Australian Government

Australian Law Reform Commission

Incarceration Rates of Aboriginal and Torres Strait Islander Peoples

DISCUSSION PAPER

You are invited to provide a submission or comment on this Discussion Paper

Discussion Paper 84 (DP 84)

July 2017

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This Discussion Paper reflects the law as at 30 June 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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Any public contribution to an inquiry is called a submission. The Australian Law Reform Commission seeks submissions from a broad cross-section of the community, as well as from those with a special interest in a particular inquiry.

The closing date for submissions to this Discussion Paper is **4 September 2017.**

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The ALRC strongly encourages online submissions directly through the ALRC website where an online submission form will allow you to respond to individual proposals and questions: https://www.alrc.gov.au/content/indigenous-incarceration-dp84-make-submission Once you have logged into the site, you will be able to save your work, edit your responses, and leave and re-enter the site as many times as you need to before lodging your final submission. You may respond to as many or as few proposals and questions as you wish. There is space at the end of the form for any additional comments.

Further instructions are available on the site. If you have any difficulties using the online submission form, please email web@alrc.gov.au, or phone +61 2 8238 6305.

Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

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Generally, submissions will be published on the ALRC website unless marked confidential. Confidential submissions may still be the subject of a Freedom of Information request. In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

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Content

Terms of Reference **5**
Participants **9**
Proposals and Questions **11**

Part 1. Introduction to the Inquiry **17**

1. Introduction to the Inquiry **19**
Acknowledgment of Country 19
The Inquiry 19
Context 21
Approach to reform 26
Structure of the Discussion Paper 28
Terminology 29
Getting involved 31

Part 2. Criminal Justice Pathways **33**

2. Bail and the Remand Population **35**
Summary 35
Background 36
Legislative amendment 44
Services that mitigate bail risks 46
Policing bail conditions 48

3. Sentencing and Aboriginality **51**
Summary 51
Systemic and background factors 51
Specialist sentencing reports 68

4. Sentencing Options **73**
Summary 73
Mandatory sentencing 74
Short sentences of imprisonment 81
Availability of community-based sentencing options 88
Flexibility to tailor sentences 91

5. Prison Programs, Parole and Unsupervised Release **93**
Summary 93
The availability and effectiveness of prison programs 94
Parole for eligible Aboriginal and Torres Strait Islander prisoners 97
The provision of throughcare 103

Part 3. Non-Violent Offending and Alcohol Regulation **105**

6. Fines and Driver Licences **107**
Summary 107
Fines and infringement notices 108
Imprisonment terms that 'cut out' fine debt 111
Driver licence related issues 125

7. Justice Procedure Offences—Breach of Community-based Sentences **133**
Summary 133
Background 134
Breach of community-based sentences 139

8. Alcohol **143**
Summary 143
Alcohol and offending 143
A focus on harm reduction 147
Assessing solutions 149

Part 4 Aboriginal and Torres Strait Islander Female Offender **159**

9. Female Offenders **161**
Summary 161
Underlying factors 161
Addressing the complex needs of ATSI female offenders 166
Diversion 172
The need for improved data collection 173

Part 5 Engagement and Accountability **175**

10. Aboriginal Justice Agreements **177**
Summary 177
Background 178
Characteristics of Aboriginal Justice Agreements 181
The future of Aboriginal Justice Agreements 182
Criminal justice targets for 'Closing the Gap' 184

11. Access to Justice Issues **187**
Summary 187
Interpreter services 188
Specialist courts and diversion programs 191
Indefinite detention when unfit to stand trial 198
Provision of legal services and supports 202
Custody Notification Service 204

12. Police Accountability **207**
Summary 207
Background 207
Improving responses 211

13. Justice Reinvestment **223**
Summary 223
'Justice reinvestment' 223
Impact on Aboriginal and Torres Strait Islander peoples 224
Justice reinvestment in this Discussion Paper 226

Consultations **227**

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.

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Proposals and Questions

2. Bail and the Remand Population

Proposal 2–1 The *Bail Act 1977* (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the *Bail Act*.

Other state and territory bail legislation should adopt similar provisions.

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

Proposal 2–2 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.

3. Sentencing and Aboriginality

Question 3–1 Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders?

If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

Question 3–2 Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?

Question 3–3 Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?

Question 3–4 In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?

Question 3–5 How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?

4. Sentencing Options

Question 4–1 Noting the incarceration rates of Aboriginal and Torres Strait Islander people:

(a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and

(b) which provisions should be prioritised for review?

Question 4–2 Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?

Question 4–3 If short sentences of imprisonment were to be abolished, what should be the threshold (eg, three months; six months)?

Question 4–4 Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?

Proposal 4–1 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.

Question 4–5 Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?

5. Prison Programs, Parole and Unsupervised Release

Proposal 5–1 Prison programs should be developed and made available to accused people held on remand and people serving short sentences.

Question 5–1 What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander peoples held on remand or serving short sentences of imprisonment?

Proposal 5–2 There are few prison programs for female prisoners and these may not address the needs of Aboriginal and Torres Strait Islander female prisoners. State and territory corrective services should develop culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners.

Question 5–2 What are the best practice elements of programs for Aboriginal and Torres Strait Islander female prisoners to address offending behaviour?

Proposal 5–3 A statutory regime of automatic court ordered parole should apply in all states and territories.

Question 5–3 A statutory regime of automatic court ordered parole applies in NSW, Queensland and SA. What are the best practice elements of such schemes?

Proposal 5–4 Parole revocation schemes should be amended to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.

6. Fines and Driver Licences

Proposal 6–1 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 unpaid fines.

Question 6–1 Should lower level penalties be introduced, such as suspended infringement notices or written cautions?

Question 6–2 Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how?

Question 6–3 Should the number of infringement notices able to be issued in one transaction be limited?

Question 6–4 Should offensive language remain a criminal offence? If so, in what circumstances?

Question 6–5 Should offensive language provisions be removed from criminal infringement notice schemes, meaning that they must instead be dealt with by the court?

Question 6–6 Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.

Proposal 6–2 Work and Development Orders were introduced in NSW in 2009. They enable a person who cannot pay fines due to hardship, illness, addiction, or homelessness to discharge their debt through:

- community work;
- program attendance;
- medical treatment;
- counselling; or
- education, including driving lessons.

State and territory governments should introduce work and development orders based on this model.

Question 6–7 Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?

Question 6–8 What mechanisms could be introduced to enable people reliant upon driver licences to be protected from suspension caused by fine default? For example, should:

(a) recovery agencies be given discretion to skip the licence suspension step where the person in default is vulnerable, as in NSW; or

(b) courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?

Question 6–9 Is there a need for regional driver permit schemes? If so, how should they operate?

Question 6–10 How could the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities be improved?

7. Justice Procedure Offences—Breach of Community-based Sentences

Proposal 7–1 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.

8. Alcohol

Question 8–1 Noting the link between alcohol abuse and offending, how might state and territory governments facilitate Aboriginal and Torres Strait Islander communities, that wish to do so, to:

(a) develop and implement local liquor accords with liquor retailers and other stakeholders that specifically seek to minimise harm to Aboriginal and Torres Strait Islander communities, for example through such things as minimum pricing, trading hours and range restriction;

(b) develop plans to prevent the sale of full strength alcohol within their communities, such as the plan implemented within the Fitzroy Crossing community?

Question 8–2 In what ways do banned drinkers registers or alcohol mandatory treatment programs affect alcohol-related offending within Aboriginal and Torres Strait Islander communities? What negative impacts, if any, flow from such programs?

9. Female Offenders

Question 9–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?

10. Aboriginal Justice Agreements

Proposal 10–1 Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.

Question 10–1 Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?

11. Access to Justice Issues

Proposal 11–1 Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.

Question 11–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?

Proposal 11–2 Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.

Question 11–2 In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?

Proposal 11–3 State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

12. Police Accountability

Question 12–1 How can police work better with Aboriginal and Torres Strait Islander communities to reduce family violence?

Question 12–2 How can police officers entering into a particular Aboriginal or Torres Strait Islander community gain a full understanding of, and be better equipped to respond to, the needs of that community?

Question 12–3 Is there value in police publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours?

Question 12–4 Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcomes evaluations; and put succession planning in place to ensure continuity of the programs?

Question 12–5 Should police be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia, where they have not already done so?

Question 12–6 Should police be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place?

13. Justice Reinvestment

Question 13–1 What laws or legal frameworks, if any, are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples?

Part 1
Introduction

1. Introduction to the Inquiry

Contents

Acknowledgment of Country 19
The Inquiry 19
Terms of Reference 20
Consultation 20
Context 21
Contributing factors 21
Child protection and adult incarceration 23
Rural and remote communities 25
Approach to reform 26
Disproportionate representation 26
Aboriginal and Torres Strait Islander incarceration in the federal context 27
International setting 27
Structure of the Discussion Paper 28
Terminology 29
Aboriginal and Torres Strait Islander peoples 29
'Culturally appropriate', 'culturally competent' and 'culturally safe' 29
Getting involved 31

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 50,000 to 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.

The Inquiry

1.1 This Inquiry focuses on the problem of over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, something that the Attorney-General of Australia, Senator the Hon George Brandis QC, described as a

'national tragedy',[1] and what law reform can do to ameliorate this situation. On 6 December 2016, the Attorney-General's Department released draft Terms of Reference for public consultation, and on 10 February 2017, the ALRC received the final Terms of Reference.[2] His Honour Judge Matthew Myers AM was appointed as ALRC Commissioner to lead the Inquiry.

Terms of Reference

1.2 The ALRC was asked 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. '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 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.

Consultation

1.4 Leading up to this Discussion Paper, the ALRC has undertaken a variety of stakeholder consultations to gain an understanding of the multifaceted and intergenerational context of Aboriginal and Torres Strait Islander incarceration. This included consultations with key stakeholders in Sydney, Dubbo, Brisbane, Perth, Alice Springs, Darwin, and Melbourne.[3] The Discussion Paper has also been informed by the insights provided in submissions on the draft Terms of Reference, highlighting key issues leading to incarceration.[4]

1.5 In keeping with usual ALRC practice, an Advisory Committee has been constituted for the period of the Inquiry. The Committee met twice during the preparation of the Discussion Paper: on 20 March 2017 and on 5 June 2017. A full list of Advisory Committee members is available on the ALRC website.

1.6 The Discussion Paper commences the second stage in the consultation process in this Inquiry. The ALRC will undertake further consultation across Australia,

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1 Senator George Brandis, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples' (Media Release, 27 October 2016).

2 Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Terms of Reference.

3 A list of consultations is included at the end of this Discussion Paper.

4 Submissions are available at Attorney-General's Department (Cth), *Australian Law Reform Commission Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* <www.agd.gov.au>.

including with stakeholders in regional communities. Submissions received in response to this Discussion Paper, together with information gained from the consultation and research process, will inform the recommendations for law reform in the Report that will be provided to the Attorney-General by 22 December 2017.

Context

Contributing factors

1.7 While this Inquiry is considering 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'.[5]

1.8 As the Attorney-General of Australia, Senator the Hon George Brandis QC, acknowledged in the Terms of Reference for this Inquiry, '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'.

1.9 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, 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.

1.10 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. The ALRC is asked to 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,

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5 Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Terms of Reference.

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.

1.11 These past reports and inquiries 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,[6] and were reported on by the Productivity Commission in its report, *Overcoming Indigenous Disadvantage: Key Indicators 2016*.[7]

1.12 Such factors 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.[8] The Royal Commission into the Protection and Detention of Children in the Northern Territory has also recognised the cyclical and intergenerational nature of social and economic disadvantage on Aboriginal and Torres Strait Islander peoples.[9]

1.13 The findings from other inquiries provide a fuller picture of both the drivers of incarceration and opportunities that exist to address offending behaviours before the point of imprisonment. The ALRC will consider these issues in more detail in the Final Report.

1.14 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.[10] Aboriginal and Torres Strait Islander communities and individuals have also been negatively affected by laws, policies and practices implemented by successive government policies, such as assimilation and child removal.

1.15 As a law reform body, the focus of the ALRC in this Inquiry is, necessarily, on reform to law and legal frameworks that can address the over-representation of Aboriginal and Torres Strait Islander peoples in prisons. However, the ALRC acknowledges that law is only one piece in a much larger historical, social and economic context that contributes to the drivers of incarceration.[11]

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6 Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)* (2009).

7 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (Produced for the Steering Committee for the Review of Government Service Provision, 2016).

8 Ibid [4.1]–[4.110].

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

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

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

Child protection and adult incarceration

1.16 One particular contributing factor to adult incarceration rates has been shown to be out-of-home care (OOHC). This Inquiry focuses on the incarceration of adult Aboriginal and Torres Strait Islander people. However, research has made links between child protection, OOHC, and juvenile and adult incarceration.[12]

1.17 Consultations to date in this Inquiry have emphasised the normalisation of incarceration in many Aboriginal families, and in particular those where children have been removed, or have been in juvenile detention. In such a context, juvenile detention can be seen as a key driver of adult incarceration. For example, a 2005 study into the likelihood of juveniles reoffending 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.[13] 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.[14]

1.18 Young people placed in OOHC care are 16 times more likely than the equivalent general population to be under youth justice supervision in the same year.[15] As the ALRC previously noted in its 2010 report, *Family Violence—A National Legal Response*:

> 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.[16]

1.19 This risk increases when the child is Aboriginal.[17] In 2014–15, Aboriginal and Torres Strait Islander children represented 90% of all children subject to care and

12 Mick Gooda, 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) 4–5.

13 Cited in Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Indigenous Australians, Incarceration and the Criminal Justice System—Discussion Paper* (2010) 32.

14 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 86–7.

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

16 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 973.

17 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 15, 8.

protection orders.[18] At June 2015, Aboriginal and Torres Strait Islander children were placed into OOHC at 9.5 times the rate of non-Aboriginal children.[19]

1.20 The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) reported 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.[20] The 1997 *Bringing them Home* report further highlighted the relationship between OOHC and the increased likelihood of coming into contact with the criminal justice system.[21]

1.21 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 Association of Community Legal Centres,[22] attention was drawn to the correlation between OOHC, the criminal justice system and homelessness, relying upon a 2012 study of the Australian Institute of Health and Welfare.[23]

1.22 The correspondence suggested that a review undertaken of some 111 NSW Children's Court criminal files found that 34% of young people appearing before the court were, or had been, in OOHC, and that children in care were 68 times more likely to appear in the Children's Court than other children.[24] Many of these children and young people were charged with assault against OOHC staff or damage of their OOHC property.[25]

1.23 Similarly 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.[26]

1.24 The ALRC notes that other current inquiries may encompass a review of child protection laws and processes for Aboriginal and Torres Strait Islander children. These include the current Royal Commission into the Protection and Detention of Children in the Northern Territory (due to report in August 2017), and the 2017 NSW Legislative

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18 Productivity Commission, above n 7, 4.92.

19 Australian Institute of Health and Welfare, above n 15, 54.

20 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 52.

21 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.

22 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, *Advice Correspondence* (24 April 2017).

23 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.

24 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. 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.

25 Ibid.

26 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.

Council Inquiry into Child Protection.[27] The Royal Commission into Institutional Responses to Child Sexual Abuse may report in part on the issue of OOHC, incorporating a national response focusing on the reduction of all abuse in that setting.[28] While there are strategies at state level,[29] 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 ALRC considers that such a review would be timely.

Rural and remote communities

1.25 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 non-Indigenous Australians (over 19 million people) live in major cities or inner regional areas.[30]

1.26 For those Aboriginal or Torres Strait Islander communities living 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.[31]

1.27 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.

1.28 Access to justice issues arise in this context, including a lack of interpreters who can assist offenders to understand the criminal justice process, as well as limited access to legal representation with a reliance on 'fly in fly out' judicial officers and legal practitioners, in some cases. Where duty lawyer schemes are provided on a 'fly in fly out' basis, the ALRC has heard that time pressures may lead to the provision of compromised advice and representation.

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27 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report Volume 2* (2014); Legislative Council General Purpose Standing Committee No 2, Parliament of NSW, *Inquiry into Child Protection* (2017).

28 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Institutional Responses to Child Sexual Abuse in Out-of-Home Care* (2016).

29 See, eg, Department of Community Services (ACT), *A Step Up for Our Kids: Out of Home Care Strategy 2015–2020*.

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

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

Approach to reform

Disproportionate representation

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

1.30 Aboriginal and Torres Strait people represent just 3% of the Australian population, but account for 27% of the adult prison population. The rate of incarceration has increased by 77% between 2000 and 2015.[32] Aboriginal and Torres Strait Islander women represent 34% of the female prison population while comprising just 2.2% of Australian women.[33] Since the RCIADIC, the rate at which Aboriginal and Torres Strait Islander people are imprisoned has more than doubled, with men are being imprisoned at 11 times the rate of the general male population, and women at more than 15 times the rate of non-Indigenous women.[34]

1.31 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 2 years, compared to 3.5 years for non-Indigenous prisoners.[35] Hence, Aboriginal and Torres Strait Islander peoples are being incarcerated for lower order crimes for which diversion and rehabilitation may be a more appropriate response.

1.32 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.[36]

1.33 While this Inquiry is examining options for law reform that can reduce the incarceration rate of Aboriginal and Torres Strait Islander peoples, the proposals in this Discussion Paper 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

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32 Productivity Commission, above n 7, xxviii.

33 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) tables 2, 4; Australian Bureau of Statistics, *Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 2001 to 2026, Cat No 3238.0* (2014) table 1 (Series B, 18 years and over).

34 Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2016, Cat No 4512.0* (2016) quoted in PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017) 5.

35 Australian Bureau of Statistics, above n 10, table 25. See further ch 4.

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

questions and proposals in this Discussion Paper 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 rates of Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander incarceration in the federal context

1.34 Much of the criminal law that is the subject of this Inquiry falls 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.[37]

1.35 During this Inquiry, the ALRC will identify 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. Additionally, the ALRC will highlight laws, legal frameworks and practices that seek to reduce the rate of Aboriginal and Torres Strait Islander incarceration.

International setting

1.36 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 'all of Australia's international obligations that are relevant to the matter'.[38]

1.37 The treatment of Aboriginal and Torres Strait Islander peoples in the criminal justice system with respect to access to justice, equity in law enforcement and equity before the judicial system is captured by several international human rights treaties that include:

- the *International Covenant on Civil and Political Rights* (ICCPR);[39]
- the *Convention on the Rights of the Child* (CROC);[40]
- the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD);[41]

37 *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(d)–(e).
38 *Australian Law Reform Commission Act 1996* (Cth) s 24(2).
39 *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.
40 *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.
41 *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,.

- the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);[42] and
- the *Convention on the Rights of Persons with Disabilities* (CRPD).[43]

1.38 In addition, the Australian Government endorsed the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) on 3 April 2009.[44] 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.

1.39 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'.[45]

Structure of the Discussion Paper

1.40 The Discussion Paper is structured in parts. Following the introduction, **Part 2** addresses criminal justice pathways. The ALRC has identified three key areas that influence incarceration rates: bail laws and processes, and remand; sentencing laws and legal frameworks including mandatory sentencing, short sentences and *Gladue*-style reports; and transition pathways from prison, parole and throughcare. These were the focus of stakeholder comments and observations in preliminary consultations.

1.41 **Part 3** considers non-violent offending and alcohol regulation. It provides an overview of the detrimental effects of fine debt on Aboriginal and Torres Strait Islander peoples, including the likelihood of imprisonment in some jurisdictions. Fine debt can be tied to driver licence offending, and the ALRC asks how best to minimise licence suspension caused by fine default. Part 3 also looks at ways laws and legal frameworks can operate to decrease alcohol supply so as to minimise alcohol-related offending in Aboriginal and Torres Strait Islander communities.

1.42 **Part 4** discusses the incarceration of Aboriginal and Torres Strait Islander women. It contextualises Aboriginal and Torres Strait Islander female offending within experiences of trauma, including isolation; family and sexual violence; and child removal. It outlines how proposals in other chapters may address the incarceration rates of Aboriginal and Torres Strait Islander women, and asks what more can be done.

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42 *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.

43 *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, 13, 14. See also Australian Human Rights Commission, *Fact Sheet 7: Australia and Human Rights Treaties* (2009).

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

45 *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).

1.43 **Part 5** considers access to justice, and examines ways that state and territory governments and criminal justice systems can better engage with Aboriginal and Torres Strait Islander peoples to prevent offending and to provide better criminal justice responses when offending occurs. The ALRC places collaboration with Aboriginal and Torres Strait Islander organisations at the centre of proposals made in this Part, and suggests accountability measures for state and territory government justice agencies and police. The remoteness of communities, the availability of and access to legal assistance and Aboriginal and Torres Strait Islander interpreters are also discussed. Alternative approaches to crime prevention and criminal justice responses, such as those operating under the banner of 'justice reinvestment', are also canvassed.

Terminology

1.44 Throughout this Discussion Paper a number of terms or phrases are frequently used. These are summarised here.

Aboriginal and Torres Strait Islander peoples

1.45 The Terms of Reference refer to 'Aboriginal and Torres Strait Islander peoples' and the ALRC has adopted this phrase throughout this Discussion Paper. 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.

1.46 Where possible, the ALRC has sought to relate data and analysis to specific Aboriginal and Torres Strait Islander communities or groups. However, the recognition of diversity is rarely apparent from data and analysis of persons involved in the criminal justice system. Data obtained by the ALRC rarely makes a distinction between Aboriginal people and Torres Strait Islander people. This deficit has prevented the ALRC from identifying whether research and analysis would be as relevant to both groups or whether people from different Aboriginal cultural backgrounds may be represented differently in the criminal justice system.

1.47 The abbreviation 'ATSI' to refer to Aboriginal and Torres Strait Islander peoples has been used in some tables and graphs in the Discussion Paper.

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

1.48 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'.

1.49 Throughout the Discussion Paper, 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.

1.50 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.[46]

1.51 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.[47]

1.52 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.[48]

1.53 The Council of Australian Governments (COAG) has defined cultural competence as meaning 'a set of congruent behaviours, attitudes, and policies that come together in a system, agency, or amongst professionals and enables that system, agency, or those professionals to work effectively in cross-cultural situations'.[49]

1.54 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.[50]

1.55 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 the Discussion Paper is in reference only to Aboriginal and Torres Strait Islander cultures.

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46 Commissioner for Children and Young People Victoria, *Cultural Safety for Aboriginal Children* Tip Sheet: Child Safe Organisations (2015) citing 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.

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

48 Commissioner 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.

49 Council of Australian Governments, *Prison to Work Report* (2016) 23.

50 Ibid.

Getting involved

1.56 This Discussion Paper is intended to encourage and facilitate informed community participation in the Inquiry. The ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions contained in this Discussion Paper, or to any of the background material and analysis.

1.57 Submissions provide important evidence to each inquiry, and it is common for the ALRC to draw upon the contents of submissions and to quote from them or refer to them in publications.

1.58 There is no specified format for submissions, although the proposals provided in this document are intended to provide guidance for respondents. Submissions may be made in writing, by email or using the online submission form. Submissions made using the online submission form are preferred.

1.59 Generally, submissions will be published on the ALRC website unless marked confidential. Confidential submissions, although not published on the ALRC website, may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

Given the short timeframe for this Inquiry, submissions must reach the ALRC by **4 September 2017** to ensure consideration for the Final Report**.**

Submissions using the ALRC's online submission form can be made at: https://www.alrc.gov.au/content/indigenous-incarceration-dp84-make-submission

Alternatively, pre-prepared submissions may be mailed, faxed or emailed, to:

The Executive Director
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Part 2

Criminal Justice Pathways

2. Bail and the Remand Population

Contents

Summary 35
Background 36
The operation of bail laws and legal frameworks 36
The impact on Aboriginal and Torres Strait Islander peoples 37
Drivers of over-representation on remand 38
Bail provisions that can take culture into account 41
Legislative amendment 44
Services that mitigate bail risks 46
Policing bail conditions 48

Summary

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

2.2 The Terms of Reference for this Inquiry ask the ALRC to have regard to laws and legal frameworks that contribute to the incarceration of Aboriginal and Torres Strait Islander peoples, including bail law and its impact on the remand population.

2.3 Irregular employment and the 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 funerals or take care of family may conflict with commonly issued bail conditions—such as curfews and exclusion orders—leading to breach and subsequent imprisonment.

2.4 The ALRC recognises that there has been a general upsurge in remand populations nationwide.[1] Nonetheless, there may be Aboriginal and Torres Strait Islander peoples held on remand unnecessarily, and the proposals 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.

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1 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.

2.5 The ALRC proposes that bail authorities should be required to take cultural considerations into account when making bail determinations and setting bail conditions for Aboriginal and Torres Strait Islander peoples. This approach has been adopted in Victoria.[2]

2.6 The ALRC also proposes that state and territory governments work with peak Aboriginal and Torres Strait Islander organisations to identify and fill gaps in service provision so that accused Aboriginal and Torres Strait Islander peoples may be supported on bail or diverted to appropriate programs and services, where necessary.

2.7 Recent reviews of bail laws have focused on presumption against bail categories.[3] This chapter does not consider or make recommendations on offences included in presumptions against bail. Instead, it focuses on enabling those Aboriginal and Torres Strait Islander people who are unlikely to pose a risk to the community to be granted bail.

Background

The operation of bail laws and legal frameworks

2.8 A person can 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.

2.9 Bail laws are complex and vary between states and territories. A general overview of how bail laws operate is provided below.

2.10 Bail can be determined at different times by police, magistrates, judges and bail justices (in some jurisdictions).[4] 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 person with a Court Attendance Notice (or equivalent) to attend court, or they can release the person on bail. It is always a condition of police bail that the person attends court; and other conditions may also be imposed.[5]

2.11 Where police refuse to release the person or to grant bail, the police must bring the person before the Local or Magistrates Court as soon as possible, where the accused person can apply to the court for bail.[6]

2.12 A statutory presumption against bail attaches to some offences. These generally include serious indictable sexual and personal violence offences, and weapon and terrorism related offending.[7]

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2 *Bail Act 1977* (Vic) s 3A.

3 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*; Hamish Thorburn, 'A Follow-up on the Impact of the Bail Act 2013 (NSW) on Trends in Bail'; Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017); Paul Coghlan, *Bail Review: Second Advice to the Victorian Government* (2017).

4 Queensland and Victoria.

5 See, eg, *Bail Act 1977* (Vic) 5; *Bail Act 1982* (WA) s 28.

6 *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.

2.13 When a person successfully 'shows cause' or reasons for bail, 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 mitigate the risk. In making this bail determination, 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.[8] These risks are termed 'bail concerns' in some jurisdictions.[9]

2.14 The type of matters that can be considered when assessing bail concerns are prescribed in some jurisdictions. In New South Wales (NSW), for example, the type of matters that can 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 compliance with court orders; the nature and seriousness of the offence; and any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander person, or having cognitive or mental health impairments (discussed below).[10]

2.15 Bail authorities can impose conditions that are 'reasonably necessary' to address the bail concern. Any conditions imposed must be 'reasonable and proportionate' to the offence, and be no more onerous than necessary to address the bail concern.[11] Bail conditions can require the person to do, or refrain from doing, something—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 a person to undergo drug testing.[12]

The impact on Aboriginal and Torres Strait Islander peoples

2.16 In 2016, the national Aboriginal and Torres Strait Islander remand prisoner population accounted for 30% (3,221) of Aboriginal and Torres Strait Islander prisoners and 27% of all prisoners held on remand.[13] This is a growing concern. For example, the NSW Bureau of Crime Statistics and Research (NSW BOCSAR) reported that the number of Aboriginal and Torres Strait Islander prisoners on remand grew in NSW by 238% between 2001 and 2015. In NSW, the highest growth offending category was in justice procedure offences.[14]

2.17 In 2016, national statistics illustrated that Aboriginal and Torres Strait Islander peoples 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

7 See, eg, *Bail Act 2013* (NSW) div 1A s 16B; *Bail Act* (NT) s 7A*; Bail Act 1980* (Qld) s 16(3).
8 See, eg, *Bail Act 2013* (NSW) s 17; *Bail Act 1980* (Qld) s 16.
9 See, eg, *Bail Act 2013* (NSW) s 17.
10 *Bail Act 2013* (NSW) s 18.
11 See, eg, *Bail Act 2013* (NSW) s 20.
12 See, eg, *Bail Act 2013* (NSW) div 3; *Bail Act 1980* (Qld) s 11.
13 Australian Bureau of Statistics, above n 1, table 8.
14 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. See also ch 7.

remand population); unlawful entry with intent (13%); and sexual assault (7%).[15] These categories, particularly acts intended to cause injury, are broadly defined and can include low level instances of offending.

2.18 In NSW, Aboriginal and Torres Strait Islander males spent an average of 44 days on remand, while it was 36 days for Aboriginal and Torres Strait Islander females.[16] 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 a custodial penalty on conviction.[17]

2.19 Aboriginal and Torres Strait Islander women are a fast growing group within the remand population. For example, the Inspector of Custodial Services in Western Australia reported that Western Australia 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'.[18] As discussed in Chapter 5, being held in prison for even a short 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'.[19]

Drivers of over-representation on remand

Bail refusal

2.20 Aboriginal and Torres Strait Islander peoples are less likely to be granted bail than non-Indigenous persons.[20] This has been attributed to the likelihood of accused Aboriginal and Torres Strait Islander peoples having prior convictions—Aboriginal and Torres Strait Islander peoples 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.[21]

2.21 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 peoples.[22] Mitchell, a pregnant 22-year-old Aboriginal single mother, had been charged with offences related to begging, and obtaining a 'financial advantage by deception' because she had been travelling on the train on a children's ticket. Mitchell was refused bail at the Magistrates' Court of

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

16 NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update March 2017* (2017) [2.3.2].

17 Don Weatherburn and Stephanie Ramsay, above n 14, 8.

18 Office of the Inspector of Custodial Services, *Western Australia's Rapidly Increasing Remand Population* (2015) 2.

19 Ibid. Also see ch 9.

20 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) 5.

21 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.

22 *Re Mitchell* [2013] VSC 59 (8 February 2013).

Victoria because it was 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. In determining the appeal, the Supreme Court held that the magistrate's conclusion that Mitchell presented an unacceptable risk of reoffending was 'unassailable'.[23] 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. The Supreme Court granted bail, with reference to the requirement to consider Aboriginality in s 3A of the *Bail Act 1977* (Vic), noting the potential to over-police Aboriginal and Torres Strait Islander peoples, and stating that to charge Mitchell with obtaining financial advantage by deception for travelling on a child's ticket was 'singularly inappropriate'.[24]

2.22 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 stable employment contributed to 'Aboriginal disadvantage' in the bail process.[25] The RCIADIC further 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 merely because of the particular difficulties they can face in appearing at a court at an 'appointed place or time'.[26]

2.23 Language barriers have been identified as another factor which can result in Aboriginal and Torres Strait Islander peoples being denied release on bail.[27]

2.24 The observations of the RCIADIC were repeated in evidence by the Chief Justice of the Supreme Court of Western Australia to the 2016 *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 peoples were often refused bail.[28]

Breach of conditions of bail

2.25 When bail is granted to Aboriginal and Torres Strait Islander peoples, the conditions attached can conflict with an Aboriginal and Torres Strait Islander person's cultural obligations, increasing the risk of breach and consequent imprisonment.[29] Curfews, exclusion zones and non-association orders can 'restrict contact with family

23 Ibid [7].
24 Ibid [13].
25 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].
26 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 3 51.
27 Ibid. See ch 11 for a broader discussion on issues impacting on access to justice for Aboriginal and Torres Strait Islander peoples.
28 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [5.64].
29 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.54].

networks and prevent Aboriginal people from maintaining relationships, performing responsibilities such as taking care of elderly relatives or attending funerals'.[30] 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) were difficult for some Aboriginal and Torres Strait Islander peoples. 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 defendants, with court delays then contributing to the length of time defendants remained in remand.[31]

2.26 The NSW Law Reform Commission (NSWLRC) in their 2012 report on bail 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.[32]

2.27 The NSWLRC also noted that Aboriginal and Torres Strait Islander peoples may have strong historical and cultural ties to particular locations. It found that bail conditions which restrict access to 'place' can have serious impacts on the person.[33]

2.28 For this reason, the NSW 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'.[34] 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.[35]

2.29 There are also practical considerations, especially for Aboriginal and Torres Strait Islander peoples 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.[36] In

30 Ibid.
31 Sanderson, Mazerolle and Anderson-Bond, above n 21, 3.
32 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.54].
33 Ibid [11.55].
34 Judicial Commission of New South Wales, *NSW Sentencing Bench Book* [2.3.2].
35 Ibid.
36 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.53].

such cases, place and circumstance can severely limit an Aboriginal and Torres Strait Islander person from complying with certain bail conditions.

Bail provisions that can take culture into account

2.30 Stakeholders in this Inquiry have suggested in preliminary consultations that bail authorities should be required to take into account cultural considerations when making bail determinations for Aboriginal and Torres Strait Islander peoples, and that cultural considerations be given appropriate weight. It has been suggested that the court should be required to weigh cultural, family and community obligations along with other matters when assessing 'unacceptable risk', including when determining bail conditions.

2.31 Provisions of this type 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 peoples. These are briefly outlined below.

New South Wales

2.32 In NSW, ss 18(a) and (k) of the *Bail Act 2013* (NSW) require the bail authority to consider, among other things, 'community ties' and any 'special vulnerability or needs the person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'.[37] The 'special vulnerability' provision appears to have been introduced into the previous *Bail Act 1978* (NSW) to reinforce the notion of prison as a last resort for these groups.[38] The ALRC has heard that this provision is rarely used to aid an accused Aboriginal and Torres Strait Islander person reach bail.

2.33 The reference to 'community ties' in s 18(a) is not specific to Aboriginal and Torres Strait Islander peoples. It may, however, have particular relevance to Aboriginal and Torres Strait Islander peoples and be derived from the previous *Bail Act 1992* (NSW), which 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).[39]

Northern Territory

2.34 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'.[40]

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37 A similar list of considerations with the same subsection as s 18(k) 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.

38 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 March 2002, 818–20 (Bob Debus).

39 *Bail Act 1982* (NSW) s 32(1)(a)(ia) of the original Act; note also *Bail Act 1992* (ACT) s 22(2)(b).

2.35 The NT provision commenced in 2015 following a review of the *Bail Act* (NT). Stakeholders in that inquiry supported the NSWLRC's 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'.[41]

Queensland

2.36 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.[42]

2.37 Community Justice Groups were established in 1993 in North Queensland. There are now up to 50 groups operating throughout Queensland. Community Justice Groups consist of Elders, Traditional Owners, and other respected 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 assistances to Aboriginal and Torres Strait Islander peoples as they progress through the Murri Court.[43]

2.38 The ALRC welcomes information on the practical application of the provisions operating in NSW, the NT and Queensland, and any views on whether these provisions need to be strengthened in order to meet any stated objectives.

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40 *Bail Act* (NT) s 24(1)(B)(iiic); *Crimes Act 1914* (Cth) s 15AB: The operation of this provision is tempered by a prohibition under Commonwealth law to consider any form of customary law or cultural practice as a reason for lessening or increasing the seriousness of the offending.

41 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 Northern Territory 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); 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).

42 *Bail Act 1980* (Qld) s 16(2)(e), see also s 15(f).

43 See, eg, Queensland Courts, *Community Justice Group Program* <https://goo.gl/RLPpnW>. Community Justice Groups are also referred to in ch 3 regarding sentencing. See also ch 11.

Victoria

2.39 Victoria is the only state or territory to have introduced a standalone provision requiring 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.[44]

2.40 This provision goes further than those provisions in NSW and the NT. It places a different emphasis on the evidence than the Queensland provision, which requires a submission from a Community Justice Group.

2.41 The provision was introduced in 2010 following a Victorian Law Reform Commission (VLRC) report on bail.[45] The VLRC recommended that bail authorities be required to take into account cultural factors and community expectations to prevent Aboriginal and Torres Strait Islander peoples from being remanded unnecessarily or bailed subject to inappropriate conditions.[46]

2.42 When introduced into Parliament, the then Attorney-General of Victoria stated that the provision would operate so that the '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'.[47] Courts have also interpreted the provision as permitting consideration of the over-representation of Aboriginal and Torres Strait Islander peoples in prison and policing practices.[48] The Supreme Court of Victoria has, however, stressed that the provision does not operate to grant bail to an Aboriginal and Torres Strait Islander applicant who poses an unacceptable risk to community safety.[49]

2.43 Section 3A was supported in the 2017 *Bail Review*, which reported widespread stakeholder support of the provision in Victoria.[50]

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44 *Bail Act 1977* (Vic) s 3A.
45 *Bail Amendment Act 2010* (Vic).
46 Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) 180. See also *DPP v S E* [2017] VSC 13 (31 January 2017) [20].
47 Victoria, *Parliamentary Debates*, Legislative Council, 29 July 2010, 3500–3503 (John Lenders).
48 *Re Mitchell* [2013] VSC 59 (8 February 2013) [13].
49 See, eg, *DPP v S E* [2017] VSC 13 (31 January 2017) [20]; *R v Chafer-Smith* [2014] VSC 51 (21 February 2014) (T Forrest J) [23]–[28]; *DPP v Hume* [2015] VSC 695 (8 December 2015) (Hollingworth J).
50 Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017) [4.82].

Legislative amendment

Proposal 2–1 The *Bail Act 1977* (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the *Bail Act*.

Other state and territory bail legislation should adopt a similar provision.

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

2.44 As outlined above, Aboriginal and Torres Strait Islander peoples may be disadvantaged in bail determinations and subject to bail conditions that have potential to conflict with cultural obligations and increase the likelihood of breach. Breaching bail can result in the person being remanded in custody, and can also influence any future bail determinations against that person.

2.45 There have been calls to introduce a provision similar to that 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.'[51] It suggested that bail authorities also 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'.[52]

2.46 A 2017 report into the over-representation of Aboriginal and Torres Strait Islander women in prison also recommended amendments to states 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. It also recommended that consideration be given to the impact of imprisonment—including remand—on dependent children.[53] 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

51 NSW Law Reform Commission, *Bail*, Report No 133 (2012) 65, Rec 11.3.

52 Ibid rec 10.4; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture—Final Report* (2006) recs 29–34.

53 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.

to have its intended effect of keeping Aboriginal and Torres Strait Islander women out of jail on remand.[54]

2.47 The ALRC proposes that state and territory bail legislation should be amended to reflect the Victorian provision. This would require bail authorities to take into account any historical disadvantage, cultural practice and obligations, and community supports when assessing the risk posed by an Aboriginal and Torres Strait Islander accused person. This may decrease the number of Aboriginal and Torres Strait Islander people accused of low level offending who are held on remand.

2.48 Courts can, however, already consider Aboriginality when making bail determinations. Legal frameworks are in place, including existing sub-sections that require the background of the person to be taken into account; and bench books and practice notes that direct the court to take into account historical context, and cultural practices and obligations in bail determinations. For example, the *Western Australian Bench Book (Aboriginal)* suggests that, under the 'exceptional circumstances' requirement for bail in serious cases, the circumstances of an Aboriginal accused person may constitute 'exceptional circumstances'.[55]

2.49 In NSW, the Bench Book suggests that decision makers

> [a]ssess 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.[56]

2.50 This approach has been reflected in bail determinations. 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.[57]

2.51 More recently, the Supreme Court of NSW found that lengthy periods of remand and separation from family may perpetuate the 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

54 Ibid 46.
55 Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australia Courts* (at 2nd), [6.1.5]. *Unchango v R* (Unreported, WASC, 12 June 1998).
56 Judicial Commission of New South Wales, above n 36, [2.3.2].
57 *R v Michael John Brown* [2013] NSWCCA 178 (2 August 2013) [34].

> of disadvantage and deprivation notoriously faced in indigenous 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.[58]

2.52 Nonetheless, the ALRC considers there to be benefits to prescribing these approaches in legislation. The introduction of a discrete provision, requiring the court to consider cultural practice and obligations in bail legislation should:

- enable the bail authority 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 the court to consider any previous offending—especially low level offending—in context, particularly where the person has experienced historical and continuing disadvantage, as in Victoria;[59]
- lower the likelihood of bail authorities imposing inappropriate conditions that ultimately 'set the person up to fail';
- decrease the risk that consideration of cultural practice and obligations by bail authorities will be applied 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.[60]

2.53 The ALRC welcomes submissions on the potential impact such a provision may have on bail determinations and the Aboriginal and Torres Strait Islander remand population.

