

11. Access to Justice Issues

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Summary

11.1 The Terms of Reference for this Inquiry ask the ALRC to develop law reform recommendations with regard to ‘access to justice issues including the remoteness of communities, the availability of and access to legal assistance and Aboriginal and Torres Strait Islander language and sign interpreters’.

11.2 In this chapter, the ALRC recognises the particular obstacles and issues facing Aboriginal and Torres Strait Islander defendants, including language and other communication difficulties, and the provision of legal services. Unless these obstacles are addressed, Aboriginal and Torres Strait Islander peoples will continue to enter the criminal justice system, and may be incarcerated unnecessarily.

11.3 The ALRC proposes that criminal justice systems should ensure that Aboriginal and Torres Strait Islander defendants are understood and are able to understand the proceedings against them. In some states and territories this requires the provision of suitable interpreter services.

11.4 When cognitive impairment or mental health issues prevent an Aboriginal and Torres Strait Islander person from understanding the proceedings against them, fitness to be tried statutory regimes should not provide for automatic indeterminate detention. The ALRC proposes the abolition of indeterminate detention regimes in favour of special hearing processes that can lead to limiting terms.

11.5 The ALRC recognises the work of specialist sentencing courts in providing access to justice for Aboriginal and Torres Strait Islander peoples, and, together with diversion, asks what more can be done in this area. The provision of appropriate legal services, particularly in regional and remote areas, is also discussed.

Interpreter services

Proposal 11–1 Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.

11.6 The need for interpreter services within the criminal justice system for Aboriginal and Torres Strait Islander peoples—particularly defendants—has been well ventilated in previous reports.¹

11.7 The ALRC is aware that hearing loss is prevalent among Aboriginal and Torres Strait Islander defendants² The proposal regarding interpreter services should be read to include sign interpreters where needed.

11.8 In preliminary consultations to this Inquiry, stakeholders reiterated the need for the expansion and adoption of the Northern Territory Aboriginal Interpreter Service (AIS) in some areas, which provides broad ranging interpreter services to Aboriginal and Torres Strait Islander peoples who come into contact with the criminal justice system.

Aboriginal and Torres Strait Islander languages

11.9 There are many Aboriginal and Torres Strait Islander languages spoken across Australia as first languages, primarily in regional and remote areas. The Productivity Commission reported that approximately 41% of Aboriginal and Torres Strait Islander people who come from remote areas speak an Aboriginal or Torres Strait Islander language as their first language, compared to about 2% of those living in metropolitan areas.³ For many people from isolated Aboriginal and Torres Strait Islander communities, English may be a second or third language.⁴

1 See, eg, Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 35; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, 55; Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 108–9.

2 See, eg, Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [2.49]–[2.52].

3 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (Produced for the Steering Committee for the Review of Government Service Provision, 2016) [5.24].

4 Ibid 5.24; North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, Submission No 31 to Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (7 May 2014) 3.

11.10 There are many Aboriginal and Torres Strait Islander languages spoken throughout Australia, with some estimates placing the current number of Indigenous languages spoken nationwide at around 120.⁵ In the Kimberley region alone it has been reported that there are up to 30 spoken languages, ranging from those that are commonly used to language groups that are spoken by a very small number of people.⁶

Impact on Aboriginal and Torres Strait Islander defendants

11.11 In 2016, the Productivity Commission reported that 38% of Aboriginal and Torres Strait Islander first language speakers experience difficulties when communicating with service providers.⁷ A 2002 survey conducted by the Office of Evaluation and Audit reported that 63% of Aboriginal and Torres Strait Islander Legal Services (ATSILS) practitioners experienced difficulty in understanding what their clients were saying, with 13% of those experiencing difficulty ‘very often/often’.⁸ This can be pronounced in some areas. For instance, Wadeye, the largest Aboriginal and Torres Strait Islander community in the NT, has been identified as a place where ‘almost all’ individuals seeking legal advice require an interpreter.⁹

11.12 Gaps in interpreter services were identified as a key issue in Aboriginal and Torres Strait Islander peoples’ access to justice by the Senate Finance and Public Administration References Committee.¹⁰ This issue is particularly acute in jurisdictions with high proportions of remote Aboriginal and Torres Strait Islander populations¹¹ that currently operate without interpreter services, such as Queensland, South Australia (SA) and Western Australia (WA). The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted to the Senate Inquiry that

[c]entral to effective engagement and provision of quality services to Aboriginal and Torres Strait Islander peoples is effective communication. For a proportion of Aboriginal and Torres Strait Islander peoples, this will be unachievable without the assistance of an interpreter.¹²

11.13 To the same inquiry, the Chief Justice of the Supreme Court of Western Australia stated:

The law on that is clear. The process is not fair unless the accused person understands the language in which the process is being conducted and in significant areas of this state there are people who do not have an adequate command of English to understand

5 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Australian Languages* <<https://aiatsis.gov.au/explore/articles/indigenous-australian-languages>>.

6 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 36–7.

7 Productivity Commission, above n 3, [5.23]–[5.24].

8 Melanie Schwartz and Chris Cunneen, ‘Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services’ (2009) 7(10) *Indigenous Law Bulletin* 2.

9 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 36.

10 *Ibid* 26, 116, rec 1.

11 Judicial Council on Cultural Diversity, *Cultural Diversity Within the Judicial Context: Existing Court Resources* (2016) 8.

