

6. Sentencing and Aboriginality

Contents

Summary	185
Considerations to be taken into account when sentencing	186
Purposes and principles of sentencing	187
Sentencing factors in Australia	188
Sentencing Aboriginal and Torres Strait Islander offenders	189
Statutory provisions	189
Common law	192
Sentencing Aboriginal offenders in Canada	197
Statutory requirement to consider Aboriginality in sentencing	198
Canadian common law	199
<i>Gladue</i> specialist sentencing reports	202
Requirement to consider Aboriginality in Australian sentencing courts	204
Previous reviews	206
Stakeholders to this Inquiry	207
Obstacles	210
Legislative form	212
Indigenous Experience Reports for Australian sentencing courts	214
Summary and superior courts—incidence	214
The current methods for submitting information to sentencing courts	216
Moves to <i>Gladue</i> -style reports in Australia	220
Stakeholders to this Inquiry	222
Flexible approach in courts of summary jurisdiction	225
Training and guidelines for use	226

Summary

6.1 The Terms of Reference to this Inquiry direct the ALRC to consider sentencing in examining the incarceration rates of Aboriginal and Torres Strait Islander peoples. Sentencing decisions are crucial in determining whether a person goes to prison and for how long. The sentencing decision may be affected by the seriousness of the offence and any subjective characteristics of the offender, including criminal history.

6.2 Aboriginal and Torres Strait Islander offenders are more likely to have prior convictions and to have served a term of imprisonment than non-Indigenous offenders.¹ Aboriginal and Torres Strait Islander offenders may have also experienced

1 See ch 3, fig 3.19.

trauma that is unique to their Aboriginality. This could include, for instance, direct or indirect experience of the Stolen Generation, loss of culture, and displacement. Aboriginal and Torres Strait Islander peoples who have experienced this type of trauma may distrust police and government agencies.²

6.3 Sentencing courts are able to consider the relevance and impact of systemic and background factors affecting an Aboriginal or Torres Strait Islander offender when taking into account subjective characteristics at sentencing, but are not required to do so. The High Court determined that, in the absence of legislative authority,³ to take ‘judicial notice’ of the ‘systemic background of deprivation of Aboriginal offenders’ more generally would be ‘antithetical to individualised justice’.⁴

6.4 For reasons of fairness, certainty, and continuity in sentencing Aboriginal and Torres Strait Islander offenders, the majority of stakeholders to this Inquiry supported the introduction of provisions requiring sentencing courts to take a two-stepped approach. First, to take into account the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples, then to proceed to review evidence as to the effect on that particular individual offender.

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

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

Considerations to be taken into account when sentencing

6.7 Sentencing or a sentencing hearing follows a conviction, regardless of whether an offender entered a plea of guilty or was found guilty at trial. Sentencing in serious or complex matters is undertaken by judges and magistrates who apply the principles and purposes of sentencing to the characteristics of the offence and the subjective characteristics of the offender to come to a sentencing decision.⁵

2 See ch 2.

3 *Munda v Western Australia* (2013) 249 CLR 600, [50].

4 *Bugmy v The Queen* (2013) 249 CLR 571, [41].

5 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper—Criminal Justice* (2016) [12.1]. Sentencing courts also consider the maximum penalty for the

6.8 Each state and territory, and the Commonwealth, has legislation that guides the sentencing process.⁶ The relevant sentencing statutes often provide the principles and purposes of sentencing, as well as listing the factors that the court may take into account when considering the subjective characteristics of the offender.

Purposes and principles of sentencing

6.9 The purposes of sentencing are well established in common law,⁷ and are outlined in the sentencing statutes of the majority of states and territories except South Australia (SA),⁸ Tasmania⁹ and Western Australia (WA). Generally, the purposes of sentencing are:

- punishment: to punish the offender for the offence in a way that is just and appropriate in all the circumstances;
- deterrence: to deter the offender (specific deterrence) or other people (general deterrence) from committing the same or similar offences;
- protection: to protect the community from the offender;
- rehabilitation: to promote the rehabilitation of the offender; and
- denunciation: to denounce the conduct of the offender.¹⁰

6.10 The purposes of sentencing can overlap, and even conflict.¹¹ For example, protection of the community may not align with the rehabilitation of the offender. As noted by the High Court of Australia, the purposes of sentencing cannot be ‘considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence, but sometimes they point in different directions’.¹²

offence as set by the legislature, and any submissions as to penalties for similar offending imposed by the court.

6 *Crimes (Sentencing) Act 2005* (ACT); *Crimes Act 1914* (Cth); *Sentencing Act 1997* (NT); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Penalties and Sentences Act 1992* (Qld); *Criminal Law (Sentencing) Act 1988* (SA); *Sentencing Act 1997* (Tas); *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA).

7 *Veen v R (No 2)* (1988) 164 CLR 465.

8 *Criminal Law (Sentencing) Act 1988* (SA) s 10 described as ‘sentencing considerations’.

9 *Sentencing Act 1997* (Tas) s 3 describes the purpose of the Act.

10 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1997* (NT) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Criminal Law (Sentencing) Act 1988* (SA) s 10; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5; *Veen v R (No 2)* (1988) 164 CLR 465. The ACT and NSW sentencing statutes each include an additional two purposes of sentencing: ‘to make the offender accountable for his or her actions’; and ‘to recognise the harm done to the victim of the crime and the community’: *Crimes (Sentencing) Act 2005* (ACT) ss 7(e), 7(g); *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A(e), 3A(g).

11 *Muldrock v The Queen* (2011) 244 CLR 120 [20].

