THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Adam Searle MLC
Chair
Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody
Parliament House, Macquarie Street
Sydney NSW 2000

By email: First.Nations@parliament.nsw.gov.au

Dear Chair,

Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody

The issue of Aboriginal and Torres Strait Islander overrepresentation in the criminal justice system and deaths in custody is not new, and the Law Society of NSW has previously advocated on these issues. This submission is informed by the Indigenous Issues, Criminal Law, Public Law and Children's Legal Issues Committees of the Law Society.

The Royal Commission into Aboriginal Deaths in Custody ("RCIADIC") was established in 1987 in response to the unacceptable rates of deaths of Indigenous peoples in prison and police custody. Judge Norrish QC has commented that the RCIADIC identified "[m]any significant, widespread and surprisingly common underlying issues to offending by Aboriginal people across Australia"[1] and that "[t]he evidence available of the impact on offending behaviour of contextual socio-economic circumstances and other historical factors beyond the control of individual offenders is readily available and, I suggest undeniable."

Central to the 339 recommendations made by the RCIADIC were those to address the overrepresentation of Indigenous peoples in the criminal justice system, and to use imprisonment only as a last resort. We note that the Government commissioned a report on the implementation of RCIADIC recommendations ("Deloitte report"). While this report was criticised for a number of reasons, including in respect of its methodology,[2] we note that it found that:

[1] Judge Stephen Norrish QC, "Sentencing Indigenous Offenders – Not enough 'judicial notice'?," *Judicial Conference of Australia Colloquium,* (October 2013) at p. 3 available online http://jca.asn.au/wp-content/uploads/2013/11/P01_13_02_29-Norrish-paper.pdf.
[2] K Jordan, T Anthony, T Walsh and F Markham, *Joint response to the Deloitte Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody,* Centre for Aboriginal Economic Policy Research, ANU College of Arts & Social Sciences, CAEPR Topical Issue No 4/2018.

> The lowest proportion of fully implemented recommendations relates to self-determination, non-custodial approaches, and cycle of offending.[3]

Given that the key finding of the RCIADIC and other reviews since is that the crux of the problem is the disproportionate rate at which Aboriginal and Torres Strait Islander people are incarcerated, and the systemic issues underlying incarceration, it is not surprising that this issue remains unaddressed almost 30 years after the RCIADIC.

More recently, the Australian Law Reform Commission (ALRC) carried out a comprehensive review of the multi-faceted and interconnected factors leading to the unacceptable levels of Indigenous people in custody and tabled the *Pathways to Justice* report in 2018 ("ALRC Report").[4] In our view, the ALRC report sets out a thorough and considered roadmap to addressing the vexed issue of Indigenous overincarceration, and should continue to be a starting point when considering the issues under inquiry. However, Governments at all levels have not responded substantively to the recommendations made in this report. The Law Society continues to support the recommendations made in the ALRC Report, and highlights below a number of recommendations that could be more immediately addressed.

We note that this inquiry is taking place while states and territories are considering how to implement the new National Closing the Gap targets, particularly in respect of justice and care and protection. In our view, addressing these issues are directly relevant to those implementation plans, and our comments are provided in that context.

1. Factors relevant to the unacceptably high level of First Nations people in custody in New South Wales

We strongly recommend that the NSW government move swiftly to work with Aboriginal and Torres Strait Islander communities, as well as health and justice agencies, to develop strategies to implement the recommendations of the ALRC Report.

We note that the 2010 report prepared for the Minister for Juvenile Justice*, A Strategic Review of the New South Wales Juvenile Justice System*, pointed out the existence of strategic plans to address Aboriginal overrepresentation in the criminal justice system as far back as 2001 and the absence of significant progress at the date of that report.[5]

There are a number of specific law reform, policy and funding measures which we suggest should, as a starting point, be addressed immediately.

In our view, there should be a focus on systemic strategies that limit Aboriginal and Torres Strait Islander peoples' entry into the criminal justice system. This will require a whole of government strategy that will consider upstream issues including diverting Indigenous children away from the care and protection jurisdiction in order to avoid the drift from care and protection into the juvenile justice system and focusing on education access for Indigenous children, as well as more immediate contact points with the justice system including arrest,

[3] Deloitte Access Economics, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in custody,* Report to the Department of Prime Minister and Cabinet, 2018, xi ("Deloitte report").
[4] Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Final Report No 133 (2017) ("ALRC Report").
[5] Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice*, April 2010, [474].

bail and sentencing. Issues in respect of policing and arrest have been dealt with in the ALRC Report,[6] and we recommend that discussion to this inquiry. We support the ALRC's recommendation that community-led justice reinvestment approaches that address the *drivers* of interactions with the criminal justice system should be considered. We highlight below matters also discussed in the ALRC report and in the context of Closing the Gap as matters that either must be addressed at a systemic level in order for programs to be successfully delivered, or can be addressed relatively quickly and achieve significant impact.

