

7. Justice Procedure Offences—Breach of Community-based Sentences

Contents

Summary	133
Background	134
Community-based sentences	134
Justice procedure offences	135
Impact on Aboriginal and Torres Strait Islander peoples	135
Circumstances related to breach of community-based sentences	137
Breach of community-based sentences	139
Compliance with conditions through assistance	139
Culturally appropriate community-based sentencing options	140

Summary

7.1 The Terms of Reference for this Inquiry ask the ALRC to consider the nature of offences resulting in incarceration.

7.2 Justice procedure offending is the third most common type of offending resulting in sentences of imprisonment for Aboriginal and Torres Strait Islander peoples.¹ A considerable proportion of Aboriginal and Torres Strait Islander people imprisoned for Justice Procedure Offences (JPOs) have breached the conditions of their community-based sentences.

7.3 The high rate of breach of community-based sentences indicates that greater attention should be given to the provision of culturally appropriate, community-based sentencing options and support services. In this chapter, the ALRC highlights some of the programs and services currently in place, and proposes that governments work with Aboriginal and Torres Strait Islander communities to identify gaps, and create the infrastructure required to develop and deliver programs and supports. The ALRC also asks what more can be done.

7.4 Issues regarding breaches of bail and breaches of parole are dealt with in Chapters 2 and 5.

1 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 10.

Background

Community-based sentences

7.5 All states and territories have sentencing regimes which enable some offenders to serve their sentence in the community.² Community-based sentences are generally categorised into ‘custodial’ (such as suspended sentences, home detention and intensive correction orders) and ‘non-custodial’ sentencing options.³

7.6 A suspended sentence, for example, is considered a custodial community-based sentence. This is because a sentence of imprisonment has been imposed, and then the execution of the sentence has been suspended.⁴ The offender enters a good behaviour bond, which may include a requirement to participate in an intervention program.⁵ Where the court revokes a good behaviour bond due to breach, the order suspending the execution of the sentence ceases to have effect.⁶ The offender is then to serve the sentence in prison or the court can impose another form of custodial sentence (such as home detention).

7.7 Every state and territory has options for non-custodial community-based sentences.⁷ For example, New South Wales (NSW) currently has Community Service Orders (CSOs) as one non-custodial sentencing option.⁸ CSOs are not confined to cases that would otherwise result in a sentence of imprisonment, although it can only be imposed for offences that are punishable by imprisonment.⁹ CSOs may require the offender to participate in personal development, education or other programs, and also may include such things as the removal of graffiti and the restoration of buildings.¹⁰ There are mandatory conditions, including the requirement to report to corrective services; to be free of drugs or alcohol when reporting; and to follow directions.¹¹

7.8 In NSW, an application to revoke a CSO may be made to the court by NSW Corrective Services on the grounds that the offender has failed—without reasonable

2 *Crimes (Sentencing) Act 2005* (ACT) ch 5 pt 5.4, ch 6; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 3, pt 7; *Sentencing Act* (NT) divs 4, 4a; *Penalties and Sentences Act 1992* (Qld) pt 5 div 2; *Criminal Law (Sentencing) Act 1988* (SA) pt 6; *Sentencing Act 1997* (Tas) pt 4; *Sentencing Act 1991* (Vic) pt 3a; *Sentencing Act 1995* (WA) pt 9.

3 The availability of community-based sentences to the court is discussed further in ch 4.

4 Judicial Commission of New South Wales, *NSW Sentencing Bench Book* [5-700]; *R v Zamagias* [2002] NSWCCA 17 [25].

5 See, eg, *Criminal (Sentencing Procedure) Act 1999* (NSW) pt 8.

6 See, eg, Judicial Commission of New South Wales, above n 4, [5-790].

7 With the exception of the Victorian sentencing regime, under which Community Correction Orders do not distinguish between custodial or non-custodial community-based sentences.

8 *Criminal (Sentencing Procedure) Act 1999* (NSW) pt 7. A new statutory sentencing regime for community-based sentences which aligns with Community Correction Orders in Victoria has been announced but not yet introduced by the NSW Government.

