

## 3. Sentencing and Aboriginality

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### Summary

3.1 The Terms of Reference direct the ALRC to consider sentencing in examining the rates of Aboriginal and Torres Strait Islander incarceration. Sentencing decisions are crucial in determining whether a person goes to prison and for how long.

3.2 This chapter considers the relevance and impact of systemic and background factors that are unique to Aboriginal and Torres Strait Islander peoples, and explores how such factors are currently dealt with in Australian jurisdictions. It also examines the Canadian context, which was referred to by many stakeholders, as one that might offer some alternative approaches suitable to Australian circumstances.

### Systemic and background factors

**Question 3–1** Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders?

If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

**Question 3–2** Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?

3.3 The sentencing of offenders has been described as being at the core of the criminal justice system.<sup>1</sup> Each state and territory, and the Commonwealth, have legislation which guides the sentencing process.<sup>2</sup>

3.4 The purposes of sentencing generally include the following:

- to punish the offender for the offence in a way that is just and appropriate in all the circumstances;
- to deter the offender (specific deterrence) or other people (general deterrence) from committing the same or similar offences;
- to protect the community from the offender;
- to promote the rehabilitation of the offender; and
- to denounce the conduct of the offender.<sup>3</sup>

3.5 New South Wales (NSW) and Australian Capital Territory (ACT) sentencing statutes each include an additional two purposes of sentencing: ‘to make the offender accountable for his or her actions’; and ‘to recognise the harm done to the victim of the crime and the community’.<sup>4</sup>

### **The sentencing of Aboriginal and Torres Strait Islander offenders**

3.6 When an offender is being sentenced, a court may have regard to submissions that provide a subjective account of the person’s history, background and experience, including matters of disadvantage. Each Australian jurisdiction has a legislative framework that guides the sentencing process.<sup>5</sup> These frameworks allow for consideration of a range of subjective factors arising from the offender’s history to be taken into account. This may include, for example, where the offender experienced deprivation, poverty, trauma or abuse where those factors may affect a person’s moral

1 Judicial Conference of Australia, *Judge for Yourself: A Guide to Sentencing in Australia* (2014).

2 *Crimes (Sentencing) Act 2005* (ACT); *Crimes Act 1914* (Cth); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic).

3 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5. See also, statement of the common law position: *Veen v R (No 2)* [1988] HCA 14 (29 March 1988).

4 *Crimes (Sentencing) Act 2005* (ACT) s 7(e) and (g); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(e) and (g).

5 *Crimes (Sentencing) Act 2005* (ACT); *Crimes Act 1914* (Cth); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1997* (NT); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA).

culpability. These frameworks apply irrespective of an offender's cultural or racial background.

3.7 The systemic background of disadvantage affecting many Aboriginal and Torres Strait Islander people, including offenders from this group, is well documented and is discussed in Chapters 1 and 9.

3.8 Two Australian jurisdictions explicitly refer to an offender's Aboriginal and Torres Strait Islander background in sentencing legislation. In Queensland, a court may have regard to submissions made by a Community Justice Group about particular matters relating to an Aboriginal and Torres Strait Islander offender's community, any cultural considerations, or available services or programs.<sup>6</sup> In South Australia (SA), the *Criminal Law (Sentencing) Act 1988* (SA)<sup>7</sup> provides for a court to convene a sentencing conference, which is

designed to promote, in the defendant, understanding of the consequences of criminal behaviour, and in the court, understanding of Aboriginal cultural and societal influences, and thereby make the punishment more effective.<sup>8</sup>

3.9 A sentencing conference involves the defendant (whose consent is required), members of their family, their legal representative, the prosecutor, the victim (if they choose to participate) and an Aboriginal Justice Officer.<sup>9</sup> A court may take the views expressed in the conference into consideration when determining sentence, although it is discretionary.<sup>10</sup> In *R v Wanganeen*<sup>11</sup> the South Australian Supreme Court commented that s 9C is

a formal recognition of the cultural differences that should be accommodated when sentencing Aboriginal offenders ... It is relevant for the purposes of this decision to again record the over-representation of Aboriginal people in the criminal justice system, and the relevance of Aboriginality in sentencing generally, in order to provide further context to the enactment of section 9C.<sup>12</sup>

3.10 The ALRC understands that sentencing conferences are not utilised frequently in South Australia,<sup>13</sup> but welcomes comment on its application, and that of s 9(2)(p) of the *Penalties and Sentences Act 1992* (Qld).

3.11 There is also a considerable body of case law that provides guidance on the sentencing of Aboriginal and Torres Strait Islander offenders in Australian jurisdictions.<sup>14</sup>

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6 *Penalties and Sentences Act 1992* (Qld) s 9(2)(p). See ch 11 for a brief description of the functions of Community Justice Groups.

7 *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

8 *R v Wanganeen* [2010] SASC 237 (30 July 2010) 4.

9 *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

10 *R v Wanganeen* [2010] SASC 237 (30 July 2010) 4.

11 *R v Wanganeen* [2010] SASC 237 (30 July 2010).

12 *Ibid* [7]–[8].

13 *Ibid* [3].

14 See, eg, *R v King* [2013] ACTCA 29 (26 July 2013); *TM v Karapanos and Bakes* [2011] ACTSC 74 (12 May 2011); *R v Ceissman* [2001] NSWCCA 73 (16 March 2001); *R v Fernando* (Unreported, Supreme Court of NSW, 13 March 1992); *BP v R* [2010] NSWCCA 159 (30 July 2010); *R v Wurramara* [1999]

3.12 Sentencing judges rely on material submitted to them by the parties about an offender to assist them in determining sentence. This may include evidence of mitigating circumstances submitted by counsel for the defendant: for example, evidence of a person's deprived background, experience of abuse or trauma and other relevant factors that may affect a person's moral culpability.

