Executive Summary

Contents

Disproportionate incarceration rate

Although Aboriginal and Torres Strait Islander adults make up around 2% of the national population, they constitute 27% of the national prison population.[1] In 2016, around 20 in every 1,000 Aboriginal and Torres Strait Islander people were incarcerated. Over-representation is both a persistent and growing problem—Aboriginal and Torres Strait Islander incarceration rates increased 41% between 2006

1 Data in this Executive Summary is drawn from, and more fully explained in ch 3.

and 2016, and the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates over that decade widened.

Aboriginal and Torres Strait Islander women constitute 34% of the female prison population. In 2016, the rate of imprisonment of Aboriginal and Torres Strait Islander women (464.8 per 100,000) was not only higher than that of non-Indigenous women (21.9 per 100,000), but was also higher than the rate of imprisonment of non-Indigenous men (291.1 per 100,000).

In 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) found that the Aboriginal population was grossly over-represented in custody. It noted that 'Aboriginal people are in gross disproportionate numbers, compared with non-Aboriginal people, in both police and prison custody and it is this fact that provides the immediate explanation for the disturbing number of Aboriginal deaths in custody'.[2]

The RCIADIC looked at indicators of disadvantage that contributed to this disproportionate representation, including that 'Aboriginal people were dispossessed of their land without benefit of treaty, agreement or compensation'.[3]

Other indicators identified by the RCIADIC were

> the economic position of Aboriginal people, the health situation, their housing requirements, their access or non-access to an economic base including land and employment, their situation in relation to education; the part played by alcohol and other drugs—and its effects.[4]

Over the 26 years since the RCIADIC, multiple resources have been dedicated to remedying the factors identified by the RCIADIC and to reducing the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples.

However, in 2016, Aboriginal and Torres Strait Islander people were 12.5 times more likely to be in prison than non-Indigenous people, and Aboriginal and Torres Strait Islander women were 21.2 times more likely to be in prison than non-Indigenous women.

The submission to this Inquiry from Jesuit Social Services summed up a common assessment: 'The over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system is a national disgrace'.[5]

While the statistics concerning the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples are alarming, it is important to bear in mind that the majority of Aboriginal and Torres Strait Islander people never commit a criminal offence.

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2 Ibid vol 1, [9.4.1].
3 Ibid vol 1, [1.4.2].
4 Ibid vol 1, [1.3.6].
5 Jesuit Social Services, *Submission 100*.

The task of this Inquiry

This Inquiry has one principal but constrained purpose. It is to inquire into the over-representation of Aboriginal and Torres Strait Islander people in prison and develop recommendations for reform of laws and legal frameworks to reduce their disproportionate incarceration.

The ALRC has had regard to the research, reports, inquiries and action plans referred to in the Terms of Reference. They include consideration of the much larger historical, social and economic context that contributes to the disproportionate incarceration rate, which are both a result and a further cause of disadvantage for Aboriginal and Torres Strait Islander peoples.

While it is difficult to disentangle historical, social and economic disadvantage from legal issues that contribute to the incarceration of Aboriginal and Torres Strait Islander peoples, the recommendations made in this Report focus principally on criminal laws and legal frameworks, as required by the Terms of Reference. The ALRC has confined its scope to recommendations relating to the incarceration of Aboriginal and Torres Strait Islander adults.

The case for reform

Equality before the law

This Inquiry involves fundamental questions about achieving substantive, not just formal, equality before the law. Formal equality suggests that all people should be treated the same regardless of their differences. Substantive equality is 'premised on the basis that rights, entitlements, opportunities and access are not equally distributed throughout society and that a one size fits all approach will not achieve equality'.[6]

The ALRC does not propose a 'parallel system' of justice for Aboriginal and Torres Strait Islander people, as warned against by the Institute of Public Affairs.[7] However, it recognises, as Brennan J observed in *Gerhardy v Brown*, that formal equality may be 'an engine of oppression destructive of human dignity if the law entrenches inequalities "in the political, economic, social, cultural or any other field of public life"'.[8] Achieving substantive and not formal equality before the law includes, for example, the consideration upon sentencing of the unique and systemic factors affecting Aboriginal and Torres Strait Islander offenders. It also includes not only consistency in the provision of sentence options and diversion and support programs across the country, but also ensuring that these are culturally appropriate.

