



Law Council
OF AUSTRALIA

Closing the Gap Refresh

Council of Australian Governments

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of the Law Society of New South Wales, the Law Society of South Australia, the Queensland Law Society, the New South Wales Bar Association, the Law Council's Indigenous Legal Issues Committee and National Criminal Law Committee in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Council of Australian Governments (**COAG**) in relation to the Closing the Gap Refresh Discussion Paper (**Discussion Paper**).
2. This submission has benefitted from input provided by Law Council Constituent Bodies, in addition to its Indigenous Legal Issues Committee, and through the Law Council's ongoing involvement with the [Change the Record Coalition](#). With regard to the latter, the Law Council endorses the submission put forward by Change the Record and supports the recommendations it has put forward as part of this consultation.
3. The Law Council notes that in 2007, COAG pledged to close key gaps in outcomes between Indigenous and non-Indigenous Australians. In 2008, Australian Governments committed to specific targets for reducing inequalities in Aboriginal and Torres Strait Islander life expectancy, mortality, education and employment. A seventh target to close the gap in school attendance was added in 2014.
4. The Prime Minister's 2018 Closing the Gap annual report to parliament showed that while progress has been made on the Closing the Gap targets, only three targets are on track.¹ Furthermore, four of the targets are set to expire in 2018, three of which appear unlikely to be achieved in this timeframe.
5. There are heightened calls to reassess current targets and introduce new ones where necessary, to ensure that tangible progress is made to closing the gaps in all areas of inequality and removing the entrenched levels of disadvantage experienced by many Aboriginal and Torres Strait Islander people and communities, particularly within the context of legal and justice outcomes.
6. A notable absence in the Closing the Gap framework relates to targets that address Aboriginal and Torres Strait Islander people's experiences with the Australian criminal justice system, for example, high incarceration rates and disproportionate levels of violence towards Aboriginal and Torres Strait Islander people. Further, there is an identifiable absence of targets within the strategy that address the overrepresentation of Aboriginal children and young people in the child protection system. While several underlying factors relating these issues have been accounted for in the Closing the Gap framework, to date, no targets have been set to address these issues.
7. It is submitted that substantive progress towards the existing Closing the Gap strategy, and the development of new targets will require a commitment to principles of self-determination, and a recognition that government must negotiate and co-design the future strategy and its indicators with Aboriginal and Torres Strait Islander community controlled organisations.
8. The Law Council has considered the Discussion Paper in relation to how the Closing the Gap agenda could be improved to better support the needs and aspirations of Aboriginal and Torres Strait Islander Peoples. The Discussion Paper poses a number of specific questions, which this submission addresses in turn below.

¹ Department of Prime Minister and Cabinet 'Closing the Gap: Prime Minister's Report 2018', online at <<https://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2018.pdf>>.

Responses to Discussion Paper questions

Discussion Paper question: How can governments, Aboriginal and Torres Strait Islander Peoples, and businesses work more effectively together? What is needed to change the relationship between government and community?

9. Aboriginal and Torres Strait Islander people have unique lived experiences and therefore need to be a central part of the conceptualisation, design and leadership of community justice and support programs. The Closing the Gap strategy should reflect the priorities of Aboriginal and Torres Strait Islander communities, as they are best placed to identify the areas for which there is a need to partner and co-design with governments to address disadvantage.
10. A recent report by PwC noted that the evidence is clear that community involvement in the design and delivery of programs is important. This requires more than mere consultation and requires a recognition that 'Indigenous Australians must have control, ownership and involvement in the solutions'.² While it is critical that Aboriginal and Torres Strait Islander people continue to be consulted across the various targets, consultation must be meaningful with resulting action. Most importantly, Aboriginal and Torres Strait Islander people must be empowered in decision making so as to allow self-determination and community-led change.
11. The Discussion Paper states that '[p]rosperity is about moving beyond wellbeing to flourishing and thriving. It refers to Aboriginal and Torres Strait Islander Peoples having the economic empowerment to be the decision makers over issues that impact their lives, and to seize opportunities for themselves, their families and communities'.³ While the Law Council agrees with this view, it is suggested that empowerment must not focus simply on economic empowerment. Government must work in true partnership with Aboriginal and Torres Strait Islander communities at a local level on the issues that affect Aboriginal and Torres Strait Islander peoples. This includes the Closing the Gap agenda itself, in respect of identifying the issues that face Aboriginal and Torres Strait Islander communities, and how to address them.
12. The Law Council's view is that respecting the principle of self-determination and its manifestation in practice by empowering communities and individuals, is critical. The United Nations *Declaration on the Rights of Indigenous Peoples (the Declaration)* provides a comprehensive base for the full participation of Indigenous peoples in the broader society in which they live or by which they may be governed, as well as a mandate for self-determination.⁴ The Declaration places the responsibility on Member States to 'provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving First Nations peoples of their integrity as distinct peoples or ethnic identities, or of their cultural values'.⁵ The principle of self-determination requires Indigenous participation in decision making, and it is submitted that the Close the Gap strategy should build on and contribute to this goal of Aboriginal and Torres Strait Islander empowerment.
13. The importance of appropriately enabling government support for indigenous-led capacity building cannot be underestimated. In this regard, the Law Council notes the work and approach adopted by the Empowered Communities strategic reform agenda,

