



Australian
Human Rights
Commission

Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION
TO THE AUSTRALIAN LAW REFORM COMMISSION**

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Australian Law Reform Commission in its Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (ALRC Inquiry).
2. The Commission commends the national leadership taken by the Australian Government and the Australian Law Reform Commission in establishing and conducting this national inquiry.
3. We would like to acknowledge at the outset that a number of national, state and territory inquiries related to the subject of this inquiry have previously been held, with various levels of government implementation.
4. In the main, the subject of this inquiry primarily falls within state and territory jurisdictions. We urge, as a priority and in consultation with Aboriginal and Torres Strait Islander peoples, that proposals arising from this ALRC Inquiry are genuinely considered and appropriately implemented by the Australian Government in partnership with state and territory jurisdictions.
5. The scope of the ALRC Inquiry, as set out in the terms of reference is broadly focused, but at its core, and in the limited time available for the inquiry, seeks to investigate practical and structural ways to reduce the overrepresentation of Aboriginal and Torres Strait Islander peoples within the justice system.
6. The Commission further notes that the situation of Aboriginal and Torres Strait Islander children and youth in the justice system falls outside the ALRC Inquiry Terms of Reference. The Commission strongly considers the needs of children and youth are very distinct to those of adults in the justice system, including the specific human rights frameworks, which would apply in protecting the rights of children and youth. As such, the Commission has not provided significant comment in this area.
7. The Commission notes the important work of the Royal Commission into the Protection and Detention of Children in the Northern Territory. We look forward to the final report recommendations due in November 2017 and urge the Australian Government to seriously consider the Royal Commission recommendations, including how they can be appropriately applied nationally.
8. The Commission welcomes the opportunity to assist the ALRC in its inquiry. We have made specific comment on the areas within the Discussion Paper which we consider will most benefit the inquiry, notably:
 - a. international Human Rights frameworks, including rights for vulnerable peoples in our communities
 - b. national strategies to addressing Indigenous incarceration¹
 - c. social, economic and cultural determinants of health²
 - d. trauma informed approaches to healing³

- e. prevention, support and access to Justice for Aboriginal and Torres Strait Islander peoples⁴
 - f. addressing the needs of Aboriginal and Torres Strait Islander women⁵
 - g. alcohol management in Aboriginal and Torres Strait Islander Communities.⁶
9. The human rights of Aboriginal and Torres Strait Islander women will be a core priority of the Aboriginal and Torres Strait Islander Social Justice Commissioner throughout her term and this submission will emphasise the need to address the experiences of Aboriginal and Torres Strait Islander women in relation to justice.

2 Summary

10. It has been widely acknowledged and evidenced for some time now that Aboriginal and Torres Strait Islander peoples are grossly overrepresented in the adult and juvenile justice systems. Incarceration remains one of the most pressing human rights issues confronting Aboriginal and Torres Strait Islander peoples. Despite being only 3% of the total Australian population:
- a. Aboriginal and Torres Strait Islander adults account for over a quarter (27%) of the total Australian prison population.⁷
 - b. Aboriginal and Torres Strait Islander youth aged between 10-17 years, make up more than half (55%) of all children in juvenile detention.⁸
 - c. Aboriginal and Torres Strait Islander women account for 34% of the adult female prison population.⁹ It is also important to note that 80% of Aboriginal and Torres Strait Islander women in prison are mothers.¹⁰
 - d. Aboriginal and Torres Strait Islander people with cognitive and psychiatric impairment are overrepresented in the criminal justice system.¹¹
11. The issue of Aboriginal and Torres Strait Islander deaths in police custody and in prison has been cause for alarm for several decades. Nationally in 2014-15, there were 11 deaths in police custody, of which five were Aboriginal and Torres Strait Islander deaths.¹²
12. The history of colonisation and dispossession continues to manifest itself in various ways in the lives of Aboriginal and Torres Strait Islander peoples, their families and communities. A high rate of imprisonment is occurring in the context of poor health, inadequate housing, high levels of family violence, and high levels of unemployment.¹³

Role of the Aboriginal and Torres Strait Islander Social Justice Commissioner and work of the Commission

13. The Aboriginal and Torres Strait Islander Social Justice Commissioner (Social Justice Commissioner) has a statutory role to report to the Australian

Parliament on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples.