3.13 In some instances, a court may request a pre-sentence report (PSR). These reports are prepared by a community corrections officer and their purpose is to give the court information to assist it in sentencing the offender. The report includes a risk assessment, and other information about the offender. It may indicate that an offender is unsuitable for a particular sentencing option, or that they are suitable but the option is not available. PSRs generally will not include a recommendation as to particular sentencing options, but may note the 'possible benefits of a particular intervention'.<sup>15</sup>

3.14 Queensland and SA have statutory provisions that explicitly provide for Aboriginal and Torres Strait Islander considerations to be put forward on behalf of an Aboriginal and/or Torres Strait Islander offender. The ALRC notes that these provisions apply in all courts hearing criminal matters in those jurisdictions, not only to Aboriginal and Torres Strait Islander specific sentencing courts (such as Koori, Murri and Nunga courts).<sup>16</sup>

3.15 In preliminary consultations, a number of stakeholders suggested that more could be done to facilitate the taking into account of the history of dispossession, colonisation and social disadvantage affecting Aboriginal and Torres Strait Islander people in Australia.

3.16 It was suggested by some stakeholders that, in some instances, submissions made on these matters on behalf of an offender are inadequate or non-existent, either because of a lack of resources, lack of time, or lack of understanding by counsel. A minority of stakeholders argued that, notwithstanding the decision in *Bugmy v The Queen* (discussed below), judicial officers ought to take 'judicial notice'<sup>17</sup> of the social disadvantage of Aboriginal and Torres Strait Islander peoples.<sup>18</sup> This argument reflects the Canadian position, which is supported by a legislative provision discussed below.<sup>19</sup>

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NTCCA 45 (28 April 1999); *Spencer v R* [2005] NTCCA 3 (29 April 2005); *R v Daniel* [1997] QCA 139 (30 May 1997); *R v KU; ex parte A-G (Qld)* [2008] QCA 154 (13 June 2008); *R v Scobie* [2003] SASC 85 (24 March 2003); *Police v Abdulla* [1999] SASC 239 (17 June 1999); *DPP v Terrick*; *DPP v Marks*; *DPP v Stewart* [2009] VSCA 220 (2 October 2009); *R v Fuller-Cust* [2002] VSCA 168 (24 October 2002); *Western Australia v Munda* [2012] WASCA 164 (22 August 2012); *Western Australia v Richards* [2008] WASCA 134 (1 July 2008).

15 Corrective Services NSW, *Policy and Procedures Manual*. (2015) section B, pt 2.

16 *Penalties and Sentences Act 1992* (Qld) s 9(2)(p); *Criminal Law (Sentencing) Act 1988* (SA) s 9C. See ch 11 for a discussion of Aboriginal and Torres Strait Islander sentencing courts.

17 Generally, all facts in issue must be established or supported through evidence. The test for matters that may be the subject of judicial notice is set out in the High Court decision of *Holland v Jones* [1917] HCA 26; *Evidence Act 1995* (Cth) 1995.

18 See, eg, Stephen Norrish, 'Sentencing Indigenous Offenders—Not Enough "Judicial Notice"?' (Speech, Judicial Conference of Australia Colloquium, 13 October 2013).

19 *R v Ipeelee* [2012] 1 SCR 433 [60]; *Criminal Code, RSC 1985, c C-46* (Canada) s 718.2(e).

3.17 Against this backdrop, there was some support for a proposal that Australian jurisdictions legislate to require courts to consider an offender's Aboriginal or Torres Strait Islander background during sentencing. A number of stakeholders cited the Canadian *Criminal Code* as offering an instructive example.

3.18 The Australian approach to sentencing is reviewed below, with a particular focus on how the law has responded to Aboriginal and Torres Strait Islander offenders. A brief overview of the Canadian context is also discussed.

### **Australian case law**

3.19 In 1982, in reviewing the sentence of an Aboriginal offender in *Neal v R*, the High Court considered that the sentencing court 'should have taken into account the special problems experienced by Aboriginals living in reserves'.<sup>20</sup> Brennan J went on to state:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.<sup>21</sup>

### ***R v Stanley Edward Fernando***<sup>22</sup>

3.20 A decade later, and a year after the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) delivered its report, Wood J (as he then was) delivered his decision in the NSW case of *R v Fernando*. Fernando, a 48-year-old Aboriginal man, pleaded guilty to a charge of malicious wounding after stabbing his de facto partner a number of times. He lived in an Aboriginal community in Walgett, in the far west of NSW. He had low levels of education, had been forcibly removed from his family as a child, and had an extensive criminal record, including a number of offences involving alcohol. He and the victim had been consuming alcohol before the stabbing.

3.21 In the decision, Wood J enunciated the following principles in relation to the sentencing of Aboriginal offenders:

(A) The same sentencing principles are to be applied in every case irrespective of the identity of the particular offender or his membership of an ethnic or other group but that does not mean the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.

(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand with Aboriginal

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20 *Neal v R* [1982] HCA 55 (1982) [8].

21 *Ibid* [13].

22 *R v Fernando* (Unreported, Supreme Court of NSW, 13 March 1992).

communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.

(H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.

3.22 These ‘*Fernando* principles’ have been described as a ‘convenient collection of circumstances that courts can take into account in an appropriate case’.<sup>23</sup> They have been influential across Australian jurisdictions, but do not automatically apply to all cases involving an Aboriginal or Torres Strait Islander offender, nor do they provide that a person’s ‘Aboriginality of itself is a mitigating factor’.<sup>24</sup> Rather, the principles provide a ‘framework for consideration of the issues of disadvantage often attending the subjective circumstances of individual Indigenous offenders’.<sup>25</sup> As Wood CJ later set out in *R v Pitt*:

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23 Legal Aid NSW, *Sentencing Aboriginal Offenders* 2004.

24 *Ibid* 3. See also *R v Fernando* [2002] NSWCCA 28 (2002) [67] (Spigelman J).

25 Janet Manuell, ‘The *Fernando* Principles: The Sentencing of Indigenous Offenders in NSW’ (Discussion Paper, NSW Sentencing Council, December 2009) 10.