² PricewaterhouseCoopers, '*Indigenous incarceration: Unlock the facts*' (May 2017), available online at <www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>.

³ Council of Australian Governments '*Closing the Gap Refresh: Discussion Paper*', at 4.

⁴ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007).

⁵ *Ibid*, Article 8.

and in particular its views on the role of structural change in supporting empowerment and self-determination for Aboriginal and Torres Strait Islander communities:

When we started Empowered Communities we identified the need for our local work to be connected and cemented with supportive structural changes to government systems and practices. We know that however hard we work in our regions to build capacity, self-reliance, aspiration, opportunity, increased choice and ensure that identities, languages and cultures are not lost, we will never cross the finish line without complementary structural change and real influence in decision making about our lives and development.⁶

14. One measure of a government's commitment to community empowerment is assessing how the service delivery to Aboriginal and Torres Strait Islander communities is designed and funded. The Law Council submits that funding of service delivery to Aboriginal and Torres Strait Islander communities should prioritise partnerships and co-design with local Aboriginal and Torres Strait Islander leadership, and should prioritise funding of Aboriginal and Torres Strait Islander community controlled organisations that may already be providing local solutions to local issues.
15. Finally, the Law Council notes the findings of the New South Wales Ombudsman on the issue of effective funding models for Aboriginal and Torres Strait Islander organisations in its report titled 'Addressing Aboriginal disadvantage: the need to do things differently' (**Ombudsman Report**).⁷ The Ombudsman Report was informed by extensive consultation with thousands of Aboriginal people, as well as hundreds of agencies and organisations responsible for service provision.
16. The Law Council endorses consideration of the findings and recommendations of the Ombudsman Report, which, in the view of the Law Council, supports a transparent funding model that is underpinned by the principle of self-determination, and which establishes true partnerships. In noting that 'substantial government investments have yielded dismally poor returns to date', the Ombudsman Report suggests 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.⁸ Further, the reform process must involve a true partnership between government and Aboriginal and Torres Strait Islander leaders.
17. The Law Council notes that while the Ombudsman report examines the New South Wales Government's Aboriginal affairs strategy, its findings and recommendations are likely to be applicable nationally, and has contextual relevance for the future direction of the Closing the Gap initiative.

⁶ Empowered Communities. 'Statement on Constitutional Recognition for the First Nations of Australia' (31 July 2017), online at <<http://empoweredcommunities.org.au/media/empowered-communities-statement-on-constitutional-recognition-254590.aspx>>.

⁷ NSW Ombudsman, 'Addressing Aboriginal disadvantage: the need to do things differently' A Special report to Parliament under section 31 of the *Ombudsman Act 1974* (October 2011), online at <www.ombo.nsw.gov.au/__data/assets/pdf_file/0012/3342/SR_Aboriginal-disadvantage-report.pdf>.

⁸ Ibid, 5.

Discussion Paper question: How could the Closing the Gap targets better measure what is working and what is not?