14. The role of the Social Justice Commissioner was created in response to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).
15. The first Social Justice Commissioner, Professor Mick Dodson, assisted as Counsel to the RCIADIC. Almost every Social Justice Commissioner appointed since has reported to the Australian Government on justice, custody and incarceration related issues of Aboriginal and Torres Strait Islander peoples.
16. The Australian Human Rights Commission, (formerly the Australian Human Rights and Equal Opportunity Commission), has conducted a number of significant national inquiries under the functions of the *Australian Human Rights Commission Act 1986*, which are relevant to note for this particular Inquiry:
 - a. The National Inquiry into Racist Violence conducted by the Australian Human Rights and Equal Opportunity Commission found that Aboriginal and Torres Strait Islander peoples experience racist violence at endemic levels, with racist attitudes and practices ingrained in many institutions, including the court system and police;¹⁴
 - b. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their families conducted by the Australian Human Rights and Equal Opportunity Commission, found that there is a direct correlation between the child protection system and Aboriginal and Torres Strait Islander children entering into the juvenile justice system, leading to a likelihood of incarceration for many Aboriginal and Torres Strait Islander peoples.¹⁵
17. The Commission has made a number of submissions to government inquiries on justice related issues for Aboriginal and Torres Strait Islander peoples. Recent submissions in this area include:
 - a. Senate Finance and Public Administration Committee, Inquiry into the Aboriginal and Torres Strait Islander experiences of law enforcement and Justice¹⁶
 - b. Senate Standing Committee on Community Affairs, Inquiry into Indefinite Detention of People with Cognitive and Psychiatric impairment in Australia¹⁷
 - c. Legal and Constitutional Affairs References Committee, Inquiry into the value of a justice reinvestment approach to criminal justice in Australia.¹⁸
18. The Commission has also published reports on justice related issues for Aboriginal and Torres Strait Islander peoples, including:
 - a. *Children's Rights Report 2016*¹⁹

- b. Preventing crime and promoting rights for Indigenous young people with cognitive disabilities and mental health issues²⁰
 - c. Ending family violence and abuse in Aboriginal and Torres Strait Islander families.²¹
19. The Commission notes that the findings from a number of justice related Inquiries and reports evidence that the core structural relationship between the justice system and Australia's First Peoples has been, and remains, detrimental to the human rights of Aboriginal and Torres Strait Islander Peoples.
20. It is important to note that both the RCIADIC and the Bringing Them Home Report recommended that arrest, charge and imprisonment of Aboriginal and Torres Strait Islander adults and youth should be used as sanctions of 'last resort'.²² The Commission considers that these recommendations remain just as valid today as they did at the time these reports were published.
21. The Commission notes that the right to equality before the law is a basic tenet of human rights.²³ As such, the experiences and needs of the most vulnerable people in our communities need to be adequately considered by this inquiry, such as Aboriginal and Torres Strait Islander people with disability, women and children.
22. It is the view of the Commission that there is a need for coordinated federal, state and territory leadership on this issue in order for the overrepresentation of Aboriginal and Torres Strait Islander people to change.

3 Recommendations

23. The Commission makes the following recommendations:

Recommendation 1

That more specific and robust monitoring and reporting on justice is implemented. We urge the Australian Government to ratify and progressively implement the *Optional Protocol to the Convention Against Torture* (OPCAT) and the establishment of the *National Preventive Mechanism* (NPM).

Recommendation 2

The Commission recommends that the Australian Government commit to the development of national standards that set minimum conditions of detention to protect the human rights of detainees in the various detention settings covered by OPCAT. Those standards should have legislative force and should deal with issues including:

- a. the protection of particularly vulnerable detainees, such as children and young people, people with disability, Aboriginal and Torres Strait Islander people, LGBTI people and immigration detainees

- b. complaints processes and consequences for unlawful or improper conduct
- c. restrictive practices, seclusion, strip searches and the use of force
- d. the safe transport of detainees
- e. the material condition of places of detention
- f. the provision of essential services (eg, health care, legal services and education).

Recommendation 3

That the Council of Australian Governments (COAG) resource a national strategy to reduce the overrepresentation of Aboriginal and Torres Strait Islander children and adults in incarceration under the Closing the Gap Framework, including:

- a. multilateral COAG level agreements involving state and territory jurisdictions on addressing the issue of overrepresentation of Aboriginal and Torres Strait Islander peoples in the justice system, including commitment to sharing best practice information and justice data across government
- b. strategies to address underlying social and economic causes of Aboriginal and Torres Strait Islander people, including children and young people, women and people with disability coming into contact with the criminal justice system
- c. establishing nationally agreed justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander people in detention or gaol; in particular:
 - i. close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2040
 - ii. cut disproportionate rates of violence against Aboriginal and Torres Strait Islander people to close the gap by 2040, with priority strategies for women and children
- d. developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies
- e. investing sufficient resources to ensure practical implementation.