9 Judicial Commission of New South Wales, above n 4, [4-400]. With the exception of offensive language *Summary Offences Act 1988* (NSW) s 4A and *Fines Act 1996* (NSW) s 58(1).

10 See definition in *Crimes (Administration of Sentences) Act 1999* (NSW) s 3; for a maximum of 500 hours: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8(2).

11 *Crimes (Administration of Sentences) Act 1999* (NSW) s 108(a); *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 201.

excuse—to comply with their obligations under the CSO.¹² When an application is made, the court has a discretion to re-sentence the offender, taking into account that community service is no longer available. Although there is no presumption of imprisonment following a breach, breaches are taken seriously by the court, and may result in the offender being re-sentenced to a term of imprisonment.¹³

Justice procedure offences

7.9 JPOs refer to the breaching of custodial or non-custodial orders (and other offences against justice). JPOs are defined by the Australian and New Zealand Standard Offence Classification to include:¹⁴

- **breach of custodial order offences:** including escape custody; breach of home detention or suspended sentence (by act or omission);
- **breach of community-based orders:** including breaches of community service orders; breaches of community-based orders; and breaches of bail, parole or bonds;
- **breach of violence and non-violence orders (protection orders):** including breaches of Apprehended Violence Orders, Domestic Violence Orders, and restraining orders;
- **offences against government operations:** including resist or hinder government officials; bribery of government officials; immigration offences; failure to lodge census, tax form, vote; hoax calls; and postal offences; and
- **security and justice procedures other than justice orders:** including subvert the course of justice; resist or hinder police; prison regulation offences; failure to appear in court.

7.10 Due to the impact on Aboriginal and Torres Strait Islander peoples, this chapter focuses on breaches of community-based sentences.

Impact on Aboriginal and Torres Strait Islander peoples

7.11 Aboriginal and Torres Strait Islander peoples are imprisoned for JPOs in greater proportions than non-Indigenous offenders:

- In 2016, 13% (957) of all sentenced Aboriginal and Torres Strait Islanders prisoners were imprisoned for JPOs (as the most serious offence charged). This makes JPOs the third highest offence type for Aboriginal and Torres Strait Islander offenders nationally, following acts intended to cause injury, and unlawful break and enter.¹⁵

12 *Crimes (Administration of Sentences) Act 1999* (NSW) s 115(2)(a).

13 Judicial Commission of New South Wales, above n 4, [4-440].

14 Used by the Australian Bureau of Statistics and the NSW Bureau of Crime Statistics and Research.

15 Australian Bureau of Statistics, above n 1, table 10. Acts intended to cause injury, the highest at 33%, unlawful entry at 15% and offences against justice 13%.

- In 2016, 9% (1,807) of the non-Indigenous prisoner population were imprisoned for JPOs—the sixth most common serious offence charged.¹⁶

7.12 Imprisonment for JPOs is more prevalent in some states and territories. The percentage of the Aboriginal and Torres Strait Islander prison population imprisoned for JPOs and the number per state and territory is shown below.

Chart 1: Of all Aboriginal and Torres Strait Islander prisoners, the percentage and number imprisoned for a Justice Procedure Offence (December 2016)¹⁷

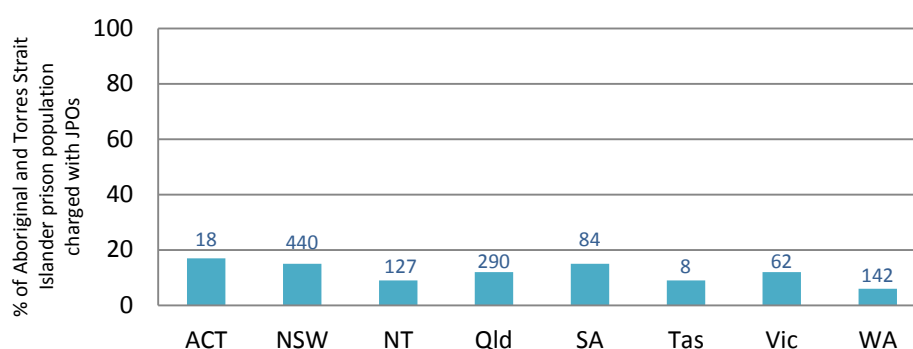


Table 1: Of all Aboriginal and Torres Strait Islander prisoners, the percentage and number imprisoned for a Justice Procedure Offence (December 2016)

