



Reducing over-imprisonment

Submission to the Australian Law Reform Commission's Inquiry
into Incarceration Rates of Aboriginal and Torres Strait Islander
Peoples

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1. Executive Summary

1.1 Summary of submission

1. Aboriginal and Torres Strait Islander people should have access to the same rights as non-Indigenous people and should be able to expect fair treatment in the criminal justice system. Unfortunately, and despite many other inquiries and recommendations over the years, this is too often not the case across Australia's criminal justice systems.
2. Barriers to equal justice include over-policing, a lack of access to legal assistance, interpreters and diversion programs and failures to diagnose and respond to a cognitive impairment, mental illness or hearing loss. These barriers are not limited to the criminal justice system – they mean a denial of justice in many areas of the legal system.
3. Australian Governments have a responsibility to work with Aboriginal and Torres Strait Islander people to stem and reverse the growing rates of imprisonment. All Australian Governments need to work with Aboriginal and Torres Strait Islander people to address the ongoing impacts of colonisation, dispossession, assimilation and discrimination, which underpin the over-imprisonment of Aboriginal and Torres Strait Islander peoples.
4. This means creating laws that compel police, judges, lawyers, prison staff and parole boards to reckon with past and ongoing systemic disadvantage and discrimination experienced by Aboriginal and Torres Strait Islander people. It means prioritising rehabilitation and diversion over police and prison cells. It also means protecting the rights of those detained so as to give them the best chance of rebuilding their lives and contributing to the community, rather than reoffending.
5. Crucially, Aboriginal and Torres Strait Islander community controlled organisations need to be sufficiently funded to provide programs and services, including legal and interpreting services – programs and services that meet the different needs of Aboriginal and Torres Strait Islander women, men and children and that support individuals to overcome the challenges in their lives that contributed to offending.
6. State and territory governments need to move away from harsh law and order responses, such as mandatory sentencing, paperless arrest laws, imprisonment for unpaid fines and laws that provide for punitive responses to public drinking. These laws do little to address the underlying causes of offending, are disproportionately, and often unfairly, used against Aboriginal and Torres Strait Islander people and contribute to over-imprisonment.
7. Money spent unnecessarily locking Aboriginal and Torres Strait Islander people up would be much better invested in community-led prevention and early-intervention strategies in urban,

regional and remote settings, so as to prevent contact with the justice system in the first place. Evidence shows that this is the best way to promote safety for both Aboriginal and Torres Strait Islander people and non-Indigenous people.

8. Reversing over-imprisonment rates requires national leadership, through setting justice targets in the Closing the Gap framework, and providing resources to support strategies to meet those targets. At the state and territory level, Aboriginal justice agreements, like that which has existed in Victoria for 17 years, have an important role to play in focusing the energies of different branches of government towards the mutually reinforcing goals of reducing Aboriginal and Torres Strait Islander peoples' imprisonment and victimisation rates.

1.2 About this submission

9. The Human Rights Law Centre's (**HRLC**) submission responds to the majority of questions and proposals raised in each chapter of the Australian Law Reform Commission's (**ALRC**) Discussion Paper through broad subheadings. There are some topics that we have not responded to, such as questions about parole, because there are organisations who are better placed to respond.
10. This submission is action-orientated because the ALRC's Discussion Paper already thoroughly canvasses the causes of Aboriginal and Torres Strait Islander over-imprisonment and the merits and challenges of different reforms.
11. The HRLC is a member of the [Change the Record Coalition](#), which will provide a separate submission to this review. The HRLC and Change the Record recently published a report, [Over-represented and Overlooked: the Crisis of Aboriginal and Torres Strait Islander Women's Over-imprisonment](#), a copy of which has been provided to the ALRC. We rely on that report as an accompaniment to this submission.

1.3 Recommendations

- i. Federal, state and territories governments should introduce human rights acts (apart from Victoria and the ACT where human rights acts are already in force).
- ii. State and territory bail laws should require bail authorities to consider a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations.
- iii. State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify gaps, particularly in relation to housing, health and rehabilitation services, and develop the infrastructure for culturally appropriate bail support and diversion options.

- iv. State and territory legal professional bodies and judicial education bodies should ensure comprehensive and regular Aboriginal and Torres Strait Islander cultural awareness training for lawyers and the judiciary, including education about the causes of Aboriginal and Torres Strait Islander people's over-imprisonment.
- v. State and territory governments sentencing laws should require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander offenders when sentencing.
- vi. State and territory governments should work with Aboriginal and Torres Strait Islander representatives to determine the most appropriate mechanisms for informing courts about cultural factors and systemic discrimination and disadvantage which the court should take into account as part of the sentencing process.
- vii. State and territory governments should review mandatory sentencing regimes and repeal provisions that unfairly and disproportionately affect Aboriginal and Torres Strait Islander people.
- viii. State and territory governments should work with Aboriginal and Torres Strait Islander organisations to ensure that community-based sentencing options are more readily available, particularly in regional and remote areas and for women with children.
- ix. State and territory governments should promote the use of community-based sentencing options by courts, as an alternative to short sentences, by adequately funding culturally appropriate community-based alternatives.
- x. Culturally appropriate prison programs should be made available to people in prison on remand and serving short sentences.
- xi. Culturally appropriate programs should be developed to respond to the unique needs and strengths of Aboriginal and Torres Strait Islander people women in prison.
- xii. State and territory governments should increase the availability of Aboriginal and Torres Strait Islander specific counselling, drug and alcohol, healthcare and disability services and programs.
- xiii. State and territory governments should abolish the routine use of strip searches.
- xiv. State and territory governments should abolish provisions in fine enforcement laws that allow for imprisonment for unpaid fines.
- xv. State and territory governments should introduce Work and Development Order schemes based on the New South Wales model, both as a response to fine default and as an independent sentencing option.

- xvi. State and territory governments should investigate the introduction of low level penalties, such as written cautions, to replace infringement notices for some low level offences.
- xvii. State and territory governments should amend laws to ensure that the application of fine default enforcement measures that restrict a person's ability to drive are subject to an assessment of circumstances and impact.
- xviii. State and territory governments should repeal offensive language offences (except offences that prohibit serious vilification and incitement to hatred or violence on the basis of a protected attribute).
- xix. State and territory governments should repeal laws that punish public drinking, including excessive police powers to apprehend, arrest or detain, such as paperless arrest laws.
- xx. State and territory governments should ensure diversion programs are accessible to Aboriginal and Torres Strait Islander women and that eligibility criteria do not exclude their participation.
- xxi. Where decision-makers are given discretion in criminal procedure and sentencing laws, state and territory governments should investigate including as a factor, the impact of a particular decision on any children in the person's care.
- xxii. State and territory governments should work with Aboriginal and Torres Strait Islander communities to renew or develop Aboriginal justice agreements.
- xxiii. Federal, state and territory governments should include justice targets as part of the Closing the Gap Framework.
- xxiv. Federal, state and territory governments should adequately and sustainably fund Aboriginal and Torres Strait Islander legal services, including family violence prevention services, and interpreter services.
- xxv. State and territory governments should introduce statutory custody notification systems in consultation with Aboriginal and Torres Strait Islander legal services.
- xxvi. Police in each state and territory should have guidance materials and undertake regular compulsory training, facilitated by Aboriginal and Torres Strait Islander people, about the ongoing and gendered impacts of colonisation, dispossession and forced removal of children, and the role of police.
- xxvii. Federal, state and territory governments should adequately and sustainably fund Aboriginal and Torres Strait Islander community-led organisations working with women to address violence in their lives.