12 *Veen v R (No 2)* (1988) 164 CLR 465, [13].

6.11 Sentencing principles have also been developed by the common law, and incorporated into some sentencing statutes.¹³ The main principles related to sentencing and the sentencing decision are:

- proportionality: the sentence needs to be appropriate or proportionate to the gravity of the crime;¹⁴
- parity: treat like cases alike and different cases differently;¹⁵
- totality: the total sentence, where there are multiple terms, needs to be just and appropriate to the whole of offending;¹⁶
- imprisonment as a last resort;¹⁷ and
- parsimony: impose the least severe sentencing option that is open to achieve the purpose or purposes of punishment.¹⁸

Sentencing factors in Australia

6.12 Some sentencing statutes provide the factors that sentencing courts can take into account in sentencing an offender. These vary in form. For example, New South Wales (NSW) legislation provides a non-exhaustive list of the mitigating and aggravating factors that the sentencing court is to take into account.¹⁹ Aggravating factors in NSW include the ‘seriousness of the offence; the criminality of the offender; and the identity and vulnerability of the victim’.²⁰ If the offender was a person of good character; was acting under duress; did not plan the offence; or had shown remorse, the severity of the sentence may be mitigated.

6.13 Some states and territories list a number of factors that a court must have regard to in sentencing, which are not expressed to be ‘aggravating’ or ‘mitigating’. For example, in Victoria the sentencing court must have regard to, among other things, the nature and gravity of the offence; the offender’s culpability and previous character; the impact of the offence on any victim; and any injury loss or damage resulting directly from the offence.²¹ Other jurisdictions simply provide that the court must take into account any aggravating or mitigating factors.²²

13 See, eg, *Sentencing Act 1997* (NT) s 5; *Penalties and Sentencing Act 1992* (Qld) s 9; *Sentencing Act 1995* (WA) s 6.

14 *Veen v R (No 2)* (1988) 164 CLR 465.

15 *Green v The Queen* (2011) 244 CLR 462, [28].

16 *Mill v R* (1988) 166 CLR 59.

17 See, eg, *R v Way* (2004) 60 NSWLR 168, [115]; *R v Vasin* (1985) 39 SASR 45, [48];

R v Zamagias [2002] NSWCCA 17, [25]–[26].

18 The principle of parsimony has been rejected by the courts in NSW: *Blundell v R* [2008] NSWCCA 63, [47].

19 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

20 Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper—Criminal Justice* (2016) [12.5]; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

21 *Sentencing Act 1991* (Vic) s 5(2); also see *Crimes (Sentencing) Act 2005* (ACT) ss 33–36.

22 *Sentencing Act 1995* (WA) s 6(2); Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper—Criminal Justice* (2016) [12.5].

Sentencing Aboriginal and Torres Strait Islander offenders

6.14 Aboriginal and Torres Strait Islander peoples hold a unique position as Australia's first peoples. The experiences of Aboriginal and Torres Strait Islander peoples are canvassed in Chapter 2 of this report.

6.15 Sentencing courts in all jurisdictions have the ability to take account of an offender's background of disadvantage, relying on submissions on the relevant issues being made or as provided in court-ordered pre-sentence reports. Courts can consider a range of subjective factors arising from the offender's history. This may include, for example, where the offender experienced deprivation, poverty, trauma or abuse and those factors may affect a person's moral culpability.²³ These can be taken into account irrespective of an offender's cultural or racial background.

6.16 Among the many experiences unique to Aboriginal and Torres Strait Islander peoples, Aboriginal and Torres Strait Islander offenders may have experienced detrimental and intergenerational effects of past government policies and criminal justice practices.²⁴ As observed by ACT Legal Aid in their submission to this Inquiry:

Numerous reports have recognised the ongoing 'complex effects of dispossession, colonisation and institutional racism on Aboriginal peoples', including 'poverty, unemployment, [poor] education, alcohol abuse, isolation, racism and loss of connection to family culture, land or Indigenous laws'... ATSI offenders must be considered in the context of the historical subjugation and dispossession that has shaped, engendered, and perpetuated ATSI disadvantage.²⁵

6.17 There are existing provisions that enable some sentencing courts to consider factors related to Aboriginality when sentencing, and the common law has also provided some guidance. These are briefly discussed below.

Statutory provisions

6.18 Provisions related to considerations of Aboriginality when sentencing are found in the sentencing statutes of the ACT, Queensland, and SA. In the ACT, the *Crimes (Sentencing) Act 2005* (ACT) directs the sentencing court to consider, among other things, the 'cultural background' of the offender.²⁶ The 'cultural background' of the offender is also a matter for inclusion in pre-sentence reports (see below).²⁷

6.19 In Queensland, s 9 of the *Penalties and Sentencing Act 1992* (Qld) determines that a sentencing court must, among other things, have regard to submissions made by a Community Justice Group about particular matters relating to an Aboriginal and Torres Strait Islander offender's community, any cultural considerations, or available services or programs:

23 *Bugmy v The Queen* 249 CLR 571.

24 See ch 2.

25 Legal Aid ACT, *Submission 107*; also see Dr A Hopkins, *Submission 24*; R Casey, *Submission 6*.

26 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m).

27 *Ibid* s 40A(b). A similar provision was repealed from the *Crimes Act 1914* (Cth) in 2006.

(2) In sentencing an offender, a court must have regard to—

...

