

1. Introduction to the Inquiry

Contents

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

Acknowledgment of Country

The ALRC recognises the unique and important position of Australia’s First Peoples. The ALRC pays respect to Aboriginal and Torres Strait Islander Traditional Owners and Elders, past and present, across Australia, and extends that respect to all Aboriginal and Torres Strait Islander peoples. The ALRC acknowledges Aboriginal and Torres Strait Islander cultures are complex and diverse with Aboriginal and Torres Strait Islander cultures having existed within Australia continuously for some 50,000 to 65,000 years. The ALRC further acknowledges the vital contribution that Aboriginal and Torres Strait Islander peoples, their traditions, and cultures have made, and continue to make, to this country.

The Inquiry

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

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

Terms of Reference

1.2 The ALRC was asked to consider laws and legal frameworks that contribute to the incarceration rate of Aboriginal and Torres Strait Islander peoples and inform decisions to hold or keep Aboriginal and Torres Strait Islander peoples in custody. ‘Legal frameworks’ encompass police, courts, legal assistance services and prisons. The ALRC was also asked to consider a number of factors that decision makers take into account when deciding on a criminal justice response, including community safety, the availability of alternatives to incarceration, the degree of discretion available in decision making and principles informing decisions to incarcerate. The incarceration of Aboriginal and Torres Strait Islander women was specifically identified as an area for consideration.

1.3 The ALRC was asked to consider laws that may contribute to the rate of Aboriginal and Torres Strait Islander peoples’ offending including, but not limited to, laws that regulate the availability of alcohol, driving offences and unpaid fines and differences in application of laws across states and territories along with other access to justice issues.

Consultation

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

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

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

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

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

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

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

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

Context

Contributing factors

1.7 While this Inquiry is considering the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, it is important to recognise that ‘the majority of Aboriginal and Torres Strait Islander peoples never commit criminal offences’.⁵

1.8 As the Attorney-General of Australia, Senator the Hon George Brandis QC, acknowledged in the Terms of Reference for this Inquiry, ‘while laws and legal frameworks are an important factor contributing to over-representation, there are many other social, economic, and historic factors that also contribute’.

1.9 Recognising such factors, the Terms of Reference direct the ALRC to have regard to existing data and research concerning ‘the broader contextual factors contributing to Aboriginal and Torres Strait Islander incarceration’ including:

the relationships between Aboriginal and Torres Strait Islander offending and incarceration and inter-generational trauma, loss of culture, poverty, discrimination, alcohol and drug use, experience of violence, including family violence, child abuse and neglect, contact with child protection and welfare systems, educational access and performance, cognitive and psychological factors, housing circumstances and employment.

1.10 The Terms of Reference recognise earlier important research that has touched or focused upon Aboriginal and Torres Strait Islander incarceration, its causes and its devastating effects. The ALRC is asked to identify and consider other reports, inquiries and action plans including but not limited to:

- a. the Royal Commission into Aboriginal Deaths in Custody,
- b. the Royal Commission into the Protection and Detention of Children in the Northern Territory (due to report 1 August 2017),
- c. Senate Standing Committee on Finance and Public Administration’s Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services,
- d. Senate Standing Committee on Community Affairs’ inquiry into Indefinite Detention of People with Cognitive and Psychiatric impairment in Australia,
- e. Senate Standing Committee on Indigenous Affairs inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities,
- f. reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner,

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

- g. the ALRC's inquiries into Family violence and Family violence and Commonwealth laws, and
- h. the National Plan to Reduce Violence against Women and their Children 2010–2022.

1.11 These past reports and inquiries have highlighted the many social, political and economic factors that contribute to Aboriginal and Torres Strait Islander imprisonment rates. Many of these are recognised in the national 'Closing the Gap' targets,⁶ and were reported on by the Productivity Commission in its report, *Overcoming Indigenous Disadvantage: Key Indicators 2016*.⁷

1.12 Such factors include: disadvantage caused by a lack of education and low employment rates; inadequate housing, overcrowding and homelessness; poor health outcomes, including mental health, cognitive impairment including Foetal Alcohol Spectrum Disorders (FASD) and physical disability; and alcohol and drug dependency and abuse.⁸ The Royal Commission into the Protection and Detention of Children in the Northern Territory has also recognised the cyclical and intergenerational nature of social and economic disadvantage on Aboriginal and Torres Strait Islander peoples.⁹

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

1.14 The ALRC also acknowledges the physical and psychological harm caused to many Aboriginal and Torres Strait Islander women and children through family violence and abuse.¹⁰ Aboriginal and Torres Strait Islander communities and individuals have also been negatively affected by laws, policies and practices implemented by successive government policies, such as assimilation and child removal.

