f241fab>; Michael Ramsey, 'Disability Royal Commission: "Brutality" at WA youth prison Banksia Hill revealed in harrowing evidence', *Perth Now* (online, 19 September 2022) <https://www.perthnow.com.au/news/wa/disability-royal-commission-brutality-at-wa-youth-prison-banksia-hill-revealed-in-harrowing-evidence-c-8289751>; Keane Bourke, 'Casuarina Prison unit holding juveniles from Banksia Hill Detention Centre to remain open', *ABC News* (online, 15 June 2023) <https://www.abc.net.au/news/2023-06-15/casuarina-prison-unit-for-banksia-hill-juveniles-to-stay-

made a number of public statements addressing these issues, and calling for the Western Australian Government to urgently adopt a justice reinvestment approach, whereby funds spent on incarceration are redirected 'towards community support and prevention and the provision of diversion and rehabilitation programs'.[43]

43. The Victorian Government recently signalled that it was pausing the implementation of justice reforms urgently recommended by the Yoorrook Justice Commission. In a September 2023 report, the Yoorrook Justice Commission had found Victoria's bail laws to be punitive, entrenching disadvantage and leading to increased numbers of Aboriginal adults and children held in prison and detention awaiting trial.[44] The Law Institute of Victoria has previously urged reform of Victoria's bail laws,[45] and considered the State's progress against the justice targets more generally as outlined at **Annexure B**. Organisations such as the Human Rights Law Centre have since called on the Victorian Government to reinstate its commitment to reform, particularly the removal of the reverse onus bail provisions for children.[46]

44. Relevant to Priority Reforms 1 and 3, the Yoorrook Justice Commission was straightforward in its assessment of the recent state of the Victorian Government's partnership with Aboriginal people, noting, for example, that:

> *Yoorrook received evidence that government ignored the concerns and advice of First Peoples about the inevitable impact of its bail reforms [i.e., punitive changes to Victoria's bail laws in 2013 and 2018], making a mockery of government commitments to self-determination and reducing over-imprisonment and eroding the trust that had been generated through*

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open/102483016>; Keane Bourke, '"Barbaric" youth detention conditions in WA', *ABC News* (online, 27 July 2023) <https://www.abc.net.au/news/2023-07-27/banksia-hill-conditions-again-impact-teen-sentenced/102644216>; Commissioner for Children and Young People, 'Don't punish Banksia Hill kids for failures of adult politicians', *The West Australian* (14 July 2022) 41.

[43] Law Society of Western Australia, *Law Society Welcomes "Fresh Set of Eyes" on the Banksia Hill Detention Centre* (media release, 8 June 2023) <https://www.lawsocietywa.asn.au/news/law-society-welcomes-fresh-set-of-eyes-on-the-banksia-hill-detention-centre/>. See also, eg, Law Society of Western Australia, *Why is the Young Offenders Amendment Bill 2023 required?* (media release, 17 May 2023) <https://www.lawsocietywa.asn.au/news/why-is-the-young-offenders-amendment-bill-2023-required/>; Law Society of Western Australia, *No Surprises at Banksia Hill on Tuesday/Wednesday Morning* (media release, 11 May 2023) <https://www.lawsocietywa.asn.au/news/no-surprises-at-banksia-hill-on-tuesday/>; Opinion Piece by Law Society President Ante Golem, 'Government's Disregard for Rule of Law a Dangerous Precedent', *The West Australian* (13 April 2023) <https://www.lawsocietywa.asn.au/news/opinion-piece-by-law-society-president-ante-golem-governments-disregard-for-rule-of-law-a-dangerous-precedent/>; Law Society of Western Australia, *Law Society President says sending children to the main maximum-security prison in Western Australia is not the right solution and there needs to be a rethink* (media release, 25 October 2022) <https://www.lawsocietywa.asn.au/news/law-society-president-says-sending-children-to-the-main-maximum-security-prison-in-western-australia-is-not-the-right-solution-and-there-needs-to-be-a-rethink/>; Law Society of Western Australia and Law Council of Australia, *Excessive use of force on children unconscionable* (joint media release, 15 November 2022) <https://www.lawsocietywa.asn.au/news/joint-media-release-law-council-of-australia-and-the-law-society-of-western-australia-excessive-use-of-force-on-children-unconscionable/>; Law Society of Western Australia, *Law Society Welcomes CCC Investigation following Death at Unit 18, Casuarina Prison* (media release, 20 October 2023) <https://www.lawsocietywa.asn.au/news/law-society-welcomes-ccc-investigation-following-death-at-unit-18-casuarina-prison/>.

[44] Yoorrook Justice Commission, *Report into Victoria's Child Protection and Criminal Justice Systems* (September 2023) 95, 292 and 304 <https://yoorrookjusticecommission.org.au/wp-content/uploads/2023/09/Yoorrook-for-justice-report.pdf>.

[45] Law Institute of Victoria, *Submission to the Inquiry into Victoria's Criminal Justice System* (10 September 2021) <https://new.parliament.vic.gov.au/4ae1ed/contentassets/d293f772cbe04cf39aa9049840795a86/submission-documents/112.-law-institute-victoria_redacted.pdf>. See also Victorian Aboriginal Legal Service, *Government won't meet its Closing The Gap justice targets if it refuses to reform its punitive bail laws* (media release, 29 July 2021).

[46] See, eg, Human Rights Law Centre, *Allan Government's senseless backflip on Victoria's children and young people will cause preventable harm* (media release, 5 October 2023).

the justice-related forms established to listen to and consult with Aboriginal people.

What eventuated was a stark reminder that the State retains power and control over the fate of First Peoples, even when it adopts the language of 'partnership', 'working together', 'respect' and 'self-determination'.[47]

45. Aboriginal and Torres Strait Islander people are uniquely placed to work with governments to achieve change and have an authoritative voice in the laws, policies and programs that affect their lives. However, failures by successive governments across Australia to work effectively with Aboriginal and Torres Strait Islander people have not only slowed progress in addressing disadvantage but exacerbated this disadvantage.

46. Aboriginal and Torres Strait Islander peoples must be clearly heard in identifying and owning the solutions on the issues that affect them and their communities, in accordance with the right to self-determination. It is critical that community-led responses to complex issues have the certainty of long-term commitment.

Implementation of outstanding justice recommendations

47. To achieve the justice outcomes envisaged under the National Agreement, governments at all levels need to commit to sweeping and tangible actions, and systemic reform.

48. There is no shortage of recommendations for concrete actions and reforms, given the numerous commissions and inquiries, informed by local knowledge and lived experience, that have been committed to advocating for change within this sector over decades.

49. The following commitments are all examples of actions previously called for by the Law Council. These are actions endorsed by Aboriginal and Torres Strait Islander peoples that governments can support and implement as a matter of priority to drive down rates of incarceration, domestic violence, and child removal. The Law Council has long recommended that governments:

    (a) urgently progress the recommendations from outstanding reports regarding Aboriginal and Torres Strait Islander peoples' experiences of the legal and justice sectors over the past thirty-five years. At a national level, this includes recommendations from:

        (i) the Royal Commission into Aboriginal Deaths in Custody;[48]

        (ii) the Royal Commission into the Protection and Detention of Children in the Northern Territory;[49]

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[47] Yoorrook Justice Commission, *Report into Victoria's Child Protection and Criminal Justice Systems* (September 2023) 21 <https://yoorrookjusticecommission.org.au/wp-content/uploads/2023/09/Yoorrook-for-justice-report.pdf>.

[48] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) <https://apo.org.au/node/30017>. See Law Council of Australia, *Royal Commission into Aboriginal Deaths in Custody requires urgent action 30 years on* (media release, 14 April 2021) <https://lawcouncil.au/media/media-releases/royal-commission-into-aboriginal-deaths-in-custody-requires-urgent-action-30-years-on>.

