

# 1. Introduction to the Inquiry

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## The Inquiry

1.1 This Inquiry has focused on the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, a situation that the then Attorney-General of Australia, Senator the Hon George Brandis QC, described as a ‘national tragedy’<sup>1</sup>. His Honour Judge Matthew Myers AM was appointed as ALRC Commissioner to lead the Inquiry.

### Terms of Reference

1.2 The ALRC was asked in the Terms of Reference for this Inquiry to consider laws and legal frameworks that contribute to the incarceration rate of Aboriginal and Torres Strait Islander peoples and inform decisions to hold or keep Aboriginal and Torres Strait Islander peoples in custody. Under the Terms of Reference, ‘legal frameworks’ encompass police, courts, legal assistance services and prisons. The ALRC was also asked to consider a number of factors that decision makers take into account when deciding on a criminal justice response, including community safety, the

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1 George Brandis and Nigel Scullion, ‘ALRC Inquiry into Incarceration Rates of Indigenous Australians’ (Media Release, 27 October 2016).

availability of alternatives to incarceration, the degree of discretion available in decision making and principles informing decisions to incarcerate. The incarceration of Aboriginal and Torres Strait Islander women was specifically identified as an area for consideration.

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

1.4 The reference provided to the ALRC essentially asked 'what laws and legal frameworks should be introduced or amended so as to reduce Aboriginal and Torres Strait Islander incarceration'. The Report, and the recommendations, set out practical measures that should be undertaken to achieve this outcome.

## **Consultation**

1.5 As part of the Inquiry process, the ALRC undertook a wide ranging consultation process to gain an understanding of the complex and often intergenerational context in which Aboriginal and Torres Strait Islander peoples are incarcerated. The ALRC conducted 149 consultations with key stakeholders across Sydney, Dubbo, Bourke, Brisbane, Perth, Alice Springs, Darwin, Adelaide, Melbourne, Cairns and the Torres Strait, and New Zealand.<sup>2</sup> The Inquiry also benefited from the many insights and experiences that were provided in 121 public and six confidential submissions made in response to a Discussion Paper published by the ALRC on 19 July 2017. These consultations and submissions, together with other research, including earlier reports and Commissions of Inquiry, have informed the recommendations for reform in this Report.

1.6 The ALRC sincerely thanks the many stakeholders who have contributed to the Inquiry, either by consultation or submission. Consultation lies at the heart of the ALRC process as a hallmark of best practice law reform, and the ALRC is extremely grateful for the generous, thoughtful and insightful contributions of our Inquiry stakeholders to the evidence base underpinning our recommendations.

1.7 In keeping with usual ALRC practice, an Advisory Committee was constituted for the period of the Inquiry. The Committee met on three occasions during the course of the Inquiry: on 20 March 2017, 5 June 2017, and 20 November 2017. 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

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2 A list of consultations is included at the end of this Report.

Commissioners, and expert readers and is extremely grateful to them for voluntarily providing their time and expertise.

## Outcomes

1.8 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.

1.9 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.

## Historical descriptions of Aboriginal and Torres Strait Islander peoples

1.10 In discussing both the recent and historical context in which Aboriginal and Torres Strait Islander peoples are incarcerated, the ALRC has quoted past language and descriptors of Aboriginal and Torres Strait Islander peoples. The ALRC considers the use of these descriptors is no longer appropriate or acceptable. The ALRC has quoted from a number of superior court judgments, as well as historical policies and legislation that referred to Aboriginal and Torres Strait Islander peoples as "Aborigines".<sup>3</sup> This descriptor is regarded by many within the Aboriginal and Torres Strait Islander community as unacceptable, and a reminder of the way in which Aboriginal and Torres Strait Islander peoples were treated pursuant to policies such as the *Aborigines Protection Act 1909* (NSW). The ALRC determined not to alter the original text of the quotes contained within this Report as such language is

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3 See, eg, *Aborigines Protection Act 1909* (NSW); *R v Fernando* (1992) 76 A Crim R 58.

demonstrative of the attitudes and context in which Aboriginal and Torres Strait Islander peoples have historically been described in Australian society.