- xxviii. State and territory governments should ensure that police protocols, guidelines and training prioritise the protection of, and provision of support to, Aboriginal and Torres Strait Islander women and children subject to violence.
- xxix. Each state and territory should establish an independent body for investigating deaths in police custody and complaints against police.
- xxx. State and territory governments should prioritise justice reinvestment approaches and ensure that decision makers in the legal system are required by law to prioritise rehabilitation and diversion for Aboriginal and Torres Strait Islander people where appropriate.
- xxxi. The ALRC should include dedicated section in the final report of its inquiry, focusing on Aboriginal and Torres Strait Islander children's over-representation in youth justice systems.

2. Response to questions and proposals

2.1 Bail and the remand population

- 12. When people are taken into custody, even for a short time on remand, their lives can be turned upside down – for example, children might be taken into child protection or housing and employment might be lost.
- 13. In 2016, 30 per cent of all Aboriginal and Torres Strait Islander people in prison were on remand. The ALRC's Discussion Paper notes that many Aboriginal and Torres Strait Islander people held on remand do not go on to receive a custodial sentence, suggesting 'that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low level offending.'¹
- 14. Remand rates for women, including Aboriginal and Torres Strait Islander women, have grown faster than for men.² Locking up women, even for short periods on remand, can have profound and lifelong consequences for their children and families. Around 80 per cent of Aboriginal and Torres Strait Islander women in prison are mothers.³ Many are primary carers of children or care for the sick or elderly in their family and many others will not have a safe home to return

¹ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper 84, 2017) [2.1].

² Australian Bureau of Statistics, *Prisoners in Australia, 2016* (8 December 2016) (data tables).

³ Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 *Contemporary Nurse: A Journal for the Australian Nursing Profession* 83, 85.

to – Aboriginal and Torres Strait Islander women are the least likely of all groups of prisoners to find appropriate housing upon release, particularly when they have children.⁴

15. The ALRC has proposed that:
 - (a) State and territory bail laws include a standalone provision that requires bail authorities to consider ‘issues that arise due to the person’s Aboriginality’, including cultural background, ties to family and place and cultural obligations; and
 - (b) State and territory governments work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure to provide culturally appropriate bail support and diversion options.
16. The HRLC supports both proposals. The proposals reflect recommendations made by Change the Record and HRLC in a joint report – *Over-represented and Overlooked: the Crisis of Aboriginal and Torres Strait Islander people Women’s Over-imprisonment (Over-represented and Overlooked)*.
17. The first proposal builds on an amendment made to the Victorian *Bail Act 1977 (Bail Act)*. This amendment was intended to promote substantive equality in bail decisions by recognising the historical and continuing disadvantage of Aboriginal and Torres Strait Islander people, which has contributed to over-imprisonment.⁵
18. Amending bails laws in this way is important, but will not be sufficient on its own. In Victoria, the *Bail Act* must be read together with the cultural rights of Aboriginal people recognised in the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.⁶
19. Human rights laws across all states and territories, and at the federal level, will be critical to redressing the systemic discrimination that is a key driver to Aboriginal and Torres Strait Islander people’s over-representation in criminal justice systems. The HRLC recommends that federal, state and territory governments take immediate steps to enact a human rights act (except in the ACT and Victoria, where human rights laws already exist).
20. Of course, for such laws to have a practical impact, culturally safe bail support and diversion programs must be available and accessible. The need for such measures is acute for Aboriginal and Torres Strait Islander women and children in the justice system. For many, a lack of stable housing or access to rehabilitation programs can mean the difference between bail and remand, and women are particularly vulnerable to housing insecurity.⁷ Bail support and diversion programs must include options linked to rehabilitation programs and

⁴ Eileen Baldry, ‘Home Safely: Aboriginal Women Post-Prison and their Children’ (2009) 7(15) *Indigenous Law Bulletin* 14.

⁵ Statement of Compatibility, *Bail Amendment Bill 2010 (Vic)* [3495].

⁶ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 19.

⁷ Baldrey, above n 4.

accommodation, including for women with children in their care. Victoria has been a leader in recent times in responding to the desperate need for programs tailored specifically to the needs and experiences of Aboriginal women, through the Koori Women's Diversion Program.⁸ Other states and territories should follow suit.

21. In addition, comprehensive cultural awareness training of lawyers and the judiciary is required to ensure appropriate and consistent application of these, and other changes to laws that flow from recommendations listed above. Aboriginal and Torres Strait Islander people must be involved in the delivery of such training and it should include education about the causes of Aboriginal and Torres Strait Islander people over-imprisonment.

2.2 Sentencing and Aboriginality

22. Sentencing decisions can have far-reaching consequences on a person's life. The ALRC has asked whether, and how, courts should be required to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples at sentencing.

A legislative obligation to take historical and systemic factors into account

23. All federal, state and territory governments should introduce laws to require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander offenders as part of the sentencing process. A specific legislative provision is central to promoting consistency in how the judiciary considers the impacts of colonisation, discrimination and disadvantage, which underpin the over-imprisonment of Aboriginal and Torres Strait Islander people.⁹
24. At present, only the ACT and Queensland have laws that *require* courts to consider the cultural background of an offender as a specific consideration. However in Queensland this requirement is contingent on submissions being made by the Aboriginal and Torres Strait Islander community justice group. In other jurisdictions, it is left to the discretion of judges and magistrates as to how (if at all) they will take into account the historical and contemporary systemic discrimination and disadvantage that contribute to the over-representation of Aboriginal and Torres Strait Islander people in criminal justice systems and to the offending of particular individuals.
25. In recognition of the over-imprisonment of First Nations peoples in Canada and their unique position in a colonised state, Canada specifically legislated to provide that sanctions other than imprisonment be considered 'for all offenders, with particular attention to the

⁸ Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017), 37.

