Submission to the Australian Law Reform Commission's Inquiry into Indigenous Incarceration Rates

Prepared by the International Commission of Jurists Victoria

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1. Organisational Context

1.1 The International Commission of Jurists Victoria ("ICJV") is a volunteer organisation of lawyers, Judges and academics. It is committed to the primacy, coherence and implementation of international legal principles that advance human rights. ICJV promotes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law.

1.2 ICJV strives to:

a) Promote adherence to and observance of the *Universal Declaration of Human Rights* and other similar international instruments;

b) Promote the conclusion, ratification and implementation of conventions, covenants and protocols protecting human rights, especially in Australia and the nations of Southeast Asia and the Pacific;

c) Provide an organisation through which the legal profession and others interested in human rights can protect and sustain the Rule of Law and promote the observance of human rights and fundamental freedoms;

d) Help, advise and encourage all who seek to achieve, by means of the Rule of Law, universal respect for the observance of human rights and fundamental freedoms;

e) Co-operate with similar organisation in Australia and other countries through the channels provided by ICJ Geneva and other available means.

f) Examine new proposals that affect the administration of justice, both domestic and abroad.

1.3 ICJV seeks to fulfil its objectives through sponsoring SE Asian human rights lawyers from SE Asia and the Pacific to attend the Victorian Bar Readers Course, public education and seminars, submissions, publications and advocacy.

2. Focus of Submission

2.1 Scope

2.1.1 ICJV welcomes the opportunity to provide a submission to the Australian Law Reform Commission's Inquiry into Indigenous Incarceration Rates.

2.1.2 This submission will focus on the following areas prompted by the Commission's Terms of Reference, Proposals and Questions:

(a) The International Legal Framework including Australia's obligations under treaties and conventions;
(b) Evolving Commonwealth and State approaches to the sentencing of indigenous offenders;
(c) The Victorian Koori Court as a model for sentencing indigenous offenders;
(d) Access to justice for indigenous offenders; and
(e) The Canadian and New Zealand experiences in dealing with their increasing rates of indigenous incarceration.

2.2 Argument

2.2.1 The phenomenon of increasing rates of indigenous incarceration should be considered in the context of Australian history. Britain claimed this country as if no-one already lived here. Attempts to deal peacefully with the original inhabitants failed through cultural misunderstanding. Introduced diseases such as small pox and tuberculosis decimated whole language groups. Exploration and pastoral expansion led to conflicts over land that were resolved by violence, the incorporation of aboriginals into the pastoral project, or expulsion. Missionaries and welfare officers pursued assimilationist policies that led to the devaluation of indigenous cultures and the removal of children from their families. Authorities treated indigenous people as refugees in their own land by herding them in missions and reserves. It was not until 1967 that a referendum effectively allowed indigenous people to become Australian citizens.

2.2.2 The acceptance of the idea of self-determination by Federal governments in the 1970s did not translate to the empowering of local indigenous community leaders. The ***Mabo*** decision in 1992 and the consequent ***Native Title Act*** **1993** has not led to economic uplift amongst those whose Native Title has been recognised. The Intervention in the Northern Territory treats indigenous adults as children who cannot decide the course of their lives. The decision to close down outstations and move people from their own land into regional townships is assimilationist policy under another name. Mandatory sentencing regimes in Western Australia and the Northern Territory have disproportionate effects on indigenous citizens.

2.2.3 In Western Australia and the Northern Territory, the criminal justice systems operate to oppress indigenous citizens. An example is Section 128(1) of the ***Police Administration Act*** **(NT)** that permits a police officer to arrest without warrant someone believed to be drunk who is also believed to be likely to commit a further offence. A person so arrested can be held for as long as they appear to be drunk. The High Court did not question the legality of this section in ***Prior v Mole***[1]. Only Justice Gageler, of the five Justices hearing the case, would have upheld Mr Prior's appeal on the basis that his arrest in Darwin was unjustified because there was an insufficient basis for the police officer's belief that Mr Prior would have kept on drinking (in breach of the ***Liquor Act***) if not arrested. There is no reference in the judgments to the fact that Mr Prior is indigenous. There is no reference to the disproportionate effect that this section has on the indigenous citizens of the Northern Territory. There was no argument before the Court about whether the section breached any treaties or conventions to which Australia is a party. There could be no argument about whether the section was in breach of any of Mr Prior's civil or political rights because we have no Bill of Rights.

2.2.4 The NT News recently published the results of a survey about what Darwin needed to improve its CBD[2]. The most pressing issue for over a quarter of the 341 respondents to the survey was the removal of itinerants from the CBD. Slightly fewer wanted better parking. The overwhelming number of itinerants in Darwin are

[1] (2017) HCA 10

[2] NT News 21 August 2017

indigenous. Section 128(1) of the ***Police Administration Act*** is a response to such concerns. Out of sight, out of mind. ICJV argues that the Australian criminal justice system reflects a colonial history of conquest and the attempted assimilation and marginalisation of its indigenous inhabitants.

2.2.5 In 1987 Professors Cornell and Kalt initiated the Harvard Project on American Indian Economic Development[3]. The Harvard Project's findings can be translated to indigenous development in Australia. The key concepts are:

(a) Sovereignty Matters: indigenous people must make their own decisions about what development approaches to take;
(b) Institutions Matter: sovereignty must be backed up by capable institutions;
(c) Culture Matters: structures and policies must fit in with contemporary culture; and
(d) Leadership Matters: all the above requires capable leaders who must be nurtured.

2.2.6 These ideas should guide those seeking to address indigenous incarceration rates. Sentencing law changes can achieve little if the causes of crime are not also addressed. They can only be addressed by empowering indigenous communities to control their own destinies. Koori Courts can help advance the principles articulated in the Harvard Project.

2.2.7 We argue that Australia's obligations under international human rights law entail taking positive steps to reduce the rate of indigenous incarceration. The recommendations of Special Rapporteurs have not been heeded. Many of the recommendations made by the Aboriginal Deaths in Custody Royal Commission were in line with international best practice but have not been implemented. The ALRC now has the opportunity to recommend much needed changes. The question will then be whether there is the political will power to legislate accordingly.

2.2.8 We argue that unless indigenous people have proper access to justice through properly funded legal, interpreting, counselling

[3] http://hpaied.org/about

and rehabilitation services any changes to sentencing law and practice will be meaningless.

2.2.9 Koori Courts and correctional institutions that focus on Koori issues will not lead to fewer Kooris in jail if the law and order policies pursued by state and territory governments mean that mandatory sentencing regimes remove sentencing discretion from Judges and Magistrates. Koori Courts and Koori correctional institutions must be properly funded.

2.2.10 We argue that Australia can learn from Canadian and New Zealand experiences. We recommend that all sentencing law in Australia should include a section similar to Canada's section 718.2(e) and provide for the provision of reports like ***Gladue*** Reports in Canada. We recommend that New Zealand's approach to Maori cultural programs in jails be adopted in Australian prisons.

3. International Legal Frameworks

3.1 The ALRC terms of reference direct it to have regard to relevant international human rights standards and instruments.

3.2 The ALRC discussion paper[4] identifies the following international human rights treaties, to which Australia is a party, as potentially relevant to the treatment of Aboriginal and Torres Strait Islander people in the criminal justice system:

a) International Covenant on Civil and Political Rights (ICCPR), articles 2, 7, 9, 10, 14, 24, 26 and 50;
b) Convention on the Rights of the Child (CROC), articles 2, 3, 37 and 40;
c) Convention on the Elimination of All Forms of Racial Discrimination (CERD), articles 2 and 5;
d) International Covenant on Economic, Social and Cultural Rights (ICESCR), articles 1 and 2;
e) Convention on the Rights of Persons with Disabilities (CRPD) art 4, 5, 7, 12, 13 and 14.

3.3 It also makes reference to the Declaration on the Rights of Indigenous Peoples and to the Human Rights Council's resolution of 1 July 2016 "reflecting concern that indigenous women and girls may be overrepresented in criminal justice systems and may be more marginalized, and thus experience more violence before, during and after the period of incarceration."

3.4 The following part of this submission provides some further analysis of the relevant human rights treaty obligations that are most pertinent to the present inquiry in the opinion of ICJV. For the most part, we agree with the rights identified by the authors of the

[4] ALRC discussion paper, [1.37] and footnotes 39-43.

discussion paper, however we also include some rights that were omitted, such as freedom from the arbitrary deprivation of life (or the right to life), and the prohibition of cruel, inhuman or degrading treatment under the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This analysis is intended to provide a brief overview of the scope of Australia's international obligations in these areas, to inform the consideration of policy proposals made later in this submission and in other submissions to this inquiry.

3.5 The discussion draws from the analysis of the respective Treaty Monitoring Committees for each of the treaties.[5] The Treaty Monitoring Committees, in their General Comments and General Recommendations, provide the authoritative interpretation of the meaning of the treaty obligations applying to states parties to the relevant treaty.[6] The Committees also publish Concluding Observations on individual states, arising from the periodic dialogue between the relevant state and the Committee as to the state's compliance with the relevant treaty and its progress in implementing its obligations within its jurisdiction. For states that have accepted the optional complaints jurisdiction of a given Committee, that Committee will also adjudicate on individual complaints of a human rights violation by the relevant state. This submission makes reference to relevant General Comments and General Recommendations, as well as the most recent published Concluding Observations from Treaty Monitoring Committees on Australia, and relevant jurisprudence from the Committees in relation to Australia and other countries.

[5] The Treaty Monitoring Committee for the ICCPR is known as the Human Rights Committee. The Committees for all other treaties take the same name as the treaty they monitor (e.g. the Committee on Economic, Social and Cultural Rights).
[6] A McBeth, J Nolan and S Rice, *The International Law of Human Rights* (2nd ed, 2017), 249.

a) Arbitrary deprivation of life

3.6 Freedom from the arbitrary deprivation of life – often referred to by the shorthand 'right to life' – is guaranteed by article 6 of the ICCPR. It is not included in the list of rights identified by the ALRC discussion paper, but is potentially relevant insofar as preventable deaths occur within the criminal justice system. The measures for prevention identified in the Royal Commission into Aboriginal Deaths in Custody can be seen as positive measures to prevent arbitrary deaths among a vulnerable population.

3.7 The prohibition on the arbitrary deprivation of life means that a death that results from proportionate and legally justified action, such as a person killed in self-defence, will not be a violation because it is not arbitrary.

3.8 The obligations of the state under the right to life extend beyond prohibiting direct killing to require states to take positive measures to avoid preventable deaths, including steps to reduce infant mortality and eliminate malnutrition and epidemics.[7] In the context of the present inquiry, practices in the criminal justice system that expose indigenous people to a lower risk of death, whether through suicide or other means, than the currently prevailing rates are positive measures to avoid preventable deaths. The failure of the state to take such positive measures could therefore be considered a breach of the state's obligations under the right to life.

b) Freedom from torture and cruel, inhuman and degrading treatment or punishment

3.9 The ICCPR (art 7) and the CAT prohibit torture and the lesser form of mistreatment known as cruel, inhuman or degrading treatment. Torture requires an act by or with the acquiescence of a public

[7] United Nations Human Rights Committee, *General Comment No 6: Article 6 (The Right to Life)*, UN doc HRI/GEN/Rev.9 (1982), [5].

official that intentionally inflicts severe physical or mental pain or suffering for a specific purpose, including punishing the person or coercing him or her to confess or provide information.[8] The prohibition on torture is absolute under international law.

3.10 Cruel, inhuman or degrading treatment or punishment, by contrast, does not need to be performed with a specific intention as torture does.[9] Subjecting a person to treatment or punishment that causes serious physical or mental suffering (but potentially at a lower level than is necessary for torture) can constitute cruel or inhuman treatment or punishment. Treatment that is humiliating or degrading to the dignity of the person, having regard to that person's characteristics – such as his or her age or cultural background – can amount to cruel, inhuman or degrading treatment or punishment. In some circumstances, treatment of a person may be cruel, inhuman or degrading due to cultural considerations that would not meet the threshold for another person.

3.11 Prison conditions have been found to constitute cruel, inhuman or degrading treatment.[10] The Human Rights Committee has also noted the obligation of states to comply with the UN Standard Minimum Rules for the Treatment of Prisoners, and that failure to meet those standards may be indicative of a breach of human rights.[11] The consequences of detention, in the context of a case of immigration detention that either caused or exacerbated mental illness in a detainee, has also been held to constitute cruel,

[8] CAT, art 1.
[9] A McBeth, J Nolan and S Rice, *The International Law of Human Rights* (2nd ed, 2017), 82.
[10] *Portorreal v Dominican Republic*, Human Rights Committee, communication no 188/1984; *Mukong v Cameroon*, Human Rights Committee, communication no 458/1991; *Edwards v Jamaica*, Human Rights Committee, communication no 529/1993.
[11] *Mukong v Cameroon*, Human Rights Committee, communication no 458/1991, [9.3].

inhuman and degrading treatment, independently of the conditions of detention.[12]

3.12 There is a specific probation on cruel, inhuman and degrading treatment or punishment for children in art 37(a) of the CROC. The standard for treatment that will meet that threshold must be judged relative to the impact the treatment will have on the child, by reference to his or her age and also the particular characteristics and vulnerabilities of the individual child.