## **Approach to reform**

1.11 While the Inquiry examined options for law reform that can reduce the incarceration rate of Aboriginal and Torres Strait Islander peoples, the recommendations and commentary in the Report do not seek to excuse or minimise violent or abusive behaviours for which incarceration is the appropriate response. It is the intention of the ALRC that the recommendations and commentary in this Report should not be read as extending to those who would place community safety or the safety of individuals at risk. Further, the ALRC does not suggest that criminal behaviours should be excused or ignored as a means to reduce the incarceration rate of Aboriginal and Torres Strait Islander peoples.

1.12 The recommendations in this Report are primarily focused on reducing the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples who are cycling through the criminal justice system serving short sentences of two years and under. This group of offenders represent some 45% of all Aboriginal and Torres Strait Islander people entering into prisons.<sup>4</sup>

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

Jail is an ineffective tool to deter crime—indeed prisons have been referred to as ‘universities of crime’, so effective they seem at encouraging recidivism. Jailing people is also very costly, so it is time that we tackle the problem and find ways to reduce the record number of people filling our jails. Investing more funds in early intervention, prevention and diversion programs that can help address the underlying causes of crime is likely to achieve safer communities and reduce rates of reoffending. Sadly, despite a reduction in most categories of crime, a lack of resources for non-custodial options, especially in regional NSW, has led to more offenders being sentenced to jail, albeit for short periods, for relatively minor offences.<sup>5</sup>

1.14 A reduction in the number of Aboriginal and Torres Strait Islander offenders serving short sentences of imprisonment would not only see a reduction in the prison population, but would create collateral benefits. The wider Australian community would benefit from safer communities through reduction in crime, as well as through a reduction in the economic cost of incarceration.

## **Disproportionate representation**

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

1.16 Aboriginal and Torres Strait Islander adults make up around 2% of the national population, and yet constituted 27% of the national prison population. Aboriginal and

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4 See ch 3.

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

Torres Strait Islander incarceration rates increased 41% between 2006 and 2016. In that time, the gap between Aboriginal and Torres Strait Islander and non-Indigenous imprisonment rates has widened: with over-representation of Aboriginal and Torres Strait Islander people in prison increasing from a factor of 11 to 12.5. In 2016, Aboriginal and Torres Strait Islander women constituted 34% of the female prison population, and an Aboriginal or Torres Strait Islander woman was 21.2 times more likely to be imprisoned than a non-Indigenous woman.<sup>6</sup>

1.17 There are also particular areas in which Aboriginal and Torres Strait Islander peoples are disproportionately represented in the prison population. For example, Aboriginal and Torres Strait Islander offenders are more likely to be sentenced to short terms of imprisonment than their non-Indigenous counterparts, with a national median aggregate sentence length of two years, compared to 3.5 years for non-Indigenous prisoners.<sup>7</sup> Hence, Aboriginal and Torres Strait Islander peoples are being incarcerated for lower order offences for which diversion and rehabilitation may be a more appropriate response.

1.18 A full discussion of the disproportionate incidence of Aboriginal and Torres Strait Islander incarceration is provided in Chapter 3.

### **Contributing factors**

1.19 While this Inquiry has considered the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system, it is important to recognise that ‘the majority of Aboriginal and Torres Strait Islander peoples never commit criminal offences’.<sup>8</sup>

1.20 The ALRC also recognises that while laws and legal frameworks are an important factor contributing to over-representation, other social, economic, and historic factors also contribute:

The bigger picture cannot be ignored: the history of colonisation and dispossession has had enduring effects on Aboriginal and Torres Strait Islander communities and individuals. For example, there is a strong correlation between having a family member removed and arrest and incarceration. The high rate of imprisonment is occurring in the context of poor health, inadequate housing, high levels of family violence, and high levels of unemployment.<sup>9</sup>

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

the relationships between Aboriginal and Torres Strait Islander offending and incarceration and inter-generational trauma, loss of culture, poverty, discrimination,

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6 For a fuller statistical overview of Aboriginal and Torres Strait Islander incarceration, see ch 3.

7 Australian Bureau of Statistics, above n 10, table 25. See further ch 3.

8 Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Terms of Reference (2017).

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

alcohol and drug use, experience of violence, including family violence, child abuse and neglect, contact with child protection and welfare systems, educational access and performance, cognitive and psychological factors, housing circumstances and employment.

