

## 2. Context

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### Summary

2.1 In 1991, the Royal Commission into Aboriginal Deaths in Custody 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. This chapter 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.

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

## History of contact with the criminal justice system

2.3 Understanding the history of incarceration of Aboriginal and Torres Strait Islander people, as well as the relationship of incarceration with other governmental modes of regulation, enables an appreciation of the complexity of addressing the over-representation of Aboriginal and Torres Strait Islander peoples in the contemporary criminal justice system. Professor Russell Hogg has argued that to make sense of the high levels of Aboriginal incarceration, ‘it is necessary to connect it to other forms of regulation of the Aboriginal population’. However, as Hogg has further noted, this ‘cannot be approached as a linear succession or smooth progression from one mode of regulation to another’.<sup>1</sup>

### Early years of British settlement

2.4 The Colony of New South Wales was said to be established, in legal terms, by settlement or occupancy, rather than by cession or conquest. The significance of this for the application of law to both Aboriginal and non-Indigenous people in the new colony was explained by Deane and Gaudron JJ in *Mabo v Queensland [No 2]* (*Mabo [No 2]*), the landmark decision recognising the survival of native title rights and interests in Australia:

once the establishment of the Colony was complete on 7 February 1788, the English common law, adapted to meet the circumstances of the new Colony, automatically applied throughout the whole of the Colony as the domestic law except to the extent (if at all) that the act of State establishing the Colony overrode it. Thereafter, within the Colony, both the Crown and its subjects, old and new, were bound by that common law.<sup>2</sup>

2.5 Thus, Aboriginal people, with their own systems of law, were immediately and unilaterally held to be subject to a foreign system of law, including the criminal law.<sup>3</sup>

2.6 Deane and Gaudron JJ went on to set out the practical reality of settlement for Aboriginal people:

The first days of the Colony were peaceful in so far as the Aboriginal inhabitants were concerned. They gave up, without dispute, the lands initially occupied by, and in connexion with, the penal camp.

As time passed, the connection between different tribes or groups and particular areas of land began to emerge. The Europeans took possession of more and more of the lands in the areas nearest to Sydney Cove. Inevitably, the Aborigines resented being

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1 Russell Hogg, ‘Penalty and Modes of Regulating Indigenous Peoples in Australia’ (2001) 3(3) *Punishment and Society* 355, 357.

2 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 80.

3 In 1986, the ALRC completed an Inquiry into Aboriginal Customary law, and concluded that Aboriginal customary law should be recognised, and that any recognition should occur against the background and within the framework of the general law. It considered that the particular form of recognition of customary law might vary with context and with the issue being addressed. In relation to criminal law, the ALRC concluded the general law should in appropriate cases take into account or allow for the customary laws and traditions of local Aboriginal groups, without being displaced by them: Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [401]. See also NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

dispossessed. Increasingly there was violence as they sought to retain, or continue to use, their traditional lands.<sup>4</sup>

2.7 The expansion of settlement brought with it continued dispossession of Aboriginal peoples.<sup>5</sup> Resistance by Aboriginal people was often met with violence. Though they were notionally British subjects, violence against Aboriginal people was not often punished, both because of attitudes toward Aboriginal people, and the fact that settlement often proceeded ahead of colonial authority.<sup>6</sup>

2.8 While the general body of British law was considered to apply in the new colony, the application of criminal laws to Aboriginal people was less clear, especially where offences were committed by one Aboriginal person against another Aboriginal person.<sup>7</sup> Hogg has suggested that the primary concern of colonial authority was less on 'the space of contact' between settler and Aboriginal people than violence *inter se*.<sup>8</sup>

2.9 In the early years of British settlement, Aboriginal people were not frequently subject to imprisonment. Professor Mark Finnane has observed that this can be explained by the fact that, while Aboriginal people were being dispossessed of their land,

prisons were originally of limited importance in that process. Imprisonment, after all, is a legalised detention for the trial or punishment of offenders. It operated within the common law assumptions of a jurisdiction over subjects sharing a common heritage. The ambiguous legal position of Aborigines, and the state of guerilla warfare on the frontiers, meant that the prisons of the settled parts of Australia were largely filled by the new settlers, not by those who were being colonised.<sup>9</sup>

2.10 However, rates of imprisonment of Aboriginal people in the early years of settlement varied across the country, largely corresponding to the spread of European occupation:

The greatest concentrations of Aboriginal prisoners at the end of the nineteenth century were not in those regions of most complete colonisation in south-eastern Australia but in the remoter areas of north Australia. ... In south-eastern Australia, dispossession was relatively rapid and completed, for the most part, by the middle of the nineteenth century. The structure of criminal justice institutions was still being formed. Where Aboriginal occupation was not being reduced by disease and starvation, it was eradicated by violence. The occupation of northern Australia took place in a different political climate. Centralised police forces, a magistracy governed from the capital cities of the colonies. Supreme Courts which expected some observation of legal standards, urban political classes which were occasionally sensitive to the abuses of colonisation—all these forces encouraged a greater attention

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4 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 104.

5 The history of the Torres Strait is addressed in more detail below.

6 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [23]; Hogg, above n 1, 358.

7 It took until 1836 for it to be settled by the Full Court of the Supreme Court of New South Wales that it had jurisdiction to try one Aboriginal person for the murder of another: *R v Murrell* (1836) 1 Legge 72

8 Hogg, above n 1, 359.

9 Mark Finnane, *Colonisation and Incarceration: The Criminal Justice System and Aboriginal Australians* (The Trevor Reese Memorial Lecture, Sir Robert Menzies Centre for Australian Studies Institute of Commonwealth Studies, University of London, 1997) 4.

to the formalities of justice—and to the uses of the prison, rather than the summary justice of the rifle. In this context, it is not surprising to see prison play a role in the management of Aboriginal resistance in the late nineteenth century which was unknown in New South Wales a half century or more before.<sup>10</sup>

2.11 Imprisonment of Aboriginal people was particularly a feature of the early development of Western Australia (WA), and included the establishment, in 1840, of a prison specifically for Aboriginal people on Rottnest Island.<sup>11</sup> Imprisonment of Aboriginal people in WA was intensified by a 1902 amendment to the Criminal Code that provided that

summary jurisdiction could be exercised in the case of any ‘aboriginal native’ who pleaded guilty to a charge for a non-capital offence. The magistrates could award a sentence of up to three years imprisonment, in contrast to their usual limit of two years.<sup>12</sup>

2.12 The use of this provision had the result that, ‘[i]n 1905, Aborigines comprised 32% of the Western Australian prison population, in 1909 more than 42%’.<sup>13</sup>

### Protection and assimilation

2.13 Beginning in the late 1800s and early 1900s, a policy of ‘protection’ was adopted toward Aboriginal and Torres Strait Islander peoples, which involved their removal onto missions and reserves, and extensive government control over all aspects of life. The ALRC summed up these policies in its 1986 Report, *Recognition of Aboriginal Customary Laws*:

formal and extensive policies of ‘protection’ were aimed at isolating and segregating ‘full-blood’ Aborigines on reserves and at restricting contact (and interbreeding) between them and outsiders, while attempting to assimilate ‘half-castes’, and especially their children. The right to marry was limited, as were other civil rights. ...

Church missions and Government settlements were set up and Aborigines were moved onto them. Special laws prohibited the consumption of alcohol, restricted the movement of Aborigines and regulated their employment. There were systematic efforts through the establishment of ‘boarding houses’ to take ‘part-Aboriginal’ children away from their parents and to educate them in European ways.<sup>14</sup>

2.14 Protection legislation created an alternative regulatory regime for Aboriginal people that meant their contact with the mainstream criminal justice system was limited during this era, with Finnane suggesting that Aboriginal and Torres Strait

10 Ibid.

11 Ibid 5. Palm Island also operated as a penal settlement for Aboriginal people in Queensland, as well as a reserve to which many Aboriginal, and some Torres Strait Islander people were removed under protection legislation: Queensland Government, *Palm Island: Community History* <[www.qld.gov.au/atsi/](http://www.qld.gov.au/atsi/)>; Don Weatherburn, *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 13–14.

12 Finnane, above n 9, 6.

13 Ibid.

14 Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31 (1986) ch 3 [25].

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Islander peoples were shifted ‘out of the domain of citizenship and criminal justice into a welfare enclave’.<sup>15</sup>

2.15 Police played a key role in administering protection legislation. For example, under the *Aborigines Protection Act 1909* (NSW) police functions included:

- issuing rations;
- patrolling and maintaining order on unsupervised Aboriginal reserves;
- recommending on the disposal of reserve land;
- expelling ‘trouble makers’ from Aboriginal reserves;
- removing children from their parents and sending them to the Aboriginal Protection Boards’ training homes;
- expelling light-coloured people from Aboriginal reserves; and
- instituting proceedings to remove whole Aboriginal communities from certain localities.<sup>16</sup>

2.16 Finnane has noted the rapid reduction in incarceration rates of Aboriginal people in WA following the enactment of a protection regime. From 42% of prisoners in 1909, in 1915, Aboriginal people comprised 13% of the prison population. Dr Don Weatherburn has also suggested that the growth of employment of Aboriginal people in rural economies may have played a role in reducing the imprisonment rate in this period.<sup>17</sup>

2.17 Equally, the dismantling of the protection era appears to have had an effect on the incarceration rate of Aboriginal people, with some leading academics arguing that the

growing appearance of Indigenous people in the mainstream prison system needs to be read against the demise of an alternative system of penalty that had been reproduced in protection legislation. The racially defined carceral regime of missions and reserves was increasingly replaced by the mainstream mechanisms of the criminal justice system.<sup>18</sup>

2.18 Weatherburn has suggested that perverse consequences from some aspects of formal equality extended to Aboriginal people under later policies of ‘assimilation’ may help explain the increased contact of Aboriginal people with the criminal justice system. For example, in the 1960s, Aboriginal employment in rural areas began to decline, the result of a number of factors, including the decision that Aboriginal station

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15 Finnane, above n 9, 6.

16 Christine Jennett, ‘Police and Indigenous Peoples in Australia’ in Mike Enders and Benoit Dupont (eds), *Policing the Lucky Country* (Hawkins Press, 2001) 50, 52.

