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**Submission to the Australian Law Reform Commission’s Inquiry into the Incarceration rates of Aboriginal and Torres Strait Islander peoples**

This submission to the Australian Law Reform Commission (‘ALRC’) on the incarceration rates of Aboriginal and Torres Strait Islander peoples focuses on the nexus between driving offences and Aboriginal and Torres Strait Islander peoples’ contact with the criminal justice system. This project is for the Griffith University course, 6000LAW Law Reform.

We are a group of four students in our penultimate and final years of Bachelor of Laws and respective double degrees. The names and contact details for the authors are:

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We would be happy to be contacted or to meet with the Commission to discuss any particular points.

**Scope and Terms of Reference**

Although the inquiry canvasses a wide range of important considerations, our submission will be confined to the following bullet points of the ALRC’s Terms of Reference:

1. (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.

(b) Factors that decision-makers take into account when considering (1)(a)(i-viii), including:

 ii) availability of alternatives to incarceration.

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

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

Contents

[**Driving Offences & Incarceration Rates of Aboriginal and Torres Strait Islander Peoples in Queensland** 4](#_Toc485412056)

[1. Introduction 5](#_Toc485412057)

[2. General Aboriginal and Torres Strait Islander peoples Incarceration Rates: Federal & Queensland 7](#_Toc485412058)

[2.1 Federal 7](#_Toc485412059)

[2.2 Queensland 7](#_Toc485412060)

[3. The Role of Driving and Traffic Offences 7](#_Toc485412061)

[4. Why are Driving Offences Causing High Incarceration Rates? 9](#_Toc485412062)

[5. Availability of Limited Statistics in Queensland 12](#_Toc485412063)

[6. Specific Barriers to Licensing 14](#_Toc485412064)

[6. 1 Learner licence driving schemes 14](#_Toc485412065)

[6.2 Rural to Urban Driving Realities 16](#_Toc485412066)

[6.3 Recommendation I: Improving Queensland’s Remote Indigenous Drivers Licensing Unit 17](#_Toc485412067)

[6.4 Culturally Appropriate Educational Resources and Licensing Systems 19](#_Toc485412068)

[6.5 Perceptions of Obtaining and Maintaining a Driver Licence 21](#_Toc485412069)

[6.5.1 Vehicle Registration 21](#_Toc485412070)

[6.5.2 Identity Documents 21](#_Toc485412071)

[6.5.3 Lack of Understanding about Licences 22](#_Toc485412072)

[6.5.4 Lack of Public Transport 22](#_Toc485412073)

[6.6 Recommendations II-VII: Improving Driver Licence Participation 23](#_Toc485412074)

[6.6.1 Recommendation II 23](#_Toc485412075)

[6.6.2 Recommendation III 23](#_Toc485412076)

[6.6.3 Recommendation IV 23](#_Toc485412077)

[6.6.4 Recommendation V 23](#_Toc485412078)

[7. Cultural and Language Barriers – Queensland Courts 24](#_Toc485412079)

[7.1 Sentencing 24](#_Toc485412080)

[7.2 The current law 25](#_Toc485412081)

[7.3 Language barriers 26](#_Toc485412082)

[7.4 Recommendation VII: Greater use of interpreters in courts 26](#_Toc485412083)

[7.5 Recommendation VIII: Sentencing procedure — towards *Gladue* 27](#_Toc485412084)

[7.6 Therapeutic Jurisprudence in court processes & sentencing 28](#_Toc485412085)

[7.7 Murri Court 29](#_Toc485412086)

[7.8 Recommendation X: Continued Support for Murri Courts throughout Queensland 32](#_Toc485412087)

[7.9 Inadequate Legal Representation and Services 32](#_Toc485412088)

[7.10 Recommendation IX: Increased State budget funding to ATSIL and LAQ 33](#_Toc485412089)

[7.11 Prison overpopulation vs Justice Reinvestment 34](#_Toc485412090)

[7.12 *Recommendation IX: Funding Justice Reinvestment in Queensland* 36](#_Toc485412091)

[8. Conclusion: 38](#_Toc485412092)

[8.2 Our Final Recommendations: 38](#_Toc485412093)

[Bibliography 39](#_Toc485412094)

# **Driving Offences & Incarceration Rates of Aboriginal and Torres Strait Islander Peoples in Queensland**

Our submission will focus on a specific key driver of Aboriginal and Torres Strait Islander incarceration rates in Queensland: custodial sentences for driving offences. The first section will highlight statistics that indicate the strong incidence of driving offences (including driving without a licence, driving unregistered and/or non-roadworthy vehicles) among Aboriginal and Torres Strait Islander peoples, particularly from rural and remote areas, and will show how laws governing transport, traffic, and licensing in Queensland bear disproportionate effects on Aboriginal and Torres Strait Islander peoples. The second section will examine some of the specific barriers faced by Aboriginal and Torres Strait Islander peoples in relation to licence participation, namely:

* Learner licence driving schemes;
* Rural to urban driving realities;
* Culturally appropriate educational resources and licensing systems; and
* Perceptions of obtaining and maintaining a driver licence among Aboriginal and Torres Strait Islander peoples.

The third section of our submission will examine how court sentencing procedures are contributing to the increasing rates of Aboriginal and Torres Strait Islander peoples in custody.[[1]](#footnote-1) It will address some key cultural and language barriers within Queensland courts, and introduce alternative approaches to sentencing, including therapeutic jurisprudence and Justice Reinvestment.

## 1. Introduction

1.1 In April 2016, Marshall Wallace, a 48-year-old Aboriginal and Torres Strait Islander, was given a 15-month prison sentence for several driving offences after being caught driving without a licence in Mount Isa. Earlier this year, he and his wife had moved from his remote community home in the Northern Territory (‘NT’) to Mount Isa to access chemotherapy treatment in Brisbane’s Princess Alexandria Hospital. Wallace suffers from terminal liver cancer. At the time he was handed down his 15-month sentence, Wallace’s remaining life expectancy was between six and nine months. The sentence was handed down despite Wallace’s doctor having provided the court with a letter saying he was unfit for custody and disclosing Wallace’s remaining life expectancy.[[2]](#footnote-2)After mounting pressure from the public, including a Change.org petition that amassed over 16 000 signatures, Wallace was recently released from custody.[[3]](#footnote-3)

1.2 Although Wallace was not required to spend his final months in prison, his case is not an isolated one. Stanley Lord died in police custody in January 2013. He too was terminally ill when convicted — suffering from a long standing heart condition. Seven months into his 18-month sentence, he suffered a cardiac arrest and was unable to be revived. Lord was 39 years old when he died. In 2006, he was imprisoned after being convicted of assault occasioning bodily harm, resisting police, and driving while disqualified. Due to the last charge, he had received a lengthy disqualification from holding a licence. Later in 2012 he was sentenced and re-imprisoned for multiple counts of driving while disqualified. This was the term of imprisonment he was carrying out at the time of his death.[[4]](#footnote-4)

1.3 As these two cases illustrate, the handing down of custodial sentences for minor driving offences are a key contributor towards the incarceration rates of Aboriginal and Torres Strait Islander peoples. Wallace’s and Lord’s cases are not uncommon. The high incidence of driving offences among Aboriginal and Torres Strait Islander peoples, especially in rural and remote areas, is widely recognised.[[5]](#footnote-5) According to the Senate Committee on Aboriginal and Torres Strait Islander Affairs, the high rate of driver licence offences among Aboriginal and Torres Strait Islander peoples is strongly related to the high rate of incarceration for minor breaches, such as fine default.[[6]](#footnote-6) Fines, which may go unpaid, contribute to an inability to subsequently attain a driver licence, resulting in more driving unlicensed offences and fines, and the eventual likelihood of receiving a custodial sentence.[[7]](#footnote-7) While the Queensland Government has made attempts to introduce Driver Licensing Programs aimed at reducing the ‘incidence and severity of incarceration and road trauma among Aboriginal and Torres Strait Islander people,’[[8]](#footnote-8) statistics illustrate Aboriginal and Torres Strait Islander people are still facing significant barriers in relation to licence participation, and are disproportionately affected by Queensland’s traffic, transport, and driving laws.[[9]](#footnote-9)