1.22 The Terms of Reference recognise earlier important research that has touched or focused upon Aboriginal and Torres Strait Islander incarceration, its causes and its devastating effects. In formulating its reform response, the ALRC has considered the recommendations made in these other reports, inquiries and action plans in so far as they address the criminal justice system, including but not limited to:

- a. the Royal Commission into Aboriginal Deaths in Custody,
- b. the Royal Commission into the Protection and Detention of Children in the Northern Territory (due to report 1 August 2017),
- c. Senate Standing Committee on Finance and Public Administration's Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services,
- d. Senate Standing Committee on Community Affairs' inquiry into Indefinite Detention of People with Cognitive and Psychiatric impairment in Australia,
- e. Senate Standing Committee on Indigenous Affairs inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities,
- f. reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner,
- g. the ALRC's inquiries into Family violence and Family violence and Commonwealth laws, and
- h. the National Plan to Reduce Violence against Women and their Children 2010–2022.<sup>10</sup>

1.23 The reports and inquiries referred to above have highlighted the many social, political and economic factors that contribute to Aboriginal and Torres Strait Islander imprisonment rates. Many of these are recognised in the national 'Closing the Gap' targets<sup>11</sup> and the Productivity Commission report *Overcoming Indigenous Disadvantage: Key Indicators 2016*.<sup>12</sup>

1.24 These reports have identified factors that include: disadvantage caused by a lack of education and low employment rates; inadequate housing, overcrowding and homelessness; poor health outcomes, including mental health, cognitive impairment including Foetal Alcohol Spectrum Disorders (FASD) and physical disability; and alcohol and drug dependency and abuse.<sup>13</sup> The Royal Commission into the Protection and Detention of Children in the Northern Territory has also recognised the cyclical

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10 Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples, Terms of Reference* (2017).

11 Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)* (2008).

12 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016).

13 *Ibid* [4.1]–[4.110]. See further ch 2.

and intergenerational nature of social and economic disadvantage on Aboriginal and Torres Strait Islander peoples.<sup>14</sup>

1.25 The ALRC has noted during the consultation process significant and recurrent factors acting as drivers of incarceration. The ALRC's work on the Inquiry suggests that there are a number of other factors that contribute to the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples, including Aboriginal and Torres Strait Islander young people's contact with the juvenile justice system; the background and lived experiences of Aboriginal and Torres Strait Islander children put into out-of-home care; the significant proportion of Aboriginal and Torres Strait Islander prisoners who experience poor physical health, mental illness and cognitive impairment, as well as Aboriginal and Torres Strait Islander prisoners with backgrounds of physical and sexual abuse. An examination of these factors is beyond the scope of this Inquiry. However, the ALRC believes that the impact of these factors warrants further consideration by governments.

1.26 The ALRC draws attention to research showing the early disproportionate incarceration of Aboriginal children in the juvenile justice system. The Australian Institute of Health and Welfare reported in 2015 that 'Indigenous young people aged 10-17 were 26 times as likely as non-Indigenous young people to be in detention on an average night in the June quarter of 2015... This was an increase from 19 times as likely in the June quarter of 2011'.<sup>15</sup>

1.27 Dr Don Weatherburn has noted the progression of young Aboriginal and Torres Strait Islander peoples through the criminal justice system in New South Wales:

By the age of 23, more than three quarters (75.6%) of the NSW Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a NSW Criminal Court. The corresponding figure for the non-Indigenous population of NSW was just 16.9%. By the same age, 24.5% of the Indigenous population, but just 1.3% of the non-Indigenous population had been refused bail or given a custodial sentence (control order or sentence of imprisonment).<sup>16</sup>

1.28 The ALRC was concerned by the many stories delivered by stakeholders during the Inquiry about the lived experiences and background of deprivation and disadvantage of young people in custody. These experiences were mirrored in the 2009 NSW Young People in Custody Health Survey (YPICHS) Report prepared by NSW Justice Health in conjunction with NSW Juvenile Justice that found:

Over 27% of YPICHS participants had been placed in care as a child; this was significantly higher among young women and Aboriginal young people. Low educational attainment was common with only 38% of participants in school prior to custody and an average age of leaving school of 14.4 years. Nearly half (45%) of participants had ever had a parent in prison and 10% currently had a parent in prison.

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

15 Australian Institute of Health and Welfare, 'Youth Detention Population in Australia—2015' (Bulletin No 131, December 2015) 11.

16 Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 5.

Aboriginal young people were twice as likely to have ever had a parent in prison compared to non-Aboriginal young people (61% vs 30%).