In our view, as a threshold issue, the NSW Government should establish a committee led by the advice and knowledge of Aboriginal and Torres Strait Islander justice and health professionals to implement the recommendations of the ALRC Report. Such a committee should include Federal and State representatives to ensure there is a coordinated whole of government response. We anticipate that the establishment of this committee would be undertaken in the context of larger efforts to implement the Closing the Gap justice and care and protection targets.

1.1. Empowerment of Aboriginal and Torres Strait Islander peoples and communities

The Law Society considers it significant that Indigenous delegates from all around Australia again identified as a consensus view in the Uluru Statement from the Heart, the importance of Makarrata, or treaty, to capture "our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination".

In the absence of a formal treaty framework, the Law Society's view is that respecting the principle of self-determination and its manifestation in practice by empowering communities and individuals, is critical. Research has consistently demonstrated that outcomes for Aboriginal and Torres Strait Islander people are better if the initiatives are Aboriginal led and owned.[7]

In this regard, we note in particular our support for funding of justice reinvestment initiatives, consistent with the recommendations made in the ALRC Report.[8]

There are many examples of successful initiatives set up in partnership with Aboriginal community leaders, such as the work undertaken by Maranguka and Just Reinvest in Bourke, NSW. The impact assessment report prepared by KPMG[9] details both the significant qualitative and quantitative benefits accrued through this community led initiative, including a reduction in both adult and juvenile bail breaches.

We understand that the key elements underpinning the success of the work of Maranguka and Just Reinvest NSW are as follows:

- The governance structures are built from the ground up, and include a tribal style council, and a cross-sector leadership group comprising of leadership from the relevant government agencies, NGOs and the philanthropic sector;
- Community capacity building is carried out by community, for community, and empowerment of individuals takes place at a pace that suits each person. We understand

[6] ALRC Report, Chapter 14.
[7] F Allison & C Cunneen, 'The Role of Indigenous Justice Agreements in improving legal and social outcomes for Indigenous people' Sydney Law Review, 32: 645-669, 2010.
[8] ALRC Report, Recommendations 4-1 and 4-2.
[9] KPMG*, Maranguka Justice Reinvestment Project: Impact Assessment*, 2018, 22.

that there is a clear plan for community engagement, and a pact was made that no one would be left behind;
- The community holds itself accountable by putting in place independent oversight and scrutiny mechanisms;
- An evidence-based, adaptive approach is taken to trialling initiatives, rather than recycling approaches that have not worked in the past;
- The approach in Maranguka is not "programmatic" and reliant on initiatives of priorities built in Sydney or Canberra. Instead, the community identifies its own needs, and solutions to those needs. In our view, this is key to successful co-designed approaches and solutions;
- Through the cross-sector leadership mechanism, the community has access to a Minister within the NSW Government who acts as a champion and a solutions-broker.

One measure of a government's commitment to community empowerment is assessing how the service delivery to Aboriginal communities is designed and funded. In our view, funding of service delivery to Aboriginal communities should prioritise partnerships with local Aboriginal leadership, and should prioritise funding of Aboriginal controlled community organisations that may be already providing local solutions to local issues.

On the issue of effective funding generally, we note the findings in the *Ombudsman's Special Report to Parliament, Addressing Aboriginal disadvantage: the need to do things differently*. This report's findings were informed by extensive consultation with thousands of Aboriginal people, as well as hundreds of agencies and organisations responsible for service provision. The report is also supported by a decade of work by the Ombudsman on these issues.

We recommend consideration of the findings and recommendations of this report, which in the Law Society's view, supports a transparent funding model that is underpinned by the principle of self-determination, and which establishes true partnerships. The report noted that in NSW "substantial government investments have "yielded dismally poor returns to date"…"[10] and that in order to change this, the reform process must make Aboriginal affairs core business for all agencies, where change is driven from the centre of government. Further, the reform process should involve a true partnership between government and Aboriginal communities. The report also noted that:

> government must work with Aboriginal leaders in developing strategies to facilitate greater participation by Aboriginal people in successful economic endeavours.[11]

We support a strategy that focuses on enhancing the strengths of Indigenous communities at the front end, and supports substantial investment in community-based programs, such as those suggested in the ALRC Report,[12] as they can make a positive contribution across the justice continuum and would positively impact on bail by reducing bail risks, the risk of reoffending and consequently remand and incarceration rates.