18. To improve the measurement process and the ultimate objective of closing the gap between Indigenous and non-Indigenous Australians, ongoing evaluation of the initiatives associated with each of the Closing the Gap targets is necessary. This will properly inform both the setting and measuring of targets. It is also important to identify where programs and initiatives have been successful to ensure that long term funding is secured for such programs and initiatives to continue or be replicated. Similarly, where targets are not on track, an evaluation of relevant programs and initiatives is required to address the shortcomings of the current approach and make appropriate changes.
19. The Law Council submits that measurement of the current targets could be improved by including greater interim targets and milestones. For example, the life expectancy gap has a target for completion in 2031, there could be milestone targets leading up to 2031 to keep the target on track. Similarly, a quarterly report could be given to the parliament in relation to key targets such as the status of life expectancy and child mortality, to ensure accountability and progress on these issues.
20. It would be sensible for the Australian Government to establish robust and measurable targets to ensure there is an understanding across all levels of government with a common, bipartisan and national approach to reducing the current poor rate of progress.
21. The Law Council further submits that outcomes need to be measured for authoritative and evidential effectiveness by Aboriginal and Torres Strait Islander professionals and subject matter experts. To this end, the Law Council notes the recommendations of the Change the Record Coalition as they relate to the establishment of an appropriately qualified independent, Aboriginal and Torres Strait Islander led body to coordinate a national approach to data collection and policy development relating to Aboriginal and Torres Strait Islander people.

Discussion Paper question: What indicators should governments focus on to best support the needs and aspirations of Aboriginal and Torres Strait Islander Peoples? Should governments focus on indicators such as prosperity, wellbeing or other areas?

22. The Law Council submits that the specific areas of focus for indicators (together with targets and sub-targets) should be developed with a strong recognition of Aboriginal and Torres Strait Islander community strengths by requiring consultation, partnership and co-design. Priorities for Aboriginal and Torres Strait Islander people must be negotiated and designed in partnership with Aboriginal and Torres Strait Islander community controlled organisations, with an focus on designing local solutions to local problems.
23. This collaborative approach has been supported by the Australian Law Reform Commission (**ALRC**) as demonstrated in its recent Inquiry into the Rates of Incarceration of Aboriginal and Torres Strait Islander Peoples:

The ALRC has not recommended specific targets, mindful of the need to ensure Aboriginal and Torres Strait Islander leadership in developing policy relating to Aboriginal and Torres Strait Islander peoples. It considers that targets should be developed in consultation with Aboriginal and Torres Strait Islander peak organisations.⁹

⁹ Australian Law Reform Commission 'Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (28 March 2018), at 497.

24. The Law Council is concerned that the Discussion Paper's reference to indicators such as 'prosperity' and 'wellbeing' may be too vague to adequately measure against. While there may be scope for alternative indicators focussed on similar areas such as welfare and income, or housing and business, the Law Council reiterates its support for the approach of the ALRC as outlined above by endorsing an approach that sees indicators and sub-targets negotiated with Aboriginal and Torres Strait Islander community controlled organisations.

Discussion Paper question: Should Aboriginal and Torres Strait Islander culture be incorporated in the Closing the Gap framework? How?

25. The Law Council considers it critical that the priorities for Aboriginal and Torres Strait Islander cultures are set by Aboriginal and Torres Strait Islander people and communities, rather than government.

26. It has been recognised that 'the people most able or equipped to provide a culturally safe atmosphere are people from the same culture'¹⁰ and therefore the framework must allow authority and remit to be placed with Aboriginal and Torres Strait Islander community controlled organisations to implement programs that build awareness and knowledge for culturally responsive, culturally safe and culturally competent understandings designed, developed and delivered by Aboriginal and Torres Strait Islander people and communities.

27. In this regard, the Law Council acknowledges and supports the view of the Change the Record Coalition that Aboriginal and Torres Strait Islander cultures are wholly developed and owned by Aboriginal and Torres Strait Islander people and communities, whereas Closing the Gap is a multi-lateral strategy between governments.

28. To this end, it is submitted that the Closing the Gap strategy must adequately recognise, support and resource Aboriginal and Torres Strait Islander community controlled organisations to deliver culturally safe and culturally appropriate programs as the key means to promote Aboriginal and Torres Strait Islander cultural strengths.

Discussion Paper question: What do you think are the key targets or commitments that should be measured in a refreshed Closing the Gap agenda?

29. The Law Council submits that the current set of seven targets within the Closing the Gap agenda are not sufficient to address the wide range of factors that create a disparity between the standard of living and outcomes between Indigenous and non-Indigenous Australians. It is suggested that there are a number of additional areas that need to be addressed and subsequent targets set, to ensure that the gap is closed.

