



**Aboriginal
Legal Service**
(NSW/ACT) Limited

2828 February 2025

Professor Chris Cunneen
Indigenous Law and Justice Hub
Jumbunna Institute for Indigenous Education and Research
[REDACTED]

Dear Professor Cunneen,

Re: Stage 2 Consultation Questions

I write to you on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (**ALS**).

The ALS is a proud Aboriginal Community-Controlled Organisation (**ACCO**) and the primary legal services provider for Aboriginal and Torres Strait Islander people in NSW and the ACT. Our vision is to achieve social justice and equity for Aboriginal and Torres Strait Islander people, families and communities.

More than 350 ALS staff members based at offices in 21 communities in NSW and the ACT support Aboriginal and Torres Strait Islander people through the provision of high quality and culturally safe legal assistance, including court representation in criminal law, children's care and protection law, and family law. We also deliver a variety of wrap-around programs including bail support, mental health referrals, women's safety programs, and child and family advocacy and support.

The ALS is the Justice Peak on the NSW Coalition of Aboriginal Peak Organisations and a key partner in Closing the Gap in NSW and the ACT. As an ACCO and an Aboriginal and Torres Strait Islander Legal Service (ATSILS), we represent community interests in our advocacy for the reform and transformation of systems which impact the lives of Aboriginal and Torres Strait Islander people.

This submission is informed by the experiences of the clients and communities we serve, and the experiences of our staff, including solicitors, field officers, administrative staff and allied professional services staff.

What key factors are driving Aboriginal and Torres Strait Islander over-representation in the ACT? How can these best be addressed? Do you have any comments on why imprisonment rates in the ACT are falling for non-Indigenous people, but not for Aboriginal and Torres Strait Islander people?

The rate of incarceration of Aboriginal people in the ACT is currently the highest in Australia, with recent Productivity Commission data showing that the ACT imprisons Aboriginal adults at over 21 times the rate of non-Aboriginal adults.¹ Despite commitments by all governments under the National Agreement on Closing the Gap to reduce the over-representation of Aboriginal people in the criminal legal system, Australian Bureau of Statistics data published in December 2024 showed that Aboriginal

¹ <https://nit.com.au/18-02-2025/16353/two-indigenous-deaths-in-custody-in-less-than-a-week-in-the-act>

women in the ACT were 76.5 times more likely to be imprisoned than non-Aboriginal women, while Aboriginal men were 25.7 times more likely to be imprisoned than non-Aboriginal men.²

Adverse discretionary decision-making by police is directly linked to the over-representation of Aboriginal people at every stage of the criminal legal process. While we do not hold relevant ACT Policing data, the experiences of our clients in the ACT mirror the experiences of our clients in NSW, where police are more likely to conduct strip searches of Aboriginal people,³ use force against Aboriginal people,⁴ and more likely to charge Aboriginal people with criminal offences than to utilise diversionary options,⁵ leading to a higher likelihood of imprisonment.

Imprisonment itself is widely described as ‘criminogenic’, and the harms of incarceration for individuals and communities, links between incarceration and future contact with the criminal process, and the failure of incarceration to meet the developmental needs of children have been well-documented.⁶ The criminalisation and incarceration of Aboriginal and Torres Strait Islander young people increases their risk of future criminalisation and imprisonment.⁷

Government policies which genuinely aim to reduce incarceration must be evidence-based, prioritise prevention and diversion from formal contact with the criminal legal system, and include long-term, sustainable investment in communities and community-based service systems to ensure the needs of individuals and communities are met, and to reduce the risk of contact with police and courts in the first place.

We note that numerous Royal Commissions, inquiries and other independent and parliamentary processes at both the territory level in the ACT and at the Commonwealth level have considered relevant social and environmental drivers of crime, and current systems and responses. A small selection is listed as follows. We recommend consideration of their findings and recommendations, in considering the way in which Australia’s consistently poor, and worsening, outcomes on Aboriginal and Torres Strait Islander incarceration are driven by successive failures to heed the overwhelming evidence that criminalisation responses do not reduce crime and, in fact, worsen community safety:

- Australian Human Rights Commission, [‘Help way earlier!’ How Australia can transform child justice to improve safety and wellbeing](#) (2024).
- Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, [Final Report – Volume 8, Criminal Justice and People with Disability](#) (September 2023).