17 Weatherburn, above n 11, 14.

18 Chris Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Routledge, 2016) 32.

workers were entitled to be paid award wages.<sup>19</sup> This loss of employment on cattle stations also involved, for many Aboriginal people, a loss of contact with traditional land.<sup>20</sup> Laws restricting sale or consumption of alcohol to or by Aboriginal people were also removed, which may have led to an increase in alcohol-related harms, including offending.<sup>21</sup> As Hogg has explained, when protection measures were removed:

Aboriginal communities were suddenly subject to the full and immediate brunt of market and legal institutions and pressures in environments that nonetheless remained deeply hostile to Aboriginality. The stable social fabric, including traditions of property ownership, education, stable employment and so on, which might have allowed Aboriginal people to assume a place in that society was almost totally lacking, because it had been the purpose of segregationist policies to destroy it ... When the dense social and governmental fabric that underpins and enmeshes the 'law-abiding' citizen is considered, there can be little surprise that for Aboriginal communities administrative segregation in its various forms gave way to penal incarceration for so many of their members.<sup>22</sup>

### **Increasing concern over incarceration rates: the Royal Commission**

2.19 The changing rates of incarceration of Aboriginal and Torres Strait Islander peoples could not be systematically tracked until the advent of a national prison census in 1982. As Weatherburn has summarised:

These data revealed, for the first time, the enormous over-representation of Indigenous Australians in prison. The ratio of Indigenous to non-Indigenous imprisonment rates per head ranged from 3.3 in Tasmania to 29.0 in Victoria. As the 1980s progressed, the number of Indigenous prisoners increased.<sup>23</sup>

2.20 Growing attention was also drawn to the high number of Aboriginal deaths in custody. Concern over this issue prompted the establishment, in 1987, of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). The RCIADIC examined both individual deaths of Aboriginal and Torres Strait Islander people in custody occurring between 1 January 1980 and 31 May 1989, as well as underlying social, cultural and legal issues associated with the deaths.<sup>24</sup>

2.21 The RCIADIC found that Aboriginal people were not more likely than non-Indigenous people to die in custody. Instead, the high number of deaths in custody was the result of gross over-representation in custody: 'too many Aboriginal people are in custody too often'.<sup>25</sup>

2.22 The RCIADIC made 339 recommendations for change. These comprised, broadly:

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19 See further Thalia Anthony, 'Reconciliation and Conciliation: The Irreconcilable Dilemma of the 1965 "Equal" Wage Case for Aboriginal Station Workers' [2007] *Labour History* 15.  
 20 Ibid 30.  
 21 Weatherburn, above n 11, 15–17.  
 22 Hogg, above n 1, 366.  
 23 Weatherburn, above n 11, 19.  
 24 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Letters Patent.  
 25 Ibid vol 1, [1.3.3].

- 126 recommendations related to underlying issues;
- 106 recommendations relating to over-representation in the criminal justice system;
- 107 recommendations relating to deaths in custody.<sup>26</sup>

2.23 The RCIADIC found that ‘a multitude of factors, both historical and contemporary, interact to cause Aboriginal people to be seriously over-represented in custody’. It insisted on the relevance of history ‘because so much of the Aboriginal people’s current circumstances, and the patterns of interactions between Aboriginal and non-Aboriginal society, are a direct consequence of their experience of colonialism and, indeed, of the recent past’.<sup>27</sup>

2.24 Significantly, the RCIADIC asserted that the fundamental causes for over-representation of Aboriginal people in custody were not located *within* the criminal justice system. Instead, ‘the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society—socially, economically and culturally’.<sup>28</sup> As a result, the Report was ‘largely concerned with demonstrating the existence of that inequality and disadvantage in many aspects of social life and social situation’. It showed ‘how this disadvantage and inequality is closely linked to the disproportionate numbers of Aboriginal people in custody, directly and indirectly’, and ‘made recommendations about reducing and eliminating disadvantage’.<sup>29</sup>

## Social determinants of incarceration

2.25 The Royal Commission’s finding that reforms to the criminal justice system alone are not sufficient to address the over-representation of Aboriginal and Torres Strait Islander people in prisons has been echoed many times since.<sup>30</sup> Reflecting on the 25 years since the RCIADIC, in 2016, Aboriginal and Torres Strait Islander peak organisations issued the *Redfern Statement*, calling for action to address Aboriginal and Torres Strait Islander disadvantage. The *Redfern Statement* emphasised that addressing disadvantage required meaningful engagement with Aboriginal and Torres Strait Islander peoples: ‘[t]his, known as self-determination, is the key to closing the gap in outcomes for the First Peoples of these lands and waters’. The *Redfern Statement* also

26 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, 335.

27 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2 pt C.

28 *Ibid* vol 1, [1.7.1].

29 *Ibid* vol 1, [1.7.2]–[1.7.4]. The Australian Government accepted all but one of the recommendations, and committed \$400 million to do so. State and territory governments agreed to report annually on the progress of implementation: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody 1989 to 1996* (Report prepared for Aboriginal and Torres Strait Islander Commission, 1996) ch 11. Mixed views have been expressed as to the extent of implementation of the Royal Commission’s recommendations: see further Weatherburn, above n 11, 26–9.

30 See, eg, Chris Cunneen, above n 26; Weatherburn, above n 11, ch 8; Change the Record Coalition, *Blueprint for Change* (Change the Record Coalition Steering Committee, 2015).

made a number of specific recommendations to address disadvantage across the domains of health, disability, violence prevention, employment, housing, early childhood, and justice, all of which foregrounded the need for Aboriginal and Torres Strait Islander peoples to have leadership in developing and delivering any initiatives.<sup>31</sup>

2.26 The significance of drivers of incarceration external to the criminal justice system was repeated by many submissions to this Inquiry. For example, Aboriginal Peak Organisations Northern Territory submitted that

[c]olonisation, dispossession and displacement from traditional lands, weakening of culture, the separation of families through past government policies, high levels of incarceration, and ongoing discrimination and racism, have all contributed to continuing disadvantage, poor health and poor social outcomes for many Aboriginal people.<sup>32</sup>

2.27 As Hogg and Quilter pointed out, ‘the role of the criminal justice system cannot be disentangled from the complex dynamics that sustain and compound high levels of disadvantage and in turn contribute directly to high levels of victimisation in many ATSI communities’.<sup>33</sup>

2.28 The importance of addressing the drivers of incarceration external to the criminal justice system has been recognised in other jurisdictions. In the United States, the National Research Council of the National Academies has noted that criminal justice reforms will not alone

relieve the underlying problems of economic insecurity, low education, and poor health that are associated with incarceration in the nation’s poorest communities. Solutions to these problems are outside the criminal justice system, and they will include policies that address school dropout, drug addiction, mental illness, and neighborhood poverty—all of which are intimately connected to incarceration. If large numbers of intensely disadvantaged prime-age men and women remain in, or return to, poor communities without supports, the effects could be broadly harmful. Sustainably reducing incarceration may depend, in part, on whether services and programs are sufficient to meet the needs of those who would otherwise be locked up. Thus, policy makers and communities will need to assess and address the availability, accessibility, and quality of social services, including drug treatment, health care, employment, and housing for those who otherwise would be imprisoned.<sup>34</sup>

2.29 This Inquiry has principally focused its recommendations on reforms to criminal laws and legal frameworks to address the disproportionate rates of Aboriginal and Torres Strait Islander incarceration. However, the ALRC recognises the significance of drivers of incarceration external to the criminal justice system. Justice reinvestment is

31 Aboriginal and Torres Strait Islander Peak Organisations, *The Redfern Statement* (2016).

32 Aboriginal Peak Organisations Northern Territory, *Submission 117*.

33 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*. See also, eg, Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Children’s Court of New South Wales, *Submission 69*; Institute of Public Affairs, *Submission 58*; Indigenous Allied Health Australia, *Submission 57*; Northern Territory Legal Aid Commission, *Submission 46*; Australian Human Rights Commission, *Submission 43*.

34 National Research Council of the National Academies, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014) 10–11.



an approach to reducing incarceration that involves redirection of money from corrections to local initiatives that strengthen communities with high levels of incarceration. Chapter 4 considers the promise of justice reinvestment for addressing the social determinants of incarceration in Aboriginal and Torres Strait Islander communities and recommends that a national body with expertise in justice reinvestment methodology be established, to assist in providing technical assistance to local sites wishing to implement justice reinvestment.<sup>35</sup>

2.30 The following section considers aspects of Aboriginal and Torres Strait Islander disadvantage that contribute to over-representation in prisons in more detail. Australian governments have committed to addressing the interrelated aspects of Aboriginal and Torres Strait Islander disadvantage through the Closing the Gap process, which focuses on achieving key targets for health, education and employment outcomes.<sup>36</sup> Many other Inquiries and reports, including those identified in the Terms of Reference for this Inquiry, have made recommendations to address these issues.<sup>37</sup>

### Education and employment

2.31 The links between lack of employment opportunity, lack of educational attainment, and subsequent entry into the criminal justice system are well established.<sup>38</sup> In recognition of this relationship, the RCIADIC made a number of recommendations in relation to education and increasing employment and economic opportunities for Aboriginal people.<sup>39</sup>

2.32 Aboriginal and Torres Strait Islander people have lower educational attainment than non-Indigenous people. For example, in 2015, only 49% of Year 3 Aboriginal and Torres Strait Islander students living in a remote area reached minimum national standards of literacy, reading and numeracy.<sup>40</sup> In 2014, 86.4% of non-Indigenous students nationally completed Year 12 or equivalent, compared with 61.5% of Aboriginal and Torres Strait Islander students. This fell to 41.7% for Aboriginal and Torres Strait Islander students living in remote areas.<sup>41</sup> Nationally in 2015, of the potential Year 12 population, 43.8% of non-Indigenous young people achieved an ATAR<sup>42</sup> of 50.00 or above, compared with 8.5% of Aboriginal and Torres Strait Islander young people.<sup>43</sup>

35 Rec 4–1.

36 See further Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017).

37 These are too numerous to be covered comprehensively in this chapter, however the ALRC outlines some major recommendations from the reports listed in the Terms of Reference in the below sections.

38 Weatherburn, above n 11, 78–9; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 141.

39 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recs 289–319.

40 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) box 4.4.1.

41 Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2017* (2017) 43–4.