## 2. General Incarceration Rates of Aboriginal and Torres Strait Islander peoples: Federal & Queensland

### 2.1Federal

As the subject of the ALRC’s inquiry, we know that Aboriginal and Torres Strait Islander peoples are massively overrepresented in the Australian prison system. The percentage of Aboriginal and Torres Strait Islander prisoners in Australia recorded in 2016 was 27.3 per cent,[[10]](#footnote-10) although they represent only three per cent of the entire population.[[11]](#footnote-11)

### 2.2 Queensland

According to statistics collected on the night of the Prison Census, 30 June 2016, there were 7746 prisoners held in Queensland prisons. Aboriginal and Torres Strait Islander peoples comprised 32 per cent (2461 prisoners) of the adult prisoner population, resulting in an age-standardised imprisonment rate of 1625.5 per 100 000 adult Aboriginal and Torres Strait Islander population, in comparison with 155.5 per 100 000 for non-Aboriginal and Torres Strait Islander adults. Therefore, Aboriginal and Torres Strait Islander persons are 11 times more likely than non-Aboriginal and Torres Strait Islander persons to be imprisoned.[[12]](#footnote-12)

## 3. The Role of Driving and Traffic Offences

3.1 During the 2016-17 financial period, statistics from the Department of Justice and Attorney-General place the finalised number of Aboriginal and Torres Strait Islander juvenile and adult defendants charged with driving offences at 3401. In the Queensland Magistrate’s court, 2497 out of 3210 (78 per cent) of total adult driving offences were recorded with respect to driving under disqualification (23 per cent), driving under suspension (14 per cent), driving without a licence (30 per cent), driver licence offences not elsewhere classified (4 per cent), registration offences (3 per cent), roadworthiness offences (<5 offences), exceeding the legal speed limit (0.3%), parking offences (<5 offences), and regulatory driving offences not elsewhere classified (4%). The other 713 recorded offences (23 per cent) comprised of drink driving offences, including exceeding general alcohol limit, exceeding zero alcohol limit, and failing to provide specimen breath. The amount of cases that went to the District and Supreme Court were minimal in comparison — only 26 adult driving offences recorded in the District Court (including drink-driving offences —with 19 offenders sentenced to imprisonment) and less than 5 for the Supreme Court.[[13]](#footnote-13)

3.2 In relation to sentencing offenders (not including drink driving offences) who recorded driving offences in the Magistrate’s Court, 6 per cent of the 2497 were sentenced to imprisonment; 3 per cent were sentenced to custody in the community; 6 per cent were given a community-based order; 78 per cent were given a monetary order (the most common sentence for driving offences); 0.4 per cent were given a good behaviour/recognisance order; and 8 per cent were sentenced to ‘other’. However, a notable limitation is the lack of statistics concerning sentencing and fine default. As noted and later elaborated on in paragraph 4.3, imprisonment by fine default has been identified as a key contributor to Aboriginal and Torres Strait Islander incarceration rates, which can be linked to fines from recurring driving offences.[[14]](#footnote-14)

3.3 Our table, using the information supplied by the Department of Justice and Attorney-General, also provides final statistics from the 2016-17 financial period in relation to the Children’s Court (Magistrate) and Children’s Court of Queensland. In the Children’s Court (Magistrate), 125 out of 157 (80 per cent) of total juvenile driving offences were recorded as driving without a licence; 15 per cent recorded for regulatory driving offences; and 8 percent for other offences such as driving under disqualification, drink driving and driver licence offences. Furthermore, less than 5 offences were recorded at the Children Court of Queensland. In relation to sentencing of these offences, 38 per cent out of the 157 offenders were assigned community-based orders or received other sentences; 12 per cent sentenced to custody in the community; 7 per cent given good behaviour/recognisance order; 3 per cent sentenced to imprisonment; and 1 per cent given a monetary order.[[15]](#footnote-15)

3.4 As outlined above, the current number of juvenile and adult Aboriginal and Torres Strait Islanders charged with driving offences is 3401 — an alarmingly high figure.[[16]](#footnote-16) Furthermore, the data revealed driving without a license to be the most commonly committed offence. For juveniles, the statistics indicate that around 125 individuals were committing the above offence and the most common sentences were community-based orders, as well as other sentences, resulting in a total of 60+. On the other hand, 986 adults were committing the above offence and the most common sentence was monetary orders, resulting at a total of 2,508. Overall, these statistics indicate that difficulty in obtaining a drivers licence, in addition to disqualifications and suspensions, is translating into incarceration.[[17]](#footnote-17) However, an examination of the statistics demonstrates that these are not the only contributing factors. Thus, the following sections aim to elaborate on existing statistics and illustrate the gravity of the situation whilst also identifying further causes of increased incarceration rates.

3.5 The link between driving offences and incarceration rates of Aboriginal and Torres Strait Islander peoples has long been established in the literature and supported by statistics.[[18]](#footnote-18) As Edmonston et al note, in 2000 the incarceration rates of Aboriginal and Torres Strait Islander peoples in Queensland were ‘nearly 12 times that of the non-Indigenous rate’,[[19]](#footnote-19) with the ‘index offence’[[20]](#footnote-20) being unlicensed driving or drink driving.[[21]](#footnote-21) These figures demonstrated that in Queensland, police were ‘proceeding against alleged Indigenous offenders at a rate of 10 858 per 100 000.’[[22]](#footnote-22) However, it should be noted that this figure ‘excludes cases where police proceeded by way of summons or penalty/infringement notice as this proceed often does not require self-identification of Indigenous status.’[[23]](#footnote-23)

3.6 The incidence of driving offences among Aboriginal and Torres Strait Islander peoples, especially from rural and remote areas, was examined further by the ‘Annual Statistical Review 2015/2016’ conducted by the Queensland Police Service.[[24]](#footnote-24) This data was classified according to Aboriginal and Torres Strait Islander offenders and Non-Aboriginal and Torres Strait Islander offenders, in addition to the type of action and age (whether Juvenile or Adult). The range of offences listed included those of relevance to our area of focus. For example, the figures show that 885 juveniles and 820 adult Aboriginal and Torres Strait Islander offenders were arrested for unlawful use of a motor vehicle.[[25]](#footnote-25) Additionally, 41 juveniles and 869 adult Aboriginal and Torres Strait Islander offenders were arrested for traffic and related offences.[[26]](#footnote-26)

3.7 Overall, the literature and statistics show us that driving offences are one of the key drivers for Aboriginal and Torres Strait peoples’ contact with the criminal justice system, particularly for driving unlicensed and driving while disqualified or suspended. These findings clearly illustrate Aboriginal and Torres Strait Islander peoples face significant barriers in relation to licence participation and the current operation of Queensland’s traffic, transport, and driving laws. This link will be explored further below.

## 4. Why are Driving Offences Causing High Incarceration Rates?

4.1 Driving offences have been identified as a key contributor towards high incarceration rates among the Aboriginal and Torres Strait Islander population for a range of reasons. According to the Centre for Accident Research and Road Safety — Queensland (‘CARRS-Q’), these include ‘alcohol impairment and misuse, cultural factors, risky pedestrian behaviour, non-wearing of seat belts or helmets, overcrowding and illegal seating positions in vehicles and non-compliance with road laws and unlicensed driving,’[[27]](#footnote-27) to mention a few. Of particular importance in relation to our submission, is the failure to adhere to road laws and unlicensed driving. Statistics from 2016 in relation to Queensland show that ‘in ‘major cities’, ‘inner regional’ and ‘outer regional’ areas, 23.6 per cent of Indigenous vehicle controllers involved in all injury crashes were unlicensed, compared to 3.2 per cent of non-Indigenous vehicle controllers.’[[28]](#footnote-28) Further, when considering ‘‘remote’ and ‘very remote’ areas, this increased to 38.5 per cent and 4.6 per cent respectively.’[[29]](#footnote-29) The data obtained by CARRS-Q also found that within ‘predominantly Indigenous local government areas… less than 40%’ of people have valid driving licences.[[30]](#footnote-30) This is relatively low and demonstrates a stark comparison to those who have valid licences within non-Aboriginal and Torres Strait Islander local government areas (90 per cent).[[31]](#footnote-31)