(p) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—

- (i) the offender's relationship to the offender's community; or
- (ii) any cultural considerations; or
- (iii) any considerations relating to programs and services established for offenders in which the community justice group participates;...²⁸

6.20 The explanatory notes to s 9(2)(p) described community justice groups as entities comprised of Elders and respected persons who volunteer their time to develop and implement local strategies for addressing crime and justice issues in Aboriginal and Torres Strait Islander communities.²⁹ At the time of the provision's introduction, there were more than 30 groups established in communities across Queensland, including remote, regional and metropolitan areas.³⁰ In 2017, there were close to 50 community justice groups in Queensland.³¹

6.21 Submissions to the sentencing court by community justice groups may be made on request by the prosecution, defence or the court, or at the volition of a Community Justice Group.³²

6.22 The key factors that led to the current form of s 9(2)(p) was the over-representation of Aboriginal and Torres Strait Islander peoples in custody, and the need for greater community-based culturally appropriate options.³³ It was intended that submissions from community justice groups would give the sentencing court insight into the 'reasons for the offending behaviour and relevant cultural and historical issues'.³⁴ Community justice groups could make the court aware of local sentencing options, particularly those in which the group participated. Submissions to this effect were to be of particular benefit to circuit courts in remote areas, with the responsible Minister noting in the second reading speech that it would be 'expected that the advice of the community justice groups will lead to more appropriate sentencing options for offenders' allowing for the 'community to take a greater role in addressing offending behaviour in a culturally appropriate way'.³⁵

6.23 There is a similar provision in Queensland relating to submissions by community justice groups regarding applications for release on bail.³⁶

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

29 Explanatory Note, *Penalties and Sentences and Other Acts Amendment Bill 2000*.

30 *Ibid.*

31 See ch 5.

32 Explanatory Note, *Penalties and Sentences and Other Acts Amendment Bill 2000*.

33 *Ibid.*

34 Queensland, *Parliamentary Debates*, Legislative Assembly, 1 June 2000, 1539 (Matthew Foley).

35 *Ibid.* 1540.

36 *Bail Act 1980* (Qld) s 16(2)(e). See also ch 5.

6.24 In their submission to this Inquiry, Caxton Legal Centre identified some limitations of the Queensland provision regarding submissions on sentencing. First, it observed that there was still no explicit requirement for sentencing courts in Queensland to take into account the ongoing and unique systemic and background factors affecting Aboriginal and Torres Strait Islander offenders.³⁷ Second, the provision did not require that submissions be sought from community justice groups, and, third, when obtained, there was no legislative requirement for sentencing judges to accept recommendations submitted by the Community Justice Group. For these reasons, Caxton Legal Centre supported ‘legislative redress’ of the Queensland provision.³⁸

6.25 In SA, the sentencing statute provides for the convening of sentencing conferences when sentencing Aboriginal and Torres Strait Islander offenders.³⁹ These are designed to promote in the defendant ‘understanding of the consequences of criminal behaviour, and in the court, understanding of Aboriginal cultural and societal influences, and thereby make the punishment more effective’.⁴⁰

6.26 A sentencing conference potentially involves the defendant (whose consent is required), members of their family, their legal representative, the prosecutor, an Aboriginal Justice Officer, and the victim, if they choose to participate.⁴¹ A court may take the views expressed in the conference into consideration when determining a sentence, although it is discretionary.⁴² In *R v Wanganeen* the South Australian Supreme Court commented that the provision was

a formal recognition of the cultural differences that should be accommodated when sentencing Aboriginal offenders ... It is relevant for the purposes of this decision to again record the over-representation of Aboriginal people in the criminal justice system, and the relevance of Aboriginality in sentencing generally, in order to provide further context to the enactment of section 9C.⁴³

6.27 The provisions in the ACT, Queensland and SA apply in all sentencing courts in those jurisdictions, not only to Aboriginal and Torres Strait Islander specific sentencing courts (such as Murri and Nunga courts).⁴⁴ The SA sentencing conference model received support from some stakeholders to this Inquiry.⁴⁵

37 Caxton Legal Centre, *Submission 47*.

38 *Ibid*.

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

40 *R v Wanganeen* [2010] SASC 237 (30 July 2010) [4].

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

42 *R v Wanganeen* [2010] SASC 237 (30 July 2010) [4].

43 *Ibid* [7]–[8].

44 *Penalties and Sentences Act 1992* (Qld) s 9(2)(p); *Criminal Law (Sentencing) Act 1988* (SA) s 9C. See ch 10 for a discussion of Aboriginal and Torres Strait Islander sentencing courts.

45 Judge Stephen Norrish QC, *Submission 96*. See also National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

Common law

6.28 There is a considerable body of case law that provides guidance for sentencing courts when sentencing Aboriginal and Torres Strait Islander offenders in Australian jurisdictions.⁴⁶ The key decisions are outlined below.

Neal

6.29 In 1982, in reviewing the sentence of an Aboriginal offender in *Neal v R*, the High Court of Australia considered that the sentencing court ‘should have taken into account the special problems experienced by Aboriginals living in reserves’.⁴⁷ Brennan J went on to state:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender’s membership of an ethnic or other group. So much is essential to the even administration of criminal justice.⁴⁸

Fernando

6.30 A decade later, and a year after the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) delivered its report, Wood J delivered a decision in the Supreme Court of NSW of *R v Fernando*.⁴⁹ Fernando, a 48-year-old Aboriginal man, entered a plea of guilty to a charge of malicious wounding after stabbing his de facto partner a number of times. Fernando lived in an Aboriginal community in Walgett, in the far west of NSW. He had low levels of education, had been forcibly removed from his family as a child, and had an extensive criminal record, including a number of offences involving alcohol. Fernando had been consuming alcohol before the stabbing.

