

5. Bail

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Summary

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

5.2 Irregular employment, previous convictions for often low-level offending, and a lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail. Furthermore, when bail is granted, cultural obligations to attend sorry business following a death in the family or community, or to take care of family may conflict with commonly issued bail conditions—such as curfews and exclusion orders—leading to breach of bail conditions, revocation of bail and subsequent imprisonment. This issue has continued despite existing laws and legal frameworks that enable some bail authorities to take cultural considerations into account.

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

5.4 As a means of decreasing the number of Aboriginal and Torres Strait Islander people in prison held on remand, bail laws should require bail authorities to consider issues and circumstances arising from a person's Aboriginality when making bail determinations. Victoria introduced a model provision in 2010, which the ALRC recommends be adopted in other state and territory bail statutes.

5.5 The effect of this provision may be diminished through limited application and use by legal advocates, and deficiencies in culturally appropriate bail support services and diversion programs. For these reasons, the ALRC further recommends that state and territory governments work with relevant Aboriginal and Torres Strait Islander organisations and legal bodies to produce usage guidelines for the judiciary and legal practitioners, and to identify gaps in the provision of bail supports. Implementation of these recommendations would likely be assisted by the uptake of Aboriginal Justice Agreements, discussed in Chapter 16.

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

Background

The operation of bail laws and legal frameworks

5.7 A person may be held on remand following charge because they did not apply for bail, the bail authority refused bail, or because a person breached a condition of bail.

5.8 Bail laws are complex and vary between states and territories, with each having a relevant Bail Act.¹ A general overview of the operation of bail laws across states and territories is provided below.

5.9 Bail can be determined at different times by police, magistrates, judges and, in some jurisdictions, by bail justices.² These decision makers are generally termed 'bail authorities'. Questions of bail first arise when a person is charged by police with an offence. Police can release the accused person with a Court Attendance Notice (or equivalent) to attend court, or police can release the accused person on bail. It is always a condition of police bail that the accused person attends court.³ Other conditions may also be imposed.

5.10 When police refuse to release the accused person or to grant bail, the police must bring the accused person before the Local or Magistrates Court as soon as possible, where the accused person can apply to the court for bail.⁴

1 *Bail Act 1992 (ACT); Bail Act 2013 (NSW); Bail Act (NT); Bail Act 1980 (Qld); Bail Act 1985 (SA); Bail Act 1994 (Tas); Bail Act 1977 (Vic); Bail Act 1982 (WA).*

2 Queensland and Victoria.

3 See, eg, *Bail Act 1977 (Vic) s 5; Bail Act 1982 (WA) s 28.*

4 *Bail Act 1992 (ACT) s 17; Bail Act 2013 (NSW) s 41; Bail Act (NT) s 33; Bail Act 1980 (Qld) s 19B; Bail Act 1985 (SA) s 14; Bail Act 1994 (Tas) s 11; Bail Act 1977 (Vic) s 4; Bail Act 1982 (WA) s 5.*

5.11 A statutory presumption against bail attaches to some offences. These generally include serious indictable sexual and personal violence offences, as well as weapon and terrorism-related offences.⁵ In some jurisdictions these offence categories are known as ‘show cause’ or ‘exceptional circumstances’ offences.⁶

5.12 When an accused person successfully ‘shows cause’, or when show cause is not required, the bail authority considers whether an accused person would pose an ‘unacceptable risk’ if released on bail, and, if so, whether conditions could be imposed to mitigate that risk. When determining unacceptable risk, the bail authority generally considers whether a person is likely to: appear in court to answer bail; interfere with witnesses; harm themselves or others; or whether there is a risk of reoffending.⁷ These risks are termed ‘bail concerns’ in New South Wales (NSW).⁸

5.13 The type of matters to be considered when assessing ‘bail concerns’ are prescribed in some jurisdictions. In NSW, for example, the type of matters to be taken into account are prescribed by the *Bail Act 2013* (NSW), and include, among other things: the accused person’s background, including criminal history, circumstances and community ties; any previous history of non-compliance with court orders; the nature and seriousness of the offence; and any special vulnerability or needs the accused person has including being young, being an Aboriginal or Torres Strait Islander person, or having cognitive or mental health impairments.⁹

5.14 In Western Australia (WA), the bail authority must have regard to the nature and seriousness of the offence; the character, previous convictions, home environment, background, place of residence, and financial position of the accused; the history of any previous grants of bail; and the strength of the evidence. The bail authority can also have regard to any other matters that are considered relevant.¹⁰ Similar matters are included in bail legislation in other states and territories.¹¹

5.15 Bail authorities can impose conditions that are ‘reasonably necessary’ to address any identified bail concern. Conditions imposed upon granting bail must be ‘reasonable and proportionate’ to the offence, and be no more onerous than necessary to address the bail concern.¹² Bail conditions can require an accused person to do, or refrain from doing, certain things—such as to report to police; live at a specific address; not associate with certain people; or to obey a curfew. Bail conditions can also enforce a condition of release, for example compel an accused person to undergo drug testing.¹³ An accused person can apply to have their bail conditions varied.¹⁴

5 See, eg, *Bail Act 2013* (NSW) s 16B; *Bail Act* (NT) s 7A; *Bail Act 1980* (Qld) s 16(3).

6 See, eg, *Bail Act 2013* (NSW) s 16A; *Bail Act 1980* (Qld) s 16; *Bail Act 1977* (Vic) s 4.

7 See, eg, *Bail Act 2013* (NSW) s 17; *Bail Act 1980* (Qld) s 16; *Bail Act 1977* (Vic) s 5(3); *Bail Act 1982* (WA) sch 1 pt C cl 1.

8 See, eg, *Bail Act 2013* (NSW) s 17.

9 See, eg, *Ibid* s 18.

10 *Bail Act 1982* (WA) sch 1 pt C cl 3.

11 See, eg, *Bail Act* (NT) ss 24, 24(1)(B)(iiiic); *Bail Act 1980* (Qld) ss 16(2), 16(2)(e).

12 See, eg, *Bail Act 2013* (NSW) s 20; *Bail Act 1977* (Vic) s 5(4)(a).

13 See, eg, *Bail Act 2013* (NSW) pt 3 div 3; *Bail Act 1980* (Qld) s 11.

14 See, eg, *Bail Act 2013* (NSW) s 51.

5.16 Breaching a condition of bail may result in bail revocation by the court, meaning an accused person is then held in prison on remand.¹⁵ Breach of bail conditions is an offence in most jurisdictions,¹⁶ as is failure to appear to answer bail.¹⁷

5.17 Some bail conditions must be confirmed or met before an accused person will be released on bail. Pre-release conditions can include the confirmation of an address or the provision of a surety.¹⁸

5.18 An accused person may also apply for bail following conviction pending sentencing or an appeal.¹⁹

The impact on Aboriginal and Torres Strait Islander people

5.19 Stakeholders to this Inquiry raised concerns about the effect that remand rates had on Aboriginal and Torres Strait Islander incarceration rates. For example, the Australian Lawyers for Human Rights (ALHR) observed that ‘bail and remand processes significantly contribute to the unnecessary imprisonment of Aboriginal and Torres Strait Islander people’,²⁰ while the NSW Bar Association considered bail law reform to be one of the most ‘important areas requiring attention in order to reduce the incarceration rates of Aboriginal and Torres Strait Islander people’.²¹

5.20 There has been a general upsurge in remand populations nationwide,²² and this has been especially pronounced for the Aboriginal and Torres Strait Islander prisoner population.

5.21 In 2016, the national Aboriginal and Torres Strait Islander remand prisoner population accounted for 30% (3,221) of Aboriginal and Torres Strait Islander prisoners, which amounted to 27% of all prisoners held on remand.²³ By June 2017, 33% (3735) of the national Aboriginal and Torres Strait Islander prisoner population were in prison held on remand.²⁴

5.22 Aboriginal and Torres Strait Islander peoples have continued to be over-represented on remand by a factor of over 11 compared to non-Indigenous remandees

15 See, eg, *Bail Act* (NT) s 38.

16 In all jurisdictions except the ACT and NSW: *Ibid* s 37B; *Bail Act 1980* (Qld) s 29; *Bail Act 1985* (SA) s 17; *Bail Act 1994* (Tas) s 9; *Bail Act 1977* (Vic) s 30A; *Bail Act 1982* (WA) s 51.

17 See, eg, *Bail Act 1992* (ACT) s 49; *Bail Act* (NT) s 39; *Bail Act 1980* (Qld) s 33; *Bail Act 1977* (Vic) s 30; *Bail Act 1982* (WA) ss 51A, 52.

18 Western Australian Auditor General, ‘Management of Adults on Bail’ (Report 10, June 2015) 5. See, eg *Bail Act 2013* (NSW) s 29; *Bail Act 1980* (Qld) s 11; *Bail Act 1977* (Vic) s 9; *Bail Act 1982* (WA) s 35.

19 See, eg, *Bail Act 2013* (NSW) s 62.

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

21 NSW Bar Association, *Submission 88*.

22 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016). The number of adult prisoners held on remand totalled 12,111 in June 2016, an increase of 22% from 2015; the number of sentenced prisoners increased by 2% in the same period.

23 *Ibid*.

24 Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2017, Cat No 4512.0* (2017) table 8, 14.

since 2010—in 2016, the rate of remand for Aboriginal and Torres Strait Islander peoples was 432 per 100,000 and 38 per 100,000 for non-Indigenous people.²⁵

5.23 In 2016, Aboriginal and Torres Strait Islander people were most likely to be held on remand when accused of offences categorised as ‘acts intended to cause injury’ (42% of the Aboriginal and Torres Strait Islander remand population); ‘unlawful entry with intent’ (13%); and sexual assault (7%).²⁶ The category of ‘acts intended to cause injury’ is broadly defined and can include low-level instances of offending. For example, 33% of Aboriginal and Torres Strait Islander peoples held on remand for ‘acts intended to cause injury’ were charged with a serious assault *not* resulting in injury²⁷ and 12% for common assault. This is not to say that all Aboriginal and Torres Strait Islander people held on remand for ‘acts intended to cause injury’ were held for low-level offending: 54% in this category were held on remand for charges of serious assault resulting in injury.²⁸

5.24 In NSW, Aboriginal and Torres Strait Islander males spent an average of 44 days on remand, while Aboriginal and Torres Strait Islander females spent an average of 38 days on remand.²⁹ Around 40% of Aboriginal and Torres Strait Islander defendants who were held on remand at their final court appearance in NSW in 2015 did not receive any custodial penalty on conviction.³⁰

5.25 Aboriginal and Torres Strait Islander women are a fast growing group within the remand population. For example, the Inspector of Custodial Services in WA reported that WA had seen a 150% growth in Aboriginal and Torres Strait Islander women being held on remand from 2009 to 2016, describing the statistic as ‘especially sharp and alarming’.³¹ It was reported that, in Victoria in 2012, 60% of Aboriginal and Torres Strait Islander women held on remand were released without sentence.³² As discussed in Chapter 11, being held in prison for even a short period of time can be disruptive and destabilising, especially for women where the ‘social as well as the financial costs of these short-term remands can be very high’.³³

25 See ch 3.

26 Australian Bureau of Statistics, above n 22, table 8.

27 This is compared to 20% of non-Indigenous people in the same category, see ch 3.

28 See ch 3.

29 NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update March 2017* (2017) [2.3.2].

30 Don Weatherburn and Stephanie Ramsay, ‘What’s Causing the Growth in Indigenous Imprisonment in NSW?’ (Bureau Brief Issue Paper No 118, NSW Bureau of Crime Statistics and Research, 2016) 8; Compare with NSW Government, *Submission 85*.