4.2 Therefore, as illustrated by these statistics, Aboriginal and Torres Strait Islander peoples are underrepresented in driver licence ownership, overrepresented in road crash data, and overrepresented in prisoner incarceration rates.[[32]](#footnote-32) Clearly, existing laws and policies are failing Aboriginal and Torres Strait Islander peoples. In the State Coroner’s Inquest into Stanley Lord’s death, they found that the Habitual Offender provisions of the *Road Transport (General) Act 2005* (NSW) had resulted in ever-lengthening periods of driving disqualification that led to Lord’s incarceration.[[33]](#footnote-33) Licence disqualification has ripple-on effects for vulnerable families, who have reduced options (if any) for transport, and subsequently limited access to essential services and employment.[[34]](#footnote-34) Cumulative disqualification periods results in offenders never, reasonably, being able to foresee a time when they can drive again. When transport is required as a necessity (as it often is in remote communities), people are inclined to take risks.[[35]](#footnote-35)

4.3 Identifying key contributors would not be complete without reference to another significant factor: fine defaults. Although there is an absence of statistics for Queensland, those from New South Wales found that ‘40% of the Aboriginal Community have outstanding debts with the State Debt Recovery office.’[[36]](#footnote-36) This position was elaborated on by the Australian Journal of Public Administration.[[37]](#footnote-37) Their studies concluded that the existing system in relation to the collection of fines has resulted in ‘high default rates’ and has decreased the ‘usefulness of fines as a sanction.’[[38]](#footnote-38) Further, the system has been deemed to be ‘unjust, unfair to poor offenders, dangerous to vulnerable offenders, expensive, administratively inconvenient and disproportionate in its effect on indigenous offenders.’[[39]](#footnote-39) In relation to traffic offences, as of June 2009 specifically: ‘5.5% of Indigenous Prisoners or 408 people, had as their most serious offence “traffic and vehicle regulatory offences” compared with 4.6% of non-Indigenous prisoners’.

4.4 As outlined by the Australian Institute of Criminology and their research conducted on Aboriginal and Torres Strait Islander Justice, while the:

fines enforcement system, on its surface, treats Aboriginal and Torres Strait Islander peoples and non-Aboriginal and Torres Strait Islander peoples equally … the disadvantage experienced by many Aboriginal and Torres Strait Islander peoples results in the fines enforcement system having disproportionate impacts upon them*.*[[40]](#footnote-40)

4.5 The disadvantage suffered by Aboriginal and Torres Strait Islander offenders in

relation to fine defaults relates back to some of the very barriers outlined above. For

example:

relative disadvantage (e.g. inability to pay) experienced by Aboriginal and Torres Strait Islander peoples, combined with cultural difference and language barriers, disproportionately, increases the likelihood of fine default by Aboriginal and Torres Strait Islander defendants, which in turn, culminates in a series of events that eventually lead to imprisonment*.*[[41]](#footnote-41)

## 5. Availability of Limited Statistics in Queensland

5.1 As Professor Mark Finnane questioned, ‘why is so much money spent on intervention programs that don’t work and are rarely evaluated’?[[42]](#footnote-42) This reflects the existing culture of resistance to transparency in Queensland as highlighted in the ‘2017 Criminal justice system — reliability and integration of data’ Report.[[43]](#footnote-43) Crime data in particular was perceived as both inaccurate and unreliable. Consequently, ‘reported crime statistics are questionable at best and unreliable at worst, and should be treated with caution*.’*[[44]](#footnote-44)

5.2 Issues were also identified in relation to senior managers in the police force and the perceived pressure upon officers to reduce crime. This leads to data ultimately being manipulated to meet these goals.[[45]](#footnote-45) Criticisms were outright denied in a statement made by Queensland Police Service commissioner Ian Stewart. He stated in defence that: ‘to imply that officers are deliberately and corruptly manipulating crime data to suit some officially sanctioned agenda is simply not correct.’[[46]](#footnote-46) He further argued these issues were not systemic, despite 22 per cent of all crime data for Queensland being identified as potentially faulty.[[47]](#footnote-47)

5.3 The Queensland Audit made the following recommendations to the Queensland Police Service, which includes ‘improvement of offence standards and classification guidelines,[[48]](#footnote-48) in addition to the need for their independent quality assurance processes for data capture, classification, amending, updating, and reporting of crime data to be strengthened’.[[49]](#footnote-49) The Audit also made recommendations directed at the Queensland Police Service and the Public Safety Business Agency, such as ‘ensuring there are appropriate guidelines, policy, and training for reporting, classifying, and managing crime statistics,as well as including details of what has been included and excluded from reported crime statistics’.[[50]](#footnote-50)

5.4 Taking the results of the Audit report into account, the Opposition Police spokesman Tim Mander raised concerns in relation to existing methods of data collection. Mander noted the need for ‘crime rates to reduce and community safety to improve’ but went on to say that ‘fudging the figures isn’t the answer.’[[51]](#footnote-51) However, it is not only the inaccuracy of data creating problems, but also the lack of data altogether regarding the Aboriginal and Torres Strait Islander sector in Queensland.

5.5 We highlight the need for Queensland to adopt a more comprehensive approach to data collection. More specifically, the current absence of statistics relating to the Aboriginal and Torres Strait Islander community must be addressed and made publically available.

5.6 The following section will examine some of the specific barriers faced by Aboriginal and Torres Strait Islander peoples in relation to licence participation, namely:

* Learner licence driving schemes;
* Rural to urban driving realities;
* Culturally appropriate educational resources and licensing systems; and
* Perceptions of obtaining and maintaining a driver licence among Aboriginal and Torres Strait Islander peoples.

## 6. Specific Barriers to Licensing

As noted by Cullen et al, there is limited empirical research that investigates the specific barriers to licensing that are impeding Aboriginal and Torres Strait Islander peoples from accessing a driver licence.[[52]](#footnote-52) The following sections will introduce some of the issues that have been identified as warranting greater attention across Government and community sectors.

### 6.1 Learner Licence Driving Schemes

6.1.1 Statistics show that Aboriginal and Torres Strait Islander peoples are underrepresented in driver licence ownership compared to the rest of the population.[[53]](#footnote-53) As Cullen et al state, there is increasing recognition that Aboriginal and Torres Strait Islander peoples experience challenges and adversity in obtaining a licence, particularly due to inadequate learner driving resources available in rural and remote areas.[[54]](#footnote-54) As noted above, less than 40 per cent of people living in predominantly Aboriginal and Torres Strait Islander local government areas have a valid driver licence, compared to 90 per cent in non-Aboriginal and Torres Strait Islander peoples local government areas,[[55]](#footnote-55) indicating our licensing system is not working effectively and equitably across Australia. These statistics are quite alarming given that public transport in rural areas is particularly scarce.

6.1.2 Across Australia, new drivers are required to progress through a Graduated Driver Licensing (‘GDL’) Scheme. As noted on the Queensland *Young Drivers* web page, the objective behind Queensland’s GDL is to reduce fatalities on the road, particularly among young drivers. The rules are grounded in research that suggests young drivers and riders (aged 16 to 24) are 60 per cent more likely to be involved in a serious crash than licensed mature adult drivers and riders (aged 25 to 29).[[56]](#footnote-56) Although these schemes vary across jurisdictions, the GDL typically involves: (1) a computer based test to obtain a Learner driver licence; (2) a minimum time period on a Learner licence; (3) minimum number of supervised driving hours to be eligible to apply for a provisional licence test; and (4) passing a driving test to obtain a provisional driver licence and drive unsupervised.[[57]](#footnote-57)

6.1.3 In Queensland specifically, the minimum learning age is 16 and learner drivers under 25 must accumulate 100 hours of supervised practice with licensed drivers before applying for their provisional test.[[58]](#footnote-58) These same requirements apply across metropolitan and remote areas, despite the differences in traffic and driving realities. Every hour of driving school lessons becomes equivalent to three hours, but the remaining 70 hours must be by supervised driving. In most remote communities, no driving schools actually exist, and research shows that Aboriginal and Torres Strait Islander youth are less likely to have qualified adult licensed drivers to supervise them, or access to roadworthy vehicles.[[59]](#footnote-59) The Department of Transport and Main Roads may grant an exemption on compassionate grounds, but the learner licence must be kept for two years (instead of one) and you are required to pay a fee.[[60]](#footnote-60) However, this exemption barely assists where there are no cars to use, supervisors to teach you, and petrol is too expensive, which is often the case in remote and disadvantaged communities. For these reasons, many Aboriginal and Torres Strait Islander peoples believe obtaining a learner licence is simply too onerous.