6.31 In the decision, Wood J enunciated the following principles in relation to the sentencing of Aboriginal offenders:

(A) The same sentencing principles are to be applied in every case irrespective of the identity of the particular offender or his membership of an ethnic or other group but that does not mean the sentencing court should ignore those facts which exist only by reason of the offender’s membership of such a group.

(B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.

46 See, eg, *R v King* [2013] ACTCA 29 (26 July 2013); *TM v Karapanos and Bakes* [2011] ACTSC 74 (12 May 2011); *R v Ceissman* [2001] NSWCCA 73 (16 March 2001); *R v Fernando* (1992) 76 Crim R 58; *BP v R* [2010] NSWCCA 159 (30 July 2010); *R v Wurrumara* [1999] NTCCA 45 (28 April 1999); *Spencer v R* [2005] NTCCA 3 (29 April 2005); *R v Daniel* [1997] QCA 139 (30 May 1997); *R v KU; ex parte A-G (Old)* [2008] QCA 154 (13 June 2008); *R v Scobie* [2003] SASC 85 (24 March 2003); *Police v Abdulla* [1999] SASC 239 (17 June 1999); *DPP v Terrick*; *DPP v Marks*; *DPP v Stewart* [2009] VSCA 220 (2 October 2009); *R v Fuller-Cust* [2002] VSCA 168 (24 October 2002); *Western Australia v Munda* [2012] WASCA 164 (22 August 2012); *Western Australia v Richards* [2008] WASCA 134 (1 July 2008).

47 *Neal v The Queen* (1982) 149 CLR 305, [8].

48 *Ibid* [13].

49 *R v Fernando* (1992) 76 Crim R 58.

(C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand with Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.

(D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.

(E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

(F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.

(G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.

(H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.⁵⁰

6.32 This judgment does not bind sentencing courts of other states and territories, nonetheless, the '*Fernando* principles' have been described as a 'convenient collection of circumstances that courts can take into account in an appropriate case'.⁵¹ They have been influential across Australian jurisdictions, but do not automatically apply to all cases involving an Aboriginal or Torres Strait Islander offender, nor do they provide that a person's 'Aboriginality of itself is a mitigating factor'.⁵² Rather, the principles provide a 'framework for consideration of the issues of disadvantage often attending

50 Ibid 62–63.

51 Legal Aid NSW, *Sentencing Aboriginal Offenders* (2004).

52 Ibid 3.

the subjective circumstances of individual Indigenous offenders'.⁵³ As Wood CJ later set out in *R v Pitt*:

What *Fernando* sought to do was to give recognition to the fact that disadvantages which arise out of membership of a particular group, which is economically, socially or otherwise deprived to a significant and systemic extent, may help to explain or throw light upon the particular offence and upon the individual circumstances of the offender. In that way an understanding of them may assist in the framing of an appropriate sentencing order that serves each of the punitive, rehabilitative and deterrent objects of sentencing.⁵⁴

6.33 Some courts have 'narrowed the application' of the *Fernando* principles, particularly in the Northern Territory (NT) and WA—principally in cases involving serious offending.⁵⁵ Commentary on the application of the principles indicates they have been applied 'unevenly'.⁵⁶ This may not be a bad outcome. The NSW Sentencing Council has suggested that this uneven application 'may simply be a reflection of the protean nature of the objective and subjective circumstances of each case and/or the availability (or otherwise) of evidence as to the subjective circumstances of particular Indigenous offenders on sentence'.⁵⁷

6.34 The *Fernando* principles continue to be utilised by the courts in sentencing offenders who have a background of disadvantage. Citing the decision of Simpson J in *R v Kennedy*,⁵⁸ the majority of the High Court of Australia affirmed this as the basis of the *Fernando* principles:

Properly understood, *Fernando* is a decision, not about sentencing Aboriginals, but about the recognition, in sentencing decisions, of social disadvantage that frequently (no matter what the ethnicity of the offender) precedes the commission of crime.⁵⁹

Bugmy

6.35 In October 2013, the High Court delivered its decision in the case of William David Bugmy.⁶⁰ Bugmy was being held on remand for other offences when he assaulted a prison officer with a pool ball. The officer sustained a serious injury, resulting in partial blindness. Bugmy's personal history was marked by disadvantage, violence, substance abuse, suicide attempts, mental illness and repeated incarceration as a juvenile and as an adult. Bugmy had entered a plea of guilty and was sentenced in the NSW Court of Criminal Appeal (NSWCCA) for various assault offences. He

53 Janet Manuell, 'The *Fernando* Principles: The Sentencing of Indigenous Offenders in NSW' (Discussion Paper, NSW Sentencing Council, December 2009) 10.

54 *R v Pitt* [2001] NSWCCA 156 (2001) [21].

55 See, eg, *Spencer v R* [2005] NTCCA 3 (29 April 2005); *R v Wurraramara* [1999] NTCCA 45 (28 April 1999); *Western Australia v Munda* [2012] WASCA 164 (22 August 2012); Indigenous Justice Clearinghouse, *Sentencing Indigenous Offenders* (2010) 3.

56 NSW Sentencing Council, *The Fernando Principles: The Sentencing of Indigenous Offenders in NSW—Discussion Paper* (2009) 10.

57 *Ibid.*

58 *Kennedy v R* [2010] NSWCCA 260 (17 November 2010).

59 *Bugmy v The Queen* (2013) 249 CLR 571, [37].

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

appealed to the High Court of Australia against the severity of the sentence on several grounds, two of which are particularly relevant to this Inquiry.