What *Fernando* sought to do was to give recognition to the fact that disadvantages which arise out of membership of a particular group, which is economically, socially or otherwise deprived to a significant and systemic extent, may help to explain or throw light upon the particular offence and upon the individual circumstances of the offender. In that way an understanding of them may assist in the framing of an appropriate sentencing order that serves each of the punitive, rehabilitative and deterrent objects of sentencing.<sup>26</sup>

3.23 Some courts have ‘narrowed the application’ of the *Fernando* principles—particularly in the Northern Territory and Western Australia, and particularly in cases involving serious offending<sup>27</sup>—and commentary on the application of the principles indicates they have been applied ‘unevenly’.<sup>28</sup> The NSW Sentencing Council has suggested that this uneven application ‘may simply be a reflection of the protean nature of the objective and subjective circumstances of each case and/or the availability (or otherwise) of evidence as to the subjective circumstances of particular Indigenous offenders on sentence.’<sup>29</sup>

3.24 However, the principles continue to be utilised by the courts in sentencing offenders who have a background of disadvantage. Citing the decision of Simpson J in *R v Kennedy*,<sup>30</sup> the majority of the High Court has affirmed this as the basis of the *Fernando* principles: ‘Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.’<sup>31</sup>

### ***Bugmy v The Queen***

3.25 In October 2013, the High Court delivered its decision in the case of William David Bugmy.<sup>32</sup> Bugmy was being held on remand for other offences when he assaulted a prison officer with a pool ball. The officer sustained a serious injury, resulting in partial blindness. Bugmy’s personal history was marked by disadvantage, violence, substance abuse, suicide attempts, mental illness and repeated incarceration as a juvenile and as an adult. Bugmy had entered a plea of guilty and was sentenced in the NSW Court of Criminal Appeal (NSWCCA) for various assault offences. He appealed to the High Court against the severity of the sentence on several grounds, two of which are particularly relevant.

3.26 First, the appellant submitted that the NSWCCA had erred in accepting the prosecution’s submission that ‘the difficult circumstances of the respondent’s youth, in particular the prevalence of alcohol abuse and the lack of parental guidance ... lost

26 *R v Pitt* [2001] NSWCCA 156 (2001) [21].

27 See, eg, *Spencer v R* [2005] NTCCA 3 (29 April 2005); *R v Wurramara* [1999] NTCCA 45 (28 April 1999); *Western Australia v Munda* [2012] WASCA 164 (22 August 2012); Indigenous Justice Clearinghouse, *Sentencing Indigenous Offenders* (2010) 3.

28 NSW Sentencing Council, *The Fernando Principles: The Sentencing of Indigenous Offenders in NSW—Discussion Paper* (2009) 10.

29 *Ibid.*

30 *Kennedy v R* [2010] NSWCCA 260 (17 November 2010).

31 *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [37].

32 *Bugmy v The Queen* [2013] HCA 37 (2 October 2013).

much of its force when it was raised against a background of numerous previous offences'.<sup>33</sup>

3.27 On appeal to the High Court, the Director of Public Prosecutions conceded an offender's background of disadvantage does not diminish over the passage of time. The High Court noted:

The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending. Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving 'full weight' to an offender's deprived background in every sentencing decision.<sup>34</sup>

3.28 The other relevant ground of appeal was that the Court ought to have regard to two decisions of the Supreme Court of Canada: *R v Gladue*,<sup>35</sup> and *R v Ipeelee*.<sup>36</sup> The Canadian context and these cases are discussed below.

### Canadian context

3.29 Canada's Aboriginal Peoples,<sup>37</sup> like Australia's Aboriginal and Torres Strait Islander peoples, are over-represented in the prison population. For example, in 2013, Canada's Aboriginal Peoples comprised 4% of the Canadian population, but almost 25% of the prison population.<sup>38</sup>

3.30 Like Australia, Canada's history is one of colonisation. The resultant impact on its original inhabitants, in many ways, mirrors the Australian experience. For example, the Canadian Royal Commission on Aboriginal Peoples acknowledged that many Canadian Aboriginal Peoples were dispossessed from their homelands, with many made wards of the state through protectionist government policies that 'sought to obliterate their cultural and political institutions'.<sup>39</sup>

3.31 In Canada, police were often responsible for implementing a range of government policies, including those relating to assimilation and removal of children into residential schools.<sup>40</sup> The relationship between Canadian Aboriginal Peoples and police has been strained, and marked by distrust on both sides. Issues related to over and under-policing of Canadian Aboriginal Peoples remain problematic.<sup>41</sup> Cultural

33 *R v Bugmy* [2012] NSWCCA 223 (18 October 2012) [48].

34 *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [44].

35 *R v Gladue* [1999] 1 SCR 688.

36 *R v Ipeelee* [2012] 1 SCR 433.

37 There are a range of terms used to describe Canada's original peoples: National Aboriginal Health Organization, *Terminology* <www.naho.ca>. In referring to the collective name for all original peoples of Canada and their descendants, and reflecting the Canadian *Criminal Code*, the ALRC will use the terms 'Aboriginal' and 'Aboriginal Peoples'.

38 Office of the Correctional Investigator, Canada, *Background: Aboriginal Offenders—A Critical Situation* <www.oci-bec.gc.ca>.

39 Canada, Royal Commission on Aboriginal Peoples, *Report* (1996) vol 1, 7.

40 Jonathan Rudin, 'Aboriginal Peoples and the Criminal Justice System' (Ipperwash Inquiry, 2007) 1.

41 Rudin, above n 40.

differences, poverty, the effect of intergenerational trauma and institutionalisation in residential schools, substance abuse, and social dysfunction resulting from discrimination and racism continue to result in over-representation of Aboriginal Peoples in Canadian prisons.<sup>42</sup>

***The differences between the Australian and Canadian contexts***

3.32 Australian and Canadian sentencing approaches are not dissimilar, although there are some differences.

3.33 The concept of ‘imprisonment as a last resort’, set out in s 718.2(e) of Canada’s *Criminal Code* builds upon an established common law principle.<sup>43</sup> Similar to the principle of parsimony,<sup>44</sup> most Australian jurisdictions have, to some degree, reflected this idea by providing that a court ‘must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate’.<sup>45</sup>

3.34 The legislative frameworks in Canada, and in all Australian jurisdictions, set out the purposes of sentencing. These have been described as the goals or objectives that a sentence should be designed to achieve.<sup>46</sup>

3.35 Section 718 of the Canadian *Criminal Code* sets out denunciation, deterrence, community protection, rehabilitation,<sup>47</sup> and ‘promoting a sense of responsibility in offenders and acknowledgement of harm done to victims to the community’.<sup>48</sup>

3.36 In contrast to most Australian statutes, however, the Canadian legislation incorporates a further principle: ‘to provide reparations for harm done to victims or to the community’.<sup>49</sup> Only the ACT and SA have a similar principle, and provide that any ‘action taken by an offender to make reparation for injury, loss or damage resulting from the offence’ as a sentencing consideration.<sup>50</sup> The Canadian statute also omits punishment as a sentencing purpose.<sup>51</sup>

3.37 These differences—the omission of punishment and incorporation of reparation for harm done—provide a foundation for a ‘restorative’ framework in delivering justice

42 Brian R Pfefferle, ‘Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration’ (2006) 32(2) *Manitoba Law Journal* 113.