3.13 In a criminal justice context, there is considerable overlap between cruel, inhuman and degrading treatment or punishment and the right to be treated humanely when detained, which is discussed below. The latter right may be breached even where the level of pain or suffering inflicted was insufficient to amount to cruel, inhuman or degrading treatment or punishment.

c) Freedom from arbitrary detention

3.14 Arbitrary detention is prohibited under article 9 of the ICCPR. Detention will be arbitrary if it is not authorised by law, such as in a sentence imposed by a court or where a person is remanded into custody or temporarily detained in a lawful arrest. However, the notion of arbitrariness is broader than merely whether the detention was authorised by law. The UN Human Rights Committee explained the scope of arbitrary detention in the following terms:

> An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.

[12] *C v Australia*, Human Rights Committee, communication no 900/1999.

> For example, remand in custody on criminal charges must be reasonable and necessary in all the circumstances. Aside from judicially imposed sentences for a fixed period of time, the decision to keep a person in any form of detention is arbitrary if it is not subject to periodic re-evaluation of the justification for continuing the detention.[13]

3.15 Detention will therefore be arbitrary if it is inappropriate, unnecessary or disproportionate, even if it is formally permitted by law. In the context of the present inquiry, mandatory sentencing, the operation of presumptions regarding bail, paperless arrests and other practices resulting in detention or incarceration could in certain circumstances be regarded as arbitrary, even though they are legally authorised. Such practices could therefore be in breach of Australia's obligations regarding freedom from arbitrary detention.

3.16 As discussed above, the High Court of Australia in ***Prior v Mole***[14] considered the Northern Territory's regime for warrantless arrests where a police officer is satisfied on reasonable grounds that a person is intoxicated and meets the other criteria described in the Act.[15] The Court considered, as a matter of statutory interpretation, whether reasonable grounds existed in this case, which were described as a safeguard against arbitrary exercise of power to detain a person.[16] Although the case turned on its specific facts, rather than an examination of the lawfulness of the scheme as a whole, we submit that the Northern Territory scheme considered in ***Prior v Mole*** would not satisfy the test for freedom from arbitrary detention under international law, particularly where the detention

[13] United Nations Human Rights Committee, *General Comment No 35: Article 9 (Liberty and Security of Person)*, UN doc CCPR/C/GC/35 (2014), [12].
[14] [2017] HCA 10.
[15] The criteria are contained in s 128(1) of the *Police Administration Act* (NT) and are set out at [1] of the High Court's judgment.
[16] See eg the judgments of Gaegler J at [22]-[27] and Gordon J at [126]-[130].

is related to conduct that would not carry a custodial sentence if the detainee had been convicted by a court, and is therefore likely to be disproportionate.[17]

3.17 Furthermore, like all the rights in the ICCPR, this right must be read in the context of article 2(1), which provides that states must give effect to all of the rights in a way that does not discriminate on any of a number of grounds, including race. If a given practice has a greater effect on the detention a specific group, such as indigenous people, it may follow that the practice is discriminatory in its effect, even if it is not discriminatory on its face.

3.18 In relation to children, art 37(b) of the CROC provides that imprisonment should only be used as a last resort.

d) Humane treatment while in detention

3.19 In addition to requiring that the detention itself not be arbitrary, conditions of persons in detention must meet certain minimum standards of treatment. Article 10(1) of the ICCPR provides that "All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person."

3.20 The underlying principle of article 10 of the ICCPR is that a person's rights should only be curtailed to the extent that is necessary as a consequence of the detention itself; all other human rights should be respected and fulfilled in the same way as a person who is not detained.[18]

[17] The issue of disproportionality was considered and dismissed in *Prior v Mole* [2017] HCA 10, [20] by Kiefel and Bell JJ, but not in the context of whether disproportionality would render the detention arbitrary for the purposes of international human rights law.
[18] United Nations Human Rights Committee, *General Comment No 21: Article 10 (Humane Treatment of Persons Deprived of Liberty)*, UN doc HRI/GEN/1/Rev.9 (1992), [3].

3.21 In ***Castles v Secretary to the Department of Justice***,[19] Emerton J in the Supreme Court of Victoria endorsed the same principle in interpreting the equivalent provision in Victoria's Charter of Human Rights and Responsibilities. Her Honour said, "the starting point should be that prisoners not be subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty."

3.22 Article 37(c) of the CROC requires that every child deprived of liberty be treated with humanity and respect for his or her inherent dignity, and in a manner which takes into account the needs of a person of that age. That provision includes a right of the child to maintain contact with his or her family through visits and correspondence. The ***Children, Youth and Families Act 2005*** (Vic) provides an example of an implementation of that obligation in Australian legislation.[20] In s 482(2), children detained in remand centres, youth residential centres or youth justice centres are entitled to have their developmental needs catered for, and are entitled to receive visits from parents, relatives, legal practitioners and others. Relevant to this inquiry, Aboriginal children so detained are entitled to have reasonable efforts made to meet their needs as members of the Aboriginal community.

3.23 In ***Brough v Australia***,[21] the Human Rights Committee considered the case of a 17 year old Aboriginal child detained originally in a youth justice centre in New South Wales and then transferred to an adult prison. The treatment Mr Brough received, ostensibly to protect him from self-harm, was held to breach Australia's obligations to provide humane treatment in detention and to

[19] (2010) 28 VR 141, [108].
[20] The scope of the entitlements guaranteed by s 482 of the *Children Youth and Families Act* was considered by the Victorian Court of Appeal in *Minister for Children, Youth and Families v Certain Children*, [2016] VSCA 343, [66] and surrounding.
[21] Human Rights Committee, communication no 1184/2003.

provide treatment that was appropriate to his age and his particular vulnerability as a person with a disability and an Aboriginal person. In the context of this inquiry, we submit that the Committee's reasoning in the following extract is particularly instructive:

> "9.1 The Committee takes note of the author's allegation that his placement in a safe cell, as well as his confinement to a dry cell on at least two occasions, was incompatible with his age, disability and status as an Aboriginal, for whom segregation, isolation and restriction of movement within prison have a particularly deleterious effect. It notes the State party's argument that these measures were necessary to protect the author from further self-harm, to protect other inmates, and to maintain the security of the correctional facility.
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> 9.2 The Committee recalls that persons deprived of their liberty must not be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Inhuman treatment must attain a minimum level of severity to come within the scope of article 10 of the Covenant. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical or mental effects and, in some instances, the sex, age, state of health or other status of the victim.
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> 9.3 The State party has not advanced that the author received any medical or psychological treatment, apart from the prescription of anti-psychotic medication, despite his repeated instances of self-harm, including a suicide attempt on 15 December 1999. The very purpose of the use of a safe

cell "to provide a safe, less stressful and more supervised environment where an inmate may be counselled, observed and assessed for appropriate placement or treatment" was negated by the author's negative psychological development. Moreover, it remains unclear whether the requirements not to use confinement to a safe cell as a sanction for breaches of correctional centre discipline or for segregation purposes, or to ensure that such confinement does not exceed 48 hours unless expressly authorized, were complied with in the author's case. The Committee further observes that the State party has not demonstrated that by allowing the author's association with other prisoners of his age, their security or that of the correctional facility would have been jeopardized. Such contact could have been supervised appropriately by prison staff.

9.4 Even assuming that the author's confinement to a safe or dry cell was intended to maintain prison order or to protect him from further self-harm, as well as other prisoners, the Committee considers that the measure incompatible with the requirements of article 10. The State party was required by article 10, paragraph 3, read together with article 24, paragraph 1, of the Covenant to accord the author treatment appropriate to his age and legal status. In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated

by his inclination to inflict self-harm and his suicide attempt. The Committee therefore concludes that the author's treatment violated article 10, paragraphs 1 and 3, of the Covenant."

e) Right to a fair trial

3.24 The right to a fair trial under art 14 of the ICCPR requires a state to provide extensive guarantees to a person facing the criminal justice process. They include the right to be presumed innocent, to be informed of the charges against him or her, to have adequate time and facilities for preparing a defence, and to have the free assistance of an interpreter if he or she cannot understand the language used in court. Equality of arms between the prosecution and defence is an important element of the right to a fair trial. Similarly, the availability of legal assistance is crucial to whether a person can participate in a legal proceeding in a meaningful way.[22]

3.25 Racially biased jury selection or tolerance of racist attitudes among a jury have been held to breach the guarantee of equality before the law as part of the right to a free trial.[23]

f) Non-discrimination

3.26 The general prohibition on discrimination on the basis of race, which is found in the ICCPR (art 26), CERD (art 2) and CROC (art 2(2)), does not preclude measures that may treat people differently on their face on the basis of race, but which are designed to protect or

[22] United Nations Human Rights Committee, *General Comment No 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, UN doc CCPR/C/GC/32 (2007), [10].
[23] United Nations Human Rights Committee, *General Comment No 32: Article 14 (Right to equality before courts and tribunals and to a fair trial)*, UN doc CCPR/C/GC/32 (2007), [25].

advance the interests of a historically disadvantaged group in the manner of affirmative action. Such special measures are permitted under international law on a similar basis to the ***Racial Discrimination Act 1975*** **(Cth)**.[24] Accordingly, any measure that treats indigenous people differently in the criminal justice system, with the intention of better securing the human rights of indigenous people as a historically disadvantaged group, will not violate international law on the basis of racial discrimination on the basis of such differential treatment alone.

3.27 Conversely, legislative or policy measures that are non-discriminatory on their face, but have the effect of disproportionately targeting a particular racial group, may violate the prohibition on racial discrimination under international human rights law. Such measures include criminalising acts that are likely to lead to the prosecution of a particular racial group,[25] or the practice of racial profiling in terms of searches, questioning, investigation or arrests.[26]

3.28 The rights guaranteed by each of the human rights treaties to which Australia is a party must be protected and fulfilled for all people within Australia's jurisdiction, without discrimination on any of the specified grounds, including race.[27] Again, treatment that is differential on its face, but is a special measure to advance a historically disadvantaged group, will not fall foul of the obligation of non-discriminatory implementation.

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[24] Section 8 of the *Racial Discrimination Act* is expressly intended to implement Australia's obligations under the CERD.
[25] United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system* (2005), [5(a)].
[26] United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system* (2005), [20].
[27] ICCPR, art 2(1); CROC, art 2(1); CERD, art 5.

g) Concerns of United Nations Treaty Monitoring Committees regarding Indigenous people in the Australian justice system

3.29 The Treaty Monitoring Committees have repeatedly expressed concerns in response to Australia's periodic reports on its progress under the various human rights treaties on the subject of the plight of indigenous people in Australia's criminal justice system. These concerns have included the disproportionate rates of incarceration of indigenous people, the use of mandatory sentencing in some jurisdictions, and issues relating to mental health in indigenous people before the courts. A selection of extracts from the most recent Concluding Observations on Australia from several of the Committees is set out below:

CERD 2010

In 2010, the CERD Committee made the following observations and recommendations regarding rates of incarceration and deaths in custody.

"20. While welcoming the endorsement of the National Indigenous Law and Justice Framework by all Australian governments, the Committee reiterates its concern about the disproportionate incarceration rates and the persisting problems leading to deaths in custody of a considerable number of indigenous Australians over the years. The Committee expresses concern in particular about the growing imprisonment rates of indigenous women and the substandard conditions in many prisons (arts. 5 and 6).

Taking into account the Committee's general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, the Committee recommends that the State party dedicate sufficient resources to address the social and economic factors underpinning

indigenous contact with the criminal justice system. It encourages the State party to adopt a justice reinvestment strategy, continuing and increasing the use of indigenous courts and conciliation mechanisms, diversionary and prevention programmes and restorative justice strategies, and recommends that, in consultation with indigenous communities, the State party take immediate steps to review the recommendations of the Royal Commission into Aboriginal Deaths in Custody, identifying those which remain relevant with a view to their implementation. The Committee also recommends that the State party implement the measures outlined in the National Indigenous Law and Justice Framework. The Committee encourages the State party to ensure the provision of adequate health care to prisoners."

CAT 2014

The CAT Committee made the following observations and recommendations on Australia's 2014 report to that Committee.

"Indigenous people in the criminal justice system

12. Noting with satisfaction the measures taken by the State party to address the situation of indigenous people, including the Indigenous Advancement Strategy, the Committee is concerned at information received that indigenous people continue to be disproportionately affected by incarceration, reportedly representing around 27 per cent of the total prisoner population while constituting between 2 and 3 per cent of the total population. In that respect, the Committee notes with concern the reports indicating that overrepresentation of indigenous people in prisons has a serious impact on indigenous young people and indigenous women. The Committee is also concerned at reports that mandatory sentencing, still in force in several jurisdictions, continues to

disproportionately affect indigenous people. Furthermore, and while welcoming the information concerning the legal assistance services available for indigenous people, the Committee is concerned at reports that these services are not adequately funded (arts. 2, 11 and 16).