Services that mitigate bail risks

Proposal 2–2 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.

2.54 Stakeholders in this Inquiry have indicated that more options are needed to support Aboriginal and Torres Strait Islander persons to be granted bail and to comply with bail conditions. A provision requiring consideration of culture alone may not be enough to facilitate a grant of bail where the person still requires support.[61] Aboriginal and Torres Strait Islander peoples may still be refused bail because they lack access to

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58 *R v Alchin* (Unreported, NSWSC, 16 February 2015) [3].
59 See, eg, *R v Chafer-Smith* [2014] VSC 51 (21 February 2014).
60 See chs 5, 9.
61 Human Rights Law Centre and Change the Record Coalition, above n 53.

appropriate accommodation or have little to no support in the community—rendering them a 'bail risk'. There are cases where—with or without the provision proposed above—if appropriate supports were available, the person would not be incarcerated.[62]

2.55 Appropriate support generally takes three forms: services that can support Aboriginal and Torres Strait Islander peoples to be granted bail and meet the conditions of their release; mainstream bail diversion programs; and culturally appropriate programs aimed at addressing offending behaviour.

2.56 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 peoples released on bail.[63] 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.[64] Examples of networked support services specifically for women include the Miranda Project in Sydney and Sisters Inside in Brisbane.

2.57 Aboriginal and Torres Strait Islander persons 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.[65]

2.58 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. This includes drug and alcohol intervention bail support programs; and early mental health interventions.[66]

2.59 Aboriginal and Torres Strait Islander peoples 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

62 Sanderson, Mazerolle and Anderson-Bond, above n 21, 205.
63 Ibid 207.
64 Human Rights Law Centre and Change the Record Coalition, above n 53, 4.
65 See, eg, Magistrates' Court of Victoria, *Court Integrated Services Program (CISP)* <www.magistratescourt.vic.gov.au>. See ch 11.
66 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>.

Strait Islander Elders to provide cultural programs to male Aboriginal offenders in a rural setting.[67]

2.60 There are also specific bail diversion programs for Aboriginal and Torres Strait Islander peoples with alcohol dependencies, such as the Queensland Indigenous Alcohol Diversion Program, which may be entered pre or post the entering of a plea. The Western Australia Indigenous Diversion Program is available on referral for drug dependent peoples who have entered a plea of guilty in some regional areas in Western Australia.[68] 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.

2.61 Stakeholders in this Inquiry have pointed to a need for the development of organisations that would help Aboriginal and Torres Strait Islander peoples show the stability needed to be granted bail, and that would then provide assistance to meet the conditions of the person's release. Other stakeholders have pointed to a lack of bail diversion programs that have been developed with Aboriginal and Torres Strait Islander communities and Elders, which elevate culture while addressing other criminogenic needs.

2.62 The ALRC proposes that state and territory governments should work with Aboriginal and Torres Strait Islander communities to identify areas of need, and develop infrastructure required to support Aboriginal and Torres Strait Islander peoples reach and retain bail. The ALRC welcomes submissions on what service provision is required, and on best practice approaches to bail diversion for Aboriginal and Torres Strait Islander peoples.

Policing bail conditions

2.63 Police discretion plays a key role in the return to prison of people who breach their bail conditions. Where a person released on bail has failed to comply with their bail conditions police can take the person back to court, where the court decides whether to continue to bail them or to hold the person on remand.

2.64 A NSW study conducted by the director of NSW BOCSAR on the breach rate of Aboriginal and Torres Strait Islander accused persons found that the rate was more than twice that of non-Indigenous breach of court orders. The authors noted that the

> difference might reflect a greater proclivity on the part of Indigenous defendants/offenders to breach court orders. It might, on the other hand, reflect either more intense police scrutiny of Indigenous defendants/offenders and/or a greater willingness on the part of police to take action against Indigenous Defendants/offenders who breach court orders.[69]

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67 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. See also ch 7.

68 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>.

69 Weatherburn and Snowball, above n 21, 57.

2.65 In NSW, for example, where police believe on reasonable grounds that a person has failed to comply or is about to fail to comply with the conditions of their release, police can:

- take no action;
- issue a warning;
- issue a notice to appear before the court;
- issue a Court Attendance Notice if they consider the failure is also an offence; or
- arrest the person without warrant (or apply for a warrant) and take person to court or bail authority.[70]

2.66 In deciding on an appropriate response, police are to consider the nature of the failure or threatened failure to comply; any reasonable excuse; the personal attributes and circumstances of the person and whether an alternative course of action to arrest is open to them.[71]

2.67 The 2016 Senate report, *Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services*, discussed breach of orders, including breach of bail conditions. It reported on stakeholder experiences and views of police practice. Stakeholders suggested that Aboriginal and Torres Strait Islander peoples subject to court orders were targeted by police, and attributed the growth in the incarceration rates of Aboriginal and Torres Strait Islander peoples and contact with the criminal justice system to this practice.[72] Specifically, the report noted the effect of the Suspect Targeting Management Policy of the NSW Police Force, a police intelligence tool that triages offenders into high or medium risk categories under which high risk offenders are subject to 'targeted policing' and additional surveillance.

2.68 The Redfern Legal Centre submitted to the Senate Inquiry that police had been targeting people with long criminal records for bail compliance checks without distinguishing between offenders with mostly minor previous offences, and those with a more serious level of criminality.[73] Statistics produced by the Redfern Legal Centre indicated a significant increase in bail compliance checks from 2005 and 2010.[74]

2.69 This does not reflect the entire approach taken by police in NSW. For example, in Bourke NSW, the recently introduced 'breach reduction strategy' relies on positive police involvement. The strategy includes making sure a warning is issued for technical breaches of bail, and that police contact community (via the Community Hub) when

70 *Bail Act 2013* (NSW) s 77(1).
71 *Bail Act 2013* (NSW) s 77(3).
72 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 80–82.
73 Ibid [5.77].
74 Ibid [5.78].

they believe that an Aboriginal and Torres Strait Islander person may not comply and may be in need of support services.[75]

2.70 The ALRC recognises the need for pre-emptive policing. Police have a difficult job, and maintaining a close watch on known offenders may prevent crime. The ALRC is, however, encouraged by the multitude of police programs that provide for engagement with Aboriginal and Torres Strait Islander peoples nationwide (see Chapter 12) and suggests that, regarding technical breaches of bail, there may be a balance between surveillance and engagement.

75 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 13.

3. Sentencing and Aboriginality

Contents

Summary 51
Systemic and background factors 51
The sentencing of Aboriginal and Torres Strait Islander offenders 52
Australian case law 55
Bugmy v The Queen 57
Canadian context 58
Legislative remedial action 66
Specialist sentencing reports 68
Information to assist the court in sentencing 68
Gladue reports 69

Summary

3.1 The Terms of Reference direct the ALRC to consider sentencing in examining the rates of Aboriginal and Torres Strait Islander incarceration. Sentencing decisions are crucial in determining whether a person goes to prison and for how long.

3.2 This chapter considers the relevance and impact of systemic and background factors that are unique to Aboriginal and Torres Strait Islander peoples, and explores how such factors are currently dealt with in Australian jurisdictions. It also examines the Canadian context, which was referred to by many stakeholders, as one that might offer some alternative approaches suitable to Australian circumstances.

Systemic and background factors

Question 3–1 Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders?

If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

Question 3–2 Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?

3.3 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 which guides the sentencing process.[2]

3.4 The purposes of sentencing generally include the following:

- to punish the offender for the offence in a way that is just and appropriate in all the circumstances;
- to deter the offender (specific deterrence) or other people (general deterrence) from committing the same or similar offences;
- to protect the community from the offender;
- to promote the rehabilitation of the offender; and
- to denounce the conduct of the offender.[3]

3.5 New South Wales (NSW) and Australian Capital Territory (ACT) 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'.[4]

The sentencing of Aboriginal and Torres Strait Islander offenders

3.6 When an offender is being sentenced, a court may have regard to submissions that provide a subjective account of the person's history, background and experience, including matters of disadvantage. Each Australian jurisdiction has a legislative framework that guides the sentencing process.[5] These frameworks allow for consideration of a range of subjective factors arising from the offender's history to be taken into account. This may include, for example, where the offender experienced deprivation, poverty, trauma or abuse where those factors may affect a person's moral

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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); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic).

3 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act* (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. See also, statement of the common law position: *Veen v R (No 2)* [1988] HCA 14 (29 March 1988).

4 *Crimes (Sentencing) Act 2005* (ACT) s 7(e) and (g); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(e) and (g).

5 *Crimes (Sentencing) Act 2005* (ACT); *Crimes Act 1914* (Cth); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1997* (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).

culpability. These frameworks apply irrespective of an offender's cultural or racial background.

3.7 The systemic background of disadvantage affecting many Aboriginal and Torres Strait Islander people, including offenders from this group, is well documented and is discussed in Chapters 1 and 9.

3.8 Two Australian jurisdictions explicitly refer to an offender's Aboriginal and Torres Strait Islander background in sentencing legislation. In Queensland, a court may 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.[6] In South Australia (SA), the *Criminal Law (Sentencing) Act 1988* (SA)[7] provides for a court to convene a sentencing conference, which is

> 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.[8]

3.9 A sentencing conference involves the defendant (whose consent is required), members of their family, their legal representative, the prosecutor, the victim (if they choose to participate) and an Aboriginal Justice Officer.[9] A court may take the views expressed in the conference into consideration when determining sentence, although it is discretionary.[10] In *R v Wanganeen*[11] the South Australian Supreme Court commented that s 9C is

> 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.[12]

3.10 The ALRC understands that sentencing conferences are not utilised frequently in South Australia,[13] but welcomes comment on its application, and that of s 9(2)(p) of the *Penalties and Sentences Act 1992* (Qld).

3.11 There is also a considerable body of case law that provides guidance on the sentencing of Aboriginal and Torres Strait Islander offenders in Australian jurisdictions.[14]

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6 *Penalties and Sentences Act 1992* (Qld) s 9(2)(p). See ch 11 for a brief description of the functions of Community Justice Groups.
7 *Criminal Law (Sentencing) Act 1988* (SA) s 9C.
8 *R v Wanganeen* [2010] SASC 237 (30 July 2010) 4.
9 *Criminal Law (Sentencing) Act 1988* (SA) s 9C.
10 *R v Wanganeen* [2010] SASC 237 (30 July 2010) 4.
11 *R v Wanganeen* [2010] SASC 237 (30 July 2010).
12 Ibid [7]–[8].
13 Ibid [3].
14 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* (Unreported, Supreme Court of NSW, 13 March 1992); *BP v R* [2010] NSWCCA 159 (30 July 2010); *R v Wurramara* [1999]

3.12 Sentencing judges rely on material submitted to them by the parties about an offender to assist them in determining sentence. This may include evidence of mitigating circumstances submitted by counsel for the defendant: for example, evidence of a person's deprived background, experience of abuse or trauma and other relevant factors that may affect a person's moral culpability.

3.13 In some instances, a court may request a pre-sentence report (PSR). These reports are prepared by a community corrections officer and their purpose is to give the court information to assist it in sentencing the offender. The report includes a risk assessment, and other information about the offender. It may indicate that an offender is unsuitable for a particular sentencing option, or that they are suitable but the option is not available. PSRs generally will not include a recommendation as to particular sentencing options, but may note the 'possible benefits of a particular intervention'.[15]

3.14 Queensland and SA have statutory provisions that explicitly provide for Aboriginal and Torres Strait Islander considerations to be put forward on behalf of an Aboriginal and/or Torres Strait Islander offender. The ALRC notes that these provisions apply in all courts hearing criminal matters in those jurisdictions, not only to Aboriginal and Torres Strait Islander specific sentencing courts (such as Koori, Murri and Nunga courts).[16]

3.15 In preliminary consultations, a number of stakeholders suggested that more could be done to facilitate the taking into account of the history of dispossession, colonisation and social disadvantage affecting Aboriginal and Torres Strait Islander people in Australia.

3.16 It was suggested by some stakeholders that, in some instances, submissions made on these matters on behalf of an offender are inadequate or non-existent, either because of a lack of resources, lack of time, or lack of understanding by counsel. A minority of stakeholders argued that, notwithstanding the decision in *Bugmy v The Queen* (discussed below), judicial officers ought to take 'judicial notice'[17] of the social disadvantage of Aboriginal and Torres Strait Islander peoples.[18] This argument reflects the Canadian position, which is supported by a legislative provision discussed below.[19]

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).

15 Corrective Services NSW, *Policy and Procedures Manual*. (2015) section B, pt 2.

16 *Penalties and Sentences Act 1992* (Qld) s 9(2)(p); *Criminal Law (Sentencing) Act 1988* (SA) s 9C. See ch 11 for a discussion of Aboriginal and Torres Strait Islander sentencing courts.

17 Generally, all facts in issue must be established or supported through evidence. The test for matters that may be the subject of judicial notice is set out in the High Court decision of *Holland v Jones* [1917] HCA 26; *Evidence Act 1995* (Cth) 1995.

18 See, eg, Stephen Norrish, 'Sentencing Indigenous Offenders—Not Enough "Judicial Notice"?' (Speech, Judicial Conference of Australia Colloquium, 13 October 2013).

19 *R v Ipeelee* [2012] 1 SCR 433 [60]; *Criminal Code, RSC 1985, c C-46* (Canada) s 718.2(e).

3.17 Against this backdrop, there was some support for a proposal that Australian jurisdictions legislate to require courts to consider an offender's Aboriginal or Torres Strait Islander background during sentencing. A number of stakeholders cited the Canadian *Criminal Code* as offering an instructive example.

3.18 The Australian approach to sentencing is reviewed below, with a particular focus on how the law has responded to Aboriginal and Torres Strait Islander offenders. A brief overview of the Canadian context is also discussed.

Australian case law

3.19 In 1982, in reviewing the sentence of an Aboriginal offender in *Neal v R*, the High Court considered that the sentencing court 'should have taken into account the special problems experienced by Aboriginals living in reserves'.[20] 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.[21]

R v Stanley Edward Fernando[22]

3.20 A decade later, and a year after the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) delivered its report, Wood J (as he then was) delivered his decision in the NSW case of *R v Fernando*. Fernando, a 48-year-old Aboriginal man, pleaded guilty to a charge of malicious wounding after stabbing his de facto partner a number of times. He 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. He and the victim had been consuming alcohol before the stabbing.

3.21 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 offenders' 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.
>
> (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

20 *Neal v R* [1982] HCA 55 (1982) [8].
21 Ibid [13].
22 *R v Fernando* (Unreported, Supreme Court of NSW, 13 March 1992).

> 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.

3.22 These '*Fernando* principles' have been described as a 'convenient collection of circumstances that courts can take into account in an appropriate case'.[23] 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'.[24] Rather, the principles provide a 'framework for consideration of the issues of disadvantage often attending the subjective circumstances of individual Indigenous offenders'.[25] As Wood CJ later set out in *R v Pitt*:

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23 Legal Aid NSW, *Sentencing Aboriginal Offenders* 2004.

24 Ibid 3. See also *R v Fernando* [2002] NSWCCA 28 (2002) [67] (Spigelman J).

25 Janet Manuell, 'The *Fernando* Principles: The Sentencing of Indigenous Offenders in NSW' (Discussion Paper, NSW Sentencing Council, December 2009) 10.

> 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.[26]

3.23 Some courts have 'narrowed the application' of the *Fernando* principles—particularly in the Northern Territory and Western Australia, and particularly in cases involving serious offending[27]—and commentary on the application of the principles indicates they have been applied 'unevenly'.[28] 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.'[29]

3.24 However, the 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*,[30] the majority of the High Court has 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.'[31]

Bugmy v The Queen

3.25 In October 2013, the High Court delivered its decision in the case of William David Bugmy.[32] 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 appealed to the High Court against the severity of the sentence on several grounds, two of which are particularly relevant.

3.26 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

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26 *R v Pitt* [2001] NSWCCA 156 (2001) [21].

27 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.

28 NSW Sentencing Council, *The Fernando Principles: The Sentencing of Indigenous Offenders in NSW–Discussion Paper* (2009) 10.

29 Ibid.

30 *Kennedy v R* [2010] NSWCCA 260 (17 November 2010).

31 *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [37].

32 *Bugmy v The Queen* [2013] HCA 37 (2 October 2013).

much of its force when it was raised against a background of numerous previous offences'.[33]

3.27 On appeal to the High Court, the Director of Public Prosecutions conceded an offender's background of disadvantage does not diminish over the passage of time. The High Court noted:

> The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending. 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.[34]

3.28 The other relevant ground of appeal was that the Court ought to have regard to two decisions of the Supreme Court of Canada: *R v Gladue*,[35] and *R v Ipeelee*.[36] The Candian context and these cases are discussed below.

Canadian context

3.29 Canada's Aboriginal Peoples,[37] like Australia's Aboriginal and Torres Strait Islander peoples, are over-represented in the prison population. For example, in 2013, Canada's Aboriginal Peoples comprised 4% of the Canadian population, but almost 25% of the prison population.[38]

3.30 Like Australia, Canada's history is one of colonisation. The resultant 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'.[39]

3.31 In Canada, police were often responsible for implementing a range of government policies, including those relating to assimilation and removal of children into residential schools.[40] 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.[41] Cultural

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33 *R v Bugmy* [2012] NSWCCA 223 (18 October 2012) [48].
34 *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [44].
35 *R v Gladue* [1999] 1 SCR 688.
36 *R v Ipeelee* [2012] 1 SCR 433.
37 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'.
38 Office of the Correctional Investigator, Canada, *Backgrounder: Aboriginal Offenders—A Critical Situation* <www.oci-bec.gc.ca>.
39 Canada, Royal Commission on Aboriginal Peoples, *Report* (1996) vol 1, 7.
40 Jonathan Rudin, 'Aboriginal Peoples and the Criminal Justice System' (Ipperwash Inquiry, 2007) 1.
41 Rudin, above n 40.

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.[42]

The differences between the Australian and Canadian contexts

3.32 Australian and Canadian sentencing approaches are not dissimilar, although there are some differences.

3.33 The concept of 'imprisonment as a last resort', set out in s 718.2(e) of Canada's *Criminal Code* builds upon an established common law principle.[43] Similar to the principle of parsimony,[44] most Australian jurisdictions have, to some degree, reflected this idea by providing that a court 'must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate'.[45]

3.34 The legislative frameworks in Canada, and in all Australian jurisdictions, set out the purposes of sentencing. These have been described as the goals or objectives that a sentence should be designed to achieve.[46]

3.35 Section 718 of the Canadian *Criminal Code* sets out denunciation, deterrence, community protection, rehabilitation,[47] and 'promoting a sense of responsibility in offenders and acknowledgement of harm done to victims to the community'.[48]

3.36 In contrast to most Australian statutes, however, the Canadian legislation incorporates a further principle: 'to provide reparations for harm done to victims or to the community'.[49] Only the ACT and SA have a similar principle, and provide that any 'action taken by an offender to make reparation for injury, loss or damage resulting from the offence' as a sentencing consideration.[50] The Canadian statute also omits punishment as a sentencing purpose.[51]

3.37 These differences—the omission of punishment and incorporation of reparation for harm done—provide a foundation for a 'restorative' framework in delivering justice

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42 Brian R Pfefferle, 'Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration' (2006) 32(2) *Manitoba Law Journal* 113.

43 *R v Way* [2004] NSWCCA 131 (11 May 2004).

44 The principle of parsimony operates to prevent the imposition of a sentence that is more severe than is necessary to achieve the purpose or purposes of the sentence: Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* Report No 103 (2006) [5.09].

45 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Sentencing Act 1991* (Vic) s 5(4); *Sentencing Act 1995* (WA) s 6(4); *Crimes Act 1914* (Cth) s 17A; *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Crimes (Sentencing) Act 2005* (ACT) s 10; *Penalties and Sentences Act 1992* (Qld) s 9(2).

46 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* Report No 103 (2006) [5.1].

47 *Criminal Code, RSC 1985, c C-46* (Canada) s718(a)–(d).

48 Ibid 718(f).

49 Ibid s 718(e).

50 *Crimes (Sentencing) Act 2005* (ACT) s 33(h); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(g).

51 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).

in Canada. There are some parts of the criminal justice system in Australian jurisdictions that incorporate aspects of restorative justice,[52] 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 jurisdictions.

3.38 In 2006, the ALRC recommended a suite of sentencing principles in the context of federal offenders, that included restoration, while retaining retribution.[53] On restoration it stated:

> Restoration may not always be an appropriate purpose of sentencing. However, where appropriate, restorative initiatives have demonstrated their potential to complement and enhance the operation of the criminal justice system. They provide an effective way to recognise victims' interests in the sentencing process and to encourage offenders to accept responsibility for their actions.[54]

3.39 The Tasmanian Law Reform Institute made a similar recommendation in 2008.[55]

3.40 However, in its review of the NSW sentencing framework in 2013, the NSW Law Reform Commission (NSWLRC) rejected the inclusion of restoration or reparation as a sentencing principle because:

- other sentencing principles, specifically those related to accountability and recognition of the harm caused, adequately accommodated the objectives of restoration or reparation;
- to do so would link punishment to 'the victim's need for restitution or compensation, rather than to the gravity of the offender's conduct'[56], hence it considered 'reparation' to be 'ancillary to the sentencing process';[57]
- the proposal received little stakeholder support; and
- there were concerns about defining the terms, and consequential issues that may arise, including how such issues could be managed by a court in assessing the weight of issues relevant to those terms.[58]

3.41 In preliminary consultations in this Inquiry, a number of stakeholders spoke about Aboriginal and Torres Strait Islander justice and culture incorporating concepts of restoration and reparation. Some said it was important that these were not only

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52 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).

53 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* Report No 103 (2006) Rec 4-1, [4.27].

54 Ibid [4.28].

55 Tasmanian Law Reform Institute, *Sentencing* Final Report No 11 (2008) Rec 88, 7.1.35-7.1.36.

56 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [2.131], citing NSW Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) [3.21].

57 Ibid [2.131].

58 Ibid [2.131]–[2.136].

acknowledged but factored into the mainstream criminal justice process. A Canadian inquiry into Aboriginal justice in 1999 made a similar point:

> The underlying philosophy in Aboriginal societies in dealing with crime was the resolution of disputes, the healing of wounds and the restoration of social harmony. It might mean an expression of regret for the injury done by the offender or by members of the offender's clan. It might mean the presentation of gifts or payment of some kind. It might even mean the forfeiture of the offender's life. But the matter was considered finished once the offence was recognized and dealt with by both the offender and the offended. Atonement and the restoration of harmony were the goals—not punishment.[59]

3.42 The Canadian Aboriginal Justice Implementation Commission distinguished the justice systems of Aboriginal peoples and those of European societies, placing atonement and restoration at the centre of the former and arguing it prevents further offending:

> It is this strong, even central, cultural imperative to prevent or deter violent acts of revenge or retribution that runs through all these accounts. Aboriginal societies felt it important that offenders atone for their acts to the aggrieved person and the victim's family or clan. European society demanded the state punish the offender. In the Aboriginal justice system, once the atonement had been made and the offence recognized, the matter was forgotten and harmony within the community was considered restored. In the European justice system, the offender 'pays his debt' to society, usually by going to jail. Rarely is there atonement to the person or persons injured. There is little restoration of harmony within the community.[60]

3.43 Noting the similar experiences of Canadian Aboriginal Peoples and those of Aboriginal and Torres Strait Islander peoples, and the cultural importance of restoration or reparation in their traditional justice systems, the ALRC is interested in stakeholder views on whether Australian jurisdictions should incorporate a similar sentencing consideration into legislation, where it does not exist.

Canada's legislative amendment to consider Aboriginality in sentencing

3.44 In 1995, the Canadian Parliament amended the *Criminal Code* to codify the purpose 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 'Purpose 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*.[61]

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59 Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba* (1999) vol 1, ch 2.

60 Ibid.

61 Emphasis added.

3.45 The then Minister for Justice noted the 'sad over-representation' of Aboriginal Peoples in Canadian prisons as the rationale for the provision.[62] The provision was considered by the Canadian Supreme Court in the case of Jamie Tanis Gladue.

R v Gladue[63]

3.46 In this case, 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.

3.47 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'.[64]

3.48 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),[65] statements made by the Minister for Justice at the time and other members of Parliament 'corroborate and do not contradict' its conclusion.[66] The Court also referred to a number of reports to support its conclusion on the remedial nature of the section.

3.49 The Court stressed that sentencing is an 'individual process'[67], but held that the effect of s 718.2(e) is to 'alter the method of analysis'[68] 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.[69]

3.50 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.[70]

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62 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.
63 *R v Gladue* [1999] 1 SCR 688.
64 Ibid [4].
65 Ibid [43].
66 Ibid [45].
67 Ibid [93].
68 Ibid.
69 Ibid.
70 Ibid.

3.51 The Court emphasised that s 718.2(e) is 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'.[71]

3.52 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.

3.53 A number of higher courts affirmed the principles set out in *Gladue*,[72] however the numbers of Aboriginal Canadians incarcerated continued to rise.

R v Ipeelee and the criticisms of s 718.2(e) and Gladue

3.54 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*.[73] 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',[74] the *Gladue* principles 'were never expected to be a panacea':[75]

> … 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*.[76]

3.55 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';[77] and that its application to serious or violent offences was 'irregular and uncertain'.[78] 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.[79]

3.56 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

71 Ibid.
72 *R v Wells* (2000) 1 SCR 207; *R v Kakekagamick* [2006] 214 OAC 127.
73 *R v Ipeelee* [2012] 1 SCR 433.
74 Ibid [63].
75 Ibid.
76 Ibid [63] (emphasis in original).
77 Ibid [81]–[83].
78 Ibid [84]–[87].
79 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*.[80]

3.57 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'.[81] Noting that 'just sanctions are those that do not operate in a discriminatory manner,[82] 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'.[83]

3.58 The Court noted that *Gladue* explicitly rejected the argument that s 718.2(e) was an 'affirmative action provision'[84] or an 'invitation to engage in reverse discrimination'.[85] 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'.[86]

> 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.[87]

3.59 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',[88] the Court rejected this, finding that it 'ignores the distinct history of Aboriginal peoples in Canada'.[89] Noting the extensive history of reports and commissions on that history, including the experience of Aboriginal peoples with the

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80 Ibid [64].
81 Ibid [66].
82 Ibid [68].
83 Ibid [66].
84 Ibid [71].
85 *R v Gladue* [1999] 1 SCR 688 [86].
86 *R v Ipeelee* [2012] 1 SCR 433 [75].
87 Ibid.
88 Ibid [76].
89 Ibid [77].

criminal justice system, the Court considered that 'current levels of criminality are intimately tied to the legacy of colonialism'.[90]

3.60 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.[91]

3.61 *Ipeelee* has been said to 'represent a significant clarification of the law'[92] post-*Gladue*, particularly in affirming its application to all, including serious, offences.

3.62 Returning to the High Court's consideration of *Bugmy*, the appellant submitted:

> *Ipeelee* and *Gladue* are authority requiring Canadian courts to take into account the unique circumstances of all Aboriginal offenders that bear on the sentencing process, as relevant to the moral blameworthiness of the individual as an aspect of the principle of proportionality in sentencing. As opposed to limiting the extent to which factors of Indigenous social deprivation can be taken into account, the Supreme Court of Canada has held that it is necessary to take such factors into account in order to achieve equality before the law.[93]

3.63 In *Bugmy*, the appellant likened the existence of s 718.2(e) of the Canadian *Criminal Code* to ss 3A and 21A of the NSW *Crimes (Sentencing Procedure) Act 1999*, which respectively provide for the purposes and principles of sentencing, and factors to be considered in sentencing.

3.64 Noting the application of *Neal* and *Fernando*, the appellant in *Bugmy* submitted that subsequent to both those decisions, there had been a myriad of court decisions, national reports, 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'.[94]

3.65 Drawing together the requirements of the relevant NSW legislation, and Canadian jurisprudence, the appellant argued that the Court adopt an approach akin to that in *Gladue*, submitting that 'such an approach promotes equality before the law'.[95]

3.66 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), and in the context of the Canadian *Criminal Code*, which includes a restorative justice focus.[96] The High Court distinguished these features from the NSW legislative context:

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90 Ibid.
91 Ibid.
92 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.
93 Bugmy, 'Appellant's Submissions', Submission in *Bugmy v The Queen*, High Court of Australia, S99/2013 (14 June 2013) [6.26].
94 Ibid [6.27]–[6.29].
95 Ibid [6.32].
96 *Bugmy v The Queen* [2013] HCA 38 [29]–[31].

> 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.[97]

3.67 The High Court referred to Australian case law and principles that provide for consideration of disadvantage within Aboriginal communities.[98] Ultimately, however, it rejected the argument that 'courts ought to take judicial notice of the systemic background of deprivation of Aboriginal offenders',[99] on the basis that it would be 'antithetical to individualised justice'.[100] This is contrasted with the Canadian Supreme Court decision in *Ipeelee* which, relying on the legislative provision, suggested:

> When sentencing an Aboriginal offender, courts *must* take judicial notice of such matters as 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 peoples. These matters provide the necessary context for understanding and evaluating the case-specific information presented by counsel. However, these matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders.[101]

Legislative remedial action

3.68 There are two schools of thought regarding the proposition that consideration of background and systemic factors affecting Aboriginal and Torres Strait Islander peoples should expressed in legislation. The first considers that the disproportionate representation of Aboriginal and Torres Strait Islander people in prison—and the unique position of historical and contemporary disadvantage experienced by Aboriginal and Torres Strait Islander people in society—warrants a legislative provision that would require judicial consideration of underlying causes of offending when determining sentences. Specific recognition and consideration by courts of these matters may ensure that, where appropriate, material facts relevant to a particular individual before the court for sentence are properly contextualised.

3.69 Prior to the decision in *Bugmy*, the NSWLRC considered whether a person's Aboriginality should be a relevant matter in sentencing. It noted that submissions to its inquiry from various stakeholders supported such a proposal, with the Bar Association and Aboriginal Legal Service NSW/ACT advocating for an amendment to s 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The NSWLRC emphasised that:

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97 Ibid [36].
98 Ibid [37]–[40].
99 Ibid [41].
100 Ibid.
101 *R v Ipeelee* [2012] 1 SCR 433 (emphasis added).

> 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.[102]

3.70 The NSWLRC did not recommend 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',[103] 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).[104]

3.71 A number of stakeholders in this Inquiry have so far supported the enactment of a provision in Australian jurisdictions that reflects that expressed in s 718.2(e) of Canada's *Criminal Code*, particularly in the context of the decision in *Bugmy*. In its recent report on the over-representation of Aboriginal and Torres Strait Islander women in Australian prisons, 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.[105]

3.72 Similarly, Judge Stephen Norrish QC of the District Court of NSW, writing extrajudicially post-*Bugmy*, suggested that

> statutory amendment to existing 'purposes' and 'factors' relevant to sentencing requiring consideration of the social context of offending applicable in all sentencing exercises may address this issue.[106]

3.73 The second school of thought argues that existing legislative provisions—including sentencing purposes, principles and factors including parsimony, 'imprisonment as a last resort', and an offender's general background—along with well established common law principles, already allow for consideration of all relevant material facts to be taken into account when sentencing Aboriginal and Torres Strait Islander offenders—including a background of disadvantage and available alternatives. It is suggested 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. Some also argued that the issue is not a

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102 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [17.17].
103 Ibid [17.39].
104 Ibid.
105 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.
106 Stephen Norrish, 'Sentencing Indigenous Offenders—Not Enough "Judicial Notice"?' (Speech, Judicial Conference of Australia Colloquium, 13 October 2013) 55.

lack of understanding by judicial officers about the issues, or a matter of having relevant material available to them when sentencing, but rather about the limited options available to them when structuring a sentence.

3.74 The ALRC notes that s 10 of the *Racial Discrimination Act 1995* (Cth) may present an impediment to Australian states legislating in this way, as alluded to without comment by the High Court in *Bugmy*.[107] There may nonetheless be avenues open to the Commonwealth to overcome any constitutional concerns.[108]

3.75 The ALRC invites comment on whether state and territory governments should legislate to expressly require courts to consider the unique background and systemic factors affecting Aboriginal and Torres Strait Islander people when sentencing offenders from those backgrounds. If so, the ALRC also invites comment on why such an approach is required, and how this could be achieved.

Specialist sentencing reports

Question 3–3 Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?

Question 3–4 In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?

Question 3–5 How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?

Information to assist the court in sentencing

3.76 The discussion above explores the legislative and common law framework setting out the matters that may be taken into account during the sentencing process.

3.77 In preliminary consultations to this Inquiry, a number of stakeholders reported 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. Some stakeholders spoke about the submissions being almost 'standardised', noting these generally incorporated a reference to the offender's Aboriginal or Torres Strait Islander heritage, a mention of history of trauma or abuse, substance usage, family and dependants, employment and housing circumstances.

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107 *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [36].

108 See, eg, Stephen Norrish, 'Sentencing Indigenous Offenders—Not Enough "Judicial Notice"?' (Speech, Judicial Conference of Australia Colloquium, 13 October 2013) 55.

3.78 A number of stakeholders that raised these issues suggested that there was a role for specialised sentencing reports. They argued that the more information a court has about an individual, their community, the supports and options available, and broader contextual factors, the more likely a sentencing outcome can be tailored to respond to the needs of the offender and the community, including the victim—noting that many victims are also Aboriginal and Torres Strait Islander people.

3.79 It was suggested that providing for specialist sentencing reports in an Australian context would give a more complete picture of the particular Aboriginal or Torres Strait Islander offender standing before the court than is currently afforded by the provision of PSRs and the making of sentencing submissions.

3.80 The ALRC invites comment on this issue.

Gladue reports

3.81 *Gladue* reports are specialist Aboriginal sentencing reports prepared in some Canadian provinces to facilitate s 718.2(e) of the *Criminal Code*, and reflecting the decision in *Gladue*, discussed above. *Gladue* reports are a way of integrating one part of specialist court processes into mainstream courts. *Gladue* reports are different from 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 people 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, they argued that the two would complement each other.

3.82 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':

> [W]hen 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.[109]

3.83 *Gladue* reports are ideally prepared 'with the help of someone who has a connection to and understands the Aboriginal community'.[110] 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

109 Law Report—ABC Radio National, *Canada's Approach to Sentencing Aboriginal Offenders* <http://www.abc.net.au/radionational/programs/lawreport/>.

110 Legal Services Society, British Columbia, *Gladue Primer* (2011) 7.

rehabilitation and healing'.[111] 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 addictions, family violence and abuse, and institutionalisation. As observed by Rudin:

> [I]nformation 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.[112]

3.84 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.[113]

3.85 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',[114] including 'more information about resources in rural and remote communities',[115] and 'options tailored to the specific needs of each person'.[116] 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'.[117]

3.86 The ALRC understands that the Aboriginal Legal Service NSW/ACT are in the process of developing the 'Bugmy Evidence Library', a body of material regarding 'the social disadvantage of certain Aboriginal communities'[118] for use as evidence in sentencing matters. The Bugmy Evidence Library will be 'freely available for the use of the legal profession and the judiciary.'[119]

What impact could specialist sentencing reports have?

3.87 The impact of *Gladue* reports in Canada varies across the provinces. Offenders in some provinces having no capacity to access a *Gladue* report, 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.

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111 Ibid.
112 Law Report—ABC Radio National, above n 109.
113 Rudin, above n 40, 48–50.
114 Legal Services Society of British Columbia, *Gladue Report Disbursement: Final Evaluation Report* (2013) 3.
115 Ibid.
116 Ibid.
117 Ibid.
118 Law and Justice Foundation, *Awarded Grants in 2015/2016* <http://www.lawfoundation.net.au>.
119 Ibid.

3.88 *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 aboriginal offender, when Crowns have that information, when defence counsel has that information, the sentences that people get change. So the *Gladue* reports make a difference on a micro level.[120]

3.89 In 2007, based on his experience in Toronto, Rudin suggested that the impact of a *Gladue* report is not reflected in Aboriginal incarceration rates,[121] a British Columbia evaluation suggested more positive results.

3.90 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.

3.91 In British Columbia, an evaluation of the LSS pilot suggested that '*Gladue* reports may contribute to fewer and shorter incarceration sentences for Aboriginal people'.[122] 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 the non-*Gladue* sample (18 days compared to 45 days).[123]

3.92 A number of stakeholders in this Inquiry supported *Gladue* style reports for Aboriginal and Torres Strait Islander offenders, arguing that they would provide invaluable contextual and individualised information about an offender that would assist judges when tailoring a sentence for that offender.

3.93 Generally, stakeholders that were supportive of legislative amendment of the type discussed above, and of Australian courts adopting a *Gladue* type approach, tended to support specialist sentencing reports for Aboriginal and Torres Strait Islander offenders. These stakeholders were generally of the view that such specialist sentencing reports should be prepared by an Aboriginal and Torres Strait Islander person, 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.

3.94 Some stakeholders considered that that community corrections officers should not prepare such reports. Similar concerns have been noted in the Canadian context. The LSS evaluation noted that among clients assisted in the British Columbia pilot,

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120 Law Report—ABC Radio National, above n 109.

121 Rudin suggested this was largely as a result of resourcing constraints: Rudin, above n 40, 60; Campbell Research Associates, *Evaluation of Gladue Aboriginal Legal Services of Toronto Gladue Caseworker Program–Oct 2006–Sept 2007* (2008).

122 Legal Services Society of British Columbia, above n 114, 25.

123 Ibid 5.2.

there was a 'broad consensus that probation officers and PSRs can be more harmful than helpful'.[124] In that context, the knowledge of Aboriginal life experience held by *Gladue* report writers tended to result in clients being more comfortable and opening up about their experiences, including about 'details they would not have told anyone else, especially their probation officers'.[125]

3.95 Most stakeholders in this Inquiry that supported specialist sentencing reports for Aboriginal and Torres Strait Islander offenders emphasised the need to ensure that appropriate organisations were resourced to prepare specialist sentencing reports. A number highlighted that, without adequate and ongoing resourcing, the introduction of such reports would have little impact at the macro level, as has been the experience in Canada.

3.96 Not all stakeholders supported such reports, noting that courts can already receive sentencing submissions about an offender's personal background, experience and the impact of various factors—including cultural and systemic factors affecting their community which may contribute to offending. Some also took the view that Australian courts and counsel *are* already expert in responding to Aboriginal and Torres Strait Islander offenders. The high volume of Aboriginal and Torres Strait Islander defendants coming through courts make them 'bread and butter' work for courts and for criminal lawyers, particularly in some courts that operate in areas with high Aboriginal and Torres Strait Islander populations.

3.97 The ALRC is interested in the views of stakeholders about whether specialist sentencing reports in the nature of *Gladue* reports would assist Australian courts in dealing with Aboriginal and Torres Strait Islander offenders, and if so, how. The ALRC also invites comment on what options should be explored to facilitate the preparation of such reports—including who should prepare them; and how should they be funded.

124 Ibid 3.
125 Ibid. For the Manitoba experience, see Rudin, above n 40, 48.

4. Sentencing Options

Contents

Summary 73
Mandatory sentencing 74
The impact on Aboriginal and Torres Strait Islander peoples 74
Whether to retain mandatory sentencing 78
Short sentences of imprisonment 81
The impact on Aboriginal and Torres Strait Islander peoples 81
Whether to abolish short sentences of imprisonment 84
Availability of community-based sentencing options 88
Remoteness 89
Suitability requirements for custodial community-based sentences 90
Flexibility to tailor sentences 91

Summary

4.1 A number of themes have emerged in preliminary consultations with stakeholders in this Inquiry about the impact of sentencing provisions and practices on the over-representation of Aboriginal and Torres Strait Islander defendants in the criminal justice system including that:

- judicial discretion should be maximised in sentencing matters;
- there may be significant benefits to sentencing courts if the quality of material put before them, as well as sentencing options available to them, are enhanced or increased; and
- some of the following issues affect not only Aboriginal and Torres Strait Islander defendants, but all defendants.

4.2 In this chapter, the ALRC asks a number of questions designed to elicit further information about sentencing provisions and practices including on mandatory sentencing, the impact of short sentences of imprisonment, and flexibility in tailoring sentences. The ALRC also makes a proposal about community-based sentencing options.