43 *R v Way* [2004] NSWCCA 131 (11 May 2004).

44 The principle of parsimony operates to prevent the imposition of a sentence that is more severe than is necessary to achieve the purpose or purposes of the sentence: Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* Report No 103 (2006) [5.09].

45 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Sentencing Act 1991* (Vic) s 5(4); *Sentencing Act 1995* (WA) s 6(4); *Crimes Act 1914* (Cth) s 17A; *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Crimes (Sentencing) Act 2005* (ACT) s 10; *Penalties and Sentences Act 1992* (Qld) s 9(2).

46 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* Report No 103 (2006) [5.1].

47 *Criminal Code*, RSC 1985, c C-46 (Canada) s718(a)–(d).

48 *Ibid* 718(f).

49 *Ibid* s 718(e).

50 *Crimes (Sentencing) Act 2005* (ACT) s 33(h); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(g).

51 New Zealand does not list punishment as a purpose of sentencing, but does incorporate ‘reparation for harm done by the offending’: *Sentencing Act 2002* (NZ) s 7(1)(d).

in Canada. There are some parts of the criminal justice system in Australian jurisdictions that incorporate aspects of restorative justice,<sup>52</sup> and a number of Australian statutes acknowledge the impact on victims and the need for offender accountability in sentencing considerations. However there remains a focus on the retributive component of sentencing in most jurisdictions.

3.38 In 2006, the ALRC recommended a suite of sentencing principles in the context of federal offenders, that included restoration, while retaining retribution.<sup>53</sup> On restoration it stated:

Restoration may not always be an appropriate purpose of sentencing. However, where appropriate, restorative initiatives have demonstrated their potential to complement and enhance the operation of the criminal justice system. They provide an effective way to recognise victims' interests in the sentencing process and to encourage offenders to accept responsibility for their actions.<sup>54</sup>

3.39 The Tasmanian Law Reform Institute made a similar recommendation in 2008.<sup>55</sup>

3.40 However, in its review of the NSW sentencing framework in 2013, the NSW Law Reform Commission (NSWLRC) rejected the inclusion of restoration or reparation as a sentencing principle because:

- other sentencing principles, specifically those related to accountability and recognition of the harm caused, adequately accommodated the objectives of restoration or reparation;
- to do so would link punishment to 'the victim's need for restitution or compensation, rather than to the gravity of the offender's conduct'<sup>56</sup>, hence it considered 'reparation' to be 'ancillary to the sentencing process';<sup>57</sup>
- the proposal received little stakeholder support; and
- there were concerns about defining the terms, and consequential issues that may arise, including how such issues could be managed by a court in assessing the weight of issues relevant to those terms.<sup>58</sup>

3.41 In preliminary consultations in this Inquiry, a number of stakeholders spoke about Aboriginal and Torres Strait Islander justice and culture incorporating concepts of restoration and reparation. Some said it was important that these were not only

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52 Including, for eg, circle sentencing and conferencing: Jacqueline Joudo Larsen, 'Restorative Justice in the Australian Criminal Justice System' (AIC Research and Public Policy Series Report No 127, Australian Institute of Criminology, 2014).

53 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* Report No 103 (2006) Rec 4-1, [4.27].

54 *Ibid* [4.28].

55 Tasmanian Law Reform Institute, *Sentencing* Final Report No 11 (2008) Rec 88, 7.1.35-7.1.36.

56 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [2.131], citing NSW Law Reform Commission, *Sentencing*, Discussion Paper No 33 (1996) [3.21].

57 *Ibid* [2.131].

58 *Ibid* [2.131]-[2.136].

acknowledged but factored into the mainstream criminal justice process. A Canadian inquiry into Aboriginal justice in 1999 made a similar point:

The underlying philosophy in Aboriginal societies in dealing with crime was the resolution of disputes, the healing of wounds and the restoration of social harmony. It might mean an expression of regret for the injury done by the offender or by members of the offender's clan. It might mean the presentation of gifts or payment of some kind. It might even mean the forfeiture of the offender's life. But the matter was considered finished once the offence was recognized and dealt with by both the offender and the offended. Atonement and the restoration of harmony were the goals—not punishment.<sup>59</sup>

3.42 The Canadian Aboriginal Justice Implementation Commission distinguished the justice systems of Aboriginal peoples and those of European societies, placing atonement and restoration at the centre of the former and arguing it prevents further offending:

It is this strong, even central, cultural imperative to prevent or deter violent acts of revenge or retribution that runs through all these accounts. Aboriginal societies felt it important that offenders atone for their acts to the aggrieved person and the victim's family or clan. European society demanded the state punish the offender. In the Aboriginal justice system, once the atonement had been made and the offence recognized, the matter was forgotten and harmony within the community was considered restored. In the European justice system, the offender 'pays his debt' to society, usually by going to jail. Rarely is there atonement to the person or persons injured. There is little restoration of harmony within the community.<sup>60</sup>

3.43 Noting the similar experiences of Canadian Aboriginal Peoples and those of Aboriginal and Torres Strait Islander peoples, and the cultural importance of restoration or reparation in their traditional justice systems, the ALRC is interested in stakeholder views on whether Australian jurisdictions should incorporate a similar sentencing consideration into legislation, where it does not exist.

#### ***Canada's legislative amendment to consider Aboriginality in sentencing***

3.44 In 1995, the Canadian Parliament amended the *Criminal Code* to codify the purpose and principles of sentencing. In response to the rates of Aboriginal incarceration, the amending bill included s 718.2(e). Section 718 sets out broadly the 'Purpose and principles of sentencing'. Section 718.2(e) relevantly provides that a court that imposes a sentence shall also take into consideration the following principle:

all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders.*<sup>61</sup>

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59 Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba* (1999) vol 1, ch 2.