	ACT	NSW	NT	QLD	SA	Tas	Vic	WA	Total
Number	18	440	127	290	84	8	62	142	1171
Percent	17%	15%	9%	12%	15%	9%	12%	6%	11%

7.13 NSW has the largest number of Aboriginal and Torres Strait Islander people imprisoned for JPOs. Between 2001 and 2015, imprisonment for JPOs in NSW increased more than any other offence category during that time—more than doubling from 2001.¹⁸ Most of the growth in prison numbers for JPOs by Aboriginal and Torres Strait Islander people came from breach of community-based orders and breach of protection orders.¹⁹

7.14 Aboriginal and Torres Strait Islander people were also disproportionately represented among prisoners charged with JPOs. Aboriginal and Torres Strait Islander

16 Ibid. Of all sentenced and non-sentenced prisoners, 11% (1,167) of Aboriginal and Torres Strait Islander people were imprisoned for JPO, compared to 8% (2,279) of non-Indigenous prisoners: table 8. It is noted that Aboriginal and Torres Strait Islander prisoners are less represented in drug and sexual offending offences.

17 Data source: Ibid table 15.

18 Don Weatherburn and Stephanie Ramsay, 'What's Causing the Growth in Indigenous Imprisonment in NSW?' (Bureau Brief Issue Paper No 118, NSW Bureau of Crime Statistics and Research, 2016) 6.

19 Ibid 3.

prisoners represented 50% of all people imprisoned for JPOs in the ACT; 35% of all people imprisoned for JPOs in NSW; and 48% in Queensland. In all jurisdictions, the percentage of Aboriginal and Torres Strait Islander people imprisoned for JPOs was higher than the percentage of the Aboriginal and Torres Strait Islander prisoner population in that state or territory.

7.15 The proportion of JPO offenders in prison that were Aboriginal and Torres Strait Islander people per state and territory is presented below.

Chart 2: The percentage of people imprisoned for JPOs that are Aboriginal and Torres Strait Islander peoples (December 2016)²⁰

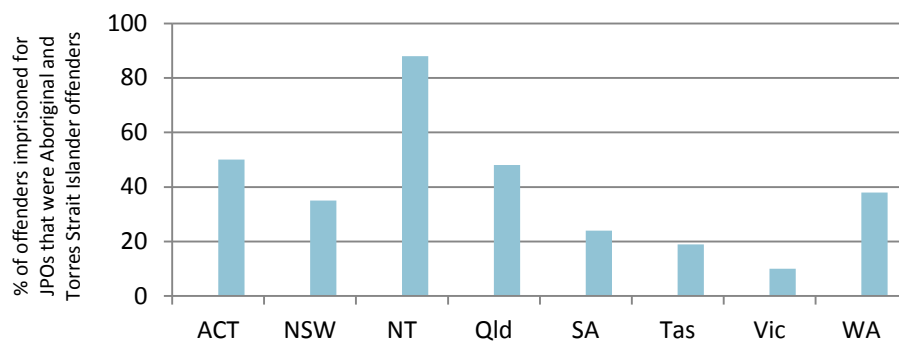


Table 2: The percentage of people imprisoned for JPOs that are Aboriginal and Torres Strait Islander peoples (December 2016)

	ACT	NSW	NT	Qld	SA	Tas	Vic	WA
Percent	50%	35%	88%	48%	24%	19%	10%	38%

Circumstances related to breach of community-based sentences

7.16 In preliminary consultations, stakeholders in this Inquiry drew attention to the high imprisonment rates of Aboriginal and Torres Strait Islander people for non-compliance with conditions of community-based sentences. Stakeholders pointed to the possibility of Aboriginal and Torres Strait Islander offenders being subject to inappropriate conditions and programs while under sentence, combined with a lack of support, as a likely cause.