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

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

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

8 *Ibid* [4.1]–[4.110].

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

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

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

Child protection and adult incarceration

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

1.17 Consultations to date in this Inquiry have emphasised the normalisation of incarceration in many Aboriginal families, and in particular those where children have been removed, or have been in juvenile detention. In such a context, juvenile detention can be seen as a key driver of adult incarceration. For example, a 2005 study into the likelihood of juveniles reoffending as adults found that 90% of Aboriginal and Torres Strait Islander youths who appeared in a children's court went on to appear in an adult court within eight years—with 36% of these receiving a prison sentence later in life.¹³ Having a criminal record—particularly as a juvenile or as a young adult—in turn increases the likelihood of unemployment, poverty and substance abuse, which again increases the likelihood of future incarceration.¹⁴

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

There is a strong correlation between juvenile participation in crime and rates of reported neglect or abuse ... Research indicates that an offending child or young person is likely to have a history of abuse or neglect, and to have been in out-of-home care. In Victoria, a study of young people sentenced to imprisonment by the children's court over a period of eight months in 2001 found that 88% had been subject to an average of 4.6 notifications to the child protection agency. Almost one-third had been the subject of six or more notifications, and 86% had been in out-of-home care. Over half of these had had five or more care placements.¹⁶

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

12 Mick Gooda, Submission No 5 to Senate Finance and Public Administration References Committee, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (27 April 2015) 4–5.

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

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

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

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

17 Catia G Malvaso, Paul H Delfabbro and Andrew Day, 'The Child Protection and Juvenile Justice Nexus in Australia: A Longitudinal Examination of the Relationship between Maltreatment and Offending' (2017) 64 *Child Abuse & Neglect* 32; Australian Institute of Health and Welfare, above n 15, 8.

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

1.20 The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) reported that almost half of the 99 Aboriginal and Torres Strait Islander people whose deaths were reviewed by that Commission had previously been removed from their parents.²⁰ The 1997 *Bringing them Home* report further highlighted the relationship between OOHC and the increased likelihood of coming into contact with the criminal justice system.²¹

1.21 In joint advice correspondence to the ALRC from Community Legal Centres NSW, Women's Legal Services NSW, Redfern Legal Centre, Kingsford Legal Centre, the Public Interest Advocacy Centre, Community Legal Centres NSW and the National Association of Community Legal Centres,²² attention was drawn to the correlation between OOHC, the criminal justice system and homelessness, relying upon a 2012 study of the Australian Institute of Health and Welfare.²³

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

1.23 Similarly Judge Johnstone, President of the Children's Court of New South Wales, noted that children who had been placed into out-of-home care were over-represented in the criminal justice system.²⁶

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

18 Productivity Commission, above n 7, 4.92.

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

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

21 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 164.

22 Community Legal Centres NSW, Women's Legal Services NSW, Redfern Legal Centre, Kingsford Legal Centre, the Public Interest Advocacy Centre, Community Legal Centres NSW and the National Association of Community Legal Centres, *Advice Correspondence* (24 April 2017).

23 Australian Institute of Health and Welfare, *Children and Young People at Risk of Social Exclusion: Links Between Homelessness, Child Protection and Juvenile Justice* (2012) vii.

24 Katherine McFarlane, 'From Care to Custody: Young Women in out-of-Home Care in the Criminal Justice System' (2010) 22(2) *Current Issues in Criminal Justice* 346. McFarlane examined 111 Children's Court criminal matter files heard at Parramatta Children's Court on specific days, chosen at random, from a six-month period between June and December 2009.

25 *Ibid.*

26 Judge Peter Johnstone, 'Cross-Over Kids—The Drift of Children From the Child Protection System Into the Criminal Justice System' (Speech, Noah's on the Beach, Newcastle, 5 August 2016) 22.

Council Inquiry into Child Protection.²⁷ The Royal Commission into Institutional Responses to Child Sexual Abuse may report in part on the issue of OOHC, incorporating a national response focusing on the reduction of all abuse in that setting.²⁸ While there are strategies at state level,²⁹ there has not been a national review of the laws and processes operating within the care and protection systems of the various states and territories. The ALRC considers that such a review would be timely.