[10] NSW Ombudsman, *Addressing Aboriginal disadvantage: the need to do things differently,* A Special Report to Parliament under s 31 of the Ombudsman Act 1974, October 2011, 5.
[11] Ibid.
[12] ALRC Report, Chapter 4.

1.2. Care targets

The Law Society is pleased that the National Agreement on Closing the Gap targets includes a care and protection target to reduce the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 45% by 2031.[13]

We note the link between out-of-home care and involvement in the criminal justice system. Of the 99 Indigenous people who died in custody, and who were the subject of the Royal Commission into Aboriginal Deaths in Custody, 43 were separated from their families as children.

More recently, the Royal Commission into the Protection and Detention of Children in the Northern Territory,[14] as well as the recent ALRC Report, specifically acknowledged the link between care and protection, juvenile detention and later adult incarceration.

We suggest that addressing the drivers leading Aboriginal children into out-of-home care will also assist with other targets, such as educational attainment. In this regard we refer to the NSW Ombudsman's August 2017 *Inquiry into behaviour management in schools*.[15] We note the alarming statistics in respect of school attendance for children in out-of-home care. The Ombudsman's inquiry found that for 295 school age children and young people who had been in out-of-home care for three or more months in 2016, 43% (128) missed 20 or more school days in 2016 for reasons other than illness. About one third (42) of these children were Aboriginal. These 128 children missed an average of 44% of the school year.[16]

We note the Ombudsman's view that the Department of Education's:

> "lack of documented information about the OOHC status of the children we reviewed highlights the need for improved work between the department and FACS to ensure that children in OOHC are accurately identified at an early point to enable an appropriate and informed response to meeting their learning and support needs."[17]

For example, anecdotally, we understand that learning plans are often not made or maintained in respect of these children. In our members' experience, despite the obligatory nature of learning plans, the out-of-home care caseworker may not be in contact with schools to develop learning plans in respect of children in out-of-home care.

We note further that issues in relation to children in out-of-home care and their educational needs have been raised previously, most notably in the Wood inquiry in 2008. The Ombudsman's view is that "[i]t is disappointing to note the lack of progress in addressing these issues."[18]

The poor outcomes that result from non-attendance at school are myriad, not least of which is the fact that it is a risk factor for children in respect of entering the juvenile justice system. In

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[13] National Agreement on Closing the Gap Targets https://www.closingthegap.gov.au/targets.
[14] *Royal Commission into the Protection and Detention of Children in the Northern Territory*, 28 July 2016, Vol. 3B, Ch 35.
[15] NSW Ombudsman, *Inquiry into behaviour management in schools: A Special Report to Parliament under s 31 of the Ombudsman Act 1974*, August 2017.
[16] Ibid. 46.
[17] Ibid. 48.
[18] Ibid. 46.

this regard, we note the recommendations made by the *Family is Culture* Report.[19] We note that one relatively inexpensive recommendation made by this report is the establishment of an Indigenous specific list in the Children's Court in respect of care and protection matters. Noting the success of the Youth Koori Court, the Law Society supports this recommendation.

The Law Society has also advocated extensively in respect of specific and targeted measures to divert Indigenous children and families away from the care and protection jurisdiction into the family law jurisdiction. Relevantly, we note the successful Indigenous list, established at the Sydney registry of the Federal Circuit Court since September 2016 (and now established at other registries including Melbourne and Adelaide). We understand that crucial to the success of this initiative is a true and committed partnership between Indigenous leadership, Indigenous therapeutic services, legal assistance providers and the Court.

We understand that the success of the Indigenous list has been largely attributed to the fact that the legal framework is supported by comprehensive, culturally safe (and therefore more effective), wrap-around therapeutic support. Indigenous community services identify and assess appropriate matters for diversion to the Court.

Legal service providers, including the Family Law Early Intervention Unit of Legal Aid NSW, provide timely legal assistance to parties, supported by Indigenous community workers. Indigenous community services attend the otherwise closed Court so that seamless and effective referrals can be made for assistance, including housing, drug and alcohol, mental health and other therapeutic assistance.