⁹ The High Court's decision in *Bugmy v The Queen* (2013) 249 CLR 571 necessitates specific laws being enacted to require judicial notice to be taken of such factors as an Aboriginal or Torres Strait Islander offender is being sentenced.

circumstances of aboriginal offenders.¹⁰ The law has been interpreted as requiring courts to consider matters such as the history of colonialism, displacement and forced removal of children, and how that history continues to translate into lower educational attainment and incomes, higher rates of substance abuse and suicide, and higher imprisonment rates.¹¹ Canadian courts must consider the types of sentencing procedures and sanctions which are appropriate for the circumstances of the offender in light of his or her particular Aboriginal heritage or connection.¹²

26. Reports

27. In order to properly take account of unique systemic and background factors, courts require information about such factors. Current mechanisms are limited in their capacity to properly inform courts of the unique circumstances or experiences of Aboriginal and Torres Strait Islander offenders and culturally appropriate and meaningful sentencing options.¹³
28. In Canada, so called ‘*Gladue* reports’ are an important mechanism both for informing the court of these factors and involving Aboriginal people in sentencing processes. Qualified Aboriginal staff investigate and report on an Aboriginal offender’s unique experiences, identifying historical and systemic factors that have contributed to offending and in turn recommend culturally appropriate rehabilitative options and supports. The individual’s experience is located within the collective Aboriginal experience in order to explore innovative and culturally-tailored options for punishment, healing and reform.¹⁴
29. In different states and territories across Australia, there are Aboriginal sentencing courts or processes that allow for Aboriginal and Torres Strait Islander people to make submissions or provide reports or references to the court. For example, Queensland and South Australia have laws that allow cultural considerations to be raised on behalf of an Aboriginal and Torres Strait Islander offender.¹⁵
30. *Gladue* reports are just one example of an alternative approach to ensuring courts are properly equipped to appropriately sentence Aboriginal and Torres Strait Islander offenders. The HRLC recommends that state and territory governments work with Aboriginal and Torres Strait Islander representatives, including representatives of existing Aboriginal and Torres Strait Islander sentencing processes, to determine the most appropriate way to ensure that cultural factors and systemic discrimination and disadvantage, are adequately taken into account by courts in decision-making.

¹⁰ *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

¹¹ *R v Ipeelee* [2012] 1 SCR 433, [59]-[60].

¹² *R v Ipeelee* [2012] 1 SCR 433, 468-9[59]-[60]; *R v Gladue* [1999] 1 SCR 688.

¹³ Human Rights Law Centre and Change the Record Coalition, above n 8, 46.

¹⁴ *R v Gladue* [1999] 1 SCR 688, 725-8 [70]-[74]. The reports are named after a Supreme Court case, *R v Gladue*, which recommended that attention be given in pre-sentencing reports to an offender’s Aboriginal status.

¹⁵ *Penalties and Sentences Act 1992* (Qld) s 9(2)(p); *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

2.3 Sentencing options

31. Sentencing options such as prison terms and fines can play an important deterrent and denunciation role, however they are of limited effectiveness, and can be counterproductive, for tackling the profound socio-economic disadvantage and systemic discrimination that underlies much offending.

Mandatory sentencing

32. The practice of mandatory sentencing curtails the ability of the court to take into account the individual circumstances of an offender and the offending during sentencing, often leading to harsh, unjust outcomes. Mandatory sentencing contributes to high imprisonment rates of Aboriginal and Torres Strait Islander people across Australia.¹⁶
33. Mandatory sentencing exists in many Australian jurisdictions,¹⁷ however it is of particular concern in the Northern Territory and Western Australia. In the Northern Territory there is mandatory sentencing for second or subsequent breaches of a domestic violence order, drug offences, violent offences and certain aggravated property offences.¹⁸ In Western Australia, mandatory sentencing applies to home burglary, assaulting a public officer and certain driving offences.¹⁹ These two jurisdictions also have the highest rates for the imprisonment of Aboriginal and Torres Strait Islander people.²⁰
34. Mandatory sentencing laws that apply to children further marginalise Aboriginal and Torres Strait Islander children in contact with the justice system. For example, in WA, from 2000–2005 approximately 87% of all children sentenced under the mandatory sentencing laws for home burglary were Aboriginal and Torres Strait Islander children.²¹
35. There is no evidence that mandatory sentencing schemes actually operate as an effective deterrent to offending or that they lead to a reduction in crime. In fact, when the Northern Territory introduced mandatory sentencing for property crime in 1997, NT property crime rates increased, and then decreased after mandatory sentencing was repealed.²²

¹⁶ Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing*, May 2014 [116].

¹⁷ *Ibid* 8.

¹⁸ *Sentencing Act* (NT) s 78B (aggravated property offences); Part 3, Division 6A (violent offences); Part 3, Division 6B (sexual offences); *Misuse of Drugs Act* (NT) s 37(2)-(5) (second and subsequent drug offence); *Domestic and Family Violence Act* (NT) ss 121(2), s 122(2) (second and subsequent offence).

¹⁹ *Criminal Code Act Compilation Act 1913* (WA) s 297(5) (grievous bodily harm in the course of home burglary); s 401(4)(b) (repeat home burglary); s 318(5) (assault public officer).

²⁰ Australian Bureau of Statistics, above n 2.

²¹ Judge Dennis Reynolds, *Youth Justice in Western Australia – Contemporary Issues and its Future Direction*, (University of Notre Dame, 13 May 2014).

²² Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders – The Northern Territory Experience* (Northern Territory of Australia, 2003), 10.

36. In 2014, the UN Committee against Torture recognised the disproportionate impact that Australia’s mandatory sentencing laws have on Aboriginal and Torres Strait Islander peoples and called for the Australian Government to review them ‘with a view to abolishing them.’²³
37. State and territory governments should review mandatory sentencing regimes and repeal provisions that unfairly and disproportionately affect Aboriginal and Torres Strait Islander people. Mandatory sentencing regimes that apply to children and to non-violent offences should be prioritised for abolition.

Short prison sentences and community-based sentencing options

38. The ALRC has proposed that state and territory governments work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.²⁴
39. The HRLC supports this proposal and recommends that state and territory governments encourage the use of community-based sentencing options, rather than short sentences, by courts by adequately funding culturally appropriate community-based alternatives.
40. The Royal Commission into Aboriginal Deaths in Custody recommended that non-custodial sentencing orders be available, accessible and culturally appropriate, and that governments work with Aboriginal and Torres Strait Islander communities and groups in designing and implementing programs.²⁵ Numerous reports have made similar recommendations since, including the evaluation of Phase Two of the Victorian Aboriginal Justice Agreement. The evaluation found that improving the responsiveness and inclusiveness of Koori needs into community corrections would have many benefits including being able to identify and remove barriers, strengthening cultural connection and linking in culturally appropriate services to address the root causes of offending.²⁶
41. Access to non-custodial sentencing options is limited for Aboriginal and Torres Strait Islander people living in regional and remote locations. This is inequitable.²⁷ Responses that aim to address the underlying causes of offending will be more effective where they support the wishes of Aboriginal and Torres Strait Islander people to remain close to family and country.
42. Ensuring adequate community-based sentencing options for young people should be prioritised in light of the growing over-representation of Aboriginal and Torres Strait Islander

²³ United Nations Committee against Torture, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia* (2014) [12].

²⁴ Australian Law Reform Commission, above n 1, proposal 4-1.

²⁵ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recs 111, 116.

²⁶ Nous Group, *Evaluation of the Aboriginal Justice Agreement – Phase 2* (Final Report for Victorian Department of Justice, 2012), 27-8.

