Australian Government

Australian Law Reform Commission

Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples

FINAL REPORT

ALRC Report 133

December 2017

This Final Report reflects the law as at 1 December 2017.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Australian Government
Australian Law Reform Commission

The Hon Christian Porter MP
Attorney-General of Australia
Parliament House
Canberra ACT 2600

22 December 2017

Dear Attorney-General

Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples

On 10 February 2017, the Australian Law Reform Commission received Terms of Reference to undertake an inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples. On behalf of the Members of the Commission involved in this Inquiry, and in accordance with the *Australian Law Reform Commission Act* 1996, I am pleased to present you with the Final Report on this reference, *Pathways to Justice—Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2017).

Yours sincerely,

Professor Helen Rhoades
Acting President

His Honour Judge Matthew Myers AM
Adjunct Professor Faculty of Law University of New South Wales
Commissioner in Charge

Acknowledgment of Country

The ALRC recognises the unique and important position of Australia's First Peoples. The ALRC pays respect to Aboriginal and Torres Strait Islander Traditional Owners and Elders, past and present, across Australia, and extends that respect to all Aboriginal and Torres Strait Islander peoples. The ALRC acknowledges Aboriginal and Torres Strait Islander cultures are complex and diverse with Aboriginal and Torres Strait Islander cultures having existed within Australia continuously for some 65,000 years. The ALRC further acknowledges the vital contribution that Aboriginal and Torres Strait Islander peoples, their traditions, and cultures have made, and continue to make, to this country. Finally, the ALRC recognises Aboriginal and Torres Strait Islander peoples as the traditional custodians of the land on which this Inquiry has been held.

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Terms of Reference

ALRC inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples

I, Senator the Hon George Brandis QC, Attorney-General of Australia, refer to the Australian Law Reform Commission, an inquiry into the over-representation of Aboriginal and Torres Strait Islander peoples in our prisons.

It is acknowledged that while laws and legal frameworks are an important factor contributing to over-representation, there are many other social, economic, and historic factors that also contribute. It is also acknowledged that while the rate of imprisonment of Aboriginal and Torres Strait Islander peoples, and their contact with the criminal justice system - both as offenders and as victims - significantly exceeds that of non-Indigenous Australians, the majority of Aboriginal and Torres Strait Islander people never commit criminal offences.

Scope of the reference

1. In developing its law reform recommendations, the Australian Law Reform Commission (ALRC) should have regard to:
    a. Laws and legal frameworks including legal institutions and law enforcement (police, courts, legal assistance services and prisons), that contribute to the incarceration rate of Aboriginal and Torres Strait Islander peoples and inform decisions to hold or keep Aboriginal and Torres Strait Islander peoples in custody, specifically in relation to:
        i. the nature of offences resulting in incarceration,
        ii. cautioning,
        iii. protective custody,
        iv. arrest,
        v. remand and bail,
        vi. diversion,
        vii. sentencing, including mandatory sentencing, and
        viii. parole, parole conditions and community reintegration.
    b. Factors that decision-makers take into account when considering (1)(a)(i-viii), including:
        i. community safety,
        ii. availability of alternatives to incarceration,

iii. the degree of discretion available to decision-makers,

iv. incarceration as a last resort, and

v. incarceration as a deterrent and as a punishment.

c. Laws that may contribute to the rate of Aboriginal and Torres Strait Islander peoples offending and including, for example, laws that regulate the availability of alcohol, driving offences and unpaid fines.

d. Aboriginal and Torres Strait Islander women and their rate of incarceration.

e. Differences in the application of laws across states and territories.

f. Other access to justice issues including the remoteness of communities, the availability of and access to legal assistance and Aboriginal and Torres Strait Islander language and sign interpreters.

2. In conducting its Inquiry, the ALRC should have regard to existing data and research[1] in relation to:

a. best practice laws, legal frameworks that reduce the rate of Aboriginal and Torres Strait Islander incarceration,

b. pathways of Aboriginal and Torres Strait Islander peoples through the criminal justice system, including most frequent offences, relative rates of bail and diversion and progression from juvenile to adult offending,

c. alternatives to custody in reducing Aboriginal and Torres Strait Islander incarceration and/or offending, including rehabilitation, therapeutic alternatives and culturally appropriate community led solutions,

d. the impacts of incarceration on Aboriginal and Torres Strait Islander peoples, including in relation to employment, housing, health, education and families, and

e. the broader contextual factors contributing to Aboriginal and Torres Strait Islander incarceration including:

i. the characteristics of the Aboriginal and Torres Strait Islander prison population,

ii. the relationships between Aboriginal and Torres Strait Islander offending and incarceration and inter-generational trauma, loss of culture, poverty, discrimination, alcohol and drug use, experience of violence, including family violence, child abuse and neglect, contact with child protection and welfare systems, educational access and performance, cognitive and psychological factors, housing circumstances and employment, and

iii. the availability and effectiveness of culturally appropriate programs that intend to reduce Aboriginal; and Torres Strait Islander offending and incarceration.

3. In undertaking this Inquiry, the ALRC should identify and consider other reports, inquiries and action plans including but not limited to:

    a. the Royal Commission into Aboriginal Deaths in Custody,

    b. the Royal Commission into the Protection and Detention of Children in the Northern Territory (due to report 1 August 2017),

    c. Senate Standing Committee on Finance and Public Administration's Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services,

    d. Senate Standing Committee on Community Affairs' inquiry into Indefinite Detention of People with Cognitive and Psychiatric impairment in Australia,

    e. Senate Standing Committee on Indigenous Affairs inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities,

    f. reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner,

    g. the ALRC's inquiries into Family violence and Family violence and Commonwealth laws, and

    h. the National Plan to Reduce Violence against Women and their Children 2010-2022.

The ALRC should also consider the gaps in available data on Aboriginal and Torres Strait Islander incarceration and consider recommendations that might improve data collection.

4. In conducting its inquiry the ALRC should also have regard to relevant international human rights standards and instruments.

Consultation

5. In undertaking this inquiry, the ALRC should identify and consult with relevant stakeholders including Aboriginal and Torres Strait Islander peoples and their organisations, state and territory governments, relevant policy and research organisations, law enforcement agencies, legal assistance service providers and the broader legal profession, community service providers and the Australian Human Rights Commission.

Timeframe

6. The ALRC should provide its report to the Attorney-General by 22 December 2017.

1. It is not the intention that the Australian Law Reform Commission will undertake independent research or evaluation of existing programs, noting that this falls outside its legislative responsibilities and expertise.

Participants

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Mr Robert Cornall AO, Acting President (from 31 July–31 October 2017)

Professor Helen Rhoades, Acting President (from 30 October–10 January 2018)

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Recommendations

4. Justice Reinvestment

Recommendation 4–1 Commonwealth, state and territory governments should provide support for the establishment of an independent justice reinvestment body. The purpose of the body should be to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and incarceration, and to provide expertise on the implementation of justice reinvestment.

Its functions should include:

- providing technical expertise in relation to justice reinvestment;
- assisting in developing justice reinvestment plans in local sites; and
- maintaining a database of evidence-based justice reinvestment strategies.

The justice reinvestment body should be overseen by a board with Aboriginal and Torres Strait Islander leadership.

Recommendation 4–2 Commonwealth, state and territory governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities, including through:

- facilitating access to localised data related to criminal justice and other relevant government service provision, and associated costs;
- supporting local justice reinvestment initiatives; and
- facilitating participation by, and coordination between, relevant government departments and agencies.

5. Bail

Recommendation 5–1 State and territory bail laws should be amended to include standalone provisions that 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. These would particularly facilitate release on bail with effective conditions for Aboriginal and Torres Strait Islander people who are accused of low-level offending.

The *Bail Act 1977* (Vic) incorporates such a provision.

As with all other bail considerations, the requirement to consider issues that arise due to a person's Aboriginality would not supersede considerations of community safety.

Recommendation 5–2 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:

- develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies; and
- identify gaps in the provision of culturally appropriate bail support programs and diversion options, and develop and implement relevant bail support and diversion options.

6. Sentencing and Aboriginality

Recommendation 6–1 Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

Recommendation 6–2 State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.

Recommendation 6–3 State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.

7. Community-based Sentences

Recommendation 7–1 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to improve access to community-based sentencing options for Aboriginal and Torres Strait Islander offenders, by:

- expanding the geographic reach of community-based sentencing options, particularly in regional and remote areas;
- providing community-based sentencing options that are culturally appropriate; and
- making community-based sentencing options accessible to offenders with complex needs, to reduce reoffending.

Recommendation 7–2 Using the Victorian Community Correction Order regime as an example, state and territory governments should implement community-based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions to reduce reoffending.

Recommendation 7–3 State and territory governments and agencies should work with relevant Aboriginal and Torres Strait Islander organisations to provide the necessary programs and support to facilitate the successful completion of community-based sentences by Aboriginal and Torres Strait Islander offenders.

Recommendation 7–4 In the absence of the availability of appropriate community-based sentencing options, suspended sentences should not be abolished.

Recommendation 7–5 In the absence of the availability of appropriate community-based sentencing options, short sentences should not be abolished.

8. Mandatory Sentencing

Recommendation 8–1 Commonwealth, state and territory governments should repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

9. Prison Programs and Parole

Recommendation 9–1 State and territory corrective services agencies should develop prison programs with relevant Aboriginal and Torres Strait Islander organisations that address offending behaviours and/or prepare people for release. These programs should be made available to:

- prisoners held on remand;
- prisoners serving short sentences; and
- female Aboriginal and Torres Strait Islander prisoners.

Recommendation 9–2 To maximise the number of eligible Aboriginal and Torres Strait Islander prisoners released on parole, state and territory governments should:

- introduce statutory regimes of automatic court-ordered parole for sentences of under three years, supported by the provision of prison programs for prisoners serving short sentences; and
- abolish parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.

10. Access to Justice

Recommendation 10–1 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:

- establish interpreter services within the criminal justice system where needed; and
- monitor and evaluate their use.

Recommendation 10–2 Where needed, **s**tate and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts. These courts should incorporate individualised case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.

Recommendation 10–3 Relevant Aboriginal Torres Strait Islander organisations should play a central role in the design, implementation and evaluation of specialist Aboriginal and Torres Strait Islander sentencing courts.

Recommendation 10–4 Where not already in place, state and territory governments should introduce special hearing processes to make qualified determinations regarding guilt after a person is found unfit to stand trial.

Recommendation 10–5 Where not already in place, state and territory governments should implement Recommendation 7–2 of the ALRC Report *Equality, Capacity and Disability in Commonwealth Laws* to provide for a fixed term when a person is found unfit to stand trial and ensure regular periodic review while that person is in detention.

11. Aboriginal and Torres Strait Islander Women

Recommendation 11–1 Programs and services delivered to female Aboriginal and Torres Strait Islander offenders within the criminal justice system—leading up to, during and post-incarceration—should take into account their particular needs so as to improve their chances of rehabilitation, reduce their likelihood of reoffending and decrease their involvement with the criminal justice system. Such programs and services, including those provided by NGOs, police, courts and corrections, must be:

- developed with and delivered by Aboriginal and Torres Strait Islander women; and
- trauma-informed and culturally appropriate.

Recommendation 11–2 Police engaging with Aboriginal and Torres Strait Islander people and communities should receive instruction in best practice for handling allegations and incidents of family violence—including preventative intervention and prompt response—in those communities.

12. Fines and Driver Licences

Recommendation 12–1 Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of, or as a result of, unpaid fines.

Recommendation 12–2 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to develop options that:

- reduce the imposition of fines and infringement notices;
- limit the penalty amounts of infringement notices;

- avoid suspension of driver licences for fine default; and
- provide alternative ways of paying fines and infringement notices.

Recommendation 12–3 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to identify areas without services relevant to driver licensing and to provide those services, particularly in regional and remote communities.

Recommendation 12–4 State and territory governments should review the effect on Aboriginal and Torres Strait Islander peoples of statutory provisions that criminalise offensive language with a view to:

- repealing the provisions; or
- narrowing the application of those provisions to language that is abusive or threatening.

13. Alcohol

Recommendation 13–1 All initiatives to reduce the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities should be developed with, and led by, these communities to meet their particular needs.

Recommendation 13–2 Commonwealth, state and territory governments should enable and provide support to Aboriginal and Torres Strait Islander communities that wish to address alcohol misuse to:

- develop and implement local liquor accords; and/or
- develop plans to prevent the sale of full strength alcohol or reduce the availability of particular alcohol ranges or products within their communities.

14. Police Accountability

Recommendation 14–1 Commonwealth, state and territory governments should review police procedures and practices so that the law is enforced fairly, equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples.

Recommendation 14–2 To provide Aboriginal and Torres Strait Islander people and communities with greater confidence in the integrity of police complaints handling processes, Commonwealth, state and territory governments should review their police complaints handling mechanisms to ensure greater practical independence, accountability and transparency of investigations.

Recommendation 14–3 Commonwealth, state and territory governments should introduce a statutory requirement for police to contact an Aboriginal and Torres Strait Islander legal service, or equivalent service, as soon as possible after an Aboriginal and Torres Strait Islander person is detained in custody for any reason—including for protective reasons. A maximum period within which the notification must occur should be prescribed.

Recommendation 14–4 In order to further enhance cultural change within police that will ensure police practices and procedures do not disproportionately contribute to the incarceration of Aboriginal and Torres Strait Islander peoples, the following initiatives should be considered:

- increasing Aboriginal and Torres Strait Islander employment within police;
- providing specific cultural awareness training for police being deployed to an area with a significant Aboriginal and Torres Strait Islander population;
- providing for lessons from successful cooperation between police and Aboriginal and Torres Strait Islander peoples to be recorded and shared;
- undertaking careful and timely succession planning for the replacement of key personnel with effective relationships with Aboriginal and Torres Strait Islander communities;
- improving public reporting on community engagement initiatives with Aboriginal and Torres Strait Islander peoples; and
- entering into Reconciliation Action Plans.

15. Child Protection and Adult Incarceration

Recommendation 15–1 Acknowledging the high rate of removal of Aboriginal and Torres Strait Islander children into out-of-home care and the recognised links between out-of-home care, juvenile justice and adult incarceration, the Commonwealth Government should establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.

16. Criminal Justice Targets and Aboriginal Justice Agreements

Recommendation 16–1 The Commonwealth Government, in consultation with state and territory governments, should develop national criminal justice targets. These should be developed in partnership with peak Aboriginal and Torres Strait Islander organisations, and should include specified targets by which to reduce the rate of:

- incarceration of Aboriginal and Torres Strait Islander people; and
- violence against Aboriginal and Torres Strait Islander people.

Recommendation 16–2 Where not currently operating, state and territory governments should renew or develop an Aboriginal Justice Agreement in partnership with relevant Aboriginal and Torres Strait Islander organisations.

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Disproportionate incarceration rate

Although Aboriginal and Torres Strait Islander adults make up around 2% of the national population, they constitute 27% of the national prison population.[1] In 2016, around 20 in every 1,000 Aboriginal and Torres Strait Islander people were incarcerated. Over-representation is both a persistent and growing problem—Aboriginal and Torres Strait Islander incarceration rates increased 41% between 2006

1 Data in this Executive Summary is drawn from, and more fully explained in ch 3.

and 2016, and the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over that decade widened.

Aboriginal and Torres Strait Islander women constitute 34% of the female prison population. In 2016, the rate of imprisonment of Aboriginal and Torres Strait Islander women (464.8 per 100,000) was not only higher than that of non-Indigenous women (21.9 per 100,000), but was also higher than the rate of imprisonment of non-Indigenous men (291.1 per 100,000).

In 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) found that the Aboriginal population was grossly over-represented in custody. It noted that 'Aboriginal people are in gross disproportionate numbers, compared with non-Aboriginal people, in both police and prison custody and it is this fact that provides the immediate explanation for the disturbing number of Aboriginal deaths in custody'.[2]

The RCIADIC looked at indicators of disadvantage that contributed to this disproportionate representation, including that 'Aboriginal people were dispossessed of their land without benefit of treaty, agreement or compensation'.[3]

Other indicators identified by the RCIADIC were

> the economic position of Aboriginal people, the health situation, their housing requirements, their access or non-access to an economic base including land and employment, their situation in relation to education; the part played by alcohol and other drugs—and its effects.[4]

Over the 26 years since the RCIADIC, multiple resources have been dedicated to remedying the factors identified by the RCIADIC and to reducing the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples.

However, in 2016, Aboriginal and Torres Strait Islander people were 12.5 times more likely to be in prison than non-Indigenous people, and Aboriginal and Torres Strait Islander women were 21.2 times more likely to be in prison than non-Indigenous women.

The submission to this Inquiry from Jesuit Social Services summed up a common assessment: 'The over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system is a national disgrace'.[5]

While the statistics concerning the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples are alarming, it is important to bear in mind that the majority of Aboriginal and Torres Strait Islander people never commit a criminal offence.

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2 Ibid vol 1, [9.4.1].
3 Ibid vol 1, [1.4.2].
4 Ibid vol 1, [1.3.6].
5 Jesuit Social Services, *Submission 100*.

The task of this Inquiry

This Inquiry has one principal but constrained purpose. It is to inquire into the over-representation of Aboriginal and Torres Strait Islander people in prison and develop recommendations for reform of laws and legal frameworks to reduce their disproportionate incarceration.

The ALRC has had regard to the research, reports, inquiries and action plans referred to in the Terms of Reference. They include consideration of the much larger historical, social and economic context that contributes to the disproportionate incarceration rate, which are both a result and a further cause of disadvantage for Aboriginal and Torres Strait Islander peoples.

While it is difficult to disentangle historical, social and economic disadvantage from legal issues that contribute to the incarceration of Aboriginal and Torres Strait Islander peoples, the recommendations made in this Report focus principally on criminal laws and legal frameworks, as required by the Terms of Reference. The ALRC has confined its scope to recommendations relating to the incarceration of Aboriginal and Torres Strait Islander adults.

The case for reform

Equality before the law

This Inquiry involves fundamental questions about achieving substantive, not just formal, equality before the law. Formal equality suggests that all people should be treated the same regardless of their differences. Substantive equality is 'premised on the basis that rights, entitlements, opportunities and access are not equally distributed throughout society and that a one size fits all approach will not achieve equality'.[6]

The ALRC does not propose a 'parallel system' of justice for Aboriginal and Torres Strait Islander people, as warned against by the Institute of Public Affairs.[7] However, it recognises, as Brennan J observed in *Gerhardy v Brown*, that formal equality may be 'an engine of oppression destructive of human dignity if the law entrenches inequalities "in the political, economic, social, cultural or any other field of public life"'.[8] Achieving substantive and not formal equality before the law includes, for example, the consideration upon sentencing of the unique and systemic factors affecting Aboriginal and Torres Strait Islander offenders. It also includes not only consistency in the provision of sentence options and diversion and support programs across the country, but also ensuring that these are culturally appropriate.

Reducing the incarceration of women

Some additional factors have to be taken into account with regard to the incarceration of women. One of these factors is the impact of family violence. Available research

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6 Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No 5—Equality and Non-Discrimination* (2013) 8.

7 Institute of Public Affairs, *Submission 58*.

8 *Gerhardy v Brown* (1985) 159 CLR 70, 129.

suggests that Aboriginal and Torres Strait Islander women experience family violence at a higher rate than the broader Australian community, and that the majority of Aboriginal and Torres Strait Islander women in prison have experienced physical or sexual abuse.[9]

The Human Rights Law Centre and Change the Record Coalition have noted:

> The overwhelming majority of Aboriginal and Torres Strait Islander women in prison are survivors of physical and sexual violence. Many also struggle with housing insecurity, poverty, mental illness, disability and the effects of trauma. ... Criminal justice systems across Australia continue to be largely unresponsive to the unique experiences, circumstances and strengths of Aboriginal and Torres Strait Islander women.[10]

Criminal justice reform is only one aspect of the range of strategies required to address family violence in Aboriginal and Torres Strait Islander communities, with National Family Violence Prevention Legal Services suggesting that:

> a combination of preventative education, community engagement, support services and legal assistance (as both early intervention and response) are all crucial parts of the continuum of services to address and reduce family violence against Aboriginal and Torres Strait Islander women and children.[11]

An additional important consideration is the effect that incarceration of women can have on families and communities. As the Human Rights Law Centre and Change the Record Coalition have further noted:

> Some 80% of Aboriginal and Torres Strait Islander women in prison are mothers. Many women in the justice system care not only for their own children, but for the children of others and family who are sick and elderly. Prosecuting and imprisoning women is damaging for Aboriginal and Torres Strait islander children, who are already over-represented in child protection and youth justice systems.[12]

The number of Aboriginal and Torres Strait Islander parents—particularly women—in prison has a direct effect on the number of Aboriginal and Torres Strait Islander children in out-of-home care, which is a recognised pathway to youth detention and adult offending.

Aboriginal and Torres Strait Islander leadership

A recurring observation made during consultations and in submissions to this Inquiry was that solutions should be developed and led by Aboriginal and Torres Strait Islander people. Good examples are the Koori courts in Victoria and community justice groups of Elders, which support and assist Aboriginal and Torres Strait Islander people throughout the criminal justice process. The ALRC was told that some of the most effective solutions to local problems (such as diversion programs and post release assistance) have been developed locally by, or in conjunction with, local Aboriginal

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9 See chs 2 and 11.
10 Human Rights Law Centre and Change the Record Coalition, above n 19, 5.
11 National Family Violence Prevention Legal Services, *Submission 77*.
12 Human Rights Law Centre and Change the Record Coalition, above n 19, 5.

and Torres Strait Islander people. The corollary is that what works in one community (such as alcohol restrictions) may not be the best solution in another.

Taking a local approach to local problems can create difficulties for Australian governments, which necessarily plan for centrally developed and imposed national, state or territory-wide programs. Without acceptance and participation by the local communities, those programs can fail or, at least, not fully meet their objectives.

The ALRC notes the importance of governments working with Aboriginal and Torres Strait Islander organisations and communities to implement the range of strategies recommended to reduce Aboriginal and Torres Strait Islander incarceration. For example, the ALRC has recommended that state and territory governments work with Aboriginal and Torres Strait Islander organisations to: develop and implement culturally appropriate bail support programs and diversion options; develop options to reduce the imposition of fines and infringement notices; and develop prison programs that address offending behaviours and prepare people for release. One way to achieve local involvement is through Aboriginal Justice Agreements. Justice reinvestment also emphasises tailored, local solutions to the particular drivers of incarceration in a community.

Economic and social costs of incarceration

The implementation of the recommendations in this Report, including the provision of more diversion, support and rehabilitation programs before, during and after incarceration, will require additional resources.

However, the cost of implementing these recommendations must be considered against the cost of incarcerating Aboriginal and Torres Strait Islander people at disproportionate levels.[13] Incarceration is expensive: it has been estimated that the total justice system costs of Aboriginal and Torres Strait Islander incarceration in 2016 were $3.9 billion. When the costs of Aboriginal and Torres Strait Islander incarceration are broadened beyond those directly related to the criminal justice system to include other economic costs, the estimated cost rises to $7.9 billion. As well as the cost of imprisonment to the State, incarceration can also have a broader social cost, particularly when concentrated in a particular community.

The recommendations in this Report can be said to take a 'justice reinvestment' approach—broadly, the notion that there should be a redirection of criminal justice resources from incarceration to strategies that can better address the causes of offending. These strategies can be both within and outside of the criminal justice system. Given the significant and growing economic and social costs of incarceration, the ALRC suggests that there is a compelling case for Australian governments collectively to invest in developing appropriate and more effective alternatives to imprisonment for Aboriginal and Torres Strait Islander people.

13 The cost of incarceration is more fully discussed in ch 4.

Overview of the Report

Context

In 1991, the RCIADIC found that the fundamental causes for over-representation of Aboriginal people in custody were not located *within* the criminal justice system. Such a claim has been echoed many times since. In **Chapter 2**, the ALRC places the disproportionate incarceration rates of Aboriginal and Torres Strait Islander peoples today in social and historical context. It briefly traces the history of Aboriginal and Torres Strait Islander peoples' contact with the criminal justice system.

The ALRC also provides a contemporary picture of the impact of the social determinants of incarceration on Aboriginal and Torres Strait Islander peoples, including education and employment, health and disability, housing and homelessness, and child protection and youth justice. It highlights some of the many inquiries, initiatives and recommendations that have sought to address the disadvantage experienced by Aboriginal and Torres Strait Islander peoples.

Incidence

Chapter 3 sets out data provided to the ALRC by researchers at Curtin University on the characteristics of Aboriginal and Torres Strait Islander prisoners. The data chart over-representation from charges before the courts to the types of sentences imposed for certain offending. The data show that Aboriginal and Torres Strait Islander peoples are over-represented in the national prison population.

Over-representation increases with the stages of the criminal justice system. In 2016, Aboriginal and Torres Strait Islander people were seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts; 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment. This is a cyclical problem, with 76% of Aboriginal and Torres Strait Islander prisoners having been in prison before.

Up to 45% of Aboriginal and Torres Strait Islander offenders sentenced in 2015–2016 received a sentence of imprisonment of less than six months. Few received a community-based sentence.

Justice reinvestment

Justice reinvestment involves the redirection of resources from the criminal justice system into local communities that have a high concentration of incarceration and contact with the criminal justice system.

A justice reinvestment approach suggests that resources are better directed—and indeed savings will be made—by reinvesting a portion of this expenditure to address the causes of offending in places where there is a high concentration of offenders. It uses place-based, community-led initiatives to address offending and incarceration, applying a distinct data-driven methodology to inform strategies for reform.

In **Chapter 4**, the ALRC outlines two key reasons why justice reinvestment holds particular promise in addressing Aboriginal and Torres Strait Islander incarceration. First, it has long been recognised that the key drivers of incarceration for Aboriginal and Torres Strait Islander people are external to the justice system, and justice reinvestment involves a commitment to invest in front-end strategies to prevent criminalisation. Second, justice reinvestment, as a place-based approach, emphasises working in partnership with communities to develop and implement reforms, and thus accords with evidence that effective policy change to address Aboriginal and Torres Strait Islander disadvantage requires partnership with Aboriginal and Torres Strait Islander peoples.

The implementation of justice reinvestment requires significant technical expertise. To provide such expertise, the ALRC recommends that Commonwealth, state and territory governments should support the establishment of an independent justice reinvestment body to promote the reinvestment of resources from the criminal justice system to local community development initiatives to address the drivers of crime and incarceration, and to provide expertise in the methodology of justice reinvestment. While justice reinvestment should remain community-led, a national body with expertise in justice reinvestment methodology could assist in providing technical assistance to local sites wishing to implement justice reinvestment.

The body should be a national one because justice reinvestment involves a holistic approach to the drivers of incarceration, which extend beyond justice-related drivers to social and community drivers of offending. These policy priorities extend across all levels of government.

The ALRC envisages the justice reinvestment body's role to be limited: principally, to providing technical assistance in the implementation of a justice reinvestment approach. It would not have the authority to impose reinvestment plans, nor to direct the allocation of resources. Therefore, the ALRC further recommends that Commonwealth, state and territory governments support place-based justice reinvestment initiatives, through resourcing, facilitating access to data, and facilitating participation by, and coordination between, relevant government departments.

Bail

Up to one third of Aboriginal and Torres Strait Islander people in prison are held on remand awaiting trial or sentence. A large proportion of Aboriginal and Torres Strait Islander people held on remand do not receive a custodial sentence upon conviction, or may be sentenced to time served while on remand. This particularly affects female Aboriginal and Torres Strait Islander prisoners, and suggests that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low-level offending.

In **Chapter 5**, the ALRC discusses how irregular employment, previous convictions for often low-level offending, and a lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail. Furthermore, it notes that when bail is granted, cultural obligations may conflict with commonly issued bail conditions—such as curfews and exclusion orders—leading to

breach of bail conditions, revocation of bail and subsequent imprisonment. This issue has continued despite existing laws and legal frameworks that enable some bail authorities to take cultural considerations into account.

The recommendations in **Chapter 5** seek to enable Aboriginal and Torres Strait Islander peoples accused of low-level offending to be granted bail in circumstances where risk can be appropriately managed.

As a means of decreasing the number of Aboriginal and Torres Strait Islander people in prison held on remand, the ALRC recommends that bail laws should require bail authorities to consider issues and circumstances arising from a person's Aboriginality when making bail determinations. Victoria introduced a model provision in 2010, which the ALRC recommends be adopted in other state and territory bail statutes. The ALRC further recommends that state and territory governments work with relevant Aboriginal and Torres Strait Islander organisations and legal bodies to produce usage guidelines for the judiciary and legal practitioners, and to identify gaps in the provision of bail supports.

The ALRC stresses the interdependency of these recommendations, and encourages governments to consider them a holistic package for bail law reform.

Sentencing and Aboriginality

Sentencing decisions are crucial in determining whether a person goes to prison, and for how long. The sentencing decision may be affected by the seriousness of an offence and any subjective characteristics of an offender, including criminal history.

In **Chapter 6,** the ALRC recognises that Aboriginal and Torres Strait Islander offenders are more likely to have prior convictions and to have served a term of imprisonment than non-Indigenous offenders, and that this history may influence the sentencing decision. Aboriginal and Torres Strait Islander offenders may have also experienced trauma that is unique to their Aboriginality, which in some instances may be criminogenic (that is, causing or likely to cause criminal behaviour). This could include, for instance, direct or indirect experience of the Stolen Generation, loss of culture, and displacement. Further, Aboriginal and Torres Strait Islander people who have experienced this type of trauma may distrust police and government agencies.

Sentencing courts are able to consider the relevance and impact of systemic and background factors affecting an Aboriginal or Torres Strait Islander offender when taking into account subjective characteristics at sentencing, but are not required to do so. In *Bugmy v The Queen*, the High Court determined that taking judicial notice of the systemic background of deprivation of Aboriginal offenders may be 'antithetical to individualised justice'.[14]

For reasons of fairness, certainty, and continuity in sentencing Aboriginal and Torres Strait Islander offenders, the majority of stakeholders to this Inquiry supported the introduction of provisions requiring sentencing courts to take a two-step approach:

14 *Bugmy v The Queen* (2013) 249 CLR 571.

first, to take into account the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples; and then to proceed to review evidence as to the effect on that particular individual offender.

The ALRC recommends the introduction of such provisions. The ALRC further recommends that in the courts of superior jurisdiction (District/County and Supreme Courts), taking account of unique systemic and background factors should be done through the submission of 'Indigenous Experience Reports', ideally prepared by independent Aboriginal and Torres Strait Islander organisations. In the courts of summary jurisdiction (Local or Magistrates Courts) where offenders are sentenced for lower level offending, and time and resources are limited, the ALRC recommends that courts accept evidence in support of the provisions through less formal methods.

The recommendations in **Chapter 6** aim to ensure sentencing courts are provided with all the information relevant to the unique experiences and systemic factors affecting Aboriginal or Torres Strait Islander peoples, and their impact on the offender. This would enable courts to impose the most appropriate sentence on Aboriginal and Torres Strait Islander offenders, taking into account all of the circumstances, including any available and appropriate community-based options.

Community-based sentencing

Each state and territory, and the Commonwealth, have legislation that guides the sentencing process and all have sentencing regimes enabling courts to order that certain offenders serve their sentences in the community. Community-based sentences have some significant advantages over full-time imprisonment where the offender does not pose a demonstrated risk to the community.

Despite the advantages of community-based sentences, Aboriginal and Torres Strait Islander peoples are less likely to receive a community-based sentence than non-Indigenous offenders and as a result may be more likely to end up in prison for the same offence. In addition, even when Aboriginal and Torres Strait Islander people are given a community-based sentence, they may be more likely to breach the conditions of the community-based sentence and may end up in prison as a result.

In **Chapter 7**, the ALRC focuses on reform to community-based sentence regimes to make them more accessible and flexible for Aboriginal and Torres Strait Islander offenders, to provide greater support and to mitigate against breach.

The ALRC also examines short and suspended sentences of imprisonment, both of which can have significant negative consequences for the offender. Nevertheless, unless access to community-based sentences is improved, the removal of short and suspended sentences of imprisonment as sentencing options may lead to an even greater number of Aboriginal and Torres Strait Islander offenders going to jail. Improving access to community-based sentences is necessary to reduce the incarceration rates of Aboriginal and Torres Strait Islander offenders. Once community-based sentences are uniformly available, consideration could be given to abolishing short terms of imprisonment and suspended sentences.

Mandatory sentencing

Evidence suggests that mandatory sentencing increases incarceration, is costly, and is not effective as a crime deterrent. Mandatory sentencing may also disproportionately affect particular groups within society, including Aboriginal and Torres Strait Islander peoples—especially those found guilty of property crime.

In **Chapter 8**, the ALRC recommends that Commonwealth, state and territory governments should repeal sentencing provisions that impose mandatory or presumptive terms of imprisonment upon conviction of an offender, and that have a disproportionate impact on Aboriginal and Torres Strait Islander peoples. This chapter further highlights those mandatory sentences attached to offences that have been identified by stakeholders as having a disproportionate impact on Aboriginal and Torres Strait Islander peoples. The ALRC suggests that states and territories do further work to identify and repeal mandatory sentence provisions that in practice have a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

Prison programs and parole

The rate of previous imprisonment for Aboriginal and Torres Strait Islander people is high—up to 76% of Aboriginal and Torres Strait Islander prisoners in 2016 had been imprisoned previously, compared with 49% of the non-Indigenous prison population. Aboriginal and Torres Strait Islander prisoners are more likely to have been in prison at least five times previously, and are less likely than non-Indigenous prisoners to have never been in prison before. Most repeat offenders had previously received a prison sentence, and generate churn in the prison system.

Prison programs that address known causes of offending—such as poor literacy, lack of vocational skills, drug and alcohol abuse, poor mental health, poor social and family ties—may provide some of the supports needed to reduce the rates of repeat offending by Aboriginal and Torres Strait Islander people. While prison programs designed for Aboriginal and Torres Strait Islander prisoners are offered in most states and territories, these programs mostly apply to prisoners serving lengthy sentences, and are generally designed for male offenders.

Aboriginal and Torres Strait Islander prisoners require assistance to address offending behaviours and to transition back into the community. For female offenders in particular, programs need to be trauma-informed and culturally safe. In **Chapter 9**, the ALRC recommends that prison programs be developed with relevant Aboriginal and Torres Strait Islander organisations. The programs should be made available to Aboriginal and Torres Strait Islander people serving short sentences or held on remand. Additionally, programs designed for female Aboriginal and Torres Strait Islander prisoners should be developed, designed and delivered by Aboriginal and Torres Strait Islander organisations and services.

The ALRC recognises the critical role that release on parole has in assisting offenders to transition out of prison and reintegrate into society. To this end, the ALRC also recommends reforms that aim to encourage, first, eligible Aboriginal and Torres Strait

Islander prisoners to apply for parole and, secondly, the development of throughcare programs that provide ongoing support following release from prison.

Access to justice

'Access to justice' is an essential element of the rule of law. It refers to the need to ameliorate or remove barriers to access and to ensure that legal and judicial outcomes are just and equitable. It is enshrined in Article 14 of the *International Covenant of Civil and Political Rights*.

In **Chapter 10,** the ALRC focuses on specific access to justice issues faced by Aboriginal and Torres Strait Islander people appearing as defendants before the criminal justice system. The ALRC makes a suite of recommendations targeted at addressing the complex legal needs of Aboriginal and Torres Strait Islander people and improving the experience of Aboriginal and Torres Strait Islander people with the courts. The ALRC recommends that, where needed, state and territory governments should establish interpreter services within the criminal justice system, and should establish specialist Aboriginal and Torres Strait Islander sentencing courts. The ALRC also recommends that, where a person is found unfit to stand trial, state and territory governments should introduce special hearing processes that provide for a fixed term of detention and regular periodic reviews while the person remains in detention.

The chapter also highlights the need for adequate resourcing of legal assistance providers. Access to legal representation and advice is one of the cornerstones of addressing the disproportionate rates of Aboriginal and Torres Strait Islander incarceration. In the absence of legal representation and advice, a defendant may be incarcerated for a range of reasons, including an inappropriate guilty plea, and a lack of awareness of available defences or pleas in mitigation.

Aboriginal and Torres Strait Islander women

In **Chapter 11**, the ALRC contextualises Aboriginal and Torres Strait Islander female offending within experiences of intergenerational trauma, family and sexual violence, child removal, mental illness and disability, and poverty. The ALRC argues that strategies that aim to address the offending of Aboriginal and Torres Strait Islander women must take a trauma-informed and culturally appropriate approach. To this end, the ALRC recommends that all criminal justice responses should be developed with and delivered by Aboriginal and Torres Strait Islander women.

The ALRC briefly reviews some of the alternatives to incarceration, including holistic, trauma-informed diversion programs for Aboriginal and Torres Strait Islander women who have experienced deep and intergenerational trauma. Aboriginal and Torres Strait Islander women constitute a fast growing group in the prison population, yet the historically low numbers of female Aboriginal and Torres Strait Islander offenders—and misunderstandings of their criminogenic needs—has meant that few appropriately-designed criminal justice responses are available.

Female Aboriginal and Torres Strait Islander offenders are likely to have been victims, often of family violence, and the ALRC makes recommendations to enhance police responses to family violence in Aboriginal and Torres Strait Islander communities.

Fines and driver licences

Statutory fine enforcement regimes affect Aboriginal and Torres Strait Islander people unduly and can result in incarceration. Imprisonment is a disproportionate response to fine default, and impacts especially on Aboriginal and Torres Strait Islander women. In **Chapter 12**, the ALRC recommends the amendment of fine enforcement regimes so that they do not, directly or indirectly, allow for imprisonment.

The imposition of fines and fine enforcement regimes affect Aboriginal and Torres Strait Islander people disproportionately. Fine enforcement regimes can aggravate criminogenic factors and operate to further entrench disadvantage, especially when the penalty for default or secondary offending includes further fines, driver licence suspension or disqualification, and imprisonment.

The ALRC makes recommendations to increase the efficacy and decrease the harm caused to Aboriginal and Torres Strait Islander people by the imposition of fines. These include decreasing the size of fines, limiting the issue of infringement notices, the nationwide adoption of Work and Development Orders based on the New South Wales model, and the provision of a discretion to skip driver licence suspension where the person in fine default is vulnerable, supported by statutory guidelines for state debt recovery agencies. These are not standalone recommendations and, together with the abolition of imprisonment, seek to make fine systems and fine enforcement regimes fairer and more responsive to the circumstances of Aboriginal and Torres Strait Islander people, especially in regional or remote locations.

The ALRC further discusses two key pathways for Aboriginal and Torres Strait Islander people into fine enforcement, namely offensive language provisions and driving without a licence.

Alcohol

Aboriginal and Torres Strait Islander people are less likely to drink alcohol than non-Indigenous people, but those who do drink, are more likely to drink at harmful levels. In **Chapter 13** the ALRC looks at the harmful use of alcohol in Aboriginal and Torres Strait Islander communities and the links between alcohol, offending and incarceration.

The ALRC outlines a range of responses that have been adopted to address alcohol-related offending, including liquor accords, restrictions on the sale of alcohol, banned drinkers registers and mandatory treatment programs and makes two recommendations for reform. First, the ALRC recommends that all initiatives to reduce the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities should be developed with, and led by, these communities to meet their particular needs. Secondly, it recommends that Commonwealth, state and territory governments should enable and provide support to Aboriginal and Torres Strait Islander communities that wish to address alcohol misuse to develop and implement local liquor accords; to develop plans to prevent the sale of full strength alcohol; or to reduce the availability of particular alcohol ranges or products within their communities.

Police accountability

In **Chapter 14**, the ALRC recognises the good work undertaken by police officers on a daily basis, often in difficult and dangerous circumstances, and that Commonwealth, state and territory police have undertaken significant reforms to culture, policy and practice in recent years to improve relationships with Aboriginal and Torres Strait Islander peoples, examples of which are provided in this chapter.

Notwithstanding those measures, throughout this Inquiry, the ALRC heard that many Aboriginal and Torres Strait Islander people continue to have negative attitudes towards police, holding the view that the law is applied unfairly and that complaints about police practices are not taken seriously. It is clear that those perceptions have strong historical antecedents, and there is evidence that the law is applied unequally—for example, Aboriginal and Torres Strait Islander young people are less likely to be cautioned and more likely to be charged than non-Indigenous young people.

The ALRC suggests that the perception of poor police practices needs to be addressed in order to improve relationships between police and Aboriginal and Torres Strait Islander peoples. Poor relations influence how often Aboriginal and Torres Strait Islander people interact with police and how they respond in interactions with police. Poor police relations can contribute to the disproportionate arrest, police custody and incarceration rates of Aboriginal and Torres Strait Islander people. It may also undermine police investigations.

The ALRC recommends that police practices and procedures—particularly the exercise of police discretion—are reviewed by governments so that the law is applied equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples. The ALRC also recommends that police complaints handling mechanisms be reviewed, particularly addressing the perception by Aboriginal and Torres Strait Islander people that their complaints are not taken seriously and that police misconduct is not addressed. Mechanisms for independent assessment or review of complaints should be considered.

The implementation of these two recommendations will require further consultation with Commonwealth, state and territory police and Aboriginal and Torres Strait Islander peoples. Such consultation can assist in finding an appropriate balance to enable efficient policing with strong internal management structures, ensure that police practices and procedures are applied equally, and make certain that investigations of complaints about police misconduct are, and are seen to be, thorough, transparent and fair.

The ALRC further recommends a range of initiatives that could be implemented to improve police culture. In particular, it suggests that successful initiatives are acknowledged and, where possible, scaled up.

Chapter 14 also deals with the gap in the provision of custody notification services that provide 24-hour, 7-day a week telephone legal advice services to Aboriginal and Torres Strait Islander people who have been detained in police custody. The ALRC recommends that a requirement to notify an Aboriginal and Torres Strait Islander legal

service be provided for in statute and that it extends to detention in custody for any reason—including for protective reasons.

Child protection and adult incarceration

Research suggests that the relationship between the child protection system, juvenile justice and adult incarceration is so strong that child removal into out-of-home care and juvenile detention could be considered key drivers of adult incarceration.

While child protection and juvenile detention fall outside the scope of this Inquiry, in **Chapter 15,** the ALRC recommends that a national review of the child protection laws and processes that affect Aboriginal and Torres Strait Islander children should be undertaken.

Criminal justice targets and Aboriginal Justice Agreements

Reducing Aboriginal and Torres Strait Islander incarceration requires a coordinated governmental response, and effective collaboration with Aboriginal and Torres Strait Islander peoples. In **Chapter 16**, the ALRC makes two recommendations that aim to improve both of these. It recommends that there should be national targets to reduce both the rate of incarceration of Aboriginal and Torres Strait Islander people, and the rate of violence against Aboriginal and Torres Strait Islander people. These goals are interrelated, and will facilitate improvements not only in the rate at which Aboriginal and Torres Strait Islander people come in contact with the criminal justice system, but also in community safety.

The ALRC also recommends that Aboriginal Justice Agreements should be in place in states and territories. The success of many of the recommendations made in this Report relies on the development of collaborative relationships between government and Aboriginal and Torres Strait Islander organisations. Aboriginal Justice Agreements can provide a foundation on which to facilitate, build, and solidify these relationships.

The law reform process

The scope of each ALRC inquiry is defined by the Terms of Reference. The recommendations for reform must sit within this scope and need to be built on an appropriate conceptual framework and evidence base.

A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform. Pursuant to section 38 of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.

The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry, as set out in the Terms of Reference. For each inquiry, the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. While the exact procedure is

tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC website.

Community consultation

The ALRC undertook a national consultation process to gain an understanding of the key issues in the Inquiry, and the broader context in which Aboriginal and Torres Strait Islander peoples are incarcerated. The ALRC conducted 149 consultations with key stakeholders across the country. A list of those consulted is included in this Report. The ALRC received 121 public and six confidential submissions in response to a Discussion Paper published on 19 July 2017. These submissions came from a wide range of people and organisations, including: individuals in their private capacity; academics; lawyers; Aboriginal and Torres Strait Islander organisations and legal services; law societies and representative groups; legal aid organisations; community legal advocacy groups; peak bodies; and state and territory governments. Consultations and submissions, together with other research, including earlier reports and inquiries, have informed the recommendations for reform in this Report. The ALRC thanks all stakeholders for the important contribution they have made to our evidence base.

Appointed experts

In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also received by the ALRC from members of its Advisory Committee and part-time Commissioners. The Advisory Committee met on three occasions during the course of the Inquiry. A list of Advisory Committee members is included at the front of this Report. While ultimate responsibility for the recommendations lies with the Commissioners of the ALRC, Advisory Committee members provide quality assurance in the consultation and research process, assist in the identification of key issues, and contribute to the determination of the final recommendations. The ALRC acknowledges the considerable contribution made by the Advisory Committee members, our part-time Commissioners, and expert readers and expresses its gratitude to them for voluntarily providing their time and expertise.

Outcomes

Implementation of the recommendations in this Report will reduce the disproportionate rate of incarceration of Aboriginal and Torres Strait Islander people and improve community safety. These recommendations will:

- promote substantive equality before the law for Aboriginal and Torres Strait Islander peoples;
- promote fairer enforcement of the law and fairer application of legal frameworks;
- ensure Aboriginal and Torres Strait Islander leadership and participation in the development and delivery of strategies and programs for Aboriginal and Torres Strait Islander people in contact with the criminal justice system;

- reduce recidivism through the provision of effective diversion, support and rehabilitation programs;
- make available to Aboriginal and Torres Strait Islander offenders alternatives to imprisonment that are appropriate to the offence and the offender's circumstances; and
- promote justice reinvestment through redirection of resources from incarceration to prevention, rehabilitation and support, in order to reduce reoffending and the long-term economic cost of incarceration of Aboriginal and Torres Strait Islander peoples.

Reduced incarceration and greater support for Aboriginal and Torres Strait Islander people in contact with the criminal justice system will, in turn, improve health, social and economic outcomes for Aboriginal and Torres Strait Islander peoples.

1. Introduction to the Inquiry

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The Inquiry

1.1 This Inquiry has focused on the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, a situation that the then Attorney-General of Australia, Senator the Hon George Brandis QC, described as a 'national tragedy'[1]. His Honour Judge Matthew Myers AM was appointed as ALRC Commissioner to lead the Inquiry.

Terms of Reference

1.2 The ALRC was asked in the Terms of Reference for this Inquiry to consider laws and legal frameworks that contribute to the incarceration rate of Aboriginal and Torres Strait Islander peoples and inform decisions to hold or keep Aboriginal and Torres Strait Islander peoples in custody. Under the Terms of Reference, 'legal frameworks' encompass police, courts, legal assistance services and prisons. The ALRC was also asked to consider a number of factors that decision makers take into account when deciding on a criminal justice response, including community safety, the

1 George Brandis and Nigel Scullion, 'ALRC Inquiry into Incarceration Rates of Indigenous Australians' (Media Release, 27 October 2016).

availability of alternatives to incarceration, the degree of discretion available in decision making and principles informing decisions to incarcerate. The incarceration of Aboriginal and Torres Strait Islander women was specifically identified as an area for consideration.

1.3 The ALRC was asked to consider laws that may contribute to the rate of Aboriginal and Torres Strait Islander peoples' offending including, but not limited to, laws that regulate the availability of alcohol, driving offences and unpaid fines and differences in application of laws across states and territories along with other access to justice issues.

1.4 The reference provided to the ALRC essentially asked 'what laws and legal frameworks should be introduced or amended so as to reduce Aboriginal and Torres Strait Islander incarceration'. The Report, and the recommendations, set out practical measures that should be undertaken to achieve this outcome.

Consultation

1.5 As part of the Inquiry process, the ALRC undertook a wide ranging consultation process to gain an understanding of the complex and often intergenerational context in which Aboriginal and Torres Strait Islander peoples are incarcerated. The ALRC conducted 149 consultations with key stakeholders across Sydney, Dubbo, Bourke, Brisbane, Perth, Alice Springs, Darwin, Adelaide, Melbourne, Cairns and the Torres Strait, and New Zealand.[2] The Inquiry also benefited from the many insights and experiences that were provided in 121 public and six confidential submissions made in response to a Discussion Paper published by the ALRC on 19 July 2017. These consultations and submissions, together with other research, including earlier reports and Commissions of Inquiry, have informed the recommendations for reform in this Report.

1.6 The ALRC sincerely thanks the many stakeholders who have contributed to the Inquiry, either by consultation or submission. Consultation lies at the heart of the ALRC process as a hallmark of best practice law reform, and the ALRC is extremely grateful for the generous, thoughtful and insightful contributions of our Inquiry stakeholders to the evidence base underpinning our recommendations.

1.7 In keeping with usual ALRC practice, an Advisory Committee was constituted for the period of the Inquiry. The Committee met on three occasions during the course of the Inquiry: on 20 March 2017, 5 June 2017, and 20 November 2017. A list of Advisory Committee members is included at the front of this Report. While ultimate responsibility for the recommendations lies with the Commissioners of the ALRC, Advisory Committee members provide quality assurance in the consultation and research process, assist in the identification of key issues, and contribute to the determination of the final recommendations. The ALRC acknowledges the considerable contribution made by the Advisory Committee members, our part-time

2 A list of consultations is included at the end of this Report.

Commissioners, and expert readers and is extremely grateful to them for voluntarily providing their time and expertise.

Outcomes

1.8 Implementation of the recommendations in this Report will reduce the disproportionate rate of incarceration of Aboriginal and Torres Strait Islander people and improve community safety. These recommendations will:

- promote substantive equality before the law for Aboriginal and Torres Strait Islander peoples;
- promote fairer enforcement of the law and fairer application of legal frameworks;
- ensure Aboriginal and Torres Strait Islander leadership and participation in the development and delivery of strategies and programs for Aboriginal and Torres Strait Islander people in contact with the criminal justice system;
- reduce recidivism through the provision of effective diversion, support and rehabilitation programs;
- make available to Aboriginal and Torres Strait Islander offenders alternatives to imprisonment that are appropriate to the offence and the offender's circumstances; and
- promote justice reinvestment through redirection of resources from incarceration to prevention, rehabilitation and support, in order to reduce reoffending and the long-term economic cost of incarceration of Aboriginal and Torres Strait Islander peoples.

1.9 Reduced incarceration and greater support for Aboriginal and Torres Strait Islander people in contact with the criminal justice system will, in turn, improve health, social and economic outcomes for Aboriginal and Torres Strait Islander peoples.

Historical descriptions of Aboriginal and Torres Strait Islander peoples

1.10 In discussing both the recent and historical context in which Aboriginal and Torres Strait Islander peoples are incarcerated, the ALRC has quoted past language and descriptors of Aboriginal and Torres Strait Islander peoples. The ALRC considers the use of these descriptors is no longer appropriate or acceptable. The ALRC has quoted from a number of superior court judgments, as well as historical policies and legislation that referred to Aboriginal and Torres Strait Islander peoples as "Aborigines".[3] This descriptor is regarded by many within the Aboriginal and Torres Strait Islander community as unacceptable, and a reminder of the way in which Aboriginal and Torres Strait Islander peoples were treated pursuant to policies such as the *Aborigines Protection Act 1909* (NSW). The ALRC determined not to alter the original text of the quotes contained within this Report as such language is

3 See, eg, *Aborigines Protection Act 1909* (NSW); *R v Fernando* (1992) 76 A Crim R 58.

demonstrative of the attitudes and context in which Aboriginal and Torres Strait Islander peoples have historically been described in Australian society.

Approach to reform

1.11 While the Inquiry examined options for law reform that can reduce the incarceration rate of Aboriginal and Torres Strait Islander peoples, the recommendations and commentary in the Report do not seek to excuse or minimise violent or abusive behaviours for which incarceration is the appropriate response. It is the intention of the ALRC that the recommendations and commentary in this Report should not be read as extending to those who would place community safety or the safety of individuals at risk. Further, the ALRC does not suggest that criminal behaviours should be excused or ignored as a means to reduce the incarceration rate of Aboriginal and Torres Strait Islander peoples.

1.12 The recommendations in this Report are primarily focused on reducing the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples who are cycling through the criminal justice system serving short sentences of two years and under. This group of offenders represent some 45% of all Aboriginal and Torres Strait Islander people entering into prisons.[4]

1.13 Pauline Wright, President of the Law Society of NSW, has suggested that:

> Jail is an ineffective tool to deter crime—indeed prisons have been referred to as 'universities of crime', so effective they seem at encouraging recidivism. Jailing people is also very costly, so it is time that we tackle the problem and find ways to reduce the record number of people filling our jails. Investing more funds in early intervention, prevention and diversion programs that can help address the underlying causes of crime is likely to achieve safer communities and reduce rates of reoffending. Sadly, despite a reduction in most categories of crime, a lack of resources for non-custodial options, especially in regional NSW, has led to more offenders being sentenced to jail, albeit for short periods, for relatively minor offences.[5]

1.14 A reduction in the number of Aboriginal and Torres Strait Islander offenders serving short sentences of imprisonment would not only see a reduction in the prison population, but would create collateral benefits. The wider Australian community would benefit from safer communities through reduction in crime, as well as through a reduction in the economic cost of incarceration.

Disproportionate representation

1.15 As the Inquiry concerned the over-representation of Aboriginal and Torres Strait Islander peoples in Australian prisons, the ALRC focused on those areas where Aboriginal and Torres Strait Islander peoples are disproportionately represented.

1.16 Aboriginal and Torres Strait Islander adults make up around 2% of the national population, and yet constituted 27% of the national prison population. Aboriginal and

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4 See ch 3.

5 Pauline Wright, 'President's Message—Call for a Stronger Focus on Sentencing Alternatives' [2017] (34) *Law Society Journal* 8.

Torres Strait Islander incarceration rates increased 41% between 2006 and 2016. In that time, the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates has widened: with over-representation of Aboriginal and Torres Strait Islander people in prison increasing from a factor of 11 to 12.5. In 2016, Aboriginal and Torres Strait Islander women constituted 34% of the female prison population, and an Aboriginal or Torres Strait Islander woman was 21.2 times more likely to be imprisoned than a non-Indigenous woman.[6]

1.17 There are also particular areas in which Aboriginal and Torres Strait Islander peoples are disproportionately represented in the prison population. For example, Aboriginal and Torres Strait Islander offenders are more likely to be sentenced to short terms of imprisonment than their non-Indigenous counterparts, with a national median aggregate sentence length of two years, compared to 3.5 years for non-Indigenous prisoners.[7] Hence, Aboriginal and Torres Strait Islander peoples are being incarcerated for lower order offences for which diversion and rehabilitation may be a more appropriate response.

1.18 A full discussion of the disproportionate incidence of Aboriginal and Torres Strait Islander incarceration is provided in Chapter 3.

Contributing factors

1.19 While this Inquiry has considered the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, it is important to recognise that 'the majority of Aboriginal and Torres Strait Islander peoples never commit criminal offences'.[8]

1.20 The ALRC also recognises that while laws and legal frameworks are an important factor contributing to over-representation, other social, economic, and historic factors also contribute:

> The bigger picture cannot be ignored: the history of colonisation and dispossession has had enduring effects on Aboriginal and Torres Strait Islander communities and individuals. For example, there is a strong correlation between having a family member removed and arrest and incarceration. The high rate of imprisonment is occurring in the context of poor health, inadequate housing, high levels of family violence, and high levels of unemployment.[9]

1.21 Recognising such factors, the Terms of Reference direct the ALRC to have regard to existing data and research concerning 'the broader contextual factors contributing to Aboriginal and Torres Strait Islander incarceration' including:

> the relationships between Aboriginal and Torres Strait Islander offending and incarceration and inter-generational trauma, loss of culture, poverty, discrimination,

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6 For a fuller statistical overview of Aboriginal and Torres Strait Islander incarceration, see ch 3.

7 Australian Bureau of Statistics, above n 10, table 25. See further ch 3.

8 Australian Law Reform Commission, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Terms of Reference (2017).

9 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission No 5 to Senate Finance and Public Administration References Committee, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (27 April 2015).

alcohol and drug use, experience of violence, including family violence, child abuse and neglect, contact with child protection and welfare systems, educational access and performance, cognitive and psychological factors, housing circumstances and employment.

1.22 The Terms of Reference recognise earlier important research that has touched or focused upon Aboriginal and Torres Strait Islander incarceration, its causes and its devastating effects. In formulating its reform response, the ALRC has considered the recommendations made in these other reports, inquiries and action plans in so far as they address the criminal justice system, including but not limited to:

a. the Royal Commission into Aboriginal Deaths in Custody,

b. the Royal Commission into the Protection and Detention of Children in the Northern Territory (due to report 1 August 2017),

c. Senate Standing Committee on Finance and Public Administration's Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services,

d. Senate Standing Committee on Community Affairs' inquiry into Indefinite Detention of People with Cognitive and Psychiatric impairment in Australia,

e. Senate Standing Committee on Indigenous Affairs inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities,

f. reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner,

g. the ALRC's inquiries into Family violence and Family violence and Commonwealth laws, and

h. the National Plan to Reduce Violence against Women and their Children 2010–2022.[10]

1.23 The reports and inquiries referred to above have highlighted the many social, political and economic factors that contribute to Aboriginal and Torres Strait Islander imprisonment rates. Many of these are recognised in the national 'Closing the Gap' targets[11] and the Productivity Commission report *Overcoming Indigenous Disadvantage: Key Indicators 2016*.[12]

1.24 These reports have identified factors that include: disadvantage caused by a lack of education and low employment rates; inadequate housing, overcrowding and homelessness; poor health outcomes, including mental health, cognitive impairment including Foetal Alcohol Spectrum Disorders (FASD) and physical disability; and alcohol and drug dependency and abuse.[13] The Royal Commission into the Protection and Detention of Children in the Northern Territory has also recognised the cyclical

10 Australian Law Reform Commission, Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Terms of Reference (2017).

11 Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)* (2008).

12 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016).

13 Ibid [4.1]–[4.110]. See further ch 2.

and intergenerational nature of social and economic disadvantage on Aboriginal and Torres Strait Islander peoples.[14]

1.25 The ALRC has noted during the consultation process significant and recurrent factors acting as drivers of incarceration. The ALRC's work on the Inquiry suggests that there are a number of other factors that contribute to the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples, including Aboriginal and Torres Strait Islander young people's contact with the juvenile justice system; the background and lived experiences of Aboriginal and Torres Strait Islander children put into out-of-home care; the significant proportion of Aboriginal and Torres Strait Islander prisoners who experience poor physical health, mental illness and cognitive impairment, as well as Aboriginal and Torrs Strait Islander prisoners with backgrounds of physical and sexual abuse. An examination of these factors is beyond the scope of this Inquiry. However, the ALRC believes that the impact of these factors warrants further consideration by governments.

1.26 The ALRC draws attention to research showing the early disproportionate incarceration of Aboriginal children in the juvenile justice system. The Australian Institute of Health and Welfare reported in 2015 that 'Indigenous young people aged 10-17 were 26 times as likely as non-Indigenous young people to be in detention on an average night in the June quarter of 2015… This was an increase from 19 times as likely in the June quarter of 2011'.[15]

1.27 Dr Don Weatherburn has noted the progression of young Aboriginal and Torres Strait Islander peoples through the criminal justice system in New South Wales:

> By the age of 23, more than three quarters (75.6%) of the NSW Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a NSW Criminal Court. The corresponding figure for the non-Indigenous population of NSW was just 16.9%. By the same age, 24.5% of the Indigenous population, but just 1.3% of the non-Indigenous population had been refused bail or given a custodial sentence (control order or sentence of imprisonment).[16]

1.28 The ALRC was concerned by the many stories delivered by stakeholders during the Inquiry about the lived experiences and background of deprivation and disadvantage of young people in custody. These experiences were mirrored in the 2009 NSW Young People in Custody Health Survey (YPICHS) Report prepared by NSW Justice Health in conjunction with NSW Juvenile Justice that found:

> Over 27% of YPICHS participants had been placed in care as a child; this was significantly higher among young women and Aboriginal young people. Low educational attainment was common with only 38% of participants in school prior to custody and an average age of leaving school of 14.4 years. Nearly half (45%) of participants had ever had a parent in prison and 10% currently had a parent in prison.

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14 Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Interim Report* (2017) 35.

15 Australian Institute of Health and Welfare, 'Youth Detention Population in Australia—2015' (Bulletin No 131, December 2015) 11.

16 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 5.

> Aboriginal young people were twice as likely to have ever had a parent in prison compared to non-Aboriginal young people (61% vs 30%).

1.29 One particular contributing factor to adult incarceration rates has been shown to be out-of-home care. This Inquiry focuses on the incarceration of adult Aboriginal and Torres Strait Islander people. However, research has made links between child protection, out-of-home care, and juvenile and adult incarceration.[17] The issue of out-of-home care as a driver of incarceration is discussed further in Chapter 15.

1.30 During the consultation process, the ALRC was advised many times of the negative effects and consequences for Aboriginal and Torres Strait Islander people experiencing intergenerational trauma. Professor Harry Blagg, Dr Vickie Hovane and Dorinda Cox submitted that:

> Inter-generational trauma impacts on all Aboriginal families and communities. It impacts on individuals, families, communities and cultures. For Aboriginal people, it is a collective consequence of colonisation rather than simply an individual experience. It is compounded by negative contact with the justice and related systems, such as children's protection. Because this trauma impacts across all levels of Aboriginal society, there is a need for a holistic and life-span approach to addressing the issue.[18]

1.31 Aboriginal and Torres Strait Islander communities and individuals have been negatively affected by laws, policies and practices implemented by successive government policies, such as assimilation and child removal. The ALRC also acknowledges the physical and psychological harm caused to many Aboriginal and Torres Strait Islander women and children through family violence and abuse.[19]

1.32 As a law reform body, the focus of the ALRC in the Inquiry centred on reform to laws and legal frameworks that could address the over-representation of Aboriginal and Torres Strait Islander peoples in prisons. However, the ALRC acknowledges that law is only one of the many factors in a larger historical, social and economic context that contributes to incarceration.[20]

Rural and remote communities

1.33 Although the majority of Aboriginal and Torres Strait Islander peoples live in cities or regional areas (57% in major cities or inner regional areas), a relatively high proportion live in remote and very remote areas (21%). In comparison, almost 90% of

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17 Aboriginal and Torres Strait Islander Social Justice Commissioner, Submission No 5 to Senate Finance and Public Administration References Committee, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (27 April 2015).

18 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

19 Hannah McGlade, *Our Greatest Challenge: Aboriginal Children and Human Rights* (Aboriginal Studies Press, 2012).

20 Chris Cunneen, 'Racism, Discrimination and the over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal Justice* 329, 334–5.

non-Indigenous Australians (over 19 million people) live in major cities or inner regional areas.[21]

1.34 For those Aboriginal or Torres Strait Islander communities in regional and remote areas, disadvantage can be compounded by a lack of access to services and infrastructure. The Productivity Commission stated:

> Socioeconomic disadvantage directly impacts on the ability of Indigenous people to access justice. Socioeconomic disadvantage among Aboriginal and Torres Strait Islander Australians is widespread and multifaceted: various analyses show that, on average, Indigenous people experience poorer outcomes than non-Indigenous people in the areas of education, income, health and housing … Socioeconomic disadvantage is linked to geographic isolation, which in itself can represent a barrier in accessing justice.[22]

1.35 The remoteness of many Aboriginal communities, and comparative lack of legal services and community programs—including drug and alcohol rehabilitation programs, adult literacy programs or employment programs—was raised with the ALRC during the consultation process as a contributing factor to incarceration. For example, a lack of services and programs means that there are few community sentencing options for offenders who live in remote communities.

1.36 There are many access to justice issues that arise in this context, including a lack of interpreters as well as limited access to legal representation with a reliance on 'fly in fly out' judicial officers and legal practitioners. In some cases this can lead to the provision of compromised advice and representation and a greater incidence of incarceration of offenders.[23]

Aboriginal and Torres Strait Islander incarceration in the federal context

1.37 Much of the criminal law that was the subject of the Inquiry fell within state and territory jurisdictions. The *Australian Law Reform Commission Act 1996* (Cth) provides that one of the functions of the ALRC during its inquiry process is to consider proposals for uniformity between state and territory laws and to consider proposals for complementary Commonwealth, state and territory laws.[24]

1.38 During the Inquiry, the ALRC identified state and territory laws and legal frameworks that are key contributors to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. Although ALRC heard that in Victoria newly introduced legislation must contain a statement of compatibility with the *Charter of Human Rights and Responsibilities Act 2009* (Vic), the ALRC is nonetheless cognisant of the considerable negative impact some laws and legal frameworks have on Aboriginal and Torres Strait Islander peoples across all states and

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21 Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011, Cat No 3238.0.55.001* (2013).

22 Productivity Commission, *Access to Justice Arrangements—Volume 2* (2014) 764.

23 See further ch 10.

24 *Australian Law Reform Commission Act 1996* (Cth) ss 21(1)(d)–(e).

territories. The ALRC has sought to highlight those laws, legal frameworks and practices that have led to the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples as well as those that have worked to reduce the rate of Aboriginal and Torres Strait Islander incarceration.

1.39 Various recommendations contained within this Report make recommendations directed towards state and territory governments. For the purposes of implementation of those recommendations, the ALRC intends that such recommendations extend to individual government departments and government agencies.

International setting

1.40 The ALRC's approach to reform in this Inquiry is informed by relevant international human rights standards and instruments. The Terms of Reference make specific reference to these. In addition, under its constituting legislation, the ALRC is directed to have regard to 'Australia's international obligations that are relevant to the matter'.[25]

1.41 International law requires that Aboriginal and Torres Strait Islander peoples enjoy equality and non-discrimination before the law and throughout the criminal justice process including in relation to law enforcement and the judicial system. Australia has obligations under international law to implement the following human rights treaties:

- the International Covenant on Civil and Political Rights (ICCPR);[26]
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);[27]
- the International Convention on the Elimination of all forms of Racial Discrimination (ICERD);[28]
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[29]
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);[30]
- the Convention on the Rights of the Child (CROC);[31]and

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25 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

26 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 7, 9–10, 14, 24, 26, 50.

27 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 1,2.

28 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 2, 5,.

29 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981).

30 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

31 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 2–3, 37, 40.

- the Convention on the Rights of Persons with Disabilities (CRPD).[32]

1.42 In addition, the Australian Government endorsed the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) on 3 April 2009.[33] Although the Declaration is non-binding and aspirational in nature, it presents a series of structured principles that might be utilised to ameliorate disadvantage and discrimination experienced by Aboriginal and Torres Strait Islander peoples.

1.43 Also of note in the international context is that, on 1 July 2016, the United Nations Human Rights Council adopted a resolution reflecting concern that 'indigenous women and girls may be overrepresented in criminal justice systems and may be more marginalized, and thus experience more violence before, during and after the period of incarceration'.[34]

Economic factors and justice reinvestment

1.44 The implementation of the recommendations in this Report, including the provision of more diversion, support and rehabilitation programs before, during and after incarceration, will cost money. Many of the recommendations in this Report will require funding. However, if implemented they will cost less than the continuing cost to the community of keeping ever increasing numbers of people detained in prisons. The ALRC suggests that when looking at these costs it is important to consider the long-term savings that will be generated through reducing incarceration rates.

1.45 A number of submissions provided information about the cost of keeping an adult in prison per day and per year. The cost differs over time and from jurisdiction to jurisdiction. The Productivity Commission has provided a general indication of these costs:

> Nationally, in 2015-16, the total cost per prisoner per day, comprising net operating expenditure, depreciation, debt servicing fees and user cost of capital (but excluding payroll tax and, where able to be disaggregated by jurisdictions, prisoner transport and escort costs and prisoner health expenditure) was $283.[35]

1.46 One example of prison growth and cost is the major expansion of New South Wales Corrective Services' prison infrastructure. At 30 June 2016, there were 12,629 adult prisoners in NSW prisons, an increase of 7% (832 prisoners) from 2015.[36] In

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32 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 4, 5, 7, 12–4. See also Australian Human Rights Commission, *Fact Sheet 7: Australia and Human Rights Treaties* (2009).

33 Australian Human Rights Commission, 'United We Stand—Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia' (Media Release, 3 April 2009).

34 *Accelerating Efforts to Eliminate Violence against Women: Preventing and Responding to Violence against Women and Girls, Including Indigenous Women and Girls*, UN HRC Res 32/19, 32nd Sess, 43rd mtg, UN Doc A/HRC/32/L28/Rev 1(30 June 2016).

35 Productivity Commission, *Report on Government Services 2017, Volume C: Justice*, 8.19

36 Australian Bureau of Statistics, *Prisoners in Australia, 2016: State and Territory Profiles—New South Wales, Cat No 4517.0* (2016).

2016, the NSW Government announced that it will spend $3.8 billion on over a dozen new correctional centres in order to house the increasing prison population.[37]

1.47 PwC has endeavoured to calculate the public costs that can be avoided by a reduction in recidivism and prison numbers, suggesting:

- Indigenous incarceration is currently costing the Australian economy $7.9 billion per annum (in 2016)
- These costs are expected to grow to $9.7 billion per annum in 2020 and $19.8 billion per annum by 2040 as a result of a growing incarcerated population.[38]

1.48 Justice reinvestment is based on the concept of saving public money by keeping people out of costly prisons through investment in programs and strategies that prevents offending behaviours within communities. Some of those savings can then be re-invested in programs that will reduce offending and recidivism and thereby slow the continuing growth in, and eventually reduce, prison numbers. However, justice reinvestment requires initial funding in the expectation of reaping greater financial returns in the longer term. The ALRC recognises that it will take a great deal of governmental determination to overcome the administrative inertia and vested interests that may resist the redirection of major spending programs away from prisons. Recommendations and a full discussion in respect of justice reinvestment can be found in Chapter 4.

Terminology

1.49 Throughout this report a number of terms or phrases are frequently used. These are summarised here.

Aboriginal and Torres Strait Islander peoples

1.50 The Terms of Reference refer to 'Aboriginal and Torres Strait Islander peoples' and the ALRC has adopted this phrase throughout this Report. The ALRC acknowledges the diversity of cultures, traditional practices and differences across communities and the various clan, language and skin groups represented throughout Australia and the Torres Strait. In using the phrase 'Aboriginal and Torres Strait Islander peoples', the ALRC does not intend to diminish or deny the importance of this cultural and linguistic diversity.

1.51 The recognition of diversity is rarely apparent from data and analysis of persons involved in the criminal justice system. Data rarely makes a distinction between Aboriginal people and Torres Strait Islander people. This deficit has prevented the ALRC from identifying whether research and analysis is relevant to both Aboriginal and Torres Strait Islander peoples, or whether those from different Aboriginal cultural backgrounds may be represented differently in the criminal justice system.

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37 Department of Justice (NSW), *New Prisons* <http://www.correctiveservices.justice.nsw.gov.au:80/new-prisons>.

38 PwC's Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (2017) 27.

1.52 The abbreviation 'ATSI' has been used to refer to Aboriginal and Torres Strait Islander peoples in some tables and graphs in this Report.

'Culturally appropriate', 'culturally competent' and 'culturally safe'

1.53 The Terms of Reference ask the ALRC to have regard to existing data and research in relation to, among other matters, the 'availability and effectiveness of culturally appropriate programs that intend to reduce Aboriginal; and Torres Strait Islander offending and incarceration'.

1.54 Throughout the Report, the ALRC uses the terms 'culturally appropriate', 'culturally competent', and 'culturally safe' in relation to programs, projects, pilots, initiatives and reforms. In using these terms, the ALRC is referring to the requirement that matters be developed, organised and implemented with Aboriginal and Torres Strait Islander communities and, where possible, facilitated and owned by those communities.

1.55 These terms lack an objective definition. The Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos, describes cultural safety as

> an environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning, living and working together with dignity and truly listening.[39]

1.56 Maryann Bin-Sallik suggests that

> [c]ultural safety extends beyond cultural awareness and cultural sensitivity. It empowers individuals and enables them to contribute to the achievement of positive outcomes. It encompasses a reflection on individual cultural identity and recognition of the impact of personal culture on professional practice.[40]

1.57 Jackomos has suggested that, for Aboriginal people, cultural safety and security requires:

> Environments of cultural resilience within Aboriginal and Torres Strait Islander communities;
>
> Cultural competency by those who engage with Aboriginal and Torres Strait Islander communities.[41]

1.58 The Council of Australian Governments (COAG) has defined cultural competence as meaning 'a set of congruent behaviours, attitudes, and policies that

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39 Commission for Children and Young People (Vic), 'Cultural Safety for Aboriginal Children' (Tip Sheet: Child Safe Organisations, 2015) quoting R Williams, 'Cultural Safety—What Does It Mean for Our Work Practice?' (1999) 23(2) *Australian and New Zealand Journal of Public Health* 213, 214–15.

40 Maryann Bin-Sallik, 'Cultural Safety: Let's Name It!' (2003) 32 *Australian Journal of Indigenous Education* 21, 21.

41 Commission for Children and Young People Victoria, *Cultural Safety for Aboriginal Children* Tip Sheet: Child Safe Organisations (2015) quoting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011* (2012) 11.

come together in a system, agency, or amongst professionals and enables that system, agency, or those professionals to work effectively in cross-cultural situations'.[42]

1.59 COAG has suggested that cultural competence is

> essential for services and programmes offering support to Aboriginal and Torres Strait Islander prisoners and ex-prisoners. Such prisoners and ex-prisoners may lack a level of bi-cultural understanding to be able to switch between Indigenous and mainstream ways of thinking, acting and communicating. This creates an additional level of disadvantage, particularly when dealing with sensitive issues or stressful situations.[43]

1.60 While the ALRC relies upon the definitions above in its understanding of the terms 'culturally appropriate', 'culturally competent', and 'culturally safe', the specific use of these terms by the ALRC in this Report is in reference only to Aboriginal and Torres Strait Islander cultures.

Trauma-informed approaches

1.61 Many of the discussions and recommendations contained within this Report refer to the effects of trauma upon Aboriginal and Torres Strait Islander peoples. Some recommendations require those implementing the recommendations to take a 'trauma-informed approach' or provide a 'trauma-informed response'. It is necessary to understand what is meant by 'trauma-informed' approach or responses that are specific to, and meet the needs of, Aboriginal and Torres Strait Islander peoples. Professor Helen Milroy—a descendant of the Palyku people of the Pilbara region of Western Australia—has described Aboriginal and Torres Strait Islander people's experiences of trauma:

> We are part of the dreaming. We have been in the dreaming for a long time before we are born on this earth and we will return to this vast landscape at the end of our days. It provides for us during our time on earth, a place to heal, to restore purpose and hope, and continue our destiny. Our country and people have suffered many traumas since colonisation, the magnitude of which is beyond words. Looking through trauma is like being trapped in the back of a mirror, there is no reflection of self. It is like being trapped in darkness, unable to see where to go or what is there, surrounded by 'not knowing', paralysed by fear. When we are wounded, our story is disrupted and life becomes fragmented. We may not be able to find our way forward and may start to see life through warped mirrors. We have to understand that trauma is only a part of our story and our story is part of a much greater story that has a different beginning, is enduring and will continue well beyond our lifetime.[44]

1.62 The Mental Health Coordinating Council (MHCC)—a peak body for community mental health organisations in New South Wales—describes the effects of trauma as

> that which arises from interpersonal abuse and/or neglect in childhood, as well as victimisation in adulthood, can lead to serious long-term consequences and many survivors adopt extreme coping strategies which can persist into adult life (as an attempt to manage overwhelming traumatic stress). These strategies include

42 Council of Australian Governments, *Prison to Work Report* (2016) 23.
43 Ibid.
44 Human Rights and Equal Opportunity Commission, *Social Justice Report 2007* (2008).

> suicidality, substance abuse and addictions, self-harming behaviours, dissociation, and re-enactments of past abusive relationships. Trauma can be trans-generational for individuals and/or affect whole communities.[45]

1.63 Trauma can overlap with, but may not include, people who have complex needs. As the MHCC noted:

> Complex Need refers to individuals who present with an inter-related mix of diverse mental health and physical health issues, developmental and psychosocial problems. Many people with complex needs have histories of trauma (emotional, physical and/or sexual abuse), as well as other types of childhood interpersonal trauma including but not limited to chronic neglect and the effects of family violence.[46]

The Stolen Generation: understanding intergenerational trauma

1.64 Professor Judy Atkinson has emphasised the importance of understanding the nature of Aboriginal and Torres Strait Islander experiences of trauma:

> While many Indigenous and non-Indigenous Australian children grow up in safe homes and live in safe communities, there are some who do not. In the case of Indigenous children, some families and communities are unable to, or are still working to, heal the trauma of past events, including displacement from Country, institutionalisation and abuse. The Stolen Generations also represent a significant cause of trauma. In 2008, an estimated 8% of Indigenous people aged 15 and over reported being removed from their natural family and 38% had relatives who had been removed from their natural family...This trauma can pass to children (inter-generational trauma).[47]

1.65 The *Bringing Them Home* Report outlined the deleterious effect of child removal:

> One principal effect of the forcible removal policies was the destruction of cultural links. This was of course their declared aim. Culture, language, land and identity were to be stripped from the children in the hope that the traditional law and culture would die by losing their claim on them and sustenance on them.[48]

1.66 Professor Ann McGrath has described policies of child removal that operated within the Northern Territory as 'the ultimate racist act'.[49] Professor Pat Dudgeon, Dr Michael Wright, Dr Yin Paradies, Darren Garvey and Professor Iain Walker have argued that '[McGrath's] statement can be generalised to the rest of Australia.'[50]

1.67 Lorraine Peeters, Shaan Hamann and Kerrie Kelly have noted that the trauma inflicted by successive government policies of child removal was effectively denied

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45 Mental Health Coordinating Council, *Trauma-Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia* (2013) 9.

46 Ibid 8.

47 Judy Atkinson, 'Trauma-Informed Services and Trauma-Specific Care for Indigenous Australian Children' (Resource Sheet No 21, Closing the Gap Clearinghouse, 2013) 2.

48 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 202.

49 Ann McGrath, *Born in the Cattle: Aborigines in Cattle Country* (Allen & Unwin, 1987).

50 Pat Dudgeon et al, 'Aboriginal Social, Cultural and Historical Contexts' in Helen Milroy, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2014) 3, 12.

until the publication of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), some 80 years after the first sanctioned child removals began:

> The trauma generated by these policies was experienced by thousands of children over a 62-year period up until 1972. However, the source of this trauma was not acknowledged until the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) drew attention to policies and practices of forcible removal in 1991. The Royal Commission reported: '*The horror of a regime that took young Aboriginal children, sought to cut them off suddenly from all contact with their families and communities, instil in them a repugnance of all things Aboriginal, and prepare them harshly for a life as the lowest level of worker in a prejudiced white community*'... Following removal, children were placed in non-Aboriginal institutions and foster and adoptive families and many were assigned new names and birth dates to prevent their families from locating them. The children were told either that their families had rejected them or that they were dead.[51]

1.68 The effects of the Stolen Generations have been lasting and intergenerational. As Professors Robert Parker and Helen Milroy note in relation to health and wellbeing outcomes:

> The WAACHS [Western Australian Aboriginal Child Health Survey] reports on the psychological wellbeing of members of the Stolen Generations and their families. The survey noted that members of the Stolen Generations were more likely to live in households where there were problems related to alcohol abuse and gambling. They were less likely to have a trusting relationship and were more likely to have been arrested for offences. Members of the Stolen Generations were more likely to have had contact with mental health services. The survey commented that children of members of the Stolen Generations had much higher rates of emotional/behavioural difficulties and high rates of harmful substance use.[52]

1.69 Intergenerational trauma related to Stolen Generations processes can sometimes manifest indirectly:

> Indigenous children may... experience a range of distressing life events including illness and accidents, hospitalisation or death of close family members, exposure to violence, family disintegration (with kin networks fragmented due to forced removals, relationship breakdown and possibly incarceration) and financial stress … [I]t can be difficult to distinguish between direct and indirect trauma for Aboriginal and Torres Strait Islander communities, where there is an ongoing reality for many of 'dislocation, dispossession, deprivation and discrimination'. These sources of trauma are historical and multigenerational, but are also relevant to the current sociological climate within Australia.[53]

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51 Lorraine Peeters, Shaan Hamann and Kerrie Kelly, 'The Marumali Program: Healing for Stolen Generations' in Helen Milroy, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2014) 493–4.

52 Robert Parker and Helen Milroy, 'Aboriginal and Torres Strait Islander Mental Health: An Overview' in Helen Milroy, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2014) 25, 30.

53 Annette Jackson et al, 'Taking Time : A Literature Review—Background for a Trauma-Informed Framework for Supporting People with Intellectual Disability' (NSW Department of Family and Community Services, 2015) 62–3.

1.70 The *Bringing Them Home* Report recommended that 'services to redress these effects had to be designed, provided and controlled by Aboriginal people themselves', and highlighted that 'only Indigenous people themselves are able to comprehend the full extent of the effects of the removal policies'.[54]

Trauma-Informed Care and Practice

1.71 Trauma-Informed Care and Practice (TICP) is 'an approach whereby all aspects of services are organised around the recognition and acknowledgement of trauma and its prevalence, alongside awareness and sensitivity to its dynamics'.[55] Approaches incorporating TICP have been described by the MHCC as

> a strengths-based framework that is responsive to the impact of trauma, emphasising physical, psychological, and emotional safety for both service providers and survivors, and creates opportunities for survivors to rebuild a sense of control and empowerment. It is grounded in and directed by a thorough understanding of the... effects of trauma and interpersonal violence and the prevalence of these experiences in persons who receive mental health services.[56]

1.72 MHCC further noted that:

> Key principles of trauma-informed care include safety, trustworthiness, choice, collaboration and empowerment. A TICP framework recognises the impact of power differentials in service settings, maximises self-determination, supports autonomy and empowers individuals to learn about the nature of their injuries and to take responsibility in their own recovery...TICP is informed by an understanding of the particular vulnerabilities and 'triggers' that survivors of complex trauma experience, with services delivering better outcomes, minimising re-victimisation and ensuring that self and community wellness and connectedness can be promoted. TICP... acknowledges and clearly articulates that no one understands the challenges of the recovery journey from trauma better than the person living it. This requires that practitioners are attuned to a person's experience and to the dynamics of trauma and acknowledge, respect and validate that experience.[57]

Family violence

1.73 For the purposes of defining family violence within this Report, the ALRC adopts the definition of family violence used in the 2001 report, *Violence within Indigenous Communities*:

> 'Family violence' was broadly defined to encapsulate not only the extended nature of Indigenous families, but also the context of a range of violence forms, occurring frequently between kinspeople in Indigenous communities. The notion of 'family violence' may be summarised as follows:
>
> - family violence may involve all types of relatives. The victim and the perpetrator often have a kinship relation

54 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 277.

55 Mental Health Coordinating Council, *Trauma-Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia* (2013) 9.

56 Ibid.

57 Ibid.

- the perpetrator of violence may be an individual or a group
- the victim of violence may also be an individual or a group
- the term 'family' means 'extended family' which also covers a kinship network of discrete, intermarried, descent groups
- the 'community' may be remote, rural or urban based; its residents may live in one location or be more dispersed, but nevertheless interact behave as a social network
- the acts of violence may constitute physical, psychological, emotional, social, economic and/or sexual abuse
- some of the acts of violence are ongoing over a long period of time, one of the most prevalent examples being spousal (or domestic) violence[58]

58 Paul Memmott et al, *Violence in Indigenous Communities: Full Report* (Attorney General's Department (Cth), 2001) 1.

2. Context

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Summary

2.1 In 1991, the Royal Commission into Aboriginal Deaths in Custody found that the fundamental causes for over-representation of Aboriginal people in custody were not located *within* the criminal justice system. Such a claim has been echoed many times since. This chapter places the disproportionate incarceration rates of Aboriginal and Torres Strait Islander peoples today in social and historical context. It briefly traces the history of Aboriginal and Torres Strait Islander peoples' contact with the criminal justice system.

2.2 The chapter then goes on to develop a contemporary picture of the impact of the social determinants of incarceration on Aboriginal and Torres Strait Islander peoples, including in the domains of education and employment, health and disability, housing and homelessness, and child protection and youth justice. It also highlights some of the many inquiries, initiatives and recommendations that have sought to address the disadvantage experienced by Aboriginal and Torres Strait Islander peoples.

History of contact with the criminal justice system

2.3 Understanding the history of incarceration of Aboriginal and Torres Strait Islander people, as well as the relationship of incarceration with other governmental modes of regulation, enables an appreciation of the complexity of addressing the over-representation of Aboriginal and Torres Strait Islander peoples in the contemporary criminal justice system. Professor Russell Hogg has argued that to make sense of the high levels of Aboriginal incarceration, 'it is necessary to connect it to other forms of regulation of the Aboriginal population'. However, as Hogg has further noted, this 'cannot be approached as a linear succession or smooth progression from one mode of regulation to another'.[1]

Early years of British settlement

2.4 The Colony of New South Wales was said to be established, in legal terms, by settlement or occupancy, rather than by cession or conquest. The significance of this for the application of law to both Aboriginal and non-Indigenous people in the new colony was explained by Deane and Gaudron JJ in *Mabo v Queensland [No 2]* (*Mabo [No 2]*), the landmark decision recognising the survival of native title rights and interests in Australia:

> once the establishment of the Colony was complete on 7 February 1788, the English common law, adapted to meet the circumstances of the new Colony, automatically applied throughout the whole of the Colony as the domestic law except to the extent (if at all) that the act of State establishing the Colony overrode it. Thereafter, within the Colony, both the Crown and its subjects, old and new, were bound by that common law.[2]

2.5 Thus, Aboriginal people, with their own systems of law, were immediately and unilaterally held to be subject to a foreign system of law, including the criminal law.[3]

2.6 Deane and Gaudron JJ went on to set out the practical reality of settlement for Aboriginal people:

> The first days of the Colony were peaceful in so far as the Aboriginal inhabitants were concerned. They gave up, without dispute, the lands initially occupied by, and in connexion with, the penal camp.
>
> As time passed, the connection between different tribes or groups and particular areas of land began to emerge. The Europeans took possession of more and more of the lands in the areas nearest to Sydney Cove. Inevitably, the Aborigines resented being

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1 Russell Hogg, 'Penality and Modes of Regulating Indigenous Peoples in Australia' (2001) 3(3) *Punishment and Society* 355, 357.

2 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 80.

3 In 1986, the ALRC completed an Inquiry into Aboriginal Customary law, and concluded that Aboriginal customary law should be recognised, and that any recognition should occur against the background and within the framework of the general law. It considered that the particular form of recognition of customary law might vary with context and with the issue being addressed. In relation to criminal law, the ALRC concluded the general law should in appropriate cases take into account or allow for the customary laws and traditions of local Aboriginal groups, without being displaced by them: Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [401]. See also NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

> dispossessed. Increasingly there was violence as they sought to retain, or continue to use, their traditional lands.[4]

2.7 The expansion of settlement brought with it continued dispossession of Aboriginal peoples.[5] Resistance by Aboriginal people was often met with violence. Though they were notionally British subjects, violence against Aboriginal people was not often punished, both because of attitudes toward Aboriginal people, and the fact that settlement often proceeded ahead of colonial authority.[6]

2.8 While the general body of British law was considered to apply in the new colony, the application of criminal laws to Aboriginal people was less clear, especially where offences were committed by one Aboriginal person against another Aboriginal person.[7] Hogg has suggested that the primary concern of colonial authority was less on 'the space of contact' between settler and Aboriginal people than violence *inter se*.[8]

2.9 In the early years of British settlement, Aboriginal people were not frequently subject to imprisonment. Professor Mark Finnane has observed that this can be explained by the fact that, while Aboriginal people were being dispossessed of their land,

> prisons were originally of limited importance in that process. Imprisonment, after all, is a legalised detention for the trial or punishment of offenders. It operated within the common law assumptions of a jurisdiction over subjects sharing a common heritage. The ambiguous legal position of Aborigines, and the state of guerilla warfare on the frontiers, meant that the prisons of the settled parts of Australia were largely filled by the new settlers, not by those who were being colonised.[9]

2.10 However, rates of imprisonment of Aboriginal people in the early years of settlement varied across the country, largely corresponding to the spread of European occupation:

> The greatest concentrations of Aboriginal prisoners at the end of the nineteenth century were not in those regions of most complete colonisation in south-eastern Australia but in the remoter areas of north Australia. … In south-eastern Australia, dispossession was relatively rapid and completed, for the most part, by the middle of the nineteenth century. The structure of criminal justice institutions was still being formed. Where Aboriginal occupation was not being reduced by disease and starvation, it was eradicated by violence. The occupation of northern Australia took place in a different political climate. Centralised police forces, a magistracy governed from the capital cities of the colonies. Supreme Courts which expected some observation of legal standards, urban political classes which were occasionally sensitive to the abuses of colonisation—all these forces encouraged a greater attention

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4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 104.

5 The history of the Torres Strait is addressed in more detail below.

6 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [23]; Hogg, above n 1, 358.

7 It took until 1836 for it to be settled by the Full Court of the Supreme Court of New South Wales that it had jurisdiction to try one Aboriginal person for the murder of another: *R v Murrell* (1836) 1 Legge 72

8 Hogg, above n 1, 359.

9 Mark Finnane, *Colonisation and Incarceration: The Criminal Justice System and Aboriginal Australians* (The Trevor Reese Memorial Lecture, Sir Robert Menzies Centre for Australian Studies Institute of Commonwealth Studies, University of London, 1997) 4.

> to the formalities of justice—and to the uses of the prison, rather than the summary justice of the rifle. In this context, it is not surprising to see prison play a role in the management of Aboriginal resistance in the late nineteenth century which was unknown in New South Wales a half century or more before.[10]

2.11 Imprisonment of Aboriginal people was particularly a feature of the early development of Western Australia (WA), and included the establishment, in 1840, of a prison specifically for Aboriginal people on Rottnest Island.[11] Imprisonment of Aboriginal people in WA was intensified by a 1902 amendment to the Criminal Code that provided that

> summary jurisdiction could be exercised in the case of any 'aboriginal native' who pleaded guilty to a charge for a non-capital offence. The magistrates could award a sentence of up to three years imprisonment, in contrast to their usual limit of two years.[12]

2.12 The use of this provision had the result that, '[i]n 1905, Aborigines comprised 32% of the Western Australian prison population, in 1909 more than 42%'.[13]

Protection and assimilation

2.13 Beginning in the late 1800s and early 1900s, a policy of 'protection' was adopted toward Aboriginal and Torres Strait Islander peoples, which involved their removal onto missions and reserves, and extensive government control over all aspects of life. The ALRC summed up these policies in its 1986 Report, *Recognition of Aboriginal Customary Laws*:

> formal and extensive policies of 'protection' were aimed at isolating and segregating 'full-blood' Aborigines on reserves and at restricting contact (and interbreeding) between them and outsiders, while attempting to assimilate 'half-castes', and especially their children. The right to marry was limited, as were other civil rights. …
>
> Church missions and Government settlements were set up and Aborigines were moved onto them. Special laws prohibited the consumption of alcohol, restricted the movement of Aborigines and regulated their employment. There were systematic efforts through the establishment of 'boarding houses' to take 'part-Aboriginal' children away from their parents and to educate them in European ways.[14]

2.14 Protection legislation created an alternative regulatory regime for Aboriginal people that meant their contact with the mainstream criminal justice system was limited during this era, with Finnane suggesting that Aboriginal and Torres Strait

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10 Ibid.

11 Ibid 5. Palm Island also operated as a penal settlement for Aboriginal people in Queensland, as well as a reserve to which many Aboriginal, and some Torres Strait Islander people were removed under protection legislation: Queensland Government, *Palm Island: Community History* <www.qld.gov.au/atsi/>; Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 13–14.

12 Finnane, above n 9, 6.

13 Ibid.

14 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) ch 3 [25].

Islander peoples were shifted 'out of the domain of citizenship and criminal justice into a welfare enclave'.[15]

2.15 Police played a key role in administering protection legislation. For example, under the *Aborigines Protection Act 1909* (NSW) police functions included:

- issuing rations;
- patrolling and maintaining order on unsupervised Aboriginal reserves;
- recommending on the disposal of reserve land;
- expelling 'trouble makers' from Aboriginal reserves;
- removing children from their parents and sending them to the Aboriginal Protection Boards' training homes;
- expelling light-coloured people from Aboriginal reserves; and
- instituting proceedings to remove whole Aboriginal communities from certain localities.[16]

2.16 Finnane has noted the rapid reduction in incarceration rates of Aboriginal people in WA following the enactment of a protection regime. From 42% of prisoners in 1909, in 1915, Aboriginal people comprised 13% of the prison population. Dr Don Weatherburn has also suggested that the growth of employment of Aboriginal people in rural economies may have played a role in reducing the imprisonment rate in this period.[17]

2.17 Equally, the dismantling of the protection era appears to have had an effect on the incarceration rate of Aboriginal people, with some leading academics arguing that the

> growing appearance of Indigenous people in the mainstream prison system needs to be read against the demise of an alternative system of penality that had been reproduced in protection legislation. The racially defined carceral regime of missions and reserves was increasingly replaced by the mainstream mechanisms of the criminal justice system.[18]

2.18 Weatherburn has suggested that perverse consequences from some aspects of formal equality extended to Aboriginal people under later policies of 'assimilation' may help explain the increased contact of Aboriginal people with the criminal justice system. For example, in the 1960s, Aboriginal employment in rural areas began to decline, the result of a number of factors, including the decision that Aboriginal station

15 Finnane, above n 9, 6.
16 Christine Jennett, 'Police and Indigenous Peoples in Australia' in Mike Enders and Benoit Dupont (eds), *Policing the Lucky Country* (Hawkins Press, 2001) 50, 52.
17 Weatherburn, above n 11, 14.
18 Chris Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Routledge, 2016) 32.

workers were entitled to be paid award wages.[19] This loss of employment on cattle stations also involved, for many Aboriginal people, a loss of contact with traditional land.[20] Laws restricting sale or consumption of alcohol to or by Aboriginal people were also removed, which may have led to an increase in alcohol-related harms, including offending.[21] As Hogg has explained, when protection measures were removed:

> Aboriginal communities were suddenly subject to the full and immediate brunt of market and legal institutions and pressures in environments that nonetheless remained deeply hostile to Aboriginality. The stable social fabric, including traditions of property ownership, education, stable employment and so on, which might have allowed Aboriginal people to assume a place in that society was almost totally lacking, because it had been the purpose of segregationist policies to destroy it … When the dense social and governmental fabric that underpins and enmeshes the 'law-abiding' citizen is considered, there can be little surprise that for Aboriginal communities administrative segregation in its various forms gave way to penal incarceration for so many of their members.[22]

Increasing concern over incarceration rates: the Royal Commission

2.19 The changing rates of incarceration of Aboriginal and Torres Strait Islander peoples could not be systematically tracked until the advent of a national prison census in 1982. As Weatherburn has summarised:

> These data revealed, for the first time, the enormous over-representation of Indigenous Australians in prison. The ratio of Indigenous to non-Indigenous imprisonment rates per head ranged from 3.3 in Tasmania to 29.0 in Victoria. As the 1980s progressed, the number of Indigenous prisoners increased.[23]

2.20 Growing attention was also drawn to the high number of Aboriginal deaths in custody. Concern over this issue prompted the establishment, in 1987, of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The RCIADIC examined both individual deaths of Aboriginal and Torres Strait Islander people in custody occurring between 1 January 1980 and 31 May 1989, as well as underlying social, cultural and legal issues associated with the deaths.[24]

2.21 The RCIADIC found that Aboriginal people were not more likely than non-Indigenous people to die in custody. Instead, the high number of deaths in custody was the result of gross over-representation in custody: 'too many Aboriginal people are in custody too often'.[25]

2.22 The RCIADIC made 339 recommendations for change. These comprised, broadly:

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19 See further Thalia Anthony, 'Reconciliation and Conciliation: The Irreconcilable Dilemma of the 1965 "Equal" Wage Case for Aboriginal Station Workers' [2007] *Labour History* 15.
20 Ibid 30.
21 Weatherburn, above n 11, 15–17.
22 Hogg, above n 1, 366.
23 Weatherburn, above n 11, 19.
24 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Letters Patent.
25 Ibid vol 1, [1.3.3].

- 126 recommendations related to underlying issues;
- 106 recommendations relating to over-representation in the criminal justice system;
- 107 recommendations relating to deaths in custody.[26]

2.23 The RCIADIC found that 'a multitude of factors, both historical and contemporary, interact to cause Aboriginal people to be seriously over-represented in custody'. It insisted on the relevance of history 'because so much of the Aboriginal people's current circumstances, and the patterns of interactions between Aboriginal and non-Aboriginal society, are a direct consequence of their experience of colonialism and, indeed, of the recent past'.[27]

2.24 Significantly, the RCIADIC asserted that the fundamental causes for over-representation of Aboriginal people in custody were not located *within* the criminal justice system. Instead, 'the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society—socially, economically and culturally'.[28] As a result, the Report was 'largely concerned with demonstrating the existence of that inequality and disadvantage in many aspects of social life and social situation'. It showed 'how this disadvantage and inequality is closely linked to the disproportionate numbers of Aboriginal people in custody, directly and indirectly', and 'made recommendations about reducing and eliminating disadvantage'.[29]

Social determinants of incarceration

2.25 The Royal Commission's finding that reforms to the criminal justice system alone are not sufficient to address the over-representation of Aboriginal and Torres Strait Islander people in prisons has been echoed many times since.[30] Reflecting on the 25 years since the RCIADIC, in 2016, Aboriginal and Torres Strait Islander peak organisations issued the *Redfern Statement*, calling for action to address Aboriginal and Torres Strait Islander disadvantage. The *Redfern Statement* emphasised that addressing disadvantage required meaningful engagement with Aboriginal and Torres Strait Islander peoples: '[t]his, known as self-determination, is the key to closing the gap in outcomes for the First Peoples of these lands and waters'. The *Redfern Statement* also

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26 Chris Cunneen, 'Racism, Discrimination and the over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal Justice* 329, 335.

27 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2 pt C.

28 Ibid vol 1, [1.7.1].

29 Ibid vol 1, [1.7.2]–[1.7.4]. The Australian Government accepted all but one of the recommendations, and committed $400 million to do so. State and territory governments agreed to report annually on the progress of implementation: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody 1989 to 1996* (Report prepared for Aboriginal and Torres Strait Islander Commission, 1996) ch 11. Mixed views have been expressed as to the extent of implementation of the Royal Commission's recommendations: see further Weatherburn, above n 11, 26–9.

30 See, eg, Chris Cunneen, above n 26; Weatherburn, above n 11, ch 8; Change the Record Coalition, *Blueprint for Change* (Change the Record Coalition Steering Committee, 2015).

made a number of specific recommendations to address disadvantage across the domains of health, disability, violence prevention, employment, housing, early childhood, and justice, all of which foregrounded the need for Aboriginal and Torres Strait Islander peoples to have leadership in developing and delivering any initiatives.[31]

2.26 The significance of drivers of incarceration external to the criminal justice system was repeated by many submissions to this Inquiry. For example, Aboriginal Peak Organisations Northern Territory submitted that

> [c]olonisation, dispossession and displacement from traditional lands, weakening of culture, the separation of families through past government policies, high levels of incarceration, and ongoing discrimination and racism, have all contributed to continuing disadvantage, poor health and poor social outcomes for many Aboriginal people.[32]

2.27 As Hogg and Quilter pointed out, 'the role of the criminal justice system cannot be disentangled from the complex dynamics that sustain and compound high levels of disadvantage and in turn contribute directly to high levels of victimisation in many ATSI communities'.[33]

2.28 The importance of addressing the drivers of incarceration external to the criminal justice system has been recognised in other jurisdictions. In the United States, the National Research Council of the National Academies has noted that criminal justice reforms will not alone

> relieve the underlying problems of economic insecurity, low education, and poor health that are associated with incarceration in the nation's poorest communities. Solutions to these problems are outside the criminal justice system, and they will include policies that address school dropout, drug addiction, mental illness, and neighborhood poverty—all of which are intimately connected to incarceration. If large numbers of intensely disadvantaged prime-age men and women remain in, or return to, poor communities without supports, the effects could be broadly harmful. Sustainably reducing incarceration may depend, in part, on whether services and programs are sufficient to meet the needs of those who would otherwise be locked up. Thus, policy makers and communities will need to assess and address the availability, accessibility, and quality of social services, including drug treatment, health care, employment, and housing for those who otherwise would be imprisoned.[34]

2.29 This Inquiry has principally focused its recommendations on reforms to criminal laws and legal frameworks to address the disproportionate rates of Aboriginal and Torres Strait Islander incarceration. However, the ALRC recognises the significance of drivers of incarceration external to the criminal justice system. Justice reinvestment is

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31 Aboriginal and Torres Strait Islander Peak Organisations, *The Redfern Statement* (2016).

32 Aboriginal Peak Organisations Northern Territory, *Submission 117*.

33 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*. See also, eg, Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Children's Court of New South Wales, *Submission 69*; Institute of Public Affairs, *Submission 58*; Indigenous Allied Health Australia, *Submission 57*; Northern Territory Legal Aid Commission, *Submission 46*; Australian Human Rights Commission, *Submission 43*.

34 National Research Council of the National Academies, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014) 10–11.

an approach to reducing incarceration that involves redirection of money from corrections to local initiatives that strengthen communities with high levels of incarceration. Chapter 4 considers the promise of justice reinvestment for addressing the social determinants of incarceration in Aboriginal and Torres Strait Islander communities and recommends that a national body with expertise in justice reinvestment methodology be established, to assist in providing technical assistance to local sites wishing to implement justice reinvestment.[35]

2.30 The following section considers aspects of Aboriginal and Torres Strait Islander disadvantage that contribute to over-representation in prisons in more detail. Australian governments have committed to addressing the interrelated aspects of Aboriginal and Torres Strait Islander disadvantage through the Closing the Gap process, which focuses on achieving key targets for health, education and employment outcomes.[36] Many other Inquiries and reports, including those identified in the Terms of Reference for this Inquiry, have made recommendations to address these issues.[37]

Education and employment

2.31 The links between lack of employment opportunity, lack of educational attainment, and subsequent entry into the criminal justice system are well established.[38] In recognition of this relationship, the RCIADIC made a number of recommendations in relation to education and increasing employment and economic opportunities for Aboriginal people.[39]

2.32 Aboriginal and Torres Strait Islander people have lower educational attainment than non-Indigenous people. For example, in 2015**,** only 49% of Year 3 Aboriginal and Torres Strait Islander students living in a remote area reached minimum national standards of literacy, reading and numeracy.[40] In 2014, 86.4% of non-Indigenous students nationally completed Year 12 or equivalent, compared with 61.5% of Aboriginal and Torres Strait Islander students. This fell to 41.7% for Aboriginal and Torres Strait Islander students living in remote areas.[41] Nationally in 2015, of the potential Year 12 population, 43.8% of non-Indigenous young people achieved an ATAR[42] of 50.00 or above, compared with 8.5% of Aboriginal and Torres Strait Islander young people.[43]

35 Rec 4–1.
36 See further Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017).
37 These are too numerous to be covered comprehensively in this chapter, however the ALRC outlines some major recommendations from the reports listed in the Terms of Reference in the below sections.
38 Weatherburn, above n 11, 78–9; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 141.
39 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recs 289–319.
40 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) box 4.4.1.
41 Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017) 43–4.
42 Australian Tertiary Admission Rank.
43 Productivity Commission, above n 40, 4.47.

2.33 Aboriginal and Torres Strait Islander people also face employment disadvantage. In 2014–15 the unemployment rate for Aboriginal and Torres Strait Islander people aged 15–64 was about three times the rate of the non-Indigenous population.[44] Just under half (48.4%) of Aboriginal and Torres Strait Islander people aged 15–64 were employed, compared with 74.8% of non-Indigenous people.[45]

2.34 There is also a lack of real employment opportunity for Aboriginal and Torres Strait Islander people living in remote areas such as central Australia.[46] As was noted in the 2017 *Closing the Gap—Prime Minister's Report*:

> Indigenous employment rates vary sharply by geography. In 2014–15, only 35.1 per cent of all Indigenous people of workforce age (15–64 years) in very remote areas were employed compared with 57.5 per cent of those living in the major cities.[47]

2.35 Ex-prisoners also face a number of barriers to employment, with inability to find work contributing to the likelihood of reoffending and reconviction. Research has suggested that unemployment is higher among Aboriginal and Torres Strait Islander people who have been arrested in the past five years than among those who had not, and that unemployment is related to reoffending and reconviction.[48]

Health and disability

2.36 In 2015, the Australian Medical Association (AMA) noted the connection between health issues experienced by Aboriginal and Torres Strait Islander peoples—including poor mental health, physical disability, cognitive disability and substance abuse—and high incarceration rates. The AMA stressed the need for a diversionary approach that focused on the underlying, undiagnosed and unaddressed health needs of Aboriginal and Torres Strait Islander people who are at high risk of entering the criminal justice system.[49] The RCIADIC also directed a number of recommendations toward improving health services, programs, and training of health professionals working with Aboriginal people.[50] It noted that the

> link between the health of Aboriginal people in the community and these deaths in custody should be obvious: Aboriginal people in general have a very poor level of health. Their quality of life is substantially reduced by illnesses that only uncommonly affect the general Australian public. Since so many Aboriginal people experience

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44 Ibid box 4.7.1.

45 Ibid.

46 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 8.

47 Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017) 54.

48 Joseph Graffam and Alison Shinkfield, 'Strategies to Enhance Employment of Indigenous Ex-Offenders after Release from Correctional Institutions' (Resource Sheet No 11, Closing the Gap Clearinghouse, March 2012) 4. See also Legal Aid WA, *Submission 33*.

49 Australian Medical Association, *2015 Indigenous Health Report Card—Treating the High Rates of Imprisonment of Aboriginal and Torres Strait Islander Peoples as Symptom of the Health Gap: An Integrated Approach to Both* (2015) 7.

50 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recs 246–271.

> serious sickness and injury as part of their everyday lives, it should be no surprise to find that they bring this impaired health status with them into the custodial situation.[51]

2.37 Aboriginal and Torres Strait Islander peoples experience health-related risk factors such as substance abuse and cognitive disability at higher rates than the general population, yet have significantly lower access to appropriate health and support services when these additional health service needs are taken into account.[52]

2.38 The 2015 report of the Aboriginal and Torres Strait Islander Social Justice Commissioner noted the challenges faced by Aboriginal and Torres Strait Islander people with disability, including underutilisation of disability services, due to factors including a lack of trust in service providers, a lack of cultural competence in service delivery, as well as difficulties in access to disability services for those living in regional and remote areas.[53] The Report made a number of recommendations related to disability, including improved data collection, evaluation of programs and policies in addressing the needs of Aboriginal and Torres Strait Islander people with disability, and the need to include a Closing the Gap target for Aboriginal and Torres Strait Islander people with disability as an area for future action.[54]

Physical disability

2.39 According to the Close the Gap *Progress and Priority Report 2016*, Aboriginal and Torres Strait Islander people experience severe or profound physical disability at about twice the rate of non-Indigenous people,[55] with about half of those experiencing severe or profound disability in sight, hearing and speech-related areas.[56]

2.40 Hearing loss is particularly prevalent among Aboriginal and Torres Strait Islander peoples. In 2014–15, 8.4% of Aboriginal and Torres Strait Islander children aged 0–14 years had a hearing condition (2.9 times the rate for non-Indigenous children.[57] In 2012–13, around one in eight (12%) Aboriginal and Torres Strait Islander people reported having diseases of the ear and mastoid and/or hearing problems, and were 1.3 times more likely than non-Indigenous people to have these conditions.[58]

2.41 Hearing impairment among adult Aboriginal and Torres Strait Islander prisoners is estimated to be extremely high—affecting between 80–95% of Aboriginal and Torres Strait Islander prisoners.[59] This can result in communication difficulties when engaged with the criminal justice system, particularly where English is a second or

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51 Ibid vol 4, [31.1.2].
52 Australian Medical Association, above n 49, 7.
53 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (Australian Human Rights Commission, 2015) 109–110.
54 Ibid recs 11–13.
55 Close the Gap Campaign Steering Committee, *Progress And Priorities Report 2016* (2016) 31.
56 Ibid.
57 Productivity Commission, above n 40, 6.44.
58 Australian Bureau of Statistics, *Australian Aboriginal and Torres Strait Islander Health Survey: First Results, Australia, 2012–13, Cat No 4727.0.55.001* (2013).
59 Law Council of Australia, *Addressing Indigenous Imprisonment: National Symposium—Discussion Paper* (2015) 13.

third language.[60] Hearing loss can also compound other forms of disadvantage regularly experienced by Aboriginal and Torres Strait Islander people, including unemployment and poor school performance, thus making entry into the criminal justice system more likely.[61]

Cognitive impairment and Fetal Alcohol Spectrum Disorder

2.42 Cognitive impairment, particularly that experienced as a result of Fetal Alcohol Spectrum Disorder (FASD)—caused by exposure to alcohol while in utero—is another risk factor for incarceration that disproportionately affects Aboriginal and Torres Strait Islander peoples. People with cognitive impairment have an increased likelihood of contact with the criminal justice system for reasons including

> difficulties regulating behaviour, impaired decision making, problems communicating, a poor understanding of criminal justice procedures, poor memory and attentiveness and social immaturity. Having a disability and underprivileged living circumstances enhances susceptibility to homelessness, substance misuse, poor general health, low levels of community support, visibility to police and ultimately criminal engagement. People with cognitive impairment are additionally vulnerable to physical and sexual trauma, coercion, peer pressure and victimisation.[62]

2.43 Available evidence suggests that there are higher levels of cognitive impairment among Aboriginal and Torres Strait Islander offenders than non-Indigenous offenders.[63] The Law Council of Australia has pointed to WA and the Northern Territory (NT) as two jurisdictions where the prevalence of cognitive impairment in Aboriginal and Torres Strait Islander communities is particularly high, including high rates of FASD and severe communication barriers.[64] The NT Office of the Public Guardian also drew attention to the high incidence of cognitive impairment and mental illness among Aboriginal and Torres Strait Islander people in the criminal justice system.[65]

2.44 FASD has been linked to extremely high levels of criminal justice contact for juveniles, with FASD-affected youth 19 times more likely to be incarcerated, as well as

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60 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 25.

61 Ibid 177–8.

62 Stephane M Shepherd, 'Aboriginal Prisoners with Cognitive Impairment: Is This the Highest Risk Group?' [2017] (536) *Trends and Issues in Crime and Criminal Justice* 1, 2. People with cognitive impairment may have an acquired brain injury (ABI). Research suggests people with an ABI are substantially overrepresented in prisons: RMIT and Jesuit Social Services, *Recognition Respect and Support: Enabling Justice for People with an Acquired Brain Injury* (2016) 11. Establishing prevalence of FASD has been described as challenging, because, among other reasons, there is no national data collection on FASD. However, available estimates suggest that rates in Aboriginal and Torres Strait Islander communities are markedly higher than for non-Indigenous people: D Gray et al, 'Review of the Harmful Use of Alcohol among Aboriginal and Torres Strait Islander People' (Australian Indigenous Health Reviews No 19, Australian Indigenous Health Infonet, 2017) 15–16.

63 Shepherd, above n 62, 2.

64 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 22. See also Gray et al, above n 62, 16.

65 Northern Territory Office of the Public Guardian, *Submission 72*.

high levels of recidivism for adults and difficulty in understanding and complying with court orders and bail conditions.[66]

2.45 In many cases FASD is undiagnosed.[67] To address this, a Guide to the Diagnosis of FASD, containing a diagnostic instrument for FASD, was released in 2016.[68] A 2016 Senate Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services (Law Enforcement and Justice Services Inquiry) recommended that the Department of Health prepare a communication plan for those working in areas such as the criminal justice field, to accompany the release of this Diagnostic Tool.[69] A National FASD Strategy 2018–2028 is under development.[70]

2.46 Prevention of FASD is also an important longer-term goal. The Law Enforcement and Justice Services Inquiry recommended that general prevention initiatives be continued, promoting knowledge about the risks of drinking alcohol during pregnancy, when planning a pregnancy or when breastfeeding.[71] A Fetal Alcohol Spectrum Disorder Prevention and Health Promotion Resources Package has been developed for use in Aboriginal and Torres Strait Islander child and maternal health care services.[72]

2.47 Ensuring access to justice and culturally appropriate support for Aboriginal and Torres Strait Islander people with cognitive impairment who are in contact with the criminal justice system is a particular challenge, and the subject of a number of recommendations in the 2016 Senate Community Affairs Reference Committee Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia.[73] These recommendations are considered further in Chapter 10, addressing access to justice issues for Aboriginal and Torres Strait Islander peoples.

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66 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 23.

67 Ibid.

68 C Bower and EJ Elliot, 'Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD): Report to the Australian Government Department of Health' (Telethon Kids Institute and University of Sydney, 2016).

69 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) rec 4. See also J Cashman, *Submission 105*.

70 Australian Indigenous Aboriginal and Torres Strait Islander Alcohol and Other Drugs Knowledge Centre, *News: Consultation for the Development of the National FASD Strategy 2018–2028* <www.aodknowledgecentre.net.au>.

71 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) rec 6.

72 The Package was developed by the Menzies School of Health Research partnership with the National Aboriginal Community Controlled Health Organisation and the Telethon Kids Institute: Department of Health (Cth), Menzies School of Health Research and National Aboriginal Community Controlled Health Organisation, *Fetal Alcohol Spectrum Disorder Prevention and Health Promotion Resources Package* (2015).

73 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016). See also First Peoples Disability Justice Consortium, *Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment* (First Peoples Disability Network, 2016).

Mental health

2.48 In 2014–15, almost one third (32.8%) of Aboriginal and Torres Strait Islander people aged 18 years and over reported experiencing high to very high levels of psychological distress, 2.6 times the non-Indigenous rate.[74] Aboriginal and Torres Strait Islander women have particularly troubling rates of poor mental health, with almost two in five (38.4%) suffering high to very high levels of psychological distress.[75] The proportion of Aboriginal and Torres Strait Islander people experiencing high to very high levels of psychological distress increased by approximately six percentage points between 2004–2005 and 2014–2015.[76]

2.49 Mental health disorders have been established as another factor that is likely to increase the risk of Aboriginal and Torres Strait Islander people entering incarceration. In 2010, the proportion of prison entrants with a history of mental health disorder was about 2.5 times higher than the general population.[77] The Mental Health Commission of NSW submitted that 'at least half of all adult inmates in NSW have been diagnosed or treated for a mental health problem and 87% of young people in custody in NSW have a past or present psychological disorder. Rates are higher for Aboriginal people in custody'. It stressed that this was the result of 'a failure to provide appropriate services and supports to people with mental illness in our community'.[78]

2.50 A 2008 Queensland study of Aboriginal and Torres Strait Islander prisoners revealed mental health disorder rates as high as 86% for female Aboriginal and Torres Strait Islander prisoners, and 73% for male Aboriginal and Torres Strait Islander prisoners. Substance abuse disorders were the most common (69% of Aboriginal and Torres Strait Islander females and 66% of Aboriginal and Torres Strait Islander males), but they were often comorbid with other conditions, including anxiety, depressive, and psychotic disorders.[79]

2.51 A 2015 study found that Aboriginal and Torres Strait Islander prisoners with diagnosed mental disorders, when compared with non-Indigenous prisoners who also had a diagnosed mental disorder, had approximately 29 additional police contacts.[80] Age when first taken into prison custody was about four years younger for Aboriginal and Torres Strait Islander prisoners with a recognised mental disorder than the equivalent non-Indigenous prison population.[81]

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74 Productivity Commission, above n 40, box 8.7.1.
75 Ibid 8.37.
76 Ibid box 8.7.1.
77 Australian Institute of Health and Welfare, *The Mental Health of Prison Entrants in Australia* (2012) 2.
78 Mental Health Commission of NSW, *Submission 20*.
79 Edward B Heffernan et al, 'Prevalence of Mental Illness among Aboriginal and Torres Strait Islander People in Queensland Prisons' (2012) 197(1) *The Medical Journal of Australia* 37.
80 Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 31.
81 Ibid 32.

Harmful use of alcohol

2.52 Most Aboriginal and Torres Strait Islander people either do not consume alcohol or do not consume it at a level that poses risks to their health over their lifetimes. However, Aboriginal and Torres Strait Islander people are also more likely than non-Indigenous Australians to consume alcohol at levels that pose risks to their health over their lifetimes and on single drinking occasions. Alcohol misuse contributes disproportionately to Aboriginal and Torres Strait Islander ill-health. It has been estimated that 8.3% of the total burden of disease is attributable to alcohol, a rate 3.1 times greater than for non-Indigenous Australians.[82]

2.53 The RCIADIC recognised the relevance of the harmful use of alcohol and other drugs for Aboriginal people in custody, and made a number of recommendations to address this.[83] The Report noted that:

> It is clear that alcohol and other drugs contribute to Aboriginal deaths in custody in two direct ways. First, alcohol and other drugs are involved in many of the offences committed by Aboriginal people that lead to their being placed in custody and to being held in protective custody owing to drunkenness. Secondly, alcohol (especially) is a major cause of chronic and acute illness among Aboriginal people, contributing to their high rates of death from injury and disease which, when combined with their high levels of over-representation in custody, lead to their high levels of death in custody. Furthermore, alcohol and other drug use contribute less directly to deaths in custody through their impact on family and community relationships, employment, housing, educational achievements, etc. These factors interact to produce the serious situation of Aboriginal people and alcohol observed today in many parts of Australia.[84]

2.54 A number of submissions to this Inquiry drew attention to the links between alcohol misuse and offending and incarceration.[85] The Northern territory Legal Aid Commission noted that '[i]n the NT generally there is a prevalent and socially accepted culture of excessive drinking, which is more likely to lead to alcohol-related harm and violence'.[86]

2.55 Overcrowding, educational disadvantage, and lack of employment opportunity have also been linked to the harmful use of alcohol in Aboriginal and Torres Strait Islander communities.[87] These interrelated factors increase the likelihood of contact with the criminal justice system.[88]

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82 Gray et al, above n 62, 2. See also Weatherburn, above n 16, 85

83 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recs 63–71.

84 Ibid vol 4, [32.1.2].

85 Aboriginal Legal Service NSW ACT Supplementary Submission, *Submission 112*; The Law Society of Western Australia, *Submission 111*; Northern Territory Legal Aid Commission, *Submission 46*; Central Australian Aboriginal Congress, *Submission 37*.

86 Northern Territory Legal Aid Commission, *Submission 46*.

87 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 8–9.

88 Weatherburn, above n 11, 86.

2.56 Alcohol-related violence is a serious issue affecting Aboriginal and Torres Strait Islander communities. A 2015 House of Representatives Committee Report about the harmful use of alcohol in Aboriginal and Torres Strait Islander communities (*House of Representatives Alcohol Report*) noted that, '[w]hile alcohol may not always be the direct cause of violent acts, alcohol misuse is implicated in the prevalence and severity of assaults and domestic violence'.[89] Alcohol use has been associated with the escalation of assaults into homicides, with 66.7% of Aboriginal and Torres Strait Islander homicides involving both the victim and offender having consumed alcohol at the time of the offence, compared to 16.3% of non-Indigenous homicides.[90] The NT Police Association have similarly reported that 67% of family violence incidents in the NT involve alcohol.[91] A 2017 review estimated that 45% of hospitalisations for family violence related assault in remote and very remote regions were attributable to alcohol.[92]

2.57 A number of ongoing governmental initiatives seek to address alcohol misuse and alcohol-related harm. The National Aboriginal Torres Strait Islander Peoples Drug Strategy 2014–2019 aims to improve the health and wellbeing of Aboriginal and Torres Strait Islander people by preventing and reducing the harmful effects of alcohol and other drugs on individuals, families and their communities.[93]

2.58 The 2013 report of the Aboriginal and Torres Strait Islander Social Justice Commissioner advocated that a human rights approach be taken to addressing alcohol misuse. This would require that 'communities are empowered to make decisions about the policies adopted to manage alcohol within their community … [and] that measures are reasonable, proportionate and necessary'.[94] The *House of Representatives Alcohol Report* made a number of recommendations to minimise alcohol misuse and alcohol-related harm, including that the harmful impacts of alcohol be put on the Coalition of Australian Governments (COAG) agenda for coordinated action. It recommended that such action should recognise the social and economic determinants of harmful uses of alcohol, and that the impact of alcohol on achieving each Closing the Gap target be considered.[95] The ALRC makes recommendations relating to laws regulating the availability of alcohol in Chapter 13.

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89 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 12.

90 Productivity Commission, above n 40, box 11.1.1.

91 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 14.

92 Gray et al, above n 62, 15.

93 Intergovernmental Committee on Drugs, *National Aboriginal and Torres Strait Islander Peoples' Drug Strategy 2014–2019* (2015).

94 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2013* (Australian Human Rights Commission, 2013).

95 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) rec 1.

Housing

2.59 The RCIADIC identified action on housing and infrastructure as important to addressing custodial rates for Aboriginal people, noting that 'the appalling conditions in which many Aboriginal people live have long been a concern to government',[96] and making a number of recommendations in relation to housing.[97]

2.60 The Productivity Commission has identified housing issues—particularly homelessness, inadequate housing, and overcrowding—as disproportionately affecting Aboriginal and Torres Strait Islander peoples.[98] Nationally, more than one in five (20.6%) Aboriginal and Torres Strait Islander people lived in overcrowded households in 2014–15, increasing to about one in two (49.4 %) for Aboriginal and Torres Strait Islander people living in very remote areas.[99]

2.61 Aboriginal and Torres Strait Islander peoples are also disproportionately represented in the homeless population: in 2011, approximately 1 in 20 Aboriginal and Torres Strait Islander people were considered homeless,[100] accounting for 28% of homeless people. Aboriginal and Torres Strait Islander people were 14 times as likely as non-Indigenous people to be homeless.[101]

2.62 Housing has been identified as one of the key determinants driving the poor health outcomes experienced by many Aboriginal and Torres Strait Islander people.[102] Overcrowding has been linked to negative impacts on childhood development, educational achievement, rates of endemic disease, and workforce participation levels.[103]

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96 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, [18.1.6].

97 Ibid vol 5, rec 73–6, 321–7.

98 Productivity Commission, above n 40, 10.1.

99 Ibid 10.4.

100 Homelessness is taken to include living in severely crowded dwellings, as well as, among others, living in supported accommodation for the homeless, and living in improvised dwellings, tents and sleeping out. Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians* (2014) 8.

101 Ibid 7.

102 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 8.

103 Ibid 8–9. Many submissions raised concerns about the impact of housing and homelessness on Aboriginal and Torres Strait Islander people's rate of imprisonment: see, eg, J Cashman, *Submission 105*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; National Congress of Australia's First Peoples, *Submission 73*; Institute of Public Affairs, *Submission 58*; Victorian Aboriginal Legal Service, *Submission 39*; Central Australian Aboriginal Congress, *Submission 37*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Kingsford Legal Centre, *Submission 19*; Change the Record Coalition, *Submission 84*.

2.63 Overcrowding, which again disproportionately affects Aboriginal and Torres Strait Islander people, has similarly been linked to harmful alcohol use[104] as well as higher rates of family violence.[105] Family violence in turn is recognised as a major risk factor for homelessness.[106]

2.64 In 2015, 27% of Aboriginal and Torres Strait Islander prison entrants reported being homeless in the four weeks prior to imprisonment.[107] Submissions to this Inquiry raised homelessness as a major driver of incarceration for Aboriginal and Torres Strait Islander peoples, with Legal Aid WA asserting that '[a]ddressing homelessness and unstable accommodation for Aboriginal people is a fundamental step in reducing disadvantage and Aboriginal imprisonment'.[108]

2.65 Homelessness and inadequate housing may also result in Aboriginal and Torres Strait Islander people being denied bail.[109] Socioeconomic factors that are taken into account in the decision of whether or not to grant bail include whether a person has stable housing arrangements, and lack of suitable housing may result in being denied bail.[110]

2.66 Those leaving prison often face homelessness, with the Australian Institute of Health and Welfare noting that 'homelessness is more common among those with a history of contact with the criminal justice system, it lasts for longer, and is more likely to re-occur than for other homeless people'.[111] In 2015, 31% of prison dischargees were expecting to be homeless.[112] A Legal Aid NSW study of women leaving Silverwater Prison in NSW over a 12-month period found that only 12% believed they had access to stable housing on release from prison.[113]

2.67 Homelessness following exit from prison increases the risk of returning to prison:

> lack of housing is also a substantial risk factor for reoffending and given the lack of emergency and transitional housing available to the Victorian community this situation will only worsen unless there is increased investment. A research study

104 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 9.

105 Closing the Gap Clearinghouse, 'Family Violence Prevention Programs in Indigenous Communities' (Resource Sheet No 37, 2016) 6.

106 Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians* (2014) 26.

107 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* (2015) 28.

108 Legal Aid WA, *Submission 33*. See also The Law Society of Western Australia, *Submission 111*; UNSW Law Society, *Submission 70*.

109 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 69.

110 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 16; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 77.

111 Australian Institute of Health and Welfare, above n 108, 28. See also Jesuit Social Services, *Submission 100*.

112 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* (2015) 29.

113 Legal Aid NSW, *Aboriginal Women Leaving Custody: Report into Barriers to Housing* (2015) 4.

> found that previous offenders were twice as likely to return to prison within nine months if they were homeless.[114]

Child protection and youth justice

2.68 Contact with the child protection system and the youth justice system are both risk factors for adult incarceration. Aboriginal and Torres Strait Islander peoples are disproportionately represented in both systems, as well as in the crossover between the two.

2.69 Entry of Aboriginal and Torres Strait Islander children into the child protection system should be understood against the historical background of the removal of children for their families under government policies toward Aboriginal and Torres Strait Islander peoples of protection and assimilation, creating what has become known as the 'Stolen Generation'.[115] Children were removed to institutions and, later, into non-Indigenous foster families.[116] The 1997 Human Rights and Equal Opportunity Commission Report, *Bringing Them Home*, concluded that, nationally:

> between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. In that time not one Indigenous family has escaped the effects of forcible removal (confirmed by representatives of the Queensland and WA Governments in evidence to the Inquiry). Most families have been affected, in one or more generations, by the forcible removal of one or more children.[117]

2.70 The RCIADIC noted that almost 43 of the 99 Aboriginal and Torres Strait Islander people whose deaths were reviewed had experienced childhood separation from their families through intervention by the State, mission organisations or other institutions,[118] and made a number of recommendations directed at welfare, youth justice services and police aimed at breaking the cycle of incarceration for Aboriginal young people.[119] The *Bringing Them Home* Report highlighted the relationship between being placed in out-of-home care and the increased likelihood of coming into

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114 Victorian Aboriginal Legal Service, *Submission 39*. See also NSW Council of Social Service (NCOSS), *Submission 45*.

115 Removal of children was authorised initially under protection legislation, and later under general child welfare legislation: Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ch 2.

116 Ibid.

117 Ibid. The estimated rate of removals has been disputed, with some preferring the estimate by the Australian Bureau of Statistics of one in ten for the rate of child removal: Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings, Cat No 4190.0* (1995). See further Sven R Silburn et al, 'The Intergenerational Effects of Forced Separation on the Social and Emotional Wellbeing of Aboriginal Children and Young People' (Family Matters No 75, Australian Institute of Family Studies, 2006). This report noted that '[g]iven the differences in removal policies which existed between the States and the ways in which these changed in their application over time, it seems unlikely that the number of Aboriginal and Torres Strait Islander people who were separated will ever be precisely ascertained from historical sources: at 16.

118 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, [2.2.9].

119 Ibid recs 234–45.

contact with the criminal justice system, through an examination of the lasting effects of institutionalisation on Aboriginal and Torres Strait Islander children.[120]

2.71 Aboriginal and Torres Strait Islander children continue to be disproportionately affected by care and protection orders and entry into the child protection system, with some describing this as a new stolen generation.[121] Rates of contact with the child protection system increased steadily over the four years to 2016. From 2012 to 2016, the number of Aboriginal and Torres Strait Islander children on care and protection orders rose from 13,268 to 18,409, with rates increasing from 46.1 to 61.9 per 1,000. By contrast, the rate of non-Indigenous children on care and protection orders has remained relatively stable, increasing from 5.6 to 6.5 per 1,000.[122]

2.72 At June 2016, there were 16,846 Aboriginal and Torres Strait Islander children in out-of-home care, a rate of 56.6 per 1,000 children. The rate of Aboriginal and Torres Strait Islander children in out-of-home care was 10 times the non-Indigenous rate.[123]

2.73 Young people in out-of-home care between 1 July 2014 and 30 June 2016 were 19 times more likely than the equivalent general population to be under youth justice supervision in the same year.[124] Aboriginal or Torres Strait Islander males were most likely to also be under youth justice supervision, with 17.8% of those in out-of-home care also under youth justice supervision, compared with 12% of non-Indigenous males, 9.9% of Aboriginal or Torres Strait Islander females and 5.6% of non-Indigenous females.[125] Aboriginal and Torres Strait Islander young people in the child protection system were almost three times as likely to be subject to youth justice supervision between 1 July 2014 and 30 June 2016 when compared with non-Indigenous young people.[126]

2.74 Many submissions emphasised the link between involvement in child protection and out-of-home care and subsequent offending.[127] Dr Kath McFarlane noted that that the 'criminogenic impact of Australia's child removal practices and subsequent institutionalisation of children has been known for decades', and outlined a long history of concern about the links between child protection and later offending:

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120 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) pt 3.

121 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report* (2017) vol 1, 91.

122 Australian Institute of Health and Welfare, 'Child Protection Australia 2015–2016' (Child Welfare Series No 66, 2017) 46.

123 Ibid 52.

124 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2015–16* (2017) 14.

125 Ibid.

126 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016) 8.

127 Legal Aid NSW, *Submission 101*; National Association of Community Legal Centres (NACLC), *Submission 94*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Children's Court of New South Wales, *Submission 69*; Victoria Legal Aid, *Submission 56*; Australian Human Rights Commission, *Submission 43*; Northern Territory Legal Aid Commission, *Submission 46*.

> In 1977 the Department of Aboriginal Affairs noted that approximately 95% of people in NSW and Victoria who sought assistance from the Aboriginal Legal Services on criminal matters had been in care. This over-representation was attributed to the children being separated from the support of the Aboriginal community, the corresponding lack of identity with Indigenous culture and simultaneous alienation from the white community. The Senate Standing Committee on Social Welfare (Australian Senate 1985) observed that welfare intervention was a highly disruptive factor that had set many young Indigenous people on the road to incarceration.[128]

2.75 Victoria Legal Aid also argued that out-of-home care is a contributing factor to imprisonment, and noted that its analysis of data between 2011 and 2016 found that, of those aged 11–17 who were placed in out-of-home care, almost one in three young people later returned to Victoria Legal Aid for assistance with a criminal matter.[129]

2.76 The Children's Court of NSW noted the efforts by the Court and within the NSW Department of Family and Community Services to improve planning and supports for Aboriginal and Torres Strait Islander children and their families, with the aim of addressing both the over-representation of Aboriginal and Torres Strait Islander children in care, and the impact on the crossover of those children into the criminal justice system.[130]

2.77 A 2015 Senate Inquiry into out-of-home care recommended that state and territory governments review Aboriginal and Torres Strait Islander over-representation in out-of-home care as a matter of priority, and provide additional resources for family support services to addresses the causes of social disadvantage.[131] The 2015 report of the Aboriginal and Torres Strait Islander Social Justice Commissioner also made a number of recommendations about child protection, including that child welfare targets be introduced into the Closing the Gap process, that state and territory governments take steps to establish Aboriginal and Torres Strait Islander Children's Commissioners, and that Commonwealth, state and territory governments support investment in research and in improving the quality of information relating to child protection.[132]

2.78 The 2017 Royal Commission into the Protection and Detention of Children in the Northern Territory (NT Royal Commission) made a number of recommendations relating to child protection in that jurisdiction. It found that the system needed fundamental change:

> The Northern Territory and Commonwealth governments need to acknowledge that the current child protection system in the Northern Territory is not effectively protecting children. Governments must accept that fundamental changes must be made. They must invest in a public health approach to supporting and protecting all

128 Dr K McFarlane, *Submission 65*.
129 Victoria Legal Aid, *Submission 56*.
130 Children's Court of New South Wales, *Submission 69*.
131 Senate Standing Committee on Community Affairs, Parliament of Australia, *Out of Home Care* (2015) rec 31.
132 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 53, recs 17–19.

> children, families and their communities. This requires sustained support over a lengthy period, with a focus on child-centred solutions.[133]

2.79 The contribution of out-of-home care to Aboriginal and Torres Strait Islander incarceration is considered further in Chapter 15, and the ALRC recommends that there be a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.

2.80 Many submissions to this Inquiry also noted the link between contact with the juvenile justice system and adult incarceration.[134] While overall rates of all young people under youth justice supervision fell over the five-year period to 2015–16, Aboriginal and Torres Strait Islander young people are disproportionately represented under youth justice supervision:

> In 2011–12, Indigenous young people were 13 times as likely to be under supervision as non-Indigenous young people, increasing to 17 times as likely in 2015–16. In 2015–16, Indigenous over-representation was higher for those in detention (25 times) than for those under community-based supervision (15 times).[135]

2.81 Research following a sample of juvenile offenders in NSW over an eight-year period found that 57% went on to appear in an adult court within that period.[136] More than 90% of Aboriginal or Torres Strait Islander young people who first appeared in the Children's Court appeared in an adult court within eight years, and 33.3% had received at least one custodial sentence in an adult court.[137]

2.82 In 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquired into Indigenous youth in the criminal justice system. It observed that the

> overrepresentation of Indigenous youth in the criminal justice system is a national crisis and Commonwealth, state and territory governments must respond rapidly and effectively to prevent current and future generations of young Indigenous people from entering into the criminal justice system. This is a long term challenge that will require sustained commitment and rigour from all jurisdictions to address the root causes of Indigenous disadvantage, and to rehabilitate young Indigenous people currently in the criminal justice system.[138]

2.83 As with adult incarceration, the Committee considered that the major drivers of incarceration of Aboriginal and Torres Strait Islander youth were external to the criminal justice system, and emphasised the need for early intervention. It made a

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133 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report* (2017) vol 3A, 185.

134 See, eg, UNICEF Australia, *Submission 104*; National Association of Community Legal Centres (NACLC), *Submission 94*; Amnesty International Australia, *Submission 89*; Human Rights Law Centre, *Submission 68*; Mission Australia, *Submission 53*.

135 Australian Institute of Health and Welfare, 'Youth Justice in Australia 2015–16' (Bulletin No 139, Bulletin 139, 2017) 1–2.

136 Shuling Chen et al, 'The Transition from Juvenile to Adult Criminal Careers' (Contemporary Issues in Crime and Justice No 86, NSW Bureau of Crime Statistics and Research, 2005).

137 Ibid table 3.

138 Senate Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 7–8.

number of recommendations responding to Aboriginal and Torres Strait Islander disadvantage, including about health, education and support for families.

2.84 The NT Royal Commission, along with making a number of recommendations about reform of youth detention in the NT, stressed the importance of early intervention to prevent entry into the youth justice system, both through police diversion and through family-focused and education-based early interventions, which 'must involve the full spectrum of services engaged with young people'. [139]

Family violence

2.85 Aboriginal and Torres Strait Islander women experience family violence at a rate much higher than the broader Australian community. A 2014 summary of family violence statistics showed that

> - Indigenous people are between two and five times more likely than non-Indigenous people to experience violence as victims or offenders.
> - Indigenous females are five times more likely to be victims of homicide than non-Indigenous females; 55% (n=33) of the 60 Indigenous homicide victims were killed in a domestic homicide; which includes 42% (n=25) that were intimate partner homicides.
> - Indigenous females were 35 times as likely to be hospitalised due to family violence related assaults, and Indigenous males 21.4 times as likely, than non-Indigenous females and males.[140]

2.86 Available research suggests that the majority of Aboriginal and Torres Strait Islander women in prison have experienced physical or sexual abuse.[141] The National Family Violence Prevention and Legal Services Victoria argued that there was

> an intrinsic link between between family violence and the over-incarceration of Aboriginal and Torres Strait Islander men, women and young people. Any measures designed to reduce the over-imprisonment of Aboriginal and Torres Strait Islander men and women must therefore also target the reduction of rates of violence against Aboriginal and Torres Strait Islander women.[142]

2.87 The Top End Women's Legal Service urged an appreciation of the complexity of violence in Aboriginal and Torres Strait Islander communities when developing responses to interpersonal violence. It argued that it is important to distinguish between

> 1. Coercive and controlling violence—an ongoing pattern of use of threat, force, emotional abuse and other coercive means to unilaterally dominate a person and induce fear, submission and compliance in them. Its focus is on control; and

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139 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report* (2017) vol 4, 411–12.

140 Australia's National Research Organisation for Women's Safety, *Fast Facts—Indigenous Family Violence* (2014).

141 Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1, 15; Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 17.

142 National Family Violence Prevention & Legal Services Victoria NFVPLS, *Submission 77*. See also Human Rights Law Centre and Change the Record Coalition, above n 142.

> 2. Lateral violence—often described as 'internalized colonialism' and refers to the harm done by Aboriginal and Torres Strait Islander people to others in their families, organisations and communities.[143]

2.88 The RCIADIC received some criticism for failing to address family violence in Aboriginal communities. Judy Atkinson observed:

> The Commissioners acknowledged 'appaling levels of domestic violence against Aboriginal women and children', with 'rape and even murder... failing to attract the due attention of police and the criminal justice system', and the fact that 53% of those who died in custody were in custody for acts of violence, with 9% for homicide, 12% for serious assault, and 32% for sexual assault. But there was not one recommendation out of the 339 which allowed for women as victims of domestic violence and/or rape, or as the wives, daughters, mothers and grandmothers of violent offenders, to access funds for services in this regard.[144]

2.89 Since the RCIADIC, family violence in both Aboriginal and Torres Strait Islander communities and the broader Australian community has become a policy priority. Since 2010, major broad-based initiatives have included the National Plan to Reduce Violence against Women and their Children 2010–2022, the 2010 ALRC and NSWLRC joint report into family violence,[145] and the 2016 Victorian Royal Commission into Family Violence.[146] A review of Aboriginal and Torres Strait Islander viewpoints on effective responses to family violence identified the following themes:

- Solutions to violence developed by Indigenous people are likely to focus on community healing, restoration of family cohesion and processes that aim to let both the victim and perpetrator deal with their pain and suffering.
- Indigenous communities want to play a more significant role in shaping program and service responses.
- Because Indigenous family violence is, in part, attributed to the breakdown of traditional culture and kinship practices, the rebuilding of these family and kinship ties is often seen as central to developing any type of response to Indigenous family violence.
- Generalised services and programs can be considered effective if they operate in a culturally sensitive way and/or are run in partnership with Indigenous organisations.
- The criminal justice system is not considered the most appropriate means for dealing with family violence in Indigenous communities. Instead, communities prefer Indigenous sentencing courts aimed at integration of Indigenous community members in the court process, rehabilitation of the offender and restoration of the family.

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143 Top End Women's Legal Service Inc, *Submission 52*. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011* (Australian Human Rights Commission, 2011) ch 2.

144 Judy Atkinson, 'A Nation Is Not Conquered' (1996) 3(81) *Aboriginal Law Bulletin* 4, 4. See also Elena Marchetti, 'Indigenous Women and the RCIADIC—Part I' (2007) 7(1) *Indigenous Law Bulletin* 6.

145 Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report No 114 (2010).

146 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016).

- Ongoing planned and consistent funding for service provision is considered a major issue.[147]

2.90 In its submission to this Inquiry, the National Family Violence Prevention and Legal Services Victoria pointed to a number of its own programs designed to prevent and respond to family violence, and noted that:

> Central to the best practice elements of these programs is the fact that these programs are designed and delivered by Aboriginal and Torres Strait Islander organisations. Successful programs take a cultural and strength-based approach and target the underlying causes of contact with the criminal justice system in the first place.[148]

2.91 The ALRC considers family violence further in Chapter 11. It also recommends in Chapter 16 that a target to reduce violence against Aboriginal and Torres Strait Islander people be adopted as part of criminal justice targets.