² <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#aboriginal-and-torres-strait-islander-prisoners>

³ “[Data shows] Aboriginal people are disproportionately represented – making up 14% of all searches but 3.4% of the state’s population”: Tamsin Rose, [‘NSW police strip-searches of Indigenous people rose 35% in past 12 months and included 11 children, data reveals’](#) (*The Guardian*, online, 17 October 2023).

⁴ Christopher Knaus, [‘NSW police use force against Indigenous Australians at drastically disproportionate levels, data shows’](#) (*The Guardian*, online, 31 July 2023),

⁵ Caitlin Fitzsimmons, [‘“Like a snare”: Indigenous young offenders more likely to be prosecuted for same crimes’](#) (*Sydney Morning Herald*, online, 30 November 2022); Adam Teperski and Sara Rahman, [‘Why are Aboriginal adults less likely to receive cannabis cautions?’](#) (Bureau of Crime Statistics and Research, Crime and Justice Bulletin No CJB258, June 2023).

⁶ See, eg, Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Report, 20 June 2013) 22–5; Australian Institute of Criminology, *Mortality and Morbidity in Prisoners after Release from Prison in Western Australia 1995–2003* (Trends & Issues in Crime and Criminal Justice No 320, July 2006) 2; Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria’s Criminal Justice System* (Report, March 2022) 585; Productivity Commission, *Australia’s Prison Dilemma* (October 2021) 26, 636–41; BOCSAR, *Reoffending Statistics for NSW* (Web Page, 15 August 2022); Joanna JJ Wang and Suzanne Poynton, *Intensive Correction Orders Versus Short Prison Sentence: A Comparison of Re-Offending* (BOCSAR, Contemporary Issues in Crime and Justice No 207, October 2017); Denis Yukhnenko et al, ‘Recidivism Rates in Individuals Receiving Community Sentences: A Systematic Review’ (2019) 14(9) *PLoS ONE* e0222495:1– 15, 1; Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-Based Sentencing Orders and Parole: A Review of Literature and Evaluations across Jurisdictions* (Report, Queensland University of Technology, April 2019) 84; Clare Ringland and Don Weatherburn, *The Impact of Intensive Correction Orders on Re-Offending* (BOCSAR, Contemporary Issues in Crime and Justice No 176, December 2013) 1; Ian Lambie and Isabel Randell, ‘The Impact of Incarceration on Juvenile Offenders’ (2013) 33 *Clinical Psychology Review* 448, 448; Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria’s Criminal Justice System* (Report, March 2022) 445; Elizabeth S Barnert et al, ‘How Does Incarcerating Young People Affect Their Adult Health Outcomes?’ (2017) 139(2) *Pediatrics* 1, 7.

⁷ See, eg, Australian Human Rights Commission, [‘Help way earlier!’ How Australia can transform child justice to improve safety and wellbeing](#) (Report, 2024) 22.

- Australian Law Reform Commission, [Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples](#) (December 2017).
- ACT Board of Inquiry, [Review into the system level responses to family violence in the ACT](#) (2016).
- House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, [Doing Time - Time for Doing: Indigenous youth in the criminal justice system](#) (2011).
- Royal Commission into Aboriginal Deaths in Custody, [National Report](#) (1991).

Restrictions on access to bail

Despite pockets of progress in some jurisdictions like Victoria,⁸ increasingly restrictive bail laws have been enacted across most Australian jurisdictions and are contributing directly to the explosion in the remand population nationally. The number of adults in prison on remand in Australia increased by 13 per cent between 2023 and 2024, while the number of adults on remand in the ACT increased by 21%.⁹

Data from NSW shows that a key driver of the increase in remand is the exponential increase in the number of Aboriginal people charged by police and proceeded against to court in that jurisdiction. In our experience, the same trend can be observed in the ACT. Research also shows that Aboriginal and Torres Strait Islander peoples are more likely to be refused bail or arrested for breach of bail than non-Aboriginal and Torres Strait Islander people.¹⁰

The ACT bail framework includes reverse-onus bail requirements for both adults and children, a status quo which is stricter than many other Australian jurisdictions (for example, many jurisdictions do not have a reverse onus bail test for children). In our experience as the primary legal services provider to Aboriginal people in the ACT, reverse onus bail requirements restrict access to bail for our clients and materially contribute to their overrepresentation in prison.

The fundamental purpose of bail is to balance the right to liberty of an accused person between arrest and trial, informed by the presumption of innocence, with ensuring the protection of the community from potential harm and ensuring that justice can be administered efficiently.