31 Office of the Inspector of Custodial Services, *Western Australia’s Rapidly Increasing Remand Population* (2015) 2.

32 Victorian Equal Opportunity and Human Rights Commission, ‘Unfinished Business: Koori Women and the Justice System’ (August 2013) 20.

33 Office of the Inspector of Custodial Services, above n 31, 4. See also ch 11.

Drivers of over-representation on remand

Bail refusal

5.26 Aboriginal and Torres Strait Islander peoples are less likely to be granted bail than non-Indigenous people.³⁴ Bail refusal for Aboriginal and Torres Strait Islander peoples has been attributed to the likelihood of accused Aboriginal and Torres Strait Islander people having prior convictions. Aboriginal and Torres Strait Islander people are up to twice as likely as non-Indigenous accused people to have 10 prior convictions, and are also more likely to have prior convictions for breach of a previous court order.³⁵

5.27 The Victorian Supreme Court appeal matter of *Re Mitchell* [2013] VSC 59 provides an example of how prior low-level offending can affect bail determinations for Aboriginal and Torres Strait Islander people.³⁶ Mitchell, a pregnant 22-year-old Aboriginal sole parent, had been charged with offences related to begging and obtaining a ‘financial advantage by deception’ because she had been travelling on the train using a children’s ticket. Mitchell was initially refused bail at the Magistrates’ Court of Victoria where that court found that, due to similar past offending, Mitchell represented an unacceptable risk of committing further offences. Mitchell had previous convictions for shoplifting, burglary, obtaining property by deception and breach of a Community Corrections Order.

5.28 In determining the appeal, the Supreme Court found that the magistrate’s conclusion that Mitchell presented an unacceptable risk of reoffending was ‘unassailable’.³⁷ Nonetheless, at the time of the appeal determination, Mitchell had spent seven weeks in prison on remand—longer than any sentence she would have received for the charges. It was likely that, if not bailed, she would spend up to nine months on remand before trial.³⁸

5.29 The Supreme Court granted bail, with reference to the requirement to consider Aboriginality at s 3A of the *Bail Act 1977* (Vic). The Supreme Court noted the potential to over-police Aboriginal and Torres Strait Islander peoples and suggested that charging Mitchell with obtaining financial advantage by deception for travelling on a child’s ticket was ‘singularly inappropriate’.³⁹

5.30 The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) found that prior failures to appear at court, and the lack of a fixed residential address and

34 See, eg, Lucy Snowball et al, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act* (NSW Bureau of Crime Statistics and Research, July 2010) 5.

35 Don Weatherburn and Lucy Snowball, ‘The Effect of Indigenous Status on the Risk of Bail Refusal’ (2012) 36(1) *Criminal Law Journal* 50, 56. Aboriginal and Torres Strait Islander defendants are also more than twice as likely to have previously been convicted of a breach offence (See ch 7). See also Jennifer Sanderson, Paul Mazerolle and Travis Anderson-Bond, ‘Exploring Bail and Remand Experiences for Indigenous Queenslanders (2011)’ (Final Report, Griffith University, 2011) 4.

36 *Re Mitchell* [2013] VSC 59 (8 February 2013).

37 *Ibid* [7].

38 *Ibid* [12].

39 *Ibid* [13].

stable employment contributed to ‘Aboriginal disadvantage’ in the bail process.⁴⁰ The report of the RCIADIC published a submission by the Queensland Attorney-General’s Department, acknowledging that high rates of ‘mental [and] physical disability, life style, communication difficulties [and] lack of education’ can lead to Aboriginal and Torres Strait Islander peoples being held on remand, not because they are attempting to ‘escape justice’, but because of the particular difficulties they can face in appearing at a court at an ‘appointed place or time’.⁴¹

5.31 The observations of the RCIADIC were repeated in evidence given by the Chief Justice of the Supreme Court of Western Australia to the 2016 Senate Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services, where Martin CJ also cited mental health issues as a key reason why Aboriginal and Torres Strait Islander people were often refused bail.⁴²

5.32 The Victorian Equal Opportunity and Human Rights Commission observed that Aboriginal and Torres Strait Islander women were often denied bail due to a lack of safe, stable and secure accommodation to which Aboriginal and Torres Strait Islander women could be bailed, particularly in regional locations.⁴³ Finding suitable accommodation was especially difficult for women with substance dependencies resulting in both Aboriginal and Torres Strait Islander women and non-Indigenous women being placed in custody for therapeutic reasons, designed to stabilise their addictions and remove them from unsafe environments that may include family violence.⁴⁴

5.33 Language barriers have been identified as another factor that can result in Aboriginal and Torres Strait Islander people being denied release on bail.⁴⁵ In their submission to this Inquiry, ALHR identified that language barriers can negatively affect bail determinations for defendants who are unable to accurately outline their living arrangements, support networks, cultural obligations and other relevant matters to the court.⁴⁶

5.34 Stakeholders to this Inquiry suggested that, when there is a presumption against bail or when an accused must ‘show cause’, the obstacles to a grant of bail for an Aboriginal and Torres Strait Islander person is magnified. Some stakeholders disagreed

40 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* [1991] Vol 3 [21.4.15]; NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.59].

41 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* [1991] Vol 3 [21.4.18].

42 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [5.64].

43 Victorian Equal Opportunity and Human Rights Commission, above n 32, 50.

44 Emma Russell and Cara Gledhill, ‘A Prison Is Not a Home: Troubling “Therapeutic Remand” for Criminalised Women’ (2014) 27(9) *Parity* 27.

45 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* [1991] Vol 3 [21.4.21]. See ch 10 for a broader discussion on issues impacting on access to justice for Aboriginal and Torres Strait Islander peoples.

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

with the ALRC's decision not to interrogate the categories of show cause offences.⁴⁷ For example, ALHR observed:

ALHR notes and regrets the Commission's decision not to discuss bail presumptions in the Discussion Paper. Bail presumptions are often the decisive legislative factor in bail applications. Just as importantly, where legislation imposes a presumption against bail for a low level offence this can result in defendants spending longer on remand than they would likely serve as a sentence. For example, ALHR notes that in the Northern Territory a defendant who has a recent prior conviction for a "technical" [a breach that causes no harm to the protected person] breach of a domestic violence order and is again arrested for a technical breach will face a presumption against bail. This is so notwithstanding that, at the sentencing stage, such a defendant may stand good prospects of a very short prison sentence or a non-custodial disposition. ALHR hopes that the Commission will address this issue in its final report.⁴⁸

5.35 Aboriginal Legal Service of Western Australia (ALSWA) referred to the impact on Aboriginal and Torres Strait Islander accused for 'Schedule Two' cases, which carry a presumption against bail in WA. Schedule Two cases are matters where the accused allegedly committed a 'serious offence' while on bail or parole for another matter. ALSWA advised that the category of 'serious offences' includes conduct such as indecent assault, stealing and breaching a police order.⁴⁹

5.36 The Criminal Lawyers Association of the Northern Territory (CLANT) noted that amendments to the *Bail Act* (NT) in 2015 expanded the number of offences that triggered the presumption against bail. While recognising that this was not focus of the ALRC Inquiry, CLANT submitted that 'the significant effect this provision has on increasing the number of ATSI people on remand cannot go unremarked'.⁵⁰

5.37 Legal Aid NSW, having represented 3,000 accused Aboriginal and Torres Strait Islander people in bail matters in 2016–17, was strongly in favour of removing the show cause provisions in the *Bail Act 2013* (NSW).⁵¹ It advised that, in NSW, an Aboriginal or Torres Strait Islander person who had been bailed for a minor offence, if subsequently charged with stealing from a shop while on bail, will be bail refused unless they can 'show cause'.⁵²

5.38 The ALRC is aware of recent reviews and ongoing monitoring of the operation of 'show cause' provisions in the various states and territories.⁵³ Nonetheless, the

47 Legal Aid NSW, *Submission 101*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; Australian Lawyers for Human Rights, *Submission 59*.

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

49 Aboriginal Legal Service of Western Australia, *Submission 74*.

50 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

51 *Bail Act 2013* (NSW) ss 16A, 16B.

52 Legal Aid NSW, *Submission 101*.

53 See, eg, NSW Sentencing Council, *Bail—Additional Show Cause Offences* (2015); Don Weatherburn and Jacqueline Fitzgerald, 'The Impact of the NSW Bail Act (2013) on Trends in Bail and Remand in New South Wales' [2015] (106) *Crime and Justice Statistics: Bureau Brief, Issue 106*; Hamish Thorburn, 'A Follow-up on the Impact of the Bail Act 2013 (NSW) on Trends in Bail' [2016] *Crime and Justice Statistics: Bureau Brief, Issue 116*; Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017); Paul Coghlan, *Bail Review: Second Advice to the Victorian Government* (2017).

ALRC accepts that the expansion of ‘show cause’ or presumption against bail categories has likely affected the Aboriginal and Torres Strait Islander remand population, and encourages states and territories to evaluate the effect of ‘show cause’ provisions on accused Aboriginal and Torres Strait Islander people when conducting their reviews.