1.3. Early contact with the criminal justice system

Data from the NSW Bureau of Crime Statistics and Research ("BOCSAR") demonstrates the disproportionate number of Aboriginal and Torres Strait Islander children in custody. Between the ages of 10 and 12, the proportion of Aboriginal Australians making their first contact with the NSW criminal justice system is between 30 and 56 times higher than that of non-Aboriginal Australians. For children aged 13, the ratio of Aboriginal to non-Aboriginal criminal justice system contact is around 7:1.[20] The Australian Institute of Health and Welfare *Youth Justice in Australia 2017-18* report found that of the 49 children aged 10-13 either in detention or under community supervision in NSW on an average day during the year under review, a total of 31 – or 63% – were Indigenous. The equivalent figures in 2016-17 and 2015-16 were 59% and 62% respectively.[21]

The life trajectory outcomes for children who encounter the criminal justice system at an early age are significant. A study by the Australian Institute of Health and Welfare has shown that the younger a child is when they complete a supervised sentence, the higher the chance of

[19] Megan Davis, *Family is culture final report: Independent review into Aboriginal out-of-home care in NSW,* October 2019.
[20] Don Weatherburn and Stephanie Ramsey, 'Offending over the life course: Contact with the NSW criminal justice system between age 10 and age 33' (April 2018), *NSW Bureau of Crime Statistics and Research Bureau Brief*, Issue paper no. 132, 5.
[21] Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (2019) Cat. no. JUV 129, table S128a.

returning to custody.[22] Children who have been in custody are also less likely to complete their education or find employment.[23]

The Law Society has previously advocated that the minimum age of criminal responsibility ("MACR") should be raised to 14 years and *doli incapax* removed. We continue to hold this position. Raising the MACR may ameliorate the disproportionate impact of the current law on Aboriginal and Torres Strait Islander children in Australia. However, a change in the MACR should not occur in isolation; it would need to be accompanied by increased capacity for needs-based, non-criminal law responses to behaviour which currently constitutes 'offending' for children aged 10-13.

1.4. Bail

We support the adoption of a standalone provision to require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations, as recommended by the ALRC.[24] In this regard we note s 3A of the *Bail Act 1977* (Vic).

Under s 32(1)(1a) of the *Bail Act 1978* (NSW), bail authorities had to consider an accused Aboriginal or Torres Strait Islander person's background and community ties, as indicated by the person's ties to extended family and kinship and other traditional ties to place.

Section 18(1)(k) of the *Bail Act 2013* (NSW) requires bail authorities to consider 'any special vulnerability or needs' of an accused person that arise from their being an Aboriginal or Torres Strait Islander person, which has, in effect, reduced the factors of Aboriginality that must be considered by a bail authority.

A standalone provision would give the section more prominence and ensure that a person's cultural background, ties to family and place, and cultural obligations are taken into account when bail is determined, and help facilitate the imposition of appropriate bail conditions.

1.5. Specialist Indigenous sentencing courts

The Law Society notes recommendations 10-2 and 10-3 of the ALRC Report that state governments should, in partnership with relevant Aboriginal and Torres Strait Islander organisations, establish specialist Indigenous sentencing courts that incorporate individualised case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.

In addition to our support for an Indigenous specific care list in the Children's Court, the Law Society supports expanding the availability of circle sentencing. We note that a recent study by the BOCSAR has found that Aboriginal people who participate in Circle Sentencing have lower rates of imprisonment and recidivism than Aboriginal people who are sentenced in the traditional way.[25]

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[22] Australian Institute of Health and Welfare*, Young people returning to sentenced youth justice supervision 2014–15* (2016). Juvenile justice series No. 20. JUV 84.
[23] Australian Institute of Health and Welfare, *Young people aged 10–14 in the youth justice system 2011–12* (2013), Juvenile justice series No.12. JUV 19, 21.
[24] ALRC Report, Recommendation 5-1.
[25] Bureau of Crime Statistics and Research, *Circle Sentencing, incarceration and recidivism*, April 2020,1.

The Law Society continues to support the work of the Youth Koori Court in NSW, and submits that it should be extended to operate in other areas to enable greater access by Indigenous young people. We commend the NSW Government for providing funding to this court, noting that the NSW Attorney General's view on the court is as follows: "Conducted in a relatively informal setting, the Youth Koori Court increases Aboriginal involvement in the delivery of justice, ensuring outcomes are culturally relevant and have more impact on the offender."[26]

The Law Society also reiterates its support for the establishment of the Walama Court in the District Court of NSW, noting that the ALRC Report also supports its establishment. We understand that it has been the subject of comprehensive planning over the years by relevant stakeholders and is ready for operation. We understand that the Government may have resourcing concerns in respect of this initiative. Nevertheless, the Law Society continues to support the establishment of this Indigenous specific sentencing model.