Intergenerational trauma

2.92 The legacy of historical dispossession and dislocation from land, culture and family has ongoing harmful effects for Aboriginal and Torres Strait Islander peoples, commonly described as 'intergenerational trauma':

> It is defined as the subjective experiencing and remembering of events in the mind of an individual or the life of a community, passed from adults to children in cyclic processes as 'cumulative emotional and psychological wounding' … [H]istorical trauma can become normalised within a culture because it becomes embedded in the collective, cultural memory of a people and is passed on by the same mechanisms through which culture, generally, is transmitted.[149]

2.93 Intergenerational trauma has particularly affected families of those who were affected by the stolen generation. The *Bringing Them Home* Report observed:

> The impacts of the removal policies continue to resound through the generations of Indigenous families. The overwhelming evidence is that the impact does not stop with the children removed. It is inherited by their own children in complex and sometimes heightened ways.[150]

2.94 As Professor Harry Blagg, Dr Vickie Hovane and Dorinda Cox described: '[f]or Aboriginal people, intergenerational trauma is a collective consequence of colonisation rather than simply an individual experience. It is compounded by negative contact with the justice and related systems, such as children's protection'.[151]

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147 Anna Olsen and Ray Lovett, 'Existing Knowledge, Practice and Responses to Violence against Women in Australian Indigenous Communities' (State of Knowledge Paper, ANROWS, 2016) 2; Paul Memmott, 'On Regional and Cultural Approaches to Australian Indigenous Violence' (2010) 43(2) *Australian & New Zealand Journal of Criminology* 333.

148 National Family Violence Prevention & Legal Services Victoria NFVPLS, *Submission 77*.

149 Judy Atkinson, 'Trauma-Informed Services and Trauma-Specific Care for Indigenous Australian Children' (Resource Sheet No 21, Closing the Gap Clearinghouse, 2013) 4–5.

150 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ch 11.

151 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

2.95 Many submissions to this Inquiry emphasised the significance of the experience of intergenerational trauma in heightening other risk factors for incarceration.[152] The National Congress of Australia's First Peoples submitted that it is 'the view of many Aboriginal people that intergenerational trauma is a key driver of many health, wellbeing and social issues faced by many Aboriginal people and communities today'.[153]

2.96 Submissions to this Inquiry stressed that addressing intergenerational trauma must form part of efforts to reduce incarceration rates of Aboriginal and Torres Strait Islander peoples. The ACT Government submitted:

> Breaking the cycle of disadvantage and intergenerational trauma requires solutions that are both future-oriented and responsive to the past. Providing meaningful employment and access to appropriate housing is as critical as providing culturally sensitive programs that respond to trauma, loss and grief, addiction, violent behaviour, experiences of abuse and mental illness.[154]

2.97 A series of community justice forums conducted by the Aboriginal Legal Service NSW/ACT identified

> the need for greater focus and investment on prevention and early intervention strategies that: address inter-generational trauma; preserve strong, vibrant and well-functioning families; and grow and nurture resilient young people. This should be guided by Elders and community leaders, and embedded in Aboriginal culture.[155]

2.98 Key principles of a 'trauma-informed' approach to delivering services have been identified:

- understand trauma and its impact on individuals, families and communal groups;
- promote safety;
- ensure cultural competence;
- support client's control;
- share power and governance;
- integrate care;
- support relationship building;
- enable recovery.[156]

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152 See, eg, Northern Territory Government, *Submission 118*; Aboriginal Peak Organisations Northern Territory, *Submission 117*; ACT Government, *Submission 110*; The Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Mission Australia, *Submission 53*; Northern Territory Legal Aid Commission, *Submission 46*; Victorian Aboriginal Legal Service, *Submission 39*.

153 National Congress of Australia's First Peoples, *Submission 73*.

154 ACT Government, *Submission 110*.

155 Aboriginal Legal Service NSW ACT Supplementary Submission, *Submission 112*.

156 Judy Atkinson, above n 150, 7.

2.99 The Aboriginal Healing Foundation, in a report marking 20 years from the *Bringing Them Home* Report, has identified the need for a 'trauma informed public policy environment'. It has advocated for police, welfare services, health and mental health providers and other institutions to become trauma-informed:

> Trauma-informed organisations use a strengths-based approach based on an understanding of the impact of trauma; emphasise the physical, psychological, and emotional safety of clients and staff; and help people affected by trauma to rebuild a sense of control and empowerment.[157]

2.100 In Chapters 9 and 11, the ALRC recognises the need for prison programs to be trauma-informed, and for services delivered to Aboriginal and Torres Strait Islander women to be designed specifically to meet their needs.

Cycle of incarceration

2.101 As a number of submissions pointed out, incarceration itself has a compounding effect on all of the above disadvantages, and can lead to a cycle of incarceration—both for ex-prisoners, and for their families.[158]

2.102 The Victorian Aboriginal Legal Service drew attention to the effects on children of the imprisonment of parents and other family members, offering the following accounts:

> Many of the Aboriginal youth in juvenile justice facilities have or have had family members incarcerated within adult correctional systems and see themselves as likely to repeat the cycle. One Aboriginal youth had a view of helplessness when envisioning his future and felt that he would likely reunite with family 'when I go to adult prison'. Another Aboriginal youth who identified with the cycle of offending experience by his family noted that he had uncles at Port Phillip Prison so 'when they put me in an adult prison, that is where I want to go'.[159]

2.103 The incarceration of women in particular can lead to entry of children into the child protection system. Australian Lawyers for Human Rights submitted that the 'incarceration of women, even for short periods on remand, may result in the removal of their children and their exposure to neglect and abuse, contributing to the cycle of disadvantage experienced by these communities'.[160]

2.104 Professor Harry Blagg, Dr Vickie Hovane and Dorinda Cox emphasised the significance of the community-level effect of the incarceration of women:

> Aboriginal women are pivotal in maintaining the health and wellbeing of families. When Aboriginal women are removed from the family structure via imprisonment it

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157 Aboriginal and Torres Strait Islander Healing Foundation, *Bringing Them Home 20 Years on: An Action Plan for Healing* (2017) 30.

158 See, eg, Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*; Northern Territory Government, *Submission 118*; North Australian Aboriginal Justice Agency (NAAJA), *Submission 113*; National Family Violence Prevention & Legal Services Victoria NFVPLS, *Submission 77*; National Congress of Australia's First Peoples, *Submission 73*; Australian Lawyers for Human Rights, *Submission 59*; Top End Women's Legal Service Inc, *Submission 52*; Victorian Aboriginal Legal Service, *Submission 39*.

159 Victorian Aboriginal Legal Service, *Submission 39*.

160 Australian Lawyers for Human Rights, *Submission 59*.

> creates a massive crisis, affecting a range of dependents, principally children. The crisis is exacerbated when there are multiple generations of women from one family in prisons, as is the case at Bandyup prison in WA. The ramifications reverberate negatively across the breadth and depth of family and community wellbeing.[161]

2.105 Professor Russell Hogg and Associate Professor Julia Quilter noted the community-level effects of incarceration:

> the numbers for young men actually caught up in the system at any given moment must, in particular, be breathtakingly high, perhaps one in three or four. … [T]his cannot be anything other than socially, demographically, economically and psychologically catastrophic for any community, producing disastrous effects on employment, household incomes, education, inter-generational relationships and so on. Put in plain terms it is criminogenic.[162]

2.106 The criminogenic effects of incarceration that is disproportionately concentrated in particular communities is considered further in Chapter 4, where justice reinvestment is explored as a place-based, community-led approach to addressing the 'upstream' drivers of incarceration for Aboriginal and Torres Strait Islander peoples.

Torres Strait Islander peoples

2.107 While this Inquiry focuses on Aboriginal and Torres Strait Islander incarceration rates, it is important to recognise that Aboriginal people and Torres Strait Islander people have significantly different histories and culture. Dr Anna Shnukal has observed that, 'Torres Strait Islanders are not mainland Aboriginal people who inhabit the islands of Torres Strait. They are a separate people in origin, history and way of life'.[163]

2.108 The Torres Strait Islands, now part of Queensland, consist of 18 island communities and five traditional island clusters. The Torres Strait is situated between the northeast tip of Cape York peninsula, and the southern coast of Papua New Guinea and covers an area of approximately 48,000 square kilometres.[164]

2.109 The 2016 Census recorded 32,344 people who identified as being of Torres Strait Islander origin only across Australia. Approximately 65% resided in Queensland, while 11% (3,595) resided on the Torres Strait Islands. A further 12% (503) people residing in the Torres Strait Islands identified as being of both Aboriginal and Torres Strait Islander origin and 26,767 people within mainland Australia identified as being 'both Aboriginal and Torres Strait Islander'.[165]

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161 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

162 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

163 Anna Shnukal, 'Torres Strait Islanders' in Maximilian Brandle (ed), *Multicultural Queensland 2001: 100 years, 100 Communities, A Century of Contributions* (Department of Premier and Cabinet (Qld), 2001) 21, 21.

164 Torres Strait Regional Authority, *Community Profiles* <www.tsra.gov.au/the-torres-strait/community-profiles>.

165 Australian Bureau of Statistics, *2016 Census: Aboriginal and/or Torres Strait Islander Peoples QuickStats—Torres Strait Islands* <www.censusdata.abs.gov.au>.

History of European contact with the Torres Strait

2.110 European contact with the Torres Strait began in 1606, when Luis Vaez de Torres navigated the Strait on the way to Manila. Throughout the following 160 years there were contacts between Islanders and Europeans, including for trade, but it was not until the 1860s that Europeans commenced a permanent presence in the Torres Strait, following the identification of commercially viable marine industries, primarily bêche-de-mer and pearling.[166]

2.111 In 1871, Christian missionaries and teachers from the London Missionary Society arrived in the Torres Strait. The introduction of Christianity, referred to as 'The Coming of the Light', had a significant and lasting impact on the people and the region, and, by the end of the nineteenth century, the majority of Torres Strait Islanders had adopted Christianity.[167]

2.112 In 1872, Queensland annexed the islands up to 60 miles from the coast of Cape York, and the majority of the remaining islands in the Torres Strait were annexed to Queensland in 1879.[168] Professor Jeremy Beckett has observed that the Queensland Government 'had little interest in the Islanders themselves, leaving them to the care of the London Missionary Society'.[169]

2.113 In 1907, Torres Strait Islander people were made subject to the protectionist legislative regime that applied to Aboriginal people in Queensland and extensively regulated their lives.[170] In other areas of Queensland, this involved relocation of much of the Aboriginal population to reserves.[171] However, large scale relocation did not occur in the Torres Strait:

> there was no need for relocation: the island communities were already isolated and had already made their adaptation to the new order; moreover, there was a market for their labour, which, combined with subsistence production, could make them self-supporting.[172]

2.114 The Queensland Government did impose a number of controls on the Torres Strait Islander people, including holding workers' earnings on their behalf and limiting

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166 John Burton, *General History—The Torres Strait* Torres Strait Regional Authority <www.tsra.gov.au/the-torres-strait/general-history>.

167 Jeremy Beckett, *Encounters with Indigeneity - Writing about Aboriginal and Torres Strait Islander Peoples* (Aboriginal Studies Press, 2014) 109; David Lawrence and Helen Reeves Lawrence, 'Torres Strait: The Region and Its People' in Richard Davis (ed), *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Aboriginal Studies Press, 2004) 24.

168 Burton, above n 168.

169 Jeremy Beckett, above n 169, 172.

170 *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginals Preservation and Protection Act 1939* (Qld); *Torres Strait Islander Act 1939* (Qld).

171 Jeremy Beckett, above n 169, 172–3. Section 9 of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) granted the Protector of Aborigines the power 'to cause Aboriginals within any district to be removed to and kept within the limits of any reserve situated in the same or any other district'.

172 Ibid 173. However, removals to the mainland did occur: for example, from Badu (Mulgrave Island), there were 17 documented removals between 1839 and 1950: Queensland Government, *Aboriginal and Torres Strait Islander Community Histories: Badu* <www.qld.gov.au/atsi/cultural-awareness-heritage-arts/community-histories-badu>.

access to retail outlets, 'justified on the grounds that Islanders were incapable of managing their affairs and must be taught thrift'.[173] However, the administrative regime on the Torres Strait from 1899 also included two or three elected councillors who were Torres Strait Islander people.

2.115 In 1936, about 70% of the Torres Strait Islander workforce went on strike for nine months, protesting government interference in wages, trade and commerce, and calling for the lifting of curfews, the removal of a permit system for inter-island travel, and the recognition of the Islanders' right to recruit their own boat crews.[174] This strike resulted in the government retaining control of Islander people's employment, earnings and consumption from Thursday Island, but leaving communities to run their own affairs on the other islands. Beckett has observed that: 'Under this new regime, the Islanders, having only restricted contact with the outside world, were able to develop a rich creole culture around the church and council'.[175]

2.116 In 1938, the Queensland Government agreed to the request of Torres Strait Islander people to be recognised as a distinct minority, who were different to Aboriginal peoples.[176] The following year, the Queensland legislature passed legislation to the same effect.[177]

2.117 The island of Mer (Murray Island) was the subject of the first successful native title claim in Australia. In 1992, the High Court in *Mabo v Queensland [No 2]*, found that pre-existing rights and interests in land held by Aboriginal and Torres Strait Islander peoples—native title—survived the assertion of sovereignty by the Crown.[178] In 2010, Torres Strait Islander peoples' native title rights to sea country in the Torres Strait were also recognised, over an area of approximately 44,000 square kilometres.[179]

2.118 In 1994, the Torres Strait Regional Authority (TSRA) was established as a Commonwealth representative body for Torres Strait Islander and Aboriginal people living in the Torres Strait.[180] The 20 elected members on the TSRA Board are Torres Strait Islander or Aboriginal people living in the region, and are elected every four years by their individual communities. The TSRA's functions include formulating, coordinating and implementing programs for Torres Strait Islander and Aboriginal people living within the region.[181]

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173 Jeremy Beckett, above n 169, 173.
174 Queensland Government, above n 174.
175 Jeremy Beckett, above n 169, 174.
176 Ibid.
177 *Torres Strait Islander Act 1939* (Qld).
178 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J).
179 *Akiba v Queensland (No 3)* (2010) 204 FCR 1.
180 Under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), today known as the *Aboriginal and Torres Strait Islander Act 2005* (Cth).
181 Torres Strait Regional Authority, *The TSRA* <www.tsra.gov.au/the-tsra>. Two Northern Peninsula Area communities, Bamaga and Seisia, are also part of area covered by the TSRA.

Criminal justice issues in the Torres Strait Islands

2.119 Forming a picture of the incarceration of Torres Strait Islander people is made difficult by the fact that the available data[182] relating to the incarceration of Aboriginal and Torres Strait Islander peoples does not distinguish between people who identify as being an 'Aboriginal' person, a 'Torres Strait Islander' person, or as both.

2.120 During this Inquiry, the ALRC visited the Torres Strait to consult with stakeholders there and gain an understanding of the incarceration of Torres Strait Islander people within the Torres Strait region.

2.121 During consultations on Thursday Island, a number of stakeholders told the ALRC that many of the criminal justice issues affecting Aboriginal communities across Australia were not experienced by Torres Strait Islander people living in the Torres Strait, due in part to its different history of colonisation.

2.122 Crime and justice figures collected by the Queensland Police Service for 2015–16 showed that, compared to Queensland, the Torres Strait region had a lower rate of total reported offences. However, it had a higher rate of reported offences against the person, compared to the rate in Queensland.[183] A 2011 study suggested that family violence in the Torres Strait was not as prevalent as in certain remote Cape York Aboriginal communities, but that there was likely to be under-reporting of family violence.[184] Alcohol and cannabis was noted as a risk factor for violence, as well as lack of appropriate service infrastructure, factors associated with poverty, such as lack of education, poor health and low self-esteem.[185]

2.123 Although contact with the criminal justice system may not be at the disproportionate rates experienced on the mainland, the ALRC observed that the operation of the criminal justice system in the Torres Strait Islands provides an experience similar to that of other regional and remote communities.

2.124 Many of the difficulties that exist in remote mainland communities when responding to criminal justice issues are also relevant in the Torres Strait. For example, the cost of travel within the Torres Strait, and from the Torres Strait to the mainland can be prohibitively expensive, which can lead to breaches of bail conditions. Scott Mclean Cullen noted that:

> The distance and the cost of transport to court for appearances is high. As it can be up to $1000 for return flights, ferries and transfers from Outer Island to Thursday Island.

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182 This refers to court and police data, as well as to prisoner data reported by the Australian Bureau of Statistics. In most instances, bureaus of crime statistics and research (for example, BOCSAR in NSW and OSCAR in South Australia) also do not distinguish between these groups.

183 The total rate of reported offences in the Torres Strait 7,907 per 100,000, compared to 9,856 per 100,000 for Queensland. The total rate of offences against the person in the Torres Strait was 2,278 per 100,000, compared to 634 per 100,000 for Queensland: Queensland Government Statistician's Office, *Queensland Regional Profiles Resident Profile—People Who Live in the Region Torres Strait Islands Statistical Area Level 2 (SA2) Compared with Queensland* (Queensland Government, 8 December 2017) <https://statistics.qgso.qld.gov.au/qld-regional-profiles>.

184 Memmott, above n 148, 346–9.

185 Ibid 349–50.

> It is a further $800–$1000 to travel from Horn Island to Cairns, this transport might include small plane flights services.[186]

2.125 Lack of access to interpreters has also been identified as a barrier to justice in the Torres Strait, where English may be a person's second or third language.[187]

2.126 The availability of community-based sentences is also limited in the Torres Strait Islands, as are diversion programs including drug and alcohol treatment programs and counselling services.[188]

2.127 While these difficulties exist, there are also examples of adaptation of the criminal justice system in the Torres Strait to be responsive to local circumstances. For example, the Magistrates Court operates an Outer Island Circuit Court on 10 different Torres Straits Islands four times a year:

> The Outer Island Court Circuit was developed so that community members from the Torres Strait Outer Islands can have their court matters heard in their own community or a community nearby. The Outer Island Courts hear minor matters which would otherwise require members of the community to travel at significant expense to Thursday Island. All serious matters are still referred and heard at Thursday Island.[189]

2.128 Community justice groups also operate to provide cultural support for court matters and to provide 'cultural reports to the courts at sentencing and bail applications, assistance to the courts in managing community-based offences, and networking to implement crime prevention initiatives'.[190] In 2012, Dorothy Elu, an Elder on the Community Justice Group, provided an example of their work:

> we have to talk on their family's side and all that, we try to ask the judge to leave it to us to do the mediation before any further action can be taken. We had one boy last week and he had about 12 cases. The judge was going to send him down to Lotus [a prison] … We talked to the judge on behalf of his family—now he's free, now he's just waiting for our time to do some mediation with him and drug and alcohol counselling and all that.[191]

2.129 Torres Strait Island Police Support Officers (TSIPSOs) are another initiative that responds to local needs. TSIPSOs are community police employed in the Torres Strait by the Queensland Police Service. TSIPSOs have limited police powers and reside on the remote Islands. They are not sworn police officers and have no power to detain or arrest, but do provide a point of contact between local communities and the police, who are based on Thursday Island.[192] Scott Mclean Cullen submitted that:

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186 S McLean Cullen, *Submission 64*.
187 Ibid.
188 Ibid.
189 Queensland Police, *A Court with a Difference for Torres Strait and Outer Islands* Far North <www.mypolice.qld.gov.au/farnorth/2016/05/23/>.
190 Department of Aboriginal and Torres Strait Islander Partnerships (Qld), *Thursday Island* <www.datsip.qld.gov.au/publications-governance-resources/justice-resources/thursday-island>. See also chs 5 and 6.
191 ABC Radio National, *Community Justice in the Torres Strait* (3 July 2012) Law Report (Dorothy Elu) <www.abc.net.au/radionational/programs/lawreport/community-justice-in-the-torres-strait/4114774>.
192 Queensland Police, *Queensland Police Welcome New Torres Strait Island Police Support Officers (TSIPSO)* (28 October 2013) <www.mypolice.qld.gov.au/farnorth/2013/10/28>.

> For the Torres Straits courts the input of local Justice Groups and the island TIPSO (Thursday Island Police Support Officer) provide valuable local knowledge into the background and local life of an individual/ and victims. They offer insight into community life standing and personal behaviour.[193]

2.130 While the ALRC makes no specific recommendations directed to incarceration in the Torres Strait, it considers that a number of recommendations made in this Report may be particularly relevant to the Torres Strait, including those relating to the availability of community-based sentences, and other access to justice issues such as the availability of interpreters.[194]

193 S McLean Cullen, *Submission 64*.
194 See also chs 7 and 10.

3. Incidence

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For a version of this chapter with accessible figures and tables please see www.alrc.gov.au/publications/incidence

Summary

3.1 There is publicly available prison data. Prison population statistics, taken from an annual census, are published by the Australian Bureau of Statistics (ABS).[1] The annual census prison population data represents the 'stock' prison population, taken on a single day. While census data is useful to gain an understanding of the national prison population, it is also limited by the nature of its collection. It cannot provide

1 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016).

information on those who entered and exited prison in the six months prior or following census date, and tends to be biased towards those prisoners serving longer sentences.

3.2 The ALRC commissioned researchers at Curtin University (led by Associate Professor Anna Ferrante, Faculty of Health Sciences) to provide a deeper statistical overview of the incarceration rates of Aboriginal and Torres Strait Islander peoples. Part of this process involved an interrogation of the 'stock' data and an analysis of 'flow' statistics—data showing the characteristics of people entering and exiting prison between census dates. This chapter presents data from that analytical research, the key findings of which indicate that Aboriginal and Torres Strait Islander peoples are:

- **over-represented in the national prison population**: Aboriginal and Torres Strait Islander adults make up around 2% of the national population, and yet constitute 27% (10,596) of the national prison population (38,845).[2] In 2016, around 20 in every 1,000 Aboriginal and Torres Strait Islander people were incarcerated.[3] The rate of over-representation was most significant in WA.[4] Over-representation is both a persistent and growing problem—Aboriginal and Torres Strait Islander incarceration rates increased 41% between 2006 and 2016,[5] and the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over the decade has widened.[6]

  Aboriginal and Torres Strait Islander women constituted 34% of the female prison population.[7] The level of imprisonment of Aboriginal and Torres Strait Islander women exceeded that of non-Indigenous women by a factor of 21.2—that is an Aboriginal or Torres Strait Islander woman was 21.2 times more likely to be imprisoned than a non-Indigenous women.

- **more likely to be charged and brought before the courts:** Aboriginal and Torres Strait Islander peoples were seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts. While the most common offence type charged was 'acts intended to cause injury', 'public order' and 'justice procedure' offences also featured heavily in the offence categories for which Aboriginal and Torres Strait Islander peoples were charged.[8]

- **over-represented in the prison remand population:** Aboriginal and Torres Strait Islander peoples constituted 27% of all people denied bail by the courts and held in prison on remand.[9] The remand prison population has grown over

2 Ibid Aboriginal and Torres Strait Islander Prisoner Characteristics.
3 See Figure 3.2.
4 See Figure 3.2.
5 See Figure 3.3.
6 See Figure 3.3.
7 Australian Bureau of Statistics, above n 1, table 20.
8 See Figure 3.8.
9 Australian Bureau of Statistics, above n 1, table 8.

time, and Aboriginal and Torres Strait Islander people have continued to be over-represented in the remand population by a factor of over 11.[10]

Aboriginal and Torres Strait Islander women were particularly over-represented in the remand population, with their remand rate exceeding that of non-Indigenous women and non-Indigenous men.[11]

- **more likely to receive a sentence of imprisonment:** The level of over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system increased from charge to imprisonment: Aboriginal and Torres Strait Islander peoples were seven times more likely to be charged with criminal offences, yet 12.5 times more likely to receive a sentence of imprisonment than non-Indigenous people.[12]
- **more likely to receive a short sentence of imprisonment:** Aboriginal and Torres Strait Islander offenders were more likely to receive a short sentence of imprisonment and less likely to receive a community-based sentence than non-Indigenous offenders.[13] 'Stock' data from the prison census showed that 10% of Aboriginal and Torres Strait Islander prisoners were serving a sentence of less than six months, and half (49%) were serving a sentence of under two years.[14] 'Flow' data indicated that 45% of Aboriginal and Torres Strait Islander offenders sentenced to imprisonment received a sentence of less than six months, compared with 27% of non-Indigenous offenders.[15]

  Offences that led to sentences of imprisonment for less than six months for Aboriginal and Torres Strait Islander offenders included 'acts intended to cause injury' and 'offences against justice procedures', but also included 'property damage' and 'public order' offences.[16]
- **more likely to have a prior record of imprisonment:** Most (76%) Aboriginal and Torres Strait Islander prisoners in 2016 had been in prison previously, compared with 49% of non-Indigenous offenders.[17]

About the data

3.3 There are two distinct data sets: 'stock' and 'flow'. In short, flow

> describes the characteristics of offenders *sent* to prison. The stock profile describes the characteristics of those *in* prison ... minor offenders generally end up accounting for a much smaller proportion of the prison stock than of the prison flow.[18]

10 See Figure 3.9.
11 See Table 3.3.
12 See Figures 3.3–3.4.
13 See Figure 3.11.
14 See Figure 3.16.
15 See Figure 3.17.
16 See Figure 3.14.
17 See Figure 3.19.
18 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 90.

Data representing the 'stock' prison population

3.4 To provide the ALRC with an analysis of the 'stock' prison population, Curtin University used available and requested data from the annual census, *Prisoners in Australia* (ABS PIA), collected on 30 June each year and published by the ABS.[19]

3.5 'Stock' data was used to show Aboriginal and Torres Strait Islander over-representation in the national prison population generally, and in the remand population. It was used to show sentence length for those in prison on census night, and to calculate prior imprisonment rates.

Data representing the 'flow' prison population

3.6 To provide the ALRC with an analysis of 'flow', Curtin University used data from the ABS *Criminal Courts Australia* series (ABS CCA).[20]

3.7 Prison receptions were approximated from the ABS CCA data by counting the number of defendants in a period that were handed a custodial sentence by the courts. Although these custodial terms may not be served in the same period that the sentence was handed down, the commencement date was sufficiently close to allow for reasonable approximation. In addition, counting rules regarding the determination of 'principal offence' in court finalisations were not entirely the same as those used to determine 'most serious offence' in prison statistics; however, these were also sufficiently similar to allow comparison. Sentence quantum, as handed down by the court and described in ABS CCA publications (often referred to as 'head sentence') was also sufficiently similar to the 'aggregate sentence' in ABS PIA statistics to allow comparison.

3.8 Although presented as a national series, breakdowns by Aboriginal and Torres Strait Islander status from the ABS CCA were only available for selected jurisdictions—New South Wales (NSW), the Northern Territory (NT), Queensland and South Australia (SA). For other jurisdictions,[21] court finalisation statistics did not provide information about the Aboriginal and Torres Strait Islander status of defendants. When combined, NSW, the NT, Queensland and SA account for more than three-quarters of the Aboriginal and Torres Strait Islander general population in Australia and 60% of the non-Indigenous general population. Given this coverage, it was possible to use the available data to make reasonably accurate assessments of national trends.

3.9 The exclusion of Western Australia (WA) from ABS CCA most likely yielded an under-estimate of the true national rate of Aboriginal and Torres Strait Islander court finalisations, given the typically high level of Aboriginal involvement in the WA criminal justice system and the use of short prison terms to pay off fines.[22] ABS CCA

19 Australian Bureau of Statistics, above n 1.
20 Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16, Cat No 4513.0* (2017).
21 The ACT, Tasmania, Victoria and WA.
22 See ch 12.

also excludes traffic related offences,[23] which likely further contributed to an under-enumeration of national prison receptions.

3.10 'Flow' data was used to show Aboriginal and Torres Strait Islander over-representation rates. It was further used to show the charges that were before the courts, conviction rates, and the penalties imposed for both Aboriginal and Torres Strait Islander offenders and non-Indigenous offenders. It was also used to show the type of offences that led to imprisonment, and to illustrate sentence lengths for those prisoners who may not have been in prison on census night.

3.11 Across both data sets, where offence categories are cited, they are categorised using the Australian and New Zealand National Standard Offence Classification.[24] Only the most serious offence for each prisoner is published in the ABS PIA series.

3.12 There are limitations to the data used to inform this chapter. These are discussed at the end of the chapter, along with data limitations that may affect understandings of Aboriginal and Torres Strait Islander incarceration more broadly.

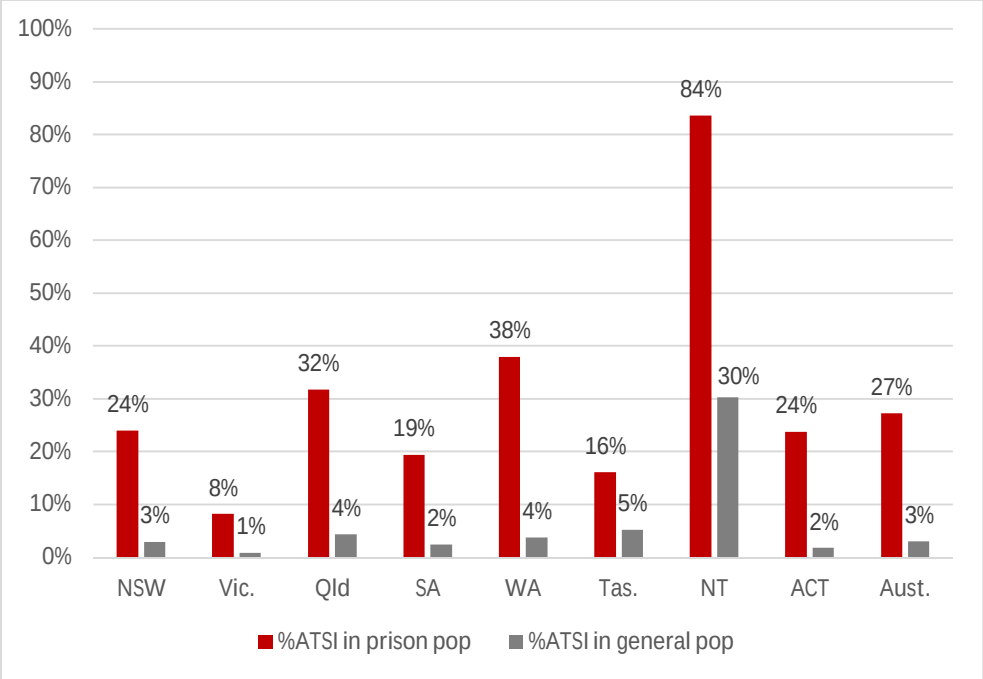
Over-representation

3.13 Aboriginal and Torres Strait Islander peoples are disproportionately represented in Australian prison populations. In 2016, Aboriginal and Torres Strait Islander people constituted just 2% of the Australian adult population but comprised more than one quarter (27%) of the national adult prison population.[25]

3.14 As shown in Figure 3.1 below, the extent of the over-representation varied by state and territory. For example, in the NT, Aboriginal and Torres Strait Islander peoples constituted 30% of the general population, and 84% of the prison population. In Victoria, Aboriginal and Torres Strait Islander peoples constituted 1% of the general population and 8% of the prison population.

23 Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification, Cat No 1234.0* (2011) div 14.
24 Australian Bureau of Statistics, above n 23.
25 Australian Bureau of Statistics, above n 1, Aboriginal and Torres Strait Islander Prisoner Characteristics.

Figure 3.1: Percentage of Aboriginal and Torres Strait Islander people in adult prison population and the general population by state and territory (2016)

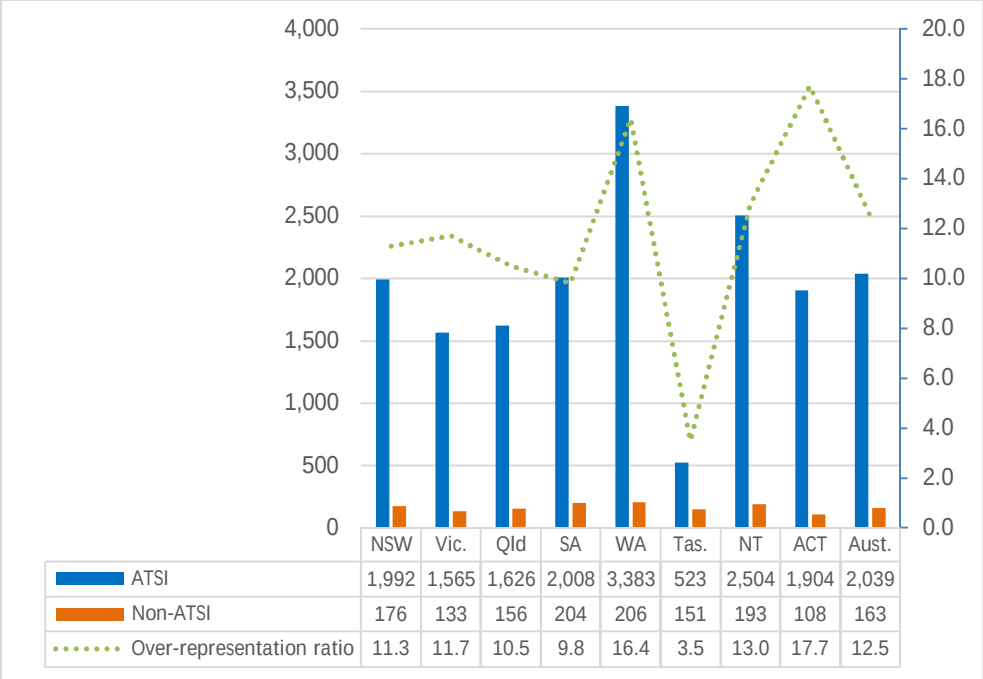


Source: **General population**, Australian Bureau of Statistics, *Australian Demographic Statistics, Cat No 3101* (2016) table 9 (Projected Resident Population, Series A(c)), table 12 (Projected Resident Aboriginal and Torres Strait Islander Population, Series A (c)); **Adult prison population**, Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 13.

3.15 One method of quantifying the extent of the over-representation of Aboriginal and Torres Strait Islander peoples in prison is to estimate incarceration rates based on the relevant Aboriginal and Torres Strait Islander adult populations and non-Indigenous adult populations. The Aboriginal and Torres Strait Islander rate was calculated by dividing the number of adult Aboriginal and Torres Strait Islander people in prison in 2016 by the total adult Aboriginal and Torres Strait Islander population estimate for 2016, and then multiplying this by 100,000 to arrive at a per capita or, more correctly, a 'per 100,000 person' imprisonment rate.

3.16 A similar rate was calculated for the non-Indigenous population. This allows comparisons to be made of the rates and assessment of the extent to which one rate exceeds the other. This is shown in Figure 3.2 below.

Figure 3.2: Imprisonment rates (per 100,000 persons) by Aboriginal and Torres Strait Islander status by jurisdiction (2016)



	NSW	Vic.	Qld	SA	WA	Tas.	NT	ACT	Aust.
ATSI	1,992	1,565	1,626	2,008	3,383	523	2,504	1,904	2,039
Non-ATSI	176	133	156	204	206	151	193	108	163
Over-representation ratio	11.3	11.7	10.5	9.8	16.4	3.5	13.0	17.7	12.5

Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016*, *Cat No 4517.0* (2016) table 16.

3.17 As shown in Figure 3.2 above, the national imprisonment rate for Aboriginal and Torres Strait Islander peoples was 2,039 per 100,000 persons. That is, about 20 in every 1,000 Aboriginal and Torres Strait Islander people were incarcerated in 2016.

3.18 To put the rates of Aboriginal and Torres Strait Islander incarceration in perspective, the non-Indigenous rate was 163 per 100,000: less than 2 in every 1,000 persons. Aboriginal and Torres Strait Islander peoples were therefore over-represented in the imprisoned population by a factor of 12.5. In other words, based on census night statistics, Aboriginal and Torres Strait Islander people were 12.5 times more likely to be in prison than non-Indigenous people.

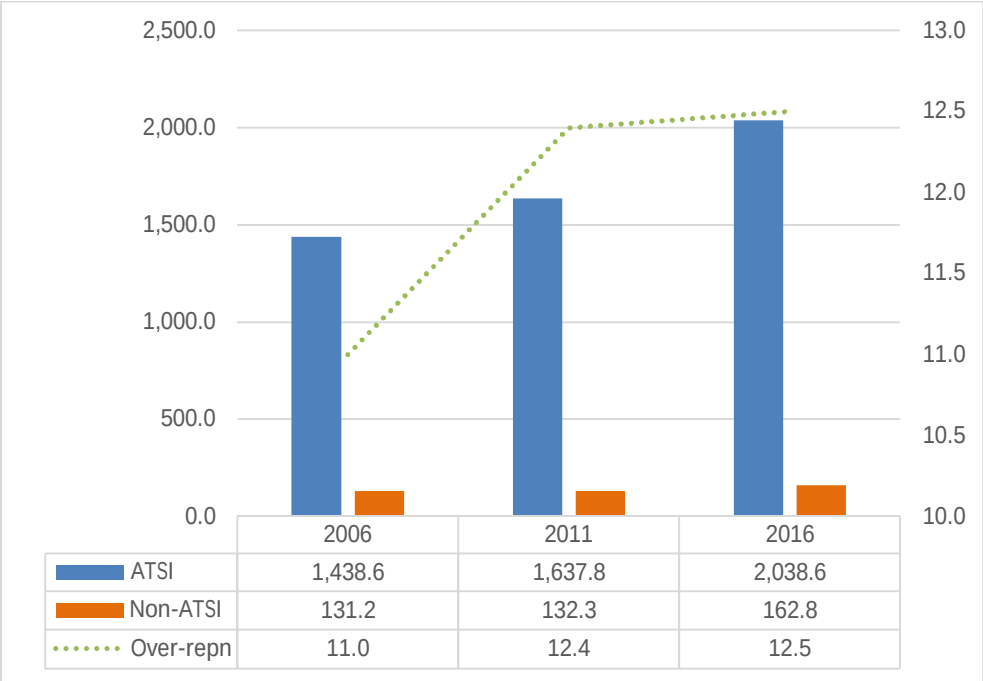
3.19 Figure 3.2 also shows that WA had the highest rate of imprisonment of Aboriginal and Torres Strait Islander people at 3,383 prisoners per 100,000 persons, as well as the highest rate of imprisonment of non-Indigenous people. In 2016, the Australian Capital Territory (ACT) and WA had the highest levels of Aboriginal and Torres Strait Islander over-representation in Australia (by a factor of 17.7 and 16.4 respectively). Note that, because the ACT has a small Aboriginal and Torres Strait Islander population, the ACT imprisonment rate is somewhat unstable. Caution should therefore be exercised in the interpretation of the ACT rate.

Trends in over-representation

3.20 Figure 3.3 below shows that the imprisonment rate for Aboriginal and Torres Strait Islander people has increased 41% over 10 years, from 1,438 per 100,000 in 2006 to 2,039 per 100,000 persons in 2016. For non-Indigenous people, the imprisonment rate has increased by 24%, from 131 to 163 per 100,000 over the same period.

3.21 The over-representation of Aboriginal and Torres Strait Islander people in prison has increased from a factor of 11 to 12.5. In short, the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over the decade has widened.

Figure 3.3: Changes in Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over time (2006-2016)



	2006	2011	2016
ATSI	1,438.6	1,637.8	2,038.6
Non-ATSI	131.2	132.3	162.8
Over-repn	11.0	12.4	12.5

Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016*, *Cat No 4517.0* (2016) table 17.

The over-representation rate by 'flow'

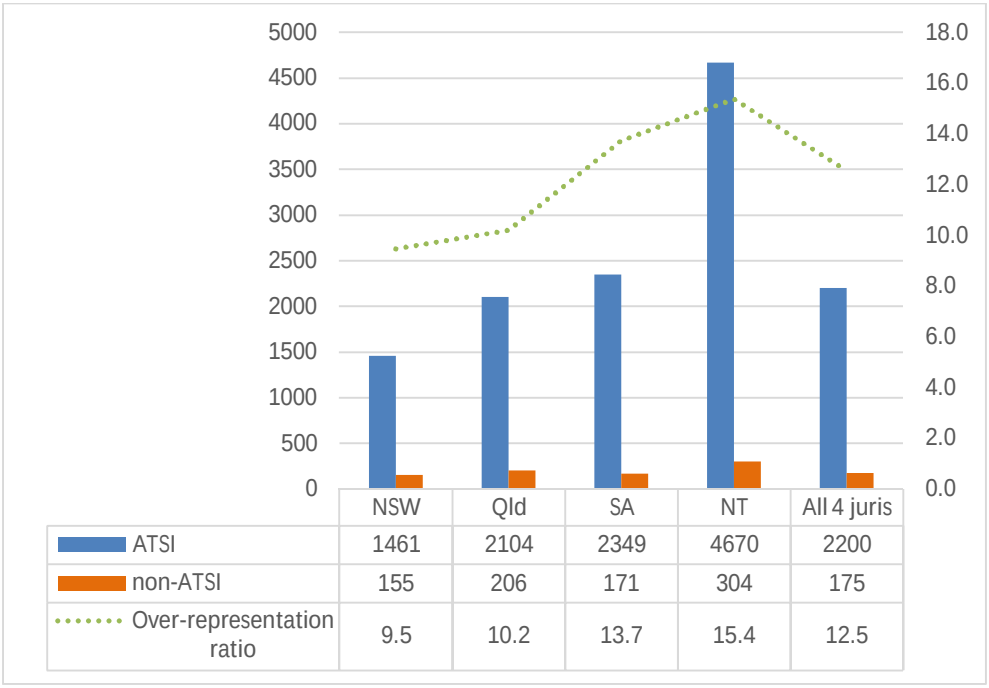
3.22 The rate of over-representation of Aboriginal and Torres Strait Islander people based on prison receptions derived from the ABS CCA ('flow') is similar to that derived from census data ('stock)' at 12.5. The reception-based ratio is, however, likely to be an under-estimate of the true national ratio because it does not include WA figures, and it excludes traffic related offences.

3.23 In the NT and SA, the level of Aboriginal and Torres Strait Islander over-representation in prison increases when reception-based figures are used. In the NT, the

census-based ratio was 13.0 but this increases to 15.4 when reception-based prison figures are used. In SA, the census-based ratio was 9.8 but this increased to 13.7.[26]

3.24 Figure 3.4 below presents the prison reception rate across the four jurisdictions, measured through court sentencing decisions. For Aboriginal and Torres Strait Islander people, this rate was 2,200 per 100,000 persons, while for non-Indigenous people the rate was 175 per 100,000 persons—Aboriginal and Torres Strait Islander peoples were over-represented in prison receptions (across the four jurisdictions) by a factor of 12.5.

Figure 3.4: Prison reception rate (per 100,000 relevant population) by Aboriginal and Torres Strait Islander status, measured through court finalisations resulting in prison sentences (2016)



	NSW	Qld	SA	NT	All 4 juris
ATSI	1461	2104	2349	4670	2200
non-ATSI	155	206	171	304	175
Over-representation ratio	9.5	10.2	13.7	15.4	12.5

Source: Australian Bureau of Statistics, *Criminal Courts Australia, 2015-16*, 45130_201516 (2017) requested table, table 3.

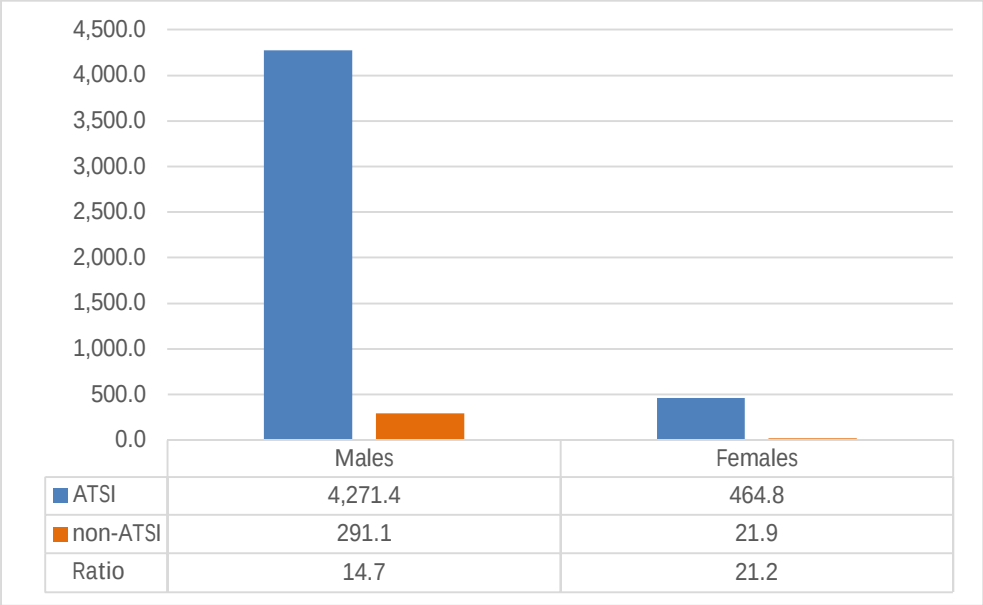
Aboriginal and Torres Strait Islander women

3.25 Aboriginal and Torres Strait Islander women are over-represented in prison populations. On census night, their level of imprisonment exceeded that of non-Indigenous women by a factor of 21.2—that is Aboriginal or Torres Strait Islander women were 21.2 times more likely to be imprisoned than non-Indigenous women.

26 Note that in NSW, the converse is true: the census-based ratio is greater than the reception-based ratio (compare a factor of 11.3 to a factor of 9.5).

3.26 The rate of imprisonment of Aboriginal and Torres Strait Islander women (464.8 per 100,000) was not only higher than that of non-Indigenous women (21.9 per 100,000), but was also higher than the rate of imprisonment of non-Indigenous men (291.1 per 100,000). See Figure 3.5 below.

Figure 3.5: Comparison of male and female imprisonment rates, by Aboriginal or Torres Strait Islander status (2016)



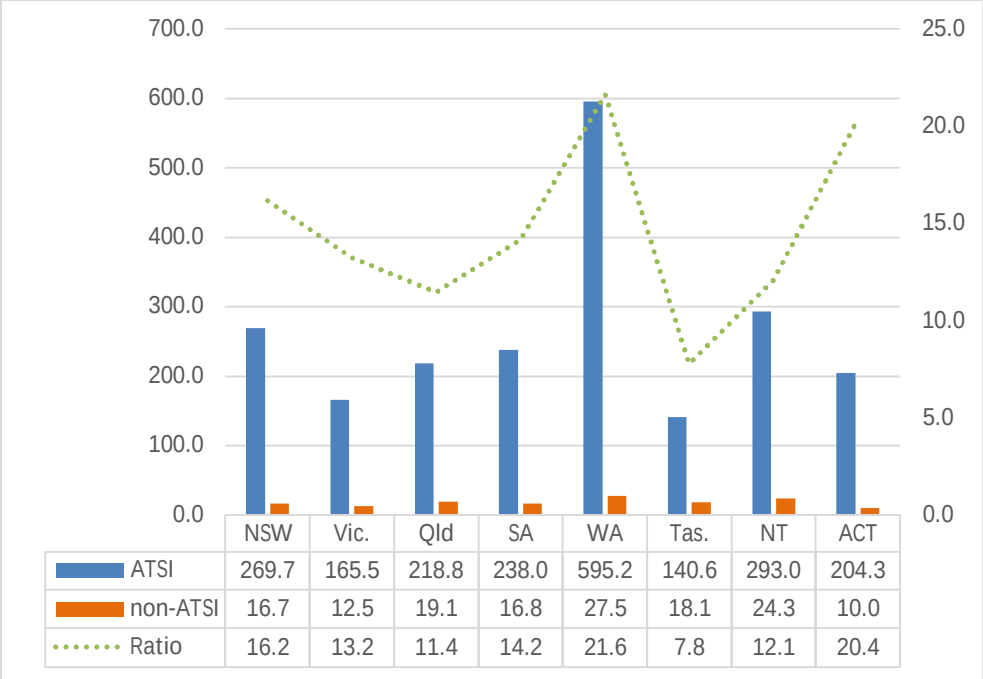
	Males	Females
ATSI	4,271.4	464.8
non-ATSI	291.1	21.9
Ratio	14.7	21.2

Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 20.

3.27 Jurisdictional variations in female imprisonment rates are shown in Figure 3.6.[27] WA presents as having the highest rate of imprisonment of women. WA also has the greatest differential between Aboriginal and Torres Strait Islander female imprisonment rates and non-Indigenous female imprisonment rates.

27 The rates shown are not age standardised.

Figure 3.6: Jurisdictional variations in Aboriginal and Torres Strait Islander female imprisonment rates and non-Indigenous female imprisonment rates

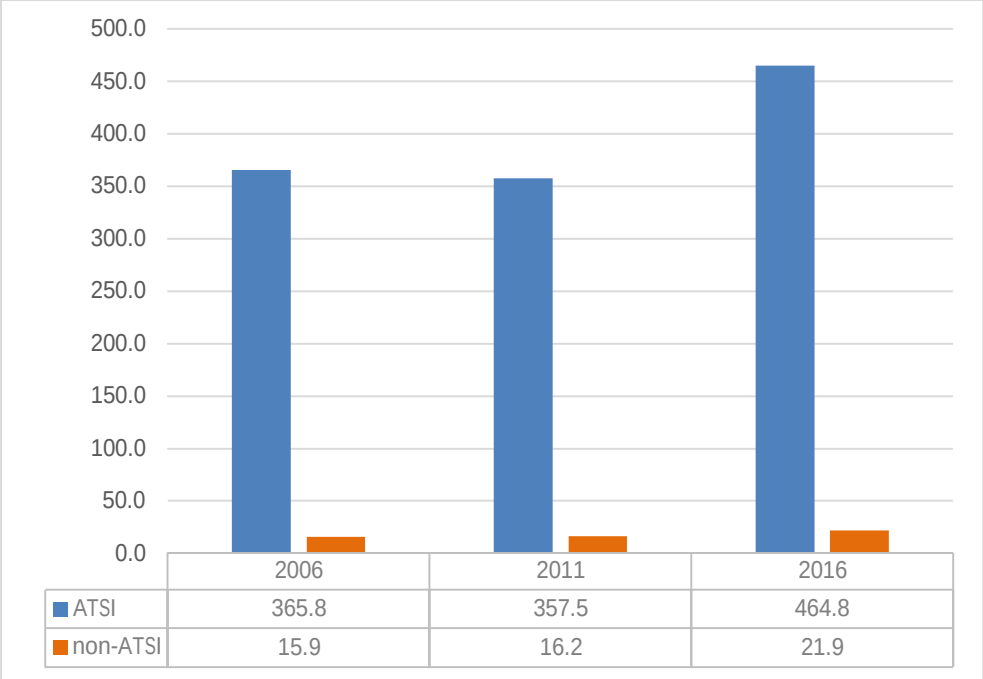


	NSW	Vic.	Qld	SA	WA	Tas.	NT	ACT
ATSI	269.7	165.5	218.8	238.0	595.2	140.6	293.0	204.3
non-ATSI	16.7	12.5	19.1	16.8	27.5	18.1	24.3	10.0
Ratio	16.2	13.2	11.4	14.2	21.6	7.8	12.1	20.4

Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 20.

3.28 Since 2006, the rate of imprisonment of Aboriginal and Torres Strait Islander women has increased. As Figure 3.7 below shows, this rate increased from 365.8 per 100,000 adult Aboriginal and Torres Strait Islander females in 2006, to 464.8 per 100,000 in 2016. The rate of imprisonment of non-Indigenous women also increased but was markedly lower at just 21.9 per 100,000 adult non-Indigenous females.

Figure 3.7: Trends in the rate of imprisonment of Aboriginal and Torres Strait Islander women, 2006, 2011 and 2016



Source: Australian Bureau of Statistics, *Prisoners in Australia* – (2006) table 5 (2011) table 4 (2016) table 20.

3.29 The ALRC discusses the particular issues attached to the imprisonment of Aboriginal and Torres Strait Islander women in Chapter 11.

Charges before the courts

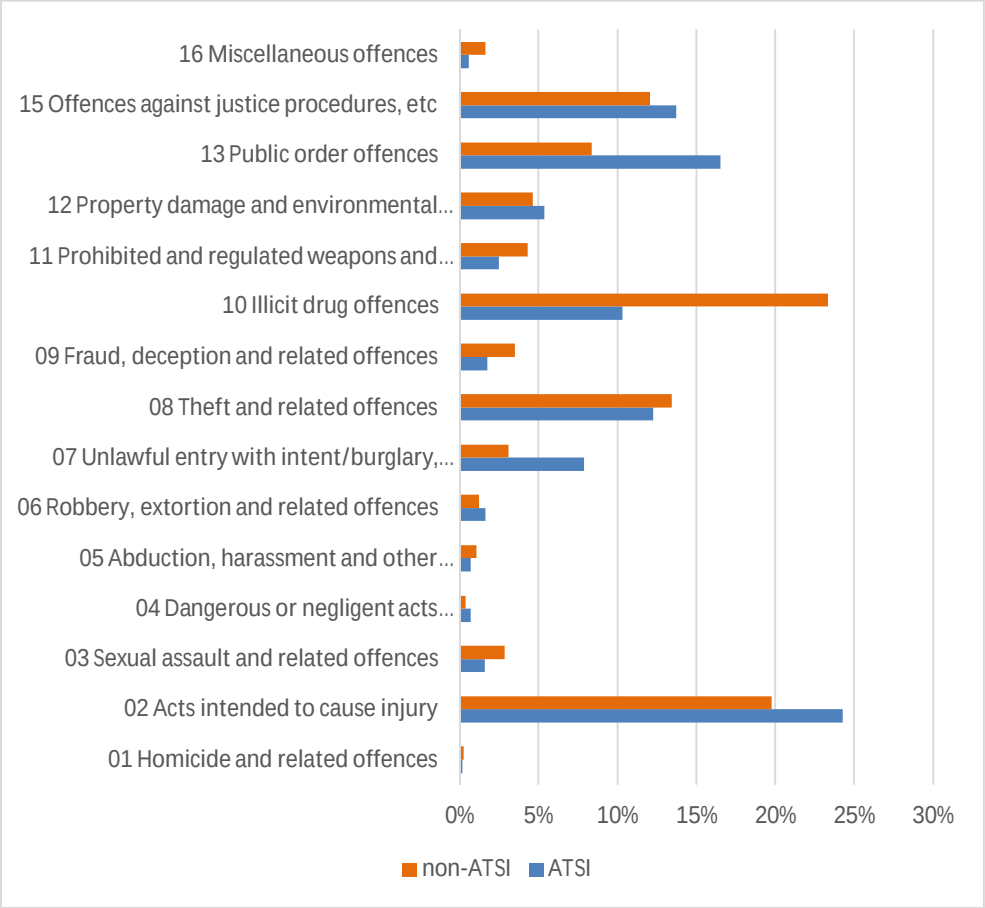
3.30 Over-representation of Aboriginal and Torres Strait Islander peoples is evident from the time of court appearance for criminal charges. The level of over-representation of Aboriginal and Torres Strait Islander people in court finalisations in 2016 was 7. That is, Aboriginal and Torres Strait Islander people were seven times more likely to be charged with a criminal offence and appear in court than non-Indigenous people.

3.31 Using the ANZOC categories,[28] the four most common offences for which Aboriginal and Torres Strait Islander people were charged and subsequently appeared in court were: acts intended to cause injury (comprising 24% of all Aboriginal and Torres Strait Islander defendants in 2016); public order offences (17%); offences against justice (14%); and theft and related offences (12%).

28 Australian Bureau of Statistics, above n 23.

3.32 In contrast, the four most common offences for which non-Indigenous people were charged and appeared in court were: illicit drug offences (comprising 23% of all non-Indigenous defendants); acts intended to cause injury (20%); theft and related offences (13%); and offences against justice (12%).

Figure 3.8: Offence profile of Aboriginal and Torres Strait Islander people and non-Indigenous people who appeared in court (2016)



Source: Australian Bureau of Statistics, *Criminal Courts, Australia, 2015–16*, 45130_201516 (2017) requested table, table 1.

3.33 A high percentage of Aboriginal and Torres Strait Islander peoples were charged with offences within the category of 'acts intended to cause injury', yet 35% of these charges related to 'serious assaults not causing injury'. Aboriginal and Torres Strait Islander peoples were over-represented in this offence type, constituting 44% of all people charged with 'serious assaults not causing injury'.

3.34 A breakdown of 'acts intended to cause injury' is presented in Table 3.1 below.

Table 3.1: Breakdown of people who appeared in court for 'acts intended to cause injury' offence types by Aboriginal and Torres Strait Islander status (2016)

Sub categories of 'acts intending to cause injury'	Aboriginal and Torres Strait Islander people		Non-Indigenous	
	number and % charged with acts intending to cause injury	% charged with sub category	number and % charged with acts intending to cause injury	% charged with sub category
0211 Serious assault resulting in injury	3,602 (32%)	26%	10,392 (32%)	74%
0212 Serious assault not resulting in injury	3,886 (35%)	44%	4,862 (15%)	56%
0213 Common assault	3,002 (27%)	18%	13,733 (42%)	82%
029 Other acts intended to cause injury	680 (6%)	15%	3,819 (12%)	85%
TOTAL	11,185 (100%)	25%	32,795 (100%)	75%

Source: Australian Bureau of Statistics, *Criminal Courts*, Australia, 2015-16, 45130_201516 (2017) requested table, table 1.

Remand

3.35 The prison population typically comprises two categories of prisoners—those who have been sentenced and those who are on remand (remandees). A person on remand has not applied for bail or has been denied bail by the courts and is in prison awaiting either trial or sentence. Bail decision-making is discussed in Chapter 5.

3.36 While equal proportions of the Aboriginal and Torres Strait Islander and the non-Indigenous prison populations were on remand (both approximately 30%), Aboriginal and Torres Strait Islander people were over-represented in the remand population on census night—constituting 27% (3,221) of all people in prison on remand.[29]

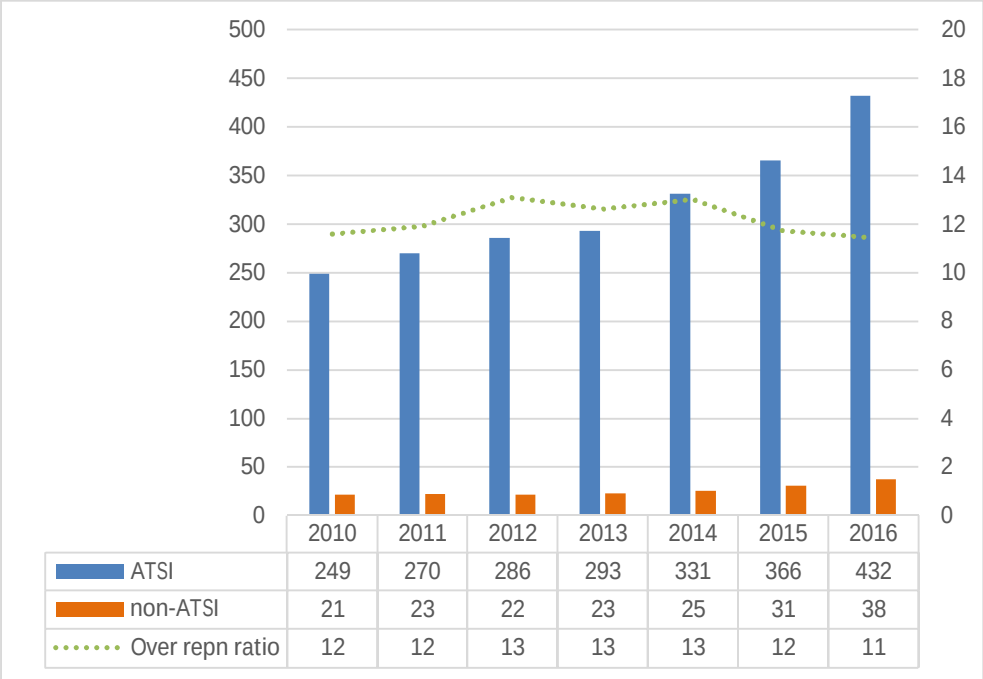
Trends in remand rates

3.37 The over-representation ratio of Aboriginal and Torres Strait Islander people to non-Indigenous people in the remand population has remained fairly static. Since 2010, the rate of remand for Aboriginal and Torres Strait Islander peoples increased from 249

29 Australian Bureau of Statistics, above n 1, table 8.

per 100,000 persons to 432 per 100,000 persons. The remand rate for non-Indigenous people increased from 21 per 100,000 to 38 per 100,000. While the remand prison population has grown over time, Aboriginal and Torres Strait Islander people have continued to be over-represented in the remand population by a factor of over 11.

Figure 3.9: Trends in Aboriginal and Torres Strait Islander and non-Indigenous rates of remand, Australia (2010−2016)



	2010	2011	2012	2013	2014	2015	2016
ATSI	249	270	286	293	331	366	432
non-ATSI	21	23	22	23	25	31	38
Over repn ratio	12	12	13	13	13	12	11

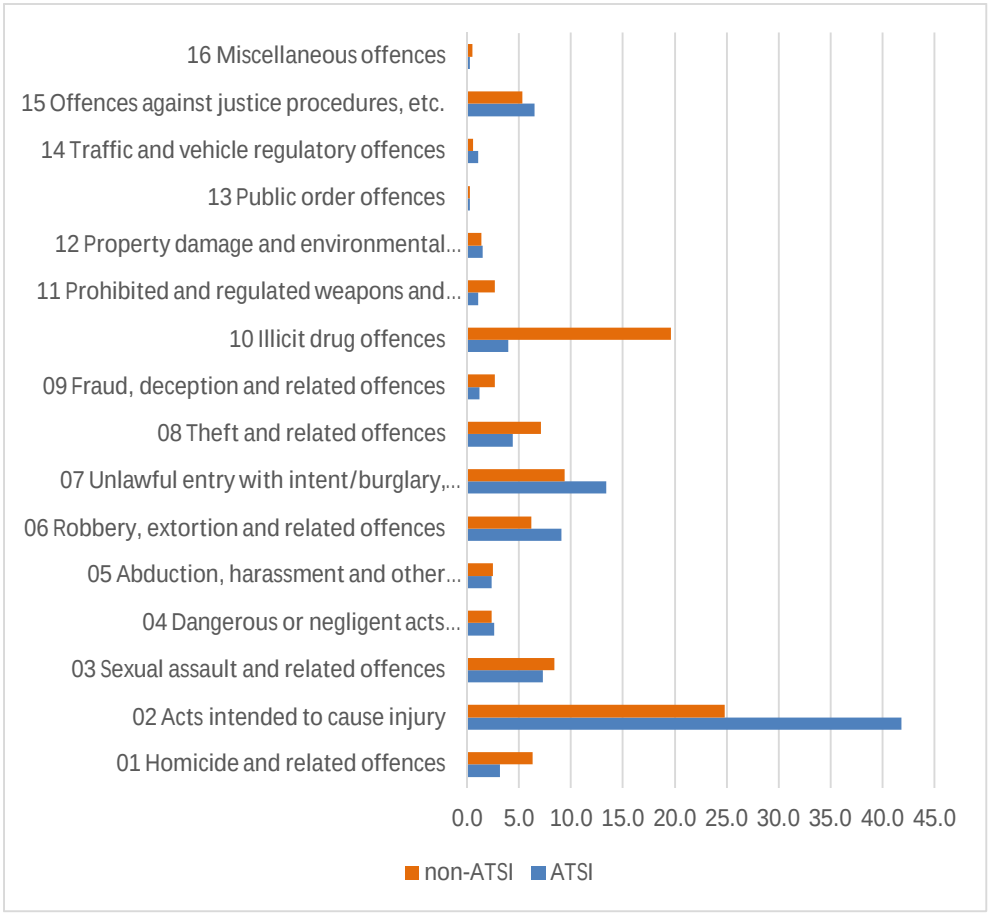
Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) requested table, table 12.[30]

The offence profile of remandees

3.38 The offence profile of the Aboriginal and Torres Strait Islander remandees and non-Indigenous remandee populations are shown in Figure 3.10. For both groups, the offence category of 'acts intended to cause injury' accounted for the largest proportion of remandees (42% of Aboriginal and Torres Strait Islander remandees; 25% of non-Indigenous remandees).

30 Rates have been calculated using ABS estimated resident populations for Aboriginal and Torres Strait Islander peoples and non-Indigenous people, and are not age adjusted.

Figure 3.10: Offence profile of Aboriginal and Torres Strait Islander remandees and non-Indigenous remandees (2016)



Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016*, *Cat No 4517.0* (2016) requested table, table 12.

3.39 A more detailed examination of the 'acts intended to cause injury' category shows that, irrespective of Aboriginal and Torres Strait Islander status, most remandees were in prison for serious assaults resulting in injury (accounting for 54% of Aboriginal and Torres Strait Islander remandees and 58% of non-Indigenous remandees).

3.40 Aboriginal and Torres Strait Islander people remain over-represented in all offence types in this category, but especially so in 'serious assault not resulting in injury', of which Aboriginal and Torres Strait Islander people constituted 51% of remandees for that offence type. See Table 3.2 below.

Table 3.2: Breakdown of Aboriginal and Torres Strait Islander remandees and non-Indigenous remandees for 'acts intended to cause injury' (2016)

Sub categories of 'acts intended to cause injury'	Aboriginal and Torres Strait Islander people		Non-Indigenous	
	number and % charged with acts intending to cause injury	% charged with sub category	number and % charged with acts intending to cause injury	% charged with sub category
0211 Serious assault resulting in injury	732 (54%)	36%	1,275 (58%)	64%
0212 Serious assault not resulting in injury	449 (33%)	51%	439 (20%)	49%
0213 Common assault	158 (12%)	28%	405 (18%)	72%
029 Other acts intended to cause injury	13 (1%)	14%	77 (4%)	86%
TOTAL	1,352 (100%)	38%	2,196 (100%)	62%

Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) requested table, table 12.

Aboriginal and Torres Strait Islander women held on remand

3.41 Aboriginal and Torres Strait Islander women are vastly over-represented in the remand population. The remand rate of Aboriginal and Torres Strait Islander women (104.3 per 100,000) on census night exceeded that of non-Indigenous women (6.7 per 100,000) and even exceeded the remand rate of non-Indigenous men (69.4 per 100,000).

3.42 The Aboriginal and Torres Strait Islander female over-representation ratio (15.7) also exceeded the over-representation ratio of Aboriginal and Torres Strait Islander men (10.9). See Table 3.3 below.

Table 3.3: Remand rates by gender and Aboriginal and Torres Strait Islander status (2016)

Persons on remand	Male		Female	
	Number	**Rate (per 100,000)**	**Number**	**Rate (per 100,000)**
Aboriginal or Torres Strait Islander	2,834	759.7	388	104.3
Non-Indigenous	8,079	69.4	788	6.7
Over-representation ratio		*10.9*		*15.7*

Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) requested table, table 4.

3.43 The impact of short prison stays on Aboriginal and Torres Strait Islander women, including imprisonment on remand, are discussed in Chapters 5 and 11.

Convictions and penalties imposed

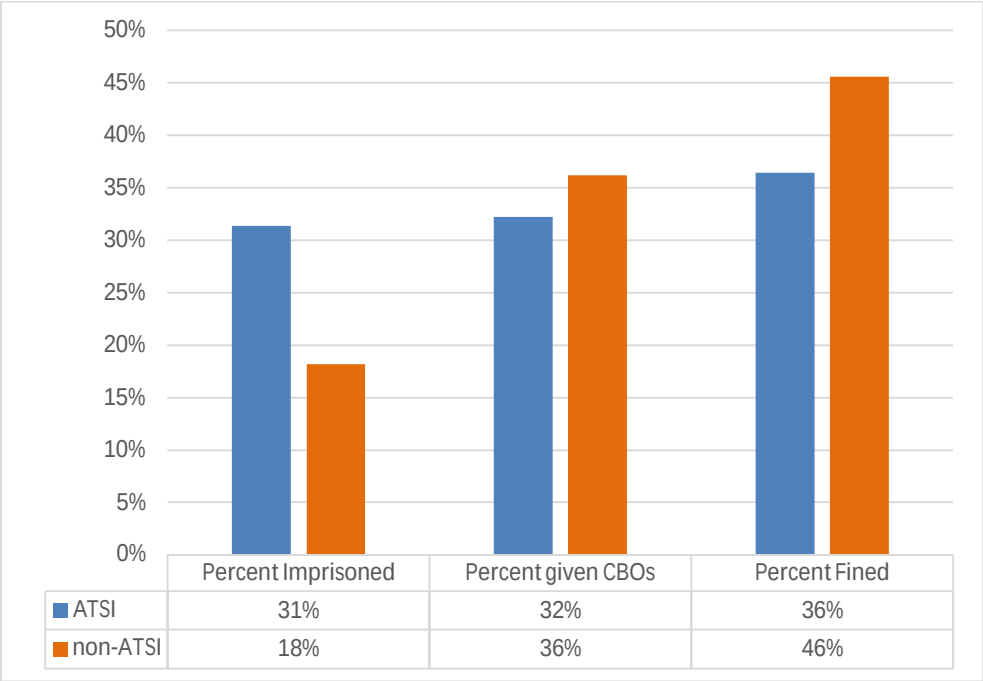
3.44 Aboriginal and Torres Strait Islander defendants were convicted in the same proportion as non-Indigenous defendants, but were more likely to receive a sentence of imprisonment.

3.45 The 'conviction rate'—that is, the rate of people who enter a plea of guilty or who are proven guilty—did not vary substantially by Aboriginal and Torres Strait Islander status: 85% of Aboriginal and Torres Strait Islander defendants were proven guilty, compared with 81% of non-Indigenous defendants.

3.46 However, a greater proportion of Aboriginal and Torres Strait Islander offenders received a sentence of imprisonment. Almost one third (31%) of Aboriginal and Torres Strait Islander defendants were given custodial sentences, compared with just 18% of non-Indigenous defendants. A further third (32%) of Aboriginal and Torres Strait Islander defendants were given community service[31] (compared with 36% of non-Indigenous defendants), with the remainder issued fines (36% of Aboriginal and Torres Strait Islander defendants compared with 46% of non-Indigenous defendants). See Figure 3.11 below.

31 Considered community-based orders (CBOs) in the relevant Figures and Tables.

Figure 3.11: Types of penalties imposed by the criminal courts (2016)

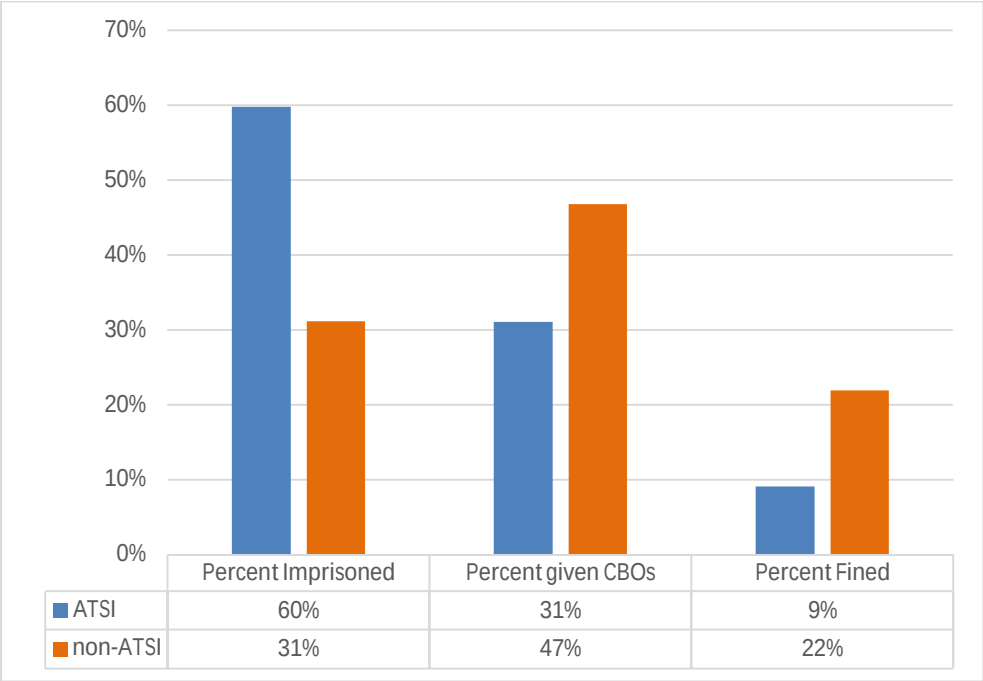


Source: Australian Bureau of Statistics, *Criminal Courts, Australia, 2015–16*, 45130_201516 (2017) requested table, table 3.

Penalty by offence type

3.47 The types of penalties issued by the courts vary by offence type. For some types of offences, the types of penalties issued to Aboriginal and Torres Strait Islander offenders differed markedly from those issued to non-Indigenous offenders. For 'acts intended to cause injury'—the most common offence type for which Aboriginal and Torres Strait Islander peoples were charged—three in every five Aboriginal and Torres Strait Islander offenders (60%) received a custodial sentence, compared with only one in three non-Indigenous offenders (30%). See Figure 3.12 below.

Figure 3.12: Types of court penalties imposed for 'acts intended to cause injury' (2016)

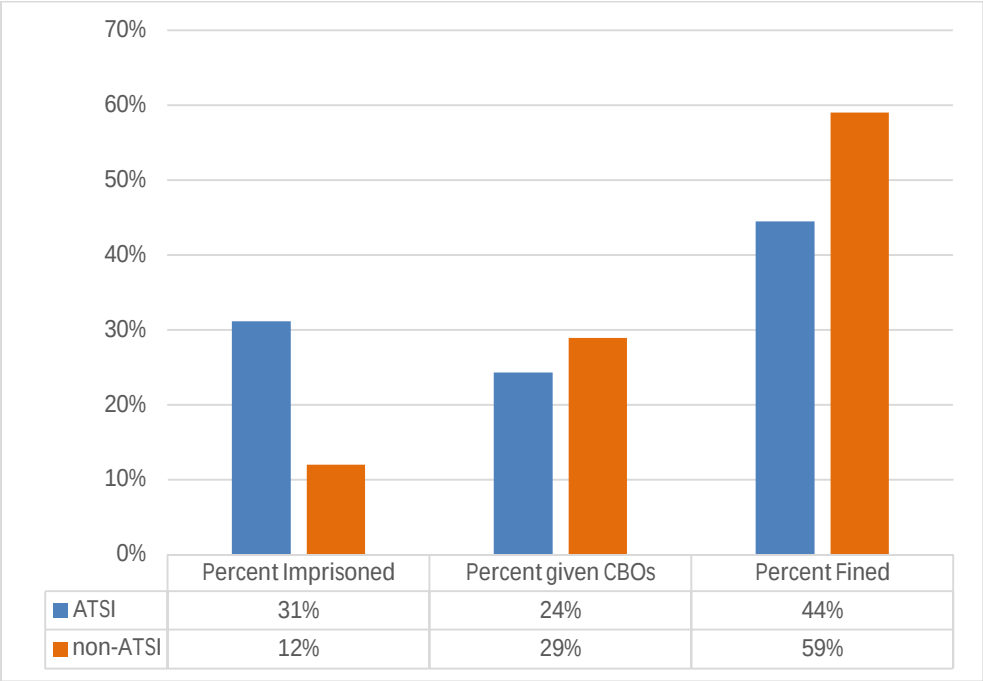


Source: Australian Bureau of Statistics, *Criminal Courts, Australia, 2015–16*, 45130_201516 (2017) requested table, table 3.

3.48 The over-representation ratio of Aboriginal and Torres Strait Islander offenders receiving a sentence of imprisonment for 'acts intended to cause injury' to non-Indigenous offenders was 17.8 (908.5 per 100,000 compared with 50.9 per 100,000).

3.49 Figure 3.13 shows a similar tendency towards the use of imprisonment for Aboriginal and Torres Strait Islander offenders convicted of 'justice-related offences' compared with non-Indigenous counterparts, where Aboriginal and Torres Strait Islander offenders were over-represented by a factor of 21.1 (326.6 per 100,000 compared with 15.5 per 100,000).

Figure 3.13: Types of court penalties imposed for justice-related offences (2016)



Source: Australian Bureau of Statistics, *Criminal Courts, Australia, 2015–16*, 45130_201516 (2017) requested table, table 3.

3.50 Justice procedure offending and ways to limit breaches of court orders are discussed in Chapter 7.

3.51 This pattern was not isolated to these offence categories. Table 3.4 shows that, for all offence categories except unlawful entry with intent, Aboriginal and Torres Strait Islander defendants were more likely to be handed a custodial sentence by the courts than their non-Indigenous counterparts.

Table 3.4: Penalty differences by offence type, for Aboriginal and Torres Strait Islander offenders and non-Indigenous convicted offenders (2016)

Principal offence	% of guilty defendants who are imprisoned		% of guilty defendants who get CBOs		% of guilty defendants who are issued fines	
	ATSI	Non-ATSI	ATSI	Non-ATSI	ATSI	Non-ATSI
01 Homicide and related offences	100%	98%	0%	0%	0%	2%
02 Acts intended to cause injury	60%	31%	31%	47%	9%	22%
03 Sexual assault and related offences	78%	75%	20%	21%	2%	4%

Principal offence	% of guilty defendants who are imprisoned		% of guilty defendants who get CBOs		% of guilty defendants who are issued fines	
	ATSI	**Non-ATSI**	**ATSI**	**Non-ATSI**	**ATSI**	**Non-ATSI**
04 Dangerous or negligent acts endangering persons	44%	23%	44%	46%	12%	31%
05 Abduction, harassment and other offences against the person	40%	29%	38%	44%	22%	27%
06 Robbery, extortion and related offences	83%	75%	17%	25%	0%	0%
07 Unlawful entry with intent/burglary, break and enter	49%	50%	48%	40%	3%	10%
08 Theft and related offences	22%	15%	41%	34%	37%	50%
09 Fraud, deception and related offences	38%	30%	33%	34%	29%	36%
10 Illicit drug offences	15%	12%	24%	34%	61%	54%
11 Prohibited and regulated weapons and explosives offences	28%	18%	31%	29%	42%	53%
12 Property damage and environmental pollution	19%	10%	47%	49%	34%	42%
13 Public order offences	6%	4%	30%	37%	64%	59%
15 Offences against justice procedures, government security and government operations	31%	12%	24%	29%	44%	59%
16 Misc offences	12%	5%	29%	26%	60%	69%
Total defendants proven guilty	**31%**	18%	**32%**	36%	**36%**	46%

Source: Australian Bureau of Statistics, *Criminal Courts, Australia*, *2015–16*, 45130_201516 (2017) requested table, tables 1-3.

3.52 The sentencing of Aboriginal and Torres Strait Islander offenders is discussed in Chapter 6. Ways to increase access to community-based sentences for Aboriginal and Torres Strait Islander offenders are further discussed in Chapter 7, and recommendations to decrease the potential harm caused by fines are discussed in Chapter 12.

Offences that lead to a sentence of imprisonment

3.53 'Stock' statistics show that the four most common offences for which Aboriginal and Torres Strait Islander offenders were imprisoned were similar to those for which they were charged, excluding public order offences, and included: acts intended to cause injury (comprising 33% of all Aboriginal and Torres Strait Islander prisoners on census night); burglary (15%); offences against justice (11%); and robbery (11%). The offence profile of female Aboriginal and Torres Strait Islander prisoners was similar.

3.54 This can be contrasted with the four most common offences for which non-Indigenous offenders were imprisoned: illicit drug offences (comprising 17.5% of all non-ATSI prisoners on census night); acts intended to cause injury (17%); sexual assault (13%); and burglary (10%), which varied significantly from the top four offences charged.

3.55 As discussed above, 'stock' data are biased toward prisoners serving long sentences (i.e. serious offending). Accordingly, offenders charged with 'acts intended to cause injury' emerged as a significant sub-group of incarcerated offenders. Statistics which reported on 'flow' produce a different, though equally valid, profile of imprisoned offenders, providing insight into prisoners who commit less serious offences and receive shorter sentences. These are outlined below, and indicate that theft, public order and property offences also led to the imprisonment of Aboriginal and Torres Strait Islander peoples.

Acts intended to cause injury

3.56 'Stock' data for prisoners incarcerated for 'acts intended to cause injury' showed some differences in the offences of Aboriginal and Torres Strait Islander populations and non-Indigenous populations in this category, where Aboriginal and Torres Strait Islander offenders were over-represented to a factor of 26.2[32] (293.4 per 100,000 compared with 11.2 per 100,000).

3.57 The majority of Aboriginal and Torres Strait Islander prisoners were incarcerated for serious assault resulting in injury. A greater proportion of Aboriginal and Torres Strait Islander offenders were incarcerated for assaults that did *not* result in injury (compare 30% of Aboriginal and Torres Strait Islander with 17% of non-Indigenous). Aboriginal and Torres Strait Islander offenders were grossly over-represented in the cohort of offenders imprisoned for 'serious assault not resulting in injury', making up 56% of all people imprisoned for that offence category.

32 Sentenced prisoners only.

Table 3.5: Further breakdown of prisoners who are incarcerated for 'acts intended to cause injury' (2016)

Sub categories of 'acts intending to cause injury'	Aboriginal and Torres Strait Islander people		Non-Indigenous	
	number and % charged with acts intending to cause injury	% charged with sub category	number and % charged with acts intending to cause injury	% charged with sub category
0211 Serious assault resulting in injury	2,072 (59%)	41%	2,998 (62%)	59%
0212 Serious assault not resulting in injury	1,063 (30%)	56%	832 (17%)	44%
0213 Common assault	307 (9%)	30%	719 (15%)	70%
029 Other acts intended to cause injury	92 (3%)	25%	275 (6%)	75%
TOTAL	3,534 (100%)	42%	4,825 (100%)	58%

Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) requested table, table 1.

Offences against justice

3.58 A similar more detailed analysis of the people who were incarcerated for justice procedure offences on census night also revealed some differences between the Aboriginal and Torres Strait Islander populations and non-Indigenous populations, and clearly illustrated the disproportionate representation of Aboriginal and Torres Strait Islander peoples in these offence types—Aboriginal and Torres Strait Islander peoples constituted 34% of all people imprisoned for 'justice-related' offending.

Table 3.6: Further breakdown of prisoners who are incarcerated for justice-related offences (2016)

Sub categories of 'offences against justice procedures, government security and government operations'	Aboriginal and Torres Strait Islander people		Non-Indigenous	
	number and % charged with justice-related offences	% charged with sub category	number and % charged with justice-related offences	% charged with sub category
151 Breach of custody	55 (5%)	44%	70 (3%)	56%
152 Breach of community-based orders	718 (62%)	31%	1573 (69%)	69%
153 Breach of Violence Orders/Non-Violence Orders	344 (30%)	46%	398 (18%)	54%
154 Offences against gov ops	8 (1%)	14%	50 (2%)	86%
155 Offences against gov security	3 (0%)	7%	40 (2%)	93%
156 Offences against justice	36 (3%)	21%	139 (6%)	79%
TOTAL	1,164 (100%)	34%	2,270 (100%)	66%

Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) requested table, table 1.

3.59 Aboriginal and Torres Strait Islander peoples were over-represented in 'offences against justice procedures' by 16.8[33] (129 per 100,000 compared with 7.7 per 100,000 for non-Indigenous offenders).

'Flow' statistics regarding offences leading to imprisonment

3.60 'Flow' offence profiles showed that less serious offences also led to sentences of imprisonment for Aboriginal and Torres Strait Islander offenders, such as 'theft', 'public order' and 'property damage' offences.[34]

33 Sentenced prisoners only.

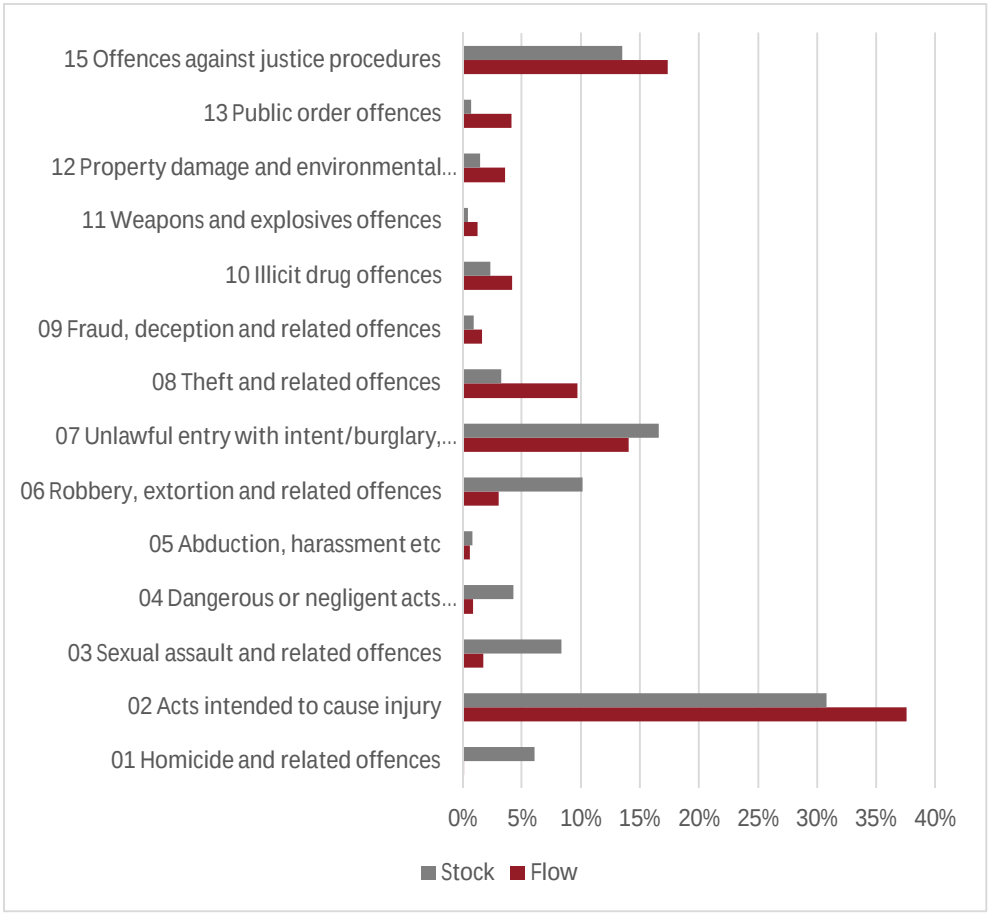
3.61 The differences between 'stock' and 'flow' figures are clearly shown in Figures 3.14 and 3.15 below. 'Stock' data generate a picture of a prison population heavy with serious offenders and longer sentences. 'Flow' data shows that Aboriginal and Torres Strait Islander peoples were also being imprisoned for low-level offending for short periods of time.

3.62 Figure 3.14 illustrates the difference in the offence profile of Aboriginal and Torres Strait Islander prisoners via the 'stock' and Aboriginal and Torres Strait Islander 'flow' populations. As the Figure shows, less serious offences—such as theft offences, public order offences, and property damage—feature more prominently in the 'flow' profile, along with acts intended to cause injury and justice procedure offending.

3.63 Figure 3.15 shows the comparable sentence lengths in years, and highlights the difference between 'stock' and 'flow' estimates, with flow statistics showing significantly shorter sentences than stock. Together Figures 3.14 and 3.15 show why reliance on just one set of data can skew understandings of the constitution of the prison population.

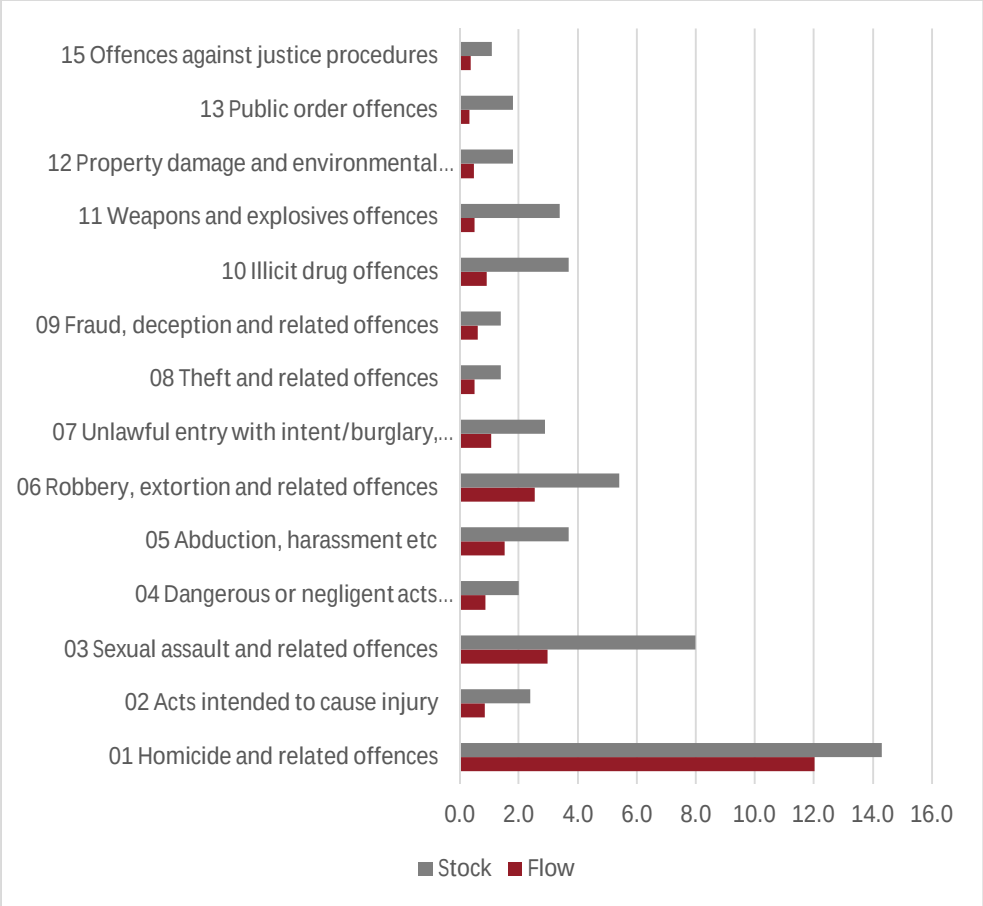
34 Traffic offences are unreported, so no commentary can be made.

Figure 3.14: Comparison of the offence profile of Aboriginal and Torres Strait Islander prison 'stock' (census) and prison 'flow' (reception) populations (2016)



Source: Australian Bureau of Statistics, *Criminal Courts, Australia, 2015–16, Cat No 4513.0* (2017) table 51; Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 10.

Figure 3.15: Comparison of the average sentence length by year of Aboriginal and Torres Strait Islander prison 'stock' (census) and prison 'flow' (reception) populations (2016)



Source: Australian Bureau of Statistics, *Criminal Courts, Australia, 2015–16, Cat No 4513.0* (2017) table 51; Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 10.

3.64 The ALRC discusses short sentences of imprisonment in Chapter 7, with preference for the expansion of community-based sentences, where appropriate. Further data relevant to short sentences of imprisonment is presented below.

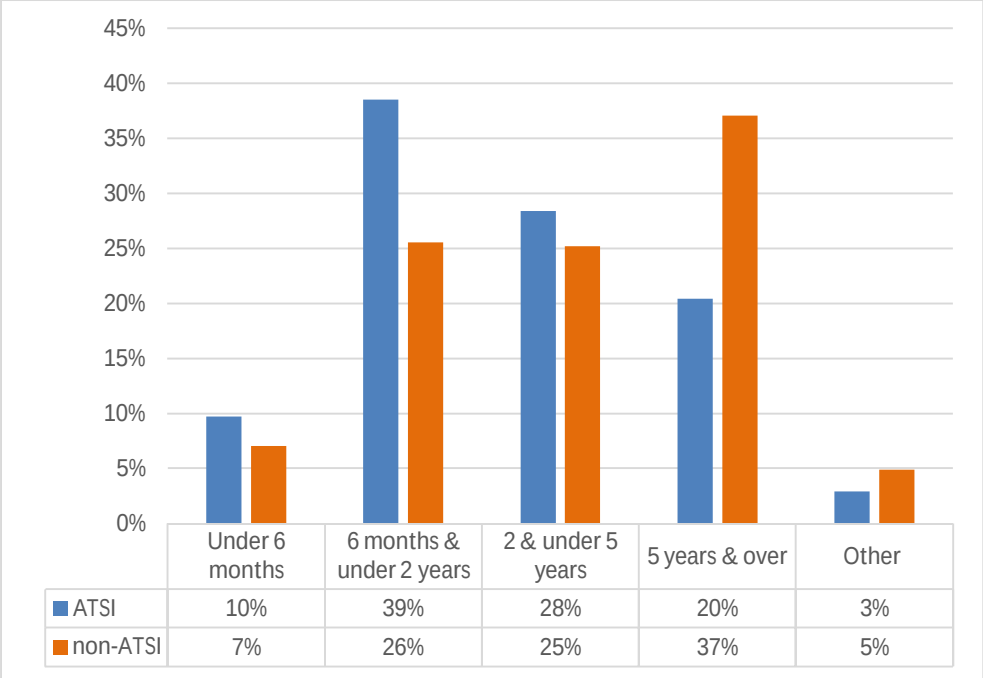
Short sentences of imprisonment

3.65 Aboriginal and Torres Strait Islander offenders generally received shorter sentences of imprisonment than non-Indigenous people. This was apparent in the 'stock' statistics below, where the median aggregate sentence length for Aboriginal and Torres Strait Islander sentenced prisoners in 2016 was 2.0 years, compared with 3.5

years for non-Indigenous prisoners.[35] This contrast was also evident in the 'flow' data (see Figure 3.15 above).

3.66 'Stock' data shows that Aboriginal and Torres Strait Islander prisoners received shorter sentences in almost all offence categories—the main exception being sexual assault offences where Aboriginal and Torres Strait Islander prisoners and non-Indigenous prisoners receive sentences of equal length. In 2016, almost half (49%) of all Aboriginal and Torres Strait Islander prisoners received an aggregate sentence length of less than two years, compared with one-third (32%) of non-Indigenous prisoners. This is presented in Figure 3.16 below.

Figure 3.16 Aggregate sentence length of Aboriginal and Torres Strait Islander sentenced prisoners and non-Indigenous sentenced prisoners



	Under 6 months	6 months & under 2 years	2 & under 5 years	5 years & over	Other
ATSI	10%	39%	28%	20%	3%
non-ATSI	7%	26%	25%	37%	5%

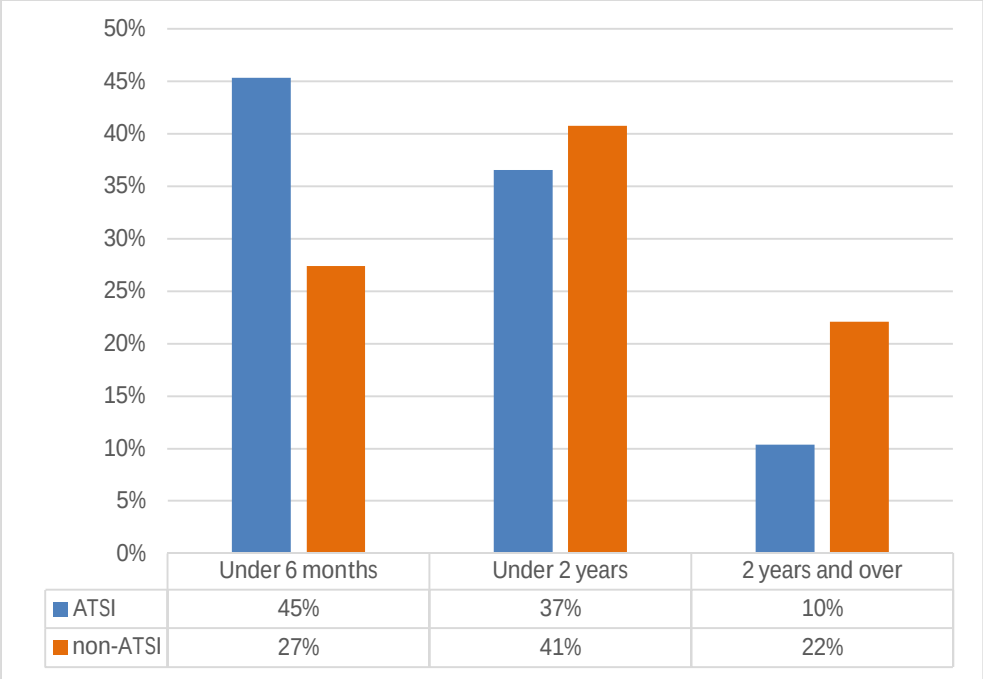
Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 10.

'Flow' statistics showing sentences of imprisonment

3.67 Figure 3.17 shows that, when counting 'flow', almost half (45%) of all Aboriginal and Torres Strait Islander defendants who received custodial sentences were handed sentences of less than six months (compared with 27% of equivalent non-Indigenous defendants).

35 Australian Bureau of Statistics, above n 1, table 10.

Figure 3.17: Length of sentences handed down to convicted and imprisoned defendants, by principal offence and Aboriginal and Torres Strait Islander status (2016)

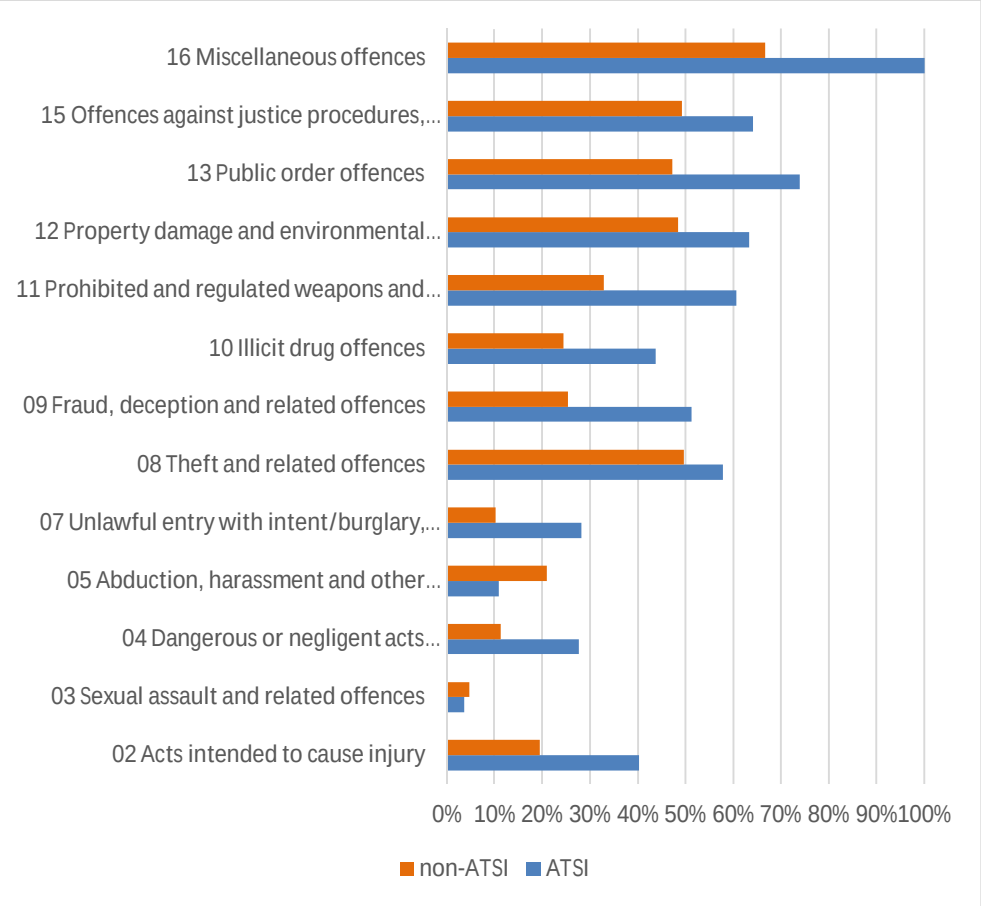


	Under 6 months	Under 2 years	2 years and over
ATSI	45%	37%	10%
non-ATSI	27%	41%	22%

Source: Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16, Cat No 4513.0* (2017) requested table 45130_201516, table 4.

3.68 Figure 3.18 shows that—other than miscellaneous offences—most Aboriginal and Torres Strait Islander offenders who received a sentence of imprisonment for less than six months were convicted of public order offences, justice-related offences, and property damage offences.

Figure 3.18: Proportion of custodial sentences given to Aboriginal and Torres Strait Islander offenders and non-Indigenous offenders that are under six months (2016)



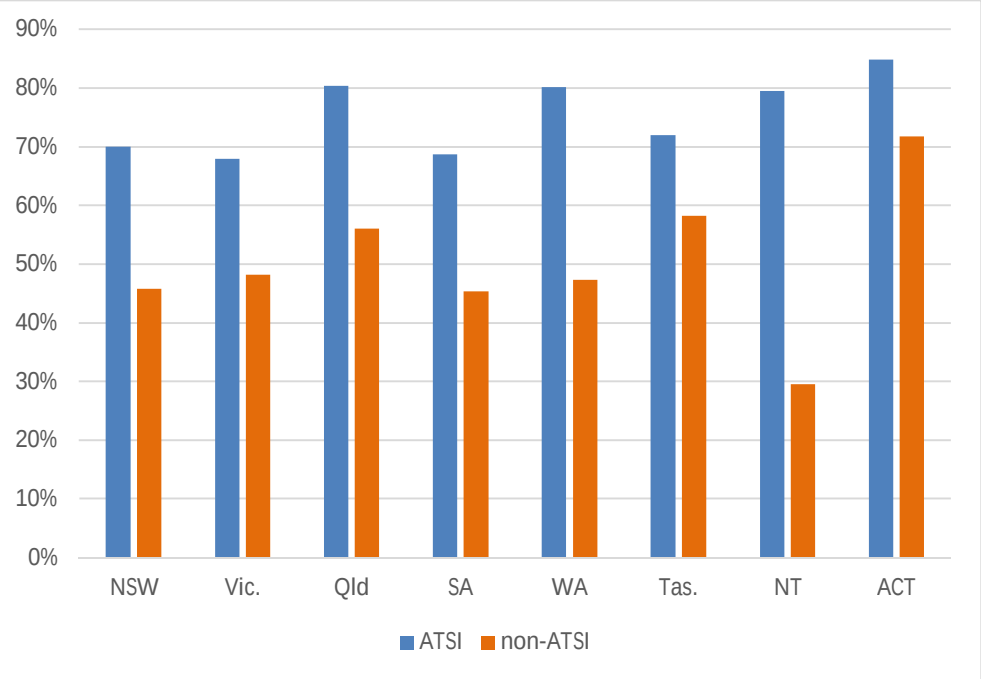
Source: Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16, Cat No 4513.0* (2017) requested table 45130_201516, table 4.

Recidivism and prior record of imprisonment

3.69 National estimates of the recidivism of offenders are not routinely published. Instead, the prior record of imprisonment of prisoners is examined. It is important to note, however, that prior record is *not* a measure of recidivism—it is incorrect to conclude that, because 76% of Aboriginal and Torres Strait Islander prisoners may be repeat offenders, the recidivism rate is 76%. Prior record is, for each prisoner, simply a count of all previous terms of imprisonment across the life-course of that individual. It is not adjusted for age or any other factor. It is *not* a forecast of the likelihood of future offending nor does it take into account the time period within which such offending might occur. It is, nonetheless, the only measure currently available.

3.70 Nationally, the proportion of prisoners with a prior record of imprisonment was very high: three quarters (76%) of Aboriginal and Torres Strait Islander prisoners and half (49%) of non-Indigenous prisoners in 2016 had been in custody on at least one previous occasion. As Figure 3.19 shows, in every jurisdiction, a greater proportion of Aboriginal and Torres Strait Islander prisoners than non-Indigenous prisoners had a prior record of imprisonment.

Figure 3.19: Proportion of prisoners with a prior record of imprisonment by Aboriginal and Torres Strait Islander status (2016)



Source: Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) requested table, table 14.

3.71 The ALRC discusses the role of prior imprisonment in bail decisions of accused Aboriginal and Torres Strait Islander peoples in Chapter 5 and in sentencing decisions in Chapter 6. Reforms that aim to minimise return to prison are discussed in Chapter 9 on prison programs, parole and throughcare.

Limitations of the data

3.72 While the ABS PIA plays a pivotal role in providing vital imprisonment statistics for Australia, the series is not without limitations. As a census based collection, the statistics are based only on those prisoners who were present on the night of 30 June of the reference year. These statistics therefore only measure the 'stock' of persons in prison. They do not count or report on the total 'flow' of prisoners who come into and leave prison over a defined period. Any person who may have entered and exited prison prior to June 30 is not included in the PIA statistics.

3.73 'Stock' statistics are an important indicator of incarceration levels; however, they under count the number of prisoners who serve short sentences and, conversely, over count prisoners who serve longer sentences (being those who commit more serious offences and receive longer terms of imprisonment).

3.74 The statistics presented in the ABS PIA series are also incomplete:

- The series does not report on fine defaulters in the prison system nor does it provide any information on whether persons in prison for traffic/driving licence offences are related to the operation of fines enforcement systems in some jurisdictions, i.e. where driver's licences may be suspended as a result of non-payment of fines.
- The PIA series is also unable to report on the number of remandees who go on to serve a term of imprisonment. In a recent report entitled *What's Causing the Growth in Indigenous Imprisonment in NSW?* (2016), BOCSAR noted that up to 40 percent of Aboriginal and Torres Strait Islander defendants held on remand did not receive a custodial penalty on conviction in the study period. This statistic cannot be derived from ABS statistics and the extent to which remandees go on to serve prison sentences is not known.
- PIA also does not report on indeterminate prisoners.[36]

Prison reception statistics

3.75 Unfortunately, publications that report on other aspects of the prison population (such as the number of people coming into or exiting prison) are not routinely reported or do not report in sufficient detail to monitor Aboriginal and Torres Strait Islander incarceration levels.

Access to data on incarceration rates

3.76 In addition to undertaking data analyses, Curtin University was requested to provide the ALRC with proposals relating to improvements in data collection and the monitoring of incarceration rates of Aboriginal and Torres Strait Islander people. In consultation with a number of experts in the field, Curtin University provided the following proposals:

3.77 **More complete data on imprisonment levels:** If Australia is to reduce the number of Indigenous people who come into contact with the prison system it needs complete, timely and accessible information about incarceration levels of Aboriginal and non-Aboriginal people. National prison statistics are produced annually by the ABS but these are incomplete—they do not count or report on the total 'flow' of prisoners who come into and leave prison over a defined period.

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36 Other limitations/exclusions of the series are described by the ABS in Australian Bureau of Statistics, *Prisoners in Australia 2016—Explanatory Notes* <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Explanatory%20Notes12016?OpenDocument>.

3.78 Basic statistics on *both* the number of people coming into and exiting prisons ('flow' data) as well as the 'stock' of prisons (i.e. the number of people in custody on any one day) are essential for ongoing monitoring, and for the design and rigorous evaluation of new policies.

3.79 The following means of obtaining greater statistical information were put forward:

- Expansion of the current national prison publications to include the collection and dissemination of prison reception statistics. This would enable more effective monitoring of the prison population and improve the visibility of offenders who serve short sentences or who are incarcerated for less serious offences.
- More regular production of stock and flow statistics - on a monthly, or at least quarterly basis, so that appropriate time series and panel analyses can be conducted. The federal nature of Australian Government opens the possibility of examining the effect of policy change in one jurisdiction using other jurisdictions as a control but this requires more frequent measurement of key variables than is currently the case.
- Inclusion of additional or improved statistics on prisoners such as more detailed information on remandees (particularly time spent on remand and what proportion of remandees go on to serve terms of imprisonment), fine defaulters and/or offenders in prison for traffic/driving licence offences related to the operation of fines enforcement systems in some jurisdictions i.e. where drivers' licences may be suspended as a result of non-payment of fines.

3.80 Additional details such as place held (e.g. police lock-ups or corrections facilities) and release status are also relevant given limited information on parole and community based orders. Reception data on inmate health status e.g. known substance abuse, mental illness, and communicable or other disease (e.g. TB, diabetes, etc.) would also assist in understanding underlying and related issues. This information could be captured using a DUMA style methodology.[37]

3.81 **Improving accessibility to data:** Recognising that it is difficult to include all possible cross-tabulations in publications, it was suggested that:

- the ABS work with other national and jurisdiction-based crime statistics agencies to explore methods of making unit record data collected on prisoners more accessible to the research community – such as through data cubes and CURFs. This would provide greater flexibility in the use of the data and permit a more fine-grained analysis of issues as/when required.

3.82 **Information about upstream factors:** Many factors, not just penal policy/practice, are known to have a bearing on incarceration levels. It is important for

37 See Australian Institute of Criminology, *Drug use monitoring in Australia* <http://www.aic.gov.au/about_aic/research_programs/nmp/duma.html>.

the community to have an understanding of how 'upstream factors' such as court/sentencing practices and policing policies/practice (e.g. arrest rates and bail decisions) influence imprisonment levels. For this reason, it was suggested that:

- national criminal court statistics be improved such that breakdowns of finalisations, sentencing decisions and penalties (quantum) by Aboriginal and Torres Strait Islander status are available for all jurisdictions. Information on traffic offences should also be included in the national court collections.
- the ABS NATSIS survey (Cat No 4714.0) be expanded to include more detail on self-reported offending and on the reason for arrest/imprisonment. At the moment it is possible to explore the correlates of victimisation but very difficult to explore the correlates of arrest/offending because there is no way of distinguishing between arrests for different kinds of crime.

3.83 It is critical that the Aboriginal and Torres Strait Islander status of defendants is accurately recorded and reported. This is especially important in WA which has the unenviable record of having both the highest rate of Indigenous imprisonment in Australia and one of the widest gaps between Aboriginal and Torres Strait Islander and non-Indigenous incarceration levels. It is disappointing that WA data, broken down by Aboriginal and Torres Strait Islander status, is not currently included in the ABS Criminal Courts Australia series.

3.84 **Recidivism rates:** National estimates of the recidivism of offenders are not routinely produced or published. Current proxy measures such as prior record of imprisonment are inadequate. It was suggested that:

- a nationally consistent approach to the estimation and analysis of recidivism rates, by way of detailed rigorous estimation of probabilities of returns to prison by offenders, with special attention paid to correlates of recidivism in prison populations. Consideration of a minimum length of follow-up time for estimates of re-imprisonment is also needed, this being critical for the development of risk tools.

3.85 The creation and use of properly validated risk assessment tools is also supported, as such tools, based on Australian prisons data, would assist in reducing the number of Indigenous people in custody. Prediction based on actuarial risk assessment tools have been shown to be more accurate than professional knowledge and experience, yet the level of investment in such instruments has been poor across Australia.

3.86 Finally, it was suggested that the best vehicle for conducting work on recidivism and risk assessment is through a collaboration between University-based researchers and national or state-based research agencies such as the Australian Institute of Criminology (AIC) and/or BOCSAR in NSW. This provides a useful blend of policy-relevant requirements, expertise in recidivism and the means to access critical data on incarceration and offending levels.

4. Justice Reinvestment

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Summary

4.1 Justice reinvestment involves the redirection of resources from the criminal justice system into local communities that have a high concentration of incarceration and contact with the criminal justice system. Incarceration is expensive: the annual cost per prisoner of providing corrective services in 2015–16 was $103,295,[1] and it has been estimated that the total justice system costs of Aboriginal and Torres Strait Islander incarceration in 2016 were $3.9 billion.[2] A justice reinvestment approach suggests that resources are better directed—and indeed savings will be made—by reinvesting a portion of this expenditure to address the causes of offending in places where there is a high concentration of offenders.

4.2 Justice reinvestment uses place-based, community-led initiatives to address offending and incarceration, using a distinct data-driven methodology to inform strategies for reform. There has been strong support in Australia for taking a justice reinvestment approach to addressing the rate of Aboriginal and Torres Strait Islander incarceration over a number of years, and justice reinvestment has been used overseas,

1 Based on a daily cost per prisoner per day of $283: Productivity Commission, *Report on Government Services 2017, Volume C: Justice* (Produced for the Steering Committee for the Review of Government Service Provision, 2017) 8.19.

2 PwC's Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (2017) 27.

particularly in some parts of the United States, to reduce criminal justice spending and to strengthen communities.

4.3 Justice reinvestment holds particular promise in addressing Aboriginal and Torres Strait Islander incarceration for at least two reasons. First, it has long been recognised that the key drivers of incarceration for Aboriginal and Torres Strait Islander people are external to the justice system, and justice reinvestment involves a commitment to invest in 'front-end' strategies to prevent criminalisation. Second, justice reinvestment, as a place-based approach, emphasises working in partnership with communities to develop and implement reforms, and thus accords with evidence that effective policy change to address Aboriginal and Torres Strait Islander disadvantage requires partnership with Aboriginal and Torres Strait Islander peoples.

4.4 The implementation of justice reinvestment requires significant technical expertise. To provide such expertise, the ALRC recommends that Commonwealth, state and territory governments should support the establishment of an independent justice reinvestment body to promote the reinvestment of resources from the criminal justice system to local community development initiatives to address the drivers of crime and incarceration, and to provide expertise in the methodology of justice reinvestment. While justice reinvestment should remain community-led, a national body with expertise in justice reinvestment methodology could assist in providing technical assistance to local sites wishing to implement justice reinvestment.

4.5 The body should be a national one because justice reinvestment involves a holistic approach to the drivers of incarceration, which extend beyond justice-related drivers to community and social drivers of offending. These policy priorities extend across all levels of government.

4.6 The ALRC envisages the justice reinvestment body's role to be limited: principally, to providing technical assistance in the implementation of a justice reinvestment approach. It would not have the authority to impose reinvestment plans, nor to direct the allocation of resources. Therefore, the ALRC further recommends that Commonwealth state and territory governments support place-based justice reinvestment initiatives, through resourcing, facilitating access to data, and facilitating participation by and coordination between relevant government departments.

What is justice reinvestment?

4.7 A justice reinvestment approach to criminal justice reform involves a redirection of money from prisons to fund and rebuild human resources and physical infrastructure in areas most affected by high levels of incarceration.[3] Justice reinvestment originated in the United States (US) as a response to an exponential growth in the rate of imprisonment since the 1970s.[4]

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3 Susan B Tucker and Eric Cadora, 'Justice Reinvestment' (Ideas for an Open Society 3(3), Open Society Institute, 2003) 2.

4 In 1975, the imprisonment rate in the US was 150 per 100,000. In 2013 it was 478 per 100,000: David Brown et al, *Justice Reinvestment: Winding Back Imprisonment* (Palgrave Macmillan, 2016) 21.

4.8 Justice reinvestment suggests that prisons are an investment failure, 'destabilising communities along with the individuals whom they fail to train, treat, or rehabilitate (and whose mental health and substance abuse are often exacerbated by the experience of imprisonment)'.[5] Instead, to address the causes of offending, money is better spent—and indeed savings can be made—by reinvesting in places where there are a high concentration of offenders. Justice reinvestment, its proponents contend, can serve both the ends of economic efficiency and social justice: 'the most efficient way to a just society is to reduce criminality at source through investment in social justice'.[6]

The costs of incarceration

4.9 Justice reinvestment has been supported on economic grounds, in that it provides a means for redirecting public money from imprisonment to strengthening individual and community capacity. Incarceration is expensive: the annual cost per prisoner of providing corrective services in 2015–16 was $103,295, and it has been estimated that the total justice system costs of Aboriginal and Torres Strait Islander incarceration in 2016 were $3.9 billion.[7]

4.10 When the costs of Aboriginal and Torres Strait Islander incarceration are broadened beyond those directly related to the justice system to include other economic costs, such as loss of productive output during incarceration, the cost of crime incurred by victims, the cost of increased mortality, excess burden of tax, and welfare costs, the cost rises to $7.9 billion.[8]

4.11 As well as the cost of imprisonment to the State, imprisonment has immediate and ongoing financial and social costs for both the imprisoned person and their family:

> Many people lose accommodation when imprisoned and become homeless once released from custody; these new problems lead to an increased likelihood of re-offending. Imprisonment of a parent can result in children having to relocate or having to enter into the care of the state—research confirms that these children are much less likely to complete secondary school and are more likely to become homeless, unemployed and come in contact with the criminal justice system. The social cost of imprisonment can also be seen through the inability of prison to reform or rehabilitate and in its self-reproductive nature: in NSW more than half of current prisoners have previously been imprisoned.[9]

4.12 Incarceration can also have a broader social cost, particularly when concentrated in a particular community. Commenting on the causes and consequences of the growth of incarceration in the US, the National Research Council of the National Academies noted that

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5 Tucker and Cadora, above n 3, 3.

6 Chris Fox, Kevin Albertson and Kevin Wong, *Justice Reinvestment: Can the Criminal Justice System Deliver More for Less?* (Routledge, 2013) 7.

7 Productivity Commission, above n 1, 8.19; PwC's Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (2017) 27.

8 PwC's Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (2017) 25–7.

9 Chris Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Routledge, 2016) 16. See also William R Wood, 'Justice Reinvestment in Australia' (2014) 9(1) *Victims & Offenders* 100, 108.

> because of the extreme social concentration of incarceration, the most important effects may be systemic, for groups and communities. If African American male high school dropouts have a high expectation of going to prison at some point in their lives, that expectation may change the behavior of all the men in the group, not just those actually going to prison. If a third of the young men in a poor community are incarcerated, skewing gender balance and disrupting family relations, incarceration may have community-level effects that shape the social context of community residents, even if their families are not involved in the criminal justice system.[10]

4.13 In the Australian context, research into impacts of incarceration on Indigenous Australians from remote communities has suggested that significant proportions of the population, particularly those aged 20–39, may be missing from these communities through incarceration, and that this contributes to 'intergenerational demographic, social and economic dysfunction'.[11]

4.14 Submissions to this Inquiry also pointed out the broader, community-level costs of incarceration. Jesuit Social Services noted that the

> social fabric of communities can play an influential role in buffering the worst effects of disadvantage, with community factors being shown to influence mental health levels in children, education and levels of safety and crime. The impacts of trauma (including neglect and exposure to violence) on children are severe and have lasting consequences, with altered brain growth and psychological functioning shown to be linked to trauma. There are long-term social costs associated with this, including mental health issues and other chronic health problems, criminality, homelessness, substance misuse and abuse and intergenerational transmission of abuse. It is estimated that child abuse and neglect in Australia cost almost $5 billion per year, including interventions and the associated long-term human and social costs.[12]

Approaches to reinvestment—criminal or social justice?

4.15 Early proponents of justice reinvestment emphasised that the 'reinvestment' envisaged was in communities affected by incarceration. In this analysis, justice reinvestment could be seen as 'preventative financing, through which policymakers shift funds away from dealing with problems "downstream" (policing, prisons) and toward tackling them "upstream" (family breakdown, poverty, mental illness, drug and alcohol dependency)'.[13] The Commission on English Prisons Today put it more starkly, arguing that 'Justice Reinvestment is not about alternatives within the criminal justice process, it is about alternatives outside of it'.[14]

4.16 The focus on upstream, or preventative, approaches is linked with an emphasis on intervention at a local level: 'a place-based community-focused justice reinvestment

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10 National Research Council of the National Academies, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014) 355–6.

11 Andrew Taylor, Hannah Payer and Tony Barnes, 'The Missing Mobile: Impacts from the Incarceration of Indigenous Australians from Remote Communities' [2017] *Applied Mobilities* 1, 1.

12 Jesuit Social Services, *Submission 100*. See also, eg, National Congress of Australia's First Peoples, *Submission 73*.

13 Tess Lanning, Ian Loader and Rick Muir, 'Redesigning Justice: Reducing Crime through Justice' (Institute of Public Policy Research, 2011) 6.

14 Commission on English Prisons Today, *Do Better, Do Less: The Report of the Commission on English Prisons Today* (The Howard League for Penal Reform, 2009) 49.

approach prioritises the importance of front-end holistic support which has the capacity to prevent criminalisation in the first instance'.[15]

4.17 However, as justice reinvestment has been implemented, especially in the US, it has largely involved redesign and reinvestment *within* the criminal justice system:

> Increasingly the aspirations of JR programmes are limited to reducing the use of incarceration through analysis of demand for prison places and identifying opportunities at different points in the system to divert offenders from custody and/or reduce the likelihood of re-offending on release. This model of JR—which we may describe as a criminal justice system redesign approach—places little attention on what is happening beyond the criminal justice system or on preventing criminality in the first place.[16]

4.18 Thus, it is possible to contrast two different forms of justice reinvestment: a social justice and a criminal justice approach. There is not necessarily mutual exclusivity between the aims of social justice and criminal justice reforms: '[i]n fact, what they represent is JR as a continuum, where the approach that is adopted by local, regional or national agencies may be shaped by dynamic factors—factors which can and do change over time'.[17]

4.19 On this view, justice reinvestment measures may intervene at all points of the criminal justice spectrum—to prevent people entering into the criminal justice system, as well as diversion from custody and in lowering the numbers of people returning to custody through breaching parole or reoffending.[18] Many of the recommendations in this Report, in this sense, are consistent with a justice reinvestment approach to the design of the criminal justice system.

4.20 A number of submissions made this observation. Jesuit Social Services provides a useful summation:

> Reforming laws and legal frameworks could help to drive justice reinvestment initiatives. Reforming laws regarding sentencing and bail, the conditions on which prisoners leave prison, and parole and probation supervision could potentially facilitate a decline in Aboriginal and Torres Strait Islander peoples imprisonment rates as part of a justice reinvestment approach. There may be benefit in legislating for diversion and sentencing options that allow for community-based alternatives to detention, so that justice reinvestment programs are utilised. [19]

4.21 Some considered that community-based sentencing was a representation of justice reinvestment.[20] The New South Wales (NSW) Council of Social Service called

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15 David Brown et al, above n 4, 119.

16 Chris Fox, Kevin Albertson and Kevin Wong, 'Justice Reinvestment and Its Potential Contribution to Criminal Justice Reform' (2013) 207 *Prison Service Journal* 38, 38.

17 Ibid 38–9.

18 Melanie Schwartz, 'Building Communities, Not Prisons: Justice Reinvestment and Indigenous over-Representation' (2010) 14(1) *Australian Indigenous Law Review* 2, 2.

19 Jesuit Social Services, *Submission 100*. See also, eg, Legal Aid NSW, *Submission 101*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Victorian Aboriginal Legal Service, *Submission 39*.

20 Recommendations about community-based sentencing are made in ch 7.

for 'more investment in community-based and Aboriginal-led assistance, diversion, rehabilitation, and post-release programs'.[21]

4.22 Reforms relating to fines and driving offences were also considered to be a form of justice reinvestment.[22] Victoria Legal Aid argued that work and development programs that allow an offender to 'work off' outstanding infringement fines were justice reinvestment in action, 'directing resources away from punishing individuals for outstanding fines and into addressing the issues which saw the individual incur the fine'.[23] A number of submissions also called for reforms to mandatory sentencing, arguing that current regimes inhibit the success of efforts to reduce spending on incarceration.[24] Submissions also considered justice targets to be important to promoting the adoption of justice reinvestment.[25]

4.23 Some have argued that, while criminal justice system redesign may be a pragmatic response to high rates of incarceration, 'in not extending their reach beyond the criminal justice system these programs may miss the opportunity to prevent criminality in the first place'.[26] Equally, in this Inquiry, many submissions emphasised that justice reinvestment should focus on the drivers of incarceration for Aboriginal and Torres Strait Islander peoples that extend beyond the criminal justice system.[27] For example, the Human Rights Law Centre submitted that '[a] justice reinvestment approach to criminal justice in Australia would provide a valuable framework to prevent crime and promote community safety, reduce imprisonment rates and deliver associated social and economic benefits for the community'.[28] The National Association of Community Legal Centres submitted:

> We support a justice reinvestment approach in Australia and consider that it is a crucial element of addressing the high levels of imprisonment of Aboriginal and Torres Strait Islander peoples. One of the key elements in any solution focussed on addressing over-representation in the criminal justice system is to address disadvantage, including through approaches such as justice reinvestment which seek to divert funding from prisons to community programs.[29]

4.24 The Aboriginal Legal Service of Western Australia submitted that 'investment in early intervention, prevention and rehabilitation is far more effective for long-term

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21 NSW Council of Social Service, *Submission 45*. See also Criminal Lawyers Association of the Northern Territory, *Submission 75*.

22 Recommendations about fines and driver licences are made in ch 12.

23 Victoria Legal Aid, *Submission 56*. See also North Australian Aboriginal Justice Agency, *Submission 113*.

24 Queensland Law Society, *Submission 86*; Northern Territory Legal Aid Commission, *Submission 46*; Kingsford Legal Centre, *Submission 19*. See further ch 8.

25 See, eg, Law Council of Australia, *Submission 108*; Aboriginal Legal Service of Western Australia, *Submission 74*. In ch 16, the ALRC recommends that criminal justice targets be developed.

26 Kevin Wong, Chris Fox and Kevin Albertson, 'Justice Reinvestment in an "Age of Austerity": Developments in the United Kingdom' (2014) 9(1) *Victims & Offenders* 76, 90.

27 See, eg, Jesuit Social Services, *Submission 100*; Community Legal Centres NSW and the Community Legal Centres NSW Aboriginal Advisory Group, *Submission 95*; National Association of Community Legal Centres, *Submission 94*; ANTaR Queensland Management Committee, *Submission 55*; Human Rights Law Centre, *Submission 68*.

28 Human Rights Law Centre, *Submission 68*.

29 National Association of Community Legal Centres, *Submission 94*.

community safety and far cheaper than continuing to imprison the most marginalised and disadvantaged members of the community'.[30] The Commissioner for Children and Young People Western Australia argued that, for Aboriginal young people in particular, '[w]hat is clear from the work of my office over the last decade is that programs that divert young people away from the justice system and address underlying causes of offending are crucial'.[31]

How does justice reinvestment work?

4.25 Justice reinvestment involves four main stages:

- 'Justice mapping': analysing criminal justice data and cross-referencing this against indicators of disadvantage and available services;
- developing options for reducing offending and generating savings;
- implementing reforms, quantifying savings and reinvesting in communities ('reinvestment' may also take the form of initial funding in anticipation of future savings); and
- monitoring and evaluation.[32]

4.26 Justice reinvestment is distinguished by its emphasis on using data to analyse the drivers of contact with the criminal justice system. In the US, for example, this form of data mapping identified so-called 'million-dollar blocks':

> The United States currently has more than 2 million people locked up in jails and prisons. A disproportionate number of them come from a very few neighborhoods in the country's biggest cities. In many places the concentration is so dense that states are spending in excess of a million dollars a year to incarcerate the residents of single city blocks.[33]

4.27 While not a justice reinvestment initiative, research commissioned by Jesuit Social Services and Catholic Social Services Australia provides an example of the mapping of disadvantage in Australia. The Dropping Off the Edge project analysed the extent to which a number of indicators of social disadvantage, such as poverty, poor health, disabilities, and low educational attainment are concentrated geographically in Australia.[34] It found that

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30 Aboriginal Legal Service of Western Australia, *Submission 74*.

31 Commissioner for Children and Young People Western Australia, *Submission 16*.

32 Fox, Albertson and Wong, above n 16, 35; David Brown et al, above n 4, 56–8; James Austin et al, 'Ending Mass Incarceration: Charting a New Justice Reinvestment' (2013) 7; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 45–8.

33 Center for Spatial Research, Columbia University, *Million Dollar Blocks* Center for Spatial Research <http://c4sr.columbia.edu/projects/million-dollar-blocks>.

34 Tony Vinson and Margot Rawsthorne, *Dropping Off the Edge 2015: Persistent Communal Disadvantage in Australia* (Jesuit Social Services/Catholic Social Services Australia, 2015). See also Just Reinvest NSW's JR calculator, which provides data and estimated costs of incarceration for local government areas in NSW: Just Reinvest NSW, *JR Calculator* <www.justreinvest.org.au/jr-calculator/>.

> complex and entrenched disadvantage continues to be experienced by a small but persistent number of locations in each state and territory across Australia. These communities experience a web-like structure of disadvantage, with significant problems including unemployment, a lack of affordable and safe housing, low educational attainment, and poor quality infrastructure and services.[35]

4.28 It also found a link between this locational disadvantage and crime, with 6% of postcodes in Victoria accounting for half of all prison admissions. The project noted that this highlighted 'the often localised nature of crime, as well as the role of disadvantage as an underlying cause of offending'.[36]

4.29 The relevant criminal justice data to be analysed, in the US context, has been identified as coming from 'all agencies that influence the criminal justice system, including arresting agencies, the jail, pretrial services, the court system, and community supervision agencies'.[37]

4.30 Justice mapping brings together information about the criminal justice system with other measures of wellbeing in a community, such as employment rates and health and education levels. Other relevant information may include government service provision, as well as identifying potential community 'assets' in a particular area, such as social support and health services.[38] This stage of justice reinvestment also involves an analysis of existing spending related to contact with the criminal justice system.[39]

4.31 When the drivers of contact with the criminal justice system have been identified, the next stage of justice reinvestment involves identifying options for reform to address these issues. In the US, these options have principally concentrated on criminal justice reforms. However, they may also include front-end or preventative strategies such as programs and services addressing poverty, education, housing and health.[40] Once strategies have been chosen, they are implemented, and subject to monitoring and evaluation.

Justice reinvestment in action

The United States

4.32 Justice reinvestment has been most extensively implemented in the US under the banner of the 'Justice Reinvestment Initiative' (JRI). The JRI focuses on state-level reforms to reduce corrections spending and to reinvest in strategies to increase public safety and strengthen communities.

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35 Jesuit Social Services, *Submission 100*.

36 Ibid.

37 Nancy La Vigne et al, 'Justice Reinvestment at the Local Level Planning and Implementation Guide 2010' (Urban Institute Justice Policy Center, 2010) 4.

38 Fox, Albertson and Wong, above n 6, 87.

39 House of Commons Justice Committee, *Cutting Crime: The Case for Justice Reinvestment* House of Commons Paper No HC 94-I, Session 2009–10 (2009) vol 1, 123-4.

40 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 46.

4.33 The JRI has been led by a number of think-tanks, non-profit organisations and non-government organisations, and financed by a mix of public and private funds, including charitable support. In 2010, the federal government began to fund the JRI through the Bureau of Justice Assistance.[41] The Bureau of Justice Assistance has described the many organisations involved in implementing the JRI:

> JRI is a public-private partnership between BJA and The Pew Charitable Trusts. Together with our technical assistance partners, BJA and Pew closely coordinate our efforts in this initiative. Urban Institute's Justice Policy Center serves as the Oversight, Coordination, Outcome, and Assessment provider, working with BJA, the Pew Center on the States, and the technical assistance providers to select JRI sites, set specific performance measures, track implementation, and assess the impact of JRI. The Council of State Governments Justice Center, Crime and Justice Institute, and the Vera Institute of Justice provide technical assistance and support to states selected as JRI sites. The Pew Center on the States also provides technical assistance and support to JRI states, both independently and in coordination with the Council of State Governments Justice Center and the Crime and Justice Institute. The Center for Effective Public Policy (CEPP) provides technical assistance to recipients of the JRI: Maximizing State Reforms grant program.[42]

4.34 Through the JRI, 24 US states have implemented reforms to reduce their corrections populations. These reforms 'typically aim to reduce the flow of people into prison, limit their time behind bars, streamline their release when appropriate, strengthen community supervision, and monitor the progress of state reform'.[43] The kinds of reforms enacted have broadly focused on:

- Amending sentencing laws: through measures including diverting people committing less serious offences from prison, adjusting penalties for certain offences, and repealing mandatory minimum sentences.
- Reforming pre-trial practices: through measures including using risk assessment to reserve detention for those at high risk of failing to appear in court, and improving pre-trial supervision.
- Modifying prison release practices: through measures including expanding the types of offences eligible for parole, and establishing presumptive parole for certain people.
- Strengthening community corrections: through measures including strengthening reentry supervision, expanded access to treatment and services, and limiting time that can be spent in prison for violating supervision rules.[44]

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41 James Austin and Garry Coventry, 'A Critical Analysis of Justice Reinvestment in the United States and Australia' (2014) 9(1) *Victims & Offenders* 126, 127.

42 Bureau of Justice Assistance, *JRI Partners—Justice Reinvestment Initiative* <www.bja.gov/programs/justicereinvestment/jri_partners.html>.

43 Samantha Harvell, Jeremy Welsh-Loveman and Hanna Love, 'Reforming Sentencing and Corrections Policy: The Experience of Justice Reinvestment Initiative States' (Research Report, Urban Institute, 2017) vi.

44 Ibid vi–vii.

4.35 A 2017 review of JRI reforms noted that, while it is premature to draw firm conclusions,

> a review of state efforts shows that 2015 prison populations in more than half the JRI states were below previously projected levels. In other words, JRI strategies helped 15 states either decrease their prison populations or keep them below levels they were predicted to reach without reform. On the fiscal front, through 2016, JRI states reported a total of $1.1 billion in savings or averted costs attributable to reforms.[45]

United Kingdom

4.36 Justice reinvestment has also attracted interest in the United Kingdom (UK). In 2009, the UK House of Commons Justice Committee endorsed a 'holistic approach across central and local agencies and authorities in order to shift resources from the provision of custody for its own sake to the prevention of crime and the reduction of re-offending'.[46]

4.37 The UK Ministry of Justice subsequently introduced pilots of an approach known as 'payment by results'. These pilots aimed to reduce demand on the criminal justice system in local areas—when demand fell by a specified amount, local criminal justice partners would receive a 'success payment'. An interim evaluation of one of these pilots found that insufficient incentives had been provided to encourage local agencies to make significant investment in reducing demand or to make substantial changes to practice.[47] Later evaluations noted that the overall cost of demand for youth and adult justice services had reduced. However, in the absence of a comparison site, it was not possible to precisely identify the reasons for this.[48]

4.38 Though described as a form of justice reinvestment, payment by results did not involve the four-stage method described above, and it has been observed that, while payment by results is not at odds with justice reinvestment, 'it is not in isolation capable of making the concept of JR real'.[49]

Australia

4.39 In Australia, justice reinvestment has been seen as particularly suitable for addressing the disproportionate incarceration rate of Aboriginal and Torres Strait Islander peoples. As Change the Record, a coalition of Aboriginal and Torres Strait Islander, human rights and community organisations, said in their Blueprint for Change

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45 Ibid v. However, the success of the JRI is contested: for a more critical view, see Austin et al, above n 32; Austin and Coventry, above n 41.

46 House of Commons Justice Committee, *Cutting Crime: The Case for Justice Reinvestment* House of Commons Paper No HC 94-I, Session 2009–10 (2009) 7.

47 Wong, Fox and Albertson, above n 26, 84–5.

48 K Wong, D Ellingworth and L Meadows, 'Local Justice Reinvestment Pilot: Final Process Evaluation Report' (Ministry of Justice Analytical Series, Ministry of Justice (UK), 2015) 4; Kevin Wong, D Ellingworth and L Meadows, 'Youth Justice Reinvestment Custody Pathfinder: Final Process Evaluation Report' (Ministry of Justice Analytical Series, Ministry of Justice (UK), 2015) 3.

49 Wong, Fox and Albertson, above n 26, 81.

on imprisonment rates of Aboriginal and Torres Strait Islander people: 'invest in communities not prisons'.[50]

4.40 Proponents of justice reinvestment in Australia largely advocate an approach to justice reinvestment that incorporates its original aspiration for reinvestment into tailored, community-driven strategies to address offending in a particular place. As academics from the Australian Justice Reinvestment Project have observed, in Australia,

> support for justice reinvestment largely accords with a social justice-oriented approach directed towards (re)building community capacity using place-based strategies that respond to local needs and conditions, address the social determinants of incarceration and contribute to social inclusion'.[51]

4.41 Such a place-based approach offers the opportunity for developing initiatives led by and in partnership with Aboriginal and Torres Strait Islander communities:

> key to JR is use of a community development approach to tackling offending. Within this approach, there is potential in an Indigenous context to realise principles of Indigenous self-determination and for application of Indigenous culture, authority and knowledge—essential contributors to any strategy designed to reduce Indigenous over-representation. Significantly, Indigenous people are empowered through JR to lead local responses to crime, including through resources diverted from correctional budgets and as government and service providers are required to work quite differently with Indigenous communities; that is, in a way that places Indigenous people firmly at the centre of the design and implementation of relevant JR initiatives.[52]

4.42 Thus, in the Aboriginal and Torres Strait Islander context, justice reinvestment is transformed from a 'technocratic means of crime control and de-incarceration, to one that is centrally concerned with Indigenous-controlled governance'.[53] Place-based justice reinvestment initiatives are underway or planned in a number of locations in Australia. These focus on strategies to address the contact of Aboriginal and Torres Strait Islander people—particularly young people—with the criminal justice system:

- The Australian Capital Territory (ACT): Two trials are planned, one targeting Aboriginal and Torres Strait Islander families with high and complex needs, and another a bail support program for Aboriginal and Torres Strait Islander offenders.[54]
- NSW: in Bourke, the Maranguka Justice Reinvestment Project, coordinated by Just Reinvest NSW; and Cowra; facilitated by an Australian Research Council-funded research project.[55]

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50 Change the Record Coalition, *Blueprint for Change* (Change the Record Coalition Steering Committee, 2015) 6.
51 David Brown et al, above n 4, 141.
52 J Guthrie, F Allison, M Schwartz, C Cunneen, *Submission 50*.
53 David Brown et al, above n 4, 130.
54 ACT Government, *Submission 110*.
55 Just Reinvest NSW, *Submission 82*; J Guthrie, F Allison, M Schwartz, C Cunneen, *Submission 50*.

- The Northern Territory (NT): in Katherine, facilitated by the Red Cross and guided by the Katherine Youth Justice Reinvestment Working Group.[56]
- Queensland: in Cherbourg, the Queensland Government has committed to working with the Cherbourg community on a justice reinvestment trial.[57]
- South Australia (SA): the SA Government has committed to implementing justice reinvestment trials in two locations. Preliminary exploration has been done for a trial in Port Adelaide.[58]

4.43 The Maranguka Justice Reinvestment Project in Bourke is the most advanced engagement with place-based justice reinvestment so far in Australia. Bourke scores highly on indicators of disadvantage, and in 2015–16 had the highest rate of juvenile convictions in NSW.[59] The town has high rates of long-term unemployment, low levels of education, and high rates of predominantly non-violent crime.[60]

4.44 In 2015–16, Bourke had a population of approximately 3,000. One in three community members of Bourke identified as Aboriginal.[61] It was estimated that the direct costs of Aboriginal juvenile and young adult involvement with the justice system was approximately $4 million per year.[62]

4.45 Interest in justice reinvestment in Bourke originated in work by the Bourke Aboriginal Community Working Party to establish a whole-of-community agenda for addressing Aboriginal disadvantage—the Maranguka Initiative. Reducing young Aboriginal people's contact with the criminal justice system was a priority goal of the Maranguka Initiative, and prompted a partnership with Just Reinvest NSW (an independent non-profit organisation auspiced by the Aboriginal Legal Service NSW/ACT) to develop the Maranguka Justice Reinvestment Project.

4.46 Aboriginal leadership of the project has continued. The first phase of the justice reinvestment process involved analysis of data relating to justice, as well as social and economic indicators, to develop a community profile for Bourke. This data was then

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56 Amnesty International Australia, *Submission 89*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

57 Department of Justice and Attorney-General (Qld), *Youth Detention Implementation Review: Justice Reinvestment Recommendations* <www.justice.qld.gov.au>; Queensland Youth Justice, Department of Justice and Attorney General (Qld), *Submission 97*.

58 PwC's Indigenous Consulting, *Consultation with Community of Potential for a Justice Reinvestment Trial in Port Adelaide* (Attorney General's Department (SA), 2015).

59 KPMG, *Unlocking the Future: Maranguka Justice Reinvestment Project in Bourke—Preliminary Assessment* (2016) 1; Jesuit Social Services, *Dropping off the Edge 2015: Postcode 2840* <https://dote.org.au/map/>.

60 KPMG, above n 59, 1; Alison Vivian and Eloise Schnierer, 'Factors Affecting Crime Rates in Indigenous Communities in NSW: A Pilot Study in Bourke and Lightning Ridge—Community Report' (Jumbunna Indigenous House of Learning, University of Technology Sydney, November 2010) 6.