42 Australian Tertiary Admission Rank.

43 Productivity Commission, above n 40, 4.47.

2.33 Aboriginal and Torres Strait Islander people also face employment disadvantage. In 2014–15 the unemployment rate for Aboriginal and Torres Strait Islander people aged 15–64 was about three times the rate of the non-Indigenous population.<sup>44</sup> Just under half (48.4%) of Aboriginal and Torres Strait Islander people aged 15–64 were employed, compared with 74.8% of non-Indigenous people.<sup>45</sup>

2.34 There is also a lack of real employment opportunity for Aboriginal and Torres Strait Islander people living in remote areas such as central Australia.<sup>46</sup> As was noted in the 2017 *Closing the Gap—Prime Minister’s Report*:

Indigenous employment rates vary sharply by geography. In 2014–15, only 35.1 per cent of all Indigenous people of workforce age (15–64 years) in very remote areas were employed compared with 57.5 per cent of those living in the major cities.<sup>47</sup>

2.35 Ex-prisoners also face a number of barriers to employment, with inability to find work contributing to the likelihood of reoffending and reconviction. Research has suggested that unemployment is higher among Aboriginal and Torres Strait Islander people who have been arrested in the past five years than among those who had not, and that unemployment is related to reoffending and reconviction.<sup>48</sup>

### Health and disability

2.36 In 2015, the Australian Medical Association (AMA) noted the connection between health issues experienced by Aboriginal and Torres Strait Islander peoples—including poor mental health, physical disability, cognitive disability and substance abuse—and high incarceration rates. The AMA stressed the need for a diversionary approach that focused on the underlying, undiagnosed and unaddressed health needs of Aboriginal and Torres Strait Islander people who are at high risk of entering the criminal justice system.<sup>49</sup> The RCIADIC also directed a number of recommendations toward improving health services, programs, and training of health professionals working with Aboriginal people.<sup>50</sup> It noted that the

link between the health of Aboriginal people in the community and these deaths in custody should be obvious: Aboriginal people in general have a very poor level of health. Their quality of life is substantially reduced by illnesses that only uncommonly affect the general Australian public. Since so many Aboriginal people experience

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44 Ibid box 4.7.1.

45 Ibid.

46 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 8.

47 Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister’s Report 2017* (2017) 54.

48 Joseph Graffam and Alison Shinkfield, ‘Strategies to Enhance Employment of Indigenous Ex-Offenders after Release from Correctional Institutions’ (Resource Sheet No 11, Closing the Gap Clearinghouse, March 2012) 4. See also Legal Aid WA, *Submission 33*.

49 Australian Medical Association, *2015 Indigenous Health Report Card—Treating the High Rates of Imprisonment of Aboriginal and Torres Strait Islander Peoples as Symptom of the Health Gap: An Integrated Approach to Both* (2015) 7.

50 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recs 246–271.

serious sickness and injury as part of their everyday lives, it should be no surprise to find that they bring this impaired health status with them into the custodial situation.<sup>51</sup>

2.37 Aboriginal and Torres Strait Islander peoples experience health-related risk factors such as substance abuse and cognitive disability at higher rates than the general population, yet have significantly lower access to appropriate health and support services when these additional health service needs are taken into account.<sup>52</sup>

2.38 The 2015 report of the Aboriginal and Torres Strait Islander Social Justice Commissioner noted the challenges faced by Aboriginal and Torres Strait Islander people with disability, including underutilisation of disability services, due to factors including a lack of trust in service providers, a lack of cultural competence in service delivery, as well as difficulties in access to disability services for those living in regional and remote areas.<sup>53</sup> The Report made a number of recommendations related to disability, including improved data collection, evaluation of programs and policies in addressing the needs of Aboriginal and Torres Strait Islander people with disability, and the need to include a Closing the Gap target for Aboriginal and Torres Strait Islander people with disability as an area for future action.<sup>54</sup>

### ***Physical disability***

2.39 According to the *Close the Gap Progress and Priority Report 2016*, Aboriginal and Torres Strait Islander people experience severe or profound physical disability at about twice the rate of non-Indigenous people,<sup>55</sup> with about half of those experiencing severe or profound disability in sight, hearing and speech-related areas.<sup>56</sup>

2.40 Hearing loss is particularly prevalent among Aboriginal and Torres Strait Islander peoples. In 2014–15, 8.4% of Aboriginal and Torres Strait Islander children aged 0–14 years had a hearing condition (2.9 times the rate for non-Indigenous children).<sup>57</sup> In 2012–13, around one in eight (12%) Aboriginal and Torres Strait Islander people reported having diseases of the ear and mastoid and/or hearing problems, and were 1.3 times more likely than non-Indigenous people to have these conditions.<sup>58</sup>

2.41 Hearing impairment among adult Aboriginal and Torres Strait Islander prisoners is estimated to be extremely high—affecting between 80–95% of Aboriginal and Torres Strait Islander prisoners.<sup>59</sup> This can result in communication difficulties when engaged with the criminal justice system, particularly where English is a second or

51 Ibid vol 4, [31.1.2].

52 Australian Medical Association, above n 49, 7.

53 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2015* (Australian Human Rights Commission, 2015) 109–110.

54 Ibid recs 11–13.

55 Close the Gap Campaign Steering Committee, *Progress And Priorities Report 2016* (2016) 31.

56 Ibid.

57 Productivity Commission, above n 40, 6.44.

58 Australian Bureau of Statistics, *Australian Aboriginal and Torres Strait Islander Health Survey: First Results, Australia, 2012–13, Cat No 4727.0.55.001* (2013).

59 Law Council of Australia, *Addressing Indigenous Imprisonment: National Symposium—Discussion Paper* (2015) 13.

third language.<sup>60</sup> Hearing loss can also compound other forms of disadvantage regularly experienced by Aboriginal and Torres Strait Islander people, including unemployment and poor school performance, thus making entry into the criminal justice system more likely.<sup>61</sup>

### ***Cognitive impairment and Fetal Alcohol Spectrum Disorder***

2.42 Cognitive impairment, particularly that experienced as a result of Fetal Alcohol Spectrum Disorder (FASD)—caused by exposure to alcohol while in utero—is another risk factor for incarceration that disproportionately affects Aboriginal and Torres Strait Islander peoples. People with cognitive impairment have an increased likelihood of contact with the criminal justice system for reasons including

difficulties regulating behaviour, impaired decision making, problems communicating, a poor understanding of criminal justice procedures, poor memory and attentiveness and social immaturity. Having a disability and underprivileged living circumstances enhances susceptibility to homelessness, substance misuse, poor general health, low levels of community support, visibility to police and ultimately criminal engagement. People with cognitive impairment are additionally vulnerable to physical and sexual trauma, coercion, peer pressure and victimisation.<sup>62</sup>

2.43 Available evidence suggests that there are higher levels of cognitive impairment among Aboriginal and Torres Strait Islander offenders than non-Indigenous offenders.<sup>63</sup> The Law Council of Australia has pointed to WA and the Northern Territory (NT) as two jurisdictions where the prevalence of cognitive impairment in Aboriginal and Torres Strait Islander communities is particularly high, including high rates of FASD and severe communication barriers.<sup>64</sup> The NT Office of the Public Guardian also drew attention to the high incidence of cognitive impairment and mental illness among Aboriginal and Torres Strait Islander people in the criminal justice system.<sup>65</sup>

2.44 FASD has been linked to extremely high levels of criminal justice contact for juveniles, with FASD-affected youth 19 times more likely to be incarcerated, as well as

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60 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 25.

61 Ibid 177–8.

62 Stephane M Shepherd, ‘Aboriginal Prisoners with Cognitive Impairment: Is This the Highest Risk Group?’ [2017] (536) *Trends and Issues in Crime and Criminal Justice* 1, 2. People with cognitive impairment may have an acquired brain injury (ABI). Research suggests people with an ABI are substantially overrepresented in prisons: RMIT and Jesuit Social Services, *Recognition Respect and Support: Enabling Justice for People with an Acquired Brain Injury* (2016) 11. Establishing prevalence of FASD has been described as challenging, because, among other reasons, there is no national data collection on FASD. However, available estimates suggest that rates in Aboriginal and Torres Strait Islander communities are markedly higher than for non-Indigenous people: D Gray et al, ‘Review of the Harmful Use of Alcohol among Aboriginal and Torres Strait Islander People’ (Australian Indigenous Health Reviews No 19, Australian Indigenous Health Infonet, 2017) 15–16.

63 Shepherd, above n 62, 2.

64 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 22. See also Gray et al, above n 62, 16.

65 Northern Territory Office of the Public Guardian, *Submission 72*.

high levels of recidivism for adults and difficulty in understanding and complying with court orders and bail conditions.<sup>66</sup>

2.45 In many cases FASD is undiagnosed.<sup>67</sup> To address this, a Guide to the Diagnosis of FASD, containing a diagnostic instrument for FASD, was released in 2016.<sup>68</sup> A 2016 Senate Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services (Law Enforcement and Justice Services Inquiry) recommended that the Department of Health prepare a communication plan for those working in areas such as the criminal justice field, to accompany the release of this Diagnostic Tool.<sup>69</sup> A National FASD Strategy 2018–2028 is under development.<sup>70</sup>

2.46 Prevention of FASD is also an important longer-term goal. The Law Enforcement and Justice Services Inquiry recommended that general prevention initiatives be continued, promoting knowledge about the risks of drinking alcohol during pregnancy, when planning a pregnancy or when breastfeeding.<sup>71</sup> A Fetal Alcohol Spectrum Disorder Prevention and Health Promotion Resources Package has been developed for use in Aboriginal and Torres Strait Islander child and maternal health care services.<sup>72</sup>

2.47 Ensuring access to justice and culturally appropriate support for Aboriginal and Torres Strait Islander people with cognitive impairment who are in contact with the criminal justice system is a particular challenge, and the subject of a number of recommendations in the 2016 Senate Community Affairs Reference Committee Inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia.<sup>73</sup> These recommendations are considered further in Chapter 10, addressing access to justice issues for Aboriginal and Torres Strait Islander peoples.

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66 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 23.

67 Ibid.

68 C Bower and EJ Elliot, 'Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD): Report to the Australian Government Department of Health' (Telethon Kids Institute and University of Sydney, 2016).

69 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) rec 4. See also J Cashman, *Submission 105*.

70 Australian Indigenous Aboriginal and Torres Strait Islander Alcohol and Other Drugs Knowledge Centre, *News: Consultation for the Development of the National FASD Strategy 2018–2028* <[www.aodknowledgecentre.net.au](http://www.aodknowledgecentre.net.au)>.