²⁷ New South Wales, Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [3.8].

children in youth detention and the long term impacts of contact with the youth justice system. In addition, governments should address the current dearth of sentencing options and services designed specifically for Aboriginal and Torres Strait Islander women, and which take into account caring responsibilities and the need for healing.²⁸

43. As Change the Record's *Blueprint for Change* recognises, people who are directly affected are those best placed to inform the design, implementation and effectiveness of community based initiatives.²⁹ In particular Aboriginal and Torres Strait Islander community controlled organisations, which have the support of the local community, have the unique capacity to provide culturally appropriate services tailored to meet the needs of the Aboriginal and Torres Strait Islander people from their region. If governments are to be effective in brokering community-based solutions to crime and supporting offenders to complete community-based sentences, then Aboriginal and Torres Strait Islander community controlled organisations must be involved in the design, implementation and evaluation of such initiatives, consistent with principles of community control and self-determination.³⁰

2.4 Prison Programs, Parole and Unsupervised Release

44. Prison programs and pre and post-release support play an important role in reducing the risks of reoffending. Reoffending rates are far higher for Aboriginal and Torres Strait Islander people than non-Indigenous people.³¹
45. As the ALRC's discussion paper notes, there is a paucity of research into what makes prison programs effective for Aboriginal and Torres Strait Islander people. There is also an alarming lack of programs and services focused on the needs of Aboriginal and Torres Strait Islander women and girls.³² The ALRC has proposed that:
- (a) Prison program be made available to people in prison on remand and short sentences.
 - (b) Culturally appropriate programs be developed to respond to the unique needs of Aboriginal and Torres Strait Islander people women in prison.
46. The HRLC supports the above proposals, noting the vital need for all prison programs to be responsive to the cultural, health and gender needs of prisoners, including LGBTI Aboriginal and Torres Strait Islander prisoners and those with a disability.

²⁸ Human Rights Law Centre and Change the Record, above n 8.

²⁹ Change the Record Coalition Steering Committee, *Blueprint for Change* (2015), 6.

³⁰ *Ibid.*

³¹ Australian Bureau of Statistics, above n 2.

³² Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (Human Rights and Equal Opportunity Commission, 2002) ch 5; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2004* (Human Rights and Equal Opportunity Commission, 2005) ch 2.

Prisoners on remand or short sentences

47. Aboriginal and Torres Strait Islander people account for around 27% of remand prisoners in Australia.³³ Those on remand or serving short sentences, have limited access to programs during their time in custody. These 'short termers' (serving 6 months or less) account for more than half of prisoners released each year and without access to appropriate programs, are at greater risk of reoffending.³⁴ A lack of stable housing, work, family and social ties, together with a lack of post-release support, heightens this risk even further.³⁵
48. The Australian Institute of Judicial Administration's report, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia*, documents the barriers to accessing prison programs for Aboriginal and Torres Strait Islander people. These include growing remand rates, overcrowding, a lack of resources, inappropriate selection criteria and a lack of investment in culturally appropriate programs and cultural support.³⁶
49. The very limited research about best practice in rehabilitation programs for Aboriginal and Torres Strait Islanders offenders indicates that rehabilitation is more likely if the treatment is tailored to an offender's 'specific needs and cultural differences and is delivered in a style and mode that is consistent with the ability and learning style of the offender.'³⁷ The needs of Aboriginal and Torres Strait Islander offenders will be vastly different from non-Indigenous offenders. Programs should be designed by and for Aboriginal and Torres Strait Islander people and factor in the historical and ongoing experience of colonisation, social disadvantage and offence-specific factors.³⁸
50. Making prison programs available and accessible to people on remand and serving short sentences will require early assessment of a person's specific needs to ensure individualised responses, including mental health treatment. This foundation should also inform the support and early intervention provided after release.
51. State and territory governments should increase the availability of Aboriginal and Torres Strait Islander specific counselling, drug and alcohol, healthcare and disability services and programs.³⁹

³³ Australian Bureau of Statistics, above n 2.

³⁴ Australasian Institute of Judicial Administration, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders across Australia* (2016), 21.

³⁵ *Ibid.*

³⁶ *Ibid* 1, 16.

³⁷ *Ibid* 11.

³⁸ *Ibid* 13.

³⁹ *Ibid.*

Women

52. Aboriginal and Torres Strait Islander women will have vastly different rehabilitative needs from men. The need for differential treatment is reflected in the *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*.⁴⁰ Further, the Standard Guidelines for Corrections in Australia require that the management and classification of female prisoners reflect their higher needs for health and welfare services and for contact with their children.⁴¹ Programs provided to prisoners, 'should be established following close consultation with the appropriate community groups and experts.'⁴²
53. The current correctional system does not provide Aboriginal and Torres Strait Islander people women with substantive equality in terms of access to services or treatment.⁴³
54. Equality in access to vital prison programs requires programs be both culturally-specific and gender-specific. In recognition of the fact that some 80% of Aboriginal and Torres Strait Islander women in prison are mothers, programs should accommodate family and cultural responsibilities and focus on connecting women to their families and communities. As noted by the ALRC, a high percentage of women offenders are victim/survivors of family and sexual violence. Responses within prisons must therefore be trauma-informed, culturally safe and led by or in partnership with Aboriginal and Torres Strait Islander community controlled organisations with expertise in supporting victims/survivors of violence. Responding effectively to violence against women will address one of the key underlying drivers of offending by women.⁴⁴

Routine strip searching

55. The overall prison environment, including the quality of staff, impacts on the effectiveness of prison programs.
56. Strip searching is routine in most jurisdictions around Australia. The routine strip search of prisoners, especially Aboriginal and Torres Strait Islander women and children, is a practice that has the potential to seriously undermine trust, recovery and ultimately rehabilitation. It is a practice that is known to be traumatising, especially to the overwhelming majority of Aboriginal and Torres Strait Islander women and girls in prison who are survivors of family or sexual violence.

⁴⁰ *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)*, rule 1.

⁴¹ *Standard Guidelines For Corrections in Australia* (2012) [1.43].

⁴² *Ibid* [3.14].

⁴³ Human Rights Law Centre and Change the Record, above n 8, 11. See also Aboriginal and Torres Strait Islander Social Justice Commissioner: *Social Justice Report 2004*, above n 32, 22; *Social Justice Report 2002*, above n 32, 135.

⁴⁴ Human Rights Law Centre and Change the Record Coalition, above n 8, 17-18.

57. The routine use of strip searching has been described a cruel and degrading treatment by the European Court of Human Rights.⁴⁵ Routine strip searching is also an unnecessary trauma in light of the growing availability and effectiveness of alternative search technologies, such as body scanners. In recognition of the harm caused by strip searching, the ACT changed its laws in 2008 to only permit strip searching on the basis of a reasonable suspicion, rather than on a routine basis. Other states and territories should follow suit.