5.39 Other issues raised by stakeholders relevant to bail refusal for Aboriginal and Torres Strait Islander accused people included bail provisions that operated to restrict multiple applications for bail following a bail refusal.⁵⁴ It was contended that these provisions increased the number of Aboriginal and Torres Strait Islander people held on remand, and acted as a disincentive to apply for bail until the person can ‘maximise their chance of release’.⁵⁵

5.40 Stakeholders also drew attention to problems that exist in regional and remote areas when bail is refused by police, and the person is held in a remote police station until transported, or over the weekend, or both.⁵⁶ When arrested in a remote area and bail is refused by police, the defendant may be held in custody until court is next sitting. Transport to court can be cumbersome and expensive. Often the accused will be granted bail by the court at the first appearance and then have to return from the court to community at their own cost. ALHR observed that this results in defendants spending longer in police custody than necessary, and that this could be avoided by the ‘provision of funding for Aboriginal legal aid lawyers to represent such defendants by phone or video link at the time of their review of the initial police bail refusal’.⁵⁷ The NT Anti-Discrimination Commission suggested that servicing by legal advocates could be included as part of a custody notification service.⁵⁸

Breach of conditions of bail

5.41 When bail is granted to an Aboriginal and Torres Strait Islander person, the conditions attached to bail may conflict with an Aboriginal and Torres Strait Islander person’s cultural obligations, increasing the risk of breach and consequent imprisonment.⁵⁹ Curfews, exclusion zones and non-association orders can ‘restrict contact with family networks and prevent Aboriginal people from maintaining relationships, performing responsibilities such as taking care of elderly relatives or attending funerals’.⁶⁰ In the 2011 report, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*, it was observed that compliance with ‘standard’ conditions (curfews, resident restrictions, reporting requirements and alcohol bans) was difficult for some Aboriginal and Torres Strait Islander people. The report concluded that

[f]ailure to comply with these conditions along with the stringent policing of minor breaches in some locations increased the risk of custodial remand for Indigenous

54 See, eg, *Bail Act 2013* (NSW) s 74.

55 Legal Aid NSW, *Submission 101*.

56 Northern Territory Anti-Discrimination Commission, *Submission 67*; S McLean Cullen, *Submission 64*; Australian Lawyers for Human Rights, *Submission 59*.

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

58 Northern Territory Anti-Discrimination Commission, *Submission 67*. See also ch 10.

59 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.54].

60 *Ibid.*

defendants, with court delays then contributing to the length of time defendants remained in remand.⁶¹

5.42 In their 2012 report on bail, the NSW Law Reform Commission (NSWLRC) pointed to transient culture as a further example of how Aboriginal and Torres Strait Islander culture can conflict with standard bail conditions:

For many Aboriginal people, frequent short-term mobility is a normal part of life. People may travel for a few days or a few months, usually to visit family, but also to attend funerals, cultural or sporting festivals or to access health services. Short-term travel is most common among young adults, with older people more firmly associated with a homeland and serving as a focus or base for others, particularly children. Bail processes requiring a fixed address and frequent reporting to a particular police station may conflict with these cultural practices.⁶²

5.43 The NSWLRC also noted that Aboriginal and Torres Strait Islander people may have strong historical and cultural ties to particular locations. It found that bail conditions that restrict access to 'place' can have serious impacts on the person.⁶³

5.44 For this reason, the NSW *Equality before the Law Bench Book* for the judiciary advised that it may be 'less appropriate to attach a condition for an Aboriginal person that the person leave town, than it would be to do so for a non-Aboriginal person'.⁶⁴ The *Bench Book* clearly articulated the problem:

Conditions of bail can often have a disproportionately stringent impact on Aboriginal people as, particularly in rural areas, the conditions may conflict with family and cultural obligations. Where residence or banning conditions are a condition of bail, the person released on bail will not have access to support from the community in which he or she grew up.⁶⁵

5.45 There are also practical considerations, especially in regional and remote communities where public transport infrastructure is lacking. Remoteness can affect a person's ability to meet reporting requirements. Aboriginal and Torres Strait Islander people may not have driver licences, registered motor vehicles (or a car at all), or access to licensed drivers.⁶⁶ In such cases, place and circumstance can limit compliance with certain bail conditions.

5.46 Non-compliance with conditions of bail can be inadvertent. In 2014, the West Australian Auditor General found that one in five Aboriginal and Torres Strait Islander accused people may need help understanding bail, and noted that interpreters were limited.⁶⁷ In their submission to this Inquiry, ALHR observed how language barriers can detract from an accused person's understanding of their bail conditions, noting that they are often explained in legalese by officers of the courts or police in a 'time-poor'

61 Sanderson, Mazerolle and Anderson-Bond, above n 35, 3.

62 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.56].

63 Ibid [11.57].

64 Judicial Commission of NSW, *Equality before the Law Bench Book* (2016) [2.3.2].

65 Ibid.

66 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.53].

67 Western Australian Auditor General, above n 18, 16. See also ch 10.

environment. It was recommended that more interpreters be employed for this purpose.⁶⁸

5.47 The submission from the NSW Government advised that the majority of breaches of bail conditions by Aboriginal and Torres Strait Islander people were generally for ‘technical breaches’. For example, in 2015 in NSW, 2,945 Aboriginal and Torres Strait Islander people had a breach of bail established against them in the Local Court. Of these, 32% involved a new offence; 25% breached curfew; 17% breached reporting requirements; and 14% failed to reside in the designated location. Some breached more than one condition.⁶⁹

5.48 The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted that courts continue to regularly impose conditions that

fail to recognise the specific cultural and community obligations, transport difficulties, transience and frequent short-term mobility (resulting in a lack of fixed address), living in a remote or regional community, poverty, or misunderstanding the purpose of bail that likely affect one’s ability to meet strict bail conditions for Aboriginal and Torres Strait Islander people.⁷⁰

5.49 Stakeholders to this Inquiry stressed that bail conditions should be imposed only to address an identified risk. It was observed that non-association orders that restrict access to family networks and prevent Aboriginal people from ‘maintaining relationships, performing responsibilities or attending funerals’ rarely address a risk and can be ‘especially problematic’ for Aboriginal people.⁷¹ The difficulty that women with family responsibilities may have in meeting conditions was also raised.⁷² It was suggested that, to avoid an accused person being in breach and then remanded in custody, bail conditions should be kept to a ‘necessary minimum’.⁷³

5.50 Bail conditions prohibiting alcohol intake were identified as particularly problematic for Aboriginal and Torres Strait Islander peoples.⁷⁴ Legal Aid WA suggested that alcohol bans increase the likelihood of breach, police intervention, and entry into custody for Aboriginal and Torres Strait Islander people ‘independent of whether they were likely to commit another offence or not’.⁷⁵ The ACT Law Society further observed that conditions regarding alcohol consumption can be both unachievable and harmful to people with alcohol dependencies, noting that ‘alcohol withdrawal can be fatal’.⁷⁶

5.51 Pre-conditions for release on bail can also be unnecessarily or unfairly applied to Aboriginal and Torres Strait Islander accused people. Legal Aid NSW submitted that some magistrates impose sureties in the absence of any demonstrated concern that the

68 Australian Lawyers for Human Rights, *Submission 59*. See also ch 10.

69 NSW Government, *Submission 85*.

70 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

71 Legal Aid NSW, *Submission 101*.

72 Northern Territory Government, *Submission 118*.

73 Legal Aid WA, *Submission 33*.

74 Law Council of Australia, *Submission 108*.

75 Legal Aid WA, *Submission 33*.

76 ACT Law Society, *Submission 40*.

offender will fail to appear.⁷⁷ Imposing sureties can be particularly difficult for Aboriginal and Torres Strait Islander people to meet, especially when living remotely without employment.⁷⁸ For Aboriginal and Torres Strait Islander people on welfare or in receipt of the cashless debit card, bail sureties can present an ‘insurmountable obstacle’ to release.⁷⁹

5.52 The *Aboriginal Benchbook for Western Australia Courts* suggests that courts in Western Australia are adept at reducing the monetary value of bail and surety undertakings to a ‘level appropriate for applicants with a low income or few assets’, and often impose other conditions, such as reporting conditions, in lieu of requiring a surety.⁸⁰ Nonetheless, ALSWA advised that they had represented many clients who spend ‘weeks or months in custody because they are unable to raise a surety’, which is often set at \$1,000 or \$2,000.⁸¹ Sureties were also identified as an issue by the Legal Services Commission of South Australia, which raised the possibility of implementing a Community Bail Fund to pay bail amounts of up to \$2,000. The bail amounts would then be recycled back through the fund when the matter concluded.⁸² ALSWA suggested that, instead of seeking a surety, the court should assess risk in relation to family, kin and community ties of Aboriginal and Torres Strait Islander accused people.⁸³

5.53 Some pre-conditions are particular to certain regions. Legal Aid WA advised the ALRC of the ‘common practice’ of some magistrates in the Pilbara to require a letter from the chairperson of an Aboriginal community that is being proposed as a place of residence to state that the accused is welcome in that community. Legal Aid WA suggested that these letters may be difficult to obtain due to time constraints and communication difficulties, resulting in the person not being granted bail. Legal Aid WA submitted that ‘this requirement has become an impediment to the granting of bail, which accused people with proposed bail addresses in non-Aboriginal communities do not experience’.⁸⁴

5.54 Pre-release conditions can affect a large number of Aboriginal and Torres Strait Islander people. In 2014, the Auditor General of Western Australia advised that there were over 1,600 people that had been granted bail but who were unable to meet their bail conditions in WA that year, so were held in remand until the condition could be met. At that time, over 40% of the prison population were Aboriginal and Torres Strait Islander people. The majority of people had release on bail delayed while they obtained

77 Legal Aid NSW, *Submission 101*.

78 Northern Territory Government, *Submission 118*.

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

80 Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* [6.1.2].

81 Aboriginal Legal Service of Western Australia, *Submission 74*.

82 Legal Services Commission of South Australia, *Submission 17*.

83 Aboriginal Legal Service of Western Australia, *Submission 74*; See also NSW Bar Association, *Submission 88*. The NSW Bar Association also noted that the requirement to show capacity to pay—that the money has been in the acceptable person’s bank account for seven days—often acts as an obstacle to release on bail for people on low incomes who generally do not keep funds in their account for long periods of time.

84 Legal Aid WA, *Submission 33*.

a surety or a residential address. While 307 people who had been granted bail were unable to meet their pre-release conditions, and did not get released.⁸⁵ The ALRC suggests that, when implemented, the bail recommendations should lower the likelihood of bail authorities imposing inappropriate conditions, including the imposition of sureties (see below).

5.55 The NSW Bar Association suggested to this Inquiry that anyone granted bail, but not released due to unmet conditions, should be brought back before the court within a maximum of three days for the court to reassess their application for bail.⁸⁶

Existing mechanisms to consider issues that arise due to Aboriginality

5.56 There are mechanisms in place to permit or encourage bail authorities to take into account issues that arise due to Aboriginality when making bail determinations. These include legal frameworks that provide guidance to judicial decision making and statutory provisions to consider Aboriginality or culture in bail determinations, outlined below. It is clear, however, that these existing mechanisms are not sufficient to ensure bail authorities adequately consider issues relating to Aboriginality, and to decrease the rate at which Aboriginal and Torres Strait Islander people are held on remand.

Legal frameworks

5.57 Legal frameworks in place in some jurisdictions encourage bail authorities to take into account historical context and cultural practices and obligations in bail determinations. The *Aboriginal Benchbook for Western Australian Courts* provides context, background and direction for the judiciary in regards to bail determinations. It suggests, for example, that under the ‘exceptional circumstances’ requirement for bail in serious cases, the circumstances of an Aboriginal accused person may constitute ‘exceptional circumstances’.⁸⁷

5.58 The NSW *Equality before the Law Bench Book* provides guidance for bail determinations that involve Aboriginal or Torres Strait Islander people. When assessing ‘unacceptable risk’, it provides the following directives:

Aboriginal people must not be subjected to any more stringent tests in relation to bail, or any conditions attached to bail, than non-Aboriginal people. A bail condition can be imposed only for the purpose of mitigating an unacceptable risk.