[49] *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, 17 November 2017) <https://www.royalcommission.gov.au/child-detention/final-report>. See Law Council of Australia, *Law Council and NT Law Society support increase of NT age of criminal responsibility* (media

(iii) the Australian Law Reform Commission's *Pathways to Justice* Report;[50]

(b) appropriately fund Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services, including in regional, rural and remote areas, commensurate with high unmet legal needs across local populations in the criminal, civil and family contexts;[51]

(c) adhere to the Aboriginal Child Placement Principle (**ACPP**)—the ACPP should be better monitored and implemented, including through compliance reporting and oversight, with analysis of the instances in which children are not being placed according to kinship ties followed by targeted, evidence-based investment to improve outcomes where possible;[52]

(d) raise the minimum age of criminal responsibility from 10 to at least 14 years old across all jurisdictions, without exception—and ensure that therapeutic and wraparound services are available and appropriately funded to address the underlying drivers of behaviours that could lead to later contact with the criminal justice system;[53]

(e) audit existing laws, policies, and practices for compliance with the UNDRIP, and take formal steps towards comprehensive domestic application of this instrument;[54]

(f) invest in reciprocal two-way learning and education of key public sector staff in government agencies and services responding to the needs of Aboriginal and Torres Strait Islander communities;[55]

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release, 31 January 2019) <https://lawcouncil.au/media/media-releases/Law-Council-and-NT-Law-Society-support-increase-of-NT-age-of-criminal-responsibility>.

[50] Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 27 March 2018) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>. See Law Council of Australia, *Time for a Government response to Pathways to Justice Report* (media release, 25 March 2021) <https://lawcouncil.au/media/media-statements/time-for-a-government-response-to-pathways-to-justice-report>.

[51] Law Council of Australia, *2022 Federal Election: Call to Parties* (April 2022) <https://lawcouncil.au/media/media-releases/justice-gap-must-be-bridged>. See also See also Law Council of Australia, Submission to the Australian Human Rights Commission, *Concept Paper for a National Anti-Racism Framework* (11 February 2022), [44] <https://lawcouncil.au/resources/submissions/concept-paper-for-a-national-anti-racism-framework>.

[52] Law Council of Australia, Submission to the Department of Social Services, *Implementing the successor plan to the National Framework for Protecting Australia's Children* (26 July 2021) <https://lawcouncil.au/resources/submissions/implementing-the-successor-plan-to-the-national-framework-for-protecting-australias-children>.

[53] Law Council of Australia, Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group, *Review of the Age of Criminal Responsibility* (2 March 2020) <https://lawcouncil.au/resources/submissions/council-of-attorneys-general-age-of-criminal-responsibility-working-group-review>; Law Council of Australia, *Policy Statement on the Minimum Age of Criminal Responsibility* (17 December 2019); Law Council of Australia, *Policy Statement Addendum on Responses to Children under the Minimum Age of Criminal Responsibility* (25 June 2022) <https://lawcouncil.au/resources/policies-and-guidelines/policy-statement-minimum-age-of-criminal-responsibility>.

[54] Law Council of Australia, Submission to Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Application of the United Nations Declaration on the Rights of Indigenous Peoples in Australia* (24 June 2022) <https://lawcouncil.au/resources/submissions/inquiry-into-the-application-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-in-australia>.

[55] Law Council of Australia, Submission to IP Australia, *Enhance and Enable—Indigenous Knowledge Consultations 2021* (3 June 2021) <https://lawcouncil.au/resources/submissions/enhance-and-enable-indigenous-knowledge-consultations-2021>, referencing Law Council of Australia, 'People—Building Legal Capability and Awareness', *Justice Project* (Final Report, August 2018) 21-23.

(g) invest in infrastructure, particularly in remote communities, including information technology infrastructure, and protective infrastructure such as stable housing;

(h) make front-end investment in families—invest in preventative support services and infrastructure to curtail intergenerational trauma and disadvantage, with emphasis placed on the provision of culturally informed programs to build the skills of families;[56]

(i) provide sufficient through-care on release from prison and places of detention, and transition support programs for young people upon their release from child protection placements, including with accessing income support payments, education or employment, and long-term accommodation;

(j) screen adults and children in correctional facilities and detention centres for undiagnosed or untreated mental and physical health conditions and communication and learning difficulties, and provide rehabilitative supports where needed;

(k) ensure people in custodial settings retain their entitlement to the Medical and Pharmaceutical Benefits Scheme funded services throughout all stages of the custodial cycle to ensure access to appropriate health care and treatment;[57] and

(l) establish a system of National Preventive Mechanisms to monitor places of detention, as mandated by Australia's international legal obligations under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[58] [59]

50. The New South Wales Bar Association has contributed a further list of recommendations that should be implemented, specific to NSW, which are set out at **Annexure C**. The Law Institute of Victoria's assessment of Victorian progress against the justice targets, at **Annexure B**, also includes several specific recommendations. Similar lists of recommendations that successive governments have not considered or implemented could be produced for most jurisdictions. This is despite such recommendations being evidence-based, endorsed by independent experts and organisations, and the subject of sustained advocacy over years. The tragedy of Closing the Gap, particularly the lack of progress towards the justice sector targets, is that such recommendations are frequently overlooked in favour of the rapid introduction of more reactive and punitive laws, policies, and programs, such as noted

[56] Law Council of Australia, Submission to the Department of Social Services, *Implementing the successor plan to the National Framework for Protecting Australia's Children* (26 July 2021) <https://lawcouncil.au/resources/submissions/implementing-the-successor-plan-to-the-national-framework-for-protecting-australias-children>; Law Council of Australia, *Policy Statement Addendum on Responses to Children under the Minimum Age of Criminal Responsibility* (25 June 2022) <https://lawcouncil.au/resources/policies-and-guidelines/policy-statement-minimum-age-of-criminal-responsibility>.

[57] Law Council of Australia, *2019 Federal Election: Call to Parties: All Australians deserve access to justice (2019), <https://lawcouncil.au/publicassets/fde82f35-2457-e911-93fc-005056be13b5/LCA%20Call%20to%20Parties%202019_web.pdf>*; see also Australian Medical Association, *AMA Position Statement: Health Care in Custodial Settings* (2023), <https://www.ama.com.au/sites/default/files/2023-03/AMA%20position%20statement%20-%20Health%20Care%20in%20Custodial%20Settings%20-%202023.pdf>.

[58] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199 (entered into force 22 June 2006).

[59] Law Council of Australia, Submission to Australian Human Rights Commission, *Optional Protocol to the Convention against Torture in the context of Youth Justice* (27 May 2016) <https://lawcouncil.au/publicassets/7928c51b-fbb4-e611-80d2-005056be66b1/3152_-_OPCAT_Inquiry.pdf>.

at paragraphs 41 to 44 of this submission—often characterised as 'tough on crime' measures.[60,61]

Effectiveness of policy partnerships

51. As discussed, the Law Council's view is that policy partnerships can only be effective if they based in the above principles of human rights, Indigenous rights and self-determination.

52. It emphasises in this respect the Productivity Commission's observation in the draft report that policy partnerships 'currently function as forums for discussion, with little if any authority for shared decision-making on significant policy matters'.[62]

53. While recognising that relationships can take time to embed to achieve real progress, the Law Council has itself over the past few years found it difficult to acquire information on the aims and work of the Justice Policy Partnership and therefore to monitor its effectiveness. This raises additional concerns of transparency and accountability.

54. A lack of public information can have significant consequences. It impacts the ability of external stakeholders like the Law Council to advocate in an informed manner to government agencies on how a government's role in, approach to, or commitments under, a partnership might improve, following consultation with Aboriginal-led organisations. It removes an important part of a democracy's civic checks and balances, which is the broader involvement of mainstream civil society in support of Aboriginal-led organisations, following consultation with them. The key concern is that the negotiating power of the Coalition of Peaks may be diminished where governments are not accountable publicly for their partnership processes.