1.29 One particular contributing factor to adult incarceration rates has been shown to be out-of-home care. This Inquiry focuses on the incarceration of adult Aboriginal and Torres Strait Islander people. However, research has made links between child protection, out-of-home care, and juvenile and adult incarceration.<sup>17</sup> The issue of out-of-home care as a driver of incarceration is discussed further in Chapter 15.

1.30 During the consultation process, the ALRC was advised many times of the negative effects and consequences for Aboriginal and Torres Strait Islander people experiencing intergenerational trauma. Professor Harry Blagg, Dr Vickie Hovane and Dorinda Cox submitted that:

Inter-generational trauma impacts on all Aboriginal families and communities. It impacts on individuals, families, communities and cultures. For Aboriginal people, it is a collective consequence of colonisation rather than simply an individual experience. It is compounded by negative contact with the justice and related systems, such as children's protection. Because this trauma impacts across all levels of Aboriginal society, there is a need for a holistic and life-span approach to addressing the issue.<sup>18</sup>

1.31 Aboriginal and Torres Strait Islander communities and individuals have been negatively affected by laws, policies and practices implemented by successive government policies, such as assimilation and child removal. The ALRC also acknowledges the physical and psychological harm caused to many Aboriginal and Torres Strait Islander women and children through family violence and abuse.<sup>19</sup>

1.32 As a law reform body, the focus of the ALRC in the Inquiry centred on reform to laws and legal frameworks that could address the over-representation of Aboriginal and Torres Strait Islander peoples in prisons. However, the ALRC acknowledges that law is only one of the many factors in a larger historical, social and economic context that contributes to incarceration.<sup>20</sup>

### ***Rural and remote communities***

1.33 Although the majority of Aboriginal and Torres Strait Islander peoples live in cities or regional areas (57% in major cities or inner regional areas), a relatively high proportion live in remote and very remote areas (21%). In comparison, almost 90% of

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

18 Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*.

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

20 Chris Cunneen, 'Racism, Discrimination and the over-Representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current Issues in Criminal Justice* 329, 334–5.



non-Indigenous Australians (over 19 million people) live in major cities or inner regional areas.<sup>21</sup>

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

Socioeconomic disadvantage directly impacts on the ability of Indigenous people to access justice. Socioeconomic disadvantage among Aboriginal and Torres Strait Islander Australians is widespread and multifaceted: various analyses show that, on average, Indigenous people experience poorer outcomes than non-Indigenous people in the areas of education, income, health and housing ... Socioeconomic disadvantage is linked to geographic isolation, which in itself can represent a barrier in accessing justice.<sup>22</sup>

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

1.36 There are many access to justice issues that arise in this context, including a lack of interpreters as well as limited access to legal representation with a reliance on ‘fly in fly out’ judicial officers and legal practitioners. In some cases this can lead to the provision of compromised advice and representation and a greater incidence of incarceration of offenders.<sup>23</sup>

### **Aboriginal and Torres Strait Islander incarceration in the federal context**

1.37 Much of the criminal law that was the subject of the Inquiry fell within state and territory jurisdictions. The *Australian Law Reform Commission Act 1996* (Cth) provides that one of the functions of the ALRC during its inquiry process is to consider proposals for uniformity between state and territory laws and to consider proposals for complementary Commonwealth, state and territory laws.<sup>24</sup>

1.38 During the Inquiry, the ALRC identified state and territory laws and legal frameworks that are key contributors to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. Although ALRC heard that in Victoria newly introduced legislation must contain a statement of compatibility with the *Charter of Human Rights and Responsibilities Act 2009* (Vic), the ALRC is nonetheless cognisant of the considerable negative impact some laws and legal frameworks have on Aboriginal and Torres Strait Islander peoples across all states and

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

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

23 See further ch 10.

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

territories. The ALRC has sought to highlight those laws, legal frameworks and practices that have led to the disproportionate incarceration of Aboriginal and Torres Strait Islander peoples as well as those that have worked to reduce the rate of Aboriginal and Torres Strait Islander incarceration.

1.39 Various recommendations contained within this Report make recommendations directed towards state and territory governments. For the purposes of implementation of those recommendations, the ALRC intends that such recommendations extend to individual government departments and government agencies.