60 Ibid.

61 Emphasis added.

3.45 The then Minister for Justice noted the ‘sad over-representation’ of Aboriginal Peoples in Canadian prisons as the rationale for the provision.<sup>62</sup> The provision was considered by the Canadian Supreme Court in the case of Jamie Tanis Gladue.

***R v Gladue***<sup>63</sup>

3.46 In this case, Gladue, an Aboriginal woman, pleaded guilty to the manslaughter of her husband, whom she suspected of having an affair. After consuming alcohol at a party on her 19th birthday, the offender stabbed her husband twice with a kitchen knife, once as he attempted to flee. She appealed the three year sentence imposed.

3.47 The Supreme Court examined the legislative and contextual background to s 718.2(e). It found the provision to be ‘remedial in nature’ and ‘is designed to ameliorate the serious problem of over-representation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing’.<sup>64</sup>

3.48 In reaching this conclusion, the Court noted that while the parliamentary debate on the amending legislation is ‘clearly not decisive’ on s 718.2(e),<sup>65</sup> statements made by the Minister for Justice at the time and other members of Parliament ‘corroborate and do not contradict’ its conclusion.<sup>66</sup> The Court also referred to a number of reports to support its conclusion on the remedial nature of the section.

3.49 The Court stressed that sentencing is an ‘individual process’<sup>67</sup>, but held that the effect of s 718.2(e) is to ‘alter the method of analysis’<sup>68</sup> that judges must use when determining an appropriate sentence for Aboriginal persons:

Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (A) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.<sup>69</sup>

3.50 The Court went further, noting that judges would require information about the accused to facilitate this process:

Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing.<sup>70</sup>

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62 House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62, 1st Sess., 35th Parl., November 17, 1994 15.

63 *R v Gladue* [1999] 1 SCR 688.

64 *Ibid* [4].

65 *Ibid* [43].

66 *Ibid* [45].

67 *Ibid* [93].

68 *Ibid*.

69 *Ibid*.

70 *Ibid*.

3.51 The Court emphasised that s 718.2(e) is not to be interpreted as ‘a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed’.<sup>71</sup>

3.52 The Supreme Court held that the sentencing judge and the Court of Appeal had erred in their application of s 718.2(e). However, noting the seriousness of the offence, including the aggravating factor that it involved domestic violence, the Court considered the three year term of imprisonment was not unreasonable and dismissed the appeal.

3.53 A number of higher courts affirmed the principles set out in *Gladue*,<sup>72</sup> however the numbers of Aboriginal Canadians incarcerated continued to rise.

### ***R v Ipeelee and the criticisms of s 718.2(e) and Gladue***

3.54 Post-*Gladue*, the application of s 718.2(e) and the *Gladue* principles varied. In 2012, the Supreme Court revisited s 718.2(e) in *R v Ipeelee*.<sup>73</sup> In a majority judgment, the Court commented that, although the provision ‘had not had a discernible impact on the over-representation of Aboriginal people in the criminal justice system’,<sup>74</sup> the *Gladue* principles ‘were never expected to be a panacea’.<sup>75</sup>

... there is some indication ... from both the academic commentary and the jurisprudence, that the failure can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court’s decision in *Gladue*.<sup>76</sup>

3.55 The Court ultimately considered that the erroneous application of the principles arose for a number of reasons. It found that, in some cases, the court required an offender to ‘establish a causal link between background factors and the ... current offence’;<sup>77</sup> and that its application to serious or violent offences was ‘irregular and uncertain’.<sup>78</sup> The Court rejected that an offender needed to establish a causal link between background factors and offending; and that sentencing judges have a duty to apply s 718.2(e) and *Gladue*, regardless of the seriousness of the offending.<sup>79</sup>

3.56 The *Ipeelee* decision identified and addressed three key criticisms that were considered to have plagued the efficacy of the remedial provision, s 718.2(e), and the *Gladue* principles:

(1) sentencing is not an appropriate means of addressing over-representation; (2) the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal

71 Ibid.

72 *R v Wells* (2000) 1 SCR 207; *R v Kakekagamick* [2006] 214 OAC 127.

73 *R v Ipeelee* [2012] 1 SCR 433.

74 Ibid [63].

75 Ibid.

76 Ibid [63] (emphasis in original).

77 Ibid [81]–[83].

78 Ibid [84]–[87].

79 Ibid [81]–[87].

offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s 718.2(e) of the *Criminal Code*.<sup>80</sup>

3.57 In addressing each of these criticisms, the Court in *Ipeelee* considered that sentencing judges have an important role to play in effectively deterring criminality and rehabilitating offenders, and that where ‘current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities’.<sup>81</sup> Noting that ‘just sanctions are those that do not operate in a discriminatory manner’,<sup>82</sup> the Court found that Parliament’s intention in enacting the provision was that ‘nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly’.<sup>83</sup>

3.58 The Court noted that *Gladue* explicitly rejected the argument that s 718.2(e) was an ‘affirmative action provision’<sup>84</sup> or an ‘invitation to engage in reverse discrimination’.<sup>85</sup> The Court in *Ipeelee*, emphasising the *Gladue* principles, found that ‘[t]he provision does not ask courts to remedy the over-representation of Aboriginal people in prisons by artificially reducing incarceration rates’.<sup>86</sup>

Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2 (e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.<sup>87</sup>

3.59 In response to the third criticism that utilising a different method of analysis is inherently unfair and ‘unjustifiably distinguishes between offenders who are otherwise similar’,<sup>88</sup> the Court rejected this, finding that it ‘ignores the distinct history of Aboriginal peoples in Canada’.<sup>89</sup> Noting the extensive history of reports and commissions on that history, including the experience of Aboriginal peoples with the

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80 Ibid [64].

81 Ibid [66].

82 Ibid [68].

83 Ibid [66].

84 Ibid [71].

85 *R v Gladue* [1999] 1 SCR 688 [86].

86 *R v Ipeelee* [2012] 1 SCR 433 [75].