12 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 35.

court processes ... [A]s a result of which a lot of the proceedings being conducted in our courts are invalid. The law on that is clear¹³

11.14 The AIS is an interpreter service that provides assistance to Aboriginal and Torres Strait Islander defendants who face language barriers. The AIS has over 370 registered interpreters, with interpreter services for up to 100 languages and dialects. It offers a range of interpreting services to those involved in the criminal justice system, but also covers a broad range of other areas where interpreters may be required, for example, in health settings.¹⁴

11.15 Barriers exist to the implementation of a network of interpreters in other states and territories, and in remote locations. The Senate Inquiry identified these to be:

- the number of Aboriginal and Torres Strait Islander languages, particularly given some of these languages are only spoken by small groups and the limited availability of interpreters;
- available interpreters may not be able to interpret at the professional level required for people facing criminal charges;
- conflicts of interest, particularly for smaller Aboriginal and Torres Strait Islander language groups, where most or all of the speakers know each other and may be members of the same family or clan;¹⁵
- the geographic remoteness and isolation of many predominantly Aboriginal and Torres Strait Islander language speaking communities;¹⁶ and
- issues relating to usage of Aboriginal English—‘gratuitous concurrence’ (agreeing to every proposition), being misunderstood because important body language cues are missed or not given their full significance by the listener, and that some English words have a different meaning in Aboriginal English.¹⁷

11.16 The ALRC welcomes submissions on the proposal that state and territory governments work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services. The ALRC considers that such services should be developed with Aboriginal and Torres Strait Islander communities if they are to meet the objective of providing culturally appropriate services. The ALRC notes that progress towards greater availability of interpreter services may already be underway—in June 2017, the Australian Government announced further resourcing for Aboriginal and Torres Strait Islander interpreter services.¹⁸

13 Ibid 36.

14 Northern Territory Government, *About the Aboriginal Interpreter Service* <www.nt.gov.au/community/interpreting-and-translating-services>.

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

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

17 Ibid 763.

18 Indigenous Affairs, Department of Prime Minister and Cabinet, *Minister Scullion: Additional \$1.6m for Indigenous Language Interpreters* <www.indigenous.gov.au/news-and-media/announcements>.

11.17 The ALRC notes that the AIS may provide a model for best practice, and invites submissions on the best way forward for other states and territories.

Specialist courts and diversion programs

11.18 Criminal offences are divided into two categories: summary and indictable offences. Summary offences are heard in the lower courts (Local or Magistrates courts), whereas indictable offences are generally heard in District/County or Supreme courts. These courts are referred to as ‘mainstream’ courts, and hear the majority of criminal cases prosecuted in all Australian jurisdictions.

11.19 For Aboriginal and Torres Strait Islander peoples, mainstream courts can be inaccessible or alienating. This affects access to justice, and can result in some of the principles underpinning criminal justice—including deterrence, punishment and rehabilitation—having a lesser impact on Aboriginal and Torres Strait Islander defendants.

11.20 Specialist courts, which provide different approaches to sentencing Aboriginal and Torres Strait Islander offenders, have been developed in response. These specialised sentencing courts aim to be inclusive and culturally appropriate.

11.21 Diversion programs, which divert a defendant or offender out of the criminal justice stream in order to address criminogenic behaviours prior to trial or sentencing, can also assist some Aboriginal and Torres Strait Islander people who come before the courts.

Question 11–1 What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?

Aboriginal and Torres Strait Islander sentencing courts

11.22 As noted above, the operation and processes of mainstream courts can cause engagement difficulties for Aboriginal and Torres Strait Islander peoples. While discussing the establishment of the Nunga Court, an Aboriginal and Torres Strait Islander sentencing court operating in SA, the Office of Crime Statistics and Research (SA) described the alienation and disconnection of Aboriginal and Torres Strait Islander defendants:

The overwhelming view that emerged ... was that Aboriginal people mistrusted the justice system, including the courts. They felt that they had limited input into the judicial process generally and sentencing deliberations specifically. They also saw the courts as culturally alienating, isolating and unwelcoming to community and family groups. It was clear that Aboriginal people found aspects of the Australian legal system difficult to understand ...¹⁹

19 Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010) 2.

11.23 Stakeholders in this Inquiry have described how Aboriginal and Torres Strait Islander defendants have left court without a real understanding of their rights and obligations in relation to the outcome of the matter. Aboriginal and Torres Strait Islander sentencing courts have been developed to respond to this disconnection. Such courts seek to directly engage people who appear before them, to provide case management, and to address underlying issues in culturally appropriate ways,²⁰ including having Elders participate in the sentencing discussion.²¹

11.24 Aboriginal and Torres Strait Islander sentencing courts exist in NSW, Queensland, SA and Victoria. A brief overview of these courts is set out below.

Victorian Koori Courts

11.25 The Victorian Koori Courts operate in the Children's, Magistrates' and County Courts. Each of the courts was created under statute.²² Generally, Koori Courts provide an 'informal atmosphere' and allow 'greater participation by the Aboriginal (Koori) community in the court process'.²³ The Victorian Koori Courts allow for Elders, Aboriginal and Torres Strait Islander family members, and a 'Koori Court Officer' to engage and influence court processes during a hearing.²⁴ Victorian Koori Courts focus on reducing cultural alienation and ensuring appropriate sentencing outcomes that are developed with a high level of community support.²⁵ These courts are more informal than mainstream courts and have a 'plain-language' focus. They do not use a traditional courtroom layout.