Mandatory sentencing

Question 4–1 Noting the incarceration rates of Aboriginal and Torres Strait Islander people:

(a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and

(b) which provisions should be prioritised for review?

4.3 In Australia, the typical approach to legislating criminal offences 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 gives courts a broad discretion to impose a sentence up to, and including, the maximum based on a range of factors. These factors include the impact of the offence on the victim and the circumstances of the offending and the accused. In sentencing an offender, the court must consider whether a particular case meets the threshold for imposing a term of incarceration, taking into account and balancing the purposes and principles of sentencing.

4.4 It is unusual for legislation to set minimum or mandatory penalties for criminal offences. Mandatory sentencing laws require that judicial officers deliver a minimum or fixed penalty (for the purposes of this paper, a term of imprisonment) upon conviction of an offender.[1] The removal of the usual discretion of the court to consider mitigating factors or to utilise alternate sentencing options to deal with an offender are defining features of such provisions. Mandatory sentencing laws may apply to certain offences, or to a particular type of offender—for example, repeat offenders.

4.5 While mandatory sentencing laws are found in most Australian jurisdictions in various forms,[2] the ALRC focuses on the impacts of mandatory sentencing for offences that stakeholders have identified as having a disproportionate impact on Aboriginal and Torres Strait Islander adult offenders.[3]

The impact on Aboriginal and Torres Strait Islander peoples

4.6 During preliminary consultations, stakeholders across the country overwhelmingly supported the repeal of mandatory sentencing provisions. The ALRC has heard that such provisions have a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

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1 For the purposes of this part, the ALRC is not referring to 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 2007* (NT) s 121(2); *Crimes Act 1958* (Vic) ss 15A, 15B; *Road Traffic Act 1974 1974* (WA) ss 60, 60B(3); *Criminal Code Act Compilation Act 1913* (WA) ss 297, 318.

3 The ALRC notes that mandatory sentencing also affects young offenders in some jurisdictions: eg, *Criminal Code Act Compilation Act 1913* (WA) s 297(6).

4.7 Western Australia (WA) and the Northern Territory (NT) have high Aboriginal and Torres Strait Islander populations, coupled with historically extensive mandatory sentencing regimes. Both jurisdictions were identified by stakeholders as currently having mandatory or presumptive sentencing provisions that have a significant impact on their Aboriginal and Torres Strait Islander populations. These provisions are discussed below.

Western Australia

4.8 In WA, mandatory penalties apply to convictions for grievous bodily harm offences; and to offenders convicted on multiple burglary counts. These were identified by stakeholders as having a disproportionate impact on Aboriginal and Torres Strait Islander populations.

4.9 In WA, a mandatory minimum term of imprisonment—75% of the maximum—is imposed upon conviction for causing grievous bodily harm when committed in the course of an aggravated home burglary.[4] The maximum penalty for grievous bodily harm is 10 years imprisonment, or 14 years if committed in circumstances of aggravation. This means that an offender would receive, at a minimum, seven and a half years, or 10 and a half years imprisonment.

4.10 Western Australian law also imposes a minimum term of imprisonment for repeat burglary offenders. An adult offender with two prior convictions for burglary must, upon the third conviction, be sentenced to at least two years imprisonment.[5]

4.11 The offence of burglary covers 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 with burglary. This has been noted by the Australian Human Rights Commission, in an example of a young offender:

> Although the legislation assumes that every offence of home burglary is equally serious, home burglary covers a wide range of circumstances. In one case, a 12 year old Aboriginal boy from a regional area, with a history of welfare intervention, educational problems and substance abuse, was sentenced to 12 months detention for entering a house in company with others and taking a wallet containing $4.00. His previous burglaries consisted of entering a laundry room in a hotel where nothing was removed and a school canteen where a can of soft drink was taken.[6]

4.12 The ALRC has also heard that, in some instances, Aboriginal offenders are being charged with burglary after entering dwellings looking for food, or having wandered in and out of houses in communities in a way that may not necessarily be regarded as inherently 'criminal' in the context of those communities.

4.13 Notwithstanding these concerns, a 2001 WA Department of Justice review of the mandatory sentencing provisions applicable to home burglary offences concluded

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4 Ibid s 297(5).

5 Ibid 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).

6 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 105.

that the amendments 'had little effect on the criminal justice system', and did not make any recommendations regarding their retention or otherwise.[7]

4.14 More recently, amendments to the WA legislation tightened the regime by providing that an offender who commits their first, second and third burglary on a single night would now be captured by the 'three strikes' law, whereas prior to the changes multiple counts could be counted as a single 'strike' in such circumstances. Some stakeholders referred to these amendments as further affecting Aboriginal and Torres Strait Islander offenders. The ALRC has heard that an offender might enter a number of homes in a night while, for example, heavily intoxicated and looking for food. They might have no prior offending history, and there may be no harm or violence involved, but the judicial officer would be required to impose a sentence of two years imprisonment under the 'three strikes' regime.

4.15 Some stakeholders also reported that the mandatory term of six months imprisonment that applies to the offence of assaulting public officers, including police officers, was a common charge laid against Aboriginal and Torres Strait Islander offenders in WA.[8]

4.16 None of the offences noted above allow for the term of imprisonment to be suspended.

4.17 The ALRC acknowledges that the manner in which data is collected and reported makes it difficult to directly attribute disproportionately high rates of incarceration with the use of mandatory sentencing.[9] However, the two most common categories of offence recorded for Aboriginal and Torres Strait Islander offenders in WA are 'acts intended to cause injury' and 'unlawful entry with intent',[10] categories into which the above offences that attract mandatory penalties would fall.

Northern Territory

4.18 The NT has had mandatory sentencing for some decades. In 1997, mandatory penalties applied to a range of property offences and operated on a 'three strikes' basis. Adult offenders faced mandatory minimum terms of imprisonment at each 'strike' (14 days, 90 days, 12 months).[11] In 2001, the laws were repealed following the suicide of a

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7 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).

8 *Criminal Code Act Compilation Act 1913* (WA) s 318.

9 This is because individual state and territory based offences are grouped into categories to allow for systematic ordering and analysis across jurisdictions. As a result, individual offence provisions, such as those that attract mandatory penalties, are grouped in with other offences that do not attach to mandatory penalties: Australian Bureau of Statistics, *Australian and New Zealand Standard Offence Classification, Cat No 1234.0* (2011).

10 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 15.

11 Declan Roche, 'Mandatory Sentencing' (Trends & Issues in Crime and Criminal Justice No 138, Australian Institute of Criminology, December 1999). Similar provisions also applied to juveniles.

15 year old Aboriginal boy mistakenly mandatorily detained for his second minor property offence (theft of stationery worth $50 from a council building).[12]

4.19 Currently, the NT *Sentencing Act* classifies individual offences into one of five offence levels. The legislation requires a court to impose either a term of 'actual imprisonment' or a 'minimum sentence', depending on the offence level and whether or not the offence is a second or subsequent offence by the offender.[13] This means that there are mandatory terms of imprisonment attached to some offence levels, and mandatory minimums for others.

4.20 The 'lower end' offences that attract mandatory penalties include common assaults, assaults on police, unlawful stalking, robbery, and assault with intent to steal. Where a person has a previous conviction for a 'violent offence',[14] the court must impose a term of actual imprisonment.[15] When an offender with no prior convictions is convicted of unlawfully causing harm to a victim and that victim 'suffers physical harm as a result of the offence', the court must impose a term of actual imprisonment.[16]

4.21 There is an 'exceptional circumstances' provision,[17] 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.[18]

4.22 The following example referred to on ABC's *Lateline* demonstrates how the law applies:

> 'Gloria' is a young Aboriginal mother of four from a remote town on the northern tip of Arnhem Land. Gloria admitted to drunkenly hitting another woman who taunted her about the death of her mother. The harm caused to the victim was described by the prosecutor as being 'a blood nose and soreness to her chest'. Gloria had appeared in court once previously for a minor offence.
>
> In court, the magistrate told defence counsel, '[t]he test is that unless you can establish some exceptional circumstances, then I must sentence this lady to three months imprisonment'. Defence counsel submitted, 'It was a spur of the moment thing, it's not something she needs deterrence from because she's not a habitual offender. She's not finding herself before the court time and time again'.
>
> With no exceptional circumstances offered, the Magistrate sentenced Gloria to three months imprisonment, as mandated. It was suggested that, prior to the introduction of mandatory sentencing laws, Gloria would have likely received a fine for the offence.[19]

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12 Leonie Howe, 'Mandatory Sentencing: A Death Sentence in the Northern Territory?' (2001) 12(3) *Current Issues in Criminal Justice*.
13 *Sentencing Act* (NT) div 6A.
14 Ibid sch 2.
15 Ibid s 78DF.
16 Ibid s 78DE.
17 Ibid s 78DI.
18 Ibid s 78DG.
19 'Mandatory Sentencing "Increases Prison Numbers"', *Lateline*, 28 May 2014 <http://www.abc.net.au/lateline/content/2014/s4014347.htm>.

4.23 A review of the NT's mandatory minimum sentences for violent offences was conducted in 2015.[20] The review concluded that the introduction of the provisions:

> coincided with a reduction in offending and reoffending dropped, but this was thought to be due to another crime reduction initiative;
>
> did not increase the overall percentage of violent offenders sentenced to prison, although it did result in changes to the type of imprisonment option used;
>
> led to an increase in sentence length for repeat violent offenders sentenced in the Court of Summary Jurisdiction, but not for first-time violent offenders or offenders sentenced in the Supreme Court;
>
> was followed by an increase in the consistency of sentence outcome and sentence length for repeat violent offenders, but had relatively little impact on consistency of outcomes for first-time offenders;
>
> resulted in an increase in the length of time and number of court appearances required to finalise defendants who pleaded guilty, and may have contributed to a decrease in the percentage of defendants with a final plea of guilty; and
>
> did not lead to an increase in the number of prisoners held for assault offences (the majority of violent offences).[21]

Whether to retain mandatory sentencing

4.24 Stakeholders consulted by the ALRC to date strongly supported the repeal of mandatory sentencing provisions as they:

- unacceptably constrain the exercise of judicial discretion;
- displace discretion to other parts of the criminal justice system, most notably to police and prosecutors;
- are inconsistent with the rule of law and the separation of powers, by directing the manner in which the judicial power should be exercised;
- contradict the principle of 'imprisonment as a last resort';[22]
- reduce the incentive to plead guilty, resulting in increased workloads for the courts; and
- do not operate to deter offenders, and may in fact increase the likelihood of reoffending, as periods of incarceration diminish employment prospects, positive social links, and other protective factors that help prevent recidivism.

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20 Department of the Attorney-General and Justice (NT), *Review of the Northern Territory Sentencing Amendment (Mandatory Minimum Sentences) Act 2013* (2015) 7.

21 Ibid 2–3.

22 Noting that all Australian jurisdictions (with the exception of Tasmania and the NT) have legislated to enforce the principle: *Crimes Act 1914* (Cth) s 17A; *Crimes (Sentencing) Act 2005* (ACT) s 10; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Penalties and Sentences Act 1992* (Qld) ss 4S, 9(2); *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1991* (Vic) ss 4B, 5(4); *Sentencing Act 1995* (WA) ss 6(4), 86.

4.25 Each of these arguments have been well ventilated previously. Representatives from across the legal sector, including those working in defence, prosecution and among the judiciary, have indicated strong opposition to mandatory sentencing on the basis of these arguments, both in Australia and in comparable international jurisdictions.[23]

4.26 Stakeholders suggested that the mandatory sentencing provisions in WA and in the NT disproportionately affect Aboriginal and Torres Strait Islander offenders because:

- they attach to some offences where Aboriginal and Torres Strait Islander peoples find themselves disproportionately charged;
- this group is highly visible and easily identifiable, particularly in smaller communities; and
- the impact of the provisions tends to exacerbate a range of problems already faced by this cohort that tend to lead to recidivism.

4.27 Of the stakeholders consulted by the ALRC to date, none have indicated support for mandatory sentencing provisions. However the ALRC acknowledges that proponents of such laws argue that they:

- promote consistency in sentencing;
- deter individuals from offending;
- denunciate the proscribed conduct;
- ensure appropriate punishment of the offender; and
- protect the community through incapacitation of the offender.[24]

4.28 In 1999, the ALRC stated that 'mandatory detention offends against the principle of proportionality',[25] noting the comments of the High Court in *Chester v R*, that

> it is now firmly established that our common law does not sanction preventive detention. The fundamental principle of proportionality does not permit the increase of a sentence of imprisonment beyond what is proportional to the crime merely for the purpose of extending the protection of society from the recidivism of the offender.[26]

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23 See, eg, Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014); Law Society of Western Australia, *Briefing Paper Mandatory Sentencing* (2016); Tammy Solonec, '"Tough on Crime": Discrimination by Another Name—The Legacy of Mandatory Sentencing in Western Australia' (2015) 8(18) *Indigenous Law Bulletin*; Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 6; Nicholas Cowdery, 'Mandatory Sentencing' (Speech, Sydney Law School, Sydney, 15 May 2014); Smart Justice, *Mandatory Sentencing* (2013).

24 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).

25 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [19.55].

26 *Chester v The Queen* (1988) 165 CLR 611, [20].

4.29 The ALRC also highlighted at that time that 'mandatory detention violates a number of provisions in the International Convention on Civil and Political Rights (ICCPR) including the prohibition on arbitrary detention in Article 9'.[27] In reference to NT and WA provisions affecting juvenile offenders, the ALRC considered 'these violations of international and common law norms so serious'[28] that it recommended federal legislation to override the laws unless the Parliaments of WA and the NT repealed them.[29]

4.30 Mandatory sentences may also be discriminatory and breach art 2 of the ICCPR in their disproportionate impact on Aboriginal and Torres Strait Islander peoples.

4.31 In 2014, the United Nations expressed concern about Australia's mandatory sentencing provisions, noting their disproportionate impact on Aboriginal and Torres Strait Islander peoples. The Committee against Torture recommended that Australia 'review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances'.[30]

4.32 The ALRC acknowledges that, as a consequence of how data is categorised, it is difficult to attribute the numbers of Aboriginal and Torres Strait Islander peoples in prison to the impact of mandatory sentencing provisions.

4.33 The ALRC has not yet had the opportunity to review each jurisdiction's offence provisions to identify all those provisions that attract mandatory penalties, noting that some mandatory sentencing provisions are likely to have little impact on Aboriginal and Torres Strait Islander offenders.[31] For this reason, the ALRC has not made a proposal in this area, but reiterates its previous opposition to mandatory sentencing and, in light of the work necessary to identify each relevant law, questions whether governments should review provisions that impose mandatory and/or presumptive sentences, with a view to restoring judicial discretion. The ALRC also invite submissions on which provisions should be prioritised for review, noting the focus of this Inquiry, as well as case study examples demonstrating the application of these provisions.

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27 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) [19.63].

28 Ibid [19.64], rec 242.

29 Ibid.

30 United Nations Committee against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia* (2014) [12].

31 For example, some people smuggling offences under the *Migration Act 1958* (Cth) s 236B.

Short sentences of imprisonment

Question 4–2 Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?

Question 4–3 If short sentences were to be abolished, what should be the threshold (eg, three months; six months)?

Question 4–4 Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?

4.34 The effectiveness of short terms of imprisonment was a key issue for a number of stakeholders consulted by the ALRC.[32] Some stakeholders called for their abolition. There were, however, strong views that retention of all sentencing options is preferable, and that ensuring that judicial officers have maximum discretion and a variety of alternatives available to them is key to achieving individualised justice.

The impact on Aboriginal and Torres Strait Islander peoples

4.35 Aboriginal and Torres Strait Islander offenders are more likely to be sentenced to short terms of imprisonment than their non-Indigenous counterparts.[33]

4.36 Over one-fifth of Aboriginal and Torres Strait Islander prisoners in Australian prisons are serving sentences of less than 12 months. About 10% of the national cohort are serving sentences of under 6 months. This suggests Aboriginal and Torres Strait Islander prisoners are being incarcerated for relatively minor, or repeat low level, offences.

4.37 ABS statistics indicate that Aboriginal and Torres Strait Islander offenders are more likely to receive shorter sentences than non-Indigenous offenders. Nationally, 14% of non-Indigenous offenders were serving terms of imprisonment under 12 months, compared to 22% of Aboriginal and Torres Strait Islander offenders.[34]

4.38 Australian Bureau of Statistics (ABS) data shows the national median aggregate sentence length for Aboriginal and Torres Strait Islander prisoners was 2.0 years, compared to 3.5 years for non-Indigenous prisoners. The longest median aggregate sentence was in South Australia (3.3 years) and the shortest was in the NT (1.2 years).[35]

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32 For the purposes of this Discussion Paper, the phrase 'short terms of imprisonment' should be read to mean terms of 6 months or less, unless otherwise specified.

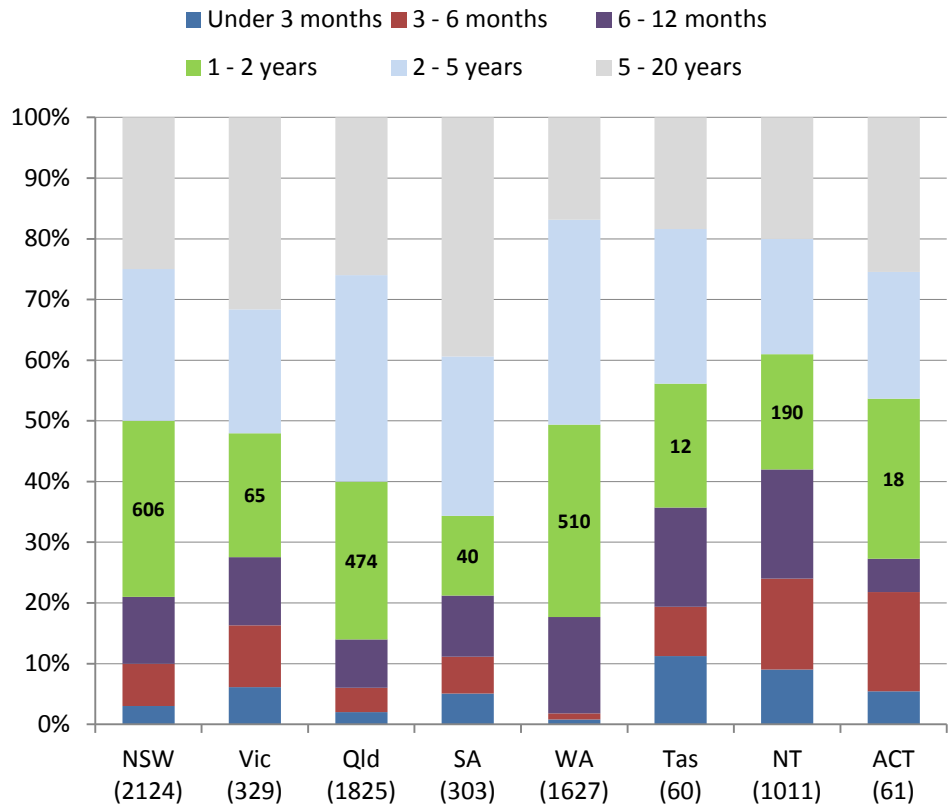
33 Australian Bureau of Statistics, above n 10, table 25.

34 Ibid table 25.

35 Ibid Table 25.

4.39 Chart 1 and Table 1 below indicate sentence lengths imposed on Aboriginal and Torres Strait Islander offenders in each state and territory in 2016, and give a comparative snapshot.

Chart 1*: *Aboriginal and Torres Strait Islander prisoner median aggregate sentence lengths by state/territory (2016)[36]



State/territory and number of Aboriginal and Torres Strait Islander persons serving a sentence of imprisonment

Table 1: Aboriginal and Torres Strait Islander prisoner median aggregate sentence lengths by state/territory (2016)

Jurisdiction (with total No. ATSI prisoners)	Under 3 months	3 - 6 months	6 - 12 months	1 - 2 years	2 - 5 years	5 - 20 years
NSW (2124)	3%	7%	12%	29%	25%	24%
Vic (329)	6%	10%	11%	20%	20%	32%

36 Data source: Ibid table 25.

Qld (1825)	2%	4%	8%	26%	34%	26%
SA (303)	5%	6%	10%	13%	26%	39%
WA (1627)	1%	1%	16%	31%	34%	17%
Tas (60)	12%	8%	17%	20%	25%	18%
NT (1011)	9%	15%	18%	19%	19%	20%
ACT (61)	7%	18%	7%	30%	23%	16%

4.40 Table 2 below concerns Aboriginal and Torres Strait Islander offenders serving short terms of imprisonment. It shows:

- the number of Aboriginal and Torres Strait Islander prisoners serving sentences of under three months, three to six months, and six to 12 months respectively;
- the total number of Aboriginal and Torres Strait Islander prisoners per jurisdiction; and
- how many Aboriginal and Torres Strait Islander prisoners are serving those sentences as a percentage of the total Aboriginal and Torres Strait Islander prison population.

Table 2: Aggregate sentence length by state and territory of sentenced Aboriginal and Torres Strait Islander prisoners (2016)[37]

Sentence length	**ACT**	**NSW**	**NT**	**Qld**	**SA**	**Tas**	**Vic**	**WA**	**Australia**
< 3 months	4	67	90	35	15	7	21	13	**252**
3-6 months	11	149	152	82	17	5	34	17	**464**
6-12 months	4	248	186	142	30	10	37	263	**914**
< 6 months	15	216	242	117	32	12	55	30	**716**
< 1 year	19	464	428	259	62	22	92	293	**1630**
TOTAL**: all** Aboriginal and Torres Strait Islander prisoners	70	2122	1017	1821	295	64	332	1618	**7337**
% < 6 months	21%	10%	24%	6%	11%	19%	17%	2%	**10%**
% < 1 year	27%	22%	42%	14%	21%	34%	28%	18%	**22%**

4.41 Several stakeholders reported that short sentences of imprisonment are particularly damaging to Aboriginal and Torres Strait Islander offenders. Apart from issues relating to availability and access to programs, courses and counselling while

37 Data source: Ibid.

serving short terms of imprisonment, stakeholders spoke about the devastating impacts that incarceration has on the offender's community and family. These impacts included homelessness post-release, loss of employment, children being removed and taken into care, stigmatisation and further marginalisation. Dislocation from family was also identified as a significant concern, with stakeholders noting that offenders were sometimes incarcerated in prisons far from their communities, making it extremely difficult for their families to visit them during their sentences.

4.42 Aboriginal and Torres Strait Islander offenders also have higher recidivism rates than non-Indigenous offenders.[38] This experience of 'cycling' through the system also has significant health impacts:

> [T]he 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.[39]

4.43 Of particular concern is the effect of short terms of incarceration on female Aboriginal and Torres Strait Islander offenders.[40] 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.

Whether to abolish short sentences of imprisonment

4.44 A number of stakeholders have reported that short terms of imprisonment serve no justifiable purpose, particularly when considering the economic and social cost of incarceration. Many referred specifically to the heavy impact on Aboriginal and Torres Strait Islander women (see Chapter 9).

4.45 While there are various arguments supporting the abolition of short sentences, these are principally based on the fundamental assumption that those offenders, who would have otherwise received a short term of imprisonment, would instead receive a community-based penalty, thereby reducing the prison population and attendant social and economic costs. Although the ALRC notes that this assumption may be flawed, given the dire shortfall in the availability and/or resourcing of sentencing alternatives, particularly in regional and remote areas, but also in some metropolitan areas.

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38 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 19, Indigenous Justice Clearinghouse, June 2015).

39 Anthea S Krieg, 'Aboriginal Incarceration: Health and Social Impacts' (2006) 184(10) *Medical Journal of Australia* 534.

40 NSW Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004); 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).

4.46 Some stakeholders argued that incarceration, as the most serious punishment available, ought to be reserved only for those offenders who represent a serious risk to the community, and for whom no other penalty is appropriate. It was argued that jails should not be used for minor or low level offenders, particularly given the cost to the community, and the detrimental impact of incarceration on the individual and their community. Those supporting the abolition of short terms of incarceration were of the view that short sentences of imprisonment:

- expose minor offenders to more serious offenders in prison;
- do not serve to deter offenders;[41]
- have significant negative impacts on the offender's family, employment, housing and income; and
- potentially increase the likelihood of recidivism through stigmatisation and the flow on effects of having served time in prison.

4.47 Stakeholders also reported that 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.[42] Offenders on short sentences are generally released into the community without supervision or supports to assist reintegration into the community on release.[43]

4.48 There were also concerns that short terms of imprisonment are not cost-effective. Stakeholders were firmly of the view that the money spent incarcerating prisoners serving short sentences would be better spent implementing programs and supports in the community which, they argued, would be cheaper and more effective for low level offenders, with prisons being reserved for the most serious offenders. There is some research to support this view. In 2002, the NSW Bureau of Crime Statistics and Research reported 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.[44]

4.49 Other stakeholders were firmly of the view that short sentences should remain an option. The key reason was the risk of 'sentence creep', that is, the risk that judicial

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41 Judy Trevana and Don Weatherburn, 'Does the First Prison Sentence Reduce the Risk of Further Offending?' (Bureau of Crime Statistics and Research, October 2015).

42 Mark Hughes, 'Prison Governors: Short Sentences Do Not Work', *The Independent* (20 June 2010) cited in Don Weatherburn, above n 23.

43 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, above n 40, 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).

44 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.

officers will ultimately sentence offenders for *longer* periods because of a lack of alternate sentencing options, combined with the inability to sentence an offender to a short term of imprisonment. Some referred to the experience in WA, discussed below.

4.50 Stakeholders acknowledged that there may be merit in abolishing short sentences when alternatives to full-time custody are uniformly available, including in remote and regional areas. It was not disputed that such options are not uniformly accessible (see below). Just Reinvest NSW, a coalition of legal, medical, sports, youth, community, and Aboriginal and Torres Strait Islander organisations, have identified reducing the number of people who receive terms of imprisonment under six months as a key policy proposal, to be achieved by encouraging greater use of non-custodial options.[45] Just Reinvest 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.[46]

4.51 Two case studies identified in a policy paper by an Aboriginal Legal Services lawyer highlight some of the issues with short sentences and 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.[47]

4.52 Proponents for retaining the option of short sentences were generally of the view that, until such alternatives are in place (community-based sentences), removing a sentencing option will further disadvantage offenders from those areas in particular, many of whom are from Aboriginal or Torres Strait Islander communities, because of sentence creep.

4.53 A related concern was that abolition of short terms of imprisonment would constrain judicial discretion and restrict flexibility in determining an appropriate sentence when dealing with an offender.

4.54 Some stakeholders also suggested that a short term of incarceration may be appropriate in some circumstances. In its 2004 report examining whether sentences of

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45 Just Reinvest NSW, *Policy Paper: Key Proposals #1–Smarter Sentencing and Parole Law Reform* (2017) prop 2. See further ch 13 of this Discussion Paper.

46 Ibid.

47 Ibid.

six months or less should be abolished, the NSW Sentencing Council set out the following as instances where this might be the case:

> A prison sentence of 6 months or less may be proportionate to the offence in question;
>
> An offender may be found guilty of a relatively minor offence, but a very lengthy criminal history and attitude to rehabilitation may suggest that full-time imprisonment, as the option of last resort, has been reached;
>
> An offender may have repeatedly refused to comply with alternative non-custodial sentencing options;
>
> An offender may be refused bail and spend a period of under 6 months in custody. At sentencing, the circumstances of the offence make it appropriate for the penalty imposed to be backdated to the date of arrest;
>
> An old offence is uncovered for an offender due to be released shortly from custody. The offence warrants a sentence of imprisonment, but should not extend the offender's time in custody.[48]

4.55 The NSW Sentencing Council did not ultimately recommend the abolition of short sentences, largely on the basis that there is a need to ensure that alternatives to custody are uniformly available state-wide, and it suggested waiting on the pending evaluation of the abolition of short sentences in WA before any action was taken. It did, however, acknowledge that 'there is real potential for positive impact',[49] and recommended that 'abolition of short prison sentences should be piloted for Aboriginal women throughout all of NSW'.[50]

The experience in Western Australia

4.56 WA is the only Australian jurisdiction to have abolished short prison sentences. In 1995 it abolished terms of imprisonment of three months or less,[51] because it was considered that short sentences were 'of little utility since they failed as a means of providing deterrence, community protection and addressing offending behaviour'.[52] In 2003, the WA legislature increased the threshold for abolition to six months.[53]

4.57 An article by the Director of the NSW Bureau of Crime Statistics and Research, Dr Don Weatherburn, refers to an unpublished evaluation undertaken by the WA Government in 2003 on the effect of abolition of short sentences: 'The analysis, which purports to show that sentence lengths increased following the reform, makes no adjustment for any changes in the profile of offenders coming before the courts.'[54]

4.58 Dr Weatherburn goes on to note that crime data for the relevant period does not support the 'sentence creep' argument, stating '[d]ata published by the WA crime

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48 NSW Sentencing Council, above n 40, 14.
49 Ibid 22.
50 Ibid.
51 *Sentencing Act 1995* (WA) s 86. There are limited exceptions: ss 86(a)–(c).
52 Chris Cunneen, Neva Collings and Nina Ralph, *Evaluation of the Queensland Aboriginal and Torres Strait Justice Agreement* (2005) 190.
53 *Sentencing Legislation Amendment and Repeal Act 2003* (WA) s 33(3).
54 Don Weatherburn, 'Rack 'em, Pack 'Em and Stack 'Em: Decarceration in an Age of Zero Tolerance' (2016) 28(1) *Current Issues in Criminal Justice.*

research centre, moreover, show no evidence that magistrates in WA began imposing sentences of more than six months after 2003'.[55]

4.59 This contrasts with the views of stakeholders, who reported that the abolition of short sentences resulted in a spike in sentence length, and that magistrates began imposing terms of incarceration greater than six months. Sentence creep was said to have been the practical outcome of abolition in circumstances identified by the NSW Sentencing Council above.

4.60 The ALRC understands that WA is considering amending its provision to revert back to a restriction on the imposition of terms of imprisonment of three months or less.

4.61 In NSW, both the Law Reform Commission and Sentencing Council considered and declined to recommend removing short sentences as an option.[56] In NSW, a judicial officer must give reasons if they are to impose a term of imprisonment for less than six months,[57] and WA has a similar requirement for terms of imprisonment of under 12 months.[58] Other jurisdictions require reasons to be given when sentencing more generally.[59]

4.62 The ALRC invites submissions on the issue and is particularly interested in stakeholder views on any potential consequences flowing from the abolition of short sentences. If short sentences were to be abolished, what should the threshold be (eg, 3 months; 6 months), and why? The ALRC is also interested in whether there are pre-conditions that should be met before such amendments are pursued, and in this regard notes the recommendation of the NSW Sentencing Council in 2004 that 'abolition of short prison sentences should be considered not until … primary alternatives to full-time custody are available uniformly [among other things]'.[60]

Availability of community-based sentencing options

Proposal 4–1 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.

4.63 The availability of community-based sentencing options for Aboriginal and Torres Strait Islander offenders can be affected by remoteness and suitability requirements, including the requirement that offenders not have an alcohol or drug dependency and have suitable accommodation. These issues are discussed below.

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55 Ibid. Citations omitted.
56 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) 160–165; NSW Sentencing Council, above n 40.
57 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5.
58 *Sentencing Act 1995* (WA) s 35.
59 See, eg, *Crimes Act 1914* (Cth) s 16F; *Criminal Law (Sentencing) Act 1988* (SA) s 9.
60 NSW Sentencing Council, above n 40, 4.

Remoteness

4.64 The ALRC has been told that a significant number of Aboriginal and Torres Strait Islander prisoners originate from regional and remote areas. For example, almost two-thirds of the Aboriginal and Torres Strait Islander population live outside of metropolitan areas,[61] and up to 80% of the Aboriginal and Torres Strait Islander prisoner population in the NT are from regional or remote communities.[62]

4.65 A range of sentencing options are available to judicial officers when sentencing offenders, including bonds, community service or correction orders, home detention, suspended sentences and intensive correction orders. The ALRC has heard that, in practice, the availability of alternatives to incarceration is limited or non-existent in many locations and, in particular, in areas outside of metropolitan areas. This can lead to the imposition of sentences of imprisonment where community-based sentences would otherwise be appropriate.

4.66 In Chapter 7, the ALRC proposes that state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the required infrastructure to introduce culturally appropriate community-based sentencing options and support services. That proposal is made with reference to reducing breaches of community-based sentences by Aboriginal and Torres Strait Islander people, but it applies equally to the identification of gaps in rural and remote areas. Accordingly, Proposals 4–1 and 7–1 are closely aligned.

4.67 Chapter 7 also canvasses other options, such as the recommendation of a 2016 independent review of NT Corrective Services to appoint Aboriginal and Torres Strait Islander Probation and Parole Officers to remote communities who are from the community—where the community agrees—to provide local supervision and support to offenders.[63] It is also noted that some stakeholders to this Inquiry have raised the possibility of supervision by community as described in the case of *Djambuy*, where the offenders were sentenced to suspended sentences that were to be supervised by the Aboriginal community, not Community Corrections.[64]

4.68 Almost all stakeholders in this Inquiry to date have supported greater resourcing of alternatives to prison. Stakeholders have told the ALRC that the lack of practical sentencing alternatives to custody—particularly in regional and remote areas—has had a disproportionate impact on Aboriginal and Torres Strait Islander peoples. Other

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

62 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006, Cat No 4705.0* (2007).

63 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. See also ch 7 of this Discussion Paper.

64 *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*.

inquiries have also noted the lack of appropriate resourcing for community-based options in regional and remote areas.[65]

4.69 The ALRC welcomes submissions on whether alternative sentences, such as community-based options, are required in remote and rural locations. It has, for example, been suggested that expanding the options may result in net-widening, where offenders, who may otherwise be fined, are instead subject to a sentence in the community.[66] The ALRC welcomes information on the best sentencing options for Aboriginal and Torres Strait Islander offenders in remote locations, particularly where the offending conduct would not have otherwise resulted in a sentence of imprisonment.

Suitability requirements for custodial community-based sentences

4.70 Some stakeholders advised the ALRC that the suitability requirements for some types of custodial community-based sentences[67] were particularly restrictive for Aboriginal and Torres Strait Islander offenders.

4.71 For example, in order for the court to impose an Intensive Correction Order (ICO) on an adult in NSW, it must have regard to an assessment report and be satisfied that the offender is a suitable person to serve the sentence, and that it is appropriate in all the circumstances for the sentence to be served by way of an ICO.[68] A person may be found unsuitable due to having a dependency on alcohol or drugs,[69] or due to a lack of stable accommodation.[70] A person living in a remote or regional area may not have access to ICOs.[71] Accordingly, in 2015, only 17% of offenders issued an ICO were Aboriginal and Torres Strait Islander peoples.[72] Aboriginal and Torres Strait Islander peoples make up 24% of the prison population in NSW.[73]

4.72 The ALRC welcomes input on how best to improve access to community-based sentences for Aboriginal and Torres Strait Islander offenders.

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65 See, eg, Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006); Senate Select Committee on Regional and Remote Indigenous Communities, Parliament of Australia, *Final Report* (2010).

66 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 36.

67 See Ch 7 for an overview on custodial and non-custodial community-based sentences.

68 *Crimes (Sentencing Procedure) Act 1999* (NSW ss 67(1), 70.

69 NSW Justice Sentencing Council, *Intensive Correction Orders: Statutory Review—Report* (2016) [2.17].

70 Ibid fig 2.1.

71 Ibid [2.26].

72 Ibid [2.29].

73 Australian Bureau of Statistics, above n 10.

Flexibility to tailor sentences

Question 4–5 Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?

4.73 Jurisdictions vary in how much flexibility judicial officers have in tailoring sentences. For example, Victoria allows for community correction orders to be combined with a term of imprisonment for short sentences[74] while legislation in the ACT and Tasmania provides for sentence combinations that include terms of full-time imprisonment in conjunction with other orders—such as community service orders, good behaviour orders, probation or a fine.[75] Following a review of sentencing law by the NSW Law Reform Commission, the NSW Government has proposed a suite of reforms designed, among other things, to introduce community correction orders intended to be a 'flexible sentence that the court can tailor to reflect the nature of the offender and the offence'.[76] It is unclear whether these will be able to be combined with terms of imprisonment.

4.74 Some jurisdictions have moved towards removing or replacing some sentencing options. Stakeholders noted that suspended sentences have been abolished in Victoria, and NSW has indicated that it will follow suit.[77] Some stakeholders have commented that suspended sentences were particularly beneficial for Aboriginal and Torres Strait Islander female offenders. It was suggested the 'last chance' nature of them, without any other conditions or requirements attached other than not to offend, made them easy to understand and comply with.

4.75 The ALRC has heard that a wide variety of sentencing options, along with more flexibility to allow for greater 'mix and match' combinations, would assist judicial officers when sentencing Aboriginal and Torres Strait Islander offenders. The ALRC welcomes submissions on whether legislative reform is necessary to meet these ends.

74 *Sentencing Act 1991* (Vic) s 44.
75 *Crimes (Sentencing) Act 2005* (ACT) s 29; *Sentencing Act 1997* (Tas) s 8.
76 NSW Government, *Tough and Smart Justice Reforms—Safer Communities FAQs* (2017).
77 Ibid.

5. Prison Programs, Parole and Unsupervised Release

Contents

Summary 93
The availability and effectiveness of prison programs 94
Remand and short sentences 95
Programs for women 96
Parole for eligible Aboriginal and Torres Strait Islander prisoners 97
Discretionary and court ordered parole 99
Counting time spent on parole when parole revoked 102
The provision of throughcare 103

Summary

5.1 Recidivism rates in the Aboriginal and Torres Strait Islander prison population are 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.[1] 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.[2]

5.2 The Terms of Reference for this Inquiry ask the ALRC to look into the 'availability and effectiveness' of programs, including prison programs, for Aboriginal and Torres Strait Islander offenders. In this chapter, the ALRC focuses on the importance of effective prison programs in reducing the Aboriginal and Torres Strait Islander recidivist prison population, and proposes that programs be developed for Aboriginal and Torres Strait Islander peoples serving short sentences and who are held on remand, as well as for Aboriginal and Torres Strait Islander women.

5.3 The ALRC also recognises the critical role that release on parole has in helping offenders transition out of prison and reintegrate into society. To this end, the ALRC makes proposals for law reform that aim to encourage eligible Aboriginal and Torres Strait Islander prisoners to apply for parole. Throughcare programs that provide support for people released, who would otherwise be unsupervised at the end of their sentences, are also canvassed.

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1 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 8.
2 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* (2015) 20.

The availability and effectiveness of prison programs

5.4 Prison programs are courses provided to people in prison by corrective services or supervised by corrective services. Programs that address the known causes of offending—such as poor literacy, lack of vocational skills, drug and alcohol abuse, poor social and family ties—may be able to provide some of the support needed to decrease recidivism rates.[3] 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.[4]

5.5 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—with particular emphasis on Aboriginal and Torres Strait Islander female prisoners.[5] The report also 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.[6]

5.6 The ALRC has not sought to replicate the work of the *Prison to Work* report, and relies heavily on its findings as well as those in the Australian Institute of Judicial Administration's 2016 report *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* to inform much of this section of the Discussion Paper.

5.7 The availability and effectiveness of prison programs can be affected by budget allocations and corrective services' policies on prisoner classifications and prisoner transfers.[7] Availability may also be affected by the size of the prison population, which has recently expanded nationwide, creating greater demand.[8]

5.8 The *Prison to Work* report highlighted some current programs relevant to Aboriginal and Torres Strait Islander prisoners, including:

- **Gundi program, run by NSW Corrective Services:** provides work experience to prison participants to construct mobile homes for use in Aboriginal and Torres Strait Islander communities, which are then distributed by the NSW

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3 See, eg, Australian Institute of Criminology, *Study in Prison Reduces Recidivism and Welfare Dependence: A Case Study from Western Australia 2005–2010* (2016) 8; Lois M 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.

4 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 3, 16.

5 Council of Australian Governments, above n 3, 6.

6 Ibid 51; Australasian Institute of Judicial Administration, above n 4, 2.

7 Australasian Institute of Judicial Administration, above n 4, 21. For example, 39% of inmates in NSW in 2016 did not complete drug and alcohol-related programs due to transfers or release.