6.36 First, the appellant submitted that the NSWCCA had erred in accepting the prosecution's submission that 'the difficult circumstances of the respondent's youth, in particular the prevalence of alcohol abuse and the lack of parental guidance ... lost much of its force when it was raised against a background of numerous previous offences'.⁶¹ The High Court agreed, noting that because the effects of 'profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving 'full weight' to an offender's deprived background in every sentencing decision'.⁶²

6.37 The second ground of appeal was that the Court ought to have regard to two decisions of the Supreme Court of Canada: *R v Gladue*⁶³ and *R v Ipeelee*⁶⁴ (discussed below). The appellant relied on these decisions as authority for two propositions: that sentencing courts should take into account the 'unique circumstances of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender' and it should take into account the high rate of incarceration of Aboriginal Australians, which reflects a 'history of dispossession and associated social and economic disadvantage'.⁶⁵

6.38 The Canadian decisions related to s 718.2(e) of the Canadian *Criminal Code*, which prescribes imprisonment to be a last resort, with 'particular attention to the circumstances of [A]boriginal offenders'. In *Gladue*, it was found that this statutory direction amounted to legislative recognition that the circumstances of Aboriginal peoples are unique and of the disproportionate rate of incarceration of Aboriginal peoples.⁶⁶ The Canadian experience is further discussed below.

6.39 In *Bugmy*, the appellant likened the existence of s 718.2(e) of the Canadian *Criminal Code* to provisions in NSW sentencing legislation which provide for imprisonment as a last resort, and which outline the factors to be considered in sentencing.⁶⁷ Noting the application of *Neal* and *Fernando*, the appellant further submitted that, subsequent to both those decisions, there had been in Australia a myriad of court decisions, national reports, and commissions of inquiry and reviews that not only elevated public understanding and awareness of, but confirmed the 'ongoing grave socio-economic difficulties in many Aboriginal communities and the link of these "background factors" to subsequent offending behaviour'.⁶⁸ The appellant quoted *Gladue* and *Ipeelee* to show that, when considering the context of offending, Canadian courts must take

61 *R v Bugmy* [2012] NSWCCA 223 (18 October 2012) [48].

62 *Bugmy v The Queen* (2013) 249 CLR 571, [44].

63 *R v Gladue* [1999] 1 SCR 688.

64 *R v Ipeelee* [2012] 1 SCR 433.

65 *Bugmy v The Queen* 249 CLR 571, [28].

66 *Ibid* [31]; *R v Gladue* [1999] 1 SCR 688 [37], [50]–[65].

67 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A, 5(1), 21A.

68 *Bugmy*, 'Appellant's Submissions', Submission in *Bugmy v The Queen*, High Court of Australia, S99/2013 (14 June 2013) [6.27]–[6.29].

judicial notice of the history of colonialism, displacement and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal offenders.⁶⁹

6.40 The appellant submitted that the High Court should require NSW courts to take into account these known systemic and background factors, rather than requiring the Aboriginal legal services to present authorities and publications relating to this same context in each case.⁷⁰

6.41 The High Court rejected this ground of appeal, finding that the Canadian decisions on which the appellant relied were founded upon the legislative provision s 718.2(e), which could be distinguished from the NSW provision because it did not direct the courts to give particular attention to the circumstances of Aboriginal people, further stating:

There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender. Nor is there a warrant to take into account the high rate of incarceration of Aboriginal people when sentencing an Aboriginal offender. Were this a consideration, the sentencing of Aboriginal offenders would cease to involve individualised justice.⁷¹

6.42 The High Court referred to Australian case law and principles that provide for consideration of disadvantage generally, which also applies within Aboriginal communities.⁷² Ultimately, however, it rejected the argument that ‘courts ought to take judicial notice of the systemic background of deprivation of Aboriginal offenders’,⁷³ on the basis that it would be ‘antithetical to individualised justice’.⁷⁴

Munda

6.43 *Munda v Western Australia*,⁷⁵ a case where an Aboriginal man had killed his de facto partner during a violent attack while intoxicated, was heard by the High Court together with *Bugmy*. Though primarily focused on issues related to appeal on sentence by the prosecution, the appellant argued that the Court of Appeal of the Supreme Court of Western Australia had failed to have proper regard to the appellant’s personal circumstances as an Aboriginal man, and to his systemic deprivation and disadvantage, including an environment in which the abuse of alcohol was endemic in Aboriginal communities.⁷⁶

6.44 In relation to the abuse of alcohol, the High Court observed that the circumstance that the appellant has been affected by an environment in which the abuse of alcohol is common must be taken into account in assessing his personal

69 Ibid [6.30].

70 Ibid.

71 *Bugmy v The Queen* (2013) 249 CLR 571, [36].

72 Ibid [37]–[40].

73 Ibid [41].

74 Ibid.

75 *Munda v Western Australia* (2013) 249 CLR 600.