### **International setting**

1.40 The ALRC's approach to reform in this Inquiry is informed by relevant international human rights standards and instruments. The Terms of Reference make specific reference to these. In addition, under its constituting legislation, the ALRC is directed to have regard to 'Australia's international obligations that are relevant to the matter'.<sup>25</sup>

1.41 International law requires that Aboriginal and Torres Strait Islander peoples enjoy equality and non-discrimination before the law and throughout the criminal justice process including in relation to law enforcement and the judicial system. Australia has obligations under international law to implement the following human rights treaties:

- the International Covenant on Civil and Political Rights (ICCPR);<sup>26</sup>
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>27</sup>
- the International Convention on the Elimination of all forms of Racial Discrimination (ICERD);<sup>28</sup>
- the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>29</sup>
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>30</sup>
- the Convention on the Rights of the Child (CROC);<sup>31</sup> and

25 *Australian Law Reform Commission Act 1996* (Cth) s 24(1)(b).

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

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

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

29 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1980, 1249 UNTS (entered into force 3 September 1981).

30 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

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

- the Convention on the Rights of Persons with Disabilities (CRPD).<sup>32</sup>

1.42 In addition, the Australian Government endorsed the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) on 3 April 2009.<sup>33</sup> Although the Declaration is non-binding and aspirational in nature, it presents a series of structured principles that might be utilised to ameliorate disadvantage and discrimination experienced by Aboriginal and Torres Strait Islander peoples.

1.43 Also of note in the international context is that, on 1 July 2016, the United Nations Human Rights Council adopted a resolution reflecting concern that ‘indigenous women and girls may be overrepresented in criminal justice systems and may be more marginalized, and thus experience more violence before, during and after the period of incarceration’.<sup>34</sup>

### **Economic factors and justice reinvestment**

1.44 The implementation of the recommendations in this Report, including the provision of more diversion, support and rehabilitation programs before, during and after incarceration, will cost money. Many of the recommendations in this Report will require funding. However, if implemented they will cost less than the continuing cost to the community of keeping ever increasing numbers of people detained in prisons. The ALRC suggests that when looking at these costs it is important to consider the long-term savings that will be generated through reducing incarceration rates.

1.45 A number of submissions provided information about the cost of keeping an adult in prison per day and per year. The cost differs over time and from jurisdiction to jurisdiction. The Productivity Commission has provided a general indication of these costs:

Nationally, in 2015-16, the total cost per prisoner per day, comprising net operating expenditure, depreciation, debt servicing fees and user cost of capital (but excluding payroll tax and, where able to be disaggregated by jurisdictions, prisoner transport and escort costs and prisoner health expenditure) was \$283.<sup>35</sup>

1.46 One example of prison growth and cost is the major expansion of New South Wales Corrective Services’ prison infrastructure. At 30 June 2016, there were 12,629 adult prisoners in NSW prisons, an increase of 7% (832 prisoners) from 2015.<sup>36</sup> In

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

33 Australian Human Rights Commission, ‘United We Stand—Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia’ (Media Release, 3 April 2009).

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

35 Productivity Commission, *Report on Government Services 2017, Volume C: Justice*, 8.19

36 Australian Bureau of Statistics, *Prisoners in Australia, 2016: State and Territory Profiles—New South Wales, Cat No 4517.0* (2016).

2016, the NSW Government announced that it will spend \$3.8 billion on over a dozen new correctional centres in order to house the increasing prison population.<sup>37</sup>

1.47 PwC has endeavoured to calculate the public costs that can be avoided by a reduction in recidivism and prison numbers, suggesting:

- Indigenous incarceration is currently costing the Australian economy \$7.9 billion per annum (in 2016)
- These costs are expected to grow to \$9.7 billion per annum in 2020 and \$19.8 billion per annum by 2040 as a result of a growing incarcerated population.<sup>38</sup>

1.48 Justice reinvestment is based on the concept of saving public money by keeping people out of costly prisons through investment in programs and strategies that prevents offending behaviours within communities. Some of those savings can then be re-invested in programs that will reduce offending and recidivism and thereby slow the continuing growth in, and eventually reduce, prison numbers. However, justice reinvestment requires initial funding in the expectation of reaping greater financial returns in the longer term. The ALRC recognises that it will take a great deal of governmental determination to overcome the administrative inertia and vested interests that may resist the redirection of major spending programs away from prisons. Recommendations and a full discussion in respect of justice reinvestment can be found in Chapter 4.