7.17 The circumstances outlined in the Western Australian Court of Criminal Appeal judgment in *AH v Western Australia* [2014] WASCA 228²¹ provides such an example. In this case, a young illiterate and innumerate adult Aboriginal woman with complex needs, that included cognitive impairment and serious mental health issues, was sentenced to a community-based order following a short history of stealing cars. Under

²⁰ Data source: Australian Bureau of Statistics, above n 1, table 15.

²¹ *AH v Western Australia* [2014] WASCA 228 (10 December 2014).

the order, the woman (AH) was to receive support from services and undergo treatment. AH had been suffering physical and mental abuse, had never been employed, was itinerant—living between two regional towns—and was unable to name all the months in a year, tell the time, and could not name the seasons. Services were not provided by corrective services as directed by the court under the order. She was, however, subjected to requirements to report at particular times. She did not comply, and subsequently stole another car. AH was sentenced to a further community-based order, under which services were again not provided, and AH again reoffended.

7.18 On the third occasion AH breached the community-based order, AH was sentenced to two years in prison. While in prison AH suffered a mental breakdown and an appeal was subsequently lodged. At the time of the appeal, AH was being held involuntarily in a mental health institution.

7.19 Information provided to the Court of Appeal showed that AH had initially reported to corrective services three days after her first appearance in court. At this meeting, she was told to come back one month later. AH failed to report and a warning letter was issued—the Court of Appeal decision noted that ‘sending a warning letter to an illiterate itinerant young Aboriginal woman with intellectual disability was an exercise in the utmost futility’.²² AH was eventually found and directed to report on a date, which she missed and appeared the day after, she then failed to report on the next allocated date and made no further contact. During the appointments that AH attended, no assessment was made to determine her suitability for any programs nor was ‘any beneficial intervention proffered’.²³ This included any supervision or assistance with accommodation or any community support systems. The State neglected to put in place a guardian for AH. This inaction led the Court of Appeal to observe that ‘there was no shortage of reports, assessments and recommendations. What was missing was any action or oversight to implement those recommendations’.²⁴

7.20 A similar turn of events followed the second community-based order. The Court of Appeal found that AH’s non-reporting was entirely predictable, and necessitated corrective services to organise some other way of making contact.²⁵

7.21 The circumstances of AH’s case highlight some of the factors that may be causative of non-compliance by Aboriginal and Torres Strait Islander peoples with conditions of community-based sentences. Causative factors may include:

- corrective services or other decision makers not setting relevant conditions and reporting requirements that are underpinned by the provision of services;
- the lack of a coordinated service response in regional areas, and a lack of available services, particularly culturally appropriate services for Aboriginal and Torres Strait Islander women;

22 Ibid [37].

23 Ibid [39].

24 Ibid [88].

25 Ibid [39], [122].

- the impact of offenders' mental health or cognitive impairment in understanding reporting requirements and other conditions; and
- cultural and intergenerational factors that may result in transience and homelessness.

Breach of community-based sentences

Proposal 7–1 To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services.

7.22 A reduction in imprisonment for JPOs could have a considerable impact on the number of Aboriginal and Torres Strait Islander peoples in prison. The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) recommended that non-custodial sentences be available, accessible and culturally appropriate, and that authorities work with Aboriginal and Torres Strait Islander groups in implementing programs.²⁶ This has also been a key focus of the Victorian Aboriginal Justice Agreements.²⁷

7.23 Stakeholders in this Inquiry have suggested that compliance with community-based orders would increase if programs and conditions were relevant and practical to the circumstances of Aboriginal and Torres Strait Islander offenders, and if offenders were supported.

7.24 There are existing models in use across the states and territories that could be expanded and adapted. Some of these are discussed below.