87 Ibid.

88 Ibid [76].

89 Ibid [77].

criminal justice system, the Court considered that ‘current levels of criminality are intimately tied to the legacy of colonialism’.<sup>90</sup>

3.60 The Supreme Court in *Ipeelee* emphasised that nothing in *Gladue* prevents consideration of the background and systemic factors for other, non-Aboriginal offenders, noting in fact it is the opposite and that consideration of such factors is also important for a sentencing judge in the sentencing of these offenders.<sup>91</sup>

3.61 *Ipeelee* has been said to ‘represent a significant clarification of the law’<sup>92</sup> post-*Gladue*, particularly in affirming its application to all, including serious, offences.

3.62 Returning to the High Court’s consideration of *Bugmy*, the appellant submitted:

*Ipeelee* and *Gladue* are authority requiring Canadian courts to take into account the unique circumstances of all Aboriginal offenders that bear on the sentencing process, as relevant to the moral blameworthiness of the individual as an aspect of the principle of proportionality in sentencing. As opposed to limiting the extent to which factors of Indigenous social deprivation can be taken into account, the Supreme Court of Canada has held that it is necessary to take such factors into account in order to achieve equality before the law.<sup>93</sup>

3.63 In *Bugmy*, the appellant likened the existence of s 718.2(e) of the Canadian *Criminal Code* to ss 3A and 21A of the NSW *Crimes (Sentencing Procedure) Act 1999*, which respectively provide for the purposes and principles of sentencing, and factors to be considered in sentencing.

3.64 Noting the application of *Neal* and *Fernando*, the appellant in *Bugmy* submitted that subsequent to both those decisions, there had been a myriad of court decisions, national reports, commissions of inquiry and reviews that not only elevated public understanding and awareness of, but confirmed the ‘ongoing grave socio-economic difficulties in many Aboriginal communities and the link of these “background factors” to subsequent offending behaviour’.<sup>94</sup>

3.65 Drawing together the requirements of the relevant NSW legislation, and Canadian jurisprudence, the appellant argued that the Court adopt an approach akin to that in *Gladue*, submitting that ‘such an approach promotes equality before the law’.<sup>95</sup>

3.66 The High Court rejected this ground of appeal, finding that the Canadian decisions on which the appellant relied were founded upon the legislative provision, s 718.2(e), and in the context of the Canadian *Criminal Code*, which includes a restorative justice focus.<sup>96</sup> The High Court distinguished these features from the NSW legislative context:

90 Ibid.

91 Ibid.

92 Ryan Newell, ‘Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration’ (2013) 51(1) *Osgoode Hall Law Journal* 215.

93 *Bugmy*, ‘Appellant’s Submissions’, Submission in *Bugmy v The Queen*, High Court of Australia, S99/2013 (14 June 2013) [6.26].

94 Ibid [6.27]–[6.29].

95 Ibid [6.32].

96 *Bugmy v The Queen* [2013] HCA 38 [29]–[31].

There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.<sup>97</sup>

3.67 The High Court referred to Australian case law and principles that provide for consideration of disadvantage within Aboriginal communities.<sup>98</sup> Ultimately, however, it rejected the argument that ‘courts ought to take judicial notice of the systemic background of deprivation of Aboriginal offenders’,<sup>99</sup> on the basis that it would be ‘antithetical to individualised justice’.<sup>100</sup> This is contrasted with the Canadian Supreme Court decision in *Ipeelee* which, relying on the legislative provision, suggested:

When sentencing an Aboriginal offender, courts *must* take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters provide the necessary context for understanding and evaluating the case-specific information presented by counsel. However, these matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders.<sup>101</sup>

### **Legislative remedial action**

3.68 There are two schools of thought regarding the proposition that consideration of background and systemic factors affecting Aboriginal and Torres Strait Islander peoples should be expressed in legislation. The first considers that the disproportionate representation of Aboriginal and Torres Strait Islander people in prison—and the unique position of historical and contemporary disadvantage experienced by Aboriginal and Torres Strait Islander people in society—warrants a legislative provision that would require judicial consideration of underlying causes of offending when determining sentences. Specific recognition and consideration by courts of these matters may ensure that, where appropriate, material facts relevant to a particular individual before the court for sentence are properly contextualised.

3.69 Prior to the decision in *Bugmy*, the NSWLRC considered whether a person’s Aboriginality should be a relevant matter in sentencing. It noted that submissions to its inquiry from various stakeholders supported such a proposal, with the Bar Association and Aboriginal Legal Service NSW/ACT advocating for an amendment to s 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW). The NSWLRC emphasised that:

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97 Ibid [36].

98 Ibid [37]–[40].

99 Ibid [41].

100 Ibid.

101 *R v Ipeelee* [2012] 1 SCR 433 (emphasis added).

A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives (*with particular attention to the circumstances of Aboriginal offenders*), that no penalty other than imprisonment is appropriate.<sup>102</sup>

3.70 The NSWLRC did not recommend legislative amendment, rather it recommended waiting until post-*Bugmy* for judicial consideration of the issue. It did, however, acknowledge that ‘there may be merit in adding ... to the factors that a court must take into account a reference to the circumstances of Aboriginal and Torres Strait Islander offenders’,<sup>103</sup> and suggested the following wording:

the offender’s character, general background (with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders), offending history, age, and physical and mental condition (including any cognitive or mental health impairment).<sup>104</sup>

3.71 A number of stakeholders in this Inquiry have so far supported the enactment of a provision in Australian jurisdictions that reflects that expressed in s 718.2(e) of Canada’s *Criminal Code*, particularly in the context of the decision in *Bugmy*. In its recent report on the over-representation of Aboriginal and Torres Strait Islander women in Australian prisons, the Human Rights Law Centre and Change the Record Coalition commented that,

in light of the High Court’s decision [in *Bugmy*], it is now incumbent on state and territory governments to legislate to ensure that historical and systemic factors that have contributed to Aboriginal and Torres Strait Islander people’s over-imprisonment inform decisions by courts about whether or not to imprison.<sup>105</sup>

3.72 Similarly, Judge Stephen Norrish QC of the District Court of NSW, writing extrajudicially post-*Bugmy*, suggested that

statutory amendment to existing ‘purposes’ and ‘factors’ relevant to sentencing requiring consideration of the social context of offending applicable in all sentencing exercises may address this issue.<sup>106</sup>

3.73 The second school of thought argues that existing legislative provisions—including sentencing purposes, principles and factors including parsimony, ‘imprisonment as a last resort’, and an offender’s general background—along with well established common law principles, already allow for consideration of all relevant material facts to be taken into account when sentencing Aboriginal and Torres Strait Islander offenders—including a background of disadvantage and available alternatives. It is suggested that Australian courts already take into account an offender’s deprived background when sentencing offenders, relying on submissions from the parties and supporting evidence to establish the extent and nature of deprivation and other relevant information specific to the individual offender. Some also argued that the issue is not a

102 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [17.17].