55. On the face of the small amount of information that has been publicly available, the Law Council has been concerned about the seeming lack of specific and concrete actions identified for pursuit under the Justice Policy Partnership, and detailed implementation plans.[63]

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[60] Law Society of Western Australia, *Law Society Welcomes "Fresh Set of Eyes" on the Banksia Hill Detention Centre* (media release, 8 June 2023) <https://www.lawsocietywa.asn.au/news/law-society-welcomes-fresh-set-of-eyes-on-the-banksia-hill-detention-centre/>, quoting Western Australia, Parliamentary Debates, Legislative Assembly, Wednesday 16 June 2010 ('Justice Reinvestment Strategy', Mr Paul Papalia):

> *For generations, politicians in Western Australia from both ends of the political spectrum have engaged in a juvenile debate about who is toughest. Invariably it involves paunchy greying late-middle-aged men jumping in front of the media, beating their chests and telling us all how tough they are. The Labor Party today chooses to draw a line under this debate and calls on the government to do something positive; to engage in a mature debate and to elevate the level of debate about law and order generally, but specifically about corrective services and how we deal with that in this state. … Why on earth [have politicians done this]? Because they would assume that the goal to pursue the tough-on-crime debate was to get endless boundless amounts of free positive feedback from the media and positive support for their populist line from the vast majority of Western Australians.*

[61] The examples provided at paragraph 40 relate to the criminal justice system. However, examples of the neglect of evidence-based recommendations, in order for politicians to instead continue a deficit narrative in service of perceived political advantage, also extend to other contexts. See, eg, Katherine Murphy, 'Bridget Archer says Dutton appears to be "weaponising" child abuse for "political advantage"', *Guardian Australia* (online, 19 October 2023).

[62] Productivity Commission, Draft Report, 3.

[63] See, eg, Attorney-General's Department, *Justice Policy Partnership* (webpage, undated) <https://www.ag.gov.au/legal-system/closing-the-gap/justice-policy-partnership>. The Justice Policy Partnership has published on this webpage only a 'High level work plan'. In addition, while the website suggests that the Justice Policy Partnership's latest meeting was scheduled for June 2023, at time of writing this submission, no meeting summary has been published since 17 March 2023. *The Justice Policy Partnership Meeting 7 Summary* noted that: 'representatives continued to review and consider draft versions of the Strategic Framework and recommendations to the Joint Council on Closing the Gap. Quorum was not

56. The Law Council has previously called for the Justice Policy Partnership to be given the mandate and resources necessary to ensure that the recommended critical legal and policy reforms made in numerous inquiries across all jurisdictions are implemented as a matter of urgency.[64]

57. It is difficult to know the extent to which the Justice Policy Partnership, and by extension the Coalition of Peaks, is involved in recent initiatives, such as the Commonwealth Government's announced commitments to Justice Reinvestment,[65] which have the potential to be transformative for local communities.

58. It is also difficult to grasp the full extent to which the partnerships are inconsistent with Priority Reform 1 that partnerships will be 'genuine' and involve 'shared decision-making'. The Law Council would appreciate more information in this context.

Shifting service delivery to Aboriginal community-controlled organisations

59. The Law Council, taking into account advice from its constituent bodies, agrees that improvements to funding and contracting of ACCOs are necessary and that funding arrangements must cover the full costs of services provided. Funding arrangements for ACCOs should also be provided for longer terms, and be more flexible, while remaining accountable. The Law Council understands that short-term funding cycles create significant administrative burdens, and are a barrier to long-term and sustainable planning. It is difficult for ACCOs (or any organisation subject to short-term funding cycles) to implement full-service, wraparound programs, which are necessary for the effective and culturally safe delivery of services, including legal services, to Aboriginal and Torres Strait Islander people.

60. By way of example of appropriately covering the full cost of services provided, the Law Council notes the following information from the Law Society of New South Wales. There have been a number of pleasing developments in NSW in respect of improving access to justice for Aboriginal and Torres Strait Islander people. These include the establishment and commencement of an Indigenous tenancy list in the NSW Civil and Administrative Tribunal, and the Winha-nga-nha list in the care and protection jurisdiction of the Children's Court in Dubbo, NSW (a busy regional centre). Both of these lists have adopted a therapeutic wraparound model for the delivery of legal and other services. The Law Society of New South Wales understands from its members that services relied upon in the tenancy list include the Aboriginal Legal Service and local ACCOs, including Aboriginal tenant advocacy services. However, the new workload is being supported out of the existing funding envelopes of these services. Without sufficient resourcing, the efficacy of these initiatives cannot be sustained, which may threaten their viability, and, from the NSW Government's perspective, the likelihood of renewing or expanding this approach altogether.

61. The Law Institute of Victoria has similarly noted that funding is required to support the frontline work of Victorian ACCOs, which are best placed to provide programs for Aboriginal people aimed at keeping families safe and keeping Aboriginal people out of the criminal justice and child protection services. The Law Institute of Victoria

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able to be established, with four of the independent representatives not being available to attend the meeting. This meant that Agenda items were able to be discussed and progressed, but no decisions were able to be made.'

[64] Law Council of Australia, *Justice gap must be bridged* (media release, 17 March 2022) <https://lawcouncil.au/media/media-releases/justice-gap-must-be-bridged>.

[65] See, eg, Department of Prime Minister and Cabinet, *Now Open: National Justice Reinvestment Program* (media release, 15 September 2023) <https://ministers.pmc.gov.au/burney/2023/now-open-national-justice-reinvestment-program>.

contends that successive Victorian state budgets have failed to deliver the funding necessary to support the rising demand for ACCO services, particularly in regional growth corridors in Victoria.

62. The Law Council strongly agrees with the contention of the draft report that the Priority Reforms are interconnected, interdependent and must be progressed together.[66] It suggests also that properly meeting Priority Reform 2 will be key to ultimately delivering on the Socioeconomic Outcomes. The aspirations of the National Agreement cannot be achieved without adequate resourcing of, and capacity building for, ACCOs. Relevant to the legal sector, and to meeting the justice and care and protection targets, the importance of adequate funding of Aboriginal and Torres Strait Islander Legal Services (**ATSILS**), at comparable levels with other providers in the legal assistance sector, cannot be overstated.

63. The Australian Law Reform Commission's *Pathways to Justice* report noted that:[67]

> *More broadly, stakeholders submitted that barriers to access to justice can be reduced by collaborations between non-Indigenous legal assistance providers and Aboriginal and Torres Strait Islander organisations. The importance of collaboration was linked to addressing some Aboriginal and Torres Strait Islander peoples' reluctance to use mainstream services because of a history of racism and culturally insensitive service provision.*

64. In the Law Council's opinion, this view continues to hold true. It understands from the Law Society of New South Wales, for example, that it is difficult for the ALS in NSW to recruit and retain staff, given the disparity between salaries and working conditions with other legal assistance providers. This has consequences for the ability of the ALS as an organisation to thrive, and this has significant implications for services available to Aboriginal and Torres Strait Islander peoples who are often more likely to place trust in their services, including due to a general distrust of the justice system.[68] This also has consequences for the general integrity of justice, care, family and civil law systems, which cannot function effectively without there being a healthy market of legal assistance providers available.

65. In the Law Council's view, there must be recognition that the services provided by ACCOs (and other community organisations) cannot be sustainable if they are continually asked to stretch without additional resourcing.

Transformation of government organisations

66. Consistent education and training remain necessary to improve the cultural capability of workforces that interact with Aboriginal and Torres Strait Islander people and impact their lives. This includes governments and the public sector. It also includes professional services such as legal practitioners who work with First Nations persons and those working within the institutions and offices of the justice sector.

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[66] Draft Report, 68-69.

[67] Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 27 March 2018), [10.23] <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.

[68] See, eg, Mick Gooda's evidence to the 2017 Senate Inquiry into Legal Assistance Services, as cited in the inquiry report at [3.46]: "It is particularly important that ATSILS and [Family Violence Prevention Legal Services] be adequately resourced because Aboriginal and Torres Strait Islander people need not just any legal services, but culturally competent legal services. There are many complex factors involved in the contact between Aboriginal and Torres Strait Islander people and the justice system."

67. As noted earlier in this submission, a national shift towards a human rights-based approach in public discourse and in law and policy making, which prioritises indigenous rights principles such as self-determination and free, prior, and informed consent, is necessary if the gap between Indigenous and non-Indigenous life outcomes is to be closed within the set timeframes. At a workforce level, this requires not only education about international human rights instruments and standards, but also education in terms of comprehensive cultural competency programs, and undoing unconscious bias.