## Terminology

1.49 Throughout this report a number of terms or phrases are frequently used. These are summarised here.

### Aboriginal and Torres Strait Islander peoples

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

1.51 The recognition of diversity is rarely apparent from data and analysis of persons involved in the criminal justice system. Data rarely makes a distinction between Aboriginal people and Torres Strait Islander people. This deficit has prevented the ALRC from identifying whether research and analysis is relevant to both Aboriginal and Torres Strait Islander peoples, or whether those from different Aboriginal cultural backgrounds may be represented differently in the criminal justice system.

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37 Department of Justice (NSW), *New Prisons* <<http://www.correctiveservices.justice.nsw.gov.au:80/new-prisons>>.

38 PwC’s Indigenous Consulting, *Indigenous Incarceration: Unlock the Facts* (2017) 27.

1.52 The abbreviation ‘ATSI’ has been used to refer to Aboriginal and Torres Strait Islander peoples in some tables and graphs in this Report.

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

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

1.54 Throughout the Report, the ALRC uses the terms ‘culturally appropriate’, ‘culturally competent’, and ‘culturally safe’ in relation to programs, projects, pilots, initiatives and reforms. In using these terms, the ALRC is referring to the requirement that matters be developed, organised and implemented with Aboriginal and Torres Strait Islander communities and, where possible, facilitated and owned by those communities.

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

an environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience, of learning, living and working together with dignity and truly listening.<sup>39</sup>

1.56 Maryann Bin-Sallik suggests that

[c]ultural safety extends beyond cultural awareness and cultural sensitivity. It empowers individuals and enables them to contribute to the achievement of positive outcomes. It encompasses a reflection on individual cultural identity and recognition of the impact of personal culture on professional practice.<sup>40</sup>

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

Environments of cultural resilience within Aboriginal and Torres Strait Islander communities;

Cultural competency by those who engage with Aboriginal and Torres Strait Islander communities.<sup>41</sup>

1.58 The Council of Australian Governments (COAG) has defined cultural competence as meaning ‘a set of congruent behaviours, attitudes, and policies that

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

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

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

come together in a system, agency, or amongst professionals and enables that system, agency, or those professionals to work effectively in cross-cultural situations'.<sup>42</sup>

1.59 COAG has suggested that cultural competence is

essential for services and programmes offering support to Aboriginal and Torres Strait Islander prisoners and ex-prisoners. Such prisoners and ex-prisoners may lack a level of bi-cultural understanding to be able to switch between Indigenous and mainstream ways of thinking, acting and communicating. This creates an additional level of disadvantage, particularly when dealing with sensitive issues or stressful situations.<sup>43</sup>

1.60 While the ALRC relies upon the definitions above in its understanding of the terms 'culturally appropriate', 'culturally competent', and 'culturally safe', the specific use of these terms by the ALRC in this Report is in reference only to Aboriginal and Torres Strait Islander cultures.

### Trauma-informed approaches

1.61 Many of the discussions and recommendations contained within this Report refer to the effects of trauma upon Aboriginal and Torres Strait Islander peoples. Some recommendations require those implementing the recommendations to take a 'trauma-informed approach' or provide a 'trauma-informed response'. It is necessary to understand what is meant by 'trauma-informed' approach or responses that are specific to, and meet the needs of, Aboriginal and Torres Strait Islander peoples. Professor Helen Milroy—a descendant of the Palyku people of the Pilbara region of Western Australia—has described Aboriginal and Torres Strait Islander people's experiences of trauma:

We are part of the dreaming. We have been in the dreaming for a long time before we are born on this earth and we will return to this vast landscape at the end of our days. It provides for us during our time on earth, a place to heal, to restore purpose and hope, and continue our destiny. Our country and people have suffered many traumas since colonisation, the magnitude of which is beyond words. Looking through trauma is like being trapped in the back of a mirror, there is no reflection of self. It is like being trapped in darkness, unable to see where to go or what is there, surrounded by 'not knowing', paralysed by fear. When we are wounded, our story is disrupted and life becomes fragmented. We may not be able to find our way forward and may start to see life through warped mirrors. We have to understand that trauma is only a part of our story and our story is part of a much greater story that has a different beginning, is enduring and will continue well beyond our lifetime.<sup>44</sup>

1.62 The Mental Health Coordinating Council (MHCC)—a peak body for community mental health organisations in New South Wales—describes the effects of trauma as

that which arises from interpersonal abuse and/or neglect in childhood, as well as victimisation in adulthood, can lead to serious long-term consequences and many survivors adopt extreme coping strategies which can persist into adult life (as an attempt to manage overwhelming traumatic stress). These strategies include