Recommendation 4

That there be a national response across all levels of government to work with Indigenous women to address the challenges facing Aboriginal and Torres Strait Islander women and the justice system.

4 International human rights framework

24. In the 2016-17 period, five United Nations Special Rapporteurs (SR) visited Australia in the lead up to Australia's candidacy bid for a seat at the United Nations Human Rights Council 2018-20. The experience and situation of Aboriginal and Torres Strait Islander Peoples was noted in almost every SR End of Mission Statement.
25. The End of Mission Statement by the SR on the Rights of Indigenous Peoples made note that current laws and policies have contributed to the increase in the incarceration of Aboriginal and Torres Strait Islander peoples.
26. The SR on the Rights of Indigenous Peoples is due to table her Country Report of Australia at the 36th Session of the United Nations Human Rights Council on 20 September 2017, which will detail justice-related findings arising from her consultations during her visit.
27. The Commission has previously set out the international human rights instruments and standards under a number of international human rights treaties, as they relate to Aboriginal and Torres Strait Islander peoples and issues of access to justice and equity in law enforcement and justice systems,²⁴ including:
 - International Covenant on Civil and Political Rights (ICCPR) articles 2, 7, 9, 10, 14, 24, 26, 50²⁵
 - Convention on the Rights of the Child (CRC) articles 2, 3, 37, 40²⁶
 - International Convention on the Elimination of Racial Discrimination (ICERD) articles 2, 5²⁷
 - International Covenant on Economic, Social and Cultural Rights (ICESCR) articles 1, 2²⁸
 - Convention on the Rights of Persons with Disabilities (CRPD) articles 4, 5, 7, 12, 13, 14, 3²⁹
 - Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) articles 2, 3, 12, 14, 15.³⁰

The United Nations Declaration on the Rights of Indigenous Peoples

28. The *United Nations Declaration on the Rights of Indigenous Peoples*³¹ (the Declaration) underpins the minimum standards necessary for the survival, dignity and well-being of Indigenous peoples of the world.³² The Declaration articulates how existing international human rights principles and standards apply to the unique cultural, historical, social and economic circumstances of indigenous peoples.³³
29. The Declaration affords the same rights to life, liberty and security to Indigenous peoples, like all other peoples. It also highlights the particular need for the rights of Indigenous elders, women, children and people with disability to be protected.³⁴
30. The four main principles that underpin the Declaration are: self-determination,³⁵ participation in decision-making, underpinned by free, prior

and informed consent and good faith,³⁶ respect for and protection of culture,³⁷ and equality and non-discrimination.³⁸

31. The development and implementation of laws and legal frameworks of any state and territory should take into account these four foundational principles as they provide an extremely useful framework to measure actions in relation to the human rights of Aboriginal and Torres Strait Islander peoples.

Optional Protocol to the Convention Against Torture

32. It is the view of the Commission that the ALRC should consider all practical steps governments can take that are consistent with international human rights standards. Attention is drawn to:

- a. the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*³⁹
- b. the *Optional Protocol to the Convention Against Torture (OPCAT)*.⁴⁰

33. The Australian Government has committed to ratify OPCAT by December 2017.⁴¹ Ratification of OPCAT will require to provide for a system of regular inspections to all places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. This will cover all prisoners, including women, people with disabilities, children and young people, and is designed to promote transparent and accountable detention processes.

34. OPCAT requires that an independent National Preventive Mechanism (NPM) be established to conduct inspections of all places of detention. In Australia, this will most likely include prisons, juvenile detention centres, immigration detention facilities and other places where people are deprived of their liberty. It may also include places where people are sometimes but not always detained, such as residential care homes for people with disability.

35. The establishment of an NPM under OPCAT would facilitate a greater level of transparency and accountability regarding conditions for, and treatment of people in Australian detention facilities.

36. The Commission notes the recent reports of detrimental treatment and harm caused towards children and young people in Australia's juvenile detention centres are alarming and further exemplifies the urgent need for an internationally recognised monitoring mechanism in Australia.

37. The Commission notes that the *Children's Rights Report 2016* provides a comprehensive analysis on how OPCAT and NPM mechanisms would operate within juvenile detention centres.⁴² The Australian Human Rights Commissioner is also undertaking a national consultation, focussing on civil society representatives, which is advising the Australian Government on how best to implement OPCAT.⁴³ The Human Rights Commissioner delivered the Commission's interim report on OPCAT implementation to the Attorney General on 1 September 2017.