11.26 The Victorian County Koori Court is the first (and only) sentencing court for Aboriginal and Torres Strait Islander offenders in an indictable jurisdiction in Australia.²⁶ A 2011 evaluation of the Court found it to be 'more engaging, inclusive and less intimidating than the mainstream court'.²⁷ This was even the case where the offender did not agree with the sentence imposed by the Court.²⁸

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- 20 See, eg, Marchetti, Elena, 'Indigenous Sentencing Courts' (Research Brief No 5, Indigenous Justice Clearinghouse, December 2009) 1; Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 1; Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010) 3–4.
- 21 See, eg, Elena Marchetti and Janet Ransley, 'Applying the Critical Lens to Judicial Officers and Legal Practitioners Involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?' (2014) 37(1) *University of New South Wales Law Journal* 15; Nigel Stonns and Geraldine Mackenzie, 'Evaluating the Performance of Indigenous Sentencing Courts' (2009) 13(2) *Australian Indigenous Law Review* 90; Michael S King and Kate Auty, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30(2) *Alternative Law Journal* 69, 69.
- 22 See *Magistrates' Court Act 1989* (Vic) s 4D; *County Court Act 1958* (Vic) s 4A; *Children, Youth and Families Act 2005* (Vic) s 517.
- 23 Magistrates' Court of Victoria, *Koori Court* <www.magistratescourt.vic.gov.au/koori-court>.
- 24 The Koori Court Officer is available to provide assistance to both the Court and the accused and their family. Koori Court officers also engage with the local community. For more information, see County Court of Victoria and the Department of Justice, *County Koori Court: Final Evaluation Report* (2011) 9.
- 25 Magistrates' Court of Victoria, above n 23; County Court of Victoria, *County Koori Court* <www.countycourt.vic.gov.au/county-koori-court>.
- 26 Higher than a Magistrates or Local Court—meaning a District or County Court or above.
- 27 County Court of Victoria and the Department of Justice, *County Koori Court: Final Evaluation Report* (2011) 49.
- 28 *Ibid* 3.

NSW Circle Sentencing

11.27 Circle Sentencing is an alternative sentencing process available in parts of NSW for Aboriginal and Torres Strait Islander offenders who have entered a plea of guilty in the summary jurisdiction. Circle Sentencing was created under statute and operates in a similar way to Victorian Koori Courts, although Circle Sentencing is only available for some summary offences.²⁹

11.28 NSW Circle Sentencing was evaluated in 2008 by NSW BOCSAR, which found ‘no significant difference between circle sentencing participants and the control group in time to reoffend’ and further found no difference in the seriousness of reoffending between participants and the control group.³⁰ However, the same study suggested that Circle Sentencing may strengthen ‘informal social controls’ in Aboriginal and Torres Strait Islander communities through participation of community members,³¹ with other reviews of Circle Sentencing finding that participants *may* be more active and involved in Circle Sentencing than in mainstream courts.³²

Queensland Murri Courts

11.29 Like other Aboriginal and Torres Strait Islander sentencing courts, Queensland Murri Courts are less formal than mainstream courts, and aim to be more culturally responsive to Aboriginal and Torres Strait Islander people appearing before the court. Queensland Murri Courts are not created under statute, and ‘operate under the goodwill and commitment of individual magistrates’.³³

11.30 Murri Courts focus on underlying causes of offending, such as substance abuse or poor mental health, and refer people who appear before it to support services in the community where required.³⁴ These Murri Courts also seek to provide magistrates with better information on the ‘defendant’s cultural and personal circumstances’ that may contribute to their offending.³⁵ This is achieved in part through the use of Community Justice Groups (CJGs), which make submissions on matters relating to the offender’s community; provide information about relevant cultural considerations; and describe

29 Circle sentencing courts operate under Part 6 of the *Criminal Procedure Regulation 2010* (NSW) and the common law principles espoused in *R v Fernando* (Unreported, Supreme Court of NSW, 13 March 1992).

30 Jacqueline Fitzgerald, ‘Does Circle Sentencing Reduce Aboriginal Offending?’ (Contemporary Issues in Crime and Justice No 115, NSW Bureau of Crime Statistics and Research, 2008) 7.

31 Ibid.

32 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 101.

33 Mary Westcott, ‘Murri Courts’ (Research Brief No 2006/14, Parliamentary Library, Parliament of Queensland, 2006) 2. Murri Courts also utilise the *Penalties and Sentences Act 1992* (Qld) s 9(2)(o), which requires the court have regard to any relevant submissions made by a representative of a Community Justice Group (CJG) existing in the offender’s community that are relevant to sentencing the offender. CJGs are discussed below.