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

72 The Package was developed by the Menzies School of Health Research partnership with the National Aboriginal Community Controlled Health Organisation and the Telethon Kids Institute: Department of Health (Cth), Menzies School of Health Research and National Aboriginal Community Controlled Health Organisation, *Fetal Alcohol Spectrum Disorder Prevention and Health Promotion Resources Package* (2015).

73 Senate Community Affairs Reference Committee, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016). See also First Peoples Disability Justice Consortium, *Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment* (First Peoples Disability Network, 2016).

**Mental health**

2.48 In 2014–15, almost one third (32.8%) of Aboriginal and Torres Strait Islander people aged 18 years and over reported experiencing high to very high levels of psychological distress, 2.6 times the non-Indigenous rate.<sup>74</sup> Aboriginal and Torres Strait Islander women have particularly troubling rates of poor mental health, with almost two in five (38.4%) suffering high to very high levels of psychological distress.<sup>75</sup> The proportion of Aboriginal and Torres Strait Islander people experiencing high to very high levels of psychological distress increased by approximately six percentage points between 2004–2005 and 2014–2015.<sup>76</sup>

2.49 Mental health disorders have been established as another factor that is likely to increase the risk of Aboriginal and Torres Strait Islander people entering incarceration. In 2010, the proportion of prison entrants with a history of mental health disorder was about 2.5 times higher than the general population.<sup>77</sup> The Mental Health Commission of NSW submitted that ‘at least half of all adult inmates in NSW have been diagnosed or treated for a mental health problem and 87% of young people in custody in NSW have a past or present psychological disorder. Rates are higher for Aboriginal people in custody’. It stressed that this was the result of ‘a failure to provide appropriate services and supports to people with mental illness in our community’.<sup>78</sup>

2.50 A 2008 Queensland study of Aboriginal and Torres Strait Islander prisoners revealed mental health disorder rates as high as 86% for female Aboriginal and Torres Strait Islander prisoners, and 73% for male Aboriginal and Torres Strait Islander prisoners. Substance abuse disorders were the most common (69% of Aboriginal and Torres Strait Islander females and 66% of Aboriginal and Torres Strait Islander males), but they were often comorbid with other conditions, including anxiety, depressive, and psychotic disorders.<sup>79</sup>

2.51 A 2015 study found that Aboriginal and Torres Strait Islander prisoners with diagnosed mental disorders, when compared with non-Indigenous prisoners who also had a diagnosed mental disorder, had approximately 29 additional police contacts.<sup>80</sup> Age when first taken into prison custody was about four years younger for Aboriginal and Torres Strait Islander prisoners with a recognised mental disorder than the equivalent non-Indigenous prison population.<sup>81</sup>

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74 Productivity Commission, above n 40, box 8.7.1.

75 Ibid 8.37.

76 Ibid box 8.7.1.

77 Australian Institute of Health and Welfare, *The Mental Health of Prison Entrants in Australia* (2012) 2.

78 Mental Health Commission of NSW, *Submission 20*.

79 Edward B Heffernan et al, ‘Prevalence of Mental Illness among Aboriginal and Torres Strait Islander People in Queensland Prisons’ (2012) 197(1) *The Medical Journal of Australia* 37.

80 Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 31.

81 Ibid 32.

### Harmful use of alcohol

2.52 Most Aboriginal and Torres Strait Islander people either do not consume alcohol or do not consume it at a level that poses risks to their health over their lifetimes. However, Aboriginal and Torres Strait Islander people are also more likely than non-Indigenous Australians to consume alcohol at levels that pose risks to their health over their lifetimes and on single drinking occasions. Alcohol misuse contributes disproportionately to Aboriginal and Torres Strait Islander ill-health. It has been estimated that 8.3% of the total burden of disease is attributable to alcohol, a rate 3.1 times greater than for non-Indigenous Australians.<sup>82</sup>

2.53 The RCIADIC recognised the relevance of the harmful use of alcohol and other drugs for Aboriginal people in custody, and made a number of recommendations to address this.<sup>83</sup> The Report noted that:

It is clear that alcohol and other drugs contribute to Aboriginal deaths in custody in two direct ways. First, alcohol and other drugs are involved in many of the offences committed by Aboriginal people that lead to their being placed in custody and to being held in protective custody owing to drunkenness. Secondly, alcohol (especially) is a major cause of chronic and acute illness among Aboriginal people, contributing to their high rates of death from injury and disease which, when combined with their high levels of over-representation in custody, lead to their high levels of death in custody. Furthermore, alcohol and other drug use contribute less directly to deaths in custody through their impact on family and community relationships, employment, housing, educational achievements, etc. These factors interact to produce the serious situation of Aboriginal people and alcohol observed today in many parts of Australia.<sup>84</sup>

2.54 A number of submissions to this Inquiry drew attention to the links between alcohol misuse and offending and incarceration.<sup>85</sup> The Northern Territory Legal Aid Commission noted that '[i]n the NT generally there is a prevalent and socially accepted culture of excessive drinking, which is more likely to lead to alcohol-related harm and violence'.<sup>86</sup>

2.55 Overcrowding, educational disadvantage, and lack of employment opportunity have also been linked to the harmful use of alcohol in Aboriginal and Torres Strait Islander communities.<sup>87</sup> These interrelated factors increase the likelihood of contact with the criminal justice system.<sup>88</sup>

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82 Gray et al, above n 62, 2. See also Weatherburn, above n 16, 85

83 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recs 63–71.

84 Ibid vol 4, [32.1.2].

85 Aboriginal Legal Service NSW ACT Supplementary Submission, *Submission 112*; The Law Society of Western Australia, *Submission 111*; Northern Territory Legal Aid Commission, *Submission 46*; Central Australian Aboriginal Congress, *Submission 37*.

86 Northern Territory Legal Aid Commission, *Submission 46*.

87 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 8–9.

88 Weatherburn, above n 11, 86.

2.56 Alcohol-related violence is a serious issue affecting Aboriginal and Torres Strait Islander communities. A 2015 House of Representatives Committee Report about the harmful use of alcohol in Aboriginal and Torres Strait Islander communities (*House of Representatives Alcohol Report*) noted that, '[w]hile alcohol may not always be the direct cause of violent acts, alcohol misuse is implicated in the prevalence and severity of assaults and domestic violence'.<sup>89</sup> Alcohol use has been associated with the escalation of assaults into homicides, with 66.7% of Aboriginal and Torres Strait Islander homicides involving both the victim and offender having consumed alcohol at the time of the offence, compared to 16.3% of non-Indigenous homicides.<sup>90</sup> The NT Police Association have similarly reported that 67% of family violence incidents in the NT involve alcohol.<sup>91</sup> A 2017 review estimated that 45% of hospitalisations for family violence related assault in remote and very remote regions were attributable to alcohol.<sup>92</sup>

2.57 A number of ongoing governmental initiatives seek to address alcohol misuse and alcohol-related harm. The National Aboriginal Torres Strait Islander Peoples Drug Strategy 2014–2019 aims to improve the health and wellbeing of Aboriginal and Torres Strait Islander people by preventing and reducing the harmful effects of alcohol and other drugs on individuals, families and their communities.<sup>93</sup>

2.58 The 2013 report of the Aboriginal and Torres Strait Islander Social Justice Commissioner advocated that a human rights approach be taken to addressing alcohol misuse. This would require that 'communities are empowered to make decisions about the policies adopted to manage alcohol within their community ... [and] that measures are reasonable, proportionate and necessary'.<sup>94</sup> The *House of Representatives Alcohol Report* made a number of recommendations to minimise alcohol misuse and alcohol-related harm, including that the harmful impacts of alcohol be put on the Coalition of Australian Governments (COAG) agenda for coordinated action. It recommended that such action should recognise the social and economic determinants of harmful uses of alcohol, and that the impact of alcohol on achieving each Closing the Gap target be considered.<sup>95</sup> The ALRC makes recommendations relating to laws regulating the availability of alcohol in Chapter 13.

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89 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 12.

90 Productivity Commission, above n 40, box 11.1.1.

91 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 14.

92 Gray et al, above n 62, 15.

93 Intergovernmental Committee on Drugs, *National Aboriginal and Torres Strait Islander Peoples' Drug Strategy 2014–2019* (2015).

94 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2013* (Australian Human Rights Commission, 2013).

95 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) rec 1.



## Housing

2.59 The RCIADIC identified action on housing and infrastructure as important to addressing custodial rates for Aboriginal people, noting that ‘the appalling conditions in which many Aboriginal people live have long been a concern to government’,<sup>96</sup> and making a number of recommendations in relation to housing.<sup>97</sup>

2.60 The Productivity Commission has identified housing issues—particularly homelessness, inadequate housing, and overcrowding—as disproportionately affecting Aboriginal and Torres Strait Islander peoples.<sup>98</sup> Nationally, more than one in five (20.6%) Aboriginal and Torres Strait Islander people lived in overcrowded households in 2014–15, increasing to about one in two (49.4 %) for Aboriginal and Torres Strait Islander people living in very remote areas.<sup>99</sup>

2.61 Aboriginal and Torres Strait Islander peoples are also disproportionately represented in the homeless population: in 2011, approximately 1 in 20 Aboriginal and Torres Strait Islander people were considered homeless,<sup>100</sup> accounting for 28% of homeless people. Aboriginal and Torres Strait Islander people were 14 times as likely as non-Indigenous people to be homeless.<sup>101</sup>

2.62 Housing has been identified as one of the key determinants driving the poor health outcomes experienced by many Aboriginal and Torres Strait Islander people.<sup>102</sup> Overcrowding has been linked to negative impacts on childhood development, educational achievement, rates of endemic disease, and workforce participation levels.<sup>103</sup>

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96 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, [18.1.6].

97 Ibid vol 5, rec 73–6, 321–7.

98 Productivity Commission, above n 40, 10.1.

99 Ibid 10.4.

100 Homelessness is taken to include living in severely crowded dwellings, as well as, among others, living in supported accommodation for the homeless, and living in improvised dwellings, tents and sleeping out. Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians* (2014) 8.

101 Ibid 7.

102 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 8.

103 Ibid 8–9. Many submissions raised concerns about the impact of housing and homelessness on Aboriginal and Torres Strait Islander people’s rate of imprisonment: see, eg, J Cashman, *Submission 105*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; National Congress of Australia’s First Peoples, *Submission 73*; Institute of Public Affairs, *Submission 58*; Victorian Aboriginal Legal Service, *Submission 39*; Central Australian Aboriginal Congress, *Submission 37*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Kingsford Legal Centre, *Submission 19*; Change the Record Coalition, *Submission 84*.