Recommendation The Commission recommends that more specific and robust monitoring and reporting on justice is implemented. We urge the Australian Government to ratify and progressively implement the *Optional Protocol to the Convention Against Torture* (OPCAT) and the establishment of the *National Preventive Mechanism* (NPM).

Recommendation The Commission recommends that the Australian Government commit to the development of national standards that set minimum conditions of detention to protect the human rights of detainees in the various detention settings covered by OPCAT. Those standards should have legislative force and should deal with issues including:

- a. the protection of particularly vulnerable detainees, such as children and young people, people with disability, Aboriginal and Torres Strait Islander people, LGBTI people and immigration detainees
- b. complaints processes and consequences for unlawful or improper conduct
- c. restrictive practices, seclusion, strip searches and the use of force
- d. the safe transport of detainees
- e. the material condition of places of detention
- f. the provision of essential services (eg, health care, legal services and education).

5 National strategies to addressing Indigenous justice issues

38. The ALRC Inquiry Discussion Paper makes note that states and territories have primary responsibility for maintaining law and order within their jurisdictions. Put simply, the laws and legal frameworks (policies, practices and procedures) in relation to policing, corrective services and the operation of prisons and youth detention centres fall within the jurisdiction of the state.

39. The challenges in addressing issues relating to Aboriginal and Torres Strait Islander peoples' overrepresentation in the justice system is fundamentally a structural issue, where states manage their affairs in relation to justice, often inconsistently to each other, including different laws and legal frameworks and the way in which each state captures and reports their justice-related data.

Close the Gap Campaign and Change the Record Campaign

40. Reform of the justice system must be undertaken in partnership with the Aboriginal and Torres Strait Islander peak legal and representative bodies, such as the National Aboriginal and Torres Strait Islander Legal Service, National Family Violence and Protection Legal Services and the National Congress of Australia's First Peoples.

41. These organisations and others involved in the Change the Record Campaign and the Close the Gap Campaign have long been calling for national leadership to address a range of justice matters subject to the ALRC Inquiry.
42. The Social Justice Commissioner is a member of the Steering Committee of the Change the Record Campaign and the Co-Chair of the Close the Gap Campaign.
43. The Change the Record Campaign's *Blueprint for Change* outlines two overarching goals:
 - a. close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040, and
 - b. cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to close the gap by 2040; with priority strategies for women and children.⁴⁴
44. It is noteworthy that the *Blueprint for Change* begins with positive community investment before suggesting specific justice system measures for implementation, with the first two recommendations calling on governments to:
 - a. invest in communities not prisons, and
 - b. appreciate that local communities have the answers as evidenced by the success of community-controlled services.

Closing the Gap Justice Target

45. The Commission, through the work of successive Social Justice Commissioners, and Close the Gap and the Change the Record campaigns, has consistently called on the Australian Government to introduce justice targets into the *Closing the Gap Strategy*.⁴⁵
46. In 2009, the then Social Justice Commissioner, Professor Tom Calma, noted in his Social Justice Report that year that 'it was a serious omission' that no formal justice targets were included in the initial *Closing the Gap Strategy* targets.⁴⁶ And in the 2016 Social Justice Report, the Commission has continued to advocate for the introduction of a justice target.⁴⁷
47. The Commission endorses the Change the Record *Blueprint for Change* proposal that these targets should be accompanied by a national agreement, which includes a reporting mechanism as well as measurable sub-targets and a commitment to halve the gap by no later than 2030.⁴⁸
48. The federal system in Australia means that all governments and their police, corrective services and justice departments must work collaboratively to achieve the targets suggested. We urge that ongoing national leadership and high-level accountability is needed to ensure ongoing focus on this critical issue. We would also like to note the importance of collaboration and best practice information sharing across government.

Recommendation That the Council of Australian Governments (COAG) resource a national strategy to reduce the over-representation of Aboriginal and Torres Strait Islander children and adults in incarceration under the Closing the Gap Framework, including:

- a. Develop multilateral COAG level agreements involving state and territory jurisdictions on addressing the issue of overrepresentation of Aboriginal and Torres Strait Islander peoples in the justice system, including commitment to sharing best practice information and justice data across government;
- b. Strategies to address underlying social and economic causes of Aboriginal and Torres Strait Islander people, including children and young people, women and people with disability coming into contact with the criminal justice system;
- c. Establishing nationally agreed justice targets and strategies aimed at significantly reducing the number of Aboriginal and Torres Strait Islander people in detention or gaol; in particular:
 - i. close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2040
 - ii. cut disproportionate rates of violence against Aboriginal and Torres Strait Islander people to close the gap by 2040, with priority strategies for women and children.
- d. Developing a commitment to working in genuine partnership with Aboriginal and Torres Strait Islander communities, leaders and representative bodies;
- e. Investing sufficient resources to ensure practical implementation.