6.1.4 First, therefore, to obtain a driver licence, Aboriginal and Torres Strait Islander youth have to pass a test in English that is formulated on intimate knowledge and experience of urban road rules they often have had no contact with. Second, they need to log 100 supervised hours — which is an onerous commitment even when you have multiple cars and supervisors.[[61]](#footnote-61)

### 6.2 Rural to Urban Driving Realities

We’ve lived out bush for so long and we come in [to the city] now and then, and that’s when he gets caught. We don’t know much about the city life properly.

 — Maxine Wallace (Marshall Wallace’s wife)[[62]](#footnote-62)

6.2.1 As Maxine Wallace shows, people living in rural and remote areas are not often aware of how strictly traffic offences operate when they travel to metropolitan areas, and are often targeted by police when they do. For many Aboriginal and Torres Strait Islander peoples living in remote communities, the roads they are familiar with lack the footpaths, gutters, lines and markers, freeways, streetlights, and traffic that define urban streets and traffic.[[63]](#footnote-63) As Anthony and Blatt acknowledge, police are responsible for conducting licence tests and processing licence renewals and should be well aware of the disconnect between these realities and expectations. Yet, a zero tolerance approach is embraced in most instances.[[64]](#footnote-64)

6.2.3 For the reasons outlined in the previous section, the majority of Aboriginal and Torres Strait Islander peoples charged with driving offences have never actually held a driver’s licence.[[65]](#footnote-65) It is clear that the *Transport Operations (Road Use Management) Act 1995* (Qld) (‘Queensland Transport Act’) itself, in addition to the Graduated Licensing Scheme, were initially designed for urban areas, and do not reflect the lifestyles of people living in rural and remote communities. The strict penalties prescribed by the Queensland Transport Act in relation to unlicensed driving illustrates the disconnect between rural and urban realities.[[66]](#footnote-66)

6.2.4 In all jurisdictions, it is currently unlawful to drive without a licence. Under the Queensland Transport Act, the penalty for a first offence driving unlicensed does not include mandatory disqualification.[[67]](#footnote-67) If repeated within five years, it becomes mandatory for the court to disqualify an unlicensed driver for one to six months.[[68]](#footnote-68) If they are caught driving unlicensed again within this prescribed disqualification period, a mandatory disqualification period of two to five years becomes applicable in addition to a maximum penalty of 60 penalty units or 18 months imprisonment.[[69]](#footnote-69) Due to the lack of alternatives, we have seen many Aboriginal and Torres Strait Islander offenders with large fines opt to go to prison because they have no chance of paying them.[[70]](#footnote-70)

6.2.5 We recognise the importance of road safety and reducing road fatalities but, as posited by Anthony and Blagg, the issue of road safety should not be divorced from its social and political context, particularly considering the wide disparities between remote Australia and metropolitan areas. As Anthony and Blagg posit, there have been ‘profound pressures exerted by the colonial state to normalise the outback’, which were part of broader strategies to ‘homogenise’ and ‘standardise’ remote Australia, bringing it into the fold of the nation state.[[71]](#footnote-71) If we seek to address the problem of driving offences among Aboriginal and Torres Strait Islander peoples, it is important to consider how customary law and culture can become interwoven in policing, driver licensing, and registration facilities — and form part of the solution.

#### 6.3 Recommendation I: Improving Queensland’s Remote Indigenous Drivers Licensing Unit

6.3.1 As discussed above, many Aboriginal and Torres Strait Islander peoples are serving imprisonment sentences for driving offences or fine default arising from driving offences that were imposed mandatorily under the Qld Transport Act.[[72]](#footnote-72) These mandatory penalties should be reformed to reflect the gravity and circumstances surrounding the specific offence(s) and offender. We will discuss existing sentencing procedures and sentencing alternatives in paragraphs 7.1 to 8 of our submission.

6.3.2 In the mid-2000s, Queensland established their Indigenous Drivers Licensing Unit (the ‘Unit’), which aims to reduce unlicensed driving in remote and Aboriginal and Torres Strait Islander communities in Far North Queensland.[[73]](#footnote-73) Their outreach includes communities in Cape York, the Gulf, and the Torres Strait Islands, where they provide learner driving licence testing, practical driver testing for cars and trucks, provide driver licence replacements and renewals, and other mainstream road safety services. Part of their aim is to reduce incarceration rates for licensing offences, as well as reducing road trauma and providing greater access to employment and other essential needs.[[74]](#footnote-74)

6.3.3 At present, there is a lack of publically-available information evaluating the Unit, which indicates the need to conduct robust evaluations and collect more data in this area. Notwithstanding, there are common pitfalls among state-funded driving units that must be remedied with increased designation of resources. The Queensland Government must thoroughly invest in the Unit to make it an effective targeted program to boost driver licence levels among the Aboriginal and Torres Strait Islander population and reduce incarceration rates arising from unlicensed driving offences. Identified pitfalls include: (1) the difficulty in gaining and maintaining funding with end-to-end licensing programs that are costing $2500 to $3000 per completion;[[75]](#footnote-75) (2) limited availability across communities and short time periods;[[76]](#footnote-76) (3) constraints in insurance coverage and volunteer driver reimbursements;[[77]](#footnote-77) (4) lack of program ownership;[[78]](#footnote-78) (5) uncertain funding;[[79]](#footnote-79) and (6) the lack of evaluation and data collection initiatives assessing the success (or otherwise) of these programs.[[80]](#footnote-80)

6.3.4 Despite the absence of funding data, the expenses for the Unit would be on a much lesser scale than investments the Queensland Government have made to accommodate increasing prison populations, including building new infrastructure. We discuss Justice Reinvestment and the Government’s sole focus on “law and order” solutions in paragraphs 7.11 to 8 of our submission. We emphasise that the Unit must be regularly evaluated to assure it is working effectively and meeting its objectives.

### 6.4 Culturally Appropriate Educational Resources and Licensing Systems

6.4.1 Research conducted by Anthony and Blatt in the NT found that many well-established Aboriginal and Torres Strait Islander men’s and women’s organisations were translating Government policies into community programs using local Aboriginal and Torres Strait Islander customary law and culture to explain them.[[81]](#footnote-81) Notwithstanding, they found the NT Government prefers more draconian methods based on the criminal law, with Government workers finding some Government agencies actually bypassing Aboriginal and Torres Strait Islander organisations that are doing important work.[[82]](#footnote-82) In the remote Central Queensland community Woorabinda, for example, initiatives such as ‘Youth Drive Alive’, which are engaging Year 10 and 11 students on road safety and thinking about how their friends drive, are run by local Aboriginal and Torres Strait Islander community workers.[[83]](#footnote-83)

6.4.2 Although the Queensland Indigenous Driver Licensing Project seeks to boost numbers in driver licences, there is limited research available to show whether they are effectively engaging local communities in tailoring these policies and regulations to Aboriginal and Torres Strait Islander populations. Research carried out by the Road & Traffic Authority (‘RTA’) (former — now Roads and Maritime Service) in consultation with Aboriginal people in 14 urban, regional, and remote locations in NSW drew a number of telling conclusions indicating widespread perceptions of learner licence testing being too text and information intensive, with respondents noting the Handbook and pamphlets were ‘too wordy’, too much ‘hard work’, and expressing a preference for an oral and/or personal presentation of the Road User’s Handbook.[[84]](#footnote-84) Respondents noted:

The young people have trouble getting their licence. They have trouble reading and understanding the questions.

Male, 35 years, Regional

I’d get one [a licence] but I can’t read. I can drive good but that test is shit.

Male, 17 years, Urban

... but a lot of this mob here can’t read and write.