34 Queensland Courts, *Murri Court* <www.courts.qld.gov.au/courts/murri-court>.

35 Ibid.

available community services or programs.³⁶ CJGs may also have a role in bail applications.³⁷

11.31 In 2010, an Australian Institute of Criminology (AIC) evaluation observed the ‘considerable success’ of Queensland Murri Courts in improving relationships between Aboriginal and Torres Strait Islander communities and Queensland Magistrates Courts.³⁸ This included an increase in appearance rates, an increase in opportunity for those appearing to be linked up with rehabilitative services,³⁹ as well as the fact the initiative was ‘highly valued’ among Aboriginal and Torres Strait Islander community stakeholders.⁴⁰

South Australian Nunga Courts

11.32 The Nunga Courts in SA were established in 1999 and were the first Aboriginal sentencing courts in Australia. They currently run periodically in three courthouses, and operate in the summary jurisdiction.⁴¹

11.33 Aboriginal Sentencing Conferences are available in all criminal jurisdictions, and permit the court to sentence an offender in an informal setting that encourages the defender to speak about their offending. Sentencing Conferences were created under statute.⁴² A 2008 evaluation of Aboriginal Sentencing Conferences found that conferencing was likely to be a more effective deterrent for Aboriginal and Torres Strait Islander offenders than mainstream court due to: its relevance to Aboriginal people; the participation of Elders; the case management into relevant services; and the provision of relevant information to the court, which leads to ‘more effective sentencing’.⁴³

11.34 Both sentencing practices include Aboriginal Justice Officers who provide information, support and advice to Aboriginal defendants and their families.

Other specialist courts

11.35 There are other specialist courts that address criminogenic factors, such as drug addiction and mental health issues. These courts are available to Aboriginal and Torres Strait Islander peoples, but are not specific to them. The ALRC has visited the Drug Court of NSW and the Victorian Neighbourhood Justice Centre (NJC), which are briefly summarised below.

36 See *Penalties and Sentences Act 1992* (Qld) s 9(2)(p).

37 See *Bail Act 1980* (Qld) s 16(2)(e).

38 Anthony Morgan and Erin Louis, ‘Evaluation of the Queensland Murri Court: Final Report’ (Technical and Background Paper No 39, Australian Institute of Criminology, 2010) 150.

39 *Ibid.*

40 *Ibid.* iii.

41 Courts Administration Authority of South Australia, *Aboriginal Sentencing Courts and Conferences Nunga Courts* <www.courts.sa.gov.au>.

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

43 Office of Crime Statistics and Research, *Port Lincoln Aboriginal Adult Conference Pilot: Review Report* (2008) iii.

The Drug Court of NSW

11.36 The Drug Court of NSW is a specialist court that takes referrals from the NSW Local Court or the District Court of NSW. The Drug Court sits in Parramatta, Toronto and Sydney⁴⁴ and aims to address drug dependencies related to criminal offending.⁴⁵ This is achieved through intensive case management between court teams, community agencies, and the judge. It is also achieved through participant sanctions for non-compliance with program conditions—including the sanction of imprisonment, which is used as a last resort. Participants are regularly tested for drugs.⁴⁶

11.37 In 2008, the BOCSAR evaluation of the Drug Court showed it to be more cost effective than prison in reducing the rate of reoffending among offenders whose crime was drug related.⁴⁷ This included a 38% decrease in recidivism for a drug offence during the follow-up period, and a 30% decrease in recidivism for a violent offence.⁴⁸

Victorian Neighbourhood Justice Centre

11.38 The NJC is a Victorian Magistrates' Court of first instance established in 2007, and is Australia's first community justice centre.⁴⁹ It seeks to resolve disputes by 'addressing the underlying causes of harmful behaviour and tackling social disadvantage'.⁵⁰ The NJC combines the usual powers and functions exercised by the Magistrates' Court, but is co-located with treatment and support services. This facilitates immediate referral to appropriate services.⁵¹

11.39 Koori Justice Workers support Aboriginal and Torres Strait Islander clients and provide advice to the Court in relation to culturally specific programs and services.⁵² The NJC also holds a monthly Aboriginal Hearing Day during which all cases involving Aboriginal defendants are heard, in order 'to provide better support for Aboriginal clients and to increase court attendance'.⁵³

11.40 The NJC was evaluated in 2010. It was found that recidivism rates for participants reduced by 7%. The opening of the NJC also aligned with a reduction in the crime rate in the City of Yarra by 12% in the first two years.⁵⁴ A later 2015 AIC evaluation of the NJC revealed that

44 The NSW Drug Court is established by and operates under the *Drug Court Act 1998* (NSW). Like many other specialist courts, the Drug Court requires a guilty plea before participants are accepted, see *Drug Court Act 1998* (NSW) s 5(1)(c).

45 Don Weatherburn et al, 'The NSW Drug Court: A Re-Evaluation of Its Effectiveness' (Contemporary Issues in Crime and Justice No 121, NSW Bureau of Crime Statistics and Research, September 2008) 1.

46 Ibid 3.

47 Ibid 2.

48 Ibid 9.

49 The NJC is provided for and operates under the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic).

50 Neighbourhood Justice Centre, *About Us* <www.neighbourhoodjustice.vic.gov.au>.

51 Ibid.

52 The NJC currently employs two Koori Justice Workers.

53 Neighbourhood Justice Centre, *Aboriginal and Torres Strait Islander Support Services* <www.neighbourhoodjustice.vic.gov.au>.