Paternalism is not appropriate.

Irrespective of their housing status, Aboriginal people often have very close kinship and family ties to a particular location. Given Aboriginal kinship ties, it may also be less appropriate to attach a condition for an Aboriginal person that the person leave town, than it would be to do so for a non-Aboriginal person.

85 Western Australian Auditor General, above n 18, 7, 13; Also see Aboriginal Legal Service of Western Australia, *Submission 74*.

86 NSW Bar Association, *Submission 88*.

87 Fryer-Smith, above n 80, [6.1.5]. *Unchango v R* (Unreported, WASC, 12 June 1998).

Assess bail and bail conditions not just based on police views but also on the views of the defence and respected members of the local Aboriginal community and/or the Local Court Aboriginal Client Service Specialist (if there is one) about the particular person's ties to the community and likelihood of absconding, and about culturally-appropriate options in relation to bail conditions. Community-based support, for example, might provide as viable an option as family-based support ...

Reporting and residential conditions need to be realistic and not unduly oppressive—for example, a condition banning residence in a particular town, or requiring court permission to change, may be ruled as unduly oppressive if there is a death in the defendant's family requiring their immediate attendance in that town.⁸⁸

5.59 This approach has been reflected in appeal decisions of the Supreme Court of NSW. For example, in *R v Brown* [2013] NSWCCA 178, the NSW Court of Criminal Appeal noted that

extended family and kinship, and other traditional ties, warrant significant consideration in the determination of whether or not to grant bail. In the cases of Aboriginal accused, particularly where the applicant for bail is young, alternative culturally appropriate supervision, where available (with an emphasis on cultural awareness and overcoming the renowned antisocial effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to a remand in gaol.⁸⁹

5.60 More recently, the Supreme Court of NSW found that lengthy periods of remand and separation from family may perpetuate a cycle of disadvantage, which could constitute 'cause' under show cause provisions. It also observed that bail conditions should be crafted so as to break that cycle:

During that period the applicant would in all likelihood see very little of the child if bail is refused. That is a factor which seems to me to be likely to perpetuate the cycle of disadvantage and deprivation notoriously faced in [I]ndigenous communities and, as a matter of evidence in the material before me, specifically faced in the family of this applicant. If the Court can reasonably impose conditions which are calculated to break that cycle, in my view it should. That is a strong factor in my finding cause shown.⁹⁰

Statutory provisions

5.61 Provisions enabling courts to take into account cultural considerations when making bail determinations for Aboriginal and Torres Strait Islander people have been introduced to varying degrees in the NT, Queensland and Victoria. In NSW, there is a requirement to consider the vulnerability of Aboriginal and Torres Strait Islander accused people. These are briefly outlined below.

New South Wales

5.62 In NSW, s 18(1)(a) and s 18(1)(k) of the *Bail Act 2013* require a bail authority to consider, among other things, 'community ties' and any 'special vulnerability or needs

88 Judicial Commission of NSW, *Equality before the Law Bench Book* (2016) [2.3.2].

89 *R v Michael John Brown* [2013] NSWCCA 178 (2 August 2013) [34]–[35].

90 *R v Alchin* (Unreported, NSWSC, 16 February 2015) [3]. See also: *R v Wright* (Unreported, NSWSC, 7 April 2015) [7]–[9].

the person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment' when assessing 'unacceptable risk'.⁹¹

5.63 The reference to 'community ties' in s 18(a) does not specifically mention Aboriginal and Torres Strait Islander peoples. It may, however, have particular relevance to Aboriginal and Torres Strait Islander people and be derived from the previous *Bail Act 1978* (NSW) that directed courts to give consideration to the

person's background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record (if known).⁹²

Northern Territory

5.64 The *Bail Act* (NT) requires bail authorities to consider, among other things, any 'needs relating to the person's cultural background, including any ties to extended family or place, or any other cultural obligation'.⁹³ The provision within the *Bail Act* (NT) does not specifically refer to Aboriginal or Torres Strait Islander culture.

5.65 The NT provision commenced in 2015 following a review of the *Bail Act* (NT). Stakeholders in that Inquiry supported the NSWLRC recommendation that bail authorities consider matters 'associated with Aboriginal or Torres Strait Islander identity, culture and heritage, including connections with extended family and traditional ties to place'.⁹⁴

5.66 The application of the NT provision to Aboriginal and Torres Strait Islander peoples may be hampered by a prohibition under Commonwealth law for bail courts to consider any form of customary law or cultural practice as a reason for lessening or increasing the seriousness of the offending.⁹⁵ However, the objective of the Commonwealth provision was to 'prevent customary law from being used to mitigate the seriousness of any offence that involves violence against women and children'.⁹⁶ The NT Supreme Court has found that provisions of this type did not prevent courts from considering customary law or cultural practice to: provide context for offending; establish good prospects of rehabilitation (relating to sentencing); and to establish the

91 A similar list of considerations was recommended for Victoria in 2017 to operate in conjunction with s 3A: Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017) 44, rec 5.

92 *Bail Act 1978* (NSW) s 32(1)(a)(ia). See also *Bail Act 1992* (ACT) s 22(3)(b).

93 *Bail Act* (NT) s 24(1)(B)(iiic).

94 Department of Attorney General and Justice, *Exposure Draft Bail Amendment Bill 2014: Discussion Paper* (2014). See, eg, North Australian Aboriginal Justice Agency, 'Submission to the NT Government, Review of the *Bail Act* (NT) (March 2013)'; Northern Territory Law Society, Submission to the Northern Territory Government, *Review of the Bail Act (NT)* (4 April 2013); NSW Law Reform Commission, *Bail*, Report No 133 (2012) rec 11.3; Department of the Attorney General and Justice (NT), *Consultation Results Report: Consultation Regarding Application in the Lower Courts of Recorded Statement Protections for Vulnerable Witnesses: Section 21B of the Evidence Act* (2014).

95 *Crimes Act 1914* (Cth) s 15AB(1)(b).

96 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *2016 Review of Stronger Futures Measures* (2016) app A.

character of the accused.⁹⁷ The equivalent provision relevant to sentencing in the NT is discussed in Chapter 6.

Queensland

5.67 The Queensland provision permits the court to consider, among other things, evidence from a Community Justice Group:

16 Refusal of bail

...

(2)(e) if the defendant is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the defendant's community, including, for example, about—

- (i) the defendant's relationship to the defendant's community; or
- (ii) any cultural considerations; or
- (iii) any considerations relating to programs and services in which the community justice group participates.⁹⁸

5.68 Community Justice Groups were established in 1993 in North Queensland. There are now up to 50 such groups operating throughout Queensland. Community Justice Groups consist of Elders, Traditional Owners, and other respected Aboriginal and Torres Strait Islander community members who come together to: make cultural submissions to Magistrates Courts on behalf of accused/defendants; identify appropriate treatment and support programs; and provide assistance to Aboriginal and Torres Strait Islander peoples as they progress through the Murri Court.⁹⁹

5.69 Stakeholders advised the ALRC that the relevant bail provisions in NSW, the NT and Queensland were rarely used¹⁰⁰ and, when used, statutory construction had limited the application and effectiveness of the provisions.¹⁰¹ NATSILS advised that the existing provisions were 'simply too narrow or uncertain to be effective'.¹⁰² CLANT observed that the NT provision informed only the decision whether to grant bail, not the conditions of bail. Further, the use of the word 'needs' rather than 'issues' in the NT was likely to 'restrict the court from considering systemic issues such as the over-incarceration of ATSI people'.¹⁰³ Conversely, the Law Society of NSW Young Lawyers Criminal Law Committee (YLCLC) expressed concern that, in NSW,

97 Ibid [2.5]. See also *The Queen v Wunungmurra* [2009] NTSC 24 [3].

98 *Bail Act 1980* (Qld) s 16(2)(e), see also s 15(f).

99 See, eg, Queensland Courts, *Community Justice Group Program* <<http://www.courts.qld.gov.au/services/court-programs/community-justice-group-program>>. Community Justice Groups are also referred to in ch 6.

100 See, eg, Legal Aid NSW, *Submission 101*; Queensland Law Society, *Submission 86*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Caxton Legal Centre, *Submission 47*; Public Defenders NSW, *Submission 8*.

101 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

102 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

103 Criminal Lawyers Association of the Northern Territory, *Submission 75*. CLANT observed that the sub section has yet to be subject to any judicial interpretation.

s 18(1)(k) appeared to be restricted to considerations of over-representation and the cycle of disadvantage, and did not include an assessment of ‘culture, kinship or the need to tailor bail conditions for Aboriginal people’.¹⁰⁴ The reliance on the language of ‘special vulnerability’ when assessing Aboriginality was also considered objectionable by the ALS NSW/ACT.¹⁰⁵

5.70 The WA Commissioner for Children and Young People expressed support for the construction and limitations of the relevant NSW provision to the extent that it ‘focuses on factors of vulnerability or special needs, including cognitive or mental health impairment, rather than focusing on race’ stating that ‘race alone is not a ‘causal’ factor’. In the view of the Commissioner all factors related to disadvantage, other than race, should be considered in bail determinations.¹⁰⁶

5.71 Caxton Legal Centre noted the limitations of the Queensland provision, pointing to the need for a provision that permitted the court to consider cultural factors more broadly ‘without the need for reports to be submitted’ by Community Justice Groups.¹⁰⁷ Caxton supported the ongoing resourcing of Community Justice Groups, while raising concerns that Community Justice Groups serviced only 25% of all accused/offenders identifying as Aboriginal and Torres Strait Islander in Queensland. It further suggested that the reliance upon participation by Community Justice Groups rendered the Queensland provision vulnerable: considerations of cultural factors by bail authorities were ‘impacted upon by both the reach of Community Justice Group program and the goodwill of incumbent State governments to adequately fund such programs’.¹⁰⁸

5.72 There was also a reported lack of engagement with the provisions. CLANT observed that the introduction of the provision in the NT was not met with the same ‘fanfare’ as the amendments to expand presumption against bail offences, introduced at the same time. It noted that the cultural consideration provision had ‘not been embraced by the profession or the judiciary in the same way’.¹⁰⁹

5.73 There was some support for the NSW provisions. NSW Chief Magistrate Henson submitted that bail law in NSW was sufficient to consider cultural issues, as the provisions already required the court to consider a list of specific matters. The extent to which issues relating to Aboriginality feature in the court’s assessment was ‘necessarily dependent upon the advocacy on behalf of the accused person’. This would remain the same whether the provision was updated or remained unamended.¹¹⁰

5.74 The YLCLC submitted that the NSW provision to consider ‘community ties’ (s 18(1)(a)) had been actively engaged with in bail proceedings—particularly when the Aboriginal Legal Service was acting as defence—to good effect. The YLCLC

104 Law Society of New South Wales’ Young Lawyers Criminal Law Committee, *Submission 98*.

105 Aboriginal Legal Service (NSW/ACT), *Submission 63*.

106 Commissioner for Children and Young People Western Australia, *Submission 16*.

107 Caxton Legal Centre, *Submission 47*.

108 *Ibid.* See also Sisters Inside, *Submission 119*.