61 KPMG, above n 59, 1.

62 Ibid 50. This estimate included costs related to police recorded criminal incidents, offences including assault, break and enter dwelling, and motor vehicle theft, Local and Children's Court finalisations, youth justice conferences, juvenile and adult custody: Ibid 50–4.

fed back to the community. The community, through the Bourke Tribal Council,[63] utilised this information to identify focus areas for reform to reduce young Aboriginal people's contact with the criminal justice system.[64]

4.47 The Bourke project began implementation in 2016. The project is being led by a 'backbone organisation', whose role is to provide project management support, monitor progress, coordinate partnerships and relationships with stakeholders, and secure funding for the project.[65] Economic modelling of costs saved during the project will be undertaken, with reinvestment of those savings to fund long-term implementation of the project.[66]

4.48 The ACT offers the most comprehensive governmental engagement with justice reinvestment to date. As well as the two trials mentioned above, the ACT Government has developed a justice reinvestment strategy. Under the strategy are a number of projects, including a justice system costing model; justice services and programs map; justice and human services system data snapshots; and an evaluation framework.[67]

A national justice reinvestment body

Recommendation 4–1 Commonwealth, state and territory governments should provide support for the establishment of an independent justice reinvestment body. The purpose of the body should be to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and incarceration, and to provide expertise on the implementation of justice reinvestment.

Its functions should include:

- providing technical expertise in relation to justice reinvestment;
- assisting in developing justice reinvestment plans in local sites; and
- maintaining a database of evidence-based justice reinvestment strategies.

The justice reinvestment body should be overseen by a board with Aboriginal and Torres Strait Islander leadership.

63 The Bourke Tribal Council is an Aboriginal local governance mechanism established to work with government to enable local decision making about community services in Bourke: KPMG, above n 59, vi–vii.

64 Ibid 33–8; Just Reinvest NSW, *Submission 82*.

65 KPMG, above n 59, 65. A 'backbone organisation' is an element of an approach to collaborative community development work known as 'collective impact': John Kania and Mark Kramer, 'Collective Impact' [2011] *Stanford Social Innovation Review*.

66 Just Reinvest NSW, *Justice Reinvestment in Bourke* <www.justreinvest.org.au/justice-reinvestment-in-bourke/>.

67 ACT Government, *Submission 110*.

Recommendation 4–2 Commonwealth, state and territory governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities, including through:

- facilitating access to localised data related to criminal justice and other relevant government service provision, and associated costs;
- supporting local justice reinvestment initiatives; and
- facilitating participation by, and coordination between, relevant government departments and agencies.

4.49 Justice reinvestment is place-based, in that it involves working with a community to design localised solutions to identified local drivers of contact with the criminal justice system. It also relies on a distinct data-driven method to inform the development of options for reform. Central to the success of the JRI in the US has been technical assistance to analyse data and develop policy options for reducing contact with the criminal justice system.

4.50 The ALRC considers that the promise of justice reinvestment in addressing Aboriginal and Torres Strait Islander incarceration relies on initiatives being designed in partnership with Aboriginal and Torres Strait Islander people, and with Aboriginal and Torres Strait Islander governance. However, it also considers that a centralised expert body can assist the process of justice reinvestment, acting to provide technical assistance to justice reinvestment sites and to promote, coordinate and track justice reinvestment initiatives.

4.51 There has been significant support for justice reinvestment in Australia, including from two successive Aboriginal and Torres Strait Islander Justice Commissioners, Tom Calma AO and Mick Gooda.[68] In addition, a number of Parliamentary Inquiries have recommended that there be support for justice reinvestment, including the:

- Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the value of a justice reinvestment approach to criminal justice in Australia (Senate Justice Reinvestment Inquiry) in 2013; [69]

68 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Australian Human Rights Commission, 2016); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (Australian Human Rights Commission, 2014); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (Australian Human Rights Commission, 2009).

69 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013). However, Coalition members of the Committee, while 'warmly endorsing' the principle of justice reinvestment, did not support the recommendations in the report.

- House of Representatives Standing Committee on Indigenous Affairs Inquiry into harmful use of alcohol in Aboriginal and Torres Strait Islander communities in 2015;[70]
- Senate Finance and Public Administration References Committee Inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services in 2016;[71] and
- Senate Community Affairs Reference Committee Inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia in 2016.[72]

4.52 A number of those closely involved in justice reinvestment in Australia supported a national justice reinvestment authority, including Just Reinvest NSW.[73] The 2013 Senate Justice Reinvestment Inquiry recommended that an independent central coordinating body for justice reinvestment be established.[74]

4.53 The body should be a national one because justice reinvestment involves a holistic approach to the drivers of incarceration, which extend beyond justice-related factors to community and social determinants of crime and incarceration. These policy priorities extend across all levels of government.

4.54 The ALRC envisages a limited role for the justice reinvestment body. It would not have authority to impose justice reinvestment on a site. Instead, similarly to the US, the justice reinvestment body would provide technical assistance only where requested to do so, working in partnership with relevant governance and decision-making structures.[75] The justice reinvestment body would also not have authority to direct the allocation of resources. Therefore, a supporting recommendation is that Commonwealth, state and territory governments support place-based justice reinvestment initiatives, through resourcing, facilitating access to data, and facilitating coordination between relevant government departments.[76]

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70 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) rec 14.

71 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) recs 7–8.

72 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) rec 24.

73 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; NSW Bar Association, *Submission 88*; Just Reinvest NSW, *Submission 82*; J Guthrie, F Allison, M Schwartz, C Cunneen, *Submission 50*.

74 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) rec 8.

75 Fox, Albertson and Wong, above n 6, 34.

76 A Senate Inquiry into Aboriginal and Torres Strait Islander experiences of law enforcement and justice Services recommended that that the Commonwealth Government contribute to the development of justice reinvestment trials at sites in each state and territory; and that the Commonwealth Government support Aboriginal led justice reinvestment projects: Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) recs 8–9.

An independent expert body

4.55 The value of an external facilitator for justice reinvestment has been recognised in overseas jurisdictions. US justice reinvestment models routinely utilise expert bodies as technical assistance providers. Academics from the Australian Justice Reinvestment Project have observed that in the US, technical assistance providers have brought 'independence and legitimacy' to the justice reinvestment process. They have offered an 'independent voice in developing policy options, helped achieve buy-in from stakeholders across the sector and eased the path for reforms that might not otherwise have been well received'.[77]

4.56 The UK House of Commons Justice Committee endorsed the importance of an expert body, noting that 'a policy which promotes the most effective use of resources to reduce crime and manage offenders would benefit from the existence of an independent cross-disciplinary centre of excellence'.[78] The Committee set out options for its establishment:

> our preference would be to establish an independent national crime reduction centre of excellence, we acknowledge that this may not be immediately feasible in the current economic climate. Alternative shorter-term mechanisms could include: establishing a multi-disciplinary team of internal researchers from across Government; drawing on the expertise of a consortium, or regional consortia, of external academics similar to the Scottish Centre for Crime and Justice Research; or, an enhanced role for the correctional services panel which currently advises [the National Offender Management Service].[79]

4.57 Some submissions supporting the establishment of a national justice reinvestment body argued that it should be established by statute.[80] However, the ALRC sees promise in utilising a corporate structure, in the form of a company limited by guarantee, to establish an independent not-for-profit body supported by Commonwealth, state and territory funding. There are precedents for this type of expert body. Australia's National Research Organisation for Women's Safety Limited (ANROWS) is an independent, not-for-profit company limited by guarantee, established as an initiative under Australia's National Plan to Reduce Violence against Women and their Children 2010-2022. It is jointly funded by the Commonwealth and all state and territory governments, who are the members of the company.[81] ANROWS has developed a national research agenda to reduce violence against women and their children, under which it conducts a national research program.

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77 David Brown et al, above n 4, 155.

78 House of Commons Justice Committee, *Cutting Crime: The Case for Justice Reinvestment* House of Commons Paper No HC 94-I, Session 2009–10 (2009) 132.

79 Ibid 134.

80 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; J Guthrie, F Allison, M Schwartz, C Cunneen, *Submission 50*.

81 Australia's National Research Organisation for Women's Safety, *Who We Are* <www.anrows.org.au/about/who-we-are>.

4.58 However established, Aboriginal and Torres Strait Islander leadership is important at all levels of justice reinvestment, and the ALRC recommends that the governance of the justice reinvestment body have Aboriginal and Torres Strait Islander leadership.

4.59 Technical assistance bodies in the US, such as the Council of State Governments Justice Center, the Vera Institute of Justice and the Urban Institute are independent not-for profit bodies, supported by a mix of public and private funding.[82]

4.60 The Commonwealth is well placed to champion and facilitate justice reinvestment, in recognition that a coordinated, whole-of-government approach to addressing drivers of incarceration is necessary. There is also considerable alignment between justice initiatives and other whole-of-government efforts to address Aboriginal and Torres Strait Islander disadvantage, through the Closing the Gap policy framework. This was acknowledged in the now lapsed National Indigenous Law and Justice Framework 2009-2015, which stated that

> [t]here are clear links between the Framework and the work being undertaken by the Commonwealth and State and Territory Governments through the Council of Australian Governments (COAG) to 'close the gap' between Indigenous and non-Indigenous Australians in relation to key life outcomes, particularly life expectancy, child mortality, education, health and employment.[83]

4.61 The ALRC has recommended that targets to reduce the incarceration rates of Aboriginal and Torres Strait Islander peoples be adopted.[84] Justice reinvestment would be one means of achieving these targets.

Working with communities

4.62 Central to the promise of justice reinvestment in addressing Aboriginal and Torres Strait Islander incarceration in Australia has been that it has operated with a community development approach, with ownership by the local Aboriginal community. This involves at least two elements: first, working in partnership with communities, rather than imposing justice reinvestment plans on them, and second, devising tailored strategies to address the particular drivers of incarceration in a community.

4.63 As to the first of these, Just Reinvest put it this way: 'JR is place-based, it looks at local problems and local solutions. For Just Reinvest NSW, this means Aboriginal led, community driven initiatives. Self-determination is critical'.[85] Similarly, the Law Council of Australia argued that 'programs and policies that incorporate the culture of

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82 CSG Justice Center, *Funders and Partners* <https://csgjusticecenter.org/funding-partners/>; Vera Institute of Justice, *About* <www.vera.org/about/financials>; Urban Institute, *Our Funding* <www.urban.org/aboutus/our-funding>.

83 Standing Committee of Attorneys-General, *National Indigenous Law and Justice Framework 2009–2015* (2010) 6. The submissions of the ACT and NT Governments also recognised the need for a whole-of-government approach: Northern Territory Government, *Submission 118*; ACT Government, *Submission 110*.

84 See ch 16.

85 Just Reinvest NSW, *Submission 82*.

Aboriginal and Torres Strait Islander people and are based on local community knowledge and understanding are critical in developing effective solutions and generating positive outcomes'.[86]

4.64 A number of submissions emphasised the importance of adaptability in implementing justice reinvestment.[87] Queensland Law Society argued that 'a one-size-fits-all approach is not appropriate. Justice reinvestment should be based on the specific drivers of crime and the 'community assets' of that community'.[88] Aboriginal Peak Organisations NT observed that 'for justice reinvestment to be effective, it must embrace the culturally specific needs of Aboriginal people in the local context in which it is implemented'.[89]

4.65 An emphasis on flexibility and tailored solutions is not incompatible with the existence of an expert justice reinvestment body. Indeed, a number of the submissions that stressed the importance of community-led, flexible approaches also supported the creation of a national justice reinvestment body. For example, Just Reinvest NSW argued that

> JR requires a centralised body with a clear mandate to work across government departments and agencies to monitor and quantify social and economic outcomes of JR initiatives. The centralised body would support local initiatives through their governance structures by collecting data, assisting in strategy development and building community capacity.[90]

4.66 A group of academic experts on justice reinvestment, Dr Jill Guthrie, Fiona Allison, Professor Chris Cuneen, and Dr Melanie Schwartz called for a

> JR Authority that has a mandate to implement and evaluate JR policy. Functions could include:
>
> - data collection and analysis;
> - economic cost-benefit analysis;
> - justice mapping;
> - testing JR methodological approaches, including where those approaches are informed by local community partnerships; and
> - the formulation of options for JR initiatives to address the particular underlying causes of crime identified in focus sites.[91]

4.67 The role of the national body would not be to impose reforms on a particular community, but rather to provide technical assistance and expertise in justice

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86 Law Council of Australia, *Submission 108*.

87 See, eg, Aboriginal Peak Organisations (NT), *Submission 117*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*.

88 Queensland Law Society, *Submission 86*.

89 Aboriginal Peak Organisations (NT), *Submission 117*.

90 Just Reinvest NSW, *Submission 82*. The NSW Bar Association endorsed Just Reinvest's submission in relation to justice reinvestment: NSW Bar Association, *Submission 88*.

91 J Guthrie, F Allison, M Schwartz, C Cunneen, *Submission 50*. NATSILS also supported a national body: National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

reinvestment methodology, to support a community wishing to implement a justice reinvestment approach. In practice, this would likely involve the justice reinvestment body working with local governance structures to progress a justice reinvestment initiative through provision of technical expertise.

4.68 Technical assistance would primarily be required at the preliminary stages of justice reinvestment: justice mapping and development of options for reform. The technical assistance provided for justice mapping is described in this way by the Bureau of Justice Assistance:

> Sites receive intensive, onsite technical assistance from nationally recognized criminal justice policy experts and researchers to analyze crime, arrest, conviction, jail, prison, and probation or parole supervision data from the last five to ten years provided by state and/or local agencies; and analyze the cost-effectiveness of the correctional system's policies, practices, and programs designed to reduce recidivism and increase public safety.[92]

4.69 Technical assistance at the second stage of justice reinvestment—the development of options for reform—is used to 'help the working group develop practical, data-driven, and consensus-based policies that reduce spending on corrections to reinvest in strategies that can improve public safety'.[93]

4.70 There is also a role for targeted technical assistance in the implementation phase, including assisting in developing implementation plans, and in providing assistance in developing mechanisms for monitoring progress and measuring performance.

4.71 The justice reinvestment body should also act as a centre of expertise on justice reinvestment, including through maintaining a database of research about justice reinvestment, and acting as a centralised location for information about progress in justice reinvestment sites.

The role of government

4.72 Place-based justice reinvestment requires government to work with local communities in progressing strategies to reduce contact with the criminal justice system. While community ownership of an initiative is important, success relies also on governmental willingness to support the implementation of justice reinvestment in identified sites. This support would include participation in working groups or steering committees for local sites, facilitating access to data, and resourcing reinvestment strategies.

4.73 In Bourke, the Marunguka Justice Reinvestment Project has not received direct funding from government. However, the project has received in-kind support from both the Commonwealth and NSW Governments, and includes participation by NSW and Commonwealth department representatives on the project's steering committee.[94] A

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92 Bureau of Justice Assistance, *What Is JRI? Justice Reinvestment Initiative* <www.bja.gov/programs /justicereinvestment/what_is_jri.html>.

93 Ibid.

94 KPMG, above n 59, 35, 76.

preliminary assessment by KPMG noted that a condition of further success in implementation was 'government developing a new way of working in partnership with the project; facilitating data sharing, and recognising the Bourke Tribal Council as the Aboriginal local governance mechanism to enable local decision making about the delivery and coordination of community services in Bourke'.[95]

4.74 The ACT Government's commitment to trials of justice reinvestment has occurred within a broader governmental strategy in relation to justice reinvestment. There may be benefit for other state and territory governments in developing justice reinvestment strategies, or to consider formalising a policy position on the alignment of justice reinvestment with other policies, plans or strategies related to Aboriginal and Torres Strait Islander communities. For example, the preliminary assessment of the Marunguka Justice Reinvestment Project by KPMG concluded that it was aligned with a number of NSW and Commonwealth Government priorities, including:

- the NSW Government Department of Justice Strategic Plan, by aiming to reduce the involvement of Aboriginal people with crime;
- the NSW Government Social Impact Investment Policy by proposing to invest in prevention approaches;
- policies and objectives of the NSW Government Department of Aboriginal Affairs by empowering Aboriginal peoples; and
- the NSW and Australian Governments, 10-year plan for improving Aboriginal health, Indigenous Economic Development Strategy 2011–2018 and the Council of Australian Government's Closing the Gap in Indigenous Disadvantage by seeking to improve the social and economic outcomes of Aboriginal peoples.[96]

Challenges for justice reinvestment

Availability of data

4.75 Access to data is a key challenge to the successful implementation of justice reinvestment. This includes the question of whether the appropriate data for analysis is currently captured, as well as the accessibility of this data.[97] The National Congress of Australia's First Peoples argued that there are 'many inadequacies in data collection in the Australian criminal justice system, especially on a national level' and noted that the 'collection, availability and sharing of data is essential to the successful implementation of a justice reinvestment approach. The first step of analysis and mapping requires standardised and efficient data collection about offending and offenders'.[98]

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95 Ibid 69.
96 Ibid ix.
97 See, eg, Change the Record Coalition, *Submission 84*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; National Congress of Australia's First Peoples, *Submission 73*.
98 National Congress of Australia's First Peoples, *Submission 73*. On the availability of data, see further ch 3.

4.76 Nonetheless, existing initiatives have progressed justice reinvestment with available data. In Bourke, this was facilitated by 'support from several government departments and project champions … Data from a broad range of government departments (both state and federal) were collected which related to the Bourke community'.[99] The Bourke process also involved collection of a secondary dataset, focused on hearing the views of children and young people in the community, 'collected though engagement with young people through a series of groups at the local high school'.[100]

4.77 In Cowra, data collection was facilitated through the project's status as a university research project. Data was obtained from the NSW Bureau of Crime Statistics and Research, as well as collected through interviews with young people, parents, service providers and other stakeholders in the Cowra community, and young people from Cowra who were incarcerated in juvenile or adult corrections systems.[101]

4.78 Kingsford Legal Centre, which sits on the steering committee of Just Reinvest NSW, recommended that data availability be improved:

> Data is essential for the identification of underlying causes of incarceration, and the ability of Just Reinvest to specifically tailor its responses according to local needs. Just Reinvest currently relies upon analysis of publically available data. As such, KLC recommends that the NSW government improve the availability of all relevant data, and reduce the cost of its acquisition wherever possible. For instance, currently Australia suffers from a lack of data regarding the costs, availability and effectiveness of alternatives to imprisonment.[102]

4.79 The recommended national body could play a role in brokering the release of such data, as well as in identifying gaps in the data necessary to progress justice reinvestment.[103]

Identifying savings for reinvestment and measuring success

4.80 It has been observed that, compared to the US, the relatively lower overall rates of incarceration and smaller population in Australia may mean that there are 'relatively less savings to be recaptured and reinvested'.[104] As a consequence, measuring the success of justice reinvestment may require a broader analysis than whether savings are made on criminal justice spending, to incorporate other social benefits, including improving public safety and community wellbeing. For example, as Brown et al have pointed out, a strategy such as 'supporting women in the community may bring

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99 KPMG, above n 59, 37.
100 Ibid 38.
101 Jill Guthrie et al, *Exploring the Potential of Justice Reinvestment in Cowra: Community Report* (Australian National University, 2017) 20–21.
102 Kingsford Legal Centre, *Submission 19*.
103 Some submissions identified difficulties in obtaining information from government departments to enable justice mapping: Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Peak Organisations (NT), *Submission 117*.
104 Wood, above n 9, 114.

financial and social benefits, such as fewer living on welfare and fewer children in care, that do not accrue to the criminal justice system'.[105]

4.81 The Senate Justice Reinvestment Inquiry considered that the economic value of justice reinvestment was likely to be realised over the long term, and best measured through considering the value of averted costs associated with contact with the criminal justice system in a broad sense:

> The committee considers that justice reinvestment provides economic benefits in the long term through shifting resources away from incarceration towards prevention, early intervention and rehabilitation. Benefits will accrue to government through improved economic participation of offenders and potential offenders, decreased use of the welfare system and improved health outcomes.
>
> While there will be economic benefits to government, the committee considers that the benefits through a justice reinvestment for individuals and communities will be more important. By addressing the social determinants of crime—unemployment, homelessness, health and education issues—justice reinvestment has the potential to improve the life outcomes of individuals and build strong, safe and cohesive communities.[106]

4.82 Especially where a justice reinvestment focus is on preventative, 'front-end' strategies to reduce or prevent contact with the criminal justice system, it is likely that initial implementation of justice reinvestment would require some level of upfront or seed funding. The Senate Justice Reinvestment Inquiry Report canvassed views on this, and noted that submissions suggested that:

> Once initial funding has been obtained, and community programs are running effectively, savings will accrue as offenders are rehabilitated and provided with treatment to deal with the underlying causes of their behaviour and reoffending is significantly reduced.
>
> The Attorney-General's Department provided its views … that justice reinvestment was probably not budget neutral. It is a long term strategy and savings will be not be generated from law and order budgets in the short term. Potentially, significant upfront funding will be needed with savings 'hopefully' becoming available in the long term.[107]

4.83 There are existing approaches which can be drawn on to undertake analyses of the costs and benefits of justice reinvestment strategies. In the US, the Washington State Institute of Public Policy has developed an influential method for undertaking a 'benefit-cost analysis' of public policy options, including options to improve criminal justice outcomes. This is a three-stage process:

> First, we systematically assess all high-quality studies from the United States and elsewhere to identify policy options that have been tested and found to achieve improvements in outcomes. Second, we determine how much it would cost Washington taxpayers to produce the results found in Step 1, and calculate how much it would be worth to people in Washington State to achieve the improved outcome.

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105 David Brown et al, above n 4, 185.

106 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 81.

107 Ibid 91.

> That is, in dollars and cents terms, we compare the benefits and costs of each policy option. It is important to note that the benefit-cost estimates pertain specifically to Washington State; results will vary from state to state. Third, we assess the risk in the estimates to determine the odds that a particular policy option will at least break even.[108]

4.84 Another such approach is to quantify the 'social return on investment' of justice reinvestment strategies. In the UK, a social return on investment analysis of alternatives to incarceration for women found that, over ten years, for every £1 spent on alternatives to prison, £14 worth of social value was generated to women and their children, victims and society.[109] Professor Julie Stubbs has observed that this

> demonstrates the paradox of women's imprisonment, in that while the number of women imprisoned relative to men is small, the potential negative impact it has on society is very large; women's incarceration is very likely to diminish the prospects of future generations since women are an important 'resource' for their communities and families, and especially their children.[110]

4.85 In Australia, cost-benefit studies of diversion and early intervention for vulnerable groups has concluded that an integrated social and disability support program for these groups would provide between $1.20 and $2.40 in savings for criminal justice and tertiary health and human services for each dollar invested.[111] A social return on investment analysis of youth programs in remote central Australia also found that for every dollar invested, between $3.48 and $4.56 of value would be created.[112]

4.86 Additionally, in the context of JRI in the US, it has been observed that alternative outcomes, in addition to identifying savings, are relevant to measuring the success of justice reinvestment:

> In addition to reducing justice system spending and encouraging reinvestment, JRI has encouraged systems change and the creation of new, collaborative roles within agencies, as well as ongoing data analysis, increased training and capacity, and implementation of evidence-based practices.[113]

4.87 Given the complexity of the task of quantifying the costs and benefits of justice reinvestment, the ALRC considers that the recommended national justice reinvestment body could provide an important locus of expertise for such analysis.

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108 Washington State Institute for Public Policy, *Benefit-Cost Results* <www.wsipp.wa.gov/BenefitCost>. See also Fox, Albertson and Wong, above n 6, 31; David Brown et al, above n 4, 145–7.

109 Julie Stubbs, 'Downsizing Prisons in an Age of Austerity? Justice Reinvestment and Women's Imprisonment' (2016) 6(1) *Oñati Socio-Legal Series* 91, 107.

110 Ibid.

111 David Brown et al, above n 4, 147, citing Eileen Baldry, 'Disability at the Margins: Limits of the Law' (2014) 23(3) *Griffith Law Review* 370.

112 Central Australian Youth Link-Up Service, *Submission 18*; Nous Group, *Investing in the Future—The Impact of Youth Programs in Remote Central Australia: A Social Return on Investment (SROI) Analysis* (2017).

113 Erika Parks et al, 'Local Justice Reinvestment Strategies, Outcomes, and Keys to Success' (Urban Institute Justice Policy Center, 2016) 15.

5. Bail

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Summary

5.1 Up to one third of Aboriginal and Torres Strait Islander people in prison are held on remand awaiting trial or sentence. A large proportion of Aboriginal and Torres Strait Islander people held on remand do not receive a custodial sentence upon conviction, or may be sentenced to time served while on remand. This particularly affects female Aboriginal and Torres Strait Islander prisoners, and suggests that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low-level offending.

5.2 Irregular employment, previous convictions for often low-level offending, and a lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail. Furthermore, when bail is granted, cultural obligations to attend sorry business following a death in the family or community, or to take care of family may conflict with commonly issued bail conditions—such as curfews and exclusion orders—leading to breach of bail conditions, revocation of bail and subsequent imprisonment. This issue has continued despite existing laws and legal frameworks that enable some bail authorities to take cultural considerations into account.

5.3 The recommendations in this chapter seek to enable Aboriginal and Torres Strait Islander peoples accused of low-level offending to be granted bail in circumstances where risk can be appropriately managed.

5.4 As a means of decreasing the number of Aboriginal and Torres Strait Islander people in prison held on remand, bail laws should require bail authorities to consider issues and circumstances arising from a person's Aboriginality when making bail determinations. Victoria introduced a model provision in 2010, which the ALRC recommends be adopted in other state and territory bail statutes.

5.5 The effect of this provision may be diminished through limited application and use by legal advocates, and deficiencies in culturally appropriate bail support services and diversion programs. For these reasons, the ALRC further recommends that state and territory governments work with relevant Aboriginal and Torres Strait Islander organisations and legal bodies to produce usage guidelines for the judiciary and legal practitioners, and to identify gaps in the provision of bail supports. Implementation of these recommendations would likely be assisted by the uptake of Aboriginal Justice Agreements, discussed in Chapter 16.

5.6 The ALRC stresses the interdependency of these recommendations, and encourages governments to consider them a holistic package for bail law reform.

Background

The operation of bail laws and legal frameworks

5.7 A person may be held on remand following charge because they did not apply for bail, the bail authority refused bail, or because a person breached a condition of bail.

5.8 Bail laws are complex and vary between states and territories, with each having a relevant Bail Act.[1] A general overview of the operation of bail laws across states and territories is provided below.

5.9 Bail can be determined at different times by police, magistrates, judges and, in some jurisdictions, by bail justices.[2] These decision makers are generally termed 'bail authorities'. Questions of bail first arise when a person is charged by police with an offence. Police can release the accused person with a Court Attendance Notice (or equivalent) to attend court, or police can release the accused person on bail. It is always a condition of police bail that the accused person attends court.[3] Other conditions may also be imposed.

5.10 When police refuse to release the accused person or to grant bail, the police must bring the accused person before the Local or Magistrates Court as soon as possible, where the accused person can apply to the court for bail.[4]

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1 *Bail Act 1992* (ACT); *Bail Act 2013* (NSW); *Bail Act* (NT); *Bail Act 1980* (Qld); *Bail Act 1985* (SA); *Bail Act 1994* (Tas); *Bail Act 1977* (Vic); *Bail Act 1982* (WA).

2 Queensland and Victoria.

3 See, eg, *Bail Act 1977* (Vic) s 5; *Bail Act 1982* (WA) s 28.

4 *Bail Act 1992* (ACT) s 17; *Bail Act 2013* (NSW) s 41; *Bail Act* (NT) s 33; *Bail Act 1980* (Qld) s 19B; *Bail Act 1985* (SA) s 14; *Bail Act 1994* (Tas) s 11; *Bail Act 1977* (Vic) s 4; *Bail Act 1982* (WA) s 5.

5.11 A statutory presumption against bail attaches to some offences. These generally include serious indictable sexual and personal violence offences, as well as weapon and terrorism-related offences.[5] In some jurisdictions these offence categories are known as 'show cause' or 'exceptional circumstances' offences.[6]

5.12 When an accused person successfully 'shows cause', or when show cause is not required, the bail authority considers whether an accused person would pose an 'unacceptable risk' if released on bail, and, if so, whether conditions could be imposed to mitigate that risk. When determining unacceptable risk, the bail authority generally considers whether a person is likely to: appear in court to answer bail; interfere with witnesses; harm themselves or others; or whether there is a risk of reoffending.[7] These risks are termed 'bail concerns' in New South Wales (NSW).[8]

5.13 The type of matters to be considered when assessing 'bail concerns' are prescribed in some jurisdictions. In NSW, for example, the type of matters to be taken into account are prescribed by the *Bail Act 2013* (NSW), and include, among other things: the accused person's background, including criminal history, circumstances and community ties; any previous history of non-compliance with court orders; the nature and seriousness of the offence; and any special vulnerability or needs the accused person has including being young, being an Aboriginal or Torres Strait Islander person, or having cognitive or mental health impairments.[9]

5.14 In Western Australia (WA), the bail authority must have regard to the nature and seriousness of the offence; the character, previous convictions, home environment, background, place of residence, and financial position of the accused; the history of any previous grants of bail; and the strength of the evidence. The bail authority can also have regard to any other matters that are considered relevant.[10] Similar matters are included in bail legislation in other states and territories.[11]

5.15 Bail authorities can impose conditions that are 'reasonably necessary' to address any identified bail concern. Conditions imposed upon granting bail must be 'reasonable and proportionate' to the offence, and be no more onerous than necessary to address the bail concern.[12] Bail conditions can require an accused person to do, or refrain from doing, certain things—such as to report to police; live at a specific address; not associate with certain people; or to obey a curfew. Bail conditions can also enforce a condition of release, for example compel an accused person to undergo drug testing.[13] An accused person can apply to have their bail conditions varied.[14]

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5 See, eg, *Bail Act 2013* (NSW) s 16B; *Bail Act* (NT) s 7A; *Bail Act 1980* (Qld) s 16(3).
6 See, eg, *Bail Act 2013* (NSW) s 16A; *Bail Act 1980* (Qld) s 16; *Bail Act 1977* (Vic) s 4.
7 See, eg, *Bail Act 2013* (NSW) s 17; *Bail Act 1980* (Qld) s 16; *Bail Act 1977* (Vic) s 5(3); *Bail Act 1982* (WA) sch 1 pt C cl 1.
8 See, eg, *Bail Act 2013* (NSW) s 17.
9 See, eg, Ibid s 18.
10 *Bail Act 1982* (WA) sch 1 pt C cl 3.
11 See, eg, *Bail Act* (NT) ss 24, 24(1)(B)(iiic); *Bail Act 1980* (Qld) ss 16(2), 16(2)(e).
12 See, eg, *Bail Act 2013* (NSW) s 20; *Bail Act 1977* (Vic) s 5(4)(a).
13 See, eg, *Bail Act 2013* (NSW) pt 3 div 3; *Bail Act 1980* (Qld) s 11.
14 See, eg, *Bail Act 2013* (NSW) s 51.

5.16 Breaching a condition of bail may result in bail revocation by the court, meaning an accused person is then held in prison on remand.[15] Breach of bail conditions is an offence in most jurisdictions,[16] as is failure to appear to answer bail.[17]

5.17 Some bail conditions must be confirmed or met before an accused person will be released on bail. Pre-release conditions can include the confirmation of an address or the provision of a surety.[18]

5.18 An accused person may also apply for bail following conviction pending sentencing or an appeal.[19]

The impact on Aboriginal and Torres Strait Islander people

5.19 Stakeholders to this Inquiry raised concerns about the effect that remand rates had on Aboriginal and Torres Strait Islander incarceration rates. For example, the Australian Lawyers for Human Rights (ALHR) observed that 'bail and remand processes significantly contribute to the unnecessary imprisonment of Aboriginal and Torres Strait Islander people',[20] while the NSW Bar Association considered bail law reform to be one of the most 'important areas requiring attention in order to reduce the incarceration rates of Aboriginal and Torres Strait Islander people'.[21]

5.20 There has been a general upsurge in remand populations nationwide,[22] and this has been especially pronounced for the Aboriginal and Torres Strait Islander prisoner population.

5.21 In 2016, the national Aboriginal and Torres Strait Islander remand prisoner population accounted for 30% (3,221) of Aboriginal and Torres Strait Islander prisoners, which amounted to 27% of all prisoners held on remand.[23] By June 2017, 33% (3735) of the national Aboriginal and Torres Strait Islander prisoner population were in prison held on remand.[24]

5.22 Aboriginal and Torres Strait Islander peoples have continued to be over-represented on remand by a factor of over 11 compared to non-Indigenous remandees

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15 See, eg, *Bail Act* (NT) s 38.

16 In all jurisdictions except the ACT and NSW: Ibid s 37B; *Bail Act 1980* (Qld) s 29; *Bail Act 1985* (SA) s 17; *Bail Act 1994* (Tas) s 9; *Bail Act 1977* (Vic) s 30A; *Bail Act 1982* (WA) s 51.

17 See, eg, *Bail Act 1992* (ACT) s 49; *Bail Act* (NT) s 39; *Bail Act 1980* (Qld) s 33; *Bail Act 1977* (Vic) s 30; *Bail Act 1982* (WA) ss 51A, 52.

18 Western Australian Auditor General, 'Management of Adults on Bail' (Report 10, June 2015) 5. See, eg *Bail Act 2013* (NSW) s 29; *Bail Act 1980* (Qld) s 11; *Bail Act 1977* (Vic) s 9; *Bail Act 1982* (WA) s 35.

19 See, eg, *Bail Act 2013* (NSW) s 62.

20 Australian Lawyers for Human Rights, *Submission 59*.

21 NSW Bar Association, *Submission 88*.

22 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016). The number of adult prisoners held on remand totalled 12,111 in June 2016, an increase of 22% from 2015; the number of sentenced prisoners increased by 2% in the same period.

23 Ibid.

24 Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2017, Cat No 4512.0* (2017) table 8, 14.

since 2010—in 2016, the rate of remand for Aboriginal and Torres Strait Islander peoples was 432 per 100,000 and 38 per 100,000 for non-Indigenous people.[25]

5.23 In 2016, Aboriginal and Torres Strait Islander people were most likely to be held on remand when accused of offences categorised as 'acts intended to cause injury' (42% of the Aboriginal and Torres Strait Islander remand population); 'unlawful entry with intent' (13%); and sexual assault (7%).[26] The category of 'acts intended to cause injury' is broadly defined and can include low-level instances of offending. For example, 33% of Aboriginal and Torres Strait Islander peoples held on remand for 'acts intended to cause injury' were charged with a serious assault *not* resulting in injury[27] and 12% for common assault. This is not to say that all Aboriginal and Torres Strait Islander people held on remand for 'acts intended to cause injury' were held for low-level offending: 54% in this category were held on remand for charges of serious assault resulting in injury.[28]

5.24 In NSW, Aboriginal and Torres Strait Islander males spent an average of 44 days on remand, while Aboriginal and Torres Strait Islander females spent an average of 38 days on remand.[29] Around 40% of Aboriginal and Torres Strait Islander defendants who were held on remand at their final court appearance in NSW in 2015 did not receive any custodial penalty on conviction.[30]

5.25 Aboriginal and Torres Strait Islander women are a fast growing group within the remand population. For example, the Inspector of Custodial Services in WA reported that WA had seen a 150% growth in Aboriginal and Torres Strait Islander women being held on remand from 2009 to 2016, describing the statistic as 'especially sharp and alarming'.[31] It was reported that, in Victoria in 2012, 60% of Aboriginal and Torres Strait Islander women held on remand were released without sentence.[32] As discussed in Chapter 11, being held in prison for even a short period of time can be disruptive and destabilising, especially for women where the 'social as well as the financial costs of these short-term remands can be very high'.[33]

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25 See ch 3.
26 Australian Bureau of Statistics, above n 22, table 8.
27 This is compared to 20% of non-Indigenous people in the same category, see ch 3.
28 See ch 3.
29 NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update March 2017* (2017) [2.3.2].
30 Don Weatherburn and Stephanie Ramsay, 'What's Causing the Growth in Indigenous Imprisonment in NSW?' (Bureau Brief Issue Paper No 118, NSW Bureau of Crime Statistics and Research, 2016) 8; Compare with NSW Government, *Submission 85*.
31 Office of the Inspector of Custodial Services, *Western Australia's Rapidly Increasing Remand Population* (2015) 2.
32 Victorian Equal Opportunity and Human Rights Commission, 'Unfinished Business: Koori Women and the Justice System' (August 2013) 20.
33 Office of the Inspector of Custodial Services, above n 31, 4. See also ch 11.

Drivers of over-representation on remand

Bail refusal

5.26 Aboriginal and Torres Strait Islander peoples are less likely to be granted bail than non-Indigenous people.[34] Bail refusal for Aboriginal and Torres Strait Islander peoples has been attributed to the likelihood of accused Aboriginal and Torres Strait Islander people having prior convictions. Aboriginal and Torres Strait Islander people are up to twice as likely as non-Indigenous accused people to have 10 prior convictions, and are also more likely to have prior convictions for breach of a previous court order.[35]

5.27 The Victorian Supreme Court appeal matter of *Re Mitchell* [2013] VSC 59 provides an example of how prior low-level offending can affect bail determinations for Aboriginal and Torres Strait Islander people.[36] Mitchell, a pregnant 22-year-old Aboriginal sole parent, had been charged with offences related to begging and obtaining a 'financial advantage by deception' because she had been travelling on the train using a children's ticket. Mitchell was initially refused bail at the Magistrates' Court of Victoria where that court found that, due to similar past offending, Mitchell represented an unacceptable risk of committing further offences. Mitchell had previous convictions for shoplifting, burglary, obtaining property by deception and breach of a Community Corrections Order.

5.28 In determining the appeal, the Supreme Court found that the magistrate's conclusion that Mitchell presented an unacceptable risk of reoffending was 'unassailable'.[37] Nonetheless, at the time of the appeal determination, Mitchell had spent seven weeks in prison on remand—longer than any sentence she would have received for the charges. It was likely that, if not bailed, she would spend up to nine months on remand before trial.[38]

5.29 The Supreme Court granted bail, with reference to the requirement to consider Aboriginality at s 3A of the *Bail Act 1977* (Vic). The Supreme Court noted the potential to over-police Aboriginal and Torres Strait Islander peoples and suggested that charging Mitchell with obtaining financial advantage by deception for travelling on a child's ticket was 'singularly inappropriate'.[39]

5.30 The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) found that prior failures to appear at court, and the lack of a fixed residential address and

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34 See, eg, Lucy Snowball et al, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act* (NSW Bureau of Crime Statistics and Research, July 2010) 5.

35 Don Weatherburn and Lucy Snowball, 'The Effect of Indigenous Status on the Risk of Bail Refusal' (2012) 36(1) *Criminal Law Journal* 50, 56. Aboriginal and Torres Strait Islander defendants are also more than twice as likely to have previously been convicted of a breach offence (See ch 7). See also Jennifer Sanderson, Paul Mazerolle and Travis Anderson-Bond, 'Exploring Bail and Remand Experiences for Indigenous Queenslanders (2011)' (Final Report, Griffith University, 2011) 4.

36 *Re Mitchell* [2013] VSC 59 (8 February 2013).

37 Ibid [7].

38 Ibid [12].

39 Ibid [13].

stable employment contributed to 'Aboriginal disadvantage' in the bail process.[40] The report of the RCIADIC published a submission by the Queensland Attorney-General's Department, acknowledging that high rates of 'mental [and] physical disability, life style, communication difficulties [and] lack of education' can lead to Aboriginal and Torres Strait Islander peoples being held on remand, not because they are attempting to 'escape justice', but because of the particular difficulties they can face in appearing at a court at an 'appointed place or time'.[41]

5.31 The observations of the RCIADIC were repeated in evidence given by the Chief Justice of the Supreme Court of Western Australia to the 2016 Senate Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services, where Martin CJ also cited mental health issues as a key reason why Aboriginal and Torres Strait Islander people were often refused bail.[42]

5.32 The Victorian Equal Opportunity and Human Rights Commission observed that Aboriginal and Torres Strait Islander women were often denied bail due to a lack of safe, stable and secure accommodation to which Aboriginal and Torres Strait Islander women could be bailed, particularly in regional locations.[43] Finding suitable accommodation was especially difficult for women with substance dependencies resulting in both Aboriginal and Torres Strait Islander women and non-Indigenous women being placed in custody for therapeutic reasons, designed to stabilise their addictions and remove them from unsafe environments that may include family violence.[44]

5.33 Language barriers have been identified as another factor that can result in Aboriginal and Torres Strait Islander people being denied release on bail.[45] In their submission to this Inquiry, ALHR identified that language barriers can negatively affect bail determinations for defendants who are unable to accurately outline their living arrangements, support networks, cultural obligations and other relevant matters to the court.[46]

5.34 Stakeholders to this Inquiry suggested that, when there is a presumption against bail or when an accused must 'show cause', the obstacles to a grant of bail for an Aboriginal and Torres Strait Islander person is magnified. Some stakeholders disagreed

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40 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* [1991] Vol 3 [21.4.15]; NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.59].

41 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* [1991] Vol 3 [21.4.18].

42 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [5.64].

43 Victorian Equal Opportunity and Human Rights Commission, above n 32, 50.

44 Emma Russell and Cara Gledhill, 'A Prison Is Not a Home: Troubling "Therapeutic Remand" for Criminalised Women' (2014) 27(9) *Parity* 27.

45 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* [1991] Vol 3 [21.4.21]. See ch 10 for a broader discussion on issues impacting on access to justice for Aboriginal and Torres Strait Islander peoples.

46 Australian Lawyers for Human Rights, *Submission 59*.

with the ALRC's decision not to interrogate the categories of show cause offences.[47] For example, ALHR observed:

> ALHR notes and regrets the Commission's decision not to discuss bail presumptions in the Discussion Paper. Bail presumptions are often the decisive legislative factor in bail applications. Just as importantly, where legislation imposes a presumption against bail for a low level offence this can result in defendants spending longer on remand than they would likely serve as a sentence. For example, ALHR notes that in the Northern Territory a defendant who has a recent prior conviction for a "technical" [a breach that causes no harm to the protected person] breach of a domestic violence order and is again arrested for a technical breach will face a presumption against bail. This is so notwithstanding that, at the sentencing stage, such a defendant may stand good prospects of a very short prison sentence or a non-custodial disposition. ALHR hopes that the Commission will address this issue in its final report.[48]

5.35 Aboriginal Legal Service of Western Australia (ALSWA) referred to the impact on Aboriginal and Torres Strait Islander accused for 'Schedule Two' cases, which carry a presumption against bail in WA. Schedule Two cases are matters where the accused allegedly committed a 'serious offence' while on bail or parole for another matter. ALSWA advised that the category of 'serious offences' includes conduct such as indecent assault, stealing and breaching a police order.[49]

5.36 The Criminal Lawyers Association of the Northern Territory (CLANT) noted that amendments to the *Bail Act* (NT) in 2015 expanded the number of offences that triggered the presumption against bail. While recognising that this was not focus of the ALRC Inquiry, CLANT submitted that 'the significant effect this provision has on increasing the number of ATSI people on remand cannot go unremarked'.[50]

5.37 Legal Aid NSW, having represented 3,000 accused Aboriginal and Torres Strait Islander people in bail matters in 2016–17, was strongly in favour of removing the show cause provisions in the *Bail Act 2013* (NSW).[51] It advised that, in NSW, an Aboriginal or Torres Strait Islander person who had been bailed for a minor offence, if subsequently charged with stealing from a shop while on bail, will be bail refused unless they can 'show cause'.[52]

5.38 The ALRC is aware of recent reviews and ongoing monitoring of the operation of 'show cause' provisions in the various states and territories.[53] Nonetheless, the

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47 Legal Aid NSW, *Submission 101*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; Australian Lawyers for Human Rights, *Submission 59*.

48 Australian Lawyers for Human Rights, *Submission 59*.

49 Aboriginal Legal Service of Western Australia, *Submission 74*.

50 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

51 *Bail Act 2013* (NSW) ss 16A, 16B.

52 Legal Aid NSW, *Submission 101*.

53 See, eg, NSW Sentencing Council, *Bail—Additional Show Cause Offences* (2015); Don Weatherburn and Jacqueline Fitzgerald, 'The Impact of the NSW Bail Act (2013) on Trends in Bail and Remand in New South Wales' [2015] (106) *Crime and Justice Statistics: Bureau Brief, Issue 106*; Hamish Thorburn, 'A Follow-up on the Impact of the Bail Act 2013 (NSW) on Trends in Bail' [2016] *Crime and Justice Statistics: Bureau Brief, Issue 116*; Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017); Paul Coghlan, *Bail Review: Second Advice to the Victorian Government* (2017).

ALRC accepts that the expansion of 'show cause' or presumption against bail categories has likely affected the Aboriginal and Torres Strait Islander remand population, and encourages states and territories to evaluate the effect of 'show cause' provisions on accused Aboriginal and Torres Strait Islander people when conducting their reviews.

5.39 Other issues raised by stakeholders relevant to bail refusal for Aboriginal and Torres Strait Islander accused people included bail provisions that operated to restrict multiple applications for bail following a bail refusal.[54] It was contended that these provisions increased the number of Aboriginal and Torres Strait Islander people held on remand, and acted as a disincentive to apply for bail until the person can 'maximise their chance of release'.[55]

5.40 Stakeholders also drew attention to problems that exist in regional and remote areas when bail is refused by police, and the person is held in a remote police station until transported, or over the weekend, or both.[56] When arrested in a remote area and bail is refused by police, the defendant may be held in custody until court is next sitting. Transport to court can be cumbersome and expensive. Often the accused will be granted bail by the court at the first appearance and then have to return from the court to community at their own cost. ALHR observed that this results in defendants spending longer in police custody than necessary, and that this could be avoided by the 'provision of funding for Aboriginal legal aid lawyers to represent such defendants by phone or video link at the time of their review of the initial police bail refusal'.[57] The NT Anti-Discrimination Commission suggested that servicing by legal advocates could be included as part of a custody notification service.[58]

Breach of conditions of bail

5.41 When bail is granted to an Aboriginal and Torres Strait Islander person, the conditions attached to bail may conflict with an Aboriginal and Torres Strait Islander person's cultural obligations, increasing the risk of breach and consequent imprisonment.[59] Curfews, exclusion zones and non-association orders can 'restrict contact with family networks and prevent Aboriginal people from maintaining relationships, performing responsibilities such as taking care of elderly relatives or attending funerals'.[60] In the 2011 report, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*, it was observed that compliance with 'standard' conditions (curfews, resident restrictions, reporting requirements and alcohol bans) was difficult for some Aboriginal and Torres Strait Islander people. The report concluded that

> [f]ailure to comply with these conditions along with the stringent policing of minor breaches in some locations increased the risk of custodial remand for Indigenous

54 See, eg, *Bail Act 2013* (NSW) s 74.
55 Legal Aid NSW, *Submission 101*.
56 Northern Territory Anti-Discrimination Commission, *Submission 67*; S McLean Cullen, *Submission 64*; Australian Lawyers for Human Rights, *Submission 59*.
57 Australian Lawyers for Human Rights, *Submission 59*.
58 Northern Territory Anti-Discrimination Commission, *Submission 67*. See also ch 10.
59 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.54].
60 Ibid.

> defendants, with court delays then contributing to the length of time defendants remained in remand.[61]

5.42 In their 2012 report on bail, the NSW Law Reform Commission (NSWLRC) pointed to transient culture as a further example of how Aboriginal and Torres Strait Islander culture can conflict with standard bail conditions:

> For many Aboriginal people, frequent short-term mobility is a normal part of life. People may travel for a few days or a few months, usually to visit family, but also to attend funerals, cultural or sporting festivals or to access health services. Short-term travel is most common among young adults, with older people more firmly associated with a homeland and serving as a focus or base for others, particularly children. Bail processes requiring a fixed address and frequent reporting to a particular police station may conflict with these cultural practices.[62]

5.43 The NSWLRC also noted that Aboriginal and Torres Strait Islander people may have strong historical and cultural ties to particular locations. It found that bail conditions that restrict access to 'place' can have serious impacts on the person.[63]

5.44 For this reason, the NSW *Equality before the Law Bench Book* for the judiciary advised that it may be 'less appropriate to attach a condition for an Aboriginal person that the person leave town, than it would be to do so for a non-Aboriginal person'.[64] The *Bench Book* clearly articulated the problem:

> Conditions of bail can often have a disproportionately stringent impact on Aboriginal people as, particularly in rural areas, the conditions may conflict with family and cultural obligations. Where residence or banning conditions are a condition of bail, the person released on bail will not have access to support from the community in which he or she grew up.[65]

5.45 There are also practical considerations, especially in regional and remote communities where public transport infrastructure is lacking. Remoteness can affect a person's ability to meet reporting requirements. Aboriginal and Torres Strait Islander people may not have driver licences, registered motor vehicles (or a car at all), or access to licensed drivers.[66] In such cases, place and circumstance can limit compliance with certain bail conditions.

5.46 Non-compliance with conditions of bail can be inadvertent. In 2014, the West Australian Auditor General found that one in five Aboriginal and Torres Strait Islander accused people may need help understanding bail, and noted that interpreters were limited.[67] In their submission to this Inquiry, ALHR observed how language barriers can detract from an accused person's understanding of their bail conditions, noting that they are often explained in legalese by officers of the courts or police in a 'time-poor'

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61 Sanderson, Mazerolle and Anderson-Bond, above n 35, 3.
62 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.56].
63 Ibid [11.57].
64 Judicial Commission of NSW, *Equality before the Law Bench Book* (2016) [2.3.2].
65 Ibid.
66 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.53].
67 Western Australian Auditor General, above n 18, 16. See also ch 10.

environment. It was recommended that more interpreters be employed for this purpose.[68]

5.47 The submission from the NSW Government advised that the majority of breaches of bail conditions by Aboriginal and Torres Strait Islander people were generally for 'technical breaches'. For example, in 2015 in NSW, 2,945 Aboriginal and Torres Strait Islander people had a breach of bail established against them in the Local Court. Of these, 32% involved a new offence; 25% breached curfew; 17% breached reporting requirements; and 14% failed to reside in the designated location. Some breached more than one condition.[69]

5.48 The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted that courts continue to regularly impose conditions that

> fail to recognise the specific cultural and community obligations, transport difficulties, transience and frequent short–term mobility (resulting in a lack of fixed address), living in a remote or regional community, poverty, or misunderstanding the purpose of bail that likely affect one's ability to meet strict bail conditions for Aboriginal and Torres Strait Islander people.[70]

5.49 Stakeholders to this Inquiry stressed that bail conditions should be imposed only to address an identified risk. It was observed that non-association orders that restrict access to family networks and prevent Aboriginal people from 'maintaining relationships, performing responsibilities or attending funerals' rarely address a risk and can be 'especially problematic' for Aboriginal people.[71] The difficulty that women with family responsibilities may have in meeting conditions was also raised.[72] It was suggested that, to avoid an accused person being in breach and then remanded in custody, bail conditions should be kept to a 'necessary minimum'.[73]

5.50 Bail conditions prohibiting alcohol intake were identified as particularly problematic for Aboriginal and Torres Strait Islander peoples.[74] Legal Aid WA suggested that alcohol bans increase the likelihood of breach, police intervention, and entry into custody for Aboriginal and Torres Strait Islander people 'independent of whether they were likely to commit another offence or not'.[75] The ACT Law Society further observed that conditions regarding alcohol consumption can be both unachievable and harmful to people with alcohol dependencies, noting that 'alcohol withdrawal can be fatal'.[76]

5.51 Pre-conditions for release on bail can also be unnecessarily or unfairly applied to Aboriginal and Torres Strait Islander accused people. Legal Aid NSW submitted that some magistrates impose sureties in the absence of any demonstrated concern that the

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68 Australian Lawyers for Human Rights, *Submission 59*. See also ch 10.
69 NSW Government, *Submission 85*.
70 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
71 Legal Aid NSW, *Submission 101*.
72 Northern Territory Government, *Submission 118*.
73 Legal Aid WA, *Submission 33*.
74 Law Council of Australia, *Submission 108*.
75 Legal Aid WA, *Submission 33*.
76 ACT Law Society, *Submission 40*.

offender will fail to appear.[77] Imposing sureties can be particularly difficult for Aboriginal and Torres Strait Islander people to meet, especially when living remotely without employment.[78] For Aboriginal and Torres Strait Islander people on welfare or in receipt of the cashless debit card, bail sureties can present an 'insurmountable obstacle' to release.[79]

5.52 The *Aboriginal Benchbook for Western Australia Courts* suggests that courts in Western Australia are adept at reducing the monetary value of bail and surety undertakings to a 'level appropriate for applicants with a low income or few assets', and often impose other conditions, such as reporting conditions, in lieu of requiring a surety.[80] Nonetheless, ALSWA advised that they had represented many clients who spend 'weeks or months in custody because they are unable to raise a surety', which is often set at $1,000 or $2,000.[81] Sureties were also identified as an issue by the Legal Services Commission of South Australia, which raised the possibility of implementing a Community Bail Fund to pay bail amounts of up to $2,000. The bail amounts would then be recycled back through the fund when the matter concluded.[82] ALSWA suggested that, instead of seeking a surety, the court should assess risk in relation to family, kin and community ties of Aboriginal and Torres Strait Islander accused people.[83]

5.53 Some pre-conditions are particular to certain regions. Legal Aid WA advised the ALRC of the 'common practice' of some magistrates in the Pilbara to require a letter from the chairperson of an Aboriginal community that is being proposed as a place of residence to state that the accused is welcome in that community. Legal Aid WA suggested that these letters may be difficult to obtain due to time constraints and communication difficulties, resulting in the person not being granted bail. Legal Aid WA submitted that 'this requirement has become an impediment to the granting of bail, which accused people with proposed bail addresses in non-Aboriginal communities do not experience'.[84]

5.54 Pre-release conditions can affect a large number of Aboriginal and Torres Strait Islander people. In 2014, the Auditor General of Western Australia advised that there were over 1,600 people that had been granted bail but who were unable to meet their bail conditions in WA that year, so were held in remand until the condition could be met. At that time, over 40% of the prison population were Aboriginal and Torres Strait Islander people. The majority of people had release on bail delayed while they obtained

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77 Legal Aid NSW, *Submission 101*.

78 Northern Territory Government, *Submission 118*.

79 Australian Lawyers for Human Rights, *Submission 59*.

80 Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* [6.1.2].

81 Aboriginal Legal Service of Western Australia, *Submission 74*.

82 Legal Services Commission of South Australia, *Submission 17*.

83 Aboriginal Legal Service of Western Australia, *Submission 74*; See also NSW Bar Association, *Submission 88*. The NSW Bar Association also noted that the requirement to show capacity to pay—that the money has been in the acceptable person's bank account for seven days—often acts as an obstacle to release on bail for people on low incomes who generally do not keep funds in their account for long periods of time.

84 Legal Aid WA, *Submission 33*.

a surety or a residential address. While 307 people who had been granted bail were unable to meet their pre-release conditions, and did not get released.[85] The ALRC suggests that, when implemented, the bail recommendations should lower the likelihood of bail authorities imposing inappropriate conditions, including the imposition of sureties (see below).

5.55 The NSW Bar Association suggested to this Inquiry that anyone granted bail, but not released due to unmet conditions, should be brought back before the court within a maximum of three days for the court to reassess their application for bail.[86]

Existing mechanisms to consider issues that arise due to Aboriginality

5.56 There are mechanisms in place to permit or encourage bail authorities to take into account issues that arise due to Aboriginality when making bail determinations. These include legal frameworks that provide guidance to judicial decision making and statutory provisions to consider Aboriginality or culture in bail determinations, outlined below. It is clear, however, that these existing mechanisms are not sufficient to ensure bail authorities adequately consider issues relating to Aboriginality, and to decrease the rate at which Aboriginal and Torres Strait Islander people are held on remand.

Legal frameworks

5.57 Legal frameworks in place in some jurisdictions encourage bail authorities to take into account historical context and cultural practices and obligations in bail determinations. The *Aboriginal Benchbook for Western Australian Courts* provides context, background and direction for the judiciary in regards to bail determinations. It suggests, for example, that under the 'exceptional circumstances' requirement for bail in serious cases, the circumstances of an Aboriginal accused person may constitute 'exceptional circumstances'.[87]

5.58 The NSW *Equality before the Law Bench Book* provides guidance for bail determinations that involve Aboriginal or Torres Strait Islander people. When assessing 'unacceptable risk', it provides the following directives:

> Aboriginal people must not be subjected to any more stringent tests in relation to bail, or any conditions attached to bail, than non-Aboriginal people. A bail condition can be imposed only for the purpose of mitigating an unacceptable risk.
>
> Paternalism is not appropriate.
>
> Irrespective of their housing status, Aboriginal people often have very close kinship and family ties to a particular location. Given Aboriginal kinship ties, it may also be less appropriate to attach a condition for an Aboriginal person that the person leave town, than it would be to do so for a non-Aboriginal person.

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85 Western Australian Auditor General, above n 18, 7, 13; Also see Aboriginal Legal Service of Western Australia, *Submission 74*.

86 NSW Bar Association, *Submission 88*.

87 Fryer-Smith, above n 80, [6.1.5]. *Unchango v R* (Unreported, WASC, 12 June 1998).

> Assess bail and bail conditions not just based on police views but also on the views of the defence and respected members of the local Aboriginal community and/or the Local Court Aboriginal Client Service Specialist (if there is one) about the particular person's ties to the community and likelihood of absconding, and about culturally-appropriate options in relation to bail conditions. Community-based support, for example, might provide as viable an option as family-based support ...
>
> Reporting and residential conditions need to be realistic and not unduly oppressive—for example, a condition banning residence in a particular town, or requiring court permission to change, may be ruled as unduly oppressive if there is a death in the defendant's family requiring their immediate attendance in that town.[88]

5.59 This approach has been reflected in appeal decisions of the Supreme Court of NSW. For example, in *R v Brown* [2013] NSWCCA 178, the NSW Court of Criminal Appeal noted that

> extended family and kinship, and other traditional ties, warrant significant consideration in the determination of whether or not to grant bail. In the cases of Aboriginal accused, particularly where the applicant for bail is young, alternative culturally appropriate supervision, where available (with an emphasis on cultural awareness and overcoming the renowned antisocial effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to a remand in gaol.[89]

5.60 More recently, the Supreme Court of NSW found that lengthy periods of remand and separation from family may perpetuate a cycle of disadvantage, which could constitute 'cause' under show cause provisions. It also observed that bail conditions should be crafted so as to break that cycle:

> During that period the applicant would in all likelihood see very little of the child if bail is refused. That is a factor which seems to me to be likely to perpetuate the cycle of disadvantage and deprivation notoriously faced in [I]ndigenous communities and, as a matter of evidence in the material before me, specifically faced in the family of this applicant. If the Court can reasonably impose conditions which are calculated to break that cycle, in my view it should. That is a strong factor in my finding cause shown.[90]

Statutory provisions

5.61 Provisions enabling courts to take into account cultural considerations when making bail determinations for Aboriginal and Torres Strait Islander people have been introduced to varying degrees in the NT, Queensland and Victoria. In NSW, there is a requirement to consider the vulnerability of Aboriginal and Torres Strait Islander accused people. These are briefly outlined below.

New South Wales

5.62 In NSW, s 18(1)(a) and s 18(1)(k) of the *Bail Act 2013* require a bail authority to consider, among other things, 'community ties' and any 'special vulnerability or needs

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88 Judicial Commission of NSW, *Equality before the Law Bench Book* (2016) [2.3.2].

89 *R v Michael John Brown* [2013] NSWCCA 178 (2 August 2013) [34]–[35].

90 *R v Alchin* (Unreported, NSWSC, 16 February 2015) [3]. See also: *R v Wright* (Unreported, NSWSC, 7 April 2015) [7]–[9].

the person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment' when assessing 'unacceptable risk'.[91]

5.63 The reference to 'community ties' in s 18(a) does not specifically mention Aboriginal and Torres Strait Islander peoples. It may, however, have particular relevance to Aboriginal and Torres Strait Islander people and be derived from the previous *Bail Act 1978* (NSW) that directed courts to give consideration to the

> person's background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record (if known).[92]

Northern Territory

5.64 The *Bail Act* (NT) requires bail authorities to consider, among other things, any 'needs relating to the person's cultural background, including any ties to extended family or place, or any other cultural obligation'.[93] The provision within the *Bail Act* (NT) does not specifically refer to Aboriginal or Torres Strait Islander culture.

5.65 The NT provision commenced in 2015 following a review of the *Bail Act* (NT). Stakeholders in that Inquiry supported the NSWLRC recommendation that bail authorities consider matters 'associated with Aboriginal or Torres Strait Islander identity, culture and heritage, including connections with extended family and traditional ties to place'.[94]

5.66 The application of the NT provision to Aboriginal and Torres Strait Islander peoples may be hampered by a prohibition under Commonwealth law for bail courts to consider any form of customary law or cultural practice as a reason for lessening or increasing the seriousness of the offending.[95] However, the objective of the Commonwealth provision was to 'prevent customary law from being used to mitigate the seriousness of any offence that involves violence against women and children'.[96] The NT Supreme Court has found that provisions of this type did not prevent courts from considering customary law or cultural practice to: provide context for offending; establish good prospects of rehabilitation (relating to sentencing); and to establish the

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91 A similar list of considerations was recommended for Victoria in 2017 to operate in conjunction with s 3A: Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017) 44, rec 5.

92 *Bail Act 1978* (NSW) s 32(1)(a)(ia). See also *Bail Act 1992* (ACT) s 22(3)(b).

93 *Bail Act* (NT) s 24(1)(B)(iiic).

94 Department of Attorney General and Justice, *Exposure Draft Bail Amendment Bill 2014: Discussion Paper* (2014). See, eg, North Australian Aboriginal Justice Agency, '*Submission to the NT Government, Review of the Bail Act (NT)* (March 2013)'; Northern Territory Law Society, Submission to the Northern Territory Government, *Review of the Bail Act (NT)* (4 April 2013).; NSW Law Reform Commission, *Bail*, Report No 133 (2012) rec 11.3; Department of the Attorney General and Justice (NT), *Consultation Results Report: Consultation Regarding Application in the Lower Courts of Recorded Statement Protections for Vulnerable Witnesses: Section 21B of the Evidence Act* (2014).

95 *Crimes Act 1914* (Cth) s 15AB(1)(b).

96 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *2016 Review of Stronger Futures Measures* (2016) app A.

character of the accused.[97] The equivalent provision relevant to sentencing in the NT is discussed in Chapter 6.

Queensland

5.67 The Queensland provision permits the court to consider, among other things, evidence from a Community Justice Group:

> **16 Refusal of bail**
>
> ...
>
> (2)(e) if the defendant is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the defendant's community, including, for example, about—
>
> (i) the defendant's relationship to the defendant's community; or
>
> (ii) any cultural considerations; or
>
> (iii) any considerations relating to programs and services in which the community justice group participates.[98]

5.68 Community Justice Groups were established in 1993 in North Queensland. There are now up to 50 such groups operating throughout Queensland. Community Justice Groups consist of Elders, Traditional Owners, and other respected Aboriginal and Torres Strait Islander community members who come together to: make cultural submissions to Magistrates Courts on behalf of accused/defendants; identify appropriate treatment and support programs; and provide assistance to Aboriginal and Torres Strait Islander peoples as they progress through the Murri Court.[99]

5.69 Stakeholders advised the ALRC that the relevant bail provisions in NSW, the NT and Queensland were rarely used[100] and, when used, statutory construction had limited the application and effectiveness of the provisions.[101] NATSILS advised that the existing provisions were 'simply too narrow or uncertain to be effective'.[102] CLANT observed that the NT provision informed only the decision whether to grant bail, not the conditions of bail. Further, the use of the word 'needs' rather than 'issues' in the NT was likely to 'restrict the court from considering systemic issues such as the over-incarceration of ATSI people'.[103] Conversely, the Law Society of NSW Young Lawyers Criminal Law Committee (YLCLC) expressed concern that, in NSW,

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97 Ibid [2.5]. See also *The Queen v Wunungmurra* [2009] NTSC 24 [3].

98 *Bail Act 1980* (Qld) s 16(2)(e), see also s 15(f).

99 See, eg, Queensland Courts, *Community Justice Group Program* <http://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>. Community Justice Groups are also referred to in ch 6.

100 See, eg, Legal Aid NSW, *Submission 101*; Queensland Law Society, *Submission 86*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Caxton Legal Centre, *Submission 47*; Public Defenders NSW, *Submission 8*.

101 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

102 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

103 Criminal Lawyers Association of the Northern Territory, *Submission 75*. CLANT observed that the sub section has yet to be subject to any judicial interpretation.

s 18(1)(k) appeared to be restricted to considerations of over-representation and the cycle of disadvantage, and did not include an assessment of 'culture, kinship or the need to tailor bail conditions for Aboriginal people'.[104] The reliance on the language of 'special vulnerability' when assessing Aboriginality was also considered objectionable by the ALS NSW/ACT.[105]

5.70 The WA Commissioner for Children and Young People expressed support for the construction and limitations of the relevant NSW provision to the extent that it 'focuses on factors of vulnerability or special needs, including cognitive or mental health impairment, rather than focusing on race' stating that 'race alone is not a 'causal' factor'. In the view of the Commissioner all factors related to disadvantage, other than race, should be considered in bail determinations.[106]

5.71 Caxton Legal Centre noted the limitations of the Queensland provision, pointing to the need for a provision that permitted the court to consider cultural factors more broadly 'without the need for reports to be submitted' by Community Justice Groups.[107] Caxton supported the ongoing resourcing of Community Justice Groups, while raising concerns that Community Justice Groups serviced only 25% of all accused/offenders identifying as Aboriginal and Torres Strait Islander in Queensland. It further suggested that the reliance upon participation by Community Justice Groups rendered the Queensland provision vulnerable: considerations of cultural factors by bail authorities were 'impacted upon by both the reach of Community Justice Group program and the goodwill of incumbent State governments to adequately fund such programs'.[108]

5.72 There was also a reported lack of engagement with the provisions. CLANT observed that the introduction of the provision in the NT was not met with the same 'fanfare' as the amendments to expand presumption against bail offences, introduced at the same time. It noted that the cultural consideration provision had 'not been embraced by the profession or the judiciary in the same way'.[109]

5.73 There was some support for the NSW provisions. NSW Chief Magistrate Henson submitted that bail law in NSW was sufficient to consider cultural issues, as the provisions already required the court to consider a list of specific matters. The extent to which issues relating to Aboriginality feature in the court's assessment was 'necessarily dependent upon the advocacy on behalf of the accused person'. This would remain the same whether the provision was updated or remained unamended. [110]

5.74 The YLCLC submitted that the NSW provision to consider 'community ties' (s 18(1)(a)) had been actively engaged with in bail proceedings—particularly when the Aboriginal Legal Service was acting as defence—to good effect. The YLCLC

104 Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.
105 Aboriginal Legal Service (NSW/ACT), *Submission 63*.
106 Commissioner for Children and Young People Western Australia, *Submission 16*.
107 Caxton Legal Centre, *Submission 47*.
108 Ibid. See also Sisters Inside, *Submission 119*.
109 Criminal Lawyers Association of the Northern Territory, *Submission 75*.
110 Chief Magistrate of the Local Court (NSW), *Submission 78*.

suggested that accused persons were more likely to be granted bail under the provision if they could demonstrate the support of their community, and particularly if they had the support of respected Elders. Involvement in Aboriginal and Torres Strait Islander support and cultural groups was also looked upon favourably by the court, although the YLCLC did report that Aboriginal and Torres Strait Islander support networks were not adequately considered by bail authorities.

5.75 Other NSW stakeholders were not so supportive of the efficacy of the existing legislative provisions. For example, the Public Defenders NSW advised that, in their experience, when the provision was mentioned in bail applications in NSW, it 'rarely made a practical difference', stating, 'simply put, a stronger message needs to be sent'.[111]

The Victorian provision: s 3A of the *Bail Act 1977*

5.76 Victoria is the only state or territory to have introduced a standalone provision that requires the court to take culture into account:

> **3A Determination in relation to an Aboriginal person**
>
> In making a determination under this Act in relation to an Aboriginal person, a court must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including—
>
> (a) the person's cultural background, including the person's ties to extended family or place; and
>
> (b) any other relevant cultural issue or obligation.[112]

5.77 Section 3A interacts with s 19 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides for cultural rights, and specifically recognises that Aboriginal persons hold distinct cultural rights. Under the Charter, Aboriginal people must not be denied the right to:

- enjoy their identity and culture;
- maintain and use their language;
- maintain their kinship ties; and
- maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

5.78 Section 3A was introduced in 2010 following a Victorian Law Reform Commission (VLRC) report on bail.[113] The VLRC recommended that bail authorities be required to take into account cultural factors and community expectations to prevent Aboriginal and Torres Strait Islander people from being remanded unnecessarily or

111 Public Defenders NSW, *Submission 8*.
112 *Bail Act 1977* (Vic) s 3A.
113 *Bail Amendment Act 2010* (Vic).

bailed subject to inappropriate conditions.[114] It was considered important to take cultural considerations into account in relation to all aspects of the bail determination process, including assessing unacceptable risk and the setting of bail conditions.[115]

5.79 The VLRC recommended that the *Bail Act 1977* (Vic) be amended to include an Aboriginal and Torres Strait Islander-specific provision. This was needed both to overcome discrimination, and the historical and continuing disadvantage suffered by Aboriginal people in relation to bail and to provide consistency in the application of bail law:

> It is important that ... cultural factors and community expectations are taken into account when making bail decisions. Otherwise Indigenous Australians may be bailed on inappropriate bail conditions which they are more likely to breach, or remanded unnecessarily contributing to their overrepresentation in custody.
>
> Without a specific direction to decision makers in the *Bail Act*, there is a risk that consideration of these matters will be inconsistent and will compound the historical and continuing disadvantage faced by Indigenous Australians in their contact with the criminal justice system.[116]

5.80 When the amendment incorporating s 3A was introduced into Parliament in 2010, the responsible Minister stated the following during the second reading speech:

> The VLRC noted that Aboriginal Australians are overrepresented on remand and face unique disadvantages in their contact with the criminal justice system. In recognition of this, the VLRC recommended that the Bail Act should contain a specific provision for accused people who are Aboriginal.
>
> In line with this recommendation, the bill inserts new section 3A in the Bail Act. Section 3A requires a decision-maker to take into account (in addition to any other requirements in the Bail Act) any issues that arise due to the Aboriginality of an accused when making a determination under the Bail Act.
>
> Under section 3A, a decision-maker would be required to take into account matters such as an obligation to attend a community funeral or participate in community cultural activities when imposing conditions of bail on an accused who is Aboriginal.
>
> While the provision requires the decision-maker to take the evidence into account it does not require the decision-maker to reach a particular decision. The test for granting bail remains unchanged, requiring a decision as to unacceptable risk.[117]

5.81 Courts have interpreted the Victorian provision to permit consideration of the over-representation of Aboriginal and Torres Strait Islander people in prison and the effects of policing practices.[118] The Supreme Court of Victoria (where appeals regarding bail applications are heard) has, however, stressed that the provision does not

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114 Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) 180.
115 Ibid 179.
116 Ibid 180.
117 Victoria, *Parliamentary Debates*, Legislative Council, 29 July 2010, 3502 (John Lenders).
118 *Re Mitchell* [2013] VSC 59 (8 February 2013) [13].

operate to grant bail to an Aboriginal and Torres Strait Islander applicant who poses an unacceptable risk to community safety.[119]

5.82 In *R v Chafer-Smith* the accused was required to 'show cause'.[120] Bail was opposed upon the ground that the accused was an unacceptable risk. The Supreme Court of Victoria was urged by the applicant to apply s 3A 'in the light of the report of the 1991 Royal Commission into Aboriginal Deaths in Custody, the vast statistical overrepresentation of Aboriginal and/or Torres Strait Islander Australians held in custody and current overcrowding in custody'.[121] The Court took these considerations into account, but refused bail, stating:

> In the circumstances ... I consider that there is a significant risk that the applicant will repeat [the] type of offending should I grant bail and should that risk become reality, the consequences may well be catastrophic. I have considered the applicant's Aboriginality, as I must under s 3A of the *Bail Act*. I am obliged to take into account any issues that arise therefrom. I accept that Aboriginal Australians are very significantly overrepresented in our prisons and I consider that if this were a marginal case where a decision to grant bail or refuse it was a close run thing, then s 3A considerations may well operate to determine the application in the applicant's favour.[122]

5.83 In *DPP v Hume* the applicant's Aboriginal kinship obligations to his mother were taken into account under s 3A. The Court determined, however, that those obligations were not sufficient to overcome the prosecution objections that the applicant represented an unacceptable risk.[123]

5.84 In *TM v AH* the Court considered an application for bail by Aboriginal child aged 14 with an intellectual disability, who was required to 'show cause'.[124] TM was refused bail by the magistrate after receiving a custodial sentence. Application for bail was then made in the Supreme Court of Victoria, where bail was granted. In its decision, the Supreme Court of Victoria held:

> I am satisfied that TM has shown cause why his detention in custody is not justified. In particular, I am satisfied that TM's tender age, his intellectual disability, his lack of prior convictions, the requirements of s 3A of the *Bail Act*, the reasonable prospect that he will receive a non-custodial sentence on appeal, and on the outstanding charges, and the proposed regime put in place for his release all, in combination, compel the view that his further detention in custody is not justified.[125]

5.85 The Supreme Court determined that the applicant was not an unacceptable risk when the conditions of bail were taken into account.[126] Considering the applicant's family ties, the Court remarked that 'TM's ties to his family and home are strong, yet

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119 See, eg, *DPP v SE* [2017] VSC 13 (31 January 2017) [20]; *R v Chafer-Smith* [2014] VSC 51 (21 February 2014) [23]–[28]; *Re Hume (Bail Application)* [2015] VSC 695 (8 December 2015).
120 *Re Chafer-Smith; An Application for Bail* [2014] VSC 51 (21 February 2014).
121 Ibid [23].
122 Ibid [27].
123 *Re Hume (Bail Application)* [2015] VSC 695 (8 December 2015) [63].
124 *TM v AH* [2014] VSC 560 (5 November 2014).
125 Ibid [31].
126 Ibid [32].

he is a long way from them at the moment and has been in that situation for nearly six months'.[127]

5.86 In *Kirby v The Queen* the Court granted bail after taking into account the strong family ties of the Aboriginal applicant with the local community.[128]

Adopt s 3A in other states and territories

Recommendation 5–1 State and territory bail laws should be amended to include standalone provisions that 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. These would particularly facilitate release on bail with effective conditions for Aboriginal and Torres Strait Islander people who are accused of low-level offending.

The *Bail Act 1977* (Vic) incorporates such a provision.

As with all other bail considerations, the requirement to consider issues that arise due to a person's Aboriginality would not supersede considerations of community safety.

Recommendation 5–2 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:

- develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies; and
- identify gaps in the provision of culturally appropriate bail support programs and diversion options, and develop and implement relevant bail support and diversion options.

5.87 The introduction of a discrete provision in the bail statutes across states and territories would require bail authorities to contextualise issues that arise due to a person's Aboriginality when making bail determinations—including determinations when the accused must 'show cause'—and in setting conditions, and should:

- require bail authorities to consider community supports, the person's role in community and cultural obligations when determining risk. It permits these considerations to be balanced against the lack of otherwise permanent residency, employment and immediate family supports;
- require courts to consider any previous offending—especially low-level offending—in context, particularly where a person has experienced historical and continuing disadvantage, as in Victoria;[129]

127 Ibid [17].
128 *Kirby v The Queen* [2013] VSC 602 (31 October 2013) [7].

- require bail authorities to consider remoteness, flexible living arrangements and mobility when setting bail conditions;[130]
- lower the likelihood of bail authorities imposing inappropriate conditions, including the imposition of sureties, that ultimately are difficult, if not impossible, to meet;
- decrease the risk that considerations of cultural practice and obligations by bail authorities will be taken into account inconsistently; and
- reduce the number of Aboriginal and Torres Strait Islander peoples in prison on remand—especially critical for women on remand, who may lose accommodation and custody of their children while in prison.[131]

5.88 There have been calls to introduce a provision similar to that enacted in Victoria in other jurisdictions. In 2012, the NSWLRC recommended the introduction of a provision that would require consideration in bail determinations to be given to matters 'associated with Aboriginal or Torres Strait Islander identity, culture and heritage, including connections with extended family and traditional ties to place.'[132] It suggested that bail authorities consider the 'strength or otherwise of the person's family and community ties, including employment, business and other associations, extended family and kinship ties and the traditional ties of Aboriginal people and Torres Strait Islanders'.[133]

5.89 A 2017 report into the over-representation of Aboriginal and Torres Strait Islander women in prison recommended amendments to state and territory bail legislation to ensure that the historical and systemic factors contributing to the over-imprisonment of Aboriginal and Torres Strait Islander peoples be taken into account in bail decisions. The report further recommended that consideration be given to the impact of imprisonment—including remand—on dependent children.[134] The report noted that bail support and diversionary options linked with accommodation, designed by and for Aboriginal and Torres Strait Islander women, were also required if such legislation is to have its intended effect of keeping Aboriginal and Torres Strait Islander women out of prison on bail.[135] This reflected the observations of the Victorian Equal Opportunity and Human Rights Commission in 2013,[136] and was also reiterated by the Law Institute of Victoria in 2017.[137]

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129 See, eg, *R v Chafer-Smith* [2014] VSC 51 (21 February 2014).
130 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
131 See ch 11.
132 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.65] rec 11.3.
133 Ibid rec 10.4; Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (Report 94, 2006) recs 29–34.
134 Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) rec 15.
135 Ibid 46.
136 Victorian Equal Opportunity and Human Rights Commission, above n 32, 52.
137 Law Institute of Victoria, 'Review of Victoria's Bail System' (2017) 27. See also Victorian Aboriginal Legal Service, *Submission 39*; Australian Red Cross, *Submission 15*.

5.90 The Victorian provision goes further than the provisions in NSW and the NT, and places a different emphasis on the evidence than the Queensland provision, which requires a submission from a Community Justice Group. Section 3A is prescriptive, *requiring* the court, rather than *permitting* the court (as in Queensland), to consider issues related to Aboriginality,[138] and wide enough to be of broader application and to include considerations of appropriate bail conditions.[139]

5.91 Section 3A was supported in a 2017 Victorian bail review, which reported widespread stakeholder support for the provision in Victoria.[140]

5.92 Submissions to this Inquiry overwhelmingly supported the proposal that state and territories adopt a provision similar to s 3A.[141] Bench books and practice notes were seen to be important, but insufficient to address the issues and to provide for consistency.[142] The Victorian provision was seen as a way to strengthen bail laws for accused Aboriginal and Torres Strait Islander peoples.[143] It was considered that s 3A would fill the gap in jurisdictions that currently do not have a statutory requirement to consider issues relating to a person's Aboriginality, and be a better option for those that do.[144] Legal Aid ACT suggested that the 'benefits' of the Victorian provision 'were clear':

> In the first instance, it would likely aid the removal of lingering (if inadvertent) structural biases, promoting a more responsive and equitable system for ATSI offenders. Courts would be required to turn their minds to the diverse cultural institutions and community configurations that exist to support and condemn ATSI offenders, and consider these relevant to other Bail Act requirements. Far from being a race based 'bonus' card, the provision's aim would be to provide accurate insight and a more complete understanding of the risks and particularities relevant to the defendants at hand.[145]

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138 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

139 Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Australian Red Cross, *Submission 15*.

140 Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017) [4.82].

141 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Amnesty International Australia, *Submission 89*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84* 84; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; National Congress of Australia's First Peoples, *Submission 73*; Australian Lawyers for Human Rights, *Submission 59*; Victoria Legal Aid, *Submission 56*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Australian Red Cross, *Submission 15*; Public Defenders NSW, *Submission 8*.

142 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.

143 Public Defenders NSW, *Submission 8*.

144 See, eg, Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid WA, *Submission 33*; Australian Red Cross, *Submission 15*.

145 Legal Aid ACT, *Submission 107*.

5.93 The Chief Magistrate of the Local Court of NSW and the Institute of Public Affairs (IPA) did not support the adoption of s 3A.[146] The Chief Magistrate suggested that the existing provisions in NSW were adequate.[147] The IPA expressed support for approaches that promote formal, not substantive, equality before the law. The IPA suggested that reform should focus on improving the ability of Aboriginal and Torres Strait Islander peoples to 'interact with the law' through services such as interpreters, rather than the creation of a 'parallel system' through legislative amendment or the introduction of 'culturally appropriate' criminal justice responses. It was the view of the IPA that bail authorities should assess the same considerations for everyone when making bail determinations.[148]

5.94 Others supported adoption of s 3A, with amendments.[149] For example, ALHR supported replicating s 3A with the insertion of additional words:

> In making a determination under this Act in relation to an Aboriginal person, a court must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including—
>
> (a) the person's cultural background, including the person's ties to extended family or place, **residence in a remote location or locations, and cultural obligations;** and
>
> (b) any other relevant cultural issue or obligation.[150]

5.95 The ALHR suggested that express reference to location may address certain issues relating to remoteness and conditions of bail, including the possibility that the community may live more 'itinerate lives' due to family networks, and experience 'geographically dispersed cultural commitments, weather extremes that render remote communities uninhabitable or inaccessible for parts of the year, and other exigencies of very remote living'.[151] Accused Aboriginal and Torres Strait Islander people may also have difficulty complying with bail conditions requiring strict confinement to a particular community or area, particularly to complying with electronic monitoring conditions. Conversely, electronic monitoring may not be available in regional and remote areas, disadvantaging Aboriginal and Torres Strait Islander people in those areas from being granted bail. It was the view of the ALHR that lack of access should be a factor that the bail authority can take into account.[152]

5.96 It was further suggested that other amendments to s 3A should:

- include reference to a person's age;[153]

146 Chief Magistrate of the Local Court (NSW), *Submission 78*; Institute of Public Affairs, *Submission 58*.
147 Chief Magistrate of the Local Court (NSW), *Submission 78*.
148 Institute of Public Affairs, *Submission 58*.
149 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Australian Lawyers for Human Rights, *Submission 59*; Public Interest Advocacy Centre, *Submission 25*.
150 Australian Lawyers for Human Rights, *Submission 59*.
151 Ibid.
152 Ibid.
153 Public Interest Advocacy Centre, *Submission 25*.

- provide 'culture' and 'background' as separate considerations (rather than the requirement to consider a person's cultural background);[154] and
- explicitly state that courts are to consider the relevant matters when determining whether the person will reach bail *and* when attaching conditions to that bail.[155]

5.97 The ALRC recommends the adoption of provisions that mirror s 3A in all states and territories. There may be opportunity for state and territory governments to work with relevant Aboriginal and Torres Strait Islander groups and representatives to review the drafting and scope of s 3A, with an eye to further clarify and improve its operation.

5.98 The ALRC is alert to fiscal constraints and time pressures that a properly instituted s 3A provision could impose on legal advocates and the criminal justice system. While the ALSWA supported the introduction of such a provision in WA, it noted the need for Aboriginal and Torres Strait Islander legal services and Aboriginal language interpreter services to support the proper presentation of issues relating to an accused person's cultural background and obligations.[156] NATSILS further commented that Aboriginal services, including legal and interpreter services, would need to be resourced to research and provide relevant matters to the court.[157]

Legal frameworks to support adoption of s 3A

5.99 For a s 3A type provision to operate successfully, it is necessary that such a provision be supported by legal frameworks. As noted by Victorian Legal Aid, the provision does not operate 'in a vacuum'.[158] The provision needs to be understood by those that administer it, and there needs to be adequate culturally appropriate and safe services and programs that Aboriginal and Torres Strait Islander people can access while on bail, when needed.

5.100 The ALRC recommends that the adoption of an equivalent s 3A bail provision by states and territories be supported by both strong guidelines on use and the provision of bail support programs and services.

The provision of guidelines

5.101 Stakeholders have told the ALRC that s 3A has been underutilised,[159] and that this underutilisation had contributed to s 3A having little impact on remand numbers in Victoria.[160]

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154 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
155 Ibid.
156 Aboriginal Legal Service of Western Australia, *Submission 74*.
157 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
158 Victoria Legal Aid, *Submission 56*.
159 See, eg, Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Victorian Aboriginal Legal Service, *Submission 39*.
160 Other factors affecting remand numbers were said to be a lack of available accommodation and the 'tightening of bail awards'.

5.102 The Victorian Aboriginal Legal Service (VALS) reported that s 3A has been narrowly interpreted by the court to apply to setting conditions, such as providing for multiple residential addresses and attending funerals, but not to the determination of risk and whether to grant bail.[161] VALS submitted that some members of the legal profession were not adept at posing the right questions and recognising issues that may arise due to a person's Aboriginality. The number of Aboriginal and Torres Strait Islander people, especially women, still held on remand indicated that the provision was not well understood.[162] Dr Thalia Anthony submitted that s 3A has had an 'equalising effect on bail outcomes' for Aboriginal and Torres Strait Islander peoples, but that the benefit only arose when lawyers who sought to rely on the provision made detailed submissions on the relevance of the person's Aboriginal background to the Court.[163]

5.103 The Law Institute of Victoria has previously recommended further guidance and associated training for Victoria Police, court registrars, magistrates and bail justices on cultural considerations, to be developed in partnership with the Victorian Equal Opportunity and Human Rights Commission.[164]

5.104 In their submission to this Inquiry, VALS supported the delivery of 'cultural sensitivity training and guidance' by VALS in partnership with the Law Institute of Victoria and the Victorian Equal Opportunity and Human Rights Commission to police, registrars, magistrates, bail justices and legal practitioners in Victoria.[165] Building better skills to deal with s 3A was also supported by Victoria Legal Aid, who observed that 'the consideration of an individual's Aboriginality does not exist in a vacuum, and requires understanding and skill across all involved in the determination of bail'. This requires 'extensive cultural awareness education' for legal advocates, prosecutors, and bail authorities in making bail determinations.[166]

5.105 The Judicial College of Victoria suggested that education developed in partnership with the 'Victorian Aboriginal and Torres Strait Islander Community' was needed specifically to guide judicial officers on how and when to refer to s 3A, as well as general Aboriginal cultural awareness education, which would operate to ensure that 'bail authorities are aware of the cultural issues it refers to'.[167]

5.106 The experience in Victoria raises the issue of the proper application of s 3A provisions in Victoria, and the potential application of mirror provisions in other states and territories. For example, the NSW Bar Association—who 'strongly' supported the introduction of the provision in NSW—identified there to be a 'significant risk' that the provision would simply be given 'lip service' and make no practical difference to the application of bail law in NSW.[168] The YLCLC observed that s 3A was not always

161 Victorian Aboriginal Legal Service, *Submission 39*.
162 Ibid; See also Victorian Equal Opportunity and Human Rights Commission, above n 32, 5.
163 Dr T Anthony, *Submission 115*.
164 Law Institute of Victoria, above n 137, 28.
165 Ibid [15]–[17].
166 Victoria Legal Aid, *Submission 56*.
167 Judicial College of Victoria, *Submission 102*.
168 NSW Bar Association, *Submission 88*.

raised when it was appropriate to do so, indicating that, for other states and territories, the 'existence of the provision does not guarantee that it will be used'.[169]

5.107 NATSILS supported further training of judicial officers to give appropriate consideration to information regarding a person's culture and background. It suggested that training should be developed and led by Aboriginal and Torres Strait Islander organisations.[170] The Law Council of Australia suggested that training and material should go beyond just 'cultural awareness' and should 'explore the modern manifestations of historical factors and highlight the social, political and economic position of Indigenous Australians in the context of offending behaviours'.[171]

5.108 The ALRC considers training, especially when developed and delivered by Aboriginal and Torres Strait Islander organisations, to be essential to building the necessary understanding of Aboriginal history and culture, and to place some offending in context. The RCIADIC recommended judicial training in 1991:

> That judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.[172]

5.109 Broad judicial cultural awareness training has occurred to some extent—the ALRC notes, for example, the education provided to the NSW judiciary through the NSW Judicial Commission's Ngara Yura Program.[173]

5.110 The ALRC supports further training for all criminal justice participants, but for a s 3A type provision to be successfully supported, there is a need to go further. Where s 3A provisions are adopted, there exists a concurrent need for well constructed written guidelines for criminal justice participants, including the judiciary.

5.111 It is desirable that the application and operation of s 3A type provisions be consistent within and across the states and territories.[174] For this reason, the ALRC suggests that guidelines should be written by relevant national legal bodies, working with Aboriginal and Torres Strait Islander organisations. There are bodies that are well placed to produce such guidelines. They may include, for example, the Australasian Institute of Judicial Administration, which produced the *National Domestic and Family*

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169 Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.

170 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*. See also Legal Aid ACT, *Submission 107*.

171 Law Council of Australia, *Submission 108*.

172 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5, rec 96.

173 Judicial Council on Cultural Diversity, *Cultural Diversity Within the Judicial Context: Existing Court Resources* (2016).

174 Sisters Inside, *Submission 119*.

Violence Bench Book to provide background knowledge and research, and practical guidelines for courtroom management aimed at harmonising the treatment of domestic violence cases across jurisdictions.[175] This approach could make a good model for a nationally consistent approach to s 3A type provisions.

5.112 Other appropriate bodies to develop guidelines could include the Law Council of Australia; and coordinated responses from Directors of Public Prosecutions, Police Commissioners, and Attorneys-General. Courts could develop practice directions.

5.113 The ALRC does not make any recommendation as to the content of s 3A guidelines, but notes the Judicial College of Victoria recommended that cultural awareness and cultural competence education for judicial officers should include:

- background information regarding the historical and ongoing impact of colonisation on Aboriginal and Torres Strait Islander people;
- an explanation of intergenerational trauma;
- contemporary issues such as daily exposure to racism;
- cultural competency information about modes of communication, body language, the need for and use of interpreters, and related issues aimed at improving cultural safety in court; and
- information about culturally-appropriate programs and services that support Aboriginal and Torres Strait Islander people who are on bail, community-based sentences or parole.

5.114 The College emphasised the need for all education to have been developed and delivered with Aboriginal and Torres Strait Islander communities, noting the need for a localised approach in order for judicial officers to 'understand the specific issues affecting those who come before their particular court'.[176]

5.115 Relating specifically to s 3A, stakeholders to this Inquiry have further suggested that bail authorities be directed to limit their discretion so that, other than in exceptional circumstances, bail authorities preclude:

- the possible repetition of minor offences from their considerations of community safety;[177]
- refusal of bail due to the unavailability of adequate accommodation; and
- the imposition of certain bail conditions such as curfews and non-association orders.[178]

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175 See, eg, *Australasian Institute of Judicial Administration, National Domestic and Family Violence Benchbook* <https://aija.org.au/publications/national-domestic-and-family-violence-bench-book/>.

176 Judicial College of Victoria, *Submission 102*.

177 NSW Bar Association, *Submission 88*.

178 Ibid. See also Sisters Inside, *Submission 119*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

The provision of bail support programs

5.116 A provision requiring consideration of culture, even with guidance, may not be enough to facilitate a grant of bail where a person requires support.[179] Aboriginal and Torres Strait Islander people may still be refused bail because they lack access to appropriate accommodation or have little to no support in the community—rendering them a 'bail risk'. The provisions need to be supported by 'practical solutions and alternatives to refusal, such as bail hostels'.[180] As the YLCLC noted, the effect of s 3A provisions would be 'diminished without available culturally appropriate bail supports and diversion options for Aboriginal and Torres Strait Islander peoples, undertaken in concert with Aboriginal and Torres Strait Islander people'.[181]

5.117 There are some services, but more options are needed to support Aboriginal and Torres Strait Islander people to be granted bail and to comply with bail conditions, including bail diversion options and bail supports.

5.118 Bail support for Aboriginal and Torres Strait Islander people generally takes three forms:

- services that can support Aboriginal and Torres Strait Islander people to be granted bail and to meet the conditions of their release;
- culturally appropriate programs; and
- mainstream bail diversion programs.

5.119 Services that can support Aboriginal and Torres Strait Islander peoples to be granted bail and meet the conditions of their release usually constitute informal networks or services delivered by non-government organisations. For example, in Queensland, Community Justice Groups may appear with the person in court, and provide informal support and link-ups to services for Aboriginal and Torres Strait Islander people released on bail.[182] This type of support can be especially critical for women who may be at risk of losing children or accommodation if refused bail and held on remand.[183] Examples of networked support services specifically for women include the Miranda Project in NSW, Sisters Inside in Queensland, and the Koori Women's Diversion Program in Victoria.[184]

5.120 There are other relevant bail support programs. The NSW Government advised of the upcoming Dubbo Aboriginal Bail Project that looks to, among other things, link accused people to community support services. It also advised of the 16-week Aboriginal Court Diversion and Bail Support Program that operates out of

179 Human Rights Law Centre and Change the Record Coalition, above n 134. See also Law Council of Australia, *Submission 108*.
180 Law Council of Australia, *Submission 108*.
181 Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*. See also Victoria Legal Aid, *Submission 56*.
182 Sanderson, Mazerolle and Anderson-Bond, above n 35, 207.
183 Human Rights Law Centre and Change the Record Coalition, above n 134, 18.
184 Human Rights Law Centre, *Submission 68*.

Campbelltown Local Court for people with complex mental health and or drug and alcohol concerns and under which they have experienced no breaches of bail.[185]

5.121 The NT Government submission to this Inquiry spoke of 'Alternative to Prison Models', which are currently under development in the NT. This is to include supported bail accommodation and other bail diversion options, such as 'saturated intense rehabilitation' which is done 'on country'.[186]

5.122 The ACT Government advised this Inquiry of its 'bail support trial', which produces information using 'info graphics' to help improve understandings of bail conditions and develops 'individual support plans'.[187]

5.123 Aboriginal and Torres Strait Islander people who enter a guilty plea in the Local or Magistrates Court may also be able to enter culturally appropriate programs that aim to address offending behaviour. These include the Balund-a (Tabulam) diversion program in northern NSW, where staff work with Aboriginal and Torres Strait Islander Elders to provide cultural programs to male Aboriginal offenders in a rural setting.[188]

5.124 There are also specific bail diversion programs for Aboriginal and Torres Strait Islander people with alcohol dependencies, such as the Queensland Indigenous Alcohol Diversion Program, which may be entered before or after the entering of a plea. The Western Australia Indigenous Diversion Program is available on referral for people with substance use who have entered a plea of guilty in some regional areas in WA.[189] This program is available to people who would have been granted bail, and would otherwise be expecting a fine or community-based order on sentencing. Victoria has places in residential rehabilitation centres specifically to divert Aboriginal and Torres Strait Islander women from remand.[190]

5.125 Aboriginal and Torres Strait Islander people can also be diverted into mainstream bail diversion programs from the Local or Magistrates Court. In Victoria, for instance, the Court Integrated Service Program (CISP) is available on referral from the Magistrates' Court regardless of the entry of a guilty plea, and includes the Koori Liaison Officer program. CISP provides case management and entry into services and accommodation for all jurisdictions of the Magistrates' Court.[191] This program received support in the submission from VALS, who reported good outcomes using this service for their clients, advising that Aboriginal people feel safer accessing

185 NSW Government, *Submission 85*.
186 Northern Territory Government, *Submission 118*.
187 ACT Government, *Submission 110*.
188 Entry to this program is via the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11, which allows for deferral of sentencing for rehabilitation and requires that the person be found guilty and then bailed under this section before entry.
189 See Government of Western Australia, Mental Health Commission, *Indigenous Diversion Program* <https://www.mhc.wa.gov.au/media/1565/idp-indigenous-brochure-final-2016.pdf>.
190 Judicial Commission of NSW, 'Aboriginal and Torres Strait Islander People within the Judicial Context—existing Courts' Resources' (2017) 18.
191 See, eg, Magistrates' Court of Victoria, *Court Integrated Services Program (CISP)* <www.magistratescourt.vic.gov.au>.

services from Aboriginal organisations. VALS recommended expanding Koori Case Managers.[192]

5.126 Other mainstream bail diversion programs from the Local or Magistrates Court can provide services for Aboriginal and Torres Strait Islander peoples. However, these are not necessarily developed to be culturally appropriate or culturally safe. These programs include drug and alcohol intervention bail support programs, and early mental health interventions.[193] In 2009, 19% of participants in the NSW Magistrate Early Referral into Treatment (MERIT) program were Aboriginal or Torres Strait Islander people, and MERIT was identified by the Productivity Commission as a program that can work to decrease repeat offending by Aboriginal and Torres Strait Islander people.[194]

5.127 While there are many programs currently in place, all stakeholders to this Inquiry who submitted their views on bail programs supported the proposal for state and territory governments to work with relevant Aboriginal and Torres Strait Islander organisations to identify gaps in the provision of bail support programs to support Aboriginal and Torres Strait Islander people on bail.[195] As noted by ALS NSW/ACT, 'Aboriginal and Torres Strait Islander organisations are the most valuable source of information on service gaps for Aboriginal and Torres Strait Islander people. This includes local organisations and relevant organisations'.[196]

5.128 ALSWA suggested that the best way to provide culturally appropriate bail support and diversion was to 'develop and establish Aboriginal-run programs that provide holistic, flexible and individualised support and assistance'. ALSWA put forward their Youth Engagement Program as a model. This program has three Aboriginal diversion officers who work with young people appearing at court. Support provided by the Aboriginal diversion officers includes: accommodation assistance; referrals to programs; transport assistance; reminders for court and other appointments;

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192 Victorian Aboriginal Legal Service, *Submission 39*.

193 See, eg, ACT Department of Health, *diversion Services—Court Alcohol and Drug Assessment Service* <http://www.health.act.gov.au/our-services/alcohol-and-other-drugs/diversion-services>; NSW Department of Justice, *Magistrates Early Referral Into Treatment* <http://www.merit.justice.nsw.gov.au/>; Queensland Courts, *Magistrates Early Referral Into Treatment* <http://www.courts.qld.gov.au/services/court-programs/queensland-magistrates-early-referral-into-treatment>; Magistrates' Court of Victoria, *CREDIT Bail Support Program* <https://www.magistratescourt.vic.gov.au/court-support-services/credit-bail-support-program>.

194 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) box 11.4.3. Reoffending has decreased where MERIT teams had implemented an Aboriginal Practice Checklist. The Productivity Commission notes that this has not happened in all areas. See also NSW Government, *Submission 85*.

195 See, eg, Legal Aid ACT, *Submission 107*; Jesuit Social Services, *Submission 100*; Queensland Law Society, *Submission 86*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Human Rights Law Centre, *Submission 68*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Public Health Association of Australia, *Submission 31*; Public Interest Advocacy Centre, *Submission 25*; Legal Services Commission of South Australia, *Submission 17*; Australian Red Cross, *Submission 15*.

196 Aboriginal Legal Service (NSW/ACT), *Submission 63*.

mentoring; and liaison with agencies. The diversion officers work onsite at the Perth Children's Court and conduct outreach services.[197]

5.129 Legal Aid WA also submitted that diversion programs, especially for young people, needed to be culturally appropriate—not just a 'modified version of what is in place for non-Aboriginal children'. Local communities and Elders need to be involved in the design and operation of programs.[198]

5.130 VALS provided a number of recommendations relevant to creating consistent and flexible bail diversion programs for Aboriginal and Torres Strait Islander peoples. These included:

- programs that address the underlying causes of offending behaviour such as drug and alcohol programs should be used;
- diversion should be monitored and people unable to comply should be given second opportunities and support;
- magistrates should have the final approval of diversion programs, and lawyers should be able to make submissions on diversion;
- judicial training should be ongoing;
- the offence types eligible for diversion should be expanded;
- the conditions attached to diversion should be relevant and appropriate to the offending behaviour; and
- Magistrate Courts should be linked in with Aboriginal and Torres Strait Islander organisations that can provide bail programs and support.[199]

5.131 Best-practice principles were identified by the Australian Institute of Criminology in a literature review of bail support programs in 2017.[200] The review was not specific to bail support programs for Aboriginal and Torres Strait Islander peoples, and focused on programs for young people. Nonetheless, the review found that each state and territory ran at least one 'program or service to support people on bail—either directly, to allow the courts to grant bail, or to provide treatment and other services to defendants on bail'.[201] Best-practice programs were:

- voluntary: participants are therefore motivated to engage in treatments;
- individualised and holistic: responsive to the criminogenic needs of the participant;
- timely: available immediately upon bail being granted;

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197 Aboriginal Legal Service of Western Australia, *Submission 74*.
198 Legal Aid WA, *Submission 33*.
199 Victorian Aboriginal Legal Service, *Submission 39*. See also National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
200 Matthew Willis *Bail Support: A Review of the Literature*, Australian Institute of Criminology Research Report No 04 (2017).
201 Ibid iii.

- collaborative: using interagency approaches;
- supportive: prioritised support over supervision;
- familiar: locally based; and
- evidence based: based on sound guidelines and processes.[202]

Bail hostels and accommodation options

5.132 One of the key obstacles to grants of bail for Aboriginal and Torres Strait Islander people identified by stakeholders was a gap in accommodation services, especially for women. This has previously been noted by the Victorian Equal Opportunity and Human Rights Commission[203] and the Law Institute of Victoria, who recommended expanding culturally and gender appropriate housing so that it may support a greater number of individuals,[204] including services for female Aboriginal and Torres Strait Islander accused and their children.[205] The Victorian Equal Opportunity and Human Rights Commission identified that residential facilities for Aboriginal and Torres Strait Islander women with appropriate supervision, wraparound services, mentoring programs and access to their children are critical to the successful completion of bail conditions.[206]

5.133 The need for appropriate accommodation options for Aboriginal and Torres Strait Islander peoples seeking release on bail was reiterated by many stakeholders to this Inquiry.[207]

5.134 Traditional bail hostel models have been problematised for use in Australia: there has been a hesitancy to house together people who may have challenging behaviours and needs, and to disturb neighbourhoods.[208] Nonetheless, South Australia has established a bail hostel, and ALS NSW/ACT submitted that bail houses can

> provide a safe, supportive, and supervised short-term housing arrangement for an individual who is eligible for bail, but may not be granted bail due to a lack of suitable and stable accommodation. Bail houses can provide a bail address for the full-duration of bail, or can act as an initial form of accommodation until other suitable and stable accommodation can be found.
>
> Bail houses can also prevent or reduce breaches of bail conditions. Bail conditions frequently impose a 'reside as directed' condition on an individual. In NSW, for example, courts can impose a condition 'requiring the accused person to reside at the relevant accommodation while at liberty on bail' under s. 28(6)(a) *Bail Act 2013*

202 Ibid iv.
203 Victorian Equal Opportunity and Human Rights Commission, above n 32, 10.
204 Law Institute of Victoria, above n 137, 28.
205 See, eg, NSW Bar Association, *Submission 88*.
206 Victorian Equal Opportunity and Human Rights Commission, above n 32, 52.
207 See, eg NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Human Rights Law Centre, *Submission 68*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Legal Services Commission of South Australia, *Submission 17*.
208 Matthew Willis *Bail Support: A Review of the Literature*, Australian Institute of Criminology Research Report No 04 (2017) 32.

> *(NSW)*. This can be a difficult condition for Aboriginal people where an individual is required to reside in unsuitable accommodation.[209]

5.135 Accommodation needs differ from area to area—the breadth of what may be needed was reflected in the range of suggested models submitted by stakeholders. VALS recommended gender and culturally appropriate accommodation and that other support services be expanded for Aboriginal and Torres Strait Islander peoples.[210] The NSW Bar Association and Legal Aid WA advocated appropriate funding of bail houses or non-custodial remand centres as alternatives to remand custody.[211] The Queensland Law Society sought the immediate implementation of emergency accommodation services, prioritising regional and remote areas.[212] NAAJA advised this Inquiry that there were no 'culturally appropriate bail support programs available for people who require suitable accommodation to secure bail' in the NT, in remote or in metropolitan areas.[213] The Legal Services Commission of SA noted the difficulty of finding suitable accommodation in metropolitan areas, especially if the person is 'far from country'. To fill this gap, the Legal Services Commission suggested that culturally appropriate bail hostels, modelled on the bail hostel in SA, though run by Aboriginal and Torres Strait Islander communities and organisations, were needed.[214]

5.136 The Law Council of Australia and Legal Aid WA suggested that culturally appropriate hostels should be modelled on the UK 'Approved Premises' model, whereby accommodation is provided along with supervision, rehabilitative services, drug and alcohol testing. It was further suggested that these hostels could be used by people transitioning out of prison or released on parole, noting the connection between homelessness and re-incarceration.[215]

5.137 ALS NSW/ACT preferred the 'Bail Supportive Housing Program' from Ontario Canada, noting the need for specific housing for Aboriginal and Torres Strait Islander people. The key features of the Canadian model include: 24-hour support and supervision; programs such as life-skilling and referral to counsellors and housing agencies; dedicated Indigenous staff including an Aboriginal Bail-Program Supervisor, who also provides outreach services to community.[216]

5.138 The ALRC considers that governments should consult with Aboriginal and Torres Strait Islander organisations to identify local solutions for bail accommodation and best-practice elements of bail accommodation models employed elsewhere.

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209 Aboriginal Legal Service (NSW/ACT), *Submission 63*.

210 This included the expansion of the availability of transitional housing provided by Corrections Victoria under its Better Pathway strategy: Victorian Aboriginal Legal Service, *Submission 39*. See also Dr T Anthony, *Submission 115*. Dr Anthony advocated for the provision of hostels for women that would allow children to stay with their mothers.

211 NSW Bar Association, *Submission 88*; Legal Aid WA, *Submission 33*.

212 Queensland Law Society, *Submission 86*.

213 North Australian Aboriginal Justice Agency, *Submission 113*.

214 Legal Services Commission of South Australia, *Submission 17*.

215 Legal Aid WA, *Submission 33*. See also Law Council of Australia, *Submission 108*.

216 Aboriginal Legal Service (NSW/ACT), *Submission 63*.

5.139 Other identified gaps in service provision to support a grant of bail for Aboriginal and Torres Strait Islander have included:

- services in support of Aboriginal and Torres Strait Islander accused people with cognitive or mental impairment;[217]
- male behavioural change programs. VALS specifically noted an undersupply of men's behavioural change programs, necessary for those accused of family violence who wish to be granted bail;[218]
- cognitive behavioural therapy options in regional areas. VALS again advised the ALRC that, in regional Victoria, there remains a 'critical undersupply of culturally specific therapeutic services'. This makes grants of bail difficult to achieve, especially where the accused must 'show cause' in bail applications;[219] and
- rehabilitation programs.[220]

5.140 As with bail accommodation, the ALRC recommends that governments work with local Aboriginal and Torres Strait Islander organisations to identify and rectify gaps in service provision.

217 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*. NATSILS recommended co-locating disability support workers within ATSILS as a way to ensure that Aboriginal and Torres Strait Islander people with disability are supported in the process of delivery to the court information relating to their cultural background and obligations.

218 Victorian Aboriginal Legal Service, *Submission 39*.

219 Ibid.

220 See, eg, Human Rights Law Centre, *Submission 68*; Commissioner for Children and Young People Western Australia, *Submission 16*.

6. Sentencing and Aboriginality

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Summary

6.1 The Terms of Reference to this Inquiry direct the ALRC to consider sentencing in examining the incarceration rates of Aboriginal and Torres Strait Islander peoples. Sentencing decisions are crucial in determining whether a person goes to prison and for how long. The sentencing decision may be affected by the seriousness of the offence and any subjective characteristics of the offender, including criminal history.

6.2 Aboriginal and Torres Strait Islander offenders are more likely to have prior convictions and to have served a term of imprisonment than non-Indigenous offenders.[1] Aboriginal and Torres Strait Islander offenders may have also experienced

1 See ch 3, fig 3.19.

trauma that is unique to their Aboriginality. This could include, for instance, direct or indirect experience of the Stolen Generation, loss of culture, and displacement. Aboriginal and Torres Strait Islander peoples who have experienced this type of trauma may distrust police and government agencies.[2]

6.3 Sentencing courts are able to consider the relevance and impact of systemic and background factors affecting an Aboriginal or Torres Strait Islander offender when taking into account subjective characteristics at sentencing, but are not required to do so. The High Court determined that, in the absence of legislative authority,[3] to take 'judicial notice' of the 'systemic background of deprivation of Aboriginal offenders' more generally would be 'antithetical to individualised justice'.[4]

6.4 For reasons of fairness, certainty, and continuity in sentencing Aboriginal and Torres Strait Islander offenders, the majority of stakeholders to this Inquiry supported the introduction of provisions requiring sentencing courts to take a two-stepped approach. First, to take into account the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples, then to proceed to review evidence as to the effect on that particular individual offender.

6.5 The ALRC recommends the introduction of such provisions. The ALRC further recommends that in the courts of superior jurisdiction (District/County and Supreme Courts), taking account of unique systemic and background factors should be done through the submission of 'Indigenous Experience Reports' (IERs), ideally prepared by independent Aboriginal and Torres Strait Islander organisations. In courts of summary jurisdiction (Local or Magistrates Courts) where offenders are sentenced for lower level offending—and time and resources are limited—the ALRC recommends that courts accept evidence in support of the provisions through less formal methods.

6.6 The recommendations of this chapter aim to ensure sentencing courts are provided with all the information relevant to the unique experiences and systemic factors affecting Aboriginal or Torres Strait Islander peoples, and their impact on the offender. This would enable courts to impose the most appropriate sentence on Aboriginal and Torres Strait Islander offenders, taking into account all of the circumstances, including any available and appropriate community-based options.

Considerations to be taken into account when sentencing

6.7 Sentencing or a sentencing hearing follows a conviction, regardless of whether an offender entered a plea of guilty or was found guilty at trial. Sentencing in serious or complex matters is undertaken by judges and magistrates who apply the principles and purposes of sentencing to the characteristics of the offence and the subjective characteristics of the offender to come to a sentencing decision.[5]

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2 See ch 2.

3 *Munda v Western Australia* (2013) 249 CLR 600, [50].

4 *Bugmy v The Queen* (2013) 249 CLR 571, [41].

5 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper—Criminal Justice* (2016) [12.1]. Sentencing courts also consider the maximum penalty for the

6.8 Each state and territory, and the Commonwealth, has legislation that guides the sentencing process.[6] The relevant sentencing statutes often provide the principles and purposes of sentencing, as well as listing the factors that the court may take into account when considering the subjective characteristics of the offender.

Purposes and principles of sentencing

6.9 The purposes of sentencing are well established in common law,[7] and are outlined in the sentencing statutes of the majority of states and territories except South Australia (SA),[8] Tasmania[9] and Western Australia (WA). Generally, the purposes of sentencing are:

- punishment: to punish the offender for the offence in a way that is just and appropriate in all the circumstances;
- deterrence: to deter the offender (specific deterrence) or other people (general deterrence) from committing the same or similar offences;
- protection: to protect the community from the offender;
- rehabilitation: to promote the rehabilitation of the offender; and
- denunciation: to denounce the conduct of the offender.[10]

6.10 The purposes of sentencing can overlap, and even conflict.[11] For example, protection of the community may not align with the rehabilitation of the offender. As noted by the High Court of Australia, the purposes of sentencing cannot be 'considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence, but sometimes they point in different directions'.[12]

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offence as set by the legislature, and any submissions as to penalties for similar offending imposed by the court.

6 *Crimes (Sentencing) Act 2005* (ACT); *Crimes Act 1914* (Cth); *Sentencing Act 1997* (NT); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA).

7 *Veen v R (No 2)* (1988) 164 CLR 465.

8 *Criminal Law (Sentencing) Act 1988* (SA) s 10 described as 'sentencing considerations'.

9 *Sentencing Act 1997* (Tas) s 3 describes the purpose of the Act.

10 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1997* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5; *Veen v R (No 2)* (1988) 164 CLR 465. The ACT and NSW sentencing statutes each include an additional two purposes of sentencing: 'to make the offender accountable for his or her actions'; and 'to recognise the harm done to the victim of the crime and the community': *Crimes (Sentencing) Act 2005* (ACT) ss 7(e), 7(g); *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A(e), 3A(g).

11 *Muldrock v The Queen* (2011) 244 CLR 120 [20].

12 *Veen v R (No 2)* (1988) 164 CLR 465, [13].

6.11 Sentencing principles have also been developed by the common law, and incorporated into some sentencing statutes.[13] The main principles related to sentencing and the sentencing decision are:

- proportionality: the sentence needs to be appropriate or proportionate to the gravity of the crime;[14]
- parity: treat like cases alike and different cases differently;[15]
- totality: the total sentence, where there are multiple terms, needs to be just and appropriate to the whole of offending; [16]
- imprisonment as a last resort;[17] and
- parsimony: impose the least severe sentencing option that is open to achieve the purpose or purposes of punishment.[18]

Sentencing factors in Australia

6.12 Some sentencing statutes provide the factors that sentencing courts can take into account in sentencing an offender. These vary in form. For example, New South Wales (NSW) legislation provides a non-exhaustive list of the mitigating and aggravating factors that the sentencing court is to take into account.[19] Aggravating factors in NSW include the 'seriousness of the offence; the criminality of the offender; and the identity and vulnerability of the victim'.[20] If the offender was a person of good character; was acting under duress; did not plan the offence; or had shown remorse, the severity of the sentence may be mitigated.

6.13 Some states and territories list a number of factors that a court must have regard to in sentencing, which are not expressed to be 'aggravating' or 'mitigating'. For example, in Victoria the sentencing court must have regard to, among other things, the nature and gravity of the offence; the offender's culpability and previous character; the impact of the offence on any victim; and any injury loss or damage resulting directly from the offence.[21] Other jurisdictions simply provide that the court must take into account any aggravating or mitigating factors.[22]

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13 See, eg, *Sentencing Act 1997* (NT) s 5; *Penalties and Sentencing Act 1992* (Qld) s 9; *Sentencing Act 1995* (WA) s 6.

14 *Veen v R (No 2)* (1988) 164 CLR 465.

15 *Green v The Queen* (2011) 244 CLR 462, [28].

16 *Mill v R* (1988) 166 CLR 59.

17 See, eg, *R v Way* (2004) 60 NSWLR 168, [115]*; R v Vasin* (1985) 39 SASR 45, [48]; *R v Zamagias* [2002] NSWCCA 17, [25]–[26].

18 The principle of parsimony has been rejected by the courts in NSW: *Blundell v R* [2008] NSWCCA 63, [47].

19 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

20 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper—Criminal Justice* (2016) [12.5]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

21 *Sentencing Act 1991* (Vic) s 5(2); also see *Crimes (Sentencing) Act 2005* (ACT) ss 33–36.

22 *Sentencing Act 1995* (WA) s 6(2); Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper—Criminal Justice* (2016) [12.5].

Sentencing Aboriginal and Torres Strait Islander offenders

6.14 Aboriginal and Torres Strait Islander peoples hold a unique position as Australia's first peoples. The experiences of Aboriginal and Torres Strait Islander peoples are canvassed in Chapter 2 of this report.

6.15 Sentencing courts in all jurisdictions have the ability to take account of an offender's background of disadvantage, relying on submissions on the relevant issues being made or as provided in court-ordered pre-sentence reports. Courts can consider a range of subjective factors arising from the offender's history. This may include, for example, where the offender experienced deprivation, poverty, trauma or abuse and those factors may affect a person's moral culpability.[23] These can be taken into account irrespective of an offender's cultural or racial background.

6.16 Among the many experiences unique to Aboriginal and Torres Strait Islander peoples, Aboriginal and Torres Strait Islander offenders may have experienced detrimental and intergenerational effects of past government policies and criminal justice practices.[24] As observed by ACT Legal Aid in their submission to this Inquiry:

> Numerous reports have recognised the ongoing 'complex effects of dispossession, colonisation and institutional racism on Aboriginal peoples', including 'poverty, unemployment, [poor] education, alcohol abuse, isolation, racism and loss of connection to family culture, land or Indigenous laws'... ATSI offenders must be considered in the context of the historical subjugation and dispossession that has shaped, engendered, and perpetuated ATSI disadvantage.[25]

6.17 There are existing provisions that enable some sentencing courts to consider factors related to Aboriginality when sentencing, and the common law has also provided some guidance. These are briefly discussed below.

Statutory provisions

6.18 Provisions related to considerations of Aboriginality when sentencing are found in the sentencing statutes of the ACT, Queensland, and SA. In the ACT, the *Crimes (Sentencing) Act 2005* (ACT) directs the sentencing court to consider, among other things, the 'cultural background' of the offender.[26] The 'cultural background' of the offender is also a matter for inclusion in pre-sentence reports (see below).[27]

6.19 In Queensland, s 9 of the *Penalties and Sentencing Act 1992* (Qld) determines that a sentencing court must, among other things, have regard to submissions made by a Community Justice Group about particular matters relating to an Aboriginal and Torres Strait Islander offender's community, any cultural considerations, or available services or programs:

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23 *Bugmy v The Queen* 249 CLR 571.
24 See ch 2.
25 Legal Aid ACT, *Submission 107*; also see Dr A Hopkins, *Submission 24*; R Casey, *Submission 6*.
26 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m).
27 Ibid s 40A(b). A similar provision was repealed from the *Crimes Act 1914* (Cth) in 2006.

> (2) In sentencing an offender, a court must have regard to—
>
> ...
>
> (p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—
>
> (i) the offender's relationship to the offender's community; or
>
> (ii) any cultural considerations; or
>
> (iii) any considerations relating to programs and services established for offenders in which the community justice group participates;... [28]

6.20 The explanatory notes to s 9(2)(p) described community justice groups as entities comprised of Elders and respected persons who volunteer their time to develop and implement local strategies for addressing crime and justice issues in Aboriginal and Torres Strait Islander communities.[29] At the time of the provision's introduction, there were more than 30 groups established in communities across Queensland, including remote, regional and metropolitan areas.[30] In 2017, there were close to 50 community justice groups in Queensland.[31]

6.21 Submissions to the sentencing court by community justice groups may be made on request by the prosecution, defence or the court, or at the volition of a Community Justice Group.[32]

6.22 The key factors that led to the current form of s 9(2)(p) was the over-representation of Aboriginal and Torres Strait Islander peoples in custody, and the need for greater community-based culturally appropriate options.[33] It was intended that submissions from community justice groups would give the sentencing court insight into the 'reasons for the offending behaviour and relevant cultural and historical issues'.[34] Community justice groups could make the court aware of local sentencing options, particularly those in which the group participated. Submissions to this effect were to be of particular benefit to circuit courts in remote areas, with the responsible Minister noting in the second reading speech that it would be 'expected that the advice of the community justice groups will lead to more appropriate sentencing options for offenders' allowing for the 'community to take a greater role in addressing offending behaviour in a culturally appropriate way'.[35]

6.23 There is a similar provision in Queensland relating to submissions by community justice groups regarding applications for release on bail.[36]

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28 *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).
29 Explanatory Note, Penalties and Sentences and Other Acts Amendment Bill 2000.
30 Ibid.
31 See ch 5.
32 Explanatory Note, Penalties and Sentences and Other Acts Amendment Bill 2000.
33 Ibid.
34 Queensland, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 1539 (Matthew Foley).
35 Ibid 1540.
36 *Bail Act 1980* (Qld) s 16(2)(e). See also ch 5.

6.24 In their submission to this Inquiry, Caxton Legal Centre identified some limitations of the Queensland provision regarding submissions on sentencing. First, it observed that there was still no explicit requirement for sentencing courts in Queensland to take into account the ongoing and unique systemic and background factors affecting Aboriginal and Torres Strait Islander offenders.[37] Second, the provision did not require that submissions be sought from community justice groups, and, third, when obtained, there was no legislative requirement for sentencing judges to accept recommendations submitted by the Community Justice Group. For these reasons, Caxton Legal Centre supported 'legislative redress' of the Queensland provision.[38]

6.25 In SA, the sentencing statute provides for the convening of sentencing conferences when sentencing Aboriginal and Torres Strait Islander offenders.[39] These are designed to promote in the defendant 'understanding of the consequences of criminal behaviour, and in the court, understanding of Aboriginal cultural and societal influences, and thereby make the punishment more effective'.[40]

6.26 A sentencing conference potentially involves the defendant (whose consent is required), members of their family, their legal representative, the prosecutor, an Aboriginal Justice Officer, and the victim, if they choose to participate.[41] A court may take the views expressed in the conference into consideration when determining a sentence, although it is discretionary.[42] In *R v Wanganeen* the South Australian Supreme Court commented that the provision was

> a formal recognition of the cultural differences that should be accommodated when sentencing Aboriginal offenders … It is relevant for the purposes of this decision to again record the over-representation of Aboriginal people in the criminal justice system, and the relevance of Aboriginality in sentencing generally, in order to provide further context to the enactment of section 9C.[43]

6.27 The provisions in the ACT, Queensland and SA apply in all sentencing courts in those jurisdictions, not only to Aboriginal and Torres Strait Islander specific sentencing courts (such as Murri and Nunga courts).[44] The SA sentencing conference model received support from some stakeholders to this Inquiry.[45]

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37 Caxton Legal Centre, *Submission 47*.
38 Ibid.
39 *Criminal Law (Sentencing) Act 1988* (SA) s 9C.
40 *R v Wanganeen* [2010] SASC 237 (30 July 2010) [4].
41 *Criminal Law (Sentencing) Act 1988* (SA) s 9C.
42 *R v Wanganeen* [2010] SASC 237 (30 July 2010) [4].
43 Ibid [7]–[8].
44 *Penalties and Sentences Act 1992* (Qld) s 9(2)(p); *Criminal Law (Sentencing) Act 1988* (SA) s 9C. See ch 10 for a discussion of Aboriginal and Torres Strait Islander sentencing courts.
45 Judge Stephen Norrish QC, *Submission 96*. See also National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

Common law

6.28 There is a considerable body of case law that provides guidance for sentencing courts when sentencing Aboriginal and Torres Strait Islander offenders in Australian jurisdictions.[46] The key decisions are outlined below.

Neal

6.29 In 1982, in reviewing the sentence of an Aboriginal offender in *Neal v R*, the High Court of Australia considered that the sentencing court 'should have taken into account the special problems experienced by Aboriginals living in reserves'.[47] Brennan J went on to state:

> The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.[48]

Fernando

6.30 A decade later, and a year after the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) delivered its report, Wood J delivered a decision in the Supreme Court of NSW of *R v Fernando*.[49] Fernando, a 48-year-old Aboriginal man, entered a plea of guilty to a charge of malicious wounding after stabbing his de facto partner a number of times. Fernando lived in an Aboriginal community in Walgett, in the far west of NSW. He had low levels of education, had been forcibly removed from his family as a child, and had an extensive criminal record, including a number of offences involving alcohol. Fernando had been consuming alcohol before the stabbing.

6.31 In the decision, Wood J enunciated the following principles in relation to the sentencing of Aboriginal offenders:

> (A) The same sentencing principles are to be applied in every case irrespective of the identity of the particular offender or his membership of an ethnic or other group but that does not mean the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.
>
> (B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.

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46 See, eg, *R v King* [2013] ACTCA 29 (26 July 2013); *TM v Karapanos and Bakes* [2011] ACTSC 74 (12 May 2011); *R v Ceissman* [2001] NSWCCA 73 (16 March 2001); *R v Fernando* (1992) 76 Crim R 58; *BP v R* [2010] NSWCCA 159 (30 July 2010); *R v Wurramara* [1999] NTCCA 45 (28 April 1999); *Spencer v R* [2005] NTCCA 3 (29 April 2005); *R v Daniel* [1997] QCA 139 (30 May 1997); *R v KU; ex parte A-G (Qld)* [2008] QCA 154 (13 June 2008); *R v Scobie* [2003] SASC 85 (24 March 2003); *Police v Abdulla* [1999] SASC 239 (17 June 1999); *DPP v Terrick; DPP v Marks; DPP v Stewart* [2009] VSCA 220 (2 October 2009); *R v Fuller-Cust* [2002] VSCA 168 (24 October 2002); *Western Australia v Munda* [2012] WASCA 164 (22 August 2012); *Western Australia v Richards* [2008] WASCA 134 (1 July 2008).

47 *Neal v The Queen* (1982) 149 CLR 305, [8].

48 Ibid [13].

49 *R v Fernando* (1992) 76 Crim R 58.

> (C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand with Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.
>
> (D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.
>
> (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.
>
> (F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.
>
> (G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.
>
> (H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.[50]

6.32 This judgment does not bind sentencing courts of other states and territories, nonetheless, the '*Fernando* principles' have been described as a 'convenient collection of circumstances that courts can take into account in an appropriate case'.[51] They have been influential across Australian jurisdictions, but do not automatically apply to all cases involving an Aboriginal or Torres Strait Islander offender, nor do they provide that a person's 'Aboriginality of itself is a mitigating factor'.[52] Rather, the principles provide a 'framework for consideration of the issues of disadvantage often attending

50 Ibid 62–63.
51 Legal Aid NSW, *Sentencing Aboriginal Offenders* (2004).
52 Ibid 3.

the subjective circumstances of individual Indigenous offenders'.[53] As Wood CJ later set out in *R v Pitt*:

> What *Fernando* sought to do was to give recognition to the fact that disadvantages which arise out of membership of a particular group, which is economically, socially or otherwise deprived to a significant and systemic extent, may help to explain or throw light upon the particular offence and upon the individual circumstances of the offender. In that way an understanding of them may assist in the framing of an appropriate sentencing order that serves each of the punitive, rehabilitative and deterrent objects of sentencing.[54]

6.33 Some courts have 'narrowed the application' of the *Fernando* principles, particularly in the Northern Territory (NT) and WA—principally in cases involving serious offending.[55] Commentary on the application of the principles indicates they have been applied 'unevenly'.[56] This may not be a bad outcome. The NSW Sentencing Council has suggested that this uneven application 'may simply be a reflection of the protean nature of the objective and subjective circumstances of each case and/or the availability (or otherwise) of evidence as to the subjective circumstances of particular Indigenous offenders on sentence'.[57]

6.34 The *Fernando* principles continue to be utilised by the courts in sentencing offenders who have a background of disadvantage. Citing the decision of Simpson J in *R v Kennedy*,[58] the majority of the High Court of Australia affirmed this as the basis of the *Fernando* principles:

> Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.[59]

Bugmy

6.35 In October 2013, the High Court delivered its decision in the case of William David Bugmy.[60] Bugmy was being held on remand for other offences when he assaulted a prison officer with a pool ball. The officer sustained a serious injury, resulting in partial blindness. Bugmy's personal history was marked by disadvantage, violence, substance abuse, suicide attempts, mental illness and repeated incarceration as a juvenile and as an adult. Bugmy had entered a plea of guilty and was sentenced in the NSW Court of Criminal Appeal (NSWCCA) for various assault offences. He

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53 Janet Manuell, 'The *Fernando* Principles: The Sentencing of Indigenous Offenders in NSW' (Discussion Paper, NSW Sentencing Council, December 2009) 10.

54 *R v Pitt* [2001] NSWCCA 156 (2001) [21].

55 See, eg, *Spencer v R* [2005] NTCCA 3 (29 April 2005); *R v Wurramara* [1999] NTCCA 45 (28 April 1999); *Western Australia v Munda* [2012] WASCA 164 (22 August 2012); Indigenous Justice Clearinghouse, *Sentencing Indigenous Offenders* (2010) 3.

56 NSW Sentencing Council, *The Fernando Principles: The Sentencing of Indigenous Offenders in NSW–Discussion Paper* (2009) 10.

57 Ibid.

58 *Kennedy v R* [2010] NSWCCA 260 (17 November 2010).

59 *Bugmy v The Queen* (2013) 249 CLR 571, [37].

60 *Bugmy v The Queen* (2013) 249 CLR 571.

appealed to the High Court of Australia against the severity of the sentence on several grounds, two of which are particularly relevant to this Inquiry.

6.36 First, the appellant submitted that the NSWCCA had erred in accepting the prosecution's submission that 'the difficult circumstances of the respondent's youth, in particular the prevalence of alcohol abuse and the lack of parental guidance … lost much of its force when it was raised against a background of numerous previous offences'.[61] The High Court agreed, noting that because the effects of 'profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving 'full weight' to an offender's deprived background in every sentencing decision'.[62]

6.37 The second ground of appeal was that the Court ought to have regard to two decisions of the Supreme Court of Canada: *R v Gladue*[63] and *R v Ipeelee*[64] (discussed below). The appellant relied on these decisions as authority for two propositions: that sentencing courts should take into account the 'unique circumstances of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender' and it should take into account the high rate of incarceration of Aboriginal Australians, which reflects a 'history of dispossession and associated social and economic disadvantage'.[65]

6.38 The Canadian decisions related to s 718.2(e) of the Canadian *Criminal Code*, which prescribes imprisonment to be a last resort, with 'particular attention to the circumstances of [A]boriginal offenders'. In *Gladue*, it was found that this statutory direction amounted to legislative recognition that the circumstances of Aboriginal peoples are unique and of the disproportionate rate of incarceration of Aboriginal peoples.[66] The Canadian experience is further discussed below.

6.39 In *Bugmy*, the appellant likened the existence of s 718.2(e) of the Canadian *Criminal Code* to provisions in NSW sentencing legislation which provide for imprisonment as a last resort, and which outline the factors to be considered in sentencing.[67] Noting the application of *Neal* and *Fernando*, the appellant further submitted that, subsequent to both those decisions, there had been in Australia a myriad of court decisions, national reports, and commissions of inquiry and reviews that not only elevated public understanding and awareness of, but confirmed the 'ongoing grave socio-economic difficulties in many Aboriginal communities and the link of these "background factors" to subsequent offending behaviour'.[68] The appellant quoted *Gladue* and *Ipeelee* to show that, when considering the context of offending, Canadian courts must take

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61 *R v Bugmy* [2012] NSWCCA 223 (18 October 2012) [48].
62 *Bugmy v The Queen* (2013) 249 CLR 571, [44].
63 *R v Gladue* [1999] 1 SCR 688.
64 *R v Ipeelee* [2012] 1 SCR 433.
65 *Bugmy v The Queen* 249 CLR 571, [28].
66 Ibid [31]; *R v Gladue* [1999] 1 SCR 688 [37], [50]–[65].
67 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A, 5(1), 21A.
68 Bugmy, 'Appellant's Submissions'', Submission in *Bugmy v The Queen*, High Court of Australia, S99/2013 (14 June 2013)' [6.27]–[6.29].

> judicial notice of the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal offenders.[69]

6.40 The appellant submitted that the High Court should require NSW courts to take into account these known systemic and background factors, rather than requiring the Aboriginal legal services to present authorities and publications relating to this same context in each case.[70]

6.41 The High Court rejected this ground of appeal, finding that the Canadian decisions on which the appellant relied were founded upon the legislative provision s 718.2(e), which could be distinguished from the NSW provision because it did not direct the courts to give particular attention to the circumstances of Aboriginal people, further stating:

> There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.[71]

6.42 The High Court referred to Australian case law and principles that provide for consideration of disadvantage generally, which also applies within Aboriginal communities.[72] Ultimately, however, it rejected the argument that 'courts ought to take judicial notice of the systemic background of deprivation of Aboriginal offenders',[73] on the basis that it would be 'antithetical to individualised justice'.[74]

Munda

6.43 *Munda v Western Australia*,[75] a case where an Aboriginal man had killed his de facto partner during a violent attack while intoxicated, was heard by the High Court together with *Bugmy*. Though primarily focused on issues related to appeal on sentence by the prosecution, the appellant argued that the Court of Appeal of the Supreme Court of Western Australia had failed to have proper regard to the appellant's personal circumstances as an Aboriginal man, and to his systemic deprivation and disadvantage, including an environment in which the abuse of alcohol was endemic in Aboriginal communities.[76]

6.44 In relation to the abuse of alcohol, the High Court observed that the

> circumstance that the appellant has been affected by an environment in which the abuse of alcohol is common must be taken into account in assessing his personal

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69 Ibid [6.30].
70 Ibid.
71 *Bugmy v The Queen* (2013) 249 CLR 571, [36].
72 Ibid [37]–[40].
73 Ibid [41].
74 Ibid.
75 *Munda v Western Australia* (2013) 249 CLR 600.
76 Ibid [3], [26].

> moral culpability, but the consideration must be balanced with the seriousness of the appellant's offending. It is also important to say that it should not be thought that indulging in drunken bouts of domestic violence is not an example of moral culpability to a very serious degree.[77]

6.45 The High Court determined that, in the 'absence of specific legislative direction of the kind discussed in the Canadian decisions of *R v Gladue* and *R v Ipeelee*, the starting point for discussion of this ground of appeal is the statement of Brennan J in *Neal v The Queen*'.[78] The appeal was dismissed. Among other things, the High Court found it to be 'contrary to principle to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities'.[79] The High Court observed further:

> To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.[80]

Sentencing Aboriginal offenders in Canada

6.46 Canada's Aboriginal Peoples,[81] like Australia's Aboriginal and Torres Strait Islander peoples, are over-represented in the prison population.[82] For example, in 2013, Canada's Aboriginal Peoples comprised 4% of the Canadian population, but almost 25% of the prison population.[83]

6.47 Canada's history is one of colonisation, and the impact on its original inhabitants, in many ways, mirrors the Australian experience. For example, the Canadian Royal Commission on Aboriginal Peoples acknowledged that many Canadian Aboriginal Peoples were dispossessed from their homelands, with many made wards of the state through protectionist government policies that 'sought to obliterate their cultural and political institutions'.[84]

6.48 In Canada, police were often responsible for implementing a range of government policies, including those relating to assimilation and removal of children

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77 Ibid [57].
78 Ibid [50].
79 Ibid [53].
80 Ibid; also see International Commission of Jurists Victoria, *Submission 54*.
81 There are a range of terms used to describe Canada's original peoples: National Aboriginal Health Organization, *Terminology* <www.naho.ca>. In referring to the collective name for all original peoples of Canada and their descendants, and reflecting the Canadian *Criminal Code*, the ALRC will use the terms 'Aboriginal' and 'Aboriginal Peoples'.
82 See ch 3.
83 Office of the Correctional Investigator, Canada, *Backgrounder: Aboriginal Offenders—A Critical Situation* <www.oci-bec.gc.ca>.
84 Canada, Royal Commission on Aboriginal Peoples, *Report* (1996) vol 1, 7.

into residential schools.[85] The relationship between Canadian Aboriginal Peoples and police has been strained, and marked by distrust on both sides. Issues related to over and under-policing of Canadian Aboriginal Peoples remain problematic.[86] Cultural differences, poverty, the effect of intergenerational trauma and institutionalisation in residential schools, substance abuse, and social dysfunction resulting from discrimination and racism continue to result in over-representation of Aboriginal Peoples in Canadian prisons.[87]

Statutory requirement to consider Aboriginality in sentencing

6.49 Australian and Canadian sentencing approaches are not dissimilar, although there are some differences. Canadian sentencing legislation incorporates a sentencing principle that is omitted from Australian statutes: 'to provide reparations for harm done to victims or to the community'.[88] Only the ACT and SA have a similar principle, and provide that any 'action the offender may have taken to make reparation for injury, loss or damage resulting from the offence' is a sentencing consideration.[89] The Canadian statute also omits punishment as a sentencing purpose.[90]

6.50 These differences—the omission of punishment and incorporation of reparation for harm done—provide a foundation for a 'restorative' framework in delivering justice in Canada. There are some parts of the criminal justice system in Australian jurisdictions that incorporate aspects of restorative justice,[91] and a number of Australian statutes acknowledge the impact on victims and the need for offender accountability in sentencing considerations. However there remains a focus on the retributive component of sentencing in most Australian jurisdictions.

6.51 In 1995, the Canadian Parliament amended the *Criminal Code* to codify the purposes and principles of sentencing. In response to the rates of Aboriginal incarceration, the amending bill included s 718.2(e). Section 718 sets out broadly the 'Purposes and principles of sentencing'. Section 718.2(e) relevantly provides that a court that imposes a sentence shall also take into consideration the following principle:

> all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders*.[92]

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85 Jonathan Rudin, 'Aboriginal Peoples and the Criminal Justice System' (Ipperwash Inquiry, 2007) 1.

86 Rudin, above n 84.

87 Brian R Pfefferle, 'Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration' (2006) 32(2) *Manitoba Law Journal* 113.

88 *Criminal Code, RSC 1985, c C-46* (Canada) s 718(e).

89 *Crimes (Sentencing) Act 2005* (ACT) s 33(h); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(g).

90 New Zealand does not list punishment as a purpose of sentencing, but does incorporate 'reparation for harm done by the offending': *Sentencing Act 2002* (NZ) s 7(1)(d).

91 Including, for eg, circle sentencing and conferencing: Jacqueline Joudo Larsen, 'Restorative Justice in the Australian Criminal Justice System' (AIC Research and Public Policy Series Report No 127, Australian Institute of Criminology, 2014).

92 *Emphasis* added.

6.52 The then Minister for Justice noted the 'sad over-representation' of Aboriginal Peoples in Canadian prisons as the rationale for the provision.[93] The provision was considered by the Canadian Supreme Court in the case of Jamie Tanis Gladue.

Canadian common law

Gladue

6.53 In this case,[94] Gladue, an Aboriginal woman, pleaded guilty to the manslaughter of her husband, whom she suspected of having an affair. After consuming alcohol at a party on her 19th birthday, the offender stabbed her husband twice with a kitchen knife, once as he attempted to flee. She appealed the three-year sentence imposed.

6.54 The Supreme Court examined the legislative and contextual background to s 718.2(e). It found the provision to be 'remedial in nature' and 'is designed to ameliorate the serious problem of over-representation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing'.[95] In reaching this conclusion, the Court noted that while the parliamentary debate on the amending legislation is 'clearly not decisive' on s 718.2(e),[96] statements made by the Minister for Justice at the time and other members of Parliament 'corroborate and do not contradict' its conclusion.[97] The Court also referred to a number of reports to support its conclusion on the remedial nature of the section.

6.55 The Court stressed that sentencing is an 'individual process',[98] but held that the effect of s 718.2(e) is to 'alter the method of analysis'[99] that judges must use when determining an appropriate sentence for Aboriginal persons:

> Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (A) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[100]

6.56 The Court went further, noting that judges would require information about the accused to facilitate this process: 'Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing'.[101]

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93 House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62, 1st Sess., 35th Parl., November 17, 1994 15.
94 *R v Gladue* [1999] 1 SCR 688.
95 Ibid [4].
96 Ibid [43].
97 Ibid [45].
98 Ibid [93].
99 Ibid.
100 Ibid.
101 Ibid.

6.57 The Court emphasised that s 718.2(e) was not to be interpreted as a 'means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed'.[102]

6.58 The Supreme Court held that the sentencing judge and the Court of Appeal had erred in their application of s 718.2(e). However, noting the seriousness of the offence, including the aggravating factor that it involved domestic violence, the Court considered the three-year term of imprisonment was not unreasonable and dismissed the appeal.

6.59 A number of higher courts affirmed the principles set out in *Gladue*.[103] Nonetheless, the numbers of Aboriginal Canadians incarcerated continued to rise.

Ipeelee

6.60 Post-*Gladue*, the application of s 718.2(e) and the *Gladue* principles varied. In 2012, the Supreme Court revisited s 718.2(e) in *R v Ipeelee*.[104] In a majority judgment, the Court commented that, although the provision 'had not had a discernible impact on the over-representation of Aboriginal people in the criminal justice system',[105] the *Gladue* principles 'were never expected to be a panacea':[106]

> there is some indication … from both the academic commentary and the jurisprudence, that the failure can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2*(e)* and this Court's decision in *Gladue*.[107]

6.61 The Court ultimately considered that the erroneous application of the principles arose for a number of reasons. It found that, in some cases, the court required an offender to 'establish a causal link between background factors and the … current offence';[108] and that its application to serious or violent offences was 'irregular and uncertain'.[109] The Court rejected that an offender needed to establish a causal link between background factors and offending; and that sentencing judges have a duty to apply s 718.2(e) and *Gladue*, regardless of the seriousness of the offending.[110]

6.62 The *Ipeelee* decision identified and addressed three key criticisms that were considered to have plagued the efficacy of the remedial provision, s 718.2(e), and the *Gladue* principles:

> (1) sentencing is not an appropriate means of addressing over-representation; (2) the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal

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102 Ibid.
103 *R v Wells* (2000) 1 SCR 207; *R v Kakekagamick* [2006] 214 OAC 127.
104 *R v Ipeelee* [2012] 1 SCR 433.
105 Ibid [63].
106 Ibid.
107 Ibid [63] (emphasis in original).
108 Ibid [81]–[83].
109 Ibid [84]–[87].
110 Ibid [81]–[87].

> offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s 718.2(e) of the *Criminal Code*.[111]

6.63 In addressing each of these criticisms, the Court in *Ipeelee* considered that sentencing judges have an important role to play in effectively deterring criminality and rehabilitating offenders, and that where 'current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities'.[112] Noting that 'just sanctions are those that do not operate in a discriminatory manner,[113] the Court found that Parliament's intention in enacting the provision was that 'nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly'.[114]

6.64 The Court noted that *Gladue* explicitly rejected the argument that s 718.2(e) was an 'affirmative action provision'[115] or an 'invitation to engage in reverse discrimination'.[116] The Court in *Ipeelee*, emphasising the *Gladue* principles, found that '[t]he provision does not ask courts to remedy the over-representation of Aboriginal people in prisons by artificially reducing incarceration rates':[117]

> Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2 (e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.[118]

6.65 In response to the third criticism that utilising a different method of analysis is inherently unfair and 'unjustifiably distinguishes between offenders who are otherwise similar',[119] the Court rejected this, finding that it 'ignores the distinct history of Aboriginal peoples in Canada'.[120] Noting the extensive history of reports and commissions on that history, including the experience of Aboriginal peoples with the

111 Ibid [64].
112 Ibid [66].
113 Ibid [68].
114 Ibid [66].
115 Ibid [71].
116 *R v Gladue* [1999] 1 SCR 688 [86].
117 *R v Ipeelee* [2012] 1 SCR 433 [75].
118 Ibid.
119 Ibid [76].
120 Ibid [77].

criminal justice system, the Court considered that 'current levels of criminality are intimately tied to the legacy of colonialism'.[121]

6.66 The Supreme Court in *Ipeelee* emphasised that nothing in *Gladue* prevents consideration of the background and systemic factors for other, non-Aboriginal offenders, noting in fact it is the opposite and that consideration of such factors is also important for a sentencing judge in the sentencing of these offenders.[122]

6.67 *Ipeelee* has been said to 'represent a significant clarification of the law'[123] post-*Gladue*, particularly in affirming its application to all, including serious, offences.

Gladue specialist sentencing reports

6.68 *Gladue* reports are specialist Aboriginal sentencing reports prepared in some Canadian provinces to facilitate s 718.2(e) of the *Criminal Code*. *Gladue* reports are a way of integrating one part of specialist court processes into mainstream courts. *Gladue* reports are different from pre-sentence reports (PSRs). Although both provide information to a court about an offender, *Gladue* reports are intended to promote a better understanding of the underlying causes of offending, including the historic and cultural context of an offender. These factors may go some way toward addressing the over-representation of Aboriginal and Torres Strait Islander peoples in prison. PSRs serve a different, but related, function. Supporters of *Gladue* reports emphasised, for example, that simply because PSRs exist does not suggest there is no need for *Gladue* reports. Rather, the two would complement each other.

6.69 According to Jonathan Rudin, Program Director of Aboriginal Legal Services in Toronto, Ontario, *Gladue* reports are written to include the offender's 'voice' and 'story':

> when we do our *Gladue* reports we spend time interviewing the client and as many other people as we can … *Gladue* reports tend to be written in the words of the people we interview … we are not summarising what someone says, we are using their language. We don't edit it, we don't do anything with it, here is their story [so] what you get are the voices of the individuals who are involved in the person's life. And certainly that's very rare because you can go through the court system in Canada from charge to plea, and if you are an accused person you may never say a word to the court.[124]

6.70 *Gladue* reports are ideally prepared 'with the help of someone who has a connection to and understands the Aboriginal community'.[125] They assist in putting the offender's 'particular situation into an Aboriginal context so that the judge can come up with a sentence that's unique to you and your culture and has an emphasis on

121 Ibid.
122 Ibid.
123 Ryan Newell, 'Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration' (2013) 51(1) *Osgoode Hall Law Journal* 215.
124 Law Report—ABC Radio National, *Canada's Approach to Sentencing Aboriginal Offenders* <http://www.abc.net.au/radionational/programs/lawreport/>.
125 Legal Services Society of British Columbia, *Gladue Primer* (2011) 7.

rehabilitation and healing'.[126] This context may include an examination of complex issues of an historical and cultural nature that are unique to, and prevalent in, Canadian Aboriginal communities, including intergenerational trauma, alcohol and drug addiction, family violence and abuse, and institutionalisation. As observed by Rudin:

> information about things that judges may not know about, like the history of residential schools, like the impact of adoption on aboriginal peoples, the history of addictions for aboriginal peoples in the country which is different from addictions in other communities. *Gladue* reports also provide detailed information on the impacts of particular experiences including those specific to the person as a result of their Aboriginal heritage, community and experience.[127]

6.71 The time taken to prepare a *Gladue* report compared to a PSR is significantly higher, reflecting the time spent with the offender and significant others. In the Ontario context, it has been estimated that a *Gladue* report can take up to 20 hours to complete, compared to the eight to 10 hours for a PSR.[128]

6.72 An evaluation of a pilot in British Columbia noted a number of key differences between *Gladue* reports and PSRs. *Gladue* reports were more comprehensive, 'specifically with respect to *Gladue* factors',[129] including 'more information about resources in rural and remote communities',[130] and 'options tailored to the specific needs of each person'.[131] The evaluation found that the greatest contribution *Gladue* reports made to the court was 'their potential to draw concrete connections between the intergenerational impacts of colonialism (residential schools, community displacement, child apprehensions) and the person in court for sentencing'.[132]

6.73 The impact of *Gladue* reports in Canada varies across the provinces. Offenders in some provinces have no capacity to access a *Gladue* report, while other provinces have been able to establish mechanisms to facilitate the preparation of *Gladue* reports. Aboriginal Legal Services in Toronto, Ontario, for example, has an established program, supported by funding from Legal Aid Ontario, with trained caseworkers who work with offenders to prepare *Gladue* reports.

6.74 *Gladue* reports have been described as having a definitive impact at an individual level:

> When we do a *Gladue* report we often see that the sentencing an individual receives is different than what, for example, the Crown and defence were thinking of going into the sentencing. So what we see is when judges have information about the circumstances of an [A]boriginal offender, when Crowns have that information, when

126 Ibid.
127 Law Report—ABC Radio National, above n 123.
128 Rudin, above n 84, 48–50.
129 Legal Services Society of British Columbia, *Gladue Report Disbursement: Final Evaluation Report* (2013) 3.
130 Ibid.
131 Ibid.
132 Ibid.

> defence counsel has that information, the sentences that people get change. So the *Gladue* reports make a difference on a micro level.[133]

6.75 In 2007, based on his experience in Toronto, Rudin suggested that the impact of a *Gladue* report is not reflected in Aboriginal incarceration rates.[134]

6.76 In 2011, the Legal Services Society (LSS) received funding from the Law Foundation of British Columbia to pilot the preparation of *Gladue* reports in British Columbia. An evaluation of the LSS pilot suggested that '*Gladue* reports may contribute to fewer and shorter incarceration sentences for Aboriginal people'.[135] A comparison of a sub-sample of 42 completed *Gladue* sentencing cases with a matched sample of 42 LSS Aboriginal client cases where there was no *Gladue* report, indicated that 'fewer *Gladue* clients (23) received a jail sentence than their non-*Gladue* counterparts (32)'; and that median sentence length for *Gladue* clients was substantially lower than for the non-*Gladue* sample (18 days compared to 45 days).[136]

Requirement to consider Aboriginality in Australian sentencing courts

Recommendation 6–1 Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

6.77 Stakeholders expressed strong support for Australian jurisdictions to introduce a provision requiring sentencing courts to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.[137] The current approach—to take subjective disadvantage into account—was considered to be an insufficient response to a unique and, often, destructive set of circumstances that only Aboriginal and Torres Strait Islander peoples have experienced in this country.[138]

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133 Law Report—ABC Radio National, above n 123.

134 Rudin suggested this was largely as a result of resourcing constraints: Rudin, above n 84, 60; Campbell Research Associates, *Evaluation of Gladue Aboriginal Legal Services of Toronto Gladue Caseworker Program–Oct 2006–Sept 2007* (2008).

135 Legal Services Society of British Columbia, above n 128, 25.

136 Ibid 5.2.

137 See, eg, Sisters Inside, *Submission 119*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Community Restorative Centre, *Submission 61*; Australian Lawyers for Human Rights, *Submission 59*; International Commission of Jurists Victoria, *Submission 54*; Victorian Aboriginal Legal Service, *Submission 39*; Mental Health Commission of NSW, *Submission 20*.

138 See ch 2.

For example, partially in response to the High Court in *Munda*,[139] the International Commission of Jurists in Victoria submitted that it cannot be

> right that prison terms calculated without regard to the unique history of social disadvantage recognise the human dignity of Aboriginal offenders. Nor, against a background of long term and worsening overrepresentation in custody, can it be right to proceed to sentence, in the absence of proof to the contrary, on the assumption that Aboriginality has nothing to do with an offender's criminality or to place on the individual offender the full burden of proving the link between his or her offending and his background.[140]

6.78 It was the view of most stakeholders that the principles of 'individualised justice' and 'equality before the law'—understood as substantive equality—required sentencing courts to consider unique and systemic factors of Aboriginal and Torres Strait Islander offenders.[141] The NSW Bar Association suggested that the introduction of a provision akin to the Canadian provision would 'promote equality before the law by promoting sentencing that is appropriate and adapted to the differences that pertain in the case of Aboriginal and Torres Strait Islander people'.[142] The NSW Bar Association further noted that Australian sentencing courts are 'bound to take into account all material facts including those which exist only by reason of the offender's membership of an ethnic or other group', in which failure to take into account the unique systemic circumstances of Aboriginal and Torres Strait Islander offenders 'thwarts the pursuit of equality and individualised justice'. [143] Put simply by Change the Record Coalition, the approach taken in Canada represents an 'application of equal justice, not a denial of it'.[144]

6.79 While sentencing courts can take disadvantage into account, including disadvantage related to factors systemic to Aboriginal and Torres Strait Islander communities, this relies on submissions by defence to that effect. Stakeholders considered that an explicit provision, requiring consideration of unique systemic and background factors of Aboriginal and Torres Strait Islander offenders in sentencing, would encourage judicial officers (and counsel) to take a proactive approach toward ensuring information relevant to those factors is before the sentencing court.[145] As noted by the International Commission of Jurists, a provision of this type would impose 'a duty to enquire' and to ensure 'all material facts to the determination of sentence have been taken into account'.[146]

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139 *Munda v Western Australia* (2013) 249 CLR 600, [53] see above.

140 International Commission of Jurists Victoria, *Submission 54*; cf Institute of Public Affairs, *Submission 58*.

141 See, eg, Legal Aid ACT, *Submission 107*; NSW Bar Association, *Submission 88*.

142 NSW Bar Association, *Submission 88*.

143 Ibid.

144 Change the Record Coalition, *Submission 84*; also see Justice Stephen Rothman AM, 'The Impact of Bugmy & Munda on Sentencing Aboriginal and Other Offenders.' (Paper Delivered at the Ngara Yura Committee Twilight Seminar, 25 February 2014) 10.

145 See, eg, Legal Aid ACT, *Submission 107*; NSW Bar Association, *Submission 88*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Victorian Aboriginal Legal Service, *Submission 39*; Mental Health Commission of NSW, *Submission 20*.

146 International Commission of Jurists Victoria, *Submission 54*; see also Legal Aid ACT, *Submission 107*; Change the Record Coalition, *Submission 84*.

Previous reviews

6.80 In 2006, the Law Reform Commission of Western Australia (LRCWA) considered the factors that sentencing courts take into account in its Inquiry into Aboriginal customary law, and recommended that WA introduce a provision requiring sentencing courts to consider the cultural background of the offender.[147] The LRCWA 'firmly rejected' the argument that permitting courts to take into the cultural background of an offender would be contrary to the principle of equality before the law, noting that 'all accused, whether Aboriginal or not, are entitled to present relevant facts concerning their social, religious and family background and beliefs'.[148]

6.81 The LRCWA also acknowledged that criminal histories of Aboriginal and Torres Strait Islander peoples could be a consequence of systemic bias and that it was critical that sentencing courts examine the circumstances of prior offending before issuing a custodial sentence. It further recommended that WA sentencing statutes expand on the principle of sentencing as a last resort in statute so that 'when considering whether a term of imprisonment is appropriate the court is to have regard to the particular circumstances of Aboriginal people'.[149] In doing so, it stated:

> The Commission wishes to make it clear that its recommendation does not mean that Aboriginal offenders will not go to prison. Nor does it mean that Aboriginal people will be treated more leniently than non-Aboriginal people just on the basis of race. By making this recommendation, the Commission strongly encourages courts in Western Australia to consider more effective and appropriate options for Aboriginal offenders, such as those developed by an Aboriginal community or a community justice group. What the Commission is recommending is that when judicial officers are required to sentence Aboriginal people they turn their minds not just to the matters that are directly relevant to the individual circumstances of the offender but to the circumstances of Aboriginal people generally. These circumstances include over-representation of Aboriginal people in the criminal justice system.[150]

6.82 Prior to the decision in *Bugmy* in 2013, the NSW Law Reform Commission (NSWLRC) considered whether a person's Aboriginality should be a relevant matter in sentencing. It noted that submissions to its Inquiry on sentencing in NSW supported such a proposal, with the Bar Association of NSW and Aboriginal Legal Service NSW/ACT advocating for an amendment to s 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which prescribes imprisonment to be a last resort, so to read:

> A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives (with particular attention to the circumstances of Aboriginal offenders), that no penalty other than imprisonment is appropriate.[151]

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147 Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (Report 94, 2006) rec 36.
148 Ibid 173.
149 Ibid rec 37.
150 Ibid 177.
151 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [17.17].

6.83 The NSWLRC did not recommend this legislative amendment; rather it recommended waiting until post-*Bugmy* for judicial consideration of the issue. It did, however, acknowledge that 'there may be merit in adding … to the factors that a court must take into account a reference to the circumstances of Aboriginal and Torres Strait Islander offenders',[152] and suggested the following wording:

> 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).[153]

6.84 In 2015, the Standing Committee on Justice and Community Safety report *Inquiry into Sentencing in the ACT*, suggested that the current provision requiring sentencing courts in the ACT to consider the 'cultural background' of the offender[154] did not go far enough, and recommended legislative change so that the relevant sentencing statute 'explicitly require courts to consider the Indigenous status of offenders at sentencing'.[155]

6.85 In 2017, a report on the over-representation of Aboriginal and Torres Strait Islander women in Australian prisons by the Human Rights Law Centre and Change the Record Coalition commented that

> in light of the High Court's decision [in *Bugmy*], it is now incumbent on state and territory governments to legislate to ensure that historical and systemic factors that have contributed to Aboriginal and Torres Strait Islander people's over-imprisonment inform decisions by courts about whether or not to imprison.[156]

6.86 The NT government advised the ALRC that Aboriginality as a sentencing factor will be considered in the NT as part of the Aboriginal Justice Agreement that is under development.[157]

Stakeholders to this Inquiry

6.87 Stakeholders to this Inquiry expressed support for the introduction of provisions to the states and territories that mirrored the Canadian statutory principle of imprisonment as a last resort—requiring the sentencing court to pay particular attention to the circumstances of Aboriginal offenders.[158] Moreover, stakeholders supported the introduction of provisions in state and territory sentencing statutes that represented the interpretation given to s 718(e), that is, requiring sentencing courts to consider the

152 Ibid [17.39].
153 Ibid.
154 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m) see above.
155 Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) rec 18.
156 Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 45.
157 Northern Territory Government, *Submission 118*.
158 Jesuit Social Services, *Submission 100*; Judge Stephen Norrish QC, *Submission 96*; NSW Bar Association, *Submission 88*; Public Defenders NSW, *Submission 8*.

unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when making sentencing decisions.[159]

6.88 Ultimately, in whatever form, the provision should require sentencing courts—as well as taking account of other sentencing considerations—to undertake a two-stepped approach when sentencing an Aboriginal or Torres Strait Islander offender. As described by the Change the Record Coalition (with reference to the Canadian approach), the sentencing of an Aboriginal and Torres Strait Islander offender should involve the sentencing court first taking judicial notice with respect to the experience of Aboriginal and Torres Strait Islander peoples as a group, including experiences of over-representation and, second, consideration of the extent to which the offender's individual circumstances can be understood by reference to this group experience.[160] This approach has been described as providing 'the necessary link between the collective experience *and* the individual circumstances'.[161]

6.89 A provision to this effect was considered a necessary mechanism to require sentencing courts to consider the impact of the unique and systemic disadvantage of Aboriginal and Torres Strait Islander peoples. For example, Victorian Aboriginal Legal Services (VALS) submitted that, given that the severe impacts of colonisation are unique to Aboriginal and Torres Strait Islander peoples, 'legislation should direct the courts to consider these impacts as means to reduce the inequality of incarceration that has arisen as a result'.[162]

6.90 Legal Aid ACT strongly supported the introduction of a specific Aboriginal and Torres Strait Islander focused sentencing provision across all jurisdictions that directed sentencing courts to expressly consider the 'unique systemic and background factors' affecting Aboriginal and Torres Strait Islander peoples. This would include, for example, the effects of dispossession on Aboriginal and Torres Strait Islander offenders. It stressed that the proposed provision would not be a

> mechanism to reduce a sentence by virtue of "race". Rather, it would function as a "legislative hook", allowing courts to properly explore relevant cultural factors, with the aim of consistently delivering equitable and apposite sentences.[163]

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159 See, eg, Sisters Inside, *Submission 119*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Community Restorative Centre, *Submission 61*; Australian Lawyers for Human Rights, *Submission 59*; International Commission of Jurists Victoria, *Submission 54*; Victorian Aboriginal Legal Service, *Submission 39*; Mental Health Commission of NSW, *Submission 20*.

160 Change the Record Coalition, *Submission 84*; Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(47) *Melbourne University Law Review* 68.

161 Thalia Anthony et al, 'Individualised Justice through Indigenous Community Reports in Sentencing' [2017] (26) *Journal of Judicial Administration* 121, 123.

162 Victorian Aboriginal Legal Service, *Submission 39*.

163 Legal Aid ACT, *Submission 107*.

6.91 The Mental Health Commission supported legislative amendment that would 'trigger the courts and the legal profession to actively consider and seek out those matters unique to Aboriginal people and which might not be immediately obvious without specialised inquiry'.[164] The NSW Bar Association noted that consideration of systemic and background factors would operate as a 'check' before any sentence of imprisonment was imposed, and inform the type of sentence imposed, thereby 'promoting both proportionality and individualised sentencing'.[165]

6.92 Consistency was also a key theme underwriting the need for the provision. Legal Aid ACT acknowledged that, while the *Fernando* principles provided some insight into the situations of Aboriginal and Torres Strait Islander peoples, the principles were 'often unevenly applied and retained a limited scope'.[166]

6.93 The Human Rights Law Centre noted that the provision in Canada had been interpreted by the Canadian courts to include the consideration of matters such as the 'history of colonialism, displacement and forced removal of children, and how that history continues to translate into lower educational attainment and incomes, higher rates of substance abuse and suicide, and higher imprisonment rates'. The Human Rights Law Centre suggested that a specific legislative provision was 'central to promoting consistency in how the judiciary considers the impacts of colonisation, discrimination and disadvantage, which underpin the over-imprisonment of Aboriginal and Torres Strait Islander people'.[167]

6.94 Criminal Lawyers Association of the Northern Territory (CLANT) suggested that legislative enactment would ensure 'consideration of such matters occurs on a regular and consistent basis, and would place more of an onus on courts to give them proper weight as a matter of course'. CLANT identified this to be particularly important for sentencing courts in the NT, which deal with a high proportion of Aboriginal and Torres Strait Islander offenders, and where the circumstances of Aboriginal and Torres Strait Islander disadvantage are 'particularly acute and pervasive'.[168]

6.95 Some stakeholders considered there to be no need to legislate such a consideration. It was contended that existing legislative provisions—including sentencing purposes, principles and factors such as parsimony, 'imprisonment as a last resort', and consideration of an offender's general background—along with well established common law principles, already allowed for consideration of all relevant material facts to be taken into account when sentencing Aboriginal and Torres Strait

164 Mental Health Commission of NSW, *Submission 20*.
165 NSW Bar Association, *Submission 88*.
166 Legal Aid ACT, *Submission 107*.
167 Human Rights Law Centre, *Submission 68*.
168 Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; also see Mental Health Commission of NSW, *Submission 20*.

Islander offenders.[169] This includes consideration of any background of disadvantage and available sentencing alternatives.

6.96 It was suggested by the Office of the Director of Public Prosecutions (NSW) (NSW ODPP) that Australian courts already take into account an offender's deprived background when sentencing offenders, relying on submissions from the parties and supporting evidence to establish the extent and nature of deprivation and other relevant information specific to the individual offender.[170] NSW Chief Magistrate Henson submitted that *Bugmy* was well understood in the Local Court of NSW as

> continuing to reinforce the need for individualised sentencing, such that consideration of a background of deprivation of an Aboriginal offender for the purpose of mitigating a sentence requires the identification in each case of specific material that tends to establish that deprivation.[171]

6.97 The Institute of Public Affairs (IPA) opposed the introduction of any provision on different grounds, arguing that disadvantage did not always play a 'material role' in the offending of disadvantaged people. The IPA pointed out that many Aboriginal and Torres Strait Islander people living in adverse circumstances do not commit crime, and that there should be no 'presumption that socioeconomic circumstances are or should be considered mitigatory'.[172] The IPA agreed with the High Court, suggesting that assuming Aboriginality is a 'disadvantage sufficient to diminish culpability expresses a denial of the agency, and thus dignity, of disadvantaged individuals, and risks portraying all Indigenous communities as inherently disordered'. IPA argued that:

> Judges have, and should retain, discretion to consider how a specific offender's actions have harmed society, and the proper role of specific punishments in addressing that harm, but this discretion is bounded by the demands of equal justice and proportionality and therefore does not include racial considerations.[173]

Obstacles

6.98 There may be legal obstacles to introducing a provision of this type. Stakeholders have raised two such possibilities: s 10 of the *Racial Discrimination Act 1975* (Cth) (*RDA*), and, in the NT, s 16AA of *Crimes Act 1914* (Cth). These are discussed below.

Racial Discrimination Act 1975

6.99 In the Discussion Paper, the ALRC asked stakeholders whether states and territories should introduce a statutory requirement to consider Aboriginality in sentencing in light of the decision in *Bugmy v the Queen*. In *Bugmy v the Queen*,[174] the High Court raised, without further comment, the question of whether a state law

169 Chief Magistrate Graeme Henson Local Court of NSW, *Submission 78*; Office of the Director of Public Prosecutions NSW, *Submission 71*.
170 Office of the Director of Public Prosecutions NSW, *Submission 71*.
171 Chief Magistrate Graeme Henson Local Court of NSW, *Submission 78*.
172 Institute of Public Affairs, *Submission 58*.
173 Ibid.
174 *Bugmy v The Queen* 249 CLR 571.

requiring consideration of Aboriginality in sentencing could be invalid by reason of inconsistency with s 10 of the *RDA*, which states:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.[175]

6.100 The ALRC considers that the *RDA* is unlikely to be an impediment to enacting such a statutory requirement—a view supported by stakeholders.[176]

6.101 Where a state or territory law confers a right or benefit which does not have universal operation, questions of invalidity do not arise. Instead, s 10(1) of the *RDA* would operate to extend the right or benefit to persons of any race, colour, or national or ethnic origin. Australian sentencing courts are already 'bound to take into account all material facts including those which exist only by reason of the offender's membership of an ethnic or other group'.[177] The recommended statutory requirement seeks to encourage judicial officers (and counsel) to take a proactive approach toward ensuring information relevant to those factors is put before the court. It does not contain a prohibition, and nor does it deprive a person of a right they previously enjoyed, and therefore would not be invalid. Section 10 of the *RDA* would operate to direct the court to consider factors arising from an accused person's membership of any racial or ethnic group as part of the sentencing process.[178]

6.102 Legal Aid ACT submitted that the issue may be side-stepped by 'careful and broad' drafting to direct courts to contemplate any 'unique systemic background factors' that may have impacted a defendant, with an example of the effect of dispossession on Aboriginal people highlighted in the explanatory note.[179]

6.103 Some stakeholders suggested that the recommended statutory requirement does not engage s 10 of the *RDA* at all, either because it does not involve an unequal enjoyment of a fundamental right or freedom, or because the provision constitutes a 'special measure' under the exception in s 8 of the *RDA*.[180]

Crimes Act 1914 (Cth)

6.104 The other legislative provisions that stakeholders raised as a possible impediment applied to sentencing in the NT. Sections 16A(2A) and 16AA of the

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175 *The Constitution 1901* (Cth) s 109. The position with regard to territories is similar. In the ACT, legislation inconsistent with a Commonwealth law has no effect: *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28. In the Northern Territory, inconsistent legislation is invalid: *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345.

176 See, eg, Ibid; M Jackson, *Submission 62*; Australian Lawyers for Human Rights, *Submission 59*; International Commission of Jurists Victoria, *Submission 54*; Victorian Aboriginal Legal Service, *Submission 39*; Dr A Hopkins, *Submission 24*; R Casey, *Submission 6*.

177 NSW Bar Association, *Submission 88*.

178 The ALRC notes that states and territories would need to give careful consideration to the drafting of the provision in order to ensure that the only in

179 Legal Aid ACT, *Submission 107*.

180 See, eg, Legal Aid ACT, *Submission 107*; M Jackson, *Submission 62*; International Commission of Jurists Victoria, *Submission 54*; Victorian Aboriginal Legal Service, *Submission 39*; Dr A Hopkins, *Submission 24*; R Casey, *Submission 6*.

Crimes Act 1914 (Cth) prohibits sentencing judges in the NT from considering customary law and cultural practice to mitigate criminal conduct:

> (1) In determining the sentence to be passed, or the order to be made, in relation to any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:
>
> (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
>
> (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

6.105 Section 16A(2A) provides the same prohibition for federal offenders. Stakeholders, including the NT Anti-Discrimination Commissioner, called for these provisions to be repealed.[181]

6.106 The Commonwealth provisions were introduced to 'prevent customary law from being used to mitigate the seriousness of any offence that involves violence against women and children'.[182] The Northern Territory Supreme Court has found that provisions of this type did not prevent courts from considering customary law or cultural practice to: provide context for offending; establish good prospects of rehabilitation (relating to sentencing); and to establish the character of the accused.[183]

6.107 It is not clear how s 16AA may have an impact on the operation of the recommended provision to consider the unique and systemic background factors affecting Aboriginal and Torres Strait Islander offenders in the NT. As customary law and cultural practice can be considered to provide context for offending, the effect of s 16AA on the operation of the recommended provision may be minimal. Nonetheless, the ALRC was advised by CLANT that, in order to give statutory consideration to Aboriginal and Torres Strait Islander disadvantage when sentencing in the NT, 'necessary amendments will need to be made to other legislation that seeks to regulate how evidence of custom and culture is to be presented'.[184] Accordingly, the ALRC encourages the Commonwealth Government to review the operation of ss 16A(2A), 16AA of *Crimes Act 1914* (Cth) to ensure that they are operating as intended, and to consider repealing or narrowing the application of the provisions if necessary to the successful implementation of a statutory requirement to consider unique and systemic factors of Aboriginal and Torres Strait Islander offenders when sentencing in the NT.

Legislative form

6.108 The ALRC does not draft legislation. There has, however, been discussion about the best form for the provision to take in sentencing statutes. Some stakeholders have

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181 NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Northern Territory Anti-Discrimination Commission, *Submission 67*.

182 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *2016 Review of Stronger Futures Measures* (2016) appendix A.

183 *The Queen v Wunungmurra* [2009] NTSC 24 [3]; Ibid [2.5].

184 Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*.

advocated for the statutory requirement of courts to take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples to be included in the purposes or principles of sentencing, while others consider it better placed as a sentencing factor.

6.109 For example, the Public Defender (NSW) suggested that, as the issue is exceptional and requires a specific direction to sentencing judges, the provision should form part of the purposes of sentencing.[185] The NSW Bar Association suggested that any new provision should be introduced *along with* statutory recognition of the purposes of sentencing as:

- ameliorating the over-representation of Aboriginal and Torres Strait Islander peoples in custody;
- reparation for harm done by the offender;
- restoration of harmony within Aboriginal and Torres Strait Islander communities, and
- providing equal justice in sentencing decisions.[186]

6.110 The NSW Bar Association also suggested that the statute should set out that there need not be a causal link between the factor and the offending conduct.

6.111 ALS NSW/ACT suggested the introduction of a statutory sentencing principle that recognises the following as unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples:

- the history of dispossession of land;
- the history of paternalistic attitudes and policies imposed by government; and
- removal of children.[187]

6.112 The Law Society of WA and Legal Aid WA suggested that the provision to consider unique and systemic background factors be incorporated as a sentencing principle.[188]

6.113 Legal Aid NSW considered that courts should be expressly required to pay particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders and that this requirement should be incorporated into the sentencing factors of s 21A in the *Crimes (Sentencing Procedure) Act 1999* (NSW):

> The character, general background (with particular attention to the circumstances of Aboriginal offenders), offending history, age, physical and mental condition of the offender (including any cognitive or mental health impairment). [189]

185 Public Defenders NSW, *Submission 8*.
186 NSW Bar Association, *Submission 88*; also see Judge Stephen Norrish QC, *Submission 96*.
187 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*.
188 The Law Society of Western Australia, *Submission 111*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Community Restorative Centre, *Submission 61*; Australian Lawyers for Human Rights, *Submission 59*; Legal Aid WA, *Submission 33*.

6.114 Careful consideration of the legislative drafting of any provision will be needed to give effect to the intention to require sentencing courts to take into account unique and systemic factors of Aboriginal and Torres Strait Islander offenders. Where adopted, the provisions should be uniform across the states and territories.

Indigenous Experience Reports for Australian sentencing courts

Recommendation 6–2 State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.

Recommendation 6–3 State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.

6.115 The introduction of such a provision raises questions about how best sentencing courts should receive information showing the 'necessary link' between the collective and individual Aboriginal experience. Pre-sentence reports (PSRs) and submissions to the court by counsel for the defence can go some way, but there remains a need for courts to be able to receive objective reports that provide insightful and accurate accounts of the experiences of Aboriginal and Torres Strait Islander offenders.

6.116 The ALRC recommends that this information be submitted in the form of 'Indigenous Experience Reports' (IERs) in superior courts (District/County and Supreme Courts) and be able to be submitted using less formal methods in the courts of summary jurisdiction (Local or Magistrates Courts).

Summary and superior courts—incidence

6.117 Courts of summary jurisdiction usually hear matters that are less serious in nature than the superior courts. For example, in NSW the Local Court has jurisdiction to sentence an offender to a term of imprisonment of up to two years, or for five years when imposing a cumulative sentence.[190] Courts of summary jurisdiction hear the majority of criminal matters. In 2015–16, the courts of summary jurisdiction nationally

189 Legal Aid NSW, *Submission 101*; also see Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*.

190 *Criminal Procedure Act 1986* (NSW) ss 267–268.

heard 97% (559,884) of all finalised adult criminal matters,[191] of which 88% were proven guilty.[192]

6.118 The rest of the matters, that is, matters that attract a sentence of imprisonment of more than two years (referred to as 'indictable matters') are heard in the superior courts. In 2015–16 this amounted to 15,971 finalised matters nationally,[193] of which 79% were proven guilty.[194] These matters are more serious, so the likelihood of a prison sentence on a guilty finding is increased. For example, in the courts of summary jurisdiction, 6% (30,826) of matters proven guilty received a sentence of imprisonment,[195] with an average length of seven months,[196] whereas in the superior courts, 68% (8,608) of those found guilty received a sentence of imprisonment,[197] with an average length of 38 months.[198]

Aboriginal and Torres Strait Islander defendants

6.119 It is not possible to know the number of Aboriginal and Torres Strait Islander people that come before the superior and summary courts nationally. Aboriginal and Torres Strait Islander status in court finalisation data is not collected for all states and territories.[199] Table 6.1 below shows the number of Aboriginal and Torres Strait Islander people in court finalisations per court jurisdiction in NSW, the NT, Queensland and South Australia, and the percentage of all matters before those courts that had Aboriginal or Torres Strait Islander defendants.

Table 6.1: Matters before the courts by state and territory, jurisdiction and by Aboriginal and Torres Strait Islander status (2015–2016)

State or territory	Number & % of matters finalised in superior courts with ATSI defendants	Number & % of matters finalised in summary courts with ATSI defendants	Total number of custodial sentences* imposed on ATSI offenders
NSW	496 (12%)	8,797 (11%)	3,360
Northern Territory	309 (68%)	5,266 (77%)	3,481
Queensland	666 (14%)	20,159 (21%)	4,485
South Australia	165 (10%)	3,904 (17%)	975
Total number & mean %	**1,636 (26%)**	**38,126 (32%)**	**12,301**

Source: Australian Bureau of Statistics, *Criminal Court Statistics*, Cat. No. 45130DO003_201516 (2015-2016) table 13, 14. These data exclude traffic offences. *Custodial sentence includes prison, community-based and suspended sentences.

191 Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16, Cat No 4513.0* (2016) table 6.
192 Ibid table 2.
193 Ibid table 6.
194 Ibid table 2.
195 Ibid table 9.
196 Ibid table 48b.
197 Ibid table 9.
198 Ibid table 48a.
199 See ch 3.

6.120 Aboriginal and Torres Strait Islander peoples were defendants in 10% to 68% of all matters in the superior courts, and 11% to 77% of those in the summary courts. Accordingly, on average, Aboriginal and Torres Strait Islander peoples represented 26% of defendants in matters before the superior court, and 32% in front of the courts of summary jurisdiction in 2015–2016.

6.121 The available statistics do not provide data on Aboriginal and Torres Strait Islander defendants found guilty by each jurisdiction. This number would provide an indication as to how many matters would be affected by a provision to consider unique and systemic factors. Assuming that 79% of matters heard in the superior courts and 88% in the summary courts result in a finding of guilt,[200] it can be inferred that, in those states and territories, up to 1,290 Aboriginal and Torres Strait Islander defendants in the superior courts would be affected, and 33,550 in the courts of summary jurisdiction.

The current methods for submitting information to sentencing courts

6.122 Sentencing courts do not have to comply with the same rules of evidence that trial courts do. Evidence Acts in the states and territories prescribe that, unless a court orders otherwise, the relevant Evidence Act does not apply in sentencing.[201] The common law rules of evidence may, however, apply where there is a dispute.[202] It is well established, for example, that in sentencing, for the prosecution to establish an aggravating factor, the onus is on the prosecution to establish it beyond reasonable doubt. For the offender to establish a mitigating factor, it need only be done on the balance of probabilities.[203]

6.123 A sentencing court can inform itself about the offender in a multitude of ways: it can receive information through written or oral submissions regarding the characteristics and background of the defendant submitted by the parties or via reports ordered by the court. In certain matters, sentencing courts can also receive victim impact statements, which can be submitted in writing or read in court by the victim or family member.[204]

Submissions by the parties

6.124 The court can receive any information that the court considers appropriate to enable it to impose the proper sentence.[205] Evidence can be submitted by the defence or prosecution orally or through written submissions.

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200 Data provided in ch 3 show little variation in the proportion of guilty findings for Aboriginal and Torres Strait Islander defendants and non-Indigenous defendants.
201 See, eg, *Evidence Act 1995* (NSW) s 4; *Evidence Act 2008* (Vic) s 4.
202 *R v Bourchas* (2002) 133 A Crim R 413, [55].
203 *Olbrich v The Queen* (1999) 199 CLR 270; see *Sentencing in the District Court* <www.publicdefenders.nsw.gov.au>.
204 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29.
205 See, eg, *Penalties and Sentencing Act 1992* (Qld) s 15(1).

6.125 During consultations, a number of stakeholders to this Inquiry advised the ALRC that sentencing submissions made on behalf of Aboriginal and Torres Strait Islander offenders progressing through mainstream courts were often rushed. Stakeholders commented on the time constraints of the courts, and the limited time that lawyers have to prepare comprehensive information about a client's background and community.

6.126 The Mental Health Commission submitted that some courts do not have adequate information available to consider offenders' backgrounds, including relevant cultural and historical factors.[206] Australian Lawyers for Human Rights suggested this gap was due to under-resourced legal aid lawyers, who did not have sufficient training or time to elicit such information, as well as due to the limited availability of interpreters.[207]

6.127 The lack of information was considered to be a widespread problem. VALS submitted that there was little information in 'mainstream courts' regarding cultural backgrounds of Aboriginal and Torres Strait Islander offenders, and that there was no legislative requirement for the court to consider such information.[208] The Human Rights Law Centre noted that it was

> left to the discretion of judges and magistrates as to how (if at all) they will take into account the historical and contemporary systemic discrimination and disadvantage that contributes to the over-representation of Aboriginal and Torres Strait Islander people in criminal justice systems and to the offending of particular individuals.[209]

6.128 VALS advised that, even in the Koori Court, where the historical impacts of colonisation and the person's individual background are generally considered, if the Elders did not know the offender or their family, there may still be information lacking.[210]

Pre-sentence reports

6.129 Pre-sentence reports (PSRs) are reports produced to assist 'Judges or Magistrates to select the most appropriate sentence for offenders who have pleaded guilty to, or have been found guilty of, an offence'.[211] PSRs have a statutory basis in all states and territories, except NSW where PSRs operate by agreement.[212] PSRs in written form may take up to six weeks to complete, for which the matter is adjourned, and the offender is either bailed or held on remand.[213]

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206 Mental Health Commission of NSW, *Submission 20*.
207 Australian Lawyers for Human Rights, *Submission 59*.
208 Victorian Aboriginal Legal Service, *Submission 39*.
209 Human Rights Law Centre, *Submission 68*.
210 Victorian Aboriginal Legal Service, *Submission 39*.
211 Corrective Services NSW, *Policy and Procedures Manual* (2015) [2.1].
212 *Crimes (Sentencing) Act 2005* (ACT) s 41; *Sentencing Act 1997* (NT) s 105; *Penalties and Sentences Act 1992* (Qld) s 15; *Criminal Law (Sentencing) Act 1988* (SA) s 8; *Sentencing Act 1997* (Tas) s 82; *Sentencing Act 1991* (Vic) s 8A; *Sentencing Act 1995* (WA) s 20; Corrective Services NSW, *Policy and Procedures Manual* (2015) [2.2.1]; also see Thalia Anthony et al, above n 160, 124.
213 Thalia Anthony et al, above n 160, 124.

6.130 PSRs are to include certain matters in relation to the offender, known as 'pre-sentence report matters'. These include, for example: the offender's age, medical and psychiatric history; the offender's educational background, employment and financial histories; any prior management by corrective services and the level of compliance under management; and an assessed level of risk.[214] PSRs may contain any other information requested by the court,[215] including information regarding the suitability of sentence types, noting the 'possible benefits of a particular intervention'.[216]

6.131 The majority of statutory provisions that outline pre-sentence report matters do not identify Aboriginality or cultural background as a pre-sentence report matter at all.[217] While some jurisdictions refer to the offender's 'social history and background',[218] only the ACT includes 'the offender's social history and background (including cultural background)' as a pre-sentence matter.[219]

6.132 Research conducted in NSW and Victoria by academics Anthony, Marchetti, Behrendt and Longman, and published in 2017, highlighted the 'pivotal role' PSRs have in the sentencing decision. It suggested that PSRs are 'very influential' to the sentencing decision to the extent that, for example, in the ACT, a court must provide reasons where it deviates from the recommendations of a PSR.[220] The research noted the absence of information relevant to offenders' Aboriginal and Torres Strait Islander experience in PSRs. It concluded that sentencing courts do not receive sufficient information relevant to Aboriginal and Torres Strait Islander background factors in sentencing, noting that submissions by counsel and PSRs are generally not enough.[221]

6.133 This finding was reaffirmed by stakeholders to this Inquiry.[222] Legal Aid ACT submitted that PSRs contain only 'rudimentary' information about the offence and the offender, and lack the 'necessary depth and substance required to provide the court with a holistic, accurate picture'. The 'routine' format means that PSRs are 'unable to map the full impact of inter-generational and historical trauma on ATSI offenders'. Legal Aid ACT recognised that, while the current approach of providing information to the sentencing court may satisfy the 'interests of justice with regard to sentencing non-

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214 *Sentencing Act 1997* (NT) s 106; *Sentencing Act 1997* (Tas) s 83; *Sentencing Act 1991* (Vic) s 8B.

215 See, eg, *Sentencing Act 1997* (NT) s 106; *Sentencing Act 1991* (Vic) s 8B; *Sentencing Act 1995* (WA) s 21.

216 Corrective Services NSW, *Policy and Procedures Manual* (2015) section B, pt 2.

217 ` Ibid [2.6.19] The NSW Corrective Services manual includes one paragraph on ways to deal with Aboriginal or Torres Strait Islander offenders, but does not go to the content of the report.

218 *Sentencing Act 1997* (NT) s 106(b); *Sentencing Act 1997* (Tas) s 83(b); *Sentencing Act 1991* (Vic) s 8B(1)(b).

219 *Crimes (Sentencing) Act 2005* (ACT) s 40A(b).

220 Thalia Anthony et al, above n 160, 124.

221 Ibid 123.

222 See also, Dr Thalia Anthony, *Submission 115*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Jesuit Social Services, *Submission 100*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Community Restorative Centre, *Submission 61*; Australian Lawyers for Human Rights, *Submission 59*.

Indigenous offenders ... with respect to Aboriginal and Torres Strait Islander offenders and particularly in light of the *Bugmy* decision, it requires significant revision'.[223]

6.134 The Aboriginal Legal Services WA (ALSWA) had 'longstanding concerns' about the use of PSRs in WA, which, in their experience, did not 'canvass issues of Aboriginality and systemic issues such as deprivation, intergenerational trauma and discrimination' and, as such, were 'rarely culturally appropriate'.[224] In the view of ALSWA some PSRs were prepared well and provided information that may be new to the court, such as information about the offender's prior involvement with the child protection system or experience of family violence. Critically, however, the ALSWA suggested that the reports mainly supported 'systemic bias within the system', as:

- interviews were often between an Aboriginal or Torres Strait Islander offender and a non-Indigenous corrective services staff member, and may even be conducted over the phone.[225] This likely leads to mistrust and a non-productive interview where the interviewer considers the offender to be without remorse;
- there may not be an interpreter;
- the report writer may 'cut and paste' from previous reports on the offender; and
- in the text of the report, the report writer may present their view as *fact* and the offender's comments as *claims*.[226]

6.135 The ALSWA provided the following case study and commentary, which highlights some of the issues of PSRs when developed for Aboriginal and Torres Strait Islander offenders:

> In 2017, the District Court sentenced A to 9 months' imprisonment for Aggravated Burglary. For the sentencing hearing, the court had a PSR prepared by a community corrections officer (CCO) and a Psychological Report. A was in custody in a regional prison; however, the CCO who prepared the PSR was from a metropolitan office. The CCO interviewed A over the phone. The report stated that A had poor insight, was reluctant to discuss the offence and his personal history and contended that this suggested 'potential difficulties with him engaging meaningfully with interventions that meet his cognitive and treatment needs'. The PSR was a typical deficit-focused report with constant references to his failings, 'cognitive deficits' and poor past compliance with community based dispositions. The Psychological Report made similar references to his 'lack of insight' and reluctance to discuss the offences and his background. The PSR mentioned that because his assessment was conducted by telephone it was 'difficult to gauge physical cues which may have been utilised to encourage an open discussion'. It is concerning the author of the PSR acknowledges that it is only 'difficult' to gauge physical cues over the telephone—one would have thought it was impossible! What is even more alarming is that neither the CCO nor the psychologist was aware that A had significant hearing loss in both ears.

223 Legal Aid ACT, *Submission 107*.
224 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.
225 See also Thalia Anthony et al, above n 160, 125.
226 Aboriginal Legal Service of Western Australia Limited, *Submission 74*. *Emphasis* added.

> Fortunately, this was known by the ALSWA lawyer, who was able to elicit significant information about A's life and background from family members.[227]

6.136 The Change the Record Coalition also suggested that the current mechanisms for obtaining relevant background information in PSRs was 'unsuitable as they often do not contextualise offending in light of historical and systemic factors (including intergenerational trauma and socioeconomic disadvantage) and further fail to examine culturally safe sentencing options'.[228] The NSW Bar Association submitted that the

> absence of such information can represent difficultly for a sentencing judge that cannot be overestimated. Without such information, a sentencing judge is constrained in his/her ability to take into account material relevant to the individual being sentenced.[229]

6.137 VALS believed that there needed to be a mandated, community-led and culturally appropriate method to obtain such information that would assist the courts in finding alternative sentencing measures to prison. The method needed to directly address the impacts of colonisation and disadvantage experienced by Aboriginal and Torres Strait Islander peoples. VALS submitted that such a process would ensure the courts are 'playing a vital role', not only in addressing the inequality of incarceration, but in 'lowering prison rates for Aboriginal and Torres Strait Islander peoples'.[230]

Moves to *Gladue*-style reports in Australia

6.138 Steps have been taken to provide for *Gladue*-style reports in Australia. These steps have varied in scope. For example, the Aboriginal Legal Service NSW/ACT are developing a 'Bugmy Evidence Library'—a body of material containing information about the 'social disadvantage of certain Aboriginal communities'[231] for use as evidence in sentencing matters. According to the Law Council of Australia submission to this Inquiry, these reports will 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'.[232]

6.139 In the NT, the Law and Justice Group's 'reference writing processes' are designed to facilitate pre-court meetings with members of the Aboriginal and Torres Strait Islander community and community leaders in order to write pre-sentence recommendations in reference letters to the presiding judge. The North Australian Aboriginal Justice Agency (NAJAA) provided information on the reference letters:

> These reference letters communicate important background information about the offender, including important cultural information and also provide community views on offending and where appropriate suggest alternative to jail options for sentencing.

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227 Ibid.

228 Change the Record Coalition, *Submission 84*. See also NSW Bar Association, *Submission 88*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; Legal Aid ACT, *Submission 107*.

229 NSW Bar Association, *Submission 88*. See also Jesuit Social Services, *Submission 100*.

230 Victorian Aboriginal Legal Service, *Submission 39*.

231 Law and Justice Foundation, *Awarded Grants in 2015/2016* <http://www.lawfoundation.net.au>.

232 The Law Council of Australia, *Submission 108*.

> In 2017 the Kurdiji Law and Justice group extended this work to include sitting in court with the presiding judge and providing input to the court system where appropriate. Kurdiji members have reported an increase in community support since they began sitting in court with the Judge. Kurdiji members placed great emphasis on the importance and symbolic nature of Kurdiji being seen by defendants as sitting alongside the Judge (and as being respected by the Judge as a source of authority) and have spoken very positively about the possibility of Kardia (Western mainstream legal system) and Yapa (Warlpiri) laws working together.
>
> While this current work is an important step towards making the current system slightly more culturally accountable, there are a number of limitations to this work including elders having to volunteer their time and the process largely unsupported by key agencies in the criminal justice system. In order for pre-sentence reports to be meaningful and have weight with the court, they ought to have legislative authority.[233]

6.140 The ACT Government advised the ALRC of an intention to trial the use of 'Aboriginal and Torres Strait Islander Experience Court Reports' in sentencing courts in the ACT. The proposed trial is in response to a 2015 ACT Standing Committee on Justice and Community Safety report, *Inquiry into Sentencing in the ACT*. As noted above, that report recommended that the ACT Government legislate to 'explicitly require the courts to consider the Indigenous status of offenders'.[234] It further recommended that the ACT Government create a specific mechanism for the 'creation of reports similar to *Gladue* reports in Canada, informing courts of any relationship between an accused's offending and his or her Indigenous status'.[235]

6.141 The ACT Government has commissioned Legal Aid ACT to design a framework for the creation of specialised reports similar to *Gladue* reports in Canada. Legal Aid ACT recommended the creation of Aboriginal and Torres Strait Islander 'Experience Court Reports' that aimed to provide the courts with pre-sentence information about an offender's community, family and personal circumstances and the impact of the cultural, social and historical issues confronted by Aboriginal and Torres Strait Islander peoples. The development of a trial for the Experience Court Reports is under consideration.[236]

6.142 VALS released a discussion paper on 'Aboriginal Community Justice Reports' in 2017 that proposed a trial for such reports to be written by Aboriginal and Torres Strait Islander communities in Victoria. These reports are proposed to be produced when sentencing offending that may attract a jail sentence and for 'a variety of justice scenarios, including bail, sentencing, child protection, and for young people'.[237]

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233 North Australian Aboriginal Justice Agency (NAAJA), *Submission 113*.

234 Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) rec 18.

235 ACT Government, *Submission 110*; Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) rec 20.

236 ACT Government, *Submission 110*; also see Mental Health Commission of NSW, *Submission 20*.

237 Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports: Addressing Over-Incarceration—Discussion Paper* (2017).

Nomenclature

6.143 There has been some discussion about how to refer to such reports in the Australian context. In Canada, they are '*Gladue* reports'. '*Bugmy* reports' are not appropriate in Australia because, in Bugmy's case, there was no such report. The Discussion Paper to this Inquiry termed them 'specialist sentencing reports', but this could indicate that the focus of the report would be on the sentence. ACT Legal Aid suggested the term 'Experience court reports', arguing this phrase more accurately describes the 'purpose and nature' of the reports.[238]

6.144 VALS suggests using the term 'Aboriginal Community Justice Reports', which is the title given to the proposed trial of the reports in Victoria.[239] Dr Thalia Anthony suggested 'Indigenous Community Reports'.[240]

6.145 The ALRC suggests that 'Indigenous Experience Reports' (IERs) accurately describes the nature of the reports, but encourages courts in each state and territory to work with Aboriginal and Torres Strait Islander organisations to determine the most suitable title for the reports in that jurisdiction.

Stakeholders to this Inquiry

6.146 The majority of stakeholders to this Inquiry supported the introduction of IERs, to operate alongside of PSRs, for Aboriginal and Torres Strait Islander offenders, arguing that IERs would provide invaluable contextual and individualised information about an offender that would further and better assist judges when tailoring a sentence for that offender.[241]

6.147 There were some considerations about the production of such reports. These include who should author and resource IERs, as well as the kind of information that they should contain.

Independent Aboriginal authorship

6.148 It was generally agreed that corrective services should not prepare IERs.[242] These reports should instead be prepared by an Aboriginal and Torres Strait Islander person or group, preferably with a connection to the offender's community. At the very least, stakeholders suggested the reports should be prepared by a person with a good understanding of the offender's particular Aboriginal or Torres Strait Islander community and history.[243]

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238 Legal Aid ACT, *Submission 107*.

239 Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports: Addressing Over-Incarceration—Discussion Paper* (2017).

240 Thalia Anthony et al, above n 160.

241 Australian Lawyers for Human Rights, *Submission 59*; NSW Bar Association, *Submission 88*; Thalia Anthony et al, above n 160.

242 See, eg, Northern Territory Anti-Discrimination Commission, *Submission 67*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Dr A Hopkins, *Submission 24*.

243 See, eg, Dr Thalia Anthony, *Submission 115*; North Australian Aboriginal Justice Agency (NAAJA), *Submission 113*; Legal Aid NSW, *Submission 101*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; NSW Bar Association, *Submission 88*; Queensland Law

6.149 Some stakeholders suggested that Aboriginal legal services would be best placed to author the reports. Others identified the need for authorship to be independent of the defence,[244] so as to not undermine the perceived impartiality and credibility of the reports.[245] The ALRC supports the independent production of IERs, where possible.

Content of reports

6.150 The content of an IER would be distinct from a PSR as their 'fundamental purpose' would be to 'identify material facts which exist only by reason of the offender's Aboriginality'.[246] Broadly speaking, stakeholders acknowledged that the introduction of IERs would 'play a vital role in bringing the entirety of complex factors that may influence Indigenous offending to the fore'.[247]

6.151 The ALHR suggested that IERs should include information regarding 'past trauma, past abuse, substance abuse, information as to loss of culture, and positive cultural issues'.[248] The Community Restorative Centre suggested the reports should give family and community background, and other 'important contextual information', such as

> intergenerational trauma pervading communities, known histories of local massacres, harsh mission life, stolen children as well as the life experiences of the accused, that may include removal from family, early school leaving, domestic and family violence.[249]

6.152 ALSWA suggested that IERs could also include information about the offender's experiences with corrective services and other relevant government and non-government agencies.[250] Other suggested content included any underlying developmental or health issues, such as foetal alcohol syndrome disorders,[251] and loss of language.[252]

6.153 It was also suggested that IERs identify any available and appropriate alternative sentencing options.[253] ALS NSW/ACT suggested that IERs could draw from the 'Bugmy Evidence Project' under development in NSW (discussed above) to provide information to a sentencing court on the background of an individual and their community, and of available community-based rehabilitation options and alternatives to custody.[254]

Society, *Submission 86*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Australian Lawyers for Human Rights, *Submission 59*; Victoria Legal Aid, *Submission 56*; Dr A Hopkins, *Submission 24*.

244 Dr A Hopkins, *Submission 24*; Associate Professor L Bartels, *Submission 21*.

245 Associate Professor L Bartels, *Submission 21*.

246 NSW Bar Association, *Submission 88*.

247 Legal Aid ACT, *Submission 107*.

248 Australian Lawyers for Human Rights, *Submission 59*. See also Queensland Law Society, *Submission 86*.

249 Community Restorative Centre, *Submission 61*.

250 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

251 NSW Bar Association, *Submission 88*.

252 Legal Aid NSW, *Submission 101*.

253 North Australian Aboriginal Justice Agency (NAAJA), *Submission 113*.

254 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*. See also Queensland Law Society, *Submission 86*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

Resourcing

6.154 It is difficult to estimate how many IERs would be required to be produced annually. It is estimated that, in the four states and territories itemised in Table 6.1 above, around 1,290 IERs could have been ordered by the superior courts if available during the 2015–2016 period. Nearly half of these would have been ordered in Queensland.

6.155 Stakeholders to this Inquiry were alert to the requirement for enhanced resources to support the preparation of IERs. For example, Sisters Inside noted:

> If these reports were to be introduced, dedicated funding would have to be made available through Legal Aid commissions for this purpose, with the presumption that all Aboriginal and Torres Strait Islander peoples are eligible for funding if they choose to rely on a report. Aboriginal and Torres Strait Islander peoples must not languish in prisons waiting for funding for reports or for availability of report writers.[255]

6.156 The Community Restorative Centres noted the need to fund Aboriginal legal services and community groups such as Wirringah Baiya Aboriginal Women's Legal Service.[256] ALS NSW/ACT suggested the resourcing model from Ontorio, Canada, where Legal Aid funds the preparation of the reports by local Aboriginal organisations. Membership on the panel requires certain levels of training and competence, and they are authorised to bill five additional hours in making a submission.[257]

6.157 The resourcing requirements for Australia would stretch beyond the actual preparation of the report. Alternative sentencing options, support networks and appropriate training and guidelines (see below) would also need to be developed and supported.[258] As identified by VALS, an IER model needs to be supported by 'case management workers post-sentence, adequately resourced culturally appropriate and community-led programs, and training and support of the judiciary'.[259] If community-led alternative sentences were not funded then the information contained in IERs would be 'redundant'.[260]

Arguments against the introduction of IERs

6.158 An argument against the introduction of IERs was advanced by NSW Chief Magistrate Henson, who contended that it was not the role of the court to inform itself, and that information of this type was best left for submissions by the defence:

> While the entrenchment in legislation of a principle or factor that requires the sentencing court to consider the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples might arguably have the effect of enhancing the prominence of this issue at a societal level, the practical question that remains for the court is how such a principle or factor is to be taken into account in

255 Sisters Inside, *Submission 119*.
256 Community Restorative Centre, *Submission 61*.
257 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*.
258 For a discussion on the availability of community-based sentences see ch 7.
259 Victorian Aboriginal Legal Service, *Submission 39*.
260 Ibid. See also Legal Aid ACT, *Submission 107*.

> the context of an individual case. Of course, it is not the role of the court in an adversarial criminal justice system to inform itself of such matters; once again this depends, and will continue to depend, upon the nature and substance of the submissions made on behalf of the offender.[261]

6.159 The NSW ODPP submitted that consideration of relevant systemic and background factors was already part of the NSW sentencing process and that 'counsel submissions, along with PSRs and any expert reports, such as that of a psychologist, do generally provide sufficient background information to NSW sentencing courts.'[262] The NSW ODPP did, however, acknowledge that reports prepared with the assistance of someone connected to the offender's community may add value, as this was generally missing in PSRs.[263]

Flexible approach in courts of summary jurisdiction

6.160 It would be ideal for an IER to be produced for every matter, or even just in matters when a sentence of imprisonment was likely. The ALRC is aware, however, that resourcing and time may make it implausible to produce IERs in all, or even limited, circumstances, and so recommends that a more flexible approach be taken in courts of summary jurisdiction.

6.161 Some stakeholders considered that a flexible approach to receiving the relevant information should be taken, regardless of the jurisdiction of the sentencing court. The Human Rights Law Centre suggested that IERs should be 'just one example of an alternative approach to ensuring courts are properly equipped to appropriately sentence Aboriginal and Torres Strait Islander offenders'. The Human Rights Law Centre emphasised the need for state and territory governments to work with Aboriginal and Torres Strait Islander representatives to determine the most appropriate way to ensure that cultural factors and systemic discrimination and disadvantage are adequately taken into account by courts.[264] The Law Council submitted it to be 'critical' that Aboriginal and Torres Strait Islander legal, health and community organisations are consulted as to the best way to put information before the courts.[265]

6.162 Other stakeholders suggested the need for the limited application of IERs. The ALSWA considered that it would be 'cost prohibitive' to require an IER for every criminal matter. The ALSWA suggested that such reports be a feature of courts hearing indictable matters (District/County or Supreme Courts) or where requested by magistrates in Local or Magistrates Courts, particularly when an offender may be facing prison in the lower court.[266] The Community Restorative Centre with the Miranda Project also submitted concerns regarding the practicalities of providing an IER in Local Courts, particularly when an offender may be unrepresented. In their view, an Aboriginal Court Support service would be needed in the lower courts to

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261 Chief Magistrate of the Local Court (NSW), *Submission 78*.
262 Office of the Director of Public Prosecutions NSW, *Submission 71*.
263 Ibid.
264 Human Rights Law Centre, *Submission 68*; also see Change the Record Coalition, *Submission 84*.
265 Legal Aid ACT, *Submission 107*.
266 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

prepare people on the day of appearance, with quick access to information about communities, with 'carefully structured, sensitive questions concerning the individual's life experiences'.[267]

6.163 The Law Society in WA recommended the constitution of a specialised agency to provide reports, including to Magistrates Courts.[268]

6.164 Local and Magistrates Courts handle the bulk of criminal matters in all jurisdictions. They are where most people who are in prison have been sentenced, including Aboriginal and Torres Strait Islander offenders. The ALRC considers that the volume of matters demands more flexible and responsive options. The importance of Aboriginal and Torres Strait Islander involvement is widely recognised. For this reason, the ALRC recommends partnerships that bring together governments and Aboriginal and Torres Strait Islander organisations and communities to develop mechanisms to do this. In designing 'from the ground up', it is more likely that the outcomes will reflect local knowledge, strengths and opportunities, and consequently deliver better outcomes.

Training and guidelines for use

6.165 The Judicial College of Victoria identified the need for judicial education in support of the introduction of provisions requiring sentencing courts to take into account unique and systemic background factors of Aboriginal and Torres Strait Islander offenders. It also noted the benefits of having 'all involved in delivering justice, including the judiciary, receive cultural awareness and cultural competence education relating to Aboriginal and Torres Strait Islander people'. The College suggested that training should include material relating to the historical and ongoing impact of colonisation on Aboriginal and Torres Strait Islander peoples, identity, intergenerational trauma, in addition to education about contemporary issues such as the exposure to racism that many experience daily. It should also include cultural competence education, regarding how to work with Aboriginal and Torres Strait Islander peoples. This would involve training on modes of communication, body language, the need for and use of interpreters and related issues. Training was also required to inform the judiciary on the availability of culturally appropriate programs and services. [269]

6.166 Ongoing education and training of the judiciary and legal practitioners to support the introduction of provisions and IERs were widely supported by stakeholders.[270] The ALRC considers training to be a necessary concomitant to the introduction of the recommended provision. Some examples of best-practice training are outlined in Chapter 5, with regard to the requirement to support a similar provision

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267 Community Restorative Centre, *Submission 61*.
268 The Law Society of Western Australia, *Submission 111*.
269 Judicial College of Victoria, *Submission 102*.
270 See, eg, NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Legal Aid WA, *Submission 33*; Mental Health Commission of NSW, *Submission 20*.

in bail statutes. In that chapter, the ALRC recommends the development of guidelines for use by the judiciary and legal practitioners.[271] If developed, there would be value in also including material in support of the recommendations of this chapter regarding sentencing and Aboriginality.

271 See ch 5 rec 5.2.

7. Community-based Sentences

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Summary

7.1 ALRC recommendations in this chapter focus on reform to community-based sentence regimes to make them more accessible and flexible to provide greater support and to mitigate against breach.

7.2 The sentencing of offenders has been described as being at the core of the criminal justice system.[1] Each state and territory, and the Commonwealth, have legislation that guides the sentencing process[2] and all have sentencing regimes that enable courts to order that certain offenders serve their sentences in the community.[3]

1 Judicial Conference of Australia, *Judge for Yourself: A Guide to Sentencing in Australia* (2014).

2 *Crimes (Sentencing) Act 2005* (ACT); *Crimes Act 1914* (Cth); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act* (NT); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA).

3 *Crimes (Sentencing) Act 2005* (ACT) ch 5 pt 5.4; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 3, pt 7; *Sentencing Act* (NT) pt 3 divs 4–5; *Penalties and Sentences Act 1992* (Qld) pt 5 div 2;

7.3 Community-based sentences have some significant advantages over full-time imprisonment where the offender does not pose a demonstrated risk to the community.[4] A community-based sentence offers a sentencing court 'the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender.'[5]

7.4 Despite the advantages of community-based sentences, Aboriginal and Torres Strait Islander peoples are less likely to receive a community-based sentence than non-Indigenous offenders and, as a result, may be more likely to end up in prison for the same offence.[6] In addition, even when Aboriginal and Torres Strait Islander people are given a community-based sentence, they may be more likely to breach the conditions of the community-based sentence and may end up in prison as a result.

7.5 This chapter also examines short and suspended sentences of imprisonment,[7] both of which can be problematic as such sentences do not always address the purposes of sentencing and can have significant negative consequences for the offender. Nevertheless, unless access to community-based sentences is improved, the removal of short and suspended sentences of imprisonment as sentencing options may lead to an even greater number of Aboriginal and Torres Strait Islander offenders going to jail. Improving access to community-based sentences is necessary to reduce the incarceration rates of Aboriginal and Torres Strait Islander offenders. Once community-based sentences are uniformly available, consideration could be given to abolishing short terms of imprisonment and suspended sentences.

Background

Legislative regimes

7.6 While all states and territories have sentencing regimes that enable some offenders to serve their sentence in the community, each regime is different. Table 7.1 sets out in broad terms the categories of sentencing options that do not involve full-time imprisonment in a corrections facility. For simplicity, orders relating to fines and compensation have not been included. Release without conviction orders (and equivalent) have also been excluded.

Criminal Law (Sentencing) Act 1988 (SA) pt 6; *Sentencing Act 1997* (Tas) pt 4; *Sentencing Act 1991* (Vic) pt 3a; *Sentencing Act 1995* (WA) pt 9.

4 Community-based sentences are also much less costly than full-time custody. Other benefits of community-based sentences include the avoidance of contaminating effects arising from imprisonment with other offenders, see NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.16]–[9.17].

5 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [114]–[115].

6 Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2017, Cat No 4512.0* (2017) table 19. See also ch 3.

7 A suspended sentence is a community-based sentence but is discussed separately to other community-based sentences because of its link to incarceration (see [7.7] below).

Table 7.1: Community-based sentencing options in each state and territory (December 2017).

Jurisdiction	Orders						
ACT[8]	Good Behaviour Order	Non-Association and Place Restriction Order		Intensive Correction Order		Suspended Sentence	
NSW[9]	Good Behaviour Bond	Community Service Order	Non-Association and Place Restriction Order	Intensive Correction Order	Compulsory Drug Treatment Order	Home Detention Order	Suspended Sentence
NSW from 2018[10]	Community Correction Order			Intensive Correction Order			
NT[11]	Community Based Order	Community Work Order		Community Custody Order		Home Detention Order	Suspended Sentence
QLD[12]	Probation Order	Community Service Order		Intensive Correction Order		Suspended Sentence	
SA[13]	Bond	Community Service Order				Home Detention Order	Suspended Sentence
TAS[14]	Probation Order	Community Service Order			Drug Treatment Order	Suspended Sentence	
VIC[15]	Community Correction Order						
WA[16]	Community Based Order			Intensive Supervision Order		Suspended Sentence	

7.7 A brief description of the general features of each order is as follows:

- **Bond or probation order**: An order of the court that requires an offender to be of good behaviour and not reoffend for a specified period of time. The court can impose conditions that an offender must comply with during the term of the bond.

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8 *Crimes (Sentencing) Act 2005* (ACT) ss 11–13, pt 3.4; *Crimes (Sentence Administration) Act 2005* (ACT) chs 5–6.

9 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 6–9, pts 5–8; *Crimes (Administration of Sentences) Act 2005* (NSW) pts 3–5.

10 Following commencement of Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017 (NSW) in 2018. *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 7–8, pts 5–7.

11 *Sentencing Act* (NT) pt 3, divs 4–5.

12 *Penalties and Sentences Act 1992* (Qld) pts 5–6, 8.

13 *Criminal Law (Sentencing) Act 1988* (SA) s 38, pts 3, 5–6.

14 *Sentencing Act 1997* (Tas) pts 3–5.

15 *Sentencing Act 1991* (Vic) pt 3A, ss 83AD–83AS.

16 *Sentencing Act 1995* (WA) pts 9–12.WA has two types of suspended sentence: a traditional suspended sentence order (pt 11) and another called conditional suspended imprisonment (pt 12) which functions similarly to an intensive order (see next page).

- **Community service order**: A sentencing option where the court orders an offender to perform a number of hours of unpaid work for the benefit of the public (or in some jurisdictions complete program hours). An offender may be required to complete unpaid work directly through a community service order or as a condition of a bond or probation order.
- **Non-association and place restriction order:** Non-association orders can prohibit personal contact and communication between specified people by any means—including post, telephone, facsimile, email or social media. Place restriction orders prohibit the subject from entering specific places or districts for a specified term.
- **Intensive order**: An emerging rehabilitative-focused sentencing option that generally allows an offender to serve a sentence of imprisonment in the community[17]—provided they comply with conditions of intensive rehabilitation, supervision, and sometimes unpaid work.
- **Drug treatment order:** Offenders subject to a drug treatment order have restrictions placed on their freedom of movement and association. Generally, offenders must undergo drug treatment, attend regular meetings, and may have to submit to drug testing, among other conditions.
- **Home detention order**: Home detention is an alternative to full-time imprisonment whereby an offender is confined to an approved residence for specified periods of time for the duration of the sentence of imprisonment.
- **Suspended sentence**: A suspended sentence is considered a significant penalty.[18] Before suspending a sentence of imprisonment a court must be satisfied that a sentence of imprisonment is justified. Once a sentence of imprisonment is imposed, the court may suspend the sentence on condition the offender enters into a bond and complies with all conditions of the bond. In this chapter, suspended sentences are discussed separately to other community-based sentences because of their link to incarceration, particularly for Aboriginal and Torres Strait Islander offenders (see Recommendation 7–4).

7.8 Parole is discussed in Chapter 9. Parole is substantively different to a community-based order, because it typically follows a period of imprisonment and is designed to facilitate a transition from prison back to the community. Nevertheless, as parole requires an offender to submit to supervision by corrective services and to follow conditions, there are some broad similarities with a community-based sentence. Accordingly, where appropriate—for example in the context of the setting of

17 Community-based sentences are generally categorised into 'custodial' (such as suspended sentences, compulsory drug treatment orders, home detention and intensive orders besides WA) and 'non-custodial' sentencing options (such as community service orders, community correction orders, probation and bonds). The key point of difference of a custodial community-based order is that if a custodial community-based order is revoked, there is a presumption the offender will serve a term of full-time imprisonment. There is no such presumption with a non-custodial order, see NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [11.12].

18 Judicial College of Victoria, *Victorian Sentencing Manual* (2017) [19.6.2.1].

appropriate conditions and provision of appropriate supports to reduce breach—examples that involve parole are used even though they are not a community-based sentence.

Effectiveness of community-based sentences

7.9 Community-based sentences are important in reducing the over-representation of Aboriginal and Torres Strait Islander peoples in prison because they enable an offender to serve their sentence in the community. They are designed to be punitive while fulfilling other sentencing purposes, such as rehabilitation and deterrence (see Chapter 6).

7.10 In addition, research suggests that community-based sentences are more effective in reducing reoffending than a short term of imprisonment. For example, NSW BOCSAR found that offenders receiving an intensive correction order (ICO) had:

> significantly lower rates of re-offending than offenders who received a short prison sentence. Using IPTW [inverse probability of treatment weighting] to weigh offenders we found a 31 per cent reduction in the odds of re-offending for those who received an ICO as their principal penalty compared with the short prison group ... [W]hen the prison group was restricted to offenders serving a fixed prison term of 6 months or less; that is, those who received no supervision or treatment post release ... we found reductions in the odds of re-offending, in favour of the ICO group, of ... between 33 and 35 per cent for offenders in the medium to high LSI-R risk categories.[19]

7.11 This is particularly important for Aboriginal and Torres Strait Islander offenders for whom reducing recidivism is integral to reducing overall contact with the criminal justice system. For example, a 10% reduction in recidivism would reduce the number of Aboriginal and Torres Strait Islander court appearances by more than 30%, with a 20% reduction decreasing the number Aboriginal and Torres Strait Islander people appearing in court by 50%.[20]

7.12 Studies have shown that intensive community supervision coupled with targeted treatment is one of the most effective ways of addressing the underlying causes of criminal behaviour. Conservative estimates suggest a 10–20% reduction in recidivism is realistic if treatment is carefully and appropriately targeted.[21]

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19 Joanna Wang and Suzanne Poynton, 'Intensive Correction Orders versus Short Prison Sentence: A Comparison of Re-Offending' (Contemporary Issues in Crime and Justice No 207, NSW Bureau of Crime Statistics and Research, October 2017).

20 Boris Beranger, Don Weatherburn and Steve Moffatt, 'Reducing Indigenous Contact with the Court System' (Issue Paper No 54, NSW Bureau of Crime Statistics and Research, December 2010).

21 Wai-Yin Wan et al, 'Parole Supervision and Re-Offending: A Propensity Score Matching Analysis' (NSW Bureau of Crime Statistics and Research, 2014); 'Parole Supervision and Reoffending (2014)' (Trends & Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014); Steve Aos, Marna Miller and Elizabeth Drake, 'Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates Individual State Developments' (2006) 19 *Federal Sentencing Reporter* 275; Elizabeth Drake, Steve Aos and Marna Miller, 'Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State' (2009) 4 *Victims and Offenders* 170.

Availability and flexibility of community-based sentencing options

Recommendation 7–1 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to improve access to community-based sentencing options for Aboriginal and Torres Strait Islander offenders, by:

- expanding the geographic reach of community-based sentencing options, particularly in regional and remote areas;
- providing community-based sentencing options that are culturally appropriate; and
- making community-based sentencing options accessible to offenders with complex needs, to reduce reoffending.

Recommendation 7–2 Using the Victorian Community Correction Order regime as an example, state and territory governments should implement community-based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions to reduce reoffending.

7.13 Notwithstanding the advantages of community-based sentences, evidence suggests that Aboriginal and Torres Strait Islander offenders are less likely to receive a community-based sentence than non-Indigenous offenders.

7.14 At June 2017, Aboriginal and Torres Strait Islander prisoners represented 27% of the total full-time adult prisoner population, while making up only 2% of the total Australian population aged 18 years and over.[22] While comprising 27% of the prison population, Aboriginal and Torres Strait Islander persons made up only one-fifth (20%) of the total community-based corrections population.[23]

7.15 ALRC recommendations in this chapter focus on reform to community-based sentencing regimes to make them more accessible and flexible for Aboriginal and Torres Strait Islander offenders.

7.16 Issues of accessibility and flexibility are interrelated, particularly in relation to offenders with complex needs.[24] This is because inflexible community-based sentencing regimes are likely to either exclude offenders with complex needs or result in high rates of breach and revocation.[25] Inflexible community-based sentencing

22 See ch 3.
23 In the June quarter of 2017, see Australian Bureau of Statistics, above n 6, table 19.
24 See ch 1 for further information on complex needs and trauma-informed approaches.
25 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.37]–[10.39].

regimes may also have the effect of preventing the imposition of treatment conditions that address the underlying causes of reoffending.[26]

Remoteness

7.17 One of the reasons that Aboriginal and Torres Strait Islander offenders are less likely to receive a community-based sentence is that those sentences are often not available in many locations and, in particular, in areas outside of metropolitan and inner regional areas.[27]

7.18 A significant number of Aboriginal and Torres Strait Islander people live in regional and remote communities. The Productivity Commission estimated in 2011, the proportion of Aboriginal and Torres Strait Islander people living outside a regional area or major city was four times that of non-Indigenous people (44% and 11%), with less than half the proportion of Aboriginal and Torres Strait Islander people living in a major city compared to non-Indigenous people (35% and 71%).[28]

7.19 Remoteness has been tied to higher rates of imprisonment and disadvantage for Aboriginal and Torres Strait Islander people. Up to 80% of the Aboriginal and Torres Strait Islander prisoner population in the NT originate from regional or remote communities.[29] In 2014–15 the Council of Australian Governments reported that, of all Aboriginal and Torres Strait Islander males aged 35 and above, more than one-in-five (22%) described being incarcerated at some time in their life. The proportion was 16% in metropolitan areas, doubling to 31% in remote areas.[30]

7.20 Further, in NSW in 2015, ICOs were used much less frequently in remote and very remote regions compared with major cities (out of 1,337 people sentenced to ICOs, the split was 74% sentenced in major cities, 19% in inner regional areas, and 0.6% in remote and very remote areas).[31]

7.21 In their submission, National Aboriginal and Torres Strait Islander Legal Services (NATSILS) emphasised that:

> A lack of alternative community based sentencing options in regional and remote areas has resulted in Aboriginal and Torres Strait Islander people being sentenced to a term of imprisonment which would not have been imposed had they lived in a metropolitan area.[32]

7.22 According to NATSILS, 'this is largely because alternatives to incarceration are more readily available in metropolitan areas.'[33]

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26 Ibid [11.10], [11.43], [11.51].
27 Ibid [12.66]; NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.79]; NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 4.
28 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) figure 3.4.1.
29 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006, Cat No 4705.0* (2007).
30 Council of Australian Governments, *Prison to Work Report* (2016) 138. 27% in very remote areas.
31 NSW Sentencing Council, *Intensive Correction Orders: Statutory Review* (2016) figure 2.4.
32 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
33 Ibid.

7.23 Even in areas where community-based sentences are technically available, significant barriers have been experienced due to limited local opportunities for community service work and appropriate rehabilitation programs (discussed below).[34] A 2011 review noted that in NSW, ICOs were not being used outside of major cities and regional centres because of:

> operational issues in relation to offenders, who would otherwise appear suitable for an ICO, being assessed as unsuitable for reasons such as the unavailability of work in a particular region that the offender could complete; and a lack of availability of rehabilitation programs for an offender with an unresolved drug or alcohol problem, notwithstanding that ICOs were specifically designed to address these issues.[35]

7.24 The submission from the NSW Government noted in relation to ICOs:

> the new ICO[36] will remove barriers to offenders, including Aboriginal offenders, accessing intensive supervision under the current ICO... For example, the mandatory 32 hour per month work requirement is very difficult for people in parts of rural and regional NSW to comply with, because there is not enough work in those areas to comply with it. In addition, people with mental health and cognitive impairments, substance abuse issues, or who are otherwise unfit, are assessed as unsuitable for the ICO because it is unrealistic to expect them to be able to do this much work per month ... The amended ICO will be available throughout NSW, including regional and remote areas where a lack of community service work can lead to short prison sentences rather than community corrections orders being imposed.[37]

7.25 Where issues related to remoteness limit the usage of community-based sentences, the consequences can be severe, and may result in net widening and penalty escalation.[38] In submissions to an earlier Inquiry, a solicitor from Far North West NSW noted:

> In recent months our firm has represented clients placed on s.12 'suspended sentences' because they lived too far from 'town' and were unlicensed, not because they were unsuitable [for a CSO]. The issue here is if a client re-offends at a later time and faces sentence, the court may in its discretion assume the s.12 bond was imposed due to the 'objective criminality' of the previous offence as opposed to the lack of an available option. This may have the effect of distorting a person's criminal history.[39]

7.26 Previous reviews of home detention have each recommended that the geographical availability of home detention be expanded to cover all of NSW.[40]

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34 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.24], [12.64].

35 Chief Magistrate of the Local Court (NSW), Submission No 2 to NSW Sentencing Council, *Suspended Sentences: A Background Report* (29 July 2011) 5; NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.85].

36 See Table 7.1 The new ICO is also discussed below at [7.82]–[7.86].

37 NSW Government, *Submission 85*.

38 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [5.78–5.85]. See section titled 'Suspended Sentences' for more on net widening and penalty escalation.

39 R Waterford, Submission No 16 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (14 March 2005) 3.

40 For a full list, see NSW Auditor-General, *Home Detention: Corrective Services NSW*, Auditor-General's Report, Performance Audit (2010) 19.

Despite these recommendations, submissions to the 2013 NSW Law Reform Commission (NSWLRC) review on sentencing raised the lack of sufficient geographical coverage of home detention as an ongoing issue.[41] Practical barriers identified in regional and remote areas preventing access to home detention include lack of supervision, and issues around telephone monitoring for offenders without a landline.[42]

7.27 In relation to home detention and ICOs, Mission Australia submitted to this Inquiry:

> Recent research demonstrates that alternatives to detention are not used as effectively as they could be, particularly for Aboriginal and Torres Strait Islander people ... [NSW BOCSAR] identified that the most common offences committed by Aboriginal and Torres Strait Islander people were Assault ABH, Intimidation/Stalking, Common Assault, Breaching a s.12 Bond, Breaching an AVO and Breaching a s.9 Bond. They note that despite the benefits of home detention and Intensive Correction Orders (ICOs) in reducing recidivism, these methods are not often used for these offences. In 2015 no Aboriginal or Torres Strait Islander person convicted of one of these offences received home detention. ... If just half of the Indigenous offenders given a prison sentence in 2015 for one of the [above] offences ... had instead been given an ICO or home detention, 689 fewer Indigenous offenders would have received a prison sentence.[43]

Working with regional and remote communities

7.28 In order to expand the availability of community-based sentencing options in rural and remote areas additional resources will be required. When considering the principle of equality before the law—a founding principle of the rule of law—those funds should be provided expeditiously.[44] The type of sentence a person receives should not be determined by where they live.

7.29 Resourcing alone will not be sufficient. The NSW Public Defenders have previously argued that:

> What works in metropolitan centres will often be unviable or inappropriate in remote settings. It is in this context that local representatives should be consulted to a greater extent to determine what is feasible and appropriate for their areas, thereby putting the community element back into community sentences not merely at the execution stage, but also in the planning process, although this may require greater flexibility in approach than has previously been the case.[45]

7.30 Accordingly, one way of expanding the availability of community-based sentencing options in non-metropolitan areas involves working with regional and

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41 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.25].

42 Ibid.

43 Mission Australia, *Submission 53*.

44 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) Preamble.

45 Public Defenders NSW, Submission No 10 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (11 March 2005) 4. See also Public Defenders NSW, Submission No 24 to NSW Law Reform Commission, *Sentencing*, Report No 139 (20 August 2012) 11.

remote communities to expand the range of programs and services that support offenders serving community-based sentences.

7.31 This would mean that, where community services or work placements are provided to Aboriginal and Torres Strait Islander offenders serving a community-based sentence, then ideally the local Aboriginal and Torres Strait Islander community should administer them and, where this is not possible, they 'should have some input into the cultural aspects that need to be included in a program'.[46] Such an approach was integral to a number of recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC),[47] and in particular, Recommendation 113:

> **Recommendation 113**
>
> That where non-custodial sentencing orders provide for a community work or development program as a condition of the order the authorities responsible for the program should ensure that the local Aboriginal community participates, if its members so choose, in the planning and implementation of the program. Further, that Aboriginal community organisations be encouraged to become participating agencies in such programs.[48]

7.32 This approach is also consistent with the recommendations of the NSW Legislative Council Standing Committee on Law and Justice's 2006 review of community-based sentences.[49] The ALRC notes a 'place-based' approach was again advocated for in 2017, through the recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory, which emphasised the need for implementing 'local solutions for local problems'.[50]

7.33 Submissions to this Inquiry were highly supportive of Aboriginal and Torres Strait Islander communities taking a greater role in the design, implementation and staffing of services and programs that could form part of a community-based sentence.[51] NATSILS argued that:

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46 Western Aboriginal Legal Service, Submission No 44 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (15 June 2005) 3.

47 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5 recs 111, 113–4, 116, 235–6.

48 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 3 [22.5.13].

49 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) rec 4–5, 23.

50 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) recs 7.1–7.3.

51 Dr T Anthony, *Submission 115*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Judicial College of Victoria, *Submission 102*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Judge Stephen Norrish QC, *Submission 96*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; National Congress of Australia's First Peoples, *Submission 73*; Office of the Director of Public Prosecutions NSW, *Submission 71*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Community

> Consultation in developing alternative community based sentencing options must focus on the expertise and knowledge that Aboriginal and Torres Strait Islander communities and organisations have in relation to unmet need for community based sentences. It is essential that community based sentences are designed and driven by community and supported if necessary by community correction officers and other appropriate support structures. It is essential that resources are provided to communities and their representative organisations to obtain their free, prior and informed consent before adopting [or] developing alternatives ... so ... engagement is able to be facilitated.[52]

7.34 The submission by the NSW Bar Association drew attention to the NT Department of Attorney-General and Justice's 2016 *Hamburger Report* on the need for a community-level approach to justice by states and territories which empowers Aboriginal and Torres Strait Islander people to be 'part of the solution to their gross over-representation':

> Working with communities means empowering communities to help themselves. It means bringing everyone to the table—not just the policy makers or service providers but representatives of all sections of the community. It means working within an appropriate framework, recognising that there is something or things that work well in every community, helping the community to identify and build on those strengths. It also means working with the community and providers of services and programs to achieve a joined-up-approach to service delivery in, and with, the community.[53]

7.35 The submission from the Criminal Lawyers Association of the Northern Territory (CLANT) noted that:

> It is imperative that any funding for infrastructure or programs must be guaranteed for 3 to 5 year periods, to allow for better staff retention, development of expertise by those running the program, and to enable those programs to earn the trust of the ATSI community.[54]

Implementation

7.36 The ALRC recognises that there are a number of practical matters that need to be overcome to effectively implement community-based sentences across the country including:

- occupational health and safety (OH&S) and public liability concerns;
- reluctance in some communities to participate in community-based sentencing schemes;[55]
- the difficulty of attracting qualified staff in some regional and remote communities,[56] particularly in relation to support services;

Restorative Centre, *Submission 61*; Victoria Legal Aid, *Submission 56*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Public Health Association of Australia, *Submission 31*; Associate Professor L Bartels, *Submission 21*; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*.

52 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

53 NSW Bar Association, *Submission 88*.

54 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

55 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) xiv.

- supporting greater integration and information sharing between Aboriginal and Torres Strait Islander communities and community corrections staff;[57] and
- provision of accessible, available and legal transport in regional and remote areas.[58]

7.37 Electronic supervision may assist in the practical implementation of community-based sentences.[59] In particular, it may aid offenders to meet reporting obligations, particularly in rural and remote communities where distance and lack of transport makes in-person reporting impossible or overly arduous. One example of electronic supervision is 'supervision kiosks', which are 'automated machines ... to which supervisees can report in lieu of in-person reporting to a probation, parole or pretrial supervision officer'.[60]

Suitability requirements

7.38 Expanding the availability of community-based sentences to individuals with complex needs would reduce the imprisonment of Aboriginal and Torres Strait Islander offenders in two ways: directly as an alternative sentence to imprisonment, and in the longer term by reducing recidivism.[61]

7.39 Aboriginal and Torres Strait Islander offenders are more likely than their non-Indigenous counterparts to have complex needs and experience multiple forms of disadvantage such as childhood and ongoing trauma, homelessness or unstable housing, marginal histories of employment, illiteracy, innumeracy, mental health issues, alcohol or drug dependency and cognitive impairment.[62] However, such individuals are often found ineligible for a community-based sentence. As a result they are likely to be given a sentence of imprisonment or a sentence that increases the risk of imprisonment in the longer term.[63]

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56 Dr T Anthony, *Submission 115*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid ACT, *Submission 107*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

57 Dr T Anthony, *Submission 115*; Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

58 Driver licence issues are discussed in ch 12.

59 Electronic supervision includes use of the following technologies: automated reporting; remote alcohol detection devices; programmed contact systems; and continuous signalling devices.

60 Jesse Jannett and Robin Halberstadt, 'Kiosk Supervision for the District of Columbia' (Urban Institute Justice Policy Center, January 2011) 2.

61 Boris Beranger, Don Weatherburn and Steve Moffatt, above n 20.

62 Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 45, 117–8; Victorian Alcohol and Drug Association, Submission No 92 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 4.

63 See, eg, Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [5.1]–[5.38]; Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [2.34]–[2.39], [2.47]–[2.52]; House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and*

7.40 This is despite the fact that community-based sentences are likely to be particularly beneficial for offenders with complex needs—if tailored appropriately—due to the success of treatment combined with supervision in responding to the factors contributing to, and supporting, offending behaviours.[64] Shopfront Youth Legal Centre have previously recognised this as a key benefit of community-based sentences:

> The flexibility of community based sentences and their ability to address the root causes of the offending makes them ideally suited to disadvantaged offenders. The only disadvantage of community based sentencing is that some options are not widely available to disadvantaged offenders.[65]

7.41 Unstable housing, homelessness and substance abuse issues have tended to exclude offenders from accessing home detention.[66] In NSW, community service work has been identified as the 'key barrier' preventing access to community-based sentences which have a mandatory work component—such as ICOs and CSOs—in relation to offenders who have a cognitive impairment, mental illness, substance dependency, homelessness or unstable housing.[67] This is because, as the NSWLRC stated:

> substance dependency or [a] significant mental health issue ... might give rise to work safety issues (both for the offender and for co-workers). Additionally any instability—in terms of housing, substance dependency, cognitive impairment or mental health—can mean that the offender will be considered unlikely to comply with the work component.[68]

7.42 Submissions to this Inquiry noted the importance of availability of non-custodial options that do not exclude female Aboriginal and Torres Strait Islander offenders with childcare and parenting responsibilities.[69] Female Aboriginal and Torres Strait Islander prisoners are a group known to experience high rates of trauma and have complex needs—with up to 80% being mothers.[70]

Torres Strait Islander Communities (2015) [1.4]–[1.16], [1.26]–[1.47], [1.67]–[1.86], [1.97–1.111]; Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) [4.24]–[4.26]. See also chs 4 and 11.

64 NSW Sentencing Council, *Intensive Correction Orders: Statutory Review* (2016) [0.11–0.14].

65 Shopfront Youth Legal Centre, Legislative Council Submission No 25 to Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (18 March 2005) 8.

66 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.25].

67 Ibid [9.75]; NSW Sentencing Council, *Intensive Correction Orders: Statutory Review* (2016) [0.12].

68 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.75].

69 Dr T Anthony, *Submission 115*; Community Legal Centres NSW and the Community Legal Centres NSW Aboriginal Advisory Group, *Submission 95*; NSW Bar Association, *Submission 88*; Women's Legal Service NSW, *Submission 83*; Human Rights Law Centre, *Submission 68*; Australian Lawyers for Human Rights, *Submission 59*; Top End Women's Legal Service, *Submission 52*; Kingsford Legal Centre, *Submission 19*.

70 Baldry et al, above n 62, 45; Women's Legal Service NSW, *Submission 83*; North Australian Aboriginal Family Violence Legal Service, Submission No 55 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013).

7.43 On this issue, the Women's Legal Service NSW submitted that:

> There should be an increased focus on rehabilitation and alternatives to custody for women offenders ...
>
> Rule 64 of the Bangkok Rules stipulates that "Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger ..."
>
> Women tell us they want to be able to access safe, stable long-term housing and long-term drug and alcohol rehabilitation programs. We submit such support would in some cases prevent offending as well as reduce recidivism.[71]

7.44 Legislation may exclude offenders who commit certain types of offences from receiving a community-based sentence. Where offences are excluded by legislation, the types of offences excluded under some community-based sentencing regimes may be contributing to Aboriginal and Torres Strait Islander offenders being under-represented as recipients of community-based sentences compared to imprisonment.[72] The NT and SA, for example, have restrictions on the types of offences that attract a suspended sentence, including violent offences.[73] The effect of these eligibility criteria is that Aboriginal and Torres Strait Islander people may be sentenced to short terms of imprisonment when they commit low-to-mid range violent offences—a criminal justice response which is unlikely to aid in terms of rehabilitation or reducing reoffending.[74]

7.45 Public Defenders NSW have previously noted:

> There are ... differences in indigenous patterns of offending which may account for some of the disproportion in the range of offending (for example, indigenous offenders are more likely to commit personal violence offences, which are less likely to be considered suitable for community based sentencing), but we would suggest that significant developments could nevertheless be made in this area, especially by using community sentences instead of short prison terms of imprisonment ... We would therefore exhort that increasing the availability and use of community sentences for indigenous offenders be considered a matter of the highest priority.[75]

7.46 Evidence previously provided by a member of the Probation and Parole Officers' Association highlighted the cyclical nature of offending committed by people excluded from community-based orders:

> Because [prisoners serving short terms] are in gaol for less than six months they cannot access the programs that are available in custody because—I suppose it is quite ironic—they are not in gaol for long enough. So they go in, they are temporarily contained, they come out, nothing has changed so they reoffend. They just keep clicking through the turnstiles. This is the population that we most need to target.

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71 Women's Legal Service NSW, *Submission 83* [42–5].

72 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76; *Sentencing Act* (NT) pt 3 div 6A–6B; *Criminal Law (Sentencing) Act 1988* (SA) ss 20AAC, 37; *Sentencing Act 1991* (Vic) s 10.

73 *Sentencing Act* (NT) pt 3 div 6A–6B; *Criminal Law (Sentencing) Act 1988* (SA) s 20AAC.

74 See ch 9.

75 Public Defenders NSW, Submission No 10 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (11 March 2005) 6.

> Many of them are Aboriginal. We have in NSW an embarrassingly large proportion of Aboriginal offenders, in particular Aboriginal women, in custody.[76]

7.47 Similarly, Shopfront Youth Legal Centre have stated that the exclusion of violent offenders from community-based sentences operates unfairly against Aboriginal and Torres Strait Islander offenders and ignores the broader social context in which the offending takes place:

> While we do not suggest that violent offences are a trivial matter, we believe that such exclusions operate unfairly against particular groups in the community, such as indigenous offenders. It is an unfortunate fact that many indigenous communities are beset by violence, which is often alcohol related ... In order to break the cycle of violence which is often linked with poverty and disadvantage, the eligibility criteria must be broadened.[77]

Combining treatment and work requirements

7.48 The Victorian experience of community correction orders (CCOs), introduced in 2012, suggests that the imposition of unpaid community work in combination with rehabilitation and treatment services can work.

7.49 In 2015, unpaid community work and community rehabilitation and treatment were imposed by the Magistrates' Court in about 75% of CCOs, with community assessment and treatment, unpaid work, and supervision being the most commonly imposed combination of conditions.[78] In the intermediate and superior courts, between May and December 2015, assessment and treatment were imposed in 87.9% of CCOs and unpaid work in 85.6% of CCOs.[79] This suggests that the existence of drug or alcohol dependency or other complex needs does not automatically exclude offenders from accessing community-based sentences with a work component, so long as appropriate support is identified and provided where needed.

Pre-work programs for offenders with complex needs

7.50 Another approach to addressing the issue of suitability assessments excluding access to community-based sentencing options is that 'pre-work' or 'work-ready' programs be made available to offenders with complex needs who are sentenced to some form of community service work. These programs would allow corrective services to address—prior to commencement of community service requirements—an offender's drug or alcohol dependency, illiteracy, lack of work training, or other issues which currently prevent access to community service.[80]

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76 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [3.78].

77 Shopfront Youth Legal Centre, Legislative Council Submission No 25 to Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (18 March 2005) 6. See ch 13.

78 Sentencing Advisory Council (Vic), *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016) figure 6, 8.

79 Ibid figure 13.

80 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.80]–[9.81].

7.51 Such an approach has been endorsed by the NSWLRC, Corrective Services NSW and the NSW Sentencing Council, with the NSWLRC noting:

> The high level of illiteracy and innumeracy and consequent marginal histories of employment within the prison population is of serious concern. The provision of basic vocational and pre-vocational training can have a significant rehabilitative effect, not only in improving self-esteem but also in opening the way for employment. Counting participation in intervention programs, educational and literacy/numeracy programs, counselling or drug treatment towards the work hours requirement would, in our view, be an effective and appropriate method of expanding access [to community-based sentences] ... Work and Development Orders, which are used as a fine enforcement option under the *Fines Act 1996* (NSW), already provide one example of this in practice.[81]

7.52 Allowing an offender to meet the condition of their community-based sentencing by participating in mental health treatment, drug or alcohol counselling, vocational or pre-vocational training, and other life skills courses aligns with a number of recommendations of the RCIADIC,[82] in particular Recommendation 94:

> **Recommendation 94**
>
> (a) Sentencing and correctional authorities should accept that community service may be performed in many ways by an offender placed on a community service order; and
>
> (b) Consistent with the object of ensuring that offenders do not re-offend, approval should be given, where appropriate, for offenders to perform Community Service work by pursuing personal development courses which might provide the offender with skills, knowledge, interests, treatment or counselling likely to reduce the risk of re-offending.[83]

7.53 Submissions to this Inquiry were supportive of an approach that would allow offenders with substance dependency issues, cognitive impairment, poor mental health or physical disability greater access to community-based sentencing options.[84]

7.54 JustReinvest NSW stated:

> Rather than exclude these offenders, the mandatory conditions could be tailored to address the underlying causes of offending and expanded to include orders to attend rehabilitative programs or violent offender programs, as an alternative to the work component.[85]

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81 Ibid [9.80–9.81]. Work and Development Orders are discussed in ch 12.

82 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5 recs 94, 103, 109–16, 119.

83 Ibid [22.3.11].

84 Dr T Anthony, *Submission 115*; North Australian Aboriginal Justice Agency, *Submission 113*; Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Women's Legal Service NSW, *Submission 83*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; Australian Red Cross, *Submission 15*.

85 Just Reinvest NSW, *Submission 82*.

7.55 Similarly, Dr Thalia Anthony noted:

> There should be greater availability of programs in regional and remote communities and more appropriate programs for Indigenous people, including the distinct needs of Indigenous women, Indigenous youths or elderly and Indigenous people with disabilities. Work should be oriented towards developing the individual's skills or education that can build the capacity.[86]

7.56 The NSW Attorney General Mark Speakman has noted, in relation to sentencing reforms due to commence in NSW 2018:

> home detention orders and intensive correction orders [are both sentencing options that] give offenders intensive supervision that tackles their offending behaviour. However, at the moment these orders have structural issues that stop many offenders with complex needs from accessing these orders and, instead, they are given short prison terms or suspended sentences. These sentencing reforms will help offenders receive the supervision and programs that address their offending behaviour, resulting in less crime and fewer victims.[87]

Fulfilment of sentence requirements through treatment and programs

7.57 Adopting some aspects of the NSW Work and Development Order (WDO) scheme has been suggested by the NSWLRC as an option to improve the availability of community-based sentences. Under such a proposal offenders could satisfy community-based sentence requirements through participation in community service work, medical or mental health treatment, education, vocational or life skills courses, financial or other counselling, drug or alcohol treatment, or any combination of these activities.[88]

7.58 A 2015 independent evaluation of the WDO program, found that 95% of work sponsors said the scheme had helped reduce the level of stress and anxiety their clients felt about their fines debt—with 87% saying the scheme had enabled clients to address the factors that made it hard for them to pay or manage their debts in the first place. Most clients received no further fines during their participation in the scheme.[89] Key client outcomes noted in the WDO evaluation included:

- engagement with counselling and treatment services that otherwise would not have occurred;
- incentive to commit to drug and alcohol recovery;
- benefits derived from a case management approach; and
- modelling of better relationships with government agencies.[90]

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86 Dr T Anthony, *Submission 115*.
87 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 1–14 (Mark Speakman). See also NSW Government, *Submission 85*.
88 *Fines Act 1996* (NSW) s 99A.
89 Inca Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component* (Final Report, 2015) 2.
90 Ibid. See ch 12.

Flexibility to tailor

7.59 Research has consistently shown that the level of intervention under a sentence served in the community should be proportionate to the risk level of the offender.[91] To achieve this, the sentencing regime for sentences served in the community needs to be as flexible as possible so that an individual sentence can be tailored by the judicial officer.[92]

Existing challenges

7.60 The inflexibility of existing community-based sentencing regimes may be increasing the use of sentences of imprisonment over other alternatives to full-time custody.

7.61 For example, in Queensland, there are restrictions on placing conditions on suspended sentences—including attendance at rehabilitation or treatment programs. This is because courts are unable to impose conditions on a suspended sentence, other than a condition that the offender not commit another offence punishable by imprisonment during the term of the order.[93]

7.62 In Queensland, sentences of imprisonment served entirely on parole have increased as a result of both restrictions on, and the lack of flexibility of, existing community-based sentencing options.[94]

7.63 The perceived lack of flexibility of community-based orders in Queensland has potentially adverse consequences, including increasing the size of the prison population,[95] as well as increasing the usage of parole in situations where an offender has spent no time in prison and thus has no need for prison-to-community reintegration.[96]

7.64 WA has the additional option of a conditional suspended imprisonment (CSI) order, which must contain at least one program, supervision or curfew requirement.[97] The submission by Legal Aid WA raised concerns in relation to the perceived inflexibility of CSI orders—which under current legislation can only be made in Perth-based specialist courts[98]—and submitted that they be available statewide.[99]

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91 See, eg, Wai-Yin Wan et al, 'Parole Supervision and Reoffending' (Trends & Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, September 2014); Elizabeth Drake, Steve Aos and Marna Miller, above n 21; Don Andrews, James Bonta and Stephen Wormith, 'The Recent Past and Near Future of Risk and/or Need Assessment' (2006) 52(1) *Crime & Delinquency* 7.

92 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [56].

93 *Penalties and Sentences Act 1992* (Qld) s 144(5). Also see *Sentencing Act 1995* (WA) ss 76–80.

94 Queensland Law Society, *Submission 86*; Associate Professor T Walsh, *Submission 51*.

95 Queensland Corrective Services, *Queensland Parole System Review: Final Report* (2016) [499], rec 4; Tamara Walsh, 'Defendants' and Criminal Justice Professionals' Views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93, 107–8. See also Associate Professor T Walsh, *Submission 51*.

96 Queensland Corrective Services, above n 95, [454]–[455].

97 *Sentencing Act 1995* (WA) ss 81–84R.

98 Ibid s 81; *Sentencing Regulations 1996* (WA) s 6B.

99 Legal Aid WA, *Submission 33*.

7.65 As noted above, submissions to this Inquiry have pointed to the importance of flexible and accessible non-custodial options for Aboriginal and Torres Strait Islander women with childcare and parenting responsibilities.[100]

7.66 The Women's Legal Service NSW submitted that:

> Imprisonment of women and particularly pregnant women and women caring for children should be as a last resort. Flexible and accessible, non-custodial alternatives to prison should be available throughout all states and territories, including in rural, regional and remote areas.[101]

7.67 The NSW Legislative Council Standing Committee on Law and Justice has also noted that Aboriginal and Torres Strait Islander women face 'particular difficulties' within the criminal justice system generally; that 'non-custodial sentencing alternatives are not being utilised for Aboriginal women';[102] and that:

> community-based sentencing options may be effectively denied to women because of an absence of suitable work, alternative child care arrangements are not available, or public transport is inaccessible.[103]

Improving flexibility

7.68 Stakeholders to this Inquiry supported granting judicial officers greater flexibility to tailor community-based sentences, particularly in order to promote greater use of alternatives to full-time imprisonment, and to allow for the imposition of treatment and programs which aim to address underlying criminogenic factors.[104]

7.69 Judge Stephen Norrish submitted that:

> Greater flexibility [is required] for making sentencing orders and more alternatives to 'full' time imprisonment—such as:
>
> (a) where terms of imprisonment are imposed diversion of offenders from remote and semi remote communities from 'gaol' custody to 'custodial settings' within or near communities, such as group residences under Corrective Services supervision i.e. gaols without bars for suitable inmates.
>
> (b) community service/community employment orders as conditions of other community based supervision— such as good behaviour bonds.

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100 Dr T Anthony, *Submission 115*; Community Legal Centres NSW and the Community Legal Centres NSW Aboriginal Advisory Group, *Submission 95*; NSW Bar Association, *Submission 88*; Women's Legal Service NSW, *Submission 83*; Human Rights Law Centre, *Submission 68*; Australian Lawyers for Human Rights, *Submission 59*; Top End Women's Legal Service, *Submission 52*; Kingsford Legal Centre, *Submission 19*.

101 Women's Legal Service NSW, *Submission 83*.

102 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [3.77].

103 Ibid [3.113].

104 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Judge Stephen Norrish QC, *Submission 96*; Just Reinvest NSW, *Submission 82*; Chief Magistrate of the Local Court (NSW), *Submission 78*; Aboriginal Legal Service of Western Australia, *Submission 74*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Associate Professor T Walsh, *Submission 51*.

(c) power to order particular types of community work.

(d) periods of residential rehabilitation in lieu of periods of imprisonment.[105]

7.70 Similarly, NSWLRC noted suggestions to increase flexibility from stakeholders in their 2013 *Sentencing* report.[106]

7.71 In contrast, Australian Lawyers for Human Rights (ALHR) stressed the importance of ensuring the availability of community-based sentencing options, but did not see a need for greater flexibility to tailor:

> Other than the abolition of mandatory and presumptive sentencing, and an increase in the availability of community based sentencing options, ALHR is of the view that the wide scope of the sentencing judge's discretion provides sufficient flexibility to tailor sentences appropriate for Aboriginal and Torres Strait Islander people.[107]

The Victorian approach

7.72 The ALRC suggests that the Victorian CCO regime represents an example of a sentencing model that allows for flexibility in both the sentencing structure and the imposition of conditions.[108]

7.73 There is evidence that the CCO regime is potentially contributing to reductions in recidivism in Victoria. Recent crime statistics show a general decrease in crime in Victoria.[109] In particular, crime decreased for those offences that Aboriginal and Torres Strait Islander offenders have been most likely to be imprisoned for.[110]

7.74 The maximum length of a CCO imposed in the County or Supreme Court of Victoria for one or more offences is five years. In the Magistrates' Court, a single CCO can be imposed for a maximum of two years (in relation to one offence), four years (in relation to two offences) and five years (in relation to three or more offences).[111] An offender who breaches a condition of a CCOs may be resentenced for the original offence and may face up to three months additional imprisonment for the breach.[112]

7.75 As part of a CCO, the court must impose at least one additional condition of either unpaid work, treatment, supervision, non-association, residence restriction, place exclusion, curfew, alcohol abstinence, a bond condition, or a judicial monitoring condition.[113] This encourages the judicial officer determining the sentence to consider which condition(s) are likely to best achieve sentencing purposes, such as community

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105 Judge Stephen Norrish QC, *Submission 96*.
106 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.76].
107 Australian Lawyers for Human Rights, *Submission 59*.
108 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [113]–[115].
109 Crime Statistics Agency Victoria, 'Latest Crime Statistics Show a Decrease in Recorded Offences, Incidents, Victim Reports and Family Incidents' (Media Release, 14 December 2017).
110 Ibid. Notable reductions included stalking/harassment (down 7%), burglary (down 9.6%), theft (down 8.6%) and justice procedure offences (down 8.4%). Imprisonment data as at 30 June 2016, see ch 3.
111 *Sentencing Act 1991* (Vic) ss 38–41A.
112 Ibid ss 83AD–83AS.
113 Ibid ss 48C–48K.

safety, punishment and rehabilitation of the offender, in a manner which is proportionate to the level of offending.[114]

7.76 The Victorian Court of Appeal in *Boulton* noted that the flexibility of the CCO as a sentencing option was a key factor in a CCO meeting multiple sentencing purposes and responding to a wide range of offending.[115]

7.77 The Court of Appeal further stated:

> the Attorney-General submitted [that] the CCO is intended to be available in serious cases where an offender may be at risk of receiving an immediate custodial sentence, but the Court considers that immediate custody is not necessary to fulfil the statutory purposes of sentencing given the range of options provided by a CCO. In this sense, the Attorney submitted, the CCO has 'the robustness and flexibility to be imposed in a wide variety of circumstances'. We agree.[116]

7.78 Section 5(4C) of the *Sentencing Act 1991* (Vic) further reinforces the ability of the CCO to respond to a wide range of offending:

> **Section 5—Sentencing Guidelines**
>
> (4C) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order ... to which one or more of the conditions referred to in sections 48F, 48G, 48H, 48I and 48J are attached.[117]

7.79 Conditions referred to in subsections 48F–48J of the *Sentencing Act 1991* (Vic) are non-association, residence restriction or exclusion, place or area exclusion, curfew, and alcohol exclusion. The purpose of s 5(4C) has been described as 'intend[ing] to 'highlight' the punitive potential of a CCO'.[118]

7.80 The Victorian Court of Appeal described the effects of s 5(4C) on the sentencing regime in that jurisdiction:

> What is most powerful about s 5(4C) is that it prohibits the imposition of a sentence of imprisonment unless the sentencing court has paid specific and careful attention to: (a) the purposes for which sentence is to be imposed on the offender; and (b) whether those purposes can be achieved by a CCO to which one or more of the specified (onerous) conditions is attached. ... The sentencing court should ask itself a question along the following lines: Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there any feature of the offence, or the offender, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option?[119]

7.81 Victoria's CCO regime is not unique. There are many features of the Victorian regime in other states and territories which each have sentences that may be served in

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114 Queensland Corrective Services, above n 95, [491]–[494].
115 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [2], [24]–[25].
116 Ibid [116].
117 *Sentencing Act 1991* (Vic) s 5(4C).
118 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [118].
119 Ibid [120–1].

the community under conditions that include supervision, community work and other therapeutic and punitive conditions as a court may consider appropriate.[120] NSW amended its sentencing legislation in October 2017, incorporating many of the features of the Victorian regime.[121] On 25 October 2017, the Queensland Government released Terms of Reference directing the Queensland Sentencing Advisory Council to conduct an inquiry with regard to

> the observations made in the [2016 *Queensland Parole System Review*] regarding the lack of flexibility of community based sentencing options available to a court and the likely adverse impact this has upon the prison population and the need to improve Queensland's sentencing laws.[122]

7.82 Unlike in Victoria, other states and territories generally have two tiers of community-based orders: the first tier applies in cases where a court considers a sentence of imprisonment would normally be required in the circumstances; the second tier applies in circumstances where the court considers a penalty lesser than imprisonment would normally be imposed.[123] This process of deciding whether or not offending is such that it would normally require a sentence of imprisonment, can limit the flexibility that a court may have in setting the scope and conditions of the order—reflecting that the two orders are designed to serve different purposes. In Victoria, the characterisation of the CCO as a 'non-custodial' order that applies to offending that would require a sentence of imprisonment in other states and territories, adds flexibility in the design and scope of the conditions that attach to the order.[124] It is not a substitution for imprisonment as it is in states that have custodial community-based orders such as NSW, Queensland and WA where the correction order is served in lieu of a sentence of imprisonment that has otherwise been determined to be appropriate.[125]

7.83 The Victorian model enables a community-based sentence to be applied over a longer period. In Queensland a court may only order an intensive correction order where it has sentenced an offender to a term of imprisonment for one year or less.[126] In WA, an intensive service order may only be made for a period between 6 months and two years.[127] The nature of the conditions and the ability to mix therapeutic and punitive conditions give the greatest flexibility in Victoria.[128] For example, Queensland's intensive correction order has a presumption that offender requirements be split into one-third treatment or programs and two-thirds unpaid community work,[129] whereas the Victorian CCO regime has no such presumption, providing

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120 Queensland Corrective Services, above n 95, [491]–[494].
121 Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017 (NSW). This bill will come into effect in 2018 having been passed by the NSW parliament in late 2017.
122 Queensland Sentencing Advisory Council, *Terms of Reference* (25 October 2017) <www.sentencingcouncil.qld.gov.au>.
123 See footnote 17.
124 Queensland Corrective Services, above n 95, [494].
125 See *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2, div 2; *Penalties and Sentences Act 1992* (Qld) pt 6; *Sentencing Act 1995* (WA) pt 10.
126 *Penalties and Sentences Act 1992* (Qld) s 112.
127 *Sentencing Act 1995* (WA) s 69.
128 Queensland Corrective Services, above n 95, [491]–[494].
129 *Penalties and Sentences Act 1992* (Qld) s 114.

greatest flexibility to judicial officers in emphasising punishment, deterrence, rehabilitation or denunciation according to the specific circumstances of the case.

7.84 The Victorian CCO regime also allows for judicial officers to 'mix-and-match' an initial short term of imprisonment with the imposition of a lengthier CCO—a feature which the Court of Appeal considered:

> adds to the flexibility of the CCO regime. It means that, even in cases of objectively grave criminal conduct, the court may conclude that all of the purposes of the sentence can be served by a short term of imprisonment coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending.[130]

7.85 Notwithstanding this flexibility, the Victorian CCO regime excludes a limited number of offences, including 'causing serious injury in circumstances of gross violence', aggravated home invasion or carjacking, and certain offences against emergency workers and custodial officers on duty.[131] The NSWLRC has recommended that, in relation to ICOs, no offences be excluded other than murder, domestic violence offences committed against a likely co-resident,[132] and offences carrying a penalty of more than five years under Part 3 Divisions 10 and 10A[133] of the *Crimes (Sentencing Procedure) Act 1999* (NSW), stating:

> Broad-based generic exclusions do not seem to be necessary for retaining public confidence in sentencing. ... Rigid exclusions that pay no regard to the objective circumstances of the case, or to the subjective circumstances of the offender, can operate to inappropriately limit the sentencing discretion that is important for a viable sentencing system. We also recognise that crimes in the most serious category of offending are most unlikely to attract sentences that would be sufficiently short to qualify for an ICO or home detention. As a consequence their generic exclusion is unnecessary.[134]

7.86 The ALRC notes that the incoming NSW sentencing reforms due to commence in 2018—which will abolish home detention and suspended sentences, combine bonds and CSOs into a single order known as a community correction order, and retain a modified version of the ICO—retain previous offence exclusions in relation to ICOs, but appear to have no offence exclusions in relation to the community correction order (which is to replace good behaviour bonds and community service orders).[135]

Resourcing flexibility

7.87 The Victorian Department of Justice's *Annual Report 2016–17* and the Victorian Auditor-General's report *Managing Community Correction Orders* illustrate the resourcing difficulties that are likely to arise if demand for community services under

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130 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [141].

131 *Sentencing Act 1991* (Vic) ss 9A–10AD.

132 Due to the possibility of an ICO being combined with a curfew or home detention condition, see *Crimes (Administration of Sentences) Act 2005* (NSW) cl 186.

133 Pt 3 Divs 10–10A deal with certain sexual offences where the victim was under the age of 16.

134 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.41], rec 9.2.

135 Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017 (NSW) pt 7.

community-based sentencing options significantly expands. The *Annual Report 2016–17* noted that in relation to the completion rate of CCOs:

> Performance in 2016–17 has decreased due to a combination of factors, including growth in offender numbers and a more complex cohort of offenders following the abolition of suspended sentences. Additional investment in CCS [Community Corrective Services] from 2016–17 is expected to result in improved outcomes in future years, including an improved successful completion rate.[136]

7.88 The Auditor-General's report found that demand for services in 2015–16—with up to 85% of CCOs imposed having an alcohol or drug program condition attached to their sentence—had led to delays and an average of 20 business days' wait for offenders to access community alcohol and drug services.

7.89 The Auditor-General stated:

> The number of CCOs with rehabilitation conditions is increasing due to there being more offenders in the system and more CCOs with multiple conditions. This has led to increasing demand for support programs and services which, in turn, has led to offenders facing significant wait times when trying to access programs. ... Almost 40 per cent of serious risk offenders on the OBP [offending behaviour program] screening priority list waited more than three months for a pre-assessment screening. For mental health conditions, some offenders on CCOs may have to make a gap payment for their treatment, which can prevent or discourage them from participating.[137]

7.90 The Victorian experience demonstrates the importance of ensuring community services are sufficiently well-resourced to be able to quickly address newly sentenced offenders who have drug and alcohol issues, mental health issues, or other treatment needs. As was noted by the Sentencing Advisory Council (Vic) in their 2017 report:

> The period immediately after a CCO commences proved to be critical in terms of managing an offender's risk of reoffending. Nearly half (44%) of offenders who contravened their CCO by further offending did so within the first three months of their CCO commencing. Four per cent reoffended in the first week and 18% reoffended in the first month. Over nine out of 10 contraventions by further offending (92%) occurred within the first 12 months of commencement. These findings highlight how crucial it is to actively engage offenders early during their CCO.[138]

7.91 There are no remote communities in Victoria,[139] and consequently other states and territories that move towards a Victorian CCO approach are likely to have additional resourcing issues that are amplified by remoteness.

Resourcing

7.92 Recommendation 112 of the RCIADIC stated:

> **Recommendation 112**

136 Department of Justice and Regulation (Vic), *Annual Report 2016–17* (2017) 31.
137 Auditor-General (Vic), *Managing Community Correction Orders* (2017) x.
138 Sentencing Advisory Council (Vic), *Contravention of Community Correction Orders* (2017) xiii.
139 Council of Australian Governments, above n 30, 74.

> That adequate resources be made available to provide support by way of personnel and infrastructure so as to ensure that non-custodial sentencing options which are made available by legislation are capable of implementation in practice. It is particularly important that such support be provided in rural and remote areas of significant Aboriginal population.[140]

7.93 This remains a problem today. Even where intermediate sentencing options are technically available, research from NSW demonstrates that a significant number of offenders on supervised bonds do not receive the services, support and supervision required for rehabilitation due to cost, long waiting lists and unavailability of services.[141] This suggests that improvement to provision of community-based sentences will require changes in community corrections practice and state and territory government resourcing of community infrastructure.[142]

7.94 Stakeholders to this Inquiry supported greater resourcing of community supports and programs—particularly in regional and remote communities where a lack of these supports and programs presents a barrier to Aboriginal and Torres Strait Islander people accessing community-based sentences.[143] For example NATSILS submitted that:

> Many Aboriginal and Torres Strait Islander peoples subject to community based orders are "*not able to access services designed to address the core reasons for their offending behaviour*" such as counselling or mental health services which may not be available in remote communities.[144]

Breach of community-based sentences

Recommendation 7–3 State and territory governments and agencies should work with relevant Aboriginal and Torres Strait Islander organisations to provide the necessary programs and support to facilitate the successful completion of community-based sentences by Aboriginal and Torres Strait Islander offenders.

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140 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5 rec 112.

141 Don Weatherburn and Lily Trimboli, 'Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds' (Contemporary Issues in Crime and Justice No 112, NSW Bureau of Crime Statistics and Research, February 2008) 17–8.

142 NSW Sentencing Council, *Intensive Correction Orders: Statutory Review* (2016) [9.23]–[9.28].

143 Law Council of Australia, *Submission 108*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Judge Stephen Norrish QC, *Submission 96*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Women's Legal Service NSW, *Submission 83*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Human Rights Law Centre, *Submission 68*; Victoria Legal Aid, *Submission 56*; Victorian Aboriginal Legal Service, *Submission 39*; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

144 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*. Italics in original.

7.95 Improving compliance with the conditions attached to a community-based sentence is integral to reducing the incarceration of Aboriginal and Torres Strait Islander peoples.

7.96 In 2015–16, Aboriginal and Torres Strait Islander offenders sentenced to a community correction order were 12.5% less likely than non-Indigenous offenders to complete their order,[145] and Aboriginal and Torres Strait Islander offenders constituted a larger proportion of the cohort imprisoned for breaching a condition of their community-based sentence.[146] This has been attributed, in part, to a lack of culturally appropriate non-custodial sentencing options and supports to facilitate completion of such sentences.

7.97 Research suggests that compliance with community-based orders would increase if programs and conditions were relevant to Aboriginal and Torres Strait Islander offenders and if offenders were given greater support.[147] In addition, stakeholders to this Inquiry suggested that Aboriginal and Torres Strait Islander offenders were breaching their order because of inappropriate conditions and programs while under sentence, combined with a lack of support.[148]

Circumstances related to breach of community-based sentences

7.98 In the Discussion Paper, the ALRC outlined the circumstances of a woman known as AH who was the subject of a judgment in *AH v Western Australia*.[149] In this case, a young illiterate and innumerate adult Aboriginal woman with complex needs, including cognitive impairment and serious mental health issues, was sentenced to a community-based order following a short history of stealing cars. Under the order, the woman (AH) was to receive support from services and undergo treatment. AH had been suffering physical and mental abuse, had never been employed, was itinerant—living between two regional towns—and was unable to name all the months in a year, tell the time, and could not name the seasons. Services were not provided by corrective services as directed by the court under the order. AH was, however, subjected to requirements to report at particular times. AH did not comply, and subsequently stole another car. AH was sentenced to a further community-based order, under which services were again not provided, and AH again reoffended.

7.99 In relation to this case, the Aboriginal Legal Service WA (ALSWA) noted that:

> This young Aboriginal woman with extremely complex needs was not provided with any services or support yet [AH] was expected to report to her community corrections officer at regular times. ... ALSWA highlights that after AH was placed on her second community-based order by the District Court, for the subsequent six weeks she 'was

145 Productivity Commission, 'Report on Government Services 2017' (Volume C: Justice, Produced for the Steering Committee for the Review of Government Service Provision, 2017) table 8A.20.

146 See ch 3.

147 Fiona Allison and Chris Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People' (2010) 32 *Sydney Law Review* 645.

148 Legal Aid NSW, *Submission 101*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*; Legal Aid WA, *Submission 33*; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*.

149 *AH v Western Australia* [2014] WASCA 228 (10 December 2014).

> spoken to only once' by her community corrections officer and this was immediately after the order was imposed. The Court of Appeal observed that while 'the various agencies involved communicated with each other during that period, none of them actually did anything to provide any form of support or assistance to AH, who then reoffended'. ALSWA has experienced this in other cases; where government and non-government agencies communicate and 'collaborate' about a particular 'client' but little is done with them or for them.[150]

7.100 The circumstances of AH's case highlight some of the factors that may affect compliance by Aboriginal and Torres Strait Islander offenders with the conditions of community-based sentences, including:

- cultural and intergenerational factors that may result in transience and homelessness;
- the lack of a coordinated service response in regional areas, and a lack of available services, particularly culturally appropriate services for Aboriginal and Torres Strait Islander women;
- corrective services or other decision makers not setting relevant conditions and reporting requirements that are underpinned by the provision of services; and
- the impact of offenders' mental health or cognitive impairment in understanding and meeting reporting requirements and other conditions.

7.101 Despite legislative requirements that obligations attached to a community-based sentence be explained to offenders in a manner that they can understand,[151] compounding factors resulting in Aboriginal and Torres Strait Islander offenders having difficulty in understanding the obligations of their community-based sentence may include:

- poor literacy;
- the use of legal terminology by solicitors and court staff when explaining bond conditions;
- lack of plain language and translated material for non-English and Aboriginal and Torres Strait Islander first language speakers;
- the stress of being in court; and
- offenders experiencing high levels of emotion after receiving a non-custodial sentence.[152]

7.102 Even where conditions are understood, cultural and intergenerational factors may have contributed to high breach rates for Aboriginal and Torres Strait Islander people subject to community-based orders. Research from the United States has noted

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150 Aboriginal Legal Service of Western Australia, *Submission 74*.

151 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 72, 83, 92, 96, 100B, 100P.

152 NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders* (2011) [5.13]; Productivity Commission, above n 28, [5.24].

the interaction between socioeconomic disadvantage and the burden of complying with the conditions of a community-based sentence.[153] Legal Aid WA noted that:

> Laws requiring offender reporting can be particularly onerous for Aboriginal people who are more likely to be transient, live in communities without a police station to easily report to, and are less likely to have access to working mobile phones (with credit) and less likely to keep track of dates in the same way as non-Aboriginal people.[154]

7.103 In relation to standard parole conditions, Legal Aid ACT noted:

> In our experience, ATSI offenders are likely to breach orders that require they remain confined to a particular place, particularly when (for their cultural and spiritual health) they feel compelled to visit a sacred community site and reorient themselves after a traumatic period of incarceration.[155]

7.104 In an earlier Inquiry, the President of the ACT Law Society's Criminal Law Committee gave evidence that:

> The circumstances are that often you will have people who live quite a long way away from where they are expected to report, so there is always difficulty around getting transport to, in fact, meet their obligations of reporting to their parole officer. Whether it is the case that they simply do not have a motor vehicle or whether it is the case that they cannot afford the bus fare at the time.
>
> ... [I]f you are in a lower socioeconomic group and you are confronted with a choice of meeting a reporting obligation, meeting with a parole officer or someone from Corrective Services, versus a day's employment, that decision is much harder than it is for someone who is employed in stable employment.[156]

7.105 The issue of unequal impact of conditions has been raised as elevating the importance of providing judicial officers with wide discretion in response to minor breaches.[157]

Reducing breach

7.106 Reductions in breach may be accomplished through engagement and collaboration with relevant Aboriginal and Torres Strait Islander organisations to provide sentencing options and assistance in meeting conditions, partnering with agencies and service providers to provide co-location of services.[158] Breach rates may also be reduced by the use of graduated sanctions in order to provide an alternative to imprisonment for breach (discussed below).

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153 See,eg, Kelli Stevens-Martin, Olusegun Oyewole and Cynthia Hipolito, 'Technical Revocations of Probation in One Jurisdiction: Uncovering the Hidden Realities' (2014) 78(3) *Federal Probation* 1; Jeffrey Lin, Ryken Grattet and Joan Petersilia, '"Back-End Sentencing" and Reimprisonment: Individual, Organizational, and Community Predictors of Parole Sanctioning Decisions' (2010) 48 *Criminology* 759.

154 Legal Aid WA, *Submission 33*.

155 Legal Aid ACT, *Submission 107*.

156 Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) [4.120]–[4.121].

157 Ibid [4.126].

158 Also known as a 'wrap around' model.

7.107 The RCIADIC recommended that non-custodial sentences be available, accessible and culturally appropriate, and that authorities work with Aboriginal and Torres Strait Islander groups in implementing programs.[159] The goal of increasing alternatives to prison has also been a key feature of the Victorian Aboriginal Justice Agreements.[160] Stakeholders to this Inquiry agreed with an approach to community-based sentencing options which maximised collaboration with Aboriginal and Torres Strait Islander organisations and allowed for flexibility in responding to breach.[161]

7.108 In relation to the need for culturally appropriate community-based orders, ALSWA submitted:

> ALSWA supports Proposal 7–1 [of the Discussion Paper][162] not only because a reduction in imprisonment for justice procedure offences will reduce the number of Aboriginal and Torres Strait Islander people in prison but also because more culturally appropriate and effective community-based orders is vital to ensure that Aboriginal and Torres Strait Islander people are provided with the right support to prevent reoffending.[163]

7.109 The Aboriginal Legal Service NSW/ACT (ALS NSW/ACT) undertook a consultative process for this Inquiry, engaging Aboriginal and Torres Strait Islander community members from across the ACT and NSW. ALS NSW/ACT noted:

> Participants consistently emphasised the need for greater use of community-based sentencing options over custodial sentences. Participants noted, in particular, that community-based sentencing options are more appropriate and effective for young people and those with mental health, alcohol and/or other drug issues. There was strong support for expansion of the MERIT (Magistrates Early Referral In to Treatment) program across regional and remote NSW, and to individuals suffering from alcohol abuse. Other examples of effective community-based sentencing options

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159 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5 recs 111, 116.

160 See ch 16.

161 Dr T Anthony, *Submission 115*; North Australian Aboriginal Justice Agency, *Submission 113*; Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Judicial College of Victoria, *Submission 102*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Judge Stephen Norrish QC, *Submission 96*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; National Congress of Australia's First Peoples, *Submission 73*; Office of the Director of Public Prosecutions NSW, *Submission 71*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Community Restorative Centre, *Submission 61*; Victoria Legal Aid, *Submission 56*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Public Health Association of Australia, *Submission 31*; Associate Professor L Bartels, *Submission 21*; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*.

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

163 Aboriginal Legal Service of Western Australia, *Submission 74*.

> cited by participants included rehabilitation farms, health facilities and alcohol or drug programs centred on identity development and Aboriginal culture.[164]

Engaging relevant Aboriginal and Torres Strait Islander organisations

7.110 In Victoria, support services and programs have been developed in collaboration with peak Aboriginal and Torres Strait Islander organisations, and include the Local Justice Worker Program and the Wulgunggo Ngalu Learning Place, which were developed under the Victorian Aboriginal Justice Agreement.[165]

7.111 The Local Justice Worker Program (LJWP) aims to increase the completion rate of Aboriginal and Torres Strait Islander offenders sentenced to community-based sentences in Victoria. The LJWP was independently evaluated in 2013.[166] The evaluation observed a narrowing of the gap between the proportions of Aboriginal and Torres Strait Islander offenders compared to non-Indigenous offenders who had successfully completed their orders since the program was first piloted. The evaluation further found that 'statewide data on improved completion rates of orders by Aboriginal offenders suggest that the programs may be making a contribution to these improved rates'.[167] The program was noted to have high Aboriginal and Torres Strait Islander female participation.[168]

7.112 The evaluation suggested that the LJWP may operate to decrease Aboriginal and Torres Strait Islander incarceration through:

- decreasing the number of Aboriginal and Torres Strait Islander offenders who breach the conditions of their community-based sentence orders/parole orders resulting in imprisonment;
- decreasing the number of Aboriginal and Torres Strait Islander offenders who lose their driver licences as a result of defaulting on fine repayments and then being charged with driving offences;
- increasing access via connections to necessary services, such as alcohol programs, housing, parenting workshops, and financial counselling; and
- increasing skill based work experience, in combination with mentoring, leading to better employment opportunities.[169]

7.113 CLANT's submission highlighted the role of Aboriginal Liaison Officers (ALOs) in reducing breach in the NT:

> It is regularly the case that those participating in community based programs will cease to engage for short periods of time. This may be due to a lack of motivation, but it can also be due to a conflict between participants' legal and cultural obligations,

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164 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.
165 See ch 16.
166 Attorney-General's Department (Vic), *Evaluation of Indigenous Justice Programs Project B: Offender Support and Reintegration—Final Report* (2013).
167 Ibid 86.
168 Ibid 98.
169 Ibid 89.

> such as a requirement to attend a funeral or ceremony. Frequently breakdowns in communication occur at this point between the participant and the supervising agency. Engagement of an Aboriginal Liaison Officer who takes the time to go to the participant's house or speak with the participant's family and to discuss with them their options would be highly desirable and would, in our submission, result in fewer breaches of orders..[170]

7.114 Given the value of ALOs in terms of communication, they could explain any difficulties an offender was having in complying with the conditions of a sentence to the supervising agency. ALS NSW/ACT also noted the importance of corrections and other government bodies engaging with local Aboriginal and Torres Strait Islander community members:

> Participants noted that many external lawyers and psychologists have difficulty communicating with Aboriginal clients due to their lack of connection with the local community. Accordingly, many participants noted the importance of the ALS Field Officer to facilitating the development of relationships with community members. The ALS Field Officer is crucial to assist Aboriginal clients to go to court and provide them with an understanding of the court process.
>
> ...Participants also demonstrated strong support for community justice groups. These groups provide members of Aboriginal and Torres Strait Islander communities and organisations with authority and funding to work cooperatively with justice agencies and staff to develop strategies within their communities for dealing with justice-related issues. Participants suggested that these groups would further promote the leadership of Aboriginal and Torres Strait Islander people and organisations within the community.[171]

7.115 ALS NSW/ACT highlighted the problem of inappropriate conditions:

> participants suggested that CSOs could more frequently use Aboriginal organisations, and that CSOs should always be served in the community of the offender. Some ALS staff also noted that a significant number of clients who get a CSO do not complete it, resulting in custody. This is often due to the fact that clients do not understand their responsibilities under a CSO or the consequences of non-completion, or because probation and parole staff do not comprehend cultural differences that may affect a client's ability to complete a CSO. To address this issue, ALS staff suggested: better education for clients as to their responsibilities under a CSO and consequences for non-completion; cultural competence training for Magistrates to ensure they set achievable conditions under a CSO; cultural competence training for Probation and Parole staff to assist them to understand the history and experience of clients' lives and give clients the best chance of completing the CSO.[172]

Co-location of services

7.116 The Victorian Neighbourhood Justice Centre (NJC) is one example of a mainstream community-based sentencing support and assistance model that has been evaluated positively.

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170 Criminal Lawyers Association of the Northern Territory, *Submission 75*.
171 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.
172 Ibid.

7.117 The NJC operates as an official Magistrates' Court of Victoria, with 'drug and alcohol assessment and counselling, dispute mediation, mental health assessments and counselling, employment and training support, housing support and financial counselling services' all co-located within the same building. The NJC utilises a problem-solving approach to offending, with the use of judicial monitoring allowing for personalised responses to issues around offender compliance, and is partnered with a range of government bodies and service providers including Victoria Police, Community Correction Services, Victoria Legal Aid, and Fitzroy Legal Service.[173]

7.118 The NJC was independently reviewed and it was found that the NJC improved completion of community work orders, reduced imprisonment, reduced reoffending and improved community safety while reducing costs.[174]

Graduated sanctions

7.119 An approach to breach of community-based orders and parole which has had some success is a form known as 'graduated', 'escalating' or 'swift, certain and fair' (SCF) sanctions. Graduated sanctions have been adopted in relation to parole in NT and Queensland, and announced or trialled in relation to community-based orders in NSW and Victoria.[175] The NSWLRC has previously recommended an approach to breach of parole modelled on the Queensland graduated system be adopted in NSW in order to promote responses to breaches that are 'proportionate, swift and certain'.[176]

7.120 Graduated sanctions may provide a more flexible and receptive range of responses than an 'all or nothing' approach to breach—and include measures such as:

> additional reporting burdens, participating in programming, attending "day reporting" centers, short-term confinement in violation centers, and extending probation terms. In many cases, these reforms are designed to intervene earlier in a supervisee's history of violations, providing a mild sanction immediately following the violation rather than the pattern of ignoring a series of violations and then filing for revocation. Research suggests that such alternative sanctions can be just as effective in reducing future violations as jail terms, while ameliorating jail "churning" and easing local budgets ...[177]

7.121 A United States based community-based sentence that received positive attention and evaluation is the Hawaiian Opportunity Probation Enforcement (HOPE)

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173 Auditor-General (Vic), *Managing Community Correction Orders* (2017) 33.

174 Ibid.

175 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 1–14 (Mark Speakman); Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders* (2017); Lorana Bartels, 'Looking at Hawaii's Opportunity Probation with Enforcement (HOPE) Program Through a Therapeutic Jurisprudence Lens' (2016) 16(3) *Queensland University of Technology Law Review* 30; NSW Law Reform Commission, *Parole*, Report No 142 (2015) [10.29–32].

176 NSW Law Reform Commission, *Parole*, Report No 142 (2015) rec 10.1.

177 Michelle Phelps and Caitlin Curry, 'Supervision in the Community: Probation and Parole' [2016] *Oxford Research Encyclopedia of Criminology and Criminal Justice* 18. The HOPE program is discussed below.

Program—a specialist court program that specifically focuses on offending related to drug and alcohol dependency.[178]

7.122 HOPE relies on 'swift and certain, but modest, sanctions to improve compliance' with participants warned at the outset that each time they violate HOPE rules they will be immediately met with an escalating custodial sanction.[179] Sanctions range from a few hours in a cell-block to up to 30 days of imprisonment—with U.S. research finding that swiftness and certainty of punishment has a larger deterrent effect than increased severity.[180]

7.123 A randomised control trial evaluation of HOPE found that participants spent 48% fewer days in prison, were less likely to be arrested for a new crime, less likely to test positive for drugs, and less likely to have their probation revoked.[181]

7.124 In relation to Australian implementation of a HOPE-style program in Australia, Association Professor Bartels considered that:

> The implications for Indigenous offenders would also need to be considered carefully, although the program may have the potential to reduce their over-representation in custody ... Any pilot program that includes a significant number of Indigenous offenders should be developed in consultation with relevant community representatives.[182]

7.125 The Victorian Sentencing Advisory Council's report, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders*, was released in October 2017. In that report, the Sentencing Council recommended against the introduction of a HOPE-style scheme of 'swift, certain and fair' sanctions specifically in the context of family violence offending.[183] Nevertheless, the Sentencing Advisory Council did note broad stakeholder support for greater use of—and flexibility in relation to—judicial monitoring as a condition of a CCO for family violence offenders, and made several recommendations to that effect.[184]

7.126 The ALRC notes that research has found that '[r]ecent efforts to replicate the HOPE program in other jurisdictions have not been successful'.[185] Judge Alm, the key judicial officer in the original HOPE program, suggested that efforts to expand the

178 Bartels, above n 175, 31.
179 Ibid 34.
180 Eric Helland and Alexander Tabarrok, 'Does Three Strikes Deter?: A Nonparametric Estimation' (2007) 42(2) *Journal of Human Resources* 309; Elizabeth Drake, 'Chemical Dependency Treatment for Offenders: A Review of the Evidence and Benefit-Cost Findings' (Report, Washington State Institute for Public Policy, December 2012) 1, 5; Steven Durlauf and Daniel Nagin, 'Imprisonment and Crime: Can Both Be Reduced?' 10(1) *Criminology & Public Policy* 13, 16–18; Steven Durlauf and Daniel Nagin, 'The Deterrent Effect of Imprisonment' (Paper, George Mason University, 2010) 43.
181 Bartels, above n 175, 38.
182 Associate Professor L Bartels, *Submission 21*.
183 Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders* (2017) rec 1.
184 Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders* (2017) xii, rec 3–7.
185 Phelps and Curry, above n 177, 19.

program have failed because 'replicators did not include the efforts to materially support probationers and instead took a punitive "sanctions only" approach'.[186]

7.127 Associate Professor Bartels also noted that:

> the court's swift, certain and proportionate sanctions model, told only part of the story. The program also featured many aspects of drug courts and adopted the principles of therapeutic jurisprudence. Significantly, the judge provided extensive encouragement, praise and support to participants … In light of this, the program model may hold significant promise for Aboriginal and Torres Strait Islander populations *if* it is implemented as intended, that is, as a therapeutic program that supports and encourages participants.[187]

Culturally appropriate community-based sentencing options

7.128 There are a number of examples of culturally appropriate community-based sentencing options that have been developed with or by Aboriginal and Torres Strait Islander organisations.

Breach diversion

7.129 Under the Victorian Aboriginal Justice Agreement, a sustainable work program based in the grounds of Weeroona Cemetery has reportedly contributed to an increase in the rate of successful order completion by Aboriginal and Torres Strait Islander offenders in Victoria.[188]

7.130 Victoria has also introduced the Wulgunggo Ngalu Learning Place, which provides a voluntary residential program for Aboriginal and Torres Strait Islander men serving community-based orders. The Victorian Aboriginal Legal Service (VALS) submitted a case study in relation to the Wulgunggo Ngalu Learning Place:

> Adam is a 43 year old Aboriginal male who has a long history with substance abuse whom VALS assisted through our ReConnect program. ...
>
> Adam advised [his VALS] caseworker that he had long standing issues with drugs and alcohol and wanted to attend Wulgunggo Ngalu Learning Place. The caseworker assisted Adam to submit an application and supported him through the assessment process. Adam was able to secure a place at Wulgunggo Ngalu where he received assistance with drugs & alcohol, mental health, life skills and cultural strengthening. Adam was also assisted with his art and was supported and guided by the caseworker in how to advertise and sell his artwork to earn income. Adam was also supported to undertake cultural strengthening activities which he reported as never having done before but being needed in order to address the disconnect from family and culture he felt. After being discharged from Wulgunggo Adam reported, over the proceeding months, as being committed to staying out of jail and indicated an intention to support his family and undertake a TAFE course on art.[189]

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186 Ibid.

187 Associate Professor L Bartels, *Submission 21*.

188 Victorian Government, *Victorian Aboriginal Justice Agreement Phase 3 (AJA3): A Partnership between the Victorian Government and the Koori Community* (2013) 47.

189 Victorian Aboriginal Legal Service, *Submission 39*.

7.131 In NSW, the Balunda-a (Tabulam)—'be good now you have a second chance down by the river'—program was developed in 2008 for male offenders aged over 18 years. The program is primarily a diversion program under which offenders in NSW are referred while under a bond prior to sentencing.[190] The program also operates as a place of referral by community corrections staff. It has been described as a 'last-chance opportunity before [people] enter into custody'.[191]

7.132 The ALRC recognises that each state and territory faces different challenges. The NT and WA, for example, have numerous remote communities, and implementing community-based sentencing options in some areas would be challenging. To overcome this, a 2016 independent review of NT Corrective Services recommended the appointment of probation and parole officers to remote communities who are from that community to provide local supervision and support to offenders.[192] The recommendation makes clear that this should only be implemented with community agreement.

Supervision by community

7.133 Stakeholders in this Inquiry raised the possibility of supervision by community.[193] For example, VALS submitted that:

> VALS advocates not only for community based sentences, but for community adjudicated sentences via a community council of elders, in particular for low level offences and in cases of children and young people. For example, Aboriginal Legal Services in Toronto have developed a community council, whereby the sentencing is decided by a council of Indigenous elders. Essentially, the offender is referred by the judge and will not return to court, unless the community sentence as directed by the elders is not completed. As such, it is up to the community council to ensure the right sentence is undertaken, with appropriate supports.
>
> This option is only open to low-level offences, and if the offender does not comply with the Community Council's sentencing regime, they do not get another chance with this process. The aim of this is to take Indigenous offenders out of the colonial justice system and to provide a level of autonomy within the community to make their own justice decisions, in a manner that is culturally appropriate.[194]

7.134 Legal Aid WA highlighted the benefits of a co-design approach:

> Co-design is about engaging consumers and users of products and services in the design process with the idea that it will lead to improvement and innovation. In harnessing the expertise of citizens towards these certain programs in this instance, people of the community as well as the creators of these programs can benefit as

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190 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11.

191 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [7.26].

192 Northern Territory Government, *A Safer Northern Territory through Correctional Interventions: Report of the Review of the Northern Territory Department of Correctional Services, 31 July 2016—Statement of Response* (2016) rec 133.

193 *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, 17 December 2012); Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013) 17(2) *Australian Indigenous Law Review* 79.

194 Victorian Aboriginal Legal Service, *Submission 39*.

> active members in the change process. Here the people involved will be much more valued as a co-designer of innovation and this will essentially allow for the effectiveness of such programs. ... Critical to the success of co-design, is for local Aboriginal Corporations to be actively and consistently involved in a community's approach to reducing crime and enhancing community safety.[195]

7.135 Stakeholders were generally supportive of this approach.[196] However CLANT noted that the success or failure of supervising offenders in this way is likely to hinge on the level of pre-existing organisation, leadership and health of the community—factors which are unlikely to be uniformly present in all Aboriginal and Torres Strait Islander communities.[197]

Appropriateness of alternative sentencing options

Suspended sentences

Recommendation 7–4 In the absence of the availability of appropriate community-based sentencing options, suspended sentences should not be abolished.

7.136 Aboriginal and Torres Strait Islander offenders may be disproportionately represented as recipients of suspended sentences compared to non-Indigenous offenders.[198]

7.137 Victoria began phasing out suspended sentences in 2011.[199] The NSW Parliament passed a Bill on 18 October 2017 to phase out suspended sentences from 2018.[200] Tasmania has also released a draft exposure Bill titled the Sentencing Amendment (Phasing Out Of Suspended Sentences) Bill 2017 which, if implemented, would also abolish suspended sentences.[201] On 19 November 2017, the Bill passed with amendments from the Tasmanian Legislative Council. The amendments prevent

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195 Legal Aid WA, *Submission 33*.