In our experience, however, many of our clients who are imprisoned on remand are experiencing homelessness, living with disability and/or experiencing mental health challenges, and are remanded because they are under-served by the human services system, and inadequately supported to meet bail conditions.

Failure to implement Closing the Gap commitments

The Royal Commission into Aboriginal Deaths in Custody in 1991 identified the need for the inclusion of Aboriginal people and their perspectives in policy development, research, and in the operation of programs and institutions to ensure they are effective and culturally responsive.¹¹ Nearly 30 years later, the current iteration of the National Agreement on Closing the Gap (National Agreement) was signed in July 2020. This was the first time a National Agreement had been developed and negotiated

⁸ <https://nit.com.au/08-08-2024/12988/new-data-shows-less-first-nations-people-in-victoria-spending-time-on-remand-since-bail-laws-changed>

⁹ <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#state-territory>

¹⁰ Lorana Bartels, 'The growth in remand and its impact on Indigenous representation in the criminal justice system', (*Indigenous Justice Clearing House*, 24, 2019, 3. <https://www.indigenoustjustice.gov.au/wp-content/uploads/mp/files/publications/files/the-growth-in-remand-13-08-2.pdf>

¹¹ Department of the Prime Minister and Cabinet, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Report, August 2018) vii <https://www.niaa.gov.au/sites/default/files/documents/publications/rciadic-review-report.pdf>

in genuine partnership with Aboriginal and Torres Strait Islander peoples, and the first time it included outcomes relating to reducing the mass incarceration of Aboriginal and Torres Strait Islander people.¹²

All Australian, state, territory and local Governments have signed the National Agreement and have committed to a future where policy-making impacting the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership. Implementing the National Agreement is everyone's responsibility and is an unprecedented shift in the way governments work by encompassing shared decision-making on the design, implementation, monitoring and evaluation of policies and programs to improve life outcomes for Aboriginal and Torres Strait Islander people.

Progress on implementing the National Agreement has been slow, however:

- government organisations continue to implement versions of shared decision-making that involve consulting with Aboriginal and Torres Strait Islander people on a pre-determined 'solution', rather than working together to identify priorities and co-design solutions with Aboriginal people and organisations;¹³
- there appears to be an assumption that 'governments know best', which is contrary to the principle of shared decision-making in the National Agreement;¹⁴
- existing power imbalances between government agencies and Aboriginal organisations remain in place, and partnerships are not consistently being used to empower shared decision-making and support processes of self-determination – ACCOs report being treated as passive funding recipients rather than being valued as necessary partners in the delivery of government services and as experts in the development of culturally safe programs that address the needs of their communities;¹⁵ and
- many governments do not recognise that ACCOs are critical partners in delivering services tailored to the priorities of their communities.¹⁶

Despite national commitments to implementing the commitments in the National Agreement, including to work in partnership through shared decision-making with Aboriginal people on the design, implementation, monitoring and evaluation of policies and programs that impact them, and to build the Aboriginal and Torres Strait Islander community-controlled sector to deliver services (Priority Reform Two, discussed further below), unilateral government decisions to enact laws, policies and practices which disproportionately harm Aboriginal communities are undermining progress towards Socioeconomic Outcomes 10 and 11 to lower rates of adult and child incarceration, and Outcomes 12 and 13 to lower rates of child removals and eliminate domestic and family violence.

The barriers to achieving these outcomes and their associated targets are interlinked. Legislative changes increasingly restricting access to bail and trends towards 'proactive' policing practices which have caused exponential increases in the number of people charged and taken to court in the 10 years prior to the introduction of 'justice' targets in the National Agreement have contributed to an explosion in the number of people in prison on remand nationally. The prioritisation of carceral, policing-driven responses to domestic and family violence is contributing to increased incarceration, including of victim-survivors, and to increased contact with child protection agencies, increasing the

¹² On 12 February 2024, NSW Government, NSW CAPO and Local Government NSW also signed the NSW Closing the Gap Partnership Agreement, with the intention of strengthening relationships and making stronger commitments to the Priority Reforms agreed in the National Agreement, with the addition of a fifth priority in NSW to grow the Aboriginal business sector in recognising Aboriginal economic prosperity as a vehicle for self-determination: NSW Closing the Gap Partnership Agreement (2024), Available at: <https://www.nsw.gov.au/sites/default/files/noindex/2024-05/NSW-Closing-the-Gap-Partnership-Agreement.pdf>

¹³ Australian Government, Productivity Commission, *Review of the National Agreement on Closing the Gap* (Final Report, 7 February 2024) 4 <https://www.pc.gov.au/inquiries/completed/closing-the-gap-review#report>.