2.5 Fines and drivers licences

Alternatives to fines

58. The punitive enforcement of fines has devastating impacts on economically disadvantaged people across Australia every day, including imprisonment, debts, homelessness and mental illness.
59. Aboriginal and Torres Strait Islander people experience much higher levels of economic disadvantage and are therefore at greater risk of being unable to pay fines. For example, in Western Australia, fine default imprisonment laws have had a much harsher impact on Aboriginal women – 64% of the fine default prison population was made up on Aboriginal women between July 2006 and June 2015.⁴⁶
60. The devastating death of a young Aboriginal woman, Ms Dhu, in police custody for unpaid fines, brought national attention to the shameful practice of imprisoning people because they do not have the means to pay fines. Her case highlighted the injustice wrought by blunt criminal justice responses, punishing people in desperate need of support, rather than helping them connect with support. Following an inquest into Ms Dhu's death, the WA State Coroner recommended that fine default imprisonment laws be abolished and that the WA Government develop more out-of-court options for low level offending.⁴⁷
61. The ALRC has proposed that state and territory governments abolish provisions in fine enforcement laws that allow for imprisonment for unpaid fines and introduce Work and Development Order schemes based on a scheme in New South Wales.
62. These proposals are supported and echo recommendations made by the HRLC and CTR in *Over-represented and Overlooked*.
63. The NSW Work and Development Order Scheme involves collaborative arrangement between the NSW Government and non-government organisations, including the Aboriginal Legal Service of NSW. People who cannot pay fines because of hardship, illness, addiction or

⁴⁵ *Frerot v France* (European Court of Human Rights, Chamber, Application No 70204/01, 12 September 2007); *Wieser v Austria* (European Court of Human Rights, Chamber, Application No 2293/03, 22 February 2007).

⁴⁶ Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) v.

⁴⁷ R V C Fogliani, Western Australia State Coroner, *Record of Investigation into Death of Ms Dhu* (15 December 2016), recommendations 6-7.

homelessness can 'pay off' their debt through options such as volunteer work, treatment, counselling, or education and training, such as driving lessons.⁴⁸ Critically, the activities are individualised and can address issues contributing to offending. At the same time, a person can apply to have some of their debt written off and inability to comply with the order does not lead to further punishment. Compliance with the order is supervised, typically by an approved non-government agency or a health professional.

64. The scheme has been evaluated positively, both in terms of reducing reoffending rates, engaging clients in positive treatment and training activities and alleviating the stress associated with unpaid fine debts.⁴⁹

65. We recommend that work and development order schemes be developed in partnership with Aboriginal and Torres Strait Islander community representatives and organisations and made available *both as a response to fine default and as an independent sentencing option*. Family violence victim/survivors should be eligible for the scheme and breach of a Work and Development Order should not result in further penalty.⁵⁰

66. In addition to Work and Development Orders being introduced as a sentencing option, the HRLC supports the introduction of other lower level penalties, such as written cautions, to replace infringement notices for some low level offences.

Drivers licence suspension and vehicle registration suspension

67. The ALRC's Discussion Paper documents the different pathways that lead to imprisonment for fine default, including through drivers' licence or vehicle registration suspension and subsequent charges for unlicensed driving.

68. Having a drivers licence or car that is registered can be essential to keeping a job, getting children to school, buying food and other basic life activities. Suspension is a punishment that is disproportionately severe for vulnerable people, including single parents, people living regionally or remotely and people on low incomes.

69. HRLC recommends that the application of enforcement measures that impair a person's ability to drive be subject to an assessment of circumstances so as to identify whether a person is unable or unwilling to pay their fine and the consequences of suspending a drivers licence or vehicle registration. For those identified as unable to pay a fine, a referral could be made for a Work and Development Order.

⁴⁸ *Fines Act 1996* (NSW) pt 4, div 8.

⁴⁹ Department of Attorney-General & Justice, 'A Fairer Fine System for Disadvantaged People: An Evaluation of Time to Pay, Cautions, Internal Review and the Work and Development Order Scheme' (Government of New South Wales, May 2011) 40-43.

⁵⁰ Human Rights Law Centre and Change the Record, above n 8, 39, recommendation 14.

Offensive language offences

70. Offensive language infringement notices are disproportionately applied against Aboriginal and Torres Strait Islander people, and often result in an infringement notice.⁵¹ Often, offensive language occurs in the context of an interaction with police. In this context, the Royal Commission into Aboriginal Deaths in Custody noted:

It is surely time that police learnt to ignore mere abuse, let alone simple "bad language". In this day and age many words that were once considered bad language have become commonplace and are in general use amongst police no less than amongst other people. Maintaining the pretence that they are sensitive persons offended by such language . . . does nothing for respect for the police. It is particularly ridiculous when offence is taken at the ranting of drunks, as is so often the case. Charges about language just become part of an oppressive mechanism of control of Aboriginals.⁵²

71. As the ALRC notes, infringement notices can be issued by police for offensive language in circumstances where, if tested in court, the language would not be found to be offensive.⁵³
72. The HRLC recommends the removal of offensive language from criminal statutes, except offences that prohibit serious vilification and incitement to hatred or violence on the basis of race, sex, disability, sexual orientation or gender identity or other protected attribute.

2.6 Justice procedure offences – breach of community-based sentences

73. Justice procedure offences include offences such as breach of bail and community based sentencing orders. The ALRC has noted that justice procedure offences are the 'third most common type of offending resulting in sentences of imprisonment for Aboriginal and Torres Strait Islander peoples.'⁵⁴
74. As noted at [19] and [39] of this submission, there are insufficient programs and supports, including for bail and community-based sentence, for Aboriginal and Torres Strait Islander people, especially women and young people, and particularly in regional and remote areas. The HRLC therefore supports the ALRC's proposal that state and territory governments work with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services.

⁵¹ Australian Law Reform Commission, above n 1 [6.45]-[6.48].

⁵² Commonwealth, Royal Commission into Aboriginal Deaths in Custody, above n 25 (Commissioner Wotton, in relation to the investigation into the death of David Gundy).

⁵³ Australian Law Reform Commission, above n 1, [6.48].

⁵⁴ *Ibid*, [7.2].

2.7 Alcohol

75. Undoubtedly, alcohol misuse and alcohol-related harm are significant problems across Australia, including for Aboriginal and Torres Strait Islander communities. However, the response should be to address alcohol misuse for what it is – a complex health issue requiring health-focused responses within a broader framework of supply, demand and harm reduction – not to criminalise individuals struggling with alcohol addiction and other health and social challenges.
76. The Northern Territory has demonstrated the ineffectiveness, injustice and discriminatory impact of punitive alcohol-related laws.⁵⁵ Between 2013 and 2014 the Government introduced:
- (a) Alcohol mandatory treatment laws: allowed for a Tribunal to order that a person taken into protective custody by police on three occasions within two months be deprived of their liberty and forced to undergo treatment for alcohol addiction for three months.⁵⁶
 - (b) alcohol protection orders: allowed for punitive control of people who were issued with an order, without the person going before a court or being found guilty of an offence. Once issued, the order made it an offence to possess or consume alcohol and to enter licenced premises (except for work or residence), restricting access to most public recreational areas.⁵⁷
 - (c) paperless arrest laws: empower police to lock a person up for four hours, or until they sober up, if they reasonably believe the person has, or might, commit an infringement notice offence, such as making undue noise.⁵⁸
77. Each of the above laws have been used overwhelmingly by police against Aboriginal and Torres Strait Islander people.⁵⁹ Each has defied evidence about effective approaches to problem drinking and led to injustice.
78. Alcohol mandatory treatment was evaluated as failing to engage or benefit many of the most vulnerable chronic drinkers and failing to address the underlying social and cultural determinants of risky alcohol consumption.⁶⁰ Alcohol protection orders criminalised public drinking some 40 years after the repeal of the offence of public drunkenness in the NT.