196 Dr T Anthony, *Submission 115*; Jesuit Social Services, *Submission 100*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; Victorian Aboriginal Legal Service, *Submission 39*.

197 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

198 In NSW in 2015–16, 8.5% of Aboriginal and Torres Strait Islander defendants found guilty were given a suspended sentence compared with 6.3% of their non-Indigenous counterparts; in Queensland 5.5% of Aboriginal and Torres Strait Islander defendants found guilty were given a fully suspended sentence compared with 4.5% of their non-Indigenous counterparts. See Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16*, *Cat No 4513.0* (2017) table 12; Australian Bureau of Statistics, above n 6, tables 1, 19; NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [7.25].

199 Sentencing Advisory Council (Vic), *Key Events for Sentencing in Victoria* <https://goo.gl/TSWGue>.

200 NSW Government, *Tough and Smart Justice Reforms—Safer Communities FAQs* (May 2017). NSW Law Reform Commission made a recommendation in 2013 that suspended sentences be abolished if the proposed community detention order was implemented. See NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) rec 10.1.

201 Department of Justice (Tas), *Sentencing Amendment Legislation* <www.justice.tas.gov.au/community-consultation/sentencing_amendment_legislation2>; Sentencing Advisory Council (Tas), *Phasing out of Suspended Sentences: Final Report* (2016) xiv–xix.

imposition of suspended sentences for certain offences,[202] with the Tasmanian Parliament to consider fully removing suspended sentences within two years.[203]

7.138 In the second reading of the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017, NSW Attorney General Mark Speakman noted:

> there are significant problems with suspended prison sentences—44 per cent of them are unsupervised and only require offenders to be of good behaviour. ... Many offenders are not receiving the supervision and programs under a suspended sentence that would compel them to address their offending behaviour in the community.
>
> ... Community safety is not just about incarceration. Imprisonment under two years is commonly not effective at bringing about medium- to long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are far more effective at this.[204]

7.139 Stakeholders drew attention to the need to ensure that intermediate sentencing options are uniformly available before suspended sentences are phased out—with particular attention to ensuring that Aboriginal and Torres Strait Islander people living in regional and remote communities are not disproportionately affected by the removal of a uniformly available sentencing option that is able to be served in the community.[205]

7.140 Queensland and WA have restrictions in relation to placing conditions on suspended sentences, including conditions requiring attendance at rehabilitation or treatment programs.[206] There are also states and territories with restrictions on the types of offences that potentially attract a suspended sentence, including SA and the NT.[207]

Issues with suspended sentences

7.141 Issues that have been identified in relation to suspended sentence regimes include their potential for net widening, their conceptually flawed nature,[208] and the potentially harsh consequences for offenders who breach them due to their 'all or nothing' nature.

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202 See Sentencing Amendment (Phasing Out Of Suspended Sentences) Bill 2017 (Tas) schedule 1.

203 Ibid cl 2(2)–2(9).

204 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 1–14 (Mark Speakman).

205 Legal Aid NSW, *Submission 101*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*.

206 Queensland does not allow the court to impose conditions on a suspended sentence, other than that the offender not commit another offence punishable by imprisonment during the term of the order, see *Penalties and Sentences Act 1992* (Qld) s 144(5). Western Australia's standard suspended sentence is similar to Queensland—but with the additional option of a conditional suspended imprisonment order, which must contain at least a program, supervision or curfew requirement, however this order is not available in the Magistrates Court, see *Sentencing Act 1995* (WA) ss 76–80, 81–84R.

207 *Sentencing Act* (NT) ss 78B–78EA, 78F; *Criminal Law (Sentencing) Act 1988* (SA) s 20AAC.

208 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.26]–[10.31]; NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.3]–[4.16].

Net widening

7.142 Research suggests that the reintroduction of suspended sentences in NSW in 1999 resulted in 'net widening'—whereby offenders who would previously have been dealt with by way of a good behaviour bond or CSO were instead given a suspended sentence.[209] According to NSW BOCSAR, it is:

> clear that suspended sentences have been used where non-custodial sanctions would otherwise have been employed. This is particularly true for CSOs in both court jurisdictions, but also for good behaviour bonds in the Higher Criminal Courts.[210]

7.143 Homeless Legal Persons' Service (HPLS) submitted to an earlier Inquiry that net widening is particularly acute in relation to:

> offences that may not warrant a term of actual imprisonment; namely, where an offender is not suitable for a community based order due to their homelessness, drug or alcohol dependence, disability, mental illness, or other chronic illness ... in such circumstances, suspended sentences are the only appropriate and available option, despite the fact that the offending in question does not warrant a term of imprisonment.[211]

7.144 Despite the potential for net widening, stakeholders in this Inquiry stated that suspended sentences provide a useful sentencing option as a 'last chance' for Aboriginal and Torres Strait Islander offenders to avoid full-time custody. There is research to support this view.[212]

7.145 In consultations and submissions, suspended sentences were emphasised by stakeholders to be particularly useful in relation to Aboriginal and Torres Strait Islander women because they are a type of sentence that is able to be structured such that there are few reporting obligations or onerous conditions—making them more suitable for offenders with kinship and cultural obligations than other types of community-based orders. For example, Sisters Inside submitted that:

> Aboriginal and Torres Strait Islander women are at high risk of breaching community-based sentences, due to sentence obligations which are incompatible with their parenting/caring responsibilities and statutory obligations. ... We support a process to identify the gaps and failures of supervised community-based sentences (including court-ordered parole). Sentencing Advisory Councils may be well-placed to undertake

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209 Rohan Lulham, Don Weatherburn and Lorana Bartels, 'The Recidivism of Offenders given Suspended Sentences: A Comparison with Full-Time Imprisonment' (Contemporary Issues in Crime and Justice Number 136, NSW Bureau of Crime Statistics and Research, September 2009) 12; Patricia Menéndez and Don Weatherburn, 'The Effect of Suspended Sentences on Imprisonment' (Issue paper 97, NSW Bureau of Crime Statistics and Research, August 2014) 1, 4–5; Lia McInnis and Craig Jones, 'Trends in the Use of Suspended Sentences in NSW' (Issue Paper No 47, NSW Bureau of Crime Statistics and Research, May 2010) 1, 4.

210 McInnis and Jones, above n 209, 4.

211 Homeless Persons' Legal Service, Submission No 3 to NSW Sentencing Council, *Suspended Sentences: A Background Report* (26 July 2011) 3, 8; NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.20].

212 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.24]; Sentencing Advisory Council (Tas), *Phasing out of Suspended Sentences: Final Report* (2016) 13.

this review in relevant jurisdictions. Any further review must take into account the unique needs of Aboriginal and Torres Strait Islander women.[213]

Breach and revocation

7.146 A breach of a suspended sentence will generally require the court to reinstate the entirety of the sentence of imprisonment that was initially suspended.[214] This means that time spent in the community under a suspended sentence is generally not counted as 'time served' in the event of revocation, even if a considerable amount of time has passed.[215] For example, revocation occurring at 11 months of a 12 month suspended sentence would result in a total of 23 months under sentence.[216]

7.147 This quirk of suspended sentences means that the longer an offender complies fully with the conditions of his or her order, the harsher the consequences of a breach resulting in revocation of the suspended sentence. Revocation of a suspended sentence, resulting in the offender being required to serve the term in prison, may also undo any rehabilitative progress made and increase the risk of future reoffending.[217]

7.148 As noted above, academics in the US have described policy movement towards graduated sanctions as providing a more flexible and receptive range of responses than an 'all or nothing' approach to breaches of community-based orders.[218]

Conclusion

7.149 Suspended sentences are problematic. In particular, research has demonstrated that they have resulted in net widening while being perceived as too lenient by the public. While offering some offenders a last chance, suspended sentences can and do 'set people up to fail', particularly people with complex needs.[219]

7.150 Nevertheless, the removal of suspended sentences without improving access to community-based sentences is likely to lead to even greater number of Aboriginal and Torres Strait Islander offenders going to jail. Improving access to community-based sentences is necessary to reduce the incarceration rates of Aboriginal and Torres Strait

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213 Sisters Inside, *Submission 119*.

214 Exceptions to this rule are the ACT and the Commonwealth; see *Crimes (Sentencing) Act 2005* (ACT) ss 12–13; *Crimes Act 1914* (Cth) ss 20–20A., although some Australian jurisdictions allow a discretionary exception to this rule in cases where it would be 'unjust to do so', the breach was 'trivial' or 'trivial in nature', or there are 'good' or 'proper' reasons for excusing the breach. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98; *Penalties and Sentences Act 1992* (Qld) s 147; *Criminal Law (Sentencing) Act 1988* (SA) s 58(3); *Sentencing Act 1997* (Tas) s 27(4C); *Sentencing Act 1995* (WA) s 80(3).

215 See, eg, Judicial Commission of New South Wales, *NSW Sentencing Bench Book* [5-790]–[5-800]; NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.27].

216 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [5.107-5.115].

217 See, eg, Vera Institute of Justice, *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* (2013) 14; Lynne Vieraitis, Tomislav Kovandzic and Thomas Marvell, 'The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002' (2007) 6(3) *Criminology & Public Policy* 589.

218 Phelps and Curry, above n 177, 18.

219 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.26]–[10.30].

Islander offenders. Once this is addressed, consideration could safely be given to abolishing suspended sentences.

Short sentences

Recommendation 7–5 In the absence of the availability of appropriate community-based sentencing options, short sentences should not be abolished.

7.151 The ALRC adopts a similar approach to short sentences of imprisonment. That is, short sentences of imprisonment are highly problematic. However, in the absence of implementing the preceding recommendations, the abolition of short sentences is likely to be detrimental.

7.152 Aboriginal and Torres Strait Islander offenders are more likely to be sentenced to short terms of imprisonment than their non-Indigenous counterparts.[220] It has been suggested that short sentences of imprisonment are not only ineffective in reducing offending but are particularly damaging to Aboriginal and Torres Strait Islander offenders. Short terms of imprisonment:

- expose minor offenders to more serious offenders in prison;
- do not serve to deter offenders;[221]
- have significant negative impacts on the offender's family, employment, housing and income;[222] and
- potentially increase the likelihood of recidivism through stigmatisation and the flow on effects of having served time in prison.[223]

7.153 Two case studies identified by Just Reinvestment (NSW) highlight some of the issues with short sentences for Aboriginal and Torres Strait Islander defendants:

> We recently had a matter where a woman received a two month sentence for stealing $5 worth of chicken from the IGA, another where a man with an intellectual disability was given 3 weeks for breaching an AVO by making contact with his ex-partner. These are clients with drug and alcohol and mental health problems—none of which get addressed in custody in those short stints. Then there is no supervision or support on release. It doesn't make sense.[224]

7.154 The imposition of a short term of imprisonment would appear to be inconsistent with the principle of 'imprisonment as a last resort' which ought to be reserved only for those offenders who represent a serious risk to the community, and for whom no other

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220 Australian Bureau of Statistics, *Prisoners in Australia, 2016*, *Cat No 4517.0* (2016) table 25. See also ch 3.

221 Judy Trevana and Don Weatherburn, 'Does the First Prison Sentence Reduce the Risk of Further Offending?' (Bureau of Crime Statistics and Research, October 2015).

222 Dr T Anthony, *Submission 115*.

223 North Australian Aboriginal Justice Agency, *Submission 113*.

224 Just Reinvest NSW, *Policy Paper: Key Proposals #1–Smarter Sentencing and Parole Law Reform* (2017) prop 2.

penalty is appropriate. Most Aboriginal and Torres Strait Islander offenders who receive a short sentence of imprisonment do so when convicted of minor or low-level offending.

7.155 Prisoners serving short sentences are less likely to be able to access programs or training, and in that regard, the time in prison does little to address offending behaviour or to develop skills that might later promote desistence from offending.[225] Offenders on short sentences are generally released into the community without supervision or supports to assist reintegration into the community on release.[226]

7.156 Short terms of imprisonment are costly. For example, 2002 research found that if all offenders in NSW prisons serving six months or less instead received a non-custodial penalty, the prison population would drop by about 10%, resulting in savings (at that time) of between $33m–47m per year.[227]

7.157 Aboriginal and Torres Strait Islander offenders also have higher recidivism rates than non-Indigenous offenders.[228] This experience of 'cycling' through the system also has significant health impacts:

> the high rates of repeated short-term incarceration experienced by Aboriginal people in Australia have a multitude of negative health effects for Aboriginal communities and the wider society, while achieving little in terms of increased community safety.[229]

7.158 Short terms of incarceration for female Aboriginal and Torres Strait Islander offenders are particularly damaging.[230] Several stakeholders commented that a short period in prison for many women frequently triggered other significant life events that often spiralled the women back into prison. The common scenario was described as a prison term resulting in a woman losing her rental property, and subsequently having her children removed because she no longer had a residence. This then resulted in the woman turning to drugs and/or alcohol, which in turn led to further offending.

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225 Mark Hughes, 'Prison Governors: Short Sentences Do Not Work', *The Independent* (20 June 2010) cited in Don Weatherburn, above n 23. See also NSW Bar Association, *Submission 88*.

226 NSW expressly precludes prisoners serving prison terms of 6 months or less from parole supervision on release. See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46. The NSW Sentencing Council has recommended repeal or amendment of s 46: NSW Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004) 5. Other jurisdictions restrict parole to prisoners sentenced to terms over 12 months: *Crimes (Sentencing) Act 2005* (ACT) s 65; *Sentencing Act 1997* (NT) s 53; *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(a); *Sentencing Act 1991* (Vic) s 11; *Sentencing Act 1995* (WA) s 89(2).

227 Bronwyn Lind and Simon Eyland, 'The Impact of Abolishing Short Prison Sentences' (Contemporary Issues in Crime and Justice No 73, NSW Bureau of Crime Statistics and Research, September 2002) 5.

228 See, eg, Boris Beranger, Don Weatherburn and Steve Moffatt, 'Reducing Indigenous Contact with the Court System' (Bureau Brief Issue Paper No 54, NSW Bureau of Crime Statistics and Research, December 2010); Peta MacGillivray and Eileen Baldry, 'Australian Indigenous Women's Offending Patterns' (Brief No 19, Indigenous Justice Clearinghouse, June 2015).

229 Anthea S Krieg, 'Aboriginal Incarceration: Health and Social Impacts' (2006) 184(10) *Medical Journal of Australia* 534.

230 NSW Sentencing Council, above n 226; Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017).

7.159 Just Reinvest NSW argue, that in NSW alone, a 90% reduction in the number of sentences of less than six months would:

- cut the number of prison sentences handed down in NSW courts and the number of people coming through the prison system by almost 40%;
- result in a 5% reduction in the overall prison population; and
- free up approximately $30 million the government currently spends on locking up people for less than 6 months each year–not including potential savings in capital expenditure.[231]

The problem with abolishing short sentences of imprisonment

7.160 A key concern regarding the potential abolition of short sentences is the risk of sentence creep, that is, the risk that judicial officers will ultimately sentence offenders for *longer* periods because of a lack of alternative sentencing options, particularly in the absence of community-based sentencing alternatives.

Sentence creep

7.161 There is evidence that abolishing short sentences has the unintended consequence of increasing the length of incarceration. In 1995, WA abolished terms of imprisonment of three months or less.[232] In 2003, the WA legislature increased the threshold to six months.[233] These reforms were not accompanied by any changes to the practical availability of community-based sentencing options or diversion programs.

7.162 In 2007, the Department of Correction Services (WA) reviewed the impact of increasing the threshold for a sentence of imprisonment to six months. That report indicates that sentence creep did occur.[234] Stakeholders similarly identified sentence creep as a particular problem arising out of the abolition of sentences of less than six months in WA. A key reason for the sentence creep in WA appears to be the absence of alternative sentencing options such as appropriate community-based options.[235]

7.163 Accordingly, Sisters Inside were 'concerned about the real possibility of 'sentence creep', and the likelihood that this would 'have a disproportionate and negative effect on women.' NAAJA submitted that:

> what occurred in Western Australia was the factor of 'sentence creep' where sentences which ordinarily would be in terms of days, weeks and months increased to sentences of 6 months and 1 day imprisonment. In order to protect against such incursions of inflated sentences there must be clear provisions for alternatives to

231 Just Reinvest NSW, *Policy Paper: Key Proposals #1–Smarter Sentencing and Parole Law Reform* (2017) prop 2.

232 *Sentencing Act 1995* (WA) s 86. There are limited exceptions: See ss 86(a)–(c).

233 *Sentencing Legislation Amendment and Repeal Act 2003* (WA) s 33(3).

234 Department of Corrective Services (WA), 'Report on the Effects on Rates of Imprisonment Following the Sentencing Legislation Reforms of 2003' (June 2007) 107.That finding has been questioned by the Director of NSW Bureau of Crime Statistics and Research, see Don Weatherburn, 'Rack 'em, Pack 'Em and Stack 'Em: Decarceration in an Age of Zero Tolerance' (2016) 28(1) *Current Issues in Criminal Justice* 137.

235 Department of Corrective Services (WA), above n 234, 107–8.

> prison to be resourced and supported appropriately and clear provisions for imprisonment as a last result.[236]

7.164 Similarly, NATSILS submitted that:

> short sentences of imprisonment should only be abolished if supported by an increase in the availability of culturally responsive diversion and rehabilitative programs. The abolition of short sentences of imprisonment cannot assist the position of Aboriginal and Torres Strait Islander people who are in contact with the criminal justice system if the courts are not provided alternative sentencing options. It is vital that we increase the number of culturally responsive diversion and rehabilitation programs available.[237]

7.165 Jesuit Social Services suggested that:

> If short sentences of imprisonment were to be abolished, there should be pre-conditions as to the availability of a comprehensive range of community sanctions as non-custodial alternatives to prison, with a requirement that these be uniformly available in regional and remote areas and all states and territories.[238]

7.166 A similar view was expressed by the Law Council of Australia who were 'concerned that if short prison sentences were abolished without the introduction of uniformly available diversionary sentencing options, offenders may be sentenced to longer periods of imprisonment or forced into inappropriate alternatives'.[239] This view was shared by other stakeholders such as the Human Rights Law Centre, and ALS NSW/ACT.[240]

Judicial discretion and family violence

7.167 Another reason for opposing the abolition of short sentences put forward in submissions was that it restricted judicial discretion. NATSILS stressed that:

> It is essential that judicial discretion is retained in all sentencing practices. ... [J]udicial discretion is critical to ensuring that the individual circumstances of a person are taken into account, and accords with the principle of proportionality.[241]

7.168 Change the Record Coalition highlighted another potential benefit of short sentences of imprisonment:

> In certain circumstances, short term sentences can serve an important community safety purpose; for example, a short prison sentence may provide sufficient time for a victim/survivor of domestic violence to extricate themselves from the circumstances surrounding the trauma, for example, by moving homes or seeking counselling or other support.[242]

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236 North Australian Aboriginal Justice Agency, *Submission 113*.
237 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
238 Jesuit Social Services, *Submission 100*.
239 Law Council of Australia, *Submission 108*.
240 Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*.
241 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
242 Change the Record Coalition, *Submission 84*.

7.169 A similar view was expressed by the Law Council of Australia.[243] National Family Violence Prevention Legal Services supported the retention of short sentences but noted that:

> While short prison sentences might in some situations provide a brief period of safety for the victim/survivor of family violence, there needs to be increased access to programs that address the violent behaviour of perpetrators, and are delivered in community.[244]

243 Law Council of Australia, *Submission 108*.
244 National Family Violence Prevention Legal Services, *Submission 77*.

8. Mandatory Sentencing

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Summary

8.1 Evidence suggests that mandatory sentencing increases incarceration, is costly and is not effective as a crime deterrent. Mandatory sentencing may also disproportionately affect particular groups within society, including Aboriginal and Torres Strait Islander peoples—especially those found guilty of property crime.

8.2 The ALRC recommends that Commonwealth, state and territory governments should repeal sentencing provisions which impose mandatory or presumptive terms of imprisonment upon conviction of an offender, and that have a disproportionate impact on Aboriginal and Torres Strait Islander peoples. This chapter does not provide an exhaustive list of such provisions because complete data is not available. Instead, this chapter highlights those mandatory sentences attached to offences that have been identified by stakeholders as having a disproportionate impact on Aboriginal and Torres Strait Islander peoples and suggests that states and territories do further work to identify and repeal mandatory sentence provisions that in practice have a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

Impact of mandatory sentencing

8.3 Mandatory sentencing laws require that judicial officers deliver a minimum or fixed penalty (for the purposes of this Report, a term of imprisonment) upon conviction of certain offences on an offender.[1] While, mandatory sentencing laws are found in most Australian jurisdictions in various forms,[2] they are a departure from the standard

1 This chapter does not consider strict liability offences.

2 See, eg, *Migration Act 1958* (Cth) s 236B; *Crimes Act 1900* (NSW) 1900 s 19B(4); *Criminal Law Consolidation Act 1935* (SA) s 11; *Misuse of Drugs Act* (NT) s 37(2); *Sentencing Act* (NT) s 78F; *Domestic and Family Violence Act* (NT) s 121(2); *Crimes Act 1958* (Vic) ss 15A, 15B; *Road Traffic Act 1974* (WA) ss 60, 60B(3); *Criminal Code Act Compilation Act 1913* (WA) ss 297, 318.

approach to legislating the sentence for criminal offences in Australia. The standard approach is to provide a maximum penalty that may be imposed upon conviction, based on the parliament's assessment of the relative severity of the offence. This approach leaves sentencing courts to assess and determine the appropriate sentence in each individual case up to, and including, the maximum.[3]

8.4 The removal of the usual discretion of the court to consider mitigating factors or to utilise alternative sentencing options to deal with an offender are defining features of such provisions. Mandatory sentencing laws may apply to certain offences, or to particular types of offenders—for example, repeat offenders.

8.5 Presumptive minimum sentences can have a similar effect to mandatory minimum sentence, so much so, that stakeholders to this Inquiry generally grouped issues relating to mandatory and presumptive sentencing together.[4] While mandatory sentencing provisions tend to entirely limit judicial discretion in relation to sentencing, offences with presumptive penalties allow for judicial discretion in sentencing, but only if 'there is a demonstrable reason—which may be broadly or narrowly defined'.[5] Aboriginal Legal Service of WA (ALSWA) raised the presumptive penalty in relation to s 61A of the *Restraining Orders Act 1997* (WA), which related to repeated breach of violence restraining orders (VROs).

8.6 ALSWA noted that:

> The sentencing court can deviate from the presumptive penalty if imprisonment or detention would be 'clearly unjust' given the circumstances of the offence and the person, and the person is unlikely to be a threat to the safety of a person protected by the order or the community generally.[6]

8.7 Parliaments have tended to regard fixed or minimum penalty provisions as a means of addressing community concerns that sentences handed down by the courts are too lenient when sentencing offenders.[7] The arguments put in favour of mandatory or presumptive sentencing provisions include that they:

- promote consistency in sentencing;
- deter individuals from offending;
- denounce the proscribed conduct;
- ensure appropriate punishment of the offender; and

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3 See ch 6.

4 Sisters Inside, *Submission 119*; Northern Territory Government, *Submission 118*; North Australian Aboriginal Justice Agency, *Submission 113*; Law Society of Western Australia, *Submission 111*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Caxton Legal Centre, *Submission 47*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*.

5 NSW Parliamentary Research Service, *Mandatory Sentencing Laws* (2014) 2.

6 Aboriginal Legal Service of Western Australia, *Submission 74*.

7 Crimes and Other Legislation Amendment (Assault and Intoxication) Bill 2014, NSW Parliamentary Debates, Legislative Assembly, 30 January 2014, 26621-5 (Barry O'Farrell, Premier).

- protect the community through incapacitation of the offender.[8]

8.8 There is evidence that mandatory sentencing increases the incarceration rate. For example, the Senate Legal and Constitutional Affairs Reference Committee noted that:

> The Chief Magistrate of the Northern Territory provided the committee with evidence of incarceration rates as a result of the imposition of mandatory sentencing in the Northern Territory during the period 1997 to 2001. The Chief Magistrate noted that the imprisonment rate was 50 per cent higher during this period than following repeal of the laws. Non-custodial orders such as home-detention and community work were almost unused for property offences during the mandatory sentencing era.[9]

8.9 Stakeholders also noted that mandatory or presumptive penalty provisions:

- are ineffective—there is little evidence that mandatory sentences act as deterrents;
- constrain the exercise of judicial discretion;
- heighten the impact of charging decisions that are within the discretion of police and prosecutors;
- contradict the principles of proportionality[10] and 'imprisonment as a last resort';[11] and
- reduce incentives to enter a plea of guilty, resulting in increased workloads for the courts.[12]

8.10 The North Australian Aboriginal Justice Agency (NAAJA) submitted that, mandatory sentencing law focus 'on punitive and retributive aspects of sentencing and the fallacy of crime prevention through deterrence.'[13] The National Association of Community Legal Centres (NACLC) submitted that mandatory sentencing laws 'are arbitrary and undermine basic rule of law principles by preventing courts from exercising discretion and imposing penalties tailored appropriately to the circumstances of the case and the offender.'[14]

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8 For a detailed discussion on these points, and the Law Council's response to them, see Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014).

9 Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) [2.37].

10 *Chester v The Queen* (1988) 165 CLR 611.

11 See for example *Crimes (Sentencing) Act 2005* (ACT) s 10; *Crimes Act 1914* (Cth) s 17A; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Penalties and Sentences Act 1992* (Qld) s 9(2)(a)(i); *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1991* (Vic) ss 5(4)-5(4C); *Sentencing Act 1995* (WA) ss 6(4), 86. See ch 6.

12 See, eg, Victorian Aboriginal Legal Service, *Submission 39*; The Light Bulb Exchange, *Submission 44*; Caxton Legal Centre, *Submission 47*; International Commission of Jurists Victoria, *Submission 54*; Australian Lawyers for Human Rights, *Submission 59*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Human Rights Law Centre, *Submission 68*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; National Association of Community Legal Centres, *Submission 94*.

13 North Australian Aboriginal Justice Agency, *Submission 113*.

14 National Association of Community Legal Centres, *Submission 94*.

8.11 Similarly, Kingsford Legal Centre noted that:

> Mandatory sentencing undermines the fundamentals of the Australian legal system such as the Rule of Law and is inconsistent with the separation of powers, by allowing the executive branch of government to direct the exercise of judicial power and to limit judicial discretion. Mandatory sentences also contradict a number of sentencing principles, such as that Courts must have regard to the gravity of the offence, the impact on the victim, and the circumstances of the offending and the accused when imposing a sentence. In particular, mandatory sentences which impose a sentence of imprisonment go against the presumption that imprisonment should be a measure of last resort and only where no other sentencing option is sufficient.[15]

8.12 The Criminal Lawyers Association of NT (CLANT) and NT Legal Aid, referred to Mildren J's description of prescribed mandatory minimum sentences as the 'very antithesis of just sentences' in the NT Supreme Court matter of *Trennery v Bradley*.[16] Mildren J went on to say that

> if a court thinks that a proper just sentence is the prescribed minimum or more, the minimum prescribed penalty is unnecessary. It therefore follows that the sole purpose of a prescribed minimum mandatory sentencing regime is to require sentencers to impose heavier sentences than would be proper according to the justice of the case. [17]

8.13 While increasing incarceration, there is no evidence that mandatory sentencing acts as a deterrent and reduces crime.[18] In fact, Victorian Aboriginal Legal Service (VALS) suggested that:

> As opposed to providing a deterrent, the impact of mandatory minimum sentences and terms of incarceration for youth means a rise criminogenic behaviour learned within the prison system.[19]

8.14 The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted that such regimes can result in 'serious miscarriages of justice':

> Mandatory sentencing regimes are not effective as a deterrent and instead contribute to higher rates of reoffending. In particular, [they] fail to deter persons with mental impairment, alcohol or drug dependency or persons who are economically or socially disadvantaged. They also have no rehabilitative value, disrupt employment and family connections … and diminish the prospects of people re-establishing social and employment links post release. Significantly, mandatory sentencing prevents the court from taking into account the individual circumstance of the person, leading to unjust outcomes. This is an arbitrary contravention of the principles of proportionality and necessity, and mandatory detention of this kind violate a number of provisions of the International Convention on Civil and Political Rights.[20]

8.15 Stakeholders noted that many mandatory and presumptive sentencing provisions disproportionately impact upon vulnerable groups, including Aboriginal and Torres

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15 Kingsford Legal Centre, *Submission 19*.

16 Criminal Lawyers Association of the Northern Territory, *Submission 75*; Northern Territory Legal Aid Commission, *Submission 46*; North Australian Aboriginal Justice Agency, *Submission 113*.

17 *Trenerry v Bradley* (1997) 6 NTLR 175.

18 See, eg, Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38(1) *Crime and Justice* 65.

19 Victorian Aboriginal Legal Service, *Submission 39*.

20 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

Strait Islander peoples.[21] In 2008 and 2014, the UN Committee Against Torture, in its regular reviews of Australia's compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, recommended that Australia abolish mandatory sentencing due to its 'disproportionate and discriminatory impact on the [I]ndigenous population.'[22] Kingsford Legal Centre explained that:

> a number of the crimes in Australian jurisdictions to which a mandatory sentence is attached are 'crimes of poverty' relating to property offences and theft. As a result, mandatory sentences have a discriminatory impact on people of a low socio-economic status and particular racial groups, including Aboriginal and Torres Strait Islander people.[23]

8.16 The NT Anti-Discrimination Commissioner urged the 'repeal of mandatory sentencing provisions as they do not make our communities safer and have disproportionate impact on Aboriginal and Torres Strait Islander people.'[24] The NACLC submitted that:

> Of particular concern is the disproportionate impact on Aboriginal and Torres Strait Islander peoples in light of the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.[25]

Repeal mandatory or presumptive sentencing provisions

Recommendation 8–1 Commonwealth, state and territory governments should repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

8.17 There are principled reasons for opposing mandatory sentencing, including those set out above. In fact, the ALRC has previously recommended against the imposition of mandatory sentences in relation to federal offenders.[26] Nevertheless, the Terms of Reference for this Inquiry are focused on those aspects of the criminal justice system that are contributing to the over incarceration of Aboriginal and Torres Strait Islander people. Accordingly, this recommendation requires a focus on those particular offence provisions with a mandatory or presumptive term of imprisonment which have a disproportionate impact on Aboriginal and Torres Strait Islander peoples. Identifying individual offence provisions with a disproportionate impact is not a simple exercise

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21 See, eg, Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; Human Rights Law Centre, *Submission 68*; Northern Territory Legal Aid Commission, *Submission 46*; Community Legal Centres NSW and the Community Legal Centres NSW Aboriginal Advisory Group, *Submission 95*.

22 UN Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/3 (2008).

23 Kingsford Legal Centre, *Submission 19*.

24 Northern Territory Anti-Discrimination Commission, *Submission 67*.

25 National Association of Community Legal Centres, *Submission 94*.

26 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* Report No 103 (2006) recs 21–3.

given the way data are collected.[27] With a view to abolition, Commonwealth, state and territory governments should review provisions that impose mandatory or presumptive penalties to determine whether they have a disproportionate impact on Aboriginal and Torres Strait Islander peoples.[28]

8.18 The next section highlights those provisions identified by stakeholders as having a disproportionate impact on Aboriginal and Torres Strait Islander peoples. Most of those identified by stakeholders related to Western Australia (WA) and the Northern Territory (NT) where mandatory sentencing is most common.

Specific offence provisions

Western Australia

8.19 WA legislation imposes mandatory penalties upon conviction in relation to certain types of offenders, and to a number of offences.

Repeat home burglary

8.20 During initial consultations, sentencing for repeat home burglary (known as the 'three strikes' rule) was commonly raised as being of particular concern, and as having a disproportionate impact on Aboriginal and Torres Strait Islander people. The 'three strikes' rule provides that an adult offender with two prior convictions for burglary must, upon the third conviction, be sentenced to at least two years imprisonment.[29]

8.21 Previous reviews concluded that this mandatory penalty 'had little effect on the criminal justice system', but did not make any recommendations regarding its retention or otherwise.[30] The offence of burglary can capture a broad range of conduct and the mandatory minimum sentences may be problematic, given the variance in the nature and gravity of conduct for which individuals are charged. For example, Legal Aid WA submitted that 'a person who steals a wallet from a table inside a motel unit by reaching through the window, commits a burglary'.[31]

8.22 Legal Aid WA's submission offers some insight into the reasons why Aboriginal and Torres Strait Islander offenders may be disproportionately impacted by the repeat burglary provisions:

> Most young Aboriginal clients commit offences together. It may be that they are out at night because home is not safe, they are hungry, they are curious or they are simply

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27 See ch 3.

28 See, eg, Legal Aid NSW, *Submission 101*; Commissioner for Children and Young People Western Australia, *Submission 16*; Legal Aid WA, *Submission 33*; Victorian Aboriginal Legal Service, *Submission 39*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Caxton Legal Centre, *Submission 47*; Australian Lawyers for Human Rights, *Submission 59*.

29 *Criminal Code Act Compilation Act 1913* (WA) s 401(4)(b). For an example involving a young Aboriginal man, see *Western Australia v Ryan* (Unreported, District Court of Western Australia, 24 October 2016).

30 Rowena Johns, 'Sentencing Law: A Review of Developments 1998–2001' (Briefing Paper No 2/202, Parliamentary Library, Parliament of NSW, 2002) 75, citing Department of Justice (WA), *Review of Section 401 of the Criminal Code* (2001).

31 Legal Aid WA, *Submission 33*.

> with the wrong people at the wrong time. Many of them are considered by police as parties to the offences committed by others simply by virtue of agreeing with police that they were 'a lookout', without any plan to commit the actual offence.[32]

8.23 The Aboriginal Legal Service WA (ALSWA) confirmed that this provision impacted a number of their clients and provided the following example:

> ALSWA acted for B who was a 20-year-old Aboriginal female from a regional location who came to live in Perth. She commenced a relationship and starting using drugs for the first time. B acted as a lookout while her boyfriend committed various burglaries. She was a repeat offender under the legislation despite having no prior convictions other than an offence of providing false details as a juvenile. The client was sentenced to the minimum mandatory term of 2 years' imprisonment; the prosecutor stated at sentencing that this case was not the type of case that the amendments to the 'three strikes home burglary laws' were aimed at and that the conduct did not warrant imprisonment.[33]

8.24 In another example, ALSWA described how, but for receiving timely legal advice, a young Aboriginal male may have been mandatorily imprisoned for repeat home burglary after a 'third strike', in which the offender entered a home he believed to have been a friend's house to eat cereal and listen to music.[34]

Breach of violence restraining orders

8.25 The *Restraining Orders Act 1997* (WA) provides the legal framework for the issuing of orders designed to 'restrain people from committing family violence or personal violence by imposing restraints on their behaviour and activities, and for related purposes.'[35] The Act provides for a presumptive penalty for repeat breach offenders. Section 61A(5) of the Act provides that an offender convicted of three or more breaches of a violence restraining order (VRO) will be subject to a presumptive term of imprisonment. The legislation allows a court to divert from the presumptive penalty in limited circumstances.[36]

8.26 ALSWA reported 'serious concerns' that 'consent is not a defence'[37] to breaching a VRO, and that breaches of this type remain subject to the presumptive sentencing regime.[38] While most VRO are issued by a judicial officer, the WA legislation also provides for the issuing of a family violence restraining order by police officers.[39] A breach of a police issued order can result in a relevant conviction for the purposes of the mandatory presumptive penalty. ALSWA noted that police issued orders

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32 Ibid.
33 Aboriginal Legal Service of Western Australia, *Submission 74*.
34 Ibid. The 12 month mandatory term of imprisonment applies where the offence was committed prior to the commencement date of the 2015 amendments. Offences committed after that date are subject to a 2 year mandatory term.
35 *Restraining Orders Act 1997* (WA).
36 Ibid s 61A(6).
37 Nor is it a mitigating factor for the purposes of sentencing: Ibid s 61B(2).
38 Aboriginal Legal Service of Western Australia, *Submission 74*.
39 *Restraining Orders Act 1997* (WA) Div 3A.

> do not require the provision of sworn evidence, are not subject to judicial oversight, do not necessarily take into account the views of the victim and are often made by police as a matter of convenience, for example, sometimes police orders are issued against the female victim because the residence belongs to the male and the female is able to access alternative accommodation.[40]

8.27 The Law Reform Commission of WA examined section 61A in the context of family and domestic violence. It reported that stakeholders in the Kimberly region had raised concerns that police orders were frequently not understood by the person bound by the order; or the person did not recall its existence because it was served on them at the scene, often when they were intoxicated.[41] Nevertheless, the Commission was of the view that the limited discretion in s 61A should be retained.[42]

Other offences

8.28 Stakeholders identified the following additional penalties to the offences for consideration:

- assault public officer (*Criminal Code Act Compilation Act 1913* (WA) s 318(4))
- breach violence restraining order (*Restraining Orders Act 1997* (WA) s 61A)
- reckless driving committed during police pursuit (*Road Traffic Act 1978* (WA) s 60B(5))
- dangerous driving causing death or grievous bodily harm committed during police pursuit (*Road Traffic Act 1978* (WA) s 59 (4A)); and
- dangerous driving causing bodily harm committed during police pursuit (*Road Traffic Act 1978* (WA) s 59A(4A)).

8.29 In relation to driving offences, NATSILS and ALSWA referred to the same case study:

> 'John' was charged with one count of reckless driving, one charge of driving without a licence and one charge of failing to stop. John made a rash and unfortunate decision to drive a motor cycle to work because his employer, who normally picked him up for work, was unable to do so.
>
> When he saw the police he panicked, sped off, drove through a red light and veered onto the wrong side of the road. He had a relatively minor record—his only prior offences were failing to stop, excess 0.02% and driving without a licence. These offences were dealt with in 2010 by the imposition of fines and John had not offended since that time.

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40 Aboriginal Legal Service of Western Australia, *Submission 74*.

41 Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws - Discussion Paper* (2013) 94. See also, Legal Aid WA, *Submission 33*.

42 Law Reform Commission of Western Australia, *Enhancing Family and Domestic Violence Laws - Final Report* (2014) 116.

> ... The magistrate indicated that, if it was not for the mandatory sentencing regime, the sentence would have been less or possibly not one of imprisonment at all.[43]

Northern Territory

8.30 The ALRC understands that the NT Government is in the process of reviewing provisions that impose mandatory penalties. The ALRC welcomes the review. During this Inquiry, stakeholders in the NT identified a number of mandatory sentencing provisions to be particularly problematic in terms of their application to Aboriginal and Torres Strait Islander offenders. NAAJA submitted that:

> The following provisions should be prioritised for immediate repeal, as they disproportionately affect Aboriginal people:
>
> - Part 3 Division 6 of the Sentencing Act – Aggravated property offences;
> - Part 3 Division 6A of the Sentencing Act – Mandatory Imprisonment for violent offences;
> - Sections 120 & 121 of the Domestic and Family Violence Act;
> - Part 3 Division 6B of the Sentencing Act – Imprisonment for sexual offences;
> - Section 53A of the Sentencing Act – Mandatory non parole periods for offences of murder;
> - Section 37(3) of the Misuse of Drugs Act.
>
> The Northern Territory governments should also abolish:
>
> - Provisions which remove the availability of suspended sentences (or other sentencing alternatives) for certain classes of offences or at all.
> - Provisions which remove the availability of home detention orders for offences that are not suspended wholly.
> - Mandatory minimum fines for traffic offences such as drive unregistered section 33 and drive uninsured section 34 of the Traffic Act.[44]

8.31 CLANT provided a similar list of offences for repeal.[45]

8.32 The *Sentencing Act* (NT) does not simply apply mandatory sentencing provisions based on the offence committed, but on whether or not the offence is a second or subsequent offence by the offender.[46] This means that there are mandatory terms of imprisonment attached to some offence levels, and mandatory minimums for others.[47]

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43 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Aboriginal Legal Service of Western Australia, *Submission 74*.

44 North Australian Aboriginal Justice Agency, *Submission 113*.

45 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

46 *Sentencing Act* (NT) div 6A.

47 There is an 'exceptional circumstances' provision, which allows a court to deviate from the mandatory minimum term of imprisonment where it is satisfied that the 'circumstances of the case are exceptional', but it must still impose a term of actual imprisonment. See *Sentencing Act* (NT) s 78DI.

8.33 The *Sentencing Act* (NT) classifies individual offences into one of five offence levels. Kingsford Legal Centre submitted that the mandatory sentences in levels 1, 2 and 4 are of 'particular concern with respect to Aboriginal and Torres Strait Islander people',[48] and called for immediate reform. Level 2 mandates a term of actual imprisonment, for 'any person who unlawfully causes harm to another.' The provision does not require a consideration of the gravity of the harm caused.[49]

New South Wales

8.34 Legal Aid NSW submitted that the mandatory minimum sentence attaching to the offence of assault causing death (while intoxicated) (so called 'one punch' laws) was particularly 'inappropriate.'[50] In a 2017 review of those laws, the Aboriginal Legal Service NSW/ACT submitted that such laws should be repealed, because of the potential for the offence to have a disproportionate impact upon Aboriginal and Torres Strait Islander communities.[51]

8.35 One punch laws were reviewed by the NSW Department of Justice in 2017 which found the law to be largely untested having been introduced in 2014.[52] Nevertheless, the Department stated that it 'supports the retention of the offences and supports the principle of a lengthy sentence of imprisonment for the aggravated offence'.[53] The Department recommended that the offence provisions be reviewed again in 2020. The ALRC suggests that such a review should also examine specifically the impact of these laws on Aboriginal and Torres Strait Islander people.

48 Kingsford Legal Centre, *Submission 19*.
49 Ibid.
50 Legal Aid NSW, *Submission 101*.
51 Aboriginal Legal Service (NSW/ACT), Submission to NSW Department of Justice, *Statutory Review of Sections 25A and 25B of the Crimes Act 1900* (6 December 2016).
52 NSW Department of Justice, *Statutory Review of Sections 25A and 25B of the Crimes Act 1900* (2017) 4.
53 Ibid.

9. Prison Programs and Parole

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Summary

9.1 Most of the Aboriginal and Torres Strait Islander prison population is either being held on remand or serving sentences of less than two years. Up to 30% of the Aboriginal and Torres Strait Islander prisoner population is imprisoned on remand,[1] and up to 50% of Aboriginal and Torres Strait Islander prisoners are serving a sentence of 2 years or less.[2] Chapter 7 of this Report stresses the need to divert Aboriginal and Torres Strait Islander offenders serving short sentences to community-based sentences, where possible. Nonetheless, when in prison, they require assistance to address offending behaviours and to transition back into the community. For female offenders in particular, programs need to be trauma-informed and culturally safe.

9.2 In this chapter, the ALRC recommends that prison programs be developed with relevant Aboriginal and Torres Strait Islander organisations. The programs should be made available to Aboriginal and Torres Strait Islander people serving short sentences or held on remand. Additionally, programs designed for female Aboriginal and Torres

1 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 8.
2 Ibid table 25.

Strait Islander prisoners should be developed designed and delivered by Aboriginal and Torres Strait Islander organisations and services.

9.3 The ALRC recognises the critical role that release on parole has in assisting offenders transition out of prison and reintegrate into society. To this end, the ALRC recommends reforms that aim to encourage eligible Aboriginal and Torres Strait Islander prisoners to apply for parole and encourages throughcare programs that provide support for people released.

Prison programs

9.4 Up to 76% of Aboriginal and Torres Strait Islander prisoners in 2016 had been imprisoned previously, as compared with 49% of the non-Indigenous prison population.[3] Aboriginal and Torres Strait Islander prisoners are more likely to have been in prison at least five times previously, and are less likely than non-Indigenous prisoners to have never been in prison before.[4] Most repeat offenders had previously received a prison sentence, and generate 'churn' in the prison system.[5]

9.5 Rates of repeat offending vary by jurisdiction. For example, in New South Wales (NSW), the Bureau of Crime Statistics and Research (BOCSAR) found that 87% of Aboriginal and Torres Strait Islander offenders convicted in 2004 were reconvicted in ten years, compared to 58% of non-Indigenous offenders.[6]

9.6 Prison programs[7] that address known causes of offending—such as poor literacy, lack of vocational skills, drug and alcohol abuse, poor mental health, poor social and family ties—may provide some of the supports needed to reduce the rates of Aboriginal and Torres Strait Islander repeat offending.[8] Connection to culture for Aboriginal and Torres Strait Islander peoples is also an important element of prison rehabilitation programs. The reach of such programs may, however, be affected by a number of external factors over which corrective services have little to no control, such as health and housing.[9]

9.7 The availability and effectiveness of prison programs can also be affected by:

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3 Ibid table 8.

4 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* (2015) 20.

5 See, eg, Probation and Parole Officers' Association of NSW, Submission No 41 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (1 June 2005).

6 W Agnew-Pauley and J Holmes, 'Re-Offending in NSW' (Issue paper 108, NSW Bureau of Crime Statistics and Research, August 2015) 2–4; NSW Government, *Submission 85*. See also ch 3.

7 Prison programs are courses or activities made available to people in prison, and are provided or supervised by corrective services.

8 See, eg, Australian Institute of Criminology, *Study in Prison Reduces Recidivism and Welfare Dependence: A Case Study from Western Australia 2005–2010* (2016) 8; LM Davis et al, *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults* (RAND Corporation, 2013); Council of Australian Governments, *Prison to Work Report* (2016) 51.

9 Australasian Institute of Judicial Administration, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (2016) 63; Council of Australian Governments, above n 8, 16.

- budget allocations;
- corrective services' policies on prisoner classifications and prisoner transfers;[10] and
- the size of the prison population, which has expanded nationwide creating greater demand for programs.[11]

9.8 There have been recent inquiries into the availability and effectiveness of prison programs. In 2016, the Council of Australian Governments (COAG) published the *Prison to Work* Report, which highlighted the importance of: cultural competence in programs; coordination in the delivery of throughcare and post-release services; and the need for an increased focus on the delivery of programs to female prisoners. The Report also noted the additional challenges faced by Aboriginal and Torres Strait Islander female prisoners:[12]

> Male and female prisoners face many of the same issues while in prison and in their post-release life. However, female prisoners face additional challenges, such as (usually) poorer access to education and training opportunities while in prison, and problems in gaining access and custody of children when out of prison. Some women also encounter particular difficulties in returning to unsafe environments.[13]

Existing programs

9.9 While the many prison programs set out below are designed for Aboriginal and Torres Strait Islander prisoners to address their offending behaviours in culturally appropriate ways, the delivery of these types of programs is challenging given the majority are designed for male offenders and rarely delivered to prisoners serving sentences of six months or less.

9.10 The Gundi program provides work experience to prisoners, involving them in the construction of mobile homes for use in Aboriginal and Torres Strait Islander communities, which are then distributed by the NSW Aboriginal Housing Office. The program is run by Corrective Services NSW. Participants are aided in gaining a range of skills and qualifications upon completion, including formal TAFE qualifications up to Certificate III.[14] The NSW Government advised that over 60 participants completed the program in 2017, with 'employment options [increasing] for participants through the engagement of local Aboriginal Land Councils, mining companies, energy companies and state-wide construction organisations'.[15]

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10 Australasian Institute of Judicial Administration, above n 9, 21. For example, 39% of inmates in NSW in 2016 did not complete drug and alcohol-related programs due to transfers or release.

11 Ibid 19. 'many prison systems have increased their rated capacity without commensurate increases in access to rehabilitation, sporting and education/vocational programs or medical and psychological services'.

12 Council of Australian Governments, above n 8, 6.

13 Ibid.

14 Ibid 68.

15 NSW Government, *Submission 85*.

9.11 The Torch Project allows for the artwork of Aboriginal and Torres Strait Islander prisoners to be sold in the community, with the proceeds used to fund post-release pathways to a life outside of incarceration for the artists involved. The project elevates culture, and aims to introduce artists to the arts industry and increase self-sufficiency.[16]

9.12 The Culture and Land Management Program (CALM) allows for Aboriginal and Torres Strait Islander prisoners to engage in gardening and horticulture, build literacy and numeracy skills, engage in arts and crafts, and develop skills in land management. The program is run by ACT Corrective Services. Former prisoners can remain within CALM following release through optional participation in seed collecting, tree planting, and bush regeneration activities.[17]

9.13 There are other programs available to Aboriginal and Torres Strait Islander prisoners that address various criminogenic needs. Examples include Men's Cultural Journey, Dilly Bag, and Growing Up Kids.[18] The NSW Government submission mentioned Yetta Dhinnakkal, a working farm maintained by prisoners, where inmates are offered practical and vocational training and provide culturally relevant intensive case management.[19]

9.14 Information was provided to the ALRC about the delivery of the Driver Knowledge Test to adults in prisons and young offenders in juvenile justice centres. Corrective Services NSW, Juvenile Justice and Roads and Maritime Services NSW entered into a memorandum of understanding to make the test available to prisoners in NSW. This initiative aims to support a reduction in recidivism for licensing offences and to increase the number of Aboriginal and Torres Strait Islander people with a driver licence.[20] Another example is the Aboriginal Inmate Birth Certificate Program run by Corrective Services NSW that provides financial assistance to eligible Aboriginal prisoners who wish to obtain a birth certificate for the purposes of obtaining 'qualifications, completing vocational training or accessing services. In 2016–17—working with the NSW Registry of Births Deaths & Marriages—the program provided 800 birth certificates to inmates across the state'.[21]

Key gaps

Recommendation 9–1 State and territory corrective services agencies should develop prison programs with relevant Aboriginal and Torres Strait Islander organisations that address offending behaviours and/or prepare people for release. These programs should be made available to:

16 Council of Australian Governments, above n 8, 82.
17 Ibid 132.
18 Victorian Aboriginal Legal Service, *Submission 39*.
19 NSW Government, *Submission 85*.
20 Ibid.
21 Ibid.

- prisoners held on remand;
- prisoners serving short sentences; and
- female Aboriginal and Torres Strait Islander prisoners.

9.15 Aboriginal and Torres Strait Islander peoples are more likely to reoffend on release from prison than non-Indigenous people.[22] While various prison programs address the criminogenic needs of Aboriginal and Torres Strait Islander prisoners, few are available to people held on remand or to prisoners serving short sentences—areas where Aboriginal and Torres Strait Islander peoples are over-represented.[23] There are also few available programs that address the specific challenges of female Aboriginal and Torres Strait Islander prisoners, whether on remand or serving long or short sentences.

Remand and people serving short sentences

9.16 There are key differences between those prisoners held on remand and those prisoners serving short sentences—namely, the presumption of innocence applies to prisoners held on remand.[24] The presumption of innocence raises legal and ethical questions about the extent to which prison programs addressing offending behaviours should be made available to prisoners on remand.

9.17 However, as noted in a 2016 South Australian report,

> effects associated with remand in custody (particularly for those subsequently not convicted) include: increased likelihood of further offending as a consequence of contact with the prison system; increased risk of suicide and mental distress, disintegration of social supports and family ties; disruption to employment and housing that may increase likelihood of reoffending on release; limited access to supports, programs and services that might address factors underpinning the alleged offence.[25]

9.18 While the discussion in this section discusses the availability of programs for Aboriginal and Torres Strait Islander remandees and prisoners serving short sentences together, the ALRC cautions that states and territories should take into account legal and ethical considerations arising from the presumption of innocence in designing and delivering programs to Aboriginal and Torres Strait Islander remandees.

9.19 Up to 30% of the Aboriginal and Torres Strait Islander prisoner population are held on remand.[26] Of those that are convicted, a large proportion are given a sentence not exceeding time served on remand[27] or are sentenced to a short term of

22 Australian Bureau of Statistics, above n 1, table 8.
23 See ch 3.
24 Bail and remand and short sentences are further discussed in chs 5 and 7.
25 Department of Correctional Services (SA), *Strategic Policy Panel Report—A Safer Community by Reducing Reoffending: 10% by 2020* (2016) 28.
26 Australian Bureau of Statistics, above n 1, table 8.
27 See ch 5.

imprisonment that exceeds time served on remand.[28] In 2016, up to 50% of Aboriginal and Torres Strait Islander prisoners were serving a sentence of 2 years or less.[29] This can be more pronounced in some jurisdictions. For example, CLANT advised that most prisoners in the NT were either on remand (30%) or serving sentences of less than *12 months* (40%).[30]

9.20 Generally, people on remand or serving short sentences do not have access to prison programs.[31] For example, while the Sentence to a Job program operating in the Northern Territory (NT) has received positive results but, like many other prison programs, is only available to those serving a sentence of more than three months.[32] The Criminal Lawyers Association of the Northern Territory (CLANT) noted generally that it was a serious concern that, in the NT, prison programs are only available on a limited basis.[33] Citing the NT Department of Correctional Services' 2015–16 Annual Report, CLANT noted that 95% of NT prisoners had not participated in the Sentence to a Job program and that other programs had ceased altogether or were only available to fewer than half the inmates.[34] CLANT advised that most NT prison inmates were either on remand (30%) or serving sentences of less than 12 months (40%)[35] meaning access to programs is very limited.

9.21 There may be both policy and practical reasons for limited access in other jurisdictions.[36] 'Offence-based' programs may not be provided to people on remand because the offences charged are yet to be proven.[37] Further, corrections staff cannot accurately assess when a person held on remand will be released and whether there will be sufficient time to complete a program in prison. People on short sentences are generally not in prison long enough to access and complete a prison program.[38] These reasons have been articulated by the Australian Institute of Judicial Administration, who noted:

> Access to programs also tended to be restricted to prisoners who had been sentenced and who were serving a minimum sentence. Such restrictions are justified based on the premise that people should not be undertaking programs until there has been a finding of guilty and based on the practical realities of delivering programs ... Many prisoners also spend less than six months in prison and are often released without addressing their rehabilitation needs. As rehabilitation takes time, it becomes

28 See ch 7.
29 Australian Bureau of Statistics, above n 1, table 25.
30 Criminal Lawyers Association of the Northern Territory, *Submission 75*. See also ch 3.
31 Council of Australian Governments, *Prison to Work Report* (2016) 22.
32 For an overview of the program see J Cashman, *Submission 105*.
33 Criminal Lawyers Association of the Northern Territory, *Submission 75*.
34 Ibid.
35 Ibid. See also chs 3, 5 and 7.
36 Australasian Institute of Judicial Administration, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (2016) 16.
37 Ibid. '[Access to prison programs] was frequently determined by a prisoner's offence or offending history that was indicative of needs that could be addressed by the program'.
38 Ibid 16–7.

> increasingly difficult to rehabilitate prisoner who have complex needs by addressing their offending behaviour in short time frames.[39]

9.22 By contrast, the Victorian Aboriginal Legal Service (VALS) noted:

> prisoners on remand and serving short sentences face the same disruption as those serving longer sentences and require the same level of support and rehabilitation services as those serving longer sentences. Unless people held on remand and serving short sentences are provided with access to positive programs their detention is a purely punitive experience that compounds their disadvantage and increases their likelihood of reoffending.[40]

9.23 In recognition of the failure to deliver programs across all prisoner groups, states and territories are beginning to focus on the remand population as well as prisoners serving short sentences. For example, in the ACT the majority of cultural programs and some offence-based programs have been made available to prisoners on remand, including female Aboriginal and Torres Strait Islander remandees.[41] The ACT's *Standard Guidelines for Corrections in Australia* (2012) states that the 'treatment of remand prisoners should not be less favourable than that of sentenced prisoners.'[42]

9.24 In September 2017, Corrective Services NSW established 10 'High Intensity Program Units' for prisoners to attend upon where they are serving sentences of six months or less[43] because 'these inmates tend to reoffend at higher rates than those with longer sentences'.[44] These facilities 'focus on delivering rehabilitation services and programs and enhanced release planning' to these prisoners. Two units—operating in Wellington and the Mid-North Coast—are specifically for 'short sentenced Aboriginal inmates'.[45] The programs at these facilities have a 'strong emphasis' on education and employment preparation, supported by 'targeted cultural support and traditional knowledge for Aboriginal inmates', including a two week 'cultural strengthening program' and participation by local community Elders. Two facilities operating over three locations deliver programs and services tailored for female prisoners, using a trauma-informed framework, with a particular focus on returning to secure and safe accommodation.[46]

9.25 In 2016, the South Australian Government released a policy that aimed to decrease reoffending rates by 10% by 2020. This comprised six strategies, including to prioritise developing programs for women, prisoners on short sentences and individuals on remand, and ensuring that targeted and culturally appropriate services and programs are available to Aboriginal offenders.[47] This policy was based on the recommendations

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39 Australasian Institute of Judicial Administration, above n 9, 16–17.
40 Victorian Aboriginal Legal Service, *Submission 39*.
41 ACT Government, *Submission 110* app A.
42 Legal Aid ACT, *Submission 107*.
43 Corrective Services NSW, *Reducing Reoffending* <www.correctiveservices.justice.nsw.gov.au>.
44 NSW Government, *Submission 85*.
45 Ibid.
46 Ibid.
47 South Australian Government, *10 by 20 —Reducing Reoffending 10% by 2020* (2016) 8, strategies 3–4.

of the Strategic Policy Panel Report.[48] The SA government has committed to implementing these by mid-2018 and to evaluate these by 2020.[49]

9.26 The *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* Report recommended, among other things, that programs be developed for Aboriginal and Torres Strait Islander prisoners sentenced to less than six months imprisonment. The Report noted that there are limitations to the effectiveness of such programs stating that, 'by their nature, those programs will be limited'. The Report also recommended 'investigating' the possibility of extending throughcare to short-term prisoners, and that attention should be given to the development of appropriate rehabilitation programs for remandees.[50]

9.27 The majority of stakeholders supported the recommendation that corrective services in each state and territory develop culturally appropriate prison programs for Aboriginal and Torres Strait Islander prisoners on remand or serving a short sentence.[51] Stakeholders described some of the issues that followed from remandees and those on short sentences not having access to prison programs. Of particular concern was the likelihood of reoffending, which was compounded by limited access to parole for prisoners who had not completed programs.[52] Further, when granted parole, such prisoners are likely to leave prison unsupervised without any further skills or understanding of their criminal conduct.[53] This problem was highlighted by the Law Council of Australia, who submitted with regard to the lack of remand programs in SA that:

> The Society advises that many of remandees are Aboriginal men who alleged to have committed domestic violence offences who have been refused bail under section 10A of the *Bail Act 1985* (SA), very many of whom are Aboriginal, serve time in custody on remand, and plead guilty on the first available opportunity. They are often released after a period of weeks or months on remand, with their family lives, their working lives and their social and cultural lives having been completely disrupted. It is those people who particularly need programs directed to cessation of domestic violence.[54]

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48 Department of Correctional Services (SA), above n 25, 6.

49 South Australian Government, above n 47, 14.

50 Australasian Institute of Judicial Administration, above n 9, 3, 65.

51 See, eg, Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Public Health Association of Australia, *Submission 31*; Australian Red Cross, *Submission 15*.

52 Many people on short sentences may not be eligible for parole. Generally, a person needs to receive a prison sentence of over twelve months to receive a non-parole period: See, eg, Sentencing Advisory Council (Vic), *Parole* <www.sentencingcouncil.vic.gov.au>. As discussed in greater detail below, parole involves case management to provide suitable accommodation, make referrals to required services, and help parolees manage financial, personal and other problems. Research published by the Australian Institute of Criminology in 2014 suggests that prisoners who receive parole have significantly lower rates of recidivism or commit less serious offences than those released unsupervised: 'Parole Supervision and Reoffending (2014)' (Trends & Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014).

53 Australasian Institute of Judicial Administration, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (2016) 17; Council of Australian Governments, *Prison to Work Report* (2016) 41, 90, 125.

54 Law Council of Australia, *Submission 108*.

9.28 The Human Rights Law Centre noted:

> These 'short termers' (serving six months or less) account for more than half of prisoners released each year and without access to appropriate programs, are at greater risk of reoffending. A lack of stable housing, work, family and social ties, together with a lack of post-release support, heightens this risk even further.[55]

9.29 The Aboriginal Legal Service of Western Australia (ALSWA) submitted that the lack of support programs available for remand prisoners and prisoners serving short sentences was a 'serious flaw' in the current system:

> prisoners on remand may spend several months in custody prior to the disposition of their charges (and even up to 18 months awaiting a trial in a superior court). Depending on the circumstances, the court may impose a sentence of imprisonment and backdate the sentence to the time when the offender first went into custody. Therefore, some offenders will be released from custody at the time or very soon after the sentencing date. For others, even a short period as a sentenced prisoner precludes participation in programs. Such offenders are released into the community with no support and the risk of reoffending is therefore high.[56]

9.30 Legal Aid WA observed that few programs were available in regional prisons, and where they were available, were often not suitable for Aboriginal prisoners, who may have low levels of English and/or literacy skills.[57] Legal Aid WA also drew the ALRC's attention to the consequential and related issue of prisoners being denied parole because they had not attended suitable programs, providing a case study of a 20 year old Aboriginal man on a 22 month sentence who was unable to access programs and therefore was denied parole. This may occur where a person has been held on remand, and, due to time served, receives only a short sentence on conviction, with parole to follow shortly thereafter. However, as there were no programs available on remand, the person does not qualify for parole.[58]

9.31 Other potential flow-on effects of completing programs in prison when on a short sentence were also raised by stakeholders. For instance, prison programs were described as being 'the only tool for people in custody to demonstrate to the Department for Child Protection that they are addressing issues or concerns that the Department might have'.[59]

9.32 Legal Aid NSW submitted that a key barrier to accessing community-based drug and alcohol services for remanded prisoners is a Corrective Services NSW policy, which requires that, in order to be eligible for an assessment report for residential rehabilitation programs, a prisoner must have entered a guilty plea or be on remand awaiting a bail determination in the Supreme Court of NSW. This means, for example, that a remandee who has pleaded not guilty to an offence being heard in the District

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55 Human Rights Law Centre, *Submission 68*.

56 Aboriginal Legal Service of Western Australia, *Submission 74*.

57 Legal Aid WA, *Submission 33*. Legal Aid ACT, *Submission 107* also observed there to be a 'paucity' of Aboriginal programs that address complex and inter-ralated issues of most Aboriginal and Torres Strait Islander prisoners. See also ch 10 for a discussion of access to interpreters.

58 Legal Aid WA, *Submission 33*.

59 Law Society of Western Australia, *Submission 111*.

Court of NSW would be ineligible to access a residential rehabilitation program. Legal Aid NSW suggested that this policy be revised and provided some practical reform options to expand the availability of programs. For instance, it suggested the establishment of a free call service to rehabilitation providers.[60]

Female Aboriginal and Torres Strait Islander offenders

9.33 The *Prison to Work* Report highlighted that the drivers of incarceration may be 'acute' for Aboriginal and Torres Strait Islander female offenders. They are likely to have experienced victimisation, sexual abuse and family violence as well as poor mental health, substance misuse, unemployment and low education.[61] The Report noted:

> Despite this experience of violence and their complex needs, Aboriginal and Torres Strait Islander women tend to access women's services and programs in prison less than non-Indigenous women, particularly those aimed at women who have dependent children.[62]

9.34 Aboriginal and Torres Strait Islander women tend to serve short sentences or be held on remand, meaning they may be unable to access prison programs.[63] The NSW Government submission noted that 'short sentences can be problematic for women as they are often incarcerated just long enough to lose their accommodation, links to community support and can serve to complicate and disrupt their lives, resulting in relapse, reoffending and in many cases, homelessness'.[64] The *Prison to Work* Report stated that to 'be female, Aboriginal and/or Torres Strait Islander and a prisoner is to experience a very complex disadvantage'.[65]

9.35 Even for longer term prisoners, when compared to the range and availability of options offered to Aboriginal and Torres Strait Islander men, women's prison programs are limited.[66] Female Aboriginal and Torres Strait Islander prisoners have been described as a group that is 'invisible' to policy makers.[67]

9.36 There are some programs available to female Aboriginal and Torres Strait Islander prisoners. The National Family Violence Prevention Legal Service (NFVPLS) provided examples of programs delivered by their Forum members across Australia. These included:

- **Strong Women, Strong Mother** (WA): delivered by Aboriginal Family Law Services in WA, the program seeks to educate participants about family violence, healthy relationships, the emotional wellbeing of children and creating stronger children for the community.

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60 Legal Aid NSW, *Submission 101*.
61 Council of Australian Governments, above n 8, 141. See also, Law Council of Australia, *Submission 108*.
62 Council of Australian Governments, above n 8, 32.
63 See ch 11 for a discussion of Aboriginal and Torres Strait Islander women's experiences with the criminal justice system. See also Top End Women's Legal Service, *Submission 52*.
64 NSW Government, *Submission 85*.
65 Council of Australian Governments, above n 8, 32.
66 Ibid 32–4; Australasian Institute of Judicial Administration, above n 9, 61.
67 Law Council of Australia, *Submission 108*; Women's Legal Service NSW, *Submission 83*.

- **Dilly Bag** (Victoria): delivered by the Aboriginal Family Violence Prevention and Legal Service (Victoria), this program works with Aboriginal women in prison and on community-based orders. It uses culture and cultural strength to help women recover from trauma.
- **Prison support program** (Victoria): delivered by Aboriginal Family Violence Prevention and Legal Service Victoria to Aboriginal women who are survivors of violence or abuse. The program provides culturally safe and holistic support and links women into services and provides community legal education. The program is provided to women on remand and women exiting prison.[68]

9.37 Legal Aid NSW pointed to the Bolwara Transitional Centre as a model currently only available to female Aboriginal or Torres Strait Islander prisoners serving longer sentences in metropolitan areas, and further identified the below programs for expansion:

- The Miranda Project (NSW);
- Rosa Coordinated Care (based in Nowra);
- WEAVE creating futures justice program; and
- Miruma residential diversionary program.[69]

9.38 Stakeholders called for better and more accessible prison programs for all female Aboriginal and Torres Strait Islander prisoners.[70] For example, Legal Aid WA supported the implementation of more programs for female Aboriginal and Torres Strait Islander prisoners, stating that programs should

> be linked to the factors contributing to the offending behaviour, including intergenerational trauma. Programs must be culturally and gender appropriate to ensure the best response possible. It is further suggested that the programs use plain English (unless an interpreter is required) and facilitators of the programs should ideally be appropriate community representatives to promote a more engaging program e.g. a female facilitator when speaking to female victims and likewise, a male facilitator when speaking to male offenders about family violence.[71]

9.39 It has been acknowledged that female Aboriginal and Torres Strait Islander prisoners require particular care, and access to appropriate services that 'acknowledge their higher levels of need and likely history of victimisation that is entwined with their offending'.[72] In 2014, the Office of the Inspector of Custodial Services of Western

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68 National Family Violence Prevention Legal Services, *Submission 77*.
69 Legal Aid NSW, *Submission 101*.
70 See, eg, Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; National Family Violence Prevention Legal Services, *Submission 77*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Legal Aid WA, *Submission 33*.
71 Legal Aid WA, *Submission 33*.
72 Council of Australian Governments, above n 8, 33–4. Also see Women's Legal Service NSW, *Submission 83*.

Australia recommended the implementation of specific strategies targeted at reducing recidivism among young female prisoners.[73]

9.40 The factors that drive 'female imprisonment and offender complexities are significantly different from male offenders'[74] Key issues in relation to prison programs for female Aboriginal and Torres Strait Islander prisoners identified by stakeholders include:

- female offenders are likely to be victims of family violence and sexual assault. Programs should acknowledge the role of family violence in Aboriginal and Torres Strait Islander women's incarceration cycles.[75]
- female offending can interact with histories of trauma and abuse. This means that prison programs that are able to successfully address these histories in a culturally competent way may be more likely to be successful in reintegration.[76]
- many female prisoners are parents—up to 80% of Aboriginal and Torres Strait Islander women in prison are mothers.[77] Female offenders often have children removed from their care, and require programs that facilitate reconnection with children upon release, such as programs that address issues around parenting capability or that model positive engagement with children.[78]

Best practice characteristics of prison programs

9.41 The NT Anti-Discrimination Commission noted that prison programs should be 'culturally appropriate in content and delivery, and be evaluated'.[79] This sentiment was echoed by other stakeholders,[80] with many highlighting the need for trauma-informed programs designed by Aboriginal and Torres Strait Islander people.[81]

9.42 The need for specialised programs targeted, not only at Aboriginal and Torres Strait Islander people generally, but to their specific needs—such as programs targeted at mental health needs—was also raised.[82] Similarly, the importance of individualised

73 Office of the Inspector of Custodial Services, *Recidivism Rates and the Impact of Treatment Programs* (2014) vi.
74 NSW Government, *Submission 85*.
75 Council of Australian Governments, above n 8, 33; Law Council of Australia, *Submission 108*.
76 Council of Australian Governments, above n 8, 32. See also Women's Legal Service NSW, *Submission 83*; Human Rights Law Centre, *Submission 68*; Australian Lawyers for Human Rights, *Submission 59*.
77 Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 21.
78 Council of Australian Governments, above n 8, 33; Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*.
79 Northern Territory Anti-Discrimination Commission, *Submission 67*.
80 See, eg, Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Victorian Aboriginal Legal Service, *Submission 39*.
81 See, eg, Northern Territory Government, *Submission 118*; Legal Aid ACT, *Submission 107*; Jesuit Social Services, *Submission 100*.
82 See, eg, NSW Bar Association, *Submission 88*.

case management, holistic support, and a therapeutic approach that addresses criminogenic needs, and support on release was emphasised.[83]

9.43 The *Prison to Work* Report noted a paucity of long-term, evaluated prison programs in Australia—meaning that the evidence base for 'what works' in relation to Aboriginal and Torres Strait Islander prisoners is not well-established.[84] VALS particularly recommended that the Commonwealth Government undertake research into the 'programmatic needs' of Aboriginal and Torres Strait Islander female prisoners.[85]

9.44 With regard to persons held on remand or serving short sentences, the Law Council of Australia observed that facilitating access to programs relies particularly on effective early assessment of a person's criminogenic needs. It noted that prison can be a 'circuit breaker for many people from the issues that have led them to being imprisoned or remanded for example, poverty, lack of housing, mental health conditions or lack of employment'.[86] The Reception Transition Triage operated by Corrections Victoria was identified as a good model that seeks to identify and address immediate needs that 'without intervention would escalate or compound'.[87] The NSW Government submission outlined the approach taken by NSW Corrective Services, which includes early identification of Aboriginal and Torres Strait Islander prisoners (as high risk of reoffending) and intervention. NSW Government advised that, in 2016–17, 29% of program attendees in offence-based programs were Aboriginal. The proportion of attendees in offence-based programs is higher than the percentage of Aboriginal and Torres Strait Islander people as a proportion of the prison population.[88]

9.45 NFVPLS identified the following best practice elements for prison programs for Aboriginal and Torres Strait Islander peoples, particularly women:

- programs for Aboriginal and Torres Strait Islander people need to be **designed and delivered by Aboriginal and Torres Strait Islander organisations** with relevant experience and expertise;
- programs must take a **strengths-based approach** that incorporates culturally-based healing and builds resilience and reduces the vulnerability of participants, particularly women who are victims/survivors of family violence;
- programs should focus on building **participants' self-esteem** and well-being;
- programs must include a strong **local community focus** that strengthens friendships, relationships and connections within the community;

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83 See, eg, Northern Territory Government, *Submission 118*; Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*; Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Legal Aid NSW, *Submission 101*; Legal Aid WA, *Submission 33*.

84 Council of Australian Governments, above n 8, 51. See also Australasian Institute of Judicial Administration, above n 9, 2.

85 Victorian Aboriginal Legal Service, *Submission 39*.

86 Law Council of Australia, *Submission 108*.

87 Ibid.

88 NSW Government, *Submission 85*.

- activities should support participants to **develop and undertake leadership roles** and speak out on issues within their community; and
- programs should increase participants' access **to support and legal services within their community**, both mainstream and Aboriginal and Torres Strait Islander specific services.[89]

Culturally appropriate programs

9.46 A key element of best practice prison programs is that they are culturally appropriate. In discussing what constitutes a culturally appropriate program for Aboriginal and Torres Strait Islander prisoners on remand or serving short sentences, and for female Aboriginal and Torres Strait Islander prisoners, stakeholders advised that programs should be:

- designed, developed and delivered by Aboriginal and Torres Strait Islander organisations where possible;
- trauma-informed, especially where being delivered to female Aboriginal and Torres Strait Islander prisoners; and
- focused on practical application, particularly for prisoners on remand or short sentence who need the skills on release to reintegrate.

9.47 These characteristics are briefly outlined below.

Design, development and delivery

9.48 Prison programs for Aboriginal and Torres Strait Islander peoples need to be led by Aboriginal and Torres Strait Islander organisations where possible. Stakeholder submissions stressed the importance of prison programs being developed and delivered by Aboriginal and Torres Strait Islander organisations where available.[90] This was key to the provision of culturally appropriate programs. Kingsford Legal Centre acknowledged research conducted by Queensland Corrective Services that supports the proposition that culturally appropriate programs are effective in reducing recidivism.[91]

9.49 Legal Aid NSW suggested that Aboriginal and Torres Strait Islander representatives needed to be involved with the development and delivery of prison programs in order to provide approaches that were local, holistic and trauma-informed, noting that many prisoners are descendants of the Stolen Generation and that 'their trauma is different to that of non-Indigenous population'.[92]

9.50 ALSWA emphasised the need for Aboriginal and Torres Strait Islander specific programs, and the need for these to be developed in collaboration with peak Aboriginal and Torres Strait Islander organisations such as Aboriginal and Torres Strait Islander legal services and Aboriginal Family Violence Prevention Legal Services. It suggested

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89 National Family Violence Prevention Legal Services, *Submission 77*. Emphasis added.
90 See, eg, Legal Aid NSW, *Submission 101*; Victorian Aboriginal Legal Service, *Submission 39*; Kingsford Legal Centre, *Submission 19*.
91 Kingsford Legal Centre, *Submission 19*.
92 Legal Aid NSW, *Submission 101*.

that programs should provide a 'one-stop shop'—a culturally appropriate model providing legal and family assistance with holistic support and case management.[93]

9.51 VALS recommended that the delivery of programs be:

- designed, delivered and managed by Aboriginal and Torres Strait Islander people;
- well resourced and consistent;
- supported by case management by Aboriginal community controlled organisations, both in prison and in transition;[94]
- supported by prison staff who are trained in cultural awareness; and
- designed around Aboriginal understandings of health, which includes 'mental health, physical, cultural and spiritual health', and understands that land is central to wellbeing.[95]

9.52 The Commissioner for Children and Young People (WA) suggested the implementation of culturally appropriate support for young offenders in custody. For young people, culturally appropriate programs should address underlying issues, take a trauma-informed approach and encourage young people to re-engage with school, learning and community.[96] The Commissioner also noted the need for a 'particular focus on Aboriginal young women in the justice system', who were described as a 'particularly vulnerable group in the prison population'. It was suggested that women with current or prior experience in the youth justice system be consulted and involved in the design and development of such programs.[97] The Miranda Project further suggested that programs be developed 'by Aboriginal women for Aboriginal women to be delivered by Aboriginal women'.[98]

A trauma-informed approach[99]

9.53 Understanding the effects of trauma has been identified as a key requirement for prison programs delivered to Aboriginal and Torres Strait Islander prisoners, and in particular, for female prisoners.[100]

9.54 The *Prison to Work* Report found that support for Aboriginal and Torres Strait Islander female prisoners could be improved, and recommended that the

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93 Aboriginal Legal Service of Western Australia, *Submission 74*. See also Law Society of Western Australia, *Submission 111*; Law Council of Australia, *Submission 108*.

94 This point is also made by the Law Council of Australia: Law Council of Australia, *Submission 108*.

95 Victorian Aboriginal Legal Service, *Submission 39*.

96 Commissioner for Children and Young People Western Australia, *Submission 16*.

97 Ibid.

98 Community Restorative Centre, *Submission 61*.

99 For a more detailed discussion of what constitutes a trauma-informed approach, see ch 1.

100 See, eg, Jesuit Social Services, *Submission 100*; National Association of Community Legal Centres, *Submission 94*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Victorian Aboriginal Legal Service, *Submission 39*.

Commonwealth Government work with states and territories to 'explore options' for pilot programs for women while in prison and to provide better throughcare which would accommodate the needs and likely experiences of 'trauma, abuse and family violence of female Aboriginal and Torres Strait Islander prisoners'.[101] It also recommended that state and territory governments consider ways to 'better facilitate women's access to their children while in prison'.[102]

9.55 The NSW Government submitted that Corrective Services NSW do take a different, trauma-informed approach to addressing the needs of female Aboriginal offenders than men, citing the Out of Dark program for women who had experienced domestic and family abuse as victims. In 2016–17, 24 women participated, of which 10 (42%) were Aboriginal.[103]

9.56 In Victoria, the *Dilly Bag Program* provides 'intensive assistance' to Aboriginal women in prison who are recovering from traumatic experiences.[104] VALS supported the development of such programs for Aboriginal and Torres Strait Islander accused peoples and offenders, noting that the need for

> therapeutic and holistic programs for those on remand and serving short sentences is felt most acutely by Aboriginal and Torres Strait Islander people who are more likely to be held on remand and are more likely to be incarcerated for less than 12 months than any other group.[105]

9.57 CLANT also observed it be 'essential that rehabilitation programs for women be designed and delivered using a trauma-informed approach'.[106] Women's Legal Service NSW sought culturally safe, strength based and trauma-informed programs that respond to the specific needs of Aboriginal and Torres Strait Islander women in prison, including women held on remand. This was echoed by the Queensland Law Society and Change the Record.[107]

Content

9.58 Stakeholders submitted that programs must:

- address offending behaviours, especially for people on short sentences and female Aboriginal and Torres Strait Islander prisoners serving any term of imprisonment;
- provide practical assistance; and
- provide case management, including beyond the end of a sentence.

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101 Council of Australian Governments, above n 8, 32–4, finding 4.
102 Ibid 10. See also ch 11.
103 NSW Government, *Submission 85*.
104 Council of Australian Governments, above n 8, 79.
105 Victorian Aboriginal Legal Service, *Submission 39*.
106 Criminal Lawyers Association of the Northern Territory, *Submission 75*. See also NSW Bar Association, *Submission 88*.
107 Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*.

Address offending behaviours

9.59 The *Sisters Day In* program is an example of a program that addresses offending behaviour. It is an early intervention and prevention program to reduce Aboriginal women's vulnerability to family violence.[108] The Kunga Stopping Violence program, operated by the Central Australian Aboriginal Legal Aid Service focuses on community reintegration for Aboriginal and Torres Strait Islander women who have been imprisoned for violent offending. National Aboriginal and Torres Strait Islander Legal Service (NATSILS) noted that 'all Kunga participants have disclosed histories of some form of domestic, family, sexual or community violence' and that the program has been designed to support women with strategies in relation to: drug and alcohol dependencies; emotional intelligence; intergenerational trauma; domestic and family violence; accommodation; and positive thinking. Women are supported for up to 12 months post release.[109]

9.60 The Public Health Association of Australian suggested there be an emphasis on programs that target substance misuse.[110] The Australian Red Cross observed that, in order to achieve one of the aims of imprisonment—to prevent recidivism—it is essential for offenders to be able to address the 'complex and multiple' reasons for offending. Accordingly, despite the stated logistical and practical challenges, programs should be available for female Aboriginal and Torres Strait Islander offenders, prisoners serving short sentences, and people on remand, and have a throughcare focus.[111]

Practical assistance

9.61 Programs that provide practical assistance are also required, and may be especially beneficial for prisoners on remand. The NT Anti-Discrimination Commissioner noted that in the NT Ombudsman Report, women and stakeholders clearly articulated those programs that were required, including programs around basic literacy and numeracy, trauma and grief, and loss.[112]

9.62 Prison programs that provided practical assistance to support reintegration, such as helping prisoners organise post-release accommodation, finances and employment are needed.[113] Legal Aid WA submitted that this need superseded that of programs that focus only on offending behaviours.[114] ALSWA suggested that programs for

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108 Council of Australian Governments, above n 8, 79.

109 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

110 Public Health Association of Australia, *Submission 31*.

111 Australian Red Cross, *Submission 15*. See also NSW Bar Association, *Submission 88*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Legal Aid WA, *Submission 33*.

112 Northern Territory Anti-Discrimination Commission, *Submission 67*. See also Ombudsman NT, 'Women in Prison II—Alice Springs Women's Correctional Facility' (Investigation Report, Volume 1 of 2, May 2017) recs 6-7.

113 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109* 108; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*.

114 Legal Aid WA, *Submission 33*. See also comments on parole in the Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.

remandees can be effective if they respond to the 'underlying needs of the prisoner rather than focusing on the specific offence or offences for which the prisoner is in custody'. These could address 'practical needs' such as housing, literacy and financial literacy, employment and training, substance abuse, driver licences and unpaid fines, and programs that help transition back into the community upon release.[115] The Miranda Project proposed that short-term programs needed to move beyond addressing criminogenic needs, and focus on social and welfare concerns such as housing, social connections and poverty, and legal literacy (identified as particularly important for female offenders).[116]

9.63 VALS acknowledged the gap in practical services for female Aboriginal and Torres Strait Islander prisoners, and recommended programs that:

- provide tailored service delivery;
- provide transition planning, supported by case management; and
- involve 'wrap around' service delivery regarding culture; employment; health, including mental health; education; housing; community and legal services; and child specialist services.[117]

9.64 NSW Government highlighted the issue of unemployment among prisoners, where only 16% of Aboriginal prisoners in NSW had been employed in the community on entry into prison, compared with 39% of non-Indigenous prisoners; highlighting a need for employment and education programs.[118]

9.65 The *Prison to Work* Report noted the practical barriers to employment that prisoners experience on release. It suggested that some barriers that could be easily overcome with assistance, such as opening a bank account or applying for valid identity documents, while others were more difficult to overcome, such as transport and accommodation. The *Prison to Work* Report also identified 'intangible barriers' to employment, such as changing entrenched behaviours, reintegration into civic life, and a lack of agency stemming from institutionalisation. It noted that 'unrealistic demands and expectations made of ex-prisoners occur when they are at their most vulnerable, which is in the period immediately following their release'.[119]

9.66 In 2017, the Commonwealth Department of Employment released a consultation paper on the proposed Prison to Work—Employment Service Offer that was developed from the *Prison to Work* Report. The Employment Service Offer will target Aboriginal and Torres Strait Islander prisoners who wish to participate and provide them with assistance to help prepare for employment post release. It plans to provide all participating Aboriginal and Torres Strait Islander prisoners with employments services from three months before their scheduled release date; an assessment to

115 Aboriginal Legal Service of Western Australia, *Submission 74*. ALSWA also observed that, as most people on remand, have prior convictions, there may be 'standing' to address criminogenic needs as well.
116 Community Restorative Centre, *Submission 61*.
117 Also see National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
118 NSW Government, *Submission 85*.
119 Council of Australian Governments, above n 8, 5.

identify any needs or barriers; a 'Transition Plan'; and a 'Facilitated Transfer' to an employment service provider. The program will be cross-coordinated between government and private providers with demonstrated cultural competence.[120] Where operating in a women's prison, the provider should provide a trauma-informed approach.[121] The Department of Employment has published an intention that sentenced, adult Aboriginal and Torres Strait Islander prisoner serving sentences of over three months will be eligible to participate in the Employment Service Offer.[122]

Case management and throughcare

9.67 The need for pre-release case management was highlighted, with Legal Aid NSW noting:

> We also consider there is a need for improved pre-release case management for prisoners on short sentences. The PLS often speaks to inmates who are serving short sentences with a parole period who do not speak with Community Corrections until very close to their "automatic" release date. In some cases, this may be only a few weeks before their earliest possible release date. The absence of post-release planning for these inmates is particularly concerning where they are referred to short-term temporary accommodation upon release.[123]

9.68 Many stakeholders supported the inclusion of programs and case management that included plans for post-release housing or housing support, assistance with Centrelink and, even, transportation from prison.[124] The NT Anti-Discrimination Commissioner suggested that programs be provided by registered providers in modules that could be completed in the community where a prisoner had not finished the program by the time they are released.[125]

Parole

9.69 When a person is sentenced to a term of imprisonment above a prescribed length,[126] a court generally imposes a non-parole period[127] as well as a head sentence.[128] Upon the expiration of the non-parole period, the offender may be conditionally released as a parolee, subject to parole conditions as set by the parole authority. Parolees are supervised by community corrections services, and must follow their reasonable directions. Breach of parole may result in a return to prison.

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120 Department of Employment, 'Prison to Work—Employment Service Offer 2018–2021' (Consultation Paper, Australian Government, 2017) 5, 9 <www.employment.gov.au>.

121 Ibid 11; Northern Territory Anti-Discrimination Commission, *Submission 67*. See also Mental Health Commission of New South Wales, *Submission 20*.

122 Department of Employment, above n 119, 8.

123 Legal Aid NSW, *Submission 101*.

124 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Jesuit Social Services, *Submission 100*; NSW Bar Association, *Submission 88*; Public Interest Advocacy Centre, *Submission 25*.

125 Northern Territory Anti-Discrimination Commission, *Submission 67*.

126 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Correctional Services Act 1982* (SA) s 66.

127 The non-parole period is the minimum period that the offender must spend in prison.

128 NSW Law Reform Commission, *Parole*, Report No 142 (2015) xvii. The head sentence is the maximum period that the offender can spend under sentence.

9.70 Parole does not commence upon the completion of a sentence. Rather, parole is part of the sentence. The *Review of the Parole System of Victoria* observed there to be a 'lack of awareness generally that parole represents only conditional release', and reiterated that 'a parolee remains under sentence while on parole'.[129] As was noted by the NSW Law Reform Commission (NSWLRC):

> an offender continues to serve his or her term of imprisonment while on parole: parole is an integral part of the original sentence ... [P]arole is not a discount or leniency. Instead it is a component of the original sentence. The offender remains subject to conditions and restriction of liberty, and may be returned to prison if parole is revoked.[130]

9.71 The setting of a parole date is seen to incentivise good behaviour and rehabilitation while an offender is in prison, and parole is seen to facilitate prisoner reintegration back into society.[131] Parole generally involves case management to provide suitable accommodation, make referrals to required services, and help parolees manage financial, personal and other problems. Research published by the Australian Institute of Criminology in 2014 suggests that prisoners who receive parole have significantly lower rates of recidivism or commit less serious offences than those released unsupervised; and that parole is most effective when it involves active supervision that is rehabilitation focused.[132]As observed in the *Review of the Parole System of Victoria*, parole benefits not just the offender, but also the wider community, by 'recognising that the wider community benefits from the rehabilitation of offenders' through a decrease in recidivism and crime rates.[133]

9.72 Some Aboriginal and Torres Strait Islander prisoners who are eligible for parole instead serve out their entire head sentence in prison. The result is that these prisoners spend a greater proportion of their sentence in prison than is required under the relevant legislative schemes; that correctional facilities are put under additional strain due to the increased prison population; and that these Aboriginal and Torres Strait Islander prisoners are then released into the community without supervision at the end of their head sentence.

9.73 This issue was highlighted in the *Prison to Work* Report, which observed that large numbers of Aboriginal and Torres Strait Islander prisoners either did not apply for or receive parole. This was particularly the case in jurisdictions with high Aboriginal and Torres Strait Islander prison populations. For instance, in WA it was reported that 80% of Aboriginal and Torres Strait Islander prisoners in 2013–14 were not released on parole.[134] In 2014–15, 53% of prisoners in the NT served their full sentence in prison (meaning they were released unsupervised).[135]

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129 Ian Callinan, *Review of the Parole System in Victoria* (2013) 67.
130 NSW Law Reform Commission, *Parole*, Report No 142 (2015) 27.
131 'Parole Supervision and Reoffending (2014)', above n 52, 6; *R v Shrestha* (1991) 173 CLR 48.
132 'Parole Supervision and Reoffending (2014)', above n 52, 6.
133 Ian Callinan, above n 128, 32.
134 Council of Australian Governments, above n 8, 97.
135 Ibid 125.

9.74 The *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report*, revealed that, in 2011, in Victoria, 67% of Aboriginal and Torres Strait Islander offenders released from prison were not released on parole.[136]

9.75 Stakeholders have articulated two key reasons why eligible Aboriginal and Torres Strait Islander prisoners may not apply for parole. First, eligible Aboriginal and Torres Strait Islander prisoners may believe that they are unlikely to be granted parole by the parole authority; this may be due living arrangements, previous offending, or lack of attendance in prison programs. It may also be related to a complex history in dealing with government representatives. Second, in jurisdictions that do not count time served on parole in the case of revocation, being granted parole creates too great a risk of increased prison time.

Recommendation 9–2 To maximise the number of eligible Aboriginal and Torres Strait Islander prisoners released on parole, state and territory governments should:

- introduce statutory regimes of automatic court-ordered parole for sentences of under three years, supported by the provision of prison programs for prisoners serving short sentences; and
- abolish parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.

9.76 This recommendation aims to encourage eligible Aboriginal and Torres Strait Islanders to apply for parole, which would provide supported transition from prison to community life. As highlighted above, a supported transition into the community reduces the risk of reoffending and further incarceration.

9.77 The granting of parole takes one of two forms: automatic, or court-ordered parole and discretionary parole. Court-ordered parole permits automatic release on parole on the date set by the court without application to the parole authority at the end of the non-parole period. Discretionary parole requires that offenders sentenced to parole-eligible sentences must make an application to the relevant parole authority prior to the expiration of the non-parole period for specific authorisation for parole.

9.78 NSW, Queensland, and SA have legislative frameworks for court-ordered parole.[137] These jurisdictions operate under a mixed system of parole where prisoners on short sentences receive automatic court-ordered parole and prisoners on longer sentences are subject to discretionary parole.[138] NSW introduced court-ordered parole

136 Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) [10.2.5].

137 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Penalties and Sentences Act 1992* (Qld) s 160B(3); *Correctional Services Act 1982* (SA) s 66.

138 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Penalties and Sentences Act 1992* (Qld) s 160B(3); *Correctional Services Act 1982* (SA) s 66. See also, Queensland Corrective Services, *Queensland Parole System Review: Final Report* (2016) [256].

in 1983 following the 1978 *Nagle* Royal Commission into NSW prisons.[139] SA introduced court-ordered parole in 1984,[140] and Queensland in 2006,[141] with the objective of diverting low risk offenders from custody while ensuring post-release supervision.[142]

9.79 There is a form of court-ordered parole in WA. Parole eligibility is set by the sentencing court, and the Parole Review Board (PRB) determines if an eligible prisoner will be released on parole and under what conditions. There are two categories of prisoners for the purposes of parole: prescribed and others. A 'prescribed prisoner' includes personal violent offenders, and prior personal violent offenders who have reoffended.[143] Statute stipulates that the PRB *may* make a parole order for prescribed prisoners, and *must* make a parole order in respect of any other offender.[144] Meaning that, for all prisoners other than prescribed prisoners, parole is automatic—decided by offence type, not length.[145] Prescribed offences include assaults, threats, and stalking[146]—offence types that include a significant number of Aboriginal and Torres Strait Islander prisoners.[147]

9.80 In the ACT, NT, Tasmania and Victoria,[148] all offenders who are sentenced to parole-eligible sentences must apply for parole to the relevant parole authority prior to the expiration of the non-parole period, regardless of the length of the head sentence.

Court-ordered parole

9.81 There are advantages to court-ordered parole. Court-ordered parole ensures that greater numbers of low-level offenders are released on parole, thus limiting the number of offenders who are released to the community unsupervised.[149] Whether release on parole is automatic or by application, only prisoners who accept the conditions of parole—which in SA are set by the parole board—will be released on parole.[150]

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139 *Probation and Parole Act 1983* (NSW) s 19.
140 *Correctional Services Act Amendment Act 2014* (SA).
141 Corrective Services Bill 2006 (Qld). Queensland Corrective Services, above n 137, [259].
142 Queensland Corrective Services, above n 137, [263].
143 *Sentence Administration Act 2003* (WA) s 23(1).
144 Ibid s 23(3).
145 Aboriginal Legal Service of Western Australia, *Submission 74*.
146 See *Sentence Administration Act 2003* (WA) sch 2.
147 See ch 3.
148 *Crimes (Sentence Administration) Act 2005* (ACT) s 135; *Parole Act* (NT) s 5; *Corrections Act 1997* (Tas) s 72; *Corrections Act 1986* (Vic) s 74; *Sentence Administration Act 2003* (WA) s 20.
149 Council of Australian Governments, above n 8, 70. Not all offence categories with certain sentence lengths will result in court ordered parole. Sex offenders, serious violent offenders, and offenders who have had a court ordered parole date cancelled do not receive an automatic release date in Queensland: *Penalties and Sentences Act 1992* (Qld) s 160B. In SA, offenders who receive a prison sentence of five years or less will be excluded from court ordered parole when the offence was committed while the person was on parole, or if the person was convicted of a sexual, personal violence, arson or firearms offence: *Correctional Services Act 1982* (SA) s 66.
150 *Correctional Services Act 1982* (SA) s 68(4). See also, Legal Aid WA, *Submission 33*.

9.82 A large proportion of Aboriginal and Torres Strait Islander prisoners receive a prison sentence that would enable them to receive court-ordered parole if available in all jurisdictions.[151]

9.83 The *Prison to Work* Report observed that, in NSW where court-ordered parole is available, a 'large proportion' of Aboriginal and Torres Strait Islander prisoners were granted parole on terms set by the court, rather than needing to apply for parole, noting:

> Given the role that parole can play in ensuring offenders are supervised and supported during reintegration, the arrangements for granting parole can be a real benefit to Aboriginal and Torre Strait Islander prisoners whose complex needs and history of offending mean that they would not otherwise be granted parole on application.[152]

9.84 A 2016 review of the parole system in Queensland reported that court-ordered parole had been introduced in that jurisdiction in response to growing prisoner numbers; the 'extraordinary' growth in the number of people serving sentences of less than one year; and a decline in number of applications for release on parole that were being approved.[153] The majority of offenders who received court-ordered parole orders in 2015–16 in Queensland had received a prison sentence of less than 12 months.[154]

9.85 Stakeholders supported the introduction of court-ordered parole. Legal Aid WA advocated for the introduction of court-ordered parole based on the NSW model, observing that Aboriginal 'offenders face difficulty in being granted parole due to limited resources and consequential lack of suitable prison rehabilitation programs'. The current system results in unfair outcomes that are outside of the control of the offender, and 'greater use of automatic parole would assist in reducing the number of Aboriginal people in prison', and provide for supervised release where currently the offender may be released without supervision. Legal Aid WA suggested a system that combined automatic parole and discretionary parole, depending on the level of seriousness of each offence. It suggested that court-ordered parole be available to offenders sentenced to a term of imprisonment of less than five years, where the offending had not involved sexual offending or serious violence—mixing the approaches of SA and Queensland.[155]

9.86 ALSWA also supported the expansion of the current WA scheme, suggesting that this would 'place a far greater onus' on government to 'ensure that there are sufficient programs and services available for Aboriginal and Torres Strait Islander prisoners' as the department will know that each 'prisoner subject to automatic parole will be released on a specified date'.[156]

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151 See ch 3, fig 3.16.

152 Council of Australian Governments, above n 8, 70. The ALRC notes that SPA can vary or remove court imposed conditions before an offender is released on parole (*Crimes (Administration of Sentences) Act 1999* (NSW) s 128(2)(b)). Changes to the program will implement a statutory parole, where standard conditions will be set by statute, with SPA retaining the ability to vary or impose conditions, see also NSW Government, *Submission 85*.

153 Queensland Corrective Services, above n 137, [363]–[365].

154 Ibid fig 4.1.

155 Legal Aid WA, *Submission 33*.

156 Aboriginal Legal Service of Western Australia, *Submission 74*.

9.87 Jesuit Social Services had similar reasons for supporting court-ordered parole in the NT, where it noted court-ordered parole was 'urgently needed'. In the NT, it was observed that often relevant programs are not available and parole is not granted, through no fault of the offender. It was also suggested that, if court-ordered parole existed, correctional services would be accountable to provide programs prior to the release.[157]

9.88 CLANT noted that, in the NT, prison numbers increased by 100% between 2005 and 2015, but grants of parole only increased by 20%, stating

> it follows that there has either been a large decrease in the proportion of prisoners who apply for parole, or a large decrease in the proportion of grants of parole to applicants, or both. This is of serious concern, and should be addressed by way of legislative reform.[158]

9.89 CLANT supported the implementation of the NSW scheme of court-ordered parole, as did the Law Council of Australia.[159]

9.90 The Institute of Public Affairs did not support court-ordered parole and submitted that court-ordered parole had potential to 'undermine the concept of corrections'.[160] The NSWLRC noted that court-ordered parole may affect one of the key functions of parole—the incentive for good behaviour:

> Automatic parole ... ensures that offenders (who are not sentenced to a fixed term) are supervised for a period and have the opportunity to attempt to reduce their recidivism risk. However, it cannot provide an incentive for good behaviour in custody or for offenders to participate in programs unless there is a means to revoke or override automatic parole for some offenders on this basis.[161]

9.91 In 2016, a BOCSAR study found that, after parole orders had expired, court-ordered parolees were more likely to reoffend than those released by the State Parole Authority (SPA), and suggested greater supports following parole in order to reduce their chances of reoffending.[162] BOCSAR suggested that SPA released parolees (ie, those released on discretionary parole) may be less likely to reoffend due to the 'selective processes of the SPA in choosing who should be granted parole or because SPA parolees are more motivated to participate in rehabilitation programs while in custody'.[163]

9.92 BOCSAR also noted the likelihood that people serving short sentences may not have qualified for program inclusion due to their exit date from prison and other factors

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157 Jesuit Social Services, *Submission 100*.

158 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

159 Law Council of Australia, *Submission 108*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

160 Institute of Public Affairs, *Submission 58*. See also, E Stavrou, S Poynton and D Weatherburn, 'Parole Release Authority and Re-Offending' (Contemporary Issues in Crime and Justice Number 194, NSW Bureau of Crime Statistics and Research, July 2016) 2, 84.

161 NSW Law Reform Commission, *Parole*, Report No 142 (2015) 34.

162 E Stavrou, S Poynton and D Weatherburn, above n 159, 84; Associate Professor L Bartels, *Submission 21*.

163 E Stavrou, S Poynton and D Weatherburn, above n 159, 1.

discussed above.[164] And, although this study appears to favour discretionary parole, the authors expressed favour for release on parole rather than unsupervised release and noted:

> The relative rates of re-offending following court-ordered and Board-ordered parole is only one issue of importance in judging the merits of different parole regimes. There is good evidence that offenders subjected to parole supervision are less likely to re-offend than offenders released without any supervision.[165]

9.93 Nonetheless, in 2016, a review of Queensland's parole system recommended retaining court-ordered parole as a way to keep down prison numbers and ensure supervised release of those on shorter sentences.[166] For similar reasons,[167] the NSWLRC also recommended retention of their scheme in 2014.[168]

9.94 Eligible Aboriginal and Torres Strait Islander prisoners may not apply for parole because they believe—rightly or wrongly—that they are unlikely to be granted parole by the parole authority. Court-ordered parole permits automatic release on parole on the date set by the court without application to the parole authority at the end of the non-parole period, and provides a solution for the set of circumstances when Aboriginal and Torres Strait Islander prisoners prefer to avoid coming before a parole authority. The ALRC recommends that the regimes in NSW, Queensland and SA be adopted in other states and territories.

Overriding court-ordered parole

9.95 An order for court-ordered parole does not guarantee release on the prescribed date. There are means to revoke the non-parole period when 'exceptional circumstances' arise after sentencing, where the prisoner would represent a 'sufficiently significant danger' to the community if released on parole such that the grant of parole ought not be made.[169]

9.96 The *Crimes (Administration of Sentences) Regulation 2014* (NSW) sets out the circumstances in which the SPA can revoke an offender's court-ordered parole while they are still in custody:

- where the offender requests revocation;
- where the SPA decides that the offender is unable to adapt to normal lawful community life; or
- where the SPA decides that satisfactory post-release accommodation or plans have not been made or cannot be made.[170]

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164 Ibid. BOCSAR's findings reiterate the importance of the availability of prison programs for Aboriginal and Torres Strait Islander prisoners serving short sentences.
165 Ibid 2.
166 Queensland Corrective Services, above n 137, rec 2.
167 NSW Law Reform Commission, *Parole*, Report No 142 (2015) [2.67]–[2.85].
168 Ibid rec 2.3.
169 Queensland Corrective Services, above n 137, [418].
170 *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222(1)(a)–(c).

9.97 In NSW, the total number of people released to parole in 2015 was 6598. Of these, 5,625 were court-ordered parole. The SPA revoked 109 parole orders prior to release, of which 85% were court-based orders.[171]

9.98 The ALRC recognises that corrective services and parole authorities are well-placed to observe and make decisions about the suitability of prisoners for release on parole. The length of time that elapses between the time of sentence and the end of a non-parole period can be substantial, and there are many reasons why a person, once deemed suitable for parole, can present a risk to the community by the time the non-parole period has been served.

9.99 The 2016 *Queensland Parole System Review: Final Report* provided a summary outlining the importance of including a pre-release override mechanism for automatic parole:

> Firstly, it operates to safeguard community safety by allowing an offender's parole order to be suspended or cancelled on limited grounds before they are released to the community. This approach allows QCS [Queensland Corrective Services] to consider the offender's behaviour close to release and, where appropriate, make a recommendation that the offender's parole be amended, suspended or cancelled before they are released into the community. Secondly, the ability to suspend or cancel a parole order because of conduct in custody would, to some degree, aid in the maintenance of prison discipline by providing an offender with an incentive to behave while in custody. Finally, the system retains certainty for the Court, and for the community, as to the length of time in custody that will actually be served by a prisoner unless the offender, by his or her conduct while in prison, demonstrates an unacceptable risk to the community close to his or her release.[172]

9.100 Of the court-ordered parole jurisdictions, only NSW's override mechanism has a statutory basis.[173] Queensland relies on a Court of Appeal decision.[174] SA appears not to have a pre-release safeguard at all. However, prisoners must accept any parole conditions set before release is granted.[175]

9.101 Court-ordered parole may be revoked before release due to unsuitable post-release accommodation, or because plans in relation to post-release accommodation have not, or cannot be made. This is a major hurdle for many Aboriginal and Torres Strait Islander prisoners.

9.102 Housing issues—particularly homelessness, inadequate housing, and over-crowding—tend to disproportionately affect Aboriginal and Torres Strait Islander peoples.[176] The NSWLRC summarised the issue:

> Previous Australian research has found that between 7% and 11% of NSW prisoners were living in primary homelessness before their entry into custody. The term

171 NSW State Parole Authority, *2015 Annual Report* (2016) 14, 17.
172 Queensland Corrective Services, above n 137, 89.
173 *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222(1)(a)–(c).
174 *Foster v Shaddock* [2016] QCA 163 (17 June 2016).
175 *Correctional Services Act 1982* (SA) s 68(4).
176 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) 10.1.

> 'primary homelessness' is generally used to describe the circumstances of people living on the street, sleeping rough or living in cars and squats. People with transient living arrangements—living in refuges, shelters or couch surfing—are described as living in secondary homelessness ... Corrective Services NSW reports that, in 2011–12, 5% of receptions in NSW prisons were living in primary homelessness prior to their entry into custody and over 50% were living in secondary homelessness. For those offenders who did have stable housing before entering custody, imprisonment can often mean that such housing is no longer available when the offender is approaching the parole date. Offenders who lived in mortgaged properties or private rental properties are likely to have lost their housing due to inability to pay while in custody. Some offenders will have lost access to their previous residence due to relationship or family breakdown. Offenders who were previously accommodated in public housing will have lost their tenancy after being in custody for more than three months.[177]

9.103 The NSWLRC further emphasised that:

> One of the biggest issues ... has been the difficulty that offenders with court based parole orders can have in arranging suitable post-release accommodation. Clause 222(1)(c) of the [Crimes (Administration of Sentences)] Regulation gives SPA the power to revoke a court based parole order before an offender is released if satisfactory accommodation or post-release arrangements have not been made or cannot be made. A lack of suitable accommodation is the main reason for SPA revoking parole prior to release.[178]

9.104 The Public Interest Advocacy Centre (PIAC) noted issues with court-ordered parole arising from a lack of accommodation as a particular obstacle for Aboriginal and Torres Strait Islander peoples:

> Aboriginal and Torres Strait Islander people should not be imprisoned at disproportional rates, and for greater periods of time, simply because of a lack of housing options post-release.[179]

Ongoing need for prison programs, support and supervised parole

9.105 Stakeholders highlighted the importance of prison programs for people on short sentences and support and supervision while on parole even in jurisdictions with court-ordered parole. Legal Aid NSW noted the need for programs in prison in support of parole. It also stressed the importance of Aboriginal and Torres Strait Islander organisations' participation in parole processes, and noted the positive impacts on rates of breach and revocation of supervised orders in areas where Aboriginal Client Service Officers are employed by Community Corrections.[180]

9.106 VALS stressed both a need for extra parole support services and a refocus on support and rehabilitation for parolees instead of 'overly stringent supervision':

> Services like the VALS' Reconnect program have proven successful in supporting prisoners on parole by providing a post-release worker who assists them in identifying and achieving goals, transitioning back into the community and meeting their parole

177 NSW Law Reform Commission, *Parole*, Report No 142 (2015) 47.
178 Ibid 46.
179 Public Interest Advocacy Centre, *Submission 25*.
180 Legal Aid NSW, *Submission 101*.

> conditions. VALS believes any changes to the parole system must be rehabilitation focused and increase funding to programs like Reconnect that have a proven track record of reducing reoffending.[181]

9.107 VALS noted that since the changes to the Victorian parole regime in 2013, there had been a sharp increase in prisoners 'maxing out' their sentences to avoid parole. This increased the prison population and the numbers of recidivists, as people were leaving prison without supervision.[182]

9.108 The ALRC encourages states and territories to provide appropriate prison programs so that people released on court-ordered parole have been provided with rehabilitative services in prison that aim to address offending behaviours and provide practical assistance.

Parole conditions and revocation of parole

9.109 All jurisdictions require supervision as a standard condition of parole, whether explicitly or in practice.[183] For example, a person subject to standard parole conditions in NSW must:

- be of good behaviour;
- not commit any offence;
- adapt to normal lawful community life;
- submit to the supervision and guidance of the Community Corrections Officer (hereafter referred to as "the Officer");
- report to the Officer;
- be available for interview;
- reside at an approved address;
- permit the Officer to visit the offender's residential address at any time;
- not leave New South Wales without permission;
- not leave Australia without permission;
- enter employment or training arranged or agreed on by the Officer;
- notify the Officer of any intention to change his or her employment;
- not associate with any person or persons specified by the Officer;

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181 Victorian Aboriginal Legal Service, *Submission 39*.

182 Victorian Aboriginal Legal Service, *Submission 39*.

183 NSW Law Reform Commission, *Parole*, Report No 142 (2015) 195. See, eg, *Crimes (Sentence Administration Act) 2005* (ACT) s 137; *Parole Act* (NT) s 5; *Corrective Services Act 2006* (Qld) s 200; *Correctional Services Act 1982* (SA) s 68; *Sentence Administration Act 2003* (WA) s 29.

- not frequent or visit any place or district designated by the Officer; and
- not use prohibited drugs, obtain drugs unlawfully or abuse drugs lawfully obtained.[184]

9.110 Additional obligations can be imposed by the relevant parole authority. These may include, for example, electronic monitoring, abstinence from alcohol, psychological assessment and counselling (including drug and addiction counselling), that the offender not be involved in the control of an organisation, that the offender not associate with children, or that the offender not possess firearms.[185]

9.111 It is observed in the *Prison to Work* Report that complying with parole conditions can be a difficult task for many parolees, particularly when they are simultaneously searching and competing for employment opportunities.[186] This difficulty can be amplified for parolees in non-metropolitan communities who are relying on limited public transport options to meet their parole requirements, such as reporting for parole, visiting Centrelink, and attending interviews.[187]

9.112 The *Queensland Parole System Review: Final Report* found three key areas of concern in relation to management of parolees through the use of parole conditions:

- first, that parole conditions are sometimes imposed which are not specific to the offending patterns and risks associated with the offender, and which may even be contrary to the offender reengaging with their support networks;
- second, that the number of conditions imposed is sometimes excessive and 'sets people up to fail' by making offenders answerable to up to 50 conditions, and that excessive conditions result in offenders focusing their energies on meeting parole obligations rather than searching for a job, getting qualifications, or finding long-term accommodation; and
- finally, that the circumstances of Aboriginal and Torres Strait Islander parolees are not taken into account, for example, by the setting of parole conditions which prevent return to community, or which restrict access to family members and support networks because they also have criminal histories.[188]

9.113 Breach of standard conditions by parolees appears to be common. For example, about half of revocations in NSW during 2011–12 were reportedly for technical breach of parole conditions—where no reoffending or criminal conduct had taken place. This included failures to reside at an approved address, to report, and to abstain from alcohol.[189] As was noted in the *Prison to Work* Report:

> [P]risoners (and many service providers) commented on the difficulties involved with complying with as many as sixty parole conditions, particularly when it comes to

184 State Parole Authority (NSW), *Parole Conditions* <www.paroleauthority.nsw.gov.au>.
185 NSW Law Reform Commission, *Parole*, Report No 142 (2015) 211–5.
186 Council of Australian Governments, above n 8, 22.
187 Ibid 35, 42.
188 Queensland Corrective Services, above n 137, 181–2.
189 NSW Law Reform Commission, *Parole Question Paper 5: Breach and Revocation* (2013) 6.

> associating with other people with criminal records, which often includes family members. A significant number of prisoners said that they had chosen to serve out their full sentence, as they were convinced they would be breached as soon as they were paroled.[190]

9.114 Standard conditions of parole can be difficult for Aboriginal and Torres Strait Islander people to comply with, especially where conditions of release clash with cultural obligations and prevent reconnection with family and community.[191]

9.115 Factors that particularly impact on Aboriginal and Torres Strait Islander parolees have been identified to include: remoteness; substance abuse issues; mental health issues; poor literacy skills; lack of access to appropriate programs; difficulty in obtaining suitable long-term housing; difficulty in finding stable employment; and issues around family violence, particularly for women.[192]

9.116 Legal Aid NSW stressed the need for parole conditions to be culturally appropriate and designed to support rehabilitation and reintegration: 'parole conditions can be overly strict, rigid, and focused on monitoring. Most parole breaches are for a failure to reside as required by the parole conditions'.[193]

Treatment of time on parole upon revocation

9.117 Stakeholders drew attention to the operation of some parole revocation schemes that require time served on parole to be served again in prison if parole is revoked. The decision to return a parolee to prison usually sits with the parole authority, and not all breaches of parole will result in a return to prison. Where breaches of parole result in a return to prison, the length of the remaining prison term can be affected depending on the parole revocation scheme operating. There are two options:

- Option 1: Time spent on parole, beginning on the date of release on parole and ending on the date of breach (or date of revocation), counts towards the head sentence (as in NSW, Queensland, SA, and WA);[194] or
- Option 2: Time spent on parole, beginning on the date of release on parole and ending on the date of breach (or date of revocation), does not count towards the head sentence, and must be served again in prison upon the parolee's return (as in the ACT, the NT, Tasmania and Victoria).[195]

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190 Council of Australian Governments, above n 8, 42.

191 Queensland Corrective Services, above n 137, 181–2.

192 Ibid 122, 146–50, 221; Council of Australian Governments, above n 8, 29–30; NSW Law Reform Commission, *Parole*, Report No 142 (2015) 204.

193 Legal Aid NSW, *Submission 101*.

194 *Crimes (Administration of Sentences) Act 1999* (NSW) s 164(2); *Corrective Services Act 2006* (Qld) s 211(2); *Correctional Services Act 1982* (SA) s 74(1); *Sentence Administration Act 2003* (WA) s 71(1)(a), 71(2)(a).

195 *Crimes (Sentence Administration) Act 2005* (ACT) s 160(3); *Parole Act* (NT) s 14(1)(a); *Corrections Act 1997* (Tas) s 79(5)(a); *Corrections Act 1986* (Vic) ss 77B(2), 77C.

9.118 Option 2 has potential adverse consequences. It extends the time a person serves under sentence[196] and it operates as a disincentive for eligible people to apply for parole,[197] increasing the prison population and the number of people released from prison without supervision. Further, as noted by Legal Aid ACT, the provisions are also 'unnecessarily punitive. In effect, they impose an 'additional sentence' on offenders, for small contraventions that are often of a civil rather than criminal nature'.[198]

9.119 The Attorney-General and Minister for Justice of the NT reported that the rate of eligible people declining parole was growing, and that up to 47% of people who declined parole between January 2016 and February 2017 did so because conditions on parole were considered too onerous and parole was too hard.[199]

9.120 The NT sought to address this by amending the *Parole Act* (NT) in August 2017 so that an offender whose conduct breaches the conditions of their parole may be reimprisoned for a short term as a sanction. This term of imprisonment does not revoke parole, so that when completed, the person picks up their parole where they left off. If the breach is serious or repetitive however, the person still returns to prison and any parole period is not counted as time served (except for any previous term of imprisonment as a sanction).[200] CLANT noted that, while these amendments are likely to decrease the severity of the current regime, it still supported the recommendation to abolish the repayment of 'street time' in the NT.[201] Aboriginal Legal Service NSW/ACT supported amending parole in the ACT to recognise 'time served' under sentence in the community if parole is later revoked.[202]

9.121 Stakeholders expressed strong concerns over parole revocation schemes that discounted 'street time' on revocation, and the affect these may have on Aboriginal and Torres Strait Islander prisoners.[203]

9.122 VALS expressed strong support for this abolition of street time regimes, noting:

> Under the current system in Victoria parolees can have parole revoked for a minor breach, such as being minutes late to a curfew, and be back in prison serving the full remainder of their sentence. Recognising time spent on parole is a way of recognising and rewarding the positive actions of parolees towards rehabilitation and is in stark contrast to the current system in Victoria, which is a punitive approach that provides

196 To illustrate, a person handed down a head sentence of 35 months in the NT who had their parole revoked could spend upwards of 50 months under sentence even though no reoffending or criminal conduct had taken place (for example, the person may have breached a condition of their parole which requires them to abstain from alcohol).

197 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 May 2017 (Natasha Fyles) 1812.

198 Legal Aid ACT, *Submission 107*.

199 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 May 2017 (Natasha Fyles) 1812–4.

200 Ibid 1813–4; Parole Amendment Bill 2017 (NT) cl 13B(3).

201 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

202 Aboriginal Legal Service (NSW/ACT), *Submission 63*; also see NSW Bar Association, *Submission 88*.

203 See, eg, Law Society of Western Australia, *Submission 111*; Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Jesuit Social Services, *Submission 100*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Public Interest Advocacy Centre, *Submission 25*.

> little incentive for parolees to comply with parole conditions and severe punishment, such as a separate criminal conviction, for breaches of parole.[204]

9.123 Statutory provisions that stipulate that time spent on parole does not count as time served if the parolee returns to prison due to a breach can greatly increase a person's time under sentence. Accordingly it can act as a disincentive for Aboriginal and Torres Strait Islander people—who can find compliance with standard conditions difficult—to apply for parole. The ALRC recommends the immediate abolition of the relevant provisions, and the adoption of regimes that count time on parole as time served if parole is revoked.

Transitioning into the community

9.124 Incarceration leads to a disruption in a person's life, including loss of employment, and potentially a loss of housing, relationships and social supports. Release from prison without support to transition into the community can lead to a cycle of reoffending. This was highlighted by stakeholders to this Inquiry.

9.125 Legal Aid NSW drew a picture of release without support:

> Our solicitors report that clients have been released without accommodation, arrangements for transport, at night in a country town when there is no train until morning, without medications or prescriptions, and without any treatment for their substance addiction. It is not uncommon for inmates to be released from the Sydney Central Law Courts or the Downing Centre Court complex in their prison greens and with no accommodation arrangements, having received no treatment in custody for their substance abuse and/or mental health issues and at potential risk of reoffending within a short time. The sense of hopelessness that stems from having nowhere to go when released, no plan or purpose, can undermine any attempts to improve an offender's mental health while in prison.[205]

9.126 Legal Aid WA observed there to be a gap in the case management and transition into the community of prisoners with mental health and cognitive impairments.[206]

9.127 NSW Council of Social Service noted that finding 'safe, stable and affordable housing' was the greatest challenge faced by prisoners on release and community organisations working in the area of reintegration and transition.[207] ALSWA strongly supported the provision of resources for culturally competent throughcare services for Aboriginal and Torres Strait Islander prisoners.[208]

9.128 Women's Legal Service NSW submitted that return to community without support can be particularly harmful when women have made their first disclosure of family violence, sexual assault or child abuse in custody. It highlighted that support such as the mentoring program previously run by Women in Prison Advocacy Network

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204 Victorian Aboriginal Legal Service, *Submission 39*.
205 Legal Aid NSW, *Submission 101*.
206 Legal Aid WA, *Submission 33*.
207 NSW Council of Social Service, *Submission 45*.
208 Aboriginal Legal Service of Western Australia, *Submission 74*.

(now Women's Justice Network) have had positive impacts of supporting women post-release—the key being a decrease in reoffending.[209]

9.129 The National Association of Community Legal Centres (NACLC) noted the importance of culturally safe transition support services that are alert to issues about returning to community and any additional cultural, family and community factors. [210]

9.130 Homelessness following prison has been demonstrated to play a role in reoffending.[211] PIAC noted the need for more community-managed, supported transitional accommodation for ex-prisoners, more crisis accommodation, more affordable accommodation, and more social housing.[212]

The provision of throughcare

9.131 Throughcare aims to support the successful reintegration of offenders returning to the community at the end of their head sentence—ie, of prisoners released without parole. The *Prison to Work* Report described the concept of 'throughcare' in the following terms:

> Prisoner through care projects provide comprehensive case management for a prisoner in the lead up to their release from prison and throughout their transition to life outside. Projects aim to make sure prisoners receive the services they need for successful rehabilitation into the community ... Good through care 'starts in custody well before walking out of the prison gate', and provides hands on, intensive support, especially at the moment of release.[213]

9.132 This definition emphasises the importance of intervention, service coordination, and support at all critical points—not just release. Throughcare programs generally involve intensive one-to-one rehabilitation support; individual structured assessments; and individual case plans, created before release and followed through in the community. Throughcare models are more likely to be successful for Aboriginal and Torres Strait Islander people if they are culturally competent, strength based, and utilise Aboriginal and Torres Strait Islander controlled organisations and/or ex-prisoner organisations.[214] In relation to women, Dorinda Cox highlighted the need to reconceive the design of throughcare models for Aboriginal and Torres Strait Islander women in prison who have experienced family violence, stating:

> The current through care models offered to Aboriginal women are founded in mainstream psychology and are individualist in their approach. They are built on the premise that post release Aboriginal women are able to function based on the work done through cognitive skills courses. But sadly, the reality is that many return to

209 Women's Legal Service NSW, *Submission 83*.
210 National Association of Community Legal Centres, *Submission 94*.
211 Public Interest Advocacy Centre, *Submission 25*; Matthew Willis and Toni Makkai, 'Ex-Prisoners and Homelessness: Some Key Issues' (2008) 21(9) *Parity* 6; Eileen Baldry, *Ex-Prisoners, and Accommodation : What Bearing Do Different Forms of Housing Have on Social Reintegration?* (Australian Housing and Urban Research Institute, 2003) 6–7.
212 Public Interest Advocacy Centre, *Submission 25*.
213 Council of Australian Governments, above n 8, 62.
214 Ibid 23; Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 104.

> families and communities that are not able to support women recently released from prison, nor are the mainstream agencies able to case manage the social and cultural obligations that Aboriginal women have in family and community contexts. At systemic level we set Aboriginal women up to fail, we expect them to live separately from their support mechanisms and their cultural obligations – not engaging the families and communities in their journey back into society, thus creating a revolving door for Aboriginal women in the justice system.
>
> Mapping the journey into, through and post release from the justice system is critical in understanding the challenges, barriers and experiences to build a new system that enables diversionary away from the current high levels of Aboriginal women in prison and to be responsive to the transmission of intergenerational trauma of Aboriginal people and communities.[215]

9.133 Agencies responsible for throughcare include corrective services; other law and justice agencies (such as parole authorities); government departments; and service providers who focus on specific areas such as accommodation, employment, addiction, mental health and vocational skills. The diversity and number of organisations involved means that close interagency collaboration is a key factor in the success or failure of any throughcare initiative. Close collaboration can provide for continuity of service provision as the offender moves from incarceration to supported transition to life in the community.[216]

9.134 The ALRC recognises that throughcare is a growing area and that various forms currently exist. There are challenges in the provision of throughcare for Aboriginal and Torres Strait Islander peoples, including the difficulty of finding suitable housing;[217] and the limited availability of services in remote communities.[218] The following section provides a brief summary of throughcare programs highlighted by stakeholders.

9.135 YWCA Darwin provides a voluntary transitional program for female offenders; which provides 6 months pre and 12 months post-release support. The program provides women with case management support, learning opportunities and practical assistance to re-engage with the community,[219] including reconnection with children, family and community, accommodation and education and employment pathways and help with transport. It focuses on personal development, and parenting, life and social skills. Women are eligible whether they are on remand, sentenced or under a community corrections order. An independent evaluation of this program is currently underway.[220]

9.136 NATSILS noted the Western Australian, *Fairbridge Bindjareb* program provides workplace training to operate machinery. Those placed in the program are relocated to Karnet Prison Farm and travel to Fairbridge Village daily to participate. This includes training, qualifications, lifestyle and personal development training, the

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215 D Cox, *Submission 120*.
216 Council of Australian Governments, above n 8, 38.
217 Ibid 46.
218 Ibid 91.
219 YWCA Darwin, *Submission 93*.
220 Ibid.

inclusion of mentors and Elders, and the provision of temporary accommodation where required.[221]

9.137 The Community Restorative Centre (CRC) drew attention to their post-release programs in NSW, and recommended that best practice reintegration support should start prior to release and be community-based, long-term, and be staffed by skilled and dedicated workers able to incorporate system advocacy on behalf of their clients.[222]

9.138 ACT Corrective Services provides an Extended Through Care Program (ETCP) to all sentenced detainees as well as female detainees on remand.[223] Detainees are identified for the ETCP four months prior to release. A case manager works with each detainee to develop a release plan. Detainees are referred to partner service providers that provide support in particular areas of need. A lead service provider is identified for each detainee and is provided with brokerage funding to support the client during the extended throughcare process. Aboriginal and Torres Strait Islander detainees have a choice of providers depending on their individual needs and preferences, and may choose between Aboriginal and Torres Strait specific services or mainstream services in some areas. The ETCP case manager also assists detainees with basic needs upon release by providing a release pack and assistance with clothing, basic household items and food.[224]

9.139 The ALRC supports the Aboriginal and Torres Strait Islander led development and delivery of throughcare to Aboriginal and Torres Strait Islander prisoners exiting the prison system as a means of lowering the likelihood of repeat offending within the community.

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221 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

222 Community Restorative Centre, *Submission 61*. The CRC submission noted 'Although there are strong arguments to be made with regard to the need to increase accessibility to various forms of prison programs inside prisons "unless there is a strong linkage between these programs and the community, then any benefits obtained through participation are unlikely to be transferred out of the custodial environment"'.

223 A Griffiths, F Zmudski and S Bates, *Evaluation of ACT Extended Throughcare Pilot Program Final Report* (UNSW, 2017) 10.

224 Ibid 1–6.

10. Access to Justice

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Summary

10.1 'Access to justice' is an essential element of the rule of law. In essence, access to justice refers to the 'affirmative steps' necessary to 'give practical content to the law's guarantee of formal equality before the law'.[1] It refers to the need to ameliorate or remove barriers to access[2] and 'must be defined in terms of ensuring that legal and judicial outcomes are just and equitable'.[3] It is enshrined in art 14 of the International Covenant of Civil and Political Rights (ICCPR).

10.2 This chapter is focused on specific access to justice issues faced by Aboriginal and Torres Strait Islander people appearing as defendants before the criminal justice system. Communication barriers, alienation and disconnection from mainstream court processes, as well as mental illness and cognitive impairment all contribute to the complexity of Aboriginal and Torres Strait Islander legal needs and limit access to justice. In this chapter, the ALRC makes a suite of recommendations targeted at addressing these needs and improving Aboriginal and Torres Strait Islander peoples' experience with the courts. The ALRC recommends that state and territory governments:

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1 Justice Ronald Sackville, 'Access to Justice: Assumptions and Reality Checks' (Paper, Access to Justice Roundtable, Law and Justice Foundation of NSW, 10 July 2002).

2 Ibid.

3 United Nations Development Programme, *Access to Justice Practice Note*, (2004).

- work with relevant Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system where needed, and monitor and evaluate their use;
- establish specialist Aboriginal and Torres Strait Islander sentencing courts in areas and regions where needed that are designed, implemented and evaluated in partnership with Aboriginal and Torres Strait Islander organisations; and
- where a person is found unfit to stand trial, introduce special hearing processes that provide for a fixed term of detention and regular periodic reviews while the person remains in detention.

10.3 The need for adequate resourcing of legal assistance providers is also discussed in depth in this chapter. Access to legal representation and advice is one of the cornerstones of addressing the disproportionate rates of Aboriginal and Torres Strait Islander incarceration. In the absence of legal representation and advice, a defendant may be incarcerated for a range of reasons, including sentencing following an inappropriate guilty plea, a lack of awareness of available defences or pleas in mitigation.

Access to interpreters

Recommendation 10–1 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:

- establish interpreter services within the criminal justice system where needed; and
- monitor and evaluate their use.

10.4 There are many Aboriginal and Torres Strait Islander languages spoken throughout Australia, with some estimates placing the current number of Indigenous languages spoken nationwide at around 120.[4] In the Kimberley region alone it has been reported that there are up to 30 spoken languages, ranging from those that are commonly used to language groups that are spoken by a very small number of people.[5]

10.5 Aboriginal and Torres Strait Islander people, particularly in remote and regional areas, are often multilingual. For many people from isolated Aboriginal and Torres Strait Islander communities, English may be a second or third language.[6] The

4 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Australian Languages* (3 June 2015) <www.aiatsis.gov.au>.

5 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 36–7. (the Law Enforcement and Justice Services Inquiry)

6 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) [5.24]. See also North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, Submission No 31 to Senate Standing Committee on Finance and Public Administration,

Productivity Commission reported that approximately 41% of Aboriginal and Torres Strait Islander people who come from remote areas speak an Aboriginal or Torres Strait Islander language as their first language, compared to about 2% of those living in metropolitan areas.[7] Additionally, Aboriginal and Torres Strait Islander people, particularly in remote and regional areas, may speak 'Aboriginal English'. As identified by the Kimberley Community Legal Centre, 'Aboriginal English... transforms the meanings of many English words and mixes English words with these different meanings with words and concepts drawn from Aboriginal languages'.[8]

10.6 Some Aboriginal and Torres Strait Islander people may find it difficult—if not impossible—to understand legal proceedings without access to an interpreter. In 2016, the Productivity Commission reported that 38% of Aboriginal and Torres Strait Islander first language speakers experience difficulties when communicating with service providers.[9] A 2002 survey conducted by the Office of Evaluation and Audit reported that 63% of Aboriginal and Torres Strait Islander legal services (ATSILS) practitioners experienced difficulty in understanding what their clients were saying, with 13% of those experiencing difficulty 'very often/often'.[10] The issue of ATSILS practitioners experiencing difficulty in taking instructions can be pronounced in some areas. For instance, Wadeye, the largest Aboriginal and Torres Strait Islander community in the Northern Territory (NT), has been identified as a place where 'almost all' individuals seeking legal advice require an interpreter.[11]

10.7 The prevalence of hearing loss makes it equally difficult for many Aboriginal and Torres Strait Islander people to understand and participate in legal proceedings. While there are no formal studies that have looked into the extent of hearing loss among Aboriginal and Torres Strait Islander people engaged with the criminal justice system,[12] the over-representation of Aboriginal and Torres Strait Islander people with hearing loss in prisons has been identified.[13] In the NT, 90% of Aboriginal and Torres Strait Islander prisoners in the Darwin and Alice Springs correctional systems have hearing loss.[14]

Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (7 May 2014).

7 Productivity Commission, above n 6, [5.24].

8 Kimberley Community Legal Services, *Submission 80*.

9 Productivity Commission, above n 6, [5.23]–[5.24].

10 M Schwartz and C Cunneen, 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(10) *Indigenous Law Bulletin* 2.

11 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 36.

12 Senate Standing Committees on Community Affairs, Parliament of Australia, *Hear Us: Inquiry into Hearing Health in Australia* (2010) [8.74].

13 Australian Hearing, Submission No 58 to House of Representatives Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Inquiry into the Hearing Health and Wellbeing of Australia* (December 2016).

14 Dr D Howard and J Barney, Submission No 98 to House of Representatives Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Inquiry into the Hearing Health and Wellbeing of Australia* (February 2017).

10.8 The right to be able to understand legal proceedings is well-established in both domestic[15] and international law.[16]

10.9 The right to an interpreter is also well recognised. Domestically, the High Court held in *Ebatarinja v Deland* that 'if the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial.'[17] The right to a fair trial itself has been variously described as 'a central pillar of our criminal justice system',[18] and 'the central prescript of our criminal law'.[19] Internationally, art 14 of the ICCPR states that in criminal proceedings, everyone is entitled to 'the free assistance of an interpreter if he cannot understand or speak the language used in court'. In relation to Aboriginal and Torres Strait Islander people with hearing loss, art 13 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) requires:

> effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stage.[20]

10.10 The obligation to provide an interpreter extends beyond court proceedings and into other points in the criminal justice system. In all jurisdictions except the NT, when police are questioning an Aboriginal and/or Torres Strait Islander person, police have a legislative obligation to arrange for the services of an interpreter 'where a person's English is insufficient to enable them to understand the questioning or speak with reasonable fluency'.[21] In the NT, the police manual incorporates the *Anunga rules*, which include the requirement for an interpreter during questioning.[22]

10.11 While the entitlement to an interpreter is clear, practical challenges exist in procuring access to interpreters, both in relation to Aboriginal and Torres Strait Islander languages and where an Aboriginal and/or Torres Strait Islander person experiences hearing loss. The majority of deaf Aboriginal and Torres Strait Islander people do not use Auslan. In the NT alone, there are approximately 55 Aboriginal signing systems, with about eight most commonly used systems. Further, it can often be culturally impermissible to use these signing systems 'away from country', meaning

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15 On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her: *Ebatarinja v Deland* (1998) 194 CLR 444, [26].

16 In the determination of any criminal charge against him, everyone shall be entitled to ... be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

17 *Ebatarinja v Deland* (1998) 194 CLR 444, [26]–[27].

18 *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

19 *Jago v District Court (NSW)* (1989) 168 CLR 23, 57 (Deane J).

20 *UN Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (Entered into Force 3 May 2008) art 13.

21 L Bartels, 'Police Interviews with Vulnerable Suspects' (Research in Practice Report No 21, Australian Institute of Criminology, July 2011) 4.

22 Ibid.

deaf Indigenous people may be prevented from teaching community signs to outsiders.[23]

10.12 There was strong support for the ALRC's proposal in the Discussion Paper that state and territory governments work with relevant Aboriginal and Torres Strait Islander organisations to map the need for additional interpreter services. Stakeholders—including many Aboriginal and Torres Strait Islander organisations—also identified existing gaps. The NT Anti-Discrimination Commissioner and the North Australian Aboriginal Justice Agency emphasised the need to monitor and evaluate the use of interpreter services through data collection.[24] The ALRC incorporated this suggestion into rec 10–1.

10.13 With regard to Aboriginal and Torres Strait Islander languages, many jurisdictions with high proportions of remote Aboriginal and Torres Strait Islander populations[25] such as Queensland, South Australia (SA), and Western Australia (WA) currently operate without state-funded dedicated interpreter services for Aboriginal and Torres Strait Islander people. Stakeholders agreed with the ALRC's suggestion that the Aboriginal Interpreter Service (AIS) in the NT was a good model. The AIS is an interpreter service that provides assistance to Aboriginal and Torres Strait Islander defendants who face language barriers. The AIS has over 370 registered interpreters, with interpreter services for up to 100 languages and dialects. It offers a range of interpreting services to those involved in the criminal justice system, but also covers a broad range of other areas where interpreters may be required, for example, in health settings.[26] However, as highlighted by stakeholders, the gaps discussed below also apply to the NT (including the discussion around the need to fund additional interpreters).[27]

10.14 The failure to incorporate interpreters across all parts of the criminal justice system was also identified. A number of stakeholders stated, for example, that interpreters were not used during police interactions, when orders such as restraining orders or domestic violence orders were served, or when explaining bail conditions, bonds or warrants.[28] Stakeholders also emphasised the need to use interpreters in delivering prison programs.[29]

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23 Dr D Howard and J Barney, Submission No 98 to House of Representatives Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Inquiry into the Hearing Health and Wellbeing of Australia* (February 2017).

24 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; Northern Territory Anti-Discrimination Commission, *Submission 67*.

25 Judicial Council on Cultural Diversity, *Cultural Diversity Within the Judicial Context: Existing Court Resources* (2016) 8.

26 Northern Territory Government, *About the Aboriginal Interpreter Service* <https://nt.gov.au>.

27 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; Northern Territory Anti-Discrimination Commission, *Submission 67*.

28 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; Legal Aid WA, *Submission 33*.

29 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; Jesuit Social Services, *Submission 100*; Legal Aid WA, *Submission 33*.

10.15 Australian Lawyers for Human Rights and Josephine Cashman suggested that the use of translation technologies or translated materials could increase the availability of interpreters in particular parts of the criminal justice system. Josephine Cashman recommended funding the AIS to review all court documents (eg, bail, domestic violence orders) and translate them into plain English and the most commonly spoken Aboriginal and Torres Strait Islander languages.[30] Australian Lawyers for Human Rights canvassed the possibility of developing electronic translation services to communicate matters such as bail conditions.[31] The NT Government noted that it commissioned the AIS to produce an app which translates the police caution into 18 common Aboriginal languages. The app is available on all police iPads.[32]

10.16 Stakeholders identified that effective access to interpreters also requires additional funding for interpreter services.[33] While noting that progress towards funding to increase the availability of interpreter services appears to already be ongoing,[34] the ALRC draws the Commonwealth Government's attention to the Law Enforcement and Justice Services Inquiry's recommendation to fund interpreters.[35]

10.17 The need for interpreters who are trained to a professional standard and able to interpret in legal contexts was also raised.[36] The International Commission of Jurists Victoria suggested that interpreter standards should be based on the following criteria, derived from the Canadian decision in *R v Tran*—continuity, precision, impartiality, competence and contemporaneousness.[37]

10.18 Stakeholders emphasised the need to provide training and guidance for police, judicial officers, court staff, corrections and others working within the criminal justice system.[38] On the question of ensuring effective access to interpreters, stakeholders submitted that training should focus on identifying when an interpreter is needed and how to interact with Aboriginal and Torres Strait Islander people through an

30 J Cashman, *Submission 105*.

31 Australian Lawyers for Human Rights, *Submission 59*.

32 Northern Territory Government, *Submission 118*.

33 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Northern Territory Anti-Discrimination Commission, *Submission 67*; Legal Aid WA, *Submission 33*.

34 In June 2017, the Australian government announced $1.6 million in further funding for the Indigenous Interpreting Project run by National Accreditation Authority for Translators and Interpreters: Senator the Hon Nigel Scullion, 'Additional $1.6 Million for Indigenous Language Interpreters' (Media Release, 16 June 2017). The project seeks to increase both the number of available languages and the number of qualified interpreters.

35 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) rec 1.

36 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; J Cashman, *Submission 105*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; International Commission of Jurists Victoria, *Submission 54*; Legal Aid WA, *Submission 33*.

37 International Commission of Jurists Victoria, *Submission 54*.

38 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; Northern Territory Office of the Public Guardian, *Submission 72*.

interpreter.[39] Legal Aid NSW noted the existence in NSW of internal guidelines on matters such as conducting interviews in the presence of interpreters.[40]

10.19 More broadly, in order to ensure effective communication, the need for training covering cross cultural communication, cultural awareness and disability awareness was also canvassed. Cross cultural communication includes matters such as 'gratuitous concurrence' (which means agreeing to any and every proposition) and the possibility of being misunderstood because important body language cues are missed or not given their full significance by the listener.[41] Cultural awareness includes an understanding of kinship, the role of individuals within the community, the historical and ongoing impact of colonisation, intergenerational trauma, and ongoing contemporary experiences of Aboriginal and Torres Strait Islander peoples and communities.[42] Disability awareness refers to matters such as the prevalence of hearing loss and Foetal Alcohol Spectrum Disorder (FASD) among Aboriginal and Torres Strait Islander people. Legal Aid NSW noted, for example, that awareness of FASD requires an understanding that 'sufferers of FASD may confess or agree to any statement due to high suggestibility and eagerness to please'.[43]

Legal services and other supports

10.20 There are four discrete but complementary categories of legal services that provide targeted and culturally appropriate legal assistance to Aboriginal and Torres Strait Islander communities, including Legal Aid Commissions, community legal centres, ATSILs in each state and territory, and the Family Violence Prevention Legal Services (FVPLS). Commonwealth, state and territory governments provide the bulk of funding for the four legal assistance services. While the level and mix of funding sources varies between these different service providers, the past three years has seen much uncertainty around the funding of these services following the expiration of the original National Partnership Agreement on Legal Assistance Services—a 4 year agreement between the Commonwealth and the states and territories—and the re-negotiation of a new agreement for 2015–2020. The recent funding history of these legal services was articulated in the Law Enforcement and Justice Services Inquiry Report,[44] and also comprehensively described in the Access to Justice Inquiry Report.[45]

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39 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Judicial College of Victoria, *Submission 102*; Legal Aid NSW, *Submission 101*.

40 Legal Aid NSW, *Submission 101*.

41 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; Northern Territory Office of the Public Guardian, *Submission 72*. See also Productivity Commission, *Access to Justice Arrangements—Volume 2* (2014) 763; Diana Eades, 'Taking Evidence from Aboriginal Witnesses Speaking English—Some Sociolinguistic Considerations' [2013] (126) *Precedent* 44, 45–47. (Access to Justice Inquiry)

42 See, eg, Dr T Anthony, *Submission 115*; Legal Aid NSW, *Submission 101*.

43 See, eg, Legal Aid NSW, *Submission 101*.

44 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 115–16.

45 Productivity Commission, *Access to Justice Arrangements—Volume 2* (2014) chs 21–2.

10.21 In the Discussion Paper, the ALRC asked 'in what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?'

10.22 Stakeholders overwhelmingly submitted that increasing access to justice fundamentally requires sufficient, sustainable and ongoing funding. In addition to the need for funding for their core work, many innovative service offerings that could increase access are also reliant on additional funding and support.[46] As discussed above, the adequate resourcing of legal assistance services is a cornerstone of access to justice. The ALRC notes the Commonwealth Government's commitment of an additional $55.7 million over the next three years for community legal centres and ATSILS. However, as noted by stakeholders, ongoing funding beyond 2020 remains uncertain. The ALRC encourages Commonwealth, state and territory governments to implement recommendations from the Access to Justice and Law Enforcement and Justice Services Inquiries relating to funding legal assistance services.

10.23 More broadly, stakeholders submitted that barriers to access to justice can be reduced by collaborations between non-Indigenous legal assistance providers and Aboriginal and Torres Strait Islander organisations. The importance of collaboration was linked to addressing some Aboriginal and Torres Strait Islander peoples' reluctance to use mainstream services because of a history of racism and culturally insensitive service provision.[47]

10.24 On the broader role of legal services in addressing disproportionate rates of Aboriginal and Torres Strait Islander incarceration, stakeholders noted that access to civil or family law assistance may help reduce rates of incarceration.[48] The role of integrated, holistic wraparound services, and the value of co-locating legal services with other support services was also emphasised.[49]

10.25 The Legal Education and Assistance Program (LEAP) run by the Women's Legal Service, Wirringa Baiya Aboriginal Women's Legal Centre and Western Sydney Community Legal Centre is an example of the role access to civil and family law services can play. LEAP provides culturally appropriate legal services to Aboriginal and Torres Strait Islander women in three metropolitan Sydney correctional services centres. Advice is provided across a range of areas, including civil and family law. Women's Legal Services NSW stated:

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46 See, eg, Law Society of Western Australia, *Submission 111*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Community Legal Centres NSW and the Community Legal Centres NSW Aboriginal Advisory Group, *Submission 95*; National Association of Community Legal Centres, *Submission 94*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*; National Family Violence Prevention Legal Services, *Submission 77*.