68. For example, the Law Council has previously highlighted that cultures and practices within certain services associated with the pursuit of Socioeconomic Outcomes 10 to 13 require improvement. It has noted:

(a) all sectors involved in responses to children should be required to meet certain minimum standards of training and practice, which are child-centred, trauma-informed and culturally safe;[69]

(b) services, programs, training and procedures should be designed, developed, implemented and reviewed in consultation with children, their families and communities, and in particular Aboriginal and Torres Strait Islander children, families and communities;[70]

(c) child protection services should be trained to engage culturally competent family supports in the first instance, including programs to develop parenting skills and provide protective infrastructure and resources, rather than an overreliance on care and protection orders and out-of-home care placements;[71]

(d) there is a need for intensive training of child protection officers in Aboriginal and Torres Strait Islander culture, language, belief and kinship systems, and family relationships;[72]

(e) systemic change in the culture of police and corrective services officers is required, including the development of protocols specific to engagement with and treatment of Aboriginal and Torres Strait Islander people within these services, as well accountability and oversight mechanisms;[73] and

(f) police should receive intensive cultural competency training, noting that, at present, Aboriginal and Torres Strait Islander people fare worse at every stage of the criminal justice process, and are more likely to be questioned by police,

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[69] See, eg, Law Council of Australia, *Policy Statement Addendum on Responses to Children under the Minimum Age of Criminal Responsibility* (25 June 2022) <https://lawcouncil.au/resources/policies-and-guidelines/policy-statement-minimum-age-of-criminal-responsibility>.
[70] Ibid.
[71] See, eg, Law Council of Australia, Submission to the Department of Social Services, *Implementing the successor plan to the National Framework for Protecting Australia's Children* (26 July 2021) <https://lawcouncil.au/resources/submissions/implementing-the-successor-plan-to-the-national-framework-for-protecting-australias-children>.
[72] Ibid.
[73] See, eg, Law Council of Australia, 'Recommendations and Group Priorities', *Justice Project* (Final Report, August 2018); Law Council of Australia, 'People—Building Legal Capability and Awareness', *Justice Project* (Final Report, August 2018); Law Council of Australia, 'Prisoners and Detainees', *Justice Project* (Final Report, August 2018); Law Council of Australia, Submission to the Australian Human Rights Commission, Access to Justice in the Criminal Justice System for People with Disability (9 August 2013). See also Australian Law Reform Commission, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 27 March 2018) <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>.

charged by police with a criminal offence, and arrested by police rather than proceeded against by summons.[74]

69. Trust of communities in the organisations delivering services is paramount, and such trust will be largely dependent on Aboriginal and Torres Strait Islander people experiencing and maintaining ongoing confidence in services as being culturally safe.

70. The importance of cultural competency can be emphasised through considering the implications on the health and safety of Aboriginal and Torres Strait Islander participants where cultural competency is lacking. For example, stakeholders consulted during the Justice Project noted that Aboriginal participants may feel shamed if they are being asked to reveal information that is beyond their traditional authority, and be reticent to do so.[75]

71. Another example is where lawyers who work with Aboriginal and Torres Strait Islander clients lack the knowledge and skills to be able to communicate meaningfully and effectively with their clients. This can have significant consequences given both the professional duty on a lawyer to act on the informed instructions of their client and the often high-stakes outcomes of legal issues.[76] The Law Council's Young Lawyers Committee raises, for example, the observation that some lawyers do not know about 'gratuitous concurrence',[77] or begin legal practice without sufficient basic skills or understanding of the socioeconomic realities faced by many communities such as low literacy levels, as detailed in the case study at **Annexure D**.

72. Organisations and services should also be undertaking reciprocal, two-way learning with Aboriginal and Torres Strait Islander people and communities. From the perspective of the delivery of legal services, the Law Council's Justice Project highlighted some key features of effective community legal education for Aboriginal and Torres Strait Islander people, which may also be relevant in other contexts. These included that compulsory legal education (**CLE**) delivery ought to be informed by the different cultural experiences of communities and individuals. By incorporating elders and community leaders into its design and delivery, CLE is most likely to overcome distrust of the legal system, engage people more effectively and provide information in the language of non-legal stakeholders. Two-way learning approaches are also valuable as they allow service providers to become familiarised with cultural perspectives, and the legal needs of communities and their conceptions of the legal and justice system.[78]

73. The formation of community partnerships and engaging directly with stakeholders on the ground is crucial to fostering culturally safe organisations and services. Those with the appropriate level of cultural authority, who are well-attuned to the needs of their communities and best placed to advocate for their interests, must be empowered in this regard.

74. Current examples of two-way learning include the *Yarning for Change* study, as explained by the First Nations Legal Policy Committee of the Queensland Law Society at **Annexure E**.

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[74] Ibid.

[75] Law Council of Australia, 'People—Building Legal Capability and Awareness', *Justice Project* (Final Report, August 2018) 21-23.

[76] See eg, the summary of the Queensland Court of Appeal's findings regarding the miscarriage of justice experienced by Robyn Kina in her conviction for murder, in which a fundamental failure of communication with her lawyers had occurred, in *The Queen v Robyn Bella Kina* [1993] QCA 480

[77]

[78] Law Council of Australia, 'People—Building Legal Capability and Awareness', *Justice Project* (Final Report, August 2018).

75. Cultural competency of organisations can also be enhanced through externally produced and provided training courses, internal cultural liaison officers, and generally increasing representation at all levels within an organisation, provided the appropriate supports are offered to relevant staff performing these roles.

76. The Law Council supports measures to increase cultural and linguistic diversity (**CALD**) in membership and particularly leadership roles across both the private and public sectors. In addition to improving the quality of decision-making through a greater diversity of perspectives offered by lived experiences of racism and racial discrimination, this would also have the effect of increasing public confidence in institutions such as the justice system, with which CALD groups have traditionally been reluctant to engage due to previous negative interactions both in Australia and other countries.

Indigenous data sovereignty

77. The Law Council supports the objective of Aboriginal and Torres Strait Islander data governance and sovereignty. It notes, however, that significant capacity building and upskilling of Aboriginal and Torres Strait Islander communities and organisations will need to occur in this area.

78. At the simplest level, governments need to invest in information technology infrastructure for Aboriginal and Torres Strait Islander communities to ensure equal access to the internet, regardless of location for an individual or community.[79]

79. This is essential to facilitating access to data collection and other technologies. It is also needed in the first instance to provide education to Aboriginal and Torres Strait Islander people, while on Country, about data collection, management and analysis, to increase the numbers of people equipped with these skillsets in communities, equal to demand.[80]

80. The Law Council notes with interest the Initial Report of the First Nations Digital Inclusion Advisory Group, released on 23 October 2023, which considers the digital divide faced in many Aboriginal and Torres Strait Islander communities. It highlights the emphasis in the report that reducing this gap 'will require significant and new investment by governments in partnership with industry and those communities',[81] and that:

> *… investments in connectivity must be based on the needs of First Nations communities, rather than the commercial interest of telecommunications carriers. Grants programs can focus too much on the latter, meaning that investment doesn't flow to where it is needed most. … We have also heard that digital inclusion will not be solved just by investments in connectivity. Affordability is critical, particularly in terms of the relative cost of data on prepaid plans. Digital ability is also critical, not only in people understanding and navigating online services, but also ensuring First Nations people and communities understand their connectivity needs and the options available to them. Ability*

[79] See, eg, Lowitja Institute, *Transforming Power: Voices for Generational Change—Close the Gap Campaign Report 2022* (March 2022) <https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-2022>.
[80] Ibid.
[81] First Nations Digital Inclusion Advisory Group, *Initial Report* (October 2023) 1 <https://www.digitalinclusion.gov.au/sites/default/files/documents/first-nations-digital-inclusion-advisory-group-initial-report.pdf>.

encompasses digital literacy, meaning that there must be support for people to navigate digital spaces in a safe and appropriate way.[82]

81. The Law Council has not had the opportunity to consider the Initial Report in full, but on preliminary analysis it commends the recommendations at pages 21 to 30 of the Initial Report as targeted and specific, with concrete action items identified for both short-term improvements and long-term planning. It notes the Initial Report was developed by First Nations leaders in close consultation with communities and a focus on their needs, and encourages all governments to closely consider its findings as a priority.

[82] Ibid.

Annexure A

82. The following example of recent government action inconsistent with the National Agreement was provided by the First Nations Legal Policy Committee of the Queensland Law Society (**QLS Committee**), and is specific to Queensland.