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

43 Ibid.

44 Human Rights and Equal Opportunity Commission, *Social Justice Report 2007* (2008).

suicidality, substance abuse and addictions, self-harming behaviours, dissociation, and re-enactments of past abusive relationships. Trauma can be trans-generational for individuals and/or affect whole communities.<sup>45</sup>

1.63 Trauma can overlap with, but may not include, people who have complex needs. As the MHCC noted:

Complex Need refers to individuals who present with an inter-related mix of diverse mental health and physical health issues, developmental and psychosocial problems. Many people with complex needs have histories of trauma (emotional, physical and/or sexual abuse), as well as other types of childhood interpersonal trauma including but not limited to chronic neglect and the effects of family violence.<sup>46</sup>

***The Stolen Generation: understanding intergenerational trauma***

1.64 Professor Judy Atkinson has emphasised the importance of understanding the nature of Aboriginal and Torres Strait Islander experiences of trauma:

While many Indigenous and non-Indigenous Australian children grow up in safe homes and live in safe communities, there are some who do not. In the case of Indigenous children, some families and communities are unable to, or are still working to, heal the trauma of past events, including displacement from Country, institutionalisation and abuse. The Stolen Generations also represent a significant cause of trauma. In 2008, an estimated 8% of Indigenous people aged 15 and over reported being removed from their natural family and 38% had relatives who had been removed from their natural family...This trauma can pass to children (inter-generational trauma).<sup>47</sup>

1.65 The *Bringing Them Home* Report outlined the deleterious effect of child removal:

One principal effect of the forcible removal policies was the destruction of cultural links. This was of course their declared aim. Culture, language, land and identity were to be stripped from the children in the hope that the traditional law and culture would die by losing their claim on them and sustenance on them.<sup>48</sup>

1.66 Professor Ann McGrath has described policies of child removal that operated within the Northern Territory as ‘the ultimate racist act’.<sup>49</sup> Professor Pat Dudgeon, Dr Michael Wright, Dr Yin Paradies, Darren Garvey and Professor Iain Walker have argued that ‘[McGrath’s] statement can be generalised to the rest of Australia.’<sup>50</sup>

1.67 Lorraine Peeters, Shaan Hamann and Kerrie Kelly have noted that the trauma inflicted by successive government policies of child removal was effectively denied

45 Mental Health Coordinating Council, *Trauma-Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia* (2013) 9.

46 Ibid 8.

47 Judy Atkinson, ‘Trauma-Informed Services and Trauma-Specific Care for Indigenous Australian Children’ (Resource Sheet No 21, Closing the Gap Clearinghouse, 2013) 2.

48 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 202.

49 Ann McGrath, *Born in the Cattle: Aborigines in Cattle Country* (Allen & Unwin, 1987).

50 Pat Dudgeon et al, ‘Aboriginal Social, Cultural and Historical Contexts’ in Helen Milroy, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2014) 3, 12.

until the publication of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), some 80 years after the first sanctioned child removals began:

The trauma generated by these policies was experienced by thousands of children over a 62-year period up until 1972. However, the source of this trauma was not acknowledged until the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) drew attention to policies and practices of forcible removal in 1991. The Royal Commission reported: *'The horror of a regime that took young Aboriginal children, sought to cut them off suddenly from all contact with their families and communities, instil in them a repugnance of all things Aboriginal, and prepare them harshly for a life as the lowest level of worker in a prejudiced white community'...* Following removal, children were placed in non-Aboriginal institutions and foster and adoptive families and many were assigned new names and birth dates to prevent their families from locating them. The children were told either that their families had rejected them or that they were dead.<sup>51</sup>

1.68 The effects of the Stolen Generations have been lasting and intergenerational. As Professors Robert Parker and Helen Milroy note in relation to health and wellbeing outcomes:

The WAACHS [Western Australian Aboriginal Child Health Survey] reports on the psychological wellbeing of members of the Stolen Generations and their families. The survey noted that members of the Stolen Generations were more likely to live in households where there were problems related to alcohol abuse and gambling. They were less likely to have a trusting relationship and were more likely to have been arrested for offences. Members of the Stolen Generations were more likely to have had contact with mental health services. The survey commented that children of members of the Stolen Generations had much higher rates of emotional/behavioural difficulties and high rates of harmful substance use.<sup>52</sup>