¹⁴ Ibid.

¹⁵ Ibid 5.

¹⁶ Ibid.

likelihood of child removals.¹⁷ Research has established a clear link between out-of-home care and incarceration.¹⁸

Chronic underfunding of Aboriginal Community-Controlled Organisations

As well as impeding progress towards Closing the Gap, these systems-level levers increase demand for legal assistance services without commensurate investment in Aboriginal and Torres Strait Islander Legal Services.¹⁹

The communities we serve have been subjected to trauma, dislocation, child removals and other violence at the hands of the state since the time of colonisation. The drivers of contact with the criminal process for nearly all of our clients stem from intergenerational trauma that is unique to the experience of Aboriginal and Torres Strait Islander people.

Mainstream services are frequently ill-suited to meeting the needs of our clients. The National Agreement recognises that Aboriginal and Torres Strait Islander community-controlled services are better for Aboriginal and Torres Strait Islander people, achieve better results, employ more Aboriginal and Torres Strait Islander people and are often preferred over mainstream services (clause 43). Many of our clients are mistrustful of government services and services that are closely linked with police, child protection or corrective services.

There has not been sufficient needs-based, sustainable and long-term investment in Aboriginal Community-Controlled Organisations (ACCOs) to deliver service to Aboriginal people in the ACT across health, mental health, alcohol and other drug support, family support, housing, education and employment. There are inadequate community-controlled, culturally safe services and accessible services for Aboriginal people in the ACT to ensure the needs of families and individuals are met, and to provide prevention, early intervention and treatment that is proven to prevent contact with the criminal process in the first place.

What's working well at the moment to prevent or limit Aboriginal and Torres Strait Islander contact with the criminal justice system and/or prevent recontact and re-offending? How can this be built on or strengthened?

ACCO-led wraparound programs and holistic legal assistance

The ALS delivers a small number of holistic, wrap-around programs that have delivered positive outcomes for our clients in the ACT.

The Ngurrumbai Bail Support program is a program funded by the ACT Government Justice and Community Safety Directorate (JACS) to support adults on bail. It is designed to support compliance with bail conditions through the creation of care plans that address support needs during the period that a client is on bail. Engagement with the program may be on a voluntary basis or mandated as a

¹⁷ Aboriginal and Torres Strait Islander children are 10.8 times more likely to be removed than non-Indigenous children, and make up 42% of children in out-of-home care nationally: SNAICC, [Family Matters Report 2024 Report Card](#).

¹⁸ See, eg, Australian Institute of Health and Welfare, [Young people under youth justice supervision and their interaction with the child protection system 2020-21](#) (Report, 2022); Katherine McFarlane, 'Care-criminalisation: The involvement of children in out-of-home care in New South Wales criminal justice system' (2018) 51(3) *Australian and New Zealand Journal of Criminology* 412; Judy Cashmore, 'The link between child maltreatment and adolescent offending – Systems neglect of adolescents' (Family Matters No 89, 2011).

¹⁹ Aboriginal Legal Service (NSW/ACT) Limited, [Submission to the Independent Review of the National Legal Assistance Partnership 2020–2025](#) (2024); National Aboriginal and Torres Strait Islander Legal Services, [Submission to the Independent Review of the National Legal Assistance Partnership](#) (2024).

condition of bail. The program reduces risk of bail breaches, further charges while on bail and decreases court appearances. Importantly, the program provides magistrates and police with a viable alternative to remand. The ALS provides referrals and other support that an individual might need to complete their bail. We have received positive feedback from the bench and police as to the efficacy of the program.

Front Up is another ALS-delivered program which provides support to Aboriginal and Torres Strait Islander people in the ACT who have outstanding warrants or have breached bail. Front Up staff assist clients to present themselves to the court in a de-escalated setting to address the outstanding warrant or breach of bail without the need for that person to hand themselves into police, avoiding time in custody. Our aim is to help someone attend court without delay, get the matter dealt with, and avoid a person entering custody where possible.

Both programs are showing positive results, but would be strengthened by additional investment and expansion. For example, Ngurrumbai is currently only funded to provide support to adults, and there is no capacity to provide the same wraparound bail supports for children who are on bail in the ACT. The ALS is currently in discussions with JACS about the potential to expand the scope of Ngurrumbai to include services to children.