Punitive criminal law reforms in Queensland

83. The QLS Committee is concerned that the Queensland Government's hardening of criminal law will have significant and disadvantageous outcomes for Aboriginal and Torres Strait Islander Peoples. It notes that earlier this year the Strengthening Community Safety Bill 2023 (Qld) was announced without consultation with First Nations leaders, which seems directly at odds with the Queensland Government's intention to cultivate a new relationship with First Nations peoples as part of its commitments to the National Agreement. This legislation, which came into effect in March 2023, introduced more punitive bail laws for children, including presumptions against bail, the ability to declare a child a 'serious repeat offender' with implications for their sentencing, and the expansion and extension of the use of electronic monitoring devices as a condition of bail on children.

84. In August 2023, the QLS Committee highlights that the Queensland Government made additional changes to the *Youth Justice Act 1992* (Qld) to declare a police watchhouse or an adult jail as a 'youth detention centre' to permit jailing a child there. These amendments sunset on 31 August 2027, although this timeframe can be extended for an additional 12 months. The QLS Committee highlights that it is difficult to reconcile such recent local criminal law reform with the objectives of the National Agreement.

85. Its concern is that there is a lack of government accountability for actions in disregard to their commitments to the Closing the Gap agreements.

Annexure B

86. The following information on the Victorian Government's progress against Socioeconomic Outcomes 10–13 was provided by the Law Institute of Victoria (**LIV**), and is specific to Victoria.

Introduction

87. Annexure B will comment on Victoria's progress against the National Agreement justice outcomes, Outcomes 10–13, and factors affecting progress toward meeting those Outcomes. Before doing so, it will briefly describe the Victorian policy context to provide important background.

88. References to statistics are based on the best available data as at December 2022.

Victorian Context

89. In Victoria, the LIV indicates that the National Agreement forms just one part of a broader policy system striving to achieve Aboriginal and Torres Strait Island equity. Other important components of the system include the Victorian Aboriginal Affairs Framework 2018–2023 (**VAAF**) and Burra Lotjpa Dunguludja—The Aboriginal Justice Agreement Phase 4 (**AJA4**).

90. The VAAF is the Victorian Government's primary, overarching framework for working with Aboriginal Victorians, organisations, and the wider community to drive action and improve socio-economic conditions. The AJA4 is the latest iteration of plans made between the Aboriginal community and the Victorian Government to improve Aboriginal justice outcomes, family and community safety, and reduce over-representation in the criminal justice system.

91. Victoria's commitments under the VAAF and the AJA4 predate and are more ambitious than its commitments under the National Agreement, especially with respect to criminal justice. As such, the Victorian Government views its commitments under the National Agreement as a baseline target that it hopes to surpass, sometimes quite significantly.

92. Accordingly, the LIV indicates that Victoria's progress toward meeting the National Agreement's Outcomes should be scrutinised in light of the following facts:

    (a) Victoria has been implementing strategies designed to target matters captured in the National Agreement's justice outcomes for years before the National Agreement came into being; and

    (b) Victoria explicitly intends to surpass the National Agreement's Outcomes, meaning that their mere satisfaction would reflect a failure to meet its own, more ambitious targets.

Outcome 10

93. The LIV indicates that adults, especially women, remain significantly and increasingly over-represented in Victorian prisons. It is concerned that Victoria is not on track to meeting more ambitious targets it has set for itself under the VAAF and AJA4, and troubling trends are emerging—including that in 2020–21, 58.8 per cent of Aboriginal women in prison were on remand.[83] The rate of recidivism among Aboriginal adults is

[83] Victorian Government, *Aboriginal Affairs Report 2021* (Report, 2021) 104.

also higher than for people who are not Aboriginal,[84] indicating that drivers of criminogenic needs for members of the Aboriginal community are not being addressed.

94. The LIV indicates that changes to the *Bail Act 1977* (Vic) in 2018 are widely considered to be driving recent increases in prison populations. Relevant amendments have included:

    (a) the introduction of a two-step test requiring a person charged with a Schedule 1 offence to show exceptional circumstances justifying the granting of bail, and requiring a person charged with a Schedule 2 offence show a compelling reason justifying the granting of bail; and

    (b) an increase in the number of Schedules 1 and 2 offences.

95. Taken together, the LIV is concerned that these amendments have effectively created a presumption against bail for a broad range of offences, including some lower-level offences.

96. The changes have particularly impacted Aboriginal women, who have become the fastest growing group to be imprisoned in Victoria. According to the Victorian ALS, many of these women are imprisoned on remand for minor offences that would not ordinarily result in a prison term.[85]

97. The LIV submits that reform to Victoria's bail laws is urgently needed if Victoria is to meet Outcome 10 of the National Agreement. In particular, the LIV recommends that the two-step test be repealed and a presumption in favour of bail should exist, except in circumstances where there is a specific and immediate risk to the physical safety of another person.[86]

Outcome 11

98. Work still needs to be done to reduce the rate of young people aged 10–17 years in detention, and in particular, the number of unsentenced children in custody. Concerningly, the proportion of unsentenced children in custody on an average day more than doubled from 2011–12 to 2018–2019, reaching 47 per cent.[87]

99. The LIV considers it critically important for the Victorian Government to maintain its commitment to raising the age of criminal responsibility to at least 14 years if it intends to reach the target. Aboriginal children are disproportionality impacted by this because they are more likely to have contact with the youth justice system at an early age, less likely than non-Aboriginal children to receive a caution from police, and more likely to be charged with a criminal offence.[88] In April 2023, the Victorian Government

[84] Ibid, 104, 107.
[85] Victorian Aboriginal Legal Service, 'Government won't meet its Closing The Gap justice targets if it refuses to reform its punitive bail laws' (Media Release, 29 July 2021).
[86] Law Institute of Victoria, *Submission to the Inquiry into Victoria's Criminal Justice System* (10 September 2021) <https://new.parliament.vic.gov.au/4ae1ed/contentassets/d293f772cbe04cf39aa9049840795a86/submission-documents/112.-law-institute-victoria_redacted.pdf>.
[87] Ibid.
[88] Commission for Children and Young People, 'Our Youth, Our Way: Inquiry into the overrepresentation of Aboriginal children and young people in the Victorian youth justice system, Summary and recommendations' (Report, 2021).

announced its intention to raise the minimum age of criminal responsibility from 10 years old to 12 by late 2024, and to 14 years old by 2027.[89]

100. Equally important is the provision of culturally safe support services to Aboriginal children. It is critical that children, especially those under 14 years, who exhibit troubling or criminal behaviours get the support that they need. The focus of the criminal justice system for these offenders should be on prevention and early support, as well as rehabilitation, rather than punishment. These services need to be culturally appropriate, properly funded, and accessible across Victoria.

Outcome 12

101. In Victoria, the LIV is concerned that the rates of over-representation of Aboriginal children in out-of-home care is substantially higher than the national average. Nationally in 2022, the rate of Aboriginal and Torres Strait Islander children aged 0–17 years in out-of-home care was 56.8 per 1000 children in the population.[90] In Victoria, the rate was 102.2 per 1000 children in the population.[91] For comparison, the rates for non-Indigenous children within the same demographic and time period were much lower Australia-wide, at 4.8 per 1000 children in the population, and in Victoria, at 4.7 per 1000 children in the population.[92] The Productivity Commission also assessed Victoria's progress under Outcome 12, on data from 2019 to 2022, as 'worsening'.[93]

102. In many circumstances, Aboriginal and Torres Strait Islander people engaging with the child protection system may be eligible for legal aid assistance. The LIV has previously supported reform to the Victoria Legal Aid guidelines for grants of legal assistance in child protection matters to improve the quality and extent of legal representation and assist to address any power imbalances between vulnerable families and the State, particularly where parties identify as Aboriginal or Torres Strait Islander.

103. In 2021, the Victorian Government introduced the Children, Youth and Families Amendment (Child Protection) Bill 2021 (Vic) with the intention of modernising the child protection jurisdiction, including the use of more progressive terminology.

104. However, the Bill also proposed changes which were not supported by the LIV, including the extension of time for filing an Emergency Care Application under clause 13 and the requirement for the Court to make an Interim Accommodation Order to a suitable person under clause 62. The LIV held concerns that these provisions would result in internal inconsistencies and the removal of rights and protections without immediately apparent justification, specifically with respect to the paramount principle of the best interests of the child.