Reducing the incarceration of women

Some additional factors have to be taken into account with regard to the incarceration of women. One of these factors is the impact of family violence. Available research

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6 Australian Human Rights Commission, *The Declaration Dialogue Series: Paper No 5—Equality and Non-Discrimination* (2013) 8.

7 Institute of Public Affairs, *Submission 58*.

8 *Gerhardy v Brown* (1985) 159 CLR 70, 129.

suggests that Aboriginal and Torres Strait Islander women experience family violence at a higher rate than the broader Australian community, and that the majority of Aboriginal and Torres Strait Islander women in prison have experienced physical or sexual abuse.[9]

The Human Rights Law Centre and Change the Record Coalition have noted:

> The overwhelming majority of Aboriginal and Torres Strait Islander women in prison are survivors of physical and sexual violence. Many also struggle with housing insecurity, poverty, mental illness, disability and the effects of trauma. ... Criminal justice systems across Australia continue to be largely unresponsive to the unique experiences, circumstances and strengths of Aboriginal and Torres Strait Islander women.[10]

Criminal justice reform is only one aspect of the range of strategies required to address family violence in Aboriginal and Torres Strait Islander communities, with National Family Violence Prevention Legal Services suggesting that:

> a combination of preventative education, community engagement, support services and legal assistance (as both early intervention and response) are all crucial parts of the continuum of services to address and reduce family violence against Aboriginal and Torres Strait Islander women and children.[11]

An additional important consideration is the effect that incarceration of women can have on families and communities. As the Human Rights Law Centre and Change the Record Coalition have further noted:

> Some 80% of Aboriginal and Torres Strait Islander women in prison are mothers. Many women in the justice system care not only for their own children, but for the children of others and family who are sick and elderly. Prosecuting and imprisoning women is damaging for Aboriginal and Torres Strait islander children, who are already over-represented in child protection and youth justice systems.[12]

The number of Aboriginal and Torres Strait Islander parents—particularly women—in prison has a direct effect on the number of Aboriginal and Torres Strait Islander children in out-of-home care, which is a recognised pathway to youth detention and adult offending.

Aboriginal and Torres Strait Islander leadership

A recurring observation made during consultations and in submissions to this Inquiry was that solutions should be developed and led by Aboriginal and Torres Strait Islander people. Good examples are the Koori courts in Victoria and community justice groups of Elders, which support and assist Aboriginal and Torres Strait Islander people throughout the criminal justice process. The ALRC was told that some of the most effective solutions to local problems (such as diversion programs and post release assistance) have been developed locally by, or in conjunction with, local Aboriginal

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9 See chs 2 and 11.
10 Human Rights Law Centre and Change the Record Coalition, above n 19, 5.
11 National Family Violence Prevention Legal Services, *Submission 77*.
12 Human Rights Law Centre and Change the Record Coalition, above n 19, 5.

and Torres Strait Islander people. The corollary is that what works in one community (such as alcohol restrictions) may not be the best solution in another.

Taking a local approach to local problems can create difficulties for Australian governments, which necessarily plan for centrally developed and imposed national, state or territory-wide programs. Without acceptance and participation by the local communities, those programs can fail or, at least, not fully meet their objectives.

The ALRC notes the importance of governments working with Aboriginal and Torres Strait Islander organisations and communities to implement the range of strategies recommended to reduce Aboriginal and Torres Strait Islander incarceration. For example, the ALRC has recommended that state and territory governments work with Aboriginal and Torres Strait Islander organisations to: develop and implement culturally appropriate bail support programs and diversion options; develop options to reduce the imposition of fines and infringement notices; and develop prison programs that address offending behaviours and prepare people for release. One way to achieve local involvement is through Aboriginal Justice Agreements. Justice reinvestment also emphasises tailored, local solutions to the particular drivers of incarceration in a community.

Economic and social costs of incarceration

The implementation of the recommendations in this Report, including the provision of more diversion, support and rehabilitation programs before, during and after incarceration, will require additional resources.