2.63 Overcrowding, which again disproportionately affects Aboriginal and Torres Strait Islander people, has similarly been linked to harmful alcohol use<sup>104</sup> as well as higher rates of family violence.<sup>105</sup> Family violence in turn is recognised as a major risk factor for homelessness.<sup>106</sup>

2.64 In 2015, 27% of Aboriginal and Torres Strait Islander prison entrants reported being homeless in the four weeks prior to imprisonment.<sup>107</sup> Submissions to this Inquiry raised homelessness as a major driver of incarceration for Aboriginal and Torres Strait Islander peoples, with Legal Aid WA asserting that '[a]ddressing homelessness and unstable accommodation for Aboriginal people is a fundamental step in reducing disadvantage and Aboriginal imprisonment'.<sup>108</sup>

2.65 Homelessness and inadequate housing may also result in Aboriginal and Torres Strait Islander people being denied bail.<sup>109</sup> Socioeconomic factors that are taken into account in the decision of whether or not to grant bail include whether a person has stable housing arrangements, and lack of suitable housing may result in being denied bail.<sup>110</sup>

2.66 Those leaving prison often face homelessness, with the Australian Institute of Health and Welfare noting that 'homelessness is more common among those with a history of contact with the criminal justice system, it lasts for longer, and is more likely to re-occur than for other homeless people'.<sup>111</sup> In 2015, 31% of prison discharges were expecting to be homeless.<sup>112</sup> A Legal Aid NSW study of women leaving Silverwater Prison in NSW over a 12-month period found that only 12% believed they had access to stable housing on release from prison.<sup>113</sup>

2.67 Homelessness following exit from prison increases the risk of returning to prison:

lack of housing is also a substantial risk factor for reoffending and given the lack of emergency and transitional housing available to the Victorian community this situation will only worsen unless there is increased investment. A research study

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104 House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 9.

105 Closing the Gap Clearinghouse, 'Family Violence Prevention Programs in Indigenous Communities' (Resource Sheet No 37, 2016) 6.

106 Australian Institute of Health and Welfare, *Homelessness among Indigenous Australians* (2014) 26.

107 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* (2015) 28.

108 Legal Aid WA, *Submission 33*. See also The Law Society of Western Australia, *Submission 111*; UNSW Law Society, *Submission 70*.

109 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 69.

110 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) 16; Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 77.

111 Australian Institute of Health and Welfare, above n 108, 28. See also Jesuit Social Services, *Submission 100*.

112 Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2015* (2015) 29.

113 Legal Aid NSW, *Aboriginal Women Leaving Custody: Report into Barriers to Housing* (2015) 4.

found that previous offenders were twice as likely to return to prison within nine months if they were homeless.<sup>114</sup>

### Child protection and youth justice

2.68 Contact with the child protection system and the youth justice system are both risk factors for adult incarceration. Aboriginal and Torres Strait Islander peoples are disproportionately represented in both systems, as well as in the crossover between the two.

2.69 Entry of Aboriginal and Torres Strait Islander children into the child protection system should be understood against the historical background of the removal of children for their families under government policies toward Aboriginal and Torres Strait Islander peoples of protection and assimilation, creating what has become known as the 'Stolen Generation'.<sup>115</sup> Children were removed to institutions and, later, into non-Indigenous foster families.<sup>116</sup> The 1997 Human Rights and Equal Opportunity Commission Report, *Bringing Them Home*, concluded that, nationally:

between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. In that time not one Indigenous family has escaped the effects of forcible removal (confirmed by representatives of the Queensland and WA Governments in evidence to the Inquiry). Most families have been affected, in one or more generations, by the forcible removal of one or more children.<sup>117</sup>

2.70 The RCIADIC noted that almost 43 of the 99 Aboriginal and Torres Strait Islander people whose deaths were reviewed had experienced childhood separation from their families through intervention by the State, mission organisations or other institutions,<sup>118</sup> and made a number of recommendations directed at welfare, youth justice services and police aimed at breaking the cycle of incarceration for Aboriginal young people.<sup>119</sup> The *Bringing Them Home* Report highlighted the relationship between being placed in out-of-home care and the increased likelihood of coming into

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114 Victorian Aboriginal Legal Service, *Submission 39*. See also NSW Council of Social Service (NCOSS), *Submission 45*.

115 Removal of children was authorised initially under protection legislation, and later under general child welfare legislation: 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) ch 2.

116 *Ibid.*

117 *Ibid.* The estimated rate of removals has been disputed, with some preferring the estimate by the Australian Bureau of Statistics of one in ten for the rate of child removal: Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings, Cat No 4190.0* (1995). See further Sven R Silburn et al, 'The Intergenerational Effects of Forced Separation on the Social and Emotional Wellbeing of Aboriginal Children and Young People' (Family Matters No 75, Australian Institute of Family Studies, 2006). This report noted that '[g]iven the differences in removal policies which existed between the States and the ways in which these changed in their application over time, it seems unlikely that the number of Aboriginal and Torres Strait Islander people who were separated will ever be precisely ascertained from historical sources: at 16.

118 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, [2.2.9].

119 *Ibid* reccs 234–45.

contact with the criminal justice system, through an examination of the lasting effects of institutionalisation on Aboriginal and Torres Strait Islander children.<sup>120</sup>

2.71 Aboriginal and Torres Strait Islander children continue to be disproportionately affected by care and protection orders and entry into the child protection system, with some describing this as a new stolen generation.<sup>121</sup> Rates of contact with the child protection system increased steadily over the four years to 2016. From 2012 to 2016, the number of Aboriginal and Torres Strait Islander children on care and protection orders rose from 13,268 to 18,409, with rates increasing from 46.1 to 61.9 per 1,000. By contrast, the rate of non-Indigenous children on care and protection orders has remained relatively stable, increasing from 5.6 to 6.5 per 1,000.<sup>122</sup>

2.72 At June 2016, there were 16,846 Aboriginal and Torres Strait Islander children in out-of-home care, a rate of 56.6 per 1,000 children. The rate of Aboriginal and Torres Strait Islander children in out-of-home care was 10 times the non-Indigenous rate.<sup>123</sup>

2.73 Young people in out-of-home care between 1 July 2014 and 30 June 2016 were 19 times more likely than the equivalent general population to be under youth justice supervision in the same year.<sup>124</sup> Aboriginal or Torres Strait Islander males were most likely to also be under youth justice supervision, with 17.8% of those in out-of-home care also under youth justice supervision, compared with 12% of non-Indigenous males, 9.9% of Aboriginal or Torres Strait Islander females and 5.6% of non-Indigenous females.<sup>125</sup> Aboriginal and Torres Strait Islander young people in the child protection system were almost three times as likely to be subject to youth justice supervision between 1 July 2014 and 30 June 2016 when compared with non-Indigenous young people.<sup>126</sup>

2.74 Many submissions emphasised the link between involvement in child protection and out-of-home care and subsequent offending.<sup>127</sup> Dr Kath McFarlane noted that that the ‘criminogenic impact of Australia’s child removal practices and subsequent institutionalisation of children has been known for decades’, and outlined a long history of concern about the links between child protection and later offending:

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120 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) pt 3.

121 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report* (2017) vol 1, 91.

122 Australian Institute of Health and Welfare, ‘Child Protection Australia 2015–2016’ (Child Welfare Series No 66, 2017) 46.

123 *Ibid* 52.

124 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2015–16* (2017) 14.

125 *Ibid*.

126 Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2014–15* (2016) 8.

127 Legal Aid NSW, *Submission 101*; National Association of Community Legal Centres (NACLC), *Submission 94*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Children’s Court of New South Wales, *Submission 69*; Victoria Legal Aid, *Submission 56*; Australian Human Rights Commission, *Submission 43*; Northern Territory Legal Aid Commission, *Submission 46*.

In 1977 the Department of Aboriginal Affairs noted that approximately 95% of people in NSW and Victoria who sought assistance from the Aboriginal Legal Services on criminal matters had been in care. This over-representation was attributed to the children being separated from the support of the Aboriginal community, the corresponding lack of identity with Indigenous culture and simultaneous alienation from the white community. The Senate Standing Committee on Social Welfare (Australian Senate 1985) observed that welfare intervention was a highly disruptive factor that had set many young Indigenous people on the road to incarceration.<sup>128</sup>

2.75 Victoria Legal Aid also argued that out-of-home care is a contributing factor to imprisonment, and noted that its analysis of data between 2011 and 2016 found that, of those aged 11–17 who were placed in out-of-home care, almost one in three young people later returned to Victoria Legal Aid for assistance with a criminal matter.<sup>129</sup>

2.76 The Children’s Court of NSW noted the efforts by the Court and within the NSW Department of Family and Community Services to improve planning and supports for Aboriginal and Torres Strait Islander children and their families, with the aim of addressing both the over-representation of Aboriginal and Torres Strait Islander children in care, and the impact on the crossover of those children into the criminal justice system.<sup>130</sup>

2.77 A 2015 Senate Inquiry into out-of-home care recommended that state and territory governments review Aboriginal and Torres Strait Islander over-representation in out-of-home care as a matter of priority, and provide additional resources for family support services to address the causes of social disadvantage.<sup>131</sup> The 2015 report of the Aboriginal and Torres Strait Islander Social Justice Commissioner also made a number of recommendations about child protection, including that child welfare targets be introduced into the Closing the Gap process, that state and territory governments take steps to establish Aboriginal and Torres Strait Islander Children’s Commissioners, and that Commonwealth, state and territory governments support investment in research and in improving the quality of information relating to child protection.<sup>132</sup>

2.78 The 2017 Royal Commission into the Protection and Detention of Children in the Northern Territory (NT Royal Commission) made a number of recommendations relating to child protection in that jurisdiction. It found that the system needed fundamental change:

The Northern Territory and Commonwealth governments need to acknowledge that the current child protection system in the Northern Territory is not effectively protecting children. Governments must accept that fundamental changes must be made. They must invest in a public health approach to supporting and protecting all

128 Dr K McFarlane, *Submission 65*.

129 Victoria Legal Aid, *Submission 56*.

130 Children’s Court of New South Wales, *Submission 69*.

131 Senate Standing Committee on Community Affairs, Parliament of Australia, *Out of Home Care* (2015) rec 31.

132 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 53, recs 17–19.

children, families and their communities. This requires sustained support over a lengthy period, with a focus on child-centred solutions.<sup>133</sup>

2.79 The contribution of out-of-home care to Aboriginal and Torres Strait Islander incarceration is considered further in Chapter 15, and the ALRC recommends that there be a national inquiry into child protection laws and processes affecting Aboriginal and Torres Strait Islander children.