Male, 52 years, Remote[[85]](#footnote-85)

6.4.3 According to the RTA’s findings, most communities were looking for some kind of help to assist them in obtaining their driver licence. In particular, services that could assist in guiding licence-seekers through the Road User’s Handbook in a visual and oral sense would be beneficial and help overcome any literary difficulties. Many also suggested in the study that Aboriginal and Torres Strait Islander peoples, and particularly young males, were more likely to learn in an interactive group environment, where they could help and encourage one another, rather than read the Handbook alone.[[86]](#footnote-86)

6.4.4 The RTA’s study also found respondents from smaller communities frequently mentioned the ‘shame’ of failing an RTA test as a barrier to obtaining their driver licence, particularly for people with literacy problems because everyone one seems to know ‘everyone else’s business’.[[87]](#footnote-87) The study found the RTA registry office was often associated with perceptions of being too open and public, and in smaller communities were often located at, or combined with, other services that are viewed quite negatively with the Aboriginal community — for example, banks, police offices. These led to a reluctance among respondents to visit an RTA Registry office.[[88]](#footnote-88)

6.4.5 The RTA found some Aboriginal and Torres Strait Islander peoples had made requests for greater assistance within their registries, particularly assistance from another Aboriginal and Torres Strait Islander person: ‘Having a black fella comin’ out would make it a lot easier and that and they explain it good’.[[89]](#footnote-89) In smaller communities, a number of respondents noted they had gotten to know some of their RTA staff individually and this alleviated some of the discomfort many felt when inside the Registry. However, a few respondents mentioned bad experiences with RTA staff, with one young (urban) male noting that after failing his Learner’s test, the staff member said to him ‘well, that was a waste of time, wasn’t it?’ He then replied aggressively and was asked to leave the Motor Registry.[[90]](#footnote-90)

### 6.5 Perceptions of Obtaining and Maintaining a Driver Licence

#### 6.5.1 Vehicle Registration

The RTA study identified financial difficulties as a key barrier to registering their vehicle, which affects their ability to afford repairs to their vehicles, registration, and insurance (both Compulsory Third Party (‘CTP’) and car insurance). Many respondents observed difficulties affording registration each year due to the large lump sum required to cover repair costs to pass inspection, registration of the vehicle, and CTP insurance.[[91]](#footnote-91)

#### 6.5.2 Identity Documents

According to Cullen et al, requisite identity documents are also precluding vulnerable people from navigating the licensing and justice system.[[92]](#footnote-92) Aboriginal and Torres Strait Islander peoples can face specific barriers when accessing required documents in light of lower birth registration rates, owning documents with multiple names and different spellings, literacy required to complete forms, limited access to service providers, costs associated with applying for identification documents, and where people have been displaced from their communities. In most of the latter cases, particularly those forming part of the Stolen Generations, an Aboriginal and Torres Strait Islander person’s inability to know their exact dates of birth can make applying for legal documentation very difficult.[[93]](#footnote-93) These barriers to obtaining identity documents are quite significant - not only are they essential to attaining a driver licence, but also to accessing employment, education, and housing.[[94]](#footnote-94)

#### 6.5.3 Lack of Understanding about Licences

Anthony and Blatt’s interviews with Warlpiri peoples in Lajamanu and Tuendumu in the NT shows limited appreciation as to why a licence is required beyond its legal requirement. Their research shows a lack of deeper recognition of the safety implications of learning to drive and road rules, including the need for road safety precautions and how reckless driving can influence other drivers and pedestrians on the road.[[95]](#footnote-95)

Since road injuries in most remote communities are very low, there is a lack of inherent understanding of the need to adhere to road rules while in their communities or learn the required rules to obtain a licence. As mentioned above, the road rules, signs and traffic conditions that are examined in licence tests barely exist in most rural communities, leading to most people regarding a licence as a legal necessity, rather than a document that shows evidence of your relevant capabilities and skills in driving.[[96]](#footnote-96)

#### 6.5.4 Lack of Public Transport

More than 70 per cent of Aboriginal and Torres Strait Islander peoples living in remote locations have nopublic transport,[[97]](#footnote-97) and more than 1 in 10 report not being able to, or often having difficulty, getting where they need to be.[[98]](#footnote-98) This lack of public transport in remote regions is particularly significant as there are often no alternatives to unlicensed driving, contributing to the perception of driving unlicensed as a normal and culturally acceptable ‘necessity’.[[99]](#footnote-99) According to Helps, Moodie, and Warman, Aboriginal and Torres Strait Islander peoples also reported some shame related to using public transport, particularly due to incidents of racial abuse.[[100]](#footnote-100)

#### 6.6 Recommendations II-VII: Improving Driver Licence Participation

#### 6.6.1 Recommendation II

Given the financial difficulties identified by respondents in paragraphs 6.1.3 and 6.5.1 above, alternative cost arrangements and deadlines for annual vehicle registration should be made available where required. Through initiatives such as the Unit, Government concession schemes that are currently operating — eg, concessional registration — should be brought to the awareness of participants in the Unit.[[101]](#footnote-101) This will reduce the financial strain of an annual lump sum payment.

#### 6.6.2 Recommendation III

Adding from above, the Unit (with adequate funding from the Queensland Government) should offer assistance in serving and maintaining vehicles. This would keep the financial costs arising from roadworthy inspections lower than otherwise.

#### 6.6.3 Recommendation IV

As identity documents are a strict requirement for obtaining a driver licence, the Unit should work in collaboration with family services to raise greater awareness among the Aboriginal and Torres Strait Islander community about the importance of birth certificate registration, and should alleviate charges of registration and obtaining other identity documents where possible. Applying for appropriate identification documents should be more accessible, and generally easier, for Aboriginal and Torres Strait Islander peoples. This recommendation aligns with the United Nations Committee on the Rights of the Child (‘CRC’)’s statement concerning Australia’s implementation of the *United Nations Convention on the Rights of the Child* in August 2012.[[102]](#footnote-102)

#### 6.6.4 Recommendation V

The Unit needs to ensure their practices are culturally appropriate (including using different methods of teaching — eg, oral and personal presentations) and service delivery is coordinated by, and alongside, Aboriginal and Torres Strait Islander communities and organisations. The Unit needs to take a proactive role in teaching Aboriginal and Torres Strait Islander youth about the dangers of driving recklessly and without regard to road rules, and particularly why obtaining a driver licence lawfully is essential, in line with the objectives of the Unit.

The next section will focus specifically on cultural and language barriers within Queensland courts, and alternative approaches to sentencing, including therapeutic jurisprudence and Justice Reinvestment.

## 7. Cultural and Language Barriers – Queensland Courts

### 7.1 Sentencing

7.1.1. The justice system, particularly the lack of diversionary options or programs for offenders, has been identified as failing to accommodate the histories of dispossession, intergenerational trauma, and cultural and linguistic diversities of Aboriginal and Torres Strait Islander communities.[[103]](#footnote-103)

7.1.2 Court sentencing procedures remain focused on achieving individualised justice. Despite the active and systemic efforts of policies and practices associated with the Stolen Generations to forcibly remove children, appropriate land, and suppress Aboriginal culture, including language and rituals, being established in national reports and literature, their impact has rarely been considered when determining the sentences of Aboriginal and Torres Strait Islander offenders from the Stolen Generation.[[104]](#footnote-104) In the recent High Court cases *Bugmy v The Queen*[[105]](#footnote-105)and *Munda v Western Australia,*[[106]](#footnote-106) the High Court considered whether collective experiences and intergenerational trauma could factor into the sentencing process, but the High Court refused to venture down this path. However, the door remains open as to *how* specific historical events, such as the Stolen Generation, and continued forced removal of Aboriginal children, should be treated in the sentencing process.[[107]](#footnote-107)

### 7.2 The current law

7.2.1 After *Bugmy*[[108]](#footnote-108)and *Munda*,[[109]](#footnote-109) it is clear that an offender’s Aboriginality, even if a member of the Stolen Generations, cannot *alone* be a reason for mitigating an offender’s sentence, but can be considered when an offender’s experiences of disadvantage can be linked to their Aboriginality and their offending — showing how their ‘deprivation bears on the appropriate sentence to be given.’[[110]](#footnote-110) If the Court is not presented with this evidence, they cannot consider Aboriginality when sentencing offenders.