What are the main gaps in service provision and programs?

In the community

There is a significant lack of services in the ACT, particularly culturally safe, ACCO-delivered services for Aboriginal people. This is a driver into the criminal justice system for the majority of our clients.

In particular:

- there is limited crisis and transitional accommodation available that is accessible to our clients;
- there is also a lack of culturally appropriate drug and alcohol counselling that can be consistently accessed by our clients; and
- there is limited specialist legal assistance for children and families, which is usually the most urgent time in which intervention is required to prevent escalation of legal issues.

Investment in ACCOs to deliver services across health, mental health and social and emotional wellbeing; housing; early intervention, primary prevention, and alcohol and other drug treatment and support; family support; disability support; educational engagement and frontline domestic, sexual and family violence services would support our clients to have their needs met and reduce their risk of contact with police and courts in the first place.

In court

There are gaps within the court system that contribute to a lack of cultural safety for Aboriginal and Torres Strait Islander people charged with criminal offences in the ACT, which in turns inhibits the likelihood of positive outcomes which reduce the likelihood of return to court.

Ongoing judicial education about Aboriginal history and culture and the unique dispossession and disadvantage inflicted on Aboriginal and Torres Strait Islander peoples over many generations would support more culturally safe experiences in court for our clients. Our solicitors report that, at times, courts devalue or disbelieve the extent of disadvantage faced by many Aboriginal people, and display a lack of awareness of historical and political factors that continue to entrench systemic disadvantage in Aboriginal communities.

We support the increase in alternative court processes which include Elders and community members more directly in court processes, such as circle sentencing in multiple court jurisdictions. We welcomed the expansion of circle sentencing to the Supreme Court, but note that the role of Elders in these proceedings is more limited than the role they play in the Magistrates Court and Children's Court in determining appropriate outcomes. Although the ultimate sentencing discretion lies with the judicial officer, and a defendant must ultimately be sentenced according to law, we support enhancement of the Supreme Court model to facilitate a more central role for Elders in the lead up to this final decision.

In custody

There is a significant lack of services for inmates in the Alexander Maconochie Centre (AMC). Our clients frequently complain that there is delay in an ability to participate in rehabilitative programs, and participation is limited to a particular period of time. Despite the significant proportion of Aboriginal people on remand, many programs are only available to people who have been sentenced.

We also hold concerns about a lack of care and cultural safety in AMC. For example, the recent death of ACT prisoner TJ Denniss in Silverwater prison in NSW brought to light a number of concerning allegations about his treatment in AMC before being transferred to Silverwater, including prolonged periods of time in solitary confinement, lack of mental health support and exposure to racism and bullying at the hands of correctional officers at AMC.²⁰ These serious cultural safety issues and lack of adequate mental health support in AMC for inmates are a cause for serious concern. We note that two Aboriginal people have died in the AMC this month and urge close examination of the circumstances leading to these deaths in custody.

We are supportive of the Yeddung Mura Aboriginal throughcare program for people leaving custody. ALS clients who have been able to access this service have reported positive results. We would encourage further funding to that program, to ensure throughcare support is available to all Aboriginal and Torres Strait Islander people in the ACT.

In relation to children and young people in custody, the ACT is the only location serviced by the ALS that does benefit from our children's 'Visiting Legal Service' (VLS), which is an initiative funded by the NSW government for our other offices. This service provides a lawyer in each office which is located close to a Youth Justice Centre to ensure that regular visits are made to children who are incarcerated to provide wellbeing checks and support their knowledge and participation in the court process in a timely manner. These lawyers also act as specialist Children's Court lawyers in their respective offices.

Funding a solicitor in the ACT office of the ALS would allow the ALS to provide specialist, culturally appropriate legal services to children who are bail refused or sentenced to a custodial sentence in the

²⁰ Sarah Collard, ['Family of Aboriginal man TJ Denniss say lack of mental health support contributed to death in custody'](#), *The Guardian*, 14 August 2023.

ACT, as well as providing a Children's Court specialist lawyer to Aboriginal children charged in the ACT. Further funding to also have an Aboriginal Youth Officer in the ACT would bolster our ability to provide wrap-around, cohesive and comprehensive legal services to children in the ACT, particularly to children who are incarcerated.