30. The Law Council suggests that as a priority, the Closing the Gap strategy should incorporate key targets in relation to justice and community safety through the establishment of targets to address the over-imprisonment and disproportionate levels of violence that Aboriginal and Torres Strait Islander people experience. The Law Council also submits that additional targets should be developed in relation to the care and protection of Aboriginal and Torres Strait Islander children. These are discussed further below.

¹⁰ Robyn Williams, 'Cultural Safety – what does it mean for our work process?' (1999) 23 (2) Australian and New Zealand Journal of Public Health 213, at 213.

Justice targets

31. Despite Australia's ongoing commitment to the Declaration as outlined above, a 2017 report by the Special Rapporteur on the rights of indigenous peoples concluded that the 'extraordinarily high rate of incarceration of Aboriginal and Torres Strait Islanders, including women and children, is a major human rights concern'.¹¹ The Special Rapporteur's report found that imprisonment sits in the context of years of dispossession, discrimination and intergenerational trauma faced by Aboriginal and Torres Strait Islanders, and mention was made of a number of current laws and policies that result in increased incarceration rates for Indigenous Australians, such as paperless arrest laws in the Northern Territory, restrictive bail laws and mandatory sentencing laws. The Special Rapporteur also found Aboriginal and Torres Strait Islanders to be drastically overrepresented among victims of family violence.
32. Long-term, consistent and coordinated government efforts are critical to reducing Aboriginal and Torres Strait Islander interaction with criminal justice system, and addressing those issues identified by the Special Rapporteur. The over-representation of Aboriginal and Torres Strait Islander people in prison and as victims of crime falls primarily under the 'safe communities' building block of the Closing the Gap strategy, however at present there is no Closing the Gap target that directly addresses this building block.
33. The Law Council has made repeated calls for the inclusion of justice targets and associated action by Australian governments to address the overrepresentation of Aboriginal and Torres Strait Islander people in imprisonment, as well as the disproportionate levels of violence experienced by Aboriginal and Torres Strait Islander people (particularly family and domestic violence).¹² It is again submitted that justice-specific targets should be included in the Closing the Gap agenda.
34. The justice gap between Indigenous and non-Indigenous Australians is of great concern, and if not addressed is going to continue to widen. The overrepresentation of Aboriginal and Torres Strait Islander people in the justice system has a significant impact, not just on the individual involved but their families and communities. The Law Council therefore considers that the broader Closing the Gap strategy is weakened by the lack of targets under the safe communities building block. In particular, the Law Council endorses the view that other Closing the Gap targets will fail to shift or change, if the reduction of the current prolific rates of incarceration of women, men and children fails to be considered a priority.¹³
35. Consistent with the Change the Record Coalition's 'Blueprint for Change',¹⁴ the Law Council notes that future targets within the Closing the Gap agenda could include:
 - (a) to close the gap in the rates of imprisonment by 2040; and
 - (b) to cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander peoples, to at least close the gap by 2040, with priority strategies for women and children.

¹¹ Victoria Tauli-Corpuz 'Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia' GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007), 12.

¹² See for example Law Council of Australia 'Call for justice targets on 10th anniversary of Apology to Australia's Indigenous peoples' Media Release (13 February 2018), online at <www.lawcouncil.asn.au/media/media-releases/call-for-justice-targets-on-10th-anniversary-of-apology-to-australias-indigenous-peoples>.

¹³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2010), 53–4.

¹⁴ Change the Record Coalition 'Blueprint for Change' (2015), 4.

36. In addition to the above, Change the Record has stated that these targets should be accompanied by a National Agreement which includes a reporting mechanism, as well as measurable sub-targets and a commitment to halve the gap in the above overarching goals by no later than 2030. The Law Council is supportive of such measures.
37. More recently, the ALRC has made similar recommendations, namely that the Australian Government, in consultation with state and territory governments, should develop national criminal justice targets including in respect of the rates of incarceration of Aboriginal and Torres Strait Islander peoples, as well as in respect of violence against Aboriginal and Torres Strait Islander peoples.¹⁵ The ALRC made it clear that these targets should be developed in partnership with peak Aboriginal and Torres Strait Islander organisations, a recommendation that the Law Council strongly supports.
38. The National Congress of Australia's First Peoples (**National Congress**) has also advocated for Commonwealth and state and territory governments to set justice targets,¹⁶ noting that there is no Closing the Gap target in relation to the justice system, either in relation to rates of incarceration or the experience of victims of crime.¹⁷
39. It is submitted that targets should be set at state, territory and federal levels. It is useful for state governments to set justice targets given state responsibility for the criminal justice system. The Law Council notes that in its National Justice Policy, the National Congress attributes the enormous differences in incarceration rates between states and territories to the differing levels of commitment to working with Aboriginal and Torres Strait Islander peoples to reduce incarceration rates.
40. In its National Justice Policy, the National Congress has put forward a number of recommendations in relation to this issue, including that:

*The Commonwealth Government and State and Territory Governments commit to Justice Targets included in a fully-funded Safe Communities National Partnership Agreement as part of the Closing the Gap strategy. This commitment should be incorporated into the National Indigenous Reform Agreement and supported by significant improvements to data collection regarding Aboriginal and Torres Strait Islander people within the justice system.*¹⁸

41. The Law Council agrees with these views. The purpose of setting justice targets would be to set clear benchmarks for measuring the effectiveness of programs aimed at reducing the incarceration rates of indigenous people and addressing the rate at which Aboriginal and Torres Strait Islander people experience physical or threatened violence.
42. It is submitted that consideration of the content of justice targets in this area should include consideration of establishing specialist Aboriginal and Torres Strait Islander sentencing courts. To this end, the ALRC has recommended that Aboriginal and Torres Strait Islander specialist courts be established in partnership with relevant Aboriginal and Torres Strait Islander organisations.¹⁹
43. The Law Council submits that sustainable resourcing is needed to build awareness and knowledge for culturally responsive, culturally safe and culturally competent programs

¹⁵ Australian Law Reform Commission 'Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (28 March 2018), Rec 16-1.

¹⁶ National Congress of Australia's First Peoples 'National Justice Policy', 4.

¹⁷ Ibid, 11.

¹⁸ Ibid, 4.

¹⁹ Australian Law Reform Commission 'Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (28 March 2018), Recs 10-2 and 10-3.

that are designed, developed and delivered by Aboriginal and Torres Strait Islander people and professionals across all levels of government (including courts, corrections and policing). The provision and implementation of self-determined diversionary programs, rehabilitative programs as well as better application and implementation of justice reinvestment strategies is critical to the success of such programs.

44. For example, in Victoria successive governments have committed to implementing the recommendations of the Royal Commission into Aboriginal Deaths in Custody and other measures to reduce Aboriginal and Torres Strait Islander incarceration rates, including the long-term Aboriginal Justice Agreement, which requires public reporting on progress and is now in its third phase. The Law Council understands that evaluations have demonstrated that the Victorian Aboriginal Justice Agreement should be considered best practice in terms of its success in providing for ongoing Aboriginal and Torres Strait Islander ownership of, and participation in, strategic policy development.²⁰ Research has demonstrated that where jurisdictions have Aboriginal Justice Agreements, incarceration rates of Aboriginal and Torres Strait Islander people are below the national average.²¹
45. Further, improved data collection on the interaction between the Aboriginal and Torres Strait Islander people and the justice system will assist with evidence-based policy making.

Care and protection targets

46. In addition to the need for targets addressing the rates of incarceration and levels of violence experienced by Aboriginal and Torres Strait Islander peoples, the Law Council notes the absence of targets with respect to child protection and out-of-home care.
47. The overrepresentation of Aboriginal and Torres Strait Islander children in the child protection system is a matter of particular concern, and the Law Council submits that future amendments to the Closing the Gap agenda should incorporate targets in respect of the number of Aboriginal and Torres Strait Islander children removed and placed into out-of-home care.
48. In 2016, Aboriginal and Torres Strait Islander children were 9.8 times more likely to be removed by child protection authorities than non-indigenous children.²² This gap in relation to Aboriginal children and young people in the child protection is set to widen. It has been predicted that the population of Aboriginal and Torres Strait Islander children in care will almost triple in size by 2035.²³ This is a matter which requires urgent attention and action.
49. The Law Council further notes the link between out-of-home care and involvement in the criminal justice system. Of the 99 Indigenous people who died in custody and were

²⁰ F Allison & C Cuneen, 'The role of Indigenous Justice Agreements in improving legal and social outcomes for indigenous people' *Sydney Law Review*, 32: 645-669, 210.