2.80 Many submissions to this Inquiry also noted the link between contact with the juvenile justice system and adult incarceration.<sup>134</sup> While overall rates of all young people under youth justice supervision fell over the five-year period to 2015–16, Aboriginal and Torres Strait Islander young people are disproportionately represented under youth justice supervision:

In 2011–12, Indigenous young people were 13 times as likely to be under supervision as non-Indigenous young people, increasing to 17 times as likely in 2015–16. In 2015–16, Indigenous over-representation was higher for those in detention (25 times) than for those under community-based supervision (15 times).<sup>135</sup>

2.81 Research following a sample of juvenile offenders in NSW over an eight-year period found that 57% went on to appear in an adult court within that period.<sup>136</sup> More than 90% of Aboriginal or Torres Strait Islander young people who first appeared in the Children’s Court appeared in an adult court within eight years, and 33.3% had received at least one custodial sentence in an adult court.<sup>137</sup>

2.82 In 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs inquired into Indigenous youth in the criminal justice system. It observed that the

overrepresentation of Indigenous youth in the criminal justice system is a national crisis and Commonwealth, state and territory governments must respond rapidly and effectively to prevent current and future generations of young Indigenous people from entering into the criminal justice system. This is a long term challenge that will require sustained commitment and rigour from all jurisdictions to address the root causes of Indigenous disadvantage, and to rehabilitate young Indigenous people currently in the criminal justice system.<sup>138</sup>

2.83 As with adult incarceration, the Committee considered that the major drivers of incarceration of Aboriginal and Torres Strait Islander youth were external to the criminal justice system, and emphasised the need for early intervention. It made a

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133 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report* (2017) vol 3A, 185.

134 See, eg, UNICEF Australia, *Submission 104*; National Association of Community Legal Centres (NACLC), *Submission 94*; Amnesty International Australia, *Submission 89*; Human Rights Law Centre, *Submission 68*; Mission Australia, *Submission 53*.

135 Australian Institute of Health and Welfare, ‘Youth Justice in Australia 2015–16’ (Bulletin No 139, Bulletin 139, 2017) 1–2.

136 Shuling Chen et al, ‘The Transition from Juvenile to Adult Criminal Careers’ (Contemporary Issues in Crime and Justice No 86, NSW Bureau of Crime Statistics and Research, 2005).

137 *Ibid* table 3.

138 Senate Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time—Time for Doing: Indigenous Youth in the Criminal Justice System* (2011) 7–8.

number of recommendations responding to Aboriginal and Torres Strait Islander disadvantage, including about health, education and support for families.

2.84 The NT Royal Commission, along with making a number of recommendations about reform of youth detention in the NT, stressed the importance of early intervention to prevent entry into the youth justice system, both through police diversion and through family-focused and education-based early interventions, which ‘must involve the full spectrum of services engaged with young people’.<sup>139</sup>

### Family violence

2.85 Aboriginal and Torres Strait Islander women experience family violence at a rate much higher than the broader Australian community. A 2014 summary of family violence statistics showed that

- Indigenous people are between two and five times more likely than non-Indigenous people to experience violence as victims or offenders.
- Indigenous females are five times more likely to be victims of homicide than non-Indigenous females; 55% (n=33) of the 60 Indigenous homicide victims were killed in a domestic homicide; which includes 42% (n=25) that were intimate partner homicides.
- Indigenous females were 35 times as likely to be hospitalised due to family violence related assaults, and Indigenous males 21.4 times as likely, than non-Indigenous females and males.<sup>140</sup>

2.86 Available research suggests that the majority of Aboriginal and Torres Strait Islander women in prison have experienced physical or sexual abuse.<sup>141</sup> The National Family Violence Prevention and Legal Services Victoria argued that there was

an intrinsic link between between family violence and the over-incarceration of Aboriginal and Torres Strait Islander men, women and young people. Any measures designed to reduce the over-imprisonment of Aboriginal and Torres Strait Islander men and women must therefore also target the reduction of rates of violence against Aboriginal and Torres Strait Islander women.<sup>142</sup>

2.87 The Top End Women’s Legal Service urged an appreciation of the complexity of violence in Aboriginal and Torres Strait Islander communities when developing responses to interpersonal violence. It argued that it is important to distinguish between

1. Coercive and controlling violence—an ongoing pattern of use of threat, force, emotional abuse and other coercive means to unilaterally dominate a person and induce fear, submission and compliance in them. Its focus is on control; and

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139 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Report* (2017) vol 4, 411–12.

140 Australia’s National Research Organisation for Women’s Safety, *Fast Facts—Indigenous Family Violence* (2014).

141 Lorana Bartels, ‘Painting the Picture of Indigenous Women in Custody in Australia’ (2012) 12(2) *Queensland University of Technology Law and Justice Journal* 1, 15; Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women’s Growing Over-Imprisonment* (2017) 17.

142 National Family Violence Prevention & Legal Services Victoria NFVPLS, *Submission* 77. See also Human Rights Law Centre and Change the Record Coalition, above n 142.

2. Lateral violence—often described as ‘internalized colonialism’ and refers to the harm done by Aboriginal and Torres Strait Islander people to others in their families, organisations and communities.<sup>143</sup>

2.88 The RCIADIC received some criticism for failing to address family violence in Aboriginal communities. Judy Atkinson observed:

The Commissioners acknowledged ‘appalling levels of domestic violence against Aboriginal women and children’, with ‘rape and even murder... failing to attract the due attention of police and the criminal justice system’, and the fact that 53% of those who died in custody were in custody for acts of violence, with 9% for homicide, 12% for serious assault, and 32% for sexual assault. But there was not one recommendation out of the 339 which allowed for women as victims of domestic violence and/or rape, or as the wives, daughters, mothers and grandmothers of violent offenders, to access funds for services in this regard.<sup>144</sup>

2.89 Since the RCIADIC, family violence in both Aboriginal and Torres Strait Islander communities and the broader Australian community has become a policy priority. Since 2010, major broad-based initiatives have included the National Plan to Reduce Violence against Women and their Children 2010–2022, the 2010 ALRC and NSWLRC joint report into family violence,<sup>145</sup> and the 2016 Victorian Royal Commission into Family Violence.<sup>146</sup> A review of Aboriginal and Torres Strait Islander viewpoints on effective responses to family violence identified the following themes:

- Solutions to violence developed by Indigenous people are likely to focus on community healing, restoration of family cohesion and processes that aim to let both the victim and perpetrator deal with their pain and suffering.
- Indigenous communities want to play a more significant role in shaping program and service responses.
- Because Indigenous family violence is, in part, attributed to the breakdown of traditional culture and kinship practices, the rebuilding of these family and kinship ties is often seen as central to developing any type of response to Indigenous family violence.
- Generalised services and programs can be considered effective if they operate in a culturally sensitive way and/or are run in partnership with Indigenous organisations.
- The criminal justice system is not considered the most appropriate means for dealing with family violence in Indigenous communities. Instead, communities prefer Indigenous sentencing courts aimed at integration of Indigenous community members in the court process, rehabilitation of the offender and restoration of the family.

143 Top End Women’s Legal Service Inc, *Submission 52*. See also Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011* (Australian Human Rights Commission, 2011) ch 2.

144 Judy Atkinson, ‘A Nation Is Not Conquered’ (1996) 3(81) *Aboriginal Law Bulletin* 4, 4. See also Elena Marchetti, ‘Indigenous Women and the RCIADIC—Part I’ (2007) 7(1) *Indigenous Law Bulletin* 6.

145 Australian Law Reform Commission, *Family Violence—A National Legal Response*, Report No 114 (2010).

146 Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016).



- Ongoing planned and consistent funding for service provision is considered a major issue.<sup>147</sup>

2.90 In its submission to this Inquiry, the National Family Violence Prevention and Legal Services Victoria pointed to a number of its own programs designed to prevent and respond to family violence, and noted that:

Central to the best practice elements of these programs is the fact that these programs are designed and delivered by Aboriginal and Torres Strait Islander organisations. Successful programs take a cultural and strength-based approach and target the underlying causes of contact with the criminal justice system in the first place.<sup>148</sup>

2.91 The ALRC considers family violence further in Chapter 11. It also recommends in Chapter 16 that a target to reduce violence against Aboriginal and Torres Strait Islander people be adopted as part of criminal justice targets.

### **Intergenerational trauma**

2.92 The legacy of historical dispossession and dislocation from land, culture and family has ongoing harmful effects for Aboriginal and Torres Strait Islander peoples, commonly described as ‘intergenerational trauma’:

It is defined as the subjective experiencing and remembering of events in the mind of an individual or the life of a community, passed from adults to children in cyclic processes as ‘cumulative emotional and psychological wounding’ ... [H]istorical trauma can become normalised within a culture because it becomes embedded in the collective, cultural memory of a people and is passed on by the same mechanisms through which culture, generally, is transmitted.<sup>149</sup>

2.93 Intergenerational trauma has particularly affected families of those who were affected by the stolen generation. The *Bringing Them Home* Report observed:

The impacts of the removal policies continue to resound through the generations of Indigenous families. The overwhelming evidence is that the impact does not stop with the children removed. It is inherited by their own children in complex and sometimes heightened ways.<sup>150</sup>

2.94 As Professor Harry Blagg, Dr Vickie Hovane and Dorinda Cox described: ‘[f]or Aboriginal people, intergenerational trauma 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’.<sup>151</sup>

147 Anna Olsen and Ray Lovett, ‘Existing Knowledge, Practice and Responses to Violence against Women in Australian Indigenous Communities’ (State of Knowledge Paper, ANROWS, 2016) 2; Paul Memmott, ‘On Regional and Cultural Approaches to Australian Indigenous Violence’ (2010) 43(2) *Australian & New Zealand Journal of Criminology* 333.

148 National Family Violence Prevention & Legal Services Victoria NFVPLS, *Submission 77*.

149 Judy Atkinson, ‘Trauma-Informed Services and Trauma-Specific Care for Indigenous Australian Children’ (Resource Sheet No 21, Closing the Gap Clearinghouse, 2013) 4–5.