Data

While we understand that ACT Policing is responsive to ad hoc requests, regular public release of data about the exercise of police powers, such as that available in NSW via the NSW Bureau of Crime Statistics and Research,²¹ would support both the implementation of the ACT Government's commitment to Priority Reform 4 under the National Agreement on Closing the Gap, as well as provide transparency, accountability and an evidence base to support the development of programs, services and responses that effectively reduce over-representation.

What new initiatives or innovations are likely to contribute to reducing over-representation and how might they be progressed?

As noted above, one of the major contributors to overrepresentation of Aboriginal and Torres Strait Islander people in the ACT justice system is the lack of flexible and sustainable funding for ACCOs to deliver evidence-based, effective services and supports to Aboriginal people.

We have previously delivered programs that provided positive outcomes for clients and reduced preventable contact with the criminal justice system, but we have not been able to sustain them. We do not have the capacity to engage in the level of community legal education and community outreach that we would like to, and that communities expect, within current resourcing.

Between December 2017 and December 2019, the ALS received funding for a road safety program (the Aboriginal and Torres Strait Islander Driver Licensing pilot) and included funding for an Aboriginal driving instructor to deliver driving lessons to clients charged with traffic offences involving driving without a licence.

It is widely recognised that geographical, cultural, economic and social barriers inhibit access to driver licensing for Aboriginal people.²² The circumstances of some Aboriginal and Torres Strait Islander people have been said to equate to an 'endemic lack of licensing access for Aboriginal people'.²³

In 2017:

- One in 20 Aboriginal people in jail was serving a sentence for unlicensed driving and other "driver license" offences;
- Less than half of eligible Aboriginal people held a driver license compared to 70 per cent of the non-Aboriginal population;
- Only 51% of Aboriginal families had access to a motor vehicle compared to over 85% of non-Aboriginal families;

²¹ See, eg, NSW Bureau of Crime Statistics and Research, *NSW Policing Activity Dashboard* (Web page) <https://policingactivitytool.bocsar.nsw.gov.au>; NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics* (Quarterly Update, September Quarter 2024) https://bocsar.nsw.gov.au/documents/publications/rcs/rcs-quarterly/2024q3/NSW_Recorded_Crime_Sep_2024.pdf

²² See, eg, Australian Law Reform Commission, *Pathways to Justice* (2017) chapter 12.

²³ *Ibid* 414.

- 38% of Aboriginal and Torres Strait Islander people with a license had had it disqualified, suspended or cancelled;
- 12% of Aboriginal and Torres Strait Islander found guilty of driving offences were jailed, compared to 5% for the general population.²⁴

The imperative to drive in communities with low levels of driver licensing can lead to unlicensed driving and subsequent fines, charges and imprisonment for unlicensed or disqualified driving, which leads to harmful impacts for Aboriginal communities. In regional and remote communities which lack public transportation infrastructure and in which community members face limited access to cars and licensed drivers to supervise learners, the risk of secondary criminalisation from driving whilst suspended or disqualified is more acute.

By providing a pathway to licensing for people charged with driving unlicensed, we successfully supported criminalised Aboriginal people in the ACT to resolve their barriers to access to a drivers licensing and prevented future contact with the system for driving related offences.

Accessible, free and ACCO-delivered licensing supports and programs would play a role in reducing the number of Aboriginal people coming into contact with the criminal legal system due to poverty and other systemic and structural barriers.

We also recommend resourcing to the Galambany Court being increased to build capacity for bail proceedings to be heard within this specialist, more therapeutic and culturally responsive process. Allowing defendants access to cultural input and support from earlier in the criminal process, as opposed to at the stage of sentencing, would support earlier appropriate support and intervention to reduce risk of contact with the system.

We understand that planning is underway to open the Winnunga Nimmityjah Aboriginal Health and Community Services residential rehabilitation service. There is an acute need for culturally safe, ACCO-delivered residential alcohol and other drug treatment and supports in the ACT, as in other jurisdictions.

The Ngunnawal Bush Healing farm, an initiative funded by the ACT government, is not accessible to many of our clients due to the strict eligibility requirements for the program. There are eight beds at the farm to allow for residential treatment that are unfilled and, to our knowledge, have never been filled. We recommend review of eligibility criteria which exclude many justice-impacted people because of a previous history of convictions for offences involving violence and/or use of medically prescribed opioid treatment or replacement medication.

What specific law, policy and practice reforms are needed to address overrepresentation, including around child protection, women and youth justice, policing, courts, prisons, post release support?