7.2.2 As noted by Holdom, in *R v Fuller-Cust*,[[111]](#footnote-111) Eames J was the only judge (in dissent) to consider the effects of family separation and forced removal of children in sentencing. As he noted, the fact of an offender’s Aboriginality is relevant in understanding the offending as well as addressing the current issue. As he argues, the criminal law’s fixation on individual responsibility, or individualised justice, is problematic for Aboriginal and Torres Strait Islander offenders because it downplays historical events and individual circumstances that stem from certain policies and histories of dispossession. In essence, our criminal legal system’s fixation with individualised justice ignores the *social context* of the individual, which is a salient barrier to recognition of the compounding oppressions of Aboriginal and Torres Strait Islander peoples’ disadvantage.[[112]](#footnote-112)

7.2.3 Holdom argues that a broader range of culturally appropriate sanctions should be made available to Queensland judges in order to effectively address this limited scope of thought.[[113]](#footnote-113) The re-establishment of the Murri Court in April 2016 goes some way towards meeting this aim, as alternatives to custodial sentences now exist, but alarmingly high rates of Aboriginal and Torres Strait Islander incarceration throughout Queensland indicate the adverse effects of mainstream sentencing processes. As noted in the Canadian example of *Gladue*,[[114]](#footnote-114) the introduction of legislative amendments that permitted Canadian courts to factor in the collective and intergenerational experiences of Aboriginal and Torres Strait Islander offenders has resulted in disadvantage being taken into account in the sentencing process.[[115]](#footnote-115) This remains a hurdle to be overcome in Australia.

### 7.3 Language barriers

7.3.1 Qualitative research carried out by Bond, Jeffries, and Loban based on research collected from actors within the court process,[[116]](#footnote-116) found that language and communication difficulties were a common problem for Aboriginal and Torres Strait Islander offenders in the sentencing process. Community justice group participants expressed their grave concern that interpreters were not being routinely used by Aboriginal and Torres Strait Islander offenders, and in many instances Aboriginal and Torres Strait Islander defendants were failing to fully comprehend the issued sentence and accompanying legal obligations.[[117]](#footnote-117)

7.3.2 A Report compiled by the North Australian Aboriginal Justice Agency (‘NAAJA’) also notes how Aboriginal and Torres Strait Islander peoples who have been fined often are not understanding court proceedings and leave without realising they have been fined, or knowing what their options are for paying a fine.[[118]](#footnote-118)

#### 7.4 Recommendation VII: Greater use of interpreters in courts

7.4.1 NAAJA calls for greater use of interpreters at court to explain outcomes to offenders.[[119]](#footnote-119) In certain locations within jurisdictions such as Western Australia, Northern Territory, Victoria, and New South Wales, they have noted that Aboriginal liaison officers have been effective in assisting and supporting the fine defaulter while identifying ways in which they can be accommodated by the system, including arranging alternative timelines for payment, converting the fine to community service, or making applications to have the fine remitted.[[120]](#footnote-120) Similar initiatives do not exist in Queensland.

7.4.2 In Bond, Jeffries, and Loban’s qualitative research, they noted how community justice group participants noted how individual magistrates could make a real difference where court interpreters were not available:

A ‘good’ magistrate will make sure the person understands what occurred in court.[[121]](#footnote-121)

7.4.3 The community justice group participants argued that further training is required to assist judicial officers to, first, gain a more comprehensive understanding of issues around language, communication, and culture; and, second, identify better when a court interpreter was needed. However, judicial participants highlighted how access to, and availability of court interpreters, was problematic — rather than difficulties to identify *when* one was needed. It is imperative that funding be allocated towards improving the availability of interpreter services in Queensland courts, particularly in remote communities throughout the Cape and Gulf.[[122]](#footnote-122)

#### 7.5 Recommendation VIII: Sentencing procedure — towards *Gladue*

7.5.1 In the Canadian Supreme Court case of *Gladue*,[[123]](#footnote-123) the Court highlighted the necessity of taking judicial notice of systemic factors that surround the Aboriginal population in Canada. They argued that having regard to the collective experiences of Aboriginal people allows courts to treat them fairly, having regard to their background(s) of dispossession and deprivation. This was an approach rejected by the Australian High Court — which was highly disappointing — on grounds that it would ‘offend’ expectations of individualised justice.[[124]](#footnote-124) As Greycar notes, Canada adopted an approach in the case of *RDS* that considers ‘true impartiality’ as based on a ‘reasonable person’ — an informed member of the community that supports fundamental principles of equality and is assumed to be aware of the histories of discrimination faced by marginalised groups.[[125]](#footnote-125)

7.5.2 As Justice Mason, President of the NSW Court of Appeal stated (in response to the judgement in *RDS*):

Judges should not aspire to neutrality. When Judges have the opportunity to recognise inequalities in society, and then to make those inequalities legally relevant to the disputes before them in order to achieve a just result, then they should doso.[[126]](#footnote-126)

7.5.3 However, this approach has not been adopted in Australia. We believe there is a lesson to be learned from the Canadian example. We support the recommendations of Holdom in her article, particularly:

1. Queensland courts needing to consider and recognise the background of Aboriginal and Torres Strait Islander peoples and their disadvantage resulting from colonisation in the sentencing process. While the sentence can remain individualised, the individual offender should be considered in the context of their disadvantage.[[127]](#footnote-127)
2. A provision should be inserted into the Queensland *Penalties and Sentencing Act 1992* (Qld) that enables Queensland judges to give special consideration to issues surrounding Aboriginality.[[128]](#footnote-128)

7.5.4 If implemented, these recommendations would acknowledge the widespread and systemic discrimination against Aboriginal and Torres Strait Islander peoples that continues to exist in Australia and perpetuates increasing rates of incarceration. They would go towards replacing the “formal equality” discourse that currently prevails in Australian courts with recognition of the adverse impacts and disadvantages arising from colonialism of Aboriginal and Torres Strait Islander peoples.

### 7.6 Therapeutic Jurisprudence in court processes & sentencing

7.6.1 Emerging legal scholarship in relation to therapeutic jurisprudence in the sentencing of Aboriginal and Torres Strait Islander offenders provides an alternative to sentencing by recognising the ability of the law to act as a ‘therapeutic or antitherapeutic agent.’[[129]](#footnote-129) More specifically, the literature recognises that ‘legal rules, legal procedures and the role of legal actors constitute social forces that may impact on the psychological well-being of those caught up by it.’[[130]](#footnote-130) Various jurisdictions in Australia, including South Australia, Victoria and Western Australia, have started to adopt this line of thought by attempting to transform court culture and the way Aboriginal and Torres Strait Islander offenders perceive and interact with the system. Some of these changes include integrating Elders from within the relevant community into the court process as judicial officers, encouraging an open dialogue between the Elder and offender, and the Magistrate incorporating the Elder’s commentary into the judgment. This enables the relevant court to be given a deeper insight into and understanding of the circumstances surrounding both the offence and offender. The steps already taken in these jurisdictions have been met with a positive response. An analysis conducted on emerging trends in courts of summary jurisdiction cited the ability of these methods to reinvigorate ‘respect for the process.’[[131]](#footnote-131) Therapeutic jurisprudence also refers back to the role of special individualised courts, eg, the Murri Court, which strives to utilise:

therapeutic court processes, including the judicial case management of participants by a court-based team and through a therapeutic interaction between the bench and the participant in order to promote participant wellbeing.[[132]](#footnote-132)

7.6.2 Whilst there have been positive developments in relation to individualised courts such as Queensland’s Murri Courts, they are not yet being used to their full potential. A project conducted by the Indigenous Justice Clearinghouse found the ‘number of offenders sentenced in these courts in most jurisdictions is still quite low compared with Aboriginal and Torres Strait Islander offenders processed via mainstream courts.’[[133]](#footnote-133) This, along with a number of other issues which arise regarding the Murri Court, will be addressed in the following section.