1.6. Sentencing reform

The Law Society supports legislative reform to require that an offender's status as an Aboriginal or Torres Strait Islander person should act as a flag to the sentencing court that it should consider the offender's particular background circumstances, and when appropriate, have regard to the effect of the offender's particular background circumstances.[27] The Law Society's view is that specific legislative direction would simply provide clearer direction to the courts to allow for individual circumstances in sentencing. In our view, consideration of such legislative amendment should be informed by recommendation 92 ("imprisonment [be] a sentence of last resort") and recommendation 93 ("adequate and appropriate range of non-custodial sentencing options should be available for all Aboriginal offenders") of the RCIADIC.

We understand that ALS NSW/ACT wrote to the NSW Attorney General Mr Greg Smith SC on 9 December 2013 requesting that the Government amend the sentencing legislation in NSW to include reference to the need for courts to carefully scrutinise the background circumstances of Aboriginal and Torres Strait Islander offenders before passing sentence. The Law Society wrote to the NSW Attorney General on 6 November 2014 supporting this view.

The ALS' request was made after the High Court's decision of *Bugmy v The Queen* [2013] HCA 37, which affirmed the need for careful and full attention to background factors in order to achieve proper individualised justice in sentencing. The High Court in *Bugmy* also found that the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending (at [44]).

We note the Canadian *Criminal Code*, RS C 1985, c46 ("*Code*") was amended in 1996 in relation to sentencing provisions. The significance of the amendment was that judicial officers are now required to take into account Aboriginality in sentencing, where the legislation now prescribes how Aboriginality can be taken into account. Relevant provisions of s 718.2(e) of the *Code* are as follows:

> A Court that imposes a sentence shall also take into consideration the following principles
> ...
> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[26] Attorney General of NSW, "$220,000 funding boost for Youth Koori Court", *Media Release,* 16 June 2017.
[27] ALRC Report, Recommendation 6-1.

The Law Society notes that in the decision of *R v Gladue* [1999] 1 S.C.R. 688, the Supreme Court of Canada provided a summary of its decision. The following three points are extracted from that summary:

i. Section 718.2(*e*) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.
ii. Section 718.2(*e*) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also to consider the unique circumstances of aboriginal people by examining
    - the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts;
    - the types of sentencing procedures and sanctions which may be appropriate because of the offender's aboriginal heritage or connection.
iii. In order to undertake these considerations, the judge will require information pertaining to the accused. Generally, case-specific information will come from counsel and from a pre-sentence report … which in turn may come from representations of the relevant aboriginal community. The accused may waive the gathering of that information.

The third point noted above identifies an evidentiary requirement that, in Canada, has been addressed by the preparation of Gladue reports, discussed further below.

The position ultimately adopted by the NSW Law Reform Commission (NSWLRC) in its 2013 report on sentencing,[28] was that:

> there may be merit in adding to our Recommendation 4.2(1)(d) about the factors that a court must take into account a reference to the circumstances of Aboriginal and Torres Strait Islander offenders. So worded, the provision would be to the following effect:
>
> > the offender's character, general background (**with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders**), offending history, age, and physical and mental condition (including any cognitive or mental health impairment)
>
> Although this would not require a different approach to sentencing, it might help to ensure that courts give attention to any of the factors that are relevant to sentencing that arise because of the offender is an Aboriginal person or Torres Strait Islander.[29]

The NSWLRC recommended that:

> **17.1 Consider including Aboriginality as a factor to be taken into account**
> After the High Court has delivered the decision in Bugmy, the government should consider, in light of that decision, whether to amend the factors that a court must take into account to include that an offender is an Aboriginal person or a Torres Strait Islander where that is relevant to the sentencing exercise.[30]

The Law Society supports this proposition for reform.

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[28] NSW Law Reform Commission, *Sentencing,* Report 139, July 2013, available online: http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-139.pdf.
[29] Ibid. 372.
[30] Ibid.

1.7. Indigenous Experience Reports

The Law Society supports the implementation of schemes, led by, and in partnership with, Aboriginal and Torres Strait Islander organisations, to facilitate the preparation of 'Indigenous Experience Reports' for offenders appearing for sentence in superior courts and other means of presenting evidence of 'unique systemic and background factors' in summary courts.[31]

In the view of our members, sentencing courts do not always have sufficient information available about the offender's background. In the *Bugmy* decision, the Court noted that "in any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background."[32] If State and Territory legislation is reformed on similar terms to the Canadian *Criminal Code*[33] (or to require consideration of Aboriginality as a factor in sentencing), then such information material may become a sentencing requirement. Even if such legislative reform does not take place, the Law Society supports the implementation of Gladue style reporting.