6 Social, economic and cultural determinants of health

49. The Commission notes the importance of the social, economic and cultural determinants of health and their impacts on justice related outcomes for Aboriginal and Torres Strait Islander peoples.
50. While the ALRC in its Inquiry will pay particular regard to the laws and legal frameworks of the justice system, the upstream factors that lead Aboriginal and Torres Strait Islander peoples into contact with the justice system must be addressed with equal priority, including in terms of prevention, sentencing and rehabilitation.
51. Every major report that analyses the state of Aboriginal and Torres Strait Islander affairs in Australia now recognises the social determinants of justice, housing, disability, housing, health, education, employment and economic access, amongst many other determinants, all affect and interrelate with each other.⁴⁹ These reports recognise that social determinants must be addressed as a priority of government policy and service delivery.

52. The Australian Institute of Health and Welfare reports that ‘selected social determinants such as education, employment status, overcrowding and household income accounted for 34% of the gap in health outcomes between Indigenous and non-Indigenous Australians’.⁵⁰
53. As stated in the Close the Gap Campaign’s 2017 Progress and Priorities Report, ‘for Aboriginal and Torres Strait Islander peoples, social determinants formed by societal structures and inequalities can be added to the historical impact of colonisation and its contemporary impacts including... the dynamics of cultural misconnection’.⁵¹
54. The Commission supports the Close the Gap Campaign’s calls for the development of a *National Aboriginal and Torres Strait Islander Social and Cultural Determinants of health Strategy*.⁵² Such a strategy would seek to meaningfully tackle the social determinants in their interconnected entirety and provide an integrated approach to addressing the overrepresentation of Aboriginal and Torres Strait Islander peoples within the justice system.
55. As noted already in this submission, addressing the social determinants is the responsibility of all Australian governments and requires national coordination through the Council of Australian Governments (COAG). The Federal Government’s Closing the Gap Strategy Refresh process offers an opportunity for the Federal, State and Territory governments to tackle this national priority.

7 Trauma-informed approaches to healing

56. The pathway to interaction with the justice system starts before a person is born and can be attributed to the impacts of generational trauma, cultural dislocation, and systemic racism.
57. In the 20 year anniversary of the Bringing them Home Report, the life trajectory and cyclical nature of the child protection system to the juvenile justice system and adult justice system is clearly evident. Regular exposure to and the impact of trauma in the lives of Aboriginal and Torres Strait Islander individuals, families and communities across generations will continue to be a key driver preventing those caught in these institutional systems from breaking the cycle.
58. The Commission agrees with the point made in the ALRC Inquiry discussion paper that it is timely for a national review of the laws and processes operating within the care and protection systems of states and territories. We support such a national review and urge the Australian Government to genuinely consider this proposal.
59. The Commission supports approaches by police, courts, corrective services, juvenile justice services and justice departments to better understand and implement practices, including laws and legal frameworks, which take into account the social, economic and cultural aspects of Aboriginal and Torres Strait Islander peoples who appear before them.
60. The Commission joins calls from Aboriginal and Torres Strait Islander organisations to develop a trauma-informed public policy environment. In

particular, the Commission supports the Healing Foundation's recommendations for:

- a. Service providers such as police, welfare services, mental health practitioners and relevant institutions undergo trauma-informed training so that these organisations engage with Aboriginal and Torres Strait Islanders peoples using, 'a strengths-based approach based on an understanding of the impact of trauma; emphasise the physical, psychological, and emotional safety of clients and staff; and help people affected by trauma to rebuild a sense of control and empowerment'.⁵³
- b. The development of a *National Aboriginal and Torres Strait Islander Trauma Strategy* which would:
 - i. address the challenges of building Aboriginal and Torres Strait Islander workforce capability within and across diverse organisations, communities and locations
 - ii. support the funding of Aboriginal and Torres Strait Islander organisations to deliver healing responses to Stolen Generations and their families
 - iii. provide a platform for integrating responses to the historical and continuing impact of trauma for both Stolen Generations and their descendants
 - iv. set out principles and processes for collaboration at both policy and service levels
 - v. acknowledge the broader social, economic and political processes required to address collective trauma and make links with initiatives to address socioeconomic disadvantage and promote reconciliation
 - vi. provide a culturally appropriate monitoring and evaluation framework to support the effective implementation of healing responses, promote continuous improvement and improve outcomes for Stolen Generations and their families
 - vii. identify key government and non-government stakeholders to support the development and implementation of the national strategy.⁵⁴

61. Culture plays a protective role in the wellbeing of Aboriginal and Torres Strait Islander people and is necessary to building their resilience and ability to deal with the many challenges they face, including their experiences within the justice system. It is the view of the Social Justice Commissioner that any reform should recognise the importance of culture in addressing the justice needs of Indigenous peoples.