⁵⁵ For more information about the HRLC's position, see Human Rights Law Centre, 'Putting an End to the Over-criminalisation of Public Drinking in the Northern Territory' (Submission to the Northern Territory Alcohol Policies and Legislation Review, 2017).

⁵⁶ *Police Administration Act* (NT) s 128A; *Alcohol Mandatory Treatment Act* (NT) ss 8-10.

⁵⁷ *Alcohol Protection Order Act 2013* (NT) s 5.

⁵⁸ *Police Administration Act* (NT) ss 133AA-133AC.

⁵⁹ Human Rights Law Centre, above n 55.

⁶⁰ Price Waterhouse Coopers Indigenous Consulting, 'Evaluation of the Alcohol Mandatory Treatment Program' (Northern Territory Department of Health, 2017), 68, 73.

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79. While alcohol protection orders and mandatory treatment laws were recently repealed by the NT Parliament and replaced by a Banned Drinker Register, paperless arrest laws remain. Paperless arrest laws give NT police extraordinary power to lock people up for short periods. This is despite the NT having some of the broadest protective custody laws in Australia.⁶¹ Following the death in custody of Kumanjayi Langdon, a man taken into custody under paperless arrest powers for simply drinking in public, the NT Coroner recommended the abolition of paperless arrest laws.⁶²
80. Similar arrest and detention powers in Western Australia allow police to arrest and detain intoxicated people for 'street drinking'. In 2017, the WA State Coroner recommended that these laws be repealed following the death in custody of Aboriginal woman, Ms Mandijarra.⁶³ Meanwhile, in Victoria, public drunkenness remain on the statute books as an offence.⁶⁴
81. There is a clear need for state and territory governments to repeal laws that punish public drinking, including excessive police powers to apprehend, arrest or detain, even for short periods. This is not a new message: the Royal Commission into Aboriginal Deaths in Custody made similar recommendations 26 years ago.
82. The Banned Drinker Register is preferable to alcohol protection orders and mandatory alcohol treatment, as an approach that does not punish or deprive intoxicated people of their liberty. However, the new laws in the Northern Territory make it an offence for someone to knowingly supply a person on a Banned Drinker Order with alcohol. This could see victim/survivors of family violence, people with disabilities or mental illness and other vulnerable people pressured into purchasing alcohol enter the criminal justice system.

Alcohol management plans

83. Measures to address alcohol misuse and alcohol-related harm must be non-discriminatory and tailored to suit the needs of specific communities. They must involve the participation of affected communities to ensure that they are culturally appropriate, address community needs and have the greatest chance of success.⁶⁵
84. The Human Rights Law Centre supports calls by the Aboriginal Peak Organisations Northern Territory (**APO NT**) for a whole-of-community approach to tackling alcohol abuse and related harm.⁶⁶ Alcohol Management Plans may be effective for individual communities so long as

⁶¹ NT protective custody laws allow police to lock a drunk person up, including because they might cause 'substantial annoyance' or commit an offence, no matter how trivial, and do not require police to consider alternatives, like taking a person home or to a sobering up shelter: *Police Administration Act* (NT) s 128.

⁶² *Inquest into the death of Kumanjayi Langdon* [2015] NTMC 016 (14 August 2015) [93].

⁶³ *Inquest into the death of Ms Mandijarra* (31 March 2017) Recommendation 1.

⁶⁴ *Summary Offences Act 1966* (Vic) s 13.

⁶⁵ Human Rights Law Centre and the National Aboriginal and Torres Strait Islander Legal Services, 'Submission to the Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities' (2014), 4.

⁶⁶ Aboriginal Peak Organisations Northern Territory, 'APO NT Submission to the Northern Territory Government Review on Alcohol Polices and Legislation' (2017) 38.

they are evidence-based and supported and led by Aboriginal and Torres Strait Islander communities.⁶⁷ As noted by APO NT:

Evidence shows that instead of putting a blanket ban on alcohol without community consultation, collaborative plans that incorporate supply, demand and harm reduction measures, that monitor the movement and sale of alcohol with the community, and that reflect the needs and wants of the whole community, will reduce the harm alcohol has on individuals, families and communities.⁶⁸

2.8 Female offenders

85. *Over-represented and Overlooked* contains a range of recommendations to improve justice outcomes for Aboriginal and Torres Strait Islander women. A copy of the report has been provided to the ALRC and many recommendations from that report are referred to throughout this submission.
86. Of particular importance is making diversion programs more accessible to Aboriginal and Torres Strait Islander women and ensuring that laws and policies do not exclude their participation through eligibility criteria. In general, Aboriginal and Torres Strait Islander women have very few options for culturally-responsive diversion programs relative to men, with only a handful existing around the country.⁶⁹ However, there are also systemic barriers to participation, including that Aboriginal and Torres Strait Islander women are:
- (a) less likely to make admissions to police (diversion usually requires an admission of wrongdoing);
 - (b) more likely to have prior convictions and/or be facing multiple charges, which make them ineligible for diversion;
 - (c) more likely to have substance abuse issues and/ or co-existing mental illness, which make their circumstances too complex; and
 - (d) more likely to live in rural and remote locations where diversion programs are not available.⁷⁰
87. It is critical therefore that diversion laws, policies and programs are designed to counteract these barriers.

⁶⁷ Ibid 38-39.

⁶⁸ Ibid 40.

⁶⁹ See generally Lorana Bartels, 'Diversion Programs for Indigenous Women' (Research in Practice Report No 13, Australian Institute of Criminology, 2010) 3.

⁷⁰ Fiona Allison and Chris Cunneen, 'Indigenous Bail Diversion: Program Options for Indigenous Offenders in Victoria' (Victorian Department of Justice, 2009) 29; Eileen Baldry and Chris Cunneen, 'Imprisoned Indigenous Women and the Shadow on Colonial Patriarchy' (2014) 47(2) *Australian & New Zealand Journal of Criminology* 276, 288-9.

88. In addition to the recommendations in *Over-represented and Overlooked*, the HRLC recommends that where decision-makers are given discretion in criminal procedure and sentencing laws, that consideration be given to including as a factor, the impact of a particular decision on any children. This is of particular relevance to Aboriginal and Torres Strait Islander women, with research indicating that 80 per cent of Aboriginal and Torres Strait Islander women in prison are mothers. The intergenerational impacts of imprisonment, and the existing over-representation of Aboriginal and Torres Strait Islander children in child protection systems, are too serious to not warrant an investigation into how police, courts, prisons and parole boards can better consider the interests of children.

2.9 Aboriginal justice agreements and justice targets

89. State and territory Aboriginal justice agreements have an important role to play in focusing the actions of different branches of government towards the inter-related goals of reducing imprisonment and violence rates. At the Federal level, the Closing the Gap framework could play a similar role, however there are currently no justice targets. The setting of targets or goals in partnership with Aboriginal and Torres Strait Islander people, accompanied by the systematic collection of data, allows for progress to be measured. This is critical to holding governments to account.