54 Department of Justice (Vic), *Evaluating the Neighbourhood Justice Centre in Yarra 2007–2009* (2010) ii.

[T]he City of Yarra has the highest crime rate of any Victorian Local Government Area (LGA) other than the City of Melbourne, with an aggregate crime rate in 2007–08 of around 18,000 per 100,000 population ... In the period after the NJC was established, crime rates in Yarra have fallen, with a 31 percent decline in total crime, largely as the result of a 40 percent decline in property crime. Crime rates have generally fallen in Victoria over the same period ... but the decline in Yarra is greater than that observed in comparable inner urban LGAs ... or LGAs with high levels of social disadvantage⁵⁵

Court diversion programs and specialist lists

11.41 Court diversion programs allow magistrates or judicial officers to adjourn matters while defendants engage in support services. Diversionary programs provide services for people who have been accused or convicted in the summary jurisdiction, who require assistance with addiction or mental health. These include, but are not limited to:

- the Australian Capital Territory Court Alcohol and Drug Assessment Service, which incorporates drug and alcohol counselling during court proceedings or as part of sentencing orders;⁵⁶
- Magistrates Early Referral into Treatment program (NSW and Queensland), which allows people whose offending is related to their substance abuse issues to voluntarily enter into rehabilitation as part of the bail process;⁵⁷
- the Victorian Court Integrated Services Program,⁵⁸ which includes Aboriginal and Torres Strait Islander controlled and mainstream organisations,⁵⁹ and
- the Victorian Assessment and Referral Court list, which provides ‘case management to participants including psychological assessment, referral to welfare, health, mental health, disability, housing services and drug and alcohol treatment’.⁶⁰

Key elements

11.42 Although specialist courts, lists and programs vary in many respects, there are a number of key elements which stakeholders in this Inquiry have emphasised as critical to the operation and success of these models, including:

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- 55 Stuart Ross, ‘Evaluating Neighbourhood Justice: Measuring and Attributing Outcomes for a Community Justice Program (2015)’ (Trends and Issues in Crime and Criminal Justice No 499, Australian Institute of Criminology, November 2015) 4 <http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi499.pdf>.
- 56 Department of Health (ACT), *Diversion Services—Court Alcohol and Drug Assessment Service* <<http://www.health.act.gov.au/our-services/alcohol-and-other-drugs/diversion-services>>.
- 57 Department of Justice (NSW), *Magistrates Early Referral Into Treatment* <<http://www.merit.justice.nsw.gov.au/>>.
- 58 Magistrates’ Court of Victoria, *Court Integrated Services Program (CISP)* <www.magistratescourt.vic.gov.au>.
- 59 Magistrates’ Court of Victoria, *Court Integrated Services Program (CISP) Koori Brochure* (2008).
- 60 Magistrates’ Court of Victoria, *Assessment and Referral Court List* <www.magistratescourt.vic.gov.au>.

11.43 **Active participation of the defendant and community:** Specialist courts aim to increase active participation through the inclusion of key community members, such as Elders, and the use of plain English to ensure that processes and requirements imposed by the court are well understood by the person appearing.⁶¹

11.44 The Koori Courts in Victoria have a legislated purpose of ‘ensuring greater participation of the Aboriginal community in the sentencing process’.⁶² The legislative aims of NSW Circle Sentencing include increased participation of Aboriginal offenders, victims, and community members in sentencing processes, and to improve community confidence in sentencing processes.⁶³

11.45 **Case management of the defendant:** A number of the specialist courts and programs observed by the ALRC or highlighted by stakeholders include case management, whereby people appearing before them are referred to support services operating in the community. In most of these examples, the court or program has established links with supports and is able to facilitate engagement with the defendant.⁶⁴ Case management is particularly noticeable in courts and programs that focus on underlying issues—such as diversionary programs, the Drug Court of NSW, and the NJC.⁶⁵

11.46 **Cultural competence:** Culturally competent specialist courts aim to directly engage with Aboriginal and Torres Strait Islander peoples in the design and decision-making processes of the court. Cultural competence in specialist courts can constitute: employing legal officers who are trained in the particular issues that can arise for Aboriginal and Torres Strait Islander peoples; and changing mainstream court environments—for example through the use of a round table, or the display of the Aboriginal and/or Torres Strait Islander flag.⁶⁶

11.47 A 2006 evaluation of the Queensland Murri Court included a survey with Aboriginal and Torres Strait Islander respondents who supported ‘the Murri Court concept because it involved Indigenous people in the justice system and made the justice system more responsive to the needs of Indigenous offenders and thus more culturally appropriate than other Magistrates Courts’.⁶⁷ Other evaluations have found that Aboriginal and Torres Strait Islander specialist courts provide a sense of ownership to participants over court processes and outcomes;⁶⁸ increase court

61 King and Auty, above n 21, 69–71.

62 *Magistrates’ Court (Koori Court) Act 2002* (Vic) s 1.

63 *Criminal Procedure Regulation 2010* (NSW) reg 35.

64 Ross, above n 55, 2; Magistrates’ Court of Victoria, *Court Integrated Services Program (CISP) Brochure* <www.magistratescourt.vic.gov.au>; Queensland Courts, above n 34.

65 The Drug Court, as noted, utilises a combination of regular judicial monitoring, achieved through regular court appearances, and sanctions for failing to meet program requirements, such as urine testing.

66 King and Auty, above n 21, 70.

67 Natalie Parker and Mark Pathé, ‘Report on the Review of the Murri Court’ (Department of Justice and Attorney-General (Qld) 2006) quoted in Stonns and Mackenzie, above n 21, 99.