8 Prevention, support and access to justice for Aboriginal and Torres Strait Islander peoples

Unique needs of Aboriginal and Torres Strait Islander people with disability

62. The Commission notes that, given the high prevalence of Aboriginal and Torres Strait Islander people with disability in the justice system, their unique needs require particular attention.
63. Aboriginal and Torres Strait Islander people with mental and cognitive disabilities are at high risk of coming into contact with the justice system in early life due to the lack of appropriate health, support and diversion pathways available.⁵⁵
64. Research indicates a high prevalence of Aboriginal and Torres Strait Islander children and young people in juvenile detention with Fetal Alcohol Spectrum Disorders (FASD). Despite significant evidence, FASD is not officially recognised as a disability in Australia.⁵⁶ As a result, comprehensive clinical diagnosis is difficult and many individuals remain largely undiagnosed.⁵⁷
65. The Commission has previously noted in *Equal before the law: towards disability justice strategies*, that people with disability often have limited access to appropriate legal representation, are not always fully aware of their legal rights and therefore do not ask for appropriate adjustments and supports.⁵⁸
66. As a result, Aboriginal and Torres Strait Islander people with disability experience issues which affect sentencing decisions: on level of competency to stand trial, validity of expert testimony, potential diminished capacity to understand right and wrong, ability to testify and recidivism.⁵⁹
67. The Commission has previously identified the lack of appropriate and effective limits on detention for people found unfit to stand trial or not guilty by reason of mental impairment.⁶⁰
68. We support a requirement in all jurisdictions that at the time a detention order is made, a plan is put in place with reviewal mechanisms every six months. It should also include timeframes, to ensure support, treatment and rehabilitation services are provided with the aim of transition into progressively less restrictive environments, and eventually being reintegrated back into the community, where possible.⁶¹
69. All state and territory governments should also establish, as a matter of urgency, an appropriate range of facilities to accommodate people who are found unfit to stand trial and/or not guilty by reason of mental impairment.⁶²

National Custody Notification Service

70. The Commission supports that custody notification services in each state and territory should receive ongoing resourcing. All jurisdictions should have a legislated duty of police procedure to contact the Aboriginal Legal Service as soon as an Aboriginal and/or Torres Strait Islander adult or juvenile comes into police custody.⁶³

Justice Reinvestment

71. The Commission has long supported a justice reinvestment approach that addresses the social determinants of health and those that aim to prevent and support Aboriginal and Torres Strait Islander individuals, families and communities who may be at risk of coming into contact with the criminal justice system.⁶⁴

9 Addressing the needs of Aboriginal and Torres Strait Islander women

72. Aboriginal and Torres Strait Islander women have been described as the ‘most legally disadvantaged group in Australia’.⁶⁵
73. As the fastest growing and most overrepresented prison population, the needs of Aboriginal and Torres Strait Islander women coming into contact with the criminal justice system must be addressed as a matter of priority.⁶⁶
74. Without taking away from the important challenges facing Aboriginal and Torres Strait Islander men and the justice system, there is an urgent need to elevate and provide for the distinct needs of Aboriginal and Torres Strait Islander women in this context.
75. This is particularly the case given that responses to Indigenous overrepresentation in the past two decades following the RCIADIC have largely focused on the circumstances of Aboriginal men.⁶⁷
76. As has been noted in numerous *Social Justice Reports*, none of the recommendations of the RCIADIC specifically addressed the circumstances of Indigenous women.⁶⁸
77. This means that much of the policy and service responses to date regarding Indigenous incarceration have generally been oriented towards the needs of men, rendering Aboriginal women largely invisible. This must change.
78. The Commission urges that there be a concerted effort across all levels of government to develop a national response to the justice challenges facing Aboriginal and Torres Strait Islander women.
79. Consideration must be given to calls, such as that made by the Senate Legal and Constitutional Affairs Reference Committee’s *Access to Justice* report, which identified the need for a national Indigenous Women’s Legal Service in order to address the chronic disadvantage experienced by Aboriginal and Torres Strait Islander women and their access to justice.⁶⁹
80. Organisations such as the Family Violence Prevention Legal Services (FVPLS) provide crucial services to vulnerable populations, such as Aboriginal and Torres Strait Islander women, who experience significant violence and abuse. These services should be strengthened in order to increase the access of culturally appropriate services to Indigenous women across regional, metropolitan and remote areas.⁷⁰