The State party should increase its efforts to address the overrepresentation of indigenous people in prisons, in particular its underlying causes. It should also review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances. The State party should also guarantee that adequately funded, specific, qualified and free-of-charge legal and interpretation services are provided from the outset of deprivation of liberty."

CESCR 2017

In response to Australia's 2017 report under the ICESCR, the CESCR made the following observations about the intersection between mental health and criminal justice, and the need to address root causes. It urged particular attention to the needs of indigenous populations in that context.

h) Mental health

3.30 The Committee is concerned about the large number of persons with cognitive or psychosocial disabilities in contact with the criminal justice system, as victims or offenders, in particular indigenous peoples. The Committee is particularly concerned that persons with disabilities who are deemed unfit to stand trial may be subject to indefinite detention without being convicted of a crime.

3.31 The Committee takes note of the State party's intention to address the situation of persons with disabilities in contact with the criminal justice system. It urges the State party to revise its approach to mental health and ensure full respect for the human rights of persons with cognitive or psychosocial disabilities. The Committee recommends that the State party:

(a) Address the root causes of the large number of persons with disabilities, notably indigenous peoples, in contact with the criminal justice system, as victims or offenders;

(b) Introduce the necessary legislative and policy changes to end indefinite detention of people with disabilities without conviction;

(c) Take effective measures to find alternative living solutions and prioritize community-based living settings for persons with cognitive or psychosocial disabilities.

UN Special Rapporteurs' Reports that relate to Indigenous Incarceration

3.32 UN Human Rights Council (UNHRC): The UNHRC was established on 15 March 2006 to replace the UN Commission on Human Rights (UNCHR), and is a subsidiary body of the UN General Assembly. The council works closely with the Office of the High Commissioner for Human Rights (OHCHR) and engages the United Nations' *special procedures*.

3.33 Special procedures mandate-holders: "Special procedures" is the general name given to the mechanisms established by the Human Rights Council to gather expert observations and advice on human rights issues in all parts of the world. Special procedures are categorized as either thematic mandates, which focus on major phenomena of human rights abuses worldwide, or country mandates, which report on human rights situations in specific countries or

territories. Special procedures can be either individuals (called "Special Rapporteurs" or "Independent Experts"), who are intended to be independent experts in a particular area of human rights, or working groups, usually composed of five members (one from each UN region). As of 30 September 2016 there were 43 thematic, and 14 country mandates. Two of the thematic mandates are indigenous peoples and racism.

3.34 The mandates of the special procedures are established and defined by the resolution creating them. Various activities can be undertaken by mandate-holders, including responding to individual complaints, conducting studies, providing advice on technical cooperation, and engaging in promotional activities. Generally, the special procedures mandate-holders report to the Human Rights Council at least once a year on their findings.

3.35 Australia issued a standing invitation to all special procedure mandate holders on 7 August 2008 and issued a specific invitation in 2000.

3.36 Mandate-holders of the special procedures serve in their personal capacity, and do not receive pay for their work. The independent status of the mandate-holders is crucial in order to be able to fulfil their functions in all impartiality. The Office of the United Nations High Commissioner for Human Rights provides staffing and logistical support to aid to mandate-holders in carrying out their work.

3.37 Visits to Australia and Reports by Special Rapporteurs: Between 2002 and 2017 there have been three Special Rapporteurs' reports on Australia under the special procedures of UNHRC and its predecessor, UNCHR, that have considered the high incarceration rates of Aboriginals and Torres Strait Islanders. Two of these have been by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (2002 and 2017) and the other by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples (2010). The ALRC should note how, for the most part, the recommendations of the Special Rapporteurs have been ignored for fifteen years:

2017 Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related

intolerance, Mr. Mutuma Ruteere, on his mission to Australia[28]

Observations:

- Notes that the disproportionately high level of incarceration of Indigenous Australians has not improved since the last report in 2001 and that the incarceration rate of indigenous youth and women has increased since 2010.
- Notes the ongoing work of the Royal Commission into the protection and detention of children in the Northern Territory and of the ALRC into the incarceration rate of Aboriginal and Torres Strait peoples.
- Justice programmes designed and led by indigenous people that aim at offering alternatives to detention, where available, are important for early intervention, prevention, diversion and support services, but that many of these were struggling because of lack of government support and funding.
- Emphasizes the importance of including indigenous organizations in national strategies, such as the National Crime Prevention Framework. The Closing the Gap strategy, which has now been under way for a number of years, sets targets for progress in, among others, indigenous health, employment, education and housing, but not in the criminal justice system. The Special Rapporteur believes that such targets could also be set up in the criminal justice system in order to reverse the inequalities.
- Several incidents of police profiling of indigenous peoples and discrimination in the private sector, especially in the provision of and access to goods and services.
- In general, there are very few indigenous police officers and remote indigenous communities are patrolled by non-indigenous law enforcement officials, who are only integrated to a limited extent in the communities they are intended to serve.
- there is a 60 per cent likelihood of indigenous Australians experiencing discrimination

72. Recommendations: The Australian Government should:

(c) Continue its commitment to, and funding of, the Closing the Gap strategy so as to end discrimination against indigenous Australians in accordance with

[28] A/HRC/35/41/Add.2 Human Rights Council 35th Session 6-23 June 2017 Agenda Item 9

the targets set; include administration of justice in those targets, especially in the criminal justice system; and provide more disaggregated data on how the strategy has reduced the inequalities between indigenous Australians and the rest of the population;

(d) Extend the different justice programmes that are designed and led by indigenous persons, including those on restorative justice, by providing adequate support and funding — with the involvement of indigenous organizations — to end the overrepresentation of indigenous Australians in the criminal justice system and to offer alternatives to detention in this regard, the outcomes of the two Royal Commissions[ed. note: ALRC is not a "Royal Commission"] will be important steps, which will require follow-up;

(e) Ensure that law enforcement agencies, in particular police forces, reflect the diversity of Australian society and the communities they serve and increase their intake of recruits from indigenous and minority communities;

2010 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya, on the situation of indigenous peoples in Australia[29]

Observations:

- Alarmingly high levels of incarceration of Aboriginal and Torres Strait Islander persons, including women and minors
- Limited access to justice in remote areas and inadequate provision of culturally appropriate justice services including translation services for criminal defendants**.**
- Still a high rate of deaths in custody. Many of the recommendations of the Royal Commission into Deaths in Custody, completed in 1991, have still not been fully and adequately addressed.
- Although there have been some noteworthy efforts funded by the Commonwealth Government to provide legal services to Aboriginal and Torres Strait Islanders and some new initiatives within the framework of the Closing the Gap campaign to reduce their overrepresentation in the criminal justice system, much work needs to be done given the extremity of the situation.

[29] A/HRC/15/37/Add.4 Human Rights Council 15th Session 2010 Agenda Item 3

V11. Conclusions and recommendations:

102. The Government should take immediate and concrete steps to address the fact that there are a disproportionate number of Aboriginal and Torres Strait Islanders, especially juveniles and women in custody.

103. The Government should take further action, in addition to actions already taken, to ensure the recommendations of the Royal Commission into Aboriginal Deaths in Custody are being fully implemented.

104. Additional funds should be immediately provided to community-controlled legal services to achieve, at a minimum, parity with mainstream legal aid services. In particular, culturally appropriate legal services should be available to all Aboriginal and Torres Strait Islander peoples, including those living in remote areas; and interpreters should be guaranteed in criminal proceedings and, where necessary, for a fair hearing in civil matters.

105. Greater efforts should be made to reform the civil and criminal justice system to incorporate Aboriginal and Torres Strait Islander customary law and other juridical systems, including community dispute resolution mechanisms

To Aboriginal and Torres Strait Islander peoples and their organizations

107. Indigenous peoples should endeavour to strengthen their capacities to control and manage their own affairs and to participate effectively in all decisions affecting them, in a spirit of cooperation and partnership with government authorities at all levels, and should make every effort to address any issues of social dysfunction within their communities, including with respect to women and children.

2002 Report by Mr. Maurice Glèlè-Ahanhanzo, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, on his

Mission to Australia.[30] Observations regarding Discrimination in the Administration of Justice

- There are a high percentage of Aboriginals and Torres Strait Islanders in the criminal justice system. The representatives of the Commonwealth Government and all other people with whom the Special Rapporteur spoke agree that this results from their socio-economic marginalization and the destructuring of their society. The measures already in place to remedy this situation will only take effect in the long term.

- The high percentage of deaths in prison and detention centres. The measures adopted by the governments at all levels regarding Aboriginal Deaths in Custody have not yet produced concrete results.

- The Royal Commission into Aboriginal Deaths in Custody and the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families have made numerous recommendations aimed at redressing the underlying causes of Indigenous over-representation in the criminal justice, juvenile justice, and care and protection. Many of the recommendations have not been acted upon or have been actively rejected by governments.

- The discriminatory nature of the mandatory sentencing laws in the Northern Territory and Western Australia.

Recommendations

This 2002 Report makes no recommendations regarding discrimination in the justice system other than in general terms.

Conclusion

3.38 Australia has consistently ignored the recommendations of the UN Special Rapporteurs and its duties as a signatory to international treaties and conventions. In 2009 the Australian Government adopted the UN Declaration on the Rights of Indigenous Peoples. Article 3 of the

[30] E/CN.4/2002/24/Add.1 Commission on Human Rights 58th Session Item 6 of the provisional agenda 26 February 2002)

Declaration sets out the right to self-determination. Article 7 sets out, among other things, the right to liberty and security of the person. We argue that Australia only pays lip service to its international obligations. We argue that the ALRC should examine Federal and State criminal and penal legislation in the light of Australia's international obligations so that indigenous citizens can begin to overcome a legacy of injustice.

4. Evolving Australian Case Law

4.2 Individualised justice is an entrenched principle of sentencing law in Australia.

Neal

4.3 In ***Neal v R***[31], it was argued on behalf of Mr Neal that a sentencing court should take account of the "special problems experienced by Aboriginal people living on reserves"[32].

4.4 Mr Neal was the Chairman of the Yarrabah Aboriginal Community, an Aboriginal reserve outside Cairns. He was convicted of unlawful assault on the white manager of the local store who was an officer of the Queensland Department of Aboriginal and Torres Strait Islanders Affairs. The assault, which involved spitting, occurred in the course of an argument about management of the reserve and departmental policy. Mr Neal, who had been elected to his role on a platform of self-management wanted all whites to leave the reserve. This was the context of his confrontation with the complainant.

4.5 The so called "special problems" were not relevant to the determination of the ground of appeal but their place in the exercise of the sentencing discretion was capable of bearing on the orders consequent upon the successful appeal. All members of the High Court thought a connection between offending and the "special problems" was capable of being a relevant matter in mitigation but, beyond this, there was no authoritative statement.

4.6 For Gibbs CJ with whom Wilson J agreed, the "special problems" had significance if the offending act was "born of frustration and discontent born of the conditions in which he had been living"[33]. Seemingly, it was

[31] (1982) 149 CLR 305

[32] Mr Neal's appeal turned on a technical point of appeals procedure. However, the significance of the "special problems" had potential significance to the orders consequent upon the successful appeal.

[33] P309

a connection between the issue and the offending that was important and which needed to be established by evidence.

4.7 Brennan J expressed the place of such a consideration, like this:

> *The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.*[34]

4.8 Murphy J analysed the issue differently. He drew not only on what the evidence established about the background to the dispute between Mr Neal and the complainant but, also, upon research into race relations more generally. He specifically noted the overrepresentation of Aboriginal people in custody[35]. He then concluded:

> *Taking into account the racial relations aspect of this case, the fact that Mr. Neal was placed in a position of inferiority to the whites managing the Reserve should have been a special mitigating factor in determining sentence.*[36]

4.9 Brennan J's approach was to apply ordinary sentencing principles, albeit acknowledging that race could be a material matter to be taken into account as mitigating. On this approach, it is the psychological impact of the "special problems" on the individual to which proof is directed. Arguably, Murphy J's approach was different. Historical factors establishing the preconditions for the dispute and the resort to violence were mitigating in and of themselves, independently of proof of their subjective impact on Mr Neal at the moment the assault occurred. The difference is in the nature and focus of proof: the historical rather than

[34] P326
[35] P318
[36] P319

the psychological and the social context as well as the individual experience. Though the two approaches may lead to the same result, they have ramifications for what must be proven and by what evidence.

4.10 This tension has been played out in various decisions of the intermediary Courts of Appeal. It is particularly acute in cases where the victim as well as the perpetrator are Aboriginal and have the same background of disadvantage. It is Brennan J's dicta that has been taken to state the law.

4.11 In ***Fernando***[37], Woods J had to sentence an Aboriginal man who pleaded guilty to malicious wounding of his sometime de-facto partner, a woman against whom he had offended before, in the course of an unpremeditated, alcohol-fuelled argument. He had had a deprived upbringing, an extensive criminal history and symptoms of alcohol-related brain injury. The material relied upon by counsel for Mr Fernando on the plea included a journal article about sentencing aboriginal offenders and the Report of the Royal Commission into Aboriginal Deaths in Custody.