1.69 Intergenerational trauma related to Stolen Generations processes can sometimes manifest indirectly:

Indigenous children may... experience a range of distressing life events including illness and accidents, hospitalisation or death of close family members, exposure to violence, family disintegration (with kin networks fragmented due to forced removals, relationship breakdown and possibly incarceration) and financial stress ... [I]t can be difficult to distinguish between direct and indirect trauma for Aboriginal and Torres Strait Islander communities, where there is an ongoing reality for many of 'dislocation, dispossession, deprivation and discrimination'. These sources of trauma are historical and multigenerational, but are also relevant to the current sociological climate within Australia.<sup>53</sup>

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51 Lorraine Peeters, Shaan Hamann and Kerrie Kelly, 'The Marumali Program: Healing for Stolen Generations' in Helen Milroy, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2014) 493–4.

52 Robert Parker and Helen Milroy, 'Aboriginal and Torres Strait Islander Mental Health: An Overview' in Helen Milroy, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2014) 25, 30.

53 Annette Jackson et al, 'Taking Time: A Literature Review—Background for a Trauma-Informed Framework for Supporting People with Intellectual Disability' (NSW Department of Family and Community Services, 2015) 62–3.



1.70 The *Bringing Them Home* Report recommended that ‘services to redress these effects had to be designed, provided and controlled by Aboriginal people themselves’, and highlighted that ‘only Indigenous people themselves are able to comprehend the full extent of the effects of the removal policies’.<sup>54</sup>

### **Trauma-Informed Care and Practice**

1.71 Trauma-Informed Care and Practice (TICP) is ‘an approach whereby all aspects of services are organised around the recognition and acknowledgement of trauma and its prevalence, alongside awareness and sensitivity to its dynamics’.<sup>55</sup> Approaches incorporating TICP have been described by the MHCC as

a strengths-based framework that is responsive to the impact of trauma, emphasising physical, psychological, and emotional safety for both service providers and survivors, and creates opportunities for survivors to rebuild a sense of control and empowerment. It is grounded in and directed by a thorough understanding of the... effects of trauma and interpersonal violence and the prevalence of these experiences in persons who receive mental health services.<sup>56</sup>

1.72 MHCC further noted that:

Key principles of trauma-informed care include safety, trustworthiness, choice, collaboration and empowerment. A TICP framework recognises the impact of power differentials in service settings, maximises self-determination, supports autonomy and empowers individuals to learn about the nature of their injuries and to take responsibility in their own recovery...TICP is informed by an understanding of the particular vulnerabilities and ‘triggers’ that survivors of complex trauma experience, with services delivering better outcomes, minimising re-victimisation and ensuring that self and community wellness and connectedness can be promoted. TICP... acknowledges and clearly articulates that no one understands the challenges of the recovery journey from trauma better than the person living it. This requires that practitioners are attuned to a person’s experience and to the dynamics of trauma and acknowledge, respect and validate that experience.<sup>57</sup>

### **Family violence**

1.73 For the purposes of defining family violence within this Report, the ALRC adopts the definition of family violence used in the 2001 report, *Violence within Indigenous Communities*:

‘Family violence’ was broadly defined to encapsulate not only the extended nature of Indigenous families, but also the context of a range of violence forms, occurring frequently between kinspeople in Indigenous communities. The notion of ‘family violence’ may be summarised as follows:

- family violence may involve all types of relatives. The victim and the perpetrator often have a kinship relation

54 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) 277.

55 Mental Health Coordinating Council, *Trauma-Informed Care and Practice: Towards a Cultural Shift in Policy Reform across Mental Health and Human Services in Australia* (2013) 9.

56 Ibid.

57 Ibid.

- the perpetrator of violence may be an individual or a group
- the victim of violence may also be an individual or a group
- the term 'family' means 'extended family' which also covers a kinship network of discrete, intermarried, descent groups
- the 'community' may be remote, rural or urban based; its residents may live in one location or be more dispersed, but nevertheless interact behave as a social network
- the acts of violence may constitute physical, psychological, emotional, social, economic and/or sexual abuse
- some of the acts of violence are ongoing over a long period of time, one of the most prevalent examples being spousal (or domestic) violence<sup>58</sup>

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58 Paul Memmott et al, *Violence in Indigenous Communities: Full Report* (Attorney General's Department (Cth), 2001) 1.