However, the cost of implementing these recommendations must be considered against the cost of incarcerating Aboriginal and Torres Strait Islander people at disproportionate levels.[13] Incarceration is expensive: it has been estimated that the total justice system costs of Aboriginal and Torres Strait Islander incarceration in 2016 were $3.9 billion. When the costs of Aboriginal and Torres Strait Islander incarceration are broadened beyond those directly related to the criminal justice system to include other economic costs, the estimated cost rises to $7.9 billion. As well as the cost of imprisonment to the State, incarceration can also have a broader social cost, particularly when concentrated in a particular community.

The recommendations in this Report can be said to take a ‘justice reinvestment’ approach—broadly, the notion that there should be a redirection of criminal justice resources from incarceration to strategies that can better address the causes of offending. These strategies can be both within and outside of the criminal justice system. Given the significant and growing economic and social costs of incarceration, the ALRC suggests that there is a compelling case for Australian governments collectively to invest in developing appropriate and more effective alternatives to imprisonment for Aboriginal and Torres Strait Islander people.

13 The cost of incarceration is more fully discussed in ch 4.

Overview of the Report

Context

In 1991, the RCIADIC found that the fundamental causes for over-representation of Aboriginal people in custody were not located *within* the criminal justice system. Such a claim has been echoed many times since. In **Chapter 2**, the ALRC places the disproportionate incarceration rates of Aboriginal and Torres Strait Islander peoples today in social and historical context. It briefly traces the history of Aboriginal and Torres Strait Islander peoples' contact with the criminal justice system.

The ALRC also provides a contemporary picture of the impact of the social determinants of incarceration on Aboriginal and Torres Strait Islander peoples, including education and employment, health and disability, housing and homelessness, and child protection and youth justice. It highlights some of the many inquiries, initiatives and recommendations that have sought to address the disadvantage experienced by Aboriginal and Torres Strait Islander peoples.

Incidence

Chapter 3 sets out data provided to the ALRC by researchers at Curtin University on the characteristics of Aboriginal and Torres Strait Islander prisoners. The data chart over-representation from charges before the courts to the types of sentences imposed for certain offending. The data show that Aboriginal and Torres Strait Islander peoples are over-represented in the national prison population.

Over-representation increases with the stages of the criminal justice system. In 2016, Aboriginal and Torres Strait Islander people were seven times more likely than non-Indigenous people to be charged with a criminal offence and appear before the courts; 11 times more likely to be held in prison on remand awaiting trial or sentence, and 12.5 times more likely to receive a sentence of imprisonment. This is a cyclical problem, with 76% of Aboriginal and Torres Strait Islander prisoners having been in prison before.

Up to 45% of Aboriginal and Torres Strait Islander offenders sentenced in 2015–2016 received a sentence of imprisonment of less than six months. Few received a community-based sentence.

Justice reinvestment

Justice reinvestment involves the redirection of resources from the criminal justice system into local communities that have a high concentration of incarceration and contact with the criminal justice system.

A justice reinvestment approach suggests that resources are better directed—and indeed savings will be made—by reinvesting a portion of this expenditure to address the causes of offending in places where there is a high concentration of offenders. It uses place-based, community-led initiatives to address offending and incarceration, applying a distinct data-driven methodology to inform strategies for reform.

In **Chapter 4**, the ALRC outlines two key reasons why justice reinvestment holds particular promise in addressing Aboriginal and Torres Strait Islander incarceration. First, it has long been recognised that the key drivers of incarceration for Aboriginal and Torres Strait Islander people are external to the justice system, and justice reinvestment involves a commitment to invest in front-end strategies to prevent criminalisation. Second, justice reinvestment, as a place-based approach, emphasises working in partnership with communities to develop and implement reforms, and thus accords with evidence that effective policy change to address Aboriginal and Torres Strait Islander disadvantage requires partnership with Aboriginal and Torres Strait Islander peoples.