The above policy reforms are all required to address overrepresentation, particularly ensuring access to alcohol and other drug supports, mental health services, housing, parenting programs, family support, education and employment long before a person is at risk of coming into contact with the criminal legal system. Ensuring that a person can access accessible, culturally safe and ACCO-delivered

²⁴ <https://www.niaa.gov.au/sites/default/files/publications/indigenous/hpf-2017/tier2/213.html>

services and supports while incarcerated, and processes are in place to ensure they are linked to necessary services before their release and supported through their release, are also vital.

Education for police and the judiciary to ensure a deep understanding of Aboriginal culture and history, including but not limited to how the impacts of colonisation continue to entrench persistent intergenerational disadvantage for many Aboriginal and Torres Strait Islander people, is also needed.

We also recommend consideration of the following legislative reforms to address areas of law which disproportionately our clients and make them more likely to be charged and incarcerated.

Bail reform

In the ACT, both children and adults must show ‘special or exceptional circumstances’ to make a bail application if charged with specified offences. The ALS opposes reverse onus bail requirements for both adults and children, but, in particular, is deeply concerned that children are subject to the same onerous bail test as adults in the ACT.

Bail is a person’s right to be at liberty for an offence while criminal charges proceed through the court process. Bail is not meant to be a punishment: bail laws are intended to balance a person’s right to liberty, and presumption of innocence until proven guilty, with the need to ensure their attendance at court and any identified risk of harm.

It is notable that, in most Australian jurisdictions, there are different bail tests for adults and children, recognising the vulnerable place children have in the criminal legal system. Restrictions on access to bail have been recognised as a significant driver of the mass incarceration of Aboriginal and Torres Strait Islander people, most notably, in the 2017 Australian Law Reform Commission inquiry, *Pathways to Justice*.²⁵

A number of features of restrictive bail laws should be addressed to alleviate remand as a driver of mass incarceration for Aboriginal children and adults, including:

1. Abolish the ‘special or exceptional circumstances’ provision, and ensure that bail laws for children are never more harsh than bail laws applicable to adults accused with the same offences;
2. Impose a presumption in favour of bail for children, reflecting the principle that imprisonment should be a measure of last resort;
3. Implement Recommendations 5-1 and 5-2 of the Australian Law Reform Commission *Pathways to Justice* inquiry in relation to legislative change and guidance for bail authorities in taking account factors arising on account of an accused person’s status as an Aboriginal or Torres Strait Islander person. We commend the recently amended s 3A of the *Bail Act 1977* (Vic) as an exemplar provision, compared with other jurisdictions.

Reform the committal process

For matters that proceeding on indictment to the Supreme Court, there is no incentive for police and prosecutors to consider the merits of their case until the proceedings have reached the Supreme Court. In our experience, it is not uncommon for offers to resolve or negotiate to not be considered

²⁵ Australian Law Reform Commission, *Pathways to Justice* (Report, 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/recommendations-14/>

by the prosecution until close to trial, in circumstances where there were easily identifiable weaknesses in the prosecution from early in the court process.

This results in some clients being imprisoned remand for months, or even years, before their charges are dropped or significantly reduced. This can be in circumstances where the evidence always showed that a conviction was not possible, but these matters were not closely examined until close to trial.

In NSW, the 'Early Appropriate Guilty Plea' scheme for indictable matters requires prosecutors to meet with defendants prior to committal and discuss prospects for resolution.²⁶ While we do not necessarily recommend implementation of a similar scheme wholesale in the ACT, we are supportive of the introduction of legislative levers which would require prosecutors to consider the merits of a matter prior to committing it for trial.

Removal of Section 35(4) of the Crimes (Sentencing) Act 2005

Section 35(4) of the *Crimes (Sentencing) Act 2005* directs the court to refrain from significantly reducing an offender's sentence for a plea of guilty if the Court considers the prosecution case was overwhelmingly strong.

We oppose this section of the Act. Even if a prosecution case is strong, a guilty plea results in time and resource savings to the court that would otherwise be directed to the running of a costly trial. A guilty plea also reduces the impact of defended proceedings on vulnerable witnesses and complainants.

This provision prevents a defendant who has, in a timely and appropriate way, taken responsibility for their conduct from the having the full weight of that responsibility acknowledged on sentence. This, in turn, prevents sentencing courts from exercising the full scope of their discretion to ensure appropriate sentencing outcomes which give effect to all of the purposes of sentencing, and contributes to the length of time spent in custody by our clients at the hands of a system that leans towards incarceration as the appropriate outcome in a disproportionate number of cases.