76 Ibid [3], [26].

moral culpability, but the consideration must be balanced with the seriousness of the appellant's offending. It is also important to say that it should not be thought that indulging in drunken bouts of domestic violence is not an example of moral culpability to a very serious degree.⁷⁷

6.45 The High Court determined that, in the 'absence of specific legislative direction of the kind discussed in the Canadian decisions of *R v Gladue* and *R v Ipeelee*, the starting point for discussion of this ground of appeal is the statement of Brennan J in *Neal v The Queen*'.⁷⁸ The appeal was dismissed. Among other things, the High Court found it to be 'contrary to principle to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities'.⁷⁹ The High Court observed further:

To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.⁸⁰

Sentencing Aboriginal offenders in Canada

6.46 Canada's Aboriginal Peoples,⁸¹ like Australia's Aboriginal and Torres Strait Islander peoples, are over-represented in the prison population.⁸² For example, in 2013, Canada's Aboriginal Peoples comprised 4% of the Canadian population, but almost 25% of the prison population.⁸³

6.47 Canada's history is one of colonisation, and the impact on its original inhabitants, in many ways, mirrors the Australian experience. For example, the Canadian Royal Commission on Aboriginal Peoples acknowledged that many Canadian Aboriginal Peoples were dispossessed from their homelands, with many made wards of the state through protectionist government policies that 'sought to obliterate their cultural and political institutions'.⁸⁴

6.48 In Canada, police were often responsible for implementing a range of government policies, including those relating to assimilation and removal of children

77 Ibid [57].

78 Ibid [50].

79 Ibid [53].

80 Ibid; also see International Commission of Jurists Victoria, *Submission 54*.

81 There are a range of terms used to describe Canada's original peoples: National Aboriginal Health Organization, *Terminology* <www.naho.ca>. In referring to the collective name for all original peoples of Canada and their descendants, and reflecting the Canadian *Criminal Code*, the ALRC will use the terms 'Aboriginal' and 'Aboriginal Peoples'.

82 See ch 3.

83 Office of the Correctional Investigator, Canada, *Backgrounder: Aboriginal Offenders—A Critical Situation* <www.oci-bec.gc.ca>.

84 Canada, Royal Commission on Aboriginal Peoples, *Report* (1996) vol 1, 7.

into residential schools.⁸⁵ The relationship between Canadian Aboriginal Peoples and police has been strained, and marked by distrust on both sides. Issues related to over and under-policing of Canadian Aboriginal Peoples remain problematic.⁸⁶ Cultural differences, poverty, the effect of intergenerational trauma and institutionalisation in residential schools, substance abuse, and social dysfunction resulting from discrimination and racism continue to result in over-representation of Aboriginal Peoples in Canadian prisons.⁸⁷

Statutory requirement to consider Aboriginality in sentencing

6.49 Australian and Canadian sentencing approaches are not dissimilar, although there are some differences. Canadian sentencing legislation incorporates a sentencing principle that is omitted from Australian statutes: ‘to provide reparations for harm done to victims or to the community’.⁸⁸ Only the ACT and SA have a similar principle, and provide that any ‘action the offender may have taken to make reparation for injury, loss or damage resulting from the offence’ is a sentencing consideration.⁸⁹ The Canadian statute also omits punishment as a sentencing purpose.⁹⁰

6.50 These differences—the omission of punishment and incorporation of reparation for harm done—provide a foundation for a ‘restorative’ framework in delivering justice in Canada. There are some parts of the criminal justice system in Australian jurisdictions that incorporate aspects of restorative justice,⁹¹ and a number of Australian statutes acknowledge the impact on victims and the need for offender accountability in sentencing considerations. However there remains a focus on the retributive component of sentencing in most Australian jurisdictions.

6.51 In 1995, the Canadian Parliament amended the *Criminal Code* to codify the purposes and principles of sentencing. In response to the rates of Aboriginal incarceration, the amending bill included s 718.2(e). Section 718 sets out broadly the ‘Purposes and principles of sentencing’. Section 718.2(e) relevantly provides that a court that imposes a sentence shall also take into consideration the following principle:

all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, *with particular attention to the circumstances of Aboriginal offenders*.⁹²

85 Jonathan Rudin, ‘Aboriginal Peoples and the Criminal Justice System’ (Ipperwash Inquiry, 2007) 1.

86 Rudin, above n 84.

87 Brian R Pfefferle, ‘Gladue Sentencing: Uneasy Answers to the Hard Problem of Aboriginal Over-Incarceration’ (2006) 32(2) *Manitoba Law Journal* 113.

88 *Criminal Code, RSC 1985, c C-46* (Canada) s 718(e).

89 *Crimes (Sentencing) Act 2005* (ACT) s 33(h); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(g).

90 New Zealand does not list punishment as a purpose of sentencing, but does incorporate ‘reparation for harm done by the offending’: *Sentencing Act 2002* (NZ) s 7(1)(d).

91 Including, for eg, circle sentencing and conferencing: Jacqueline Joudo Larsen, ‘Restorative Justice in the Australian Criminal Justice System’ (AIC Research and Public Policy Series Report No 127, Australian Institute of Criminology, 2014).

92 *Emphasis added*.

6.52 The then Minister for Justice noted the ‘sad over-representation’ of Aboriginal Peoples in Canadian prisons as the rationale for the provision.⁹³ The provision was considered by the Canadian Supreme Court in the case of Jamie Tanis Gladue.

Canadian common law

Gladue

6.53 In this case,⁹⁴ Gladue, an Aboriginal woman, pleaded guilty to the manslaughter of her husband, whom she suspected of having an affair. After consuming alcohol at a party on her 19th birthday, the offender stabbed her husband twice with a kitchen knife, once as he attempted to flee. She appealed the three-year sentence imposed.

6.54 The Supreme Court examined the legislative and contextual background to s 718.2(e). It found the provision to be ‘remedial in nature’ and ‘is designed to ameliorate the serious problem of over-representation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing’.⁹⁵ In reaching this conclusion, the Court noted that while the parliamentary debate on the amending legislation is ‘clearly not decisive’ on s 718.2(e),⁹⁶ statements made by the Minister for Justice at the time and other members of Parliament ‘corroborate and do not contradict’ its conclusion.⁹⁷ The Court also referred to a number of reports to support its conclusion on the remedial nature of the section.