109 Criminal Lawyers Association of the Northern Territory, *Submission 75*.

110 Chief Magistrate of the Local Court (NSW), *Submission 78*.

suggested that accused persons were more likely to be granted bail under the provision if they could demonstrate the support of their community, and particularly if they had the support of respected Elders. Involvement in Aboriginal and Torres Strait Islander support and cultural groups was also looked upon favourably by the court, although the YLCLC did report that Aboriginal and Torres Strait Islander support networks were not adequately considered by bail authorities.

5.75 Other NSW stakeholders were not so supportive of the efficacy of the existing legislative provisions. For example, the Public Defenders NSW advised that, in their experience, when the provision was mentioned in bail applications in NSW, it ‘rarely made a practical difference’, stating, ‘simply put, a stronger message needs to be sent’.¹¹¹

The Victorian provision: s 3A of the *Bail Act 1977*

5.76 Victoria is the only state or territory to have introduced a standalone provision that requires the court to take culture into account:

3A Determination in relation to an Aboriginal person

In making a determination under this Act in relation to an Aboriginal person, a court must take into account (in addition to any other requirements of this Act) any issues that arise due to the person’s Aboriginality, including—

- (a) the person’s cultural background, including the person’s ties to extended family or place; and
- (b) any other relevant cultural issue or obligation.¹¹²

5.77 Section 3A interacts with s 19 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which provides for cultural rights, and specifically recognises that Aboriginal persons hold distinct cultural rights. Under the Charter, Aboriginal people must not be denied the right to:

- enjoy their identity and culture;
- maintain and use their language;
- maintain their kinship ties; and
- maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

5.78 Section 3A was introduced in 2010 following a Victorian Law Reform Commission (VLRC) report on bail.¹¹³ The VLRC recommended that bail authorities be required to take into account cultural factors and community expectations to prevent Aboriginal and Torres Strait Islander people from being remanded unnecessarily or

111 Public Defenders NSW, *Submission 8*.

112 *Bail Act 1977* (Vic) s 3A.

113 *Bail Amendment Act 2010* (Vic).

bailed subject to inappropriate conditions.¹¹⁴ It was considered important to take cultural considerations into account in relation to all aspects of the bail determination process, including assessing unacceptable risk and the setting of bail conditions.¹¹⁵

5.79 The VLRC recommended that the *Bail Act 1977* (Vic) be amended to include an Aboriginal and Torres Strait Islander-specific provision. This was needed both to overcome discrimination, and the historical and continuing disadvantage suffered by Aboriginal people in relation to bail and to provide consistency in the application of bail law:

It is important that ... cultural factors and community expectations are taken into account when making bail decisions. Otherwise Indigenous Australians may be bailed on inappropriate bail conditions which they are more likely to breach, or remanded unnecessarily contributing to their overrepresentation in custody.

Without a specific direction to decision makers in the *Bail Act*, there is a risk that consideration of these matters will be inconsistent and will compound the historical and continuing disadvantage faced by Indigenous Australians in their contact with the criminal justice system.¹¹⁶

5.80 When the amendment incorporating s 3A was introduced into Parliament in 2010, the responsible Minister stated the following during the second reading speech:

The VLRC noted that Aboriginal Australians are overrepresented on remand and face unique disadvantages in their contact with the criminal justice system. In recognition of this, the VLRC recommended that the *Bail Act* should contain a specific provision for accused people who are Aboriginal.

In line with this recommendation, the bill inserts new section 3A in the *Bail Act*. Section 3A requires a decision-maker to take into account (in addition to any other requirements in the *Bail Act*) any issues that arise due to the Aboriginality of an accused when making a determination under the *Bail Act*.

Under section 3A, a decision-maker would be required to take into account matters such as an obligation to attend a community funeral or participate in community cultural activities when imposing conditions of bail on an accused who is Aboriginal.

While the provision requires the decision-maker to take the evidence into account it does not require the decision-maker to reach a particular decision. The test for granting bail remains unchanged, requiring a decision as to unacceptable risk.¹¹⁷

5.81 Courts have interpreted the Victorian provision to permit consideration of the over-representation of Aboriginal and Torres Strait Islander people in prison and the effects of policing practices.¹¹⁸ The Supreme Court of Victoria (where appeals regarding bail applications are heard) has, however, stressed that the provision does not

114 Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) 180.

115 *Ibid* 179.

116 *Ibid* 180.

117 Victoria, *Parliamentary Debates*, Legislative Council, 29 July 2010, 3502 (John Lenders).

118 *Re Mitchell* [2013] VSC 59 (8 February 2013) [13].

operate to grant bail to an Aboriginal and Torres Strait Islander applicant who poses an unacceptable risk to community safety.¹¹⁹

5.82 In *R v Chafer-Smith* the accused was required to ‘show cause’.¹²⁰ Bail was opposed upon the ground that the accused was an unacceptable risk. The Supreme Court of Victoria was urged by the applicant to apply s 3A ‘in the light of the report of the 1991 Royal Commission into Aboriginal Deaths in Custody, the vast statistical overrepresentation of Aboriginal and/or Torres Strait Islander Australians held in custody and current overcrowding in custody’.¹²¹ The Court took these considerations into account, but refused bail, stating:

In the circumstances ... I consider that there is a significant risk that the applicant will repeat [the] type of offending should I grant bail and should that risk become reality, the consequences may well be catastrophic. I have considered the applicant's Aboriginality, as I must under s 3A of the *Bail Act*. I am obliged to take into account any issues that arise therefrom. I accept that Aboriginal Australians are very significantly overrepresented in our prisons and I consider that if this were a marginal case where a decision to grant bail or refuse it was a close run thing, then s 3A considerations may well operate to determine the application in the applicant's favour.¹²²

5.83 In *DPP v Hume* the applicant's Aboriginal kinship obligations to his mother were taken into account under s 3A. The Court determined, however, that those obligations were not sufficient to overcome the prosecution objections that the applicant represented an unacceptable risk.¹²³

5.84 In *TM v AH* the Court considered an application for bail by Aboriginal child aged 14 with an intellectual disability, who was required to ‘show cause’.¹²⁴ TM was refused bail by the magistrate after receiving a custodial sentence. Application for bail was then made in the Supreme Court of Victoria, where bail was granted. In its decision, the Supreme Court of Victoria held:

I am satisfied that TM has shown cause why his detention in custody is not justified. In particular, I am satisfied that TM's tender age, his intellectual disability, his lack of prior convictions, the requirements of s 3A of the *Bail Act*, the reasonable prospect that he will receive a non-custodial sentence on appeal, and on the outstanding charges, and the proposed regime put in place for his release all, in combination, compel the view that his further detention in custody is not justified.¹²⁵

5.85 The Supreme Court determined that the applicant was not an unacceptable risk when the conditions of bail were taken into account.¹²⁶ Considering the applicant's family ties, the Court remarked that ‘TM's ties to his family and home are strong, yet

119 See, eg, *DPP v SE* [2017] VSC 13 (31 January 2017) [20]; *R v Chafer-Smith* [2014] VSC 51 (21 February 2014) [23]–[28]; *Re Hume (Bail Application)* [2015] VSC 695 (8 December 2015).

120 *Re Chafer-Smith; An Application for Bail* [2014] VSC 51 (21 February 2014).

121 *Ibid* [23].

122 *Ibid* [27].

123 *Re Hume (Bail Application)* [2015] VSC 695 (8 December 2015) [63].

124 *TM v AH* [2014] VSC 560 (5 November 2014).

125 *Ibid* [31].

126 *Ibid* [32].

he is a long way from them at the moment and has been in that situation for nearly six months'.¹²⁷

5.86 In *Kirby v The Queen* the Court granted bail after taking into account the strong family ties of the Aboriginal applicant with the local community.¹²⁸

Adopt s 3A in other states and territories

Recommendation 5–1 State and territory bail laws should be amended to include standalone provisions that require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations. These would particularly facilitate release on bail with effective conditions for Aboriginal and Torres Strait Islander people who are accused of low-level offending.

The *Bail Act 1977* (Vic) incorporates such a provision.

As with all other bail considerations, the requirement to consider issues that arise due to a person's Aboriginality would not supersede considerations of community safety.

Recommendation 5–2 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:

- develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies; and
- identify gaps in the provision of culturally appropriate bail support programs and diversion options, and develop and implement relevant bail support and diversion options.

5.87 The introduction of a discrete provision in the bail statutes across states and territories would require bail authorities to contextualise issues that arise due to a person's Aboriginality when making bail determinations—including determinations when the accused must 'show cause'—and in setting conditions, and should:

- require bail authorities to consider community supports, the person's role in community and cultural obligations when determining risk. It permits these considerations to be balanced against the lack of otherwise permanent residency, employment and immediate family supports;
- require courts to consider any previous offending—especially low-level offending—in context, particularly where a person has experienced historical and continuing disadvantage, as in Victoria;¹²⁹

127 Ibid [17].

128 *Kirby v The Queen* [2013] VSC 602 (31 October 2013) [7].

- require bail authorities to consider remoteness, flexible living arrangements and mobility when setting bail conditions;¹³⁰
- lower the likelihood of bail authorities imposing inappropriate conditions, including the imposition of sureties, that ultimately are difficult, if not impossible, to meet;
- decrease the risk that considerations of cultural practice and obligations by bail authorities will be taken into account inconsistently; and
- reduce the number of Aboriginal and Torres Strait Islander peoples in prison on remand—especially critical for women on remand, who may lose accommodation and custody of their children while in prison.¹³¹

5.88 There have been calls to introduce a provision similar to that enacted in Victoria in other jurisdictions. In 2012, the NSWLRC recommended the introduction of a provision that would require consideration in bail determinations to be given to matters ‘associated with Aboriginal or Torres Strait Islander identity, culture and heritage, including connections with extended family and traditional ties to place.’¹³² It suggested that bail authorities consider the ‘strength or otherwise of the person’s family and community ties, including employment, business and other associations, extended family and kinship ties and the traditional ties of Aboriginal people and Torres Strait Islanders.’¹³³

5.89 A 2017 report into the over-representation of Aboriginal and Torres Strait Islander women in prison recommended amendments to state and territory bail legislation to ensure that the historical and systemic factors contributing to the over-imprisonment of Aboriginal and Torres Strait Islander peoples be taken into account in bail decisions. The report further recommended that consideration be given to the impact of imprisonment—including remand—on dependent children.¹³⁴ The report noted that bail support and diversionary options linked with accommodation, designed by and for Aboriginal and Torres Strait Islander women, were also required if such legislation is to have its intended effect of keeping Aboriginal and Torres Strait Islander women out of prison on bail.¹³⁵ This reflected the observations of the Victorian Equal Opportunity and Human Rights Commission in 2013,¹³⁶ and was also reiterated by the Law Institute of Victoria in 2017.¹³⁷

129 See, eg, *R v Chafer-Smith* [2014] VSC 51 (21 February 2014).

130 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

131 See ch 11.

132 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.65] rec 11.3.