90. Aboriginal justice agreements have been described as contributing to:

a more coherent government focus upon Indigenous justice issues and...have also led to development of a number of effective initiatives and programs in the justice area. An [AJA] can also advance principles of government accountability with independent monitoring and evaluation, with maximum Indigenous input into those processes. [AJAs] have effectively progressed Indigenous community engagement, self-management, and ownership where they have set up effective and well-coordinated community-based justice structures.⁷¹

91. To be meaningful however, the setting of targets or goals by federal, state and territory governments must also be accompanied by a long term commitment to partnership with Aboriginal and Torres Strait Islander communities and organisations, and sustainable resourcing to ensure effective implementation.

92. Only Victoria and the ACT have current Aboriginal justice agreements in place. The Victorian agreement has been described as meeting 'the highest standards in terms of Indigenous participation, implementation, monitoring and independent evaluation.'⁷²

⁷¹ Fiona Allison and Chris Cunneen, *Indigenous Justice Agreements* (Current Initiatives Paper 4, Indigenous Justice Clearinghouse, June 2013) 6.

⁷² *Ibid.*

93. The HRLC supports the ALRC's proposal for state and territory governments to work with peak Aboriginal and Torres Strait Islander organisations, as well as communities, to renew or develop Aboriginal justice agreements where they do not exist.⁷³
94. The HRLC also supports calls by the Change the Record Coalition for the federal government to develop justice targets as part of the Closing the Gap framework. These targets should aim to:
- (a) close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2040; and
 - (b) cut disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040, with priority strategies for women and children.⁷⁴

2.10 Access to justice issues

Access to interpreter and legal services

95. The ALRC's discussion paper acknowledges the multifaceted and compounding barriers to justice for Aboriginal and Torres Strait Islander defendants, such as language and cultural barriers, mental illness, disability (including cognitive impairment and hearing loss) and remoteness. These barriers also deny Aboriginal and Torres Strait Islander people access to other facets of the justice system, including as victims of crime or discrimination, parents seeking custody of their children, tenants facing homelessness or consumers tricked into sham contracts. Being unable to deal promptly and effectively with such issues can see them escalate, causing enormous distress and creating conditions in which contact with the criminal justice system is more likely.
96. Aboriginal legal services (including family violence prevention legal services) and interpreter services play a vital role in overcoming these barriers and ensuring legal processes are fair for Aboriginal and Torres Strait Islander people. This was acknowledged in the recent report of the Senate Finance and Public Administration References Committee's inquiry into Aboriginal and Torres Strait Islander people's experience of law enforcement and justice services.⁷⁵ It noted 'overwhelming evidence about the legal needs of Aboriginal and Torres Strait Islander people which are not being met'⁷⁶ and that Aboriginal legal services are not adequately funded to meet the needs of Aboriginal and Torres Strait Islander people.⁷⁷

⁷³ Consistent with recommendations made in Human Rights Law Centre and Change the Record, above n 8.

⁷⁴ Change the Record, above n 29, 5.

⁷⁵ Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016).

⁷⁶ *Ibid* 25 [3.2].

⁷⁷ *Ibid* 17 [2.43].

97. Access to Aboriginal and Torres Strait Islander legal services and interpreting services can be improved through the provision of adequate and sustainable funding from governments, including funding for community education and advocacy by legal services, which are critical to overcoming systemic injustices. Funding security is vital to planning and designing their services to meet demand in the long term.
98. Both the UN Committee on the Elimination of Racism and the Special Rapporteur on Indigenous people's rights have called for the federal government to adequately fund these vital services.⁷⁸
99. The HRLC recommends long term investment in Aboriginal and Torres Strait Islander community controlled legal services and interpreting services. The HRLC also supports an approach that sees governments working with Aboriginal and Torres Strait Islander communities and organisations to identify existing demand for services, the level of unmet need and challenges to addressing unmet need. This should not be limited to the criminal justice system.

Custody notification service

100. Custody notification services (**CNS**) require that police notify the relevant Aboriginal legal service when an Aboriginal or Torres Strait Islander person is taken into police custody so that an independent legal and welfare check can be conducted.⁷⁹
101. A well-resourced CNS can be lifesaving. Had a resourced and effective CNS been in place in Western Australia in 2014, Ms Dhu may have had a lawyer to advocate for her welfare and her death may have been prevented.⁸⁰
102. After the introduction of a legislative CNS in NSW were no Aboriginal deaths in police custody for 16 years. A death in custody occurred in 2016 in circumstances where it appears that police detained a woman for "protective" reasons, rather than for questioning or investigation. The CNS in NSW did not mandate a notification in such circumstances.
103. The HRLC supports the ALRC's proposal that state and territory governments, in consultation with Aboriginal legal services, introduce a statutory CNS. It should be mandatory for the police to notify Aboriginal legal services when an Aboriginal or Torres Strait Islander person taken

⁷⁸ Victoria Tauli-Corpuz, *End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz on Her Visit to Australia* (3 April 2017). Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) [19].

⁷⁹ The introduction of CNS was a recommendation of the Royal Commission into Aboriginal Deaths in Custody: Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 4, 111, recommendations 223-4.

⁸⁰ The introduction of a custody notification scheme modelled on the NSW scheme was called for by the Aboriginal Legal Services of Western Australia and recommended for consideration by the WA Government: *Record of Investigation into Death of Ms Dhu*, above n 47 [841]-[844].

into custody, even for protective reasons. Crucially, Aboriginal legal services must be resourced to respond to notifications with legal and welfare checks.

2.11 Police accountability

104. The over-policing of Aboriginal and Torres Strait Islander communities through increased police numbers, patrols and surveillance contributes to over-representation in the criminal justice system.⁸¹ The Chief Justice of Western Australia recently stated that ‘Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested...at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.’⁸²
105. There is a justifiable mistrust of the police, stemming from the legacy of colonisation, oppressive laws and policies executed, sometimes brutally, by police, and the ongoing discrimination and dispossession experienced by Aboriginal and Torres Strait Islander peoples around Australia. The ALRC’s Discussion Paper documents reports that have looked at strategies to address inappropriate and discriminatory policing in remote communities.⁸³
106. Removing excessive police powers to apprehend and detain, such as through paperless arrest and protective custody laws in the NT and street drinking detention laws in WA (see above), will reduce negative contact between police and Aboriginal and Torres Strait Islander people.
107. However, there is a desperate need for fundamental change in the way police interact with Aboriginal and Torres Strait Islander people and communities, including improved cultural awareness, with the aim of building trust, promoting safety and reducing crime.⁸⁴
108. Police in each state and territory should have guidance materials and undertake regular training, facilitated by Aboriginal and Torres Strait Islander people, about the ongoing history and gendered impacts of colonisation, dispossession and forced removal of children, and the role of police. Such training should be mandatory, ongoing and location-specific and involve an assessment of learning.⁸⁵

Improving police responses to experiences of victimisation

109. Aboriginal and Torres Strait Islander women are simultaneously over-policed as alleged offenders and under-policed as victim/survivors of crime.⁸⁶ There are many accounts of police

⁸¹ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011), 200.