68 See, eg, Judicial Commission of New South Wales, *Circle Sentencing in New South Wales—A Review and Evaluation* (2003); Fitzgerald, above n 30; Office of Crime Statistics and Research, *Port Lincoln Aboriginal Adult Conference Pilot: Review Report* (2008).

appearance rates for Aboriginal and Torres Strait Islander offenders;⁶⁹ and improve compliance with court orders.⁷⁰

11.48 Specialist courts and diversionary programs are not always available. Alternative criminal justice responses tend to be concentrated in metropolitan areas.⁷¹ This may be because necessary treatment and community resources are available in metropolitan areas.⁷² In particular, dedicated rehabilitative services—such as community drug and alcohol counselling providers—are much less likely to service non-metropolitan areas.⁷³ Even where available, places in treatment and community support services are limited.⁷⁴

11.49 Specialised courts are more resource intensive than mainstream courts.⁷⁵ Participants in specialist courts may have to appear multiple times over an extended period (due to case management and judicial monitoring);⁷⁶ and treatment and community resource providers are an obligatory component of many specialist courts.⁷⁷

11.50 The ALRC welcomes submissions on whether reform to laws and legal frameworks related to specialist courts or lists are required to further increase access to justice for Aboriginal and Torres Strait Islander peoples.

Indefinite detention when unfit to stand trial

Proposal 11–2 Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.

11.51 ‘Limiting terms’ refer to the period of time a person found unfit to stand trial must spend in forensic custody under supervision. The length of a limiting term

69 See, eg, Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010); Allan Borowski, ‘Indigenous Participation in Sentencing Young Offenders: Findings from an Evaluation of the Children’s Koori Court of Victoria’ (2010) 43(3) *Australian & New Zealand Journal of Criminology* 465; Victorian Sentencing Advisory Council, *Sentencing in the Koori Court Division of the Magistrates’ Court: A Statistical Profile* (2010).

70 See, eg, Department of Justice (Vic), *‘A Sentencing Conversation’: Evaluation of the Koori Courts Pilot Program October 2002–October 2004* (2006); Natalie Parker and Mark Pathé, ‘Report on the Review of the Murri Court’ (Department of Justice and Attorney-General (Qld), 2006).

71 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) 40: ‘74% of all respondents agreed or strongly agreed that their clients were disadvantaged by a lack of local access to specialist [courts]’.

72 *Ibid* 129–31.

73 Michael King, ‘Applying Therapeutic Jurisprudence in Regional Areas—The Western Australian Experience’ (2003) 10(2) *Murdoch University Journal of Law* 2.

74 Richard Coverdale, Centre for Rural Regional Law and Justice Deakin University, above n 71, 129.

75 *Ibid* 37–8.

76 Lorana Bartels, ‘Challenges in Mainstreaming Specialty Courts’ (Trends and Issues in Crime and Criminal Justice No 383, Australian Institute of Criminology, 2009) 4.

77 *Ibid* 1–2.

represents the sentence of imprisonment a court would have imposed for the offending conduct if the person had been found guilty at trial.

11.52 In jurisdictions that do not have limiting terms, stakeholders advised the ALRC that, when required, fitness to stand trial may not be raised because an accused person may end up held in indefinite detention without trial. In these circumstances, the ALRC has been advised that the accused person may instead enter a plea of guilty or stand trial in order to receive a fixed term of imprisonment with a release date.

11.53 This means that some people—particularly Aboriginal and Torres Strait Islander peoples—with cognitive impairments or mental health issues, who may not have the capacity to understand the consequences of a guilty plea or court processes, are entering the criminal justice system, instead of the forensic mental health system, and are not receiving the required treatment or care.

11.54 This may affect the likelihood of recidivism and runs counter to legal principles that underpin fair trials and access to justice.⁷⁸

Cognitive impairment in the criminal justice system

11.55 High rates of cognitive impairment have been observed in the Australian general prison population, with Aboriginal and Torres Strait Islander prisoners particularly likely to experience cognitive impairments such as Foetal Alcohol Spectrum Disorders (FASD) and Foetal Alcohol Syndrome (FAS).⁷⁹ Research has indicated that Aboriginal and Torres Strait Islander prisoners with cognitive impairments have earlier contact with the criminal justice system, occurring at a significantly higher rate than non-Indigenous prisoners with cognitive impairments.⁸⁰ This is particularly acute for Aboriginal and Torres Strait Islander women.⁸¹

78 NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 31–5.

79 Eileen Baldry et al, 'A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System' (University of New South Wales, 2015) 156.

80 *Ibid* 31.

81 *Ibid* 45.

11.56 The rate of cognitive impairment in the Aboriginal and Torres Strait Islander prison population was discussed in an inquiry conducted by the Senate Community Affairs References Committee into indefinite detention, to which the Aboriginal Legal Service of Western Australia submitted:

In my estimation, 95 per cent of Aboriginal people charged with criminal offences appearing before the courts have either an intellectual disability, a cognitive impairment or a mental illness. The overwhelming majority of those are undiagnosed and, therefore, untreated. If they go to jail it is almost impossible to conceive of them being diagnosed in jail; therefore, they are untreated. If you receive a community-type sanction, if you are from a regional or remote area, you will go to a place where you do not receive any meaningful interventions to deal with your problem.⁸²

11.57 The final report of that inquiry highlighted:

- the importance of assessment and screening tools in order to detect cognitive impairment at an early stage in criminal justice proceedings, including FASD;
- the importance of a therapeutic approach towards people with cognitive impairment in the criminal justice system—particularly under legislation which allows for their indefinite detention; and
- the particular attention needed in responding to Aboriginal and Torres Strait Islander people with cognitive impairment within the criminal justice system, including that these responses be culturally competent and pay particular attention to court processes and police questioning practices.⁸³

Fitness to stand trial regimes

11.58 Where cognitive impairment or mental health issues are acute, the issue of a person's fitness to stand trial may be raised. At common law, a person will be found unfit to stand trial if they cannot understand the offence with which they are charged or the nature of the proceedings against them. A person found unfit would not have the capacity to enter an appropriate plea, make a defence in answer to the charge, or give necessary instructions to counsel.⁸⁴

11.59 State and territories have legislative responses to deal with findings of unfitness, which differ in two key ways. In the ACT, NSW, and SA, a person found unfit to plead may ultimately undergo a 'special hearing' process where a court makes a qualified finding on the limited evidence.⁸⁵ Where there is a qualified finding of guilt, the court can impose a limited term, which represents the time the person must spend in forensic

82 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 24.