The Law Society is aware that ALS NSW/ACT has established the Bugmy Evidence Project, to gather and develop community by community reports about locations with high populations of Aboriginal people. These reports are intended to provide narrative and statistical information about Aboriginal communities in NSW, where the essential aim of the project is to provide background community evidence supporting an individual's personal experience in that community, which is often of social disadvantage.

We understand that the Bugmy Evidence Project is not aimed at providing individualised reporting about the community for a person facing court (similar to Canadian Gladue reports), but it coheres with that style of reporting and would inform and assist any future Gladue reporting project. In this regard, we also note the *Bugmy Bar Book Project.*[34]

It is critical that Aboriginal and Torres Strait Islander legal, health and community organisations be consulted in relation to the information gaps that currently exist, and how best to put that information before the courts. We suggest that the following information may benefit the court, depending on the background of the relevant offender:

- The community profiles prepared pursuant to the Bugmy Evidence Project, noting the importance of ensuring that evidence of intergenerational trauma, and how particular families and communities may be affected by, for example, the experience of the Stolen Generations, is made available to the court.
- Where there is a history of trauma or deprivation, assessments by an Aboriginal mental health professional or mental health professional who has undergone cultural competence training to properly assess the impact of the trauma, identify any Indigenous specific mental health issues and culturally appropriate treatment and support.
- Other information contained in Gladue reports, in particular, information in respect of community-based rehabilitation and alternatives to imprisonment.

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[31] ALRC Report, Recommendations 6-2 and 6-3.
[32] *Bugmy v The Queen* [2013] 37, [41].
[33] Ontario law requires that *Gladue* principles apply anytime an Aboriginal person's liberty is at stake. See: http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr12_11/p3.html#sec653.
[34] For further information see: https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book.aspx.

The following information on Gladue reports provided by an Aboriginal caseworker with the Aboriginal Legal Services of Toronto who authors Gladue reports is instructive:

> It serves two purposes: first, it highlights the unique systemic factors that may have brought a particular Aboriginal offender before the court. Second, it provides information regarding community-based rehabilitation that may or may not be culturally appropriate.
>
> Some of the unique systemic factors include impacts of residential school, child welfare involvement, dislocation, substance abuse and discrimination just to name a few. Each report is unique as it reflects an Aboriginal offender's life experience. Some of these factors may run deep into an Aboriginal offender's life and may have caused them to cope negatively by way of substance abuse, for example.
>
> Based on the information collected and after discovering and/or determining an Aboriginal offender's underlying issues, a *Gladue* caseworker is able to suggest culturally appropriate (where available) programming to assist in rehabilitation. This is made by way of recommendation for the court's consideration when crafting an appropriate sentence.
>
> For the most part, *Gladue* reports have been authored by an Aboriginal. An Aboriginal report writer has a better understanding of the unique circumstances faced by Aboriginal people and, more often than not, shares those experiences in common with the Aboriginal offender. This generally allows a report writer to build rapport with an Aboriginal offender quite quickly.[35]

The Law Society further notes that implementing Gladue style reporting, assuming the reports are informed by members of the relevant Aboriginal communities and prepared by Aboriginal people, would animate recommendation 104 of the RCIADIC (Aboriginal communities should be involved in the sentencing of Aboriginal offenders to a greater extent).

The Law Society is of the strong view that if Gladue style reports are implemented in NSW, they should be prepared by independent bodies that are properly resourced. The reports should be prepared at least with Aboriginal input and should particularly be informed by members of the Aboriginal communities in question. We do not support a model where the report is prepared by Corrective Services NSW.

That said, we note that it will be important to ensure that there is some practical interaction between reports prepared by Corrective Services NSW or Youth Justice NSW and any Gladue type report.

Consideration should be given to whether there should be one report which includes a Gladue component or whether there should be two separate reports. One very worthwhile example of reports of this nature is in the New Zealand Youth Court where the report is prepared by an independent person, who takes the role of a "community" or "cultural" or "family" advocate.[36]

The Law Society suggests consideration of the experience of Ontario Canada in respect of appropriate models for the funding and preparation of specialist sentencing reports.

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[35] Chad Kicknosway, "Gladue Reports: not just a sentencing report," 13 March 2015, *Legal Aid Ontario Blog,* available online: http://blog.legalaid.on.ca/2015/03/13/gladue-reports-not-just-a-sentencing-report/.