8 Ibid 19.

branch of the Aboriginal Housing Office. Participants are aided in gaining a range of skills upon completion, including formal TAFE qualifications up to the level of Certificate III.[9]

- **The Torch Project, run as a collaboration between Corrections Victoria and a non-government organisation:** the Torch Project allows for artwork of Aboriginal and Torres Strait Islander prisoners to be sold in the community, with the proceeds used to fund post-release pathways for the artists involved. The project elevates culture, and aims to introduce artists to the arts industry and increase self-sufficiency.[10]
- **Culture and Land Management Program, run by ACT Corrective Services:** 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. Ex-prisoners can remain within CALM following release through optional participation in seed collecting, tree planting, and bush regeneration activities.[11]

Remand and short sentences

Proposal 5–1 Prison programs should be developed and made available to accused people held on remand and people serving short sentences.

Question 5–1 What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander prisoners held on remand or serving short sentences of imprisonment?

5.9 Up to 30% of the Aboriginal and Torres Strait Islander prisoner population are imprisoned on remand.[12] Of those that are convicted, a large proportion are released with time served or are sentenced to a short term of imprisonment—in 2016, up to 50% of Aboriginal and Torres Strait Islander prisoners were serving a sentence of 2 years or less.[13]

5.10 Generally, people on remand or serving short sentences do not have access to prison programs.[14] There may be both policy and practical reasons for limited access.[15] 'Offence-based' programs may not be provided to people on remand because the

9 Council of Australian Governments, above n 3, 68.
10 Ibid 82.
11 Ibid 132.
12 Australian Bureau of Statistics, above n 1, table 8.
13 Ibid table 25.
14 Council of Australian Governments, *Prison to Work Report* (2016) 22.
15 Australasian Institute of Judicial Administration, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (2016) 16.

offences charged are yet to be proven,[16] and 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.[17] Many people on short sentences may not be eligible for parole,[18] and are likely to leave prison unsupervised without any further skills or understanding of their criminal conduct.[19]

5.11 The ALRC welcomes submissions on the practical application of this proposal. Corrections Victoria has previously indicated they consider it important to make programs available to all prisoners, including those on remand and short sentences.[20] The ALRC seeks input on what programs, if any, could work for these prisoners. It may be, for example, that programs on life skills or other matters could be introduced to remand prisoners.

Programs for women

Proposal 5–2 There are few prison programs for female prisoners and these may not address the needs of Aboriginal and Torres Strait Islander female prisoners. State and territory corrective services should develop culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners.

Question 5–2 What are the best practice elements of programs for Aboriginal and Torres Strait Islander female prisoners to address offending behaviour?

5.12 Aboriginal and Torres Strait Islander women are likely to serve short sentences and periods on remand, meaning they are likely to be part of the cohort discussed above and be unable to access prison programs.[21] Even for longer term prisoners, when compared to the range and availability of options offered to men, women's programs are limited.[22]

16 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'.

17 Ibid 16–7.

18 Generally, a person needs to receive a prison sentence of over twelve months to receive a non-parole period.

19 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.

20 Council of Australian Governments, *Prison to Work Report* (2016) 77.

21 See ch 9.

22 Council of Australian Governments, above n 3, 32–4; Australasian Institute of Judicial Administration, above n 4, 61.

5.13 Key issues in relation to prison programs for Aboriginal and Torres Strait Islander women 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.[23]
- 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.[24]
- Many female prisoners are parents—up to 80% of Aboriginal and Torres Strait Islander women in prison are mothers.[25] 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.[26]

5.14 The ALRC welcomes submissions regarding the availability and effectiveness of prison programs for Aboriginal and Torres Strait Islander female offenders and remandees, and is particularly interested in any best practice models. The ALRC notes, for example, the Kunga Stopping Violence program, run via the Central Australian Aboriginal Legal Aid Service (CAALAS). The program focuses on community reintegration for Aboriginal and Torres Strait Islander women who have been imprisoned for violent offending.[27]

Parole for eligible Aboriginal and Torres Strait Islander prisoners

5.15 When a person is sentenced to a term of imprisonment above a prescribed length,[28] a court generally imposes a non-parole period (the minimum period that the offender must spend in prison) as well as a head sentence (the maximum period that the offender can spend under sentence).[29] 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, and must follow their reasonable directions. Breach of parole may result in a return to prison.

5.16 Parole is not release. The *Review of the Parole System of Victoria* observed there to be a 'lack of awareness generally that parole represents only conditional release',

23 Council of Australian Governments, above n 3, 33.
24 Ibid 32.
25 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 21.
26 Council of Australian Governments, above n 3, 33.
27 Emma Williams and Eileen Cummings, *'I'm Moving Forward Now': Formative, Realist-Informed Evaluation of the Kunga Stopping Violence Program* (2016) 3.
28 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Correctional Services Act 1982* (SA) s 66.
29 NSW Law Reform Commission, *Parole*, Report No 142 (2015) xvii.

and reiterated that 'a parolee remains under sentence while on parole'.[30] 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.[31]

5.17 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.[32]

5.18 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; and that parole is most effective when it involves active supervision that is rehabilitation focused.[33]

5.19 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.[34]

5.20 The ALRC has heard that eligible Aboriginal and Torres Strait Islander prisoners rarely apply for parole at the end of their non-parole period. Stakeholders have articulated two key reasons. First, eligible Aboriginal and Torres Strait Islander prisoners may believe that they are unlikely to be granted parole by the parole authority. 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.

5.21 The following proposals aim to address these two barriers and encourage eligible Aboriginal and Torres Strait Islanders to apply for parole, which would provide supported transition from prison to community life.

Eligible Aboriginal and Torres Strait Islander people might not apply for parole

5.22 Stakeholders have told the ALRC that many Aboriginal and Torres Strait Islander prisoners who are eligible for parole instead serve out their entire head sentence in prison. The result is that this cohort can 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.

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30 Ian Callinan, *Review of the Parole System in Victoria* (2013) 67.
31 NSW Law Reform Commission, *Parole*, Report No 142 (2015) 27.
32 Australian Institute of Criminology, *Parole Supervision and Reoffending* (2014) 6.
33 Ibid.
34 Ian Callinan, above n 30, 32.

5.23 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.[35] In 2014–15, 53% of prisoners in the NT served their full sentence in prison (meaning they were released unsupervised).[36]

5.24 The *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report*, revealed that, in Victoria, 67% of Aboriginal and Torres Strait Islander offenders released from prison were not released on parole in 2011.[37]

Discretionary and court ordered parole

Proposal 5–3 A statutory regime of automatic court ordered parole should apply in all states and territories.

Question 5–3 A statutory regime of automatic court ordered parole applies in NSW, Queensland and SA. What are the best practice elements of such schemes?

5.25 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. Under court ordered parole, when a person is sentenced to a term of imprisonment for less than three years,[38] the parole date set by the court at the time of sentencing is the 'automatic' release date.[39] The court may have full discretion in setting the parole date, or it may be constrained by relevant sentencing legislation requiring the setting of a non-parole period.[40] NSW, Queensland, and SA have legislative frameworks for court ordered parole.[41]

5.26 Figures released in 2016 suggest that in most states and territories, between 30% and 50% of Aboriginal and Torres Strait Islander peoples sentenced to a term of imprisonment received head sentences of between six months and two years.[42] In Tasmania and the NT, the figures are 57% and 61% respectively. In NSW,

35 Council of Australian Governments, above n 3, 97.
36 Ibid 125.
37 Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) [10.2.5].
38 Five years in South Australia: *Correctional Services Act 1982* (SA) s 66.
39 NSW Law Reform Commission, *Parole*, Report No 142 (2015) 28. Parole is only available for sentences over 6 months (NSW) or 12 months (Queensland and South Australia). See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Penalties and Sentences Act 1992* (Qld) s 160B(3); *Correctional Services Act 1982* (SA) s 66.
40 Compare, for example, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51 and *Corrective Services Act 2006* (Qld) s 184.
41 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Penalties and Sentences Act 1992* (Qld) s 160B(3); *Correctional Services Act 1982* (SA) s 66.
42 Australian Bureau of Statistics, above n 1, table 25.

approximately 40% of all prison terms were between six months and two years for Aboriginal and Torres Strait Islander offenders.

5.27 Court ordered parole does not operate in the ACT, NT, Tasmania, WA and Victoria.[43] In these jurisdictions, 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. This system of parole is termed 'discretionary parole'.[44]

5.28 There are advantages to court ordered parole. Court ordered parole ensures that greater numbers of low-level offenders are released on parole, limiting the number of offenders who are released to the community unsupervised.[45] There are also limitations. Primarily, court ordered parole may affect one of the key functions of parole—the incentive for good behaviour. The NSWLRC notes:

> 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.[46]

Means to revoke or override automatic parole

5.29 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.[47]

5.30 In NSW, revocations for court ordered parole are uncommon.[48] The *Crimes (Administration of Sentences) Regulation 2014* (NSW) sets out the circumstances in which the State Parole Authority (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.[49]

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43 *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.

44 Discretionary parole also applies in the court ordered parole jurisdictions of NSW, Queensland and South Australia for sentences of imprisonment longer than the court ordered parole cut off.

45 Council of Australian Governments, above n 3, 70.

46 NSW Law Reform Commission, *Parole*, Report No 142 (2015) 34.

47 Queensland Corrective Services, *Queensland Parole System Review: Final Report* (2016) 88.

48 New South Wales Law Reform Commission, above n 29, table 3.2.

49 *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222(1)(a)–(c).

5.31 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.

5.32 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.[50]

5.33 Of the court ordered parole jurisdictions, only NSW's override mechanism has a statutory basis.[51] Queensland relies on a Court of Appeal decision as the basis for its safeguard powers.[52] SA appears not to have a pre-release safeguard at all, though prisoners must accept any parole conditions set before release is granted.[53]

Accommodation as an obstacle to court ordered parole

5.34 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.

5.35 Housing issues—particularly homelessness, inadequate housing, and over-crowding—tend to disproportionately affect Aboriginal and Torres Strait Islander peoples.[54] 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 '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

50 Queensland Corrective Services, above n 47, 89.
51 *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222(1)(a)–(c).
52 *Foster v Shaddock* [2016] QCA 163 (17 June 2016).
53 *Correctional Services Act 1982* (SA) s 68(4).
54 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (Produced for the Steering Committee for the Review of Government Service Provision, 2016) 10.1.

> 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.[55]

5.36 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.[56]

5.37 The ALRC welcomes submissions relating to the benefits and disadvantages of court ordered parole for Aboriginal and Torres Strait Islander offenders.

Counting time spent on parole when parole revoked

Proposal 5–4 Parole revocation schemes should be amended to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.

5.38 Stakeholders in this Inquiry have drawn 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.

5.39 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).
- 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

55 NSW Law Reform Commission, *Parole*, Report No 142 (2015) 47.
56 Ibid 46.

head sentence, and must be served again in prison upon the parolee's return (as in the ACT, the NT, Tasmania and Victoria).

5.40 Option 2 has potential adverse consequences. It extends the time a person serves under sentence[57] and it operates as a disincentive for eligible people to apply for parole, increasing the prison population and the number of people released from prison without supervision.

5.41 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.[58] Factors that particularly affect the ability of Aboriginal and Torres Strait Islander parolees to comply with conditions, 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.[59]

5.42 The ALRC welcomes submissions on whether or not a nationally consistent approach—modelled on the NSW, Queensland, SA, and WA approaches—is necessary or desirable.

The provision of throughcare

5.43 Throughcare aims to support the successful reintegration of offenders returning to the community at the end of their head sentence—ie, prisoners released without parole. The *Prison to Work* report described the concept of 'throughcare' in the following terms:

> Prisoner throughcare 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 throughcare 'starts in custody well before walking out of the prison gate', and provides hands on, intensive support, especially at the moment of release.[60]

5.44 The *Prison to Work* definition emphasised the importance of intervention, service coordination, and support at all critical points—not just release.

5.45 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

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57 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).

58 Queensland Corrective Services, above n 47, 181–2.

59 Ibid 122, 146, 149–50.

60 Council of Australian Governments, above n 3, 62.

competent, strength-based, and utilise Aboriginal and Torres Strait Islander controlled organisations and/or ex-prisoner organisations.[61]

5.46 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.[62]

5.47 Throughcare is currently provided by both independent and government agencies. For example:

- the North Australian Aboriginal Justice Agency (NAAJA) operates the Throughcare Support Program (TSP), which provides wraparound support and services to individuals exiting prison via a TSP officer within corrective services, case management in the community on release, and legal advice throughout;[63]
- ACT Corrective Services provides an Extended Through Care Program (ETCP) to all sentenced detainees as well as female detainees on remand,[64] and has been shown to provide some benefit to Aboriginal and Torres Strait Islander women.[65]

5.48 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;[66] and the limited availability of services in remote communities.[67]

5.49 The ALRC welcomes submissions on areas of reform in throughcare specific to Aboriginal and Torres Strait Islander peoples, and any further related information.

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61 Ibid 23; Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 104.

62 Council of Australian Governments, above n 3, 38.

63 North Australian Aboriginal Justice Agency, 'Throughcare Project' <http://www.naaja.org.au/our-services/indigenous-throughcare-project/>.

64 UNSW, *Evaluation of ACT Extended Throughcare Pilot Program Final Report* (2017) 10.

65 Ibid 67. The evaluation found that, although successful overall, the ETCP failed to lower recidivism rates for Aboriginal and Torres Strait Islander male prisoners. The ETCP showed some success for Aboriginal and Torres Strait Islander females but the results were worse than for the overall treatment group which included non-Indigenous participants.

66 Council of Australian Governments, above n 3, 46.

67 Ibid 91.

Part 3

Non-Violent Offending and Alcohol Regulation

6. Fines and Driver Licences

Contents

Summary 107
Fines and infringement notices 108
Statutory enforcement frameworks 108
Fine provisions leading to imprisonment 110
Imprisonment terms that 'cut out' fine debt 111
The impact of infringement notices 113
Infringement notices for offensive language/conduct 117
Alternatives to court imposed fines 121
NSW Work and Development Orders 123
Driver licence related issues 125
Impact on Aboriginal and Torres Strait Islander peoples 125
Loss of licence through fine default 126
Access to driver licences 129

Summary

6.1 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 peoples unduly and can result in incarceration.

6.2 In this chapter, the ALRC outlines issues related to Aboriginal and Torres Strait Islander peoples and fines. It includes an examination of the use of imprisonment to discharge fine debts, which the ALRC proposes should be abolished. Even without a direct link to imprisonment, fine default and entry into the fine enforcement system can have detrimental consequences for Aboriginal and Torres Strait Islander peoples leading to criminal justice responses.

6.3 The ALRC asks what preventative measures should be adopted to minimise the likelihood of receiving fines and infringement notices, and to minimise the impact on the person when received. It proposes placing limits on the issuing of infringement notices; expanding court imposed penalty options; and introducing the NSW Work and Development Order (WDO) scheme across states and territories.

6.4 A person with unpaid fines may have their driver licence suspended and may ultimately be imprisoned for driving while disqualified. These elements of enforcement regimes have a disproportionate impact on Aboriginal and Torres Strait Islander peoples and the ALRC asks what steps can be taken to minimise or prevent loss of

driver licences for fine default. In addition, ways to improve access to driver licences are also canvassed.

Fines and infringement notices

6.5 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 to monetary penalties imposed by courts and those received under infringement notices.

6.6 Where fines remain unpaid after a certain period of time, statutory fine enforcement regimes refer collection to relevant state and territory debt recovery offices. The steps for fine enforcement generally include the issuing of notices, licence or vehicle registration suspensions, civil enforcement orders, and community service orders (CSOs). There are fine mitigation options open to defaulters, such as 'time to pay' arrangements, waiver processes and, in NSW, the WDO scheme.

6.7 Fine enforcement statutes also provide for terms of imprisonment as a final enforcement step, whereby the term served in prison discharges fine debt: it 'cuts out' the fines.

6.8 Aboriginal and Torres Strait Islander peoples are over-represented as fine recipients and are less likely than non-Indigenous people to pay a fine at first notice (attributed to financial capacity, itinerancy and literacy levels), and are consequently susceptible to escalating fine debt and fine enforcement measures.[2]

6.9 Stakeholders in this Inquiry have pointed to the detrimental impact of fine enforcement processes on Aboriginal and Torres Strait Islander peoples, particularly the likelihood of prison in some jurisdictions following ongoing fine default, noting that Aboriginal and Torres Strait Islander women are disproportionally affected.

Statutory enforcement frameworks

6.10 Every state and territory has a statutory enforcement regime for fine and infringement notice default. Generally, these permit the state debt recovery authority to enforce progressive sanctions. The NSW statutory framework is used in this chapter as an example.

6.11 NSW fine enforcement is legislated under the *Fines Act 1996* (NSW) (the Act) and administered by the State Debt Recovery Office (SDRO). Enforcement action is taken against fine defaulters when they have not paid a fine as required by a notice

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 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].

served on the defaulter; have not paid by an extended due date granted by the SDRO; or have not paid agreed instalments (see fine mitigation below).[3]

6.12 The progressive recovery process is prescribed by the Act:

> **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:
>
> (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.

6.13 Enforcement begins with the issuing of a notice. Ordinarily, the next step is for NSW Roads and Maritime Services (RMS) to suspend the person's driver licence and/or motor vehicle registration.[4] If the fine is still not paid within a set time period, the SDRO can commence civil enforcement action to satisfy the payment of the fine. If civil enforcement is unable to commence or is unsuccessful, the SDRO may make a CSO, requiring the defaulter to perform community service work to pay off the unpaid

3 *Fines Act 1996* (NSW) s 65(1).
4 *Fines Act 1996* (NSW) s 71(1)(a).

fine amount.[5] Finally, the defaulter may serve a term of imprisonment for non-compliance with that order.[6] This is reportedly rare,[7] and stakeholders have advised the ALRC that imprisonment for non-compliance following a fine has not happened in recent practice in NSW.

Fine provisions leading to imprisonment

6.14 In each state and territory, fine enforcement statutes permit imprisonment where a person is ineligible or fails to comply with a CSO.[8] However, the process and the likelihood of incarceration differs significantly across the states and territories. There are two key pathways from a fine to imprisonment.

6.15 First, where the court imposes a CSO, and the person fails to comply or is otherwise ineligible, the court can impose a period of imprisonment by which the person 'cuts out' the fine amount owed (the ACT, SA and Victoria).[9] There are statutory safeguards,[10] and imprisonment rarely occurs in these jurisdictions.[11]

6.16 Second, where the state debt recovery agency imposes a CSO, and the person fails to comply or is otherwise ineligible, the agency can issue a warrant of commitment for the imprisonment of the person (NSW, the NT, Tasmania, Queensland, and WA).[12] The ALRC has heard that this is never used in practice in NSW. In WA, warrants of commitment can only be issued for court ordered fines and are commonly issued.

6.17 There are maximum periods that the person can spend in prison to cut out fine debt, regardless of the size of the debt.[13] In SA and WA, cutting out fines in prison can only occur for court-ordered fines.[14]

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5 *Fines Act 1996* (NSW) s 79(1): calculated at $15 per hour, maximum 100 hours (s 81).

6 *Fines Act 1996* (NSW) 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.

7 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012).

8 See, eg, *Crimes Sentence Administration Act 2005* (ACT) s 116ZK*; Fines and Penalties (Recovery) Act* (NT) ss 88, 90, 91; and *Infringements Act 2006* (Vic) prt 12, ss 156, 160.

9 *Crimes (Sentencing Administration) Act 2005* (ACT) s 116ZK*; Criminal Law (Sentencing) Act 1988* (SA) s 71; *Infringements Act 2006* (Vic) ss 156, 160.

10 See, eg, *Infringements Act 2006* (Vic) prt 12; *Sentencing Act 1991* (Vic) pt 3B regarding court-imposed fines.

11 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.

12 *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.

13 See, eg, *State Penalties Enforcement Act 1999* (Qld) s 52A(3): the maximum period of imprisonment is 2 years; *Fines, Penalties and Infringement Notices Enforcement Act* 1994 (WA) s 53: the maximum time served equivalent to the maximum term of imprisonment, if any, for the offence.

14 *Criminal Law (Sentencing) Act 1988* (SA) s 71(2); *Sentencing Act 1995* (WA) ss 58–59: when imposing a fine, courts in Western Australia can order that the person serve a sentence of imprisonment or set the period by which, if not paid, the person be imprisoned.

6.18 Imprisonment for fine default is most prevalent in WA. For example, the Western Australian Office of the Inspector of Custodial Services reported that, from July 2006 to June 2015:

- 7,462 prisoners were received into correctional centres for fine default in WA;
- 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;
- 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.[15]

6.19 The particular impact of short term imprisonment on Aboriginal and Torres Strait Islander women is discussed in Chapter 9.

6.20 Imprisonment to cut out fines in WA can also be served in police lock up.[16] This is reported to be a common practice, and is not recorded in the custodial statistics.[17]

Imprisonment terms that 'cut out' fine debt

Proposal 6–1 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 unpaid fines.

6.21 Fines are penalties imposed for what are usually minor infractions—conduct that the legislature or the courts has determined does not warrant a term of imprisonment.[18] Imprisonment for fine default results in punishment disproportionate to the offending conduct, and contradicts the principle of imprisonment 'as a last resort'.[19]

6.22 In 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommended that all governments ensure that sentences of imprisonment were not automatically imposed for the default of payment of a fine.[20] While the direct link

15 Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) v.

16 *Prisons Act 1981* (WA) s 16(7*)*.

17 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 152–5.

18 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).

19 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).

20 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, rec 117.

between fine default and imprisonment has been removed from statutes nationwide, and fine mitigating options have been introduced, fine enforcement regimes still provide a pathway from a fine to imprisonment. Further, regimes that use warrants of commitment permit imprisonment without hearings or trials. Imprisonment remains automatic at a certain point in the enforcement process.

6.23 In 2012, the NSW Law Reform Commission (NSWLRC) recommended the abolition of imprisonment for non-compliance with a CSO in that state, describing the process as contrary to the principles of natural justice and procedural fairness.[21]

6.24 In 2016, the Coroner's Court of Western Australia questioned whether incarcerating fine defaulters provided any benefit to the community and recommended the abolition of warrants of commitment in WA.[22] 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 a CSO or other alternatives) where appropriate.[23] This reflects enforcement regimes in the ACT, SA and Victoria, and was supported in 2016 by the Law Society of WA.[24]

6.25 The Western Australian system has been identified as particularly arduous for Aboriginal and Torres Strait Islander women. In 2013, it was reported that one in every three women who entered prison in West Australia did so for fine default.[25] More recent statistics show that 73% of female fine defaulters in WA were unemployed when imprisoned. About 64% of women imprisoned for fine default were Aboriginal and Torres Strait Islander women.[26]

6.26 The UN Special Rapporteur on Violence against Women urged the Western Australian 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'.[27] The 2017 report by the Human Rights Law Centre on the over-representation of Aboriginal and Torres Strait Islander women in prison identified fine default statutes as laws that unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women, and recommended the abolition of all laws that lead to the imprisonment of people who cannot pay fines.[28]

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21 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 8.4.

22 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 147.

23 Ibid 151.

24 The Law Society of Western Australia, *Imprisonment of Defaulters* (Briefing Paper, 2016).

25 Western Australia Labor, *Locking in Poverty: How Western Australia Drives the Poor, Women and Aboriginal People to Prison*, (Discussion Paper, 2014) 2.

26 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.

27 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).

28 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.

6.27 This concern has been further highlighted by Australian legal advocates. In 2016, the Law Society of NSW submitted to the national *Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services* that the WA 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'.[29]

6.28 The Aboriginal Legal Service of WA has 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.[30]

6.29 The Law Council of Australia has indicated support for the national abolition of fine default imprisonment schemes.[31]

6.30 The ALRC is alert to the argument that to remove the option for prison is to remove a 'short and sharp' option for people without the means to discharge their fine debt to become debt-free. There may be more equitable means by which to minimise the impact of fines and to clear fine debt. These are discussed below and include:

- limiting the number of infringement notices able to be issued in one transaction and placing limits on the monetary penalty of infringement notices;
- expanding sentencing options for low-level offending; and
- introducing the NSW WDO scheme in each state and territory.

The impact of infringement notices

Question 6–1 Should lower level penalties be introduced, such as suspended infringement notices or written cautions?

Question 6–2 Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how?

Question 6–3 Should the number of infringement notices able to be issued in one transaction be limited?

6.31 Infringement notices are the most common penalty issued by criminal justice systems in Australia.[32] In 2009, the NSW Ombudsman reported that the NSW Police Force, as an 'issuing agency', had issued more than 500,000 infringement notices to

29 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].
30 Aboriginal Legal Service of WA, *Addressing Fine Default by Vulnerable and Disadvantaged Persons: Briefing Paper* (2016) 2.
31 The Law Society of Western Australia, *Imprisonment of Defaulters* (Briefing Paper, 2016).
32 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [1.26]–[1.28].

adults in the previous year.[33] At the same, over 8,000 criminal infringement notices (discussed below) were also issued. In Victoria up to five million infringement notices were issued across all issuing agencies in 2015–16.[34]

6.32 Infringement notices generally refer to regulatory penalties in areas such as traffic infringements (such as for parking or speeding) as well as in areas such as health and safety, national parks and wildlife, passenger transport, and rail safety.[35] In 2012, the NSWLRC observed in their 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.[36]

6.33 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.[37]

Impact on Aboriginal and Torres Strait Islander peoples

6.34 The imposition of monetary penalties, especially the sometimes high fixed amounts under infringement notices, has been widely criticised for having a disproportionate impact on: people with low incomes (including young people); people in prison;[38] homeless or transient people with complex needs; and people with mental health issues or cognitive impairments.[39] Aboriginal and Torres Strait Islander peoples are over-represented in these groups.[40]

6.35 There are other issues related to infringement notice enforcement regimes that are particular to Aboriginal and Torres Strait Islander peoples. For example, a high proportion of Aboriginal and Torres Strait Islander people live in regional or remote communities and may not routinely receive mail. This may mean that enforcement notices are not received and can lead to a greater risk of accruing fine related debt, enforcement costs and enforcement measures.[41]

6.36 Penalties received under single or multiple infringement notices can be disproportionate to the offending conduct. The ALRC has heard examples of the

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33 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) foreword.

34 Infringement Management and Enforcement Services, *Annual Report on the Infringements System 2015–16* (2016) 25.

35 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [1.3], [1.7].

36 Ibid [1.32].

37 See, eg, NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 102.

38 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [17.1], [17.3], [17.67].

39 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.

40 See ch 11.

41 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [16.9].

potential for escalation, such as that of a young Aboriginal girl (Ms X) with a dysfunctional family who skipped school and rode the trains. Ms X was asked for a ticket by a transit officer, who Ms X told to 'fuck off'. Ms X was then given an infringement notice for fare evasion and offensive language.[42] For which Ms X said, 'you got to be fucking kidding', for which Ms X received another notice for offensive language, amounting to well over $1,000 in fines.

6.37 The ALRC has also heard about an Aboriginal boy (Mr X) who was given an infringement notice on his way to and from school every day for not wearing a bicycle helmet. As a young adult, Mr X was paralysed by fine debt, and ended up in prison.

Ways to lower the monetary penalty

6.38 Punishment should be proportionate to the crime. In 2014, the Sentencing Advisory Council of Victoria (SACV) observed that the principle of proportionality requires 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.[43] The SACV reported that some infringement penalties in Victoria amounted to 50% of the maximum penalty available to the court. It also noted the discrepancy 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.[44] In its report on penalty notices, the NSWLRC adopted a formula to recommend that infringement notice amounts should not exceed 25% of the maximum court fine for that offence.[45]

6.39 Concession infringement notices have been raised as another way to ensure the efficacy and fairness of infringement notices. This was recommended by the SACV, which 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 this scheme would be able to apply for a reduced infringement penalty to the enforcement agency as soon as the person has received the penalty. This recommendation sought to provide the person with an early exit from the infringement enforcement system.[46] The NSWLRC considered that the administration of this option could be overly burdensome, citing the added complexity to the infringement notice system, preferring instead to expand the WDO scheme and 'time to pay' systems.[47]

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42 See, eg, *Rail Safety (Offences) Regulation 2008* (NSW) cl 12(1)(a), 12(1)(b), sch 1 pt 3.

43 Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria: Report* (2014) [8.3.4].

44 Ibid [8.3.19], [8.3.26], rec 38.

45 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) rec 4.5.

46 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.

47 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) [11.25]–[11.27].

Ways to minimise the issuing of infringement notices

6.40 There may be ways to minimise the issuing of infringement notices in the first instance. The NSWLRC recommended that:

- there be greater use of the discretion to caution and that cautions be written, so that data could be collected; [48] and
- 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.[49]

6.41 The ALRC asks whether issuing officers should be restricted to one infringement notice in the same category per interaction. This means that, for example, 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. For example, the girl on the train in the example given above would only receive one infringement notice for using offensive language, and one for fare evasion.

6.42 There may be an option to issue a written caution instead of an infringement notice. For example, in 2017, South Australian police introduced an adult cautioning scheme for some summary offences that would have previously resulted in the person going before the court.[50]

6.43 The ALRC notes the availability of fine mitigation options following the imposition of a fine. 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. 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.

6.44 The ALRC welcomes submissions on options to minimise the impact of infringement notices on Aboriginal and Torres Strait Islander peoples.

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48 Ibid rec 5.1, 5.4.

49 Ibid rec 6.5.

50 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.

Infringement notices for offensive language/conduct

Question 6–4 Should offensive language remain a criminal offence? If so, in what circumstances?

Question 6–5 Should offensive language provisions be removed from criminal infringement notice schemes, meaning that they must instead be dealt with by the court?

6.45 Infringement notices that are able to be issued by police for minor summary offences are called 'criminal infringement notices' (CINs). These can generally be issued for public order offences and some low level larceny or obtaining goods offences. Prior to the introduction of CINs, a person charged for these types of offences would be charged and required to go before the court. CINs are a relatively new form of infringement notice. For example, NSW introduced CINs in 2004, and WA introduced them in 2016.

6.46 Police can issue CINs for offensive language in all states and territories except SA, Tasmania and the ACT.[51] The maximum fines available (for offences that go before the court) and the CIN amounts are itemised in the table below.

51 *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.

Table 1: Offensive language provisions with maximum penalties per state and territory (source: 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.

State or territory	Legislation	Conduct	Location	Maximum Fine (ex prison)	CIN
NSW	*Summary Offences Act 1988* (NSW) s 4A(1)[52]	Offensive language	In or near, or within hearing from, a public place or a school	$660	$500
Vic	*Summary Offences Act 1966* (Vic) ss 17, 60AA, 60AB	Profane, indecent or obscene language; or threatening, abusive or insulting words	In or near a public place or within the view or hearing of any person being or passing therein or thereon	25 penalty units	$295.22
Qld	*Summary Offences Act 2005* (Qld) s 6; *State Penalties Enforcement Act* 1999 (Qld)	Offensive, obscene, indecent or abusive language	The person's behaviour must interfere, or be likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public	$1,100	$110
WA	*Criminal Code (Infringement Notices) Regulation 2015* (WA) sch 1; *Criminal Procedure Act 2004* (WA) ss 8 and 9; *Criminal Code* (WA) ss 74A, 720–3	Insulting, offensive or threatening language	In a public place; or in the sight or hearing of any person in a public place; or in a police station or lock up	$6,000	$500

52 Instead of imposing a fine, a court may make an order directing the person to perform community service work (up to 100 hours), s 4A(3)–(6); there are also specific provisions that prohibit offensive language in more specific places, and provide different penalties. 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.

State or territory	Legislation	Conduct	Location	Maximum Fine (ex prison)	CIN
SA	*Summary Offences Act 1953* (SA) ss 7, 22	Offensive, threatening, abusive or insulting, indecent or profane language	In a public place or a police station (profane or indecent words are punishable if audible from such a place, which is audible from a public place or neighbouring or adjoining occupied premises, or the person intends to offend or insult any person)	$1,250 $250 (indecent or profane language)	NA
Tas	*Police Offences Act 1935* (Tas) s 12	Profane, indecent, obscene, offensive, or blasphemous language; or threatening, abusive, or insulting words	In any public place, or within the hearing of any person in that place	3 penalty units	NA
NT	*Summary Offences Act* (NT) ss 47, 53; *Summary Offences Regulations 1994* (NT) reg 4A	Profane, indecent, obscene, threatening, abusive or objectionable words, offending, or causing substantial annoyance to a person	In or within the hearing or view of any person in any road, street, thoroughfare or public place	$2 ,000 (profane, indecent or obscene words)	$144 $288 $432[53]
ACT	*Crimes Act 1900* (ACT) s 392	Riotous, indecent, offensive or insulting behaviour	In, near, or within the view or hearing of a person in, a public place	$1,000	**NA**

Impact on Aboriginal and Torres Strait Islander peoples

6.47 Aboriginal and Torres Strait Islander peoples are over-represented as recipients of offensive language CINs. For example, the NSW Ombudsman found that 11% of CINs for offensive language in 2008 were issued to Aboriginal and Torres Strait Islander people.[54] More recently, it was reported that the proportion had risen to 17%.[55]

53 *Summary Offences Act* (NT) ss 47, 53; *Summary Offences Regulations 1994* (NT) reg 4A. Note that the location depends on the words used, for example, indecent, obscene or profane language is punishable in a public place, or within the view or hearing of any person passing therein.

54 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 59.

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 SDRO for enforcement. By comparison, 48% of all CIN penalty notices were referred for enforcement.[56]

6.48 The issues regarding offensive language provisions and how they are applied to Aboriginal and Torres Strait Islander peoples have been well ventilated. Primarily, these arguments are that most offensive language CINs are issued for language directed at police; and, if tested in court, may not meet the legal definition of 'offensive'.[57]

Should offensive language provisions be removed from CIN regimes?

6.49 The ALRC has heard from stakeholders that Aboriginal and Torres Strait Islander peoples can be targeted by issuing officers. This may result in many more Aboriginal and Torres Strait Islander peoples entering the fine enforcement system. It has been suggested that offensive language provisions be removed from CIN offences—as the prospect of offensive language charges going before the court may discourage issuing officers from charging trivial infractions.

6.50 The ALRC has also heard that CIN regimes provide an appropriate diversionary option, which results in less contact for Aboriginal and Torres Strait Islander peoples with the criminal justice system—the person is not arrested and need not attend the police station, making it less likely that the person will be charged with further offences, such as resist arrest or assault officer. This addresses a key concern of the RCIADIC.[58] With regard to the diversionary value of the CIN regime, however, the NSW Ombudsman noted:

> Of the Aboriginal people contributing to this review ... all voiced concerns that any benefits arising from diverting minor offenders in this way were likely to be eclipsed by the much more pervasive problems associated with fine default, especially with respect to the high number of Aboriginal people who are ineligible to drive or register a vehicle because of sanctions imposed as part of measures to enforce unpaid fines.[59]

6.51 The ALRC invites submissions on whether offensive language provisions remain an issue related to the incarceration of Aboriginal and Torres Strait Islander peoples. If so, the ALRC asks for comments on whether these provisions should be abolished, or whether they should be removed from CIN regimes.

6.52 There are other options. For example, the NSWLRC 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.[60] South Australian

55 Elyse Methven, *Dirty Talk: A Critical Discourse Analysis of Offensive Language Crimes* (PhD Thesis, Faculty of Law, University of Technology Sydney, 2017) 5.

56 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) iv–v.

57 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).

58 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 22.

59 NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 49.

60 NSW Law Reform Commission, *Penalty Notices*, Report No 132 (2012) recs 10.2–10.3.

police are able to issue a caution to adults for offensive language offending, and provide an example of swearing at police resulting in the issuing of an adult caution on their website.[61]

6.53 The ALRC also welcomes submissions on any other CIN offence that affects Aboriginal and Torres Strait Islander criminalisation and incarceration rates. 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'.[62] 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.[63]

Alternatives to court imposed fines

Question 6–6 Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.

6.54 Generally, fines are the lowest penalty a court can impose, and a court imposed fine need not equate to a large amount. 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.[64] 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).

6.55 This section asks whether there is a requirement for other court sanctions to be introduced to prevent people without means from entering the fine enforcement regime. The ALRC outlines options including the potential introduction of suspended fines; day fines; and WDOs, but welcomes submissions on other possible alternatives.

Suspended fines

6.56 WA introduced legislation to provide for suspended fines in 2016.[65] Suspended fines would 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 provisions are yet to commence.

6.57 The option of a suspended fine would allow a court, in sentencing an offender to a fine, to order that the fine be suspended for a period set by the court of up to 24 months. A suspended fine could not be imposed unless a fine equal to the suspended

61 South Australia Police, above n 50.
62 *Summary Offences Act* (NSW) s 9.
63 NSW Ombudsman, *Policing Intoxicated and Disorderly Conduct: Review of Section 9 of the Summary Offences Act 1988* (2014) 3.
64 See, eg, *Crimes (Sentencing) Act 2005* (ACT) s 14; *Fines Act 1996* (NSW) s 6; *Sentencing Act* (NT) s 17; *Penalties and Sentences Act 1992* (Qld) s 48; *Sentencing Act 1997* (Tas) s 43; *Sentencing Act 1991* (Vic) s 52(1); *Sentencing Act 1995* (WA) s 53.
65 *Sentencing Legislation Amendment Act 2016* (WA) pt 4 div 3.

amount would be appropriate in all the circumstances. The effect of suspending a fine would be that the offender would not need to pay the fine unless they committed an offence during the suspension period and the court makes an order requiring the person to pay, or part pay, the fine.[66]

6.58 The introduction of suspended fines has been criticised as operating 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 argued to be unlikely to address the issues that lead to conviction and default.[67]

6.59 As part of the findings in the inquest into the death of Ms Dhu, the Western Australian Coroner's Court suggested that the question of whether the person has the means to pay the fine if they reoffend could be addressed in the legislation, as the court would have 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.[68]

Day fines

6.60 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 the fine off. This type of approach has been taken in some European jurisdictions.[69]

6.61 While there are advocates for day fines in Australia,[70] the ALRC considers it unlikely that Australian jurisdictions would adopt such an approach. It is 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. In its 2015 report on federal offenders, the ALRC contended that:

> 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

66 Ibid s 52.
67 Western Australia, *Parliamentary Debates*, Legislative Assembly, 15 November 2016, 28028c–8067a (John Quigley).
68 *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 150.
69 Such as Germany, Austria, Denmark and Finland.
70 Adam Fletcher and André Dao, 'Alternatives to Imprisonment for Vulnerable Offenders International Standards and Best Practice—Report for Australian Government Attorney-General's Department' (July 2012) rec 3; Tasmanian Law Reform Institute, *Sentencing* Final Report No 11 (2008) 150–52.

> 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.[71]

6.62 The ALRC welcomes submissions on the suitability of this type of system in Australia.

Court ordered work and development order schemes

6.63 Currently, most courts can order some form of community service at first instance or in lieu of a fine debt. Breaches of such orders, however, may result in a prison sentence. The NSW WDO scheme is currently only available *following* the imposition of a court-ordered fine (or receipt of an infringement notice). It has been suggested that courts should be able to impose a WDO, as understood in NSW, at first instance.

6.64 Courts are already able to issue CSOs or non-conviction orders.[72] The ALRC is interested in current practice and procedure, and whether there is any need to introduce a WDO sentencing option for courts.

NSW Work and Development Orders

Proposal 6–2 Work and Development Orders were introduced in NSW in 2009. They enable a person who cannot pay fines due to hardship, illness, addiction, or homelessness to discharge their debt through:

- community work;
- program attendance;
- medical treatment;
- counselling; or
- education, including driving lessons.

State and territory governments should introduce work and development orders based on this model.

6.65 WDOs were introduced in NSW in 2009 to provide meaningful and achievable ways of discharging fine debt where a person cannot pay.[73] WDOs enable a person

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71 Australian Law Reform Commission, *Sentencing of Federal Offenders* Discussion Paper No 70 (2005) 110–11.