6.55 The Court stressed that sentencing is an ‘individual process’,⁹⁸ but held that the effect of s 718.2(e) is to ‘alter the method of analysis’⁹⁹ that judges must use when determining an appropriate sentence for Aboriginal persons:

Section 718.2(e) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (A) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (B) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.¹⁰⁰

6.56 The Court went further, noting that judges would require information about the accused to facilitate this process: ‘Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing’.¹⁰¹

93 House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 62, 1st Sess., 35th Parl., November 17, 1994 15.

94 *R v Gladue* [1999] 1 SCR 688.

95 *Ibid* [4].

96 *Ibid* [43].

97 *Ibid* [45].

98 *Ibid* [93].

99 *Ibid*.

100 *Ibid*.

101 *Ibid*.

6.57 The Court emphasised that s 718.2(e) was not to be interpreted as a ‘means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed’.¹⁰²

6.58 The Supreme Court held that the sentencing judge and the Court of Appeal had erred in their application of s 718.2(e). However, noting the seriousness of the offence, including the aggravating factor that it involved domestic violence, the Court considered the three-year term of imprisonment was not unreasonable and dismissed the appeal.

6.59 A number of higher courts affirmed the principles set out in *Gladue*.¹⁰³ Nonetheless, the numbers of Aboriginal Canadians incarcerated continued to rise.

Ipeelee

6.60 Post-*Gladue*, the application of s 718.2(e) and the *Gladue* principles varied. In 2012, the Supreme Court revisited s 718.2(e) in *R v Ipeelee*.¹⁰⁴ In a majority judgment, the Court commented that, although the provision ‘had not had a discernible impact on the over-representation of Aboriginal people in the criminal justice system’,¹⁰⁵ the *Gladue* principles ‘were never expected to be a panacea’.¹⁰⁶

there is some indication ... from both the academic commentary and the jurisprudence, that the failure can be attributed to some extent to a fundamental misunderstanding and misapplication of both s. 718.2(e) and this Court’s decision in *Gladue*.¹⁰⁷

6.61 The Court ultimately considered that the erroneous application of the principles arose for a number of reasons. It found that, in some cases, the court required an offender to ‘establish a causal link between background factors and the ... current offence’;¹⁰⁸ and that its application to serious or violent offences was ‘irregular and uncertain’.¹⁰⁹ The Court rejected that an offender needed to establish a causal link between background factors and offending; and that sentencing judges have a duty to apply s 718.2(e) and *Gladue*, regardless of the seriousness of the offending.¹¹⁰

6.62 The *Ipeelee* decision identified and addressed three key criticisms that were considered to have plagued the efficacy of the remedial provision, s 718.2(e), and the *Gladue* principles:

(1) sentencing is not an appropriate means of addressing over-representation; (2) the *Gladue* principles provide what is essentially a race-based discount for Aboriginal offenders; and (3) providing special treatment and lesser sentences to Aboriginal

102 Ibid.

103 *R v Wells* (2000) 1 SCR 207; *R v Kakekagamick* [2006] 214 OAC 127.

104 *R v Ipeelee* [2012] 1 SCR 433.

105 Ibid [63].

106 Ibid.

107 Ibid [63] (emphasis in original).

108 Ibid [81]–[83].

109 Ibid [84]–[87].

110 Ibid [81]–[87].

offenders is inherently unfair as it creates unjustified distinctions between offenders who are similarly situated, thus violating the principle of sentence parity. In my view, these criticisms are based on a fundamental misunderstanding of the operation of s 718.2(e) of the *Criminal Code*.¹¹¹

6.63 In addressing each of these criticisms, the Court in *Ipeelee* considered that sentencing judges have an important role to play in effectively deterring criminality and rehabilitating offenders, and that where ‘current sentencing practices do not further these objectives, those practices must change so as to meet the needs of Aboriginal offenders and their communities’.¹¹² Noting that ‘just sanctions are those that do not operate in a discriminatory manner’,¹¹³ the Court found that Parliament’s intention in enacting the provision was that ‘nothing short of a specific direction to pay particular attention to the circumstances of Aboriginal offenders would suffice to ensure that judges undertook their duties properly’.¹¹⁴

6.64 The Court noted that *Gladue* explicitly rejected the argument that s 718.2(e) was an ‘affirmative action provision’¹¹⁵ or an ‘invitation to engage in reverse discrimination’.¹¹⁶ The Court in *Ipeelee*, emphasising the *Gladue* principles, found that ‘[t]he provision does not ask courts to remedy the over-representation of Aboriginal people in prisons by artificially reducing incarceration rates’:¹¹⁷

Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process. Section 718.2 (e) is intended to remedy this failure by directing judges to craft sentences in a manner that is meaningful to Aboriginal peoples. Neglecting this duty would not be faithful to the core requirement of the sentencing process.¹¹⁸

6.65 In response to the third criticism that utilising a different method of analysis is inherently unfair and ‘unjustifiably distinguishes between offenders who are otherwise similar’,¹¹⁹ the Court rejected this, finding that it ‘ignores the distinct history of Aboriginal peoples in Canada’.¹²⁰ Noting the extensive history of reports and commissions on that history, including the experience of Aboriginal peoples with the

111 Ibid [64].

112 Ibid [66].

113 Ibid [68].

114 Ibid [66].

115 Ibid [71].

116 *R v Gladue* [1999] 1 SCR 688 [86].

117 *R v Ipeelee* [2012] 1 SCR 433 [75].