The implementation of justice reinvestment requires significant technical expertise. To provide such expertise, the ALRC recommends that Commonwealth, state and territory governments should support the establishment of an independent justice reinvestment body to promote the reinvestment of resources from the criminal justice system to local community development initiatives to address the drivers of crime and incarceration, and to provide expertise in the methodology of justice reinvestment. While justice reinvestment should remain community-led, a national body with expertise in justice reinvestment methodology could assist in providing technical assistance to local sites wishing to implement justice reinvestment.

The body should be a national one because justice reinvestment involves a holistic approach to the drivers of incarceration, which extend beyond justice-related drivers to social and community drivers of offending. These policy priorities extend across all levels of government.

The ALRC envisages the justice reinvestment body's role to be limited: principally, to providing technical assistance in the implementation of a justice reinvestment approach. It would not have the authority to impose reinvestment plans, nor to direct the allocation of resources. Therefore, the ALRC further recommends that Commonwealth, state and territory governments support place-based justice reinvestment initiatives, through resourcing, facilitating access to data, and facilitating participation by, and coordination between, relevant government departments.

Bail

Up to one third of Aboriginal and Torres Strait Islander people in prison are held on remand awaiting trial or sentence. A large proportion of Aboriginal and Torres Strait Islander people held on remand do not receive a custodial sentence upon conviction, or may be sentenced to time served while on remand. This particularly affects female Aboriginal and Torres Strait Islander prisoners, and suggests that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low-level offending.

In **Chapter 5**, the ALRC discusses how irregular employment, previous convictions for often low-level offending, and a lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail. Furthermore, it notes that when bail is granted, cultural obligations may conflict with commonly issued bail conditions—such as curfews and exclusion orders—leading to

breach of bail conditions, revocation of bail and subsequent imprisonment. This issue has continued despite existing laws and legal frameworks that enable some bail authorities to take cultural considerations into account.

The recommendations in **Chapter 5** seek to enable Aboriginal and Torres Strait Islander peoples accused of low-level offending to be granted bail in circumstances where risk can be appropriately managed.

As a means of decreasing the number of Aboriginal and Torres Strait Islander people in prison held on remand, the ALRC recommends that bail laws should require bail authorities to consider issues and circumstances arising from a person's Aboriginality when making bail determinations. Victoria introduced a model provision in 2010, which the ALRC recommends be adopted in other state and territory bail statutes. The ALRC further recommends that state and territory governments work with relevant Aboriginal and Torres Strait Islander organisations and legal bodies to produce usage guidelines for the judiciary and legal practitioners, and to identify gaps in the provision of bail supports.

The ALRC stresses the interdependency of these recommendations, and encourages governments to consider them a holistic package for bail law reform.

Sentencing and Aboriginality

Sentencing decisions are crucial in determining whether a person goes to prison, and for how long. The sentencing decision may be affected by the seriousness of an offence and any subjective characteristics of an offender, including criminal history.

In **Chapter 6,** the ALRC recognises that Aboriginal and Torres Strait Islander offenders are more likely to have prior convictions and to have served a term of imprisonment than non-Indigenous offenders, and that this history may influence the sentencing decision. Aboriginal and Torres Strait Islander offenders may have also experienced trauma that is unique to their Aboriginality, which in some instances may be criminogenic (that is, causing or likely to cause criminal behaviour). This could include, for instance, direct or indirect experience of the Stolen Generation, loss of culture, and displacement. Further, Aboriginal and Torres Strait Islander people who have experienced this type of trauma may distrust police and government agencies.

Sentencing courts are able to consider the relevance and impact of systemic and background factors affecting an Aboriginal or Torres Strait Islander offender when taking into account subjective characteristics at sentencing, but are not required to do so. In *Bugmy v The Queen*, the High Court determined that taking judicial notice of the systemic background of deprivation of Aboriginal offenders may be 'antithetical to individualised justice'.[14]

For reasons of fairness, certainty, and continuity in sentencing Aboriginal and Torres Strait Islander offenders, the majority of stakeholders to this Inquiry supported the introduction of provisions requiring sentencing courts to take a two-step approach:

14 *Bugmy v The Queen* (2013) 249 CLR 571.

first, to take into account the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples; and then to proceed to review evidence as to the effect on that particular individual offender.