Compliance with conditions through assistance

7.25 The Victorian Government has developed support services and programs in collaboration with peak Aboriginal and Torres Strait Islander organisations to assist Aboriginal and Torres Strait Islander offenders complete community-based sentences. These include the Local Justice Worker Program and the Wulgunggo Ngalu Learning Place, which were developed under the Victorian Aboriginal Justice Agreement.²⁸

7.26 The Local Justice Worker Program (LJWP) aims to increase the completion rate of Aboriginal and Torres Strait Islander offenders sentenced to community-based sentences in Victoria. Under this program, the Local Justice Worker links up offenders with services and culturally appropriate worksites; and can connect with the Sherriff's

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

27 See ch 10.

28 See ch 10.

Office to help set up appropriate options for the repayment of fines, including payment plans, community work permits or Community Correction Orders (CCOs).²⁹

7.27 The LJWP includes the Koori Offender Support and Mentoring Program, in which Elders and respected persons are involved to provide support, advice and cultural connection to offenders, as well as to supervise offenders undertaking community work. Where available, Elders are engaged to participate in various activities with offenders, including fishing, traditional dance, arts and craft.³⁰

7.28 The LJWP operates from 10 locations across Victoria, chosen based on the daily average number of Aboriginal offenders reporting to Community Corrections Services (CCS) offices in each region.

7.29 The LJWP was independently evaluated in 2013.³¹ The evaluation observed a narrowing of the gap between the proportions of Aboriginal and Torres Strait Islander offenders as compared to non-Indigenous offenders who had successfully completed their orders since the program was first piloted. The evaluation further found that ‘statewide data on improved completion rates of orders by Aboriginal offenders suggest that the programs may be making a contribution to these improved rates’.³² The program was noted to have high Aboriginal and Torres Strait Islander female participation.³³

7.30 The evaluation suggested that the LJWP may operate to decrease Aboriginal and Torres Strait Islander incarceration through:

- decreasing the number of Aboriginal and Torres Strait Islander offenders who breach the conditions of their community-based sentence orders/parole orders resulting in imprisonment;
- decreasing the number of Aboriginal and Torres Strait Islander offenders who lose their driver licences as a result of defaulting on fine repayments and then being charged with driving offences;
- increasing access via connections to necessary services, such as alcohol programs, housing, parenting workshops, and financial counselling; and
- increasing skill based work experience, in combination with mentoring, leading to better employment opportunities.³⁴

Culturally appropriate community-based sentencing options

7.31 The ALRC has heard about the existence of culturally appropriate community-based sentencing options that have been developed with or by Aboriginal and Torres

29 Fines are further discussed in ch 6.

30 Attorney-General’s Department (Vic), *Evaluation of Indigenous Justice Programs Project B: Offender Support and Reintegration—Final Report* (2013) 90.

31 Attorney-General’s Department (Vic), *Evaluation of Indigenous Justice Programs Project B: Offender Support and Reintegration—Final Report* (2013).

32 *Ibid* 86.

33 *Ibid* 98.

34 *Ibid* 89.

Strait Islander organisations. There are examples of culturally appropriate community-based sentencing options in the Victorian Aboriginal Justice Agreement. These include the advent of a sustainable work program based in the grounds of Weeroona Cemetery, which has reportedly contributed to an increase in the rate of successful order completion by Aboriginal and Torres Strait Islander offenders in Victoria.³⁵

7.32 Victoria has also introduced the Wulgunggo Ngalu Learning Place, which provides a voluntary residential program for up to 20 Aboriginal and Torres Strait Islander men serving community-based orders. This option usually becomes available when an Aboriginal or Torres Strait Islander man has already breached a CCO, and the only other option is prison.