4.12 Woods J considered this material, clearly regarding it as relevant to his task, and from it distilled eight propositions, including the adoption of the Brennan J dicta that ordinary principles of sentencing apply. Proposition B was that Aboriginality may have an "explanatory" rather than "mitigating" relevance.

4.13 In ***Kennedy***, the Fernando propositions were explained:

> *Properly understood, Fernando, is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime*. [38]

[37] *R v Fernando* (1992) 76 A Crim R 58
[38] *Kennedy v R* [2010] NSWCCA 260 [53]

4.14 Similarly in the South Australian decision of ***Pennington***:

> *While membership of a particular ethnic or other group is, without more, irrelevant, membership of a particular ethnic or other group becomes relevant when it tells the court something about the offence or the offender relevant to the determination of the appropriate penalty*.[39]

Fuller-Cust

4.15 In Victoria, while adopting the Brennan J dicta that the same sentencing principles apply irrespective of race, Eames J observed to have regard to the fact of the applicant's Aboriginality would not mean that any factor would necessarily emerge by virtue of his race which was relevant to sentencing, but it would mean that a proper concentration would be given to his antecedents which would render it more likely that any relevant factor for sentencing which did arise from his Aboriginality would be identified and not overlooked.[40]

4.16 He allowed therefore that, even applying the same sentencing principles, "*different outcomes may result for an Aboriginal offender simply because mitigating factors in the background of the offender, or circumstances of the offence, occurred or had an impact peculiarly so because of the Aboriginality of the offender*."[41]

4.17 In resentencing Fuller-Cust, Eames J expressed himself as entitled to have regard to reports such as that of the Royal Commission into Aboriginal Deaths in Custody and information about over-representation of Aboriginal people in custody and observed The significance of the work of the Royal Commission and the potential relevance of its findings to cases involving Aboriginal offenders who had experienced separation from their natural families has been well recognised and the potential

[39] [2015] SASCFC 98 [23]
[40] *R v Fuller-Cust* (2002) 6 VR 496, 520 [80]
[41] Ibid, p522 [88]

for there to be a connection between that experience and later offending behaviour should not be underestimated.[42]

Bugmy and *Munda*

4.18 The significance of a background of social disadvantage in sentencing Aboriginal offenders returned to the High Court in two sentence appeals heard together in 2013. Both were appeals from successful crown appeals against sentences imposed on Aboriginal men from remote communities for violent offending, where there was evidence linking that offending to growing up in circumstances of severe social deprivation.

4.19 In each case the High Court rejected reliance on the Canadian cases ***Gladue***[43] and ***Ipeelee***[44] as having any application in sentencing in Australia in the absence of specific legislative direction.[45]

4.20 In ***Bugmy***[46], the court rejected arguments that, firstly, sentencing courts should take into account the "unique circumstances of all Aboriginal offenders" as relevant to the moral culpability of an individual Aboriginal offender and, secondly, that courts should take into account the high rate of incarceration of Aboriginal Australians when sentencing an Aboriginal offender.

4.21 The High Court re-asserted that the law in Australia is as stated by Brennan J, namely that there is no warrant for applying a different method of analysis to the sentencing of Aboriginal and non-Aboriginal offenders and that an Aboriginal offender's deprived background may mitigate sentence in the same way the deprived background of a non-Aboriginal offender might.[47]

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[42] Ibid, p533 [139]
[43] *R v Gladue* [1999] 1 SCR 688
[44] *R v Ipeelee* [2012] 1 SCR 433
[45] As to these, see section [#] on the Canadian cases
[46] *Bugmy v R* (20-13) 249 CLR 571
[47] Ibid, p592 [36]

4.22 However, it went further and held that individualised justice also meant that there was no warrant for the court to take judicial notice of the systemic background of deprivation of Aboriginal offenders or to take account of the high rate of incarceration of Aboriginal people. Aboriginal offenders seeking to rely on a background of deprivation as a matter in mitigation must, individually, prove that background and its effects upon them.[48] In this respect, it may be that the historical method adopted in ***Fuller-Cust***, ***Fernando*** and by Murphy J in ***Neal*** are to be regarded as wrong.

4.23 In ***Munda***, the majority further observed that giving mitigating weight to the unique circumstances of Aboriginal offenders or having regard to their over-representation in custody would be to accept that Aboriginal offenders are in general less responsible for their actions than other persons and to deny Aboriginal people their full measure of human dignity.[49]

4.24 It cannot be right that prison terms calculated without regard to the unique history of social disadvantage recognise the human dignity of Aboriginal offenders. Nor, against a background of long term and worsening overrepresentation in custody, can it be right to proceed to sentence, in the absence of proof to the contrary, on the assumption that Aboriginality has nothing to do with an offender's criminality or to place on the individual offender the full burden of proving the link between his or her offending and his background[50].

Need for legislative change

4.25 Requiring a sentencing court simply to have regard to the unique circumstances of Aboriginal Australians and their over-representation in custody does not automatically lead to a "race discount". It simply

[48] Supra and p594 [41]

[49] *Munda v State of Western Australia* (2013) 249 CLR 600, 619, [53]

[50] Just as it is not contrary to the human dignity of women to recognise in s338 *Criminal Procedure Act 2009* (Vic) or s37B *Crimes Act 1958* (Vic) the high incidence of sexual violence against women.

imposes a duty to enquire and to ensure all material facts to the determination of sentence have been taken into account. This does not, as was said in ***Munda*****,** involve an acceptance that a victim of an Aboriginal offender (very commonly an Aboriginal woman) is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide. It simply requires the imposition of a lawful sentence, which is the only legitimate expectation a victim can have.

4.26 Consequent upon the decisions in ***Munda*** and ***Bugmy*** we argue that the legislature should intervene to require a sentencing court to have regard to the unique circumstances of Australia's indigenous citizens and their over-representation in custody.

Section 9C *Criminal Law (Sentencing) Act* 1988 (SA)

4.27 In ***R v Wanganeen***[51] Justice Gray in the South Australian Supreme Court discussed s9C of ***Criminal Law (Sentencing) Act*** **1988 (SA)** which permits a sentencing conference that is similar to that carried out in Nunga Courts and almost identical to the sentencing conversation held in Koori Courts as discussed below. Justice Gray cited with approval and at length the remarks of Justice Nyland in ***R v Tijami.***[52] We discuss below the organic process that is the sentencing conversation in the Koori Courts. It allows different voices from the indigenous community to be heard in circumstances where otherwise the only voice heard in mitigation may be that of a *gubba* (non-indigenous) lawyer from an Aboriginal Legal Aid Service.

Special Measures under the *Racial Discrimination Act* 1975 (Cth) ("*RDA*")

4.28 In ***R v Grose***[53] the South Australian Court of Criminal Appeal decided that s9C was a special measure under Article 1(4) of the ***International Convention on the Elimination of all Forms of Racial Discrimination*** as referred to s8(1) of the ***RDA***. Justice Gray found that sentencing conferences fell within the scope of

[51] (2010) SASC 237
[52] (2000) 77 SASR 514 at paras 8-9
[53] (2014) SASCFC 42

Article 5 of the Convention as it concerned the '*right to equal treatment before tribunals and all other organs administering justice'*.

4.29 Justice Gray in ***Grose***[54] discussed the High Court's distinguishing of the Canadian authorities ***Gladue*** and ***Ipeelee*** *in* ***Bugmy*** to the effect that there was nothing in section 5(1) of the NSW Sentencing Act directing courts to give particular attention to the circumstances of Aboriginal offenders, unlike s718.2(e) of the Canadian Sentencing Act as discussed below. The cases of ***Bugmy*** and ***Munda*** demonstrate the necessity of enacting a law with similar effect to s718.2(e). We argue that such a section would also be interpreted as a special measure under the ***RDA***.

[54] *Grose* at para 93

5. Access to Justice

5.1 Access to justice is a key principle of the rule of law. It refers to the ability of individuals to access the legal system; a system which becomes meaningless if social, cultural, economic, and legal barriers prevent them from doing so. As such, in the Inquiry's Terms of Reference, the Commission were tasked with the investigation of:

> "'*…access to justice issues, including the remoteness of communities, the availability of and access to legal assistance, and Aboriginal and Torres Strait Islander language and sign interpreters".*[55]

5.2 From an international perspective, access to justice is engrained within many legal frameworks. These are detailed in the table below:

International Legal Framework:	***Relevant Sections:***
Declaration of the High-level Meeting on the Rule of Law	This framework stresses the right of access to justice for all, including members of vulnerable groups.
Universal Declaration of Human Rights (UDHR)	Articles 7 and 8 provide the right to equality before the law without discrimination, equal protection of the law, and the right to an effective remedy from competent national tribunals.
International Covenant on Civil and Political Rights (ICCPR)	Article 2(1) provides for non-discrimination, notably on the basis of social origin or status, meaning that ability to pay should not be a barrier to claiming rights. This is also reinforced in Article 26 which provide that all persons are equal before the law and entitled to equal protection of the law, without discrimination.

[55] Australian Law Reform Commission, *Inquiry into Indigenous Incarceration Rates: Consultation Paper,* (2017) at p.187

	Article 2(3) requires an effective remedy from a competent authority. The HRC has commented that Article 2 requires that States "adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations." States are required to take steps across the spectrum of government control to ensure that rights are realized. Article 14 specifically addresses the administration of justice. The HRC has recognized Article 14 as setting out the right to equality before the courts and tribunals and to a fair trial.
International Covenant on Economic, Social and Cultural Rights	The preamble notes that "everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights" which includes "appropriate means of redress, or remedies … and appropriate means of ensuring governmental accountability.
UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems	The first international instrument on the right to legal aid. This framework establishes minimum standards for the right to legal aid in criminal justice systems, and provides practical guidance on how to ensure access to effective criminal legal aid services.

Table 1: International Legal Frameworks

5.3 As a signatory to these international frameworks, Australia is obliged to provide fair, transparent, effective and non-discriminatory services that promote and defend access to justice. However, due to its historical origin, the Australian justice system is one that privileges 'white' experiences and understandings of the law.[56] This often taints the justice system as a tool of oppression, especially given its historical treatment of indigenous peoples:

[56] Eileen Baldry and Chris Cunneen, "Imprisoned Indigenous Women and the Shadow of Colonial Patriarchy," *Australian and New Zealand Journal of Criminology*, (2014), vol.47, no.2, pp.219-240

"…many indigenous people still see the criminal justice system as an arm of colonialism; […] the most powerful short-term tool at the disposal of any government, in that it can be used to legally disperse violence".[57]

5.4 Furthermore, as the Law Council of Australia has written:

"Systematic discrimination, criminalisation of Aboriginal and Torres Strait Islander communities, deaths in custody and the denial of political rights have created a profound and ongoing distrust in the Australian system."[58]

5.5 This distrust is often complemented by financial barriers, geographical location, and differences in communication styles, all of which help restrict the opportunities available to legal assistance. In 2012, the Australia-wide LAW Survey revealed considerable differences in the level of disadvantage faced by indigenous people and the general population (as seen in Table 2).[59]

Indicator	***Indigenous***		***Non-indigenous***		***Total***	
	N	***%***	***N***	***%***	***N***	***%***
Disability	146	23.9	3936	19.6	4082	19.7
Disadvantaged housing	131	21.4	1157	5.8	1288	6.2
Low education	345	56.4	6211	30.9	6556	31.6
Low income	188	30.7	4479	22.3	4667	22.5
Non-English main language	44	7.2	1368	6.8	1412	6.8
Remote or outer-regional area	330	53.9	2416	12.0	2746	13.3
Single parent	109	17.8	1408	7.0	1517	7.3
Unemployment	134	21.9	2062	10.3	2196	10.6
Total N	***612***		***20104***		***20716***	

Table 2: Indigenous Status by Indicators of Disadvantage

[57] Marianne O. Nielsen and Linda Robyn, "Colonialism and Criminal Justice for Indigenous Peoples in Australia, Canada, New Zealand and the United States of America", *Indigenous National Studies Journal*, (2003), vol.4, no.1, at p.39

[58] Law Council of Australia, "Aboriginal and Torres Strait Islander People," *The Justice Project: Consultation Paper,* (2017) at p.18

[59] Zhigang Wei and Hugh M. McDonald, "Indigenous People's Experiences of Multiple Legal Problems and Multiple Disadvantage – a working paper," *Updating Justice,* (2014), no.36, at p.4

5.6 The consequence of these disadvantages is that many indigenous people become locked out of the system altogether.[60] This inaccessibility can worsen the legal and socio-economic problems indigenous people already face. As such, the ICJV argues that in order for Australia to adopt its international obligations, significant investments must be made in measures that will increase access to justice for indigenous people. Three such measures include the establishment of adequate interpreter services, expanding the provision and funding of available legal services, and introducing new statutory duties to control police operations.

i. Interpreter Services

5.7 ICJV supports the proposal for state and territory governments to work with peak indigenous organisations so as to establish interpreter services within the criminal justice system.