150 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) ch 11.

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

2.95 Many submissions to this Inquiry emphasised the significance of the experience of intergenerational trauma in heightening other risk factors for incarceration.<sup>152</sup> The National Congress of Australia's First Peoples submitted that it is 'the view of many Aboriginal people that intergenerational trauma is a key driver of many health, wellbeing and social issues faced by many Aboriginal people and communities today'.<sup>153</sup>

2.96 Submissions to this Inquiry stressed that addressing intergenerational trauma must form part of efforts to reduce incarceration rates of Aboriginal and Torres Strait Islander peoples. The ACT Government submitted:

Breaking the cycle of disadvantage and intergenerational trauma requires solutions that are both future-oriented and responsive to the past. Providing meaningful employment and access to appropriate housing is as critical as providing culturally sensitive programs that respond to trauma, loss and grief, addiction, violent behaviour, experiences of abuse and mental illness.<sup>154</sup>

2.97 A series of community justice forums conducted by the Aboriginal Legal Service NSW/ACT identified

the need for greater focus and investment on prevention and early intervention strategies that: address inter-generational trauma; preserve strong, vibrant and well-functioning families; and grow and nurture resilient young people. This should be guided by Elders and community leaders, and embedded in Aboriginal culture.<sup>155</sup>

2.98 Key principles of a 'trauma-informed' approach to delivering services have been identified:

- understand trauma and its impact on individuals, families and communal groups;
- promote safety;
- ensure cultural competence;
- support client's control;
- share power and governance;
- integrate care;
- support relationship building;
- enable recovery.<sup>156</sup>

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152 See, eg, Northern Territory Government, *Submission 118*; Aboriginal Peak Organisations Northern Territory, *Submission 117*; ACT Government, *Submission 110*; The Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Mission Australia, *Submission 53*; Northern Territory Legal Aid Commission, *Submission 46*; Victorian Aboriginal Legal Service, *Submission 39*.

153 National Congress of Australia's First Peoples, *Submission 73*.

154 ACT Government, *Submission 110*.

155 Aboriginal Legal Service NSW ACT Supplementary Submission, *Submission 112*.

156 Judy Atkinson, above n 150, 7.

2.99 The Aboriginal Healing Foundation, in a report marking 20 years from the *Bringing Them Home* Report, has identified the need for a ‘trauma informed public policy environment’. It has advocated for police, welfare services, health and mental health providers and other institutions to become trauma-informed:

Trauma-informed organisations use a strengths-based approach based on an understanding of the impact of trauma; emphasise the physical, psychological, and emotional safety of clients and staff; and help people affected by trauma to rebuild a sense of control and empowerment.<sup>157</sup>

2.100 In Chapters 9 and 11, the ALRC recognises the need for prison programs to be trauma-informed, and for services delivered to Aboriginal and Torres Strait Islander women to be designed specifically to meet their needs.

### Cycle of incarceration

2.101 As a number of submissions pointed out, incarceration itself has a compounding effect on all of the above disadvantages, and can lead to a cycle of incarceration—both for ex-prisoners, and for their families.<sup>158</sup>

2.102 The Victorian Aboriginal Legal Service drew attention to the effects on children of the imprisonment of parents and other family members, offering the following accounts:

Many of the Aboriginal youth in juvenile justice facilities have or have had family members incarcerated within adult correctional systems and see themselves as likely to repeat the cycle. One Aboriginal youth had a view of helplessness when envisioning his future and felt that he would likely reunite with family ‘when I go to adult prison’. Another Aboriginal youth who identified with the cycle of offending experience by his family noted that he had uncles at Port Phillip Prison so ‘when they put me in an adult prison, that is where I want to go’.<sup>159</sup>

2.103 The incarceration of women in particular can lead to entry of children into the child protection system. Australian Lawyers for Human Rights submitted that the ‘incarceration of women, even for short periods on remand, may result in the removal of their children and their exposure to neglect and abuse, contributing to the cycle of disadvantage experienced by these communities’.<sup>160</sup>

2.104 Professor Harry Blagg, Dr Vickie Hovane and Dorinda Cox emphasised the significance of the community-level effect of the incarceration of women:

Aboriginal women are pivotal in maintaining the health and wellbeing of families. When Aboriginal women are removed from the family structure via imprisonment it

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157 Aboriginal and Torres Strait Islander Healing Foundation, *Bringing Them Home 20 Years on: An Action Plan for Healing* (2017) 30.

158 See, eg, Professor H Blagg, Dr V Hovane and D Cox, *Submission 121*; Northern Territory Government, *Submission 118*; North Australian Aboriginal Justice Agency (NAAJA), *Submission 113*; National Family Violence Prevention & Legal Services Victoria NFVPLS, *Submission 77*; National Congress of Australia’s First Peoples, *Submission 73*; Australian Lawyers for Human Rights, *Submission 59*; Top End Women’s Legal Service Inc, *Submission 52*; Victorian Aboriginal Legal Service, *Submission 39*.

159 Victorian Aboriginal Legal Service, *Submission 39*.

160 Australian Lawyers for Human Rights, *Submission 59*.

creates a massive crisis, affecting a range of dependents, principally children. The crisis is exacerbated when there are multiple generations of women from one family in prisons, as is the case at Bandyup prison in WA. The ramifications reverberate negatively across the breadth and depth of family and community wellbeing.<sup>161</sup>

2.105 Professor Russell Hogg and Associate Professor Julia Quilter noted the community-level effects of incarceration:

the numbers for young men actually caught up in the system at any given moment must, in particular, be breathtakingly high, perhaps one in three or four. ... [T]his cannot be anything other than socially, demographically, economically and psychologically catastrophic for any community, producing disastrous effects on employment, household incomes, education, inter-generational relationships and so on. Put in plain terms it is criminogenic.<sup>162</sup>

2.106 The criminogenic effects of incarceration that is disproportionately concentrated in particular communities is considered further in Chapter 4, where justice reinvestment is explored as a place-based, community-led approach to addressing the ‘upstream’ drivers of incarceration for Aboriginal and Torres Strait Islander peoples.

### Torres Strait Islander peoples

2.107 While this Inquiry focuses on Aboriginal and Torres Strait Islander incarceration rates, it is important to recognise that Aboriginal people and Torres Strait Islander people have significantly different histories and culture. Dr Anna Shnukal has observed that, ‘Torres Strait Islanders are not mainland Aboriginal people who inhabit the islands of Torres Strait. They are a separate people in origin, history and way of life’.<sup>163</sup>

2.108 The Torres Strait Islands, now part of Queensland, consist of 18 island communities and five traditional island clusters. The Torres Strait is situated between the northeast tip of Cape York peninsula, and the southern coast of Papua New Guinea and covers an area of approximately 48,000 square kilometres.<sup>164</sup>

2.109 The 2016 Census recorded 32,344 people who identified as being of Torres Strait Islander origin only across Australia. Approximately 65% resided in Queensland, while 11% (3,595) resided on the Torres Strait Islands. A further 12% (503) people residing in the Torres Strait Islands identified as being of both Aboriginal and Torres Strait Islander origin and 26,767 people within mainland Australia identified as being ‘both Aboriginal and Torres Strait Islander’.<sup>165</sup>

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

162 Adjunct Professor Russell Hogg and Associate Professor Julia Quilter, *Submission 87*.

163 Anna Shnukal, ‘Torres Strait Islanders’ in Maximilian Brandle (ed), *Multicultural Queensland 2001: 100 years, 100 Communities, A Century of Contributions* (Department of Premier and Cabinet (Qld), 2001) 21, 21.

164 Torres Strait Regional Authority, *Community Profiles* <[www.tsra.gov.au/the-torres-strait/community-profiles](http://www.tsra.gov.au/the-torres-strait/community-profiles)>.

165 Australian Bureau of Statistics, *2016 Census: Aboriginal and/or Torres Strait Islander Peoples QuickStats—Torres Strait Islands* <[www.censusdata.abs.gov.au](http://www.censusdata.abs.gov.au)>.

## History of European contact with the Torres Strait

2.110 European contact with the Torres Strait began in 1606, when Luis Vaez de Torres navigated the Strait on the way to Manila. Throughout the following 160 years there were contacts between Islanders and Europeans, including for trade, but it was not until the 1860s that Europeans commenced a permanent presence in the Torres Strait, following the identification of commercially viable marine industries, primarily bêche-de-mer and pearling.<sup>166</sup>

2.111 In 1871, Christian missionaries and teachers from the London Missionary Society arrived in the Torres Strait. The introduction of Christianity, referred to as ‘The Coming of the Light’, had a significant and lasting impact on the people and the region, and, by the end of the nineteenth century, the majority of Torres Strait Islanders had adopted Christianity.<sup>167</sup>

2.112 In 1872, Queensland annexed the islands up to 60 miles from the coast of Cape York, and the majority of the remaining islands in the Torres Strait were annexed to Queensland in 1879.<sup>168</sup> Professor Jeremy Beckett has observed that the Queensland Government ‘had little interest in the Islanders themselves, leaving them to the care of the London Missionary Society’.<sup>169</sup>

2.113 In 1907, Torres Strait Islander people were made subject to the protectionist legislative regime that applied to Aboriginal people in Queensland and extensively regulated their lives.<sup>170</sup> In other areas of Queensland, this involved relocation of much of the Aboriginal population to reserves.<sup>171</sup> However, large scale relocation did not occur in the Torres Strait:

there was no need for relocation: the island communities were already isolated and had already made their adaptation to the new order; moreover, there was a market for their labour, which, combined with subsistence production, could make them self-supporting.<sup>172</sup>

2.114 The Queensland Government did impose a number of controls on the Torres Strait Islander people, including holding workers’ earnings on their behalf and limiting

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166 John Burton, *General History—The Torres Strait* Torres Strait Regional Authority <[www.tsra.gov.au/the-torres-strait/general-history](http://www.tsra.gov.au/the-torres-strait/general-history)>.

167 Jeremy Beckett, *Encounters with Indigeneity - Writing about Aboriginal and Torres Strait Islander Peoples* (Aboriginal Studies Press, 2014) 109; David Lawrence and Helen Reeves Lawrence, ‘Torres Strait: The Region and Its People’ in Richard Davis (ed), *Woven Histories, Dancing Lives: Torres Strait Islander Identity, Culture and History* (Aboriginal Studies Press, 2004) 24.