⁸² Senate Finance and Public Administration References Committee, above n 75, 70.

⁸³ Australian Law Reform Commission, above n 1, chapter 12.

⁸⁴ Change the Record, above n 29,10.

⁸⁵ *Record of Investigation into Death of Ms Dhu*, above n 47, 137-8, recommendations 3-4.

⁸⁶ See for example cases of Ms Dhu and Ms Mullaley, in report by Human Rights Law Centre and Change the Record, above n 8, 5, 31.

minimising Aboriginal women's experiences of violence or viewing their behaviour as atypical and "difficult".⁸⁷

110. The ALRC has identified the need for improved police responses to Aboriginal and Torres Strait Islander women's experiences of violence. This is critical to reducing women's over-representation in the criminal justice system, both as defendants and victim/survivors. The HRLC recommends sustainable funding and support for Aboriginal community-led organisations working with women to address violence in their lives, including to support these organisations working with police to improve responses to Aboriginal and Torres Strait Islander women.⁸⁸
111. State and territory governments should ensure that police protocols, guidelines and training prioritise the protection of, and provision of support to Aboriginal and Torres Strait Islander women and children subject to violence, and emphasise gender-specific and culturally-appropriate police responses.⁸⁹ There is also an urgent need for recruitment practices that promote Aboriginal and Torres Strait Islander women's participation, both in policing and the training of police.⁹⁰

Independent investigation of police misconduct and deaths in custody

112. Relations between Aboriginal and Torres Strait Islander people and police could be improved if allegations of police misconduct and deaths in custody were independently investigated.
113. No Australian jurisdiction has established a system for completely independent investigations of deaths in police custody or of allegations of torture and mistreatment. Complaints against police officers are primarily investigated by other police officers.⁹¹ Queensland has implemented a model which more directly involves the State Coroner.⁹² However, this remains far from being a fully impartial investigation by a body independent to the police, in line with international standards.⁹³
114. The recent Federal Court finding of racial discrimination by Queensland Police in its response to the death of Mulrunji Doomadgee in Palm Island police custody in 2004 highlights the critical need for independence in the investigation of deaths and ill-treatment in custody. The Court found that the investigating officers 'operated with a sense of impunity, impervious to the

⁸⁷ Human Rights Law Centre and Change the Record, above n 8, 31; Aboriginal Family Violence Prevention and Legal Service Victoria, 'Submission to the Royal Commission into Family Violence' (2015) 46.

⁸⁸ Ibid.

⁸⁹ Recommendation 9.

⁹⁰ See recommendations in Human Rights Law Centre and Change the Record, above n 8, 33.

⁹¹ Office of Police Integrity Victoria, *Review of the Investigation of Deaths Associated with Police Contact* (2011) 26.

⁹² Ibid 9, 26.

⁹³ Craig Longman, "Police investigators too in-house to probe deaths in custody" *The Conversation* (online) 15 April 2011 available at <<https://theconversation.com/police-investigators-too-in-house-to-probe-deaths-in-custody-838>>.

reactions of Palm Islanders, and very much with an ‘us and them’ attitude.’⁹⁴ Further, the court observed that police had performed their duties ‘differently by reference to the race of the people they are dealing with’ and described this as “an affront to the rule of law.”⁹⁵

115. Each state and territory should establish an independent body for investigating deaths in police custody and complaints against police. Such a body should be hierarchically, institutionally and practically independent of the police and have features to ensure that investigations are comprehensive, prompt, subject to public scrutiny and, in the case of deaths in custody, involve the family of the deceased.

2.12 Justice reinvestment

116. A justice reinvestment approach to criminal justice in Australia would provide a valuable framework to prevent crime and promote community safety, reduce imprisonment rates and deliver associated social and economic benefits for the community. A justice reinvestment approach involves re-directing government money spent on prisons towards community-based initiatives aimed at addressing the underlying causes of crime.
117. Experience from overseas shows that justice reinvestment initiatives can reduce crime and imprisonment rates, cut government spending on prisons and strengthen communities.⁹⁶ The *Change the Record Blueprint for Change* calls for governments to invest in communities, not prisons, and to focus on safety and strengthening communities, including by investing in holistic prevention and early-intervention strategies designed and implemented in partnership with Aboriginal and Torres Strait Islander people.
118. The UN Committee on the Elimination of Racial Discrimination and a number of Australian parliamentary inquiries, including an inquiry into the death in custody of Aboriginal man, Mr Ward, in Western Australia, have recommended justice reinvestment approaches.⁹⁷
119. Justice reinvestment approaches require strategies that are tailored to the needs and aspirations of communities. As such, the development of legal and policy frameworks needs to be guided by the identified needs of the community. However, legal frameworks can support justice reinvestment initiatives by ensuring that decision makers in the legal system – police,

⁹⁴ *Wotton v State of Queensland (No 5)* [2016] FCA 1457.

⁹⁵ *Ibid.*, [1806].

⁹⁶ See, eg, Justice Center, Council of State Governments, *Justice Reinvestment in Kansas* (2007) 2; Nancy LaVigne et al, *Justice Reinvestment Initiative State Assessment Report* (Urban Institute, 2014) 3-4.

⁹⁷ Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010) [20]; Standing Committee on Environment and Public Affairs, Legislative Council of Western Australia, *Inquiry into the Transportation of Detained Persons: The Implementation of the Coroner’s Recommendations in Relation to the Death of Mr Ward and Related Matters* (2011); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013).

magistrates, judges, parole boards – are required by law to prioritise rehabilitative and diversionary options where appropriate.

120. The HRLC provided a comprehensive submission on justice reinvestment to an inquiry into justice reinvestment by the Senate Standing Committee on Legal and Constitutional Affairs in 2013, a copy of which is included as **Attachment A**.

3. Aboriginal and Torres Strait Islander children

121. Aboriginal and Torres Strait Islander children are over-imprisoned at higher rates than adults. Early contact with the justice system increases the likelihood of poorer outcomes throughout life, including imprisonment as an adult.
122. Reports of mistreatment and abuse of children in youth detention have resulted in numerous inquiries, including a Royal Commission, undertaken across Australia. We note that the ALRC's Discussion Paper does not include a section dedicated to the over-representation of Aboriginal and Torres Strait Islander children in justice systems across Australia. However the ALRC has not indicated that the over-imprisonment of Aboriginal and Torres Strait Islander children is outside the scope of its terms of reference.
123. We therefore recommend a dedicated section in the final report on the unique needs of Aboriginal and Torres Strait Islander children in the youth justice system. This could bring together the findings and recommendations of the different inquiries around Australia as they relate to Aboriginal and Torres Strait Islander children.
124. The HRLC has made a number of submissions in recent years to youth justice inquiries, most recently in Victoria, Queensland and the Northern Territory. Rather than reiterate the recommendations made in those submissions, we have attached two submissions (**Attachments B and C**) made to the Royal Commission into the Protection and Detention of Children in the Northern Territory. These submissions focus on youth justice system reforms to reduce the over-representation of Aboriginal and Torres Strait Islander children, and conditions in detention, which are critical to supporting the rehabilitation and positive reintegration of children who enter youth detention centres.