133 *Ibid* rec 10.4; Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (Report 94, 2006) recs 29–34.

134 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) rec 15.

135 *Ibid* 46.

136 Victorian Equal Opportunity and Human Rights Commission, above n 32, 52.

137 Law Institute of Victoria, ‘Review of Victoria’s Bail System’ (2017) 27. See also Victorian Aboriginal Legal Service, *Submission 39*; Australian Red Cross, *Submission 15*.

5.90 The Victorian provision goes further than the provisions in NSW and the NT, and places a different emphasis on the evidence than the Queensland provision, which requires a submission from a Community Justice Group. Section 3A is prescriptive, *requiring* the court, rather than *permitting* the court (as in Queensland), to consider issues related to Aboriginality,¹³⁸ and wide enough to be of broader application and to include considerations of appropriate bail conditions.¹³⁹

5.91 Section 3A was supported in a 2017 Victorian bail review, which reported widespread stakeholder support for the provision in Victoria.¹⁴⁰

5.92 Submissions to this Inquiry overwhelmingly supported the proposal that state and territories adopt a provision similar to s 3A.¹⁴¹ Bench books and practice notes were seen to be important, but insufficient to address the issues and to provide for consistency.¹⁴² The Victorian provision was seen as a way to strengthen bail laws for accused Aboriginal and Torres Strait Islander peoples.¹⁴³ It was considered that s 3A would fill the gap in jurisdictions that currently do not have a statutory requirement to consider issues relating to a person's Aboriginality, and be a better option for those that do.¹⁴⁴ Legal Aid ACT suggested that the 'benefits' of the Victorian provision 'were clear':

In the first instance, it would likely aid the removal of lingering (if inadvertent) structural biases, promoting a more responsive and equitable system for ATSI offenders. Courts would be required to turn their minds to the diverse cultural institutions and community configurations that exist to support and condemn ATSI offenders, and consider these relevant to other Bail Act requirements. Far from being a race based 'bonus' card, the provision's aim would be to provide accurate insight and a more complete understanding of the risks and particularities relevant to the defendants at hand.¹⁴⁵

138 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

139 Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Australian Red Cross, *Submission 15*.

140 Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017) [4.82].

141 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Amnesty International Australia, *Submission 89*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84 84*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; National Congress of Australia's First Peoples, *Submission 73*; Australian Lawyers for Human Rights, *Submission 59*; Victoria Legal Aid, *Submission 56*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Public Interest Advocacy Centre, *Submission 25*; Australian Red Cross, *Submission 15*; Public Defenders NSW, *Submission 8*.

142 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*.

143 Public Defenders NSW, *Submission 8*.

144 See, eg, Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid WA, *Submission 33*; Australian Red Cross, *Submission 15*.

145 Legal Aid ACT, *Submission 107*.

5.93 The Chief Magistrate of the Local Court of NSW and the Institute of Public Affairs (IPA) did not support the adoption of s 3A.¹⁴⁶ The Chief Magistrate suggested that the existing provisions in NSW were adequate.¹⁴⁷ The IPA expressed support for approaches that promote formal, not substantive, equality before the law. The IPA suggested that reform should focus on improving the ability of Aboriginal and Torres Strait Islander peoples to ‘interact with the law’ through services such as interpreters, rather than the creation of a ‘parallel system’ through legislative amendment or the introduction of ‘culturally appropriate’ criminal justice responses. It was the view of the IPA that bail authorities should assess the same considerations for everyone when making bail determinations.¹⁴⁸

5.94 Others supported adoption of s 3A, with amendments.¹⁴⁹ For example, ALHR supported replicating s 3A with the insertion of additional words:

In making a determination under this Act in relation to an Aboriginal person, a court must take into account (in addition to any other requirements of this Act) any issues that arise due to the person’s Aboriginality, including—

- (a) the person’s cultural background, including the person’s ties to extended family or place, **residence in a remote location or locations, and cultural obligations;** and
- (b) any other relevant cultural issue or obligation.¹⁵⁰

5.95 The ALHR suggested that express reference to location may address certain issues relating to remoteness and conditions of bail, including the possibility that the community may live more ‘itinerate lives’ due to family networks, and experience ‘geographically dispersed cultural commitments, weather extremes that render remote communities uninhabitable or inaccessible for parts of the year, and other exigencies of very remote living’.¹⁵¹ Accused Aboriginal and Torres Strait Islander people may also have difficulty complying with bail conditions requiring strict confinement to a particular community or area, particularly to complying with electronic monitoring conditions. Conversely, electronic monitoring may not be available in regional and remote areas, disadvantaging Aboriginal and Torres Strait Islander people in those areas from being granted bail. It was the view of the ALHR that lack of access should be a factor that the bail authority can take into account.¹⁵²

5.96 It was further suggested that other amendments to s 3A should:

- include reference to a person’s age;¹⁵³

146 Chief Magistrate of the Local Court (NSW), *Submission 78*; Institute of Public Affairs, *Submission 58*.

147 Chief Magistrate of the Local Court (NSW), *Submission 78*.

148 Institute of Public Affairs, *Submission 58*.

149 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Australian Lawyers for Human Rights, *Submission 59*; Public Interest Advocacy Centre, *Submission 25*.

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

151 *Ibid.*

152 *Ibid.*

153 Public Interest Advocacy Centre, *Submission 25*.

- provide ‘culture’ and ‘background’ as separate considerations (rather than the requirement to consider a person’s cultural background);¹⁵⁴ and
- explicitly state that courts are to consider the relevant matters when determining whether the person will reach bail *and* when attaching conditions to that bail.¹⁵⁵

5.97 The ALRC recommends the adoption of provisions that mirror s 3A in all states and territories. There may be opportunity for state and territory governments to work with relevant Aboriginal and Torres Strait Islander groups and representatives to review the drafting and scope of s 3A, with an eye to further clarify and improve its operation.

5.98 The ALRC is alert to fiscal constraints and time pressures that a properly instituted s 3A provision could impose on legal advocates and the criminal justice system. While the ALSWA supported the introduction of such a provision in WA, it noted the need for Aboriginal and Torres Strait Islander legal services and Aboriginal language interpreter services to support the proper presentation of issues relating to an accused person’s cultural background and obligations.¹⁵⁶ NATSILS further commented that Aboriginal services, including legal and interpreter services,¹⁵⁷ would need to be resourced to research and provide relevant matters to the court.¹⁵⁷

Legal frameworks to support adoption of s 3A

5.99 For a s 3A type provision to operate successfully, it is necessary that such a provision be supported by legal frameworks. As noted by Victorian Legal Aid, the provision does not operate ‘in a vacuum’.¹⁵⁸ The provision needs to be understood by those that administer it, and there needs to be adequate culturally appropriate and safe services and programs that Aboriginal and Torres Strait Islander people can access while on bail, when needed.

5.100 The ALRC recommends that the adoption of an equivalent s 3A bail provision by states and territories be supported by both strong guidelines on use and the provision of bail support programs and services.

The provision of guidelines

5.101 Stakeholders have told the ALRC that s 3A has been underutilised,¹⁵⁹ and that this underutilisation had contributed to s 3A having little impact on remand numbers in Victoria.¹⁶⁰

154 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

155 *Ibid.*

156 Aboriginal Legal Service of Western Australia, *Submission 74*.

157 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

158 Victorian Legal Aid, *Submission 56*.

159 See, eg. Law Society of New South Wales’ Young Lawyers Criminal Law Committee, *Submission 98*; Victorian Aboriginal Legal Service, *Submission 39*.

160 Other factors affecting remand numbers were said to be a lack of available accommodation and the ‘tightening of bail awards’.

5.102 The Victorian Aboriginal Legal Service (VALS) reported that s 3A has been narrowly interpreted by the court to apply to setting conditions, such as providing for multiple residential addresses and attending funerals, but not to the determination of risk and whether to grant bail.¹⁶¹ VALS submitted that some members of the legal profession were not adept at posing the right questions and recognising issues that may arise due to a person's Aboriginality. The number of Aboriginal and Torres Strait Islander people, especially women, still held on remand indicated that the provision was not well understood.¹⁶² Dr Thalia Anthony submitted that s 3A has had an 'equalising effect on bail outcomes' for Aboriginal and Torres Strait Islander peoples, but that the benefit only arose when lawyers who sought to rely on the provision made detailed submissions on the relevance of the person's Aboriginal background to the Court.¹⁶³

5.103 The Law Institute of Victoria has previously recommended further guidance and associated training for Victoria Police, court registrars, magistrates and bail justices on cultural considerations, to be developed in partnership with the Victorian Equal Opportunity and Human Rights Commission.¹⁶⁴

5.104 In their submission to this Inquiry, VALS supported the delivery of 'cultural sensitivity training and guidance' by VALS in partnership with the Law Institute of Victoria and the Victorian Equal Opportunity and Human Rights Commission to police, registrars, magistrates, bail justices and legal practitioners in Victoria.¹⁶⁵ Building better skills to deal with s 3A was also supported by Victoria Legal Aid, who observed that 'the consideration of an individual's Aboriginality does not exist in a vacuum, and requires understanding and skill across all involved in the determination of bail'. This requires 'extensive cultural awareness education' for legal advocates, prosecutors, and bail authorities in making bail determinations.¹⁶⁶

5.105 The Judicial College of Victoria suggested that education developed in partnership with the 'Victorian Aboriginal and Torres Strait Islander Community' was needed specifically to guide judicial officers on how and when to refer to s 3A, as well as general Aboriginal cultural awareness education, which would operate to ensure that 'bail authorities are aware of the cultural issues it refers to'.¹⁶⁷

5.106 The experience in Victoria raises the issue of the proper application of s 3A provisions in Victoria, and the potential application of mirror provisions in other states and territories. For example, the NSW Bar Association—who 'strongly' supported the introduction of the provision in NSW—identified there to be a 'significant risk' that the provision would simply be given 'lip service' and make no practical difference to the application of bail law in NSW.¹⁶⁸ The YLCLC observed that s 3A was not always