168 Burton, above n 168.

169 Jeremy Beckett, above n 169, 172.

170 *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginals Preservation and Protection Act 1939* (Qld); *Torres Strait Islander Act 1939* (Qld).

171 Jeremy Beckett, above n 169, 172–3. Section 9 of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) granted the Protector of Aborigines the power ‘to cause Aborigines within any district to be removed to and kept within the limits of any reserve situated in the same or any other district’.

172 *Ibid* 173. However, removals to the mainland did occur: for example, from Badu (Mulgrave Island), there were 17 documented removals between 1839 and 1950: Queensland Government, *Aboriginal and Torres Strait Islander Community Histories: Badu* <[www.qld.gov.au/atsi/cultural-awareness-heritage-arts/community-histories-badu](http://www.qld.gov.au/atsi/cultural-awareness-heritage-arts/community-histories-badu)>.

access to retail outlets, ‘justified on the grounds that Islanders were incapable of managing their affairs and must be taught thrift’.<sup>173</sup> However, the administrative regime on the Torres Strait from 1899 also included two or three elected councillors who were Torres Strait Islander people.

2.115 In 1936, about 70% of the Torres Strait Islander workforce went on strike for nine months, protesting government interference in wages, trade and commerce, and calling for the lifting of curfews, the removal of a permit system for inter-island travel, and the recognition of the Islanders’ right to recruit their own boat crews.<sup>174</sup> This strike resulted in the government retaining control of Islander people’s employment, earnings and consumption from Thursday Island, but leaving communities to run their own affairs on the other islands. Beckett has observed that: ‘Under this new regime, the Islanders, having only restricted contact with the outside world, were able to develop a rich creole culture around the church and council’.<sup>175</sup>

2.116 In 1938, the Queensland Government agreed to the request of Torres Strait Islander people to be recognised as a distinct minority, who were different to Aboriginal peoples.<sup>176</sup> The following year, the Queensland legislature passed legislation to the same effect.<sup>177</sup>

2.117 The island of Mer (Murray Island) was the subject of the first successful native title claim in Australia. In 1992, the High Court in *Mabo v Queensland [No 2]*, found that pre-existing rights and interests in land held by Aboriginal and Torres Strait Islander peoples—native title—survived the assertion of sovereignty by the Crown.<sup>178</sup> In 2010, Torres Strait Islander peoples’ native title rights to sea country in the Torres Strait were also recognised, over an area of approximately 44,000 square kilometres.<sup>179</sup>

2.118 In 1994, the Torres Strait Regional Authority (TSRA) was established as a Commonwealth representative body for Torres Strait Islander and Aboriginal people living in the Torres Strait.<sup>180</sup> The 20 elected members on the TSRA Board are Torres Strait Islander or Aboriginal people living in the region, and are elected every four years by their individual communities. The TSRA’s functions include formulating, coordinating and implementing programs for Torres Strait Islander and Aboriginal people living within the region.<sup>181</sup>

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173 Jeremy Beckett, above n 169, 173.

174 Queensland Government, above n 174.

175 Jeremy Beckett, above n 169, 174.

176 Ibid.

177 *Torres Strait Islander Act 1939* (Qld).

178 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J).

179 *Akiba v Queensland (No 3)* (2010) 204 FCR 1.

180 Under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), today known as the *Aboriginal and Torres Strait Islander Act 2005* (Cth).

181 Torres Strait Regional Authority, *The TSRA* <[www.tsra.gov.au/the-tsra](http://www.tsra.gov.au/the-tsra)>. Two Northern Peninsula Area communities, Bamaga and Seisia, are also part of area covered by the TSRA.

### Criminal justice issues in the Torres Strait Islands

2.119 Forming a picture of the incarceration of Torres Strait Islander people is made difficult by the fact that the available data<sup>182</sup> relating to the incarceration of Aboriginal and Torres Strait Islander peoples does not distinguish between people who identify as being an ‘Aboriginal’ person, a ‘Torres Strait Islander’ person, or as both.

2.120 During this Inquiry, the ALRC visited the Torres Strait to consult with stakeholders there and gain an understanding of the incarceration of Torres Strait Islander people within the Torres Strait region.

2.121 During consultations on Thursday Island, a number of stakeholders told the ALRC that many of the criminal justice issues affecting Aboriginal communities across Australia were not experienced by Torres Strait Islander people living in the Torres Strait, due in part to its different history of colonisation.

2.122 Crime and justice figures collected by the Queensland Police Service for 2015–16 showed that, compared to Queensland, the Torres Strait region had a lower rate of total reported offences. However, it had a higher rate of reported offences against the person, compared to the rate in Queensland.<sup>183</sup> A 2011 study suggested that family violence in the Torres Strait was not as prevalent as in certain remote Cape York Aboriginal communities, but that there was likely to be under-reporting of family violence.<sup>184</sup> Alcohol and cannabis was noted as a risk factor for violence, as well as lack of appropriate service infrastructure, factors associated with poverty, such as lack of education, poor health and low self-esteem.<sup>185</sup>

2.123 Although contact with the criminal justice system may not be at the disproportionate rates experienced on the mainland, the ALRC observed that the operation of the criminal justice system in the Torres Strait Islands provides an experience similar to that of other regional and remote communities.

2.124 Many of the difficulties that exist in remote mainland communities when responding to criminal justice issues are also relevant in the Torres Strait. For example, the cost of travel within the Torres Strait, and from the Torres Strait to the mainland can be prohibitively expensive, which can lead to breaches of bail conditions. Scott Mclean Cullen noted that:

The distance and the cost of transport to court for appearances is high. As it can be up to \$1000 for return flights, ferries and transfers from Outer Island to Thursday Island.

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182 This refers to court and police data, as well as to prisoner data reported by the Australian Bureau of Statistics. In most instances, bureaus of crime statistics and research (for example, BOCSAR in NSW and OSCAR in South Australia) also do not distinguish between these groups.

183 The total rate of reported offences in the Torres Strait 7,907 per 100,000, compared to 9,856 per 100,000 for Queensland. The total rate of offences against the person in the Torres Strait was 2,278 per 100,000, compared to 634 per 100,000 for Queensland: Queensland Government Statistician’s Office, *Queensland Regional Profiles Resident Profile—People Who Live in the Region Torres Strait Islands Statistical Area Level 2 (SA2) Compared with Queensland* (Queensland Government, 8 December 2017) <<https://statistics.qgso.qld.gov.au/qld-regional-profiles>>.

184 Memmott, above n 148, 346–9.

185 Ibid 349–50.

It is a further \$800–\$1000 to travel from Horn Island to Cairns, this transport might include small plane flights services.<sup>186</sup>

2.125 Lack of access to interpreters has also been identified as a barrier to justice in the Torres Strait, where English may be a person's second or third language.<sup>187</sup>

2.126 The availability of community-based sentences is also limited in the Torres Strait Islands, as are diversion programs including drug and alcohol treatment programs and counselling services.<sup>188</sup>

2.127 While these difficulties exist, there are also examples of adaptation of the criminal justice system in the Torres Strait to be responsive to local circumstances. For example, the Magistrates Court operates an Outer Island Circuit Court on 10 different Torres Straits Islands four times a year:

The Outer Island Court Circuit was developed so that community members from the Torres Strait Outer Islands can have their court matters heard in their own community or a community nearby. The Outer Island Courts hear minor matters which would otherwise require members of the community to travel at significant expense to Thursday Island. All serious matters are still referred and heard at Thursday Island.<sup>189</sup>

2.128 Community justice groups also operate to provide cultural support for court matters and to provide 'cultural reports to the courts at sentencing and bail applications, assistance to the courts in managing community-based offences, and networking to implement crime prevention initiatives'.<sup>190</sup> In 2012, Dorothy Elu, an Elder on the Community Justice Group, provided an example of their work:

we have to talk on their family's side and all that, we try to ask the judge to leave it to us to do the mediation before any further action can be taken. We had one boy last week and he had about 12 cases. The judge was going to send him down to Lotus [a prison] ... We talked to the judge on behalf of his family—now he's free, now he's just waiting for our time to do some mediation with him and drug and alcohol counselling and all that.<sup>191</sup>

2.129 Torres Strait Island Police Support Officers (TSIPSOs) are another initiative that responds to local needs. TSIPSOs are community police employed in the Torres Strait by the Queensland Police Service. TSIPSOs have limited police powers and reside on the remote Islands. They are not sworn police officers and have no power to detain or arrest, but do provide a point of contact between local communities and the police, who are based on Thursday Island.<sup>192</sup> Scott McLean Cullen submitted that:

186 S McLean Cullen, *Submission 64*.

187 Ibid.

188 Ibid.

189 Queensland Police, *A Court with a Difference for Torres Strait and Outer Islands Far North* <[www.mypolice.qld.gov.au/farnorth/2016/05/23/](http://www.mypolice.qld.gov.au/farnorth/2016/05/23/)>.

190 Department of Aboriginal and Torres Strait Islander Partnerships (Qld), *Thursday Island* <[www.datsip.qld.gov.au/publications-governance-resources/justice-resources/thursday-island](http://www.datsip.qld.gov.au/publications-governance-resources/justice-resources/thursday-island)>. See also chs 5 and 6.

191 ABC Radio National, *Community Justice in the Torres Strait* (3 July 2012) Law Report (Dorothy Elu) <[www.abc.net.au/radionational/programs/lawreport/community-justice-in-the-torres-strait/4114774](http://www.abc.net.au/radionational/programs/lawreport/community-justice-in-the-torres-strait/4114774)>.

192 Queensland Police, *Queensland Police Welcome New Torres Strait Island Police Support Officers (TSIPSO)* (28 October 2013) <[www.mypolice.qld.gov.au/farnorth/2013/10/28](http://www.mypolice.qld.gov.au/farnorth/2013/10/28)>.



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For the Torres Straits courts the input of local Justice Groups and the island TIPSO (Thursday Island Police Support Officer) provide valuable local knowledge into the background and local life of an individual/ and victims. They offer insight into community life standing and personal behaviour.<sup>193</sup>

2.130 While the ALRC makes no specific recommendations directed to incarceration in the Torres Strait, it considers that a number of recommendations made in this Report may be particularly relevant to the Torres Strait, including those relating to the availability of community-based sentences, and other access to justice issues such as the availability of interpreters.<sup>194</sup>

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193 S McLean Cullen, *Submission 64*.

194 See also chs 7 and 10.