83 *Ibid* xiii–xix.

84 *R v Presser* [1958] 45 VR 48.

85 *Crimes Act 1900* (ACT) pt 13; *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19; *Criminal Law Consolidation Act 1935* (SA) pt 8A, div 3.

custody under supervision. The length of a limiting term generally mirrors the sentence of imprisonment a court would have imposed for the offending conduct.⁸⁶

11.60 All other states and territories do not have special hearings that result in limiting terms. A finding of unfitness to stand trial in these jurisdictions can result instead in indefinite detention.⁸⁷ As observed in the Senate Community Affairs References Committee report:

All Australian jurisdictions have in place legislation that addresses a defendant within the criminal justice system and their fitness to stand trial. These justice diversion provisions are applied when people with cognitive or psychosocial disability are deemed ‘unfit’ to stand trial ... [J]ustice diversion provisions [without limiting terms] have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that may significantly exceed the maximum period of custodial sentence for the offence.⁸⁸

11.61 Indefinite detention regimes have affected Aboriginal and Torres Strait Islander peoples. For example, evidence submitted to the Senate Community Affairs References Committee indicated that, of the 100 people detained across Australia without conviction under forensic mental health provisions, at least 50 were Aboriginal and Torres Strait Islander peoples.⁸⁹

11.62 The Australian Human Rights Commission (AHRC) reviewed the status of three Aboriginal men found unfit to be tried and held under indefinite detention in the NT,⁹⁰ and found that:

- the men had been held in a maximum security prison in Alice Springs because no suitable places for forensic patients existed;⁹¹
- one of the men had been in detention for six years, despite the maximum penalty of the crime he was accused of committing being 12 months imprisonment under regular criminal processes;
- another of the men had been in detention for over four years, despite a maximum criminal penalty of 12 months imprisonment; and

86 *Crimes Act 1900* (ACT) s 301; *Mental Health (Forensic Provisions) Act 1990* (NSW) s 23(1)(b); *Criminal Law Consolidation Act 1935* (SA) s 269O(2). If the court finds no custodial sentence would have been imposed, it may impose any other penalty or order it might have made in a normal trial of criminal proceedings.

87 *Criminal Code Act 1996* (NT) s 43ZC; *Mental Health Act 2016* (Qld) ch 12 pts 3–4; *Criminal Justice (Mental Impairment) Act 1999* (Tas) ss 15–18, 24, 26 (Tasmania first requires a qualified finding of guilt); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 27(1); *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16, 33.

88 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 6.

89 *Ibid* 14.

90 Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia [2014] AusHRC 80: Report into Arbitrary Detention, Inhumane Conditions of Detention and the Right of People with Disabilities to Live in the Community with Choices Equal to Others* (2014).

91 A forensic patient facility was constructed in March 2013.

- the third man had also been in detention for over four years, and remained so at the time of the AHRC's reporting date.⁹²

11.63 Indefinite detention regimes enforced after a finding of unfitness have received international criticism. The United Nations Committee on the Rights of Persons with Disabilities criticised the operation of WA's unfitness to stand trial regime, which had resulted in the detention of an Aboriginal and Torres Strait Islander man for nearly a decade.⁹³

11.64 There have also been calls among Australian defence advocates for the introduction of special hearings, supported by the implementation of throughcare following the conclusion of a limiting term.⁹⁴ In 2014, the ALRC recommended the introduction of limiting terms combined with regular reviews of detention orders for state and territory jurisdictions with indeterminate detention regimes.⁹⁵ These recommendations were supported by the Senate Community Affairs References Committee in 2016.⁹⁶

11.65 The ALRC is aware that the introduction of limiting terms does not address the issue of people with cognitive impairment in the forensic mental health system being held in correction centres. This is an area of ongoing concern, on which state and territory bodies continue to make recommendations.⁹⁷

11.66 The ALRC recognises that fitness to stand trial regimes, and the operation of forensic mental health systems are complex. The ALRC has focused on indefinite detention, as this affects incarceration rates, and it is the area most raised by stakeholders in preliminary consultations. The ALRC welcomes submissions on the proposal to abolish indefinite detention in response to a finding of unfitness to stand trial and any other related area.

Provision of legal services and supports

Question 11–2 In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?

92 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 35–6.

93 United Nations Committee on the Rights of Persons with Disabilities, *Views Adopted by the Committee under Article 5 of the Optional Protocol, Concerning Communication No. 7/2012*, UN Doc CRPD/C/16/D/7/2012 (10 October 2016).

94 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 69.

95 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) rec 7–2.

96 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) xiii.

97 See, eg, NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) recs 10.1–10.2; Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) recs 49–50, 98, 100, 104–5.