[36] For more information see a paper by the (then) Chief Judge of the NZ Youth Court Judge Andrew Becroft. https://www.youthcourt.govt.nz/assets/Documents/Publications/Youth-Court-the-rise-rise-of-lay-advocates-in-New-Zealand.pdf.

For example, we understand that Legal Aid Ontario (LAO) is one source of funding for the preparation of these reports,[37] which are prepared by Aboriginal Legal Services of Toronto and Aboriginal organisations in a number of localities throughout Ontario,[38] and that a Gladue member panel has been established by LAO. Membership of the panel requires certain levels of training and cultural competence.[39]

1.8. Investing in support services and diversionary options

The Law Society considers it critical that funding be provided for culturally competent, safe and appropriate residential drug and alcohol rehabilitation centres in all regional areas. In particular, there is a clear need for sufficient beds to avoid long waiting lists and minimise the possibility that motivation for change will be extinguished by delay. These essential services would provide meaningful treatment options for accused persons on bail and for post-release offenders. They would also strengthen the NSW sentencing reforms, commencing in September 2018, which are geared towards strengthening community-based sentencing options.

What is very clear from the ALRC Report, and to Law Society members who represent accused persons at every level of the justice system, is that there is an unacceptable lack of support services and diversionary options for Aboriginal and Torres Strait Islander people. This is particularly so in regional and remote areas. This includes community based mental health services, out-patient drug and alcohol services and residential rehabilitation facilities. Without the availability of adequate and appropriate services, the courts are less likely to release an accused person on bail or impose a community-based sentencing option and thus reduce the rate of imprisonment of Aboriginal and Torres Strait Islander people.

The distinct lack of residential rehabilitation centres in remote and regional areas often means that people in need of these essential services often have to travel significant distances from home to access a service, even if they can gain admission to it. This can be a disincentive to participating in treatment as the travel may be a financial strain on low income people experiencing addiction but it may also be daunting for people to travel away from their family and community at a time when they need their support. Regional and remote communities should have reasonable access to centres which:

- are culturally competent and provide for the specific treatment and healing needs of Indigenous Australians and practice excellence in holistic healthcare
- recognise the prevalence of dual diagnosis by providing treatment for people who experience drug dependence as well as mental health issues
- provide outpatient services to allow local people to effectively transition back into their communities with the continuity in care provided by the centre and appropriate local referrals.

There are often substantial wait lists for out-patient drug and alcohol services and psychological services, especially public services. There are generally too few culturally appropriate and safe services to cater for the demand.

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[37] '2019 service changes', *Legal Aid Ontario* https://www.legalaid.on.ca/lawyers-legal-professionals/2019-service-changes/.
[38] 'Gladue report programs in Ontario', *Legal Aid Ontario* https://www.legalaid.on.ca/lawyers-legal-professionals/for-aboriginal-legal-issues/gladue-report-programs-in-ontario/.
[39] 'Gladue panel standards', *Legal Aid Ontario* https://www.legalaid.on.ca/lawyers-legal-professionals/interested-in-doing-legal-aid-work/gladue-panel-standards/.

We support Indigenous led, culturally appropriate and safe healing/treatment services, such as Weave's *Creating Futures Justice Program*, which is an intensive support service for young people aged 18-30 years leaving custody or otherwise involved in the criminal justice system. It provides wraparound casework tailored to the needs and goals of each client, as well as court support and advocacy. A recent evaluation of the service reported, inter alia, decreased recidivism rates and improved bail outcomes.[40]

It is essential for Indigenous and non-Indigenous people on remand that meaningful alternatives to prison are available in the community, particularly to support people with mental health issues and drug and alcohol dependence. There is a distinct lack of residential and other drug and alcohol services in New South Wales. This is particularly so for regional and remote areas of New South Wales.[41] Such services are less expensive than prison, provide targeted therapy for vulnerable people who may be at risk of offending and enhance the safety of our community.

1.9. Mental health care in correctional and mental health facilities

The Law Society is concerned about the availability of culturally appropriate mental health care for Aboriginal and Torres Strait Islander people in correctional and mental health facilities.

We were deeply concerned following Deputy State Coroner Grahame's decision of 6 May 2020, finding that that the death of an Aboriginal person at Junee correction centre was "…in circumstances of being held in custody with inadequate mental health care in the preceding months".[42] At [273] of the findings, it was said:

> In my view, the evidence demonstrates a clear need for Aboriginal Mental Health Workers at Junee CC. The evidence disclosed that well intentioned non-Indigenous doctors and nurses had been unable to establish any significant or consistent rapport with [the deceased] or even acquire permission to seek collaborative information from community or family sources.