161 Victorian Aboriginal Legal Service, *Submission 39*.

162 Ibid; See also Victorian Equal Opportunity and Human Rights Commission, above n 32, 5.

163 Dr T Anthony, *Submission 115*.

164 Law Institute of Victoria, above n 137, 28.

165 Ibid [15]–[17].

166 Victoria Legal Aid, *Submission 56*.

167 Judicial College of Victoria, *Submission 102*.

168 NSW Bar Association, *Submission 88*.

raised when it was appropriate to do so, indicating that, for other states and territories, the ‘existence of the provision does not guarantee that it will be used’.¹⁶⁹

5.107 NATSILS supported further training of judicial officers to give appropriate consideration to information regarding a person’s culture and background. It suggested that training should be developed and led by Aboriginal and Torres Strait Islander organisations.¹⁷⁰ The Law Council of Australia suggested that training and material should go beyond just ‘cultural awareness’ and should ‘explore the modern manifestations of historical factors and highlight the social, political and economic position of Indigenous Australians in the context of offending behaviours’.¹⁷¹

5.108 The ALRC considers training, especially when developed and delivered by Aboriginal and Torres Strait Islander organisations, to be essential to building the necessary understanding of Aboriginal history and culture, and to place some offending in context. The RCIADIC recommended judicial training in 1991:

That judicial officers and persons who work in the court service and in the probation and parole services and whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.¹⁷²

5.109 Broad judicial cultural awareness training has occurred to some extent—the ALRC notes, for example, the education provided to the NSW judiciary through the NSW Judicial Commission’s Ngarra Yura Program.¹⁷³

5.110 The ALRC supports further training for all criminal justice participants, but for a s 3A type provision to be successfully supported, there is a need to go further. Where s 3A provisions are adopted, there exists a concurrent need for well constructed written guidelines for criminal justice participants, including the judiciary.

5.111 It is desirable that the application and operation of s 3A type provisions be consistent within and across the states and territories.¹⁷⁴ For this reason, the ALRC suggests that guidelines should be written by relevant national legal bodies, working with Aboriginal and Torres Strait Islander organisations. There are bodies that are well placed to produce such guidelines. They may include, for example, the Australasian Institute of Judicial Administration, which produced the *National Domestic and Family*

169 Law Society of New South Wales’ Young Lawyers Criminal Law Committee, *Submission 98*.

170 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*. See also Legal Aid ACT, *Submission 107*.

171 Law Council of Australia, *Submission 108*.

172 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report (1991) Vol 5*, rec 96.

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

174 Sisters Inside, *Submission 119*.

Violence Bench Book to provide background knowledge and research, and practical guidelines for courtroom management aimed at harmonising the treatment of domestic violence cases across jurisdictions.¹⁷⁵ This approach could make a good model for a nationally consistent approach to s 3A type provisions.

5.112 Other appropriate bodies to develop guidelines could include the Law Council of Australia; and coordinated responses from Directors of Public Prosecutions, Police Commissioners, and Attorneys-General. Courts could develop practice directions.

5.113 The ALRC does not make any recommendation as to the content of s 3A guidelines, but notes the Judicial College of Victoria recommended that cultural awareness and cultural competence education for judicial officers should include:

- background information regarding the historical and ongoing impact of colonisation on Aboriginal and Torres Strait Islander people;
- an explanation of intergenerational trauma;
- contemporary issues such as daily exposure to racism;
- cultural competency information about modes of communication, body language, the need for and use of interpreters, and related issues aimed at improving cultural safety in court; and
- information about culturally-appropriate programs and services that support Aboriginal and Torres Strait Islander people who are on bail, community-based sentences or parole.

5.114 The College emphasised the need for all education to have been developed and delivered with Aboriginal and Torres Strait Islander communities, noting the need for a localised approach in order for judicial officers to ‘understand the specific issues affecting those who come before their particular court’.¹⁷⁶

5.115 Relating specifically to s 3A, stakeholders to this Inquiry have further suggested that bail authorities be directed to limit their discretion so that, other than in exceptional circumstances, bail authorities preclude:

- the possible repetition of minor offences from their considerations of community safety;¹⁷⁷
- refusal of bail due to the unavailability of adequate accommodation; and
- the imposition of certain bail conditions such as curfews and non-association orders.¹⁷⁸

175 See, eg, *Australasian Institute of Judicial Administration, National Domestic and Family Violence Benchbook* <<https://aija.org.au/publications/national-domestic-and-family-violence-bench-book/>>.

176 Judicial College of Victoria, *Submission 102*.

177 NSW Bar Association, *Submission 88*.

178 *Ibid.* See also Sisters Inside, *Submission 119*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

The provision of bail support programs

5.116 A provision requiring consideration of culture, even with guidance, may not be enough to facilitate a grant of bail where a person requires support.¹⁷⁹ Aboriginal and Torres Strait Islander people may still be refused bail because they lack access to appropriate accommodation or have little to no support in the community—rendering them a ‘bail risk’. The provisions need to be supported by ‘practical solutions and alternatives to refusal, such as bail hostels’.¹⁸⁰ As the YLCLC noted, the effect of s 3A provisions would be ‘diminished without available culturally appropriate bail supports and diversion options for Aboriginal and Torres Strait Islander peoples, undertaken in concert with Aboriginal and Torres Strait Islander people’.¹⁸¹

5.117 There are some services, but more options are needed to support Aboriginal and Torres Strait Islander people to be granted bail and to comply with bail conditions, including bail diversion options and bail supports.

5.118 Bail support for Aboriginal and Torres Strait Islander people generally takes three forms:

- services that can support Aboriginal and Torres Strait Islander people to be granted bail and to meet the conditions of their release;
- culturally appropriate programs; and
- mainstream bail diversion programs.

5.119 Services that can support Aboriginal and Torres Strait Islander peoples to be granted bail and meet the conditions of their release usually constitute informal networks or services delivered by non-government organisations. For example, in Queensland, Community Justice Groups may appear with the person in court, and provide informal support and link-ups to services for Aboriginal and Torres Strait Islander people released on bail.¹⁸² This type of support can be especially critical for women who may be at risk of losing children or accommodation if refused bail and held on remand.¹⁸³ Examples of networked support services specifically for women include the Miranda Project in NSW, Sisters Inside in Queensland, and the Koori Women’s Diversion Program in Victoria.¹⁸⁴

5.120 There are other relevant bail support programs. The NSW Government advised of the upcoming Dubbo Aboriginal Bail Project that looks to, among other things, link accused people to community support services. It also advised of the 16-week Aboriginal Court Diversion and Bail Support Program that operates out of

179 Human Rights Law Centre and Change the Record Coalition, above n 134. See also Law Council of Australia, *Submission 108*.

180 Law Council of Australia, *Submission 108*.

181 Law Society of New South Wales’ Young Lawyers Criminal Law Committee, *Submission 98*. See also Victoria Legal Aid, *Submission 56*.

182 Sanderson, Mazerolle and Anderson-Bond, above n 35, 207.

183 Human Rights Law Centre and Change the Record Coalition, above n 134, 18.

184 Human Rights Law Centre, *Submission 68*.

Campbelltown Local Court for people with complex mental health and or drug and alcohol concerns and under which they have experienced no breaches of bail.¹⁸⁵

5.121 The NT Government submission to this Inquiry spoke of ‘Alternative to Prison Models’, which are currently under development in the NT. This is to include supported bail accommodation and other bail diversion options, such as ‘saturated intense rehabilitation’ which is done ‘on country’.¹⁸⁶

5.122 The ACT Government advised this Inquiry of its ‘bail support trial’, which produces information using ‘info graphics’ to help improve understandings of bail conditions and develops ‘individual support plans’.¹⁸⁷

5.123 Aboriginal and Torres Strait Islander people who enter a guilty plea in the Local or Magistrates Court may also be able to enter culturally appropriate programs that aim to address offending behaviour. These include the Balund-a (Tabulam) diversion program in northern NSW, where staff work with Aboriginal and Torres Strait Islander Elders to provide cultural programs to male Aboriginal offenders in a rural setting.¹⁸⁸

5.124 There are also specific bail diversion programs for Aboriginal and Torres Strait Islander people with alcohol dependencies, such as the Queensland Indigenous Alcohol Diversion Program, which may be entered before or after the entering of a plea. The Western Australia Indigenous Diversion Program is available on referral for people with substance use who have entered a plea of guilty in some regional areas in WA.¹⁸⁹ This program is available to people who would have been granted bail, and would otherwise be expecting a fine or community-based order on sentencing. Victoria has places in residential rehabilitation centres specifically to divert Aboriginal and Torres Strait Islander women from remand.¹⁹⁰

5.125 Aboriginal and Torres Strait Islander people can also be diverted into mainstream bail diversion programs from the Local or Magistrates Court. In Victoria, for instance, the Court Integrated Service Program (CISP) is available on referral from the Magistrates’ Court regardless of the entry of a guilty plea, and includes the Koori Liaison Officer program. CISP provides case management and entry into services and accommodation for all jurisdictions of the Magistrates’ Court.¹⁹¹ This program received support in the submission from VALS, who reported good outcomes using this service for their clients, advising that Aboriginal people feel safer accessing

185 NSW Government, *Submission 85*.

186 Northern Territory Government, *Submission 118*.

187 ACT Government, *Submission 110*.

188 Entry to this program is via the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11, which allows for deferral of sentencing for rehabilitation and requires that the person be found guilty and then bailed under this section before entry.

189 See Government of Western Australia, Mental Health Commission, *Indigenous Diversion Program* <<https://www.mhc.wa.gov.au/media/1565/idp-indigenous-brochure-final-2016.pdf>>.

190 Judicial Commission of NSW, ‘Aboriginal and Torres Strait Islander People within the Judicial Context—existing Courts’ Resources’ (2017) 18.