### 7.7 Murri Court

7.7.1 In 2002, the Murri Court was first introduced in Brisbane, Queensland as a way to address Aboriginal and Torres Strait Islander peoples’ over-representation in the criminal justice system from high reoffending rates, provide a more culturally-appropriate process, and to engage the community in a holistic approach to sentencing.[[134]](#footnote-134) The Murri Court sought to achieve this by being more informal, less intimidating, and delivering sentences that emphasise rehabilitation where possible.[[135]](#footnote-135) After their implementation in select communities across Queensland, results showed fewer offenders receiving custodial sentences, and reoffending rates and seriousness of offences declining.[[136]](#footnote-136) In 2006, it was stated by Annette Hennessy, the Regional Coordinating Magistrate of the Central Region of Queensland: ‘four out of every five offenders who have appeared before the Murri Court have not re-offended’.[[137]](#footnote-137)

7.7.2 Commentators have noted that Murri Courts have been effective as Aboriginal and Torres Strait Islander offenders were less likely to breach community-based orders due to the increased support offered post-sentence.[[138]](#footnote-138) In this way, Murri Courts have been successful in meeting their stated goal of ‘reducing the frequency and seriousness of any contact that Murri Court defendants might have with the criminal justice system’.[[139]](#footnote-139) Furthermore, another identified benefit is their less informal and less intimidating nature that allows Aboriginal and Torres Strait Islander offenders to become more engaged with legal proceedings, consequently improving their confidence in, and knowledge of, the court process.[[140]](#footnote-140)

7.7.3 As noted in the above section on therapeutic jurisprudence, a successful strategy adopted by the Murri Courts has been the presence of elders and other respected Aboriginal and Torres Strait Islander leaders. In allowing them to inform the Magistrate on cultural issues and background information of the offender, this provides a more holistic sentencing procedure.[[141]](#footnote-141) This goes towards the Murri Court goal of ‘encouraging magistrates to consider at sentence how a defendant’s cultural and personal circumstances contribute to their offending’.[[142]](#footnote-142) This also increases respect for the sentencing process. As stated by a defendant in the Murri Court:

[it] means a whole lot more to be given directions about your future life path from a person who is an elder of your community and has a better understanding of the shoes us blackfellas walk in.[[143]](#footnote-143)

7.7.4 Furthermore, the Murri Courts allow for greater community participation in the process in the form of ‘encouraging the offender to attend and engage with support services while on bail’.[[144]](#footnote-144) These practices have been shown to improve ‘physical, psychological, and quality of life of offenders in general’.[[145]](#footnote-145)

7.7.5 Notwithstanding these positives, Murri Courts were ceased in 2012 by then Attorney-General and Minister for Justice, Jarrod Bleijie, for believing it did not deliver “consistent” results.[[146]](#footnote-146) When this announcement was made, the founding member of the Murri Court in Brisbane, Uncle Albert Holt, stated:

The State Government will need to start building more prisons … since the Government had opened the floodgates to state jails, with Aboriginal children already comprising around 70% of the prison population in Qld, Western Australia and the Northern Territory.[[147]](#footnote-147)

7.7.6 It would appear Mr Holt’s prediction proved true. Although not confined to Queensland specifically, as outlined by the Steering Committee for the Review of Government Service Provision in their ‘Overcoming Indigenous Disadvantage’ Report, between 2000 to 2013, Indigenous Australians’ imprisonment rates rose to 13 times higher than non-Indigenous adults and increased by 57.4 per cent throughout Australia.[[148]](#footnote-148) Furthermore, it was highlighted in the report ‘all states and territories recorded increased rates of imprisonment for Aboriginal and Torres Strait Islander adults between 2000 and 2013’. [[149]](#footnote-149)

7.7.7 In light of these dire imprisonment rates, and calls from key sectors of the community to address the issue, the Murri Courts were re-introduced across Queensland in 2016.[[150]](#footnote-150) The Queensland Law Society have stated the move represents ‘a positive step toward reducing the appalling rate of Aboriginal and Torres Strait Islander imprisonment across the state’.[[151]](#footnote-151)

#### 7.8 Recommendation X: Continued Support for Murri Courts throughout Queensland

7.8.1 As shown above, the effectiveness of the Murri Courts as a culturally appropriate alternative to mainstream courts, which utilises therapeutic jurisprudence methods, is well-established as a preventative measure against reoffending and ensuing incarceration rates. We recommend that the State Government continue to fund and support the Murri Courts to allow them to achieve their stated goals and objectives.

### 7.9 Inadequate Legal Representation and Services

7.9.1 As Burns posits, cultural competency has been recognised as an essential element of legal practice in the United States, as well as professional practice in health services globally, but little has been done to promote cultural competency of legal professionals in Australia.[[152]](#footnote-152) Aboriginal and Torres Strait Islander people who have personally, or indirectly through family members, had negative experiences with the legal profession and lawyers are more inclined to distrust lawyers. We cannot ignore that Western law was used as the main tool to facilitate Aboriginal and Torres Strait Islander peoples’ oppression and dispossession throughout history, including the Stolen Generations, the 2007 NT Intervention, and more. When we consider the criminal justice system, it is important to be mindful of how these concepts were used to isolate Aboriginal and Torres Strait Islander peoples, and deprive them of their lands, languages, culture, and dignity.[[153]](#footnote-153)

7.9.2 According to Legal Aid Queensland, Aboriginal and Torres Strait Islander peoples pose a particular service challenge as a client group. They cite the primary reasons being their disadvantaged and vulnerable status across socio-economic status indicators, such as social, health, location (primarily living in rural and remote areas) and lack of contact with and understanding of the legal system.[[154]](#footnote-154)

7.9.3 The priorities of the current budget have resulted in widespread deficiencies across legal services in relation to financial assistance for those in need. This, in turn, has created a “justice gap” as current funding arrangements cannot cover all disadvantaged clients.[[155]](#footnote-155) As former Chief Justice Gleeson stated:

The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation.[[156]](#footnote-156)

7.9.4 This has had very strong repercussions on the Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (‘ATSIL’), who have been unable to obtain resources to adequately deal with the matters before them. At present, their ability to give legal representation is limited to criminal matters, and only some driving and traffic offences.[[157]](#footnote-157) In Queensland, ATSIL, through their partnership with Legal Aid Queensland (‘LAQ’), are able to provide a duty lawyer at the courts to represent those eligible for legal aid. A limitation, however, is that LAQ and ATSIL are not resourced well enough to represent those charged unless their offence is serious enough to warrant jail time.[[158]](#footnote-158) As noted above, most Aboriginal and Torres Strait Islander peoples who find themselves incarcerated on account of driving offences have accumulated multiple minor breaches, of which start with first offences. They often must be self-represented on these.

#### 7.10Recommendation IX: Increased State budget funding to ATSIL and LAQ

7.10.1 ATSIL, at present, only are able to provide legal representation on criminal matters, and traffic and driving offences that have a serious possibility of going to jail. If greater funding was allocated to ATSIL, they could increase the scope of their services to minor traffic offences as well as civil and family issues. This would enable them to play an active role in the prevention of re-offending — for example, legal representation can bring their client’s best case forward for a work licence. This has the potential to halt the pattern of re-offending with earlier intervention.

7.10.2 Deficiencies in ATSIL legal aid funding also results in legal representatives having little time with their clients.[[159]](#footnote-159) This is of no fault of the legal representatives, but rather, the case that there is ‘not enough of them’.[[160]](#footnote-160) Greater funding would enable legal aid representatives to allocate more time to attend to their clients and respective cases.

### 7.11 Prison overpopulation vs Justice Reinvestment

7.11.1 Until late 2016, Queensland was the only jurisdiction in Australia that classified 17 year olds as adult offenders.[[161]](#footnote-161) Prior to this amendment, once a young person had turned 17, they became an adult in the eyes of the criminal law and had to face the full consequences under the law, including mandatory incarceration. The legacy of this remains felt in Queensland today. Despite the fact 17-year-old offenders have been removed from adult prisons, we are still grappling with the remaining long-term psychological effects. The fact that 70 per cent of the juvenile prison population in Queensland, Western Australia, and Northern Territory comprise of Aboriginal and Torres Strait Islander youth indicate an alarming trend.[[162]](#footnote-162)

7.11.2 In Australia today, our prison population is expanding.[[163]](#footnote-163) As stated by Guthrie, Levy, and Fforde, there is a language characterised by enthusiasm and opportunity, rather than regret when Premiers unveil new prisons to facilitate this expansion. This exuberance for prison building reflects the *dominant narrative* for prison building in Australia, at least politically, to criminal justice and community safety issues.[[164]](#footnote-164) In Queensland this is particularly the case — with recent Premiers advocating for a strict law and order approach to policing.