²¹ F Allison & C Cuneen, 'Indigenous Justice Agreements', *Current Initiatives Paper 4, Indigenous Justice Clearinghouse*, June 2013, 6, online at <www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/initiative004.pdf>.

²² SNAICC – National Voice for our Children, the University of Melbourne, Griffith University, and Save the Children Australia, *Family Matters Report 2017*, 28, online at <www.familymatters.org.au/wp-content/uploads/2017/11/Family-Matters-Report-2017.pdf>.

²³ Australian Institute of Health and Welfare, *Bulletin 139* (March 2017), online at <www.aihw.gov.au/publication-detail/?id=60129558624>.

the subject of the Royal Commission into Aboriginal Deaths in Custody, 43 involved individuals who were separated from their families as children.²⁴

50. More recently, the Royal Commission into the Protection and Detention of Children in the Northern Territory, as well as the ALRC Inquiry into the Rates of Incarceration of Aboriginal and Torres Strait Islander Peoples specifically acknowledged the links between care and protection, juvenile detention and later adult incarceration.²⁵
51. The Law Council has previously drawn attention to its concerns regarding discriminatory practices within child protection services towards Aboriginal and Torres Strait Islander peoples, including the disproportionate removal of Aboriginal and Torres Strait Islander children and the likelihood that Aboriginal women refrain from reporting family violence due to fears that their children will be removed.²⁶ The Law Council's Justice Project has raised the disproportionate rates of Aboriginal and Torres Strait Islander children in out-of-home care, and the concerns that this generates for those individuals.²⁷ These concerns have been reflected in the ALRC's recommendation that the Commonwealth should establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.²⁸
52. It is further suggested that focussing on the issues around Aboriginal and Torres Strait Islander children in out-of-home care will also assist with other targets within the Closing the Gap strategy, such as in respect of educational attainment. For example, the Law Council notes the New South Wales Ombudsman's 2017 inquiry into behaviour management in schools, which revealed alarming statistics in respect of school attendance for children in out-of-home care. Here, 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 per cent missed 20 or more school days in 2016 for reasons other than illness. About one third of these children were identified as Aboriginal.²⁹
53. Again, the content of care and protection targets should include consideration of initiatives that are specialised and targeted and co-designed with Aboriginal and Torres Strait Islander community controlled organisations. Relevantly, the Law Council has been made aware of the successful pilot Indigenous list established at the Sydney registry of the Federal Circuit Court since September 2016, as an example of an initiative that is a true and committed partnership between Aboriginal and Torres Strait Islander leadership and, Aboriginal and Torres Strait Islander services, legal assistance providers and the Court. From September 2016 to December 2017, it is understood that there were 38 matters listed without a single applicant dropping out.

²⁴ Australian Human Rights Commission 'Timeline - History of separation of Aboriginal and Torres Strait Islander children from their families' online at <www.humanrights.gov.au/timeline-history-separation-aboriginal-and-torres-strait-islander-children-their-families-text>.

²⁵ The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory noted research demonstrating the significantly increased risk of offending for children who have been in out-of-home care, see Final Report, Volume 3B, Chapter 35, 7. The ALRC recommended that the Commonwealth Government should establish a national inquiry into child protection laws and processes affecting Indigenous children (recommendation 15-1).

²⁶ Law Council of Australia, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Discussion Paper 84*, Submission to the Australian Law Reform Commission, 6 October 2017, <<https://www.lawcouncil.asn.au/tags/submissions>>.

²⁷ Law Council of Australia, Justice Project Consultation Paper 'Aboriginal and Torres Strait Islander People' (August 2017), at 37. Online at <www.lawcouncil.asn.au/justice-project/consultation-papers>.

²⁸ Australian Law Reform Commission 'Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (28 March 2018), Rec 15.

²⁹ NSW Ombudsman, 'Inquiry into behaviour management in schools' (August 2017), 46.

54. It is understood that the success of this pilot has been largely attributed to the fact that the legal framework is supported by comprehensive, culturally safe, wrap-around therapeutic support. The Law Council suggests that, in addition to achieving better outcomes for Aboriginal and Torres Strait Islander children by keeping families together, it is likely to reduce backlogs, promote higher settlement rates, and result in lasting orders. Such a specialised Court list is a relatively inexpensive innovation, and has the potential to address multiple targets within the Closing the Gap strategy, including in relation to child protection and out-of-home care.