The ALRC recommends the introduction of such provisions. The ALRC further recommends that in the courts of superior jurisdiction (District/County and Supreme Courts), taking account of unique systemic and background factors should be done through the submission of 'Indigenous Experience Reports', ideally prepared by independent Aboriginal and Torres Strait Islander organisations. In the courts of summary jurisdiction (Local or Magistrates Courts) where offenders are sentenced for lower level offending, and time and resources are limited, the ALRC recommends that courts accept evidence in support of the provisions through less formal methods.

The recommendations in **Chapter 6** aim to ensure sentencing courts are provided with all the information relevant to the unique experiences and systemic factors affecting Aboriginal or Torres Strait Islander peoples, and their impact on the offender. This would enable courts to impose the most appropriate sentence on Aboriginal and Torres Strait Islander offenders, taking into account all of the circumstances, including any available and appropriate community-based options.

Community-based sentencing

Each state and territory, and the Commonwealth, have legislation that guides the sentencing process and all have sentencing regimes enabling courts to order that certain offenders serve their sentences in the community. Community-based sentences have some significant advantages over full-time imprisonment where the offender does not pose a demonstrated risk to the community.

Despite the advantages of community-based sentences, Aboriginal and Torres Strait Islander peoples are less likely to receive a community-based sentence than non-Indigenous offenders and as a result may be more likely to end up in prison for the same offence. In addition, even when Aboriginal and Torres Strait Islander people are given a community-based sentence, they may be more likely to breach the conditions of the community-based sentence and may end up in prison as a result.

In **Chapter 7**, the ALRC focuses on reform to community-based sentence regimes to make them more accessible and flexible for Aboriginal and Torres Strait Islander offenders, to provide greater support and to mitigate against breach.

The ALRC also examines short and suspended sentences of imprisonment, both of which can have significant negative consequences for the offender. Nevertheless, unless access to community-based sentences is improved, the removal of short and suspended sentences of imprisonment as sentencing options may lead to an even greater number of Aboriginal and Torres Strait Islander offenders going to jail. Improving access to community-based sentences is necessary to reduce the incarceration rates of Aboriginal and Torres Strait Islander offenders. Once community-based sentences are uniformly available, consideration could be given to abolishing short terms of imprisonment and suspended sentences.

Mandatory sentencing

Evidence suggests that mandatory sentencing increases incarceration, is costly, and is not effective as a crime deterrent. Mandatory sentencing may also disproportionately affect particular groups within society, including Aboriginal and Torres Strait Islander peoples—especially those found guilty of property crime.

In **Chapter 8**, the ALRC recommends that Commonwealth, state and territory governments should repeal sentencing provisions that impose mandatory or presumptive terms of imprisonment upon conviction of an offender, and that have a disproportionate impact on Aboriginal and Torres Strait Islander peoples. This chapter further highlights those mandatory sentences attached to offences that have been identified by stakeholders as having a disproportionate impact on Aboriginal and Torres Strait Islander peoples. The ALRC suggests that states and territories do further work to identify and repeal mandatory sentence provisions that in practice have a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

Prison programs and parole

The rate of previous imprisonment for Aboriginal and Torres Strait Islander people is high—up to 76% of Aboriginal and Torres Strait Islander prisoners in 2016 had been imprisoned previously, compared with 49% of the non-Indigenous prison population. Aboriginal and Torres Strait Islander prisoners are more likely to have been in prison at least five times previously, and are less likely than non-Indigenous prisoners to have never been in prison before. Most repeat offenders had previously received a prison sentence, and generate churn in the prison system.

Prison programs that address known causes of offending—such as poor literacy, lack of vocational skills, drug and alcohol abuse, poor mental health, poor social and family ties—may provide some of the supports needed to reduce the rates of repeat offending by Aboriginal and Torres Strait Islander people. While prison programs designed for Aboriginal and Torres Strait Islander prisoners are offered in most states and territories, these programs mostly apply to prisoners serving lengthy sentences, and are generally designed for male offenders.