11.67 There are four discrete but complementary categories of legal services that provide targeted and culturally appropriate legal assistance to Aboriginal and Torres Strait Islander communities, including Legal Aid Commissions, Community Legal Centres, Indigenous Legal Assistance providers such as the Aboriginal Legal Service (ALS) in each state and territory, and the Family Violence Prevention Legal Services (FVPLS). Commonwealth, state and territory governments provide the bulk of funding for the four legal assistance services.

11.68 While the level and mix of funding sources varies between these different service providers, the past three years has seen much uncertainty around the funding of these services following the expiration of the original National Partnership Agreement on Legal Assistance Services (NPA)—a 4 year agreement between the Commonwealth and the states and territories—and the re-negotiation of a new agreement for 2015–2020.

11.69 The recent funding history of these legal services was articulated in the 2016 report of the Senate Standing Committee on Finance and Public Administration, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*⁹⁸ and also comprehensively described in the Productivity Commission’s 2014 *Access to Justice Arrangements* report.⁹⁹

11.70 The ALRC specifically notes the Senate Standing Committee’s recommendation that the Commonwealth Government ‘adequately support legal assistance services’, and that funding should focus on:

- Community legal education for Aboriginal and Torres Strait Islander people;
- Outreach workers to assist Aboriginal and Torres Strait Islander people; and
- Interpreters for Aboriginal and Torres Strait Islander people in both civil and criminal matters to ensure that they receive effective legal assistance.¹⁰⁰

11.71 In 2013–14, the Productivity Commission considered funding of legal services and assistance and thereafter made several findings and recommendations targeting the legal services sector and those organisations servicing the Aboriginal and Torres Strait Islander community.¹⁰¹ The Productivity Commission estimated at that time that the *additional* cost of adequately supporting this sector would amount to around \$200 million per year.¹⁰²

11.72 While an extensive in-depth examination of the provision of legal services and supports is outside the scope of the Terms of Reference to this Inquiry, in consultations to date, the ALRC has been told of the negative effects on the legal assistance sector stemming from funding uncertainty and the consequent negative impacts on

98 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 115–16.

99 Productivity Commission, *Access to Justice Arrangements—Volume 2* (2014) chs 21–2.

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

101 Productivity Commission, *Access to Justice Arrangements—Volume 2* (2014) rec 21.4.

102 Ibid 738.

incarceration outcomes for Aboriginal and Torres Strait Islander peoples. Notwithstanding the announcement that the funding reduction announced in 2013¹⁰³ would not proceed, the need for increased funding to the legal services sector, as recommended by the Productivity Commission, is noted. The ALRC acknowledges that the lack of access to legal assistance is a particular issue for regional and remote communities, and that this may have an impact on the incarceration rates of Aboriginal and Torres Strait Islander peoples.

Custody Notification Service

Proposal 11–3 State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

11.73 State and territories currently operate a notification system whereby an ALS practitioner or equivalent is contacted when an Aboriginal or Torres Strait Islander person is detained in police custody. In NSW, this is a legislated duty.¹⁰⁴

11.74 The Custody Notification Service (CNS) is a 24-hour, 7-day a week telephone legal advice service for Aboriginal and Torres Strait Islander people that have been taken into custody in NSW and the ACT.¹⁰⁵ The NSW CNS was set up in response to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) to prevent deaths in custody in NSW. Since then there has been no deaths in custody in NSW where the CNS was used.¹⁰⁶

11.75 The NSW CNS is legislated under cl 37 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW):¹⁰⁷

37 Legal assistance for Aboriginal persons or Torres Strait Islanders

If a detained person or protected suspect is an Aboriginal person or Torres Strait Islander, then, unless the custody manager for the person is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must:

- (a) immediately inform the person that a representative of the Aboriginal Legal Service (NSW/ACT) Limited will be notified:
 - (i) that the person is being detained in respect of an offence, and
 - (ii) of the place at which the person is being detained, and

103 Announced in the 2013 'Mid Year Economic Financial Outlook'.

104 *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) cl 37.

105 The CNS operates in both ACT and NSW but is only legislatively imposed on police in NSW.

106 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 86.

107 The provision was previously cl 33 under the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW).

(b) notify such a representative accordingly.

11.76 The provision prescribes that when an Aboriginal and Torres Strait Islander person in NSW is taken into custody the police must contact the ALS, and advise them of this fact.¹⁰⁸ The Aboriginal and Torres Strait Islander person in custody is then provided over-the-phone legal advice, with CNS lawyers trained to detect and respond to issues such as threats of self-harm or suicide, or any injuries sustained during arrest.¹⁰⁹

11.77 There have been moves to legislate a CNS in Western Australia,¹¹⁰ with the Western Australian Coroner's Court and the Australian Lawyers for Human Rights both recently advocating for the implementation of a legislated CNS in that state.¹¹¹ Stakeholders in this Inquiry have stressed the importance of having a mandatory legislative duty to notify and urged its introduction in other states and territories.

11.78 Stakeholders have explained that the CNS is critical to the welfare of Aboriginal and Torres Strait Islander peoples and their access to justice, and the ALRC welcomes submissions regarding the proposal to extend a legislated duty to notify to every jurisdiction.

108 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 85.

109 Aboriginal Legal Service (NSW/ACT), *Custody Notification Service* <www.alsnswact.org.au/pages/custody-notification-service>.

110 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 87–8.

111 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) 7, 40; *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 157.