47 Victoria Legal Aid, *Submission 56*.

48 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Women's Legal Service NSW, *Submission 83*; Aboriginal Legal Service of Western Australia, *Submission 74*; Victorian Aboriginal Legal Service, *Submission 39*.

49 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Women's Legal Service NSW, *Submission 83*; National Family Violence Prevention Legal Services, *Submission 77*; Victoria Legal Aid, *Submission 56*; Mental Health Commission of New South Wales, *Submission 20*.

> Access to legal services in prison is essential to help reduce the risk of prisoners re-offending and being re-incarcerated. This is because imprisonment often exacerbates civil law and family law issues which are interconnected with the criminal law issues. This can prevent the successful reintegration of people after they are released.... As a statewide service WLS NSW often continues to act for clients after their release. Maintaining this relationship has resulted in women calling us for early legal advice about their safety, arrangements for their children and assistance to avoid parole breaches, for example, by varying reporting conditions. This is particularly important for Aboriginal and Torres Strait Islander women who may have family and community obligations requiring them to move between locations to assist with looking after children and family members.[50]

10.26 National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted that co-locating disability and legal services is an important avenue to improve access to justice. Aboriginal and Torres Strait Islander clients with a cognitive impairment or mental illness could be provided with a range of supports by disability support workers embedded within ATSILS including communication assistance, referrals, family assistance and emotional support. Disability support workers are also in a position to assist lawyers to recognise a client's support needs, model good communication, and develop support packages that assist a client as they interact with police, prosecution services and the courts, 'in order to reduce the risk of reoffending'.[51]

10.27 Melbourne University ran a six month Disability Justice Program trial with NATSILS, Victorian Aboriginal Legal Service (VALS) and the Intellectual Disability Rights Service that embedded disability support workers within a community legal centre setting.[52] While the trial has ended, NATSILS and VALS have tried to continue the co-location model but face resourcing constraints.[53] Comments collected as part of the evaluation of the trial demonstrate the crucial role disability support workers can play. For example, in relation to a case where fitness to stand trial was raised with respect to an Aboriginal and Torres Strait Islander client, a lawyer told researchers:

> We had a report prepared whereby some of the psychologists said he was in the lowest one per cent of intellect in the population. The question then is how do you ensure he doesn't come back before the system? And there was a list of treatment options available and [the support person] was going to look at that and help the client engage with those options.[54]

10.28 The end result was that rather than face possible indefinite detention following a finding of unfitness to stand trial, a diversionary order was made 'which did not require that he enter a plea'.[55]

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50 Women's Legal Service NSW, *Submission 83*.
51 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
52 Bernadette McSherry et al, 'Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community' (Melbourne Social Equity Institute, University of Melbourne, 2017) 29.
53 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
54 Bernadette McSherry et al, above n 52, 34.
55 Bernadette McSherry et al, above n 52.

10.29 The ALRC encourages Commonwealth, state and territory governments to support initiatives such as LEAP and the disability support worker program above.

Specialist Aboriginal and Torres Strait Islander sentencing courts

Recommendation 10–2 Where needed, state and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts. These courts should incorporate individualised case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.

Recommendation 10–3 Relevant Aboriginal Torres Strait Islander organisations should play a central role in the design, implementation and evaluation of specialist Aboriginal and Torres Strait Islander sentencing courts.

10.30 Criminal offences are divided into two categories: summary and indictable offences. Summary offences are heard in the lower courts (Local or Magistrates courts), whereas indictable offences are generally heard in District/County or Supreme courts. Together, these courts are referred to as 'mainstream' courts, and hear the majority of criminal cases prosecuted in all Australian jurisdictions.

10.31 For Aboriginal and Torres Strait Islander peoples, mainstream courts can be inaccessible or alienating. Specialist Aboriginal and Torres Strait Islander sentencing courts were established against the background of 'the sense of powerlessness and alienation felt by many Aboriginal people caught up in the criminal justice system' revealed by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).[56] Such courts 'emphasise the importance of giving aboriginal people a meaningful say in the decisions that affect their everyday lives'.[57]

10.32 The Office of Crime Statistics and Research (SA) described the alienation and disconnection of Aboriginal and Torres Strait Islander defendants as follows:

> The overwhelming view that emerged... was that Aboriginal people mistrusted the justice system, including the courts. They felt that they had limited input into the judicial process generally and sentencing deliberations specifically. They also saw the courts as culturally alienating, isolating and unwelcoming to community and family groups. It was clear that Aboriginal people found aspects of the Australian legal system difficult to understand[58]

10.33 The Australasian Institute of Judicial Administration suggests that the process of some specialist Aboriginal and Torres Strait Islander sentencing courts promote concepts such as validation, respect and self-determination. The establishment of such

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56 Justice Jenny Blokland, 'Foreword' in Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders—Aboriginal Courts in Australia* (Federation Press, 2016) v.

57 Ibid.

58 Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010) 2.

courts 'demonstrate respect for Indigenous culture and the Elders who are its authority figures. Their processes, collaborative in nature, promote the resolution of underlying problems that have brought individual offenders to court'.[59]

10.34 A 2010 evaluation of Murri Courts in Queensland observed its 'considerable success' in improving relationships between Aboriginal and Torres Strait Islander communities and Queensland Magistrates Courts.[60] The study found an increase in appearance rates, an increase in opportunity for those appearing to be linked up with rehabilitative services,[61] and that the initiative was 'highly valued' among Aboriginal and Torres Strait Islander community stakeholders.[62]

10.35 The ALRC acknowledges that specialist courts are more resource intensive than mainstream courts.[63] Participants in specialist courts may have to appear multiple times over an extended period (due to case management and judicial monitoring);[64] and treatment and community resource providers are an obligatory component of many specialist courts.[65] However, for the reasons set out above, and because of the complex needs that many Aboriginal and Torres Strait Islander defendants face, the ALRC recommends that, where needed, state and territory governments establish (and continue to support) lower level specialist Aboriginal and Torres Strait Islander sentencing courts. Stakeholders expressed strong support for this recommendation.[66] Submissions reiterated the need to establish such courts in regional areas.[67] Kingsford Legal Centre submitted, for example, that 'the effectiveness of specialist courts ... is impeded by their... high level of concentration in metropolitan areas'.[68]

10.36 While such courts have historically existed in all jurisdictions except Tasmania, their establishment and operation 'has been neither easy nor inevitable'.[69] State and territory governments have taken the view that 'reducing recidivism was the main rationale for the use of specialist Aboriginal courts'.[70] For example, currently, there are no specialist Aboriginal sentencing courts in the NT or WA. WA saw the abolition of

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59 Australasian Institute of Judicial Administration, *Indigenous Issues and Indigenous Sentencing Courts* <www.aija.org.au>.

60 Anthony Morgan and Erin Louis, 'Evaluation of the Queensland Murri Court: Final Report' (Technical and Background Paper No 39, Australian Institute of Criminology, 2010) 150.

61 Ibid.

62 Ibid iii.

63 Richard Coverdale, Centre for Rural Regional Law and Justice Deakin University, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria* (2011) 37–8.

64 Lorana Bartels, 'Challenges in Mainstreaming Specialty Courts' (Trends and Issues in Crime and Criminal Justice No 383, Australian Institute of Criminology, October 2009) 4.

65 Ibid 1–2.

66 UNICEF Australia, *Submission 104*; Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Kimberley Community Legal Services, *Submission 80*; Legal Aid WA, *Submission 33*; Kingsford Legal Centre, *Submission 19*.

67 Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; Kingsford Legal Centre, *Submission 19*.

68 Kingsford Legal Centre, *Submission 19*.

69 Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders—Aboriginal Courts in Australia* (Federation Press, 2016) 1.

70 Ibid 71. In making this point, Bennett refers to: Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 443.

two specialist Aboriginal sentencing courts in 2015, both following evaluations of the courts that found that recidivism either did not significantly reduce, or because it in fact increased.[71] In January 2015, the Barndimalgu Court—a specialist Aboriginal family violence court—was abolished[72] following a 2014 evaluation that found that while rates of reoffending were lower, the difference was not statistically significant.[73] The Kalgoorlie Community Court was abolished following an evaluation that found that recidivism rates were higher than in mainstream courts. In Queensland, although they have since been re-established, Murri courts were abolished in 2012 on the basis that they did not reduce recidivism rates.[74]

10.37 This approach to evaluating specialist Aboriginal and Torres Strait Islander courts can be quite a blunt approach. Recidivism is only one of a number of aims for such courts, including increased attendance rates, and 'providing a better and more culturally relevant sentencing process'.[75] Most of the other aims have been achieved to some extent.[76]

Key elements

10.38 Specialist courts, aim to be inclusive and culturally appropriate. They seek to directly engage people who appear before them, to provide individualised case management, and to address underlying issues in culturally appropriate ways,[77] including by having Elders participate in the sentencing discussion.[78]

10.39 Such courts should:

- involve active participation by the defendant and the community;

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71 It is worth noting that a 2009 study of the Nowra Circle Court cautioned against the accuracy of an exclusively statistical or quantitative analysis of rates of recidivism. It advocated for a mix of qualitative and statistical data, to get a better understanding of recidivism on the basis that 'desistance from offending' is an uneven process: K Daly, G Proietti=Scifoni, G, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of the Elders and Reoffending* (School of Criminology and Criminal Justice, Griffith University, 2009) 108–110.

72 Amanda Banks, 'Special Domestic Violence Court Axed' *The West Australian* (Perth), 23 January 2015 <www.thewest.com.au>.

73 Department of the Attorney General, Policy and Aboriginal Services Directorate (WA), *Evaluation of the Metropolitan Family Violence Court and Evaluation of the Barndimalgu Court—Evaluation Report* (2014) 11.

74 Bennett, above n 69, 71.

75 Ibid.

76 Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (Crime and Justice Bulletin No 115, NSW Bureau of Crime Statistics and Research, 2008) 7.

77 See, eg, Marchetti, Elena, 'Indigenous Sentencing Courts' (Research Brief No 5, Indigenous Justice Clearinghouse, December 2009) 1; Elena Marchetti and Kathleen Daly, above n 70, 1; Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010) 3–4.

78 See, eg, Elena Marchetti and Janet Ransley, 'Applying the Critical Lens to Judicial Officers and Legal Practitioners Involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?' (2014) 37(1) *University of New South Wales Law Journal* 15; Nigel Stonns and Geraldine Mackenzie, 'Evaluating the Performance of Indigenous Sentencing Courts' (2009) 13(2) *Australian Indigenous Law Review* 90; Michael S King and Kate Auty, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30(2) *Alternative Law Journal* 69, 69.

- provide individualised case management for the defendant and wraparound services that address criminogenic factors;
- be culturally appropriate and competent; and
- have its design, implementation and evaluation led by relevant Aboriginal and Torres Strait Islander organisations.

Active participation

10.40 Specialist courts aim to increase active participation through the inclusion of key community members, such as Elders, and the use of plain English to ensure that processes and requirements imposed by the court are well understood by the person appearing.[79]

10.41 The Koori Courts in Victoria have a legislated purpose of 'ensuring greater participation of the Aboriginal community in the sentencing process'.[80] The legislative aims of NSW Circle Sentencing include increased participation of Aboriginal offenders, victims, and community members in sentencing processes, and to improve community confidence in sentencing processes.[81]

10.42 Such participation has also been found to correlate with high satisfaction levels by users, and greater engagement with the system.[82]

Individualised case management of the defendant and availability of wraparound services

10.43 As discussed above, a number of evaluations of specialist Aboriginal and Torres Strait Islander sentencing courts suggest that these courts may have limited short-term success in reducing reoffending. Bennett argues that these findings should be unsurprising, stating:

> As a number of the studies have observed, the Aboriginal Courts generally do not have integrated pre- or post-sentence programs to address issues frequently related to Aboriginal offending (anger management, mental health, alcohol and substance abuse).[83]

> 10.44 He also stated that 'the need for a broader approach combining the Aboriginal Court process with rehabilitative programs to address the major causes of offending has been recommended by a number of studies'.[84]

10.45 For example, the 2010 study into the Murri Court considered such an approach crucial to meaningfully address reoffending, stating:

> Realistically, for the Murri Court to have any impact on reoffending (while not moving away from the philosophy of involving Indigenous community

79 King and Auty, above n 78, 69–71.
80 *Magistrates' Court (Koori Court) Act 2002* (Vic) s 1.
81 *Criminal Procedure Regulation 2017* (NSW) reg 39.
82 Bennett, above n 69, 62–3.
83 Ibid 70.
84 Ibid 71.

> representatives in the sentencing process), strategies are required to enhance the capacity of rehabilitative programs to address those factors recognised as being associated with the disproportionate rate of offending among Indigenous offenders.[85]

10.46 The NSW Bar Association made similar points regarding circle sentencing in NSW:

> whilst circle sentencing gives Aboriginal and Torres Strait Islander people direct involvement in the sentencing of Indigenous offenders... such involvement by itself does not necessarily lead to a reduction in reoffending. Specialist Aboriginal and Torres Strait Islander courts must also have available to them specialist programs, a capacity for continued court monitoring after sentence and the resources to conduct drug testing.[86]

10.47 The NSW Bar Association submitted that the proposed District Court of NSW Koori Court (the Walama Court) was a good example of a court operating under a model incorporating individualised case management and wraparound services. Under this model, a program would be determined for the defendant during a 'sentencing conversation' that includes Elders and a Koori Court officer, among others. In addition to a cultural component, and the content of the program itself (which can incorporate referral to services), it is proposed that the Court would be empowered to engage in individualised case management through the incorporation of the following elements:

- release of the defendant on a suspended sentence to undertake the program;
- phases of low, medium and high supervision, including breath-testing, urinalysis and progress appearances in the Koori Court; and
- sanctions for breach of program requirements.[87]

10.48 While not a lower level court, the ALRC supports the establishment of the Walama Court.

10.49 The Neighbourhood Justice Centre (NJC) operating in Victoria also provides a useful model.[88] The NJC is a Victorian Magistrates' Court of first instance established in 2007, and is Australia's first community justice centre.[89] The NJC is co-located with treatment and support services and seeks to resolve disputes by 'addressing the underlying causes of harmful behaviour and tackling social disadvantage'.[90]

10.50 Bennett sounded a note of caution around the operation of specialist Aboriginal and Torres Strait Islander sentencing courts, outlining that the incorporation of pre-sentence programs requires an active judicial role in ongoing monitoring to ensure compliance with diversion programs. He cautioned that the adoption of a problem-

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85 Morgan and Louis, above n 60, 146.

86 NSW Bar Association, *Submission 88*. Other stakeholders also expressed strong support for the need for individualised case management and the greater availability of support services: Change the Record Coalition, *Submission 84*; Legal Aid WA, *Submission 33*; Kingsford Legal Centre, *Submission 19*.

87 NSW Bar Association, *Submission 88*.

88 Aboriginal Legal Service of Western Australia, *Submission 74*.

89 The NJC is provided for and operates under the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic).

90 Neighbourhood Justice Centre, *About Us* <www.neighbourhoodjustice.vic.gov.au>.

solving model into specialist Aboriginal and Torres Strait Islander courts requires a careful balance between this additional monitoring role and ensuring that Elders and the community remain central to the process and that it continues to be an Aboriginal and Torres Strait Islander process. The ALRC considers that these issues demonstrate the importance of ensuring that the design of such courts are led by Aboriginal and Torres Strait Islander organisations.

Culturally appropriate and competent

10.51 A 2013 study concluded that a culturally appropriate court process was 'critical when providing a justice response for Aboriginal and Torres Strait Islander people'.[91] The Kimberley Community Legal Centre provided some useful guidance in determining what is culturally appropriate, cautioning against making assumptions about 'what is culturally appropriate or likely to be wanted or supported' by Aboriginal and Torres Strait Islander people in an area.[92] It submitted that 'models such as specialist courts... have lower prospects of being successful unless they are worked through and developed for the particular, local context'.[93] This requires that the design, implementation and evaluation of these courts be led by relevant Aboriginal and Torres Strait organisations.

10.52 When considering how courts might be appropriately evaluated, Eleni Marchetti emphasised the importance of ensuring that Aboriginal and Torres Strait Islander values and knowledge informs evaluations of specialist Aboriginal and Torres Strait Islander sentencing courts.[94] The use of 'positivist methods of evaluation' mean that existing evaluations of specialist Aboriginal and Torres Strait Islander sentencing courts 'often focus on measures and criteria that are difficult to apply within a non-mainstream setting and may not reflect Indigenous cultural values and aspirations'.[95]

Other specialist courts, lists and diversion programs

10.53 There are other specialist courts that address criminogenic factors, such as drug addiction and mental health issues. These courts are available to Aboriginal and Torres Strait Islander peoples, but are not specific to them. Diversion programs—which divert a defendant or offender out of the criminal justice stream in order to address such factors prior to trial or sentencing—can also assist some Aboriginal and Torres Strait Islander people who come before the courts. Some examples of these courts and diversion programs that were drawn to the ALRC's attention during this Inquiry are described briefly below.

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91 Cultural and Indigenous Research Centre Australia, *Evaluation of Indigenous Justice Programs Project A: Aboriginal Sentencing Courts and Conferences, Attorney General's Department Final Report* (2013) 87.

92 Kimberley Community Legal Services, *Submission 80*.

93 Ibid.

94 Elena Marchetti, 'Nothing Works? A Meta-Review of Indigenous Sentencing Court Evaluations' (2017) 28(3) *Current Issues in Criminal Justice* 257, 257.

95 Ibid citing M Walter, 'The Politics of the Data: How the Australian Statistical Indigene is Constructed'(2010) 3(2) *International Journal of Critical Indigenous Studies*, 45–56.

Specialist courts

The Drug Court of NSW

10.54 The Drug Court of NSW is a specialist court that takes referrals from the NSW Local Court or the District Court of NSW. The Drug Court sits in Parramatta, Toronto and Sydney[96] and aims to address drug dependencies related to criminal offending.[97] Issues of drug dependency are addressed through intensive case management between court teams, community agencies, and the judge. It is also achieved through participant sanctions for non-compliance with program conditions—including the sanction of imprisonment, which is used as a last resort. Participants are regularly tested for drugs.[98] The registrar and Drug Court team considers the number of Aboriginal and Torres Strait Islander applicants in determining the number of places available.[99]

10.55 In 2008, a NSW Bureau of Crime Statistics and Research evaluation of the Drug Court showed it to be more cost effective than prison in reducing the rate of reoffending among offenders whose crime was drug-related.[100] This included a 38% decrease in recidivism for a drug offence during the follow-up period, and a 30% decrease in recidivism for a violent offence.[101]

Victorian Neighbourhood Justice Centre

10.56 The NJC employs Koori Justice Workers to support Aboriginal and Torres Strait Islander clients and provide advice to the Court in relation to culturally specific programs and services.[102] The NJC also holds a monthly Aboriginal Hearing Day during which all cases involving Aboriginal defendants are heard, in order 'to provide better support for Aboriginal clients and to increase court attendance'.[103]

10.57 The NJC was evaluated in 2010. It was found that recidivism rates for participants reduced by 7%. The opening of the NJC also aligned with a reduction in the crime rate in the City of Yarra by 12% in the first two years.[104] A later 2015 AIC evaluation of the NJC revealed that

> [T]he City of Yarra has the highest crime rate of any Victorian Local Government Area (LGA) other than the City of Melbourne, with an aggregate crime rate in 2007–08 of around 18,000 per 100,000 population... In the period after the NJC was established, crime rates in Yarra have fallen, with a 31 percent decline in total crime, largely as the result of a 40 percent decline in property crime. Crime rates have

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96 The NSW Drug Court is established by and operates under the *Drug Court Act 1998* (NSW). Like many other specialist courts, the Drug Court requires a guilty plea before participants are accepted, see *Drug Court Act 1998* (NSW) s 5(1)(c).

97 Don Weatherburn et al, 'The NSW Drug Court: A Re-Evaluation of Its Effectiveness' (Crime and Justice Bulletin No 121, NSW Bureau of Crime Statistics and Research, September 2008) 1.

98 Ibid 3.

99 Ibid 16.

100 Ibid 2.

101 Ibid 9.

102 The NJC currently employs two Koori Justice Workers.

103 Neighbourhood Justice Centre, *Aboriginal and Torres Strait Islander Support Services* <www.neighbourhoodjustice.vic.gov.au>.

104 Department of Justice (Vic), *Evaluating the Neighbourhood Justice Centre in Yarra 2007–2009* (2010) ii.

> generally fallen in Victoria over the same period... but the decline in Yarra is greater than that observed in comparable inner urban LGAs... or LGAs with high levels of social disadvantage[105]

Court diversion programs and specialist lists

10.58 Court diversion programs allows judicial officers to adjourn matters while defendants engage in support services. These diversion programs can provide services for people accused or convicted in the summary jurisdiction who require assistance with addiction or mental health issues.

10.59 Diversion programs include, but are not limited to:

- the **Australian Capital Territory (ACT) Court Alcohol and Drug Assessment Service**, which incorporates drug and alcohol counselling during court proceedings or as part of sentencing orders.[106]
- the **Statewide Community and Court Liaison Service** (SCCLS) (NSW) is a service of the Justice Health & Forensic Mental Health Network. This service provides court-based identification and assessment of defendants with mental health issues and cognitive impairments, resulting in a pathway for diversion under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).
- the **Cognitive Impairment Diversion Program** (NSW), which was launched as a pilot in September 2017 in the Gosford and Penrith Local Courts. The program involves expanding the SCCLS to include court-based identification, assessment and diversion of defendants with cognitive impairment, and linking them with the National Disability Insurance Scheme.
- **Magistrates Early Referral into Treatment program** (NSW and Queensland), which allows people whose offending is related to their substance abuse issues to voluntarily enter into rehabilitation as part of the bail process;[107]
- the **NT Mental Health List**, which was established as a pilot in 2016 in Darwin. The list diverts all defendants with possible mental health issues or cognitive impairments to this list. The Court relies on a 'therapeutic framework that allows for the management and treatment of such offenders'.[108]

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105 Stuart Ross, 'Evaluating Neighbourhood Justice: Measuring and Attributing Outcomes for a Community Justice Program (2015)' (Trends and Issues in Crime and Criminal Justice No 499, Australian Institute of Criminology, November 2015).

106 Department of Health (ACT), *Diversion Services—Court Alcohol and Drug Assessment Service* <http://www.health.act.gov.au/our-services/alcohol-and-other-drugs/diversion-services>.

107 Department of Justice (NSW), *Magistrates Early Referral Into Treatment* <http://www.merit.justice.nsw.gov.au/>.

108 Northern Territory Government, *Submission 118*.

- the **Victorian Court Integrated Services Program**,[109] which includes Aboriginal and Torres Strait Islander controlled and mainstream organisations;[110] and
- the **Victorian Assessment and Referral Court** list, which provides 'case management to participants including psychological assessment, referral to welfare, health, mental health, disability, housing services and drug and alcohol treatment'.[111]

Fitness to stand trial regimes

10.60 High rates of cognitive impairment and mental illness have been observed in the Australian general prison population. For example, in NSW, people with a mental illness or cognitive impairment were found to be 3 to 9 times more likely to be in prison than the general population.[112] This over-representation is particularly pronounced for Aboriginal and Torres Strait Islander prisoners with research finding that Aboriginal and Torres Strait Islander people with mental illness and cognitive impairment are 'significantly more likely to have experienced earlier and more frequent contact with the criminal justice system'.[113]

10.61 Where cognitive impairment or mental illness is acute, the issue of a person's fitness to stand trial may be raised.[114] If found unfit to stand trial, in jurisdictions without fixed terms, a person may face a particularly stark access to justice issue—the prospect of indefinite detention or detention that far exceeds the maximum sentence for the offence.[115] As observed in the Indefinite Detention Inquiry:

> justice diversion provisions [without limiting terms] have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being

109 Magistrates' Court of Victoria, *Court Integrated Services Program (CISP)* <www.magistratescourt.vic.gov.au>.

110 Magistrates' Court of Victoria, *Court Integrated Services Program (CISP) Koori Brochure* (2008).

111 Magistrates' Court of Victoria, *Assessment and Referral Court List* <www.magistratescourt.vic.gov.au>.

112 Ruth McCausland et al, 'People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-Benefit Analysis of Early Support and Diversion' (UNSW, PwC, August 2013) 3.

113 Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 10.

114 More broadly, research indicates that 'across Australia, thousands of people with mental and cognitive disability are being 'managed' by criminal justice systems rather than being supported in the community, a disproportionate number of them Indigenous': Ibid 12. Breaking this cycle requires a culturally sensitive, trauma informed, therapeutic approach that takes into account of and address this criminogenic factor at all points of the criminal justice system discussed in this Report.

115 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Northern Territory Anti-Discrimination Commission, *Submission 67*; Legal Aid WA, *Submission 33*. See also, Jesuit Social Services, Submission No 53 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016); National Aboriginal and Torres Strait Islander Legal Services, Submission No 34 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016).

> convicted of a crime, and for periods that may significantly exceed the maximum period of custodial sentence for the offence.[116]

10.62 Indefinite detention regimes disproportionately affect Aboriginal and Torres Strait Islander peoples. A 2012 study found, for instance, that all nine individuals who were indefinitely detained in WA, following a finding of unfitness to stand trial, were Aboriginal.[117] Evidence submitted to the Indefinite Detention Inquiry indicated that of the 100 people detained across Australia without conviction under forensic mental health provisions, at least 50 were Aboriginal and Torres Strait Islander peoples.[118]

10.63 The Australian Human Rights Commission (AHRC) reviewed the status of three Aboriginal men found unfit to be tried and held under indefinite detention in the NT,[119] and found that:

- the men had been held in a maximum security prison in Alice Springs because no suitable places for forensic patients existed;[120]
- one of the men had been in detention for six years, despite the maximum penalty of the crime he was accused of committing being 12 months imprisonment under regular criminal processes;
- another of the men had been in detention for over four years, despite a maximum criminal penalty of 12 months imprisonment; and
- the third man had also been in detention for over four years, and remained so at the time of the AHRC's reporting date.[121]

Special hearings

Recommendation 10–4 Where not already in place, state and territory governments should introduce special hearing processes to make qualified determinations regarding guilt after a person is found unfit to stand trial.

10.64 The question of fitness to stand trial is determined by reference to whether the accused person is 'of sufficient intellect to comprehend the course of proceedings in the trial so as to make a proper defence, to know that he may challenge any of you to

116 Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 6.

117 Mindy Sotiri, Patrick McGee and Eileen Baldry, 'No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment' (Report for the National Justice Chief Executive Officers Working Group) 33.

118 Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 14.

119 Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia [2014] AusHRC 80: Report into Arbitrary Detention, Inhumane Conditions of Detention and the Right of People with Disabilities to Live in the Community with Choices Equal to Others* (2014).

120 A forensic patient facility was constructed in March 2013.

121 Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 35–6.

whom he may object and to comprehend the details of the evidence'.[122] Circumstances that may give rise to a finding of unfitness to plead include an inability to understand the charge, the proceedings, the substantial effect of evidence led against the accused, or an inability to instruct counsel.[123]

10.65 In all jurisdictions except WA and Queensland, if a person is found unfit to stand trial, a qualified determination relating to guilt is made following a 'special hearing', during which the prosecution case is tested. Other than under Commonwealth law, such proceedings must be conducted in a manner as near as possible to a criminal trial,[124] where the criminal standard of proof must be met—beyond reasonable doubt. In most jurisdictions, if a person is found unfit to stand trial, a qualified determination is made about whether that person committed the offence.[125]

10.66 Stakeholders submitted that a requirement to conduct a special hearing is necessary in order to test the evidence against the defendant.[126] NATSILS, in particular, submitted that such a process should adopt the Victorian model where proceedings are conducted in a manner as close to a criminal trial as possible. The model requires that where findings are made that an accused 'committed the offence charged', such finding must be proven to the criminal standard of proof, [127] and be subject to appeal.[128]

10.67 In Queensland, the Mental Health Court—constituted by judges of the Supreme Court of Queensland and advised by two psychiatrists—is required to determine whether a person charged with a serious offence is unfit for trial.[129] Where the Court finds that the defendant is permanently unfit to stand trial, proceedings must be discontinued.[130] The Mental Health Court is then required to make a custodial or non-custodial order relating to that person. Where the court considers it necessary to do so 'because of the person's mental condition, to protect the safety of the community, *including* from the risk of serious harm to other persons or property', the court will make a custodial order regardless of whether the person was guilty of the offence

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122 *R v Pritchard* (1836) 173 ER 135, 304.

123 *R v Presser* [1958] VR 45, 48.

124 *Crimes Act 1900* (ACT) s 316(1); *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21(1); *Criminal Code Act 1983* (NT) s 43W(1); *Criminal Justice (Mental Impairment) Act 1996* (Tas) s 16(1); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 16(1).

125 *Crimes Act 1900* (ACT) s 316(1); *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21(1); *Criminal Code Act 1983* (NT) s 43W(1); *Criminal Justice (Mental Impairment) Act 1996* (Tas) s 16(1); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 16(1).

126 Law Society of Western Australia, *Submission 111*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Aboriginal Legal Service of Western Australia, *Submission 74*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*.

127 *Crimes Act 1900* (ACT) s 316(9)(c); *Crimes Act 1914* (Cth) s 20B(3); *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19(2); *Criminal Code Act 1983* (NT) s 43V(1); *Criminal Law Consolidation Act 1935* (SA) ss 269M(B)(1), 269N(A)(1); *Criminal Justice (Mental Impairment) Act 1996* (Tas) s 15(2); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) ss 3, 15.

128 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

129 *Mental Health Act 2016* (Qld) s 21(1).

130 Ibid s 122.

charged.[131] Such a test is broader than the criteria that applies when making a treatment order under the *Mental Health Act 2016* (Qld)—where a person may be detained for treatment only if they pose a risk of imminent serious harm to themselves or others.[132]

10.68 In WA, a judge must be satisfied, by reference to a number of factors including the strength of the available evidence, that it would be appropriate to make a custodial order.[133] A judge is not required to follow any particular process to satisfy him or herself of the appropriateness of the order. For instance, in *Western Australia v Tax*, Martin CJ released the defendant unconditionally where the court gave weight to representations by counsel, including in relation to alibi evidence in favour of the defendant and concessions by the State relating to the identification of the defendant.[134] In another case, McKechnie J made a custodial order on the basis that 'the prosecution case was "objectively strong" because the High Court had recently ordered a retrial' instead of quashing the case.[135]

Fixed term of detention

Recommendation 10–5 Where not already in place, state and territory governments should implement Recommendation 7–2 of the ALRC Report *Equality, Capacity and Disability in Commonwealth Laws* to provide for a fixed term when a person is found unfit to stand trial and ensure regular periodic review while that person is in detention.

10.69 A person charged with a serious indictable offence found unfit to stand trial may be ordered to spend time in forensic custody under supervision. Custodial supervision regimes[136] fall into four broad categories:[137]

- **detention without a nominated end date:** the court makes a custodial supervision order of indefinite length. The term of detention rests in the hands of administrative decision-makers who conduct reviews.[138]

131 Ibid s 134.
132 Ibid s 18(3).
133 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(6)(a), 19(5)(a).
134 *Western Australia v Tax* [2010] WASC 208 (18 June 2010) [3].
135 *Western Australia v Stubley [No 2]* [2011] WASC 292 (24 October 2011). Both this case and the case cited in n 134 were referred to in Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40 *Melbourne University Law Review* 816, 846.
136 Supervision in custody is described in a number of ways, including 'forensic orders' and 'supervision orders'. In this report, these are generically referred to as custodial supervision orders.
137 Piers Gooding et al, above n 135, 851.
138 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(5), 19(4), 35; *Mental Health Act 2016* (Qld) ss 134, 137–8. Tasmania also operates under an indefinite detention model. However, the decision about whether to discharge a person from detention rests with the Supreme Court of Tasmania. An application for discharge can be made every two years: *Criminal Justice (Mental Impairment) Act 1996* (Tas) ss 24, 26. It is a hybrid of the nominal term and indefinite detention models.

- **custody for a nominal term:** the court fixes a term for custodial supervision, [139] at the end of which, the court initiates, under its own motion, a 'major review'. The court must release the person, unless satisfied that the person would be a serious risk to themselves or members of the public.[140] This approach has been described as being broadly consistent with preventative detention regimes applicable to serious sex offenders.[141]
- **custody for a limiting term**: the court orders that the person be detained for a period that is the best estimate of the sentence the court would have imposed following a full criminal trial.[142] However, upon an application, the court may extend the term of detention if the person would present an unacceptable risk of serious harm to others.[143]
- **custody for a fixed term**: detention can only be for a specific period.[144] Under Commonwealth law, this term cannot exceed the maximum term for the offence. In the ACT and SA, the maximum term is the term that the court would have imposed following a 'normal' criminal trial. The person cannot be detained for longer than this period.[145]

10.70 Regimes that can lead to indefinite detention[146] raise two key access to justice issues: the potential for detention that far exceeds the sentence that may have been imposed for the offence charged; and the concomitant possibility that a person chooses to plead guilty and end up in the criminal justice system instead of being treated as part of the mental health system or assisted through guardianship regimes.

10.71 Indefinite detention regimes enforced after a finding of unfitness have received international criticism. The United Nations Committee on the Rights of Persons with Disabilities criticised the operation of WA's unfitness to stand trial regime, which

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139 *Criminal Code Act 1983* (NT) ss 43ZC, 43ZG; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) ss 27–8. In Victoria, the nominal term is 25 years for murder or treason, the maximum term for any serious offence other than murder or threats to kill, half the maximum term for other offences with a statutory maximum term. Where no statutory maximum term is prescribed, the judge determines the length of custodial supervision. In the NT, the nominal term is set by reference to the sentence the person would have received if found guilty as part of the 'normal' criminal trial process.

140 *Criminal Code Act 1983* (NT) s 43ZG(5); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 35(3).

141 Piers Gooding et al, above n 135, 853.

142 *Criminal Law Consolidation Act 1935* (SA) s 269O(2), Note 1. NSW operates under a hybrid model. A person found unfit to stand trial may be detained for what is referred to as a 'limiting term'

143 *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1 cl 2. This differs from the nominal term model as the person ceases to be a forensic patient at the end of the limiting term *unless* an application is made seeking an extension.

144 *Mental Health Act 2015* (ACT) s 183; *Crimes Act 1914* (Cth) s 20BC(2); *Criminal Law Consolidation Act 1935* (SA) ss 269(2)–(3). Although the ACT and SA refer to these terms as 'limiting terms', these are referred to as 'fixed terms' for the purposes of this Inquiry.

145 *Mental Health Act 2015* (ACT) s 183; *Criminal Law Consolidation Act 1935* (SA) s 269O(2).

146 Of the four categories described above, all but the fixed term regimes can lead to a person found unfit to stand trial being detained indefinitely.

resulted in the detention of an Aboriginal and Torres Strait Islander man for nearly a decade.[147]

10.72 In order to avoid indefinite detention, a person may rely on legal advice to plead guilty.[148] For example, NATSILS provided the following case study in its submission to the Indefinite Detention Inquiry:

> 'Mary' is a CAALAS client who suffers from a cognitive disability. Mary is from Central Australia, but was found unfit to plead in WA and detained there indefinitely. By agreement between the WA and NT Governments, Mary was released from detention in WA and returned to Central Australia where public housing accommodation had been arranged. Unfortunately Mary was taken back into police custody following the commission of further offences. CAALAS was able to take instructions from Mary in relation to these offences, and the matter resolved to a plea with Mary receiving a term of imprisonment. In CAALAS' observation, being detained indefinitely due to a question of fitness to plead was far more distressing and traumatic for Mary than receiving a finite term of imprisonment. Whilst indefinitely detained, Mary was extremely frustrated and upset and would frequently ask her lawyer when she was getting out, and when she was going home. CAALAS observed the lack of certainty to be utterly tortuous for her.[149]

10.73 Where people plead guilty in order to avoid indefinite detention they enter the criminal justice system instead of the forensic mental health system and may not receive necessary treatment or care. This could affect the likelihood of recidivism and runs counter to legal principles that underpin fair trials and access to justice.[150]

10.74 The ALRC's recommendations contained in the ALRC's Report *Equality, Capacity and Disability in Commonwealth Laws*, relating to detention following a finding of unfitness to stand trial were supported by the Senate Community Affairs References Committee in 2016.[151] The Law Reform Commission of WA also recommended that custody orders should not be indefinite.[152] Inquiries by the NSW Law Reform Commission (NSWLRC) and Victorian Law Reform Commission (VLRC) recommended the adoption of limiting terms and indefinite detention regime with rolling five year reviews respectively on the basis that the possibility of detention

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147 United Nations Committee on the Rights of Persons with Disabilities, *Views Adopted by the Committee under Article 5 of the Optional Protocol, Concerning Communication No. 7/2012*, UN Doc CRPD/C/16/D/7/2012 (10 October 2016).

148 Bernadette McSherry et al, above n 52, 18; First Peoples Disability Justice Consortium, Submission No 39 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016). See also, Queensland Advocacy Incorporated, *Submission 60*.

149 National Aboriginal and Torres Strait Islander Legal Services, Submission No 34 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016).

150 NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 31–5.

151 Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) xiii.

152 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 243.

beyond the end of the nominated term is sometimes necessary for community protection.[153]

10.75 While many stakeholders expressed support for 'limiting terms',[154] a number noted that the time spent in detention as part of the criminal justice process must be *finite*.[155] The Mental Health Commission of NSW submitted, for example, that it 'remains concerned about the indefinite detention of individuals found unfit to be tried, including by way of extension of court order limiting terms'.[156]

10.76 NATSILS submitted to the Indefinite Detention Inquiry that the absence of finite orders leads to

> the paradoxical result... that there are rightfully limits on the time spent in custody for those convicted of crimes, including those who are mentally impaired, whilst the current legislation allows for indefinite detention, of those mentally impaired accused who are not convicted in law of any crime.[157]

10.77 NATSILS provided the following case study to illustrate the risk of indefinite detention once a custodial supervision order is made—even where that order is for a term reflective of the sentence that would have been given if ordinarily convicted of the offence:

> 'Ronald' is an Aboriginal man who required criminal law assistance from CAALAS. Ronald was subject to an adult guardianship order. Despite being subject to an adult guardianship order, Ronald was not receiving enough support or resources from the Department of Health and this prompted his guardian to raise the issue of fitness to plead at Ronald's court hearing. Ronald was assessed as unfit to plead. As a result, Ronald was in custody at the Alice Springs Correctional Centre from August 2007 – July 2013, and at the time of writing remains in the Secure Care facility. Ronald's period of detention was initially set at a nominal term of 12 months, however when

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153 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) rec 84; NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) rec 11.1. The VLRC recommended indefinite detention with rolling five year reviews conducted by the court. NSWLRC recommended that the court have the power, upon application by the Minister, to make an extension order for a period of five years at the end of a limiting term (or period of extension).

154 North Australian Aboriginal Justice Agency, *Submission 113*; Law Society of Western Australia, *Submission 111*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*; Northern Territory Anti-Discrimination Commission, *Submission 67*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Mental Health Commission of New South Wales, *Submission 20*; Kingsford Legal Centre, *Submission 19*.

155 Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Aboriginal Legal Service of Western Australia, *Submission 74*; Northern Territory Anti-Discrimination Commission, *Submission 67*; International Commission of Jurists Victoria, *Submission 54*; Legal Aid WA, *Submission 33*; Mental Health Commission of New South Wales, *Submission 20*.

156 Mental Health Commission of New South Wales, *Submission 20*.

157 National Aboriginal and Torres Strait Islander Legal Services, Submission No 34 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016).

> this nominal term has been reviewed, Ronald's period of detention has been further extended due to a lack of community supports and alternatives. CAALAS estimates that if Ronald had been found guilty of the criminal charges, he would have received a sentence of imprisonment of approximately 4 months. In contrast, he has now been in custody for almost 9 years and it is unclear when he will be released.[158]

10.78 The Law Council of Australia, in its submission to this Inquiry noted that 'defendants, once found to lack legal capacity and consigned to a "mental health facility"... have little prospect of demonstrating a change in capacity and effectively remain in custody for an indeterminate period'.[159]

10.79 The criminal justice system is not the appropriate pathway for the ongoing management of people with mental illness or cognitive impairment. As stated in the ALRC's *Equality Capacity and Disability in Commonwealth Laws* Report: 'if [the person is] a threat to themselves or the public at [the time their set period of detention ends], they should be the responsibility of mental health authorities, not the criminal justice system'.[160] The ALRC notes that states and territories also have in place disability or guardianship legislation that permits detention of persons with a cognitive impairment who present a risk to themselves or others.[161]

Regular periodic reviews

10.80 As a matter of broad principle, the ALRC considers that, within the constraints of the fixed term model discussed above, it is important to facilitate the recovery and gradual reintegration of persons held under custodial supervision orders, and that the term of a custodial supervision order should be 'the maximum period that forensic patients spend in prison'.[162] The provision of trauma-informed, culturally appropriate services to assist a person while in custody is a crucial step in this process. The ALRC considers that the provision of such services should be supplemented by a regular periodic review while the person is in detention. The purpose of such a review would be to determine both whether the person should be released prior to the expiry of the fixed term, and to monitor and evaluate the services that are made available while the person is under the order.

158 Ibid.
159 Law Council of Australia, *Submission 108*.
160 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [7.91].
161 See discussion in Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [8.3]–[8.27].
162 Ibid [3.99].

Judicial discretion—non-custodial supervision orders

10.81 Stakeholders to this Inquiry submitted that the criminal justice system should adopt a health-based, therapeutic approach to the treatment of persons found unfit to stand trial.[163] In all jurisdictions except WA, the court has the power to make conditional non-custodial orders with regard to a person found unfit to stand trial. In WA, where a person is found unfit to stand trial, the court has two options: a custodial supervision order or unconditional release. It cannot make a conditional non-custodial supervision order. A case study provided by Legal Aid WA demonstrates how the lack of judicial discretion can perpetuate a cycle of contact with the criminal justice system:

> A young Aboriginal man from a remote East Kimberley community, suffers Foetal Alcohol Spectrum Disorder, and as a result is severely impaired in his cognitive functioning. Since about the age of 13, he has been repeatedly arrested and charged by Police for committing stealing and burglary offences, always in company with other young people, who are less impaired than him or cognitively able. These offences have never been at the high end of the scale in terms of seriousness. Although his participation in this type offending has seemed to increase as he has grown older, he remains as suggestible and vulnerable to peer direction as he has always been.... [He is repeatedly] found unfit to stand trial, and his matters continue to be dismissed, followed by his unconditional release.... There are no social supports available for him because he cannot be subject to youth corrections orders.[164]

10.82 The ALRC considers that courts should be given the power to impose a range of orders—including non-custodial supervision orders—a view supported by stakeholders.[165] Legal Aid WA, in the same case study, demonstrated that such a holistic approach could reduce the likelihood that a person with cognitive impairment and complex needs comes into contact with the criminal justice system again:

> Recently, in finalising the last set of charges against him, the young man's defence counsel and a proactive youth justice officer, worked with the family to explore other options. They supported a referral to a social and emotional wellbeing program run by the local Aboriginal health service. This is a one on one mentor program that is very flexible to adapt to an individual's needs, and may assist the young man to be proactively engaged in his community and family life, without becoming caught up in antisocial behaviour. This option was not and could not be provided by the criminal justice system—it is a health system program, which may well prevent further involvement in the criminal justice system for a young person with complex mental health needs.... [This case] highlights the need for a more flexible and medically supportive judicial approach to managing FASD sufferers within the structures of the court system.[166]

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163 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Jesuit Social Services, *Submission 100*; Legal Aid WA, *Submission 33*.

164 Legal Aid WA, *Submission 33*.

165 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Jesuit Social Services, *Submission 100*; Aboriginal Legal Service of Western Australia, *Submission 74*; Legal Aid WA, *Submission 33*.

166 Legal Aid WA, *Submission 33*.

10.83 In the above case study, a court with the flexibility to order non-custodial supervision orders would have the power to require the young man attend the mentor program, and could require the program to report to the court on its efficacy.

10.84 A holistic, therapeutic approach should be applied both to non-custodial supervision orders and the custodial orders discussed in the previous section. This approach should extend to the services and assistance available to a person while under a custodial supervision order, and following their release. The principles discussed elsewhere in this Report about the need for flexible, culturally appropriate, trauma-informed approaches should underpin the development of such services.

11. Aboriginal and Torres Strait Islander Women

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Summary

11.1 The Terms of Reference to this Inquiry ask the ALRC to have regard to Aboriginal and Torres Strait Islander women and their rate of incarceration. This chapter contextualises Aboriginal and Torres Strait Islander female offending within experiences of intergenerational trauma, including family and sexual violence, child removal, mental illness and disability and poverty.

11.2 Strategies that aim to address the offending of Aboriginal and Torres Strait Islander women must take a trauma-informed and culturally appropriate approach. These strategies must be responsive to the numerous reasons why Aboriginal and Torres Strait Islander women become involved in the criminal justice system and the multiple layers of disadvantage they face.

11.3 Aboriginal and Torres Strait Islander women constitute a fast growing group in prison populations, yet the historically low numbers of female Aboriginal and Torres Strait Islander offenders—and misunderstandings of their criminogenic needs—has meant that few appropriately-designed criminal justice responses are available.

11.4 This chapter briefly reviews some of the alternatives to incarceration, including holistic, trauma-informed diversion programs for Aboriginal or Torres Strait Islander women who have experienced deep and intergenerational trauma. To minimise reoffending and to help Aboriginal and Torres Strait Islander women out of the criminal justice system, it is critical that criminal justice responses are not only trauma-informed and culturally appropriate but are developed with and delivered by Aboriginal and Torres Strait Islander women.

11.5 Female Aboriginal and Torres Strait Islander offenders are likely to have been victims, often of family violence. In this chapter the ALRC makes recommendations to enhance police responses to family violence in Aboriginal and Torres Strait Islander communities.

Incidence

11.6 The vast majority of Aboriginal and Torres Strait Islander women will never enter the criminal justice system as offenders, or be incarcerated.[1] It is well established, however, that Aboriginal and Torres Strait Islander women are vastly over-represented in the criminal justice system and in the prison population, and that the numbers of female Aboriginal and Torres Strait Islander prisoners are rapidly growing.[2]

11.7 In 2016, Aboriginal and Torres Strait Islander women represented 34% of all women in prison.[3] The level of imprisonment for Aboriginal and Torres Strait Islander women exceeded that of non-Indigenous women by a factor of 21.2—that is Aboriginal or Torres Strait Islander women were 21.2 times more likely to be imprisoned than non-Indigenous women. Further still, the rate of imprisonment for Aboriginal and Torres Strait Islander women exceeded even that of non-Indigenous men.[4]

11.8 Aboriginal and Torres Strait Islander women are also significantly over-represented in the remand population, meaning that Aboriginal and Torres Strait Islander women may be less likely to be granted bail by the court than non-Indigenous people.[5] In fact, Aboriginal and Torres Strait Islander women were 15.7 times more likely to be in prison on remand than non-Indigenous women—an over-representation ratio even higher than that of Aboriginal and Torres Strait Islander men to non-Indigenous men (10.9).[6]

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1 See, eg, Lorana Bartels, 'Indigenous Women's Offending Patterns: A Literature Review' (Australian Institute of Criminology, 2010) iii; Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 5; Don Weatherburn, 'Rack 'em, Pack 'Em and Stack 'Em: Decarceration in an Age of Zero Tolerance' (2016) 28(1) *Current Issues in Criminal Justice*; Law Council of Australia, *Addressing Indigenous Imprisonment: National Symposium—Discussion Paper* (2015) 9.

2 Human Rights Law Centre and Change the Record Coalition, above n 1, 10; Peta MacGillivray and Eileen Baldry, 'Australian Indigenous Women's Offending Patterns' (Brief No 19, Indigenous Justice Clearinghouse, June 2015) 11; Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) [4.13.1]; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 16. See also ch 3.

3 Human Rights Law Centre and Change the Record Coalition, above n 1, 10; Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) tables 2, 4; Australian Bureau of Statistics, *Australian Demographic Statistics, Cat No 3101.0* (2016) table 7; Australian Bureau of Statistics, *Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026, Cat No 3238.0* (2014) series B, 18 years and over, table 1.

4 See ch 3.

5 See ch 5.

6 See ch 3.

11.9 This rate of over-representation is a persistent and growing problem. Since 2006, the rate of imprisonment of Aboriginal and Torres Strait Islander women increased from 365.8 per 100,000 adult Aboriginal and Torres Strait Islander females in 2006, to 464.8 per 100,000 in 2016.[7]

11.10 Aboriginal and Torres Strait Islander incarceration has been characterised by:

- low-level offending including justice procedure offences and failure to pay a fines);
- prior incarceration; and
- short terms of imprisonment.[8]

11.11 Aboriginal and Torres Strait Islander female prisoners are disproportionately more likely than their non-Indigenous counterparts to:

- be mothers and primary care givers of children;
- have experienced family violence and sexual abuse;
- have mental illness or cognitive disability;
- have substance abuse issues;
- have entered into the child protection system as children;
- have earlier and more frequent criminal justice contact—including police contact and incarceration;
- be living in unstable housing or homeless;
- be unemployed; and
- have lower levels of educational attainment.[9]

11.12 In their 2017 Report the Human Rights Law Centre and Changing the Record asserted that:

> These realities drive the over-representation of Aboriginal and Torres Strait Islander women in Australian criminal justice systems. They stem from the oppression, violence, trauma and discrimination associated with colonisation, transmitted through generations. In effectively punishing Aboriginal and Torres Strait Islander women for

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7 See ch 3.

8 Lorana Bartels, above n 1, iii; Lorana Bartels, 'Sentencing of Indigenous Women' (Brief No 14, Indigenous Justice Clearinghouse, November 2012) 3; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 20.

9 See, eg, Holly Johnson, 'Drugs and Crime: A Study of Incarcerated Female Offenders' (Research and Public Policy Series No 63, Australian Institute of Criminology, 2004) 20; Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 *Contemporary Nurse: A Journal for the Australian Nursing Profession* 85; Koori Justice Unit, Department of Justice (Vic), 'Koori Women's Diversion Project' (Presentation, Koori Women's Diversion Project Working Group, 3 July 2013).

> extreme disadvantage, the criminal justice system perpetuates and institutionalises discrimination and inequality.[10]

11.13 Although the lack of reliable and cross-comparable data in relation to offending and incarceration is an issue affecting Aboriginal and Torres Strait Islander people generally, it is an issue that particularly hinders accurate assessment of the needs and pathways of Aboriginal and Torres Strait Islander female offenders.[11] This has been a longstanding problem. In 2002 and in 2004, the Aboriginal and Torres Strait Islander Social Justice Commissioner stressed that the paucity of data in relation to Aboriginal and Torres Strait Islander female offending had rendered them 'invisible' in the criminal justice system.[12]

11.14 Although now beginning to improve, data analysis in relation to Aboriginal and Torres Strait Islander women has been particularly hampered because publicly available data may not disaggregate Aboriginal and Torres Strait Islander women from men, or Aboriginal and Torres Strait Islander women from non-Indigenous women.[13]

11.15 Legal Aid WA raised concerns around the failure of existing data on Female Aboriginal offenders 'to consider Aboriginal women as a separate group with a unique set of circumstances and needs' where analysis of that data 'tends to focus on Aboriginal people *or* gender as a group, yet rarely the intersection of the two'.[14]

11.16 Even where data is collected in a disaggregated way, it may not be cross-comparable with other jurisdictions because of the way in which the data has been collected, differences in statutory definitions, or differences in the way in which criminal justice processes operate.[15] This lack of consistency between jurisdictions can make comparisons difficult, and contributes to the lack of evidence-based solutions in relation to Aboriginal and Torres Strait Islander women.[16]

11.17 Limitations of data are further discussed in Chapter 3. The importance of consistency in data collection and of empirical evidence and evaluated programs form key features of Aboriginal Justice Agreements and criminal justice targets. These are further discussed in Chapter 16.

Drivers of incarceration for Aboriginal and Torres Strait Islander women

11.18 The rate at which Aboriginal and Torres Strait Islander women are imprisoned

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10 Human Rights Law Centre and Change the Record Coalition, above n 1, 16.
11 Ibid 21.
12 Ibid 21; Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004* (2005) 135.
13 Human Rights Law Centre and Change the Record Coalition, above n 1, 21.
14 Legal Aid WA, *Submission 33*.
15 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 45–6; Human Rights Law Centre and Change the Record Coalition, above n 1, 21.
16 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 46–50; Human Rights Law Centre and Change the Record Coalition, above n 1, 21.

has been identified as a reflection of the multiple and layered nature of the disadvantage they face.[17] The links between entrenched disadvantage, including social, cultural and economic forms, and increased rates of criminal justice contact, are well-established.[18] A cycle of ongoing disruption—caused partly by repeated low-level offending and short terms of incarceration—can exacerbate existing disadvantage and make it extremely difficult for a female offender to reintegrate into her community.[19]

Family violence and sexual abuse

11.19 Aboriginal and Torres Strait Islander women are frequent victims of crime, particularly interpersonal or violent crime.[20] Female Aboriginal and Torres Strait Islander prisoners are likely to have been victims of crime themselves, particularly family violence and sexual abuse.[21] Prison population surveys have revealed high rates of family violence and sexual abuse among incarcerated Aboriginal and Torres Strait Islander women. One Western Australian study suggested that up to 90% of Aboriginal and Torres Strait Islander female prisoners were survivors of family and other violence.[22] A New South Wales study in 2014 revealed that 70% of the Aboriginal and Torres Strait Islander female prisoners disclosed they were survivors of child sexual abuse, with 44% subject to ongoing sexual abuse as adults and 78% experiencing violence as adults.[23] The National Association of Community Legal Centres submitted similar data on the rates of sexual abuse and assault of Aboriginal women in prison in NSW.[24] A study of Victorian female prisoners found 87% were victims of sexual, physical or emotional abuse, with most having suffered abuse in multiple forms.[25]

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17 Human Rights Law Centre and Change the Record Coalition, above n 1, 16; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 84; Sisters Inside, Submission No 69 to Senate Standing Committees on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 4–7.

18 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4; Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 126; Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 27–42; Human Rights Law Centre and Change the Record Coalition, above n 1, 16; Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into the Impact of Drug-Related Offending on Female Prisoner Numbers: Interim Report* (2010) v–vi.

19 Human Rights Law Centre and Change the Record Coalition, above n 1, 4–5; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 88.

20 Council of Australian Governments, *National Plan to Reduce Violence against Women and Their Children 2010–2022* (2011) 1; Productivity Commission, above n 2, 4.98.

21 Council of Australian Governments, above n 20, 1; Productivity Commission, above n 2, 4.98.

22 Mandy Wilson et al, 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia' (2017) 7(1) *SAGE Open* 6.

23 Human Rights Law Centre and Change the Record Coalition, above n 1, 17; Mary Stathopoulos and Antonia Quadara, 'Women as Offenders, Women as Victims: The Role of Corrections in Supporting Women with Histories of Sexual Abuse' (Women's Advisory Council of Corrective Services NSW, 2014) 18.

24 Mary Stathopoulos and Antonia Quadara, above n 23.

25 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013).

11.20 The prevalence of family violence in Aboriginal and Torres Strait Islander communities, and the damaging effects of family violence and sexual abuse have been recognised as key drivers of the incarceration of Aboriginal and Torres Strait Islander men and, increasingly, women.[26] Family violence has been described as cyclical and intergenerational.[27]

11.21 Research suggests that Aboriginal and Torres Strait Islander women are up to 35 times more likely to experience domestic and family violence than non-Indigenous Australian women[28] and that Aboriginal and Torres Strait Islander women and girls are 31 times more likely to be hospitalised due to domestic and family violence-related assaults compared to non-Indigenous women and men.[29]

11.22 Aboriginal and Torres Strait Islander women face many barriers when attempting to access the justice system. The National Family Violence Prevention Legal Services (NFVPLS) submitted:

> [F]rontline experience demonstrates that Aboriginal and Torres Strait Islander women face a wide array of complex and compounding barriers to accessing support, including the reporting of family violence. Those barriers include:
>
> - a lack of understanding of legal rights and options and how to access advice and support;
> - mistrust of mainstream legal, medical, community and other support services and their ability to understand and respect the needs and wishes of Aboriginal and Torres Strait Islander women;
> - a lack of cultural competency and experiences of direct or indirect discrimination across the support sector, including by police and other agencies such as child protection;
> - a lack of access to interpreters or support for people with low levels of literacy;
> - fear of child removal if disclosing experiences of violence and/or risk of criminalisation;
> - particular cultural or community pressures not to go to the police, such as perceived threats to cultural connection (especially for children) or to avoid increased criminalisation of Aboriginal and Torres Strait Islander men; and
> - poverty and social isolation.[30]

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26 PwC's Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (2017) 23.

27 See, eg, Aboriginal Peak Organisations (NT), Submission No 134 to the Senate Standing Committees on Finance and Public Administration, *Domestic Violence in Australia* (August 2014) 4; Janet Stanley et al, 'Causal Factors of Family Violence and Child Abuse in Aboriginal Communities: Exploring Child Sexual Abuse in Western Australia' (Australian Institute of Family Studies, prepared for the Western Australian Government Inquiry into Responses by Government Agencies to complaints of Family Violence and Child Abuse in Aboriginal Communities, 2002).

28 National Plan to Reduce Violence against Women and Their Children, *Third Action Plan 2016–2019 of the National Plan to Reduce Violence against Women and Their Children 2010–2022* (2016) 1, citing Australian Institute of Health and Welfare, *Family Violence among Aboriginal and Torres Strait Islander Peoples* (2006).

29 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011—Report* (2011) 29.

30 National Family Violence Prevention Legal Services, *Submission 77*.

11.23 In 2001, the NSW Aboriginal Justice Advisory Council reported that at least 80% of Aboriginal women surveyed linked previous experiences of abuse indirectly to their offending,[31] with histories of sexual abuse in particular noted as 'central features of women's pathways into offending, their experiences of custody, and their capacity to engage in rehabilitation programs'.[32]

11.24 In order to address the issue of Aboriginal and Torres Strait Islander female incarceration rates—as well as the high rates of substance abuse and psychological distress—addressing the prevalence of family and sexual violence in Aboriginal communities must be a priority and involve targeted trauma-informed responses including culturally competent supports and interventions. As the Human Rights Law Centre and Change the Record Coalition have stated, '[r]esponding effectively to violence against Aboriginal and Torres Strait Islander women will address one of the key underlying drivers of women's offending, which should in turn lead to less women in the justice system, both as victim/survivors and offenders'.[33]

11.25 However, due to the short length of sentences Aboriginal and Torres Strait Islander women commonly receive, there can be practical difficulties in providing appropriate mental health and other treatments and supports in what is often a relatively short prison episode.[34] Short sentences are further discussed in Chapter 7, while a greater exploration of the effects of prison environments on Aboriginal and Torres Strait Islander women is discussed below.

11.26 In 2017, the United Nations Special Rapporteur on Violence Against Women emphasised the crucial importance of diverting Aboriginal and Torres Strait Islander women from the criminal justice system—particularly those who are mothers—and recommended that state and territory governments amend laws that contribute to their unnecessary imprisonment.[35]

11.27 The Rapporteur specifically recommended that fine default laws be amended, in part due to their disproportionate impact on the rate of imprisonment of Aboriginal and Torres Strait Islander women.[36] The impact of fines on the incarceration of women is discussed in Chapter 12. The Rapporteur also recommended the introduction of family violence 'justice targets' as part of the Council of Australian Government's 'Closing the Gap' measures, noting the role of family violence in the incarceration of Aboriginal and Torres Strait Islander women.[37] A discussion on the development of criminal justice targets is included in Chapter 16.

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31 Aboriginal Justice Advisory Council, *Holistic Community Justice: A Proposed Response to Aboriginal Family Violence* (Attorney-General's Department (NSW), 2001) 6 as cited in Human Rights Law Centre and Change the Record Coalition 17.

32 Ibid.

33 Ibid.

34 Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1, 11.

35 United Nations Special Rapporteur on the Rights of Indigenous Peoples, *End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, on Her Visit to Australia* (2017).

36 Ibid.

37 Ibid.

Mental health and cognitive impairment

11.28 Rates of psychological disability for Aboriginal and Torres Strait Islander women are more than double that for Aboriginal and Torres Strait Islander men.[38] This includes higher rates of hospitalisation for psychiatric issues, as well as higher rates of mental illness, Post Traumatic Stress Disorder (PTSD), and cognitive impairment.[39] One Victorian study revealed that more than nine in ten (92%) Aboriginal and Torres Strait Islander female prisoners surveyed had received a lifetime diagnosis of a recognised mental illness, and almost half met the criteria for PTSD.[40]

11.29 Female Aboriginal and Torres Strait Islander offenders also commonly have histories involving substance abuse.[41] For many of these prisoners, self-medicating can be a response to childhood and ongoing trauma, which may include experience in or with the child protection system, homelessness, and being a victim of abuse.[42] Aboriginal and Torres Strait Islander women who are survivors of family violence are also more likely to experience mental illness and cognitive impairment.[43]

11.30 Aboriginal and Torres Strait Islander women with cognitive impairment have among the highest rates of criminal justice system contacts of any group and are significantly over-represented in multiple areas of disadvantage compared to men—be they Aboriginal and/or Torres Strait Islander or otherwise.[44] These include rates of: complex needs; out-of-home care; police contact; remand episodes; homelessness; and victimisation.[45] It may also be the case that cognitive impairment—including Foetal Alcohol Spectrum Disorders (FASD)—may remain undetected and undiagnosed, often leading to a cycle of incarceration and disadvantage.

11.31 National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted to this Inquiry that:

> A substantial number of Aboriginal and Torres Strait Islander women are entering the criminal justice system with an undetected disability. Aboriginal and Torres Strait Islander women with cognitive impairment have some of the highest rates of the criminal justice system of any social group, and are significantly over-represented

38 Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander People, Oct 2010, Cat No 4704.0* (2010); Human Rights Law Centre and Change the Record Coalition, above n 1, 18.

39 Human Rights Law Centre and Change the Record Coalition, above n 1, 18; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 33.

40 Victoria Department of Justice, *Koori Prisoner Mental Health and Cognitive Function Study—Final Report* (2013) 13.

41 Ibid 13.

42 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 77; Sisters Inside, *The Over-Representation of Aboriginal and Torres Strait Islander Women in Prison* (2013) 3.

43 Eileen Baldry, 'Continuing Systemic Discrimination—Indigenous Australian Women Exiting Prison' in *Women Exiting Prison: Critical Essays on Gender, Post-Release Support and Survival* (Routledge, 2013) 99–100.

44 Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 45.

45 Ibid.

> compared to men. Experiences of disability and poor mental health must be a central focus of the development of culturally safe diversionary options.[46]

11.32 The criminal justice system is poorly suited to respond to complex needs arising from mental illness, disability, acquired brain injury and substance abuse. The Human Rights Law Centre and the Change the Record Coalition argue that the role of prison has become, in many cases, simply to 'warehouse' or 'manage' people who fall into these categories, without providing appropriate or adequate support in addressing the underlying issues that led Aboriginal and Torres Strait Islander women to become incarcerated in the first place.[47] This is particularly the case for cognitive impairment, which remains chronically undiagnosed and largely misunderstood. This is further explored in Chapter 10 that looks at access to justice issues.

Poverty and homelessness

11.33 Poverty and homelessness is a significant factor in the lives of many Aboriginal and Torres Strait Islander women who are incarcerated where:

> Poverty has been shown to magnify the detrimental effect that minor offending has on an offender. The Top End Women's Legal Service Inc noted:In 2015-16, around 60 percent of TEWLS clients were experiencing or at risk of experiencing domestic and family violence; over 60 percent were on a low or nil income; and over 20 percent identified having a disability and/or mental illness. Additionally, in 2015-16, TEWLS provided double the amount of advices as the previous year, and triple the amount of casework, with women still being referred out due to capacity constraints.[48]

11.34 The interaction of poverty and punitive criminal justice regimes can be hugely damaging for Aboriginal and Torres Strait Islander women, particularly in relation to unpaid fine regimes, penalty notices, and Criminal Infringement Notices (CINs). It can result in escalating consequences arising from what may begin as relatively minor and victimless offending. The negative impact of fines, including offensive language offences and driving offences, is discussed in Chapter 12.

11.35 Sisters Inside suggested a link between poverty, homelessness and criminal behaviours stating:

> Poverty, homelessness and social exclusion are also drivers of criminalisation and imprisonment for women. The Newstart Allowance is the only source of income for many criminalised women prior to and after their imprisonment. The Newstart Allowance has not increased in real terms (i.e. greater than CPI) since 1994.[49]

11.36 NATSILS submitted:

> Homelessness and poverty increase the chances of individuals entering the criminal justice system. It is necessary for legal frameworks to support those who experience homelessness rather than further marginalise and criminalise experiences of homelessness. Additional support services are required to ensure the availability of accommodation options and stable housing to meet certain community based orders.

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46 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
47 Human Rights Law Centre and Change the Record Coalition, above n 1, 18.
48 Top End Women's Legal Service, *Submission 52*.
49 Sisters Inside, *Submission 119*.

> Disconnection from country and culture, and the inter-generational effects of historic treatment of Aboriginal and Torres Strait Islander people, plays a role in the over-representation of Aboriginal and Torres Strait Islander people in prison.[50]

11.37 The interaction of Aboriginal and Torres Strait Islander female disadvantage and incarceration was also described by the Human Rights Law Centre and Change the Record Coalition, reporting 'those who are poorer are at greater risk of being locked up. Aboriginal and Torres Strait Islander women are more likely to be living in poverty, and thus have been found to be more likely to be locked up for unpaid fines'.[51]

11.38 Stakeholders suggested that the Western Australian fines legislation has particularly significant consequences for Aboriginal and Torres Strait Islander women. The legislation provides for a series of escalating consequences that, when combined with poverty, eventually results in the imprisonment of the fine defaultee, without the safeguard of judicial oversight.[52]

11.39 Unpaid fines resulting in driver licence disqualification can have serious and cascading effects in these situations, and can result in the imprisonment of the Aboriginal and Torres Strait Islander women for secondary offences such as driving while disqualified.[53]

11.40 Homelessness or a lack of stable accommodation can be a criminogenic factor for Aboriginal and Torres Strait Islander women that is often elevated on release from prison—adding to the likelihood of reoffending. This in turn may put children at a high risk of entering the child protection system.[54]

11.41 Aboriginal and Torres Strait Islander women are the least likely of any group within prisons to be able to find appropriate accommodation upon release from incarceration—particularly where they have dependent children.[55] A study of NSW and Victorian Aboriginal and Torres Strait Islander female prisoners released between 2001–2003 found that:

- none of the women was able to find stable family accommodation;
- half were still homeless at nine months after release; and
- over two-thirds (68%) returned to prison within nine months.[56]

11.42 Legal Aid NSW highlighted accommodation issues for Aboriginal and Torres Strait Islanders upon release from prison, drawing attention to the following case study:

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50 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
51 Human Rights Law Centre and Change the Record Coalition, above n 1, 22.
52 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).
53 Human Rights Law Centre and Change the Record Coalition, above n 1, 38.
54 Ibid 18.
55 Ibid.
56 Eileen Baldry et al, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39(1) *Australian & New Zealand Journal of Criminology* 8.

Case Study: Kayla

Legal Aid NSW assisted Kayla, an Aboriginal woman leaving custody. She advised us that many years earlier she had left social housing because of domestic violence, and became homeless. She applied for social housing at the Department of Housing, indicating that she left her previous tenancy because of domestic violence. Despite this, her application was refused because of a debt she owed to the Department. She was not advised of her right to appeal this refusal. She was given 28 days of emergency housing. She was subsequently homeless for six years and did not have her children with her during that period. She was physically and sexually assaulted during this time. Eventually, she was convicted of criminal offences and incarcerated.[57]

11.43 The Law Council of Australia suggested:

> Access to adequate housing is a growing and serious issue in Australia. Aboriginal women exiting prison who have children face extreme difficulty in establishing a home where they can live with their children post-release. Children of imprisoned parents are at a higher risk of homelessness and disrupted childhoods than other young people. International human rights law recognises that every person has the right to adequate housing. Article 11 of the International Covenant on Economic, Social and Cultural Rights, which Australia is a party, states: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right".
>
> There is strong evidence that indicates the best solutions are to invest in health and housing support services, so that there is an adequate safety net for people who are vulnerable. Without adequate housing Aboriginal women may be forced into homelessness, making them particularly vulnerable to violence and to police interference, harassment and re-arrest for public order offences.[58]

11.44 Josephine Cashman highlighted the need for increased funding for housing and other infrastructure especially in remote communities:

> A 2015 infrastructure audit of the 73 largest remote Indigenous communities in the NT found that less than 50% had mobile and data services. Only 26% had standard town planning regimes, less than 50% had a permanent police presence, and housing met only 60% of demand. Nearly all had no sea transport services, ensuring that communities in the north are inaccessible by land for half the year due to flooding. The impact of this lack of infrastructure is devastating for Indigenous communities. In the worst affected areas, overcrowding is at a rate of 19 adults and children per room. The solution is to build enabling environments across remote Australia. This will require large investments over coming decades.[59]

57 Legal Aid NSW, *Submission 101*. See also Law Council of Australia, *Submission 108*.
58 Law Society of Western Australia, *Submission 111*; Law Council of Australia, *Submission 108*.
59 J Cashman, *Submission 105*.

Criminal Justice services, programs and responses

Recommendation 11–1 Programs and services delivered to female Aboriginal and Torres Strait Islander offenders within the criminal justice system—leading up to, during and post-incarceration—should take into account their particular needs so as to improve their chances of rehabilitation, reduce their likelihood of reoffending and decrease their involvement with the criminal justice system. Such programs and services, including those provided by NGOs, police, courts and corrections, must be:

- developed with and delivered by Aboriginal and Torres Strait Islander women; and
- trauma-informed and culturally appropriate.

11.45 In their report on Koori women in the criminal justice system, the Victorian Equal Opportunity and Human Rights Commission suggested that the complex needs of many Aboriginal and Torres Strait Islander female offenders is deeply intertwined with historical and ongoing experiences of intergenerational trauma, institutionalisation, and colonisation.[60] Strategies that aim to address the offending of Aboriginal and Torres Strait Islander women should be responsive to the numerous reasons why Aboriginal and Torres Strait Islander women become involved in the criminal justice system and the multiple layers of disadvantage they face. This suggests that programs and services must take a trauma-informed and culturally appropriate approach.

11.46 Numerous articles and reports have argued that Aboriginal and Torres Strait Islander female offenders are, by and large, a group that requires support, prevention, and diversion—not punitive responses.[61]

> Prison is a stressful and traumatic experience for many Aboriginal and Torres Strait Islander women, most of whom have significant histories of trauma. It disconnects women from children, family, community and country. The unnecessary imprisonment of a growing number of Aboriginal and Torres Strait Islander women contributes to the dislocation and fragmentation of families and communities, when action to strengthen communities is needed.[62]

11.47 Programs developed for Aboriginal and Torres Strait Islander men do not necessarily transpose to Aboriginal and Torres Strait Islander women—each group

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60 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 22.

61 See, eg, Chris Cunneen, 'Colonial Processes, Indigenous Peoples, and Criminal Justice Systems' in Sandra Bucerius and Michael Tonry (eds), *The Oxford Handbook of Ethnicity, Crime, and Immigration* (Oxford University Press, 2014) 280; Human Rights Law Centre and Change the Record Coalition, above n 1, 5; Amanda Porter, 'The Price of Law and Order Politics: Re-Examining the *Fines, Penalties and Infringement Notices Enforcement Amendment Act 2012* (WA)' (2015) 8(16) *Indigenous Law Bulletin* 28.

62 Human Rights Law Centre and Change the Record Coalition, above n 1, 18.

having different needs.[63] Aboriginal and Torres Strait Islander women, in particular, appear to engage most effectively with an intersectional approach that recognises their needs both as women and as Aboriginal and Torres Strait Islander people.[64]

11.48 Dr Vickie Hovane, Dorinda Cox and Professor Harry Blagg described a systemic failing of the criminal justice system, where programs delivered to Aboriginal peoples, particularly Aboriginal women, are not designed by Aboriginal people and particularly not by Aboriginal women, thus failing to meet their needs:

> Inter-generational trauma impacts on all Aboriginal families and communities. It impacts on individuals, families, communities and cultures. For Aboriginal people, it is a collective consequence of colonisation rather than simply an individual experience. It is compounded by negative contact with the justice and related systems, such as children's protection. Because this trauma impacts across all levels of Aboriginal society, there is a need for a holistic and life-span approach to addressing the issue. Such an approach starts as a minimum from pre-birth through to later-life. It aims to reduce the incidence of issues such as foetal alcohol spectrum disorders (FASD) as a result of maternal substance use, low birthweight due to poverty, and other impairments among children being born into Aboriginal families. Such an approach should also respond to the traumatising impacts of processes such as the Stolen Generations on the health and wellbeing of individuals, families and communities, across generations. These are all symptoms of the profound intergenerational trauma experienced by Aboriginal people.
>
> Mainstream approaches and programs, particularly those relying on cognitive behavioural therapeutic techniques have only limited value for responding to intergenerational trauma among Aboriginal people including those who are imprisoned. It is time for a paradigm shift that requires investment in Aboriginal led, designed and managed initiatives. The current system has been designed by White people for White people. More specifically, it is designed by White men for White men – Aboriginal women are particularly disadvantaged because of this. [65]

11.49 Dorinda Cox further suggested failings in the way in which diversionary programs are delivered:

> Many of the Aboriginal women are hyper vigilant due to their trauma and medication is used for behavioural management, rather than having culturally led therapeutic responses these should be lead by Aboriginal organisations and workers to engage with Aboriginal women on their specific needs across remand, sentenced and pre-release facilities... Mapping the journey into, through and post release from the justice system is critical in understanding the challenges, barriers and experiences to build a new system that enables diversionary away from the current high levels of Aboriginal women in prison and to be responsive to the transmission of intergenerational trauma of Aboriginal people and communities.[66]

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63 Australasian Institute of Judicial Administration, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (2016) 13; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 25, 98.

64 Human Rights Law Centre and Change the Record Coalition, above n 1, 17; Lorana Bartels, 'Diversion Programs for Indigenous Women' (Research in Practice Report No 13, Australian Institute of Criminology, 2010) 3.

65 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

66 D Cox, *Submission 120*.

Police responses

Recommendation 11–2 Police engaging with Aboriginal and Torres Strait Islander people and communities should receive instruction in best practice for handling allegations and incidents of family violence—including preventative intervention and prompt response—in those communities.

11.50 There is a long list of Royal Commissions, reports, inquests, and inquiries documenting both the existence and effects of policing practices on Aboriginal and Torres Strait Islander people and their communities.[67]

11.51 The ALRC recognises that police practices, and police and community relationships, have much improved over recent years. However, a number of stakeholders emphasised that issues remain, suggesting in particular, that Aboriginal and Torres Strait Islander women are over-policed as offenders,[68] while also being under-recognised as victims of crime. Queensland Law Society stated:

> 'police practices that contribute to stereotyping First Nations women as violent and/or untrustworthy or criminal may contribute to the increase of criminalisation and over-representation of Aboriginal and or Torres Strait islander women in the criminal justice system.'[69]

11.52 The Australian Institute of Criminology has identified a combination of factors underlying the deep mistrust of police by some Aboriginal and Torres Strait Islander women. These include: over and under-policing; the historical role of police in implementing former government policies including those relating to child removal; a history of conflict between police and Aboriginal and Torres Strait Islander communities; and the role of police in Aboriginal and Torres Strait Islander deaths in custody.[70] The ALRC acknowledges the views of many stakeholders that, while the past cannot be undone, there are strong pathways to be forged between Aboriginal and Torres Strait Islander communities and police, and that these can result in better

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67 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5 recs 60–1, 79–91, 214–33; Human Rights Law Centre and Change the Record Coalition, above n 1, 22; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 42; Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 70, 80; Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System—Discussion Paper* (2010) 36; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Australian Human Rights Commission, 2016) 40–2; *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016).

68 See, eg, Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 39, 42; Human Rights Law Centre and Change the Record Coalition, above n 1, 24, 30–3; Sisters Inside, Submission No 69 to Senate Standing Committees on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 12–13.

69 Queensland Law Society, *Submission 86*.

70 Matthew Willis, 'Non-Disclosure of Violence in Australian Indigenous Communities' (Trends and Issues in Crime and Criminal Justice No 405, Australian Institute of Criminology, January 2011) 4–10.

outcomes for people, including women, in those communities. In their Report, the Human Rights Law Centre and Change the Record Coalition suggested that to better address family violence in Aboriginal and Torres Strait Islander communities:

> ...Police must come to understand and be responsive to the justified distrust Aboriginal and Torres Strait Islander women have in police and the high rates of violence and trauma in many women's lives. Addressing institutionalised patterns of behaviour is no easy task. There is however, a clear need for police protocols that require officers to prioritise responding to Aboriginal and Torres Strait Islander women's victimisation. There is also an urgent need for training and recruitment practices that ensure appropriate responses to Aboriginal and Torres Strait Islander women and that promote Aboriginal and Torres Strait Islander women's participation.[71]

11.53 Because family violence contributes significantly to the factors that contribute to offending—including child removal, homelessness, poverty, poor physical and mental health and substance misuse—the way police respond to family violence incidents can have a significant impact on women's offending and incarceration.[72]

11.54 Historical and ongoing processes of colonisation provide important context for the way in which police respond to family violence within Aboriginal and Torres Strait Islander households and communities and the way those communities in turn perceive that police response.[73] Factors identified as particularly affecting contemporary police responses in relation to family violence include the historical role of police in child removals and the deaths in custody of Aboriginal and Torres Strait Islander men—as well as a history of police responding poorly when Aboriginal and Torres Strait Islander women report family violence.[74]

11.55 One of the key challenges facing police in relation to family violence affecting Aboriginal and Torres Strait Islander households and communities is under-reporting. An Australian Institute of Criminology (AIC) 2010 review highlighted research that suggested up to 90% of violence against Aboriginal and Torres Strait Islander women goes unreported to police.[75]

11.56 The AIC found that although there are structural barriers affecting the reporting of family violence generally (including perceptions of inadequate justice system responses), fear and distrust of police and the justice system is a factor particularly affecting the reporting of family violence by Aboriginal and Torres Strait Islander women.[76] Antoinette Braybrook suggested that Aboriginal victims/survivors of family

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71 Human Rights Law Centre and Change the Record Coalition, above n 1, 33.

72 Sisters Inside, *Submission 119*; J Cashman, *Submission 105*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*; National Family Violence Prevention Legal Services, *Submission 77*; Human Rights Law Centre, *Submission 68*; Top End Women's Legal Service, *Submission 52*.

73 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 2 [13.2.2–13.2.14]; Willis, above n 70, 3; Human Rights Law Centre and Change the Record Coalition, above n 1, 16.

74 Sisters Inside, Submission No 69 to Senate Standing Committees on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013).

75 Willis, above n 70, 1.

76 Ibid 4.

violence face significant impediments to reporting and seeking support for family violence including:

> lack of understanding of legal rights and options and how to access supports when experiencing family violence poor police responses and discriminatory practices within police and child protection services community pressure not to go to the police in order to avoid increased criminalisation of Aboriginal men.[77]

11.57 In her 2016 address to the National Press Club, Jacinta Price outlined the many difficulties with respect to Aboriginal and Torres Strait Islander people making complaints to police in relation to family violence and abuse:

> I could spend days giving examples of acts of family violence that I have been witness to or learned of within my own family in remote communities … Where I am related to both victim and perpetrator and where the kinship network demands loyalty to your family members even if they are a perpetrator. One is expected to pretend that these perpetrators are decent human beings and ignore the fact that they have committed acts of physical and sexual violence towards those you love. Because to speak the truth is to create conflict. So from early in life, everyone learns to lie to keep the peace—which manifests into child and youth suicide and the continuation of a destructive cycle. I have given just a glimpse of examples of violence that some Aboriginal women experience. The number of deaths due to homicide that have impacted my family is in the hundreds. And in the NT alone for Aboriginal families it is in the thousands. But this epidemic is not only occurring in remote areas but within urban Aboriginal communities as well. The code of silence that victims live in blankets both remote and urban Australia.[78]

11.58 Stakeholders to this Inquiry noted the barriers to reporting family violence including: a lack of understanding of their legal rights and options; mistrust of mainstream legal and other services; fear of child removal if they disclose experiences of violence and/or the risk of criminalisation; and cultural or community pressures not to go to the police.[79]

11.59 The NFVPLS assessed that:

> ... a combination of preventative education, community engagement, support services and legal assistance (as both early intervention and response) are all crucial parts of the continuum of services to address and reduce family violence against Aboriginal and Torres Strait Islander women and children ...[80]

11.60 Josephine Cashman noted benefits arising from supports around the reporting of family violence, submitting that where 'victims are supported and encouraged to report violence, the act of reporting itself works to deter offenders and potential offenders by signalling intolerance for this criminal behaviour'.[81]

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77 Antoinette Braybrook, 'Family Violence in Aboriginal Communities' 2 *Domestic Violence Resource Centre Victoria Advocate* 20.

78 Jacinta Price, 'Violence and Silence' in *Ending the Violence in Indigenous Communities* (National Press Club Address, CIS Occasional Paper 152, 2016) 4.

79 National Family Violence Prevention Legal Services, *Submission 77*; Aboriginal Legal Service of Western Australia, *Submission 74*.

80 National Family Violence Prevention Legal Services, *Submission 77*.

81 J Cashman, *Submission 105*.

11.61 A number of stakeholders also voiced concerns about calls to minimise police involvement as a response to the issue of over-policing. Commenting on the Third Action Plan to Reduce Violence Against Women (implemented as part of the National Plan to Reduce Violence against Women and their Children 2010–2022), Professor Marcia Langton stated:

> It recommends that cases of violence against Indigenous women and children should be dealt with, and I quote, through 'activities that provide wraparound, case-managed support for families, and encourage behavioural change without resorting to police or courts'. Indigenous women who are involved in ending the violence against us are asking this question: Why would the Third National Action Plan to end Violence recommend that police and courts not be involved in the rising tide of violence against us? What about the rule of law, so highly valued by all major political parties and the bedrock of Australian society? I am calling it 'drinking the Kool Aid'.[82]

11.62 Josephine Cashman has expressed similar views on this aspect of the Third Action Plan and suggested that 'Forcing victims to resolve crimes perpetrated against them without going to the police will do nothing but feed the destructive culture of silence that allows criminals to gain power over communities through fear, and further normalise criminal behaviours'.[83]

11.63 These stakeholders were strongly of the view that a core problem for Aboriginal and Torres Strait islander women and their families is a lack of police responsiveness to the experience of Aboriginal women experiencing violence.[84]

11.64 Under-reporting of family violence to police can have a negative impact on victims and can increase their own offending and subsequent incarceration. However, many stakeholders to this Inquiry also spoke of the other side of policing, the over-policing of certain types of offending. With respect to over-policing, the evidence indicates that Aboriginal and Torres Strait Islander women are more likely to be charged and arrested for public order offences and other forms of minor offending than non-Indigenous women.[85] These offences include offensive language and behaviour, driving offences, and justice procedure offences (such as breach of a community-based order). When compared to non-Indigenous women, Aboriginal and Torres Strait Islander women are also more likely to be subject to 'preventative' detention regimes—such as the Alcohol Mandatory Treatment regime (AMT) in the NT.[86] AMT is discussed in Chapter 13.

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82 Marcia Langton, 'If We Don't Stop the Violence, We Have No Chance of Closing the Gap' in *Ending the Violence in Indigenous Communities* (National Press Club Address, CIS Occasional Paper 152, 2016) 11.

83 Josephine Cashman, 'Lack of Response Prevents Progress' in *Ending the Violence in Indigenous Communities* (National Press Club Address, CIS Occasional Paper 152, 2016) 17.

84 Hannah McGlade, 'The Causes and Consequences of Violence against Indigenous Women and Girls, Including Those with Disabilities' (Panel Discussion, Palais Des Nations, Geneva, 20 September 2016).

85 Human Rights Law Centre and Change the Record Coalition, above n 1, 22; Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders—Discussion Paper* (2017) 173; Mary Stathopoulos and Antonia Quadara, above n 23, 17; Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia', above n 34.

86 Human Rights Law Centre and Change the Record Coalition, above n 1, 24.

11.65 The results of punitive policing and arrest practices against Aboriginal and Torres Strait Islander women can be tragic. Of the 11 female deaths examined as part of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), none of the women were incarcerated for serious offences.[87]

> [F]ive of the females were detained for drunkenness, three for unpaid fines, one for driving without a licence and while under the influence of alcohol, and one for indecent language. [Ms] O'Rourke (the juvenile) was detained while arrangements were being made to return her to Sydney because she did not want to return to her most recent foster care placement.[88]

11.66 More recently, the death of Ms Dhu in custody in Western Australia (WA) illustrated the escalating impacts that minor offending can result in when combined with racial stereotypes, assumptions, and discrimination by police. The Coroner's report into the death of Ms Dhu noted that she had been arrested on various warrants of commitment, and that it had been calculated that Ms Dhu would have had to 'spend four days in custody unless outstanding fines …were paid'.[89]

11.67 This case illustrates the failure of police to empathetically respond to the circumstances of an Aboriginal woman experiencing family violence. Ms Dhu died in police custody of complications from an infected rib fracture—an injury sustained in a family violence incident—after repeated failure by officers to provide access to adequate medical care. As was noted by the Human Rights Law Centre, this failure was largely rooted in the false assumption by police officers that Ms Dhu was withdrawing from substance addiction, rather than the victim of a family violence incident:

> Despite repeated requests and cries for help by Ms Dhu, police and health professionals responded woefully inadequately to her rapidly deteriorating health over the three days she was in police custody. Their assessment of her condition was infected by an erroneous assumption made early in her imprisonment that her behaviour was the result of drug withdrawal. This resulted in a cascading series of errors and ultimately, her tragic and avoidable death. The conduct of police was described by the Coroner as 'inhumane' and 'unprofessional'.[90]

11.68 A further case of Ms Mitchell, a 22-year old pregnant Aboriginal woman with two small children, also illustrates how over-policing and harsh use of officer discretion can further contribute to distrust and fear of police. Ms Mitchell was charged with a serious fraud offence for travelling as an adult on a child's ticket when a lesser and more appropriate infringement notice offence was available to officers. On appeal following her refusal of bail, the Supreme Court of Victoria noted:

> [O]ver policing of Aboriginal communities and their overrepresentation amongst the prison population are matters of public notoriety. In this case I regard the use of

87 Ibid.

88 Elena Marchetti, 'Victims or Offenders: Who Were the 11 Indigenous Female Prisoners Who Died in Custody and Were Investigated by the Australian Royal Commission into Aboriginal Deaths in Custody?' (2013) 19(1) *International Review of Victimology* 37, 37–8.

89 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016); Human Rights Law Centre and Change the Record Coalition, above n 1, 24.

90 Human Rights Law Centre and Change the Record Coalition, above n 1, 32.

> s 82(1) of the [*Crimes Act 1958* (Vic)] (obtaining financial advantage by deception) to charge an adult for travelling on a child's ticket as singularly inappropriate.[91]

11.69 Previous research has highlighted that poor police responses can involve minimising or dismissing Aboriginal and Torres Strait Islander women's experiences of family violence, or reflects a focus on their perceived criminality rather than their victimisation.[92] As the Human Rights Law Centre noted:

> There is a long history of over-policing of Aboriginal and Torres Strait Islander communities, including high numbers of Aboriginal and Torres Strait Islander women being picked up for very low level offending, like the use of offensive language. At the same time, there is a history of police responding poorly to Aboriginal and Torres Strait Islander women who experience violence. Many Aboriginal and Torres Strait Islander women understandably hold a deep distrust of the police...The trauma of repeated victimisation combined with deep distrust of police can shape the way that women behave when police do intervene. There is a history of police, the majority of whom are non-Indigenous and male, viewing Aboriginal and Torres Strait Islander women's responses to violence as atypical and 'difficult'.[93]

11.70 These poor responses include documented cases of police charging Aboriginal and Torres Strait Islander women, who are the subject of family violence protection orders, with aid-and-abet provisions in relation to their breach.[94] Sisters Inside submitted:

> [W]e are seeing rising rates of Aboriginal and Torres Strait Islander women charged with breaches of domestic violence protection orders, often in circumstances where the police (rather than the intimate partner) have applied to impose the order. The criminalisation of Aboriginal and Torres Strait Islander women for acts of domestic violence is unacceptable and totally inconsistent with the evidence that women and children are disproportionately survivors of violence.[95]

11.71 Legal Aid NSW drew attention to their experience of police failing to correctly identify the primary perpetrator of family violence:

> Celia was the victim of violence from Harry over a 20 year relationship. They have a child together ... There was an incident at their home and police were called. Harry claimed that Celia scratched his face. Police charged Celia with assault occasioning actual bodily harm and intimidation and applied for an ADVO [Apprehended Domestic Violence Order] against Celia. Celia was required to leave the home and could not see her child.
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> Celia disclosed to the DVU [Legal Aid NSW Domestic Violence Unit] lawyer that she has actually been the victim of serious physical and sexual violence by Harry for

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91 *Re Mitchell* [2013] VSC 59 (8 February 2013).

92 See, eg, Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 42; Sheena Fleming, Tim Prenzler and Janet Ransley, 'The Status of Indigenous Women in Policing: A Queensland Case Study' (2013) 24(3) *Current Issues in Criminal Justice* 357, 358; Chris Cunneen, 'Policing and Aboriginal Communities: Is the Concept of Over-Policing Useful?' in Chris Cunneen (ed), *Aboriginal Perspectives on Criminal Justice* (Sydney University Institute of Criminology, 1992) 76; Human Rights Law Centre and Change the Record Coalition, above n 1, 31–2.

93 Human Rights Law Centre and Change the Record Coalition, above n 1, 22, 31.

94 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [12.35]–[12.41].

95 Sisters Inside, *Submission 119*.

> years. Celia said that on the night in question, Harry had punched her and tried to take her phone to stop her from calling police. Celia feared for her life and defended herself ... DVU represented Celia in defence of the criminal charges and the ADVO. The evidence confirmed Celia's injuries to her face; and the Triple 000 calls were played in court. The court accepted Celia's account of violence and dismissed the charges and the ADVO application.[96]

11.72 These police responses help explain the distrust and fear that many Aboriginal and Torres Strait Islander women feel in relation to reporting family violence to police. These responses may also help explain why Aboriginal and Torres Strait Islander women are more likely than their non-Indigenous counterparts to be charged and imprisoned for 'acts intended to cause injury'— where in some cases resorting to violence may be seen as the only feasible means of defending themselves and their children against a violent partner.[97]

Positive police responses

11.73 As noted above, more consistent and higher quality police responses to Aboriginal and Torres Strait Islander women experiencing family violence could dramatically influence the incidence of their imprisonment—because family violence is a key driver of criminogenic factors such as substance abuse, contact with the child protection system and unresolved trauma.

11.74 The Human Rights Law Centre noted the importance of police discretion in diverting Aboriginal and Torres Strait Islander women out of further involvement with the criminal justice system:

> Community-based prevention and early-intervention measures offer significant potential to reduce the number of Aboriginal and Torres Strait Islander women entering the criminal justice system in the first place. ... The criminal justice system must be responsive to Aboriginal and Torres Strait Islander women's interests and strengths if it is to contribute to the broader goal of reducing imprisonment rates. There are a number of points at which police and courts make decisions that can dramatically alter women's lives. These points present an opportunity to help women transition onto a more positive trajectory.[98]

11.75 Just Reinvest NSW submitted that community ownership is important in successful police responses to family violence and highlighted the Bourke Tribal Council's *Growing our Kids up Safe Smart Strong* example:

> The program involves the police visiting the home of perpetrators of domestic violence following a DV incident with a member of the community for a check-in – the purpose of the visit being both supervisory and supportive. The police and the Aboriginal community in Bourke worked together in partnership to reduce family violence. In doing so they created an environment of support for families. Repeat Victim Assaults have reduced from 45 in the second half of last year, to a total of 28 in the first half of this year.[99]

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96 Legal Aid NSW, *Submission 101*.
97 Mandy Wilson et al, above n 22, 1, 6.
98 Human Rights Law Centre and Change the Record Coalition, above n 1, 30.
99 Just Reinvest NSW, *Submission 82*.

11.76 The Aboriginal Legal Service (ALS) NSW/ACT supplementary submission[100] also supported genuine community engagement and involvement in police responses to family violence:

> With respect to community engagement, participants strongly emphasised the importance of community policing approaches. This includes, among other things, frontline police attending cultural events and programs in their communities. This is necessary to combat perceptions of police in the community as only responding to 'bad' situations. Participants suggested that the police place particular emphasis on attending schools and educating children, to demonstrate that they are good community role models and potentially demonstrate policing as a viable career.
>
> In relation to family violence in Aboriginal communities, participants suggested that police work with the whole family, not only victims or perpetrators. Additionally, participants suggested police act proactively through ongoing engagement with families in which violence may be in issue. This would improve perceptions of police and increase trust placed in the police by the community to effectively respond to incidents if they occur.[101]

11.77 The Change the Record Coalition also stressed the value of engagement with Aboriginal and Torres Strait Islander family and community services in responding to family violence—and pointed to the Victoria Police 'e-learning package' as a successful product of this type of engagement:

> Police need to be less confrontational in their approach to taking out intervention orders on behalf of family violence victims and need to better understand the complexities of Aboriginal communities when dealing with family violence. Engaging other services to support family violence victims during this period is crucial. It is preferable that Aboriginal services be engaged or police should explore with the client and family which services have previously worked or if there are any particular support workers that the victim or family would prefer to engage...The Victoria Police e-learning package, developed in response to recommendations of the Victorian Royal Commission into Family Violence, is one example of a positive initiative taken to improve police responses to Aboriginal and Torres Strait Islander victims/survivors of family violence. Part of the success of this initiative was its close consultation with and inclusion of Aboriginal community members and Aboriginal Community Controlled Organisations. The e-learning package is compulsory for all levels of the police force and, to date, it has been completed by 11,700 police officers across Victoria. It is just the first step in the development of a new family violence education framework and creation of a family violence centre of learning within Victoria Police in order to implement recommendations of the Royal Commission into Family Violence.[102]

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100 The ALS conducted a series of state-wide community justice forums with ALS staff, community leaders and stakeholders to get their input on the issues raised in the discussion paper. Over 250 people attended forums in Coffs Harbour, Dubbo, Moree, Nowra, and Redfern over August and September 2017.

101 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.

102 Change the Record Coalition, *Submission 84*.

11.78 Sisters Inside preferred a locally-driven response to violence within regional and remote Aboriginal and Torres Strait Islander communities, but did not support diversion of funds to police-community programs:

> Rather than relying on police, communities must be funded and supported to develop local, Indigenous-controlled responses to violence. Additionally, funding should be made available for appropriate crisis accommodation and related support services to allow women and children the choice to leave dangerous situations...We do not support diverting funds from direct investment in Aboriginal and Torres Strait Islander communities and organisations to "community" programs operated by the police.[103]

11.79 The NSW Bar Association encouraged police to extend their involvement with Aboriginal and Torres Strait Islander communities by entering 'into genuine and meaningful collaborations with communities to reduce family violence, such as the Domestic Violence Home Visiting Program in Bourke'.[104]

Diversion programs

11.80 Diversion programs involve initiatives that seek to divert offenders from the criminal justice system and may include 'treatment, healing, family support, education and training programs that target the root causes of offending' as well as 'restorative justice processes … that aim to directly engage the offender with the consequences of their offending and repairing the harm'.[105]

11.81 Many stakeholders to this Inquiry have urged that diversion initiatives and responses to Aboriginal and Torres Strait Islander female offending and incarceration be underpinned by the demonstrated strengths of Aboriginal and Torres Strait Islander women. The Australasian Institute of Judicial Administration has observed that diversion initiatives and programs that are effective for non-Indigenous women or Aboriginal and Torres Strait Islander men may be ineffective or even detrimental to Aboriginal and Torres Strait Islander women.[106] Vickie Hovane, Dorinda Cox and Harry Blagg submitted that:

> Mainstream approaches and programs, particularly those relying on cognitive behavioural therapeutic techniques, have only limited value for responding to intergenerational trauma among Aboriginal people including those who are imprisoned. It is time for a paradigm shift that requires investment in Aboriginal led, designed and managed initiatives.[107]

11.82 Commissioner for Children and Young People WA suggested:

> There is a strong need for a range of diversionary programs tailored to the needs of young female offenders and those at high risk of offending. As young female offenders represent only a small proportion of young offenders they are often overlooked for dedicated programs and services, however their high vulnerability for

103 Sisters Inside, *Submission 119*.
104 NSW Bar Association, *Submission 88*.
105 Human Rights Law Centre and Change the Record Coalition, above n 1, 35.
106 Australasian Institute of Judicial Administration, above n 63, 13.
107 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

> harm and exploitation must be recognised and given due attention.... young females who participated in my office's youth justice consultation identified the need for culturally appropriate programs and services to better support their mental health, wellbeing and education needs and their overall rehabilitation. More could also be done to make legal services more accessible to young Aboriginal women by ensuring they are culturally secure, including being delivered by Aboriginal people and organisations, being safe and confidential and providing access to interpreters where required.[108]

11.83 Despite the lack of evidence generally in terms of 'what works' in relation to Aboriginal and Torres Strait Islander women to reduce and mitigate the effects of contact with the criminal justice system, some key principles have been identified.[109] The Law Council of Australia suggested that diversion programs for Aboriginal and Torres Strait Islander offenders should:

- be culturally and gender specific;
- draw on community knowledge in their design and delivery;
- recognise the significant role of Aboriginal and Torres Strait Islander women in family and community life;
- ensure Aboriginal and Torres Strait Islander women 'have a stable base—especially in regards to safe and secure housing';
- allow Aboriginal and Torres Strait Islander women 'to be with their children and support families to rebuild;
- deal with experiences of violence, trauma and victimisation—and secondary consequences of these;
- promote and strengthen connection to culture;
- support Aboriginal and Torres Strait Islander women to navigate the complex and fragmented service system; and
- use a wrap-around approach, providing life skills, parenting skills, mental health services, drug and alcohol support and disability support, as required.[110]

11.84 NFVPLS provided an example of a diversion program specifically designed to meet the needs of Aboriginal and Torres Strait islander offenders:

> The Dilly Bag Program is an intensive women's cultural strengthening program delivered by the Aboriginal Family Violence Prevention and Legal Service (Victoria) that targets Aboriginal women, and has been adapted to work with women on community based orders. The program assists Aboriginal women with recovery from trauma they may have experienced in their lives. Dilly Bag builds on cultural strength and experiences to explore ways to increase self-esteem and enhance emotional,

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108 Commissioner for Children and Young People Western Australia, *Submission 16*.

109 Human Rights Law Centre and Change the Record Coalition, above n 1, 21.

110 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 6–7. See also Sisters Inside, *The Over-Representation of Aboriginal and Torres Strait Islander Women in Prison* (2013) 2–8.

> physical and spiritual well-being, which strengthens the ability of Aboriginal women to reduce their vulnerability to family violence. It is a residential program in a community setting that highlights the important roles Aboriginal women play in their community as leaders and nurturers. Dilly Bag was developed in response to an identified gap in therapeutic programs that provide culturally-based healing for Aboriginal women where the program has been developed and delivered for and by Aboriginal women. An external evaluation of the program determined that it has significant beneficial impacts, including increased self-esteem and well-being, strengthened relationships and networks, increased knowledge and understanding of family violence and the supports available, and significant changes to participants' lifestyles such as living arrangements, matters relating to custody of children and personal care.

11.85 The Northern Territory Government submitted that:

> Although there are currently no diversionary options specifically for Aboriginal female offenders in the Northern Territory, the Through-Care program at NAAJA and the Kunga Stopping Violence program through CAALAS offers re-integration support and case management for Aboriginal women who have been sentenced to a term of imprisonment.[111]

11.86 Where Aboriginal and Torres Strait Islander specific diversion programs do exist, the ALRC has heard that they are commonly offered only to Aboriginal and Torres Strait Islander men and exclude Aboriginal and Torres Strait Islander women, in part due to the much greater total volume of male offenders. Systemic barriers specific to Aboriginal and Torres Strait Islander women include:

- lower rates of admission to police diversions—because diversion options often require an admission of wrongdoing;[112]
- demand for diversionary initiatives often exceeding supply—particularly in relation to court-based diversionary options;[113]
- high rates of homelessness and lack of stable housing, compounded by family violence—making it difficult to engage with court and other community-based diversionary initiatives;[114]
- the likelihood that Aboriginal and Torres Strait Islander women have criminal records than their non-Indigenous counterparts, or be facing multiple charges—making them often ineligible for diversionary options that may exist;
- higher rates of substance abuse and mental health issues—which can make their circumstances too complex for existing diversionary options with strict eligibility criteria; and

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111 Northern Territory Government, *Submission 118*.

112 Reasons for mistrust of police by Aboriginal and Torres Strait Islander women are discussed by the ALRC at [11.52].

113 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 58.

114 Ibid 60.

- high rates of remand and short sentences, making them ineligible for any programs that may aid in reducing recidivism.[115]

11.87 The ALRC's recommendation—that all programs and services delivered to female Aboriginal and Torres Strait Islander offenders within the criminal justice system should take into account their particular needs and be developed with and delivered by Aboriginal and Torres Strait Islander women and be trauma-informed and culturally appropriate—builds on these observations.

> What is required is for governments and their agents to trust Aboriginal people to know what is needed and how to respond to the needs of people, families and communities. What is required is Aboriginal led and responsive, place-based initiatives that are trauma and attachment informed; initiatives which aim to heal families rather than simply focusing on individuals. The need to maintain and rebuild attachments and connections, severed by imprisonment, is critical for the rehabilitation of Aboriginal people, particularly women, and for the health and wellbeing of children and other dependents.[116]

Prison environments, programs and services

11.88 Many stakeholders raised the failings and inadequacies in the actual prison environment and in particular of the services delivered to Aboriginal and Torres Strait Islander women while incarcerated. Jesuit Social Services described these as:

- Chronic overcrowding leading to pressure on every aspect of prison operations. Overcrowding has led to further housing and facility issues such as limited access to basic amenities including shelter from harsh weather and access to bathrooms
- Failing to prepare women for transition back into the community post-release because of a lack of access to education and rehabilitation programs
- Limited employment opportunities for women
- The under-identification of health issues among female prisoners and the consequent lack of access to health care in the facility
- A number of issues relating to basic necessities including food, hygiene, clothing and recreational activities
- Inadequate culturally-appropriate supports to understand and navigate the prison system, such as induction provided in languages other than English
- Risks to infants and children housed with their mothers in prison under the current arrangements.[117]

11.89 The experience for women, and particularly Aboriginal and Torres Strait Islander female offenders in prison, is vastly different to that experienced by male offenders. Bartels and Gaffney argue that there are problems in the way in which correctional services are delivered to female offenders:

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115 Prison programs are discussed in ch 9.
116 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.
117 Jesuit Social Services, *Submission 100*.

> A majority of facilities do not specifically cater for female prisoners is due, in part, to the fact that traditionally, the majority of prisoners have been male.... more is required to effectively address the specific issues relevant to women and ensure that correctional policies and practices applied to women are not merely an adaptation of those considered appropriate for men.[118]

11.90 The experience of incarceration for female prisoners who have been victims of physical and sexual abuse can be especially both difficult and damaging. Research reveals that prison—rather than being a refuge from violence or sexual abuse—can actually mirror the power dynamics of abusive relationships, with acts such as routine strip-searching contributing to the ongoing re-traumatisation of Aboriginal and Torres Strait Islander women, and reinforcing themes of powerlessness, lack of control, and vulnerability to an already traumatised group.[119] De-incarceration and women's prisoner advocate, Debbie Kilroy, has described the effects of prisons on women as follows:

> They are based on rigid rules, imposed by authority figures (often in an arbitrary manner), and requiring absolute obedience. Common prison practices, in particular strip-searching, often re-traumatise women with a history of abuse contributing to increased incidents of self-harm. Prison staff typically respond to threatened or actual self-harm, by placing women in isolation – a practice totally contrary to the best medical advice. And, in some jurisdictions, male officers undertake tasks such as inspecting women's cells at night, observing (often naked) women in isolation cells and participating in strip searches. Far from preparing a woman to return to society, they leave her more vulnerable to ongoing abuse than ever before:
>
> As a result of even a very short period in prison a woman may lose her housing and employment (if she had these prior to imprisonment).
>
> Many women lose custody of their children - with their children, too often, going into state care.
>
> Any treatment they were receiving for mental health issues or substance abuse will have been stopped, or, at best, suspended.
>
> If a woman was participating in education or training, she may permanently lose her place.
>
> Many (particularly women who went to prison unexpectedly) will have accumulated further debts and a poor credit rating, and have lost most of their household items and personal belongings.
>
> And, women leave prison with a new or extended criminal record which is an added barrier to accessing employment, housing and services.
>
> For women leaving prison, these often appear insurmountable obstacles. Many will engage in self harm, and some will commit suicide. At least 40% will return to prison

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118 Lorana Bartels and Antonette Gaffney, 'Good Practice in Women's Prisons: A Literature Review' (Technical and Background Paper 41, Australian Institute of Criminology, February 2011) 1.

119 Human Rights Law Centre and Change the Record Coalition, above n 1, 17; Human Rights Law Centre, *Total Control: Ending the Routine Strip Searching of Women in Victoria's Prisons* (2017) 14; Mary Stathopoulos et al, 'Addressing Women's Victimisation Histories in Custodial Settings' (ACCSA Issues No 13, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies, 2012) 10–11.

> —17% within 12 months and 27% within 2 years. (One major study found that 70% of Aboriginal and Torres Strait Islander women returned to prison within 9 months.) The prognosis for their children's future lives will have similarly deteriorated - particularly if they were taken into care. The lives of most women and their families will be significantly worse than when they first went to prison. It is hardly surprising that many women feel compelled to return to violent relationships following their release.[120]

11.91 In its submission to this Inquiry, the Criminal Lawyers Association of the Northern Territory pointed to issues related to overcrowding within women's prisons and the deleterious effects on women prisoners :

> The number of Indigenous female offenders and defendants is growing. However, the infrastructure of the criminal justice system is ill-equipped to deal with this. It is an established fact, and commented upon by the judiciary, that there is acute overcrowding in the female sections of the Northern Territory jails, particularly Alice Springs. This has compromised the availability of education programs due to lack of space. It has also led to unrest within the prison population, including recent reports of women inmates fighting over scarce basic necessities such as undergarments.[121]

11.92 The Northern Australian Aboriginal Justice Agency submitted that:

> In the Northern Territory, female prison facilities are grossly overcrowded. A recent report found that the new Darwin Correctional Precinct, only open in 2016, was already at 3 times the appropriate capacity for women. This needs to be addressed immediately.... as well as overcrowding, facilities need to be culturally appropriate. For example, current procedures for visitations require strip searches, which does not acknowledge that Aboriginal and Torres Strait Islander women in prison are oftentimes survivors of sexual abuse and domestic violence and there is the potential for strip searches to re-traumatise survivors of such violence.[122]

11.93 Academic Elizabeth Grant noted a shift in approach by some correctional agencies to respond to the needs of Aboriginal prisoners so as to fulfil cultural obligations such as sorry business through the construction of small shelters in which prisoners could gather and grieve.[123] Drawing on this work, Legal Aid WA submitted that 'prisons for women should provide a respectful and dignified prison environment where women are empowered to make meaningful and responsible choices'.[124] It further suggested that services and programs provided to Aboriginal women in prison should reflect Aboriginal culture, traditions and beliefs, including providing outdoor areas for cultural gatherings such as fire pits for the preparation and cooking of traditional foods and shelters in which to gather and grieve.

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120 Debbie Kilroy, 'Women in Prison in Australia' (Panel Presentation, Current Issues in Sentencing Conference, 6–7 February 2016.

121 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

122 North Australian Aboriginal Justice Agency, *Submission 113*.

123 Elizabeth Grant, 'Designing Carceral Environments for Indigenous Prisoners: A Comparison of Approaches in Australia, Canada, Aotearoa New Zealand, the US and Greenland (Kalaallit Nunaat)' (2016) 1 *Advancing Corrections Journal* 26, 35.

124 Legal Aid WA, *Submission 33*.

11.94 The South Australian Legal Services Commission supported what it described as 'Mother-and-Infant Facilities' in women's prisons where the Commission identified such facilities were able to lower the risk of offending, in conjunction with 'significantly improved outcomes' for both mothers and children. The Commission raised concerns about the lack of such a facility at the Adelaide Women's Prison.[125]

11.95 The National Congress of Australia's First Peoples (Congress) succinctly outlined the intersect between historic trauma and the prison environment stating:

> The damage inflicted on Aboriginal and Torres Strait Islander women can be aggravated by invasive and disempowering prison routines that may trigger past traumas. One such example is strip-searching, in which the woman experiences disempowerment and vulnerability that can be likened to experiences of family violence. Although such routines may play an important functional role in the criminal justice system, Congress stresses that they must be used only where absolutely necessary, and that culturally appropriate measures should be taken to minimise their detrimental effects on Aboriginal and Torres Strait Islander women's mental health. The intergenerational and ongoing trauma experienced by Aboriginal and Torres Strait women clearly demonstrates that alternative treatment is needed. Congress submits that mainstream service providers are unlikely to cater to the specific needs of Aboriginal and Torres Strait Islander women. Further, programs specifically for Aboriginal and Torres Strait islander women, such as 'Sisters Inside,' while successful, do not have the funding or scope to instigate change on a national level.[126]

11.96 As a means of ameliorating these issues Congress made recommended that more funding be allocated towards developing specialised therapeutic and rehabilitation services specifically for Aboriginal and Torres Strait Islander women.[127]

11.97 One example of a prison program that seeks to meet the needs of Aboriginal and Torres Strait Islander women was provided by NFVPLS:

> The Prison Support Program (*Name pending) is delivered to Victorian Aboriginal women at the Dame Phyllis Frost Centre and Tarrengower Prison who are survivors of violence or abuse. The program provides culturally safe and holistic support and links women into a range of services and supports to address a broad spectrum of legal and non-legal needs, including for example legal advice for family violence, child protection or victims of crime assistance; family violence counselling, housing, drug and alcohol services, parenting programs and more. The program also facilitates the provision of community legal education to provide information to Aboriginal women in prison about their legal rights and the services available. The majority of the women supported through this program are on remand, and aged between 18 and 34. The program can also support women preparing to exit prison and post-release to ensure women have a network of supports and plans in place to address safety and risk, and reduce vulnerability to further victimisation or criminalisation upon release. Through this program, FVPLS Victoria has seen a profound transformation in many of the women we work with – from an attitude of despair or having given up hope for

125 Legal Services Commission of South Australia, *Submission 17*.
126 National Congress of Australia's First Peoples, *Submission 73*.
127 Ibid.

> the future, to one of renewed motivation to address the issues that led to imprisonment.[128]

11.98 Outlining the barriers to the delivery of programs to Aboriginal and Torres Strait Islander women within prisons, and the difficulties caused to their families through imprisonment, Kimberly Community Legal Services Inc noted:

> Aboriginal female prisoners are a cohort in need of particular attention. Many prison programs are unavailable to women due to a lack of female prison staff, and others are not culturally or gender appropriate. Many Aboriginal women prisoners are victims as well as offenders, which is an important consideration in providing appropriate prison programs. Imprisonment of women, and especially of mothers who are the primary carers of children, can cause extraordinary amounts of disruption to family cohesion. Visiting hours for those who are the primary carers of children should be extended to allow for their caretaking responsibilities to be maintained.[129]

11.99 Prison programs are discussed in more detail at Chapter 9.

Prison for mothers and their children

11.100 Legal Aid Western Australia submitted that 'most women in prison are mothers and carers. Most are also survivors of physical and sexual violence'[130]. Some estimates suggest that up to 80% of Aboriginal and Torres Strait Islander female prisoners are mothers,[131] with 20% of Aboriginal and Torres Strait Islander children nationally experiencing parental incarceration.[132]

11.101 The effect on imprisonment on women significantly impacts upon their capacity to parent or care for family members as well as impacting upon children. The Human Rights Law Centre noted:

> Many women in the justice system care not only for their own children, but for the children of others and family who are sick and elderly. Prosecuting and imprisoning women is damaging for Aboriginal and Torres Strait islander children, who are already over-represented in child protection and youth justice systems.[133]

11.102 The incarceration of Aboriginal and Torres Strait Islander women can therefore contribute to gaps in 'parenting, income, child care, role models and leadership' in their communities,[134] entrenching future disadvantage.[135] The

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128 National Family Violence Prevention Legal Services, *Submission 77*.
129 Kimberley Community Legal Services, *Submission 80*.
130 Legal Aid WA, *Submission 33*.
131 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 81.
132 Simon Quilty, 'The Magnitude of Experience of Parental Incarceration in Australia' (2005) 12(1) *Psychiatry, Psychology and Law* 256–7; Michael Levy, 'Children of Prisoners: An Issue for Courts to Consider in Sentencing' (Speech, Federal Criminal Justice Forum, Canberra, 29 September 2008).
133 Human Rights Law Centre and Change the Record Coalition, above n 1, 5.
134 Ibid 13.
135 See, eg, Hannah Payer, Andrew Taylor and Tony Barnes, 'Who's Missing? Demographic Impacts from the Incarceration of Indigenous People in the Northern Territory, Australia' (Paper, Crime, Justice and Social Democracy: 3rd International Conference, 2015) vol 1; Human Rights Law Centre and Change the Record Coalition, above n 1, 13; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 76, 90–1.

intergenerational nature of Aboriginal and Torres Strait Islander female incarceration appears to be borne out in data that shows that Aboriginal and Torres Strait Islander children, who are removed from their mothers, are themselves not only much more likely to enter the criminal justice system,[136] but also are at higher risk of 'developing behaviour problems, experiencing psychosocial dysfunction, experiencing stigmatisation and discrimination, and suffering negative health outcomes'.[137] The Australian Institute of Health and Welfare noted that young people who are the subject of child protection orders are 27 times more likely to be under a youth justice supervision order in the same year.[138]

11.103 In its submission to this Inquiry, the ACT Government acknowledged that the 'impact of female incarceration can be especially devastating for families where children are involved'.[139] The Aboriginal Legal Service NSW/ACT noted that,

> 'the incarceration of Aboriginal and Torres Strait Islander women has a significant, negative impact on families. This is particularly the case where children are removed while the mother is in custody, and placed in non-Aboriginal care or care that is not on country'.[140]

11.104 Dorinda Cox pointed to complexities and trauma experienced by many Aboriginal and Torres Strait Islander women that brings them into contact with the criminal justice system resulting in not only child removal but the perpetuation of intergenerational trauma stating:

> In my observations whilst visiting Aboriginal women in prison they have told me how they have wanted to leave violent relationships and have gone to seek help and refuge only to be flagged in the system as unable or unwilling to protect their children from violence. This systemic contact results in the removal of the children with more permanent consequences in child placement through government policies. The removal of Aboriginal children from their families and communities, in particular their mothers, has a historical legacy for Aboriginal people. The removal of Aboriginal women from their role in families and communities, further fragments and exacerbates the social and cultural issues that occur in the everyday lives of Aboriginal people. The immediate consequence for the women on a deeply personal level is the interruption of attachment to their children resulting in transmission of inter-generational trauma and further entrenching cycles of disempowerment, sometimes resulting in multiple generations of Aboriginal women from the same families incarcerated at the same time.[141]

11.105 The Queensland Law Society drew attention to the need to support Aboriginal and Torres Strait Islander female prisoners who have children, submitting that:

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136 Department of Juvenile Justice (NSW), *NSW Young People in Custody Health Survey: Key Findings Report* (2003).

137 Arlene F Lee, 'Children of Inmates: What Happens to These Unintended Victims?' (2005) 67(3) *Corrections Today* 84; PwC's Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (2017) 33.

138 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016) vi.

139 ACT Government, *Submission 110*.

140 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.

141 D Cox, *Submission 120*.

(a) Incarceration of women has significant implications for families and can lead to family law and child protection issues. Women tend to be primarily caregivers for children and may be the only caregiver in a family. In these circumstances, incarceration can lead to children being placed in out of home care and triggering the entire child protection machinery, which often results in trauma to children, separation from family and community and difficulty achieving reunification. It can also place considerable pressure on extended families.

(b) The enormous impact of incarceration on women's family relationships and responsibilities in relation to their children must be considered.

(c) There are ongoing impacts on the health and wellbeing of women where they have lost their children as a result of their imprisonment. This can lead to destructive and self-sabotaging behaviours, for example, increased drug use to self-medicate, which then leads to further offending to support a drug habit.[142]

11.106 Dr Vicky Hovane, Dorinda Cox and Professor Harry Blagg pointed to the negative effect upon children and families where often multiple generations of Aboriginal women are removed into prison stating:

> Aboriginal women are pivotal in maintaining the health and wellbeing of families. When Aboriginal women are removed from the family structure via imprisonment it creates a massive crisis, affecting a range of dependents, principally children. The crisis is exacerbated when there are multiple generations of women from one family in prisons, as is the case at Bandyup prison in WA. The ramifications reverberate negatively across the breadth and depth of family and community wellbeing.[143]

The impact of incarceration on children

11.107 Although this Report is directed to the over-representation of Aboriginal and Torres Strait Islander adults in prison, as noted above, it is important to recognise that they—particularly the women—may be the primary carer of children.

11.108 Given the highly disproportionate incarceration rates of both Aboriginal and Torres Strait Islander men and women, their imprisonment will have a consequentially disproportionate but largely hidden adverse outcome for their children.

11.109 The Human Rights Law Centre has noted:

> Many women in the justice system care not only for their own children, but for the children of others and family who are sick and elderly. Prosecuting and imprisoning women is damaging for Aboriginal and Torres Strait islander children, who are already over-represented in child protection and youth justice systems.[144]

11.110 When exploring the impact of incarceration on children, it is relevant to consider the Convention on the Rights of the Child. Article 3.1 of the Convention provides that 'In all actions concerning children, whether undertaken by public or private welfare institutions, courts of law, administrative authorities or legislative

142 Queensland Law Society, *Submission 86*.
143 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.
144 Human Rights Law Centre and Change the Record Coalition, above n 1, 5.

bodies, the best interests of the child shall be a primary consideration'.[145] While the Convention has been ratified by Australia it has not been enacted into domestic law.

11.111 When the primary carer of an Aboriginal or Torres Strait Islander child is in custody (whether on remand or sentenced), there is a considerable risk that the child will be taken into out-of-home care. Such an outcome can arise while the parent is in custody and may continue even after release if the child's parent is then homeless. The NSW Bar Association made clear this issue pointing out that:

> When an Indigenous women is incarcerated, there is often a significant disruption in the family and an increased risk that the children will end up in the child protection system. The impact of separation of Indigenous children from their families and communities is irrefutable. The incarceration of Indigenous women, often the primary or sole carers compounds the trauma. The Bringing Them Home report found that the effects on children of separation from the primary carer can have serious long-term consequences on these children's lives. Separation of children at a young age results in depression, trust and self worth issues, choice of inappropriate partners, difficulties parenting their own children and unresolved trauma and grief. This separation fractures families and results in children who are more likely to have disrupted education, poor health and unstable housing. This ultimately creates conditions entrenching the cycle of disadvantage.[146]

11.112 The number of Aboriginal and Torres Strait Islander men and women in prison and children in out-of-home care suggests more attention should be given to the Convention and the rights and best interests of the children involved as a primary consideration when courts sentence the primary carer of the child, usually their mother, to a period of imprisonment.

11.113 The New South Wales Bar Association suggested:

> When sentencing an Aboriginal or Torres Strait Islander woman to a term of imprisonment, a court must pay particular attention to the impact on her children and any evidence of intergenerational trauma caused by a history of removal and separation.[147]

11.114 The *Crimes Act 1914* (Cth) requires that, in federal sentencing, 'the court must take into account such of the following matters as are relevant and known to the court: … the probable effect that any sentence or order under consideration would have on any of the person's family or dependants'.[148] Section 16A(2)(p) would apply to an Aboriginal or Torres Strait Islander offender facing incarceration for a federal offence who has a child or children, especially mothers.

11.115 An approach that considers the 'probable effect' on these children could, on a wide reading of the section, be thought to be important to take into account, particularly where the decision about incarceration is finely balanced and involves a less serious offence.

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145 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.1.

146 NSW Bar Association, *Submission 88*.

147 Ibid.

148 *Crimes Act 1914* (Cth) s 16A(2)(p).

11.116 Such an approach could take into account that many Aboriginal and Torres Strait Islanders, and non-Indigenous offenders, are likely to receive a custodial sentence because they live in a remote area with few sentencing alternatives that would be available to those offenders living in metropolitan or major regional areas.

11.117 The courts have however determined that the application of section 16A(2)(p) would only apply in 'exceptional' circumstances.[149]

11.118 This issue does not solely arise in Commonwealth legislation. For example, in NSW, there is no equivalent provision to s 16A(2)(p). However, it has been established at common law that courts can take hardship to family and dependants into account as a subjective matter in sentencing in State offences but only in 'highly exceptional' circumstances where 'it would be, in effect, inhuman to refuse to do so'.[150]

11.119 The NSW Court of Criminal Appeal has held that, although the effect of imprisonment on an offender's family can be taken into account as one subjective circumstance in sentencing, in the absence of exceptional circumstances it cannot be taken into account as a specific matter that results in a substantial reduction or elimination of a sentence'.[151] Similar considerations apply to people remanded in custody pending trial or sentence.

11.120 The ALRC suggests that the impact that incarceration of a primary care giver has on his or her children—at least in areas of Australia that have inadequate or no alternatives to imprisonment—should be taken into account by sentencing courts As this issue came to attention late in the course of this Inquiry, and was not identified in the Discussion Paper or the subject of detailed consultation, the ALRC does not make a recommendation to address this issue. However, the ALRC suggests that the concerns raised in respect of the impact of incarceration on children are of sufficient importance for governments to consider reviewing the scope and application of the 'exceptional circumstances' sentencing consideration.

149 See, for example, *R v Togias* (2001) 127 A Crim R 23, 25–6 (Spigelman CJ); *Anna Le v Regina* [2006] NSWCCA 136, 25 (Latham J).

150 See *R v Wirth* (1976) 14 SASR 291, 295–6 (Wells J), followed by the NSW Court of Criminal Appeal in *R v Edwards* (1996) 90 A Crim R 510.

151 *R v Girard* [2004] NSWCCA 170 [21]; *R v X* [2004] NSWCCA 93 [24].

12. Fines and Driver Licences

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Summary

12.1 The Terms of Reference for this Inquiry ask the ALRC to have regard to laws that may contribute to the rate of Aboriginal and Torres Strait Islander offending, including 'driving offences and unpaid fines'—the statutory enforcement regimes of which affect Aboriginal and Torres Strait Islander people unduly and can result in incarceration.

12.2 The ALRC considers that fine enforcement regimes should not, directly or indirectly, allow for imprisonment, and recommends that legalisation should be amended to this effect. Imprisonment is a disproportionate response to fine default, and impacts especially on Aboriginal and Torres Strait Islander women.

12.3 The imposition of fines and fine enforcement regimes affect Aboriginal and Torres Strait Islander people disproportionately. Fine enforcement regimes can aggravate criminogenic factors and operate to further entrench disadvantage, especially when the penalty for default or secondary offending includes further fines, driver licence suspension or disqualification, and imprisonment.

12.4 The ALRC makes recommendations to increase the efficacy and decrease the harm caused to Aboriginal and Torres Strait Islander people by the imposition of fines. These include decreasing the size of fines, limiting the issue of infringement notices, the nationwide adoption of Work and Development Orders (WDOs) based on the New

South Wales (NSW) model, and the provision of a discretion to skip driver licence suspension where the person in fine default is vulnerable, supported by statutory guidelines for state debt recovery agencies. These are not standalone recommendations and, together with the abolition of imprisonment, seek to make fine systems and fine enforcement regimes fairer and more responsive to the circumstances of Aboriginal and Torres Strait Islander people, especially in regional or remote locations.

12.5 This chapter further discusses two key pathways for Aboriginal and Torres Strait Islander people into fine enforcement, namely offensive language provisions and driving without a licence.

Fines and infringement notices

12.6 The term 'fines' usually encompasses both fines imposed by courts following convictions and infringement notices, which are monetary penalties handed out at the point of infringement by issuing officers. Issuing officers include transit police, police officers and council workers.[1] The two penalty types have clear differences and non-payment can have different consequences. Nonetheless, unless otherwise stated, the term 'fines' in this chapter generally refers both to monetary penalties imposed by courts and those received under infringement notices.

Statutory enforcement frameworks

12.7 Every state and territory has a statutory enforcement regime for fine and infringement notice default.[2] Generally, these permit the state debt recovery authority to enforce progressive sanctions against a person in default. The NSW statutory framework is used in this chapter as an example.

12.8 NSW fine enforcement is legislated under the *Fines Act 1996* (NSW) (the Act) and administered by State Debt Recovery (SDR)[3]—now called 'Revenue NSW'. Enforcement action is taken against fine defaulters when they have not paid a fine by a notice served on the defaulter; have not paid by an extended due date granted by SDR; or have not paid agreed instalments (see fine mitigation below).[4]

12.9 The progressive recovery process is summarised in s 58 of the Act:[5]

> 58 Summary of enforcement procedure
>
> (1) The following is a summary of the enforcement procedure under this Part following the making of a fine enforcement order:

1 Department of Attorney General and Justice (NSW), *A Fairer Fine System for Disadvantaged People: An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (2011) 13.

2 *Crimes (Sentencing Administration) Act 2005* (ACT) ch 6A; *Fines Act 1996* (NSW) pt 4; *Fines and Penalties (Recovery) Act* (NT) pt 5; *State Penalties Enforcement Act 1999* (Qld) pts 4–6; *Criminal Law (Sentencing) Act 1988* (SA) pt 9 div 3; *Expiation of Offences Act 1996* (SA) s 14B; *Monetary Penalties Enforcement Act 2005* (Tas); *Infringements Act 2006* (Vic); *Sentencing Act 1991* (Vic) pt 3B; *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).

3 *Fines Act 1996* (NSW) s 115.

4 Ibid s 65(1).

5 See also ibid pt 4.

(a) **Service of fine enforcement order** Notice of the fine enforcement order is served on the fine defaulter and the fine defaulter is notified that if payment is not made enforcement action will be taken (see Division 2).

(b) **Driver licence or vehicle registration suspension or cancellation** If the fine is not paid within the period specified, Roads and Maritime Services suspends any driver licence, and may cancel any vehicle registration, of the fine defaulter. If the driver licence of the fine defaulter is suspended and the fine remains unpaid for 6 months, Roads and Maritime Services cancels that driver licence (see Division 3).

(c) **Civil enforcement** If the fine defaulter does not have a driver licence or a registered vehicle or the fine remains unpaid 21 days after the Commissioner directs Roads and Maritime Services to take enforcement action, civil action is taken to enforce the fine, namely, a property seizure order, a garnishee order or the registration of a charge on land owned by the fine defaulter (see Division 4).

(d) **Community service order** If civil enforcement action is not successful, a community service order is served on the fine defaulter (see Division 5).

(e) **Imprisonment if failure to comply with community service order** If the fine defaulter does not comply with the community service order, a warrant of commitment is issued to a police officer for the imprisonment of the fine defaulter (except in the case of children).

(f) **Fines payable by corporations** The procedures for fine enforcement (other than community service orders and imprisonment) apply to fines payable by corporations (see Division 7).

(g) **Fine mitigation** A fine defaulter may seek further time to pay and the Commissioner may write off unpaid fines or make a work and development order [WDO] in respect of the fine defaulter for the purposes of satisfying all or part of the fine. Applications for review may be made to the Hardship Review Board (see Division 8).

(2) This section does not affect the provisions of this Part that it summarises.

12.10 Enforcement begins with the issuing of a notice. Ordinarily, the next step is for NSW Roads and Maritime Services (RMS) to suspend a person's driver licence and/or motor vehicle registration.[6] If the fine is still not paid within a set time period, SDR can commence civil enforcement action to satisfy the payment of the fine. If civil enforcement is unable to commence or is unsuccessful, SDR may make a Community Service Order (CSO), requiring the defaulter to perform community service work to pay off the unpaid fine amount.[7] Finally, the defaulter may serve a term of imprisonment calculated in reference to the amount in default for non-compliance with that order.[8]

12.11 Some states and territories also provide for the details of defaulters to be published on a government website.[9]

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6 Ibid s 71(1)(a).

7 Ibid ss 79(1), 81 calculated at $15 per hour, maximum 100 hours.

8 Ibid div 6, ss 89(1), 90(1) calculated at $120 per day with a minimum of one day and maximum of three months. The defaulter may apply for an order to serve the time under an intensive correction order in the community.

9 See, eg, *Fines and Penalties (Recovery) Act* (NT) s 66M.

Fine provisions leading to imprisonment

12.12 Fine default imprisonment can be broken down into three broad categories:[10]

- imprisonment on the basis of continued fine default that is not necessarily dependant on breach of a CSO; [11]
- imprisonment following failure to comply with a CSO, imposed following fine default;[12] and
- imprisonment for a secondary offence, such as driving while licence disqualified when the driver licence was suspended or cancelled as part of the fine default enforcement regime (see further below).[13]

12.13 In each state and territory, fine enforcement statutes permit imprisonment when a person is ineligible or fails to comply with a CSO.[14] However, the process and the likelihood of incarceration differ significantly across the states and territories.

12.14 There are two key pathways from a fine to imprisonment. First, where the court imposes a CSO, and a defaulter fails to comply or is otherwise ineligible, the court can impose a period of imprisonment by which a defaulter pays off, or 'cuts out', the fine amount owed (the Australian Capital Territory (ACT), South Australia (SA) and Victoria).[15] While there are statutory safeguards, such as the Hardship Review Board, [16] and it has been reported that imprisonment occurs only rarely in these jurisdictions, [17] it does not mean the provisions are never used. The Sentencing Advisory Council of Victoria reported in 2014 that 338 people entered prison for fine default between 2001 and 2013 in Victoria.[18] National Aboriginal and Torres Strait Islander Legal Services (NATSILS) advised this Inquiry that imprisonment in SA for breach of a CSO imposed for fine default does not show up in statistics as imprisonment for fine default. Instead,

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10 The Law Council of Australia, *Submission 108*.

11 See, eg, *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

12 See, eg *Crimes (Sentencing Administration) Act 2005* (ACT) s 116ZK; *Fines Act 1996* (NSW) div 6; *Fines and Penalties (Recovery) Act* (NT) ss 88, 90–91; *State Penalties Enforcement Act 1999* (Qld) pt 6; *Criminal Law (Sentencing) Act 1988* (SA) s 71; *Infringements Act 2006* (Vic) ss 156, 160.

13 See, eg, *Road Transport Act 2013* (NSW) s 54; The Law Council of Australia, *Submission 108*.

14 See, eg, *Crimes (Sentencing Administration) Act 2005* (ACT) s 116ZK; *Fines Act 1996* (NSW) div 6; *Fines and Penalties (Recovery) Act* (NT) ss 88, 90–91; *State Penalties Enforcement Act 1999* (Qld) pt 6; *Criminal Law (Sentencing) Act 1988* (SA) s 71; *Infringements Act 2006* (Vic) ss 156, 160; *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

15 *Crimes (Sentencing Administration) Act 2005* (ACT) ss 116ZK, 116ZM; *Criminal Law (Sentencing) Act 1988* (SA) s 71; *Infringements Act 2006* (Vic) ss 156, 160, 160A.

16 See, eg, *Infringements Act 2006* (Vic) pt 12; *Sentencing Act 1991* (Vic) pt 3B regarding court imposed fines.

17 See, eg, Department of Justice (Vic), *Statistical Profile of the Victorian Prison System 2006–07 to 2010–11* (2011) 66: five people in 2010/11 were received by Corrections for fine default. Between July 2006 and June 2011, however, 151 prison receptions for people serving sentences for non-payment of fines only, of which 12 (8%) were Aboriginal and Torres Strait Islander peoples.

18 Sentencing Advisory Council (Vic), *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria—Report* (2014) figure 26. See also Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

it is recorded as a justice procedure offence, and NATSILS 'sees this occurring in South Australia quite regularly'.[19]

12.15 Secondly, where the state debt recovery agency imposes a CSO, and a person fails to comply or is otherwise ineligible, the state debt recovery agency can issue a warrant of commitment for the imprisonment of the person (NSW, the Northern Territory (NT), Tasmania, Queensland, and Western Australia (WA)).[20] With the exception of WA, which need not rely on a breach or ineligibility for a CSO to issue a warrant, imprisonment for fine default in these jurisdictions is reportedly rare.[21] For example, the NT Government advised that in 2016 only one warrant was issued against a fine defaulter in the NT.[22] The NSW Government advised that SDR had not issued a warrant of commitment since 1998, and that SDR was exploring options to repeal provisions in the *Fines Act 1996* (NSW) that permit imprisonment via a warrant of commitment for fine default. The NSW Government submitted they were considering replacing warrants of commitment with a prison sanction that could only be imposed by a court.[23]

12.16 Some jurisdictions distinguish between the types of fines that can result in imprisonment. In Victoria, for example, imprisonment can only be imposed for default on an infringement notice.[24] In SA, imprisonment can only be imposed by the court for default on court-ordered fines.[25] In WA, warrants of commitment can only be issued by the state debt recovery agency for court-ordered fines.[26]

12.17 There are maximum periods that a defaulter can spend in prison to 'cut out' fine debt, regardless of the size of the debt.[27]

12.18 Imprisonment for fine default is most prevalent in WA. For example, the WA Office of the Inspector of Custodial Services reported that in WA between July 2006 and June 2015:

- 7,462 prisoners were received into correctional centres for fine default;
- there were approximately 11 people on any given day in prison for fine default;
- the average stay in prison for fine default was four days;

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19 NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*. For justice procedure offending see ch 7.

20 *Fines Act 1996* (NSW) s 87; *Fines and Penalties (Recovery) Act* (NT) s 86; *State Penalties Enforcement Act 1999* (Qld) s 119; *Monetary Penalties Enforcement Act 2005* (Tas) s 103; *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

21 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012).

22 Northern Territory Government, *Submission 118*.

23 NSW Government, *Submission 85*; *Fines Act 1996* (NSW) pt 4 div 6.

24 *Infringements Act 2006* (Vic) s 160AB.

25 *Criminal Law (Sentencing) Act 1988* (SA) s 71(2).

26 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 29.

27 See, eg, in Queensland, the maximum period of imprisonment is two years: *State Penalties Enforcement Act 1999* (Qld) s 52A(3); in WA, the maximum time served is equivalent to the maximum term of imprisonment, if any, for the offence: *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

- Aboriginal and Torres Strait Islander men represented 38% of the fine default male prison population; and
- Aboriginal and Torres Strait Islander women made up 64% of the female fine defaulter prison population—and constituted the fastest growing fine default population.[28]

12.19 Imprisonment to cut out fines in WA can also be served in police lock up.[29] In the coronial inquest into the death of Ms Dhu—an Aboriginal woman held in custody on a warrant of commitment—the coroner was advised that cutting out fines in police lock up was common place in WA, and was not recorded in the custodial statistics.[30]

12.20 Regimes that use warrants of commitment that are issued by state debt recovery agencies result in imprisonment without hearings or trials. Imprisonment is automatic at a certain point in the enforcement process. In 2012, the NSW Law Reform Commission (NSWLRC) recommended the abolition of imprisonment for non-compliance with a CSO in NSW, describing the process of warrants of commitment issued by SDR as contrary to the principles of natural justice and procedural fairness.[31] Legal Aid NSW submitted to this Inquiry that the system in NSW was entirely inconsistent with Recommendation 117 of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which had called for the intervention of a judge or magistrate to determine whether a term of imprisonment should be ordered.[32] The NSW Government advised the ALRC that the relevant NSW provisions are under review.[33]

12.21 In 2016, the Coroner's Court of WA questioned whether incarcerating fine defaulters provided any benefit to the community and recommended the abolition of warrants of commitment in WA.[34] At the very least, the Coroner's Court recommended that imprisonment must be subject to a hearing in the Magistrates Court and determined by a Magistrate who is authorised to make orders other than imprisonment (such as CSOs or other alternatives) where appropriate.[35] This approach was supported in 2016 by the Law Society of WA.[36]

12.22 The ALRC understands that the WA Government may introduce reforms to address imprisonment for fine default in that state, including introducing lesser penalties and expanding the use of CSOs.[37]

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28 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) v.
29 *Prisons Act 1981* (WA) s 16(7).
30 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 152–5.
31 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 8.4.
32 Legal Aid NSW, *Submission 101*.
33 NSW Government, *Submission 85*.
34 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 147.
35 Ibid 151.
36 The Law Society of Western Australia, 'Imprisonment of Defaulters' (Briefing Paper, 2016).
37 Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 September 2017, 188–207 (John Quigley); The Law Council of Australia, *Submission 108*.

The impact on Aboriginal and Torres Strait Islander peoples

12.23 Aboriginal and Torres Strait Islander people are over-represented as fine recipients and are less likely than non-Indigenous people to pay a fine at the time of issue of the initial notice (attributed to financial capacity, itinerancy and literacy levels). Aboriginal and Torres Strait Islander people are consequently susceptible to escalating fine debt and fine enforcement measures.[38] Adjunct Professor Russell Hogg and Associate Professor Julia Quilter submitted:

> We do know from research and official inquiries that fines have disproportionate and serious adverse impacts on disadvantaged sections of the community: Indigenous Australians, the young, homeless, the welfare dependent, mentally ill, people with intellectual disabilities and prisoners. These groups are more vulnerable to being fined in the first place and to accruing multiple fines. They are less likely to be able to pay fines or to negotiate the processes available to contest them or otherwise mitigate their impact. Literacy and numeracy problems, language difficulties, housing insecurity and residential transience ensure that many will fall foul of inflexible administrative systems that are insensitive to the circumstances of the poor and marginal.[39]

12.24 The WA system has been identified as particularly arduous for Aboriginal and Torres Strait Islander peoples, especially women. In 2013, it was reported that one in every three women who entered prison in WA did so for fine default.[40] Between 2006 and 2015, nearly three-quarters (73%) of female fine defaulters in WA were unemployed when imprisoned, and about 64% of women imprisoned for fine default were Aboriginal and Torres Strait Islander women.[41]

12.25 The United Nations Special Rapporteur on Violence against Women urged the WA Government to review the policy of incarceration for unpaid fines, noting the 'disproportionate effect on the rates of incarceration of Aboriginal women because of the economic and social disadvantage that they face'.[42] This call was reiterated by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, who expressed concern about the growing number of Aboriginal women imprisoned for fine default, and noted that the 'laws on fine default are an example of legislation having a disproportionate impact on Aboriginal women'.[43] A 2017 report by the Human Rights Law Centre on the over-representation of Aboriginal and Torres Strait Islander women in prison also identified fine default statutes as laws that unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women, and

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38 Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [3.68].

39 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

40 Western Australia Labor, 'Locking in Poverty: How Western Australia Drives the Poor, Women and Aboriginal People to Prison' (Discussion Paper, 2014) 2.

41 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) v: only 10% of men were unemployed at entry for fine default.

42 United Nations Special Rapporteur on Violence against Women, *End of Mission Statement by Dubravka Šimonović, United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences, on Her Visit to Australia from 13 to 27 February 2017* (2017).