Aboriginal and Torres Strait Islander prisoners require assistance to address offending behaviours and to transition back into the community. For female offenders in particular, programs need to be trauma-informed and culturally safe. In **Chapter 9**, the ALRC recommends that prison programs be developed with relevant Aboriginal and Torres Strait Islander organisations. The programs should be made available to Aboriginal and Torres Strait Islander people serving short sentences or held on remand. Additionally, programs designed for female Aboriginal and Torres Strait Islander prisoners should be developed, designed and delivered by Aboriginal and Torres Strait Islander organisations and services.

The ALRC recognises the critical role that release on parole has in assisting offenders to transition out of prison and reintegrate into society. To this end, the ALRC also recommends reforms that aim to encourage, first, eligible Aboriginal and Torres Strait

Islander prisoners to apply for parole and, secondly, the development of throughcare programs that provide ongoing support following release from prison.

Access to justice

'Access to justice' is an essential element of the rule of law. It refers to the need to ameliorate or remove barriers to access and to ensure that legal and judicial outcomes are just and equitable. It is enshrined in Article 14 of the *International Covenant of Civil and Political Rights*.

In **Chapter 10,** the ALRC focuses on specific access to justice issues faced by Aboriginal and Torres Strait Islander people appearing as defendants before the criminal justice system. The ALRC makes a suite of recommendations targeted at addressing the complex legal needs of Aboriginal and Torres Strait Islander people and improving the experience of Aboriginal and Torres Strait Islander people with the courts. The ALRC recommends that, where needed, state and territory governments should establish interpreter services within the criminal justice system, and should establish specialist Aboriginal and Torres Strait Islander sentencing courts. The ALRC also recommends that, where a person is found unfit to stand trial, state and territory governments should introduce special hearing processes that provide for a fixed term of detention and regular periodic reviews while the person remains in detention.

The chapter also highlights the need for adequate resourcing of legal assistance providers. Access to legal representation and advice is one of the cornerstones of addressing the disproportionate rates of Aboriginal and Torres Strait Islander incarceration. In the absence of legal representation and advice, a defendant may be incarcerated for a range of reasons, including an inappropriate guilty plea, and a lack of awareness of available defences or pleas in mitigation.

Aboriginal and Torres Strait Islander women

In **Chapter 11**, the ALRC contextualises Aboriginal and Torres Strait Islander female offending within experiences of intergenerational trauma, family and sexual violence, child removal, mental illness and disability, and poverty. The ALRC argues that strategies that aim to address the offending of Aboriginal and Torres Strait Islander women must take a trauma-informed and culturally appropriate approach. To this end, the ALRC recommends that all criminal justice responses should be developed with and delivered by Aboriginal and Torres Strait Islander women.

The ALRC briefly reviews some of the alternatives to incarceration, including holistic, trauma-informed diversion programs for Aboriginal and Torres Strait Islander women who have experienced deep and intergenerational trauma. Aboriginal and Torres Strait Islander women constitute a fast growing group in the prison population, yet the historically low numbers of female Aboriginal and Torres Strait Islander offenders—and misunderstandings of their criminogenic needs—has meant that few appropriately-designed criminal justice responses are available.

Female Aboriginal and Torres Strait Islander offenders are likely to have been victims, often of family violence, and the ALRC makes recommendations to enhance police responses to family violence in Aboriginal and Torres Strait Islander communities.

Fines and driver licences

Statutory fine enforcement regimes affect Aboriginal and Torres Strait Islander people unduly and can result in incarceration. Imprisonment is a disproportionate response to fine default, and impacts especially on Aboriginal and Torres Strait Islander women. In **Chapter 12**, the ALRC recommends the amendment of fine enforcement regimes so that they do not, directly or indirectly, allow for imprisonment.

The imposition of fines and fine enforcement regimes affect Aboriginal and Torres Strait Islander people disproportionately. Fine enforcement regimes can aggravate criminogenic factors and operate to further entrench disadvantage, especially when the penalty for default or secondary offending includes further fines, driver licence suspension or disqualification, and imprisonment.