81. There are opportunities to build on critical services such as FVPLS through sustainable and increased funding to allow these organisations to extend their service provision beyond legal advice to policy, advocacy and support services.
82. Investing in an integrated service approach that addresses the legal as well as complex social needs of Aboriginal and Torres Strait Islander women around health, housing, employment, financial security, substance abuse, family violence and child protection issues may help to reduce the contact between Aboriginal and Torres Strait Islander women and the justice system.⁷¹ The importance of this approach has been emphasised by Sisters Inside who maintain that: Addressing full clusters of issues and needs is both more efficient and effective than referring women to a variety of services.⁷²
83. Law reform alone, without taking steps to address the underlying causes of offending will do little to change the trajectory for those Aboriginal and Torres Strait Islander women at risk of entering the criminal justice system.
84. Greater investment is urgently needed to provide Aboriginal and Torres Strait Islander women with culturally appropriate services that specifically target the need for:
 - a. preventative and early intervention responses for those at risk of offending
 - b. post release services to those at risk of re-offending, and
 - c. healing and trauma informed approaches
85. This must be matched by a significant investment in the evaluation of new services to provide evidence of ‘what works.’ The extent to which Aboriginal and Torres Strait Islander women are overrepresented in the justice system tells us that current approaches are not working.
86. Despite calls following the RCIADIC for incarceration to be a method of last resort, Aboriginal and Torres Strait Islander women are still imprisoned and still die in prison at unacceptable rates. Current efforts around diversion must be strengthened so that women are not imprisoned for offences such as, but not limited to, fine default, public drunkenness, substance abuse and traffic offences.

Recommendation That there be a national response across all levels of government to work with Indigenous women to address the challenges facing Aboriginal and Torres Strait Islander women and the justice system.

10 Alcohol management in Aboriginal and Torres Strait Islander communities

87. Significant evidence shows that alcohol and substance abuse is a major cause to increased risks to health and offending behaviour.
88. The ALRC Inquiry Discussion Paper notes the *Social Justice Report 2010*, which details the community-led alcohol restrictions in the Fitzroy Valley.⁷³

89. The current Social Justice Commissioner, June Oscar AO was one of the community women who led the alcohol restrictions campaign in the Fitzroy Valley. It was her view that addressing alcohol dependency in the community was, and remains, a critical issue for the Fitzroy community. She said however, that,

Alcohol restrictions are just a small toe hold into the enormous challenges we face. It is not the answer to our problems. It was never intended to be. Its purpose was always to give us breathing space from the trauma and chaos of death, violence and fear; breathing space to think and plan strategically.⁷⁴

90. A whole of community approach to the future of the Fitzroy Valley ran parallel to the alcohol restriction campaign, which focused on local governance and local voices to address the needs of the community.

91. This genuine community-led approach enabled the people of the Fitzroy Valley to invest and focus on solutions to address the high prevalence of children being born with FASD.⁷⁵

92. The Commission notes that the most successful approaches to alcohol management, including the development and implementation of local liquor accords and plans to prevent sale of full strength alcohol, should be based on priorities identified by the community. However, successes achieved and processes implemented by a community may not be appropriate to mirror in other communities, as a 'one size fits all' approach is known to be ineffective.

93. The Commission emphasises, the importance of all governments to appropriately engage and liaise with Aboriginal and Torres Strait Islander communities to identify their needs and priorities on a case-by-case basis under a national engagement framework that is consistent with the minimum standards affirmed in the Declaration.⁷⁶

94. Punitive measures aimed at curbing alcohol dependence through broad welfare restrictions, such as through the Cashless Debit Card, remain problematic. The Commission has previously and will continue to advocate for such measures to be in consultation with the community and opt-in for individuals on a case-by-case basis.⁷⁷

95. The Social Justice Commissioner, considers that solutions to the issues Aboriginal and Torres Strait Islander peoples face will only be effective if they are community identified, community led and community driven.

¹ In addressing question 10-1 of the ALRC Inquiry Discussion Paper.