5.8 As highlighted in Table 1, the *UDHR* and the *ICCPR* both state that non-discrimination is a pre-condition to access to justice. As the *United Nations Declaration on the Rights of Indigenous Peoples* states, a common form of discrimination faced by indigenous peoples is that which is based on the characteristics of their language and speech. This includes one's accent, size of vocabulary, syntax, and gestures.

5.9 In Australia, there are approximately 145 spoken Aboriginal languages, and three main languages spoken by the Torres Strait Islanders.[61] Thus, within many indigenous communities, English is used as a second, third, or fourth language. Varying types of English may also exist, along with different styles or bodily expressions. One such example is the minimising of eye contact or the valuing of silence.

[60] Chris Cunneen, Fiona Allison, and Melanie Schwarz, "Access to Justice for Aboriginal People in the Northern Territory," *Australian Journal of Social Sciences*, (2014), vol.49, no.2

[61] Law Council of Australia, "Aboriginal and Torres Strait Islander People," *The Justice Project: Consultation Paper,* (2017) at p.5

5.10 Furthermore, as Table 2 demonstrates, there are high levels of disability impairment (23.9%) and poor education (56.4%) among indigenous peoples. Any language difficulties arising from these two disadvantages may also lead to discrimination.

5.11 The potential for language discrimination highlights the need for interpreter services. Article 14(3) of the *ICCPR* states that, in all criminal cases, individuals should:

a. "…be informed promptly and in detail, in language which he understands of the nature and cause of the charge against him."

And,

f. "Have the free assistance of an interpreter if he cannot understand the language used in court."

5.12 Furthermore, Section 18 of the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* also holds that:

"States should endeavour to enhance the knowledge of their communities about their justice system and its functions, the ways to file complaints before the courts and alternative dispute resolution mechanisms."

5.13 However, it is essential that interpreter services are of an appropriate standard. In the Canadian case ***R v Tran***,[62] a conviction was overturned due to insufficient interpretation provided in the original hearing. The court listed five criteria for court interpreting of a sufficient standard: continuity, precision, impartiality, competence, and contemporaneousness. ICJV recommends that these criteria be used for the establishment of interpreter standards within the wider Australian criminal justice system. ICJV recommends that Certified Special Interpreters who are qualified by the National Accreditation Authority for Translators and Interpreters are available to all indigenous citizens who face serious charges in the criminal justice system. This particularly applies to indigenous citizens living in remote Australia and north of the Tropic of Capricorn whose first language often is not English.

[62] (1994) 2 S.C.R. 951

ii. Provision of Legal Services and Supports

5.14 As the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* holds, legal aid programs are a central component of strategies to enhance access to justice. However, ICJV submits that the provision of legal services and supports for indigenous peoples is currently inadequate. This is due to the following reasons:

5.15 Firstly, as seen in Table 2, the Indigenous population is diverse and spread throughout urban, regional and remote areas of the country. In the Northern Territory, 80 per cent of the indigenous population live in remote or very remote areas. With the exception of a few services, most community legal aid centres and programs operate in highly-populated areas. This is largely due to insufficient funding which restricts the opportunity for expanding to regional and very remote areas.

5.16 Given the number of indigenous people involved within the legal system and the complexity of their needs, it is vital that legal centres are adequately resourced and accessible to all indigenous people. According to Cunneen and Schwartz, specialised centres that incorporate the unique cultural experiences of indigenous peoples provide a substantial improvement to their access to justice:

> *"… [This] goes to the heart of questions of access, equity and the rule of law. It represents the ability of Indigenous people to use the legal system (both criminal and civil) to the level enjoyed by other Australians."*[63]

5.17 However, funding for specialised indigenous legal services has not kept up with the increase in caseload. This reflects the insufficient levels of funding for community legal centres more broadly, as was highlighted in a recent report by the Productivity Commission.[64]

5.18 One of the consequences of poor funding is that community legal centres cannot afford to provide all legal services. This is particularly

[63] Chris Cunneen and Melanie Schwartz, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of equity and access' (2008) *Criminal Law Journal* 38, at p.41
[64] Productivity Commission, 'Access to Justice Arrangements,' *Inquiry Report No. 72*, (2014) at p.24.

problematic for indigenous people who, according to the LAW Survey, don't just experience multiple legal problems, but often problems of a more substantial nature. Moreover, as Figure 1 demonstrates, indigenous people who experience multiple types of disadvantage are likely to experience a significantly higher number of substantial legal problems than those who do not.[65]

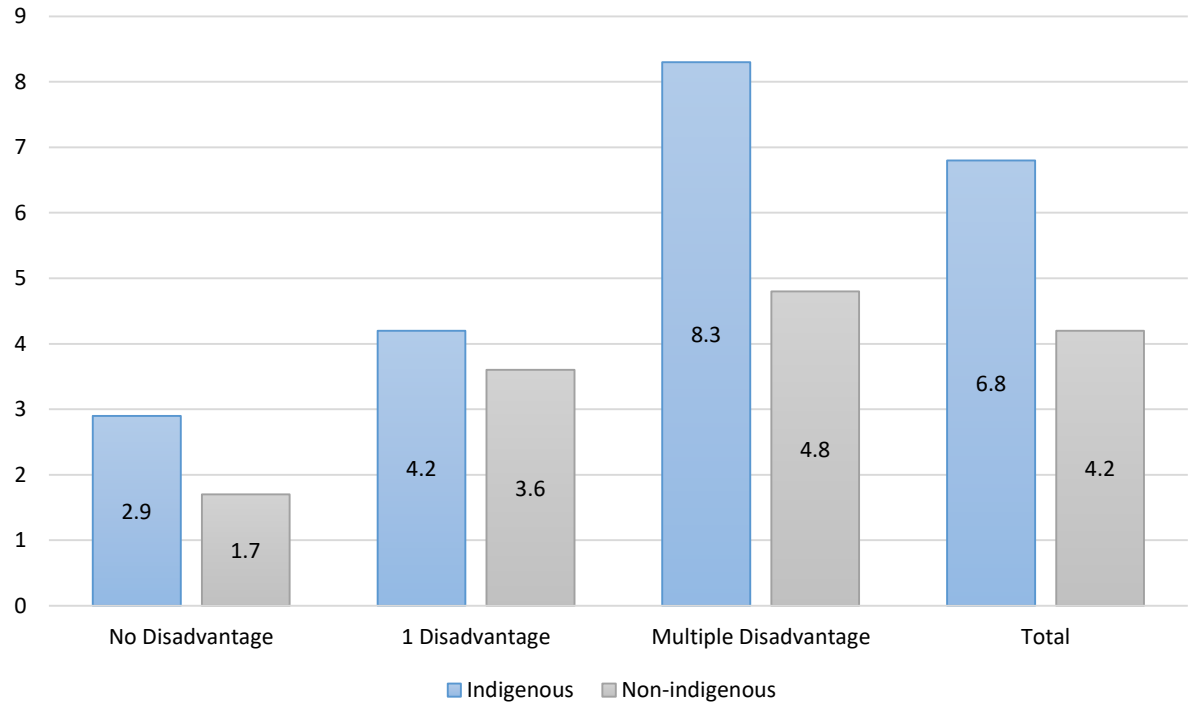

Figure 1: Mean Number of Legal Problems by Level of Disadvantage[66]

iii. Custody Notification Service

5.19 ICJV supports the proposal that state and territory governments introduce a statutory custody notification that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an indigenous person.

[65] Law Council of Australia, "Aboriginal and Torres Strait Islander People," *The Justice Project: Consultation Paper,* (2017) at pp.4-10
[66] Zhigang Wei and Hugh M. McDonald, "Indigenous People's Experiences of Multiple Legal Problems and Multiple Disadvantage – a working paper," *Updating Justice,* (2014), no.36, at p.7

5.20 As Table 2 shows, indigenous people experience many, and often intersecting, disadvantages which may prevent them from knowing how to contact a community legal service. This new police duty would reflect section 23 of the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* which states that:

"It is the responsibility of police, prosecutors and judges to ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided access to legal aid."

iv. Conclusion

5.21 Access to justice is a key principle of the rule of law, entrenched within many international frameworks that Australia is signatory to. However, the experiences of indigenous people within the Australian legal system reveal the many barriers to equitable access to justice.

5.22 ICJV notes that there has been an improvement in the provision of interpreter services to indigenous people living in the Northern Territory over the last twenty years but there are still insufficient interpreters who are professionally trained to meet Australia's international obligations.

5.23 New measures to improve access to justice in the areas discussed above should be introduced at Federal and State level.

6. Koori Courts in Victoria

Establishment

6.1 In May 2000 the Victorian Government and representatives from Victorian Aboriginal Communities entered into the Victorian Aboriginal Justice Agreement ("VAJA"). This agreement established the Aboriginal Justice Forum ("AJF") that comprises members from government, government agencies, Courts and the Aboriginal chairs of Regional Aboriginal Justice Advisory Committees. The AJF endorsed the adoption of the Nunga Courts model from South Australia. This led to the establishment of Koori Courts.

6.2 The Attorney-General made it clear in the second reading speech introducing the necessary legislation that the government *"did not pretend that the Koori Court is the only answer to address the alarming number of Aboriginal people represented within the justice system. Rather, it is one initiative of the government's and the Aboriginal community's agreement which encompasses the areas of prevention, accessibility, effectiveness of justice related services and rehabilitation."* The Koori courts were meant to be part of comprehensive program that included adult residential facilities, cultural immersion programs, a Koori family history and link up project, more indigenous bail justices, improved community legal education and improved relations between police and Aboriginal communities. While Victorian Courts have enthusiastically supported the Koori Court model by using funds from their existing budgets to enable them to do so, other parts of the program have not been able to proceed because of lack of funds.

6.3 The Attorney-General also emphasised the importance of role of Koori Elders and Respected Persons ("ERPs"), Aboriginal justice workers and extended kin groups in reducing the alienation of indigenous offenders from the justice system.

6.4 Koori Courts were first established in the Magistrates' Courts in Shepparton in October 2003 and Broadmeadows in April 2003. There are also now Magistrates' Koori Courts in Melbourne, Mildura, Warrnambool, La Trobe Valley, Bairnsdale, Swan Hill and Geelong.

6.5 The Children's Koori Courts commenced at Melbourne in 2005 and now sit throughout Victoria.

6.6 The County Koori Court began in the La Trobe Valley in November 2008 and now also sits at Melbourne and Mildura.

6.7 There are now 88 ERPs participating in Koori Courts in Victoria. There are also Aboriginal Koori Court Officers employed by the Courts. They assist offenders attending court, offer support and advice in court and assist the courts with case management.

Operation

6.8 Koori Court Sentencing Hearings are available to indigenous offenders. These offenders must be descended from an Aborigine or Torres Strait Islander, identify as an Aborigine or Torres Strait Islander and be accepted as such by an Aboriginal or Torres Strait Islander community. They must be pleading guilty to criminal offences (apart from sex offences and family violence offences). The AJF has endorsed the extension of the powers of the Koori Courts to deal with family violence offences and a Bill to enable this is before Parliament. The offender must consent to the jurisdiction of the Koori Court and the Koori Court must consider it appropriate for the matter to proceed in the Koori Court.

6.9 Magistrates and Judges exercise the same sentencing powers in Koori Courts but adopt a different process to assist decision making.

6.10 The Koori Courts have evolved their own procedures that adopt features from other similar models such as the Nunga Courts.

Hearings

6.11 The offender is pleads guilty or is arraigned in the normal way with the Magistrate or Judge sitting on the bench.

6.12 The parties all then reconvene for the sentencing conversation around the bar table. The Magistrate or Judge is flanked by EROs. The Koori Court Officer, prosecutor, corrections worker, defence lawyer and the offender. A family member or support person sits next to the offender. Drug and alcohol workers and mental health workers may also be present at the table. Other family and community members sit in the court behind the bar table.

6.13 Some courts have art works by Aboriginal artists and the Australian, Aboriginal and Torres Strait Islander flags on display.

6.14 The sentencing conversation commences with an acknowledgement of country. The Magistrate or Judge explains the roles of the people at the table and how the ERPs are not responsible for the sentencing decision, only the Magistrate or Judge.

6.15 A prosecutor reads an agreed statement of facts. A victim impact statement may then be read.

6.16 The offender then has the opportunity to speak about his or her life and the offending itself. In normal court proceedings this when the offender's lawyer would commence a plea in mitigation, rarely with any oral input from the offender.

6.17 The ERPs will engage at this stage of the process about how the offending has affected the community and how the offender needs to change his or her behaviour. This may involve a shaming process that emphasises how offending affects everyone, not just the offender and the victim. This is a vital part of the process that gives ownership to the ERPs and the community they represent. It is an empowering process that reflects the goals of the Harvard Project.

6.18 ERPs often talk about their own experience to guide the offender. Other parties around the table will talk about support programs that are available.