The ALRC makes recommendations to increase the efficacy and decrease the harm caused to Aboriginal and Torres Strait Islander people by the imposition of fines. These include decreasing the size of fines, limiting the issue of infringement notices, the nationwide adoption of Work and Development Orders based on the New South Wales model, and the provision of a discretion to skip driver licence suspension where the person in fine default is vulnerable, supported by statutory guidelines for state debt recovery agencies. These are not standalone recommendations and, together with the abolition of imprisonment, seek to make fine systems and fine enforcement regimes fairer and more responsive to the circumstances of Aboriginal and Torres Strait Islander people, especially in regional or remote locations.

The ALRC further discusses two key pathways for Aboriginal and Torres Strait Islander people into fine enforcement, namely offensive language provisions and driving without a licence.

Alcohol

Aboriginal and Torres Strait Islander people are less likely to drink alcohol than non-Indigenous people, but those who do drink, are more likely to drink at harmful levels. In **Chapter 13** the ALRC looks at the harmful use of alcohol in Aboriginal and Torres Strait Islander communities and the links between alcohol, offending and incarceration.

The ALRC outlines a range of responses that have been adopted to address alcohol-related offending, including liquor accords, restrictions on the sale of alcohol, banned drinkers registers and mandatory treatment programs and makes two recommendations for reform. First, the ALRC recommends that all initiatives to reduce the harmful effects of alcohol in Aboriginal and Torres Strait Islander communities should be developed with, and led by, these communities to meet their particular needs. Secondly, it recommends that Commonwealth, state and territory governments should enable and provide support to Aboriginal and Torres Strait Islander communities that wish to address alcohol misuse to develop and implement local liquor accords; to develop plans to prevent the sale of full strength alcohol; or to reduce the availability of particular alcohol ranges or products within their communities.

Police accountability

In **Chapter 14**, the ALRC recognises the good work undertaken by police officers on a daily basis, often in difficult and dangerous circumstances, and that Commonwealth, state and territory police have undertaken significant reforms to culture, policy and practice in recent years to improve relationships with Aboriginal and Torres Strait Islander peoples, examples of which are provided in this chapter.

Notwithstanding those measures, throughout this Inquiry, the ALRC heard that many Aboriginal and Torres Strait Islander people continue to have negative attitudes towards police, holding the view that the law is applied unfairly and that complaints about police practices are not taken seriously. It is clear that those perceptions have strong historical antecedents, and there is evidence that the law is applied unequally—for example, Aboriginal and Torres Strait Islander young people are less likely to be cautioned and more likely to be charged than non-Indigenous young people.

The ALRC suggests that the perception of poor police practices needs to be addressed in order to improve relationships between police and Aboriginal and Torres Strait Islander peoples. Poor relations influence how often Aboriginal and Torres Strait Islander people interact with police and how they respond in interactions with police. Poor police relations can contribute to the disproportionate arrest, police custody and incarceration rates of Aboriginal and Torres Strait Islander people. It may also undermine police investigations.

The ALRC recommends that police practices and procedures—particularly the exercise of police discretion—are reviewed by governments so that the law is applied equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples. The ALRC also recommends that police complaints handling mechanisms be reviewed, particularly addressing the perception by Aboriginal and Torres Strait Islander people that their complaints are not taken seriously and that police misconduct is not addressed. Mechanisms for independent assessment or review of complaints should be considered.

The implementation of these two recommendations will require further consultation with Commonwealth, state and territory police and Aboriginal and Torres Strait Islander peoples. Such consultation can assist in finding an appropriate balance to enable efficient policing with strong internal management structures, ensure that police practices and procedures are applied equally, and make certain that investigations of complaints about police misconduct are, and are seen to be, thorough, transparent and fair.

The ALRC further recommends a range of initiatives that could be implemented to improve police culture. In particular, it suggests that successful initiatives are acknowledged and, where possible, scaled up.

Chapter 14 also deals with the gap in the provision of custody notification services that provide 24-hour, 7-day a week telephone legal advice services to Aboriginal and Torres Strait Islander people who have been detained in police custody. The ALRC recommends that a requirement to notify an Aboriginal and Torres Strait Islander legal

service be provided for in statute and that it extends to detention in custody for any reason—including for protective reasons.

Child protection and adult incarceration

Research suggests that the relationship between the child protection system, juvenile justice and adult incarceration is so strong that child removal into out-of-home care and juvenile detention could be considered key drivers of adult incarceration.