43 United Nations Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc A/HRC/36/46 (15 September 2017) 72.

recommended the abolition of all laws that lead to the imprisonment of people who cannot pay fines.[44]

12.26 Such concerns have also been highlighted by Australian legal advocates. In 2016, the Law Society of NSW submitted to the Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services that the WA fine default scheme 'operates disproportionately on those most vulnerable, particularly Indigenous women and only exacerbates poverty and disadvantage. It furthermore fails to deter fine defaulting or gather fine revenue'.[45] This observation was reiterated by stakeholders to this Inquiry.[46]

12.27 The Aboriginal Legal Service of WA (ALSWA) has previously stated that the

> complex underlying problems that exist for vulnerable fine defaulters (such as mental illness, cognitive impairment, homelessness, poverty, substance abuse, family violence and unemployment) will never be addressed by the current blunt fines enforcement system in Western Australia.[47]

12.28 The potential 'bluntness' of the enforcement regime in WA was illustrated in a case study provided by Kimberly Community Legal Services:

> Client G resides in an Aboriginal Community near Fitzroy Crossing. He receives his post c/- the Post Office as do many Aboriginal people who reside in communities in the Kimberley where there is no postal delivery to residences. Client G had fines in excess of $20,000 incurred over a long time. He had entered into a repayment agreement and set up Centrepay deductions from his Centrelink benefit. At the time the Centrepay deductions were set up Client G's Centrelink payments were subject to Income Management. Client G was subsequently taken off Income Management and was receiving a Disability Support Pension (DSP). At the time the transfer was made, all Client G's Centrepay deductions were cancelled. Client G does not believe he was ever notified of this and to the best of his knowledge he was still making regular payments towards his fines.
>
> Client G came to see KCLS to find out how much his fines were. KCLS made inquiries with the local Sheriff and was advised that, at the time of the inquiry, Client G's fines were approximately $17,000 and there was no current repayment agreement in place. The Sheriff also advised that given the quantum of the fines, unless a repayment agreement was implemented immediately, it was likely a warrant would be issued for Client G's arrest. Client G was understandably distressed at this information. KCLS assisted Client G to reinstate his Centrepay deductions which avoided the warrant being issued.
>
> The suspension of the repayments was a result of an administrative process internal to Centrelink that was not communicated to Client G, or not communicated appropriately having regard to his literacy and general comprehension of English

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44 Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) rec 3.

45 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [6.2].

46 See, eg, Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Legal Aid WA, *Submission 33*.

47 Aboriginal Legal Service of WA, *Addressing Fine Default by Vulnerable and Disadvantaged Persons: Briefing Paper* (2016) 2.

> language, or the issues related to receiving post by checking at the Post Office. Had Client G not contacted KCLS when he did, a warrant for his arrest would have been issued and Client G would have been incarcerated.[48]

12.29 This case study clearly identifies the interrelated issues that Aboriginal and Torres Strait Islander people who live in regional or remote communities and who may not routinely receive mail may face in relation to fine enforcement. Issues of remoteness coupled with unreliable postal services can mean that enforcement notices may not be received, leading to greater risk of fine debt escalating, enforcement costs accruing and enforcement measures being implemented.[49]

Imprisonment terms that 'cut out' or result from fine debt

Recommendation 12–1 Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of, or as a result of, unpaid fines.

12.30 The ALRC recommends that statutory provisions permitting imprisonment resulting from unpaid fines should be repealed. Fines are penalties imposed in response to usually minor infractions—conduct that the legislature and the courts have determined not to warrant a term of imprisonment.[50] Imprisonment for fine default results in punishment disproportionate to the offending conduct, and contradicts the principle of imprisonment 'as a last resort'.[51]

12.31 Fine enforcement provisions provide for stepped enforcement actions. It is the view of the ALRC that when a fine defaulter is unable to pay a fine or infringement notice; has not applied for time to pay or other payment options; has no income or property to be the subject of civil orders; and is unable to complete a CSO, that person requires assistance, not prison.

12.32 The RCIADIC recommended that all governments ensure that sentences of imprisonment were not automatically imposed for the default of payment of a fine.[52] While the direct link between fine default and imprisonment has been removed from

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48 Kimberley Community Legal Services, *Submission 80*.

49 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [16.9].

50 Department of Attorney General and Justice (NSW), *A Fairer Fine System for Disadvantaged People: An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (2011) 15; NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012). See also S McLean Cullen, *Submission 64*.

51 See, eg, Amanda Porter, 'Reflections on the Coronial Inquest of Ms Dhu' (2016) 25 *Human Rights Defender* 8; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016).

52 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, rec 117.

statutes nationwide, and fine payment options have been introduced, fine enforcement regimes still provide pathways from fines to imprisonment.

12.33 The NSW Government did not support abolition of a court's ability to order imprisonment for fine default altogether, as it considered that the 'principle of imprisonment as a last resort protects against imprisonment for fine default unless necessary'.[53] The vast majority of stakeholders to this Inquiry, however, supported the abolition of statutory provisions that provide for imprisonment in lieu of, or as a result of, unpaid fines.[54] Many pointed out the absurdity of imprisonment for such a 'crime'. Legal Aid WA observed that imprisonment for fine default 'normalises imprisonment, undermining the effectiveness of the deterrence element of the sentence of a term of imprisonment and detracting from the policy position that a sentence of imprisonment should be a last resort'.[55] The NSW Bar Association strongly supported any reforms that

> prevent incarceration, directly or indirectly, solely as a result of the non-payment of fines. Deprivation of liberty for this reason is not compatible with a modern, civilised society and has had a manifestly disproportionate impact upon Aboriginal and Torres Strait Islander people. Fines are a debt and should only be enforced as such.[56]

12.34 The Law Society of NSW Young Lawyers Criminal Law Committee (YLCLC) suggested that imprisonment as a result of fine default 'offends both principle and pragmatism'.[57]

12.35 The Infringement Working Group in Victoria is a joint working group of the Victorian Federation of Community Legal Centres and Financial and Consumer Rights Council. Its joint submission with the Victorian Aboriginal Legal Service to this Inquiry (VALS/IWG) expressed 'strong' support for the proposal to abolish the possibility of a person being imprisoned for unpaid fines.[58]

12.36 VALS/IWG advised that, in Victoria, the most common way infringements can lead to imprisonment is when a 'person does not pay their fine, is arrested and brought before the Magistrate's Court for a penalty enforcement warrant (PEW) hearing and is

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53 NSW Government, *Submission 85*.

54 See, eg, Sisters Inside, *Submission 119*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*; Kimberley Community Legal Services, *Submission 80*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Victoria Legal Aid, *Submission 56*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Kingsford Legal Centre, *Submission 19*; Legal Services Commission of South Australia, *Submission 17*; Commissioner for Children and Young People Western Australia, *Submission 16*.

55 Legal Aid WA, *Submission 33*.

56 NSW Bar Association, *Submission 88*.

57 The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.

58 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

then placed on an "imprisonment in lieu of payment" order (IIL order)'. This means that any default in payment leads to the automatic issuing of an imprisonment warrant which enables the person to be taken directly to prison without further court oversight. They advised that people can be on an IIL order for years, with one lasting as long as 40 years. VALS/IWG reported there to be 8,000 imprisonment warrants in existence in Victoria. So, although the court does impose imprisonment in Victoria, imprisonment is then contingent upon actions of the defaulter and the matter does not go back before the court when a person has not paid. It is not known how many warrants issued are for Aboriginal and Torres Strait Islander people. VALS/IWG observed that, as Aboriginal and Torres Strait Islander people 'disproportionately experience factors making IIL order default more likely, including financial hardship, insecure housing, poor health including mental health and cognitive impairment, involvement with Chid Protection and problematic substance misuse', it was 'likely that Aboriginal and Torres Strait Islander people are over-represented amongst this group'.[59]

12.37 VALS/IWG reported that up to 272 people in Victoria were received into custody for fine default only between 2010 and 2016.[60] The median time in prison was 24 days, whereas the longest was 345 days.[61]

12.38 Some states and territories are considering reform to their fine default regimes. WA is reviewing their fine enforcement system while, in NSW, the Commissioner of Fines Administration has established a steering committee to review the impact of the penalty notice system on Aboriginal and Torres Strait Islander people in NSW.[62] The NT Government also advised that it is 'currently considering alternative options to infringements'.[63] Many jurisdictions are also adopting the WDO scheme from NSW (discussed below).

12.39 VALS/IWG outlined the approach taken by the Department of Economic Development, Jobs, Transport and Resources in Victoria, which has included increasing the training of decision makers at the frontline to help guide the exercise of discretion. This training aims to ensure that people who make mistakes or who are experiencing disadvantage are not penalised. Further, a person who receives a fine is given an opportunity to provide evidence of their special circumstances to avoid the enforcement of a fine.[64] VALS/IWG suggested this approach as a model for reform.

12.40 The ALRC is cognisant that removing prison as an option removes both a final incentive to pay and a 'short and sharp' option for people without the means to discharge their fine debt to become debt-free. The Public Interest Advocacy Centre (PIAC) submitted to this Inquiry that, accordingly, there is the need for better

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59 Ibid. The VALS/IWG suggested an expansion of the Koori Court to sit in relation to PEW and special circumstances matters

60 Without any other conviction.

61 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

62 NSW Government, *Submission 85*.

63 Northern Territory Government, *Submission 118*.

64 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

alternatives to be in place before the final option of prison is removed in some jurisdictions.[65]

Increase the efficacy of fine regimes

Recommendation 12–2 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to develop options that:

- reduce the imposition of fines and infringement notices;
- limit the penalty amounts of infringement notices;
- avoid suspension of driver licences for fine default; and
- provide alternative ways of paying fines and infringement notices.

12.41 Fines are of little benefit when the person fined cannot pay and the state expends resources to enforce a debt that cannot be discharged. Seeking to enforce an unrecoverable debt is costly for governments. The NSW Bar Association noted that in many cases the 'cost of enforcement exceeds the amount successfully recovered', and enforcement has both tangible and intangible costs for a vulnerable person in default.[66]

12.42 The sheer cost, and sometimes number, of penalties can appear insurmountable, where even partial payment may further impoverish a person. Fine default results in loss of driver licences, which can exacerbate disadvantage for Aboriginal and Torres Strait Islander people in regional areas, and affect the likelihood of employment. Loss of a licence may also decrease accessibility to health services and family, kin and community, and result in offences for driving while unlicensed (discussed below). Fine default can also lead to enormous stress and the fear of—or actual—incarceration. As noted by Hogg and Quilter, fine enforcement involves a form of 'sentence creep', in which a 'supposedly lenient penalty for a minor offence gives way to harsh sanctions for those who cannot pay but is also criminogenic in its effects'.[67]

12.43 The ALRC believes that there are more equitable ways to increase the effect of fines and fine enforcement while minimising the harm. The ALRC recommends that state and territories work with relevant Aboriginal and Torres Strait Islander organisations to introduce a suite of options aimed at reducing the likelihood of fines being imposed, mitigating negative outcomes when fines are imposed, and using innovative approaches to 'pay' the fine that benefit the person and the community. Stakeholders strongly supported these approaches and provided various models and options, which are outlined throughout this chapter.

12.44 The ALRC encourages states and territories to:

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65 Public Interest Advocacy Centre, *Submission 25*.
66 NSW Bar Association, *Submission 88*.
67 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

- introduce or clarify the use of written cautions (supported by training) issued in lieu of infringement notices for minor or first time offending;
- provide concessional infringement penalty amounts for those receiving government benefits;
- cap the total penalty amount able to be received in one incident;
- consider introducing suspended court-ordered fines;
- skip the enforcement step of driver licence suspension for Aboriginal and Torres Strait Islander people living in regional and remote communities; and
- introduce the NSW model of voluntary WDOs.

12.45 These options are discussed below.

Reduce the imposition of fines and infringement notices

12.46 Infringement notices are the most common penalty issued by criminal justice systems in Australia.[68] In 2009, the NSW Ombudsman reported that the NSW Police Force, as an 'issuing agency', had issued more than 500,000 infringement notices to adults in 2008,[69] and over 8,000 criminal infringement notices (discussed below). In Victoria up to five million infringement notices were issued across all issuing agencies in 2015–16.[70]

12.47 Infringement notices generally refer to regulatory penalties covering areas such as traffic infringements (such as for parking or speeding) as well as areas such as health and safety, national parks and wildlife, passenger transport, and rail safety.[71] In 2012, the NSWLRC observed in its report on penalty notices that

> [m]any penalty notice offences involve conduct that is not generally thought of as highly culpable. For instance, few people are likely to think of themselves as engaging in criminal activity when they park illegally, or smoke a cigarette on a railway platform.[72]

12.48 The penalty received under an infringement notice is fixed in price and cannot be tailored to the circumstances of the recipient. While infringement notices can be challenged in court, this is reportedly rare, especially when the accused is vulnerable or an Aboriginal and Torres Strait Islander person.[73]

12.49 The imposition of monetary penalties, particularly the significant high fixed amounts under infringement notices, has been widely criticised for having a

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68 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [1.26]–[1.28].
69 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) foreword.
70 Infringement Management and Enforcement Services (Vic), *Annual Report on the Infringements System 2015–16* (2016) 25.
71 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [1.3], [1.7].
72 Ibid [1.32].
73 See, eg, NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 102.

disproportionate impact on: people with low incomes (including young people); people in prison;[74] homeless or transient people with complex needs; and people with mental health issues or cognitive impairments.[75] Aboriginal and Torres Strait Islander people are over-represented in these groups.[76]

12.50 Paying a fine can be especially problematic for people living remotely with little means. A submission from the Torres Strait noted that: 'I have met offenders with SPER fines in the $4,000 and $6,000. In comparison to a mainland working class this equates to a mortgage for these people. They do not have a hope of making full payment.'[77]

12.51 Penalties received under single or multiple infringement notices can be disproportionate to the offending conduct. In consultations, the ALRC heard examples of the potential for escalation, such as that of a young Aboriginal girl (Ms X) with a dysfunctional family who skipped school and rode the trains without a ticket. Ms X was asked to present her ticket for inspection by a transit officer. Ms X told the transit officer to 'fuck off'. Ms X was then issued an infringement notice for fare evasion and offensive language.[78] Ms X responded to the transit officer: 'you got to be fucking kidding'. Ms X received a further infringement notice for offensive language. In one short incident Ms X was issued with fines well in excess of $1,000.

12.52 Fine mitigation options following the imposition of a fine are available. These include time-to-pay options in all jurisdictions and the availability of Centrepay—the ability to have fines deducted weekly from Centrelink payments to pay off outstanding fines. There are also bodies that consider the special circumstances of the person regarding fine debt. These include the Hardship Review Board in NSW and the Enforcement Review Program (a special circumstances court) in Victoria for persons with a diagnosed mental illness or cognitive impairment, an addiction to drugs, or for people experiencing homelessness. Legal Aid NSW observed that, while

> time to pay, the Work and Development Order scheme and the write-off of fine debt are important mitigation measures, they cannot and should not serve as a substitute for proper 'front end' regulation of the system. Front end changes are needed to ensure that infringement notices are only issued in appropriate circumstances, and for appropriate amounts, so as to reduce their disproportionate impact on Aboriginal and Torres Strait Islander people.[79]

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74 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [17.1], [17.3], [17.67].

75 Department of Attorney General and Justice (NSW), *A Fairer Fine System for Disadvantaged People: An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (2011) 14.

76 See ch 10.

77 S McLean Cullen, *Submission 64*.

78 *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(1)(a)–(b), sch 1 pt 3.

79 Legal Aid NSW, *Submission 101*.

Greater use of cautions in lieu of infringement notices

12.53 Issuing officers may use their discretion to informally warn a person rather than to issue an infringement notice in some circumstances. Some jurisdictions also provide for written cautions.[80] The NSWLRC noted:

> The use of both warnings and cautions allows issuing officers to encourage compliance by using the least restrictive measure called for in the circumstances of a particular case. A warning or a caution may be particularly appropriate, for example, where the offence is at the very minor end of a scale of offending, or where the person has a vulnerability, such as homelessness or mental illness, that impairs the ability to comply with or understand the relevant regulations or legislation.[81]

12.54 In 2017, SA Police introduced an adult cautioning scheme for some summary offences that would have previously resulted in the person going before the court.[82] The SA scheme does not have a statutory basis. NT Police can also issue written or verbal cautions, although the issuing of a caution is not recorded.[83]

12.55 Issuing officers in NSW are empowered by statute to issue an official caution.[84] For all issuing officers, other than police officers, directions regarding the imposition of official cautions are provided in guidelines issued by the Attorney General (NSW) (the Guidelines).[85] The Guidelines 'assist officers in exercising their discretion, they do not create any right or obligation to give a caution'.[86]

12.56 The Guidelines set out the matters to be taken into account when deciding whether to issue a caution, including: the characteristics of the offence; whether the person is homeless, has a mental illness or intellectual impairment, or is a child; whether the offending was inadvertent; whether the person was cooperative; and whether it was otherwise reasonable to issue a caution.[87] A caution must only be given in circumstances where an infringement notice could have been issued.[88] Under the Guidelines, the giving of a caution should be recorded 'where practical' to do so, including the date, the name of the offender and the issuing officer, and the offence for which the caution was given. Agencies should ensure that all issuing officers have a good understanding of the offences, are aware of the guidelines, and receive 'regular and appropriate training'.[89]

12.57 In 2012, the NSWLRC found that the cautioning system, while new at that time, could be strengthened, as issuing officers had difficulty identifying vulnerable people.

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80 See, eg, *Fines Act 1996* (NSW) s 19A.
81 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [5.7].
82 South Australia Police, *SA Police Introduce Adult Cautioning* <https://www.police.sa.gov.au/sa-police-news-assets/front-page-news/sa-police-introduce-adult-cautioning>. SA does not have a Criminal Infringement Notice system.
83 Northern Territory Government, *Submission 118*.
84 *Fines Act 1996* (NSW) s 19A.
85 *Caution Guidelines under the Fines Act 1996* (NSW).
86 Ibid 1.
87 Ibid.
88 Ibid 6.
89 Ibid 7, 8.

It noted compliance with the Guidelines by issuing officers was 'uneven'.[90] The NSWLRC recommended that:

- the *Fines Act 1996* (NSW) direct issuing officers to consider whether it is appropriate to issue an official caution instead of a penalty notice;
- all guidelines on the issuing of cautions be publicly available;
- unless police develop their own consistent guidelines, legislation prescribe that the Attorney General Guidelines apply to police; and
- the Guidelines contain a 'statement of principle' regarding the need to reduce the involvement of vulnerable people in the infringement notice system.[91]

12.58 The NSWLRC also found that it was difficult to ascertain the incidence of cautions, and recommended that all cautions be written, recorded and reported on, and that issuing officers be accountable to an oversight body.[92]

12.59 Stakeholders to this Inquiry supported the introduction of formalised adult cautioning schemes across the jurisdictions.[93] ALSWA agreed with the use of cautions when people were clearly vulnerable, noting that it was 'important to bear in mind that vulnerable and disadvantaged people are not likely to pay the infringement amount in any event'.[94] Instead of attempting to have fines that are issued to disadvantaged people removed after the fact, the Law Council of Australia advocated for wider use of cautions, suggesting that written cautions should be issued in the first instance for most offences. Training and guidelines should be strengthened to include cautioning and referrals to services rather than infringements where cautioning has not been successful.[95] VALS/IWG also expressed strong support for the wider use of cautions and official warnings, stating that low level and first time offending should be routinely dealt with by official warning or written caution.[96]

12.60 Associate Professor Tamara Walsh advised that written cautions are used as an effective diversionary mechanism in the UK, and suggested that they should be further trialled in Australia.[97]

12.61 Official cautioning schemes have the potential to divert minor offenders away from fine enforcement systems. The NSW approach of a statutory scheme with supporting guidelines provides a good model. The requirement for cautions to be

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90 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [5.23].

91 Ibid rec 5.1, 5.3, 5.5. See also Legal Aid NSW, *Submission 101*.

92 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 5.3, 5.4.

93 See, eg, Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Associate Professor T Walsh, *Submission 51*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

94 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

95 The Law Council of Australia, *Submission 108*.

96 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

97 Associate Professor T Walsh, *Submission 51*.

issued only where an infringement notice usually would be issued minimises the potential for 'net widening'.[98] The ALRC suggests that guidelines apply to all issuing agencies, and that the recommendations of the NSWLRC be considered when adult cautioning systems are adopted in other states and territories.

Suspended court fines

12.62 Generally, fines are the lowest penalty a court can impose (excluding no sentence or conditional release orders). Up to 40% of offenders sentenced in Australian criminal courts receive a fine as their principal penalty.[99] Fines are commonly imposed in courts of summary jurisdictions for assaults, thefts, drug offences, property damage and public order offences.

12.63 Courts can use discretion when imposing a fine, and are directed by statute to consider the means of the offender when imposing a fine amount.[100] There are also statutory maximums. Nonetheless, the courts can still impose relatively large fines, especially where fines are imposed *ex parte* (in the absence of the accused). The median fine amount given in courts of summary jurisdiction in 2015–2016 was $669.[101]

12.64 Unpaid court fines are generally subjected to the same fine enforcement regime as infringement notices, although in WA and SA imprisonment is only permitted for default of court-ordered fines.

12.65 PIAC considered there to be an 'urgent need' for state and territory governments to provide alternative penalties to court-ordered fines.[102] The Criminal Lawyers Association of NT (CLANT) submitted that alternatives should be an option when it is apparent that a person has no capacity to pay the fines.[103] YLCLC noted that generally there needed to be a more 'nuanced and diverse set of tools at the disposal of decision makers within the criminal system. Broader discretion enhances the ability of courts to provide individualised justice'.[104]

12.66 WA introduced legislation to provide for suspended fines in 2017.[105] Suspended fines operate in the same way as suspended sentences of imprisonment—only to be enforced where further offending occurs within a certain period of time. The option of suspended fines allows courts, in sentencing offenders to fines, to order that the fine be suspended for a period set by the court of up to 24 months. A suspended fine cannot be

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98 PIAC raised concern about net-widening: 'we are concerned about the potential for these lower level penalties to be used by police in a wider range of circumstances, rather than as an alternative to a 'higher level' penalty (such as an infringement notice)': Public Interest Advocacy Centre, *Submission 25*.

99 Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16, Cat No 4513.0* (2016) table 9. See also Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*. See ch 3.

100 See, eg, *Crimes (Sentencing Administration) Act 2005* (ACT) s 14; *Fines Act 1996* (NSW) s 6; *Sentencing Act* (NT) s 17; *Penalties and Sentencing Act 1992* (Qld) s 48; *Sentencing Act 1997* (Tas) s 43; *Sentencing Act 1991* (Vic) s 52(1); *Sentencing Act 1995* (WA) s 53.

101 Australian Bureau of Statistics, above n 99, table 50.

102 Public Interest Advocacy Centre, *Submission 25*.

103 Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*.

104 The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.

105 *Sentencing Legislation Amendment Act 2016* (WA) pt 4 div 3.

imposed unless a fine equal to the suspended amount would be appropriate in all the circumstances. The effect of suspending a fine is that the offender does not need to pay the fine unless they commit an offence during the suspension period and the court makes an order requiring the person to pay, or part pay, the fine.[106]

12.67 The introduction of suspended fines in WA has been criticised as operating simply as a postponing device, which still criminalises people who are likely to recommit low level offences. This includes vulnerable people who are without means to pay a court imposed fine, such as people experiencing homelessness, drug and alcohol addiction, and mental health issues. A suspended fine without the provision of support services is unlikely to address the issues that lead to conviction and default.[107]

12.68 In its submission to this Inquiry, VALS/IWG raised these concerns, considering the likelihood of breach by disadvantaged people to be high:

> Any intended deterrent function is unlikely to be effective when the offending conduct is compelled by a person's circumstances—including mental illness, substance dependence, family violence or homelessness. Having said this, suspended fines are preferable to the use of traditional fines.[108]

12.69 As part of the findings in the inquest into the death of Ms Dhu, the WA Coroner's Court suggested that the question of whether the person has the means to pay the fine if they reoffend is addressed in the WA legislation. The court has the power to re-fine 'unless it decides that it would be unjust to do so in view of all the circumstances that have arisen, or have become known, since the suspended fine was imposed'. If the court decides that ordering payment would be unjust, it must provide written reasons. The Coroner's Court stated:

> One of the obvious merits is that in the case of a suspended fine, the re-offender is brought back before the court for decision, rather than having the fine enforced through a subsequent executive act. This will mandate the consideration, by a judicial officer, of the re-offender's means to pay the fine at the relevant time, amongst other factors that must be taken into account.[109]

12.70 In 2013, the NSWLRC recommended the introduction of suspended fines in NSW to operate in conjunction with s 10 bonds under the *Crimes (Sentencing Procedure) Act 1999* (NSW). Section 10 bonds permit a sentencing court to order the dismissal of charges without proceeding to a conviction. The order can be made with or without conditions.[110] Under the NSWLRC approach, payment of the fine would be required on breach and revocation of the bond,[111] with the court retaining discretion to

106 Ibid s 52.
107 Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 2016, 28028c–8067a (John Quigley).
108 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.
109 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 150.
110 Judicial Commission of New South Wales, *NSW Sentencing Bench Book* [5–000].
111 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) rec 14.3.

cancel the fine and resentence where the offender's capacity to pay had changed from the time of the order.[112]

12.71 Legal Aid NSW supported the introduction of suspended fines so long as the conditions were not too onerous and that the scheme was unable to result in prison term.[113] The NSW Bar Association supported suspended fines as long as they were voluntarily entered into.[114] ALSWA supported the introduction of suspended fines, but submitted that the imposition of a suspended fine without the provision of support services is unlikely to address the underlying issues. ALSWA preferred the proposed amended Conditional Release Orders (CROs) that are yet to commence in WA. CROs would permit the court to require the offender to participate in an approved educational, vocational or personal development program, or unpaid work. ALSWA acknowledged, however, that the proposed amended CROs would not be available to people likely to reoffend (those with previous convictions), and that these are the people who would benefit most from this type of program and who are accumulating massive fine debt, ultimately resulting in short prison terms.[115] A court-ordered WDO was not supported by other stakeholders, who noted that the voluntariness of the NSW program was a 'key factor of the program's success'.[116]

12.72 Other stakeholders preferred the introduction day fines.[117] Day fines refer to fining systems that respond to a person's capacity to pay. Day fines rely on a formula where the seriousness of the offence is indexed to the offender's average daily income or the surplus remaining after daily expenses. Fines are then expressed according to the number of days it would take that particular offender to pay off the fine. This type of approach has been taken in some European jurisdictions.[118]

12.73 Kingsford Legal Centre considered that fixed penalty amounts (extending to infringement notices) hurt the most vulnerable, and preferred a system that proportionally adjusted the fine relative to an individual's income.[119] The NSW Bar Association submitted that the 'quantum of fines should be strictly limited, both for infringement notices and in court, for people who are at the lowest level of income'.[120]

12.74 The ALRC considers it to be unlikely that Australian jurisdictions would adopt day fines. In a 2005 Inquiry into the sentencing of federal offenders, the ALRC did not support day fines. It suggested that day fines would be complex to apply, would rely on state and Commonwealth information sharing, and could result in distorted fine and penalty amounts for people on middle to high incomes:

> a day fine scheme should not be introduced for federal offenders. Day fine schemes do not operate in any state or territory, and submissions and consultations revealed

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112 Ibid [14.44].
113 Legal Aid NSW, *Submission 101*.
114 NSW Bar Association, *Submission 88*.
115 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.
116 See, eg, Legal Aid NSW, *Submission 101*.
117 See, eg, Community Legal Centres Tasmania, *Submission 99*; Kingsford Legal Centre, *Submission 19*.
118 Such as Germany, Austria, Denmark and Finland.
119 Kingsford Legal Centre, *Submission 19*.
120 NSW Bar Association, *Submission 88*.

> limited support for such a scheme. A day fine scheme would be time consuming and complex to administer in practice. In addition, the ALRC is not convinced that a day fine scheme would ensure that fines operated more equitably for all offenders. For example, an offender with little or no income may have substantial assets, a significant future earning capacity, or the capacity to acquire money from other sources.[121]

Limit the penalty amounts of infringement notices

Concession penalty notices for people in receipt of government benefits

12.75 The monetary penalties attached to infringement notices are fixed and can be high. For example, in NSW offensive language provisions attract a $500 penalty.[122]

12.76 There have been proposals and recommendations regarding the best way to lessen penalty amounts for vulnerable people, including Aboriginal and Torres Strait Islander people. In 2014, the Sentencing Advisory Council of Victoria (SACV) observed that the principle of proportionality required that infringement penalty dollar amounts be proportionate to the seriousness of the offence, and that the penalty be lower than a person would expect to receive if the matter was to go to court.[123] The SACV reported that some infringement penalties in Victoria amounted to 50% of the maximum penalty available to the court. It also noted disparity between the high penalty attached to public order offences and the lower, but more dangerous, traffic offences, such as speeding. The SACV recommended a review of infringement penalty amounts to ensure the proportionality of the amount.[124]

12.77 In its report on penalty notices, the NSWLRC adopted a formula recommending infringement notice amounts should not exceed 25% of the maximum court fine for that offence.[125] Adopting this recommendation would mean that offensive language infringement penalties in NSW would be capped at $165. This approach was supported by stakeholders to this Inquiry, including PIAC and Legal Aid NSW.[126]

12.78 Concessional infringement notices have been suggested as another way to ensure the efficacy and fairness of infringement notices. This was also recommended by the SACV, who supported a fixed reduction model of 50% for people experiencing financial hardship (using the same eligibility as that for automatic entitlement to a payment plan). Eligible infringement recipients under such a scheme would be able to apply for a reduced infringement penalty to the enforcement agency following the person receiving the penalty. The SACV model aimed to provide the person fined with an early exit from the infringement enforcement system.[127] This approach was

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121 Australian Law Reform Commission, *Sentencing of Federal Offenders* Discussion Paper No 70 (2005) 110–11.

122 *Summary Offences Act 1988* (NSW) s 4A; *Criminal Procedure Regulation 2017* (NSW) sch 4.

123 Sentencing Advisory Council (Vic), *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria—Report* (2014) [8.3.4].

124 Ibid [8.3.19], [8.3.26], rec 38.

125 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 4.5.

126 Legal Aid NSW, *Submission 101*; Public Interest Advocacy Centre, *Submission 25*.

127 Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria—Report* (2014) [8.4.49]–[8.4.53] rec 39.

supported by VALS/IWG in their submission to this Inquiry, noting that a $229 infringement notice issued for failing to produce a valid train ticket amounts to 85% of the weekly earnings for a person relying on the Newstart Allowance. VALS/IWG recommended that fines for eligible concession card holders be substantially reduced, reflecting such a person's actual capacity to pay, and that the SACV recommendation for fixed reduction be implemented.[128]

12.79 A decrease in penalty amounts was not supported by CLANT, who submitted that general deterrence may be affected if fines are decreased.[129]

12.80 The NSWLRC Report considered that the administration of a concessional infringement notice system could be overly burdensome, citing the added complexity to the infringement notice system. It preferred instead to expand the WDO scheme and 'time-to-pay' systems.[130] VALS/IWG stressed the need for a variety of options. It observed that, regardless of special circumstances and WDOs, 'some people may want to resolve their infringements through payment, and for this to be a possibility, the system needs to acknowledge that people on very low incomes cannot, and in fairness should not, pay the same amount as people on average to high incomes'.[131]

12.81 Kimberly Community Legal Services put forward a simpler option: the provision of a standard discount rate for low income earners, welfare recipients and any person who would qualify for a WDO.[132] Similarly, Legal Aid NSW suggested that one rate should be developed for people on Centrelink benefits.[133] It may be less burdensome to develop two penalty streams, with a concession penalty able to be administered at the point of infringement.

12.82 Concession rates are not a standalone solution. As noted by Hogg and Quilter, while concessions are a worthwhile approach, the effect would still be limited for the 'most vulnerable who typically confront major obstacles in negotiating abstruse administrative processes'.[134] For some people, even a small penalty can be unworkable and lead them into the fines enforcement system. Cautions (above) need to be implemented as well.

Limiting the total penalty amount

12.83 The ALRC has heard that, in some instances, multiple infringement notices may be issued in one transaction. This can be unhelpful and result in insurmountable debt. VALS/IWG observed that the 'deterrent effect of infringements is not commensurate with the number of infringements issued', contending that the opposite was true. The

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128 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

129 Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*.

130 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [11.25]–[11.27]. See also Northern Territory Government, *Submission 118*.

131 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

132 Kimberley Community Legal Services, *Submission 80*.

133 The Law Council of Australia, *Submission 108*. See also Legal Aid NSW, *Submission 101*; Legal Aid WA, *Submission 33*.

134 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

more fines received, the more overwhelming and unmanageable they become, and the less effective they are. VALS/IWG reported that their experience had shown that payment and compliance is more likely where fewer fines are issued to a person.[135]

12.84 Multiple issuing of fines could be limited by statute in three ways. Issuing officers could be restricted to issuing one infringement notice in the same offence category per interaction. In practice, this would mean that where a person swears multiple times, they would only receive one infringement notice and one penalty, not multiple penalties for each infraction within the same altercation. This approach was not supported by NT Police, because, as outlined in the NT Government submission, 'police currently consider a person's capacity to pay and whether the fine is creating further hardship',[136] but was otherwise 'strongly supported' by stakeholders who suggested that this could be achieved through guidelines or statutory reform.[137]

12.85 Stakeholders to this Inquiry further suggested that a cap should be placed on the total financial penalty able to be imposed in a single transaction.[138]

12.86 A third approach was outlined by the NSWLRC in its inquiry into penalty notices. It recommended that issuing officers be required to consider whether the issuing of multiple penalty notices in response to a single set of circumstances would unfairly or disproportionately punish a person in a way that does not reflect the totality, seriousness or circumstances of the offending behaviour, and that where this is found, the issuing agency must withdraw one or more notices.[139] This approach was supported by the Commissioner for Children and Young People in WA in their submission to this Inquiry.[140]

12.87 Limiting the number of infringement notices per transaction or placing a cap on the financial penalty serves to minimise the difficulty large fines can place on vulnerable people, including Aboriginal and Torres Strait Islander peoples. The greatest effect on minimising hardship to Aboriginal and Torres Strait Islander people from fine regimes would occur if the limitation on imposing multiple infringement notices also operated in a system where cautions are prioritised, and infringement notices for people in receipt of government benefits are reduced.

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135 The Law Council of Australia, *Submission 108*.

136 Northern Territory Government, *Submission 118*.

137 See, eg, Legal Aid NSW, *Submission 101*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*.

138 See, eg, The Law Council of Australia, *Submission 108*; The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

139 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 6.5.

140 Commissioner for Children and Young People Western Australia, *Submission 16*.

Discretion regarding driver licence suspension

12.88 When a person does not pay a fine debt, after a certain period of time, the relevant state debt recovery agency can direct the roads and traffic authority to suspend a person's driver licence. The original fine need not be for traffic-related offences.

12.89 A person who drives without a valid driver licence commits a criminal offence. Penalties for that offence include: court imposed fines; licence suspension and disqualification; and possible imprisonment, with penalties increasing with each related infraction.

12.90 Licence suspension can lead to 'secondary offending', when a fine defaulter commits another offence related to the enforcement action taken to recover the original outstanding fine.[141] As noted by Legal Aid WA:

> The fine suspension system is complex. Mail may not be received; fine suspension, demerit suspension and court suspension are all administered separately, making inquiries difficult... Fine suspension can lead to a vicious cycle of a person being under fine suspension initially, who then drives under that fine suspension and then is charged with that offence and then may drive under court suspension and ultimately may be imprisoned for driving under court suspension.[142]

12.91 A person convicted of driving while suspended is most likely to receive a court imposed fine, and have their licence disqualified. It is unlikely that a first time offender for driving while suspended would or could receive a sentence of imprisonment. However, where the person drives while under the court imposed disqualification, this can result in serious penalties, including prison.

12.92 Loss of licence through fine default is common. For example, in WA up to 308,400 licence suspensions were imposed by the Fines Enforcement Registry in 2014–15. During the same period, 270,843 suspensions were lifted (for fines paid or for people entering a time-to-pay arrangement).[143] In smaller jurisdictions like Tasmania, up to 12,000 people had their licence suspended over a two-year period.[144]

12.93 Up to 67% of licence suspensions in NSW were the result of fine enforcement measures, as shown in the table below.

Table 12.1: NSW driver licence cancellations and disqualifications (March 2016)

Court cancellations	Court disqualifications	Demerit point suspensions	Fine default suspensions	Police suspensions
1,876	1,714	4,575	26,463	1,220

Source: Roads and Maritime Services (NSW), *Monthly Trend in Licence Suspensions and Cancellations by All Licence Holders (Suspensions and Cancellations Commencing during Month)* (2016) table 3.1.1.

141 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.
142 Legal Aid WA, *Submission 33*. See also Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*.
143 Department of Attorney General (WA), *Report on the Fines Enforcement Registry 2010/11 to 2014/15* (2015).
144 Community Legal Centres Tasmania, *Submission 99*.

Impact on Aboriginal and Torres Strait Islander people

12.94 Aboriginal and Torres Strait Islander people are susceptible to licence suspension due to fine default, and are over-represented in this regard.[145] For example, in 2013, the NSW Auditor-General reported that Aboriginal and Torres Strait Islander people were suspended for fine default in NSW at over three times the rate of non-Indigenous people.[146]

12.95 Licence suspension can make life more difficult in regional and remote areas, affecting employment options and family obligations. The need to drive can lead to secondary offending, and ultimately to imprisonment for driving while disqualified. A 2017 study into the barriers to driver licences for Aboriginal and Torres Strait Islander peoples in NSW and SA observed that reduced transport options for regional and remote communities were 'implicated in the over-representation of Aboriginal people incarcerated for transport offences'.[147] The study attributed over-representation to a 'cycle of unauthorised driving following the suspension of a driver licence due to fine defaults, leading to court imposed licence disqualification, further fine defaults and—potentially—imprisonment'.[148]

12.96 The impact of fine default licence suspension in the criminal justice system has undergone evaluation. In 2003, a study of WA licence disqualifications found that, in 2001, over 80% of licence disqualifications had originated in fine default. For Aboriginal and Torres Strait Islander people, over 60% of licence disqualifications for fine default related to non-traffic offending, such as court fines for justice and good order offending, and infringement notices for parking and fare evasion.[149] Fare evasion constituted 24% of all fine suspensions.[150]

12.97 The same study found that Aboriginal and Torres Strait Islander people were more likely to receive a custodial sentence once convicted of driving without a valid licence (which may or may not be the result of fine default), with 17.5% of Aboriginal and Torres Strait Islander offenders imprisoned for disqualified driving, compared with 8.6% of non-Indigenous offenders.[151]

12.98 The link between licence suspension due to fine default and imprisonment for driving while disqualified can be difficult to identify. NSW has an offence of driving while licence suspended or cancelled due to fine default.[152] For this reason the NSW Bureau of Crime Statistics and Research (BOCSAR) was able to provide data to the

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145 Alice Barter, 'Indigenous Driving Issues in the Pilbara Region' in Melissa Castan and Paula Gerber (eds), *Proof of Birth* (Future Leaders, 2015) 62, 64.

146 Audit Office of New South Wales, *New South Wales Auditor-General's Report: Performance Audit—Improving Legal and Safe Driving among Aboriginal People* (2013) 3.

147 Kathleen Clapham et al, 'Addressing the Barriers to Driver Licensing for Aboriginal People in New South Wales and South Australia' (2017) 41(3) *Australian and New Zealand Journal of Public Health* 280, 280.

148 Ibid.

149 Anna Ferrante, 'The Disqualified Driver Study: A Study of Factors Relevant to the Use of Licence Disqualification as an Effective Legal Sanction in Western Australia' (Crime Research Centre, 2003).

150 Ibid vii.

151 Ibid 36.

152 *Road Transport Act 2013* (NSW) ss 54(5)(a)–(b).

ALRC that traced the history of people imprisoned for driving while disqualified when the licence was originally lost due to fine default.

12.99 The BOCSAR data showed that 5% (89) of defendants who received a sentence of imprisonment for driving while disqualified from January 2016 to March 2017 had a proven prior offence of driving while licence suspended/cancelled due to fine default where they had received a penalty of licence disqualification. Of these, 17% (15) were Aboriginal and Torres Strait Islander people (76% were non-Indigenous and in 7% of cases the Indigenous status was unknown). The median prison sentence for Aboriginal and Torres Strait Islander offenders who had lost their licence due to fine default was four months.[153]

12.100 The data confirms that people can end up in prison due to secondary offending directly related to fine default in NSW. This problem is not confined to Aboriginal and Torres Strait Islander people. Nonetheless, 15 Aboriginal and Torres Strait Islander people were imprisoned in NSW over a 14-month period for driving while disqualified who had initially lost their driver licences through fine default. It may be that the fine they had received and the subsequent licence suspension was entirely unrelated to traffic offending.

Provide ways to skip licence suspension as an enforcement measure

12.101 Where a person has sufficient funds with which to pay a fine, but initially refuses or neglects to do so, licence suspension (or the threat of) can be effective in encouraging payment.[154] However, where a person is not paying a fine because they have insufficient funds to do so, licence suspension can have grievous consequences for that person. This is especially the case for many Aboriginal and Torres Strait Islander people.

12.102 Some Aboriginal and Torres Strait Islander people face particular difficulties relevant to remoteness and transiency that can make them highly susceptible to licence suspension for fine default. Licence suspension can further entrench disadvantage. VALS/IWG considered licence suspension to be an 'overly blunt tool that penalises whole families and communities and unfairly interferes with people's employment, education, access to healthcare and other services, and other opportunities'.[155] The Kingsford Legal Centre noted that the 'link between fine recovery and loss of licence provides a barrier to employment, particularly in remote areas where public transport is unavailable or inadequate', and recommended the removal of the licence suspension step for fine default enforcement regimes.[156] Removal of this step was supported by

153 NSW Bureau of Crime Statistics and Research, *Sentences of Imprisonment for Driving While Disqualified (S54(1)(a) of the Road Transport Act 2013), NSW Reoffending Database January 2016 to March 2017, Ref No 17–15537* (2017).

154 Department of Attorney General and Justice (NSW), *A Fairer Fine System for Disadvantaged People: An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme* (2011) 14.

155 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

156 Kingsford Legal Centre, *Submission 19*. See also Sisters Inside, *Submission 119*.

other stakeholders,[157] including the NSW Bar Association who submitted that this type of enforcement had a 'disproportionate impact on marginalised communities ... and leads to secondary offending and imprisonment'.[158]

12.103 NATSILS suggested that driver licence suspension had 'exacerbated effects' on people living regionally and remotely, stating that unless licence suspension was removed for 'vulnerable and disadvantaged persons, a pathway to prison for fine default will remain through driving offences in areas or roles where driving is required'.[159] The NT Government acknowledged the problems for defaulters who lived regionally and remotely, but suggested licence suspension for default of fines to be a 'reasonable action for the majority of people living in urban settings'.[160] Hogg and Quilter noted the importance of driving to many facets of daily life, and echoed NATSILS and the NSW Bar Association when observing that licence suspension for Aboriginal and Torres Strait Islander communities was 'highly punitive and may also be criminogenic in certain respects'.[161]

12.104 The NSW Government did not support removal of this step altogether, noting that 'suspension or cancellation of a person's licence is one of the most effective enforcement actions to recover debts'.[162] Other stakeholders also saw the benefit of retaining the licence suspension step on the condition that greater awareness is made of repayment options and that access to WDOs is increased.[163] Some stakeholders called for the abolition of licence suspension for all non-traffic-related fines, retaining it only where the person defaults on a fine received for traffic offending.[164]

12.105 In 2017, NSW introduced a statutory discretion allowing SDR to skip licence suspension where the person in fine default is deemed to be 'vulnerable'. Instead, SDR can recover fines earlier via civil enforcement action with 'less negative impact on vulnerable members of the community'.[165] SDR may decide that civil enforcement action is preferable in the 'absence of and without giving notice to, or making inquiries of, the fine defaulter'.[166] Many stakeholders supported this approach.[167] There was some concern, however, regarding the practical effects of this provision and how to

157 See, eg, NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; Kimberley Community Legal Services, *Submission 80*; Public Interest Advocacy Centre, *Submission 25*.
158 NSW Bar Association, *Submission 88*.
159 NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.
160 Northern Territory Government, *Submission 118*.
161 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87* attachment 1.
162 NSW Government, *Submission 85*.
163 Northern Territory Government, *Submission 118*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.
164 The Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Kimberley Community Legal Services, *Submission 80*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.
165 Fines Amendment Bill 2017 (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2017, 47 (Victor Dominello, Minister for Finance, Services and Property).
166 Fines Amendment Bill 2017 (NSW) sch 1 cl 5.
167 See, eg, Change the Record Coalition, *Submission 84*; Kimberley Community Legal Services, *Submission 80*; Legal Aid WA, *Submission 33*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

assess vulnerability with limited information.[168] Hogg and Quilter noted a lack of legislative guidance in NSW on how SDR will be 'satisfied that civil enforcement action is preferable or how a potential offender is able to agitate for this discretion to be used'.[169]

12.106 Kimberly Community Legal Services recommended the development of statutory principles to help guide the discretion of a decision maker. It suggested that the principles should support the presumption that a driver licence suspension is unsuitable where the original fine did not result from a driving offence; and the person who defaulted on the fine is Aboriginal or Torres Strait Islander, or lives in a remote area, or is unable to pay the original fine, or can otherwise demonstrate that they are reliant on their driver licence.[170]

12.107 Others considered that the relevant state debt recovery agency should exercise its discretion not to suspend when driver licence suspension is likely to have a significant flow-on effect, such as limiting employment, access to health services or where needed to support children.[171]

12.108 In WA, the Fines Enforcement Registrar may impose driver licence suspension orders for unpaid infringement notices and fines.[172] The registrar has discretion not to make a licence suspension order, or to cancel one in certain cases of hardship.[173] These include when a driver licence is needed for urgent medical treatment, to facilitate income or where the licence suspension order would hinder the person performing family or personal responsibilities, or for 'good reason'.[174] The Registrar can also directly issue a CSO (called 'work and development order') and skip or revoke a licence disqualification when licence suspension would be ineffective and would not result in payment of the fine.[175]

12.109 The ALSWA recommended that the discretion in the WA regime should be expanded to cover the same category of person that NSW WDOs currently do, that is: a person experiencing mental illness, mental health or cognitive impairment; homelessness; acute economic hardship; and having substance addiction, where the person can demonstrate a genuine need to drive.[176]

12.110 There is little doubt that licence suspension due to fine default entrenches disadvantage and can result in further penalties, including further fines or even imprisonment, for Aboriginal and Torres Strait Islander people. In Recommendation 12–2, the ALRC supports the introduction of a statutory discretion for state debt

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168 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

169 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

170 Kimberley Community Legal Services, *Submission 80*.

171 Change the Record Coalition, *Submission 84*.

172 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 19, 43.

173 Ibid ss 27A, 55A.

174 Ibid ss 20, 27A(1), 44.

175 Ibid s 47A. See also Explanatory Notes, Acts Amendment (Fines Enforcement) Bill 1999 (WA) 1–3.

176 Aboriginal Legal Service of Western Australia Limited, *Submission 74*. The ALSWA also suggested including family violence, although not currently part of the NSW WDO criteria.

recovery agencies to skip the licence suspension step where the person is vulnerable. There is a clear need for this to be underscored by statutory principles to help guide the decision maker in the use of this discretion. These principles should be developed by state and territory governments with relevant Aboriginal and Torres Strait Islander bodies in all jurisdictions.

Alternative ways of paying fines and infringement notices

NSW Work and Development Order scheme

12.111 Work and Development Orders (WDOs) were introduced in NSW in 2009 to provide meaningful and achievable ways of discharging fine debt.[177] WDOs enable a person who cannot pay their fines due to acute economic hardship, mental illness, serious addiction, or homelessness to discharge their debt through: community work; program attendance; medical treatment; counselling; or education, including driving lessons.[178] Once on a WDO, any related driver licence suspension is lifted.

12.112 The WDO program is set out in the *Fines Act 1996* (NSW). A WDO can be made by SDR when a fine enforcement notice has been made, and the defaulter meets the criteria.[179] An applicant for a WDO must be supported by an 'approved person' who is to supervise their compliance.[180]

12.113 A WDO can—to satisfy all or part of a fine—require the defaulter to:

- undertake unpaid work (for an approved organisation);
- undergo medical or mental health treatment;
- undertake an educational, vocational or life skills course (including driver licence training);
- undergo financial or other counselling;
- undergo drug or alcohol treatment; or
- undertake a mentoring program (where under 25 years old).[181]

12.114 The applicant must submit the grounds for making an order, outline the proposed activities to be carried out under the order, and propose a time for completion of the activities to SDR.[182] There are some restrictions. For example, where the applicant has an addiction and does not satisfy any other criteria, the person must be required to carry out counselling and/or drug and alcohol treatment.[183] The rate at

177 WDOs in NSW represent a scheme particular to that jurisdiction. WA has a WDO option, but this represents mandatory community service ordered by the state debt recovery agency. It is the NSW WDO program the ALRC is referring to when citing WDOs in this section.
178 *Fines Act 1996* (NSW) s 99A.
179 Ibid s 99B(1).
180 Ibid ss 99A (meaning an approved organisation or health practitioner); 99B(2)(b).
181 Ibid s 99A.
182 Ibid s 99B(2)(c).
183 Ibid s 99B(2A).

which fines are discharged depends on the activity, and is set out in the WDO guidelines.[184]

12.115 The WDO program was independently evaluated in 2015. The evaluation concluded that the WDO scheme was 'achieving its objective of enabling vulnerable people to resolve their outstanding NSW fines by undertaking activities that benefit them and the community'.[185] The NSW Department of Justice has reported that, as of December 2016, almost 2,000 service locations provided WDOs, and that nearly $74 million in fine debt had been cleared since the program commenced in 2009.[186] In October 2016, the Senate Finance and Public Administration References Committee reported that $9 million of the $44 million that had been waived through the WDO scheme had been in 'Aboriginal communities'.[187]

12.116 The NSW Government submission to this Inquiry advised that in 2016–17, 4,875 WDOs were approved for Aboriginal and Torres Strait Islander participants, which represented 21% of all WDOs during that time. The average debt was $3,281 per Aboriginal and Torres Strait Islander participant, which was about 7% higher than the average debt for non-Indigenous participants. The majority of Aboriginal and Torres Strait Islander participants were eligible due to acute economic hardship (50%), addiction (34%) and mental illness (18%).[188]

12.117 There is momentum to introduce WDOs in other states and territories:

- the ACT has introduced WDOs for traffic infringements;[189]
- the Queensland Parliament passed legislation to introduce a WDO scheme in May 2017;[190]
- a WDO scheme came into force in Victoria in July 2017, applying only to infringement notice penalties;[191]
- the Legal Services Commission of SA[192] advised the ALRC that legislation before SA Parliament contains a financial hardship provision, allowing debts to be offset by attending treatment programs and community service;[193] and

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184 Department of Attorney General and Justice (NSW), *Work and Development Order Guidelines 2012* (2012) 18.

185 Inca Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component* (Final Report, 2015) 2.

186 Judy Trevana and Don Weatherburn, 'Does the First Prison Sentence Reduce the Risk of Further Offending?' (Bureau of Crime Statistics and Research, October 2015).

187 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [6.10].

188 NSW Government, *Submission 85*.

189 ACT Government, *Infringement Notice Management Plans and Work and Development Programs* (6 December 2017). <https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/2140/~/infringement-notice-management-plans-and-work-and-development-programs#!tabs-2>.

190 State Penalties Enforcement Registry, *New Legislation to Streamline SPER Operations* (10 May 2017) <www.sper.qld.gov.au/news-and-announcements/legislation-changes.php>.

191 Fines Reform and Infringements Acts Amendment Bill 2016 (Vic); *Infringements Act 2006* (Vic) s 27A.

192 Legal Services Commission of South Australia, *Submission 17*.

193 Fines Enforcement and Recovery Bill 2017 (SA).

- the NT Government has advised that it is considering options for payment of fines, including WDOs, although it noted that its implementation may be hampered by the required service provision throughout that Territory.[194]

12.118 The vast majority of stakeholders to this Inquiry supported the introduction of WDOs across jurisdictions.[195] WDOs were generally considered to be an innovative yet sensible solution to both fine debt and disadvantage. The Australian Red Cross—a WDO 'sponsor' providing a driver mentor program in Wagga Wagga, NSW—considered that 'wide implementation' of WDOs would provide an important diversionary option for 'vulnerable people struggling to pay existing fines'. It submitted:

> Not only do Work and Development Orders provide an opportunity to divert people from the system, but they also provide a unique opportunity to gain work place experience through volunteering and community work that can be conducted as part of the scheme. It is important that such a measure is sufficiently funded in order to maximise participation in the scheme.[196]

12.119 The Commissioner for Children and Young People (WA) supported WDOs because an order 'recognises the individual circumstances and capacity of a juvenile offender as well as providing for further rehabilitation, rather than taking a purely punitive approach'.[197] Kingsford Legal Centre offered a similar observation, and stated that the 'WDO program directly reduces incarceration of highly vulnerable ATSI peoples by offering a non-financial method of repaying fines, whilst simultaneously incentivising participation in educational and counselling services'.[198]

12.120 The redirection of resources away from punishing individuals for fine default and into addressing the issues which saw the individual incur the fine was described by Victorian Legal Aid as 'justice reinvestment in action'.[199]

12.121 Some improvements to the existing scheme were proposed. The need to further include Aboriginal and Torres Strait Islander people in the scheme was key. PIAC, for example, stated:

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194 Northern Territory Government, *Submission 118*.

195 See, eg, Sisters Inside, *Submission 119*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Kimberley Community Legal Services, *Submission 80*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; National Congress of Australia's First Peoples, *Submission 73*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Kingsford Legal Centre, *Submission 19* 19; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*.

196 Australian Red Cross, *Submission 15*.

197 Commissioner for Children and Young People Western Australia, *Submission 16*. See also Kingsford Legal Centre, *Submission 19*.

198 Kingsford Legal Centre, *Submission 19*.

199 Victoria Legal Aid, *Submission 56*. Justice reinvestment is explained in ch 4.

> The Work and Development Order (WDO) scheme has proven to be an effective mechanism for helping individuals manage and reduce their debts. For many clients of PIAC's Homeless Persons' Legal Service, access to the WDO scheme has allowed them to resolve their fines debt while engaging in meaningful activities that promote positive outcomes, such as volunteer work or health treatment.
>
> However, the WDO scheme is not suited to all individuals as paying off a substantial debt would require a regular commitment over an extended period of time. Consideration should be given to the additional barriers to participation that are faced by Aboriginal and Torres Strait Islander people who may have family and cultural commitments that require them to spend their time across two or more locations.
>
> Two key strategies could be adopted that would help make the scheme more accessible on a wider scale:
>
> To ensure that culturally appropriate options are available to participants, Aboriginal and Torres Strait Islander community controlled organisations should be supported to become participants in the WDO scheme in New South Wales, and in other jurisdictions where the scheme is adopted. Additional resources may be required to allow those organisations to provide appropriate support to participants, and to meet the ongoing administrative and reporting requirements of their own participation in the scheme.
>
> The process for temporarily suspending and then reinstating a WDO should be streamlined. This would make it easier for individuals with complex life circumstances to take part, and to continue with their participation following a break (which may be due to a health condition, family commitment, unstable housing, etc).[200]

12.122 VALS/IWG strongly supported the introduction of 'WDO-style schemes' across Australia, but noted the need to resource the scheme for Aboriginal and Torres Strait Islander fine defaulters. It observed that, in Victoria, almost all of the sponsor organisations were mainstream organisations.[201] The ALS NSW/ACT also noted the lack of sponsor sites in regional and remote areas of NSW and the ACT, and recommended that an 'incentive scheme' be considered to encourage regional and remote locations to sponsor WDO placements.[202] This observation was echoed by Kimberly Community Legal Services, who supported implementation of the NSW model, but expressed 'significant concern' about how WDOs could be made available across WA.[203] The Commissioner for Children and Young People (WA) emphasised the need for governments to work with local Aboriginal communities and organisations to provide WDOs in regional and remote areas.[204]

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200 Public Interest Advocacy Centre, *Submission 25*.

201 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*. See also ACT Government, *Submission 110*; Victoria Legal Aid, *Submission 56*.

202 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*. See also NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

203 Kimberley Community Legal Services, *Submission 80*.

204 Commissioner for Children and Young People Western Australia, *Submission 16*.

12.123 Other suggested improvements to help facilitate use of WDOs by Aboriginal and Torres Strait Islander people included:

- creating greater awareness of the program by having a certain level of fine debt trigger recovery agencies to assist with solutions, such as directing the person to contacts for undergoing a WDO;[205] and
- expanding the definition of 'acute economic hardship' to include those on Abstudy; and victims of family violence. Consideration should also be given as to whether to include gambling addicts.[206]

12.124 Sisters Inside supported the introduction of the WDO program in Queensland, but noted that it remains 'practically impossible' for large debts to be discharged solely through WDOs.[207] Legal Aid NSW supported the implementation of WDOs in other states and territories, but stressed the importance that it not be the only option, and that frontend solutions need be found.[208]

12.125 The ALRC encourages state and territory governments to adopt the options outlined above to limit the imposition of fines, and decrease the negative effects of fine enforcement, as well as providing for WDOs or other innovative payment solutions.

'Cutting out' a fine when already in prison

12.126 There is a clear difference between imprisoning people for fine default and enabling people already in prison to 'cut out' their fines concurrently while serving a sentence of imprisonment. Those who exit prison with outstanding fines often face further barriers to reintegration, especially where fines prevent them from driving, or act as a disincentive to employment where there is a garnishee order in place.[209] Fine debt can prevent Aboriginal and Torres Strait Islander peoples from accessing housing, and impact on the likelihood of recidivism.[210] Legal Aid NSW told this Inquiry that they had provided advice to some 153 Aboriginal women leaving prison in the previous year, and of those women close to 100% had a fine debt.[211]

12.127 Victorian statute provides for prisoners to request that unpaid fines are 'cut out' and converted to days spent in custody under sentence for another offence.[212] In NSW, Corrective Services are a sponsor of the WDO scheme, and prisoners who complete voluntary programs in prison can have this count towards their fine debt.[213]

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205 The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.
206 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*.
207 Sisters Inside, *Submission 119*.
208 Legal Aid NSW, *Submission 101*.
209 Kingsford Legal Centre, *Submission 19*.
210 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.
211 Legal Aid NSW, *Submission 101*.
212 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*. See *Infringements Act 2006* (Vic) s 161A .
213 Corrective Services NSW, *Policy for Supporting Offenders to Manage Fine-Related Debts through Work and Development Orders* (2017).

The ALRC recognises the negative impact that a fine debt can have on a person exiting prison and supports these initiatives.

12.128 The NSW Government submission also provided information on the Driver Knowledge Test, available to prisoners in NSW, which aims to support a reduction in recidivism for licensing offences and to increase the number of Aboriginal and Torres Strait Islander peoples with a driver licence. It also provided information on the Aboriginal Inmate Birth Certificate Program run by Corrective Services which provides financial assistance to eligible Aboriginal prisoners who wish to obtain a birth certificate for the purposes of obtaining 'qualifications, completing vocational training or accessing services'. In 2016–17, the program provided 800 birth certificates to inmates across the state'.[214]

12.129 The *Prison to Work* Report noted that, in the NT, the Department of Corrective Services can work through licensing issues with prisoners, and can 'support prisoners to pay outstanding fines, enabling suspended licences to be reinstated'. It further noted that, depending upon the security classification of a prisoner, such prisoner may be able to 'qualify for a learner's permit or probationary licence while in prison, although many are released without a licence'.[215] A similar program exists in the ACT, where prisoners can complete 'Road Ready' driver theory training while in prison, however 'practical driver instruction is not available due to the need for prisoners to be contained inside the prison'.[216]

Driving when unlicensed

Recommendation 12–3 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to identify areas without services relevant to driver licensing and to provide those services, particularly in regional and remote communities.

12.130 A person who is convicted of driving when unlicensed is likely to enter the fine enforcement system and may also have their licence disqualified, preventing them from becoming licensed in the near future. Persistent driving while unlicensed can result in a term of imprisonment.

12.131 Some Aboriginal and Torres Strait Islander people can face particular obstacles to getting a driver licence. These include: limited access to registered vehicles and licensed drivers to supervise learners; the number of learner hours required to become licensed; difficulty in obtaining identity documentation (such as birth certificates);[217] financial constraints; and language or literacy issues and

214 NSW Government, *Submission 85*.
215 Council of Australian Governments, *Prison to Work Report* (2016) 127.
216 Ibid 135.
217 Alice Barter, above n 147, 64; NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) 406.

corresponding difficulty passing written tests.[218] 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'.[219]

12.132 The ACT Government submitted:

> Aboriginal and Torres Strait Islander people experience significant barriers to obtaining and sustaining a licence relating to low level literacy, low income, challenges navigating a mainstream system and limited access to both licensed drivers and registered vehicles for supervised practice. What starts as a social justice issue often becomes a criminal justice issue.[220]

12.133 Aboriginal and Torres Strait Islander people who live in regional and remote areas are likely to experience 'transport disadvantage',[221] that is, to live remotely without access to public transport. Austroads submitted that 87% of people in regional and remote areas travelled to work in a privately owned car.[222] In 2013, fewer than half of all eligible Aboriginal and Torres Strait Islander people held a driver licence compared with 70% of the non-Indigenous population.[223] As observed by ALSWA:[224]

> The nature of living in a remote area means that people have a very real need to drive. It is impossible to compare driving in the city or a large town to driving in the regional and remote parts of Western Australia; the vast distances, harsh environment and lack of public transport means people must drive whether or not they hold a valid licence.[225]

12.134 ALSWA also noted that cultural requirements for law business, funerals, hunting and visiting family, as well as being obliged to follow Elders, can also result in unlicensed driving.[226]

12.135 The NSW Bar Association noted that driving offences that affect Aboriginal and Torres Strait Islander people living remotely 'demonstrate how metropolitan laws may operate unjustly in remote areas. Often Aboriginal or Torres Strait Islander communities have longer distances to travel, minimal access to public transport and face administrative and financial obstacles to obtaining a driving licence'.[227]

12.136 Driving unlicensed can have dire consequences. The NSW Council of Social Service observed:

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218 Senate Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) [6.119]–[6.123]; Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) viii, [3.43]–[3.44].

219 Patricia Cullen et al, 'Challenges to Driver Licensing Participation for Aboriginal People in Australia: A Systematic Review of the Literature' 15(1) *International Journal for Equity in Health* 134, 134.

220 ACT Government, *Submission 110*.

221 Patricia Cullen et al, '"The Program Was the Solution to the Problem": Process Evaluation of a Multi-Site Driver Licensing Program in Remote Communities' (2017) 4 *Journal of Transport & Health* 81, 81; Austroads, *Submission 13*.

222 Austroads, *Submission 13*.

223 Audit Office of New South Wales, above n 148, 2, 21.

224 See also Alice Barter, above n 147, 66–67.

225 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

226 Ibid.

227 NSW Bar Association, *Submission 88*.

> The consequences of driving without a licence can be serious and significant for Aboriginal people and the communities in which they live. Not being able to drive can mean not being able to access vital services, such as receiving medical treatment. Being caught driving without a licence can exacerbate financial hardship and result in loss of employment and potential imprisonment.[228]

Impact on Aboriginal and Torres Strait Islander peoples

12.137 The NSW Aboriginal Legal Services reported that, in 2010, of people charged with driving unlicensed in NSW, 21% were Aboriginal and Torres Strait Islander people.[229] BOCSAR data shows that in 2016, Aboriginal and Torres Strait Islander people constituted 31% of all people imprisoned for driving while suspended or disqualified.[230] This is similar in other states and territories, and is particularly high in the NT.[231]

12.138 Nationally, 3% (270) of the total Aboriginal and Torres Strait Islander prison population in 2016 were imprisoned for traffic and vehicle regulatory offences (TVRO). This proportion was similar in the non-Indigenous prison population, at 2% (556).[232] However, Aboriginal and Torres Strait Islander peoples are over-represented in this prison population, constituting 33% of all prisoners imprisoned with traffic and vehicle regulatory offences nationally—and 100% in the NT.[233]

Table 12.2: Number and percentage of Aboriginal and Torres Strait Islander prisoners convicted of traffic and vehicle regulatory offences (TVRO) by state and territory (Dec 2016)

Jurisdiction	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Number of prisoners convicted of TVRO	3	96	70	17	13	10	6	58
Percentage of all prisoners convicted of TVRO who are Aboriginal and Torres Strait Islander peoples	18%	29%	**100%**	20%	20%	22%	7%	48%
Percentage of Aboriginal and Torres Strait Islander prisoners convicted of TVRO	3%	3%	5%	0.7%	2%	11%	1%	2%

Source: Australian Bureau of Statistics, *Prisoners in Australia 2016, Cat No 4517.0* (2016) table 15.

228 NSW Council of Social Service (NCOSS), *Submission 45*.
229 Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [3.39].
230 NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2016* (2017) tables 5, 14.
231 Thalia Anthony and Harry Blagg, 'Addressing the "crime Problem" of the Northern Territory Intervention: Alternate Paths to Regulating Minor Driving Offences in Remote Indigenous Communities' (Report, Criminology Research Advisory Council, June 2012).
232 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 1.
233 Ibid.

12.139 TVRO include: driver licence offences; vehicle registration and roadworthiness offences; regulatory driving offences (such as speeding and parking offences); and pedestrian offences. They exclude: dangerous or negligent driving (including driving under the influence of alcohol or drugs and culpable driving); actually or potentially causing an injury; motor vehicle theft; and fraud related to motor vehicles.[234]

12.140 'Driver licence offences' include 'drive while licence suspended or disqualified', 'drive without licence' (where licence expired or unlicensed driving), and other driver licence offences including 'drive contrary to conditions of a restricted licence' and 'fail to produce licence on demand'.[235]

12.141 Stock prisoner figures are taken from census data. These data may hide the actual number of people—especially Aboriginal and Torres Strait Islander people—that driver licence offending affects. As discussed in Chapter 3, Prisoner census data limits our understanding of flow—the number of people imprisoned on short sentences which flow through the system over the period of a month, or six months or a year.[236] Austroads noted:

> Traffic related offences, including the direct and indirect impact of imprisonment for unpaid fines, are often identified as a small component of the cause of Aboriginal and Torres Strait Islander incarceration. This is a contested issue in the literature ... Nonetheless, the broader consequences of the disconnection and inequality resulting from reduced mobility are significant contributors to the underlying drivers of Aboriginal and Torres Strait Islander imprisonment rates.[237]

The provision of driver licence programs and services

12.142 Most jurisdictions require that for a person to attain a provisional driver licence, they must: complete a computer based testing procedure to attain a learner driver licence; complete minimum time period on that licence whereby the person completes a minimum number of supervised driving hours; and pass a driving test. These requirements have been described as 'frequently insurmountable'[238] that 'inadvertently disadvantage' vulnerable groups in accessing a licence.[239]

12.143 Driving in the bush is often viewed differently to driving in urban areas. In some communities, bush driving without a driver licence is intergenerational and normalised.[240] In 2009, the North Australian Aboriginal Justice Agency (NAAJA) suggested that community members in the NT should be able to drive unlicensed or in

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234 Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification, Cat No 1234.0* (2011) div 14.

235 Ibid sub-div 141.

236 Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 2; Alex Avery and Stuart Kinner, 'A Robust Estimate of the Number and Characteristics of Persons Released from Prison in Australia' (2015) 39(4) *Australian and New Zealand Journal of Public Health* 315, 315–317.

237 Austroads, *Submission 13*.

238 Patricia Cullen et al, 'Challenges to Driver Licensing Participation for Aboriginal People in Australia: A Systematic Review of the Literature', above n 221, 142.

239 Ibid 135.

240 Alice Barter, above n 147, 66.

unregistered cars within communities and on Aboriginal land on bush tracks, especially for hunting purposes.[241]

12.144 There has been support for the introduction of driver permit schemes for Aboriginal and Torres Strait Islander people living in some regional and remote areas. For example, in 2010, the Standing Committee on Aboriginal and Torres Strait Islander Affairs recommended the introduction of 'special remote area' driver licences.[242] The recommendation was supported in a 2012 report to the NT Government, which suggested that the reform be 'carefully studied' as a way to increase employment opportunities for young Aboriginal and Torres Strait Islander people.[243]

12.145 Some stakeholders to this Inquiry supported the introduction of regional driver permits for Aboriginal and Torres Strait Islander people in remote communities.[244] The ALSWA, for example, submitted that a reduced driver permit should provide for a reduced number of hours and learner and probationary periods. It should require fewer identity documents, with drivers having to undergo a modified test more relevant to country driving. Low income earners should access it on a reduced fee basis. ALSWA also submitted that a regional driver permit could relate to a person's community, relevant native title determination or regional boundaries, with an option to expand the permit after a certain period without any traffic convictions.[245]

12.146 Kimberly Community Legal Services did not support the design and implementation of a regional driver licence scheme, advising that it would 'create a more confusing and elaborate process of licensing than already exists'. It suggested instead that further consideration needs to be given to decreasing costs associated with licensing.[246] The Legal Services Commission of SA advocated a 'return to the previous model of a single, practical driving test conducted by local police' for Aboriginal people living remotely.[247]

12.147 The NSW Government submission advised the ALRC of the Restricted Provisional P1 Licence (RP1), available in certain regional and remote areas. The RP1 requires fewer hours of on-road driving experience (50 compared with 120 hours). The licence permits drivers to drive for work, education or medical purposes only. Take up of the RP1 has been low, and research has suggested that system barriers such as literacy; access to proof of identity documents, vehicles, petrol, and supervised drivers; and unpaid fines are still preventing young people in these regional areas from achieving 50 hours of supervised driving. While the RP1 is still available in NSW, [248]

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241 North Australian Aboriginal Justice Agency, *Aboriginal Communities and the Police's Taskforce Themis: Case Studies in Remote Aboriginal Community Policing in the Northern Territory* (2009).

242 Senate Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 220, rec 21.

243 Anthony and Blagg, above n 233, rec 13.

244 The Law Society of Western Australia, *Submission 111*; The Law Council of Australia, *Submission 108*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Legal Aid WA, *Submission 33*.

245 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

246 Kimberley Community Legal Services, *Submission 80*.

247 Legal Services Commission of South Australia, *Submission 17*.

248 NSW Bar Association, *Submission 88* supported this type of measure.

focus has relocated to addressing barriers through the Driver Licensing Access Program and Safer Driver Court Disadvantaged Learner Initiative (see below).[249]

Driver licence programs and services

12.148 The ALRC is not opposed to these and the other options discussed above. There is value in local solutions developed with Aboriginal and Torres Strait Islander communities. Nonetheless, the ALRC recommends that state and territory governments work with relevant Aboriginal and Torres Strait Islander organisations to identify gaps in servicing to remove the obstacles to Aboriginal and Torres Strait Islander peoples getting fully licensed. VALS/IWG stated that, in regards to driver licences, the 'priority should be investing in significant additional resources to ensure that Aboriginal and Torres Strait Islander people living in regional locations have better opportunities from a young age to obtain and keep a full drivers licence as opposed to a limited regional driver permit'.[250]

12.149 This is not a new proposal. The RCIADIC recommended that, in jurisdictions where motor vehicle offences are a significant cause of Aboriginal imprisonment, these causal factors should be identified and, in conjunction with Aboriginal community organisations, programs should be designed to reduce the incidence of offending.[251]

12.150 There are some driver licence schemes already operating, such as the Aboriginal Justice Project in WA, which provides travelling services to assist Aboriginal and Torres Strait Islander peoples to pay fines, access birth certificates and apply for or reinstitute their driver licence. To this end, representatives from the Department of Transport, Centrelink, Registry of Births, Deaths and Marriages, Fine Enforcement Registry, and the Aboriginal Justice Program attend 'open days' in identified priority locations.

12.151 In 2015–16 the Aboriginal Justice Project reported that it had:

- conducted 73 open days, which 2,751 people attended;
- converted over $300,000 worth of fines to time-to-pay schemes or stayed the fine;
- provided for 33 people to enter time-to-pay schemes;
- lifted 684 licence suspensions caused by fine default;
- enabled 900 people to apply for a birth certificate; and
- conducted 146 practical driving assessments and over 200 theory tests.

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249 NSW Government, *Submission 85*.

250 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*. See also Northern Territory Government, *Submission 118*.

251 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, rec 95.

12.152 WA also has the Royalty for Regions program, which provides enhanced driver training and education in regional and remote communities;[252] the Remote Areas Licensing Program run by Department of Transport; and a community owned driving school in Roebourne (the Red Dirt Driving Academy*)*, which also provides assistance with getting identification. There are also other community-led[253] and NGO programs available throughout WA, such as those provided in the Kimberley by Life without Barriers.[254]

12.153 The NT Government developed DriveSafe NT Remote, which provides free licensing services to Aboriginal clients in remote NT communities. It uses

> verbal assessment methodology and unique educational resources to recognise the environmental and cultural attributes of Aboriginal learning styles and linguistically diverse population groups, many with low levels of English literacy with online versions available in English and three Aboriginal languages (Warlpiri, Yolgnu Matha and Kriol). In addition, driver education and licensing services are delivered in remote high schools and correctional institutions (prisons and work camps) through the Departments of Educational and Correctional Services.[255]

12.154 The program has provided for an increase in driver licensing rates for Aboriginal and Torres Strait Islander people living in the NT.[256] The NT Government submitted that, since the program's inception in 2012, it has delivered 4,671 learner licences, 1,713 provisional licences, and issued over 1,500 birth certificates, describing the program as a 'sustainable solution to the complex, multi-causal and interdependent barriers to getting a driver licence for clients who reside in remote and regional areas of the NT'.[257] A program evaluation published in 2017 concluded that the program offered flexible delivery and community engagement and had filled a need within communities.[258]

12.155 There are similar driver licence programs in NSW, including Driving Change; and the Balunda-a program (for offenders). Birrang Enterprises provides community-led literacy and training to adult Aboriginal and Torres Strait Islander people.[259] Programs also facilitate payment of fine default. An evaluation of the initial three pilot sites[260] for Driving Change was published in 2016.[261] This evaluation found that the program increased access to driver licences for young Aboriginal people and delivered a 'sufficiently flexible' program that was able to respond to 'community and

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252 Advice Correspondence, Stephen Cannon (15 May 2017).
253 Alice Barter, above n 147, 68.
254 See, *Life without Barriers, David's Dream* <http://www.lwb.org.au/about-us/news-and-events/davids-dream/>.
255 Northern Territory Government, *Submission 118*.
256 Patricia Cullen et al, '"The Program Was the Solution to the Problem": Process Evaluation of a Multi-Site Driver Licensing Program in Remote Communities', above n 223, 81.
257 Northern Territory Government, *Submission 118*.
258 Patricia Cullen et al, '"The Program Was the Solution to the Problem": Process Evaluation of a Multi-Site Driver Licensing Program in Remote Communities', above n 223, 84, 88.
259 See also Transport for NSW, 'NSW Aboriginal Road Safety Action Plan 2014–2017' (December 2014).
260 Redfern, Griffith and Shellharbour.
261 Patricia Cullen et al, 'Implementation of a Driver Licensing Support Program in Three Aboriginal Communities: A Brief Report from a Pilot Program' (2016) 27(2) *Health Promotion Journal of Australia* 167.

client identified need'. It reported that 22% of people who participated in the program sought help for fine and debt management, and 22% had sanctions lifted.[262] The program is to expand into a further nine communities in NSW.[263]

12.156 Driver training is also a key element of the Maranguka Justice Reinvestment Program in Bourke, NSW. In 2013, Bourke was identified to have the highest number of driver licences offences in the state. In response, the Maranguka Justice Reinvestment Project developed the driver licensing program, which commenced in late 2015. Under the project, a person can either volunteer, or be referred by police (as a diversion strategy) to take part in the program. The program provides:

- access to registered cars, driver mentors and associated costs;
- removal of barriers to identity documents;
- case management of the services required by the individual; and
- the opportunity to obtain a Certificate 1 in Automotive Mechanics.

12.157 From December 2015–September 2016, 58 licences were obtained; two people required assistance gaining documentation; and 53 required assistance with SDR, WDOs or Centrepay. Four people had secured employment due to having a driver licence. Similar statistics were provided by Just Reinvest NSW from October 2016 to June 2017.[264]

12.158 The NSW Government submission also outlined the Driver Licensing Access Program, which provides culturally appropriate support services including literacy, numeracy and computer skills, access to roadworthy vehicles, debt negotiation and management and learner driver mentoring and supervision.[265] The NSW Government submission further informed the ALRC of the Driving and Licences Offences Project, which provides support to Aboriginal and Torres Strait Islander peoples appearing in court for driving or licensing offences in some regional and remote local courts. Through this project, driving offenders can be referred to services such as Births Deaths and Marriages for identification, SDR to put in place time-to-pay plans or referrals to WDOs to reduce fines and retain or regain licences.[266]

12.159 Similar programs are run in other jurisdictions. The Queensland Department of Transport and Mains Road Indigenous Driver Licensing Unit operate the Indigenous Driver Licensing Program, which provides licensing services to some Aboriginal and Torres Strait Islander communities in Far North Queensland.[267] Victoria has a Learner to Permit program, which is reportedly used by Aboriginal and Torres Strait Islander

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262 Ibid table 2.
263 Ibid abstract.
264 Just Reinvest NSW, *Submission 82*.
265 See also, *Driver Licences, Freedom and opportunity*, <http://roadsafety.transport.nsw.gov.au/aboutthecentre/aboriginalprojects/licensing.html>
266 NSW Government, *Submission 85*.
267 See, *Indigenous Driver Licensing Program*, <https://www.tmr.qld.gov.au/Community-and-environment/Indigenous-programs/Indigenous-driver-licensing-program.aspx>

young people.[268] The SA Government runs the 'On the Right Track Remote' driver licensing service. Under this program, some clients can be exempted from some aspects of the Graduated Licensing Scheme, specifically the number of hours of supervised driving and the length of time required on a learner permit.[269] A program for a driver licensing pilot for Aboriginal and Torres Strait Islander people in the ACT is under development.[270] These types of programs were supported by stakeholders.[271]

12.160 The NSW Auditor-General's 2013 report, *Improving Legal and Safe Driving among Aboriginal People*, outlined characteristics of successful driver licence programs. These included using and building on community capacity; having program champions; and involving Aboriginal and Torres Strait Islander peoples in program development and delivery.[272] In their submission to this Inquiry, Austroads advised the ALRC of its project, 'Improving Driver Licensing Programs for Indigenous Road Users and Transitioning Learnings to Other User Groups'. The project aims to provide national policy principles to guide further Aboriginal and Torres Strait Islander program development; provide service-level solutions to licence barriers; and better link data sources and information sharing. The project is scheduled for completion in August 2018.[273]

12.161 Driving programs are necessarily limited by resources and geography. Other issues include the small scale and short lifespan of most programs; the practical constraints of insurance cover; volunteer driver reimbursements; and lack of ownership, funding and evaluations.[274] Driver licence programs require coordination between different government departments, such as Births, Deaths and Marriages, Attorneys-General, and Roads and Maritime Services. This happened under the Aboriginal Justice Program in WA, but lack of coordination can be a problem in other states and territories. The NSW Auditor-General identified coordination as a key gap in the steady provision of driving programs to Aboriginal and Torres Strait Islander peoples in NSW.[275]

12.162 ALSWA suggested that, to improve the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities, an increase in the frequency and geographic scope of current programs in WA was needed. It also suggested that school driver licence programs be run in all regional schools; that regional and remote communities receive reduced fees for all government resources and services related to driving tests for Aboriginal and Torres Strait Islander people, and that the services produce culturally appropriate material; and that government

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268 Mission Australia, *Submission 53*.
269 See, *On the Right Track, Aboriginal Road Safety and Driver Licensing Program*, <http://www.dpti.sa.gov.au/ontherighttrack>.
270 ACT Government, *Submission 110*.
271 See, eg, NSW Council of Social Service (NCOSS), *Submission 45*; ACT Law Society, *Submission 40*. For a summary of available programs nationwide see Austroads, *Submission 13*.
272 Audit Office of New South Wales, above n 148, 4.
273 Austroads, *Submission 13*.
274 Audit Office of New South Wales, above n 148, 4.
275 Ibid 4, 55.

uncouple the Department of Transport offices from law enforcement facilities, and employ Aboriginal and Torres Strait Islander people. [276]

12.163 Incorporating driver programs into the school curriculum was supported. Mission Australia advised that, in Victoria, this was provided by Changing Gears and Ignition programs in remote area schools.[277] In WA, the Department of Transport had partnered with schools to implement programs to assist students to obtain their learner permit and progress to a provisional driver licence.[278]

12.164 It was also suggested that school-age children receive information on getting a licence, and the consequences of driving without one.[279]

12.165 Other suggestions have included:

- the expansion and better use of WDOs and legal solutions, such as court diversion programs to attain a driver licence;[280] and
- requiring people who are detected driving while unlicensed to undergo training (including through alternative methods of testing competency which may not rely on literacy) for a licence rather than facing mandatory disqualification from becoming licensed.[281]

12.166 Under-licensing can result in serious consequences for Aboriginal and Torres Strait Islander people who choose, or need, to drive unlicensed. While work has been done to improve access to driver licences, there remains an imperative for state and territory governments to work with Aboriginal and Torres Strait Islander communities to enhance and commit to current and new government driver education programs.[282]

Infringement notices for offensive language

12.167 Stakeholders to this Inquiry have advised that offensive language provisions and subsequent infringement notices for such conduct continue to be an issue for Aboriginal and Torres Strait Islander peoples.

276 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.
277 Mission Australia, *Submission 53*.
278 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.
279 The Law Society of Western Australia, *Submission 111*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.
280 Kathleen Clapham et al, above n 149, 281.
281 NSW Bar Association, *Submission 88*.
282 Kathleen Clapham et al, above n 149, 281.

Recommendation 12–4 State and territory governments should review the effect on Aboriginal and Torres Strait Islander peoples of statutory provisions that criminalise offensive language with a view to:

- repealing the provisions; or
- narrowing the application of those provisions to language that is abusive or threatening.

Statutory frameworks

12.168 All states and territories have provisions that criminalise the use of offensive language in a public place.[283] A person may receive an infringement notice for using offensive language from various issuing officers,[284] including police—where the infringement notice is generally referred to as a Criminal Infringement Notice (CIN). Police can issue CINs for offensive language in all states and territories except SA, Tasmania and the ACT, where the matter must go before the court.[285] In the jurisdictions with CINs, there remains an option for police to arrest or issue a court attendance notice for the matter to go before the court.

12.169 CINs are a relatively new form of infringement notice. For example, NSW introduced CINs in 2004, and WA introduced CINs in 2016.[286]

12.170 The penalty amount for offensive language CINs ranges from $110 in Queensland to $500 in NSW and WA.[287] When appearing in court, the maximum fine ranges from $660 in NSW to $6,000 in WA, with the majority of jurisdictions having maximum fines of approximately $1,000. A sentence of imprisonment can also be imposed in all jurisdictions except NSW and WA.[288]

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283 *Crimes Act 1900* (NSW) s 392; *Summary Offences Act* (NT) ss 47, 53; *Summary Offences Regulations 1994* (NT) reg 4A; *Summary Offences Act 1988* (NSW) s 4A(1); *Summary Offences Act 2005* (Qld) s 6; *State Penalties Enforcement Act 1999* (Qld); *Summary Offences Act 1953* (SA) ss 7, 22; *Police Offences Act 1935* (Tas) s 12; *Summary Offences Act 1966* (Vic) ss 17, 60A–60AB; *Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1; *Criminal Procedure Act 2004* (WA) ss 8–9; *Criminal Code 1913* (WA) ss 74A, 720–3.

284 See, eg, *Parramatta Park Trust Regulation 2007* (NSW) reg 49, sch 3 pt 2; *Rail Safety (Offences) Regulation 2008* (NSW) reg 12(1), sch 1 pt 3; Elyse Methven, 'Dirty Talk: A Critical Discourse Analysis of Offensive Language Crimes' (PhD Thesis, Faculty of Law, University of Technology Sydney, 2017) 5.

285 *Criminal Procedure Regulation 2010* (NSW) reg 106, sch 3; *Criminal Procedure Act 1986* (NSW) ss 333–7; *Summary Offences Regulations* (NT) regs 3–4A; *Police Powers and Responsibilities Act 2000* (Qld) s 394; *Penalties and Sentences Act 1992* (Qld) s 5; *State Penalties Enforcement Act 1999* (Qld) sch 2; *Police Offences Act 1935* (Tas) s 61; *Monetary Penalties Enforcement Act 2005* (Tas) s 14; *Summary Offences Act 1966* (Vic) ss 60AA, 60AB(2); *Criminal Code* (WA) ss 730–3; *Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1.

286 *Criminal Code Amendment (Infringement Notices) Act 2011* (WA).

287 In 2014, NSW increased the penalty amount for offensive conduct and language from $200 to $500: *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW); *Criminal Procedure Regulation 2017*, sch 4.

288 *Summary Offences Act* (NT) ss 47, 53; *Summary Offences Act 2005* (Qld) s 6(3); *Summary Offences Act 1953* (SA) ss 7, 22; *Police Offences Act 1935* (Tas) s 12; *Summary Offences Act 1966* (Vic) ss 17, 60AA–

The impact on Aboriginal and Torres Strait Islander peoples

12.171 Aboriginal and Torres Strait Islander people remain over-represented as recipients of offensive language CINs.[289] For example, the NSW Ombudsman found that 11% of CINs for offensive language in 2008 were issued to Aboriginal and Torres Strait Islander people.[290] More recently, it was reported that the proportion had risen to 17%.[291] This can have a significant impact. According to the NSW Ombudsman, 89% of Aboriginal and Torres Strait Islander people issued with a CIN failed to pay on time and were referred to SDR for enforcement. By comparison, 48% of all CIN penalty notices were referred for enforcement.[292]

12.172 Professor Tamara Walsh submitted that Aboriginal people in Queensland are up to 12 times more likely to be charged with or receive infringement notices for public nuisance than non-Indigenous people. In most cases, offensive language was directed at police officers. Where these matters were dealt with in the court, Aboriginal and Torres Strait Islander people were more likely to receive a custodial sentence.[293]

12.173 The issues regarding offensive language provisions and how they are applied to Aboriginal and Torres Strait Islander people have been well ventilated. Primarily: most offensive language CINs are issued for language directed at police;[294] and, if tested in court, may not meet the legal definition of 'offensive'.[295] Instead, under CINs, police are the 'victim, enforcer and judge' of the law, which provides strong foundation for conflict and misuse.[296]

12.174 The RCIADIC recognised the role of offensive language provisions in incarcerating Aboriginal and Torres Strait Islander people, and recommended that offensive language provisions be monitored.[297]

12.175 The high incidence of Aboriginal and Torres Strait Islander offensive language offending has been ascribed to the likelihood of Aboriginal and Torres Strait Islander people being out in public, amounting to an increased likelihood of police interaction.[298] Aboriginal and Torres Strait Islander people are likely to be over-represented in areas of social disadvantage, including homelessness, mental health

60AB; Elyse Methven, 'Dirty Talk: A Critical Discourse Analysis of Offensive Language Crimes' (PhD Thesis, Faculty of Law, University of Technology Sydney, 2017) table 4.1. See also Northern Territory Government, *Submission 118*; Dr Elyse Methven, *Submission 114*.

289 Dr Elyse Methven, *Submission 114*.

290 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 59.

291 Elyse Methven, 'Dirty Talk: A Critical Discourse Analysis of Offensive Language Crimes' (PhD Thesis, Faculty of Law, University of Technology Sydney, 2017) 5.

292 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) iv–v.

293 Associate Professor T Walsh, *Submission 51*.

294 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012); Dr Elyse Methven, *Submission 114*.

295 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [10.47]; NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009).

296 Dr Elyse Methven, *Submission 114*.

297 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* [1991] Vol 3 rec 86.

298 The Law Council of Australia, *Submission 108*.

issues and lower education; and are more likely to be reliant on public services.[299] This visibility means that there is a high likelihood of interaction with police, which can easily escalate.[300]

12.176 It has also been reported that there is an acceptance of swear words in the vernacular of some Aboriginal and Torres Strait Islander communities.[301] The use of swear words when interacting with police may be an expression of resistance to police but also may represent cultural differences in attitudes to swearing, where it may be more 'routine' in some Aboriginal communities.[302] This may not always be the case. The NT Government suggested to this Inquiry that some Aboriginal communities welcome the criminalisation of offensive language:

> A person's right to feel safe in the community should not be compromised, and the lessening of community value standards through abolition of such offences could contribute to decreased social amenity. A recurring theme in Aboriginal communities as part of the NT Police community safety management process is the importance of a safe community, free from offensive language and disorderly behaviours. Community members often pose sanction options that should apply if people engage in offensive behaviour and the use of offensive language as Aboriginal communities state it is detrimental to the values they wish to uphold in their communities.[303]

Offensive language provisions should be reviewed

12.177 Offensive language provisions have a particular history associated with Aboriginal and Torres Strait Islander peoples, and have wide application. There may be value in, if not abolishing relevant offensive language provisions, then narrowing their application.

12.178 Abolition may result in unintended consequences—it may leave police without a tool to manage some situations, and may even result in more serious charges being laid. It may therefore be most appropriate for states and territories to narrow the application of relevant provisions to language voiced in public which is threatening or abusive. This would remove the option for a person to be fined for telling police something was 'none of their fucking business', for example, but retain the option for police to issue CINs when threatened or abused. It may be, however, that certain threatening or abusive conduct is already proscribed by the criminal law in some states and territories, and that police can use move-on powers, intoxication, assault or inciting provisions when needed.[304]

12.179 The ALRC suggests that states and territories evaluate their relevant offensive language provisions.

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299 See ch 2.

300 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Dr Elyse Methven, *Submission 114*.

301 Dr Elyse Methven, *Submission 114*.

302 Ibid.

303 Northern Territory Government, *Submission 118*.

304 See, eg, *Summary Offences Act 1988* (NSW) s 9; *Crimes Act 1900* (NSW) 1900 s 60; Dr Elyse Methven, *Submission 114*. It is noted that not many of these provisions come under CIN regimes.

Options for reform

12.180 Stakeholders in this Inquiry expressed strong support for the abolition of all offensive language provisions.[305] Stakeholders submitted that these provisions were disproportionately used and had a disproportionate effect on Aboriginal and Torres Strait Islander people.[306]

12.181 Redfern Legal Centre supported abolition of the offence of offensive language, noting that 'though ostensibly less serious than criminal proceedings, the consequences of receiving a CIN can be significant'.[307] It argued that Aboriginal and Torres Strait Islander people are unlikely to request a review or elect to have a CIN dealt with by the court, even where it is likely that the offensive language will not satisfy the legal test. As a result, the 'overwhelming majority' of CINs issued to Aboriginal and Torres Strait Islander people for offensive language were not scrutinised by a court. In Redfern Legal Centre's view, the CIN scheme had not met its stated aims of diverting people away from the criminal justice system: it instead involved them further through fine default and involved more people through net widening.[308]

12.182 The ALSWA noted that, for many Aboriginal and Torres Strait Islander people, the penalty amount of $500 in WA would be 'impossible to pay'.[309] Kimberly Community Legal Services argued that for 'Aboriginal people, the homeless and other disadvantaged groups the imposition of such a fine is tantamount to a prison sentence in WA'.[310]

12.183 Some stakeholders considered offensive language provisions to be outmoded.[311] The NSW Bar Association asserted that, not only are these types of provisions no longer needed, but that their continuing use 'brings the law into disrepute':

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305 See, eg, Sisters Inside, *Submission 119*; Dr Elyse Methven, *Submission 114*; The Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*; Kimberley Community Legal Services, *Submission 80*; Redfern Legal Centre, *Submission 79*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; S McLean Cullen, *Submission 64*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Caxton Legal Centre, *Submission 47*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Associate Professor L Bartels, *Submission 21*; Commissioner for Children and Young People Western Australia, *Submission 16*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

306 See, eg, NSW Bar Association, *Submission 88*; Redfern Legal Centre, *Submission 79*; Caxton Legal Centre, *Submission 47*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.

307 Redfern Legal Centre, *Submission 79*.

308 Ibid.

309 Aboriginal Legal Service of Western Australia Limited, *Submission 74*. Also see Legal Aid NSW, *Submission 101*.

310 Kimberley Community Legal Services, *Submission 80*.

311 Dr Elyse Methven, *Submission 114*.

> Historically, the offence has been used disproportionately against Aboriginal and Torres Strait Islander people, and it is likely to continue to be so used. There is no justification for its retention. Other existing laws provide protection from verbal threats and intimidation.[312]

12.184 Short of abolition, there are other options by which to reduce the use of offensive language provisions. For example, the NSWLRC has previously recommended that if offensive language provisions were retained, the issuing of a CIN for these offences should be subject to mandatory review by a senior police officer.[313] This approach garnered some support from stakeholders to this Inquiry. Redfern Legal Centre supported this with an additional requirement to examine and monitor usage on Aboriginal and Torres Strait Islander peoples.[314] VALS/IWG suggested, however, that police oversight without any other mechanism may not be an effective measure to prevent the imposition of fines, especially multiple fines.[315]

12.185 The YLCLC suggested that the NSW provision should also include a requirement that offensive language is used at a 'time or in circumstances at which it was likely to be heard by a reasonable member of the public and it caused offence or was done in a manner likely to cause offence to a reasonable member of the public'.[316] Professor Tamara Walsh suggested that, if retained, the threshold of 'offensiveness' set by the High Court in *Coleman v Power* (2004)[317] should be spelt out within the relevant provisions—that is that offensive behaviour provisions were meant to protect the public from harms including disorder, violence, intimidation and serious affront.[318]

12.186 The Law Society of WA suggested that offensive language should only be capable of criminal sanction where it forms part of a more serious set of circumstances giving rise to a breach of the peace.[319] The Law Council of Australia suggested that only language that is so 'grossly offensive as to amount to vilification or intimation' ought to be criminalised.[320]

The reforms of this chapter

12.187 Offensive language CINs provide an example of how fine systems can operate in a way that disproportionately affects Aboriginal and Torres Strait Islander people. The ALRC has heard of people receiving multiple infringement notices for swearing more than once in the same transaction. Swearing need not be abusive or threatening, and can be a consequence of everyday vernacular. The large penalty amounts render offensive language CINs difficult to pay, and are likely to result in the

312 NSW Bar Association, *Submission 88*.
313 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) recs 10.2–10.3.
314 Redfern Legal Centre, *Submission 79*.
315 Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*.
316 The Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.
317 *Coleman v Power* (2004) 220 CLR 1.
318 Associate Professor T Walsh, *Submission 51*.
319 The Law Society of Western Australia, *Submission 111*.
320 The Law Council of Australia, *Submission 108*. See also Dr Elyse Methven, *Submission 114*.

offender entering the fine enforcement regime. It some jurisdictions it can result in prison.

12.188 The recommendations in this chapter aim to circumscribe the effects of such provisions. Under these, the issuing officer would be directed to recognise circumstances when the imposition of a formal caution is more appropriate. Police in SA can issue a caution to adults for offensive language offending, including for swearing at police.[321] Cautioning is particularly appropriate to offensive language offending, which is more often than not a 'victimless crime'.[322]

12.189 When cautioning is not appropriate, or has not been effective, the recommendations of this chapter would provide that the monetary penalty attached to a fine for offensive language be decreased to a more manageable amount. Offensive language CINs carry high penalties. As noted above, an imposition of a $500 fine on many Aboriginal and Torres Strait Islander people is insurmountable, and is likely to cause a person to enter the fine enforcement regime.

12.190 Under the recommendations in this chapter, when unable to pay the decreased amount, the offender could opt to pay the fine via a WDO.

12.191 This mitigation would apply to other types of offending that lead to the issuing of infringement notices or CINs. For example, in 2014, the NSW Ombudsman noted that Aboriginal and Torres Strait Islander peoples were particularly affected by the issuing of CINs for the offence of 'continuation of intoxicated and disorderly behaviour following move on direction'.[323] The Ombudsman reported that, of the 484 fines or charges issued for this offence during the review period, 31% (150) were issued to Aboriginal people.[324] Stakeholders to this Inquiry also pointed to alcohol, begging offences, and move-on powers as problematic provisions for Aboriginal and Torres Strait Islander peoples.[325]

12.192 Nonetheless, as offensive language provisions particularly affect Aboriginal and Torres Strait Islander people, the ALRC recommends state and territory governments review the relevant statutes with a view to repealing or narrowing the application of the provisions.

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321 South Australia Police, above n 82.
322 Queensland Advocacy Incorporated, *Submission 60*. See also Redfern Legal Centre, *Submission 79*.
323 *Summary Offences Act 1988* (NSW) s 9.
324 NSW Ombudsman, *Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences Act 1988* (2014) 3.
325 Redfern Legal Centre, *Submission 79*; Joint Submission of the Victorian Aboriginal Legal Service and the Infringements Working Group, *Submission 42*; Victorian Aboriginal Legal Service, *Submission 39*.

13. Alcohol

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Summary

13.1 Aboriginal and Torres Strait Islander people are less likely to drink alcohol than non-Indigenous people, but those who do drink, are more likely to drink at harmful levels.[1] This chapter concerns the harmful use of alcohol in Aboriginal and Torres Strait Islander communities and the links between alcohol, offending and incarceration.

13.2 While liquor licensing laws fall within state and territory jurisdictions, the Terms of Reference ask the ALRC to have regard to laws that may contribute to the rate of Aboriginal and Torres Strait Islander peoples' offending including, for example, laws that regulate the availability of alcohol.

13.3 The chapter outlines a range of responses that have been adopted to address alcohol-related offending, including liquor accords, restrictions on the sale of alcohol, banned drinkers registers and mandatory treatment programs.

13.4 The ALRC makes two recommendations. Firstly, that all initiatives to reduce the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities should be developed with, and led by, these communities to meet their particular needs. Secondly, that Commonwealth, state and territory governments should enable and provide support to Aboriginal and Torres Strait Islander communities, that wish to address alcohol misuse, to develop and implement local liquor accords; and/or develop plans to prevent the sale of full strength alcohol or reduce the availability of particular alcohol ranges or products within their communities.

13.5 Other substance abuse issues may also contribute to incarceration, including the use and availability of illicit and non-illicit drugs, and the use of inhalants. However, these substances are not included in the Terms of Reference and have therefore not been the subject of inquiry.

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1 Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report 2010* (2011).

13.6 During the consultation process, the ALRC was made aware of other issues linked to the consumption of alcohol, for example the introduction of Cashless Debit Cards in communities and volumetric taxation of alcohol. The ALRC considers that both these issues fall outside of the scope of the Terms of Reference for this Inquiry.

Alcohol and offending

13.7 The over-consumption of alcohol is associated with: health conditions including liver disease, diabetes, cardiovascular disease, and some cancers; accidents and injury; and harms to family and community.[2]

13.8 A number of prior inquiries have also identified widespread problems relating to the harmful use of alcohol and the links between alcohol and offending. For example, the 2013 National Drug Strategy Household Survey found that, while many drinkers in the Australian community consume alcohol responsibly, there is a substantial proportion of drinkers who consume alcohol at levels considered to increase the risk of alcohol-related harm.[3] The Productivity Commission's 2016 Report into Indicators of Indigenous Disadvantage stated that excessive alcohol consumption increases an individual's risk of death, disease and injury. Alcohol also contributes to family and community related problems, such as child abuse and neglect, work or financial problems, family breakdown, and violence and crime.[4]

13.9 The National Drug Strategy 2010–2015 noted that 'excessive consumption of alcohol is a major cause of health and social harms' and that,

> [s]hort episodes of heavy alcohol consumption are a major cause of road and other accidents, domestic and public violence, and crime. Long-term heavy drinking is a major risk factor for chronic disease, including liver disease and brain damage, and contributes to family breakdown and broader social dysfunction.[5]

13.10 With respect to Aboriginal and Torres Strait Islander peoples, the National Aboriginal and Torres Strait Islander Health Survey 2004–05 reported that, overall, fewer Aboriginal people drink alcohol than non-Indigenous people.[6] However, later inquiries have identified the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities.[7]

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2 National Health and Medical Research Council, *Australian Guidelines to Reduce Health Risks from Drinking Alcohol* (2009).

3 Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report* (2013) 40.

4 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016).

5 Ministerial Council on Drug Strategy, *National Drug Strategy 2010–2015: A Framework for Action on Alcohol, Tobacco and Other Drugs* (2011) 2.

6 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Health Survey, 2004–05, Cat No 4715.0* (2006) tables 6, 17; Australian Bureau of Statistics, *National Health Survey: Summary of Results, 2004–05, Cat No 4364.0* (2006) table 17.

7 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015).

13.11 In 2015, the House of Representatives Standing Committee on Indigenous Affairs conducted an inquiry into the harmful use of alcohol in Aboriginal and Torres Strait Islander communities (House of Representatives Alcohol Inquiry). Its Report made 33 recommendations concerning best practice strategies to minimise alcohol misuse and alcohol-related harm and best practice alcohol treatments and support.[8]

13.12 Submissions to the House of Representatives Alcohol Inquiry spoke of the harm that alcohol abuse continues to cause Aboriginal communities and its connection to the over-representation of Aboriginal people in the criminal justice system.[9] For example, the Australian Crime Commission noted that alcohol was a factor in 78% of violent offences involving Aboriginal and Torres Strait Islander persons dealt with in the Alice Springs Supreme Court in 2010;[10] and the Northern Territory (NT) Police Association said that 60% of all assaults and 67% of reported domestic violence incidents in the NT involved alcohol.[11]

13.13 The Victorian Aboriginal Controlled Health Organisation (VACCHO) referred to research conducted through a partnership between the Victorian Department of Justice, Monash University and VACCHO, that showed 'high levels of alcohol and drug use in Victorian Aboriginal people in prison (higher than for non-Aboriginal prisoners) contributing to increasing rates of Aboriginal incarceration'.[12]

13.14 In its submission to this Inquiry, Endeavour Drinks Group[13] suggested there is an oversimplification of the role alcohol plays in Aboriginal and Torres Strait Islander offending. The Group suggested that alcohol itself does not cause violence. Instead, the Group suggested that alcohol abuse in Aboriginal and Torres Strait Islander communities is a symptom of factors such as poverty, unemployment, passive welfare, and the loss of land and culture.[14]

13.15 However, a 2009 review of the Alice Springs Alcohol Management Plan suggested that high levels of alcohol consumption are associated with high levels of alcohol-related harm and low consumption with low levels of harm. Drawing on the

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8 Ibid.

9 See, eg, Central Australian Aboriginal Legal Aid Service, Submission No 56 to House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (April 2014) 2.

10 Australian Crime Commission, Submission No 59 to Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities: Alcohol, Hurting People and Harming Communities* (17 April 2014).

11 Northern Territory Police Association, Submission No 27 to Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities: Alcohol, Hurting People and Harming Communities* (16 April 2014).

12 Victorian Aboriginal Community Controlled Health Organisation, Submission No 33 to House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (March 2014).

13 Endeavour Drinks Group is part of Woolworths Limited and operates 1,515 packaged liquor outlets in every Australian State and Territory. Some of these outlets (predominantly in Queensland) are operated in association with a joint venture business, Australian Leisure and Hospitality. See Endeavour Drinks Group, *Submission 5*.

14 Renate Kreisfeld, James Harrison and Jerry Moller, 'Injury Deaths amongst Aboriginal Australians' (1995) 19(1) *Aboriginal and Islander Health Worker Journal* 19, 21.

work of the National Drug Research Institute (2007), the review identified the most effective measures to reduce alcohol-related harm. These included:

- restrictions on the hours and days of sale on licensed premises;
- minimum legal drinking age enforcement for consumption and purchase;
- restrictions on high risk alcohol beverages (eg, cheap cask wine/fortified wine);
- outlet density;
- dry community declarations (when communities request declaration);
- mandatory packages of restrictions for remote and regional areas;
- restrictions on service to intoxicated people when enforced; and
- community-based interventions when enforced.[15]

13.16 While a connection between alcohol abuse and criminal conduct has been identified, criminalising alcohol consumption may not be an appropriate response. The National Congress of Australia's First Peoples (the National Congress) has described such an approach as a 'failed strategy, merely adding to a cycle of escalating rates of incarceration. It hides specific problems in watch-houses, prisons and institutions and provides no remedy. This approach should play no future part in the alcohol policy'.[16]

13.17 The National Congress further argued that alcohol offences should not be seen as a criminal justice issue, but rather as a social and health problem:

> The way forward lies in a health and wellbeing approach based on community healing and personal rehabilitation, which addresses the historical and social factors which contribute to an unhealthy social environment and targets resources at those areas affected.[17]

13.18 Similarly, the NT Anti-Discrimination Commission submitted to this Inquiry that 'alcohol misuse must be addressed as a social and health issue rather than criminalised ... On repeated occasions, we have seen the failure to address misuse of alcohol in this way, lead to incarceration of Aboriginal people'.[18]

13.19 The Human Rights Law centre argued that:

> [t]he response should be to address alcohol misuse for what it is—a complex health issue requiring health-focused responses within a broader framework of supply, demand and harm reduction—not to criminalise individuals struggling with alcohol addiction and other health and social challenges.[19]

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15 Suzanne MacKeith, Dennis Gray and Tanya Chikritzhs, *Review of Moving Beyond the Restrictions: The Evaluation of the Alice Springs Alcohol Management Plan—A Report Prepared for the Alice Springs People's Alcohol Action Coalition* (2009) 12.

16 National Congress of Australia's First People, Submission No 97 to Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2014) 2.

17 Ibid 3.

18 Northern Territory Anti-Discrimination Commission, *Submission 67*.

19 Human Rights Law Centre, *Submission 68* .

Fetal Alcohol Spectrum Disorder

13.20 Alcohol consumed during pregnancy has been shown to cause defects in the developing foetus.[20] There is also 'increasing evidence that early onset of drinking during childhood and the teenage years can have health effects and interrupt the normal development of the brain'.[21]

13.21 Fetal Alcohol Syndrome (FAS) and Fetal Alcohol Spectrum Disorders (FASD) describe a range of conditions that result from prenatal alcohol exposure during pregnancy. FAS and FASD can affect an unborn child exposed to alcohol in utero, with risk increasing as a multiple of the frequency and intensity of alcohol consumption. The effects of FAS and FASD on cognitive functioning and behaviour, first noticed in children, continues through to adulthood.[22]

13.22 Studies of the prevalence of FAS and FASD are limited. According to the Royal Australian and New Zealand College of Obstetricians and Gynaecologists (RANZCOG):

> FASD is a community wide problem with prevalence rates of Fetal Alcohol Syndrome (FAS) reported to be between 0.064 and 0.685 per 1,000 live births in Australia. Indigenous women are less likely to consume alcohol than non-Indigenous women but those who do are more likely to consume harmful amounts. FAS is up to 4 times higher in Indigenous Australians: 2.767 to 4.75 per 1,000 live births.[23]

13.23 RANZCOG describes the range of behavioural disabilities associated with FAS and FASD as 'behavioural disorders (for example, poor impulse control) and developmental delay including impaired language and communication, social and emotional delays. These have lifelong implications such as impaired education, employment and imprisonment'.[24]

13.24 Some research points to FAS and FASD contributing to Aboriginal incarceration rates.[25] However, data on the relationship between imprisonment and FASD is scarce. One Canadian study found that youths with FASD are 19 times more likely to be

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20 Ministerial Council on Drug Strategy, *National Drug Strategy 2010–2015: A Framework for Action on Alcohol, Tobacco and Other Drugs* (2011) 2.

21 Ibid.

22 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 107.

23 Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Submission No 66 to House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2014); House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 99.

24 Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Submission No 66 to House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2014).

25 Harry Blagg, Tamara Tulich and Zoe Bush, 'Placing Country at the Centre: Decolonising Justice for Indigenous Young People with Foetal Alcohol Spectrum Disorders (FASD)' (2015) 19(2) *Australian Indigenous Law Review* 4.

incarcerated than youths without FASD in a given year.[26] There is limited statistical information in Australia about incarcerated persons with FASD:

> Limited research has investigated the relationship between FASD and contact with the criminal justice system in Australia. The limited Australian literature, complemented by international research, indicates that FASD should be considered at every stage of the criminal justice system, from offending behaviour, through to court proceedings, as well as throughout incarceration and post-release. There is no Australian estimate of the number of offenders with FASD. Overseas studies of individuals with FASD, however, demonstrate high rates of contact with the criminal justice system.[27]

13.25 The National Indigenous Drug and Alcohol Committee made six specific recommendations directed at FAS and FASD, including: community information campaigns about the effects of consuming alcohol while pregnant; training of health practitioners to increase the earlier diagnosis and to assist in early identification and intervention; and other initiatives to address available support for people with FASD.[28] Other research has suggested that resourcing Indigenous organisations to provide mentoring and family and support services, as well as 'on-country' camps that aim to stabilise affected young people while attempting to heal families, may address the social effects of FAS and FASD more appropriately than a criminal justice response.[29]

13.26 The Commonwealth has developed an action plan to reduce the impact of FASD, which aims to improve outcomes for FASD affected infants as well as reducing its incidence in the population.[30]

A focus on harm reduction

13.27 To respond to harms associated with alcohol abuse and misuse, the Intergovernmental Committee on Drugs developed the National Aboriginal and Torres Strait Islander Peoples' Drug Strategy 2014–2019 (the Drug Strategy).[31] The Drug Strategy provides a roadmap for work that might be done to minimise the negative effects of alcohol and other drugs (AOD), suggesting that

> [i]n order to reduce high levels of harmful AOD use among some segments of the Aboriginal and Torres Strait Islander population it is necessary to: prevent or minimise the uptake of harmful use; provide safe acute care for those who are intoxicated; provide treatment for those who are dependent; support those whose

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26 Svetlana Popova et al, 'Fetal Alcohol Spectrum Disorder Prevalence Estimates in Correctional Systems: A Systematic Literature Review' (2011) 102(5) *Canadian Journal of Public Health* 336.

27 National Indigenous Drug and Alcohol Committee, *Addressing Fetal Alcohol Spectrum Disorder in Australia* (2012) 10.

28 National Indigenous Drug and Alcohol Committee, Submission No 94 to Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2014) 18–9.

29 Harry Blagg, Tamara Tulich and Zoe Bush, above n 25.

30 Australian Government, *Responding to the Impact of Fetal Alcohol Spectrum Disorders in Australia: A Commonwealth Action Plan* (2013).

31 Intergovernmental Committee on Drugs, *National Aboriginal and Torres Strait Islander Peoples' Drug Strategy 2014–2019* (2015) 3. The Drug Strategy is a sub-strategy of the National Drug Strategy 2010–2015.

> harmful AOD use has left them disabled or cognitively impaired; and support those whose lives are affected by other's harmful AOD use.[32]

13.28 The Drug Strategy adopted a harm minimisation approach, identifying 'three pillars' of reduction focused on demand, supply and harm.[33] In an Aboriginal and Torres Strait Islander context such approaches were described as follows:

> Demand reduction strategies aim to reduce the appeal of alcohol, tobacco and other drugs, and drug taking. Prevention and early intervention are key elements of effective demand reduction strategies. Strategies that are effective in this context include preventative strategies such as early intervention, education and health promotion, provision of alternatives to AOD use; community-led initiatives leading to alcohol bans, permits and restrictions on hours of supply.
>
> Supply reduction strategies aim to reduce the availability of alcohol, tobacco and other drugs, and control their use. Strategies that are effective in this context include indirect price controls by banning cheap high alcohol content beverages such as cask wine, restrictions on trading hours, fewer outlets, dry-community declarations and culturally sensitive enforcement of existing laws.
>
> Harm reduction strategies aim to reduce the negative effects of AOD use, without necessarily expecting people who use drugs to stop or reduce their use. Effective harm reduction strategies include: bans on the serving of alcohol in glass containers, night patrols, and sobering-up shelters.[34]

Imposition of alcohol controls

13.29 Some efforts to control supply of alcohol in Aboriginal and Torres Strait Islander communities have involved the imposition of alcohol restrictions without significant community consultation or consent. For example, in 2007, widespread alcohol restrictions on designated areas in the NT were introduced by the *Northern Territory Emergency Response Act 2007* (Cth). These restrictions were continued in 2012 by the *Stronger Futures in the Northern Territory Act 2012* (Cth), and included prohibition of the possession, supply and consumption of alcohol—effectively creating 'dry' communities.[35]

13.30 A 2016 evaluation of these measures found that there was

> insufficient data available to the reviewers that would evidence comprehensive and robust links between the Act and changes in key indicators of alcohol related harm over the 2012 to 2015 period. While some positive changes in patterns of consumption have occurred contemporaneously … it is problematic to attribute such outcomes to the operation of the Act.[36]

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32 Ibid 10.
33 Ibid 5.
34 Ibid 12.
35 Northern Territory Government, *Alcohol Policies and Legislation Review: Final Report* (2017) 73.
36 Department of the Prime Minister and Cabinet (Cth), *Review of the Stronger Futures in the Northern Territory Act (2012)* (2016) ii.

13.31 A 2017 review of alcohol policies and legislation in the NT noted that many stakeholders held the view that

> the unilateral decision to ban the supply, possession and consumption of alcohol in Aboriginal communities … has been discriminatory and detrimental to effective community driven alcohol reduction measures. The approach taken by the NTERA in declaring significantly more communities 'dry' in the manner it did, exacerbated the issues … relating to people leaving their community, or establishing unsafe drinking areas.[37]

13.32 Another response to alcohol misuse in the NT is the Banned Drinkers Register (BDR), which commenced in September 2017.[38] The BDR identifies people who are banned from purchasing, consuming or possessing alcohol and prevents their purchase of alcohol at a takeaway outlet. A person can be placed on the BDR for reasons including:

- any combination of three alcohol-related protective custodies or alcohol infringement notices in two years
- two low-range drink driving offences or a single mid-range or high-range drink driving offence
- being the defendant on an alcohol-related domestic violence order
- having an alcohol prohibition condition on a court order (including child protection orders), bail or parole order
- by decision of the BDR Registrar after being referred by an authorised person such as a doctor, nurse or child protection worker, or a family member or carer
- self-referral for any reason.[39]

13.33 Stakeholders to this Inquiry held mixed views about the appropriateness and efficacy of the BDR. NATSILS submitted that the BDR will disproportionately impact upon Aboriginal and Torres Strait Islander peoples. It preferred that harmful consumption of alcohol be addressed through rehabilitative programs focusing on positive health outcomes rather than through 'the implementation of punitive regimes'.[40]

13.34 The Central Australian Aboriginal Congress supported the BDR, but cautioned that a 'high quality expert evaluation' of the BDR and other alcohol measures in the NT was warranted.[41]

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37 Northern Territory Government, above n 35, 74.
38 Northern Territory Government, *Banned Drinker Register Frequently Asked Questions* (2017).
39 Ibid.
40 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
41 Central Australian Aboriginal Congress, *Submission 37*.

Community-driven solutions

Recommendation 13–1 All initiatives to reduce the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities should be developed with, and led by, these communities to meet their particular needs.

Recommendation 13–2 Commonwealth, state and territory governments should enable and provide support to Aboriginal and Torres Strait Islander communities that wish to address alcohol misuse to:

- develop and implement local liquor accords; and/or
- develop plans to prevent the sale of full strength alcohol or reduce the availability of particular alcohol ranges or products within their communities.

13.35 The ALRC recommends that any initiative to reduce the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities should be developed with, and led by, those communities. Many stakeholders to this Inquiry supported this approach. National Aboriginal and Torres Strait Islander Legal Services submitted that law reform designed to address the link between alcohol abuse and offending,

> must be based on ground up rather than top down models of community engagement. Accordingly, the development and implementation of liquor accords and other law reforms must be supported by community members, community sector organisations, social service providers and other key stakeholders. [42]

13.36 The Australian Human Rights Commission (AHRC) cautioned that 'successes achieved and processes implemented by a community may not be appropriate to mirror in other communities, as a "one size fits all" approach is known to be ineffective'. [43] The AHRC emphasised the importance of governments appropriately engaging and liaising with Aboriginal and Torres Strait Islander communities in order to identify their needs and priorities on a case-by-case basis.[44]

13.37 The NT Legal Aid Commission similarly submitted that 'a sound evidence base, combined with the meaningful participation by Aboriginal people, communities and organisations in the identification and implementation of solutions is crucial to addressing this issue'.[45]

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42 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
43 Australian Human Rights Commission, *Submission 43*.
44 Ibid.
45 Northern Territory Legal Aid Commission, *Submission 46*.

13.38 The Human Rights Law Centre also suggested that:

> Measures to address alcohol misuse and alcohol-related harm must be non-discriminatory and tailored to suit the needs of specific communities. They must involve the participation of affected communities to ensure that they are culturally appropriate, address community needs and have the greatest chance of success.[46]

13.39 Commenting on programs that reduced harms of alcohol and drug abuse, Mission Australia suggested that the common thread of effective interventions were those with strong community interest, engagement and leadership.[47]

13.40 The need for Aboriginal and Torres Strait Islander leadership in developing initiatives to address alcohol-related harm has been acknowledged in the Drug Strategy, which recommended that 'development of actions to achieve each outcome should be led by local communities in collaboration with government and non-government sectors':[48]

> Aboriginal and Torres Strait Islander people should be meaningfully included and genuinely consulted regarding the development of solutions to harmful AOD use. Aboriginal and Torres Strait Islander ownership of solutions should occur from inception and planning, right through to implementation and provision, and monitoring and evaluation of any solutions.[49]

13.41 The Drug Strategy identified four priority areas including: building community capacity; developing culturally responsive and appropriate programs; strengthening partnerships between the community, government, law enforcement and health; and establishing meaningful evaluation of programs.[50]

13.42 The Australian Government's National Drug Strategy 2017–2026 has also emphasised that,

> [i]t is critical to ensure that any efforts to reduce the disproportionate harms experienced by Aboriginal and Torres Strait Islander people are culturally responsive and appropriately reflect the broader social, cultural and emotional wellbeing needs of Aboriginal and Torres Strait Islander people. Planning and delivery of services should have strong community engagement including joint planning and evaluation of prevention programs and services provided to Aboriginal and Torres Strait Islander communities taking place at the regional level. Wherever possible, interventions should be based on evidence of what works specifically for Indigenous people.[51]

13.43 The importance of ownership of solutions has been emphasised in a review of what works to reduce harm related to alcohol and other drugs among Indigenous Australians, which argued that despite gaps in our knowledge, 'there is ample evidence

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46 Human Rights Law Centre, *Submission 68*.
47 Mission Australia, *Submission 53*.
48 Intergovernmental Committee on Drugs, above n 31, 18.
49 Ibid 4.
50 Ibid 4–5.
51 Ministerial Council on Drug Strategy, *National Drug Strategy 2012–2017: A Framework for Action on Alcohol, Tobacco and Other Drugs* (2017).

to show what can be done to reduce AOD-related harm. What is needed is the commitment to do it—with and not for Indigenous people'.[52]

13.44 Below, the ALRC considers two examples of measures to reduce alcohol-related harm that have been successfully developed and led by Aboriginal and Torres Strait Islander communities: liquor accords, and the ban on full strength alcohol in Fitzroy Crossing.

Liquor accords

13.45 Liquor accords are a local community response that seeks to address alcohol-related harm within a particular community. The liquor industry—comprised of off-licence retailers commonly referred to as 'bottle shops', and on-licence liquor providers, such as hotels and registered clubs—have, in many instances, sought to regulate the sale of liquor to reduce or minimise the harm of alcohol misuse or alcohol abuse. Large liquor industry players—such as Wesfarmers (Coles), having a 33.5% share of the retail liquor market, and Woolworths, having a 40.2% share[53]—have historically joined as members of accords across states and territories.

13.46 A liquor accord, as the NT chapter of the Australian Hoteliers Association (AHA (NT)) has explained, is

> a written agreement between licensed venues and other stakeholders, with the purpose of working together to support one another on issue/s of mutual concern. For example a liquor accord may be created to assist in the reduction of alcohol misuse and associated harms within a local community.
>
> Depending on the specific needs and characteristics of the region involved, most liquor accords include members from the local business community, local councils, local police, government departments and other community focused organisations. Voluntary participation by licensees in local area initiatives is allowed for when a stakeholder of a liquor accord and liquor related problems can be addressed with the introduction of practical solutions. Such teamwork aims to ensure that precincts and venues are safe and enjoyable places in which to meet and socialise which will ultimately enhance community life and enjoyment of the local area.[54]

13.47 The AHA (NT) considered that liquor accords were 'extremely worthwhile', provided that

> all parties come to the table as equals and have a long-term view of the benefits which can flow from an effective liquor accord. This requires a strong commitment from all members (licensees, police, government) who must be able to work together to make

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52 Dennis Gray and Edward Wilkes, 'Reducing Alcohol and Other Drug Related Harm' (Resource Sheet No 3, Closing the Gap Clearinghouse, 2010) 1, 2. See also Alison Ritter et al, *New Horizons: The Review of Alcohol and Other Drug Treatment Services in Australia—Final Report* (UNSW, 2014).

53 Liquor Marketing Group, Submission to the South Australian Attorney-General *Liquor Licensing Discussion Paper* (February 2016) 3.

54 Australian Hoteliers Association Northern Territory, Liquor Accords <www.ahant.com.au>. The AHA (NT) assists in the development and implementation of Alcohol Management Plans and received funding from the Department of Business to assist industry to develop, maintain and promote liquor accords within the NT.

> change happen. It may also present an opportunity for local police and councils to improve their working relationships with industry on issues of common interest.[55]

13.48 The AHRC submitted to this Inquiry that the success of approaches to alcohol management—that included the development and implementation of local liquor accords and plans to prevent sale of full strength alcohol—hinged on those programs being based on priorities identified by the community.[56]

13.49 Liquor accords may raise concerns relating to anti-competitive behaviours. With respect to this, the AHA (NT) said that these could be addressed

> by seeking immunity from the competition provisions of the Trade Practices Act through the 'authorization' process. There is a clear process to follow which will prevent any legal repercussions for members of an accord. The problem of alcohol abuse within local communities and the need for a range of strategies to address the problems are understood by the ACCC [Australian Competition and Consumer Commission]. Where the ACCC is satisfied that the public benefit from the arrangements between competitors will outweigh any public detriment, it can grant immunity from legal action.[57]

13.50 Liquor and Gaming New South Wales has suggested that some liquor accords have reduced harmful effects of alcohol misuse and abuse:

> Successful liquor accord groups generate many benefits for licensees, patrons and the community:
>
> - Less alcohol-related assaults and anti-social behaviour
> - Local neighbourhoods that are safer and more welcoming
> - Better reputations for licensees
> - Improved business environment
> - Constructive relationships between licensees, councils, patrons, residents and police
> - Stronger compliance
> - Less under-age drinking
> - More awareness about responsible consumption of alcohol.[58]

13.51 The liquor accord in Norseman, Western Australia, is an example of a liquor accord that has community support and is driven by community priorities:

> In the early 2000s members of the Indigenous community in Norseman in Western Australia became increasingly concerned that heavy alcohol consumption was the main cause of chronic health problems in their community. The community, in collaboration with local Health Department officers, worked with individuals and their families to prevent harmful drinking, but were not able to sustain a change to

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55 Ibid.
56 Australian Human Rights Commission, *Submission 43*.
57 Australian Hoteliers Association Northern Territory, above n 54.
58 Liquor & Gaming NSW, *What Is a Liquor Accord?* Department of Industry NSW <www.liquorandgaming.nsw.gov.au>.

> low risk drinking, and so decided that a different approach was needed … The Indigenous community in Norseman is not geographically discrete, rather it is distributed throughout the township. Consequently, the option used by many Indigenous communities, of declaring themselves dry was not available. However, there was clear recognition within the Indigenous community that certain beverages were particularly associated with heavy drinking. In an effort to reduce the amount of alcohol consumed, in particular the packaged liquor most linked to heavy drinking, the community proposed restricting the quantity and the hours of sale of these products.[59]

13.52 An evaluation of the Norseman liquor accord found that the accord had reduced alcohol-related harms:

> the Indigenous community was the driving force for introducing the restrictions, in response to the domestic violence, chronic disease and death that was associated with heavy drinking. The reasons given for not allowing sales, other than between midday and 6pm, was to limit the period of drinking so there was break for heavy drinkers to sober up. There was almost universal agreement that the behaviour of drinkers, the amount of alcohol consumed and alcohol-related harms had all changed for the better since the introduction of restrictions ... [and] the benefits for the Norseman community are clear. The restrictions are still in place, have increased social order, are still overwhelmingly supported by the community including the Licensee, and have remained effective in keeping in check those beverages identified from initial community discussions as problematic. These findings indicate that … an Accord, which is fashioned by key stakeholders, and supported by the whole community, can have a long-term impact on local alcohol problems.[60]

13.53 In its submission to this Inquiry, NATSILS supported community-developed restrictions to reduce alcohol consumption, including restrictions on opening hours, number and density of liquor licences, and a limitation on the type and quantity of takeaway alcohol purchased.[61]

13.54 Similarly, the NT Legal Aid Commission supported 'evidence-based whole of community measures to reduce the availability of alcohol', including restricted trading hours.[62]

13.55 The Commissioner for Children and Young People Western Australia suggested it was important that state and territory governments

> provide guidance to communities on how to implement alcohol restrictions using the various mechanisms available, and support communities to gather the evidence required to determine harm and to challenge and restrict alcohol supply, including strengthening alcohol accords. [63]

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59 Richard Midford, John McKenzie and Rachel Mayhead, '"It Fits the Needs of the Community": Long Term Evaluation of the Norseman Voluntary Liquor Agreement' (Foundation for Alcohol Research, 2016) 9.

60 Ibid 22–7.

61 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

62 Northern Territory Legal Aid Commission, *Submission 46*.

63 Commissioner for Children and Young People Western Australia, *Submission 16*.

13.56 Legal Aid Western Australia supported measures to control alcohol abuse such as liquor accords and plans to restrict full strength alcohol. They noted that alcohol restrictions had made a significant difference in Halls Creek, where full strength alcohol is only available from the local hotel.[64] They suggested that the seriousness of offending in Halls Creek had substantially reduced, while also acknowledging the assistance of night patrols that support people affected by alcohol to return home or obtain shelter.[65] Legal Aid WA cautioned, however, that the success of these restrictions also required measures to avoid the black market sale of alcohol. It also opposed any restrictions that would only apply to Aboriginal people.[66]

13.57 The Institute of Public Affairs was supportive of liquor accords, while noting the complex nature of alcohol abuse, the inability of the criminal justice system to solve such issues, and the inappropriateness of prohibition. It observed:

> the abuse of alcohol is a problem that the criminal justice system can only manage, it cannot solve it. The reasons that people choose to drink are complex and will need to be addressed by communities and individuals from the bottom-up. In remote communities, cooperation between private businesses and civil society may be the best way to manage the supply of alcohol. Accords are a proper exercise of market power, so long as membership is voluntary. However, Indigenous Australians retain the right to purchase alcohol wherever it is legally sold, just as all Australians do. Across-the-board prohibition will not work and is not desirable. Alcohol bans will not address the reasons that people choose to drink.[67]

13.58 In its submission to this Inquiry, the NT Government outlined its commitment to finalising a comprehensive public review of alcohol policies and legislation to address alcohol misuse and its effects on individuals, families and communities throughout the NT. It suggested the review would consider

> plans to prevent the sale of full strength alcohol, and accords between liquor retailers and other stakeholders to minimize harm will form part of the NTG's Local Decision Making policy (that is currently under development). This initiative aims to create opportunities for interested communities to exercise a high-degree of local decision making, and where possible to control the delivery of Government services. The Local Decision Making policy initiative will provide an opportunity for government and Aboriginal communities to work together on alcohol issues that impact on Aboriginal peoples' lives.[68]

Fitzroy Crossing ban on full strength alcohol

13.59 In a 2010 report, the AHRC detailed the implementation of alcohol restrictions in Fitzroy Crossing, noting its community-driven genesis:

> In 2007 … the senior women in the Fitzroy Valley decided to discuss the alcohol issue and look for solutions at their Annual Women's Bush Meeting. The Women's Bush Meeting is auspiced by Marninwarntikura; it is a forum for the women from the

64 Legal Aid WA, *Submission 33*.
65 Ibid.
66 Ibid.
67 Institute of Public Affairs, *Submission 58*.
68 Northern Territory Government, *Submission 118*. See further Northern Territory Government, above n 35.

> four language groups across the Valley. At the 2007 Bush Meeting, discussions about alcohol were led by June Oscar and Emily Carter from Marninwarntikura. The women in attendance agreed it was time to make a stand and take steps to tackle the problem of alcohol in the Fitzroy Valley. While the women did not represent the whole of the Valley, there was a significant section of the community in attendance. Their agreement to take action on alcohol was a starting point and it gave Marninwarntikura a mandate to launch a campaign to restrict the sale of alcohol from the take-away outlet in the Fitzroy Valley. The community-generated nature of this campaign has been fundamental to its ongoing success. The communities themself were ready for change.[69]

13.60 The Fitzroy Crossing initiative did not seek the complete prohibition on the sale of alcohol or to make Fitzroy Crossing a dry community. Instead, it sought to prevent the sale of full strength alcohol.

13.61 Speaking to SBS about her experiences implementing the ban on full strength alcohol in Fitzroy Crossing, June Oscar AO stated:

> We couldn't continue to live in a community that was just being decimated by alcohol. Every aspect of life. Every facet of life was being affected. And in 2005–6 we had 50 deaths in the valley. Many of them were alcohol-related deaths. Our right to a future was important. We had to fight for that future. So the women decided then in July of 2007 enough was enough. We want to pursue restrictions on the sale of full strength alcohol … Within the first 3 to 6 months we saw the presentations at hospital from 85% alcohol-related injuries drop to 25, 15%.[70]

13.62 The Fitzroy Crossing initiative also allowed members of the Fitzroy Crossing community to design and implement strategies to reduce the prevalence of FASD in the community. The AHRC noted:

> In October 2008, just over a year after the alcohol restrictions were brought into the Fitzroy Valley, members of the communities gathered to discuss FASD and other alcohol-related problems … In November 2008, a draft strategy was developed by the CEO of Marninwarntikura, June Oscar and Dr James Fitzpatrick, a paediatric trainee serving the communities. The strategy was called Overcoming Fetal Alcohol Spectrum Disorders (FASD) and Early Life Trauma (ELT) in the Fitzroy Valley: a community initiative. This strategy is now described locally as the Marulu Project. Marulu is a Bunuba word meaning 'precious, worth nurturing'.[71]

13.63 An evaluation of the effects of alcohol restrictions in Fitzroy Crossing two years following their implementation found continuing health and social benefits for the residents of Fitzroy Crossing and the Fitzroy Valley communities, including:

- reduced severity of domestic violence;
- reduced severity of wounding from general public violence;
- reduced street drinking;
- a quieter town;

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69 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (2011) 71.
70 SBS, *Fitzroy Crossing—Meet June Oscar* <www.sbs.com.au/programs/first-contact>.
71 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (2011) 94.

- less litter;
- families purchasing more food and clothing;
- families being more aware of their health and being proactive in regard to their children's health;
- reduced humbug and anti-social behaviour;
- reduced stress for service providers;
- increased effectiveness of services already active in the valley;
- generally better care of children and increased recreational activities; and,
- a reduction in the amount of alcohol being consumed by Fitzroy and Fitzroy Valley residents.[72]

13.64 Another analysis also noted the benefits flowing from the experience in Fitzroy Crossing:

> In Fitzroy Crossing and Halls Creek, where the impetus for alcohol restrictions came from strong local women and where responsible serving of alcohol is now being enforced, there has been a noticeable decline (between 20% and 40%) in the number of alcohol-related crimes and alcohol-related admissions to hospitals.[73]

13.65 However, the same analysis also noted that, while

> stricter controls on alcohol has made these towns more pleasant places to live … the restrictions have not addressed the reasons why people are drinking in the first place. Controls on alcohol supply help mitigate the harms that alcohol causes, but they will not solve the alcohol problem.[74]

13.66 Kayla Calladine has also suggested that there are several limitations of alcohol restrictions, including the prevalence of unlawful sales of liquor at highly inflated prices to dry communities, otherwise known as 'sly grogging'. However, she concludes that 'early evidence suggests *prima facie* improvement in living conditions, suggesting that voluntary prohibition regimes contribute to the aims of substantive equality'.[75]

13.67 Concerns also exist that prohibition of alcohol within dry communities has led to the substitution of illicit drugs for alcohol. The Healing Foundation has suggested that '[m]any dry communities now face the scourge of drugs as a substitute for grog, causing many of the same issues such as violence that alcohol did'.[76] Similarly Scott

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72 University of Notre Dame Australia, *Fitzroy Valley Alcohol Restriction Report: An Evaluation of the Effects of Alcohol Restrictions in Fitzroy Crossing Relating to Measurable Health and Social Outcomes, Community Perceptions and Alcohol Related Behaviours After Two Years* (2010) 10.

73 Sara Hudson, *Alcohol Restrictions in Indigenous Communities and Frontier Towns* (Centre for Independent Studies, 2011) 20.

74 Ibid.

75 Kayla Calladine, 'Liquor Restrictions in Western Australia' (2009) 7(11) *Indigenous Law Bulletin* 23, 27.

76 Healing Foundation, Submission No 42 to Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2014) 5.

Mclean Cullen suggested limiting access to alcohol has the effect of creating 'black market sly grogging or an increase in home brew and the associated health risks'.[77]

13.68 The ALRC accepts that, while community-led initiatives to reduce alcohol consumption are a useful circuit breaker to address alcohol-related harm and offending, such measures do not address the underlying causes of excessive drinking and addiction. Addressing the causes of alcohol abuse will ultimately be the key to reducing alcohol-fuelled offending and subsequent incarceration.

13.69 However, there was much support in consultations and submissions to this Inquiry for initiatives like the one in Fitzroy Crossing, that prohibit the sale of full strength alcohol. To achieve meaningful results in minimising alcohol abuse within Aboriginal and Torres Strait Islander communities, these communities must have ownership of the solutions, be supported to develop local initiatives and be resourced to implement them. The ALRC recommends that state and territory governments facilitate these sorts of initiatives where there is community desire to do so.

77 S McLean Cullen, *Submission 64*. See also Aboriginal Legal Service of Western Australia, *Submission 74*.

14. Police Accountability

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Summary

14.1 The ALRC recognises the good work undertaken by police officers on a daily basis, often in difficult and dangerous circumstances. The ALRC also recognises that Commonwealth, state and territory police have undertaken significant reforms to culture, policy and practice in recent years to improve relationships with Aboriginal and Torres Strait Islander peoples, examples of which are provided in this chapter.

14.2 Notwithstanding those measures, throughout this Inquiry, the ALRC heard that many Aboriginal and Torres Strait Islander people continue to have negative attitudes towards police, with the view that the law is applied unfairly and that complaints about police practices are not taken seriously. It is clear that those perceptions have strong historical antecedents (see Chapter 2) and that there is evidence that the law is applied unequally—for example Aboriginal and Torres Strait Islander young people are less likely to be cautioned and more likely to be charged than non-Indigenous young people.

14.3 The perception of poor police practices needs to be addressed in order to improve relationships between police and Aboriginal and Torres Strait Islander peoples. In the context of broader community relations, this is acknowledged by police.[1]

14.4 Poor relations influence how often Aboriginal and Torres Strait Islander people interact with police and how they respond in interactions with police. Poor police relations can contribute to disproportionate arrest, police custody and incarceration rates in relation to Aboriginal and Torres Strait Islander peoples. It may also undermine police investigations.[2]

14.5 The ALRC recommends that police practices and procedures—particularly the exercise of police discretion—are reviewed by governments so that the law is applied equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples. The ALRC also recommends that police complaints handling mechanisms be reviewed, particularly addressing the perception by Aboriginal and Torres Strait Islander people that their complaints are not taken seriously and that police misconduct is not addressed. Mechanisms for independent assessment or review of complaints should be considered.

14.6 The implementation of these two recommendations will require further consultation with Commonwealth, state and territory police and Aboriginal and Torres Strait Islander peoples to ensure that the balance is struck between efficient policing with strong internal management structures and the need for rigorous reviews to ensure that police practices and procedures are applied equally and investigation of complaints about police misconduct are, and are seen to be, thorough, transparent and fair.

14.7 The ALRC also recommends strengthening custody notification services (CNS) that provide 24-hour, 7-day a week telephone legal advice services to Aboriginal and Torres Strait Islander people who have been detained in police custody. A CNS provides an opportunity to conduct welfare checks; and to provide culturally sensitive legal advice to Aboriginal and Torres Strait Islander people. The ALRC recommends that a requirement to notify an Aboriginal and Torres Strait Islander legal or equivalent service be provided for in statute and that it extend to detention in custody for any reason—including for protective reasons.

14.8 The ALRC recognises the importance of police culture and recommends a range of initiatives that could be implemented to improve police culture. In particular, successful initiatives need to be acknowledged and, where possible, scaled up.

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1 See, eg, Victoria Police, *Victoria Police Blue Paper: A Vision for Victoria Police in 2025* (2014) 10; Attorney-General's Department (Cth), *National Youth Policing Model* (2010). All Australian police ministers agreed to the National Youth Policing Model in July 2010.

2 Victoria Police, above n 1, 10.

Background

14.9 Each state and territory, and the Commonwealth, has its own police service operating under state and territory and federal legislation.[3] In the Australian Capital Territory (ACT), policing is carried out by the Australian Federal Police.[4] In each jurisdiction policing covers four broad areas:

- *Community safety* – Preserving public order and promoting a safer community
- *Crime* – investigating crime and identifying and apprehending offenders
- *Road safety* – targeted operations to reduce the incidence of traffic offences and through attendance at, and investigation of, road traffic collisions and incidents
- *Judicial services* – support to the judicial process including the provision of safe custody for alleged offenders[5]

14.10 As explained by Victoria Police:

> The fundamental purpose of policing is the protection and vindication of the human rights of every citizen.
>
> Equally, police must protect human rights in the exercise of their duty; every interaction between a sworn officer and a member of the public conveys strong signals about whether that person is treated with respect and dignity.[6]

14.11 Effective policing in Australia relies on the principle of policing with the consent of the public.[7] In 2015–2016, 75% of Australians were satisfied or very satisfied with police, rising to 85% of people who were satisfied or very satisfied with the service they received during their most recent contact with police.[8] Unfortunately this survey did not provide figures in relation to Aboriginal and Torres Strait Islander peoples. However, evidence from a range of sources suggests that Aboriginal and Torres Strait Islander people continue to have less positive attitudes to police.[9]

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3 See, eg, *Victoria Police Act 2013* (Vic); *Police Service Administration Act 1990* (Qld); *Police Act 1990* (NSW).

4 ACT Government and Australian Federal Police, *An Ongoing Arrangement between the Minister for Justice of the Commonwealth and the ACT Minister for Police and Emergency Services for the Provision of Policing Services to the ACT: Commencing June 2017* (2017); ACT Government and Australian Federal Police, *Agreement between the ACT Minister for Police and Emergency Services, Australian Federal Police Commissioner, and the Chief Police Officer for the ACT for the Provision of Policing Services to the Australian Capital Territory 2017–2021* (2017).

5 Productivity Commission, 'Report on Government Services 2017' (Volume C: Justice, Produced for the Steering Committee for the Review of Government Service Provision, 2017) 6.1.

6 Victoria Police, above n 1, 9.

7 See, eg, Ibid 10; Colin Prof Rogers, 'Maintaining Democratic Policing: The Challenge for Police Leaders' (2014) 2(2) *Australian Institute of Police Management* 1.

8 Productivity Commission, above n 5, 6.15-6.16.

9 See, eg, Daphne Habibis et al, *Telling It like It Is: Aboriginal Perspectives on Race and Race Relations: Early Findings* (2016) 8; Reconciliation Australia, *State of Reconciliation in Australia: Summary* (2016) 7. See, also, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5 recs 60–1, 79–91, 214–33; Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) 22; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 42; Senate Standing Committees on

14.12 In describing the relationship between police and Aboriginal and Torres Strait Islander communities, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) noted:

> There is absolutely no doubt in my mind that the antipathy which so many Aboriginal people have towards police is based not just on historical conduct but upon the contemporary experience of contact with many police officers ... The challenge for police departments is to accept that there is a basis for Aboriginal resentment and suspicion about police conduct and to consider the Aboriginal perspective when devising policing strategies.[10]

14.13 Much has changed since the RCIADIC. For example, The Royal Commission into the Protection and Detention of Children in the Northern Territory highlights a number of examples of positive interactions between police and communities in the Northern Territory (NT).[11] However, issues continue to remain, particularly in relation to what has been described as over-policing of public order and criminal infringement offences, 'proactive' policing in relation to bail and residential checks, and under-policing of family violence when Aboriginal and Torres Strait Islander people, particularly women, are the victim.