103 *Ibid* [17.39].

104 *Ibid*.

105 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) 45.

106 Stephen Norrish, ‘Sentencing Indigenous Offenders—Not Enough “Judicial Notice”?’ (Speech, Judicial Conference of Australia Colloquium, 13 October 2013) 55.

lack of understanding by judicial officers about the issues, or a matter of having relevant material available to them when sentencing, but rather about the limited options available to them when structuring a sentence.

3.74 The ALRC notes that s 10 of the *Racial Discrimination Act 1995* (Cth) may present an impediment to Australian states legislating in this way, as alluded to without comment by the High Court in *Bugmy*.<sup>107</sup> There may nonetheless be avenues open to the Commonwealth to overcome any constitutional concerns.<sup>108</sup>

3.75 The ALRC invites comment on whether state and territory governments should legislate to expressly require courts to consider the unique background and systemic factors affecting Aboriginal and Torres Strait Islander people when sentencing offenders from those backgrounds. If so, the ALRC also invites comment on why such an approach is required, and how this could be achieved.

## Specialist sentencing reports

**Question 3–3** Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender’s background, including cultural and historical factors that relate to the offender and their community?

**Question 3–4** In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?

**Question 3–5** How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?

## Information to assist the court in sentencing

3.76 The discussion above explores the legislative and common law framework setting out the matters that may be taken into account during the sentencing process.

3.77 In preliminary consultations to this Inquiry, a number of stakeholders reported that sentencing submissions made on behalf of Aboriginal and Torres Strait Islander offenders progressing through mainstream courts were often rushed. Stakeholders commented on the time constraints of the courts, and the limited time that lawyers have to prepare comprehensive information about a client’s background and community. Some stakeholders spoke about the submissions being almost ‘standardised’, noting these generally incorporated a reference to the offender’s Aboriginal or Torres Strait Islander heritage, a mention of history of trauma or abuse, substance usage, family and dependants, employment and housing circumstances.

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107 *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [36].

108 See, eg, Stephen Norrish, ‘Sentencing Indigenous Offenders—Not Enough “Judicial Notice”?’ (Speech, Judicial Conference of Australia Colloquium, 13 October 2013) 55.

3.78 A number of stakeholders that raised these issues suggested that there was a role for specialised sentencing reports. They argued that the more information a court has about an individual, their community, the supports and options available, and broader contextual factors, the more likely a sentencing outcome can be tailored to respond to the needs of the offender and the community, including the victim—noting that many victims are also Aboriginal and Torres Strait Islander people.

3.79 It was suggested that providing for specialist sentencing reports in an Australian context would give a more complete picture of the particular Aboriginal or Torres Strait Islander offender standing before the court than is currently afforded by the provision of PSRs and the making of sentencing submissions.

3.80 The ALRC invites comment on this issue.

### ***Gladue* reports**

3.81 *Gladue* reports are specialist Aboriginal sentencing reports prepared in some Canadian provinces to facilitate s 718.2(e) of the *Criminal Code*, and reflecting the decision in *Gladue*, discussed above. *Gladue* reports are a way of integrating one part of specialist court processes into mainstream courts. *Gladue* reports are different from PSRs. Although both provide information to a court about an offender, *Gladue* reports are intended to promote a better understanding of the underlying causes of offending, including the historic and cultural context of an offender. These factors may go some way toward addressing the over-representation of Aboriginal and Torres Strait Islander people in prison. PSRs serve a different, but related, function. Supporters of *Gladue* reports emphasised, for example, that simply because PSRs exist does not suggest there is no need for *Gladue* reports. Rather, they argued that the two would complement each other.

3.82 According to Jonathan Rudin, Program Director of Aboriginal Legal Services in Toronto, Ontario, *Gladue* reports are written to include the offender's 'voice' and 'story':

[W]hen we do our *Gladue* reports we spend time interviewing the client and as many other people as we can ... *Gladue* reports tend to be written in the words of the people we interview ... we are not summarising what someone says, we are using their language. We don't edit it, we don't do anything with it, here is their story [so] what you get are the voices of the individuals who are involved in the person's life. And certainly that's very rare because you can go through the court system in Canada from charge to plea, and if you are an accused person you may never say a word to the court.<sup>109</sup>

3.83 *Gladue* reports are ideally prepared 'with the help of someone who has a connection to and understands the Aboriginal community'.<sup>110</sup> They assist in putting the offender's 'particular situation into an Aboriginal context so that the judge can come up with a sentence that's unique to you and your culture and has an emphasis on

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109 Law Report—ABC Radio National, *Canada's Approach to Sentencing Aboriginal Offenders* <<http://www.abc.net.au/radionational/programs/lawreport/>>.

110 Legal Services Society, British Columbia, *Gladue Primer* (2011) 7.

rehabilitation and healing'.<sup>111</sup> This context may include an examination of complex issues of an historical and cultural nature that are unique to, and prevalent in, Canadian Aboriginal communities, including intergenerational trauma, alcohol and drug addictions, family violence and abuse, and institutionalisation. As observed by Rudin:

[I]nformation about things that judges may not know about, like the history of residential schools, like the impact of adoption on aboriginal peoples, the history of addictions for aboriginal peoples in the country which is different from addictions in other communities. *Gladue* reports also provide detailed information on the impacts of particular experiences including those specific to the person as a result of their Aboriginal heritage, community and experience.<sup>112</sup>

3.84 The time taken to prepare a *Gladue* report compared to a PSR is significantly higher, reflecting the time spent with the offender and significant others. In the Ontario context, it has been estimated that a *Gladue* report can take up to 20 hours to complete, compared to the eight to 10 hours for a PSR.<sup>113</sup>