Needs-based, sustainable federal funding for ATSILS

The parties to the National Agreement on Closing the Gap recognise that ACCOs 'are better for Aboriginal and Torres Strait Islander people, achieve better results, employ more Aboriginal and Torres Strait Islander people and are often preferred over mainstream services'.²⁷

The ALS not only operates within the ATSILS sector, but also within the ACCO sector. This comes with significant obligations from multiple stakeholders that other legal assistance providers do not have. It is also our strength. The ALS has provided specialised, independent, culturally safe and community-controlled legal services for over 50 years in NSW and the ACT. We recognise that Aboriginal and Torres Strait Islander people are smart, strong and resilient in the face of longstanding structural and systemic forces which disempower communities and disproportionately bring Aboriginal people into contact with the legal system. Because we understand the needs of communities, and because we have a local presence in so many communities, we are uniquely positioned to respond appropriately

²⁶ Criminal Procedure Act 1986 (NSW), s 70.

²⁷ Priority Reform Two: <https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap/6-priority-reform-areas/two>

to local needs, to provide effective service delivery, and to platform community voices in our advocacy.

We are frequently the service provider of choice for Aboriginal and Torres Strait Islander people, who are often reluctant to use mainstream services because of a history of culturally insensitive service provision and lack of trust in government organisations. It is because we understand the needs of community that our service delivery model is unique: a holistic approach is core to the way we work.

Despite the critical role we play in delivering high quality, culturally appropriate legal services to Aboriginal and Torres Strait Islander people, we have been historically and systemically under-valued, under-funded and under-resourced to meet the known demand for our legal services. Demand for ALS services in NSW almost doubled between 2018 and 2023. Without commensurate increases to our funding to match this demand, the ALS has maintained that greater resources are needed, not only to meet existing demand but to address consistently increasing demand.

The recent *Independent Review of the National Legal Assistance Partnership 2020-25* (NLAP Review) confirmed [the submission of National Aboriginal and Torres Strait Islander Legal Services \(NATSILS\)](#) that the current funding envelopes and funding distribution models fail to provide sustainable, needs-based investment, forcing ATSILS to turn away clients and to impose service freezes due to chronic underfunding.

While the Commonwealth Government has announced increases to legal assistance funding from 1 July 2025 under the new National Access to Justice Partnership (NAJP), the forthcoming federal funding arrangements make inadequate provision for indexation and rising costs, and fall short of the investment required by ATSILS to meet demand for services.

Aboriginal and Torres Strait Islander peoples have the highest legal needs of any group in Australia, face structural discrimination at every stage of the legal process; are disproportionately harmed by punitive laws and policies that drive over-incarceration; intergenerational traumas and deeply entrenched systemic disadvantage. Despite commitments under the National Agreement on Closing the Gap to improve life outcomes for Aboriginal and Torres Strait Islander peoples, culturally safe and holistic legal assistance services for Aboriginal and Torres Strait Islander communities remain critically underfunded, leaving many without access to justice.

While we continue to urge action by the Commonwealth Government to provide needs-based, sustainable funding to ATSILS, we acknowledge and highly value the ongoing support of the ACT Government in providing additional jurisdictional resourcing to the ALS via various funding streams, including funding which enables us to deliver our holistic, wraparound support programs in the ACT.

Conclusion

The inequities between Aboriginal and non-Aboriginal communities in the ACT are pronounced, deeply entrenched and underpinned by persistent structural racism and discrimination at every stage of the criminal process. Responding to these inequities requires an approach which strengthens communities through investment in addressing the social and environmental determinants of

incarceration,²⁸ and providing adequate services to meet community needs – not through punitive interventions which increase the risk of crime and decrease community safety.

In accordance with all governments' commitments under the National Agreement on Closing the Gap, responses must be developed in genuine partnership with Aboriginal and Torres Strait Islander people, represented by their Peak Organisations, through shared decision-making in the design, implementation, monitoring and evaluation of policies and programs impacting Aboriginal and Torres Strait Islander people, and give effect to the Priority Reforms, including strengthening the community-controlled sector.

Thank you for inviting us to engage in this consultation. If you require further information, please contact [REDACTED]

Sincerely,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁸ <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/2-context/social-determinants-of-incarceration/>