6.19 Reported cases in the County Koori Court demonstrate how senior family members step up to take control of the planned rehabilitation process[67]. They discuss with the offender and with the presiding Judge what can be done to provide work, support, a safe and secure place to live and a way forward to address drug, alcohol or mental health issues. They explain to the Judge the history of the offender in the context of problems in the family such as dealing with stolen generation issues, substance abuse or domestic violence. This evidence is much more powerful coming from the mouth of one who has shared the experience than from a report written by a professional from outside the community. Because of the respect enjoyed by the ERPs, there is no place in the sentencing conversation for *gammon* speech, that it, speech that pretends or is false.

6.20 When the sentencing conversation is concluded, the Magistrate of Judge will resume their position on the bench to deliver their sentencing remarks.

Evaluation

6.21 The first two years of the Magistrates' Koori Court operations were evaluated. The evaluation found that there were fewer Kooris breaching correctional orders and bail orders. It found that offenders believed the forum was less alienating and allowed the court to better hear their account of the offending behaviour. It found that the Koori Court better integrated services for rehabilitating offenders.

[67] DPP v W (2016) VCC 107 at paras 13-17per Lawson J, DPP v B (2016) VCC (CR-16-00572) at paras 11-14 per Grant J

6.22 In 2011 there was an evaluation of the first two years of the County Koori Court's operations. It was found to be too early to evaluation the effect on recidivism. The evaluators found that offenders took more responsibility for their behaviour and felt more motivated to address their offending than in ordinary court proceedings. They found that the roles of the ERPs were enhanced by their participation in the process and that their participation created more respect for the process in the community.

Conclusions

6.22 ICJV recommends that processes similar to the Koori Court model be adopted across the country. It recommends that in Victoria there be further consultation about whether to extend the Koori Court operations into the Supreme Court and about whether Koori Courts be empowered to deal with sexual offences. It recommends that Koori Courts be empowered to order the obtaining of reports similar to the Canadian ***Gladue*** Reports as discussed below. It emphasises that Koori Courts need specific funding. It emphasises that unless there are ancilliary rehabilitation services available to work in tandem with the Koori Courts then recidivism rates are likely to remain unchanged.

7. The Canadian Experience

The purpose of this section is to set out the legal response from the Canadian government in relation to high indigenous incarceration rates. It will begin by providing a background to Canadian indigenous history, including the issue of indigenous overrepresentation in the criminal justice system. We will then go on to analyse several initiatives taken by the Canadian Government and the courts to combat this issue, including, adjustments to policing and diversion programs in indigenous communities, amendments to criminal sentencing procedures for indigenous offenders, and the introduction of an indigenous court system.

7.1 Background

a) Historical and Legal Context

7.1.1 In the Canadian context, the term 'indigenous' or 'aboriginal' peoples refer to the original peoples of North America and their descendants (we will use the term 'indigenous peoples').[68] The Canadian Constitution recognises three groups of indigenous peoples: First Nations, Inuit and Métis.[69] Each of these groups have distinct spiritual beliefs, cultural practices and languages. More than 1.4 million Canadians identify as Indigenous.[70] Demographically, indigenous peoples are the fastest growing population in Canada, are the youngest population, and, are increasingly living in urban areas.[71] Approximately 30% of indigenous peoples live on dedicated indigenous reservations,

[68] Indigenous and Northern Affairs, *History: Aboriginal Peoples, Aboriginal Affairs and Northern Development Canada and the Treaty Relationship* (5 May 2012) Government of Canada <https://www.aadnc-aandc.gc.ca/eng/1338907166262/1338907208830>.

[69] *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3; *Constitution Act 1982* (UK) cl 11, sch B ('Canadian Constitution') s 35.

[70] Indigenous and Northern Affairs, above n 1.

[71] Ibid.

and 70% live 'off-reserve'.[72] Historically, the relationship between the Indigenous peoples and the colonial powers active within the Canadian territory (namely, Britain and France), differed significantly from the relationship between Indigenous Australians and British colonists. During settlement and colonisation indigenous peoples entered treaties with the colonial powers, and allied militarily with both the French and the British prior to British settlement.[73]

7.1.2 This is reflected in significantly greater legal recognition of Indigenous rights under British and Canadian Constitutional documents. Following the British victory over France in the Seven Year War, King George III issued the *Royal Proclamation 1763* which set out the guidelines for European settlement in North America. This document explicitly states that Indigenous title previously existed, and continues to exist, over the territory; and recognises the legal personhood of the Indigenous peoples.[74] The Canadian Constitution was amended to recognise and affirm Indigenous rights.[75] Notably, this amendment does not *create* indigenous rights; but rather protects and enshrines existing rights without defining or limiting them substantively. 'Indigenous rights', protected through s35, have been interpreted to include a range of cultural, social, political, and economic rights including the right

[72] Savvas Lithopoulos, 'Crime, Criminal Justice, and Aboriginal Justice' (Paper presented at Indigenous Justice/Indigenous Critique Workshop, Toronto, 22 April 2016) 5.

[73] Indigenous Foundations, *Aboriginal Rights* (2009) First Nations Studies Program, University of British Columbia <http://indigenousfoundations.arts.ubc.ca/home/>.

[74] Indigenous Foundations, *Royal Proclamation, 1763* (2009) First Nations Studies Program, University of British Columbia <http://indigenousfoundations.arts.ubc.ca/home/>.

[75] Canadian Constitution s 35.

to land, the right to practice one's own culture, and the ability to enter treaties.[76]

7.1.3 Despite the comparatively greater recognition, Indigenous peoples have confronted legal discrimination and disenfranchisement like that faced by indigenous Australians and the indigenous people of Canada continue to struggle with a legacy of government policy designed to assimilate communities into the majority European culture.[77] Following settlement, the regulation of indigenous peoples was primarily set out in the *Indian Act*. This Act is federal law and remains in force with amendments. It consolidates numerous policies on how the government interacts with indigenous persons. Throughout history, it has been highly invasive and paternalistic. It was used as the legal authority for policies which encroach on the day-to-day lives of Indigenous persons and communities registered under it.[78] For example, the *Indian Act* introduced and promoted the Residential School program, which attempted to assimilate indigenous children through forced removal from their families. This program has since been recognised as severely abusive and detrimental to the affected Indigenous persons and their communities.[79] Prior to its amendment in 2008, the *Canadian Human Rights Act* (CHRA)

[76] Indigenous Foundations, *Constitution Act, 1982 s 35* (2009) First Nations Studies Program, University of British Columbia <http://indigenousfoundations.arts.ubc.ca/constitution_act_1982_section_35/>.

[77] Ibid.

[78] Indigenous Foundations, *Government Policy* (2009) First Nations Studies Program, University of British Columbia http://indigenousfoundations.arts.ubc.ca/government_policy/>.

[79] Ibid.

did not allow for any claims arising from the *Indian Act,* making it the only legislation shielded from scrutiny under the CHRA.[80]

b) Indigenous Incarceration

7.1.4 Indigenous persons are overrepresented in Canadian correctional facilities. While indigenous persons comprise of 3.8% of the total Canadian population, they account for 23.2% of the total inmate population.[81] This gap is widening; in the decade between 2005 and 2015 the indigenous inmate population increased by 50% in comparison to a 10% increase in indigenous persons relative to the overall population.[82] Notably, Indigenous women are even more severely overrepresented in comparison to their non-Indigenous counterparts. In the same period, the number of Indigenous woman inmates doubled, and represented 35.5% of all incarcerated Canadian women.[83] The Correctional Investigator of Canada states the following rationale for this discrepancy: 'the intergenerational effects of Aboriginal social histories (i.e. residential schools experience; involvement in child welfare; adoption and protection systems; dislocation and dispossession of Aboriginal people; poverty and poor living conditions on many native reserves; family or community history of suicide, substance abuse and/or victimisation) continues to drive the

[80] Ibid.

[81] Office of the Correctional Investigator, *Aboriginal Issues* (14 March 2016) Government of Canada <http://www.oci-bec.gc.ca/cnt/priorities-priorites/aboriginals-autochtones-eng.aspx>.

[82] Ibid.

[83] Ibid.

disproportionate number of Aboriginal peoples caught up in Canada's criminal justice system'.[84]

7.1.5 Most indigenous offenders identify as First Nations (68%), followed by Métis (26.5%) and Inuit (5.5%).[85] In the *Annual Report of the Office of the Correctional Investigator 2014-2015* ('Annual Report'), the Correctional Investigator presents a profile of indigenous offenders. They find that, compared to non-indigenous offenders, indigenous offenders are: younger (median age is 27); less formally educated; more likely to have a history of substance abuse, addiction and/or mental health concerns; more likely to have committed a violent crime; more likely to have served prior sentences; disproportionately from backgrounds of domestic/physical abuse; and more likely to be affiliated with a gang.[86] In terms of correctional outcomes, indigenous inmates are classified as higher risk on release in regards to securing employment, community reintegration, substance abuse and family support; over represented in segregation and maximum security populations; disproportionately involved in use of force interventions and self-injury; released later in their sentence and more likely to return to custody.[87]

7.2 Relevant Law and Policy

a) Policing and Diversion

7.2.1 *Policing Indigenous Communities: First Nations Policing Program*: Indigenous communities have been found in

[84] Ibid.

[85] Steven Blaney, Minister for Public Safety House of Commons, *Annual Report of the Office of the Correctional Investigator 2014-2015* (2015) 4.

[86] Ibid.

[87] Ibid.

numerous reports to be subject to over-policing, which subsequently drives higher incarceration rates.[88] Further, this over-policing diminishes the relationship with the police force and the perception of the justice system in indigenous communities, and leads to under-protection and a reluctance to rely on the police force when needed.[89] As stated in the Manitoba Justice Inquiry, an Indigenous person may be more likely to be charged by police: 'when a white person in the same circumstances might not be arrested at all, or might not be held […]. Many indigenous people feel they have little reason to trust police and as a consequence, are reluctant to turn to police for protection'.[90] Research in this area has emphasised the need for police to understand the culture of the communities they operate in; through actively learning about the relevant indigenous culture, and spending enough time within the community to gain mutual trust.[91] Despite efforts to increase indigenous recruitment, indigenous persons (particularly indigenous women) remain underrepresented within the Canadian police force.[92]

7.2.2 In response to these issues, the Canadian Government introduced the *First Nations Policing Program* (FNPP) in 1991, administered by Public Safety Canada. The program allows for the establishment and federal funding of First Nations

[88] Don Clairmont 'Aboriginal Policing in Canada: An Overview of Developments in First Nations' *Public Safety Canada* (September 2006) 4.

[89] Ibid.

[90] Commissioners Hamilton and Sinclair, *Report of the Aboriginal Justice Enquiry of Manitoba: The Deaths of Helen Betty Osborne and John Joseph Harper* (1999); as cited in Amnesty International Canada *Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada* (2004) 18.

[91] Amnesty International Canada, above n 23.

[92] Ibid.

administered police forces. The stated objective of the FNPP is to: strengthen public security and personal safety in indigenous communities; increase accountability within the police force; and, build partnerships between indigenous communities and the police force.[93] A FNPP police force can be established through either: 1. Self-administered Agreement, where a First Nation or Inuit community manages its own police service under provincial policing legislation and regulations; or, 2. Community Tripartite Agreements, where a dedicated of officers from the Royal Canadian Mounted Police provides policing services to a First Nation or Inuit community exclusively. Under the second agreement, the community and dedicated forces are expected to work together through consultative groups to set policing priorities.[94] In 2013-14 there were 172 current policing agreements and 1244 police officers working under the program.[95]

7.2.3 The FNPP has not been subject to amendment since 1996; and is currently undergoing legislative review to evaluate its efficiency and success. In preparing for this review, the Government of Canada released their report, *Evaluation of the First Nations Policing Program 2014-2015*. Here it is noted that 'almost two decades after the implementation of the FNPP there has been comparatively little academic research undertaken on the program'.[96] The report notes that the goals and basic

[93] Public Safety Canada, *Indigenous Policing* (8 September 2016) Government of Canada <https://www.publicsafety.gc.ca/cnt/cntrng-crm/plcng/brgnl-plcng/index-en.aspx>.

[94] Government of Canada, Public Safety Canada, *Evaluation of the First Nations Policing Program 2014-15* (2015) 2.2.

[95] Ibid.

[96] Ibid 3.

structure of the FNPP remain relevant; however, issues regarding funding and delivery of the FNPP services are hindering the success of the program.[97] Further, the report reiterates strong support on behalf of the Canadian government to a tiered policing model. It identifies the unique position of Indigenous communities as requiring a distinctive policing approach outside of the mainstream police force.[98] They reference several studies which examine the failure of mainstream police force to address indigenous needs, including that: they are not designed to consider the needs of indigenous peoples; they fail to consider language, culture, traditions or current circumstances; and indigenous peoples are underrepresented.[99]

7.2.4 *Diversion Programs: National Crime Prevention Strategy and Aboriginal Community Safety Development Program:* Public Safety Canada also administer two programs designed to reduce crime rates; each of which impact indigenous persons and communities. The first is the *National Crime Prevention Strategy* (NCPS)*,* which was established in 1998. The NCPS provides time-limited funding for the development, implementation, and evaluation of evidence-based interventions designed to prevent initial offences and recidivism. The NCPS focuses on priority 'high-risk' groups, namely: children (aged 6-11), youth (aged 12-17), and young adults (18-24) who present multiple risk factors related to offending behaviours; indigenous people and Northern communities; and, former offenders who are no longer

[97] Ibid.