7.33 In NSW, the Balunda-a (Tabulam)—‘be good now you have a second chance down by the river’—program was developed in 2008 for male offenders aged over 18 years. The program is primarily a diversion program under which offenders in NSW are referred while under a bond prior to sentencing.³⁶ The program also operates as a place of referral by community corrections staff for male offenders when revocation of parole or a community-based order is being considered, or when during the course of supervision an offender is assessed as requiring intensive residential supervision. Like the Wulgunggo Ngalu Learning Place, this option is only available following a breach where risk of imprisonment arises. It has been described as a ‘last-chance opportunity before [people] enter into custody’.³⁷

7.34 The NSW Corrective Services website states:

Following acceptance into the program offenders participate in structured programs within a culturally sensitive framework. Programs address specific areas of risk to assist on improving life skills and reintegration into the community, for example, cognitive based programs, drug and alcohol, anger management, education and employability, domestic violence, parenting skills and living skills. Cultural activities include excursions to sacred sites, music, dance and art. Elders employed by the program provide support and assist residents to recognise, restore and value cultural links with their land and history.

The property is situated on 534 hectares and also operates as a farming and beef cattle property giving the residents the opportunity to develop agricultural skills. The length of stay at the program varies according to individual needs however a minimum period of 6 months is required.

While a focus of the program is to reduce re-offending, and thereby the incarceration rate of Aboriginal people, the program is available to all within NSW.³⁸

35 Victorian Government, *Victorian Aboriginal Justice Agreement Phase 3 (AJA3): A Partnership between the Victorian Government and the Koori Community* (2013) 47.

36 *Criminal (Sentencing Procedure) Act 1999* (NSW) s 11.

37 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [7.26].

38 Community Corrections, Department of Justice (NSW), *Balund-a (Tabulam)* <www.correctiveservices.justice.nsw.gov.au>.

7.35 The above examples are not an exhaustive list of programs. There may be other culturally appropriate community-based sentencing options that the ALRC has not reviewed. Submissions on other community-based sentencing options are welcomed.

7.36 The ALRC recognises that community-based sentencing options may not be available in every location where they are required.³⁹ Each state and territory faces different challenges. The Northern Territory (NT) and Western Australia (WA), for example, have numerous remote communities, and implementing community-based sentencing options in some areas would be challenging. To overcome this, a 2016 independent review of NT Corrective Services recommended the appointment of Probation and Parole Officers to remote communities who are from that community to provide local supervision and support to offenders.⁴⁰ The recommendation makes clear that this should only be implemented with community agreement. Some stakeholders in this Inquiry have raised the possibility of supervision by community as described in the NT Supreme Court case of *DjAmbuy*, where the offenders were sentenced to suspended sentences that were to be supervised by the Aboriginal community, instead of Community Corrections.⁴¹

7.37 In this chapter, the ALRC proposes that state and territory governments—particularly corrective services—work with peak Aboriginal and Torres Strait Islander organisations to identify program gaps, and develop programs and support services to facilitate the completion of community-based sentences by Aboriginal and Torres Strait Islander offenders. One example of such a gap is likely to be programs for Aboriginal and Torres Strait Islander women. The ALRC considers that these programs should be developed by Aboriginal and Torres Strait Islander communities if they are to meet the objective of providing culturally appropriate content and support.

7.38 The ALRC further recognises the facilitative role that the Aboriginal Justice Agreements have had in developing programs and support services in Victoria. Aboriginal Justice Agreements are discussed in Chapter 10.

7.39 The ALRC welcomes submissions on the scope and practical implications of this proposal, and is interested to hear about other options and initiatives that may decrease the rate of non-compliance with community-based orders by Aboriginal and Torres Strait Islander offenders. While this chapter is focused on JPOs relating to a failure to comply with conditions of community-based sentencing orders, the ALRC also welcomes submissions on ways to minimise other justice procedure offending.

39 See, eg, Richard Coverdale, Centre for Rural Regional Law and Justice Deakin University, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria* (2011) 62.

40 Northern Territory Government, *A Safer Northern Territory through Correctional Interventions: Report of the Review of the Northern Territory Department of Correctional Services, 31 July 2016—Statement of Response* (2016) rec 133.

41 *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, 17 December 2012); Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013) 17(2) *Australian Indigenous Law Review*.