7.11.3 The costs of imprisoning offenders are significant on an individual, maintenance, and infrastructural level. Bill Potts, the former President of the Queensland Law Society, stated that ‘the current estimated cost of incarceration in Queensland was $66 000 per prisoner each year — while the cost of keeping a person fed, clothed, with a roof over their head and a university education was about $38 000.’[[165]](#footnote-165) The NSW Government recognises that, with their prison population growing at its current rates, they would have to build another prison every two years to cater for this — with operational costs alone increasing by $170 million each year.[[166]](#footnote-166) Victoria also recently invested over $1 billion to upgrade and increase the capacity of their prison system.[[167]](#footnote-167)

7.11.4 As posited by Guthrie, Levy, and Fforde, instead of regarding our prison population with political exuberance, and supporting incarceration with greater investment, more consideration should be given to the reality that Australia’s prison estate is indicative of a ‘failed current model’.[[168]](#footnote-168) The concept of ‘Justice Reinvestment’ poses an alternative to the Australian model of high-level incarceration. Although often invoked by politicians, Justice Reinvestment has not yet been adopted by Government at any level in Australia.

7.11.5 Justice Reinvestment, as a place-based initiative, seeks to foster community empowerment through the diversion of resources towards ‘community safety and amenity together with the restoration of (otherwise incarcerated) individuals to their communities’.[[169]](#footnote-169) It seeks to build better relationships with youth as key stakeholders in decision-making and create diversionary infrastructure that benefits the whole community. In this way, it identifies mass incarceration as a generator of crime problems itself, and how neighbourhoods characterised by poverty and disadvantage of young people are more prone to high crime rates. Justice Reinvestment attempts to address the root causes of crime, but with an all-encompassing holistic approach of service provision, including ‘housing, employment, legal, family support, mental health, alcohol, and other drug use services’.[[170]](#footnote-170)

7.11.6 The implementation of Justice Reinvestment in some US states have been lauded a success. Oregon has yielded a 72 per cent drop in juvenile incarceration, and growth of the Texan prison population has halted after the State invested $241 million in Justice Reinvestment initiatives, such as treatment programs, improved probation, and parole services.[[171]](#footnote-171)

#### 7.12 *Recommendation IX: Funding Justice Reinvestment in Queensland*

7.12.1 The first major Justice Reinvestment project in Australia is underway in Bourke — a small town in north-west NSW. The Bourke Project is based on three ‘justice circuit breakers’: addressing breaches of bail, outstanding warrants, and the need for a learner driver program in Bourke.[[172]](#footnote-172) The current implementation phase is from 2016 to 2019, and economic modelling will chart the savings associated with the Bourke Project over a 5 to 10 year period.[[173]](#footnote-173)

7.12.2 For some Aboriginal and Torres Strait Islander youth, the prospect of juvenile detention is more appealing than their home situations. Lack of access to appropriate accommodation has been identified as one of the key drivers of juvenile detention among Aboriginal and Torres Strait Islander peoples, and there is strong evidence of a dynamic relationship between homelessness and contact with the justice system.[[174]](#footnote-174) The appeal of juvenile detention is captured by Shae, an Aboriginal and Torres Strait Islander youth based in Mt Isa:

You kick the football. Go into the cell at 5 and come out at 6 and then go back into the cell. And then you come out and do your program and go to sleep and watch TV. It's not really bad in there.[[175]](#footnote-175)

7.12.3 Mickeal, another Aboriginal and Torres Strait Islander youth aged 15, has allegedly visited cells at the police station ‘about 20 times’ and predicts he will end up in youth detention pretty soon. ‘I’d love to go’, says Mickeal.[[176]](#footnote-176)

7.12.4 By focusing on engaging youth, the Bourke Project seeks to reinvigorate community in disadvantaged communities, and replicate the same sense of routine and entertainment that juvenile detention centres can offer for troubled youth. Bourke has a particularly large youth population and youth crime has been identified locally as a major problem.[[177]](#footnote-177) Relative to other postcode locations throughout NSW, Aboriginal children and young people aged 10 to 17 years in Bourke experience the highest rate of juvenile convictions.[[178]](#footnote-178) The Bourke Project seeks to engage vulnerable children and youth in the community with initiatives such as ‘Youth Off the Streets’ that provides a safe house, and ‘Eternity Aid’ that works with young people in prison and develops supportive programs in schools.[[179]](#footnote-179) Judge Johnstone of the NSW Children’s Court has stated that ‘breaking the cycle starts with children,’[[180]](#footnote-180) which is specifically what the Bourke Project is aiming to achieve.

7.12.5 A project similar to the Justice Reinvestment Project in Bourke NSW (‘Bourke Project’) should be implemented in Queensland. This Queensland Justice Reinvestment Project must be designed and delivered using a collective impact approach, which provides the commitment of a group of actors from different sectors to a common agenda for solving complex social problems.[[181]](#footnote-181)

7.12.6 We support the fundamental framework utilised by the Bourke Project, and would like to see these elements incorporated within a Queensland Justice Reinvestment Project (‘the Project’). These key elements include:

* A whole-of-community and whole-of-government common agenda to reduce youth crime and increase community safety.[[182]](#footnote-182)
* As a place-based initiative, the proposed framework must be founded on ‘real-time data’ throughout an allocated time frame (Bourke has a 5 to 10-year period) to accurately reflect the realities of the community’s circumstances and the Project’s impact.
* A common approach, based on best evidence, for creating change in shared measures and developing the will and capability within the system to implement these responses. This includes engaging youth in decision-making along with organisations, police, community elders, etc.
* A backbone organisation to perform the necessary functions of facilitating the collaboration, continuously communicating and tracking change in the shared measures.
* A clear financial picture of the cost of implementation and the costs saved through effective implementation.[[183]](#footnote-183)

## 8. Conclusion

8.1 Throughout this submission, we have identified driving and traffic offences as a key contributor to the increasing incarceration rates of Aboriginal and Torres Strait Islander peoples in Queensland. We have identified the need for Government, universities, corrective services, and community organisations to collect comprehensive data on a greater scale in order to adequately assess the contribution that minor traffic and driving offences are having on incarceration rates. As other jurisdictions have shown, these minor offences, when they become multiple charges, can add up to larger sentences, and in the cases of those like Marshall and Lord, can result in adverse circumstances that produce unjust and unfair outcomes. If any of the above matters require elucidation, we would be very happy to assist the ALRC in any way we can.

#### 8.2 Our recommendations are as follows:

1. The lack of publically-available information that evaluates the program indicates the need to conduct robust evaluations and collect more data in this area.

2. Improving Queensland’s Remote Indigenous Drivers Licensing Unit, through:

1. Alternative financial arrangements for vehicle registration;
2. Assistance in serving and maintaining vehicles;
3. Working in collaboration with family services to raise greater awareness among the Aboriginal and Torres Strait Islander community about the importance of birth certificate registration, and should alleviate charges of registration and obtaining other identity documents where possible; and

1. Ensuring their practices are culturally appropriate (including using different methods of teaching — eg, oral and personal presentations) and service delivery is coordinated by and alongside Aboriginal and Torres Strait Islander communities and organisations.

3. Greater use of interpreters in courts;

4. Provide sentencing alternatives and diversionary programs that:

1. Allow collective notions to factor into judicial sentencing discretions — moving away from the Australian tradition of individualised justice;
2. Incorporate therapeutic jurisprudence into mainstream court processes; and
3. Continue funding for Murri Courts throughout Queensland and expanding these courts into remote Aboriginal and Torres Strait Islander communities.

5. Increased State budget funding to ATSIL and LAQ;

6. Funding a Justice Reinvestment Project in Queensland, modelled on the Bourke Project, and taking guidance from ‘successful’ Justice Reinvestment projects in the US.

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