Rural and remote communities

1.25 Although the majority of Aboriginal and Torres Strait Islander peoples live in cities or regional areas (57% in major cities or inner regional areas), a relatively high proportion live in remote and very remote areas (21%). In comparison, almost 90% of non-Indigenous Australians (over 19 million people) live in major cities or inner regional areas.³⁰

1.26 For those Aboriginal or Torres Strait Islander communities living in regional and remote areas, disadvantage can be compounded by a lack of access to services and infrastructure. The Productivity Commission stated:

Socioeconomic disadvantage directly impacts on the ability of Indigenous people to access justice. Socioeconomic disadvantage among Aboriginal and Torres Strait Islander Australians is widespread and multifaceted: various analyses show that, on average, Indigenous people experience poorer outcomes than non-Indigenous people in the areas of education, income, health and housing ... Socioeconomic disadvantage is linked to geographic isolation, which in itself can represent a barrier in accessing justice.³¹

1.27 The remoteness of many Aboriginal communities and comparative lack of legal services and community programs including drug and alcohol rehabilitation programs, adult literacy programs or employment programs, was raised with the ALRC during the consultation process as a contributing factor to incarceration. For example, a lack of services and programs means that there are few community sentencing options for offenders who live in remote communities.

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

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

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

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

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

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

Approach to reform

Disproportionate representation

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

1.30 Aboriginal and Torres Strait people represent just 3% of the Australian population, but account for 27% of the adult prison population. The rate of incarceration has increased by 77% between 2000 and 2015.³² Aboriginal and Torres Strait Islander women represent 34% of the female prison population while comprising just 2.2% of Australian women.³³ Since the RCIADIC, the rate at which Aboriginal and Torres Strait Islander people are imprisoned has more than doubled, with men are being imprisoned at 11 times the rate of the general male population, and women at more than 15 times the rate of non-Indigenous women.³⁴

1.31 There are also particular areas in which Aboriginal and Torres Strait Islander peoples are disproportionately represented in the prison population. For example, Aboriginal and Torres Strait Islander offenders are more likely to be sentenced to short terms of imprisonment than their non-Indigenous counterparts, with a national median aggregate sentence length of 2 years, compared to 3.5 years for non-Indigenous prisoners.³⁵ Hence, Aboriginal and Torres Strait Islander peoples are being incarcerated for lower order crimes for which diversion and rehabilitation may be a more appropriate response.

1.32 Pauline Wright, President of the Law Society of NSW, has suggested that:

Jail is an ineffective tool to deter crime—indeed prisons have been referred to as ‘universities of crime’, so effective they seem at encouraging recidivism. Jailing people is also very costly, so it is time that we tackle the problem and find ways to reduce the record number of people filling our jails. Investing more funds in early intervention, prevention and diversion programs that can help address the underlying causes of crime is likely to achieve safer communities and reduce rates of reoffending. Sadly, despite a reduction in most categories of crime, a lack of resources for non-custodial options, especially in regional NSW, has led to more offenders being sentenced to jail, albeit for short periods, for relatively minor offences.³⁶

1.33 While this Inquiry is examining options for law reform that can reduce the incarceration rate of Aboriginal and Torres Strait Islander peoples, the proposals in this Discussion Paper do not seek to excuse or minimise violent or abusive behaviours for which incarceration is the appropriate response. It is the intention of the ALRC that the

32 Productivity Commission, above n 7, xxviii.

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

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

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

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

questions and proposals in this Discussion Paper should not be read as extending to those who would place community safety or the safety of individuals at risk. Further, the ALRC does not suggest that criminal behaviours should be excused or ignored as a means to reduce the incarceration rates of Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander incarceration in the federal context

1.34 Much of the criminal law that is the subject of this Inquiry falls within state and territory jurisdictions. The *Australian Law Reform Commission Act 1996* (Cth) provides that one of the functions of the ALRC during its inquiry process is to consider proposals for uniformity between state and territory laws and to consider proposals for complementary Commonwealth, state and territory laws.³⁷

1.35 During this Inquiry, the ALRC will identify state and territory laws and legal frameworks that are key contributors to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. Additionally, the ALRC will highlight laws, legal frameworks and practices that seek to reduce the rate of Aboriginal and Torres Strait Islander incarceration.

International setting

1.36 The ALRC's approach to reform in this Inquiry is informed by relevant international human rights standards and instruments. The Terms of Reference make specific reference to these. In addition, under its constituting legislation, the ALRC is directed to have regard to 'all of Australia's international obligations that are relevant to the matter'.³⁸

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

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

37 *Australian Law Reform Commission Act 1996* (Cth) s 21(1)(d)–(e).

38 *Australian Law Reform Commission Act 1996* (Cth) s 24(2).

39 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2, 7, 9, 10, 14, 24, 26, 50.

40 *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990) arts 2, 3, 37, 40.

41 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) arts 2, 5.