While child protection and juvenile detention fall outside the scope of this Inquiry, in **Chapter 15,** the ALRC recommends that a national review of the child protection laws and processes that affect Aboriginal and Torres Strait Islander children should be undertaken.

Criminal justice targets and Aboriginal Justice Agreements

Reducing Aboriginal and Torres Strait Islander incarceration requires a coordinated governmental response, and effective collaboration with Aboriginal and Torres Strait Islander peoples. In **Chapter 16**, the ALRC makes two recommendations that aim to improve both of these. It recommends that there should be national targets to reduce both the rate of incarceration of Aboriginal and Torres Strait Islander people, and the rate of violence against Aboriginal and Torres Strait Islander people. These goals are interrelated, and will facilitate improvements not only in the rate at which Aboriginal and Torres Strait Islander people come in contact with the criminal justice system, but also in community safety.

The ALRC also recommends that Aboriginal Justice Agreements should be in place in states and territories. The success of many of the recommendations made in this Report relies on the development of collaborative relationships between government and Aboriginal and Torres Strait Islander organisations. Aboriginal Justice Agreements can provide a foundation on which to facilitate, build, and solidify these relationships.

The law reform process

The scope of each ALRC inquiry is defined by the Terms of Reference. The recommendations for reform must sit within this scope and need to be built on an appropriate conceptual framework and evidence base.

A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform. Pursuant to section 38 of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.

The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry, as set out in the Terms of Reference. For each inquiry, the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. While the exact procedure is

tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC website.

Community consultation

The ALRC undertook a national consultation process to gain an understanding of the key issues in the Inquiry, and the broader context in which Aboriginal and Torres Strait Islander peoples are incarcerated. The ALRC conducted 149 consultations with key stakeholders across the country. A list of those consulted is included in this Report. The ALRC received 121 public and six confidential submissions in response to a Discussion Paper published on 19 July 2017. These submissions came from a wide range of people and organisations, including: individuals in their private capacity; academics; lawyers; Aboriginal and Torres Strait Islander organisations and legal services; law societies and representative groups; legal aid organisations; community legal advocacy groups; peak bodies; and state and territory governments. Consultations and submissions, together with other research, including earlier reports and inquiries, have informed the recommendations for reform in this Report. The ALRC thanks all stakeholders for the important contribution they have made to our evidence base.

Appointed experts

In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also received by the ALRC from members of its Advisory Committee and part-time Commissioners. The Advisory Committee met on three occasions during the course of the Inquiry. A list of Advisory Committee members is included at the front of this Report. While ultimate responsibility for the recommendations lies with the Commissioners of the ALRC, Advisory Committee members provide quality assurance in the consultation and research process, assist in the identification of key issues, and contribute to the determination of the final recommendations. The ALRC acknowledges the considerable contribution made by the Advisory Committee members, our part-time Commissioners, and expert readers and expresses its gratitude to them for voluntarily providing their time and expertise.

Outcomes

Implementation of the recommendations in this Report will reduce the disproportionate rate of incarceration of Aboriginal and Torres Strait Islander people and improve community safety. These recommendations will:

- promote substantive equality before the law for Aboriginal and Torres Strait Islander peoples;
- promote fairer enforcement of the law and fairer application of legal frameworks;
- ensure Aboriginal and Torres Strait Islander leadership and participation in the development and delivery of strategies and programs for Aboriginal and Torres Strait Islander people in contact with the criminal justice system;

- reduce recidivism through the provision of effective diversion, support and rehabilitation programs;
- make available to Aboriginal and Torres Strait Islander offenders alternatives to imprisonment that are appropriate to the offence and the offender's circumstances; and
- promote justice reinvestment through redirection of resources from incarceration to prevention, rehabilitation and support, in order to reduce reoffending and the long-term economic cost of incarceration of Aboriginal and Torres Strait Islander peoples.

Reduced incarceration and greater support for Aboriginal and Torres Strait Islander people in contact with the criminal justice system will, in turn, improve health, social and economic outcomes for Aboriginal and Torres Strait Islander peoples.