191 See, eg, Magistrates’ Court of Victoria, *Court Integrated Services Program (CISP)* <www.magistratescourt.vic.gov.au>.

services from Aboriginal organisations. VALS recommended expanding Koori Case Managers.¹⁹²

5.126 Other mainstream bail diversion programs from the Local or Magistrates Court can provide services for Aboriginal and Torres Strait Islander peoples. However, these are not necessarily developed to be culturally appropriate or culturally safe. These programs include drug and alcohol intervention bail support programs, and early mental health interventions.¹⁹³ In 2009, 19% of participants in the NSW Magistrate Early Referral into Treatment (MERIT) program were Aboriginal or Torres Strait Islander people, and MERIT was identified by the Productivity Commission as a program that can work to decrease repeat offending by Aboriginal and Torres Strait Islander people.¹⁹⁴

5.127 While there are many programs currently in place, all stakeholders to this Inquiry who submitted their views on bail programs supported the proposal for state and territory governments to work with relevant Aboriginal and Torres Strait Islander organisations to identify gaps in the provision of bail support programs to support Aboriginal and Torres Strait Islander people on bail.¹⁹⁵ As noted by ALS NSW/ACT, ‘Aboriginal and Torres Strait Islander organisations are the most valuable source of information on service gaps for Aboriginal and Torres Strait Islander people. This includes local organisations and relevant organisations’.¹⁹⁶

5.128 ALSWA suggested that the best way to provide culturally appropriate bail support and diversion was to ‘develop and establish Aboriginal-run programs that provide holistic, flexible and individualised support and assistance’. ALSWA put forward their Youth Engagement Program as a model. This program has three Aboriginal diversion officers who work with young people appearing at court. Support provided by the Aboriginal diversion officers includes: accommodation assistance; referrals to programs; transport assistance; reminders for court and other appointments;

192 Victorian Aboriginal Legal Service, *Submission 39*.

193 See, eg, ACT Department of Health, *diversion Services—Court Alcohol and Drug Assessment Service* <<http://www.health.act.gov.au/our-services/alcohol-and-other-drugs/diversion-services>>; NSW Department of Justice, *Magistrates Early Referral Into Treatment* <<http://www.merit.justice.nsw.gov.au/>>; Queensland Courts, *Magistrates Early Referral Into Treatment* <<http://www.courts.qld.gov.au/services/court-programs/queensland-magistrates-early-referral-into-treatment>>; Magistrates’ Court of Victoria, *CREDIT Bail Support Program* <<https://www.magistratescourt.vic.gov.au/court-support-services/credit-bail-support-program>>.

194 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) box 11.4.3. Reoffending has decreased where MERIT teams had implemented an Aboriginal Practice Checklist. The Productivity Commission notes that this has not happened in all areas. See also NSW Government, *Submission 85*.

195 See, eg, Legal Aid ACT, *Submission 107*; Jesuit Social Services, *Submission 100*; Queensland Law Society, *Submission 86*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Human Rights Law Centre, *Submission 68*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Public Health Association of Australia, *Submission 31*; Public Interest Advocacy Centre, *Submission 25*; Legal Services Commission of South Australia, *Submission 17*; Australian Red Cross, *Submission 15*.

196 Aboriginal Legal Service (NSW/ACT), *Submission 63*.

mentoring; and liaison with agencies. The diversion officers work onsite at the Perth Children's Court and conduct outreach services.¹⁹⁷

5.129 Legal Aid WA also submitted that diversion programs, especially for young people, needed to be culturally appropriate—not just a 'modified version of what is in place for non-Aboriginal children'. Local communities and Elders need to be involved in the design and operation of programs.¹⁹⁸

5.130 VALS provided a number of recommendations relevant to creating consistent and flexible bail diversion programs for Aboriginal and Torres Strait Islander peoples. These included:

- programs that address the underlying causes of offending behaviour such as drug and alcohol programs should be used;
- diversion should be monitored and people unable to comply should be given second opportunities and support;
- magistrates should have the final approval of diversion programs, and lawyers should be able to make submissions on diversion;
- judicial training should be ongoing;
- the offence types eligible for diversion should be expanded;
- the conditions attached to diversion should be relevant and appropriate to the offending behaviour; and
- Magistrate Courts should be linked in with Aboriginal and Torres Strait Islander organisations that can provide bail programs and support.¹⁹⁹

5.131 Best-practice principles were identified by the Australian Institute of Criminology in a literature review of bail support programs in 2017.²⁰⁰ The review was not specific to bail support programs for Aboriginal and Torres Strait Islander peoples, and focused on programs for young people. Nonetheless, the review found that each state and territory ran at least one 'program or service to support people on bail—either directly, to allow the courts to grant bail, or to provide treatment and other services to defendants on bail'.²⁰¹ Best-practice programs were:

- voluntary: participants are therefore motivated to engage in treatments;
- individualised and holistic: responsive to the criminogenic needs of the participant;
- timely: available immediately upon bail being granted;

197 Aboriginal Legal Service of Western Australia, *Submission 74*.

198 Legal Aid WA, *Submission 33*.

199 Victorian Aboriginal Legal Service, *Submission 39*. See also National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

200 Matthew Willis *Bail Support: A Review of the Literature*, Australian Institute of Criminology Research Report No 04 (2017).

201 *Ibid* iii.

- collaborative: using interagency approaches;
- supportive: prioritised support over supervision;
- familiar: locally based; and
- evidence based: based on sound guidelines and processes.²⁰²

Bail hostels and accommodation options

5.132 One of the key obstacles to grants of bail for Aboriginal and Torres Strait Islander people identified by stakeholders was a gap in accommodation services, especially for women. This has previously been noted by the Victorian Equal Opportunity and Human Rights Commission²⁰³ and the Law Institute of Victoria, who recommended expanding culturally and gender appropriate housing so that it may support a greater number of individuals,²⁰⁴ including services for female Aboriginal and Torres Strait Islander accused and their children.²⁰⁵ The Victorian Equal Opportunity and Human Rights Commission identified that residential facilities for Aboriginal and Torres Strait Islander women with appropriate supervision, wraparound services, mentoring programs and access to their children are critical to the successful completion of bail conditions.²⁰⁶

5.133 The need for appropriate accommodation options for Aboriginal and Torres Strait Islander peoples seeking release on bail was reiterated by many stakeholders to this Inquiry.²⁰⁷

5.134 Traditional bail hostel models have been problematised for use in Australia: there has been a hesitancy to house together people who may have challenging behaviours and needs, and to disturb neighbourhoods.²⁰⁸ Nonetheless, South Australia has established a bail hostel, and ALS NSW/ACT submitted that bail houses can

provide a safe, supportive, and supervised short-term housing arrangement for an individual who is eligible for bail, but may not be granted bail due to a lack of suitable and stable accommodation. Bail houses can provide a bail address for the full-duration of bail, or can act as an initial form of accommodation until other suitable and stable accommodation can be found.

Bail houses can also prevent or reduce breaches of bail conditions. Bail conditions frequently impose a ‘reside as directed’ condition on an individual. In NSW, for example, courts can impose a condition ‘requiring the accused person to reside at the relevant accommodation while at liberty on bail’ under s. 28(6)(a) *Bail Act 2013*

202 Ibid iv.

203 Victorian Equal Opportunity and Human Rights Commission, above n 32, 10.

204 Law Institute of Victoria, above n 137, 28.

205 See, eg, NSW Bar Association, *Submission 88*.

206 Victorian Equal Opportunity and Human Rights Commission, above n 32, 52.

207 See, eg NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Human Rights Law Centre, *Submission 68*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Legal Services Commission of South Australia, *Submission 17*.

208 Matthew Willis *Bail Support: A Review of the Literature*, Australian Institute of Criminology Research Report No 04 (2017) 32.

(NSW). This can be a difficult condition for Aboriginal people where an individual is required to reside in unsuitable accommodation.²⁰⁹

5.135 Accommodation needs differ from area to area—the breadth of what may be needed was reflected in the range of suggested models submitted by stakeholders. VALS recommended gender and culturally appropriate accommodation and that other support services be expanded for Aboriginal and Torres Strait Islander peoples.²¹⁰ The NSW Bar Association and Legal Aid WA advocated appropriate funding of bail houses or non-custodial remand centres as alternatives to remand custody.²¹¹ The Queensland Law Society sought the immediate implementation of emergency accommodation services, prioritising regional and remote areas.²¹² NAAJA advised this Inquiry that there were no ‘culturally appropriate bail support programs available for people who require suitable accommodation to secure bail’ in the NT, in remote or in metropolitan areas.²¹³ The Legal Services Commission of SA noted the difficulty of finding suitable accommodation in metropolitan areas, especially if the person is ‘far from country’. To fill this gap, the Legal Services Commission suggested that culturally appropriate bail hostels, modelled on the bail hostel in SA, though run by Aboriginal and Torres Strait Islander communities and organisations, were needed.²¹⁴

5.136 The Law Council of Australia and Legal Aid WA suggested that culturally appropriate hostels should be modelled on the UK ‘Approved Premises’ model, whereby accommodation is provided along with supervision, rehabilitative services, drug and alcohol testing. It was further suggested that these hostels could be used by people transitioning out of prison or released on parole, noting the connection between homelessness and re-incarceration.²¹⁵

5.137 ALS NSW/ACT preferred the ‘Bail Supportive Housing Program’ from Ontario Canada, noting the need for specific housing for Aboriginal and Torres Strait Islander people. The key features of the Canadian model include: 24-hour support and supervision; programs such as life-skilling and referral to counsellors and housing agencies; dedicated Indigenous staff including an Aboriginal Bail-Program Supervisor, who also provides outreach services to community.²¹⁶

5.138 The ALRC considers that governments should consult with Aboriginal and Torres Strait Islander organisations to identify local solutions for bail accommodation and best-practice elements of bail accommodation models employed elsewhere.

209 Aboriginal Legal Service (NSW/ACT), *Submission 63*.

210 This included the expansion of the availability of transitional housing provided by Corrections Victoria under its Better Pathway strategy: Victorian Aboriginal Legal Service, *Submission 39*. See also Dr T Anthony, *Submission 115*. Dr Anthony advocated for the provision of hostels for women that would allow children to stay with their mothers.

211 NSW Bar Association, *Submission 88*; Legal Aid WA, *Submission 33*.

212 Queensland Law Society, *Submission 86*.

213 North Australian Aboriginal Justice Agency, *Submission 113*.

214 Legal Services Commission of South Australia, *Submission 17*.

215 Legal Aid WA, *Submission 33*. See also Law Council of Australia, *Submission 108*.

216 Aboriginal Legal Service (NSW/ACT), *Submission 63*.

5.139 Other identified gaps in service provision to support a grant of bail for Aboriginal and Torres Strait Islander have included:

- services in support of Aboriginal and Torres Strait Islander accused people with cognitive or mental impairment;²¹⁷
- male behavioural change programs. VALS specifically noted an undersupply of men's behavioural change programs, necessary for those accused of family violence who wish to be granted bail;²¹⁸
- cognitive behavioural therapy options in regional areas. VALS again advised the ALRC that, in regional Victoria, there remains a 'critical undersupply of culturally specific therapeutic services'. This makes grants of bail difficult to achieve, especially where the accused must 'show cause' in bail applications;²¹⁹ and
- rehabilitation programs.²²⁰

5.140 As with bail accommodation, the ALRC recommends that governments work with local Aboriginal and Torres Strait Islander organisations to identify and rectify gaps in service provision.

217 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*. NATSILS recommended co-locating disability support workers within ATSILS as a way to ensure that Aboriginal and Torres Strait Islander people with disability are supported in the process of delivery to the court information relating to their cultural background and obligations.

218 Victorian Aboriginal Legal Service, *Submission 39*.

219 Ibid.

220 See, eg, Human Rights Law Centre, *Submission 68*; Commissioner for Children and Young People Western Australia, *Submission 16*.