[98] Ibid 4.1.

[99] Ibid.

inmates.[100] Per an evaluation from the years 2012-13 the NCPS funds 94 prevention projects in 67 locations across Canada, representing an investment of around $31 million. Of the 94 projects, 43 focused on indigenous youths, which have reached approximately 23,000 at-risk individuals. Many of these programs have a focus on tackling gang related crime. The second program is the *Aboriginal Community Safety Development Program,* which funds the development of tailored approaches to community safety in indigenous communities. This is achieved by facilitating and funding knowledge sharing between indigenous communities and the police force, through workshops and community-based projects.[101]

b) Criminal Law Policy and Sentencing

7.2.5 *Sentencing under the Criminal Code and in Case Law*:

Sentencing law in Canada, both through legislation and in case law, recognises the exceptional position of Indigenous peoples and requires that this be taken into consideration in determining a criminal sentence. In 1995, an amendment was made to the sentencing principles in the *Criminal Code,* to add s 718.2(e) which states:

> 718.2. A court that imposes a sentence shall also take into consideration the following principles:
>
> (e) all available sanctions or options other than imprisonment that are reasonable in the circumstances

[100] Ibid 2.4.
[101] Ibid.

should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders.*[102]

7.2.6 This provision was first considered in the Supreme Court case of ***R v Gladue***.[103] Herein, the court considered and applied the broad requirement to pay attention to the 'circumstances of Aboriginal offenders' in determining an appropriate sentence. The specific and unique circumstances of Indigenous offenders is described: 'it is true that systematic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognised that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systematic and direct discrimination, many suffer from a legacy of dislocation, and many are substantially affected by poor social and economic conditions. *Moreover, as has been emphasised repeatedly in studies and commission reports, aboriginal offenders are, […] more adversely affected by incarceration and less likely to be 'rehabilitated' thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination against them is so often rampant in penal institutions'.*[104] Here, when determining an appropriate sentence, the court not only recognises Indigenous identification as a mitigating circumstance in the commission of a crime; but also that incarceration may disproportionately punish an Indigenous person vis-à-vis his or her non-Indigenous counterpart. In summary, the court determines that s 718.2(e) requires a two-limbed consideration for Indigenous offenders:

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[102] *Criminal Code,* RSC 1985, c C-46, s 718.2(e).

[103] [1999] 1 SCR 688 ('*Gladue*')

[104] *Gladue* [68].

7.2.7 In sentencing an aboriginal offender, the judge must consider:

(A) The unique systematic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[105]

7.2.8 The principles set out in ***Gladue*** have been applied and expanded in numerous cases. In the 2012 case of ***R v Ipeelee,*** the Supreme Court reaffirmed the principles set out in ***Gladue,*** and further specified the circumstances that must be considered (per the first limb of the ***Gladue*** test, above) when sentencing an Indigenous offender:

> Courts have, at times, been hesitant to take judicial notice of systematic and background factors affecting Aboriginal people in Canadian society […]. *To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.* These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide necessary context for

[105] *Gladue* [93].

understanding and evaluating the case-specific information presented by counsel.[106]

7.2.9 Therefore, ***Ipeelee*** clarifies what was previously a misunderstanding in the application of the ***Gladue*** sentencing principles. Where the defendant is Indigenous, it is not required that they provide evidence of disadvantage; rather, the court should take judicial notice of systematic factors which negatively affect all Indigenous peoples.[107]

7.2.10 *Aboriginal Justice Strategy:* In 1991, the Canadian Government introduced several legislative changes under the broad *Aboriginal Justice Strategy* (AJS), which was aimed at providing timely and effective alternatives the mainstream justice system for indigenous offenders. The AJS aims to support community-based justice programs that offer alternative to the mainstream justice system in appropriate circumstances.[108] The stated objectives of the AJS is to: contribute to a decrease in the rates of victimisation, crime and incarceration among indigenous peoples; assist indigenous communities in assuming greater responsibility for the administration of justice in their communities; provide better and more timely information about the existing community-based programs for at-risk indigenous persons;

[106] *R v Ipeelee* [2012] 1 SCR 433 [59]-[60] ('*Ipeelee*').

[107] *Ipeelee* [59]-[60].

[108] Department of Justice, *The Aboriginal Justice Strategy* (22 September 2016) Government of Canada <http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/ajs-sja.html>.

and, to reflect indigenous values within the justice system.[109] The AJS consists of two funding components. The first is the Community-Based Justice Fund, which supports community-based justice programs in partnership with indigenous communities. This includes the funding of various approaches to make the justice system more adaptable to indigenous needs, such as programs which respond to the development of alternate pre-sentencing options, sentencing alternatives (for example, circles), and family and civil mediation.[110] The second is the Capacity-Building fund, which supports indigenous communities in developing the knowledge and skills to establish and manage community-based justice programs.[111]

7.2.11 *Indigenous Court System:* Indigenous courts have been introduced in several jurisdictions throughout Canada. Existing Indigenous courts in Canada are part of the mainstream Provincial Court system, and the decisions are given equal weight, respect, and enforcement power as the mainstream courts.[112] The distinction between the indigenous and mainstream courts is that the former are structured to incorporate Indigenous culture and make use of local traditional dispute resolution techniques; for example, judgements being delivered by elders and peacemakers, and hearings being held in the local language, and having jurisdiction to consider both

[109] Ibid.

[110] Ibid.

[111] Ibid.

[112] Karen Whonnock, 'Aboriginal Courts in Canada' (Fact Sheet, The Scow Institute, April 2008) 1.

domestic law and recognised traditional law.[113] Currently, there are several major indigenous courts operating in Canada, for example:

a) The Tsuu T'ina First Nation Court (Alberta): Established in 2000. Has jurisdiction over criminal, youth, and by law offences. The court operates under both the Alberta Provincial Court system and the First Nations peacemaker process. Its personal jurisdiction includes Tsuu T'ina members, Indigenous non-Tsuu T'ina members, and non-Indigenous peoples under its jurisdiction as a provincial court.
b) The Cree-speaking Court and Dene-speaking Court (Saskatchewan): Established in 2001. These courts are each based in Northern Saskatchewan and travel through the rural, largely Indigenous northern Canadian regions. The court includes Cree judges, prosecutors, clerks and public defenders; and all services can be delivered in the native languages of Cree and Dene.
c) The Gladue (Aboriginal Persons) Court (Ontario): Established in 2001. This court is the first urban Indigenous court, which was enacted specifically to implement the Supreme Court decision in *R. v. Gladue* and s 718.2(e) of the *Criminal Code.* In doing so, the staff, lawyers, and workers before the court must consider the unique circumstances of adult indigenous accused and indigenous offenders. The court is voluntary and open to all self-identified Indigenous peoples.

[113] Ibid.

d) First Nations Court (British Columbia): Established in 2006. This court has jurisdiction to hear criminal offences, and may hear youth or family related matters. After a guilty plea is entered, everyone involved in the proceeding can speak, and a 'healing plan' is created to address the root cause of the criminal behaviour.[114]

7.3 Conclusion

7.3.1 In conclusion, we have provided a brief overview of the interaction between indigenous communities and the criminal justice system in Canada. The Canadian Government's approach to tackling the overrepresentation of indigenous peoples in their correctional facilities are largely twofold: 1. funding for programs which promote cooperation between traditional indigenous communities and the mainstream justice system (either at the point of policing, diversion, or the sentencing process); and 2. formal amendment of the justice system and criminal sentencing laws to recognise difference and disadvantage of Indigenous offenders.

[114] Shelly Johnson, 'Developing First Nations Courts in Canada: Elders as Foundational to Indigenous Therapeutic Jurisprudence' (2014) 3(2) *Journal of Indigenous Social Development* 1, 5-11.

8. The New Zealand Experience

8.1 Background

8.1.1 While the ALRC discussion paper examines the Canadian experience with indigenous incarceration, it does not look at the New Zealand experience. We argue that New Zealand's attempts to deal with indigenous incarceration are highly relevant to the Australian situation.

8.1.2 Māori people represent 15% of the population of New Zealand but 51.4% of its prison and remand population (as at 2015). Women are further over-represented: 65% of prisoners are of Māori heritage, and so are young people: 54% of all child offenders appearing before the Youth Court are Māori.

8.1.3 The incarceration rates of Māori people are increasing and have been for some time: the number of Māori people starting a prison sentence (the way the NZ Department of Corrections measures its statistics) has increased by 105% from 1984/85 to 2014/15, compared to an increase of 60% for New Zealanders of European descent. In 2014/15, 57% of all prisoners starting a sentence were Māori.

8.1.4 In the broader New Zealand community, Māori people tend to have markedly poorer education levels, health and welfare outcomes, and engagement with the criminal justice system than other peoples and ethnicities. This, and the similarities between New Zealand and Australia's colonial-settler history and common law justice system, form the basis for a compelling comparison to Australia.

8.2 Legal context

8.2.1 New Zealand's legal context differs from Australia in two key respects: the British signed the Treaty of Waitangi with Māori leaders in 1840 which guaranteed the Māori's rights to self-determination, and New Zealand has a constitutional Bill of Rights. However, European colonisation still destroyed many of the laws and customs of the Māori people, and what has been preserved has had little bearing on the content of New Zealand's mainstream justice system: there is minimal recognition of Māori law in the substance of New Zealand law.[115]

[115] Elena Marchetti & Thalia Anthony 'Sentencing Indigenous Offenders in Canada, Australia, and New Zealand' [2016] University of Technology Sydney Law Research Series 27.

8.2.2 Nonetheless, concerted efforts have been made to incorporate elements of tikanga Māori (Māori law and philosophy) into the procedures of the criminal justice system, especially in sentencing and rehabilitation. When discussed in government and academic documents, tikanga Māori is seen as situating the individual offender within the context of their collective group: the victim of the crime, the offender's whānau (extended family), their hapū (clan or descent group) and their iwi (tribe). Under tikanga Māori, the community as a whole is involved in the justice process. These efforts are contextualised by the historical recognition of equal rights and self-determination of Māori, the violence and oppression subsequently inflicted upon Māori people by the British settlers, and their current socio-economic disadvantages and high crime rates.

a) Court system

8.2.3 New Zealand's judicial system consists of district courts, high courts in each state (each with courts of appeal) and the Supreme Court. In addition, there is a Māori Land Court, a Māori Appellate Court, an Alcohol and Other Drug Treatment Court, the Waitangi Tribunal (decisions of which are not legally binding), the Human Rights Review Tribunal (which reviews decisions made by the Human Rights Commission) and Nga Kooti Rangatahi (Māori youth courts).

8.2.4 Māori tikanga have been integrated into the AODT Court and the Rangatahi courts. The AODT Court was established in 2012, modelled on US drug courts, and aimed to allow defendants facing a term of over 3 years' imprisonment to undergo alcohol and drug treatment before being sentenced. In 2013, the Court engaged a Māori advisor to ensure that Māori cultural practices, traditions and values were reflect in the Court's process.[116]

8.2.5 The Rangatahi youth courts have been operating since 2008, and as at 2016 there were 14 courts located throughout the country.[117] These are sentencing courts, which aim to reduce recidivism by Māori youth by providing more culturally appropriate and effective sentencing options.[118] The courts' procedures attempt to integrate the marae (community gathering) and tikanga Māori into the court, to involve the offender's culture and community in their rehabilitation and

[116] Ibid.
[117] Human Rights Commission (2012) 'Rangatahi and Pasifika Youth Courts'.
[118] Ibid.

post-offence supervision.[119] The courts are presided over by Māori judges (the Māori courts; there are also Pasifika courts which are presided over by Pacific Islander judges and sentence Pacific Islander kids) and, where the victim consents and the judge believes it to be appropriate, can develop and impose Family Group Conference Plans as an alternative sentence. These Plans are compiled at Family Group Conferences convened by the presiding judge, and consistent of the offender, a youth advocate or social worker, the offender's family, the victim(s), Māori elders, the police and other relevant agencies' representatives. These meetings are convened every few weeks at a marae, with the aim of monitoring the progress of the offender in terms of rehabilitation in the context of their whanau, hapu and iwi while allowing a relationship between the offender and the judge to develop.

b) Legislation

8.2.6 Sentencing is regulated by the ***Sentencing Act 2002***; the ***Corrections Act 2004*** and the ***Parole Act 2002*** set procedures for imprisonment and parole respectively.