105. Further, the LIV held concerns that the expansion of proof under clause 60 would potentially extend the coverage of the *Children, Youth and Families Act 2005* (Vic) to Victorian families, and families in particular, who may otherwise have no reason or need to be subject to the intervention of the child protection system. Though this Bill

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[89] Premier of Victoria, *Keeping Young People Out of the Criminal Justice System* (media release, 26 April 2023) <https://www.premier.vic.gov.au/keeping-young-people-out-criminal-justice-system>.
[90] 'Material for download—Children are not overrepresented in the child protection system data tables', *Table CtG12A.1 Out-of-home care, state and territory and Australia, by Indigenous status (a)* (Microsoft Excel Datasheet, 30 June 2022) available at Productivity Commission, *Socioeconomic outcome area 12* (online, 30 June 2022) <https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area12>.
[91] Ibid.
[92] Ibid.
[93] Productivity Commission, *Socioeconomic outcome area 12* (online, 30 June 2022) <https://www.pc.gov.au/closing-the-gap-data/dashboard/socioeconomic/outcome-area12>.

has now lapsed, the LIV was concerned that if this Bill were to be passed into legislation, these provisions would have a significant and disproportionate effect on Aboriginal children given the existing overrepresentation of children in out-of-home care. Further iterations of this Bill will need to be carefully considered to ensure such concerns are not repeated.[94]

Outcome 13

106. The LIV underlines that there is an urgent need to ensure service coordination and more collaborative systemic responses to the intersectional nature and complexity of the needs of Aboriginal and Torres Strait Islander children and families experiencing family violence and who are 'at risk' of justice involvement.

107. The Victorian Royal Commission into Family Violence noted that Aboriginal and Torres Strait Islander people are significantly less likely to report family violence than non-Indigenous people for a range of reasons including 'fear about the consequences of disclosure [in particular, child removal], distrust of government agencies and service providers, historical and cultural factors and a lack of access to support services'.[95]

108. As poverty, unsafe living conditions, a lack of appropriate alternative accommodation and family violence are often interconnected, Aboriginal and Torres Strait Islander women affected by violence may be hesitant to contact authorities due to fears of child removal and losing social housing rights. This fear is exacerbated by the historical intergenerational trauma associated with child removal for many parents.

109. The LIV submits that the Victorian Government should increase crisis accommodation and transitional housing management programs for Aboriginal people, and advocate to the Federal Government to include homelessness and family violence as exemptions for meeting Centrelink Newstart Reporting Obligations. Facilitating access to culturally safe family violence response services, support networks, allied social and health services and programs, may promote improved engagement from communities. The LIV supports the work of the Victorian Aboriginal Legal Service (**VALS**) in providing family violence Client Support Officers to support client through family law of civil law matters, with the provision of appropriate referrals to access local support programs and emergency relief money.[96] The LIV reiterates the importance of the services provided by VALS to fill the gap in the lack of culturally appropriate legal services.[97]

[94] See, eg, Children, Youth and Families Amendment (Home Stretch) Bill 2023 <https://www.legislation.vic.gov.au/bills/children-youth-and-families-amendment-home-stretch-bill-2023>.
[95] Royal Commission into Family Violence Victoria (Report and Recommendations, March 2016) Vol V, 28. See also UN General Assembly, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences on her Mission to Australia, 38th Sess, Agenda Item 3, UN Doc A/HRC/38/47/Add.1 (17 April 2018) [43].
[96] Victorian Aboriginal Legal Service, *Submission to the Sentencing Act Reform Project* (April 2020) <https://vals.org.au/assets/2020/04/Sentencing-Act-Reform-Project-VALS-submission-2020.pdf>.
[97] Victorian Aboriginal Justice Agreement, *Burra Lotjpa Dunguludja—The Aboriginal Justice Agreement Phase 4* (3 July 2020).

Annexure C

110. The following information was provided by the New South Wales Bar Association, and is specific to NSW.

Overrepresentation of First Nations people in custody in NSW

111. The New South Wales Bar Association is deeply concerned about the continued gross overrepresentation of First Nations people in custody in NSW. The data alone starkly demonstrates the continued relevance of previous reform recommendations including those made by the Royal Commission into Aboriginal Deaths in Custody (**RCADIC**) and the Australian Law Reform Commission in the *Pathways to Justice* Report, as well as, more recently, Recommendation 3 of the NSW Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (**NSW Select Committee**):

> *That the NSW Government, within its jurisdictional plan to implement the National Closing the Gap Agreement, commit to achieving parity in prison rates by 2031.*[98]

112. According to the most recent BOCSAR statistics on the overrepresentation of Aboriginal people in custody:

    (a) Aboriginal adults represent 29.5 per cent of the adult prison population in NSW and Aboriginal young people represent 56.7 per cent of the juvenile detention population;

    (b) The numbers of Aboriginal men, women and young people in custody are all increasing;

    (c) The number of Aboriginal adults appearing in court increased by 16.3 per cent and the number of Aboriginal young people appearing in court increased by 22.8 per cent; and

    (d) Aboriginal adults and young people on remand rose by 17.0 per cent and 87.8 per cent respectively from March 2021 to March 2023.[99]

113. Such alarming and disproportionate figures provide unequivocal support for the continuing relevance of recommendations aimed at addressing the overrepresentation of First Nations people in custody across Australia that have been consistently repeated over more than three decades, and have been aptly described as 'a national shame'.[100]

114. In the face of these figures, action on outstanding recommendations from the RCADIC, the Pathways to Justice Report, and the NSW Select Committee can no longer be delayed.

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[98] New South Wales Legislative Council Select Committee, *The High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (Report 1, April 2021) <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report%20No%201%20-%20First%20Nations%20People%20in%20Custody%20and%20Oversight%20and%20Review%20of%20Deaths%20in%20Custody.pdf>.

[99] New South Wales Bureau of Crime Statistics and Research, *NSW Criminal Justice Aboriginal Over-Representation Quarterly Report* (March 2023—Aboriginal Young People) and (March 2023—Aboriginal Adults).

[100] Australian Government, Department of the Prime Minister and Cabinet, *Joint Council on Closing the Gap – Justice Reinvestment Community Readiness Support* (media release, 7 June 2023).

Specialist Aboriginal and Torres Strait Islander sentencing courts[101]

115. The NSW Bar Association has advocated for the establishment of, and investment in, a fully-funded, permanent Walama Court since the inception of the pilot program in the District Court of NSW in February 2022.

116. Investment in a fully-funded, permanent Walama Court is critical to achieving the justice targets under the National Agreement on Closing the Gap and ensuring that the benefits of a culturally- informed and community-based approach to sentencing are accessible to more First Nations offenders.

117. The transformative opportunities of a Walama Court for First Nations participants and the NSW community are well known, and the potential cost savings for the justice system have been comprehensively documented in a Business Case prepared by the Walama Working Group in 2019. Adequate resourcing and funding for the establishment of a permanent Walama Court has been described as "a keystone policy for reducing the over-incarceration of First Nations people"[102] and has been strongly endorsed in the following reform recommendations:

    (a) Recommendation 21 of the NSW Select Committee: That the NSW Government provide adequate resourcing and funding for the establishment of the Walama Court in the District Court of New South Wales.

    (b) Recommendation 61 of the Special Commission of Inquiry into the Drug 'Ice':[103] That the NSW Government implement the Walama Court proposal, including through adequate funding and resourcing, to improve access to culturally appropriate diversion programs for Aboriginal people.

    (c) Recommendation 10.2 of the Pathways to Justice Report: Where needed, state and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts. These courts should incorporate individualised case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.

118. Yet despite these recommendations and positive feedback and strong support from participants and justice system agencies, the Walama List is still largely unfunded and remains in the pilot phase. The NSW Bar Association is concerned that the lack of Government commitment and funding to establish a permanent, fully-funded Walama Court means that participating agencies are under significant strain, even with a cap of 50 participants in the pilot and despite the unwavering dedication of all personnel involved.