3.85 An evaluation of a pilot in British Columbia noted a number of key differences between *Gladue* reports and PSRs. *Gladue* reports were more comprehensive, 'specifically with respect to *Gladue* factors',<sup>114</sup> including 'more information about resources in rural and remote communities',<sup>115</sup> and 'options tailored to the specific needs of each person'.<sup>116</sup> The evaluation found that the greatest contribution *Gladue* reports made to the court was 'their potential to draw concrete connections between the intergenerational impacts of colonialism (residential schools, community displacement, child apprehensions) and the person in court for sentencing'.<sup>117</sup>

3.86 The ALRC understands that the Aboriginal Legal Service NSW/ACT are in the process of developing the 'Bugmy Evidence Library', a body of material regarding 'the social disadvantage of certain Aboriginal communities',<sup>118</sup> for use as evidence in sentencing matters. The Bugmy Evidence Library will be 'freely available for the use of the legal profession and the judiciary'.<sup>119</sup>

#### ***What impact could specialist sentencing reports have?***

3.87 The impact of *Gladue* reports in Canada varies across the provinces. Offenders in some provinces having no capacity to access a *Gladue* report, other provinces have been able to establish mechanisms to facilitate the preparation of *Gladue* reports. Aboriginal Legal Services in Toronto, Ontario, for example, has an established program, supported by funding from Legal Aid Ontario, with trained caseworkers who work with offenders to prepare *Gladue* reports.

111 Ibid.

112 Law Report—ABC Radio National, above n 109.

113 Rudin, above n 40, 48–50.

114 Legal Services Society of British Columbia, *Gladue Report Disbursement: Final Evaluation Report* (2013) 3.

115 Ibid.

116 Ibid.

117 Ibid.

118 Law and Justice Foundation, *Awarded Grants in 2015/2016* <<http://www.lawfoundation.net.au>>.

119 Ibid.

3.88 *Gladue* reports have been described as having a definitive impact at an individual level:

When we do a *Gladue* report we often see that the sentencing an individual receives is different than what, for example, the Crown and defence were thinking of going into the sentencing. So what we see is when judges have information about the circumstances of an aboriginal offender, when Crowns have that information, when defence counsel has that information, the sentences that people get change. So the *Gladue* reports make a difference on a micro level.<sup>120</sup>

3.89 In 2007, based on his experience in Toronto, Rudin suggested that the impact of a *Gladue* report is not reflected in Aboriginal incarceration rates,<sup>121</sup> a British Columbia evaluation suggested more positive results.

3.90 In 2011, the Legal Services Society (LSS) received funding from the Law Foundation of British Columbia to pilot the preparation of *Gladue* reports in British Columbia.

3.91 In British Columbia, an evaluation of the LSS pilot suggested that ‘*Gladue* reports may contribute to fewer and shorter incarceration sentences for Aboriginal people’.<sup>122</sup> A comparison of a sub-sample of 42 completed *Gladue* sentencing cases with a matched sample of 42 LSS Aboriginal client cases where there was no *Gladue* report, indicated that ‘fewer *Gladue* clients (23) received a jail sentence than their non-*Gladue* counterparts (32)’; and that median sentence length for *Gladue* clients was substantially lower than the non-*Gladue* sample (18 days compared to 45 days).<sup>123</sup>

3.92 A number of stakeholders in this Inquiry supported *Gladue* style reports for Aboriginal and Torres Strait Islander offenders, arguing that they would provide invaluable contextual and individualised information about an offender that would assist judges when tailoring a sentence for that offender.

3.93 Generally, stakeholders that were supportive of legislative amendment of the type discussed above, and of Australian courts adopting a *Gladue* type approach, tended to support specialist sentencing reports for Aboriginal and Torres Strait Islander offenders. These stakeholders were generally of the view that such specialist sentencing reports should be prepared by an Aboriginal and Torres Strait Islander person, preferably with a connection to the offender’s community. At the very least, stakeholders suggested the reports should be prepared by a person with a good understanding of the offender’s particular Aboriginal or Torres Strait Islander community and history.

3.94 Some stakeholders considered that that community corrections officers should not prepare such reports. Similar concerns have been noted in the Canadian context. The LSS evaluation noted that among clients assisted in the British Columbia pilot,

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120 Law Report—ABC Radio National, above n 109.

121 Rudin suggested this was largely as a result of resourcing constraints: Rudin, above n 40, 60; Campbell Research Associates, *Evaluation of Gladue Aboriginal Legal Services of Toronto Gladue Caseworker Program—Oct 2006–Sept 2007* (2008).

122 Legal Services Society of British Columbia, above n 114, 25.

123 Ibid 5.2.

there was a ‘broad consensus that probation officers and PSRs can be more harmful than helpful’.<sup>124</sup> In that context, the knowledge of Aboriginal life experience held by *Gladue* report writers tended to result in clients being more comfortable and opening up about their experiences, including about ‘details they would not have told anyone else, especially their probation officers’.<sup>125</sup>

3.95 Most stakeholders in this Inquiry that supported specialist sentencing reports for Aboriginal and Torres Strait Islander offenders emphasised the need to ensure that appropriate organisations were resourced to prepare specialist sentencing reports. A number highlighted that, without adequate and ongoing resourcing, the introduction of such reports would have little impact at the macro level, as has been the experience in Canada.

3.96 Not all stakeholders supported such reports, noting that courts can already receive sentencing submissions about an offender’s personal background, experience and the impact of various factors—including cultural and systemic factors affecting their community which may contribute to offending. Some also took the view that Australian courts and counsel *are* already expert in responding to Aboriginal and Torres Strait Islander offenders. The high volume of Aboriginal and Torres Strait Islander defendants coming through courts make them ‘bread and butter’ work for courts and for criminal lawyers, particularly in some courts that operate in areas with high Aboriginal and Torres Strait Islander populations.

3.97 The ALRC is interested in the views of stakeholders about whether specialist sentencing reports in the nature of *Gladue* reports would assist Australian courts in dealing with Aboriginal and Torres Strait Islander offenders, and if so, how. The ALRC also invites comment on what options should be explored to facilitate the preparation of such reports—including who should prepare them; and how should they be funded.

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124 Ibid 3.

125 Ibid. For the Manitoba experience, see Rudin, above n 40, 48.