72 Such as s 10 orders under the *Crimes (Sentencing Procedure) Act 1999* (NSW).

73 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.

who cannot pay their fines due to hardship, illness, addiction, or homelessness to discharge their debt through community work; program attendance; medical treatment; counselling; or education, including driving lessons. Once on a WDO, any related licence suspension (see below) is lifted.

Legislative framework

6.66 The WDO program is set out in the *Fines Act 1996* (NSW). A WDO can be made by the SDRO when a fine enforcement notice has been made, and the defaulter meets the criteria.[74] An applicant for a WDO must be supported by an 'approved person' who is to supervise their compliance.[75]

6.67 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).[76]

6.68 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 the SDRO.[77] 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.[78] The rate at which fines are discharged depends on the activity, and is set out in in the WDO guidelines.[79]

Outcomes

6.69 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'.[80]

6.70 The NSW Department of Justice stated that, as of December 2016, almost 2,000 service locations provided WDOs, and that nearly $74 million in fine debt had been

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74 *Fines Act 1996* (NSW) s 99B(1).
75 Ibid ss 99A (meaning an approved organisation or health practitioner); 99B(2)(b).
76 Ibid s 99A.
77 Ibid s 99B(2)(c).
78 Ibid s 99B(2A).
79 Department of Attorney-General and Justice (NSW), *Work and Development Order Guidelines 2012* (2012) 18.
80 Inca Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component* (Final Report, 2015) 2.

cleared since the program commenced in 2009.[81] 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'.[82]

Obstacles

6.71 There are some obstacles to nationwide implementation. Regional and remote areas may lack the infrastructure required to implement the programs and provide employment opportunities, excluding some Aboriginal and Torres Strait Islander communities from participating. Nonetheless, there is momentum to introduce WDOs in this form in other jurisdictions. The Sentencing Advisory Council of Victoria (SACV) recommended that Victoria introduce the NSW WDO scheme in 2014.[83] The Queensland Parliament passed legislation to introduce a WDO scheme in May 2017.[84]

6.72 The ALRC notes the strong support for WDOs shown in all states and territories during consultation, and seeks further comments on this proposal.

Driver licence related issues

6.73 A person that drives without a valid driver licence commits a criminal offence. Penalties include: court imposed fines; licence suspension and disqualification; and imprisonment, with penalties increasing with each related infraction. Aboriginal and Torres Strait Islander people are susceptible to licence suspension due to fine default, or may never gain a valid driver licence.

Impact on Aboriginal and Torres Strait Islander peoples

6.74 Where public transport is limited or not available—which is particularly relevant for remote communities—Aboriginal and Torres Strait Islander peoples without a valid driver licence or under a licence suspension may still be required to drive in order to maintain employment, fulfil cultural and family obligations, or drive to obtain medical assistance or necessities such as food.

6.75 Driver licence related offences affect Aboriginal and Torres Strait Islander communities, particularly where regionally or remotely located. For example, the NSW Aboriginal Legal Service reported that, in 2010 in NSW, 12% of people charged with driving while suspended or disqualified were Aboriginal and Torres Strait Islander peoples. Of those charged with driving unlicensed, 21% were Aboriginal and Torres Strait Islander peoples.[85] The NSW Bureau of Crime Statistics and Research data

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81 Judy Trevana and Don Weatherburn, 'Does the First Prison Sentence Reduce the Risk of Further Offending?' (Bureau of Crime Statistics and Research, October 2015).

82 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].

83 Sentencing Advisory Council, *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria: Report* (2014) rec 13.

84 State Penalties Enforcement Registry, *New Legislation to Streamline SPER Operations* (10 May 2017) <www.sper.qld.gov.au/news-and-announcements/legislation-changes.php>.

85 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].

shows that in 2016, Aboriginal and Torres Strait Islander peoples constituted 31% of all people imprisoned for driving while suspended or disqualified.[86] This is similar in other states and territories, and is particularly high in the NT.[87]

6.76 Nationally, 3% (270) of the total Aboriginal and Torres Strait Islander prison population in 2016 were imprisoned for traffic and vehicle regulatory offences. This proportion was similar in the non-Indigenous prison population, at 2% (556).[88]

Loss of licence through fine default

Question 6–7 Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?

Question 6–8 What mechanisms could be introduced to enable people reliant upon driver licences to be protected from suspension caused by fine default? For example, should:

(a) recovery agencies be given discretion to skip the driver licence suspension step where the person in default is vulnerable, as in NSW; or

(b) courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?

6.77 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. 270,843 suspensions were lifted during the same period (for fines paid or for people entering a time-to-pay arrangement).[89] Up to 67% of licence suspensions in NSW are the result of fine enforcement measures, as shown in the table below.

Table 2: The source of NSW driver licence cancellations and disqualifications at March 2016 [90]

Court cancellations	Court disqualifications	Demerit point suspensions	Fine default suspensions	Police suspensions
1,876	1,714	4,575	26,463	1,220

86 NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2016* (2017) tables 5, 14.

87 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).

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

89 Department of Attorney General (WA), *Report on the Fines Enforcement Registry 2010/11 to 2014/15* (2015).

90 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.

Prison for driving while disqualified

6.78 A person cannot go directly to prison for driver licence suspension due to fine default. The person must be consequently convicted of driving while suspended and then be disqualified. Continuing to drive while disqualified can result in a sentence of imprisonment. This is generally rare, but can be pronounced in some regions. For example, the NSW ALS observed that 50% of their clients in the Dubbo region who were charged for driving while disqualified received a sentence of imprisonment. They were generally sentenced to imprisonment on their second to fourth offence.[91]

6.79 Driver licence disqualification periods, which are imposed when a person is caught driving while suspended, are mandatory in some jurisdictions. In the ACT, NSW, and Queensland, courts do not have a discretion whether or not to apply a statutory disqualification period.[92] Where there is more than one disqualification period, the periods can be required to be served consecutively—which can result in extremely long periods of disqualification.

Impact on Aboriginal and Torres Strait Islander peoples

6.80 Driver licences can be suspended as a result of fine default—even where the originating fine was unrelated to the defaulter's driving ability. The ALRC has heard, for example, of Aboriginal and Torres Strait Islander people caught *fishing* without a permit, which resulted in driver licence suspension.

6.81 The ALRC has been told that some Aboriginal and Torres Strait Islander peoples face particular difficulties relevant to remoteness and transiency that can make them highly susceptible to licence suspension for fine default. The NSW Ombudsman reported that

> Aboriginal people are far less likely than non-Aboriginal people to pay their fines by the due date and there is a high likelihood that they will remain in the fines enforcement system for up to several years after they have committed the offence(s) for which one or more penalty notices were issued.[93]

6.82 This means that Aboriginal and Torres Strait Islander people are likely to be over-represented in licence suspension due to fine default. For example, in 2013, the NSW Auditor-General reported that Aboriginal and Torres Strait Islander peoples were suspended for fine default in NSW at over three times the rate of non-Indigenous people.[94]

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91 Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [7.12].

92 *Road Transport (Driver Licensing) Act 1999* (ACT) ss 31A, 32; *Road Transport Act 2013* (NSW) ss 53, 54, 115, 205; *Transport Operations (Road Use Management) Act 1995* (Qld) ss 78(3), 79D.

93 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].

94 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.

Whether state debt recovery agencies should skip licence suspension step

6.83 Where a person has funds but is refusing to pay an unpaid fine, licence suspension (or the threat of) can be effective in encouraging payment.[95] However, where a person is not paying an unpaid fine because they simply do not have the funds, licence suspension can have grievous consequences for people, especially Aboriginal and Torres Strait Islander peoples. There have been calls to reconsider the fine enforcement step of licence suspension. For example, a report to the then Roads and Traffic Authority (NSW) noted that, if licence suspension was to continue to be one consequence of fine debt, the SDRO needed to work more closely with the community to minimise adverse or unintended consequences.[96] The ALRC goes further to ask whether—considering the option for civil orders—the step is really necessary.

6.84 In 2017, NSW introduced a statutory discretion allowing the SDRO to skip licence suspension where the person in fine default is deemed to be 'vulnerable'. Instead, the SDRO can use discretion to skip the RMS step, and recover fines earlier via civil enforcement action with 'less negative impact on vulnerable members of the community'.[97] The SDRO may decide that civil enforcement action is preferable in the absence of and without giving notice to, or making inquiries of, the fine defaulter.[98]

Whether disqualification periods should be discretionary

6.85 The ALRC notes that in certain jurisdictions, the court has little discretion as to the disqualification period.[99] In NSW, for example, if the court wants to impose a lesser penalty than one prescribed, it only has limited discretion to make a non-conviction order.[100] It has been suggested that expanding the discretion of the courts is a better solution than introducing a process to apply to have the disqualification quashed after a period of good behaviour,[101] although that option already exists in some jurisdictions.[102] There may be an option for discretionary disqualification periods to apply only to licence suspensions due to fine default.

6.86 The ALRC seeks input on the best way to minimise the impact of licence suspension on Aboriginal and Torres Strait Islander peoples who have defaulted on fine payments, and welcomes submissions on these questions as well as any other relevant material.

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95 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.

96 Roads and Traffic Authority of NSW, *Research Report: An Investigation of Aboriginal Driver Licencing Issues* (2008) rec 2.

97 Fines Amendment Bill 2017 (NSW); New South Wales, *Parliamentary Debates*, Legislative Assembly, 14 February 2017, 47 (Victor Dominello, Minister for Finance, Services and Property).

98 Fines Amendment Bill 2017 (NSW) sch 1 cl 5.

99 See, eg, *Road Transport (Driver Licensing) Act 1999* (ACT) ss 31A, 32; *Transport Operations (Road Use Management) Act 1995* (Qld) ss 78, 79D.

100 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10.

101 Legislative Assembly of New South Wales Committee on Law and Safety, Parliament of New South Wales, *Driver Licence Disqualification Reform*, Report 3/55 (2013) [4.22].

102 *Transport Operations (Road Use Management) Act 1995* (Qld); *Road Traffic (Authorisation to Drive) Act 2008* (WA).

Access to driver licences

Question 6–9 Is there a need for regional driver permit schemes? If so, how should they operate?

Question 6–10 How could the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities be improved?

6.87 Some Aboriginal and Torres Strait Islander people can face particular obstacles in 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); and any literacy issues and corresponding difficulty passing written tests.[103]

6.88 In 2013, the NSW Auditor-General reported that fewer than half of eligible Aboriginal and Torres Strait Islander peoples held a driver licence, compared with 70% of the non-Indigenous population, and observed that 'meeting the Graduated Licensing Scheme requirements is difficult if your literacy is poor, you cannot access a vehicle or there is not a licensed driver to supervise you'.[104] Being in fine default can also prevent a person from applying for a driver licence.

Whether to introduce a regional driver permit scheme

6.89 In preliminary consultations in this Inquiry, the ALRC has been told that there should be a driver permit scheme for Aboriginal and Torres Strait Islander peoples living in some regional and remote areas. This has been raised previously in other inquiries. For example, in 2010, the Standing Committee on Aboriginal and Torres Strait Islander Affairs recommended the introduction of 'special remote area' driver licences.[105] 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 peoples.[106]

6.90 In 2009, the North Australian Aboriginal Justice Agency suggested that community members in the NT should be able to drive unlicensed or in unregistered

103 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].

104 Audit Office of New South Wales, above n 94, 2, 21.

105 Senate Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, above n 103, rec 21.

106 Anthony and Blagg, above n 87, rec 13.

cars within communities and on Aboriginal land on bush tracks, especially for hunting purposes.[107]

6.91 The ALRC envisages that, in order to address the current obstacles preventing Aboriginal and Torres Strait Islander peoples from accessing driver licences, a regional driver permit is likely to require fewer identity documents and cost less to access. The driving requirements prior to receiving the permit would likely be less arduous. It would need to be limited to use in certain areas, and should not qualify as equivalent personal identification to a standard driver licence for the purposes of confirming identity.

Whether it is better to focus on the obstacles to becoming licensed

6.92 The ALRC has also heard that regional driver permit schemes would only provide 'band aid' solutions, and be difficult to implement and administer. Instead what needs to be addressed are the obstacles to receiving a driver licence in the first place. This is not a new issue: 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.[108]

6.93 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.

6.94 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;
- 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.

6.95 The Royalty for Regions program in WA also provided enhanced driver training and education in regional and remote communities.[109]

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107 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).

108 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, rec 95.

109 Advice Correspondence, Stephen Cannon (15 May 2017).

6.96 There are similar driver licence programs in NSW, including *Driving Change*; the *Balunda-a* program (for offenders); and *Birrang Enterprises*, which provides literacy and training to adult Aboriginal and Torres Strait Islander peoples. Driver training is also a key element of the Maranguka Justice Reinvestment Program in Bourke. The ALRC has also heard about driving programs developed for Aboriginal and Torres Strait Islander peoples in Queensland and the NT.

6.97 The NSW Auditor-General's 2013 report on *Improving Legal and Safe Driving among Aboriginal People*, outlined the characteristics of successful programs, including using and building on community capacity; having program champions; and involving Aboriginal and Torres Strait Islander peoples in program development and delivery.[110]

6.98 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.[111] Driver licence programs require coordination between different government departments, such as Births, Deaths and Marriages, Attorneys-General, and Roads and Maritime Services. This happens 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.[112]

6.99 Considering the suite of current driver programs, and identification of best practice for the successful delivery of driver programs for Aboriginal and Torres Strait Islander peoples, the ALRC welcomes submissions on whether a limited driver permit scheme is necessary, or whether the focus should remain on expanding and enhancing the current service provision.

6.100 The ALRC also welcomes submissions on the best way to deliver driver licence programs to regional Aboriginal and Torres Strait Islander communities. For example, it has been suggested to the ALRC in consultations that, where Aboriginal and Torres Strait Islander young people are likely to complete high school education and unlikely to face other identified obstacles (such as access to birth certificates), driver licence programs could constitute an elective in the school curriculum. It has also been suggested that state and territory governments enhance and commit to current government driver education programs, so as to extend the geographic reach of the program and the consistency of service in certain areas.

110 Audit Office of New South Wales, above n 94, 4.
111 Ibid.
112 Ibid 4, 55.

7. Justice Procedure Offences—Breach of Community-based Sentences

Contents

Summary 133
Background 134
Community-based sentences 134
Justice procedure offences 135
Impact on Aboriginal and Torres Strait Islander peoples 135
Circumstances related to breach of community-based sentences 137
Breach of community-based sentences 139
Compliance with conditions through assistance 139
Culturally appropriate community-based sentencing options 140

Summary

7.1 The Terms of Reference for this Inquiry ask the ALRC to consider the nature of offences resulting in incarceration.

7.2 Justice procedure offending is the third most common type of offending resulting in sentences of imprisonment for Aboriginal and Torres Strait Islander peoples.[1] A considerable proportion of Aboriginal and Torres Strait Islander people imprisoned for Justice Procedure Offences (JPOs) have breached the conditions of their community-based sentences.

7.3 The high rate of breach of community-based sentences indicates that greater attention should be given to the provision of culturally appropriate, community-based sentencing options and support services. In this chapter, the ALRC highlights some of the programs and services currently in place, and proposes that governments work with Aboriginal and Torres Strait Islander communities to identify gaps, and create the infrastructure required to develop and deliver programs and supports. The ALRC also asks what more can be done.

7.4 Issues regarding breaches of bail and breaches of parole are dealt with in Chapters 2 and 5.

1 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 10.

Background

Community-based sentences

7.5 All states and territories have sentencing regimes which enable some offenders to serve their sentence in the community.[2] Community-based sentences are generally categorised into 'custodial' (such as suspended sentences, home detention and intensive correction orders) and 'non-custodial' sentencing options.[3]

7.6 A suspended sentence, for example, is considered a custodial community-based sentence. This is because a sentence of imprisonment has been imposed, and then the execution of the sentence has been suspended.[4] The offender enters a good behaviour bond, which may include a requirement to participate in an intervention program.[5] Where the court revokes a good behaviour bond due to breach, the order suspending the execution of the sentence ceases to have effect.[6] The offender is then to serve the sentence in prison or the court can impose another form of custodial sentence (such as home detention).

7.7 Every state and territory has options for non-custodial community-based sentences.[7] For example, New South Wales (NSW) currently has Community Service Orders (CSOs) as one non-custodial sentencing option.[8] CSOs are not confined to cases that would otherwise result in a sentence of imprisonment, although it can only be imposed for offences that are punishable by imprisonment.[9] CSOs may require the offender to participate in personal development, education or other programs, and also may include such things as the removal of graffiti and the restoration of buildings.[10] There are mandatory conditions, including the requirement to report to corrective services; to be free of drugs or alcohol when reporting; and to follow directions.[11]

7.8 In NSW, an application to revoke a CSO may be made to the court by NSW Corrective Services on the grounds that the offender has failed—without reasonable

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2 *Crimes (Sentencing) Act 2005* (ACT) ch 5 pt 5.4, ch 6; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 3, pt 7; *Sentencing Act* (NT) divs 4, 4a; *Penalties and Sentences Act 1992* (Qld) pt 5 div 2; *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.

3 The availability of community-based sentences to the court is discussed further in ch 4.

4 Judicial Commission of New South Wales, *NSW Sentencing Bench Book* [5-700]; *R v Zamagias* [2002] NSWCCA 17 [25].

5 See, eg, *Criminal (Sentencing Procedure) Act 1999* (NSW) pt 8.

6 See, eg, Judicial Commission of New South Wales, above n 4, [5-790].

7 With the exception of the Victorian sentencing regime, under which Community Correction Orders do not distinguish between custodial or non-custodial community-based sentences.

8 *Criminal (Sentencing Procedure) Act 1999* (NSW) pt 7. A new statutory sentencing regime for community-based sentences which aligns with Community Correction Orders in Victoria has been announced but not yet introduced by the NSW Government.

9 Judicial Commission of New South Wales, above n 4, [4-400]. With the exception of offensive language *Summary Offences Act 1988* (NSW) s 4A and *Fines Act 1996* (NSW) s 58(1).

10 See definition in *Crimes (Administration of Sentences) Act 1999* (NSW) s 3; for a maximum of 500 hours: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8(2).

11 *Crimes (Administration of Sentences) Act 1999* (NSW) s 108(a); *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 201.

excuse—to comply with their obligations under the CSO.[12] When an application is made, the court has a discretion to re-sentence the offender, taking into account that community service is no longer available. Although there is no presumption of imprisonment following a breach, breaches are taken seriously by the court, and may result in the offender being re-sentenced to a term of imprisonment.[13]

Justice procedure offences

7.9 JPOs refer to the breaching of custodial or non-custodial orders (and other offences against justice). JPOs are defined by the Australian and New Zealand Standard Offence Classification to include:[14]

- **breach of custodial order offences:** including escape custody; breach of home detention or suspended sentence (by act or omission);
- **breach of community-based orders:** including breaches of community service orders; breaches of community-based orders; and breaches of bail, parole or bonds;
- **breach of violence and non-violence orders (protection orders):** including breaches of Apprehended Violence Orders, Domestic Violence Orders, and restraining orders;
- **offences against government operations:** including resist or hinder government officials; bribery of government officials; immigration offences; failure to lodge census, tax form, vote; hoax calls; and postal offences; and
- **security and justice procedures other than justice orders:** including subvert the course of justice; resist or hinder police; prison regulation offences; failure to appear in court.

7.10 Due to the impact on Aboriginal and Torres Strait Islander peoples, this chapter focuses on breaches of community-based sentences.

Impact on Aboriginal and Torres Strait Islander peoples

7.11 Aboriginal and Torres Strait Islander peoples are imprisoned for JPOs in greater proportions that non-Indigenous offenders:

- In 2016, 13% (957) of all sentenced Aboriginal and Torres Strait Islanders prisoners were imprisoned for JPOs (as the most serious offence charged). This makes JPOs the third highest offence type for Aboriginal and Torres Strait Islander offenders nationally, following acts intended to cause injury, and unlawful break and enter.[15]

12 *Crimes (Administration of Sentences) Act 1999* (NSW) s 115(2)(a).
13 Judicial Commission of New South Wales, above n 4, [4-440].
14 Used by the Australian Bureau of Statistics and the NSW Bureau of Crime Statistics and Research.
15 Australian Bureau of Statistics, above n 1, table 10. Acts intended to cause injury, the highest at 33%, unlawful entry at 15% and offences against justice 13%.

- In 2016, 9% (1,807) of the non-Indigenous prisoner population were imprisoned for JPOs—the sixth most common serious offence charged.[16]

7.12 Imprisonment for JPOs is more prevalent in some states and territories. The percentage of the Aboriginal and Torres Strait Islander prison population imprisoned for JPOs and the number per state and territory is shown below.

Chart 1: Of all Aboriginal and Torres Strait Islander prisoners, the percentage and number imprisoned for a Justice Procedure Offence (December 2016)[17]

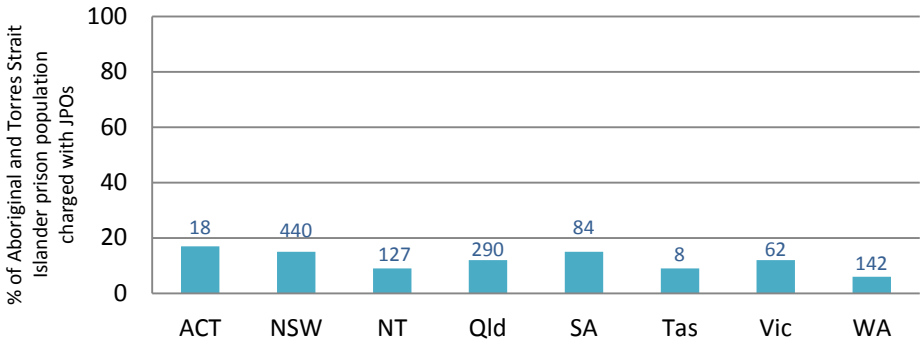

Table 1: Of all Aboriginal and Torres Strait Islander prisoners, the percentage and number imprisoned for a Justice Procedure Offence (December 2016)

	ACT	**NSW**	**NT**	**QLD**	**SA**	**Tas**	**Vic**	**WA**	**Total**
Number	18	440	127	290	84	8	62	142	**1171**
Percent	17%	15%	9%	12%	15%	9%	12%	6%	**11%**

7.13 NSW has the largest number of Aboriginal and Torres Strait Islander people imprisoned for JPOs. Between 2001 and 2015, imprisonment for JPOs in NSW increased more than any other offence category during that time—more than doubling from 2001.[18] Most of the growth in prison numbers for JPOs by Aboriginal and Torres Strait Islander people came from breach of community-based orders and breach of protection orders.[19]

7.14 Aboriginal and Torres Strait Islander people were also disproportionately represented among prisoners charged with JPOs. Aboriginal and Torres Strait Islander

16 Ibid. Of all sentenced and non-sentenced prisoners, 11% (1,167) of Aboriginal and Torres Strait Islander people were imprisoned for JPO, compared to 8% (2,279) of non-Indigenous prisoners: table 8. It is noted that Aboriginal and Torres Strait Islander prisoners are less represented in drug and sexual offending offences.

17 Data source: Ibid table 15.

18 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) 6.

19 Ibid 3.

prisoners represented 50% of all people imprisoned for JPOs in the ACT; 35% of all people imprisoned for JPOs in NSW; and 48% in Queensland. In all jurisdictions, the percentage of Aboriginal and Torres Strait Islander people imprisoned for JPOs was higher than the percentage of the Aboriginal and Torres Strait Islander prisoner population in that state or territory.

7.15 The proportion of JPO offenders in prison that were Aboriginal and Torres Strait Islander people per state and territory is presented below.

Chart 2: The percentage of people imprisoned for JPOs that are Aboriginal and Torres Strait Islander peoples (December 2016) [20]

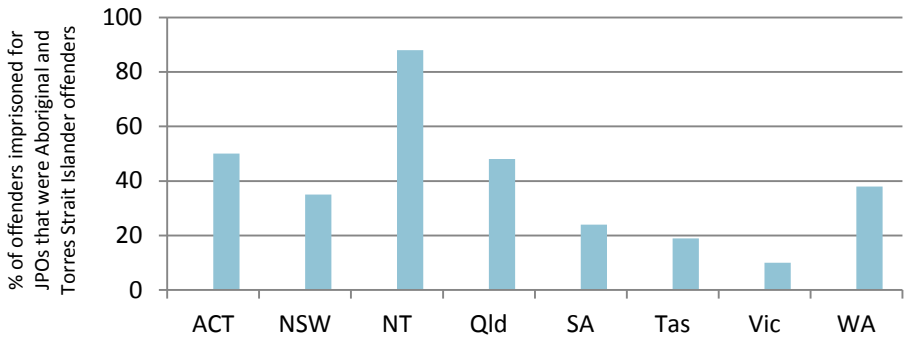

Table 2: The percentage of people imprisoned for JPOs that are Aboriginal and Torres Strait Islander peoples (December 2016)

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Percent	50%	35%	88%	48%	24%	19%	10%	38%

Circumstances related to breach of community-based sentences

7.16 In preliminary consultations, stakeholders in this Inquiry drew attention to the high imprisonment rates of Aboriginal and Torres Strait Islander people for non-compliance with conditions of community-based sentences. Stakeholders pointed to the possibility of Aboriginal and Torres Strait Islander offenders being subject to inappropriate conditions and programs while under sentence, combined with a lack of support, as a likely cause.

7.17 The circumstances outlined in the Western Australian Court of Criminal Appeal judgment in *AH v Western Australia* [2014] WASCA 228[21] provides such an example. In this case, a young illiterate and innumerate adult Aboriginal woman with complex needs, that included cognitive impairment and serious mental health issues, was sentenced to a community-based order following a short history of stealing cars. Under

20 Data source: Australian Bureau of Statistics, above n 1, table 15.
21 *AH v Western Australia* [2014] WASCA 228 (10 December 2014).

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. She was, however, subjected to requirements to report at particular times. She 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.

7.18 On the third occasion AH breached the community-based order, AH was sentenced to two years in prison. While in prison AH suffered a mental breakdown and an appeal was subsequently lodged. At the time of the appeal, AH was being held involuntarily in a mental health institution.

7.19 Information provided to the Court of Appeal showed that AH had initially reported to corrective services three days after her first appearance in court. At this meeting, she was told to come back one month later. AH failed to report and a warning letter was issued—the Court of Appeal decision noted that 'sending a warning letter to an illiterate itinerant young Aboriginal woman with intellectual disability was an exercise in the utmost futility'.[22] AH was eventually found and directed to report on a date, which she missed and appeared the day after, she then failed to report on the next allocated date and made no further contact. During the appointments that AH attended, no assessment was made to determine her suitability for any programs nor was 'any beneficial intervention proffered'.[23] This included any supervision or assistance with accommodation or any community support systems. The State neglected to put in place a guardian for AH. This inaction led the Court of Appeal to observe that 'there was no shortage of reports, assessments and recommendations. What was missing was any action or oversight to implement those recommendations'.[24]

7.20 A similar turn of events followed the second community-based order. The Court of Appeal found that AH's non-reporting was entirely predictable, and necessitated corrective services to organise some other way of making contact.[25]

7.21 The circumstances of AH's case highlight some of the factors that may be causative of non-compliance by Aboriginal and Torres Strait Islander peoples with conditions of community-based sentences. Causative factors may include:

- corrective services or other decision makers not setting relevant conditions and reporting requirements that are underpinned by the provision of services;
- 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;

22 Ibid [37].
23 Ibid [39].
24 Ibid [88].
25 Ibid [39], [122].

- the impact of offenders' mental health or cognitive impairment in understanding reporting requirements and other conditions; and
- cultural and intergenerational factors that may result in transience and homelessness.

Breach of community-based sentences

Proposal 7–1 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.

7.22 A reduction in imprisonment for JPOs could have a considerable impact on the number of Aboriginal and Torres Strait Islander peoples in prison. The Royal Commission into Aboriginal Deaths in Custody (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.[26] This has also been a key focus of the Victorian Aboriginal Justice Agreements.[27]

7.23 Stakeholders in this Inquiry have suggested that compliance with community-based orders would increase if programs and conditions were relevant and practical to the circumstances of Aboriginal and Torres Strait Islander offenders, and if offenders were supported.

7.24 There are existing models in use across the states and territories that could be expanded and adapted. Some of these are discussed below.

Compliance with conditions through assistance

7.25 The Victorian Government has developed support services and programs in collaboration with peak Aboriginal and Torres Strait Islander organisations to assist Aboriginal and Torres Strait Islander offenders complete community-based sentences. These include the Local Justice Worker Program and the Wulgunggo Ngalu Learning Place, which were developed under the Victorian Aboriginal Justice Agreement.[28]

7.26 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. Under this program, the Local Justice Worker links up offenders with services and culturally appropriate worksites; and can connect with the Sherriff's

26 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report (1991) vol 5, recs 111, 116.
27 See ch 10.
28 See ch 10.

Office to help set up appropriate options for the repayment of fines, including payment plans, community work permits or Community Correction Orders (CCOs).[29]

7.27 The LJWP includes the Koori Offender Support and Mentoring Program, in which Elders and respected persons are involved to provide support, advice and cultural connection to offenders, as well as to supervise offenders undertaking community work. Where available, Elders are engaged to participate in various activities with offenders, including fishing, traditional dance, arts and craft.[30]

7.28 The LJWP operates from 10 locations across Victoria, chosen based on the daily average number of Aboriginal offenders reporting to Community Corrections Services (CCS) offices in each region.

7.29 The LJWP was independently evaluated in 2013.[31] The evaluation observed a narrowing of the gap between the proportions of Aboriginal and Torres Strait Islander offenders as 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'.[32] The program was noted to have high Aboriginal and Torres Strait Islander female participation.[33]

7.30 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.[34]

Culturally appropriate community-based sentencing options

7.31 The ALRC has heard about the existence of culturally appropriate community-based sentencing options that have been developed with or by Aboriginal and Torres

29 Fines are further discussed in ch 6.
30 Attorney-General's Department (Vic), *Evaluation of Indigenous Justice Programs Project B: Offender Support and Reintegration—Final Report* (2013) 90.
31 Attorney-General's Department (Vic), *Evaluation of Indigenous Justice Programs Project B: Offender Support and Reintegration—Final Report* (2013).
32 Ibid 86.
33 Ibid 98.
34 Ibid 89.

Strait Islander organisations. There are examples of culturally appropriate community-based sentencing options in the Victorian Aboriginal Justice Agreement. These include the advent of a sustainable work program based in the grounds of Weeroona Cemetery, which has reportedly contributed to an increase in the rate of successful order completion by Aboriginal and Torres Strait Islander offenders in Victoria.[35]

7.32 Victoria has also introduced the Wulgunggo Ngalu Learning Place, which provides a voluntary residential program for up to 20 Aboriginal and Torres Strait Islander men serving community-based orders. This option usually becomes available when an Aboriginal or Torres Strait Islander man has already breached a CCO, and the only other option is prison.

7.33 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.[36] The program also operates as a place of referral by community corrections staff for male offenders when revocation of parole or a community-based order is being considered, or when during the course of supervision an offender is assessed as requiring intensive residential supervision. Like the Wulgunggo Ngalu Learning Place, this option is only available following a breach where risk of imprisonment arises. It has been described as a 'last-chance opportunity before [people] enter into custody'.[37]

7.34 The NSW Corrective Services website states:

> Following acceptance into the program offenders participate in structured programs within a culturally sensitive framework. Programs address specific areas of risk to assist on improving life skills and reintegration into the community, for example, cognitive based programs, drug and alcohol, anger management, education and employability, domestic violence, parenting skills and living skills. Cultural activities include excursions to sacred sites, music, dance and art. Elders employed by the program provide support and assist residents to recognise, restore and value cultural links with their land and history.
>
> The property is situated on 534 hectares and also operates as a farming and beef cattle property giving the residents the opportunity to develop agricultural skills. The length of stay at the program varies according to individual needs however a minimum period of 6 months is required.
>
> While a focus of the program is to reduce re-offending, and thereby the incarceration rate of Aboriginal people, the program is available to all within NSW.[38]

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35 Victorian Government, *Victorian Aboriginal Justice Agreement Phase 3 (AJA3): A Partnership between the Victorian Government and the Koori Community* (2013) 47.

36 *Criminal (Sentencing Procedure) Act 1999* (NSW) s 11.

37 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [7.26].

38 Community Corrections, Department of Justice (NSW), *Balund-a (Tabulam)* <www.correctiveservices .justice.nsw.gov.au>.

7.35 The above examples are not an exhaustive list of programs. There may be other culturally appropriate community-based sentencing options that the ALRC has not reviewed. Submissions on other community-based sentencing options are welcomed.

7.36 The ALRC recognises that community-based sentencing options may not be available in every location where they are required.[39] Each state and territory faces different challenges. The Northern Territory (NT) and Western Australia (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.[40] The recommendation makes clear that this should only be implemented with community agreement. Some stakeholders in this Inquiry have raised the possibility of supervision by community as described in the NT Supreme Court case of *DjAmbuy*, where the offenders were sentenced to suspended sentences that were to be supervised by the Aboriginal community, instead of Community Corrections.[41]

7.37 In this chapter, the ALRC proposes that state and territory governments—particularly corrective services—work with peak Aboriginal and Torres Strait Islander organisations to identify program gaps, and develop programs and support services to facilitate the completion of community-based sentences by Aboriginal and Torres Strait Islander offenders. One example of such a gap is likely to be programs for Aboriginal and Torres Strait Islander women. The ALRC considers that these programs should be developed by Aboriginal and Torres Strait Islander communities if they are to meet the objective of providing culturally appropriate content and support.

7.38 The ALRC further recognises the facilitative role that the Aboriginal Justice Agreements have had in developing programs and support services in Victoria. Aboriginal Justice Agreements are discussed in Chapter 10.

7.39 The ALRC welcomes submissions on the scope and practical implications of this proposal, and is interested to hear about other options and initiatives that may decrease the rate of non-compliance with community-based orders by Aboriginal and Torres Strait Islander offenders. While this chapter is focused on JPOs relating to a failure to comply with conditions of community-based sentencing orders, the ALRC also welcomes submissions on ways to minimise other justice procedure offending.

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39 See, eg, 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) 62.

40 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.

41 *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*.

8. Alcohol

Contents

Summary 143
Alcohol and offending 143
Foetal Alcohol Spectrum Disorder 145
A focus on harm reduction 147
Assessing solutions 149
Owning solutions 149
Liquor accords 150
Fitzroy Crossing ban on full strength alcohol 153
Alcohol Mandatory Treatment and Banned Drinkers Register 155

Summary

8.1 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.

8.2 Liquor licensing laws fall within state and territory jurisdiction. In this chapter, the ALRC considers proposals to address harmful alcohol use and outlines previous recommendations by other inquiries and initiatives to address alcohol-related harms.

8.3 The Terms of Reference direct this Inquiry to consider laws regulating alcohol that may contribute to the rate of offending of Aboriginal and Torres Strait Islander peoples. However, the ALRC recognises that other substance abuse issues may also contribute, including the use and availability of illicit and non-illicit drugs, and the use of inhalants.

Alcohol and offending

8.4 A number of prior inquiries have 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.[1]

1 Australian Institute of Health and Welfare, *National Drug Strategy Household Survey Detailed Report* (2013) 40.

8.5 The National Drug Strategy 2010–2015, developed by the Ministerial Council on Drug Strategy, 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.[2]

8.6 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.[3] However, later inquiries have identified the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities.[4]

8.7 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. The report made 33 recommendations concerning best practice strategies to minimise alcohol misuse and alcohol-related harm and best practice alcohol treatments and support.[5]

8.8 Submissions to the House of Representatives 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.[6] 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;[7] 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.[8]

8.9 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 the levels of alcohol and drug

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2 Ministerial Council on Drug Strategy, *National Drug Strategy 2010–2015: A Framework for Action on Alcohol, Tobacco and Other Drugs* (2011) 2.

3 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.

4 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).

5 Ibid.

6 See, eg, Central Australian Aboriginal Legal Aid Service, Submission No 56 to Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (April 2014) 2.

7 Australian Crime Commission (ACC), 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).

8 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).

use in Victorian Aboriginal people in prison were higher than for non-Aboriginal prisoners, contributing to increasing rates of Aboriginal incarceration.[9]

8.10 A 2009 review of the Alice Springs Alcohol Management Plan has 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 work of the National Drug Research Institute (2007), the review identified the most effective measures of reducing alcohol-related harm 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.[10]

8.11 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 (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'.[11]

8.12 The National Congress also 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.[12]

Foetal Alcohol Spectrum Disorder

8.13 Alcohol consumed during pregnancy has been shown to cause defects in the developing foetus. The National Drug Strategy 2010–2015 pointed out that '[d]rinking during pregnancy can cause birth defects and disability, and there is increasing

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9 Victorian Alcohol & Drug Association, Submission No 29 to Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (April 2014).

10 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.

11 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.

12 Ibid 3.

evidence that early onset of drinking during childhood and the teenage years can interrupt the normal development of the brain'.[13]

8.14 Foetal Alcohol Syndrome (FAS) and Foetal 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 continue through to adulthood.[14]

8.15 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.[15]

8.16 RANZCOG describes the range of behavioural disabilities associated with FAS as 'behavioural disorders (eg, poor impulse control) and developmental delay (eg, impaired language and communication, social and emotional delays). These have lifelong implications such as impaired education, employment and imprisonment'.[16]

8.17 Some research points to FAS and FASD contributing to Aboriginal incarceration rates.[17] 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 incarcerated than youths without FASD in a given year.[18] 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

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13 Ministerial Council on Drug Strategy, *National Drug Strategy 2010–2015: A Framework for Action on Alcohol, Tobacco and Other Drugs* (2011) 2.

14 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.

15 Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Submission No 66 to 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.

16 Royal Australian and New Zealand College of Obstetricians and Gynaecologists, Submission No 66 to Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2014).

17 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.

18 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.

> 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.[19]

8.18 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.[20] Funding 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 also address the social effects of FAS and FASD more appropriately than a criminal justice response.[21]

8.19 A Commonwealth Action Plan to reduce the Impact of Foetal Alcohol Spectrum Disorders (FASD) 2013–14 to 2016–17 aims to improve outcomes for FASD affected infants as well as reducing its incidence in the population.[22]

A focus on harm reduction

8.20 As a response to harms associated with alcohol abuse and misuse, governments have prepared and implemented various strategies or plans. For example, the Intergovernmental Committee on Drugs developed the National Aboriginal and Torres Strait Islander Peoples' Drug Strategy 2014–2019 (Drug Strategy).[23] The Drug Strategy provides a roadmap for work that might be done to minimise the negative effects of alcohol and other drugs (AOD), suggesting:

> In 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 harmful AOD use has left them disabled or cognitively impaired; and support those whose lives are affected by other's harmful AOD use.[24]

8.21 The Drug Strategy adopted a harm minimisation approach, identifying 'three pillars' of reduction focused on demand, supply and harm.[25]

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19 National Indigenous Drug and Alcohol Committee, *Addressing Fetal Alcohol Spectrum Disorder in Australia* (2012) 10.

20 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.

21 Harry Blagg, Tamara Tulich and Zoe Bush, above n 17.

22 Australian Government, *Responding to the Impact of Fetal Alcohol Spectrum Disorders in Australia: A Commonwealth Action Plan* (2013).

23 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.

24 Ibid 10.

25 Ibid 5.

8.22 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. For optimal treatment outcomes, a range of treatment options (provided in various settings) aimed at reducing individual demand, including screening and brief interventions, withdrawal management, pharmacotherapies, counselling, social support and ongoing support to reduce relapse rates need to be available.
>
> 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. A petrol sniffing strategy implemented by the Australian Government replacing unleaded petrol with a low aromatic alternative has led to significant reductions in petrol sniffing.
>
> 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.[26]

8.23 A range of responses have been recommended in combating alcohol abuse in Aboriginal and Torres Strait Islander communities. These include: dry communities; pricing controls; supply reduction strategies and reduction in trading hours; community controls and patrols; and other laws that restrict the sale of alcohol to intoxicated persons.[27] The 2015 House of Representatives Inquiry noted that Justice Reinvestment approaches also provided a 'promising strategy for reducing the number of Aboriginal and Torres Strait Islander people who are incarcerated for alcohol-related offences'.[28]

8.24 One review has suggested that the following alcohol reduction measures have not been successful at reducing harm, and, in some cases, have increased harm:

- staggered opening hours for licensed premises (which may increase violence);
- restrictions on service to intoxicated people when not enforced;
- liquor accords and community-based interventions when not enforced;
- local dry area alcohol bans (which do not decrease public disorder or hospitalisations, tends to elevate harms to Indigenous people, and often have the effect of being discriminatory);

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26 Ibid 12.