8.2.7 Under the ***Sentencing Act***, courts must:

a) Account for an offender's personal, family, whānau (extended family), community, and cultural background in imposing a sentence or otherwise dealing with the offender for a rehabilitative purpose: s 8(1)
b) Hear any person or persons requested by the offender to speak on their personal, family, whānau, community, and cultural background: s 27.

8.2.8 The court may also suggest to an offender that such a person could assist them.

c) *Jurisprudence*

8.2.9 In sentencing Māori people, New Zealand courts will consider information argued to be mitigating in the person's circumstances but do not consider Māori heritage an inherently or *prima facie* mitigating – or even relevant – factor. Courts rely on information presented by a person under section 27 of the *Sentencing Act*,[120] and have occasionally imposed non-

[119] Ibid.
[120] Marchetti & Anthony, above n 1.

custodial sentences for minor offences where convinced that the person's community will invoke Māori law and culture for an effective rehabilitative or punitive purpose.

Case (court, year)	**Facts**	**Principle**
Mika v R (NZCA, 2013)	Māori man pled guilty to manslaughter caused by car crash when he was intoxicated, had passengers in the car, and refused to stop for police.	There can be no 'fixed discount' automatically applied to an offender's sentence merely because of their ethnicity; a nexus between Māori heritage and reduced culpability must be proven.
R v Mason *(No 1)* (NZHC, 2012)	Māori man pled guilty to murder and attempted murder of his former partner's mother and former partner respectively.	Mason could not be sentenced under tikanga Māori instead of New Zealand criminal law; challenge to jurisdiction unsuccessful.
R v Mason *(No 2)* (NZHC, 2012)	See above	Cultural factors (Mr Mason's whakama (shame) following his partner's break-up) and Mr Mason's position at the 'crossroads' of Maori and European NZ culture are relevant but are given little weight because there is 'one law for all New Zealand'. Imposed a life sentence with minimum non-parole period of 17 years (upheld on appeal).

R v Rawiri (NZHC, 2009)	Five Māori siblings were found guilty of manslaughter following the drowning of a cousin who they believed had been afflicted by makutu (an evil curse or spirit)	Cultural beliefs which create or influence motivations for offences are relevant context in sentencing mitigation. However an offender cannot '*hide behind*' their culture and it should not be '*over emphasise[d]*'.
Nishikata v Police (HCNZ, 1999)	Māori woman (who 'strongly identified' as being Māori) was violent towards a person abusing a Māori elder	*Equality before the law is fundamental to the administration of justice, but ... the penalty must reflect matters of mitigation arising from an offender's background and which recognises the structure and operation of the society within which he lives and in particular the degree to which the cultural or ethnic heritage predominates, in any problems of a cross-cultural nature.*

8.2.10 The Court of Appeal in ***Mika*** has been criticised for neglecting to advise Mr Mika to seek someone to address it under s 27 of the ***Sentencing Act***.[121]

8.2.11 The NZ courts have occasionally imposed non-custodial sentences in response to the role played in punishment and rehabilitation by Māori offender's culture and community. For example:

a) In ***R v Nathan***, 1989, the NZ High Court did not send the offender to prison because it believed his own community and culture would enforce a 'more stable and more responsible life style'

b) In ***R v Huata Huata***, 2005, the Auckland District Court noted the role of whakama (shame) in the offender's future life, but found that because she was still supported

[121] Max Harris, 'Criminal law, sentencing and ethnicity: sensible or superficial?' (2014) *Maori Law Review* 20; Nina W Harland, '*R v Mika*: an investigation into the Court of Appeal's neglect of s 27 of the *Sentencing Act 2002*' (Thesis, 2014, Victoria University of Wellington).

by others whakama did not play a major role in sentencing consideration.

8.3 Policy

8.3.1 Māori over-representation in the criminal justice system has been an explicit policy concern since the early 1980s, when it prompted inter-agency responses and several Māori-specific 'interventions'.[122] Following a lapse into interventionist policies throughout the 1980s and 1990s, the New Zealand government and Department of Corrections seems to have made a concerted effort to support Māori-led and developed initiatives, including through partnership with Te Puni Kokiri (the Department of Māori Development), leading to a more fully integrated and respected approach to inclusion of Māori law and culture.[123]

8.3.2 The New Zealand Department of Corrections signed an accord with the Kiingitanga (Māori elected king/monarch) in March, 2017. The Accord formalised the parties' intentions to collaborate on initiatives to improve the health and wellbeing of Māori offenders in custody; their rehabilitation and reintegration prospects, and likelihood of recidivism.[124]

8.3.3 Further, the Department of Corrections released in 2017 its *Change Lives, Shape Futures* Strategic Plan to reduce Māori reoffending. The Plan includes using the Accord to develop partnerships with iwis and urban authorities; exploring more tailored reintegration efforts in partnership with iwis; maintain and improve relationships with Māori groups; and developing a gang strategy to address the negative influence of gang members within the custodial environment.[125]

a) Diversion

8.3.4 The Adult Diversion Scheme is a mainstream diversionary programme across NZ, but is intended to be implemented through partnerships with Māori communities and service providers.[126] The Scheme provides the police with an

[122] Juan Marcellus Tauri and Robert Webb, 'A Critical Appraisal of Responses to Maori Offending' (2012) 3(4) *The International Policy Journal* 1, 1.
[123] Te Puni Kokiri, 'Addressing the Drivers of Crime for Māori' (2011).
[124] *Accord* cl 12.
[125] Dept of Corrections, *Change Lives, Shape Futures: Reducing Reoffending Among Māori* (2016) 18.
[126] New Zealand Police, 'Adult Diversion Scheme Policy' 3.

alternative way to exercise prosecutorial powers, by dealing with some offences (usually minor) and some offenders (usually first-time or low-risk) summarily, outside of the judicial process. Of particular relevance to Māori offenders is the ability of the police to refer an offender to a restorative justice procedure as a pathway more likely to result in rehabilitation and reparation than a criminal prosecution.[127] Police may only refer offenders to an RJ procedure if there is a registered Restorative Justice provider (community panel funded by the Ministry of Justice) in the person's area and the victim consents to the process.[128]

b) Rehabilitation

8.3.5 The main rehabilitative program dedicated to adult Māori offenders (and tackling Māori recidivism) is the Māori Focus Units, which are independent facilities located within prison grounds at 5 locations throughout New Zealand.[129] These Units were first set up in 1997, and now are entirely run by Māori service providers for Māori prisoners. The Unit managers have developed the Māori Te Pae (Māori Therapeutic Program), which they deliver with little input from the Department.[130] The Te Pae consists of a group-based offender rehabilitation programme, in which participants are taught social, cognitive and practical skills to avoid relapses, with Māori cultural language, values and narratives used throughout.[131] A 2009 evaluation of the Units by the Department of Corrections found that the small sample of inmates housed in the Units made it difficult to ascertain the effect of the program on reoffending rates, but psychologists involved in the study found that there were measurable changes in criminal thinking patterns and the development of culturally-based motivations and affiliation – which, given studies into criminological drivers of Maori offending, have potential to reduce reoffending.[132]

8.3.6 More generally, the mainstream Drug Treatment Units, Medium Intensity Rehabilitation and Out of Gate programmes are effective in reducing reoffending overall, but research indicates that they are less effective for Māori offenders.[133] The

[127] Ibid 22.
[128] Ibid.
[129] Department of Corrections (2009).
[130] Human Rights Commission (2012) 'Māori Focus Units'.
[131] Dept of Corrections (2009) 6-7.
[132] Dept of Corrections (2009)
[133] Dept of Corrections, *Change Lives, Shape Futures: Reducing Reoffending Among Māori* (2016) 6.

Department of Corrections has also developed mainstream initiatives which are particularly pertinent to Māori offenders because they address reoffending in the types of offence which are most prevalent among Māori offenders: driving, family violence, and drug-related offences.[134]

8.3.7 Tiaki Tangata is a reintegration program intended to provide ongoing case-management for high-risk, long-serving Māori offenders to reintegrate into the community. According to the Department of Corrections, the case managers assist people to find accommodation and employment, and to reconnect with their iwi, hapu, whanau and family.[135] There is also a residential violence prevention program, Tai Aroha, which aims to provide a 'culturally responsive rehabilitation experience' for Māori participants.[136]

8.4 Research & evaluations

a) Evaluations

8.4.1 There seems to be little publicly available quantitative or qualitative research into the effectiveness of the policies discussed above.

8.4.2 An independent audit of the Department of Corrections' approach to reducing reoffending in 2013 found that the Department does use effective policies to target Māori offenders, and had implemented – and was planning to implement – sufficient targeted policies.[137]

8.4.3 A study by a private Māori company commissioned by the Department of Corrections in 2012 found that the Department had had some success in integration the *Kaupapa Māori* approach into its policies. *Kaupapa Māori* broadly means 'by Māori, for Māori' and includes: kaupapa (collective philosophy); taonga tuku iho (cultural heritage and aspirations); ako Maori (culturally preferred pedagogy); tino rangatiratanga (self-determination); whanau; kia piki ake i nga raruraru o te kainga (socio-economic mediation).[138] The study found that whanau is central as a major influence on Maori people, and then extending out the influences of hapu, iwi and community

[134] Ibid 9.
[135] Ibid 16.
[136] Ibid 17.
[137] Office of the Attorney General (2013) [2.15].
[138] Williams & Cram 8.

organisations are also important,[139] as are Maori values and principles (kaupapa);[140] mentors and leaders,[141] and that the Department has integrated and must continue to integrate these elements of Māori culture and identity into its targeted policies.

b) Academic research

8.4.4 Tauri (2012) is critical of policy efforts to address Māori offending and reoffending. Tauri argues that the initial intention in the 1980s to work with communities in policy-development dissipated, and that since then the 'primary policy response [has] largely revolved around the controlled integration of "acceptable" Māori concepts and cultural practices into confined areas of the judicial system'.[142] Similarly, Hess writes in a 2011 article that New Zealand must take steps to incorporate the Maori community and its values into the sentencing process, in order to improve its relationship with Maori people and create the perception that sentencing is not just the final step in an already and inherently biased process.[143]

8.4.5 Quince, writing in 2009,[144]argued that 'one of the major barriers to progress in solving the "Maori crime problem" is the failure of successive government departments, social agencies, Judges, police and other actors, to directly highlight and address the fact that a disproportionate amount of offenders are Maori' meaning that 'we do not get to the root of [the social issues] for many offenders, which is the intergenerational effect of the trauma of surviving colonisation'.[145]

8.4.6 In 1988, Moana Jackson, a Māori scholar, wrote that access to and participation in a secure and healthy Māori cultural identity is central to addressing the crisis of poverty and harm that

[139] Williams & Cram 5.
[140] Ibid 51.
[141] Ibid 53.
[142] Tauri 4.
[143] Joanna Hess, 'Addressing the Overrepresentation of the Maori in New Zealand's Criminal Justice System at the Sentencing Stage: How Australia can provide a Model for Change' (2011) 20(1) *Pacific Rim Law and Policy Journal* 179, 180.
[144] Khylee Quince, 'Maori and the criminal justice system in New Zealand' in Julia Tolmie and Warran Brookbanks (eds) *Criminal Justice in New Zealand* (LexisNexis, Wellington, 2009) ch 12.
[145] Ibid 3.

Māori people can find themselves in.[146] This was echoed by Mason Durie, another Māori scholar, in a 2005 book.[147]

[146] Moana Jackson, He Whaipaanga Hou: Maori and the Criminal Justice System: A New Perspective (Wellington, 1988).
[147] Mason Durie, Nga Tai Matatu: Tides of Māori Endurance (Oxford University Press, Melbourne, 2005).

9. Conclusions

9.1 ICJV recommends that the ALRC adopt the four key concepts of the Harvard Project outlined above so that all attempts to reduce indigenous incarceration are owned by indigenous communities. It is important to remember that in the late 18th century there were over 300 different indigenous language groups in Australia with different cultures. Consultation with indigenous community leaders is vital to ensure that changes are culturally appropriate.

9.2 We recommend that the ALRC adopt the recommendations made by UN Special Rapporteurs in relation to indigenous incarceration. We recommend that all mooted legal and policy changes be examined through the lens of Australia's international treaty and convention obligations. We recommend that the recommendations of the Aboriginal Deaths in Custody Royal Commission be re-examined and implemented in the light of Australia's international obligations and recent experience.

9.3 We recommend that all Australian States and Territories adopt court models for indigenous offenders similar to the Victorian Koori Courts in all jurisdictions, in consultation with local indigenous communities. Such Courts must be properly resourced with dedicated funding for all associated services.

9.4 We recommend that that aboriginal legal services, interpreting services, counselling services and rehabilitation services be funded properly to provide real access to justice for indigenous citizens.

9.5 We recommend that all Australian States and Territories adopt laws similar to Canada's s718.2(e) and provide for the provision of sentencing reports like the Canadian ***Gladue*** Reports.

9.6 We recommend that the ALRC analyses the New Zealand approach to the rehabilitation of Maori offenders and so that successful programs in New Zealand can be applied in Australia.