14.14 The Public Interest Advocacy Centre (PIAC) has noted that over-policing:

> has also continued to cement the precarious relationship between Aboriginal young people and adults with the police officers in their communities. Aboriginal Australians report a high level of discrimination across a range of settings, with one of the highest occurrences being when interacting with police, security people, lawyers or in a court of law. The very perception of discrimination has an impact on Aboriginal and Torres Strait Islander people's well being; research has shown that just a perception can lead to changes in job seeking behaviour or dropping out of the work force. Discrimination can also be linked to negative health outcomes.[12]

14.15 The role of the police, and the criminal justice system more broadly, in contributing to the over-incarceration of Aboriginal and Torres Strait Islander peoples was explained by the Honourable Wayne Martin AC, Chief Justice of Western Australia:

> Over-representation amongst those who commit crime is, however, plainly not the entire cause of over-representation of Aboriginal people. The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested than

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Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 70, 80; Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System—Discussion Paper* (2010) 36; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Australian Human Rights Commission, 2016) 40–2; *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016).

10 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 2 [13.2.2]–[13.2.19].

11 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) recs 25.1–25.22.

12 Public Interest Advocacy Centre, Submission No 17 to Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (30 April 2015).

> proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people.[13]

14.16 A key issue identified by the Honourable Wayne Martin AC, was the initial decision by police to arrest. In this regard, the Human Rights Law Centre and Change the Record Coalition have pointed out the role that police discretion plays in determining incarceration rates:

> ATSILS [Aboriginal and Torres Strait Islander Legal Services] have consistently pointed to a bias in the exercise of police discretion against diverting or cautioning Aboriginal and Torres Strait Islander people, particularly young people. Research in several jurisdictions has supported this view. There is evidence also that Aboriginal and Torres Strait Islander women are more likely to be arrested and charged with an offence compared to non-Indigenous women.[14]

14.17 The Victorian Equal Opportunity and Human Rights Commission has noted the significant power that individual police have in exercising their discretion:

> Victoria Police officers have significant discretionary powers and play an important role as the entry point to the justice system. Every decision made (such as whether to investigate, question, search, arrest, caution, charge and prosecute) involves an element of discretion on the part of the officer ... Given the scope and significance of police powers, and the harm that can be caused if decision-making is not undertaken with people's rights being fully considered, discretion should be exercised appropriately.[15]

14.18 The link between police discretion and incarceration rates of Aboriginal and Torres Strait Islander peoples has been acknowledged previously in the *Aboriginal Strategic Direction 2007–2010.* That direction focused on the need to use discretion as an alternative to arrest in order to '[r]educe offending and over-representation of Aboriginal people in the criminal justice system.'[16]

Improving police practices and procedures

Recommendation 14–1 Commonwealth, state and territory governments should review police procedures and practices so that the law is enforced fairly, equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples.

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13 Chief Justice Wayne Martin, 'Indigenous Incarceration Rates: Strategies for Much Needed Reform' (Speech, Law Summer School, 2015).

14 Human Rights Law Centre and Change the Record Coalition, above n 9, 32.

15 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 43.

16 NSW Police Force, *Aboriginal Strategic Direction 2007–2011* (2007) 46.

14.19 Throughout this Inquiry, a number of stakeholders informed the ALRC that police practices and policies contribute to the over-incarceration of Aboriginal and Torres Strait Islander peoples.[17] In order to address over-incarceration, and provide for the equal application of the law, the ALRC recommends that governments specifically review police procedures and practices both in their design and implementation. Those reviews should consider the factors outlined above and involve a broad range of stakeholders including Aboriginal and Torres Strait Islander peoples.

14.20 This section highlights some aspects of police procedure and practice that warrant particular attention including the application of police discretion and any evidence of over charging by police.

Police discretion

14.21 Police discretion is an important and necessary feature of our criminal justice system. When a police officer suspects that a person has committed an offence they will exercise judgement (or discretion) as to how best to proceed. The officer will 'consider not only the illegality of the offense but also contextual and mitigating factors.'[18] A key feature of policing in Australia is premised on the principle that '[s]trict adherence to the letter of the law in many cases would be too harsh and justice may be better served by not introducing an offender into the criminal justice process.'[19] That is, a police officer may elect not to proceed in response to a minor offence or may choose to otherwise divert the offender.

14.22 In other circumstances, the exercise of discretion relates to decisions about how to initiate a criminal justice response. There are two ways to charge a person: by way of a physical arrest (with or without a warrant) and taking into custody or by issuing a summons or attendance notice to attend court at a later date. Arrest is typically seen as an option of last resort, as it involves at least a temporary loss of liberty.[20] It may be necessary, however, to protect community safety or to preserve evidence. Police discretion is regulated not just by laws and regulations but by policing manuals and instructions, as well as by directions from a more senior officer in certain circumstances.

14.23 Police discretion can work in favour of, or against, a person suspected of criminal conduct. A key focus of this recommendation is a review of inappropriate uses of police discretion and how best to ensure police policies and practices support the appropriate exercise of police discretion.

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17 See, eg, Redfern Legal Centre, *Submission 79*; Caxton Legal Centre, *Submission 47*; Human Rights Law Centre and Change the Record Coalition, above n 9; Aboriginal Legal Service of Western Australia, *Submission 74*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; North Australian Aboriginal Justice Agency, *Submission 113*.

18 Richard Wortley, 'Measuring Police Attitudes toward Discretion' (2003) 30(5) *Criminal Justice and Behavior* 538, 540.

19 Ibid.

20 Jonathon Hunyor, 'Imprisonment: Paperless Arrests and the Rise of Executive Power in the Northern Territory' (2015) 8(21) *Indigenous Law Bulletin* 3, 7.But see Vicki Sentas and Rebecca McMahon, 'Changes to Police Powers of Arrest in New South Wales' (2013) 25 *Current Issues Crim. Just.* 785.

14.24 As set out in Chapter 3, Aboriginal and Torres Strait Islander people are seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts. In addition to the statistical overview provided in that chapter, specific research has focused on the rates of police cautioning for young people. This research suggests that Aboriginal and Torres Strait Islander young people are more likely to be arrested than their non-Indigenous counterparts even after other factors such as the offence, offending history and background factors are taken into account. For example:

- Crime Statistics Agency Victoria (CSAV) found that from July 2016 to June 2017, Aboriginal and Torres Strait Islander people were 10% more likely to be arrested following an alleged offender incident, were less likely to be cautioned, and were also less likely to receive a summons or intent to summons than a non-Indigenous alleged offender.[21]
- In 2008, the Australian Institute of Criminology (AIC) examined differences in juvenile diversionary rates for Aboriginal and Torres Strait Islander and non-Indigenous offenders in New South Wales (NSW), South Australia (SA) and Western Australia (WA). It found that Aboriginal and Torres Strait Islander offenders were more likely to be referred to a court than non-Indigenous offenders whereas non-Indigenous offenders in all three states were significantly more likely to receive a police caution. [22]

14.25 Similar findings have been made by the Crime and Misconduct Commission in Queensland,[23] the NSW Bureau of Crime Statistics and Research (NSW BOCSAR),[24] and the Office of Police Integrity Victoria.[25]

14.26 Redfern Legal Centre (RLC) submitted the following case study on the use of police discretion to arrest:

> **Case Study: Melissa - part 1**
>
> Melissa had been celebrating a friend's birthday with a group of teenagers outside a McDonald's restaurant. Several of the young people were intoxicated. Melissa's friend was arrested for swearing at police. After Melissa tried to assist her friend by wrapping her arms around her, Melissa was arrested and charged with resisting and hindering police. The Constable who arrested Melissa tackled her to the ground, put her in a headlock, dragged her towards the back of a paddywagon, dropping her on the

21 Crime Statistics Agency Victoria, *Indigenous Alleged Offender Incidents—Year Ending June 2017* (2017) table 6.

22 Lucy Snowball and Australian Institute of Criminology, 'Diversion of Indigenous Juvenile Offenders' (Trends & Issues in Crime and Criminal Justice No 355, Australian Institute of Criminology, 2008). The effect was reduced but still statistically significant after controlling for variables.

23 Crime and Misconduct Commission, *Policing Public Order—A Review of the Public Nuisance Offence* (2008) 92.

24 Clare Ringland and Nadine Smith, 'Police Use of Court Alternatives for Young Persons in NSW' (Contemporary Issues in Crime and Justice No 167, NSW Bureau of Crime Statistics and Research, January 2013) 10.

25 Office of Police Integrity Victoria, *Talking Together—Relations between Police and Aboriginal and Torres Strait Islanders in Victoria: A Review of the Victoria Police Aboriginal Strategic Plan 2003–2008* (2011) 20.

> ground where Melissa hit her head and became unconscious. The Magistrate who dismissed the charges against Melissa found that police used "an inordinate amount of force."[26]

14.27 Legal Aid NSW submitted the following case study in relation to police discretion in enforcing bail regimes:

> **Case Study: Donna**
>
> Legal Aid NSW received an inquiry from a worker at a support service whose client, Donna, was an Aboriginal woman whose bail condition required her to live at a particular address. Donna was experiencing domestic violence at this address and spoke to police about her intention to live elsewhere. The police officer she spoke to said she would be arrested if she breached her residence condition.[27]

14.28 Consistent with these cases studies, a number of stakeholders suggested that police discretion continues to be exercised inappropriately in regards to Aboriginal and Torres Strait Islander peoples. The Aboriginal Legal Service NSW/ACT (ALS NSW/ACT) submitted that their community consultations showed that:

> The majority of participants considered there to be very little or nothing working well between the police and their community ... A number of participants suggested that institutional racism has become a feature of policing in NSW. These participants noted that police offer very little discretion when dealing with Aboriginal people, and that many communities in regional and remote NSW communities suffer from over policing.[28]

14.29 RLC submitted that the use of police discretion in relation to arrest was particularly important in order to ensure arrest remains a genuine 'last resort':

> It is well established that in the common law, arrest is for the purpose of commencing proceedings against a person and is an action of last resort. In RLC's experience arrest is routinely used against Aboriginal and Torres Strait Islander people as a first resort rather than utilising the range of alternatives available to police such as a Court Attendance Notice (CAN), warning or caution. These alternatives are outlined in legislation and guidance manuals for police. It is clear that meaningful action is required to ensure police arrest practices change. The support of police leadership across Australian police agencies to foster an understanding of and commitment to the principle of arrest as a last resort is needed.[29]

14.30 In order to facilitate a decreased reliance on arrest, RLC suggested that NSW introduce a legislative reform so that 'police are mandated in legislation to explicitly use arrest as a last resort when dealing with Aboriginal and Torres Strait Islander people. Police policy and training alone are insufficient.'[30]

14.31 Caxton Legal Centre submitted that police should be required to report on their use of discretion in relation to Aboriginal and Torres Strait Islander people:

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26 Redfern Legal Centre, *Submission 79*.
27 Legal Aid NSW, *Submission 101*.
28 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.
29 Redfern Legal Centre, *Submission 79*.
30 Ibid.

> Whilst the reporting of engagement strategies may create positive impetus for their use, our view is that such reporting should also include full coverage of areas where police have discretionary powers including on the use of criminal infringement notices and the issuing of move on directions. Implementing such changes would shed light on how the use of discretionary police powers impacts on the involvement of Aboriginal and Torres Strait Islander individuals and the criminal justice system ... It is hoped that by making such records public police would be deterred from having too many Indigenous entries on the record [31]

14.32 Another relevant aspect of policing practice concerns how local police commands prioritise resources to tackle crime. In NSW for example, the Suspect Target Management Plan (STMP) has been implemented. STMP is 'a strategy to encourage local commands to target serious or repeat offenders across NSW'.[32] It is premised on the belief that 'targeting of recidivist behaviour is possibly the most efficient method of reducing crime'[33] Under STMP high risk suspects are subject to surveillance, monitoring, and strict enforcement of all requirements under any non-custodial order the person may be subject to (such as reporting for bail)—even where these requirements are ostensibly unrelated to reoffending.[34]

14.33 There is some evidence that STMP also targets Aboriginal and Torres Strait Islander people with previous offending histories, particularly those subject to non-custodial orders, for frequent compliance checks—resulting in higher rates of breach and imprisonment, often for minor or 'technical' breaches.[35]

Policing of bail conditions

14.34 Stakeholders to this Inquiry suggested that more proactive policing of bail conditions, particularly focused on technical breaches (rather than reoffending), is contributing to over-incarceration of Aboriginal and Torres Strait Islander peoples. RLC provided the following case study to this Inquiry:

> **Case Study: Toby, part 1**
>
> At the age of 15 Toby was on bail for charges of break and enter, larceny and goods in custody. Police deemed Toby a 'high-risk offender' and closely monitored his movements. In a period of four and a half months, Toby was subject to 155 bail checks. Police attended Toby's home frequently and often after midnight, even when Toby was no longer subject to a curfew. On one occasion, Toby reported that Police attended the family home four times in a single night.[36]

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31 Caxton Legal Centre, *Submission 47*.

32 NSW Ombudsman, *Improving the Management of Complaints: Police Complaints and Repeat Offenders* (Special Report to Parliament under s 31 of the Ombudsman Act 1974, September 2002).

33 Ibid.

34 Redfern Legal Centre, Submission No 30 to Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (23 April 2015).

35 See Vicki Sentas and Camilla Pandolfini, 'Policing Young People in NSW: A Study of the Suspect Targeting Management Plan' (Youth Justice Coalition, 2017). See also Redfern Legal Centre, Submission No 30 to Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (23 April 2015).

36 Redfern Legal Centre, *Submission 79*.

14.35 The ALRC recognises the importance of complying with conditions of bail. This was explained by Howie JA:

> [I]f offenders do not treat the obligations imposed upon them by the bond seriously and if courts are not rigorous in revoking the bond upon breach in the usual case, both offenders and the public in general will treat them as being nothing more than a legal fiction designed to allow an offender to escape the punishment that he or she rightly deserved.[37]

14.36 However, the focus of policing appears to be on technical rather than substantive breaches of bail conditions. PIAC explained that its clients were

> being detained for 'technical breaches' of bail, a term which refers to the circumstances where a person is arrested for breach of a bail condition which in itself is not a new offence, and does not harm the young person, another person or the community. Examples of technical breaches including being five minutes late for curfew or being with a different family member other than the person specified in the bail condition. PIAC's clients are frequently reporting a level of policing of their bail conditions that is out of step with the severity of the alleged offence, such as incessant checking of curfews throughout the night several nights per week. Excessive monitoring of bail conditions was also reported to the AIC, which found [in 2013] an Australia-wide practice of 'overzealous policing of young people's bail compliance and in some cases, a 'zero tolerance' approach to bail breaches'.[38]

14.37 This is consistent with research by NSW BOCSAR which found that in 2015 the remand population was 'much higher... than it was prior to the introduction of the NSW *Bail Act* (2013)'—and that the key driver of this growth was likely more proactive policing practices, not legislative amendment.[39]

Charging practices and charge bargaining

14.38 A review of police practices should consider whether further guidelines or instructions on charging Aboriginal and Torres Strait Islander peoples should be developed and implemented.

14.39 Charging decisions are made by police based on whether the evidence obtained during an investigation has a reasonable prospect of sustaining a conviction.[40] Where the charges relate to more serious or indictable offences, the Director of Public Prosecutions of that state or territory will, at various stages in the criminal justice process, provide advice to police on, and make decisions regarding, the appropriate charges to prosecute.[41] This may result in charges being withdrawn, downgraded or

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37 *DPP v Cooke* [2007] NSWCA 2 (7 February 2007) [23].

38 Public Interest Advocacy Centre, Submission No 17 to Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (30 April 2015).

39 Don Weatherburn and Jacqueline Fitzgerald, 'The Impact of the NSW Bail Act (2013) on Trends in Bail and Remand in New South Wales' [2015] *Crime and Justice Statistics: Bureau Brief, Issue 106* 1.

40 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [26.58].

41 Office of the Director of Public Prosecutions New South Wales, *Prosecution Guidelines* (2007); Director of Public Prosecutions for the State of Victoria, *Policy of the Director of Public Prosecutions for Victoria*.

added. A defendant may also seek to 'charge bargain'—to have charges withdrawn in exchange for a guilty plea to a lesser charge.[42]

14.40 The initial decision by police to charge can be made in fluid circumstances. Not all the evidence may have been obtained and decisions to charge may be made in the context of ensuring public safety. As the NSW Law Reform Commission explained: 'The charge can be informed by evidence that may be changing and events that may still be underway.'[43]

14.41 Nonetheless, charging practices can impact on the likelihood of an inappropriate guilty plea, the likelihood of bail refusal, and ultimately the likelihood of the accused receiving a term of imprisonment. Charging decisions interact with criminal justice systems which are designed to encourage and reward early guilty pleas with sentence discounts to save considerable public resources.[44] It is in this context that 'charge bargaining' between prosecution and defence can occur pre-trial.

14.42 During the consultation process, the ALRC heard that police charging practices can result in an Aboriginal and Torres Strait Islander person being charged with multiple offences in relation to one incident or being charged too high for an offence, or both (so called 'over charging'). However, a decision to withdraw charges may not necessarily mean that the initial charge decision was incorrect; it can simply mean that new evidence has come to light or a review by the Director of Public Prosecutions in indictable matters has meant that charges have changed.

14.43 The NT Royal Commission into youth justice also identified charging practices as contributing to youth incarceration: 'Northern Territory Police over charge children and young people with offences. The extent to which this occurs could not be determined.'[45]

14.44 Examples of overcharging in that report include:

> A Supervising Summary Prosecutor from the DPP told the Commission of one example where a young person was charged with 169 offences arising out of one incident. The prosecution later proceeded on only 27 charges to which the young person pleaded guilty.
>
> The Commission was also told in the Judges' Roundtable Royal Commission into the Protection and Detention of Children in the Northern Territory that a child or young

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42 This is also known as 'charge and fact bargaining' whereby the number and level of charges may be reduced in return for the defendant entering a guilty plea to some or all charges. Such bargaining may also involve the prosecution agreeing to present a recommendation for sentence, including on the basis of an agreed summary of facts. See Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [26.58].

43 NSW Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas*, Report 141 (2014) 58.

44 Clare Ringland and Lucy Snowball, 'Predictors of Guilty Pleas in the NSW District Court' (Number 96, NSW Bureau of Crime Statistics and Research, 2014) 1.

45 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) 249.

> person may initially face, for example, in excess of 70 charges, later reduced to fewer than five.[46]

14.45 Further:

> It was noted at the Judges' Roundtable that children and young people may remain in detention for an extended period while the charges that should not have been laid are considered by the prosecution and withdrawn.[47]

14.46 The adverse outcomes attached to overcharging may be magnified for Aboriginal and Torres Strait Islander peoples who may be more likely than non-Indigenous people to:

- have other vulnerabilities, such as cognitive impairment or mental illness;
- have language barriers and other communication barriers;
- have a criminal record; and
- be bail refused, particularly on the grounds of homeless.[48]

14.47 The initial charge needs to, as much as possible, reflect the actual criminal conduct for which a person is accused. The practice of over charging followed by negotiation to lessen the charges, or the number of charges, can be disadvantageous for Aboriginal and Torres Strait Islander accused. A review of police practices should focus on ways to improve the accuracy of charging decisions.

Complaints against police

Recommendation 14–2 To provide Aboriginal and Torres Strait Islander people and communities with greater confidence in the integrity of police complaints handling processes, Commonwealth, state and territory governments should review their police complaints handling mechanisms to ensure greater practical independence, accountability and transparency of investigations.

14.48 The ALRC recognises that a number of jurisdictions have recently reviewed or amended their complaints handling mechanisms, including most recently in SA and NSW.[49] There is also currently a Parliamentary Inquiry into the Independent Broad-Based Anti-Corruption Commission (IBAC) in Victoria.[50]

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46 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report* (2017) 248.

47 Ibid 247.

48 See chs 1 and 2.

49 *Police Complaints and Discipline Act 2016* (SA), *Independent Commissioner Against Corruption Act 2012* (SA), *Law Enforcement Conduct Commission* Act *2016* (NSW).

50 See Independent Broad-based Anti-corruption Commission Committee, *Inquiry into the external oversight of police corruption and misconduct in Victoria*, (6 September 2017) Parliament of Victoria <https://www.parliament.vic.gov.au/ibacc/inquiries/article/3799>.

14.49 Notwithstanding these improvements, the ALRC considers that the particular concerns raised by Aboriginal and Torres Strait Islander people throughout this Inquiry suggests that further reforms to police complaint handling is required. Those concerns have previously been explained by the Victorian Aboriginal Legal Service in the following terms:

> Low substantiation rates [of complaints] and poor communication with complainants, combined with concerns about lack of independence where police are investigating complaints against police, continue to undermine community confidence in the complaints process. This in turn leads to lower rates of complaints, which means that police are not being held to account for their actions, and there is less opportunity for Victoria Police to learn from its mistakes and improve its relationship with Aboriginal and Torres Strait Islander communities into the future.[51]

14.50 The ALRC recommends a review in each jurisdiction of police complaints handling mechanisms. This review must specifically focus on how to improve the perception held by Aboriginal and Torres Strait Islander people regarding police accountability for misconduct. The review should also address concerns that when Aboriginal and Torres Strait Islander people complain about police conduct those complaints are not properly addressed and investigated. Finally, the review should address specific concerns by Aboriginal and Torres Strait Islander people that when they are the victims of crime that crime is not properly investigated.

14.51 In 1996, the ALRC considered police accountability mechanisms and specifically considered a model for complaints mechanisms for the Australian Federal Police (AFP) and the then National Crime Authority (NCA). The ALRC noted that:

> Complaints and disciplinary systems are to give support to the overall objectives of law enforcement agencies, namely that there is effective and efficient law enforcement and that law enforcement powers are exercised according to law. Law enforcement agencies should be professional, effectively managed, vigilant against corruption and misconduct and publicly accountable. Powers should be exercised with respect for human rights and with regard to the appropriate balance between civil liberties and effective law enforcement. Complaints and discipline are integral parts of law enforcement accountability. They are as essential to the notion of 'good' policing as they are to preventing police malpractice and abuse of authority.[52]

14.52 In that Inquiry, the ALRC explained that, in crafting its recommendations, it sought 'an appropriate mix between internal and external responsibilities in both the AFP and NCA complaints and disciplinary systems.'[53] That balance was intended to maintain appropriate managerial responsibility while ensuring that, where appropriate, complaints and disciplinary systems had sufficient independence to be rigorous and fair. A key principle of the ALRC's Inquiry was designing a complaints mechanism

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51 Victorian Aboriginal Legal Service, Submission No 46 to Independent Broadbased Anti-Corruption Commission Committee, Parliament of Victoria, *Inquiry into the External Oversight of Police Corruption and Misconduct in Victoria* (15 September 2017) 7

52 Australian Law Reform Commission, *Integrity: But Not by Trust Alone: AFP & NCA Complaints and Disciplinary Systems*, ALRC Report No 82, (1996) [2.2].

53 Ibid [2.4].

that provided for both public confidence in the mechanism itself and the agencies more broadly.[54]

14.53 Effective and accessible police complaints handling mechanisms increase police accountability in a number of ways by providing:

- scrutiny of police conduct and powers;
- a sense of being heard for people who experience police conduct they perceive as inappropriate, unfair or unlawful; and
- consequences for inappropriate or unlawful police conduct.[55]

14.54 In addition, police complaint handling mechanisms provide an avenue for the review and reform of systemic failures and biases in policing practices—including those relating to the use of powers to detain, search, arrest, use force, enter private premises and seize property.[56] On this point, the Police Accountability Project—a project of the Victorian Flemington & Kensington Community Legal Centre—noted:

> Police are granted powers by the state and it is the state's responsibility to ensure that these powers are not abused. Police must be fully accountable for their every action when interacting with citizens.
>
> The use of force, or the use of coercive and invasive powers, are a routine part of a police member's job. Police are provided with weapons including guns, Tasers, OC (pepper) spray and batons. Police arrest, detain, stop, question and search people, their cars and homes, all of which impacts on fundamental human rights and freedoms.
>
> ... Complaints are an opportunity for positive reform. Most people who spend the time and effort it takes to make a formal complaint provide a benefit to the community. Complaints from the public allow the detection, investigation, disciplining and prosecuting of police members who have engaged in misconduct. When a person takes the time and effort to lodge a formal complaint, they create an opportunity for the reform of systemic failures in police practices.[57]

14.55 Generally, research on police accountability differentiates between 'oversight' mechanisms which involve an external agency or body reviewing and potentially investigating police complaints, and internal mechanisms within a police service for addressing complaints and investigating misconduct which maintain institutional and management authority.[58] As set out in Table 14.1, most jurisdictions in Australia have a mix of both internal and external mechanisms for dealing with complaints.

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54 Ibid [2.12].

55 Tim Prenzler and Louise Porter, 'Improving Police Behaviour and Police-Community Relations through Innovative Responses to Complaints' in Stuart Lister and Michael Rowe (eds), *Accountability of Policing* (Routledge, 2015) 49.

56 Independent Broad-Based Anti-Corruption Commission (Vic), *Audit of Victoria Police Complaints Handling Systems at Regional Level* (2016) 7.

57 Police Accountability Project, *Independent Investigation of Complaints against the Police: Policy Briefing Paper* (2017) 4–5.

58 Australian Law Reform Commission, *Integrity: But Not by Trust Alone: AFP & NCA Complaints and Disciplinary Systems*, ALRC Report No 82, (1996) [2.32].

Table 14.1 Police complaints handling bodies in Australia

Jurisdiction	Internal Management	Primary Oversight
ACT[59]	AFP Professional Standards	Commonwealth Ombudsman and the Australian Commission for Law Enforcement Integrity which focuses on serious and systemic corruption
NSW[60]	Police Standards Command—Primarily managed by the relevant local police station	Law Enforcement Conduct Commission—focused on serious misconduct or serious maladministration
NT[61]	Police Standards Command	Ombudsman NT
Qld[62]	Ethical Standards Command	Crime and Corruption Commission—deals with corrupt conduct and police misconduct. Does not deal with customer service and minor breaches of conduct
SA[63]	Internal Investigations Section	Office for Public Integrity, Independent Commissioner Against Corruption (for issues of corruption or serious or systemic misconduct or maladministration)
Tas[64]	Professional Standards	Ombudsman Tasmania and Integrity Commission which deals with complaints about misconduct by police officers
Vic[65]	Professional Standards Command	Independent Broad-Based Anti-Corruption Commission—serious corruption and police misconduct
WA[66]	Professional Standards	Corruption and Crime Commission deals with serious misconduct (which includes all police misconduct)

Inadequacy of existing complaints handling mechanisms

14.56 The RCIADIC identified that a lack of police accountability undermines the relationship between Aboriginal and Torres Strait Islander peoples, communities and the police.[67] While in the intervening 26 years the police have undertaken work to improve relationships with Aboriginal and Torres Strait Islander peoples and communities, a perception of lack of accountability for wrong doing continues to undermine confidence and trust in police.[68] The RCIADIC recommendation on police complaints set out the key principles that should guide the design and implementation

59 *Australian Federal Police Act 1979* (Cth) pt V; *Ombudsman Act 1976* (Cth); *Law Enforcement Integrity Commission 2006* (Cth) ss5-7.

60 *Police Act 1990* (NSW) pt 8A; *Law Enforcement Conduct Commission Act 2016* (NSW). In addition to this the NSW Ombudsman has powers under the *Ombudsman Act 1974* (NSW) pt 3A and 3C in relation to abuse of children and persons with a disability that cover police.

61 *Police Administration Act* (NT) pt II div 6; *Ombudsman Act* (NT) pt 7.

62 *Police Service Administration Act 1990* (Qld) Pt 7; *Crime and Corruption Act 2001* (Qld).

63 *Police Complaints and Discipline Act 2016* (SA); *Independent Commissioner Against Corruption Act 2012* (SA).

64 *Police Service Act 2003* (Tas) pt 3; *Ombudsman Act 1978* (Tas); *Integrity Commission Act 2009* (Tas).

65 *Victoria Police Act 2013* (Vic) pt 9 div 2; *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic).

66 *Police Act 1892* (WA) s 23; *Corruption, Crime and Misconduct Act 2003* (WA).

67 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 2.

68 Amnesty International and Clayton Utz, *Review of the Implementation of RCIADIC - May 2015* (2015) 162–184.

of police complaints mechanisms, rather than providing a specific model.[69] Key features of the RCIADIC report remain relevant today including:

- the need for investigation into police conduct to be independent of police;
- that there be transparency throughout the investigation; and
- the need for formal support for complainants, including legal assistance.[70]

14.57 The RLC provided a number of case studies that it suggested highlight the inadequacy of existing complaints mechanisms:

> **Case Study: Andrew part 3**
>
> RLC submitted a formal complaint on behalf of Andrew requesting that the officer involved in multiple stop/search incidents be the subject of non-reviewable action per Sch 1 of the *Police Act 1990* (NSW), in order to remedy the issues in his understanding of proper police practice and allow him to effectively contribute to community policing. The LAC [Local Area Command] investigated the complaint but determined that the evidence did not sustain any of the behaviour complained of.
>
> **Case Study: Bill**
>
> Bill was arrested by police in respect of multiple criminal offences. During his arrest, police used excessive force in restraining him which was captured on in-car-video. Bill didn't raise the excessive force in his criminal proceedings as it was not relevant to the substantive charges. After his criminal proceedings were finalised, Bill made a complaint about the excessive force used by police during his arrest. Despite there being independent evidence of excessive force, police declined to investigate on the basis that Bill had "an alternate means of redress", being his criminal proceedings.
>
> **Case Study: Melissa part 2**
>
> Following the Magistrate's findings in relation to the conduct of police, NSW Police conducted an internal investigation. NSW Police agreed with the Magistrate's finding and recommended retraining in restraint techniques for the officer involved. RLC made a complaint on behalf of Melissa's mother raising further issues that were not considered in the internal investigation such as the decision by police to bring charges against Melissa, the delay in bringing those charges and problems with the evidence given. NSW Police took more than 19 months to release their decision. Although some of the other issues were acknowledged, NSW Police failed to respond to all of the issues raised and no further disciplinary action was recommended.[71]

14.58 Aboriginal Legal Service Western Australia (ALSWA) submitted a number of case studies including:

> **Case Example Y**
>
> ALSWA represented Y, a 14-year-old Aboriginal boy from a remote town in relation to a complaint about how the police treated him. Y and a number of his cousins went for a ride in their aunt's car. Y was a passenger and the driver did not hold a licence. A police car started following them. The driver kept driving. The driver then panicked

69 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 4 ch 28.5.
70 Ibid.
71 Redfern Legal Centre, *Submission 79*.

> and veered off the road to try to go onto a back, dirt road but the car became stuck in a ditch. The boys all got out of the car and started running.
>
> The police officers caught Y and two others. Y instructed ALSWA that the officers told them to 'Get down'. He got down and he could feel the officer aiming a gun on the back of his neck. The male officer then said 'Stop crawling away or I'll shoot you with the gun'. Another boy heard the officers say 'Shut up motherfuckers. Get on the ground motherfuckers. Hey don't move or we'll shoot you with the gun. Shut up—you want to die?'
>
> This boy said the police officers tackled him to the ground and hit him in the face and ribs. They then kicked him in the ribs. They also hit him on the leg with a baton.
>
> ALSWA submitted a complaint about this conduct to the Western Australia Police Internal Affairs Unit who subsequently performed an investigation. The Western Australia Police interviewed Y and one other boy on one occasion; however, other boys were not interviewed due to difficulties in attending the remote locations. ALSWA is of the view that this client's complaint was adversely affected by his and his cousins' remoteness and the difficulties he had with engaging with police officers.
>
> The Western Australian Police investigation "established insufficient evidence to sustain any criminal conduct on the part of any police officer or any breaches of Western Australia Police policy."
>
> This response is the standard response that ALSWA receives to the majority of its serious complaint … It is clear that police investigating police is neither effective nor procedurally fair. Invariably, if ALSWA makes a complaint to the Western Australian Corruption and Crime Commission (CCC) about police conduct, the CCC refers the complaint back to Western Australia Police internal investigations. ALSWA has requested in some cases for the CCC to conduct its own independent investigation; however, the typical response is that the CCC has 'refocussed its efforts' and now oversees fewer investigations.[72]

14.59 These case studies are consistent with a number of submissions to this Inquiry that expressed the view that current police complaints handling mechanisms are inadequate because of:

- a perceived lack of impartiality of the police complaints processes;
- low substantiation rates when complaints are made;
- police being able to influence complaint processes;
- undue or arbitrary time limits for the making of complaints;
- powers given to independent police complaints bodies being too narrow; and
- independent police complaints bodies too frequently referring complaints back to police instead of conducting an external review.[73]

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72 Aboriginal Legal Service of Western Australia, *Submission 74*.

73 Sisters Inside, *Submission 119*; North Australian Aboriginal Justice Agency, *Submission 113*; Aboriginal Peak Organisations (NT), *Submission 117*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Community Legal Centres NSW and the Community Legal Centres NSW Aboriginal Advisory Group, *Submission 95*; Aboriginal Legal Service of Western Australia, *Submission 74*; Redfern

Lack of independence

14.60 A key concern raised in relation to police complaints during this Inquiry was a lack of independence, that is, the involvement of the police in reviewing and investigating a complaint about police. As noted by the Independent Commissioner Against Corruption South Australia (ICAC SA): 'Historically, police forces have been in charge of handling complaints about police. There are many recorded instances in other jurisdictions of inadequate investigations and even intimidation of those who wish to lodge a complaint.'[74]

14.61 It has been argued argues that true independence cannot be satisfied by the system utilised in all Australian jurisdictions of internal investigations by police which are supervised or reviewed by an independent authority.[75] A number of submissions supported this view. National Aboriginal and Torres Strait Islander Legal Service (NATSILS) argued:

> Current practices of allowing other police officers from the same agency to investigate claims is insufficient, as it leads to obvious biases and inadequate outcomes for Aboriginal and Torres Strait Islander people bringing complaints. Currently there is no system for independent and impartial investigations in Australia, meaning that mistreatment of Aboriginal and Torres Strait Islander people in the criminal justice system is not properly addressed.[76]

14.62 Aboriginal Peak Organisations NT (APO NT) submitted that there needs to be a process 'established for investigation and complaints of Police that is independent of Police and autonomous and has the necessary powers to perform its functions. Aboriginal people must be involved in this structure, including in key and leading roles.'[77]

14.63 Kingsford Legal Centre (KLC) identified a lack of independent police complaint mechanism in NSW for less serious complaints as disproportionately impacting on Aboriginal and Torres Strait Islander peoples:

> In NSW, less serious police complaints are dealt with internally, by the Local Area Command which conducts the investigation and is monitored by the Police Commissioner's staff. The lack of an independent investigation means that less serious complaints have the potential to not be adequately dealt with, with investigations often finding that the complaint is not sustained. If a complainant wants to view information held by police in relation to the complaint, they are often required to make an application under the *Government Information (Public Access) Act 2009* (NSW) and this can be a very time-consuming process. It is imperative that the

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Legal Centre, *Submission 79*; Human Rights Law Centre, *Submission 68*; Caxton Legal Centre, *Submission 47*; Kingsford Legal Centre, *Submission 19*.

74 Independent Commissioner Against Corruption South Australia, *Review of Legislative Schemes: The Oversight and Management of Complaints about Police* (2015) 24.

75 Tamar Hopkins, *An Effective System for Investigating Complaints Against Police: A Study of Human Rights Compliance in Police Complaint Models in the US, Canada, UK, Northern Ireland and Australia* (Victorian Law Foundation, 2009) 23, 34–5.

76 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

77 Aboriginal Peak Organisations (NT), *Submission 117*.

> current mechanisms in place for the investigation of police complaints be reviewed and undergo reform to ensure due process, efficiency and effective remedies.[78]

14.64 North Australian Aboriginal Justice Agency (NAAJA) identified a number of issues with the *Ombudsman Act* (NT), which provides the 'main formal mechanism' to bring complaints against police in the NT. The Act sets out a three-tiered process for the way a police complaint is to be handled, based on a triage process,[79] which provides 'who should investigate a complaint and the processes and level of formality which is to be applied to the investigation'.[80] NAAJA raised concerns that complaints were not being categorised appropriately at the initial assessment stage and as a result certain complaints were not investigated appropriately and with sufficient independence.[81]

Independent investigation of deaths in custody

14.65 Many of the issues raised above in relation to complaints against police are relevant in the context of any death in police custody. The Human Rights Law Centre submitted that: 'Relations between Aboriginal and Torres Strait Islander people and police could be improved if allegations of police misconduct and deaths in custody were independently investigated.'[82]

14.66 In 2014–15 there were a total of 11 deaths in police custody.[83] Five of those deaths were Aboriginal and Torres Strait Islander people.[84] The most recent figures from the AIC suggest that most deaths in custody are due to natural causes. Unlawful homicides are a small proportion of deaths in custody.[85] Fortunately, in Australia, deaths in custody are not common. Nevertheless, the circumstances of those deaths and how they are investigated are critical for maintaining public confidence in police, particularly among Aboriginal and Torres Strait Islander peoples. The then Office of Police Integrity in Victoria explained that: 'It is important that the investigation of a death associated with police contact is conducted in such a way as to give the public confidence that the circumstances surrounding the death will be subject to the highest levels of scrutiny.'[86]

14.67 The RCIADIC made a total of 35 recommendations for the reform of custody investigations and coronial inquiries in the event of an Aboriginal and Torres Strait

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78 Kingsford Legal Centre, *Submission 19*.
79 *Ombudsman Act* (NT) ss 78, 80, 86.
80 North Australian Aboriginal Justice Agency, *Submission 113*.
81 Ibid.
82 Human Rights Law Centre, *Submission 68*.
83 Productivity Commission, above n 5, 6.13.
84 Productivity Commission, above n 5. Deaths in custody represent a relatively small proportion of those who die as a result of contact with police. Deaths while attempting to detain have been the most common category associated with police custody and custody-related operations deaths since 1989–90, accounting for 73 percent of deaths. See Ashleigh Baker and Tracy Cussen, 'Deaths in Custody in Australia: National Deaths in Custody Program 2011–12 and 2012–13' (Monitoring Report No 26, Australian Institute of Criminology, 2015).
85 Baker and Cussen, above n 84.
86 Office of Police Integrity, *Review of the Investigative Process Following a Death Associated with Police Contact* (2011) 8.

Islander person dying in custody.[87] Following the RCIADIC, all states and territories have made reforms to their coronial system, though there is no uniform approach to suspicious deaths generally and death in police custody specifically.[88]

14.68 Importantly, coronial processes ensure there is independent judicial oversight of all deaths in custody and coroners have full judicial powers to summons and question witnesses.[89] Nevertheless, police retain an important role and generally have primary carriage of the initial fact finding investigation when there is a death in police custody.[90] For example, in Victoria it is the police who have responsibility for preparing a brief of evidence for the Coroner.[91]

14.69 As a result, there are ongoing concerns about police investigating police following a death in custody. The Office of Police Integrity in Victoria conducted a review of the investigative process following a death associated with police in Victoria and explained that:

> Although some consider police to have the most relevant investigative expertise and a greater capacity to respond in a timely fashion, others question the independence and impartiality of police in conducting such investigations.
>
> Some of those who contributed to this Review expressed concerns that Victoria Police has a conflict of interest in the outcome of the investigation. They say the police 'search for the truth' may conflict with their interest in protecting the reputation of Victoria Police and safeguarding legal or financial liability that may arise if a person is wronged by the actions of police. Concerns were also raised regarding a culture of loyalty and empathy within police services, in which members 'look out for one another'[92]

14.70 The Human Rights Law Centre submitted that:

> No Australian jurisdiction has established a system for completely independent investigations of deaths in police custody or of allegations of torture and mistreatment. Complaints against police officers are primarily investigated by other police officers. Queensland has implemented a model which more directly involves the State Coroner. However, this remains far from being a fully impartial investigation by a body independent to the police, in line with international standards.[93]

14.71 In terms of specific reforms, the Human Rights Law Centre submitted that:

> Each state and territory should establish an independent body for investigating deaths in police custody and complaints against police. Such a body should be hierarchically,

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87 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 2.

88 Amnesty International and Clayton Utz, above n 68, 25.

89 Chief Justice Wayne Martin, 'The Coronial Jurisdiction: Lessons for Living' (Speech, 2016 Asia Pacific Coroners Society Conference, Perth, 9 November 2016) 9.

90 Coroners Court of Victoria, *The Coroners Process* (2013) 22. In Queensland, the Crime and Corruption Commission is informed of all police-related deaths and may attend an incident if there is concern about the public interest. See Crime and Corruption Commission Queensland, *Annual Report 2014-15* (2015) 23.

91 Coroners Court of Victoria, above n 90, 22.

92 Office of Police Integrity, above n 86, 13.

93 Human Rights Law Centre, *Submission 68*.

> institutionally and practically independent of the police and have features to ensure that investigations are comprehensive, prompt, subject to public scrutiny and, in the case of deaths in custody, involve the family of the deceased.[94]

14.72 There are a range of international models that could be drawn upon to establish functional independence from the police for the conduct of investigating deaths in police custody. For example:

- Independent Police Conduct Authority in New Zealand;[95]
- Independent Police Complaints Commission in England and Wales;[96]
- Police Ombudsman for Northern Ireland;[97]
- Garda Síochána Ombudsman in the Republic of Ireland;[98] and
- Special Investigations Unit in Ontario, Canada.[99]

14.73 In New Zealand, the Independent Police Conduct Authority has statutory independence from police, is led by a District Court Judge and has a team of independent investigators who have a range of investigative powers similar to police.[100] Under the *Independent Police Conduct Authority Act 1988* (NZ) the Authority will investigate, independently of police, an incident involving a death that may have been caused by a police officer in the execution of their duty where it is in the public interest for the authority to conduct the investigation.[101] This model avoids the conflict of police investigating police and potentially improves perceptions of police accountability.

14.74 In the Republic of Ireland, the Garda Síochána Ombudsman Commission (GSOC) is responsible for conducting investigations in circumstances where it appears that the conduct of a garda (police) may have resulted in the death of, or serious harm to, a person.[102] The GSOC was established by the *Garda Síochána Act 2005* (Republic of Ireland) and ensures independent investigation.[103]

14.75 In Northern Ireland, the Office of the Police Ombudsman in Northern Ireland provides independent, impartial, civilian oversight of policing. The Ombudsman is a statutory body that is financially and institutionally independent of the police.[104] The Ombudsman is responsible for investigating deaths after police contact and deaths in custody. Officers of the Ombudsman can be appointed to investigate such deaths with

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94 Ibid.
95 *Independent Police Conduct Authority Act 1988* (NZ).
96 *Police Reform Act 2002* (UK) c 30.
97 *Police (Northern Ireland) Act 1998* (UK) c32.
98 *Garda Síochána Act 2005* (Republic of Ireland).
99 *Police Services Act 1990* (Ontario, Canada).
100 Independent Police Conduct Authority, *Annual Report 2015–2016* (2016) 7.
101 Ibid.
102 *Garda Síochána Act 2005* (Republic of Ireland).
103 Ibid.
104 Police Ombudsman for Northern Ireland, *Annual Report and Accounts for the year ended 31 March 2017* (2017).

the same powers as are available to the police.[105] The Office can recommend prosecution of a police officer to the Director of Public Prosecutions.[106]

14.76 In the province of Ontario, Canada, the Special Investigations Unit (SIU) is an independent civilian agency with the power to both investigate and charge police officers with a criminal offence.[107] The SIU was created by the *Police Services Act 1990* (Ontario, Canada). The director of the SIU can investigate the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers. SIU investigators may be former police officers but may not investigate their former force.[108]

14.77 The ALRC suggests that these international models should be reviewed and considered as part of reforms to police complaints handling mechanism in Australia.

Custody Notification Services

Recommendation 14–3 Commonwealth, state and territory governments should introduce a statutory requirement for police to contact an Aboriginal and Torres Strait Islander legal service, or equivalent service, as soon as possible after an Aboriginal and Torres Strait Islander person is detained in custody for any reason—including for protective reasons. A maximum period within which the notification must occur should be prescribed.

14.78 Custody Notification Services (CNS) are state or territory-wide 24-hour, 7-day a week telephone legal advice services available to Aboriginal and Torres Strait Islander people who have been detained in custody. CNS lawyers provide legal advice in a culturally sensitive manner, and are trained to detect and respond to issues such as threats of self-harm or suicide, or any injuries sustained during arrest.

14.79 All states and territories have arrangements in place to notify the relevant Aboriginal and Torres Strait Islander legal service (ATSILS) when an Aboriginal or Torres Strait Islander person is detained in police custody.[109]

105 Ibid.
106 Ibid.
107 Special Investigations Unit, *Annual Report 2016-2017* (2017).
108 Ibid.
109 *Crimes Act 1900* (ACT) s 187; *Crimes Act 1914* (Cth) s 23H; *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) cl 37; *Police General Order Q1* (NT) [4.7]; *Police General Order 3015* (SA) [13]; *Victoria Police Manual VPM Instruction 113–1—Taking a Person into Custody* (Vic) [4.7]; *Police Manual* (WA) Policy AD4.1. In Queensland, there is a limited statutory duty to the arrangements are pursuant to a Memorandum of Understanding between the Queensland Police Service and Aboriginal Legal Services (Qld): Aboriginal and Torres Strait Islander Legal Service (Qld), *Safe Custody—Working Together to Ensure Safe Custody and Create Safer Communities* <www.police.qld.gov.au>. In Tasmania, the commitment to notify is set out in: Department of Police and Emergency Management (Tas), *Aboriginal Strategic Plan 2104–2022* (2014) 5.

14.80 The nature of these arrangements range from a limited obligation in the NT to take reasonable steps to obtain legal assistance if requested[110] with no concomitant duty to inform an individual of their right to legal counsel, to a requirement in Victoria for police to notify Victorian Aboriginal Legal Services (VALS) within 60 minutes of an Aboriginal person being detained in custody *for any reason*.[111] An obligation to notify is provided for in legislation or regulation in relation to Commonwealth offences and in the ACT and NSW.[112]

14.81 The RCIADIC recommended that: 'in jurisdictions where legislation, standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person.'[113]

14.82 The RCIADIC recommendation seeks to improve compliance with police practices and procedures by permitting

> Aboriginal people to receive legal advice delivered in a culturally sensitive manner at the earliest possible opportunity in order to prevent them from acquiescing to police demands in a manner which could jeopardise subsequent court proceedings.[114]

14.83 The recommendation also protects the welfare of Aboriginal and Torres Strait Islander people in custody by facilitating a welfare check.

14.84 Stakeholders emphasised that implementation of CNSs must be accompanied by adequate, ongoing funding. Legal Aid ACT, while broadly supportive, suggested that there ought to be an option to request a service other than an ATSILS at first instance, and that the obligation may be met by requiring contact with a non-legal service provider, who may then coordinate access to a lawyer.[115] The ALRC accepts that it is important for both reasons of choice and confidentiality that a detained person be given the opportunity to nominate that a service provider other than an ATSILS be contacted in the first instance. Recommendation 12–3 does not preclude this option. Obtaining the detained person's consent prior to making contact can facilitate this choice and already occurs in some jurisdictions.

14.85 However, in light of the twofold goals of the custody notification scheme—welfare checking and preventing Aboriginal and Torres Strait Islander people in custody from acquiescing to police demands—the ALRC considers that it is preferable that the notification requirement be tied to contacting an ATSILS or equivalent service, including, for example Legal Aid.

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110 *Police General Order Q1* (NT) [4.7]. The Northern Territory Government submission noted that 'NT police practice mandates that notification is provided to the respective Aboriginal Legal Service upon the detention of an Aboriginal person': Northern Territory Government, *Submission 118*.

111 *Victoria Police Manual VPM Instruction 113–1—Taking a Person into Custody* (Vic) [4.3].

112 *Crimes Act 1900* (ACT) s 187; *Crimes Act 1914* (Cth) s 23H; *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) cl 37.

113 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, rec 224.

114 Aboriginal and Torres Strait Islander Legal Services, *Custody Notification Service: An Analysis of the Operation of This Service by Each Aboriginal and Torres Strait Islander Legal Service* (2017) 1.

115 Legal Aid ACT, *Submission 107*.

Legislative requirement

14.86 A legislative requirement to notify an ATSILS when an Aboriginal and/or Torres Strait Islander person is detained in police custody reflects the importance of this safeguarding measure. It also ensures that the terms of the specific obligation are publicly available and discoverable, and less susceptible to change. By contrast, in some jurisdictions police manuals—which often contain the requirement to notify—are only available for purchase in disc format,[116] and may be changed more frequently reflecting their status as internal procedures and policies. Stakeholders expressed strong support for the ARLC's recommendation.[117] NATSILS submitted, for example that

> there is a clear need for notification requirements and procedures to be enshrined in legislation so as to create a system of notifications that is either mandatory in all instances, or at the very least consistent in application to prevent ad hoc compliance.[118]

14.87 Ms Tegan Kelly submitted that the RCIADIC recommendation was intended as an interim measure, and suggested that the ALRC consider making a recommendation along the lines of the RCIADIC's recommendation 223 relating to the development of local accords and protocols. While noting the historical support for a mandatory duty to notify, and the role that ATSILS can play in 'reduc[ing] the disadvantage faced by Aboriginal and Torres Strait Islander people in their interactions with police', she argued that 'it is worthwhile investigating further whether a local level protocol would be a better approach to establishing such a duty'.[119]

14.88 As discussed further below, the ALRC values and encourages the development of cooperative initiatives between police and Aboriginal and Torres Strait Islander communities that build goodwill and promote a constructive relationship. However, as submitted by NATSILS, incorporation of a statutory duty guards against *ad hoc* compliance. It may also, in some circumstances, act as a catalyst for the development of relationships and initiatives of this kind.

Detention in custody for any reason

14.89 In the Discussion Paper, the ALRC proposed that the statutory requirement to notify should apply when an Aboriginal and/or Torres Strait Islander person is detained in custody. The Human Rights Law Centre and ALSWA urged the ALRC to clarify that the obligation arises irrespective of why the Aboriginal and/or Torres Strait

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116 Victoria Police, *Policies, Procedures and Legislation* <www.police.vic.gov.au>.

117 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; NSW Bar Association, *Submission 88*; Human Rights Law Centre, *Submission 68*; Northern Territory Anti-Discrimination Commission, *Submission 67*; International Commission of Jurists Victoria, *Submission 54*; Victorian Aboriginal Legal Service, *Submission 39*. See, eg, Sisters Inside, *Submission 119*; North Australian Aboriginal Justice Agency, *Submission 113*; Law Society of Western Australia, *Submission 111*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Human Rights Law Centre, *Submission 68*; International Commission of Jurists Victoria, *Submission 54*; Australian Human Rights Commission, *Submission 43*; Legal Aid WA, *Submission 33*; Kingsford Legal Centre, *Submission 19*.

118 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

119 T Kelly, *Submission 116*.

Islander person is detained in police custody—that is, it should not be limited to detention in custody in relation to an offence.[120] They highlighted, for example, that a person may be detained for other reasons, such as in protective custody,[121] or in relation to outstanding warrants.[122]

14.90 The ALRC agrees with such an approach. The recommendation reflects the nature of this obligation. Policies, procedures and manuals in Victoria and Tasmania already explicitly require notification where there is detention 'for any reason',[123] or in every case where an 'Aboriginal person is in custody'.[124]

Timing of notification

14.91 Ensuring that police notify the relevant legal service as soon as possible after an Aboriginal and/or Torres Strait Islander person is detained in custody is crucial in safeguarding the person's welfare and rights. The ALRC considers that states and territories should set a maximum time limit within which the notification must occur. While the ALRC does not make a specific recommendation about what the time limit should be, it notes that, in Victoria, police are required to notify VALS within 60 minutes of the person arriving at the police station.[125]

14.92 Legal Aid NSW raised concerns that attempts by the Commonwealth Government earlier this year to amend s 23H(1) of the *Crimes Act 1914* (Cth) could 'water down' the notification requirement.[126] The proposed amendment would have had the effect of amending s 23H(1) to read 'if the investigating official in charge of investigating a Commonwealth offence ... must, *immediately before starting to question the person*' notify the relevant ATSILS. The explanatory memorandum to the Bill stated that the amendments sought to:

> provide legislative certainty following the case of *R v CK* [2013] ACTSC 251 (R v CK). In that case, the court found that the wording of subsection 23H(1) did not require an investigating official to notify an Aboriginal legal assistance organisation prior to commencing questioning. This finding is contrary to the intention of subsection 23H(1), which is to implement safeguards for Aboriginals and Torres Strait Islanders arrested or taken into custody, giving effect to recommendation 224 of the report by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). This recommended that governments take steps (in jurisdictions where such arrangements were not already in place) to make it mandatory for an Aboriginal legal assistance organisation to be notified upon the arrest or detention of any Aboriginal or Torres Strait Islander. The amendments to section 23H clarify that an investigating official must notify an Aboriginal legal assistance organisation prior to commencing questioning of a suspect.

120 Aboriginal Legal Service of Western Australia, *Submission 74*; Human Rights Law Centre, *Submission 68*.
121 See, eg, Aboriginal Legal Service of Western Australia, *Submission 74*; Human Rights Law Centre, *Submission 68*.
122 Aboriginal Legal Service of Western Australia, *Submission 74*.
123 *Victoria Police Manual VPM Instruction 113–1—Taking a Person into Custody* (Vic) [4.3].
124 Department of Police and Emergency Management (Tas), above n 109, 5.
125 *Victoria Police Manual VPM Instruction 113–1—Taking a Person into Custody* (Vic) [4.3].
126 Legal Aid NSW, *Submission 101*.

14.93 While it is unlikely that a court, faced with a provision in those terms enacted for the reasons set out above, would interpret the provision in a manner that waters down any notification obligation, the ALRC considers that the preferable policy approach would be to:

- impose a prohibition on police asking the detained person any questions other than to determine their Aboriginality or obtain their consent to the notification; and
- set a maximum time after the person's arrest within which notification must occur.

Improving police culture

Recommendation 14–4 In order to further enhance cultural change within police that will ensure police practices and procedures do not disproportionately contribute to the incarceration of Aboriginal and Torres Strait Islander peoples, the following initiatives should be considered:

- increasing Aboriginal and Torres Strait Islander employment within police;
- providing specific cultural awareness training for police being deployed to an area with a significant Aboriginal and Torres Strait Islander population;
- providing for lessons from successful cooperation between police and Aboriginal and Torres Strait Islander peoples to be recorded and shared;
- undertaking careful and timely succession planning for the replacement of key personnel with effective relationships with Aboriginal and Torres Strait Islander communities;
- improving public reporting on community engagement initiatives with Aboriginal and Torres Strait Islander peoples; and
- entering into Reconciliation Action Plans.

14.94 Police culture was identified by RCIADIC as contributing to the over-policing of Aboriginal and Torres Strait Islander people back in 1991.[127] Police have made reforms to their practice and procedures over the last 25 years and these have irrevocably changed the culture of police.[128]

14.95 However, as has been highlighted above, more needs to be done to embed a cultural change within police that will ensure police practices and procedures do not contribute to the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples. The Human Rights Law Centre submitted that there was a 'need for

127 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 4 [29.5].

128 Amnesty International and Clayton Utz, above n 68, 183.

fundamental change in the way police interact with Aboriginal and Torres Strait Islander people and communities, including improved cultural awareness, with the aim of building trust, promoting safety and reducing crime.'[129]

14.96 Similarly Caxton Legal Centre explained that any 'plan to reduce indigenous incarceration must [include] measurable actions designed to shift the behavioural norms of police officers to ensure discretion is exercised to divert Indigenous people from the criminal justice system.'[130] Such a plan needs 'demonstrated "change agent" public leadership amongst the highest levels of Australia's justice portfolios, law enforcement agencies and Aboriginal and Torres Strait Islander communities.'[131] Such a plan also needs to build on examples of success many of which have been provided to the ALRC throughout this Inquiry. This section highlights some of the examples of success and sets out a number of initiatives that could assist to progress cultural change within police.

Employment strategies

14.97 A key recommendation of the RCIADIC was the employment of more Aboriginal and Torres Strait Islander police officers, especially women.[132] Progress has been made in implementing this recommendation.[133] Nevertheless, the Productivity Commission documented that: 'The proportion of Aboriginal and Torres Strait Islander police staff in 2015-16 was below the representation of Aboriginal and Torres Strait Islander people in the population aged 20–64 years for all jurisdictions except NSW and the ACT.'[134]

14.98 ALSWA suggested that aiming for population parity is not enough: 'Bearing in mind the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system and as victims, even 3.2% Aboriginal employment is insufficient.'[135]

14.99 The rate of participation of Aboriginal and Torres Strait Islander people in sworn or unsworn roles and in operations or non-operational roles at a national is not readily available. As an indication, the NSW Police 2016-2017 Annual Report explains that there is some evidence that Aboriginal and Torres Strait Islander employees 'tend to be more concentrated at lower salary bands than is the case for other staff.'[136]

14.100 In addition, national statistics on the number of Aboriginal and Torres Strait Islander women employed by police is incomplete. A number of submissions highlighted the need for more Aboriginal and Torres Strait Islander policewomen in

129 Human Rights Law Centre, *Submission 68*.
130 Caxton Legal Centre, *Submission 47*.
131 Ibid.
132 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, rec 229.
133 Amnesty International and Clayton Utz, above n 68, 500–504.
134 Productivity Commission, above n 5, 6.8.
135 Aboriginal Legal Service of Western Australia, *Submission 74*.
136 NSW Police Force, *Annual Report 2016–17* (2017) 86.

order to address family violence.[137] The Human Rights Law Centre also suggested that there 'is also an urgent need for recruitment practices that promote Aboriginal and Torres Strait Islander women's participation, both in policing and the training of police.'[138]

14.101 A key issue is how to improve recruitment practices to encourage greater numbers of applications from Aboriginal and Torres Strait Islander peoples. Reconciliation Australia has said that an Aboriginal and Torres Strait Islander employment strategy provides a 'blueprint for developing, implementing and maintaining Indigenous employment actions'.[139] The Closing the Gap Clearinghouse suggested that key elements for increasing Aboriginal and Torres Strait Islander employment should include:

- Increasing the skill levels of Indigenous Australians via formal education and training.
- Pre-employment assessment and customised training for individuals in order to get Indigenous job seekers employment-ready.
- Non-standard recruitment strategies that give Indigenous people who would be screened out from conventional selection processes the opportunity to win jobs.
- The provision of cross-cultural training by employers.
- Multiple and complementary support mechanisms to improve the retention of Indigenous employees is crucial. These may include:
  - ongoing mentoring and support;
  - flexible work arrangements to allow Indigenous employees to meet their work, family and/or community obligations;
  - provision of family support;
  - dealing with racism in the workplace via initiatives such as the provision of cross-cultural training.[140]

14.102 The then NSW Police Commissioner, Andrew Scipione APM, suggested:

> Increased Aboriginal employment within the NSW Police Force improves the participation of Aboriginal people across a range of policing issues and builds community relationships, cooperation and trust. Both our organisation and our Aboriginal communities benefit in a range of ways from a greater understanding by police of Aboriginal issues.[141]

14.103 Various police forces have undertaken training and employment initiatives as a means of bolstering Aboriginal and Torres Strait Islander police numbers. One such

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137 Aboriginal Legal Service of Western Australia, *Submission 74*; Human Rights Law Centre, *Submission 68*.

138 Human Rights Law Centre, *Submission 68*.

139 GenerationOne & Reconciliation Australia *Everybody's Business: A Handbook for Indigenous Employment* (2013) 6.

140 Matthew Gray, Boyd Hunter and Shaun Lohoar, 'Increasing Indigenous Employment Rates' (Bureau Brief Issue Paper 3, Closing the Gap Clearinghouse, 2012) 1–2.

141 NSW Police Force, *Aboriginal Employment Strategy 2015–2019* (2015).

specialised training program was introduced by the NSW Police for Aboriginal and Torres Strait Islander persons wishing to join the police force. The Indigenous Police Recruitment Our Way Delivery program (developed by the NSW Police Force and TAFE NSW) aims to assist Aboriginal and Torres Strait Islander people in gaining skills, qualifications and confidence to successfully apply for a position within the NSW Police Force.[142]

14.104 Submissions highlighted the positive contribution of Aboriginal Community Police Officers (ACPOs) in the NT. ACPOs perform a range of duties including liaising with Aboriginal communities and contributing to effective Community Safety Action Plans.[143] The NSW/ACT ALS supplementary submission also noted that:

> A number of participants applauded the role of Aboriginal Community Liaison Officers (ACLOs) in brokering ... connections [between police and the community], and suggested that ACLOs need to be stationed at all police stations as well as out of regular hours (i.e. after hours and on weekends).[144]

14.105 Similarly, in the Torres Strait, police have appointed non-sworn Aboriginal and Torres Strait Islander people as locally-based Torres Strait Island Police Support Officers (known as TSIPSOs) who support police and act as liaisons between police and the community.[145]

14.106 The Aboriginal Legal Service of Western Australia highlighted the Aboriginal Cadet Program which was 'created to encourage more young indigenous people to become police officers'.[146] The two year program is 'designed to prepare cadets to undertake the police recruit selection process.'[147] The 2016–17 WA Police Annual Report records that a total of 25 Aboriginal cadets had been recruited and

> [t]he program is expected to increase the number and success of Aboriginal applicants for police officer positions within the agency. Additionally, it will build momentum towards achieving greater representation of Aboriginal people in the WA Police workforce; to better reflect the communities the agency works with as well as promoting a more diverse workforce mix.[148]

Cultural awareness training

14.107 In 1991, the RCIADIC recommended:

> That police training courses be reviewed to ensure that a substantial component of training both for recruits and as in-service training relates to interaction between police and Aboriginal people. It is important that police training provide practical advice as to the conduct which is appropriate for such interactions. Furthermore, such training should incorporate information as to:

142 NSW Police Force, *Aboriginal Recruitment* <www.police.nsw.gov.au/recruitment/the_career/atsi>.
143 Northern Territory Police, Fire & Emergency Services, *2015–16 Annual Report* (2016) 28.
144 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.
145 Queensland Police, *Queensland Police Welcome New Torres Strait Island Police Support Officers (TSIPSO)* <www.mypolice.qld.gov.au/farnorth/2013/10/28>.
146 Aboriginal Legal Service of Western Australia, *Submission 74*.
147 Western Australia Police, *Annual Report 2017* (2017).
148 Ibid.

a. The social and historical factors which have contributed to the disadvantaged position in society of many Aboriginal people;

b. The social and historical factors which explain the nature of contemporary Aboriginal and non-Aboriginal relations in society today; and

c. The history of Aboriginal police relations and the role of police as enforcement agents of previous policies of expropriation, protection, and assimilation.[149]

14.108 There was broad support throughout this Inquiry for greater training of police to improve cultural understanding as a basis for improving relationships between police and Aboriginal and Torres Strait Islander peoples and communities. For example the NSW/ACT ALS supplementary submission noted that:

> Many participants stated that there is a lack of respect between the police and Aboriginal and Torres Strait Islander people in their community. Some participants suggested that this lack of respect was primarily due to a general lack of understanding and awareness of cultural differences among the police.[150]

14.109 Submissions also noted that cultural awareness training is available to police and typically forms a compulsory part of training to become a police officer. For example the NT Government advised:

> Cultural understanding and training feature in the NT Police recruit course curriculum along with mandatory cultural awareness training for all members. Local engagement and training with identified Traditional Owners or Elders also improves understanding and cross cultural awareness.[151]

Education regarding specific communities

14.110 During the Inquiry, the ALRC heard about an unpreparedness of police entering into often remote and sometimes challenging Aboriginal communities. Women's Legal Services Australia submitted that: 'Every police officer should be responsible for understanding the issues facing the local Aboriginal and Torres Strait Islander communities and for building a relationship of trust and accountability with them.'[152]

14.111 Similarly, the NSW/ACT ALS supplementary submission explained that:

> Participants suggested two strategies to ensure police better understand and respond to Aboriginal communities – cultural awareness training and community engagement. Participants suggested that training should include information specific to the community in which police are working, such as language training and descriptions of different cultural groups. They also suggested that it is important for police to demonstrate to the community that this training is being or has been conducted, through promotion and advertising. [153]

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149 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) rec 228.
150 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.
151 Northern Territory Government, *Submission 118*.
152 Women's Legal Service NSW, *Submission 83*.
153 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.

14.112 A 2010 independent review of policing in remote Aboriginal communities in the NT suggested:

> [I]nitiatives should include ensuring that members who are selected for remote postings are provided with appropriate and adequate hand over/takeover time on arrival at the community, introductions to community elders and leaders, cultural training by community members including understanding of significant ceremonies and ceremonial locations, mentoring by other staff with proven prior experience in the location, appropriate employment conditions, appropriate supervision and management support, and recognition of their completed, satisfactory service at remote locations in future postings.[154]

14.113 In 2011, the Victorian Office of Police Integrity found that, while Victoria Police had a strong commitment to addressing issues within Aboriginal communities, 'more needs to be done to build a better understanding of Koori culture and local Koori issues to ensure police who are working with Koori communities can provide a culturally appropriate response to their needs'.[155] As a result the Office recommended that 'Aboriginal and Torres Strait Islander cultural training is desirable for all police but should be a prerequisite for all police prior to deployment to Policing Service Areas where there is a significant Koori population'.[156]

14.114 In its submission, Legal Aid WA emphasised the importance of cultural awareness training for police officers and staff, especially training that is delivered by Elders in the community and is specific to the local area.[157]

14.115 That view was supported by the Human Rights Law Centre:

> Police in each state and territory should have guidance materials and undertake regular compulsory training, facilitated by Aboriginal and Torres Strait Islander people... Such training should be mandatory, ongoing and location specific and involve an assessment of learning.[158]

14.116 These submissions suggest that more and better targeted training for police is required to improve understand of local Aboriginal and Torres Strait Islander communities. The ALSWA stressed the importance of reporting on training as an accountability measure:

> Western Australia Police should be required to report on an annual basis the proportion of police officers who have undertaken cultural competency training; the nature, location and duration of that training; and how many officers have undertaken subsequent training.[159]

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154 The Allen Consulting Group, *Independent Review of Policing in Remote Indigenous Communities in the Northern Territory: Policing Further into Remote Communities* (2010) 78.

155 Office of Police Integrity Victoria, *Talking Together—Relations between Police and Aboriginal and Torres Strait Islanders in Victoria: A Review of the Victoria Police Aboriginal Strategic Plan 2003–2008* (2011) 14.

156 Ibid.

157 Legal Aid WA, *Submission 33*.

158 Human Rights Law Centre, *Submission 68*.

159 Aboriginal Legal Service of Western Australia, *Submission 74*.

Cooperative initiatives

14.117 During this Inquiry, the ALRC was informed about, and observed, some very positive initiatives undertaken by, or involving, police and local Aboriginal and Torres Strait Islander people. This suggests that cooperative community initiatives at a local level can result in significant improvements. There are many initiatives which illustrate the success of such programs. The following programs are a small sample to illustrate what can be achieved.

14.118 For example, a number of cooperative initiatives between police and the local community have been introduced in the Sydney suburb of Redfern. In 2009, Redfern Police, led by the Local Area Commander, Aboriginal community leaders in Redfern and Tribal Warrior Aboriginal Corporation, instigated the 'Clean Slate Without Prejudice' program. In 2016, the 'Never Going Back' program was implemented in Redfern by Redfern Police, Aboriginal community leaders in Redfern and Tribal Warrior with the additional assistance of Long Bay Correctional Complex General Manager.

14.119 Tribal Warrior provided this description of those programs:

> Clean Slate Without Prejudice program … consists of a boxing and fitness program at the National Indigenous Centre of Excellence gymnasium in Redfern. It also involves the active participation of community leaders and police officers from the Redfern Local Area Command. The Never Going Back program targets Aboriginal inmates who are nearing the completion of their custodial sentences. They are collected from Long Bay Correctional Centre three times a week at to attend boxing with Clean Slate Without Prejudice and receive training for employment.[160]

14.120 Both programs received Australian Crime and Violence Prevention awards in 2016, a recognition of good practice in the prevention or reduction of violence and other types of crime in Australia.[161]

14.121 A 2016 review of the programs by Professor Karl Roberts found the programs were making a positive contribution, noting the following effects:

- reductions in reported crime in the area, particularly robbery and burglary;
- increased community confidence in police; and
- enhanced resilience of communities and 'at risk' groups.[162]

14.122 Professor Roberts suggested that the principles underlying the success of the programs were:

> 1. The success of the Redfern programs is underpinned by a procedurally just approach towards the community. This is characterised by treating community members with respect, giving them a clear voice that is listened to by police in

160 Tribal Warrior, *Gold Award for Tribal Warrior Mentoring Programs* <www.tribalwarrior.org>.

161 Australian Institute of Criminology, 'Two NSW Police Projects Recognised for Reducing Crime in the Redfern Area' (Media Release, 23 November 2016).

162 Karl Roberts, *Review of Two Community Engagement Programs in Redfern Local Area Command New South Wales Police* (2016) 4–5.

police-community interactions, giving community members explanations for police activity and decisions, and utilizing reliable and fair approaches towards community members. This underpins the development of trust.

2. Enhancing trust between police and community has been central to the improvement in police-community relations and cooperation with police.
3. Police familiarity with some of the mechanisms of social influence is likely to be useful in identifying leaders, community collaborators and designing programs that will have the greatest influence upon changing attitudes and behaviour within communities.[163]

14.123 The Marunguka Justice Reinvestment project in the New South Wales town of Bourke has involved collaboration between the local Aboriginal community and police to address community-identified problems. In consultation with Marunguka, in 2016 the Bourke Local Area Command implemented a program of visits to the homes of perpetrators of domestic violence following an incident of violence. Police were accompanied on the visits by a member of the community, so that the visits served a dual purpose—both supervisory and supportive.[164]

14.124 Another example from Bourke, NSW is the recently introduced 'breach reduction strategy', which relies on positive police involvement. The strategy includes making sure a warning is issued for technical breaches of bail, and that police contact the community (via a local community hub) when they believe that an Aboriginal and Torres Strait Islander person may not comply and may be in need of support services.[165] PIAC supported expansion of this approach to communities with large populations of Aboriginal and Torres Strait Islander peoples.[166]

14.125 In Cairns and on Thursday Island, the ALRC observed the effectiveness of the involvement of Aboriginal and Torres Strait Islander court officers and the substantial, voluntary participation of community Elders in the criminal court process. The ALRC also noted the advantages derived from the long term appointment to the Torres Strait of an experienced and culturally aware magistrate along with a police inspector and prosecutor with a thorough understanding of the local Torres Strait Island communities.

Public reporting

14.126 During the Inquiry, a number of stakeholders noted that information about initiatives and programs, like those outlined above, is not always easy to find. For example, performance measures to be implemented by the NSW Police set out in their Aboriginal Strategic Direction 2012–2017 provide for internal reporting only, and do not require public reporting.[167]

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163 Ibid 5–6.
164 Just Reinvest NSW, *Submission 82*. See ch 4.
165 Sarah Hopkins and Eleanor Holden, 'Justice Reinvestment and Over-Policing: A Conversation with Sarah Hopkins' (2016) 25 *Human Rights Defender* 22, 23. Justice reinvestment is discussed in ch 4.
166 Public Interest Advocacy Centre, *Submission 25*.
167 NSW Police Force, *Aboriginal Strategic Direction 2012–2017* (2015) 16.

14.127 In the Discussion Paper, the ALRC sought views of whether annual reporting may:

- allow for members within a particular police force to be made aware of all programs operating within a state or territory;
- encourage better engagement and understanding of programs within Aboriginal communities;
- assist those undertaking research to easily identify police programs and strategies;
- reveal where police are not engaging with a particular Aboriginal or Torres Strait Islander community that has high rates of offending behaviours and recidivism; and
- encourage best practice.

14.128 The NSW Bar Association responded:

> ... all State, Territory and Federal police forces should be required to report to their relevant Minister on the character, quantity and coverage of programs and courses/seminars on Indigenous cultural and social issues as recommended by the Royal Commission into Aboriginal Deaths in Custody in recommendations 225 and 228 of its final report.[168]

14.129 Submissions supported documenting police programs and public reporting.[169] For example, the National Aboriginal & Torres Strait Islander Legal Services supported public reporting for the following reasons:

> In order to collect data and ensure that the programs implemented are as effective as possible, it is essential that police document and evaluate these programs ... Reporting is essential for transparency and accountability. There are number of benefits:
>
> (a) keeping communities and local organisations informed of police initiatives;
>
> (b) ensuring that communities and organisations understand what measures are being taken by police to address local problems; and
>
> (c) facilitating better collaboration between police and community organisations (such as the numerous ATSILS) on such programs.[170]

14.130 A key consideration is how public reporting should be implemented. The ALRC's focus in the Discussion Paper was reporting in an annual report. However, annual reports are prepared in accordance with legislation. For example, the NSW Police Annual Report is prepared in accordance with the *Annual Reports (Departments) Act 1985* and the *Annual Reports (Departments) Regulation 2015* and is primarily intended to provide an account of operational expenditures to the government

168 NSW Bar Association, *Submission 88*.

169 Commissioner for Children and Young People Western Australia, *Submission 16*; Victorian Aboriginal Legal Service, *Submission 39*; Aboriginal Legal Service of Western Australia, *Submission 74*; Kimberley Community Legal Services, *Submission 80*.

170 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

and parliament.[171] This ensures accountability for the public expenditure of funds. Given that state and territory police are annually spending billions of dollars for states with large populations and hundreds of millions of dollars for states with small populations,[172] there is usually little information on activity at the level of the local police station or local area command in an annual report.[173] Instead, information is highly aggregated and considers the implementation of broad strategic directions rather than cataloguing individual initiatives. Often a single individual initiative is highlighted in an annual report as an example of the type of work police are undertaking across community. For instance, the 2016–17 Victoria Police Annual Report explained: 'More than 20 police joined over 70 Aboriginal participants from the Dungulay in Mileka program in the Massive Murray Paddle during November 2016. The event started in Yarrawonga and finished in Swan Hill over a course of 404 km.'[174]

14.131 Another challenge for reporting on initiatives through an annual report consistently across jurisdictions is that, in the NT and Tasmania, the police do not prepare standalone annual reports but contribute one part of a broader multi-agency report.[175]

14.132 The 2012–2013 Annual Report on ACT Policing provided an example of what is possible in terms of including information on programs and initiatives developed or implemented by police to build engagement with Aboriginal and Torres Strait Islander communities and support at risk youth.[176] The Annual Report includes a dedicated section to Aboriginal and Torres Strait Islander peoples with information required to be reported under the ACT Aboriginal Justice Agreement. The current (2016–17) Annual Report is much shorter and excludes this information.[177]

14.133 ALSWA noted that: 'The Western Australia Police website refers to the Aboriginal and Community Diversity Unit but provides no details about what programs and initiatives are actually undertaken; instead it is a mere statement of intention.'[178]

14.134 The ALRC suggests that police websites provide an outline of their work with Aboriginal and Torres Strait Islander peoples and communities. The websites should include details and evaluations of their community engagement strategies, protocols, procedures and programs designed to prevent or reduce offending behaviour and possible incarceration. The website should also contain year by year statistical data for the purpose of comparison and public assessment. Equally important is ensuring

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171 NSW Police Force, above n 136.

172 Productivity Commission, above n 5, Table 6A.10.

173 South Australia Police, *Annual Report 2016–17* (2017); Western Australia Police, above n 147; Northern Territory Police, Fire and Emergency Services, *2016–17 Annual Report* (2017); NSW Police Force, above n 136; Queensland Police Service, *Annual Report 2016–17* (2017); Victoria Police, *Annual Report 2016–17* (2017); Australian Federal Police, *ACT Policing Annual Report 2016-17* (2017); Tasmania Department of Police, Fire and Emergency Management, *2016–17 Annual Report* (2017).

174 Victoria Police, above n 173.

175 Northern Territory Police, Fire and Emergency Services, above n 173; Tasmania Department of Police, Fire and Emergency Management, above n 173.

176 Australian Federal Police, *ACT Policing Annual Report 2012-13* (2013) 137.

177 Australian Federal Police, above n 173.

178 Aboriginal Legal Service of Western Australia, *Submission 74*.

that police formally report regularly to the local community about police engagement with Aboriginal and Torres Strait Islander peoples including details of all programs and activities.

Succession Planning

14.135 During consultations for this Inquiry, succession planning was raised as an issue for the continuation of successful, innovative programs when a key police officer moves to another posting or retires.

14.136 The ALRC was made aware, for example, that the Tackling Violence program, which had been conducted by the NSW police for several years, ceased for a period upon the retirement of the police officer who had driven the program.[179]

14.137 The program was described in the NSW Police Force Aboriginal Strategic Direction 2012–2017 as using:

> … men and boys' love of rugby league to encourage them to be leaders and role models in the campaign against domestic violence in their communities. Tackling Violence is a mainstream program that is led by Aboriginal people to change attitudes about domestic violence. Participating teams work in partnership with Police Domestic Violence Region Coordinators, Domestic Violence Liaison Officers, Aboriginal Community Liaison Officers, Aboriginal Coordination Team and Local Area Commands.[180]

14.138 The ALRC acknowledges that succession planning for key roles can be challenging. For example, succession planning was a major feature of the Victorian Auditor-General's 2006 report, *Planning for a Capable Victoria Police Workforce*.[181] In 2011 the Office of Police Integrity identified limited succession planning as an ongoing issue and recommended that a framework for succession planning be implemented.[182]

14.139 Nevertheless the continuation of successful and innovative community engagement programs relies on careful and timely succession planning. Efforts to more broadly embed such programs within the core work of local area commands should be pursued to ensure that such programs are not wholly reliant on individual police officers.

Reconciliation Action Plans

14.140 In 2016, 767 Australian organisations had developed a Reconciliation Action Plan. A Reconciliation Action Plan is a type of strategic plan which provides a set of actions that a particular organisation will undertake to achieve reconciliation with Aboriginal and Torres Strait Islander peoples. Plans are designed and implemented with input from Reconciliation Australia, the national expert body on reconciliation.[183]

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179 The ALRC understands the program has now recommenced.
180 NSW Police Force, *Aboriginal Strategic Direction 2012–2017* (2015) 18.
181 Auditor-General of Victoria, *Planning for a Capable Victoria Police Workforce* (2006) [7.3.4].
182 Office of Police Integrity (Vic), *Enabling a Flexible Workforce for Policing in Victoria* (2011) 8.
183 Reconciliation Australia, *About Us* <https://www.reconciliation.org.au/about/>.

14.141 Reconciliation Australia has outlined the contribution that Plans can make to reconciliation:

> The Reconciliation Action Plan program contributes to achieving reconciliation by developing relationships, respect and opportunities with Aboriginal and Torres Strait Islander peoples. RAPs help workplaces to facilitate understanding, promote meaningful engagement, increase equality and develop sustainable employment and business opportunities.[184]

14.142 Reconciliation Action Plans contain a list of key objectives (or 'actions') and assign the task of delivering those objectives to individuals with time lines for delivery. Organisations that have adopted a Plan must report annually to Reconciliation Australia as to the achievement and outcome of their objectives.

14.143 The ALRC understands that only SA Police, Victoria Police and the AFP have Reconciliation Action Plans.

14.144 Kimberley Community Legal Services Inc proposed:

> ... the WA Police should be encouraged to enter RAPs. The process of developing and promoting RAPs can have educational, attitudinal and operational effects. On an organisational level, a formal recognition of the historic inequity in services provided to Aboriginal people has the potential to shift perception and make a concrete difference to responses and outcomes for Indigenous people.[185]

14.145 The 2017–2020 South Australian Police Plan lists 15 actions that include 'Create opportunities to support Aboriginal and Torres Strait Islander staff and increase employment pathways and outcomes within our workplace'.

14.146 The 2016 RAP Impact Measurement Report highlights the success of the implementation of Reconciliation Action Plans across Australia:

- 6,658 partnerships currently existing between RAP organisations and Aboriginal and Torres Strait Islander communities
- 19,413 Aboriginal and Torres Strait Islander people were working or studying in organisations with a current RAP
- 51,797 employees completed online cultural learning, 46,446 employees completed face-to-face cultural awareness training and 3,043 employees completed cultural immersion experience.[186]

14.147 The National Aboriginal & Torres Strait Islander Legal Services submitted:

> [Reconciliation Action Plans], among other great benefits, improve the perception of Aboriginal and Torres Strait Islander peoples, increase pride in Aboriginal and Torres Strait Islander cultures and increase the number of social interactions organisations

184 Reconciliation Australia, *2016 RAP Impact Measurement Report* (2017) 2.
185 Kimberley Community Legal Services, *Submission 80*.
186 Reconciliation Australia, *2016 RAP Impact Measurement Report* (2017) 6, 8, 10.

> have with Aboriginal and Torres Strait Islander peoples. A RAP will only improve police relationships with Aboriginal and Torres Strait Islander peoples.[187]

14.148 The Law Council of Australia was also supportive:

> The Law Council further submits that RAPs will have a significant impact on the services provided by the police force when engaging with Indigenous communities, promote cultural awareness and respect for Indigenous communities and Aboriginal people, and encourage and promote employment opportunities for Aboriginal people who may wish to join the police force.[188]

187 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
188 Law Council of Australia, *Submission 108*.

15. Child Protection and Adult Incarceration

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Summary

15.1 This chapter discusses the relationship between the child protection system, juvenile justice and adult incarceration. Research suggests that the links between these systems is so strong that child removal into out-of-home care and juvenile detention could be considered as key drivers of adult incarceration.

15.2 While child protection and juvenile detention fall outside the scope of this Inquiry, the ALRC considers that a national review of the child protection laws and processes that affect Aboriginal and Torres Strait Islander children is warranted.

A national review of out-of-home care

> **Recommendation 15–1** Acknowledging the high rate of removal of Aboriginal and Torres Strait Islander children into out-of-home care and the recognised links between out-of-home care, juvenile justice and adult incarceration, the Commonwealth Government should establish a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.

15.3 The ALRC is aware of current, and recent inquires that may encompass a review of child protection laws and processes for Aboriginal and Torres Strait Islander children, including the Royal Commission into the Protection and Detention of Children in the Northern Territory,[1] and the 2017 New South Wales Legislative

1 The Royal Commission made 11 separate negative findings in respect of children in out-of-home care in the Northern Territory at ch 33 of its report, 10 separate recommendations in respect of child protection oversight at ch 37 and 7 separate recommendations in respect to changing the approach to child protection in the Northern Territory at ch 39. See Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) rec 33.1–33.25.

Council Inquiry into Child Protection. The Royal Commission into Institutional Responses to Child Sexual Abuse has also recently reported on out-of-home care, which may include a national response focusing on the reduction of all abuse in that setting. State and territory governments have also developed out-of-home care strategies.[2] However, the ALRC notes that there has not been a national review of the laws and processes operating within the care and protection systems of the various states and territories. The Australian Human Rights Commission expressed support for such a review suggesting 'it is timely for a national review of the laws and processes operating within the care and protection system of states and territories'.[3]

15.4 In terms of this Inquiry, it is the view of the ALRC that the incarceration rate of adult Aboriginal and Torres Strait Islander peoples cannot be fully and satisfactorily addressed without a national review of Aboriginal and Torres Strait Islander children in child protection, and the state and territory laws that see such children placed into out-of-home care.

Crossover out-of-home care into detention

15.5 The Terms of Reference for this Inquiry do not include an investigation into child protection, child removal or the juvenile justice system. However, given the link between out-of-home care, juvenile justice and adult incarceration, a link that has been shown in many studies and reports, the ALRC considers that the issue warrants further attention.[4] In consultations, the ALRC was told many times of the normalisation of incarceration in many Aboriginal families, and in particular those where children have been removed, or have been in juvenile detention.

15.6 Juvenile detention is a key driver of adult incarceration. A 2005 study by Chen et al. into the likelihood of juveniles re-offending as adults, found that 90% of Aboriginal and Torres Strait Islander youths who appeared in a children's court went on to appear in an adult court within eight years—with 36% of these receiving a prison sentence later in life.[5]

15.7 The Royal Commission into Aboriginal Deaths in Custody reported in 1991 that almost half of the 99 Aboriginal and Torres Strait Islander people whose deaths were reviewed by that Commission had previously been removed from their parents.[6] The 1997 *Bringing them Home* Report further highlighted the relationship between out-of-

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2 Including the ACT Community Services Directorate Strategy July 2015–June 2020, NSW FACS—Shaping a Better Child Protection System Discussion Paper October 2017.

3 Australian Human Rights Commission, *Submission 43*.

4 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016) 7–17; Australian Institute of Health and Welfare, *Children and Young People at Risk of Social Exclusion: Links Between Homelessness, Child Protection and Juvenile Justice* (2012) 25–9; Pia Salmelainen, 'Child Neglect: Its Causes and Its Role in Delinquency' (Contemporary Issues in Crime and Justice No 33, NSW Bureau of Crime Statistics and Research, December 1996) 3–4; Don Weatherburn and Bronwyn Lind, *Social and Economic Stress, Child Neglect and Juvenile Delinquency* (1997).

5 Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System—Discussion Paper* (2010) 32.

6 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) 52.

home care and the increased likelihood of coming into contact with the criminal justice system.[7] Having a criminal record—particularly as a juvenile or as a young adult—in turn increases the likelihood of unemployment, poverty and substance abuse, which again increases the likelihood of future incarceration.[8]

15.8 The seriousness of the issue of the removal of Aboriginal and Torres Strait Islander children into out-of-home care was highlighted in the Australia Human Rights Commission Social Justice and Native Title Report 2015:

> The overrepresentation of Aboriginal and Torres Strait Islander children and young people in the child protection system is one of the most pressing human rights challenges facing Australia today.[9]

15.9 Young people placed in out-of-home care are 16 times more likely than the equivalent general population to be under youth justice supervision in the same year.[10] In its 2010 Report, *Family Violence—A National Legal Response*, the ALRC noted:

> There is a strong correlation between juvenile participation in crime and rates of reported neglect or abuse ... Research indicates that an offending child or young person is likely to have a history of abuse or neglect, and to have been in out-of-home care. In Victoria, a study of young people sentenced to imprisonment by the children's court over a period of eight months in 2001 found that 88% had been subject to an average of 4.6 notifications to the child protection agency. Almost one-third had been the subject of six or more notifications, and 86% had been in out-of-home care. Over half of these had had five or more care placements.[11]

15.10 This risk increases when the child is Aboriginal or Torres Strait Islander.[12] In 2014–15, Aboriginal and Torres Strait Islander children represented 90% of all children on care and protection orders.[13] At June 2015, Aboriginal and Torres Strait Islander children were placed into out-of-home care at 9.5 times the rate of non-Aboriginal children.[14]

15.11 In joint advice correspondence to the ALRC from Community Legal Centres NSW, Women's Legal Services NSW, Redfern Legal Centre, Kingsford Legal Centre, the Public Interest Advocacy Centre, Community Legal Centres NSW and the National

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7 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 164.

8 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 86–7.

9 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (Australian Human Rights Commission, 2015) 138.

10 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016).

11 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) [20.154].

12 Catia G Malvaso, Paul H Delfabbro and Andrew Day, 'The Child Protection and Juvenile Justice Nexus in Australia: A Longitudinal Examination of the Relationship between Maltreatment and Offending' (2017) 64 *Child Abuse & Neglect* 32; Australian Institute of Health and Welfare, above n 7, 8.

13 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) 4.92.

14 Australian Institute of Health and Welfare, above n 7, 54.

Association of Community Legal Centres,[15] attention was drawn to the links between out-of-home care, the criminal justice system and homelessness relying upon a 2012 study of the Australian Institute of Health and Wellbeing.[16]

15.12 The correspondence suggested that a review undertaken by Katherine McFarlane of some 111 NSW Children's Court criminal files[17] found that 34% of young people appearing before the court were, or had been, in out-of-home care, and that children in care were 68 times more likely to appear in the Children's Court than other children. McFarlane also identified that many of these children and young people were charged with assault against staff or damage of their out-of-home care property. Further, 26% of the care cohort and overall sample was female and 60% of the female care cohort was Aboriginal or Torres Strait Islander females.[18]

15.13 Judge Johnstone, President of the Children's Court of New South Wales, noted that children who had been placed into out-of-home care were over-represented in the criminal justice system.[19] Similarly, Mission Australia expressed alarm at the growing rate of Aboriginal and Torres Strait Islander children in out-of-home care that is now almost ten times that of other children, and the over-representation of these children in the juvenile justice system.[20] Mission Australia submitted that 'concerted efforts are required to address both of these concerning statistics through systems'.[21] Community Legal Centres New South Wales suggested:

> There is a clear connection between care and protection interventions of children and future offending, with complex social disadvantage and vulnerability impeding the ability of a significant majority of the young people accessing the Children's Court to meaningfully participate and engage in decisions that will have a long-lasting impact on their life course.[22]

15.14 The Royal Commission into the Protection and Detention of Children in the Northern Territory also noted the crossover of children in out-of-home care into detention finding that the NT Government agency, 'Territory Families', and its

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15 Advice correspondence to the ALRC from Community Legal Centres NSW, Women's Legal Services NSW, Redfern Legal Centre, Kingsford Legal Centre, the Public Interest Advocacy Centre, Community Legal Centres NSW and the National Association of Community Legal Centres provided to the Australian Law Reform Commission dated 24 April 2017.

16 Australian Institute of Health and Welfare, *Children and Young People at Risk of Social Exclusion: Links Between Homelessness, Child Protection and Juvenile Justice* (2012) vii.

17 McFarlane examined 111 Children's Court criminal matter files heard at Parramatta Children's Court on specific days, chosen at random, from a six-month period between June and December 2009.

18 Katherine McFarlane, 'From Care to Custody: Young Women in out-of-Home Care in the Criminal Justice System' (2010) 22(2) *Current Issues in Criminal Justice* 346.

19 Judge Peter Johnstone, 'Cross-Over Kids—The Drift of Children From the Child Protection System Into the Criminal Justice System' (Speech, Noah's on the Beach, Newcastle, 5 August 2016) 22.

20 Mission Australia, *Submission 53*.

21 Ibid.

22 Community Legal Centres NSW (CLCNSW) and the CLCNSW Aboriginal Advisory Group, *Submission 95*.

predecessors, had failed to provide the support required for some children in out-of-home care to avoid pathways likely to lead them into the youth justice system.[23]

Removal

15.15 There has been significant criticism of the various state and territory child protection systems where there has been a nationwide increase in the number of Aboriginal and Torres Strait Islander children in out-of-home care. In their 2017 report, the Australian Institute of Health and Welfare found that, as at 30 June 2016, there were:

> 16,846 Aboriginal and Torres Strait Islander children in out-of-home care—a rate of 56.6 per 1,000 children. Across jurisdictions, rates ranged from 27.3 per 1,000 in Tasmania to 87.4 per 1,000 in Victoria ... Nationally, the rate of Indigenous children in out-of-home care was 10 times the rate for non-Indigenous children. In all jurisdictions, the rate of Indigenous children in out-of-home care was higher than that for non-Indigenous children, with rate ratios ranging from 3.4 in Tasmania to 17.5 in Western Australia.[24]

15.16 The Australian Institute of Family Studies, commenting on these statistics, highlighted the stark disparity between Aboriginal and Torres Strait Islander child removal as compared to non-Indigenous child removal noting:

> Australian Bureau of Statistics (ABS) population projection data for 30 June 2016 indicates that Aboriginal and Torres Strait Islander children would comprise 5.5% of all children aged 0-17 years in Australia; yet in 2015-16 they constituted 36.2% of all children placed in out-of-home care.[25]

15.17 Grandmothers Against Removal, a national Aboriginal Elders group of grandmothers affected by the removal of Aboriginal children, stated:

> The number of Aboriginal children in "out of home care," is higher than ever and rising rapidly. Far more children are being taken today than during the Stolen Generations of the 20th Century. The numbers have increased 400 per cent since Kevin Rudd's "apology" for the crimes of the past. The proportion of children being placed with their Aboriginal family is also steadily declining. Many end up in the juvenile detention system and Aboriginal children are 28 times more likely to be in prison than non-Aboriginal children.[26]

15.18 Further, Adelaide Titterton suggests that the numbers of children being removed from their families and put into out-of-home care could create a new Stolen Generation of Aboriginal children:

> [T]he disproportionately high levels of Indigenous children currently in out-of-home care calls into question what options Indigenous families have available to them to avoid their children being 'taken away'. Many have suggested that the over-

23 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report* (2017) 3B.

24 Australian Institute of Health and Welfare, *Child Protection Australia 2015–16* (2017) 52.

25 Australian Institute of Health and Welfare, *Children in Care: Resource Sheet— October 2017* (2017).

26 Grandmothers Against Removals Sydney, *Home* <http://stopstolengenerations.com.au/>.

> representation of Indigenous children in out-of-home care risks creating another 'Stolen Generation'.[27]

15.19 Natalie Lewis raised significant alarm around the growth of Aboriginal and Torres Strait Islander children entering into out-of-home care suggesting:

> If we continue to do what we are currently doing in child protection, the numbers of Aboriginal and Torres Strait Islander children in out-of-home care (OOHC) will at least treble in the next 20 years. The outlook is even worse than the data predicted last year. The rates of over-representation of Aboriginal and Torres Strait Islander children continue to increase across jurisdictions. Not only are we not closing the gap, we are failing to arrest the widening of the gap.[28]

15.20 Central Australian Aboriginal Congress submitted to this Inquiry that the Northern Territory Government needed to devise a comprehensive strategy to address out-of-home care for Aboriginal children in the Northern Territory.[29] Australians for Native Title and Reconciliation Queensland Inc also supported the proposal for a national review of out-of-home care stating:

> Given the links between OOHC and incarceration AQ fully supports the Discussion Paper *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples'* proposal that a national review of the laws and processes operating within the care and protection systems of the various states and territories be undertaken as a further essential response to address the over-representation of Aboriginal and Torres Strait Islander people within both the institutions of welfare and of justice.[30]

15.21 The Taskforce 1000 investigation, *Always was, always will be Koori children: a systemic inquiry into services provided to Aboriginal children and young people in out-of-home care in Victoria*, raised significant concerns about the care and protection system operating in Victoria. The Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos, found that, while children were taken from home for their own safety, many went on to suffer physical, mental and cultural neglect across multiple agencies, including child protection, police, education, and health.[31]

15.22 Commenting at the time of the release of the Taskforce 1000 final report Commissioner Jackomos stated:

> Many children did not know they were Aboriginal, were split from siblings, and left for years in residential care – isolated from family, culture and country – when they might have been in the loving care of grandparents or other relatives... We had child

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27 Adelaide Titterton, 'Indigenous Access to Family Law and Caring for Indigenous Children' 40(1) *UNSW Law Journal* 146, 152.

28 Secretariat of National Aboriginal and Islander Child Care (SNAICC), University of Melbourne, Griffith University and Save the Children *Family Matters Report* (2017) 3.

29 Central Australian Aboriginal Congress, *Submission 37*.

30 Australians for Native Title and Reconciliation Queensland Inc, *Submission 49*.

31 Commission for Children and Young People, *Always Was, Always Will Be Koori Children–Investigation into the Circumstances of Aboriginal Children and Young People in out-of-Home Care in Victoria* (2016) 11–2.

> protection officials tell us they had been unable to trace a child's Aboriginal family for years when we were able to track them down on Facebook within minutes.[32]

15.23 The report found of 980 Aboriginal children and young people in out-of-home-care more than 86 per cent were case managed by a non-Indigenous agency, 60 per cent placed with a non-Indigenous carer, 42 per cent away from their extended family, and more than 40 per cent separated from brothers and sisters.[33] The report further found that, in Victoria, Aboriginal children are 12.9 times more likely than non-Indigenous children to be placed into out-of-home care and represent 17.6% of all children in state care despite Aboriginal peoples comprising less than 1% of the Victorian population.[34]

Costs

15.24 The Australian Human Rights Commission Social Justice and Native Title Report 2015 found the costs of providing child protection and out-of-home care services are increasing. Nationally, approximately $3.3 billion was spent in 2013–14, representing a $77.8 million increase from the previous year and a total increase of $543.4 million since 2009–10.[35]

15.25 The Report set out the extremely high cost of child protection services across the various states and territories for the period 2013–2014 as being:

> Cost per notification:
>
> > NSW: $513, VIC: $309, QLD: $996, WA: $1,178, SA: $687, TAS: $358, ACT: NA, NT: $549
>
> Cost per notification investigated:
>
> > NSW: $1,111, VIC: $1,626, QLD: $2,322, WA: $1,843, SA: $1,395, TAS: $2,080, ACT: $1,461, NT: $1,204
>
> Cost per child commencing protective intervention who is on an order:
>
> > NSW: $24,262, VIC: NA, QLD: $16,328, WA: $8,793, SA: $9,108, TAS: $4,433, ACT: $7,530, NT: $17,087
>
> Cost per placement night:
>
> > NSW: $123, VIC: $152, QLD: $143, WA: $174, SA: $170, TAS: $122, ACT: $146, NT: $279.[36]

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32 Commissioner for Children and Young People, *Victoria's Child Protection Has Failed Aboriginal Children, a Landmark Report Has Found* Media release <https://ccyp.vic.gov.au/news/always-was-always-will-be-koori-children-report/>.

33 Commission for Children and Young People, *Always Was, Always Will Be Koori Children–Investigation into the Circumstances of Aboriginal Children and Young People in out-of-Home Care in Victoria* (2016) 10.

34 Ibid.

35 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 6, 149.

36 Ibid.

15.26 The ALRC considers that a national review of the out-of-home care system would be able to address the question of whether a different approach modelled on Justice Reinvestment approaches could make more effective use of the resources that are currently being expended on the child removal.

16. Criminal Justice Targets and Aboriginal Justice Agreements

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Summary

16.1 Reducing Aboriginal and Torres Strait Islander incarceration requires a coordinated governmental response, and effective collaboration with Aboriginal and Torres Strait Islander peoples. This chapter makes two recommendations that aim to improve both of these. It recommends that there should be national targets to reduce both the rate of incarceration of Aboriginal and Torres Strait Islander people, and the rate of violence against Aboriginal and Torres Strait Islander people. Both goals are interrelated, and will facilitate improvements not only in the rate at which Aboriginal and Torres Strait Islander people come in contact with the criminal justice system, but also in community safety.

16.2 The ALRC also recommends that Aboriginal Justice Agreements (AJAs) should be in place in states and territories. The success of many of the recommendations made in this Report relies on the development of collaborative relationships between government and peak Aboriginal and Torres Strait Islander organisations. AJAs can provide a foundation on which to facilitate, build, and solidify these relationships.

Criminal justice targets

Recommendation 16–1 The Commonwealth Government, in consultation with state and territory governments, should develop national criminal justice targets. These should be developed in partnership with peak Aboriginal and Torres Strait Islander organisations, and should include specified targets by which to reduce the rate of:

- incarceration of Aboriginal and Torres Strait Islander people; and
- violence against Aboriginal and Torres Strait Islander people.

16.3 The ALRC recommends that there should be national criminal justice targets to reduce both the rate of incarceration of Aboriginal and Torres Strait Islander people, and the rate of violence against Aboriginal and Torres Strait Islander people.

16.4 These should be developed by the Commonwealth Government, in consultation with state and territory governments, and in partnership with peak Aboriginal and Torres Strait Islander organisations.

16.5 Criminal justice targets will focus attention on achieving tangible outcomes in reducing incarceration and victimisation, and improve accountability in relation to these. They will also promote whole-of-government cooperation and coordination to achieve them. Submissions considering criminal justice targets gave unanimous support to their introduction.[1]

Closing the Gap targets

16.6 In 2005, Tom Calma AO, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, called on the Australian Government to commit to achieving equality for Aboriginal and Torres Strait Islander peoples in the areas of health and life expectancy within 25 years.[2] This led to the National Indigenous Health Equality Campaign in 2006, and to the adoption of the Close the Gap Campaign that demanded state, territory and federal governments commit to closing the health and life expectancy gap between Aboriginal and Torres Strait Islander peoples and other Australians within a generation.[3]

16.7 In 2008, the Council of Australian Governments (COAG) approved the National Indigenous Reform Agreement, setting out six Closing the Gap targets to:

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1 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; National Association of Community Legal Centres, *Submission 94*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; National Congress of Australia's First Peoples, *Submission 73*.

2 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005* (Australian Human Rights Commission, 2005).

3 Australian Indigenous HealthInfoNet, *History of Closing the Gap* < www.healthinfonet.ecu.edu.au >.

- close the life expectancy gap within a generation;
- halve the gap in mortality rates for Indigenous children under five within a decade;
- ensure access to early childhood education for all Indigenous four year olds in remote communities within five years;
- halve the gap in reading, writing and numeracy achievements for children within a decade;
- halve the gap for Indigenous students in year 12 attainment rates by 2020; and
- halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade.[4]

16.8 In 2014, a new target to close the gap in school attendance by the end of 2018 was agreed to.[5] The 2017 Prime Minister's Report on progress to meet these targets indicates that only the target to halve the gap in Year 12 attainment rates is on track to be achieved.[6]

16.9 In 2017, nearing the tenth anniversary of Closing the Gap, Commonwealth, state and territory governments have agreed to work together with Aboriginal and Torres Strait Islander leaders, organisations, communities and families on a refreshed agenda and renewed targets.[7]

16.10 This is an opportune time to develop criminal justice targets as part of a renewed whole-of-government commitment to address Aboriginal and Torres Strait Islander disadvantage.

16.11 There have been sustained calls to adopt justice targets as part of the Closing the Gap framework.[8] The Australian Government has previously resisted this, arguing that the adoption of additional targets will dilute the impact of existing targets, and that targets at the Commonwealth level are not appropriate, given that responsibility for

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4 Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)* (2008) 8. The early childhood education target was renewed in 2015 to a target of 95 per cent of all Indigenous four-year-olds enrolled in early childhood education by 2025: Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017) 7.

5 Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017) 7.

6 Ibid 6–7.

7 Department of Prime Minister and Cabinet (Cth), *Closing the Gap* <www.pmc.gov.au/indigenous-affairs/closing-gap>; Council of Australian Governments, *Communiqué* (Hobart, 9 June 2017).

8 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (Australian Human Rights Commission, 2009); Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (Australian Human Rights Commission, 2014). For further background on support for criminal justice targets, see: Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 53–8.

criminal justice issues relating to Aboriginal and Torres Strait Islander peoples largely rest with the states and territories.[9]

16.12 However, as Chapter 2 discusses more fully, the forms of disadvantage experienced by Aboriginal and Torres Strait Island peoples that are the subject of existing targets are deeply interrelated with incarceration. As the National Congress of Australia's First Peoples argued:

> Incarceration has severe flow on effects on all factors of family and community life, particularly in the case of female incarceration, and thus impacts factors like life expectancy, health outcomes and education attainment—all aspects of Closing the Gap measures.[10]

16.13 The Australian Government can provide national leadership on this issue, and drive coordinated action to achieve the target. The Law Council of Australia submitted:

> Australian governments must work together and in proper consultation with Aboriginal and Torres Strait Islander organisations to find and implement effective solutions. The introduction of a justice target in the Closing the Gap framework, accompanied by a considered and properly funded intergovernmental strategy is likely to lead to greater consistency in the implementation of programs across Australia and encourage greater accountability by governments.[11]

16.14 The Aboriginal and Torres Strait Islander Social Justice Commissioner has articulated the value of targets in terms of the cooperative action they promote:

> It is not the targets in and of themselves that have led to changes but the enhanced level of cooperation at the Council of Australian Governments level and targeted increases in funding. However, without the targets in place to guide this work, and a mechanism whereby the Prime Minister annually reports to Parliament against these targets, there is a real risk that our progress would stall.[12]

Target to reduce incarceration and victimisation

16.15 The ALRC recommends that criminal justice targets be focused on reductions in both the rate of incarceration of Aboriginal and Torres Strait Islander people, and the rate of violence against Aboriginal and Torres Strait Islander people. The latter target is particularly significant for Aboriginal and Torres Strait Islander women. As discussed in Chapter 11, Aboriginal and Torres Strait Islander women are disproportionately likely to experience family violence. Moreover, Aboriginal and Torres Strait Islander women prisoners are highly likely to have experienced family and other violence. The ALRC considers that both targets are interrelated, and will facilitate improvements not

9 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 54.

10 National Congress of Australia's First Peoples, *Submission 73*. See also National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Public Interest Advocacy Centre, *Submission 25*.

11 Law Council of Australia, *Submission 108*.

12 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (Australian Human Rights Commission, 2014) 119.

only in the rate at which Aboriginal and Torres Strait Islander people come in contact with the criminal justice system, but also in community safety.[13]

Suggested targets

16.16 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.

16.17 There was significant support in submissions for the targets recommended by the Change the Record Coalition, a coalition of Aboriginal and Torres Strait Islander, human rights and community organisations. Its '*Blueprint for Change*' for Aboriginal and Torres Strait Islander incarceration rates recommended the following targets:

- close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040; and
- cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040; with priority strategies for women and children.[14]

16.18 Other submissions agreed that targets should be developed in consultation with Aboriginal and Torres Strait Islander organisations.[15] The Criminal Lawyers Association of the Northern Territory cautioned that targets need to be realistic,[16] while the Australian Capital Territory (ACT) Government endorsed the value of targets that 'stretch' governments to achieve them.[17]

16.19 A number of submissions argued that 'headline' targets should be accompanied by sub-targets.[18] For example, the Aboriginal Legal Service of Western Australia (ALSWA) suggested that, a target to reduce incarceration could include sub-targets for:

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13 Change the Record Coalition, *Blueprint for Change* (Change the Record Coalition Steering Committee, 2015) 5. See also, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; National Legal Aid, *Submission 103*; Amnesty International Australia, *Submission 89*; Just Reinvest NSW, *Submission 82*; Aboriginal Legal Service of Western Australia, *Submission 74*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; NSW Council of Social Service, *Submission 45*; Australian Human Rights Commission, *Submission 43*.

14 Change the Record Coalition, above n 13, 5. See, eg, National Association of Community Legal Centres, *Submission 94*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Victoria Legal Aid, *Submission 56*; NSW Council of Social Service, *Submission 45*; Australian Human Rights Commission, *Submission 43*.

15 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Jesuit Social Services, *Submission 100*; Kimberley Community Legal Services, *Submission 80*; ANTaR, *Submission 76*; National Congress of Australia's First Peoples, *Submission 73*; Indigenous Allied Health Australia, *Submission 57*.

16 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

17 ACT Government, *Submission 110*.

18 See, eg. National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; UNICEF Australia, *Submission 104*; National Association of Community Legal Centres, *Submission 94*; NSW Bar Association, *Submission 88*; Aboriginal Legal Service of Western Australia, *Submission 74*; Australian Human Rights Commission, *Submission 43*. As noted above, many other submissions supported the

- reduced arrest rates;
- reduced numbers of people in remand;
- increased police diversion;
- increased resourcing for Aboriginal Community Controlled programs and services;
- increased compliance rates for community-based orders; and
- increased numbers of prisoners released on parole.[19]

16.20 ALSWA further suggested that a target to reduce violence could include sub-targets for:

- increased alternative accommodation facilities for victims and perpetrators;
- increased resources for Indigenous-specific legal services to assist victims of violence; and
- increases in culturally competent perpetrator programs.[20]

16.21 A number of submissions argued that one sub-target should relate to resourcing of Aboriginal and Torres Strait Islander organisations.[21]

Targets must be supported by other frameworks

16.22 The adoption of criminal justice targets needs to be supported by a plan and resources to achieve them. The approach taken for existing Closing the Gap targets provides a model for this. Closing the Gap targets are contained within a 'National Agreement' between the Commonwealth and states and territories—the National Indigenous Reform Agreement.[22]

16.23 A National Agreement is a key component of the federal financial relations framework—a framework through which the Commonwealth and the States collaborate on policy development and service delivery to implement that agenda.[23] A National Agreement defines objectives, outcomes, outputs and performance indicators, and clarifies the roles and responsibilities that guide the Commonwealth and the states and territories in the delivery of services in key sectors.[24]

Blueprint for Change recommendation in relation to criminal justice targets, which includes a recommendation that there be measurable sub-targets.

19 Aboriginal Legal Service of Western Australia, *Submission 74*.

20 Ibid.

21 See, eg, National Association of Community Legal Centres, *Submission 94*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*.

22 Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)* (2008).

23 Council on Federal Financial Relations, *A Short Guide to the Intergovernmental Agreement on Federal Financial Relations and the Federal Financial Relations Framework* (2016) 2.

24 Council of Australian Governments, *Intergovernmental Agreement on Federal Financial Relations* (2008) sch E.

16.24 The National Indigenous Reform Agreement is further supported by a number of 'National Partnership agreements', on specific areas, such as Indigenous early childhood development, remote service delivery and Indigenous economic participation. National Partnership agreements 'define the mutually agreed objectives, outcomes, outputs and performance benchmarks or milestones related to the delivery of specific projects, improvements in service delivery or reform'.[25]

16.25 The ALRC considers that criminal justice targets would need to be similarly supported by agreements within the federal financial relations framework. The recommendation for criminal justice targets in the Change the Record Coalition's *Blueprint for Change*, endorsed by many of the submissions in this Inquiry, also called for a National Agreement to accompany the setting of criminal justice targets.[26]

16.26 The ALRC also considers that regular public reporting of progress against the criminal justice targets should occur. The Prime Minister reports progress against the Closing the Gap targets to Parliament annually.[27] When requested by COAG, the Productivity Commission is also responsible for providing an independent assessment of the progress of the Commonwealth, state and territory governments toward the Closing the Gap targets, and associated performance indicators,. Its last report to date was for the 2013–14 year.[28]

Aboriginal Justice Agreements

Recommendation 16–2 Where not currently operating, state and territory governments should renew or develop an Aboriginal Justice Agreement in partnership with relevant Aboriginal and Torres Strait Islander organisations.

16.27 The ALRC considers that AJAs should operate in all state and territory jurisdictions. Submissions to this Inquiry considering this issue gave unanimous support to the development of AJAs.[29]

16.28 An AJA is a formal agreement between governments and Aboriginal and Torres Strait Islander communities to work together to improve justice outcomes. It enables strategic planning in relation to criminal justice issues affecting Aboriginal and Torres Strait Islander peoples, enabling the creation of joint justice objectives across departments and agencies. It facilitates partnerships between government and

25 Council on Federal Financial Relations, above n 23, 3.
26 Change the Record Coalition, above n 13, 5.
27 See, eg, Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017).
28 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) box 1.2.1.
29 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Just Reinvest NSW, *Submission 82*; Kimberley Community Legal Services, *Submission 80*; Human Rights Law Centre, *Submission 68*; Northern Territory Legal Aid Commission, *Submission 46*; Indigenous Allied Health Australia, *Submission 57*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*.

Aboriginal and Torres Strait Islander communities and organisations at multiple levels, including at the local level, to work together to develop, implement and evaluate responses to over-incarceration. It also improves accountability—setting out clear objectives and providing measurable action plans.[30]

16.29 State and territory governments may have other justice strategies or frameworks that seek to reduce Aboriginal and Torres Strait Islander incarceration. However, the ALRC considers that AJAs are an important initiative to promote partnership with Aboriginal and Torres Strait Islander peoples, drive strategic planning, and facilitate collaborative, culturally appropriate, and effective criminal justice responses.

16.30 The success of many of the recommendations made in this Report relies on the development of collaborative relationships between government and relevant Aboriginal and Torres Strait Islander organisations. AJAs can provide a foundation on which to facilitate, build and solidify these relationships.

16.31 AJAs may be challenging to develop. They rely on government agencies working together, and the development, identification and engagement of relevant Aboriginal and Torres Strait Islander organisations.[31] States and territories that seek to formalise Aboriginal and Torres Strait Islander participation in criminal justice decision making would need to develop suitable governance structures that reflect the diversity of Aboriginal and Torres Strait Islander communities in that jurisdiction.

History of Aboriginal Justice Agreements

16.32 AJAs were first introduced following a summit of key Aboriginal and Torres Strait Islander organisations in 1997. These organisations were concerned about a gap in state and territory government accountability left after the requirement for state and territories to report on Aboriginal and Torres Strait Islander incarceration, as recommended by the Royal Commission into Aboriginal Deaths in Custody, concluded.[32] Subsequently, these organisations met with Commonwealth, state and territory ministers responsible for criminal justice, and it was resolved to develop AJAs.[33]

16.33 At their inception, AJAs were to be developed in all states and territories (excluding the Northern Territory (NT)) in partnership with Aboriginal and Torres Strait Islander groups. They were required to cover the 'delivery, funding, and coordination of Indigenous programs and services'.[34] AJAs were to include, among other things, targets to reduce the rate of over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system and to decrease incarceration rates.

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30 See further Fiona Allison and Chris Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People' (2010) 32 *Sydney Law Review* 645.

31 Fiona Allison and Chris Cunneen, 'Indigenous Justice Agreements' (Current Initiatives Paper No 4, Indigenous Justice Clearinghouse, June 2013) 3.

32 Allison and Cunneen, above n 30, 648–9.

33 Ibid 649.

34 Allison and Cunneen, above n 31, 1–2.

16.34 Not all jurisdictions adopted an AJA. The AJAs of states and territories are outlined in the table below.

Table 16.1: Aboriginal Justice Agreements in states and territories 2000–2017

State or territory	Year	Agreement	Status
ACT	2010	ACT Government, *Aboriginal and Torres Strait Islander Agreement 2010–2013*	Expired
	2015	ACT Government, *Aboriginal and Torres Strait Islander Agreement 2015–2018*	Active
NSW	2003	Aboriginal Justice Advisory Council, *NSW Aboriginal Justice Agreement*	Expired
	2004	Aboriginal Justice Advisory Council, *Aboriginal Justice Plan: Beyond Justice 2004–2014*	Expired
NT	n/a	Not adopted	Under development
Qld	2000	Queensland Government, *The Queensland Aboriginal and Torres Strait Islander Justice Agreement (2000–2011)*	Evaluated in 2006, expired in 2011
SA	n/a	Not adopted	
Tas	n/a	Not adopted	
Vic	2000	Department of Justice (Vic), *The Victorian Aboriginal Justice Agreement Phase 1*	Expired
	2006	Department of Justice (Vic), *The Victorian Aboriginal Justice Agreement Phase 2*	Expired, evaluated in 2012
	2013	Department of Justice (Vic), *The Victorian Aboriginal Justice Agreement Phase 3*	Active, evaluation due 2018
WA	2004	Government of Western Australia, *Western Australian Aboriginal Justice Agreement 2004–2009*	Expired
	2009	State Aboriginal Justice Congress, *State Justice Plan: Aboriginal Community Solutions for Statewide Issues (2009–2014)* (A non-government strategy developed under the AJA)	Expired

16.35 The ACT and Victoria have current AJAs. The NT is currently developing an AJA. All other states either did not adopt an agreement, or the AJA has lapsed.

16.36 AJAs generally involve numerous state and territory government portfolios, including: Premier and Cabinet; Aboriginal and Torres Strait Islander policy development; Justice and Attorney-General; Police; Corrective Services; and Family Services.[35]

35 See, eg, parties to the Queensland and Victorian Aboriginal Justice Agreements.

The ACT Partnership

16.37 The ACT AJA—called 'the Partnership'—was developed with the ACT Aboriginal and Torres Strait Islander Elected Body in 2015.[36] The Partnership includes an action plan to reduce the average number of Aboriginal and Torres Straits Islander people in prison to less than 10% of the prison population. It aims to do this by 'improving accessibility, utilisation and effectiveness of justice-related programs and services', including diversionary programs.[37]

16.38 The 'action plan' outlines key initiatives, measures and delegates for each program. In the area of criminal justice, this includes: developing culturally appropriate corrective services programs; increasing participation in throughcare; creating outreach support to aid compliance with community-based orders; and maximising existing diversion options.[38]

16.39 The Partnership and its actions are to be monitored by the Elected Body and the Aboriginal and Torres Strait Islander Sub-committee of the ACT Public Service Strategic Board. Annual community forums seeking feedback from the community on the effectiveness of service outcomes are to be held, and publicly available progress reports are to be submitted to the ACT Attorney-General annually.[39]

The Victorian agreements

16.40 Victoria has taken a long-term, staged approach to developing an AJA. The first phase began with AJA1 which, among other things, created infrastructure to facilitate ongoing, multi-layered collaboration with government and Aboriginal and Torres Strait Islander groups, including the creation of the Aboriginal Justice Forum and Regional and Local Aboriginal Justice Advisory Committees (RAJAC).[40]

16.41 The Aboriginal Justice Forum (AJF) meets three times per year and is constituted by Victorian Government representatives and the Koori Caucus. The Caucus is comprised of representatives from the nine RAJACs and other peak Aboriginal and Torres Strait Islander organisations. The Caucus meets six weeks prior to the AJF to determine and discuss issues for the agenda, and again the day before the AJF.[41]

16.42 AJA2 outlined a government action plan and set benchmarks for monitoring the success of the programs developed under the Agreement.[42]

16.43 The Victorian AJAs were evaluated in 2012. The evaluation found that the Agreements delivered 'significant improvements in justice outcomes for Koories in

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36 As noted below, it was developed with reference to the *National Indigenous Law and Justice Framework 2009–2015*.

37 ACT Government, *ACT Aboriginal and Torres Strait Islander Justice Partnership 2015–2018* (2015) 3.

38 Ibid 10–12, actions 1.1–1.8.

39 Ibid 34.

40 Allison and Cunneen, above n 31, 4.

41 Koori Justice Unit (Vic), *Understanding the Victorian Aboriginal Justice Agreement (AJA): A Partnership between the Victorian Government and Koori Community*.

42 Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) 26–28.

Victoria', but that improvements could be made.[43] For example, it found that there were limited diversion options available for women, one of a number of key risk points in the system that could be strengthened to reduce over-representation.[44]

16.44 The evaluation found that, while Aboriginal and Torres Strait Islander over-representation had increased, the increase was less than would have been expected without AJA2.[45] The evaluation further found that AJA2 had delivered 'gross benefits' to Victoria of between $22 and $26 million, and it recommended the development of AJA3.[46]

16.45 AJA3 was introduced in 2013. AJA3 expanded on the programs—including diversion programs for Aboriginal and Torres Strait Islander women—and targets of AJA2, and has six objectives:

- crime prevention and early intervention;
- diversion and strengthening alternatives to imprisonment;
- reducing re-offending;
- reducing conflict, violence and victimisation;
- responsive and inclusive services; and
- strengthening community justice responses and improving community safety.[47]

Northern Territory

16.46 The NT Government, through the Aboriginal Justice Unit located within the Department of the Attorney-General and Justice, began consultations to develop an AJA in July 2017:

> the AJU will focus on gathering information and perspectives from remote and regional communities in the NT to drive the development of the content of the AJA.
>
> It is intended that under the framework of the AJA, NTG will enter into a partnership with Aboriginal and non-government organisations to address the complex issues that contribute to the disadvantage and rising incarceration and recidivism rates of Aboriginal Territorians.[48]

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43 Ibid 3.

44 Ibid 54. Other risk points identified included: the need to address drivers of offending through a whole-of-government approach; the need for additional support for offenders prior to court; and gaps in transition support: at 52–6.

45 Ibid fig 1.

46 Ibid 57.

47 Victorian Government, *Victorian Aboriginal Justice Agreement Phase 3 (AJA3): A Partnership between the Victorian Government and the Koori Community* (2013) pt 4.

48 Northern Territory Government, *Submission 118*.

How should Aboriginal Justice Agreements be developed?

Collaboration with Aboriginal and Torres Strait Islander peoples

16.47 AJAs provide an important means by which partnerships with Aboriginal and Torres Strait Islander peoples can be developed or strengthened, as well as an opportunity to ensure that Aboriginal and Torres Strait Islander peoples are centrally involved in policy development affecting them. Many submissions emphasised the need for genuine partnership with Aboriginal and Torres Strait Islander peoples in developing justice strategies.[49] As the Australian Red Cross stressed, 'to be successful, any response to justice issues for Aboriginal and Torres Strait Islander peoples must be driven and owned by Aboriginal and Torres Strait Islander communities and organisations'.[50]

16.48 The North Australian Aboriginal Justice Agency (NAAJA), quoting Rob Hulls, the former Victorian Attorney-General, argued that the NT AJA represented an 'opportunity to lead the nation', so long as it was born out of genuine consultation with Aboriginal and Torres Strait Islander peoples. NAAJA emphasised the importance of consultation, but noted also the issue of 'consultation fatigue' in circumstances where policy changes have been frequent.[51] It is clear that the AJA must found a sustained commitment to working with Aboriginal and Torres Strait Islander communities to meet shared and agreed upon objectives.

16.49 Victorian Aboriginal Legal Service commended the value of the staged approach taken by Victoria to developing its AJA, which first concentrated on 'developing key infrastructure to facilitate collaboration between government and the Aboriginal community'.[52]

Flexible and responsive to context

16.50 The NT Anti-Discrimination Commission noted in its submission supporting the value of AJAs, 'each jurisdiction will have a unique demographic, geography, profile of Aboriginal communities and history of that jurisdiction'.[53] As a result, there is no single template for an AJA that can be used across Australia. Each AJA will need to be developed from the bottom up, through extensive consultation with Aboriginal and Torres Strait Islander peoples. This is likely to take considerable time—in the NT, consultation commenced in July 2017 and the final agreement is expected in December 2018.[54]

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49 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*; National Congress of Australia's First Peoples, *Submission 73*; Victoria Legal Aid, *Submission 56*; Mission Australia, *Submission 53*; Northern Territory Legal Aid Commission, *Submission 46*; Australian Human Rights Commission, *Submission 43*; Dr A Hopkins, *Submission 24*; Australian Red Cross, *Submission 15*.

50 Australian Red Cross, *Submission 15*.

51 North Australian Aboriginal Justice Agency, *Submission 113*.

52 Victorian Aboriginal Legal Service, *Submission 39*.

53 Northern Territory Anti-Discrimination Commission, *Submission 67*. See also Jesuit Social Services, *Submission 100*.

54 Northern Territory Government, *Submission 118*.

16.51 The Kimberley Community Legal Service argued that any governance mechanisms for AJAs should be careful not to supplant or undermine existing governance in Aboriginal communities: '[f]lexibility with regard to the regional governance mechanism must be a central consideration in developing AJAs, as particular details of regional and local bodies would necessarily differ from community to community and region to region'.[55]

16.52 In a similar vein, Legal Aid NSW argued that consideration should be given to whether a set of local AJAs may be preferable to a statewide AJA in NSW.[56]

Key features of Aboriginal Justice Agreements

Joint objectives

16.53 AJAs should provide for the creation of joint justice objectives across government departments and agencies. Programs and initiatives to address incarceration rates can otherwise be siloed from other agencies and initiatives.

16.54 The Law Council of Australia submitted that:

> AJAs are likely to have also led to increased whole-of-government planning directed towards addressing Aboriginal and Torres Strait Islander social disadvantage, relevant to addressing rates of incarceration. Further, three of the five jurisdictions which have developed an AJA since 2000 have also formulated whole-of-government 'overarching' Aboriginal and Torres Strait Islander strategic policy, covering a broader social and economic framework, with some emphasis on justice issues.[57]

16.55 In the Western Australian context, Kimberley Community Legal Services argued that 'without an AJA, efforts to minimise the overrepresentation of Aboriginal people in WA's criminal justice system will continue to be diminished by the lack of coordination between WA justice programs'.[58]

16.56 Reflecting on the Victorian AJA, Jesuit Social Services observed that 'AJAs have a positive impact by focusing government attention on the need to work to address ATSI justice issues, and by contributing to a more coherent government focus on those issues'.[59]

Aboriginal and Torres Strait Islander governance

16.57 AJAs should facilitate participation through agreed systems of governance. The Change the Record Coalition saw AJAs as operationalising the principle of self-determination:

> Community control and ownership is essential for strategies to address the high rates of incarceration to be successful, and Aboriginal Justice Agreements are a valuable

55 Kimberley Community Legal Services, *Submission 80*.
56 Legal Aid NSW, *Submission 101*.
57 Law Council of Australia, *Submission 108*.
58 Kimberley Community Legal Services, *Submission 80*.
59 Jesuit Social Services, *Submission 100*.

> tool in formalising and institutionalising the principle of self-determination and the direct role of Aboriginal Community Controlled Organisations.[60]

16.58 Fiona Allison and Professor Chris Cunneen have argued that AJAs have 'effectively progressed indigenous community engagement, self-management, and ownership where they have set up effective and well-coordinated community-based justice structures'.[61]

16.59 The appropriate governance structures will differ across states and territories, and should be responsive to existing Aboriginal governance mechanisms. The Law Council of Australia submitted that:

> A direct relationship exists between the formulation of an AJA and the existence of an independent community-based Aboriginal and Torres Strait Islander representative advisory body. Where advisory bodies do not exist, there is less chance that the AJA will be developed, and also less chance that government justice agencies will develop their own strategic policies and initiatives.[62]

16.60 The Aboriginal Legal Service NSW/ACT observed that the 'dismantling over time of Aboriginal representative bodies and its impact upon policy development is a point of particular concern', and argued that any AJA in NSW 'must include participation of local Aboriginal organisations and communities to monitor the effectiveness of the AJA'.[63]

16.61 The Aboriginal Legal Service of WA advocated for the establishment of an 'independent Aboriginal Justice Council/Congress with representatives from across the state' as part of a renewed AJA process in WA.[64]

16.62 In Victoria, part of the process of developing an AJA involved developing governance infrastructure and a representative process, which enables any group or body to participate in the Aboriginal Justice Forum.[65]

Accountability frameworks

16.63 Many submissions emphasised the need for AJAs to commit to measurable outcomes, and for ongoing monitoring and evaluation against these outcomes.[66] For example, Legal Aid NSW argued that

> AJAs must set clear and measurable outcomes in order to be effective, and be subject to independent monitoring and evaluation against those outcomes. Aspirational policy frameworks, and/or those with no provision for monitoring and evaluation, are less likely to have practical impact.[67]

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60 Change the Record Coalition, *Submission 84*.
61 Allison and Cunneen, above n 31, 6.
62 Law Council of Australia, *Submission 108*.
63 Aboriginal Legal Service (NSW/ACT), *Submission 63*.
64 Aboriginal Legal Service of Western Australia, *Submission 74*.
65 Victorian Government, *Victorian Aboriginal Justice Agreement: A Partnership between the Victorian Government and the Koori Community* (2000) 32–4.
66 See, eg, Legal Aid NSW, *Submission 101*; Kimberley Community Legal Services, *Submission 80*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*.
67 Legal Aid NSW, *Submission 101*.

16.64 The ACT Government highlighted the value of Aboriginal and Torres Strait Islander oversight of progress under an AJA. It noted that the Aboriginal and Torres Strait Islander Caucus' role is to monitor 'progress under the Partnership … consider reports of lead agencies and advise on claims of achievement when the statistics or experience on the ground suggest otherwise'.[68]

16.65 Fiona Allison and Professor Chris Cunneen have argued that AJAs can improve government accountability, and emphasised the need for 'maximum Indigenous input into those processes'.[69]

16.66 The ALRC considers that AJAs should have clear objectives and provide measurable action plans for governments. Government accountability is facilitated by processes which promote ongoing participation, discussion and review, and by conducting independent evaluations.

68 ACT Government, *Submission 110*.
69 Allison and Cunneen, above n 31, 6.

Appendix 1. Consultations

Name	Location
Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd	Teleconference—March
Aboriginal and Torres Strait Islander Strategic Directions Steering Committee, NSW Police Force	Dubbo—February
Aboriginal Coordination Team, NSW Police Force	Sydney—April
Aboriginal Employment Programs Unit, NSW Police Force	Teleconference—March
Aboriginal Family Violence Prevention and Legal Service Victoria	Melbourne—April
Aboriginal Interpreter Service	Darwin—March
Aboriginal Legal Rights Movement	Adelaide—August
Aboriginal Legal Service (NSW/ACT)	Sydney—March
Aboriginal Legal Service of WA	Perth—March
ACT Government, Department of Justice	Canberra—August
ACT Law Reform Advisory Council: Dr Lorana Bartels, Head of School of Law and Justice, University of Canberra; Justice John Burns, ACT Supreme Court; Chief Magistrate Lorraine Walker, ACT Magistrates' Court; Martin Hockridge, Law Society of the ACT; David Heckendorf ; John Kalokerinos; Dr Fiona Tito Wheatland, Australian National University College of Law; Dr Helen Watchirs OAM, ACT Human Rights Commissioner	Canberra—August
ACT Law Society	Canberra—August

Amaroo Aboriginal and Torres Strait Islander Elders Justice Group: Mike Adam; Leila Savage (TSI); Bev Weatherall; Mervyn Weatherall; Lloyd Bealor; Roberta Stanley	Cairns—August
Associate Professor Thalia Anthony, Faculty of Law, University of Technology Sydney	Sydney—March
Zachary Armytage, Community Legal Centres NSW	Sydney—February and October
Australian Government, Attorney-General's Department	Canberra—August
Australian Government, Education, Community Safety and Health Division, Department of the Prime Minister and Cabinet	Sydney—August
Australian Government, Indigenous Employment and Recognition Division, Department of the Prime Minister and Cabinet	Canberra—August
Australian National University: Darcy Therese Jackman; Judith Harrison; Sharon Payne; Professor James Stellios; Mary Spiers Williams; Associate Professor Asmi Wood	Canberra—August
Australians for Native Title and Reconciliation	Brisbane—March
Justice Robert Benjamin AM, Family Court of Australia	Sydney—April
Magistrate Paul Bennett, Aboriginal Sentencing Courts—Nunga Court	Adelaide—August
Magistrate Trevor Black	Thursday Island—August
Dr Harry Blagg, Faculty of Law, University of Western Australia	Perth—March
Dr Harry Blagg, Faculty of Law, University of Western Australia; Dr Victoria Hovane, Tjallara Consulting; Dorinda Cox, Nyungar woman	Sydney—December

Hon. A/Judge Jennifer Boland AM, Deputy President and Head—Occupational Division, NSW Civil and Administrative Tribunal	Sydney—June
Professor Stephen Bottomley FAAL, Professor and Dean, Australian National University	Canberra—August
Sean Brennan, Associate Professor and Director, Gilbert + Tobin Centre of Public Law, University of New South Wales	Sydney—November
Brisbane Murri Elders Community Justice Group	Brisbane—March
Justice Robert Bromwich SC, Federal Court of Australia	Sydney—September
Josephine Cashman, Riverview Global Partners	Sydney—March
Russel Cavanagh, Mid North Coast Community Legal Centre and Legal Aid	Sydney—February
Central Australia Women's Legal Service	Alice Springs—March
Central Australian Aboriginal Legal Aid Service	Alice Springs—March
Central Land Council	Alice Springs—March
Criminal Lawyers Association of the Northern Territory	Alice Springs—March
Danila Dilba Health Service	Darwin—March
Developmental Disability WA	Teleconference—April
Judge Roger Dive, Senior Judge, Drug Court of NSW	Sydney—March
Drug and Alcohol Services Association NT	Alice Springs—March
Peter Dwyer, Barrister	Sydney—April and August
Nick Eakin, Jawun General Manager, Regions	North Avoca—October
Helen Eason, Women's Justice Network	Sydney—November
First Nations Deaths in Custody Watch Committee	Perth—March

First Peoples Disability Network Australia	Sydney—October
The Hon Robert French AC	Perth—March
Superintendent Luke Freudenstein APM, Local Area Commander, Redfern Local Area Command	Sydney—June
Carol Garlett, Cultural Advisor, Strategic Capability and Review Division, Department of Corrective Services WA	Teleconference—April
Sean Gordon, CEO, Darkinjung Local Aboriginal Land Council	Teleconference—June
Chief Justice Michael Grant, Supreme Court NT, and Chief Judge Dr John Lowndes, NT Local Court	Darwin—March
Judge Paul Grant, County Koori Court of Victoria and Terrie Stewart	Melbourne—April
Dr Jillian Guthrie, National Centre for Epidemiology and Population Health, Australian National University College of Health and Medicine	Sydney—October
Justice Hilary Hannam, Family Court of Australia	Sydney—October
Judge Graeme Henson, Chief Magistrate, NSW Local Court	Sydney—April
Sarah Hopkins, Chair, Just Reinvest NSW	Sydney—March and October
Dr Jackie Huggins AM, Co-Chair of National Congress of Australia's First Peoples	Sydney—August
Indigenous Caucus: Aboriginal Legal Services NSW/ACT; Legal Aid ACT; Beryl Women Inc; ACT Corrective Services; ACT Health; ACT Justice and Community Safety Directorate	Canberra—August
Indigenous Lawyers Association of Qld	Brisbane—March
Andrew Jackomos, Commissioner for Aboriginal Children and Young People Victoria	Teleconference—May

Judge Peter Johnstone, President, Children's Court of NSW	Sydney—March
Just Reinvest NSW; Maranguka Justice Reinvestment Project; Bourke stakeholders	Bourke—July
Justice Health & Forensic Mental Health Network	Sydney—October
Koori Caucus, Victorian Aboriginal Justice Forum	Melbourne—April
Professor Marcia Langton AM, Faculty of Medicine, University of Melbourne	Melbourne—April
Chief Magistrate Peter Lauriston and Deputy Magistrate Jelena Popovic, Magistrates' Court of Victoria	Melbourne—April
Law Society of NSW	Sydney—March
Law Society of WA	Perth—March
Legal Aid ACT	Canberra—August
Legal Aid NSW	Sydney—March
Legal Aid NSW, Criminal Law Group	Sydney—May
Legal Aid Queensland	Brisbane— March
Legal Services Commission of SA	Adelaide—August
Legislation Policy and Programs Branch, Justice and Community Safety Directorate ACT	Teleconference—May
Mr Amos Lewin, Coordinator, Thursday Island Justice Committee; Chris White; Dorothy (Aunty); Riley (Uncle); Ivy (Aunty); Jennifer (Aunty)	Thursday Island—August
Making Justice Work Alliance	Darwin—March
Iri Mako, Manager—Mau Te Rongo, Justice Services MUMA, Auckland, New Zealand	Teleconference—July
Mayor Vonda Malone, Torres Shire Council	Thursday Island—August

Chief Justice Wayne Martin AC, Supreme Court of WA	Perth—March
C'Zarke Maza, Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd	Thursday Island—August
Tony McAvoy SC, Frederick Jordan Chambers, Sydney	Sydney—September
Rick McGarry, Australian National University	Sydney—December
Dr Hannah McGlade, Senior Indigenous Research Fellow, Curtin University	Sydney—April
Will McGregor, Chief Executive Officer, Bush Mob	Alice Springs—March
Alister McKeich, Senior Project Officer, Royal Commission and Specialist Projects, Victorian Aboriginal Legal Service	Sydney—August
Commissioner James McMahon, Corrective Services WA	Perth—March
The Miranda Project	Sydney—February
Charlie Mundine	Sydney—March
Warren Mundine AO	Sydney—April
National Land Council	Darwin—March
Neighbourhood Justice Centre, Magistrates' Court of Victoria: Magistrate David Fanning; Cameron Wallace; Kylie Smith	Melbourne—April
New Zealand Police and New Zealand Ministry of Justice	Sydney—October
Acting Police Commissioner Nicholls, NT Police	Darwin—March
Judge Stephen Norrish, District Court of NSW	Sydney—March
North Australian Aboriginal Family Legal Service	Darwin—March

North Australian Aboriginal Justice Agency	Darwin—March
Northern Territory Government, Department of the Attorney-General and Justice	Darwin—March
NSW Bar Association	Sydney—March
NSW Law Reform Commission	Sydney—March
NSW Sentencing Council	Sydney—February
NT Correctional Services	Darwin—March
NT Legal Aid Commission	Darwin—March
Office of Probation and Parole	Thursday Island—August
Office of Public Prosecutions, Victoria	Melbourne —April
Office of the Director of Public Prosecutions, NSW	Sydney—February
Office of the Director of Public Prosecutions, NT	Darwin—March
Office of the Director of Public Prosecutions, Queensland	Brisbane —March
Office of the Director of Public Prosecutions, WA	Perth—March
Cheryl Orr, Lawyer	Sydney—May
June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission	Sydney—May and August
Noel Pearson, Cape York Institute for Policy and Leadership	Teleconference—May
Judge Derek Price AM, Chief Judge of the District Court of NSW	Sydney—March
Queensland Police	Brisbane—March
Queensland Police Services	Thursday Island—August

Queensland Sentencing Advisory Council	Brisbane—March
Commissioner Mark Rallings, Corrective Services Queensland	Brisbane—March
Reconciliation Australia	Sydney—October
Redfern Legal Service	Sydney—March
Peter Reeves, Developing Leaders Aboriginal Corporation, Peninsula Community Centre	Woy Woy—October
Joanne Selfe, Project Officer, Ngara Yura Program, Judicial Commission of NSW	Sydney—October and November
Commissioner Jan Shuard PSM, Corrective Services Victoria and Aboriginal Programs Unit, Victorian Department of Justice	Melbourne—April
Dr Dubravka Simonovic, UN Special Rapporteur on Violence against Women	Teleconference—February
Sisters Inside	Brisbane—March
South Australia Government, Department for Correctional Services and Attorney-General's Department	Adelaide—August
Betty Stefanovic, Community Corrections Bourke	Sydney—August
Supreme Court of Victoria: Chief Justice Marilyn Warren AC; Justice Stephen Kaye; Claire Downey	Melbourne—September
Tangentyere Council	Alice Springs—March
Maureen Tangney , Civil Justice Strategy, NSW Department of Justice	Sydney—March
Victoria Tauli-Corpuz, UN Special Rapporteur on the rights of indigenous peoples	Sydney—March
Brendan Thomas, Deputy Secretary, NSW Department of Justice	Sydney—March

Tjabal Centre, Auntie Anne Martin & Indigenous Students, Australian National University	Canberra—August
Top End Women's Legal Service	Darwin—March
Torres Strait Island Magistrates' Court Stakeholders	Thursday Island—August
Torres Strait Regional Authority (TSRA)	Thursday Island—August
Shane Tremble, General Manager, Endeavour Drinks Group	Sydney—May
University of New South Wales Roundtable: Emeritus Professor David Brown; Professor Chris Cunneen; Professor Luke McNamara; Melanie Schwartz; Julie Stubbs	Sydney—March
Victoria Police	Melbourne—April
Victorian Aboriginal Legal Service & National Aboriginal and Torres Strait Islander Legal Services	Melbourne—April
Victorian Adult Parole Board: Peter Webster; Aunty Pam Pederson; Uncle Kevin Coombs OAM; Uncle Glenn James OAM	Melbourne—September
WA Bar Association	Teleconference —April
WA Police	Perth—March
Dr Don Weatherburn PSM, NSW Bureau of Crime Statistics and Research	Sydney—February
Rick Welsh, Men's Health Information and Resource Centre, Western Sydney University	Sydney—March and May
Michael West, Metro Land Council and Trent Shepherd, Federal Circuit Court of Australia	Sydney—April
Western Australia Government, Department of the Attorney General	Perth—March
Wirringa Baiya Aboriginal Women's Legal Centre	Sydney—March

Women's Justice Network (formerly WIPAN)	Sydney—April
Pauline Wright, President, Law Society NSW	Sydney—March and September
Judge Dina Yehia, District Court of NSW	Sydney—March
Youth Justice, Department of Justice Queensland	Brisbane—March

Appendix 2. Submissions

Name	***Number***
Aboriginal Legal Service (NSW and ACT) Ltd	63, 112
Aboriginal Legal Service of WA Limited	74
Aboriginal Peak Organisations NT	117
ACT Government	110
ACT Law Society	40
Amnesty International Australia	89
ANTaR	76
Associate Professor T Anthony	115
Arts Law Centre of Australia	10
Aunts	90
Australian Human Rights Commission	43
Australian Lawyers for Human Rights	59
Australian Red Cross	15
Australians for Native Title and Reconciliation Queensland Inc	49
Australians for Native Title and Reconciliation, Queensland Management Committee	55
Austroads	13
Professor M Bagaric	81

Associate Professor L Bartels	21
J Baumgartner	3
L Billington	30
Dr H Blagg, Dr V Hovane, D Cox	121
M Boswell	12
C Brown	7
R Casey	6
J Cashman	105
Caxton Legal Centre	47
Central Australian Aboriginal Congress	37
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