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

1.38 In addition, the Australian Government endorsed the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) on 3 April 2009.⁴⁴ Although the Declaration is non-binding and aspirational in nature, it presents a series of structured principles that might be utilised to ameliorate disadvantage and discrimination experienced by Aboriginal and Torres Strait Islander peoples.

1.39 Also of note in the international context is that, on 1 July 2016, the United Nations Human Rights Council adopted a resolution reflecting concern that ‘indigenous women and girls may be overrepresented in criminal justice systems and may be more marginalized, and thus experience more violence before, during and after the period of incarceration’.⁴⁵

Structure of the Discussion Paper

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

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

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

42 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) arts 1,2.

43 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 4, 5, 7, 12, 13, 14. See also Australian Human Rights Commission, *Fact Sheet 7: Australia and Human Rights Treaties* (2009).

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

45 *Accelerating Efforts to Eliminate Violence against Women: Preventing and Responding to Violence against Women and Girls, Including Indigenous Women and Girls*, UN HRC Res 32/19, 32nd Sess, 43rd Mtg, UN Doc A/HRC/32/L28/Rev 1(30 June 2016).

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

Terminology

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

Aboriginal and Torres Strait Islander peoples

1.45 The Terms of Reference refer to ‘Aboriginal and Torres Strait Islander peoples’ and the ALRC has adopted this phrase throughout this Discussion Paper. The ALRC acknowledges the diversity of cultures, traditional practices and differences across communities and the various clan, language and skin groups represented throughout Australia and the Torres Strait. In using the phrase ‘Aboriginal and Torres Strait Islander peoples’, the ALRC does not intend to diminish or deny the importance of this cultural and linguistic diversity.

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

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

‘Culturally appropriate’, ‘culturally competent’ and ‘culturally safe’

1.48 The Terms of Reference ask the ALRC to have regard to existing data and research in relation to, among other matters, the ‘availability and effectiveness of culturally appropriate programs that intend to reduce Aboriginal; and Torres Strait Islander offending and incarceration’.

1.49 Throughout the Discussion Paper, the ALRC uses the terms ‘culturally appropriate’, ‘culturally competent’, and ‘culturally safe’ in relation to programs, projects, pilots, initiatives and reforms. In using these terms, the ALRC is referring to the requirement that matters be developed, organised and implemented with Aboriginal

and Torres Strait Islander communities and, where possible, facilitated and owned by those communities.

1.50 These terms lack an objective definition. The Victorian Commissioner for Aboriginal Children and Young People, Andrew Jackomos, describes cultural safety as

an environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning, living and working together with dignity and truly listening.⁴⁶

1.51 Maryann Bin-Sallik suggests that

[c]ultural safety extends beyond cultural awareness and cultural sensitivity. It empowers individuals and enables them to contribute to the achievement of positive outcomes. It encompasses a reflection on individual cultural identity and recognition of the impact of personal culture on professional practice.⁴⁷

1.52 Jackomos has suggested that, for Aboriginal people, cultural safety and security requires:

- Environments of cultural resilience within Aboriginal and Torres Strait Islander communities;
- Cultural competency by those who engage with Aboriginal and Torres Strait Islander communities.⁴⁸

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

1.54 COAG has suggested that cultural competence is

essential for services and programmes offering support to Aboriginal and Torres Strait Islander prisoners and ex-prisoners. Such prisoners and ex-prisoners may lack a level of bi-cultural understanding to be able to switch between Indigenous and mainstream ways of thinking, acting and communicating. This creates an additional level of disadvantage, particularly when dealing with sensitive issues or stressful situations.⁵⁰

1.55 While the ALRC relies upon the definitions above in its understanding of the terms ‘culturally appropriate’, ‘culturally competent’, and ‘culturally safe’, the specific use of these terms by the ALRC in the Discussion Paper is in reference only to Aboriginal and Torres Strait Islander cultures.

46 Commissioner for Children and Young People Victoria, *Cultural Safety for Aboriginal Children Tip Sheet: Child Safe Organisations* (2015) citing R Williams, ‘Cultural Safety—What Does It Mean for Our Work Practice?’ (1999) 23(2) *Australian and New Zealand Journal of Public Health* 213, 214–15.

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

48 Commissioner for Children and Young People Victoria, *Cultural Safety for Aboriginal Children Tip Sheet: Child Safe Organisations* (2015) quoting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011* (2012) 11.

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

50 Ibid.

Getting involved

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

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

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

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

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

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

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

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Email: indigenous-incarceration@alrc.gov.au
Facsimile: +61 2 8238 6363