² In addressing question 3-3 of the ALRC Inquiry Discussion Paper.

³ In addressing question 12-2 of the ALRC Inquiry Discussion Paper.

⁴ In addressing questions 11-1, 11-2, 11-3 and 13-1 of the ALRC Inquiry Discussion Paper.

⁵ In addressing, within a specific context of the needs of Aboriginal and Torres Strait Islander women, questions 2-2, 5-2 and 9-1 of the ALRC Inquiry Discussion Paper.

⁶ In addressing question 8-1 of the ALRC Inquiry Discussion Paper.

- ⁷ Australian Bureau of Statistics (2016) Prisoners in Australia, Aboriginal and Torres Strait Islander Prisoner Characteristics, 4517.0, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>
- ⁸ Australian Institute of Health and Welfare, Youth detention population in Australia 2016, <http://www.aihw.gov.au/publication-detail/?id=60129557387&tab=2>
- ⁹ Australian Bureau of Statistics, Prisoners in Australia, 2016 (data tables) in *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, Human Rights Law Centre and Change the Record, 10.
- ¹⁰ *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, Human Rights Law Centre and Change the Record, 5.
- ¹¹ Consistent jurisdictional justice data is unavailable; however the prevalence of Aboriginal and Torres Strait Islander peoples with cognitive and psychiatric impairment in the criminal justice system is well documented.
- ¹² Productivity Commission, *Report on Government Services 2017*, Vol C: Justice, Steering Committee for the Review of Government Service Provision (2017) 6.13; First Peoples Disability Justice Consortium, Submission 39 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry on the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*.
- ¹³ See for example, Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016*; PWC, *Indigenous incarceration: Unlock the facts* (2017). At: <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may17.pdf>; T Allard, *Understanding and preventing Indigenous offending*, Indigenous Justice Clearinghouse, Brief 9 (2010).
- ¹⁴ Australian Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) 79 – 123.
- ¹⁵ *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their Families*, Australian Human Rights and Equal Opportunity Commission, 489.
- ¹⁶ Australian Human Rights Commission, Submission 5 to the Senate Finance and Public Administration Committee, Parliament of Australia, *Inquiry into the Aboriginal and Torres Strait Islander experiences of law enforcement and Justice*, 27 April 2015.
- ¹⁷ Australian Human Rights Commission, Submission 6 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Indefinite Detention of People with Cognitive and Psychiatric impairment in Australia*, March 2016.
- ¹⁸ Australian Human Rights Commission, Submission 85 to the Legal and Constitutional Affairs References Committee, Parliament of Australia, *Inquiry into the value of a justice reinvestment approach to criminal justice in Australia*, 21 November 2013.
- ¹⁹ Megan Mitchell, *Children's Rights Report 2016*, Australian Human Rights Commission (2016).
- ²⁰ Australian Human Rights Commission, *Preventing crime and promoting rights for Indigenous young people with cognitive disabilities and mental health issues* (2008).
- ²¹ Australian Human Rights and Equal Opportunity Commission, *Ending family violence and abuse in Aboriginal and Torres Strait Islander families* (2006).
- ²² Royal Commission into Aboriginal Deaths in Custody, National Report (1991); Australian Human Rights and Equal Opportunity Commission, *Bringing them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their families* (1997); see also, Change the Record, Amnesty International and Clayton Utz, *Review of the Implementation of the RCIADIC*, May 2015. At: <https://changetherecord.org.au/review-of-the-implementation-of-rciadic-may-2015>
- ²³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 14; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 7.
- ²⁴ Australian Human Rights Commission, Submission 5 to the Senate Finance and Public Administration Committee, Parliament of Australia, *Inquiry into the Aboriginal and Torres Strait Islander experiences of law enforcement and Justice*, 27 April 2015.
- ²⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ²⁶ *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- ²⁷ *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).
- ²⁸ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

- ²⁹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
- ³⁰ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
- ³¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007).
- ³² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/61/L.67 (2007), art 43.
- ³³ Australian Human Rights Commission, Submission 5 to the Senate Finance and Public Administration Committee, Parliament of Australia, *Inquiry into the Aboriginal and Torres Strait Islander experiences of law enforcement and Justice*, 27 April 2015; J Anaya, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, Report by the Special Rapporteur on the rights of indigenous peoples to the Human Rights Council 9th session, UN Doc A/HRC/9/9 (2008), para 40. At <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/AnnualReports.aspx>
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- ⁴⁸ Change the Record, *Blueprint for Change*, Change the Record Steering Committee (2015).
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