27 Dennis Gray and Edward Wilkes, 'Reducing Alcohol and Other Drug Related Harm' (2010) 3 *Closing the Gap Clearinghouse* 1.

28 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) 84. Justice reinvestment is discussed in detail in ch 13.

- wet canteens in Indigenous communities … community concerns relate to conflict between control of consumption and dependence on profits).[29]

Assessing solutions

Question 8–1 Noting the link between alcohol abuse and offending, how might state and territory governments facilitate Aboriginal and Torres Strait Islander communities, that wish to do so, to:

(a) develop and implement local liquor accords with liquor retailers and other stakeholders that specifically seek to minimise harm to Aboriginal and Torres Strait Islander communities, for example through such things as minimum pricing, trading hours and range restriction;

(b) develop plans to prevent the sale of full strength alcohol within their communities, such as the plan implemented within the Fitzroy Crossing community?

Question 8–2 In what ways do banned drinkers registers or alcohol mandatory treatment programs affect alcohol-related offending within Aboriginal and Torres Strait Islander communities? What negative impacts, if any, flow from such programs?

8.25 This section outlines a range of responses that have been trialled to address alcohol-related offending, including liquor accords, restrictions on the sale of alcohol, banned drinkers registers and mandatory treatment programs, and asks for submissions on their effectiveness.

Owning solutions

8.26 The Drug Strategy pointed out that, to achieve meaningful outcomes, there would need to be Aboriginal and Torres Strait Islander ownership of solutions, where 'development of actions to achieve each outcome should be led by local communities in collaboration with government and non-government sectors':[30]

> 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.[31]

29 Suzanne MacKeith, Dennis Gray and Tanya Chikritzhs, above n 10, 12–3, citations omitted.
30 Intergovernmental Committee on Drugs, above n 23, 18.
31 Ibid 4.

8.27 The Drug Strategy identified four priority areas:

> **Priority area one**
>
> Build capacity and capability of the AOD service system, particularly Aboriginal and Torres Strait Islander community-controlled services and its workforce, as part of a cross-sectoral approach with the mainstream AOD services to address harmful AOD use.
>
> **Priority area two**
>
> Increase access to a full range of culturally responsive and appropriate programs, including prevention and interventions aimed at the local needs of individuals, families and communities to address harmful AOD use.
>
> **Priority area three**
>
> Strengthen partnerships based on respect both within and between Aboriginal and Torres Strait Islander peoples, government and mainstream service providers, including in law enforcement and health organisations, at all levels of planning, delivery and evaluation.
>
> **Priority area four**
>
> Establish meaningful performance measures with effective data systems that support community-led monitoring and evaluation.[32]

8.28 The importance of ownership of solutions has been emphasised by Dennis Gray and Edward Wilkes, who argued that '[d]espite gaps in our knowledge, there is ample evidence to show what can be done to reduce AOD (Alcohol and other drug)-related harm. What is needed is the commitment to do it—with and not for Indigenous people'.[33]

Liquor accords

8.29 The liquor industry, comprised of off-licence packaged liquor 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.

8.30 Large liquor industry players, such as Wesfarmers (Coles), having a 33.5% share, and Woolworths, having a 40.2% share of the retail liquor market as of 2015,[34] have historically joined as members of accords across states and territories.

8.31 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

32 Ibid 4–5.

33 Dennis Gray and Edward Wilkes, above n 27, 2. See also Alison Ritter et al, *New Horizons: The Review of Alcohol and Other Drug Treatment Services in Australia—Final Report* (UNSW, 2014).

34 Liquor Marketing Group, Submission to the South Australian Attorney-General *Liquor Licensing Discussion Paper* (February 2016) 3.

> 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.[35]

8.32 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.

8.33 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 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.[36]

8.34 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.[37]

8.35 Liquor and Gaming New South Wales suggest 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

35 Australian Hoteliers Association Northern Territory, *Liquor Accords* <www.ahant.com.au>.
36 Ibid.
37 Ibid.

- Constructive relationships between licensees, councils, patrons, residents and police
- Stronger compliance
- Less under-age drinking
- More awareness about responsible consumption of alcohol.[38]

8.36 The Norseman liquor accord is an example of an 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 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.[39]

8.37 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.[40]

8.38 The ALRC invites comment on the effectiveness of liquor accords in addressing alcohol-related offending, and ways in which state and territory governments can facilitate the development and implementation of such accords in Aboriginal and Torres Strait Islander communities where there is community support for them.

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38 Liquor & Gaming NSW, *What Is a Liquor Accord?* Department of Industry NSW <www.liquorandgaming.nsw.gov.au>.

39 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.

40 Ibid 22–7.

Fitzroy Crossing ban on full strength alcohol

8.39 In a 2010 report, the Australian Human Rights Commission 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 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.[41]

8.40 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.

8.41 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%.[42]

8.42 The Fitzroy Crossing initiative allowed members of the Fitzroy Crossing community to design and implement strategies to reduce the prevalence of FASD in the community. The Australian Human Rights Commission 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'.[43]

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41 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (2011) 71.
42 SBS, *Fitzroy Crossing—Meet June Oscar* <www.sbs.com.au/programs/first-contact>.
43 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010* (2011) 94.

8.43 In an evaluation of the effects of alcohol restrictions in Fitzroy Crossing two years following their implementation, a report by the University of Notre Dame (Australia) 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;
- 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.[44]

8.44 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.[45]

8.45 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.[46]

8.46 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

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44 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.

45 Sara Hudson, *Alcohol Restrictions in Indigenous Communities and Frontier Towns* (Centre for Independent Studies, 2011) 20.

46 Ibid.

that 'early evidence suggests *prima facie* improvement in living conditions, suggesting that voluntary prohibition regimes contribute to the aims of substantive equality'.[47]

8.47 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'.[48]

8.48 The ALRC invites stakeholder comment about the usefulness of initiatives, like that in Fitzroy Crossing, to prohibit the sale of full strength alcohol, and also about how state and territory governments might play a role in facilitating this where there is community support to do so.

Alcohol Mandatory Treatment and Banned Drinkers Register

8.49 During stakeholder consultations in the NT, the ALRC was made aware of mixed views about the appropriateness and success of the Alcohol Mandatory Treatment (AMT) Scheme operating in the NT and the possible reimplementation of a Banned Drinkers Register (BDR).

8.50 The Department of Health (NT) has described AMT as a 'mandatory treatment for adults who are taken into police custody for being intoxicated in public three or more times in two months':

> Individuals are clinically assessed and an independent tribunal then decides the best treatment options including:
>
> - up to three months in a secure residential treatment facility
> - up to three months in community residential treatment facility
> - another form of community management, such as income management.
>
> During their treatment clients are offered life skills and work readiness programs. On completion of their treatment, clients are provided with an aftercare program to support them when they return home.[49]

8.51 The proposed 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

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47 Kayla Calladine, 'Liquor Restrictions in Western Australia' (2009) 7(11) *Indigenous Law Bulletin* 23, 27.

48 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.

49 Northern Territory Department of Health, *Alcohol Mandatory Treatment (AMT)* <health.nt.gov.au/professionals/alcohol-and-other-drugs-health-professionals/alcohol-mandatory-treatment-amt>.

- 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.[50]

8.52 The House of Representatives Standing Committee on Indigenous Affairs Inquiry into alcohol use in Aboriginal and Torres Strait Islander communities noted that concerns have been expressed about AMT, including that it criminalised public drunkenness. It took into account the recommendations of the Royal Commission into Aboriginal Deaths in Custody for the abolition of offences around public drunkenness, and the submission of the Law Society of the NT raising concerns about a trend of criminalising addiction within the NT.[51]

8.53 An inquest into the death of Mr Murrungun, an NT Aboriginal man, heard that, while Mr Murrungun had been taken into police custody more than 60 times in 2014, he had only been referred for assessment under the AMT scheme on two occasions:

> In closing submissions at the inquest, counsel assisting the coroner Kelvin Currie described the scheme as 'illusory' and said police failed to document protective custody incidents.
>
> Mr Currie said almost 40 protective custody incidents were not recorded and counted towards the AMT scheme, despite laws requiring police to do this.[52]

8.54 The NT is not the only state or territory that provides for mandatory treatment of persons who abuse alcohol. Victorian laws in respect of mandatory treatment are found in the *Severe Substance Dependence Treatment Act 2010*, which allows for detention and treatment of a person experiencing severe substance dependence for up to 14 days. In New South Wales, the *Drug and Alcohol Treatment Act 2007* allows for initial detention of 'identified patients' for 28 days, with an option to extend treatment to three months.

8.55 In a 2017 study, PricewaterhouseCoopers Indigenous Consulting (PwC PIC) noted that, in 2012, the NT AMT replaced the BDR of some 2600 people without an evaluation into the effectiveness of that system.[53] In April 2017 it was announced that the NT Government is proposing a return of the BDR.[54]

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50 Northern Territory Government, *Banned Drinker Register Frequently Asked Questions* (2017).

51 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) 86.

52 Felicity James, *NT's Mandatory Alcohol Treatment Scheme 'Completely Dysfunctional'* (13 June 2016) ABC News <www.abc.net.au>.

53 PricewaterhouseCoopers Indigenous Consulting (PIC), *Evaluation of the Alcohol Mandatory Treatment Program* (2017) 5.

54 Sara Everingham, *Banned Drinker Register to Return to NT in September* ABC News <www.abc.net.au>.

8.56 Looking at issues relating to people who are not eligible for AMT, PwC PIC found that

> [a] significant number of people 'leaked out' of the AMT system and received no assessment or treatment. Sometimes this was expected—for example, people with outstanding warrants are not eligible for AMT and people with serious physical or mental health issues are immediately taken to hospital for treatment. This means a number of people who could potentially benefit from treatment were excluded from the process.[55]

8.57 There have been criticisms made of AMT. Fiona Lander, Dennis Gray and Edward Wilkes have argued that:

> there is little evidence of the scheme's efficacy, and that the NT Government could adopt more cost-effective alternatives that would not involve the dubious application of a medical intervention to reduce public intoxication, with its concomitant legal and ethical issues.[56]

8.58 Despite criticism of AMT, the PwC PIC evaluation found that

> clients were consistently being supported to withdraw from alcohol safely and were being provided all the appropriate medical care during this time. Assessment staff also ensure any other pre-existing conditions are monitored during withdrawal to prevent complications arising. Once a client has safely withdrawn from the effects of alcohol they are provided with full time comprehensive health care and treatment for any existing conditions until transferred elsewhere as an outcome of the tribunal hearing. Assessment staff also ensure that clients learn about and understand their conditions, what their medications are for and the importance of complying with a treatment program. As per usual clinical guidelines, assessment staff request interpreters to help discuss medical issues with clients when it is appropriate.[57]

8.59 Commenting on evidence from case studies during the evaluation process, PwC PIC said that

> by the end of the assessment phase, after clients have had time to sober up and reflect, … they are more open to receiving treatment. For example, after completing the assessment process for the AMT program 75% of the case study group in this evaluation reported being highly or somewhat motivated to continue with the program, while 25% stated they were not very motivated or highly unmotivated/disinterested. Service providers reported that they believed most people were in the pre-contemplative stage after assessment but did agree that most people were compliant and willing to engage in treatment. However, the workers felt that many people may not be ready to make long-term changes in their drinking patterns and lifestyle, and that their experience was that most people would need more than one episode of treatment before changes would be seen. All case study participants

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55 PricewaterhouseCoopers Indigenous Consulting (PIC), *Evaluation of the Alcohol Mandatory Treatment Program* (2017) iii.

56 Fiona Lander, Dennis Gray and Edward Wilkes, 'The Alcohol Mandatory Treatment Act: Evidence, Ethics and the Law' (2015) 203(1) *The Medical Journal of Australia* 47, 47–9.

57 PricewaterhouseCoopers Indigenous Consulting (PIC), *Evaluation of the Alcohol Mandatory Treatment Program* (2017) 22.

> responded that they had been shown dignity and respect during the assessment process with one commenting 'it's a good place, they gave me clothes'.[58]

8.60 The ALRC is interested in hearing comment about the ways that BDRs and AMTs can reduce alcohol-related offending within Aboriginal and Torres Strait Islander communities, as well as any negative impacts that these approaches may have.

58 Ibid 22–3.

Part 4

Aboriginal and Torres Strait Islander Female Offenders

9. Female Offenders

Contents

Summary 161
Underlying factors 161
Addressing the complex needs of ATSI female offenders 166
- Parenting responsibilities and intergenerational trauma 166
- Family violence and sexual abuse 167
- Mental illness, disability, and substance abuse 169
- Poverty 170
- Homelessness and lack of stable accommodation 171

Diversion 172
The need for improved data collection 173

Summary

9.1 The Terms of Reference 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 trauma, including isolation, family and sexual violence, and child removal. Consequently, the ALRC makes some proposals in the Discussion Paper related to the provision of services that may be required to address some of the criminogenic factors of female Aboriginal and Torres Strait Islander offenders.

9.2 While the ALRC makes no proposals in this chapter, chapters 5, 6, and 7 include proposals, questions and discussions on areas that specifically respond to Aboriginal and Torres Strait Islander women's incarceration.

Underlying factors

9.3 The vast majority of Aboriginal and Torres Strait Islander women will never enter the criminal justice system as offenders, or be incarcerated.[1] However, Aboriginal and Torres Strait Islander female offenders are the fastest growing prison cohort in Australia, growing at a rate which significantly exceeds the growth rate of other

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.

offenders, including Aboriginal and Torres Strait Islander male offenders.[2] They represent over one-third (34%) of all incarcerated women, despite representing only 2% of the adult female population.[3] At June 2016, Aboriginal and Torres Strait Islander women were incarcerated at a rate which was 21 times the rate for non-Indigenous women,[4] while in the Northern Territory (NT), Aboriginal and Torres Strait Islander women made up 86% of the adult female prison population.[5]

9.4 The rate at which Aboriginal and Torres Strait Islander women are imprisoned has been identified as a reflection of the multiple and layered nature of the disadvantage they face as a cohort.[6] The links between entrenched disadvantage—including social, cultural and economic forms—and increased rates of criminal justice contact, are well-established.[7] Aboriginal and Torres Strait Islander female prisoners are disproportionately more likely than their non-Indigenous counterparts to:

- have experienced family violence and sexual assault;
- be mothers and primary care givers of children;[8]
- have mental illness or cognitive disability;
- have substance abuse issues;

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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 19, Indigenous Justice Clearinghouse, June 2015) 11; Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (Produced for the Steering Committee for the Review of Government Service Provision, 2016) [4.13.1]; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 16.

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 Human Rights Law Centre and Change the Record Coalition, above n 1, 10; Australian Bureau of Statistics, above n 3, table 20.

5 Human Rights Law Centre and Change the Record Coalition, above n 1, 10; Australian Bureau of Statistics, above n 3, table 20; Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2016, Cat No 4512.0* (2017).

6 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 Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 4–7.

7 See, eg, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 126; 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.

8 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).

- 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]

9.5 As the Victorian Equal Opportunity and Human Rights Commission noted, 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.[10] This suggests that strategies which aim to address the complex needs of Aboriginal and Torres Strait Islander female offenders should take a trauma-informed and culturally appropriate approach. These strategies should be responsive to the numerous reasons why Aboriginal and Torres Strait Islander women may choose not to disclose their histories, and the multiple layers to the disadvantage they face.

9.6 Aboriginal and Torres Strait Islander female offenders disproportionately experience incarceration defined by:

- low-level offending (eg, failure to pay a fine);
- repeat incidents; and
- short terms of incarceration.[11]

9.7 This can result in a cycle of ongoing disruption, caused partly by repeated low-level offending and incarceration, which exacerbates existing disadvantage and makes it extremely difficult to reintegrate into society.[12] Although data is not conclusive, it appears that Aboriginal and Torres Strait Islander women are incarcerated at greater rates for minor crimes which, if committed by a non-Indigenous woman, are unlikely to attract prison sentences.[13] One possible explanation for why Aboriginal and Torres Strait Islander women may be incarcerated at greater rates is that they often have long

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9 Human Rights Law Centre and Change the Record Coalition, above n 1, 16; Lorana Bartels, 'Painting the Picture of Indigenous Women in Custody in Australia' (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1.

10 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 22.

11 Lorana Bartels, above n 1, iii; Lorana Bartels, 'Sentencing of Indigenous Women (2012)' (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.

12 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.

13 Human Rights Law Centre and Change the Record Coalition, above n 1, 11–2, 24; Lorana Bartels, above n 1; Bartels, above n 11; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 56.

criminal records marked by low-level offending.[14] For example, a 2012 study revealed that 67% of Aboriginal and Torres Strait Islander female prisoners had been incarcerated previously, compared to 36% of non-Indigenous women.[15] By contrast, others argue that Aboriginal and Torres Strait Islander people are in general less likely to receive a custodial sentence than those who are non-Indigenous.[16]

9.8 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 communities and peoples generally.[17] The ALRC acknowledges that police practices, and police and community relationships, have much improved over recent years. However, a number of stakeholders emphasised that issues remain, in particular, suggested that Aboriginal and Torres Strait Islander women are over-policed as offenders,[18] while also being under-recognised as victims of crime.

9.9 With respect to over-policing, the evidence indicates that this group are more likely to be charged and arrested for public order offences and other forms of minor offending than non-Indigenous women.[19] These include offences such as 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.[20] AMT is discussed in Chapter 8.

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14 Human Rights Law Centre and Change the Record Coalition, above n 1, 12; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 56; 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) 10.

15 Bartels, above n 11, 1.

16 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 37.

17 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 Finance and Public Administration References Committee, 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* (2016) 40–2; *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016).

18 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 Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 12–13.

19 Human Rights Law Centre and Change the Record Coalition, above n 1, 22; Victoria Sentencing Advisory Council, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders—Discussion Paper* (2017) 173; Mary Stathopoulos and Antonia Quadara, 'Women as Offenders, Women as Victims: The Role of Corrections in Supporting Women with Histories of Sexual Abuse' (Report, Women's Advisory Council of Corrective Services NSW, 2014) 17; Bartels, above n 9.

20 Human Rights Law Centre and Change the Record Coalition, above n 1, 24.

9.10 In a 2013 report, the Victorian Equal Opportunity and Human Rights Commission cited an example of over-policing of an Aboriginal woman. In that matter, police charged a pregnant 21 year old Aboriginal mother of two small children with a fraud offence for travelling on a train using a child's ticket—when the lesser, and more appropriate,[21] charge of failure to carry a valid ticket was open and available to them.[22] This matter is discussed further in Chapter 2.

9.11 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.[23] More recently, the death of Ms Dhu in custody in Western Australia (WA) illustrates 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 she would have had to 'spend four days in custody unless outstanding fines …were paid'.[24]

9.12 The Australian Institute of Criminology has identified a combination of factors as underlying the deep mistrust of police by some Aboriginal and Torres Strait Islander women.[25] 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. The ALRC acknowledges the views of many stakeholders that, although 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 outcomes for people, including women, in those communities.

9.13 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.[26] However, there remains a lack of available evaluations of 'what works' in terms of reintegration of Aboriginal and Torres Strait Islander female prisoners and offenders.[27] It is evident that programs that work for

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21 *Re Mitchell* [2013] VSC 59 (8 February 2013).

22 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 46.

23 Human Rights Law Centre and Change the Record Coalition, above n 1, 24.

24 *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.

25 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.

26 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.

27 Australasian Institute of Judicial Administration, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (2016) 2, 13; Lorana Bartels, above n

Aboriginal and Torres Strait Islander men do not necessarily work for Aboriginal and Torres Strait Islander women—each group having different needs.[28] 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.[29]

Addressing the complex needs of ATSI female offenders

Parenting responsibilities and intergenerational trauma

9.14 Some estimates suggest that up to 80% of Aboriginal and Torres Strait Islander female prisoners are mothers,[30] with 20% Aboriginal and Torres Strait Islander children nationally experiencing parental incarceration.[31] Stakeholders told the ALRC that the incarceration of Aboriginal and Torres Strait Islander women contributes to gaps in 'parenting, income, child care, role models and leadership' in their communities,[32] entrenching future disadvantage.[33] The 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,[34] but also are at higher risk of 'developing behaviour problems, experiencing psychosocial dysfunction, experiencing stigmatisation and discrimination, and suffering negative health outcomes'.[35] 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.[36] Aboriginal and Torres Strait Islander young males and females were 1.7 and 2.2 times as likely to be the subject of a supervision order, compared to their non-Indigenous counterparts.[37]

1, ix; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 5–6, 70.

28 Australasian Institute of Judicial Administration, above n 27, 13; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 25, 98.

29 Human Rights Law Centre and Change the Record Coalition, above n 1, 17; Australian Institute of Criminology, *Diversion Programs for Indigenous Women* (2010) 3.

30 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 81.

31 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).

32 Human Rights Law Centre and Change the Record Coalition, above n 1, 13.

33 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.

34 Department of Juvenile Justice (NSW), *NSW Young People in Custody Health Survey: Key Findings Report* (2003).

35 Arlene F Lee, 'Children of Inmates: What Happens to These Unintended Victims?' (2005) 67(3) *Corrections Today* 84; PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017) 33.

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

37 Ibid.

9.15 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.[38]

9.16 The Special 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.[39] Fines are discussed in Chapter 6. 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.[40] Justice targets are discussed in Chapter 10.

Family violence and sexual abuse

9.17 Aboriginal and Torres Strait Islander women are frequent victims of crime, particularly interpersonal or violent crime.[41] 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 are survivors of family and other violence.[42] A New South Wales study revealed that 70% of the Aboriginal and Torres Strait Islander female prisoner cohort disclosed they were survivors of child sexual abuse, with 44% subject to ongoing sexual abuse, and 70% experiencing violence as adults.[43] Unsurprisingly, these experiences of trauma often translate into higher rates of psychiatric issues—with Aboriginal and Torres Strait Islander women more than 11 times more likely to experience severe psychological distress than the general population.[44]

9.18 Aboriginal and Torres Strait Islander women are among the least likely to disclose the fact that they are survivors of violence and sexual abuse—with studies showing that up to 90% of violence directed at Aboriginal and Torres Strait Islander women is unreported to police.[45] Poor police responses may be a contributing factor to the under-reporting of violence against Aboriginal and Torres Strait Islander women.

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38 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).

39 Ibid.

40 Ibid.

41 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.

42 Mandy Wilson et al, 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia' (2017) 7(1) *SAGE Open* 2158244016686814, 6.

43 Human Rights Law Centre and Change the Record Coalition, above n 1, 17; Stathopoulos and Quadara, above n 19, 18.

44 Bartels, above n 9, 11.

45 Willis, above n 25, 1; Human Rights Law Centre and Change the Record Coalition, above n 1, 17.

9.19 There have been documented instances of police responding poorly or not at all to offending that occurs against Aboriginal and Torres Strait Islander women—particularly in relation to family violence. The case of Ms Mullaley is illustrative. In March 2013, Ms Mullaley was assaulted by her partner and found naked and injured by Western Australian police officers. Instead of being taken to medical services or given medical aid, Ms Mullaley was charged with assaulting police, with her behaviour branded a 'distraction' from other issues raised by Ms Mullaley with police about a potential threat to her child's safety. The child was ultimately murdered by her abusive partner. Upon investigation by the WA Corruption and Crime Commissioner, it was noted that police had failed to consider whether the cause of Ms Mullaley's behaviour was related to family violence committed against her—and had instead made assumptions that Ms Mullaley was a perpetrator, not a victim.[46]

9.20 Submissions to the ALRC and NSWLRC joint inquiry into family violence in 2010 also provided examples 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.[47] The following example was provided by National Legal Aid to that Inquiry:

> An Aboriginal woman living in the Pilbara had been in a long-term violent relationship. After being physically assaulted again, she obtained an interim violence restraining order against her partner on the advice of the police. Some weeks later after pressure from extended family and her children she allowed her partner to attend her house to see the children. Her partner again assaulted her and the police were called to the house. The police charged her partner with assault and breach of the restraining order. The woman was also charged with breach of restraining order as a party to the offence. She pleaded guilty and was given a fine. She remarked to the refuge that she would never seek a protection order again.[48]

9.21 Although experiences of abuse have not been found to directly contribute to rates of Aboriginal and Torres Strait Islander female incarceration, traumatic histories can have secondary and cascading effects which can continue long after the initial abuse has ended. 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,[49] 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'.[50] 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

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46 Human Rights Law Centre and Change the Record Coalition, above n 1, 31.

47 Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report No 114, NSWLRC Report No 128 (2010) 517–8; *Keane v Police* (1997) 69 SASR 481, 484.

48 National Legal Aid, Submission No 232 to Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence—A National Legal Response* (15 July 2010).

49 Human Rights Law Centre and Change the Record Coalition, above n 1, 17.

50 Ibid.

women, and reinforcing themes of powerlessness, lack of control, and vulnerability to an already traumatised cohort.[51]

9.22 This suggests that 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—the causes of trauma must be addressed through culturally competent supports and interventions. 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 treatment and other supports in what is often a relatively short prison episode.[52] Short sentences are discussed in Chapter 4.

Mental illness, disability, and substance abuse

9.23 Rates of psychological disability for Aboriginal and Torres Strait Islander women are more than double that for Aboriginal and Torres Strait Islander men.[53] 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.[54] 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.[55]

9.24 Aboriginal and Torres Strait Islander female offenders also commonly have histories involving substance abuse.[56] 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.[57] Aboriginal and Torres Strait Islander women who are survivors of family violence are also more likely to experience mental illness and cognitive impairment.[58]

9.25 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 overrepresented in multiple areas of disadvantage compared to men—

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51 Ibid; 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.

52 Bartels, above n 9, 11.

53 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.

54 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.

55 Victoria Department of Justice, *Koori Prisoner Mental Health and Cognitive Function Study—Final Report* (2013) 13.

56 Ibid 13.

57 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.

58 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.

Aboriginal and Torres Strait Islander or otherwise.[59] These include rates of: complex needs; out-of-home care; police contact; remand episodes; homelessness; and victimisation.[60] 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.

9.26 The criminal justice system is poorly suited to respond to complex needs arising from mental illness, disability, 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 them to become incarcerated in the first place.[61] This is particularly the case for cognitive impairment, which remains chronically undiagnosed and largely misunderstood. These issues are explored in Chapter 11 dealing with access to justice.

Poverty

9.27 Poverty has been shown to magnify the detrimental effect that minor offending has on an offender. The most common penalty Aboriginal and Torres Strait Islander women receive are fines.[62] Fines can have hugely significant impacts when they are imposed on people who experience poverty and disadvantage.[63] The Human Rights Law Centre and Change the Record Coalition argued that 'unpaid fines [as well as enforcement costs], may in reality mean a choice between imprisonment and children going without food, clothes or other necessities'.[64]

9.28 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. Fines are discussed in Chapter 6. Common examples raised by stakeholders to date include offensive language offences and the issuing of speeding tickets.

9.29 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 any safeguard of judicial oversight.[65]

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59 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.
60 Ibid.
61 Human Rights Law Centre and Change the Record Coalition, above n 1, 18.
62 Ibid 38.
63 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 46.
64 Human Rights Law Centre and Change the Record Coalition, above n 1, 38.
65 *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).

9.30 The interaction of Aboriginal and Torres Strait Islander female disadvantage and incarceration is described by the Human Rights Law Centre and Change the Record Coalition in the following terms:

> 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.[66]

9.31 Even where fine default does not result in imprisonment, the interaction of poverty and CINs can result in driver licence disqualification for Aboriginal and Torres Strait Islander women, on the basis that they are often unable to pay the fine. This can create impossible situations for women, particularly in areas that are not supported by transport infrastructure. For instance, it makes it impossible, or at the least, very difficult to continue to meet family needs such as dropping children off at school or attending medical appointments.

9.32 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.[67]

Homelessness and lack of stable accommodation

9.33 The lack of stable accommodation can mean that Aboriginal and Torres Strait Islander women are more likely to breach community-based orders, parole and bail. It has been identified as contributing to higher levels of criminal justice contact and incarceration for Aboriginal and Torres Strait Islander people.[68] However, because of the central role Aboriginal and Torres Strait Islander women play in raising children, the importance of securing stable accommodation for this cohort is elevated.[69] One common consequence of incarceration—particularly where there are repeated episodes of short-term incarceration—is that the offender may lose access to their existing housing. This puts their children at high risk of entering the child protection system.[70]

9.34 Aboriginal and Torres Strait Islander women are the least likely of any cohort to be able to find appropriate accommodation upon release from incarceration—particularly where they have dependent children.[71] A study of NSW and Victorian Aboriginal and Torres Strait Islander female prisoners released between 2001–2003 found that:

- none of the women were able to find stable family accommodation;

66 Human Rights Law Centre and Change the Record Coalition, above n 1, 22.
67 Ibid 38.
68 Council of Australian Governments, *Prison to Work Report* (2016) 47; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 22.
69 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 76–7.
70 Human Rights Law Centre and Change the Record Coalition, above n 1, 18.
71 Ibid.

- half were still homeless at nine months after release; and
- over two-thirds (68%) returned to prison within nine months.[72]

Diversion

Question 9–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?

9.35 Stakeholders consulted to date have stressed that diversion initiatives and responses to Aboriginal and Torres Strait Islander female offending and incarceration must be underpinned by the demonstrated strengths of Aboriginal and Torres Strait Islander women as a group. Diversion programs might involve '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'.[73]

9.36 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.[74] Despite the lack of evidence generally in terms of 'what works' in relation to Aboriginal and Torres Strait Islander women in terms of reducing and mitigating the effects of criminal justice system contact,[75] some key principles have been identified. Diversion programs for Aboriginal and Torres Strait Islander female 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;

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72 Eileen Baldry et al, 'Ex-Prisoners, Homelessness and the State in Australia' (2006) 39(1) *Australian & New Zealand Journal of Criminology* 8.

73 Human Rights Law Centre and Change the Record Coalition, above n 1, 35.

74 Australasian Institute of Judicial Administration, above n 27, 13.

75 Human Rights Law Centre and Change the Record Coalition, above n 1, 21.

- 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.[76]

Barriers to effective diversion of Aboriginal and Torres Strait Islander women

9.37 Where Aboriginal and Torres Strait Islander specific 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 prisoners. Systemic barriers specific to Aboriginal and Torres Strait Islander women include:

- lower rates of admission to police—because diversion options often require an admission of wrongdoing;[77]
- demand for diversionary initiatives often exceeding supply—particularly in relation to court-based diversionary options;[78]
- 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;[79]
- 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
- high rates of remand and short sentences, making them ineligible for any programs that may aid in reducing recidivism.[80]

The need for improved data collection

9.38 Although 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

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76 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.

77 Reasons for mistrust of police by Aboriginal and Torres Strait Islander women are discussed by the ALRC above.

78 Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 58.

79 Ibid 60.

80 Prison programs are discussed in Chapter 5.

pathways of Aboriginal and Torres Strait Islander female offenders.[81] 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.[82]

9.39 Although now beginning to improve, data analysis in relation to Aboriginal and Torres Strait Islander women has been particularly hampered by the fact that data collected regularly does not disaggregate Aboriginal and Torres Strait Islander women and men, or Aboriginal and Torres Strait Islander and non-Indigenous women.[83] This is part of the 'invisibility' of Aboriginal and Torres Strait Islander women in the criminal justice system. One example of this is provided by the Human Rights Law Centre and Change the Record Coalition:

> while the ABS had data about the percentage of Aboriginal and Torres Strait Islander people in prison on remand and the number of women in prison on remand, the percentage of Aboriginal and Torres Strait Islander women on remand was not identified.[84]

9.40 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.[85] This lack of consistency between jurisdictions can make comparisons impossible or misleading, and contributes to the lack of evidence-based solutions in relation to Aboriginal and Torres Strait Islander women.[86]

9.41 The importance of consistency in data collection and the importance of empirical evidence and evaluated programs form key features of Aboriginal Justice Agreements, discussed in Chapter 10.

9.42 The ALRC invites comment on what, if any, reforms to criminal justice laws or legal frameworks could be made to respond to the increasing rate of female Aboriginal and Torres Strait Islander incarceration.

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81 Human Rights Law Centre and Change the Record Coalition, above n 1, 21.

82 Ibid 21; Aboriginal & Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004* (2005) 135.

83 Human Rights Law Centre and Change the Record Coalition, above n 1, 21.

84 Ibid.

85 Senate Finance and Public Administration References Committee, 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.

86 Senate Finance and Public Administration References Committee, 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.

Part 5

Engagement and Accountability

10. Aboriginal Justice Agreements

Contents

Summary 177
Background 178
The ACT Partnership 179
The Victorian agreements 180
Related government strategies 181
Characteristics of Aboriginal Justice Agreements 181
The future of Aboriginal Justice Agreements 182
Criminal justice targets for 'Closing the Gap' 184

Summary

10.1 There are numerous programs in place that aim to divert Aboriginal and Torres Strait Islander peoples from the criminal justice system, or to prevent re-entry following sentence. Some of these have been summarised or referred to in the previous chapters. The ALRC has been told, however, that many of these programs are run in isolation by particular individuals or groups; are not evaluated; and, in some cases, their development is not underpinned by the participation of Aboriginal and Torres Strait Islander community members. These issues can result in an unsystematic approach: programs can be difficult to track; outcomes or impacts are unknown; and programs that are doing well may be vulnerable to budget measures. It can also preserve a 'top down' approach which excludes or minimises Aboriginal and Torres Strait Islander community participation.

10.2 Aboriginal Justice Agreements (AJAs) were introduced in some states and territories as a way to preserve collaboration and accountability regarding the contact of Aboriginal and Torres Strait Islander peoples with the criminal justice system and consequent incarceration. AJAs have historically represented a coalition between peak Aboriginal and Torres Strait Islander organisations and state or territory governments to improve justice outcomes for Aboriginal and Torres Strait Islander peoples.

10.3 In this chapter, the ALRC identifies the various AJAs of the states and territories, with particular focus on the agreement developed in Victoria. The ALRC proposes the introduction and renewal of state and territory based AJAs. As most states and territories have had experience with AJAs, the ALRC seeks feedback on the value of AJAs, and any obstacles to renewing, developing or implementing such agreements.

10.4 The ALRC also asks whether justice targets should be introduced when the Commonwealth Government renews the 'Closing the Gap' policy.

Background

10.5 AJAs were first introduced following a summit of key Aboriginal and Torres Strait Islander organisations that 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.[1]

10.6 At their inception, AJAs were to be developed in all states and territories (excluding the 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'.[2] AJAs were to include, among other things, targets to reduce the rate of over-representation of Aboriginal and Torres Strait Islander persons in the criminal justice system and to decrease incarceration rates.

10.7 Not all jurisdictions adopted an AJA. The AJAs of states and territories are outlined in the table below.

Table 1: Aboriginal Justice Agreements in states and territories 2000–2016

State 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*	Running
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	The Queensland Government, *The Queensland Aboriginal and Torres Strait Islander Justice Agreement (2000–2011)*	Evaluated in 2006 Concluded 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

1 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, 648–649.

2 Fiona Allison and Chris Cunneen, 'Indigenous Justice Agreements' (Current Initiatives No 4, Indigenous Justice Clearinghouse, June 2013) 1–2.

State territory	Year	Agreement	Status
	2006	Department of Justice (Vic), *The Victorian Aboriginal Justice Agreement Phase 2*	Evaluated in 2012
	2013	Department of Justice (Vic), *The Victorian Aboriginal Justice Agreement Phase 3*	Running 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

10.8 AJAs generally involve numerous state and territory government departments, including: Premier and Cabinet; Aboriginal and Torres Strait Islander policy development; Justice and Attorney General; Police; Corrective Services; and Family Services.[3]

10.9 The ACT and Victoria have current AJAs. All other states and territories either did not adopt an agreement, or the AJA has lapsed.

The ACT Partnership

10.10 The ACT AJA—called 'the Partnership'—was developed with the ACT Aboriginal and Torres Strait Islander Elected Body in 2015.[4] 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.[5]

10.11 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.[6]

10.12 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

3 See, eg, parties to the Queensland and Victorian Aboriginal Justice Agreement.
4 As noted below, it was developed with reference to the *National Indigenous Law and Justice Framework 2009–2015*.
5 ACT Government, *ACT Aboriginal and Torres Strait Islander Justice Partnership 2015–2016* (2015) 3.
6 Ibid [1.1]–[1.8].

the effectiveness of service outcomes are to be held, and publicly available progress reports are to be submitted to the ACT Attorney-General annually.[7]

10.13 The ALRC welcomes comments and submissions on the operation of the Partnership in the ACT.

The Victorian agreements

10.14 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 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).[8]

10.15 The Aboriginal Justice Forum (AJF) meets three times per year and is constituted by Victorian justice 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 for a minimum of two days to determine and discuss issues for the agenda, and again the day before the AJF.

10.16 AJA2 outlined a government action plan and set benchmarks for monitoring the success of the programs developed under the Agreement.[9] Among other programs, it included the Local Justice Worker Program and the delivery of the Wulgunggo-Ngalu Learning Place residential diversion program for men (discussed in Chapter 7).

10.17 The Victorian AJAs were evaluated in 2012. The evaluation found that the Agreements delivered 'significant improvements in justice outcomes for Koories in Victoria', but that there was more to do.[10] For example, it found that there had not been a proportionate focus on the needs of Koori women,[11] categorising this omission as a 'key risk point in the system that could be strengthened to reduce over-representation'.[12]

10.18 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.[13] 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.[14]

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7 Ibid 34.
8 Allison and Cunneen, above n 2, 4.
9 Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) 26–28.
10 Ibid 3.
11 Ibid 79.
12 Ibid 52–4; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 26.
13 Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) 4, 5, figure 1.
14 Ibid 57.

10.19 AJA3 was introduced in 2013. It expanded on the programs—including diversion programs for Aboriginal and Torres Strait Islander women—and targets of AJA2. It will undergo evaluation in 2018.

10.20 AJAs in Victoria have been well-received. In preliminary consultations with Victorian stakeholders, the ALRC heard that these agreements have facilitated partnerships and justice programs that would not have otherwise occurred.

Related government strategies

10.21 Other states and territories may not have specific AJAs, but they do have policies, frameworks and strategies related to Aboriginal and Torres Strait Islander incarceration rates. These are many, and include the adoption of Reconciliation Action Plans by government departments.

10.22 Some relevant policies may have been developed under the *National Indigenous Law and Justice Framework 2009–2015* (the Framework)—an initiative of the then Standing Committee of Attorneys-General—designed to guide states and territories on 'good practice' approaches to eliminate Aboriginal and Torres Strait Islander disadvantage in law and justice; and to close the gap in law and justice outcomes.[15]

10.23 One of the goals of the Framework was to reduce over-representation in the criminal justice system,[16] and states and territories were encouraged to develop and trial innovative crime prevention initiatives in partnership with communities.[17] It intended to provide an opportunity for government, NGOs and Aboriginal and Torres Strait Islander peoples 'to build on existing partnerships and agreements to identify and develop the most appropriate response to law and justice issues'.[18] The ACT AJA was developed under the Framework.[19]

10.24 The Framework noted its link with work undertaken by states and territories under the national 'Closing the Gap' commitments—particularly with work related to the commitment to build safe communities.[20] The Framework formed one of three national policy vehicles in that regard.[21] Closing the Gap is further discussed below.

Characteristics of Aboriginal Justice Agreements

10.25 The Victorian and ACT AJAs share similar characteristics. The ALRC has identified four defining features: collaboration; governance; joint objectives; and evaluation.

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15 Standing Committee of Attorneys-General, *National Indigenous Law and Justice Framework 2009-2015* (2010).
16 Ibid goal 2.
17 Ibid [2.1.1c].
18 Ibid 4.
19 ACT Government, above n 5, 24.
20 Standing Committee of Attorneys-General, above n 15, 6.
21 The two other policies were *The National Council's Plan to Reduce Violence Against Women and their Children 2009–2021*, and the *National Framework for Protecting Australia's Children 2009–2020.*

10.26 **Collaboration**: AJAs are not government-developed strategic plans that can appear to take a 'top down' approach. Collaborative processes are the defining feature of AJAs.[22] Stakeholders in preliminary consultation to this Inquiry stressed the importance of participation by Aboriginal and Torres Strait Islander peoples in the development and implementation of criminal justice reforms aimed at decreasing Aboriginal and Torres Strait Islander incarceration rates. Participation can result in solutions that are community led and culturally safe and appropriate.