Concerted and directed efforts must be made to increase the number of suitably qualified mental health workers and Aboriginal and Torres Strait Islander mental health workers in the forensic, juvenile justice and corrective systems.

1.10 Policing

Finally, we note that policing practices and underuse of diversionary options by police play a considerable role in the over-representation of Aboriginal people in the criminal justice system.

Data indicates that some locations with high proportions of Aboriginal people, for example Blacktown LGA in Sydney, have disproportionately lower rates of diversions of young people under the *Young Offenders Act 1997.*

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[40] Schwartz and Terare, *Creating Futures: Weave's intensive support service for young people leaving custody or involved in the criminal justice system*, Evaluation Report, 2020, p7.
[41] NSW Legislative Council, Portfolio Committee No. 2 - Health and Community Services *Provision of drug rehabilitation services in regional, rural and remote New South Wales*, Report 49, 2018, Rec 2; Professor Dan Howard SC, *Special Commission of Inquiry into the crystal methamphetamine and other amphetamine-type stimulants*, 2020, Rec 31.
[42] *Inquest into the death of Jonathon Hogan* (2020) Coroners Court of NSW (6 May 2020), [305].

Mt Druitt, in the Blacktown LGA, carries NSW's highest fines debt which can be a trigger into secondary offences related to driving unlicensed. The use of onerous bail conditions can also be a driver into the criminal justice system.

We also refer to the disproportionate use punitive policing practices and surveillance under Suspect Target Management Plans against young Aboriginal people that draws them into the criminal justice system.[43]

2. Oversight

Given that the overarching issue is the disproportionate rate of Indigenous people going into custody, we note that effective oversight of the entire process, starting at initial contact with the criminal justice system and ending with a death in custody, is critical. Such oversight must include effective feedback into the relevant systems. Effective feedback requires the timely rectification of any systemic reasons, (as well as individual error or malfeasance, misfeasance or nonfeasance), underlying why Indigenous (and non-Indigenous) people continue to die in police or prison custody.

In the Law Society's view, there is ambiguity as to the responsibilities of the various oversight bodies in respect of deaths in custody, including ambiguity in respect of what the scope of these responsibilities of the various oversight bodies are at the different touch points in the criminal justice system.

For example, the Coroner can only investigate and make recommendations after there has been a death. The Law Enforcement Conduct Committee (LECC) has carried out investigations over the last year into the treatment of Indigenous people in police custody, but can only use those powers to obtain information if there is suspected misconduct of police. The LECC and the Independent Commission Against Corruption have the capacity to carry out research and prevention work; however, they are limited to the amount of information that they can request from the agency being investigated.

Each of the listed bodies has its own mandate, and the very fact that Parliament is requesting commentary in respect of the suitability of each body suggests that the responsibility attached to each body regarding this issue is not clear.

The Law Society suggests that the Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody request information from the relevant agencies themselves about the touch points, to gain more information and knowledge about any gaps in oversight of the criminal justice process..

A systematic review that maps the responsibilities and powers of each oversight body should uncover any gaps in oversight, as well as any weakness in the system preventing systemic improvement.

[43] Sentas, V and Pandolfini, C, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan. A Report of the Youth Justice Coalition NSW*, (Sydney, 2017).

3. Conclusion

The Law Society notes that these issues are long-standing and require a concerted and coordinated whole of government response, and the will to make substantive, structural changes. We note the view of Chief Justice Bathurst in a recent speech:

> Our commitment to access to justice requires us to be particularly astute to the injustices facing Aboriginal and Torres Strait Islander communities. The Black Lives Matter movement has brought the racism, inequality and abuses of power that have haunted our nation for so long to the forefront of public consciousness. This year marks 250 years since Captain Cook first landed in Australia. Despite this significant passage of time, the Black Lives Matter movement has exposed that our criminal justice system remains a tool of injustice for Indigenous Australians, who are one of the most incarcerated people in the world. [footnote omitted][44]

Concerningly, we note the Deloitte report's finding that areas where the RCIADIC recommendations have not been fully implemented include the intensity of reporting on the progress of the implementation of the recommendations, which has reduced over time across all jurisdictions.[45]

Thank you for the opportunity to provide this submission. Questions may be directed to Vicky Kuek, Principal Policy Lawyer, at victoria.kuek@lawsociety.com.au or 9926 0354.

Yours sincerely,

Richard Harvey
President

[44] Chief Justice Bathurst, *Admission of Lawyers*, 2020 [21], http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2020%20Speeches/Bathurst_20200800.pdf.
[45] Deloitte report, xiii.