119. In 2018 whilst in opposition, the Labor Government introduced the Justice Legislation Amendment (Walama Court) Bill 2018 seeking to establish the Walama Court. The Association considers that this Bill can usefully inform this consultation, as will the experience of the pilot, and notes that, regrettably:

    (a) Despite the introduction of the Bill, no action has been taken to legislate for a fully-funded, permanent Walama Court; and

[101] See generally, the discussion at paragraphs 3.62-3.141 of the NSW Select Committee Report. For a discussion of the nature and benefits of the Walama Court, refer to paragraphs 3.130-3.141 of the NSW Select Committee Report.
[102] NSW Select Committee, evidence of Ngalaya Indigenous Corporation, paragraph 3.134.
[103] NSW Government, Special Commission of Inquiry into the Drug 'Ice', January 2020.

(b) Despite the empirical and experiential evidence in support of a fully-funded, permanent Walama Court, the NSW Budget for 2023–24 made no funding provision for Walama.

Bias in discretionary policing practices

120. Another issue of considerable concern to the New South Wales Bar Association, and which supports the continued relevance of previous reform recommendations, is bias in discretionary policing practices.

121. By way of example, it raises that two areas of discretionary policing in which racial bias is well-documented are:

(a) The significantly higher rates of prosecution (as opposed to cautioning) of First Nations young people; and

(b) The grossly disproportionate application of NSW consorting laws to First Nations peoples.

122. In relation to (a) above, by age 17, 40.7 per cent of young First Nations offenders are prosecuted (as opposed to cautioned), compared with 16.9 per cent of young non-First Nations offenders. The probability of a First Nations young person being cautioned rather than prosecuted is approximately half that of a young non-First Nations person.[104]

123. In relation to (b) above, and again by way of example, between February 2019 and February 2022, 42 per cent of people who were subjected to consorting laws under Part 3A Division 7 *Crimes Act 1900* (NSW) were First Nations. Of the 48 young people issued with a warning for consorting, 12 were First Nations.[105]

124. Such figures are deeply concerning given that First Nations people account for only 3.4 per cent of the NSW population.[106] Such figures also continue to emerge despite recommendations for reform such as Recommendation 14.1 of the Australian Law Reform Commission's Pathways to Justice Report:

> *Commonwealth, state and territory governments should review police procedures and practices so that the law is enforced fairly, equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples.*

Ongoing risk to vulnerable prisoners posed by hanging points in NSW correctional facilities

125. The New South Wales Bar Association highlights that another issue which provides unequivocal support for the ongoing relevance of previous reform recommendations, including those made in 1991 by the RCADIC, is the ongoing risk to vulnerable prisoners posed by hanging points in NSW correctional facilities.

126. The RCADIC investigated 99 deaths, 30 of which were by hanging. In all but one case, the Commission found that the deceased, alone and unaided, procured his or her hanging. In Recommendation 165 of its Final Report, the Commission highlighted

[104] Don Weatherburn and Brendan Thomas, 'The influence of Indigenous status on the issue of police cautions', *Journal of Criminology* (2022) Vol 56(2)-(3) 1-25.
[105] Law Enforcement Conduct Commission, *Review of the operation of amendments to the consorting law under Part 3 Division 7 of the Crimes Act 1900*, February 2023.
[106] Australian Bureau of Statistics, 'New South Wales: Aboriginal and Torres Strait Islander population summary' (1 July 2022).

the need to remove suicide hanging points to reduce the number of First Nations deaths in custody.[107]

127. Despite these findings, between 1999 and 2013, 73 cases of custodial deaths by hanging were recorded across Australia. At least 33 of these cases referred to removing hanging points and/or related issues regarding compliance with 'safe cell' principles.[108]

128. In April 2021, the NSW Select Committee recommended that the NSW Government assess the current status of hanging points in all NSW correctional facilities and develop a detailed plan and timetable for the removal of these points, or discontinue placement of vulnerable inmates, including First Nations people, in these cells (Recommendation 29). The Committee also made a number of recommendations relating to reviews of, and increased funding for, mental health screening procedures and mental health assessment, management and treatment of prisoners, including attention as to placement of prisoners with mental health conditions (Recommendation 25; Recommendation 26).

129. In its Report, the NSW Select Committee stated (at paragraphs 5.74—5.75):

> *The committee was deeply troubled by the apparent lack of a sustained and dedicated plan to manage the removal of hanging points. It acknowledges the challenges, and indeed cost, associated with achieving complete elimination of hanging points, however the absence of a plan, overseen by agency heads, suggests a complacency toward this issue. Our concern in this regard is compounded by the time that has passed since this issue was identified by the Royal Commission, repeated recommendations from other inquiries and sadly, continued deaths by hanging in New South Wales prisons.*
>
> *It is now thirty years since the Royal Commission into Aboriginal Deaths in Custody report recommended the removal of hanging points in prison cells, this cannot wait decades more to be finally addressed. Not only must there be a plan but it must have a clear and publicly state timetable for the full implementation of that plan to remove hanging points in New South Wales prison cells.*

130. In its Response to Recommendation 29 of the NSW Select Committee, the NSW Government stated:

> *In NSW there are over 12,000 cells in the adult system, most of which were constructed before the development of anti-ligature design standards. In 2021–22, $6 million has been allocated to remove obvious hanging points in approximately 400 cells. Corrective Services NSW will continue to seek funds to continue the removal of hanging points.*[109]

131. Since that Response, coronial recommendations continue to highlight the lack of Government action on Recommendation 29.[110] The failure to implement such

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[107] *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991), rec 165 <https://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol5/5.html#Heading21>.
[108] Australian Institute of Criminology, 'Trends & Issues in Crime and Criminal Justice' (May 2020), 8.
[109] NSW Government, Response: Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody (13 October 2021).
[110] See, for example: Inquest into the death of Mr Gavin Ellis – Deputy State Coroner Forbes recommended the allocation of funds as a priority to the removal of ligature points in Darcy Unit cells at the MRCC. Following the death of Ms Kerry-Ellen Knight in Silverwater Correctional Centre in March 2021, Deputy State Coroner

recommendations has a disproportionate and in some cases fatal impact on First Nations people in custody, most recently apparent in the reported death by hanging of a First Nations person, 'RRC', at Shortland Correctional Centre in November 2021, a mere 13 days after the NSW Government published its Response to Recommendation 29.

132. The above statistics and the ongoing and increasing overrepresentation of First Nations people in custody in NSW indicate that the need for the removal of hanging points, and the implementation of inquiry recommendations, is more urgent than ever.

Other areas of continued relevance to previous reform recommendations

133. The issues canvassed above persist largely as a result of inadequate action by State and Federal Governments on well informed, evidence-based recommendations for reform. The issues the NSW Bar Association has highlighted provide merely a 'snapshot' in support of the continued relevance of certain recommendations and are far from comprehensive. Other examples raised by the NSW Bar Association, many of which have been the subject of previous reform recommendations over the course of several decades, include:

    (a) The failure to engage First Nations medical services to deliver primary health care in custody;[111]

    (b) The failure to discontinue the NSW Police Force's Suspect Target Management Plan, which disproportionately impacts First Nations people and contributes to the overrepresentation of First Nations people in custody;[112]

    (c) The failure to commence section 21AA of the *Fisheries Management Act 1994* (NSW), as recommended by the NSW Legislative Council Portfolio Committee No. 4 in its recent *Report into the Commencement of the Fisheries Management Amendment Act 2009*;[113]

    (d) The failure to provide mandatory cultural competency training for judicial officers in NSW; and

    (e) The failure to allow prison inmates access to Medicare whilst in custody.

134. First Nations people also continue to be disproportionately charged with, and suffer the consequential compounding effects of, offensive language under section 4A of the *Summary Offences Act 1988* (NSW).[114] This is contrary to collective and consistent calls from NSW Bar Association for the provision to be repealed and is in direct disregard of Recommendation 86 of the RCADIC and Recommendation 10 of the *Pathways to Justice* Report.

135. Most importantly, the NSW Bar Association is concerned that the NSW Government is lagging behind several other jurisdictions in failing to raise the minimum age of criminal responsibility—a failure which has the greatest impact on First Nations

Grahame also recommended the removal of hanging points or decommissioning of cell with hanging points at that facility as soon as practicable.