10.27 **Governance**: AJAs can facilitate participation through agreed systems of governance. Victoria spent time developing governance infrastructure and a representative process, which enables any group or body to participate in the Aboriginal Justice Forums.

10.28 **Joint objectives and strategic directions**: AJAs 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.

10.29 The ALRC has been told that, outside of the ACT and Victoria (and, perhaps, coordinated responses such as the Maranguka Justice Reinvestment Project in Bourke),[23] programs relating to prevention, diversion and rehabilitation appear to be developed and applied in isolation, without a clear strategic framework for governance or decision making. Many programs are personality driven and most remain unevaluated.[24] This may leave current programs in jurisdictions without AJAs more vulnerable to changes in government, policy or budget allocations.

10.30 **Accountability:** AJAs have clear objectives and provide measurable action plans for government departments to meet. Government accountability is facilitated by processes which promote ongoing participation, discussion and review, and by conducting independent evaluations.

The future of Aboriginal Justice Agreements

Proposal 10–1 Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.

22 Allison and Cunneen, above n 2, 3.
23 See ch 13.
24 Allison and Cunneen, above n 2, 6.

10.31 AJAs have not featured in recent inquiries relevant to Aboriginal and Torres Strait Islander incarceration.[25] There is, however, momentum to introduce AJAs in some states and territories. For example:

- In 2015, the South Australian Council of Social Services called for an agreement to address rising Aboriginal and Torres Strait Islander incarceration rates.[26]
- In 2016, the *Making Justice Work* coalition called on the NT Government to prioritise the creation of an Aboriginal Justice Agreement.[27] The ALRC has been told that an AJA is now under development as part of the government's policy platform.
- In 2017, the Human Rights Law Centre and the Change the Record Coalition recommended that state and territory governments develop and implement community led justice agreements, with a particular focus on Aboriginal and Torres Strait Islander women in the justice system.[28]

10.32 The ALRC recognises that while AJAs are not a complete solution to the high rates of incarceration of Aboriginal and Torres Strait Islander peoples, AJAs are an important initiative that can assist in bringing about a reduction. It is not just the agreements themselves but the infrastructure which they create that plays a critical role in the facilitation of collaborative, culturally appropriate, and effective criminal justice responses.

10.33 The success of some of the proposals made in this Discussion Paper relies on the development of collaborative relationships between government and peak Aboriginal and Torres Strait Islander organisations.[29] AJAs could provide a foundation on which to facilitate, build and solidify these relationships.

10.34 The ALRC also recognises that AJAs may be challenging to develop. They rely heavily on government agencies working together, and the development, identification and engagement of peak Aboriginal and Torres Strait Islander organisations.[30] 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 and requirements in that jurisdiction. A strong governance structure is critical. For example, the evaluation of the AJA conducted in Queensland found that, although an increase in incarceration rates had slowed under the Agreement, the

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25 Such as those reviews referred to in the Terms of Reference.

26 South Australian Council of Social Service, *SACOSS Calls for Indigenous Justice Agreement in Response to Increasing Rates of Over-Representation of Aboriginal Young People in SA Juvenile Justice System* <www.sacoss.org.au>.

27 Making Justice Work, *2016 NT Election: Six Asks to Make Justice Work for Territorians* <http://makingjusticework.wixsite.com/website>.

28 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 4.

29 See, eg, proposals in chs 2, 4 and 7.

30 Allison and Cunneen, above n 2, 3.

government's failure to train and properly resource Community Justice Groups had affected the effectiveness of the Agreement.[31]

10.35 The ALRC understands that justice policy and initiatives are constantly developing. It is likely that AJAs or similar initiatives may already be underway in the states and territories without current agreements. The ALRC also recognises that NSW, Queensland and Western Australia have implemented AJAs and have not renewed them in the same form.

10.36 The ALRC welcomes submissions on the proposal that, where not already operating, AJAs be developed in each state and territory. Particularly, the ALRC welcomes any comments regarding: experiences with current AJAs; potential obstacles to the implementation of AJAs; and whether other policy frameworks regarding Aboriginal and Torres Strait Islander incarceration rates are providing good outcomes.

Criminal justice targets for 'Closing the Gap'

Question 10–1 Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?

10.37 In 2005, Tom Calma AO, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, called 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.[32] 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. On 20 December 2007, the Council of Australian Governments (COAG) agreed to be accountable for reaching this goal within 10 years. This strategy has become known as 'Closing the Gap'.[33] It set six targets that are reported on annually by the incumbent government.

10.38 In the *Social Justice Report 2009*, it was argued that the expansion of the Closing the Gap targets to include a criminal justice target would address the disproportionate representation of Aboriginal and Torres Strait Islander peoples as both victims of crime and in the prison system itself:

> Although it is a serious omission that no formal targets were set at that point to close the gap in imprisonment rates, the emphasis on health, education and employment all speak to a vision of strong Indigenous communities. The problem is, however, that you will not be able to meet these targets if you continue to have such a high proportion of the Indigenous population caught up in the criminal justice system

31 Chris Cunneen, 'Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement' (2006) 10(4) *Australian Indigenous Law Review* xvi.

32 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005* (2005).

33 Australian Indigenous HealthInfoNet, *History of Closing the Gap* < www.healthinfonet.ecu.edu.au >.

> because imprisonment compounds individual and community disadvantage. Over time we would hope that the Closing the Gap targets will lead to an improvement in life chances and therefore a reduction in imprisonment but this could take a generation at the very least. For this reason, specific justice targets are needed now.[34]

10.39 In the *Social Justice and Native Title Report 2014*, support for justice targets that would address this over-representation was reiterated:

> Targets encourage policy makers to focus on outputs and outcomes, rather than just inputs. It is not enough for governments to continue to report on what they do and spend, especially if that appears to be making little positive difference. Targets move us towards accountability and ensure that tax payers' money is being spent in a results-focused way.[35]

10.40 The Social Justice Commissioner argued that targets have made the gap between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians 'visible' and that this is 'exactly what needs to happen on the issue of over-representation with the criminal justice system as victims and offenders'.[36]

10.41 Despite bi-partisan support for the development and inclusion of criminal justice targets as part of Closing the Gap, no justice targets have been included to date. The 2016 Senate Finance and Public Administration References Committee report discussed the call for criminal justice targets to be added to COAG Closing the Gap targets and many submitters to that Inquiry supported the development of justice targets.[37] For example, the National Association of Community Legal Centres argued that justice targets are a vital tool in supporting justice reinvestment strategies and provide a way to measure the impact and effectiveness of government strategies.[38]

10.42 Others questioned whether adding more targets to the Closing the Gap targets might both water down these original targets and distract from the work already being done in the other areas. The Australian Government has also argued that, as most of the levers to reduce incarceration are held at the state and territory level, it may not make sense to have a target for the Commonwealth.[39]

10.43 The 2017 report, *Overrepresented and Overlooked: the Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-imprisonment*, supported the development of criminal justice targets, calling on COAG to develop a fully resourced national plan of action or partnership agreement directed towards addressing Aboriginal and Torres Strait Islander over-imprisonment and violence rates. A second

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

35 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (2014) 118.

36 Ibid 119.

37 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 55–8.

38 National Association of Community Legal Centres, Submission No 42 to Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (21 May 2015) 18–19.

39 Commonwealth, *Parliamentary Debates*, Senate, 12 February 2016 (Nigel Scullion) 61.

recommendation in the report advocated for the development of national justice targets in partnership with Aboriginal and Torres Strait Islander peak organisations, to:

- close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2040
- cut 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.[40]

10.44 The Closing the Gap targets are currently under review. The conclusion of the *National Indigenous Law and Justice Framework 2009–2015* has meant that there is limited continuing national leadership on issues related to Aboriginal and Torres Strait Islander incarceration. Whether or not there should be justice targets included in any new policy initiative remains a question that the ALRC is seeking guidance on.

40 Human Rights Law Centre and Change the Record Coalition, above n 28, rec 5–6.

11. Access to Justice Issues

Contents

Summary 187
Interpreter services 188
Aboriginal and Torres Strait Islander languages 188
Impact on Aboriginal and Torres Strait Islander defendants 189
Specialist courts and diversion programs 191
Aboriginal and Torres Strait Islander sentencing courts 191
Other specialist courts 194
Court diversion programs and specialist lists 196
Key elements 196
Indefinite detention when unfit to stand trial 198
Cognitive impairment in the criminal justice system 199
Fitness to stand trial regimes 200
Provision of legal services and supports 202
Custody Notification Service 204

Summary

11.1 The Terms of Reference for this Inquiry ask the ALRC to develop law reform recommendations with regard to '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'.

11.2 In this chapter, the ALRC recognises the particular obstacles and issues facing Aboriginal and Torres Strait Islander defendants, including language and other communication difficulties, and the provision of legal services. Unless these obstacles are addressed, Aboriginal and Torres Strait Islander peoples will continue to enter the criminal justice system, and may be incarcerated unnecessarily.

11.3 The ALRC proposes that criminal justice systems should ensure that Aboriginal and Torres Strait Islander defendants are understood and are able to understand the proceedings against them. In some states and territories this requires the provision of suitable interpreter services.

11.4 When cognitive impairment or mental health issues prevent an Aboriginal and Torres Strait Islander person from understanding the proceedings against them, fitness to be tried statutory regimes should not provide for automatic indeterminate detention. The ALRC proposes the abolition of indeterminate detention regimes in favour of special hearing processes that can lead to limiting terms.

11.5 The ALRC recognises the work of specialist sentencing courts in providing access to justice for Aboriginal and Torres Strait Islander peoples, and, together with diversion, asks what more can be done in this area. The provision of appropriate legal services, particularly in regional and remote areas, is also discussed.

Interpreter services

Proposal 11–1 Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.

11.6 The need for interpreter services within the criminal justice system for Aboriginal and Torres Strait Islander peoples—particularly defendants—has been well ventilated in previous reports.[1]

11.7 The ALRC is aware that hearing loss is prevalent among Aboriginal and Torres Strait Islander defendants[2] The proposal regarding interpreter services should be read to include sign interpreters where needed.

11.8 In preliminary consultations to this Inquiry, stakeholders reiterated the need for the expansion and adoption of the Northern Territory Aboriginal Interpreter Service (AIS) in some areas, which provides broad ranging interpreter services to Aboriginal and Torres Strait Islander peoples who come into contact with the criminal justice system.

Aboriginal and Torres Strait Islander languages

11.9 There are many Aboriginal and Torres Strait Islander languages spoken across Australia as first languages, primarily in regional and remote areas. The 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.[3] For many people from isolated Aboriginal and Torres Strait Islander communities, English may be a second or third language.[4]

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1 See, eg, Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 35; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, 55; Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 108–9.

2 See, eg, Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [2.49]–[2.52].

3 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (Produced for the Steering Committee for the Review of Government Service Provision, 2016) [5.24].

4 Ibid 5.24; North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, Submission No 31 to Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (7 May 2014) 3.

11.10 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.[5] 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.[6]

Impact on Aboriginal and Torres Strait Islander defendants

11.11 In 2016, the Productivity Commission reported that 38% of Aboriginal and Torres Strait Islander first language speakers experience difficulties when communicating with service providers.[7] 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'.[8] This can be pronounced in some areas. For instance, Wadeye, the largest Aboriginal and Torres Strait Islander community in the NT, has been identified as a place where 'almost all' individuals seeking legal advice require an interpreter.[9]

11.12 Gaps in interpreter services were identified as a key issue in Aboriginal and Torres Strait Islander peoples' access to justice by the Senate Finance and Public Administration References Committee.[10] This issue is particularly acute in jurisdictions with high proportions of remote Aboriginal and Torres Strait Islander populations[11] that currently operate without interpreter services, such as Queensland, South Australia (SA) and Western Australia (WA). The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted to the Senate Inquiry that

> [c]entral to effective engagement and provision of quality services to Aboriginal and Torres Strait Islander peoples is effective communication. For a proportion of Aboriginal and Torres Strait Islander peoples, this will be unachievable without the assistance of an interpreter.[12]

11.13 To the same inquiry, the Chief Justice of the Supreme Court of Western Australia stated:

> The law on that is clear. The process is not fair unless the accused person understands the language in which the process is being conducted and in significant areas of this state there are people who do not have an adequate command of English to understand

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5 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Australian Languages* <https://aiatsis.gov.au/explore/articles/indigenous-australian-languages>.

6 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 36–7.

7 Productivity Commission, above n 3, [5.23]–[5.24].

8 Melanie Schwartz and Chris Cunneen, 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(10) *Indigenous Law Bulletin* 2.

9 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 36.

10 Ibid 26, 116, rec 1.

11 Judicial Council on Cultural Diversity, *Cultural Diversity Within the Judicial Context: Existing Court Resources* (2016) 8.

12 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 35.

> court processes … [A]s a result of which a lot of the proceedings being conducted in our courts are invalid. The law on that is clear[13]

11.14 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.[14]

11.15 Barriers exist to the implementation of a network of interpreters in other states and territories, and in remote locations. The Senate Inquiry identified these to be:

- the number of Aboriginal and Torres Strait Islander languages, particularly given some of these languages are only spoken by small groups and the limited availability of interpreters;
- available interpreters may not be able to interpret at the professional level required for people facing criminal charges;
- conflicts of interest, particularly for smaller Aboriginal and Torres Strait Islander language groups, where most or all of the speakers know each other and may be members of the same family or clan;[15]
- the geographic remoteness and isolation of many predominantly Aboriginal and Torres Strait Islander language speaking communities;[16] and
- issues relating to usage of Aboriginal English—'gratuitous concurrence' (agreeing to every proposition), being misunderstood because important body language cues are missed or not given their full significance by the listener, and that some English words have a different meaning in Aboriginal English.[17]

11.16 The ALRC welcomes submissions on the proposal that state and territory governments work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services. The ALRC considers that such services should be developed with Aboriginal and Torres Strait Islander communities if they are to meet the objective of providing culturally appropriate services. The ALRC notes that progress towards greater availability of interpreter services may already be underway—in June 2017, the Australian Government announced further resourcing for Aboriginal and Torres Strait Islander interpreter services.[18]

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13 Ibid 36.

14 Northern Territory Government, *About the Aboriginal Interpreter Service* <www.nt.gov.au /community/interpreting-and-translating-services>.

15 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 37.

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

17 Ibid 763.

18 Indigenous Affairs, Department of Prime Minister and Cabinet, *Minister Scullion: Additional $1.6m for Indigenous Language Interpreters* <www.indigenous.gov.au/news-and-media/announcements>.

11.17 The ALRC notes that the AIS may provide a model for best practice, and invites submissions on the best way forward for other states and territories.

Specialist courts and diversion programs

11.18 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. These courts are referred to as 'mainstream' courts, and hear the majority of criminal cases prosecuted in all Australian jurisdictions.

11.19 For Aboriginal and Torres Strait Islander peoples, mainstream courts can be inaccessible or alienating. This affects access to justice, and can result in some of the principles underpinning criminal justice—including deterrence, punishment and rehabilitation—having a lesser impact on Aboriginal and Torres Strait Islander defendants.

11.20 Specialist courts, which provide different approaches to sentencing Aboriginal and Torres Strait Islander offenders, have been developed in response. These specialised sentencing courts aim to be inclusive and culturally appropriate.

11.21 Diversion programs, which divert a defendant or offender out of the criminal justice stream in order to address criminogenic behaviours prior to trial or sentencing, can also assist some Aboriginal and Torres Strait Islander people who come before the courts.

Question 11–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?

Aboriginal and Torres Strait Islander sentencing courts

11.22 As noted above, the operation and processes of mainstream courts can cause engagement difficulties for Aboriginal and Torres Strait Islander peoples. While discussing the establishment of the Nunga Court, an Aboriginal and Torres Strait Islander sentencing court operating in SA, the Office of Crime Statistics and Research (SA) described the alienation and disconnection of Aboriginal and Torres Strait Islander defendants:

> 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 …[19]

19 Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010) 2.

11.23 Stakeholders in this Inquiry have described how Aboriginal and Torres Strait Islander defendants have left court without a real understanding of their rights and obligations in relation to the outcome of the matter. Aboriginal and Torres Strait Islander sentencing courts have been developed to respond to this disconnection. Such courts seek to directly engage people who appear before them, to provide case management, and to address underlying issues in culturally appropriate ways,[20] including having Elders participate in the sentencing discussion.[21]

11.24 Aboriginal and Torres Strait Islander sentencing courts exist in NSW, Queensland, SA and Victoria. A brief overview of these courts is set out below.

Victorian Koori Courts

11.25 The Victorian Koori Courts operate in the Children's, Magistrates' and County Courts. Each of the courts was created under statute.[22] Generally, Koori Courts provide an 'informal atmosphere' and allow 'greater participation by the Aboriginal (Koori) community in the court process'.[23] The Victorian Koori Courts allow for Elders, Aboriginal and Torres Strait Islander family members, and a 'Koori Court Officer' to engage and influence court processes during a hearing.[24] Victorian Koori Courts focus on reducing cultural alienation and ensuring appropriate sentencing outcomes that are developed with a high level of community support.[25] These courts are more informal than mainstream courts and have a 'plain-language' focus. They do not use a traditional courtroom layout.

11.26 The Victorian County Koori Court is the first (and only) sentencing court for Aboriginal and Torres Strait Islander offenders in an indictable jurisdiction in Australia.[26] A 2011 evaluation of the Court found it to be 'more engaging, inclusive and less intimidating than the mainstream court'.[27] This was even the case where the offender did not agree with the sentence imposed by the Court.[28]

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20 See, eg, Marchetti, Elena, 'Indigenous Sentencing Courts' (Research Brief No 5, Indigenous Justice Clearinghouse, December 2009) 1; Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 1; Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010) 3–4.

21 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.

22 See *Magistrates' Court Act 1989* (Vic) s 4D; *County Court Act 1958* (Vic) s 4A; *Children, Youth and Families Act 2005* (Vic) s 517.

23 Magistrates' Court of Victoria, *Koori Court* <www.magistratescourt.vic.gov.au/koori-court>.

24 The Koori Court Officer is available to provide assistance to both the Court and the accused and their family. Koori Court officers also engage with the local community. For more information, see County Court of Victoria and the Department of Justice, *County Koori Court: Final Evaluation Report* (2011) 9.

25 Magistrates' Court of Victoria, above n 23; County Court of Victoria, *County Koori Court* <www.countycourt.vic.gov.au/county-koori-court>.

26 Higher than a Magistrates or Local Court—meaning a District or County Court or above.

27 County Court of Victoria and the Department of Justice, *County Koori Court: Final Evaluation Report* (2011) 49.

28 Ibid 3.

NSW Circle Sentencing

11.27 Circle Sentencing is an alternative sentencing process available in parts of NSW for Aboriginal and Torres Strait Islander offenders who have entered a plea of guilty in the summary jurisdiction. Circle Sentencing was created under statute and operates in a similar way to Victorian Koori Courts, although Circle Sentencing is only available for some summary offences.[29]

11.28 NSW Circle Sentencing was evaluated in 2008 by NSW BOCSAR, which found 'no significant difference between circle sentencing participants and the control group in time to reoffend' and further found no difference in the seriousness of reoffending between participants and the control group.[30] However, the same study suggested that Circle Sentencing may strengthen 'informal social controls' in Aboriginal and Torres Strait Islander communities through participation of community members,[31] with other reviews of Circle Sentencing finding that participants *may* be more active and involved in Circle Sentencing than in mainstream courts.[32]

Queensland Murri Courts

11.29 Like other Aboriginal and Torres Strait Islander sentencing courts, Queensland Murri Courts are less formal than mainstream courts, and aim to be more culturally responsive to Aboriginal and Torres Strait Islander people appearing before the court. Queensland Murri Courts are not created under statute, and 'operate under the goodwill and commitment of individual magistrates'.[33]

11.30 Murri Courts focus on underlying causes of offending, such as substance abuse or poor mental health, and refer people who appear before it to support services in the community where required.[34] These Murri Courts also seek to provide magistrates with better information on the 'defendant's cultural and personal circumstances' that may contribute to their offending.[35] This is achieved in part through the use of Community Justice Groups (CJGs), which make submissions on matters relating to the offender's community; provide information about relevant cultural considerations; and describe

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29 Circle sentencing courts operate under Part 6 of the *Criminal Procedure Regulation 2010* (NSW) and the common law principles espoused in *R v Fernando* (Unreported, Supreme Court of NSW, 13 March 1992).

30 Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (Contemporary Issues in Crime and Justice No 115, NSW Bureau of Crime Statistics and Research, 2008) 7.

31 Ibid.

32 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 101.

33 Mary Westcott, 'Murri Courts' (Research Brief No 2006/14, Parliamentary Library, Parliament of Queensland, 2006) 2. Murri Courts also utilise the *Penalties and Sentences Act 1992* (Qld) s 9(2)(o), which requires the court have regard to any relevant submissions made by a representative of a Community Justice Group (CJG) existing in the offender's community that are relevant to sentencing the offender. CJGs are discussed below.

34 Queensland Courts, *Murri Court* <www.courts.qld.gov.au/courts/murri-court>.

35 Ibid.

available community services or programs.[36] CJGs may also have a role in bail applications.[37]

11.31 In 2010, an Australian Institute of Criminology (AIC) evaluation observed the 'considerable success' of Queensland Murri Courts in improving relationships between Aboriginal and Torres Strait Islander communities and Queensland Magistrates Courts.[38] This included an increase in appearance rates, an increase in opportunity for those appearing to be linked up with rehabilitative services,[39] as well as the fact the initiative was 'highly valued' among Aboriginal and Torres Strait Islander community stakeholders.[40]

South Australian Nunga Courts

11.32 The Nunga Courts in SA were established in 1999 and were the first Aboriginal sentencing courts in Australia. They currently run periodically in three courthouses, and operate in the summary jurisdiction.[41]

11.33 Aboriginal Sentencing Conferences are available in all criminal jurisdictions, and permit the court to sentence an offender in an informal setting that encourages the defender to speak about their offending. Sentencing Conferences were created under statute.[42] A 2008 evaluation of Aboriginal Sentencing Conferences found that conferencing was likely to be a more effective deterrent for Aboriginal and Torres Strait Islander offenders than mainstream court due to: its relevance to Aboriginal people; the participation of Elders; the case management into relevant services; and the provision of relevant information to the court, which leads to 'more effective sentencing'.[43]

11.34 Both sentencing practices include Aboriginal Justice Officers who provide information, support and advice to Aboriginal defendants and their families.

Other specialist courts

11.35 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. The ALRC has visited the Drug Court of NSW and the Victorian Neighbourhood Justice Centre (NJC), which are briefly summarised below.

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36 See *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).

37 See *Bail Act 1980* (Qld) s 16(2)(e).

38 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.

39 Ibid.

40 Ibid iii.

41 Courts Administration Authority of South Australia, *Aboriginal Sentencing Courts and Conferences* Nunga Courts <www.courts.sa.gov.au>.

42 *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

43 Office of Crime Statistics and Research, *Port Lincoln Aboriginal Adult Conference Pilot: Review Report* (2008) iii.

The Drug Court of NSW

11.36 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[44] and aims to address drug dependencies related to criminal offending.[45] This is achieved 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.[46]

11.37 In 2008, the BOCSAR 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.[47] 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.[48]

Victorian Neighbourhood Justice Centre

11.38 The NJC is a Victorian Magistrates' Court of first instance established in 2007, and is Australia's first community justice centre.[49] It seeks to resolve disputes by 'addressing the underlying causes of harmful behaviour and tackling social disadvantage'.[50] The NJC combines the usual powers and functions exercised by the Magistrates' Court, but is co-located with treatment and support services. This facilitates immediate referral to appropriate services.[51]

11.39 Koori Justice Workers support Aboriginal and Torres Strait Islander clients and provide advice to the Court in relation to culturally specific programs and services.[52] 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'.[53]

11.40 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.[54] A later 2015 AIC evaluation of the NJC revealed that

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44 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).

45 Don Weatherburn et al, 'The NSW Drug Court: A Re-Evaluation of Its Effectiveness' (Contemporary Issues in Crime and Justice No 121, NSW Bureau of Crime Statistics and Research, September 2008) 1.

46 Ibid 3.

47 Ibid 2.

48 Ibid 9.

49 The NJC is provided for and operates under the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic).

50 Neighbourhood Justice Centre, *About Us* <www.neighbourhoodjustice.vic.gov.au>.

51 Ibid.

52 The NJC currently employs two Koori Justice Workers.

53 Neighbourhood Justice Centre, *Aboriginal and Torres Strait Islander Support Services* <www.neighbourhoodjustice.vic.gov.au>.

54 Department of Justice (Vic), *Evaluating the Neighbourhood Justice Centre in Yarra 2007–2009* (2010) ii.

> [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 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[55]

Court diversion programs and specialist lists

11.41 Court diversion programs allow magistrates or judicial officers to adjourn matters while defendants engage in support services. Diversionary programs provide services for people who have been accused or convicted in the summary jurisdiction, who require assistance with addiction or mental health. These include, but are not limited to:

- the Australian Capital Territory Court Alcohol and Drug Assessment Service, which incorporates drug and alcohol counselling during court proceedings or as part of sentencing orders;[56]
- 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;[57]
- the Victorian Court Integrated Services Program,[58] which includes Aboriginal and Torres Strait Islander controlled and mainstream organisations;[59] 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'.[60]

Key elements

11.42 Although specialist courts, lists and programs vary in many respects, there are a number of key elements which stakeholders in this Inquiry have emphasised as critical to the operation and success of these models, including:

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55 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) 4 <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi499.pdf>.

56 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>.

57 Department of Justice (NSW), *Magistrates Early Referral Into Treatment* <http://www.merit.justice.nsw.gov.au/>.

58 Magistrates' Court of Victoria, *Court Integrated Services Program (CISP)* <www.magistratescourt.vic.gov.au>.

59 Magistrates' Court of Victoria, *Court Integrated Services Program (CISP) Koori Brochure* (2008).

60 Magistrates' Court of Victoria, *Assessment and Referral Court List* <www.magistratescourt.vic.gov.au>.

11.43 **Active participation of the defendant and community:** 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.[61]

11.44 The Koori Courts in Victoria have a legislated purpose of 'ensuring greater participation of the Aboriginal community in the sentencing process'.[62] 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.[63]

11.45 **Case management of the defendant:** A number of the specialist courts and programs observed by the ALRC or highlighted by stakeholders include case management, whereby people appearing before them are referred to support services operating in the community. In most of these examples, the court or program has established links with supports and is able to facilitate engagement with the defendant.[64] Case management is particularly noticeable in courts and programs that focus on underlying issues—such as diversionary programs, the Drug Court of NSW, and the NJC.[65]

11.46 **Cultural competence:** Culturally competent specialist courts aim to directly engage with Aboriginal and Torres Strait Islander peoples in the design and decision-making processes of the court. Cultural competence in specialist courts can constitute: employing legal officers who are trained in the particular issues that can arise for Aboriginal and Torres Strait Islander peoples; and changing mainstream court environments—for example through the use of a round table, or the display of the Aboriginal and/or Torres Strait Islander flag.[66]

11.47 A 2006 evaluation of the Queensland Murri Court included a survey with Aboriginal and Torres Strait Islander respondents who supported 'the Murri Court concept because it involved Indigenous people in the justice system and made the justice system more responsive to the needs of Indigenous offenders and thus more culturally appropriate than other Magistrates Courts'.[67] Other evaluations have found that Aboriginal and Torres Strait Islander specialist courts provide a sense of ownership to participants over court processes and outcomes;[68] increase court

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61 King and Auty, above n 21, 69–71.

62 *Magistrates' Court (Koori Court) Act 2002* (Vic) s 1.

63 *Criminal Procedure Regulation 2010* (NSW) reg 35.

64 Ross, above n 55, 2; Magistrates' Court of Victoria, *Court Integrated Services Program (CISP) Brochure* <www.magistratescourt.vic.gov.au>; Queensland Courts, above n 34.

65 The Drug Court, as noted, utilises a combination of regular judicial monitoring, achieved through regular court appearances, and sanctions for failing to meet program requirements, such as urine testing.

66 King and Auty, above n 21, 70.

67 Natalie Parker and Mark Pathé, 'Report on the Review of the Murri Court' (Department of Justice and Attorney-General (Qld) 2006) quoted in Stonns and Mackenzie, above n 21, 99.

68 See, eg, Judicial Commission of New South Wales, *Circle Sentencing in New South Wales—A Review and Evaluation* (2003); Fitzgerald, above n 30; Office of Crime Statistics and Research, *Port Lincoln Aboriginal Adult Conference Pilot: Review Report* (2008).

appearance rates for Aboriginal and Torres Strait Islander offenders;[69] and improve compliance with court orders.[70]

11.48 Specialist courts and diversionary programs are not always available. Alternative criminal justice responses tend to be concentrated in metropolitan areas.[71] This may be because necessary treatment and community resources are available in metropolitan areas.[72] In particular, dedicated rehabilitative services—such as community drug and alcohol counselling providers—are much less likely to service non-metropolitan areas.[73] Even where available, places in treatment and community support services are limited.[74]

11.49 Specialised courts are more resource intensive than mainstream courts.[75] Participants in specialist courts may have to appear multiple times over an extended period (due to case management and judicial monitoring);[76] and treatment and community resource providers are an obligatory component of many specialist courts.[77]

11.50 The ALRC welcomes submissions on whether reform to laws and legal frameworks related to specialist courts or lists are required to further increase access to justice for Aboriginal and Torres Strait Islander peoples.

Indefinite detention when unfit to stand trial

Proposal 11–2 Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.

11.51 'Limiting terms' refer to the period of time a person found unfit to stand trial must spend in forensic custody under supervision. The length of a limiting term

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69 See, eg, Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010); Allan Borowski, 'Indigenous Participation in Sentencing Young Offenders: Findings from an Evaluation of the Children's Koori Court of Victoria' (2010) 43(3) *Australian & New Zealand Journal of Criminology* 465; Victorian Sentencing Advisory Council, *Sentencing in the Koori Court Division of the Magistrates' Court: A Statistical Profile* (2010).

70 See, eg, Department of Justice (Vic), *'A Sentencing Conversation': Evaluation of the Koori Courts Pilot Program October 2002–October 2004* (2006); Natalie Parker and Mark Pathé, 'Report on the Review of the Murri Court' (Department of Justice and Attorney-General (Qld), 2006).

71 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) 40: '74% of all respondents agreed or strongly agreed that their clients were disadvantaged by a lack of local access to specialist [courts]'.

72 Ibid 129–31.

73 Michael King, 'Applying Therapeutic Jurisprudence in Regional Areas—The Western Australian Experience' (2003) 10(2) *Murdoch University Journal of Law* 2.

74 Richard Coverdale, Centre for Rural Regional Law and Justice Deakin University, above n 71, 129.

75 Ibid 37–8.

76 Lorana Bartels, 'Challenges in Mainstreaming Specialty Courts' (Trends and Issues in Crime and Criminal Justice No 383, Australian Institute of Criminology, 2009) 4.

77 Ibid 1–2.

represents the sentence of imprisonment a court would have imposed for the offending conduct if the person had been found guilty at trial.

11.52 In jurisdictions that do not have limiting terms, stakeholders advised the ALRC that, when required, fitness to stand trial may not be raised because an accused person may end up held in indefinite detention without trial. In these circumstances, the ALRC has been advised that the accused person may instead enter a plea of guilty or stand trial in order to receive a fixed term of imprisonment with a release date.

11.53 This means that some people—particularly Aboriginal and Torres Strait Islander peoples—with cognitive impairments or mental health issues, who may not have the capacity to understand the consequences of a guilty plea or court processes, are entering the criminal justice system, instead of the forensic mental health system, and are not receiving the required treatment or care.

11.54 This may affect the likelihood of recidivism and runs counter to legal principles that underpin fair trials and access to justice.[78]

Cognitive impairment in the criminal justice system

11.55 High rates of cognitive impairment have been observed in the Australian general prison population, with Aboriginal and Torres Strait Islander prisoners particularly likely to experience cognitive impairments such as Foetal Alcohol Spectrum Disorders (FASD) and Foetal Alcohol Syndrome (FAS).[79] Research has indicated that Aboriginal and Torres Strait Islander prisoners with cognitive impairments have earlier contact with the criminal justice system, occurring at a significantly higher rate than non-Indigenous prisoners with cognitive impairments.[80] This is particularly acute for Aboriginal and Torres Strait Islander women.[81]

78 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.

79 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) 156.

80 Ibid 31.

81 Ibid 45.

11.56 The rate of cognitive impairment in the Aboriginal and Torres Strait Islander prison population was discussed in an inquiry conducted by the Senate Community Affairs References Committee into indefinite detention, to which the Aboriginal Legal Service of Western Australia submitted:

> In my estimation, 95 per cent of Aboriginal people charged with criminal offences appearing before the courts have either an intellectual disability, a cognitive impairment or a mental illness. The overwhelming majority of those are undiagnosed and, therefore, untreated. If they go to jail it is almost impossible to conceive of them being diagnosed in jail; therefore, they are untreated. If you receive a community-type sanction, if you are from a regional or remote area, you will go to a place where you do not receive any meaningful interventions to deal with your problem.[82]

11.57 The final report of that inquiry highlighted:

- the importance of assessment and screening tools in order to detect cognitive impairment at an early stage in criminal justice proceedings, including FASD;
- the importance of a therapeutic approach towards people with cognitive impairment in the criminal justice system—particularly under legislation which allows for their indefinite detention; and
- the particular attention needed in responding to Aboriginal and Torres Strait Islander people with cognitive impairment within the criminal justice system, including that these responses be culturally competent and pay particular attention to court processes and police questioning practices.[83]

Fitness to stand trial regimes

11.58 Where cognitive impairment or mental health issues are acute, the issue of a person's fitness to stand trial may be raised. At common law, a person will be found unfit to stand trial if they cannot understand the offence with which they are charged or the nature of the proceedings against them. A person found unfit would not have the capacity to enter an appropriate plea, make a defence in answer to the charge, or give necessary instructions to counsel.[84]

11.59 State and territories have legislative responses to deal with findings of unfitness, which differ in two key ways. In the ACT, NSW, and SA, a person found unfit to plead may ultimately undergo a 'special hearing' process where a court makes a qualified finding on the limited evidence.[85] Where there is a qualified finding of guilt, the court can impose a limited term, which represents the time the person must spend in forensic

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82 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 24.

83 Ibid xiii–xix.

84 *R v Presser* [1958] 45 VR 48.

85 *Crimes Act 1900* (ACT) pt 13; *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19; *Criminal Law Consolidation Act 1935* (SA) pt 8A, div 3.

custody under supervision. The length of a limiting term generally mirrors the sentence of imprisonment a court would have imposed for the offending conduct.[86]

11.60 All other states and territories do not have special hearings that result in limiting terms. A finding of unfitness to stand trial in these jurisdictions can result instead in indefinite detention.[87] As observed in the Senate Community Affairs References Committee report:

> All Australian jurisdictions have in place legislation that addresses a defendant within the criminal justice system and their fitness to stand trial. These justice diversion provisions are applied when people with cognitive or psychosocial disability are deemed 'unfit' to stand trial ... [J]ustice diversion provisions [without limiting terms] have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that may significantly exceed the maximum period of custodial sentence for the offence.[88]

11.61 Indefinite detention regimes have affected Aboriginal and Torres Strait Islander peoples. For example, evidence submitted to the Senate Community Affairs References Committee 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.[89]

11.62 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,[90] and found that:

- the men had been held in a maximum security prison in Alice Springs because no suitable places for forensic patients existed;[91]
- 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

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86 *Crimes Act 1900* (ACT) s 301; *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b); *Criminal Law Consolidation Act 1935* (SA) s 269O(2). If the court finds no custodial sentence would have been imposed, it may impose any other penalty or order it might have made in a normal trial of criminal proceedings.

87 *Criminal Code Act 1996* (NT) s 43ZC; *Mental Health Act 2016* (Qld) ch 12 pts 3–4; *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 15–18, 24, 26 (Tasmania first requires a qualified finding of guilt); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27(1); *Criminal Law (Mentally Impaired Accused) Act* 1996 (WA) ss 16, 33.

88 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 6.

89 Ibid 14.

90 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).

91 A forensic patient facility was constructed in March 2013.

- the third man had also been in detention for over four years, and remained so at the time of the AHRC's reporting date.[92]

11.63 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 had resulted in the detention of an Aboriginal and Torres Strait Islander man for nearly a decade.[93]

11.64 There have also been calls among Australian defence advocates for the introduction of special hearings, supported by the implementation of throughcare following the conclusion of a limiting term.[94] In 2014, the ALRC recommended the introduction of limiting terms combined with regular reviews of detention orders for state and territory jurisdictions with indeterminate detention regimes.[95] These recommendations were supported by the Senate Community Affairs References Committee in 2016.[96]

11.65 The ALRC is aware that the introduction of limiting terms does not address the issue of people with cognitive impairment in the forensic mental health system being held in correction centres. This is an area of ongoing concern, on which state and territory bodies continue to make recommendations. [97]

11.66 The ALRC recognises that fitness to stand trial regimes, and the operation of forensic mental health systems are complex. The ALRC has focused on indefinite detention, as this affects incarceration rates, and it is the area most raised by stakeholders in preliminary consultations. The ALRC welcomes submissions on the proposal to abolish indefinite detention in response to a finding of unfitness to stand trial and any other related area.

Provision of legal services and supports

Question 11–2 In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?

92 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 35–6.

93 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).

94 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 69.

95 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 7–2.

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

97 See, eg, NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) recs 10.1–10.2; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) recs 49–50, 98, 100, 104–5.

11.67 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, Indigenous Legal Assistance providers such as the Aboriginal Legal Service (ALS) 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.

11.68 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 (NPA)—a 4 year agreement between the Commonwealth and the states and territories—and the re-negotiation of a new agreement for 2015–2020.

11.69 The recent funding history of these legal services was articulated in the 2016 report of the Senate Standing Committee on Finance and Public Administration, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*[98] and also comprehensively described in the Productivity Commission's 2014 *Access to Justice Arrangements* report.[99]

11.70 The ALRC specifically notes the Senate Standing Committee's recommendation that the Commonwealth Government 'adequately support legal assistance services', and that funding should focus on:

- Community legal education for Aboriginal and Torres Strait Islander people;
- Outreach workers to assist Aboriginal and Torres Strait Islander people; and
- Interpreters for Aboriginal and Torres Strait Islander people in both civil and criminal matters to ensure that they receive effective legal assistance.[100]

11.71 In 2013–14, the Productivity Commission considered funding of legal services and assistance and thereafter made several findings and recommendations targeting the legal services sector and those organisations servicing the Aboriginal and Torres Strait Islander community.[101] The Productivity Commission estimated at that time that the *additional* cost of adequately supporting this sector would amount to around $200 million per year.[102]

11.72 While an extensive in-depth examination of the provision of legal services and supports is outside the scope of the Terms of Reference to this Inquiry, in consultations to date, the ALRC has been told of the negative effects on the legal assistance sector stemming from funding uncertainty and the consequent negative impacts on

98 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 115–16.
99 Productivity Commission, *Access to Justice Arrangements—Volume 2* (2014) chs 21–2.
100 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016).
101 Productivity Commission, *Access to Justice Arrangements—Volume 2* (2014) rec 21.4.
102 Ibid 738.

incarceration outcomes for Aboriginal and Torres Strait Islander peoples. Notwithstanding the announcement that the funding reduction announced in 2013[103] would not proceed, the need for increased funding to the legal services sector, as recommended by the Productivity Commission, is noted. The ALRC acknowledges that the lack of access to legal assistance is a particular issue for regional and remote communities, and that this may have an impact on the incarceration rates of Aboriginal and Torres Strait Islander peoples.