[111] See, for example, Recommendations 63 and 127 of the RCADIC and Recommendation 24 of the NSW Select Committee.

[112] Refer to the NSW Select Committee Report, paragraphs 3.142 – 3.160 and Recommendation 22.

[113] NSW Legislative Council Portfolio Committee No. 4, Report into the Commencement of the Fisheries Management Amendment Act 2009, November 2022.

[114] Refer to the discussion at paragraphs 3.23-3.32 of the NSW Select Committee Report.

people, who are grossly overrepresented in detention in NSW between the ages of 10 and 14.[115] The absence of meaningful and tangible action in this area:

(a) Contradicts empirical evidence about criminalisation and recidivism amongst young people and the inability of children below the age of 14 to understand the nature and significance of criminal conduct and the lifelong consequences of such conduct;

(b) Ignores stakeholders' calls for the age of criminal responsibility to be raised in NSW on the basis that detention is an inappropriate, counter-intuitive and damaging response for addressing a young person's offending behaviour; and

(c) Occurs despite longstanding reform recommendations, including but not limited to the following recommendations of the NSW Select Committee:[116]

(i) Recommendation 11: That the NSW Government raise the minimum age of criminal responsibility and the minimum age of children in detention to at least 14.

(ii) Recommendation 12: That the NSW Government establish an inter-agency and inter-department taskforce to develop a cohesive, whole of government approach to therapeutic pathways that integrate health, education and housing approaches to youth behaviour for children between the ages of 10 and 14.

Conclusion

136. The NSW Bar Association further raises that a 2018 Review by Deloitte Access Economics found that, of the recommendations made by the RCADIC, 64 per cent had been implemented in full, 14 per cent had been mostly implemented, 16 per cent had been partially implemented, and 6 per cent had not been implemented at all.[117] In 2021, the NSW Select Committee referred to widespread criticism of the Review as being based on "a desktop review of government policy and government self-assessment", and noted that the resulting Report "did not contain a clear and accessible list of what recommendations were outstanding for New South Wales to implement."[118] Recommendation 1 of the Select Committee was that the NSW Government commit to "the immediate and comprehensive implementation of all outstanding recommendations" from the Royal Commission Report and the Pathways to Justice Report.[119] This is yet to occur.

[115] NSW Select Committee Report, paragraph 3.48. See generally the discussion at paragraphs 3.33 – 3.61.
[116] NSW Select Committee Report, paragraph 3.165.
[117] Deloitte Access Economics, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody* (August 2018) xi <https://www.niaa.gov.au/sites/default/files/publications/rciadic-review-report.pdf>.
[118] New South Wales Legislative Council Select Committee, *The High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (Report 1, April 2021) 7 and 17.
[119] Ibid, 17.

Annexure D

137. The following is a personal reflection provided by a member of the Law Council's Young Lawyers Committee:

> *In my third year of practice, I moved to* [a remote town in the] *Northern Territory, to begin work as a lawyer at a remote legal service. I had not previously practiced in a remote area and had limited experience working with Indigenous clients.*
>
> *In my first week of practice, I attended a case conference with an Indigenous client and a senior lawyer of the service. It had not occurred to me that the client would not be able to read the agreement put in place by the Department. The senior solicitor spoke to the client in very plain English and continued to reiterate, "do you agree or not agree? It is okay not to agree or to want time to think". The department did not use plain English in the meeting and expected the lawyer to explain difficult concepts to the client.*
>
> *Observing this meeting with the client was invaluable to my training as a lawyer in this location and role. However, the senior solicitor left the service one week after I commenced, and there was a lot more to learn, including kinship systems, culture, language, belief systems and much more. Most of what I learned I had to pick up from building trusting relationships with clients over many months in very remote communities in the NT and speaking with stakeholders and workers within those communities.*
>
> *I was lucky that my workplace did send me to an amazing culture and language course further into my employment, but not all of the services in the town had this same experience, and the lack of cultural awareness and competency was well known by Indigenous clients who would either suffer from or avoid certain services for this reason. It is not always possible in remote locations to rely on those you work with to have the experience to teach this important contextual information when working with Indigenous clients or rely on them to provide this education through other means.*
>
> *Even after two years working in very remote locations of the NT, there is still so much to learn and understand. But even a basic understanding of Indigenous history, culture and systems is essential for lawyers practicing all over Australia, as they are very relevant to the safety of Indigenous clients and ensuring equal access to justice, which contributes to closing the gap.*

Annexure E

138. The following example of how the voices and involvement of Aboriginal and Torres Strait Islander people can be embedded in policy-making was provided by the First Nations Legal Policy Committee of the Queensland Law Society (the **QLS Committee**).

Listening to the voices of Aboriginal and Torres Strait Islander young people

139. In response to the Queensland Law Society's Call to Parties Statement 2022, the Queensland Government gave an election commitment which involved tasking the Queensland Family and Child Commission (**QFCC**) to undertake conversations with Aboriginal and Torres Strait Islander children and young people about their experiences with the justice system, as part of the *Growing up in Queensland* survey.

140. The QFCC determined that a survey was not an adequate means of achieving the objective and instead it established the *Yarning for Change* study which was designed and conducted to ensure that engagement was authentic, appropriate and flexible to the needs of children and young people. The purpose of this study is to:

    (a) ensure the voices of children, young people, their families, their communities and those who support them are heard and considered when informing and evaluating changes to the youth justice system in Queensland;

    (b) assess the impact of the current youth justice reforms on wellbeing and rights of children and young people, and consider the effectiveness of existing responses in addressing the cases of recidivism.[120]

141. In September 2022, the QFCC released its report, *Yarning for Change*, which observed, amongst other things, 'the rights and aspirations of First Nations children and young people with a lived experienced of the youth justice system are largely rendered invisible in the discourse, in the policy and practice of 'justice''.[121] Notably, of the more than 100 children and young people aged between eight and 25 who participated in the study, the vast majority were First Nations.[122]

142. The QLS Committee highlights that there are lessons to be gleaned from the information-gathering approach used in this study. In particular, it highlights the commitment of the study to:

    (a) viewing children and young people as rights holders and empowering their own expression of their lived experience;[123]

    (b) embedding the study in an understanding of the United Nations Convention on the Rights of the Child, including a child's right be involved in decisions affecting them and to have their opinions considered;[124]

    (c) understanding the perceptions of children and young people about the extent to which institutions, services and their individual, family, community and structural

[120] Queensland Family and Child Commission, *Yarning for Change—Listen to my voice: Conversations with Aboriginal and Torres Strait Islander Peoples* (September 2022) 1 <https://www.qfcc.qld.gov.au/sites/default/files/2022-11/Yarning%20for%20Change.pdf>.
[121] Ibid, ii.
[122] Ibid, 4.
[123] Ibid, 22.
[124] Ibid, 3.

circumstances, contribute to or divert them from offending or reoffending—and what they believe would be successful solutions;[125]

(d) prioritising research locations based on rates of serious and repeat youth justice offending, and consulting with community members and stakeholders across youth justice services, youth detention centres and community organisations to identify participants in the first phase of the study;[126]

(e) equipping all researchers with 'the necessary accreditation and supervision to maintain cultural integrity and observe cultural protocols whilst engaging with children, young people and communities';[127]

(f) designing the structure of yarns to encourage respectful and trusting interactions and protect the mental health and wellbeing of participants. This incorporated:

(i) 'pre- and post-yarn evaluations to minimise any emotional harm to participants and to identify any supports that participants may need after their yarn';[128] and

(ii) meeting with children 'in their community, to share food and share stories', to create a positive and safe experience in comfortable surroundings;[129] and

(g) formatting the report and its findings in a way that 'follows the rhythm and flow of the yarns with children'—writing the report 'for children, young people and their families because it is their stories being shared'.[130]

143. The QLS Committee suggests that the evaluative approach taken in the *Yarning for Change* study has the potential for application more broadly across the Closing the Gap framework, to operate as a further layer of accountability where Aboriginal and Torres Strait Islander people are involved in policy design rather than having policy done to them.

[125] Ibid, 2.
[126] Ibid.
[127] Ibid.
[128] Ibid, 3.
[129] Ibid.
[130] Ibid, 5.