Custody Notification Service

Proposal 11–3 State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

11.73 State and territories currently operate a notification system whereby an ALS practitioner or equivalent is contacted when an Aboriginal or Torres Strait Islander person is detained in police custody. In NSW, this is a legislated duty.[104]

11.74 The Custody Notification Service (CNS) is a 24-hour, 7-day a week telephone legal advice service for Aboriginal and Torres Strait Islander people that have been taken into custody in NSW and the ACT.[105] The NSW CNS was set up in response to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) to prevent deaths in custody in NSW. Since then there has been no deaths in custody in NSW where the CNS was used.[106]

11.75 The NSW CNS is legislated under cl 37 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW):[107]

> **37 Legal assistance for Aboriginal persons or Torres Strait Islanders**
>
> If a detained person or protected suspect is an Aboriginal person or Torres Strait Islander, then, unless the custody manager for the person is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must:
>
> (a) immediately inform the person that a representative of the Aboriginal Legal Service (NSW/ACT) Limited will be notified:
>
> (i) that the person is being detained in respect of an offence, and
>
> (ii) of the place at which the person is being detained, and

103 Announced in the 2013 'Mid Year Economic Financial Outlook'.
104 *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) cl 37.
105 The CNS operates in both ACT and NSW but is only legislatively imposed on police in NSW.
106 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 86.
107 The provision was previously cl 33 under the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW).

(b) notify such a representative accordingly.

11.76 The provision prescribes that when an Aboriginal and Torres Strait Islander person in NSW is taken into custody the police must contact the ALS, and advise them of this fact.[108] The Aboriginal and Torres Strait Islander person in custody is then provided over-the-phone legal advice, with CNS lawyers trained to detect and respond to issues such as threats of self-harm or suicide, or any injuries sustained during arrest.[109]

11.77 There have been moves to legislate a CNS in Western Australia,[110] with the Western Australian Coroner's Court and the Australian Lawyers for Human Rights both recently advocating for the implementation of a legislated CNS in that state.[111] Stakeholders in this Inquiry have stressed the importance of having a mandatory legislative duty to notify and urged its introduction in other states and territories.

11.78 Stakeholders have explained that the CNS is critical to the welfare of Aboriginal and Torres Strait Islander peoples and their access to justice, and the ALRC welcomes submissions regarding the proposal to extend a legislated duty to notify to every jurisdiction.

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108 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 85.

109 Aboriginal Legal Service (NSW/ACT), *Custody Notification Service* <www.alsnswact.org.au/pages/custody-notification-service>.

110 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 87–8.

111 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, 40; *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 157.

12. Police Accountability

Contents

Summary 207
Background 207
Control and intervention 208
Communication barriers 210
Improving responses 211
Aboriginal women experiencing family violence 211
Better police responses to communities 214
Cooperative initiatives 216
Annual public reporting 217
Police programs 218
Reconciliation Action Plans 219
Employment strategies 221

Summary

12.1 Police responses can have an impact on the rate of imprisonment of Aboriginal and Torres Strait Islander peoples. Police are at the 'front line' in the criminal justice system. They receive direct complaints of criminal behaviour, investigate those complaints and then may lay charges. Police have significant powers, including in many instances, a discretion to charge or not charge an individual with an offence.

12.2 This chapter asks how police responses and practices in relation to Aboriginal and Torres Strait Islander peoples might be improved, including questions about how police might work better with Aboriginal and Torres Strait Islander communities to prevent family violence; how to improve police readiness for working in Aboriginal and Torres Strait Islander communities; the value of reporting and evaluating police programs and initiatives involving Aboriginal and Torres Strait Islander peoples; and the value of Reconciliation Action Plans and employment strategies for state and territory police services.

Background

12.3 An Australian Institute of Criminology study in 1988 found that most Australians respected and felt protected by the police forces of the states and territories.[1] However, an Aboriginal and Torres Strait Islander perspective can differ—

1 Bruce Swanton et al, 'How the Public See the Police: An Australian Survey' (Trends and Issues in Crime and Criminal Justice No 11, Australian Institute of Criminology, 1988).

given the historical nature of the involvement of police in the lives of Aboriginal and Torres Strait Islander peoples post-1788, where

> police came to take on the role of protectors of Aboriginal communities situated on reserves and missions. This role involved them in considerable supervision of Aboriginal people's lives. It is symbolised by images of them returning runaways in neck and leg chains … It also came to involve the removing children from their families.[2]

12.4 Many see the 1967 referendum as a 'watershed moment', when Australia voted for the betterment of Aboriginal peoples.[3] Jo Kimara has however suggested that, although policing policies changed following the 1967 referendum, such a change was not necessarily for the better:

> Far from being inclusionary, many policing practices became covert and exclusionary. Without specific legislation there was an increase in arrests and incarceration for offences that non-Indigenous people would be unlikely to be arrested for. This was and still is colloquially known as the offence of 'being Black in a public place' and encompasses the notorious trifecta legislation of offensive language, resist arrest and assault police.[4]

Control and intervention

12.5 Early police involvement in, and control over, the lives of Aboriginal people in states and territories was embodied in legislation such as the *Aborigines Protection Act 1909* (NSW). For many Aboriginal people in New South Wales (NSW), the involvement of police in their lives under the *Aborigines Protection Act* remains within living memory. The genesis of discord between police and Aboriginal communities relates to the role police assumed beyond that of conventional policing. Professor Chris Cunneen and Dr Terri Libesman provided the following examples, noting that police:

- issued rations to Aboriginal peoples; determined quantity and reduction in rations;
- withheld rations where children failed to attend school;
- refused to supply rations to Aboriginal people so as to persuade them to move to another locality or on to an Aboriginal reserve or station;
- determined whether a Aboriginal person was sufficiently unwell to see a doctor;
- patrolled and maintained order on unsupervised Aboriginal reserves;
- recommended on the disposal of reserve land;
- expelled 'trouble makers' from Aboriginal reserves;
- removed children from their parents and sent them to the Board's 'training homes', on the grounds that they were 'neglected' or that they were 14 years of age;

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2 Christine Jennett, 'Police and Indigenous Peoples in Australia' (Paper, History of Crime, Policing and Punishment Conference, 9–10 December 1999) 2.

3 ABC Radio, *The 1967 Referendum—50 Years On* <www.abc.net.au/radio/programs/overnights/1967-referendum/8567608>.

4 Jo Kamira, 'Indigenous Participation in Policing: From Native Police to Now—Has Anything Changed?' (Paper, History of Crime, Policing and Punishment Conference, 9–10 December 1999) 5.

- instituted proceedings against Aboriginal parents who took their children away from Aboriginal reserves or from school in an attempt to escape the Board's decision that their children be removed from them and 'trained';
- expelled light-coloured people from Aboriginal reserves and stopped them from returning to their families still living on reserves; and
- instituted proceedings to remove whole Aboriginal communities from certain localities, under section 14 of the Act.[5]

Child removal

12.6 Police were also involved in implementing the policy of removing children from Aboriginal families. A particular example in NSW was s 13A of the *Aborigines Protection Act 1909*, introduced in 1915:

> The Board may assume full control and custody of the child of any aborigine, if after due inquiry it is satisfied that such a course is in the interest of the moral and physical welfare of such child. The Board may thereupon remove such child to such control and care as it thinks best.

12.7 This legislation saw the beginning of what became known as the 'the stolen generation'.[6]

12.8 Police were central to the operation of the Aborigines Protection Board:

> The Aborigines Protection Board was established to manage reserves and the welfare of the estimated 9000 Aboriginal people living in New South Wales in the 1880s. It was part of the Department of Police and was chaired by the Commissioner of Police. It met weekly in Phillip Street in Sydney. Board members … developed legislation in the period 1909 to 1935 that restricted the capacity of Aboriginal people to choose where they lived, enjoy education at the same standard offered to the rest of the community, set their own employment contracts, drink alcohol or receive family endowment in cash. After considerable controversy, the Aborigines Protection Board was replaced by the Aborigines Welfare Board in 1940.[7]

12.9 The forced removal of Aboriginal children from their parents was part of a broader policy of assimilation, framed by the conviction that 'the destiny of the natives of aboriginal origin … lies in their ultimate absorption by the people of the Commonwealth and … that all efforts be directed to that end'.[8]

12.10 The 1997 *Bringing Them Home Report* of the (then) Human Rights and Equal Opportunity Commission, described the scale of removal across Australia:

> Nationally we can conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in

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5 Chris Cunneen and Terri Libesman, *Indigenous People and the Law in Australia* (Butterworths, 1995) 33.

6 Peter Read, 'The Stolen Generations: The Removal of Aboriginal Children in New South Wales 1883 to 1969' (Occasional Paper, Ministry of Aboriginal Affairs (NSW), 1982); Chris Cunneen, 'The New Stolen Generations' (Paper, Australian Institute of Criminology Juvenile Crime and Juvenile Justice Conference, 26–7 June 1997).

7 Find & Connect, *Aborigines Protection Board (1883–1940)* <www.findandconnect.gov.au>.

8 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).

> 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.[9]

12.11 Margaret Tucker set out her experience of having been removed with her sister from her mother by the police:

> I thought: 'Everything will be right now. Mum won't let us go.'
>
> Myrtle was grabbed by her auntie. We had our arms around our mother, and refused to let go. She still had her apron on, and must have run the whole one and a half miles. She arrived just in time, due to the kindness of Mrs Hill. As we hung onto our mother she said fiercely, 'They are my children they are not going away with you.'
>
> The policeman, who was no doubt doing his duty, patted his handcuffs, which were in a leather case on his belt, and which May and I thought were a revolver. 'Mrs Clements,' he said, 'I'll have to use this if you do not let us take these children now.'
>
> Thinking that policeman would shoot Mother, because she was trying to stop him, we screamed, 'We'll go with him Mum, we'll go.' I cannot forget any detail of that moment, it stands out as though it were yesterday. I cannot ever see kittens taken from their mother cat without remembering that scene. It was just sixty years ago.[10]

12.12 Dr Christine Jennett has suggested that the long lasting effect of this police involvement in the lives of Aboriginal people has created a legacy of 'deep mistrust/hatred' of police in Aboriginal communities.[11]

Communication barriers

12.13 During consultation with stakeholders, the ALRC was made aware of the desire of both Aboriginal and Torres Strait Islander communities and police to work together, and of failures in doing so successfully. This experience appears long standing. Commenting on his experiences as Royal Commissioner for the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), the Hon JH Wootten AC QC noted communication barriers between Aboriginal communities and the police:

> I was struck, as I went around eastern Australia as a Royal Commissioner, by how often I found police officers who were well motivated, anxious to improve relations with the local Aborigines, but disillusioned and frustrated. They would tell me how they had had great plans but Aborigines would not cooperate, how they had called meetings but Aborigines would not come. Then I would talk to leaders of the Aboriginal community and find them equally anxious for constructive change, but equally disillusioned and frustrated. 'The police will not listen to us', they would say. 'They call meetings at times that suit them in places where they are comfortable; they

9 Ibid 31.

10 Margaret Tucker, *If Everyone Cared: Autobiography of Margaret Tucker MBE* (Grosvenor, 1983) 92–3.

11 Christine Jennett, 'Police and Indigenous Peoples in Australia' (Paper, History of Crime, Policing and Punishment Conference, 9–10 December 1999) 4.

> are their meetings, not ours. If we go, they do not want to listen to us, they just want to tell us about their ideas.'[12]

12.14 Recommendation 215 of the RCIADIC advocated communication and negotiation between police and Aboriginal and Torres Strait Islander communities:

> That Police Services introduce procedures, in consultation with appropriate Aboriginal organisations, whereby negotiation will take place at the local level between Aboriginal communities and police concerning police activities affecting such communities, including:
>
> a. The methods of policing used, with particular reference to police conduct perceived by the Aboriginal community as harassment or discrimination;
>
> b. Any problems perceived by Aboriginal people; and
>
> c. Any problems perceived by police. Such negotiations must be with representative community organisations, not Aboriginal people selected by police, and must be frank and open, and with a willingness to discuss issues notwithstanding the absence of formal complaint.

12.15 In preliminary consultations, the ALRC has heard that the relationship between Aboriginal and Torres Strait Islander peoples and police remains fraught in a number of communities.

Improving responses

Aboriginal women experiencing family violence

Question 12–1 How can police work better with Aboriginal and Torres Strait Islander communities to reduce family violence?

12.16 The prevalence of family violence in Aboriginal and Torres Strait Islander communities has been recognised as a key driver of the incarceration of Aboriginal and Torres Strait Islander men and, increasingly, women.[13] Family violence within those communities has been described as cyclical and intergenerational.[14] Some stakeholders have suggested that the response by police to family violence in Aboriginal and Torres Strait Islander communities requires significant improvement.[15]

12.17 Article 22 of the UN *Declaration on the Rights of Indigenous Peoples* provides Indigenous women with the right to access justice and protection against violence. The

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12 Hal Wootten, 'Aborigines and Police' (2003) 16(1) *UNSW Law Journal* 265, 286.

13 PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017) 23.

14 See, eg, Aboriginal Peak Organisations (NT), Submission No 134 to the Senate Finance and Public Administration References Committee, Parliament of Australia, *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).

15 See, eg, Josephine Cashman, 'Lack of Response Prevents Progress' in *Ending the Violence in Indigenous Communities, National Press Club Address, November 2016* (Centre for Independent Studies) 13, 14.

response of police to Aboriginal and Torres Strait Islander women experiencing family violence is directly relevant to how well this right can be realised.

12.18 United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, outlines the complexity of the issue:

> Discrimination against Aboriginal and Torres Strait Islander women exists on the grounds of gender, race and class and is structurally and institutionally entrenched. This discrimination coupled with the lack of culturally appropriate measures to address the issue, fosters a disturbing pattern of violence against Aboriginal and Torres Strait Islander women … Family violence is an intersectional concern that overlaps with homelessness, poverty, incarceration, health and removal of children. If not tackled comprehensively, family violence will remain cyclical and undermine efforts to address related issues.[16]

12.19 Similarly, United Nations Special Rapporteur on Violence against Women, Dubravka Šimonović, notes:

> Aboriginal and Torres Strait Islander women face institutional, systemic, multiple, intersecting forms of discrimination. In addition to sexism and racism, many women also face class-based discrimination due to the low socioeconomic status, as well as social exclusion arising from their regional or remote geographical location. These forms of discrimination and exclusion culminate to create extremely difficult social conditions and manifest themselves in an alarmingly high prevalence of violence against Aboriginal and Torres Strait Islander women who continue to experience higher rates of domestic/family violence and more severe forms of such violence as compared to other women.[17]

12.20 Professor Marcia Langton AM notes the scale of the problem of violence and abuse within Aboriginal communities:

> In the last reporting period—2014–2015—almost a quarter of the entire Indigenous Australian population over the age of 15 reported that they had been victims of physical or threatened violence in the last 12 months … Rates of hospitalisation for assault for Indigenous females were: 51 times the non-Indigenous female rate in remote areas and 63 times the non-Indigenous female rate in the NT.[18]

12.21 Research has suggested that Aboriginal and Torres Strait Islander females are up to 35 times more likely to experience domestic and family violence than non-Indigenous Australian women[19] and that Aboriginal and Torres Strait Islander women

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16 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) 13.

17 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) 6.

18 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, November 2016* (Centre for Independent Studies) 7, 7.

19 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).

and girls are 31 times more likely to be hospitalised due to domestic and family violence related assaults compared to non-Indigenous women and girls.[20]

12.22 There has been strong criticism of initiatives that seek to address family violence in Aboriginal and Torres Strait Islander communities by minimising the involvement of police. 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 Langton has 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'.[21]

12.23 Also commenting on this aspect of the Third Action Plan, Josephine Cashman has suggested:

> There is another glaring failure of this third action plan. 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'. How does this divestment of the roles of the police, the courts and allied services respond to the needs of Indigenous victims of criminal violence? 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.[22]

12.24 In terms of barriers related to policing, Antoinette Braybrook suggests that Aboriginal victims/survivors face significant impediments to reporting and seeking support for family violence that include:

- 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.[23]

12.25 The ALRC notes that difficulties exist with respect to Aboriginal and Torres Strait Islander people making complaints to police in relation to family violence and abuse. For example, Jacinta Price has said:

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20 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011—Report* (Produced for the Steering Committee for the Review of Government Service Provision, 2011) 29.

21 Langton, above n 18, 11.

22 Cashman, above n 15, 17.

23 Antoinette Braybrook, 'Family Violence in Aboriginal Communities' 2 *DVRCV Advocate* 20.

> 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.[24]

12.26 Dr Hannah McGlade suggests there is a lack of police responsiveness to the experience of Aboriginal women experiencing violence, pointing to the failing of police that led to the death of Aboriginal woman, Ms Dhu:

> Ms Dhu was arrested by police and taken into police custody on 2 August 2014 for reasons related to unpaid fines. Young Aboriginal women, who typically live in poverty, are disproportionately affected by the policy.
>
> Ms Dhu was pronounced dead on 4 August 2014 only two days after being taken into custody. She was a victim of domestic violence in need of medical help—but to the police she was only an offender, an Aboriginal woman jailed for unpaid fines.[25]

12.27 The ALRC invites stakeholder comment on how police can work better with Aboriginal and Torres Strait Islander communities to reduce family violence.

Better police responses to communities

Question 12–2 How can police officers entering into a particular Aboriginal or Torres Strait Islander community gain a full understanding of, and be better equipped to respond to, the needs of that community?

12.28 The ALRC has heard from various stakeholders during consultations of inadequate training or readiness of police entering into often remote and sometimes challenging Aboriginal communities. This feedback echoes many previous reports.

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24 Jacinta Price, 'Violence and Silence' in *Ending the Violence in Indigenous Communities, National Press Club Address, November 2016* (Centre for Independent Studies) 3, 4.

25 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).

12.29 Recommendation 228 of the RCIADIC provided 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:
>
> 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.[26]

12.30 The 1986 ALRC report into the recognition of customary laws suggested an improvement in relations between Aboriginal people and the police required an increased understanding of each group by the other that could be achieved through better training and education for police officers.[27]

12.31 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'.[28]

12.32 The Office went on to recommend 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'.[29]

12.33 Similarly, a 2010 independent review of policing in remote Aboriginal communities in the Northern Territory 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

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26 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 4 rec 228.

27 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [873]–[874].

28 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.

29 Ibid.

> management support, and recognition of their completed, satisfactory service at remote locations in future postings.[30]

12.34 The ALRC seeks comment about how police newly entering into a particular community might be able to develop an understanding of the needs of that Aboriginal and Torres Strait Islander community and be better equipped to deal with and respond to those needs.

Cooperative initiatives

12.35 A number of cooperative initiatives between police and the local community have been introduced in Redfern, a suburb of Sydney, since 2009. Historically, the relationship between police and Aboriginal people in Redfern has been particularly difficult. Professor Cunneen undertook a study of the relations between the police and Aboriginal people in Redfern in 1990, a time of major discord.[31] Professor Cunneen concluded 'there has been a continuity in complaints concerning police activities in Redfern for the 20 years between 1970 and 1990. Many of those complaints related to discriminatory policing practices and the excessive use of force'.[32]

12.36 A riot in Redfern in February 2004 followed the death of Thomas 'TJ' Hickey.[33] Although an inquest found TJ's death was a 'freak accident',[34] the Hickey family and others continue to blame the police for TJ's death.[35]

12.37 In 2009, Redfern Police, led by Local Area Commander Detective Superintendent Luke Freudenstein, 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 Pat Aboud.

12.38 Tribal Warrior describes these 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.[36]

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30 The Allen Consulting Group, *Independent Review of Policing in Remote Indigenous Communities in the Northern Territory: Policing Further into Remote Communities* (2010) 78.

31 Chris Cunneen, *Aboriginal-Police Relations in Redfern: With Special Reference to the 'Police Raid' of 8 February 1990* (Human Rights and Equal Opportunity Commission, 1990) 1.

32 Ibid 8.

33 ABC News, *Fifty Police Injured in Redfern Riot* <www.abc.net.au/news/>.

34 State Coroner's Office, *Report by the NSW State Coroner into Deaths in Custody/Police Operations 2004* (2005) 89.

35 Rebecca Barrett, *TJ Hickey's Family Seeks Apology 10 Years after Redfern Riot Death* (14 February 2014) ABC News <http://www.abc.net.au/news>.

36 Tribal Warrior, *Gold Award for Tribal Warrior Mentoring Programs* <www.tribalwarrior.org>.

12.39 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.[37]

12.40 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.[38]

12.41 Roberts suggested that the principles underlying the success of the program 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 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.[39]

Annual public reporting

Question 12–3 Is there value in police publicly reporting annually on their engagement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours?

12.42 During stakeholder consultations the ALRC has heard of significant work being undertaken at high levels within state and territory police forces in designing and implementing strategies aimed at reducing offending and recidivism within Aboriginal and Torres Strait Islander communities. The ALRC was also made aware of both large and small programs being undertaken in individual local area commands with Aboriginal and Torres Strait Islander communities. However, information about such programs is not easily accessible through annual police reports.

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37 Australian Institute of Criminology, 'Two NSW Police Projects Recognised for Reducing Crime in the Redfern Area' (Media Release, 23 November 2016) 2016.

38 Karl Roberts, *Review of Two Community Engagement Programs in Redfern Local Area Command New South Wales Police* (2016) 4–5.

39 Ibid 5–6.

12.43 For example, performance measures to be implemented by the NSW Police Force within their Aboriginal Strategic Direction 2012–2017 provide only for internal reporting and do not require public reporting.[40]

12.44 While the ALRC is not aware of any studies concerning the impacts of public reporting on police strategies and programs, an examination of the impact of public reporting in the heath care sector suggests significant benefits.[41] The Australian Institute of Health and Welfare suggests:

> Evidence from a number of other countries shows that public reporting on the performance of health care organisations drives improvements in patient care and health systems. Publishing comparative data is important for transparency and accountability, in that it enables the community to see how their local services are performing.[42]

12.45 The ALRC seeks comment from stakeholders so that it can consider 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.

Police programs

Question 12–4 Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcomes evaluations; and put succession planning in place to ensure continuity of the programs?

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40 NSW Police Force, *Aboriginal Strategic Direction 2012–2017* (2015) 16.

41 Bureau of Health Information, *Public Reporting Improves Healthcare* (2010); Ketan Sharma et al, 'Public Reporting of Healthcare Data: A New Frontier in Quality Improvement' (2012) 97(6) *Bulletin of the American College of Surgeons* 6; McKinsey's Health Systems and Services Practice, *Transparency—the Most Powerful Driver of Health Care Improvement: Transparency about Performance May Be a Key Precondition for Improving Service Delivery and Productivity in Health Care* (2011).

42 Australian Institute of Health and Welfare, *Impacts of Local Level Public Reporting* <www.aihw.gov.au/health-performance/impacts-of-local-level-public-reporting/>.

12.46 Many state and territory police forces have implemented programs aimed at reducing offending behaviour and recidivism of Aboriginal and Torres Strait Islander persons. Programs are rarely, if ever, documented in writing or evaluated. The ALRC seeks input from stakeholders about whether the programs should be documented; have succession plans in place; and be evaluated.

Succession planning

12.47 During consultations with stakeholders, the ALRC heard concerns about succession planning within police programs when key persons retire or move on.

12.48 The ALRC was made aware, for example, that the Tackling Violence program, conducted by the NSW Police Force for several years, had ceased for a period upon the retirement of a key police officer who had driven the program. The ALRC understands the program has now recommenced.

12.49 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.[43]

Systems and outcomes evaluations

12.50 The ALRC is concerned that where there is a failure to undertake systems and outcomes evaluations of police programs, the success or otherwise of particular programs cannot be measured. During stakeholder consultations, the ALRC was made aware that there were challenges in supporting arguments for new funding or continuation of programs where evaluation of a police program did not exist.

Reconciliation Action Plans

Question 12–5 Should police be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia, where they have not already done so?

12.51 The RCIADIC suggested the importance of reconciliation to the involvement of Aboriginal and Torres Strait Islander peoples in the criminal justice system and recommended:

> That all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided. To

43 NSW Police Force, *Aboriginal Strategic Direction 2012–2017* (2015) 18.

> this end the Commission recommends that political leaders use their best endeavours to ensure bi-partisan public support for the process of reconciliation and that the urgency and necessity of the process be acknowledged.[44]

12.52 Reconciliation Australia (RA) has described the importance of reconciliation:

> We can't change the past but we can learn from it. We can make amends and we can ensure mistakes are never repeated. Our nation's past is reflected in the present and unless we can heal historical wounds, they will continue to play out in our country's future. Reconciliation can only truly evolve when the Australian community and our major institutions acknowledge and repair the wrongs of the past, understand their effects—and make sure that these wrongs, or similarly damaging actions, are not occurring today, and are never repeated in the future.[45]

12.53 The ALRC understands that, while many state and territory government bodies and organisations associated with the criminal justice system have adopted Reconciliation Action Plans (RAPs), few state or territory police forces currently have a RAP.

12.54 RAPs are a type of strategic plan which provide a set of actions that a particular organisation will undertake to achieve reconciliation with Aboriginal and Torres Strait Islander peoples.

12.55 RAPs are designed and implemented with input from RA, the national expert body on reconciliation in Australia.[46]

12.56 RA has outlined the contribution that RAPs can make to reconciliation:

> The Reconciliation Action Plan (RAP) 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.[47]

12.57 RAPs 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 RAPs must report to RA as to the outcome of their objectives.

12.58 The ALRC seeks input about whether the adoption of RAPs by state and territory police may assist in reducing Aboriginal and Torres Strait Islander incarceration.

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44 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, rec 339.

45 Reconciliation Australia, *State of Reconciliation in Australia: Summary* (2016) 14.

46 Reconciliation Australia, *About Us* <https://www.reconciliation.org.au/about/>.

47 Reconciliation Australia, *RAP Impact Measurement Report 2015* (2016) 2.

Employment strategies

Question 12–6 Should police be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place?

12.59 A key recommendation of the RCIADIC was the employment of more Aboriginal and Torres Strait Islander police officers, especially women, in part, as a strategy to reduce the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system.[48]

12.60 Employment strategies can be successful in improving employment and retention rates of Aboriginal and Torres Strait Islander peoples in organisations. GenerationOne has suggested that an Aboriginal and Torres Strait Islander employment strategy provides a 'blueprint for developing, implementing and maintaining Indigenous employment actions'.[49]

12.61 Matthew Gray, Boyd Hunter and Shaun Lohoar have suggested that key elements for increasing Aboriginal and Torres Strait Islander employment 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.[50]

48 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, rec 229.

49 GenerationOne & Reconciliation Australia *Everybody's Business: A Handbook for Indigenous Employment* (2013) 6.

50 Matthew Gray, Boyd Hunter and Shaun Lohoar, 'Increasing Indigenous Employment Rates' (Issues Paper 3, Closing the Gap Clearinghouse, 2012) 1–2.

12.62 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.[51]

12.63 It has been acknowledged that the employment of Aboriginal and Torres Strait Islander peoples within police forces has positive outcomes. For example, in the NT, Aboriginal Community Police Officers perform a range of duties including liaising with Aboriginal communities, and contributing to effective Community Safety Action Plans.[52] It has been noted that Aboriginal Liaison Officers within the NT police force have positively contributed to liaising with victims of crime, assisting with general intelligence and identifying cases of emerging disturbances or community safety issues, strengthening community engagement and providing a greater focus on engaging with school aged children to deliver safety messages among a variety of other functions.[53]

12.64 Various police forces have undertaken training and employment initiatives as a means of bolstering Aboriginal and Torres Strait Islander police numbers. For example, the NSW Police Force introduced a specialised training program for those Aboriginal and Torres Strait Islander peoples wishing to join the police force. The Indigenous Police Recruitment Our Way Delivery (IPROWD) 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.[54]

12.65 Most of the state and territory police forces make provision for employment of Aboriginal and Torres Strait Islander peoples through a range of initiatives, while the NSW Police Force has a specific Aboriginal employment strategy.[55]

12.66 The ALRC seeks comment about whether employment strategies might increase the number of Aboriginal and Torres Strait Islander peoples employed in state and territory police forces, and how employment strategies might help to reduce the incarceration rates of Aboriginal and Torres Strait Islander peoples.

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51 NSW Police Force, *Aboriginal Employment Strategy 2015–2019* (2015).
52 Northern Territory Police, Fire & Emergency Services, *2015–16 Annual Report* (2016) 28.
53 Ibid.
54 NSW Police Force, *Aboriginal Recruitment* <www.police.nsw.gov.au/recruitment/the_career/atsi>.
55 Ibid.

13. Justice Reinvestment

Contents

Summary 223
'Justice reinvestment' 223
Impact on Aboriginal and Torres Strait Islander peoples 224
The Maranguka Project: Bourke, NSW 225
Justice reinvestment in this Discussion Paper 226

Summary

13.1 In this chapter the ALRC acknowledges the growing area of 'justice reinvestment', with particular reference to the initiative in Bourke, New South Wales (NSW). It also refers to the 2013 report of the Senate Standing Committee on Legal and Constitutional Affairs, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* and the 2016 report of the Senate Standing Committees on Finance and Public Administration, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*, both of which supported justice reinvestment approaches to some Aboriginal and Torres Strait Islander communities.

13.2 The ALRC asks if any further reforms to laws and legal frameworks are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples.

'Justice reinvestment'

13.3 There is no single accepted definition of the term 'justice reinvestment'.[1] It is, however, generally understood to represent a form of economic modelling whereby resources are redirected from punitive responses to crime into preventative strategies and early diversion away from the criminal justice system in areas with high crime rates. According to the report, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*:

> justice reinvestment essentially refers to a policy approach to criminal justice spending, whereby funds ordinarily spent on keeping individuals incarcerated, are diverted to the development of programs and services that aim to address the

1 David Brown et al, *Justice Reinvestment: Winding Back Imprisonment* (Palgrave Macmillan, 2016) 11; Todd Clear, 'A Private-Sector, Incentives-Based Model for Justice Reinvestment' (2011) 10(3) *Criminology & Public Policy* 585, 586–7; Shadd Maruna, 'Lessons for Justice Reinvestment from Restorative Justice and the Justice Model Experience' (2011) 10(3) *Criminology & Public Policy* 661.

> underlying causes of criminal behaviour in communities that have high levels of incarceration.[2]

13.4 Mission Australia, in their submission to the *Inquiry on the value of a justice reinvestment approach to criminal justice in Australia*, described some of the principles that underpin justice reinvestment: 'The rationale for justice reinvestment is that diverting human and financial resources to disadvantaged communities and vulnerable people to address the underlying causes of crime will produce better value for money and long term economic benefits.'[3]

13.5 In their submission to the same inquiry, the Law Council of Australia characterised justice reinvestment as preventative criminal justice strategies that are both evidence-based and collaborative:

> Justice reinvestment relies heavily on interactions between agencies at both the state and local level. It also has a significant community-focus, seeking 'community-level solutions to community-level problems'. It is these aspects of justice reinvestment, along with its evidence-based approach and focus on addressing and preventing the underlying causes of crime such as unemployment and drug and alcohol abuse, that have given rise to the growing support for justice reinvestment in recent years throughout the world.[4]

13.6 The 2016 publication, *Justice Reinvestment: Winding Back Imprisonment*, reiterated these points, and referred to the importance of 'bottom-up' approaches to public policy developments. It stated that a 'top-down' approach loses much of the democratic value and potential of justice reinvestment initiatives, and stressed the importance of approaches that are 'community' and 'place-based'.[5]

Impact on Aboriginal and Torres Strait Islander peoples

Question 13–1 What laws or legal frameworks, if any, are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples?

2 Law Council of Australia, Submission No 78 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* (20 May 2015) 5; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 104.

3 Mission Australia, Submission No 99 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 4.

4 Law Council of Australia, Submission No 97 to Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (22 March 2013) 6.

5 David Brown et al, above n 1, 243.

13.7 Justice reinvestment has received widespread support in previous inquiries, including some of those referred to in the Terms of Reference for this Inquiry.[6] For example, the Senate Legal and Constitutional Affairs References Committee report, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* recommended that the Commonwealth Government take a 'leadership role' in implementing justice reinvestment in Australia, particularly in relation to issues of funding, data collection, and evaluation. In particular, the inquiry recommended that

> the Commonwealth commit to the establishment of a trial of justice reinvestment in Australia in conjunction with the relevant states and territories, using a place-based approach, and that at least one remote Indigenous community be included as a site ... the committee recommends that any trial actively involve local communities in the process ... beyond the electoral cycle and be subject to a robust evaluation process.[7]

13.8 In preliminary consultations, the ALRC has heard widespread support for justice reinvestment initiatives for Aboriginal and Torres Strait Islander communities.

The Maranguka Project: Bourke, NSW

13.9 Much of the support for justice reinvestment has been articulated in relation to the Maranguka Project operating in Bourke, NSW—a collaboration between Just Reinvest NSW and Aboriginal and Torres Strait Islander residents. In 2015–16, Bourke was reportedly one of the most disadvantaged Local Government Areas in NSW, and the area had the highest rate of juvenile convictions in the state.[8] The town was affected by high rates of long-term unemployment, low levels of education, and high rates of predominantly non-violent crime.[9]

13.10 In 2015–16, Bourke had a population of approximately 3,000 and was reportedly spending $4,000,000 in costs associated with youth involvement in the juvenile justice system.[10] One in three community members of Bourke identified as Aboriginal.[11]

13.11 As explained by Just Reinvest NSW, the Marunguka Project seeks to provide

> better coordinated support to vulnerable families and children in Bourke through community-led teams working in partnership with existing service providers, so that

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6 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) 94; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (2016) 48; Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 115–7; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 119.

7 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) rec 6.

8 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/>.

9 KPMG, above n 8, 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.

10 KPMG, above n 8, 50.

11 Ibid 1.

> together we could look at what's happening in our town and why Aboriginal disadvantage was not improving, and together we could build a new accountability framework which wouldn't let our kids slip through.[12]

13.12 In order to ensure the initiative was community-led, Mick Gooda, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, who has been heavily involved in the Maranguka Project, explained:

> We decided to work with the community in a real and meaningful way. We did not start off with a plan; we just started talking to people. My role out there was to chair community meetings as an independent person from outside of Bourke. We spent about 18 months doing that, just talking to people, the community talking amongst themselves, before they were ready to make their first foray into change... I think the key to what is happening at Bourke is that the Bourke community runs it, the Bourke community owns it, and they are the ones that coordinate all the service providers.[13]

13.13 A number of pilot initiatives have also been ongoing in the ACT as well as Cowra (NSW), Katherine (NT) and Ceduna (SA).[14]

13.14 The ALRC welcomes submissions on whether laws and legal frameworks require reform in order to facilitate justice reinvestment responses such as the Maranguka Project.

Justice reinvestment in this Discussion Paper

13.15 This Inquiry focuses on criminal justice responses. That is, what laws and legal frameworks can do to decrease Aboriginal and Torres Strait Islander incarceration rates. Nonetheless, this Discussion Paper canvasses many programs and criminal justice responses that are relevant to the principles of justice reinvestment. This includes proposals to provide for community-led diversion programs and bail support networks for Aboriginal and Torres Strait Islander peoples. The proposals within this Discussion Paper also emphasise the requirement for community-led collaboration and whole-of-government responses.[15]

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12 Just Reinvest NSW, *Justice Reinvestment in Bourke* <http://www.justreinvest.org.au/justice-reinvestment-in-bourke/> quoted in Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 116.

13 Commonwealth, *Committee Hansard*, Senate, 4 April 2016 (Mick Gooda) 2 quoted in Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 111.

14 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (2016) 48.

15 See, for example, chs 2, 4, 5, 7 10 and 11.

Consultations

Name	Location
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 Service	Melbourne—April
Aboriginal Interpreter Service	Darwin—March
Aboriginal Legal Service (NSW/ACT)	Sydney—March
Aboriginal Legal Service of WA	Perth—March
Associate Professor Thalia Anthony, Faculty of Law, UTS	Sydney—March
Zachary Armytage, Community Legal Centres NSW	Sydney—February
Australians for Native Title and Reconciliation	Brisbane—March
Justice Robert Benjamin, Family Court of Australia	Sydney—April
Dr Harry Blagg, Faculty of Law, University of Western Australia	Perth—March
Hon. A/Judge Jennifer Boland AM Deputy President Head – Occupational Division NSW Civil and Administrative Tribunal	Sydney—June

Brisbane Murri Elders Community Justice Group	Brisbane —March
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 Law Consultation Group, Legal Aid NSW	Sydney—May
Danila Dilba Health Service	Darwin—March
Department of the Attorney General WA	Perth—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, Justice Health & Forensic Mental Health Network, Department of Health NSW	Sydney—April
Magistrate David Fanning, Neighbourhood Justice Centre, Magistrates' Court of Victoria, Cameron Wallace, Kylie Smith	Melbourne—April
First Nations Deaths in Custody Watch Committee	Perth—March
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 of the Northern Territory, and Chief Judge Dr Lowndes, NT Local Court	Darwin—March
Judge Paul Grant, County Koori Court of Victoria and Terrie Stewart	Melbourne—April
Judge Graeme Henson, Chief Magistrate, NSW Local Court	Sydney—April
Sarah Hopkins, Chair, Just Reinvest NSW	Sydney—March
Indigenous Lawyers Association of Queensland	Brisbane—March
Commissioner Andrew Jackomos, Aboriginal Children and Young People	Teleconference—May
Judge Peter Johnstone, President, Children's Court of NSW	Sydney—March
Koori Caucus, Victorian Aboriginal Justice Forum	Melbourne—April
Professor Marcia Langton, 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 Western Australia	Perth—March
Legal Aid NSW	Sydney—March
Legal Aid Queensland	Brisbane— March
Legislation Policy and Programs Branch, Justice and Community Safety Directorate ACT	Teleconference—May
Making Justice Work Alliance	Darwin—March

Chief Justice Wayne Martin AC, Supreme Court of Western Australia	Perth—March
Dr Hannah McGlade, Senior Indigenous Research Fellow, Curtin University	Sydney—April
Will McGregor, Chief Executive Officer, Bush Mob	Alice Springs—March
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
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
NSW Bar Association	Sydney—March
NSW Law Reform Commission	Sydney—March
NSW Sentencing Council	Sydney—February
NT Correctional Services	Darwin—March
NT Criminal Lawyers Association	Alice Springs—March
NT Department of the Attorney—General and Justice	Darwin— March
NT Legal Aid Commission	Darwin —March

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 for Western Australia	Perth—March
Cheryl Orr, Lawyer	Sydney—May
June Oscar AO, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission	Sydney—May
Noel Pearson, Cape York Institute for Policy and Leadership	Teleconference—May
Judge Derek Price, Chief Judge of the District Court of NSW	Sydney—March
Queensland Aboriginal and Torres Strait Islander Legal Service	Teleconference—March
Queensland Police	Brisbane—March
Queensland Sentencing Advisory Council	Brisbane—March
Commissioner Mark Rallings, Corrective Services Queensland	Brisbane—March
Redfern Legal Service	Sydney—March
Commissioner Jan Shuard, Corrective Services Victoria and Aboriginal Programs Unit, Department of Justice, Victoria	Melbourne—April
Sisters Inside	Brisbane—March
Tangentyere Council	Alice Springs—March

Maureen Tangney , Civil Justice Strategy, NSW Department of Justice	Sydney—March
Brendan Thomas, Deputy Secretary, NSW Department of Justice	Sydney—March
Top End Women's Legal Service	Darwin—March
Shane Tremble, General Manager, Endeavour Drinks Group	Sydney—May
University of NSW Roundtable	Sydney—March
Victoria Police	Melbourne—April
Victorian Aboriginal Legal Service & National Aboriginal and Torres Strait Islander Legal Services	Melbourne—April
WA Bar Association	Teleconference —April
WA Police	Perth—March
Dr Don Weatherburn, NSW Bureau of Crime Statistics and Research	Sydney—February
Rick Welsh, Men's Health Information and Resource Centre, Western Sydney University	Sydney – March, May
Michael West, Metro Land Council and Trent Shepherd, Federal Circuit Court of Australia	Sydney—April
Wirringa Baiya Aboriginal Womens Legal Centre	Sydney—March
Women’s Justice Network (formerly WIPAN)	Sydney—April
Pauline Wright, President, The Law Society of New South Wales	Sydney—March
Judge Dina Yehia, District Court of NSW	Sydney —March
Youth Justice, Department of Justice Queensland	Brisbane—March