118 Ibid.

119 Ibid [76].

120 Ibid [77].

criminal justice system, the Court considered that ‘current levels of criminality are intimately tied to the legacy of colonialism’.¹²¹

6.66 The Supreme Court in *Ipeelee* emphasised that nothing in *Gladue* prevents consideration of the background and systemic factors for other, non-Aboriginal offenders, noting in fact it is the opposite and that consideration of such factors is also important for a sentencing judge in the sentencing of these offenders.¹²²

6.67 *Ipeelee* has been said to ‘represent a significant clarification of the law’¹²³ post-*Gladue*, particularly in affirming its application to all, including serious, offences.

***Gladue* specialist sentencing reports**

6.68 *Gladue* reports are specialist Aboriginal sentencing reports prepared in some Canadian provinces to facilitate s 718.2(e) of the *Criminal Code*. *Gladue* reports are a way of integrating one part of specialist court processes into mainstream courts. *Gladue* reports are different from pre-sentence reports (PSRs). Although both provide information to a court about an offender, *Gladue* reports are intended to promote a better understanding of the underlying causes of offending, including the historic and cultural context of an offender. These factors may go some way toward addressing the over-representation of Aboriginal and Torres Strait Islander peoples in prison. PSRs serve a different, but related, function. Supporters of *Gladue* reports emphasised, for example, that simply because PSRs exist does not suggest there is no need for *Gladue* reports. Rather, the two would complement each other.

6.69 According to Jonathan Rudin, Program Director of Aboriginal Legal Services in Toronto, Ontario, *Gladue* reports are written to include the offender’s ‘voice’ and ‘story’:

when we do our *Gladue* reports we spend time interviewing the client and as many other people as we can ... *Gladue* reports tend to be written in the words of the people we interview ... we are not summarising what someone says, we are using their language. We don’t edit it, we don’t do anything with it, here is their story [so] what you get are the voices of the individuals who are involved in the person’s life. And certainly that’s very rare because you can go through the court system in Canada from charge to plea, and if you are an accused person you may never say a word to the court.¹²⁴

6.70 *Gladue* reports are ideally prepared ‘with the help of someone who has a connection to and understands the Aboriginal community’.¹²⁵ They assist in putting the offender’s ‘particular situation into an Aboriginal context so that the judge can come up with a sentence that’s unique to you and your culture and has an emphasis on

121 Ibid.

122 Ibid.

123 Ryan Newell, ‘Making Matters Worse: The Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration’ (2013) 51(1) *Osgoode Hall Law Journal* 215.

124 Law Report—ABC Radio National, *Canada’s Approach to Sentencing Aboriginal Offenders* <<http://www.abc.net.au/radionational/programs/lawreport/>>.

125 Legal Services Society of British Columbia, *Gladue Primer* (2011) 7.

rehabilitation and healing'.¹²⁶ This context may include an examination of complex issues of an historical and cultural nature that are unique to, and prevalent in, Canadian Aboriginal communities, including intergenerational trauma, alcohol and drug addiction, family violence and abuse, and institutionalisation. As observed by Rudin:

information about things that judges may not know about, like the history of residential schools, like the impact of adoption on aboriginal peoples, the history of addictions for aboriginal peoples in the country which is different from addictions in other communities. *Gladue* reports also provide detailed information on the impacts of particular experiences including those specific to the person as a result of their Aboriginal heritage, community and experience.¹²⁷

6.71 The time taken to prepare a *Gladue* report compared to a PSR is significantly higher, reflecting the time spent with the offender and significant others. In the Ontario context, it has been estimated that a *Gladue* report can take up to 20 hours to complete, compared to the eight to 10 hours for a PSR.¹²⁸

6.72 An evaluation of a pilot in British Columbia noted a number of key differences between *Gladue* reports and PSRs. *Gladue* reports were more comprehensive, 'specifically with respect to *Gladue* factors',¹²⁹ including 'more information about resources in rural and remote communities',¹³⁰ and 'options tailored to the specific needs of each person'.¹³¹ The evaluation found that the greatest contribution *Gladue* reports made to the court was 'their potential to draw concrete connections between the intergenerational impacts of colonialism (residential schools, community displacement, child apprehensions) and the person in court for sentencing'.¹³²

6.73 The impact of *Gladue* reports in Canada varies across the provinces. Offenders in some provinces have no capacity to access a *Gladue* report, while other provinces have been able to establish mechanisms to facilitate the preparation of *Gladue* reports. Aboriginal Legal Services in Toronto, Ontario, for example, has an established program, supported by funding from Legal Aid Ontario, with trained caseworkers who work with offenders to prepare *Gladue* reports.

6.74 *Gladue* reports have been described as having a definitive impact at an individual level:

When we do a *Gladue* report we often see that the sentencing an individual receives is different than what, for example, the Crown and defence were thinking of going into the sentencing. So what we see is when judges have information about the circumstances of an [A]boriginal offender, when Crowns have that information, when

126 Ibid.

127 Law Report—ABC Radio National, above n 123.

128 Rudin, above n 84, 48–50.

129 Legal Services Society of British Columbia, *Gladue Report Disbursement: Final Evaluation Report* (2013) 3.

130 Ibid.

131 Ibid.

132 Ibid.

defence counsel has that information, the sentences that people get change. So the *Gladue* reports make a difference on a micro level.¹³³

6.75 In 2007, based on his experience in Toronto, Rudin suggested that the impact of a *Gladue* report is not reflected in Aboriginal incarceration rates.¹³⁴

6.76 In 2011, the Legal Services Society (LSS) received funding from the Law Foundation of British Columbia to pilot the preparation of *Gladue* reports in British Columbia. An evaluation of the LSS pilot suggested that ‘*Gladue* reports may contribute to fewer and shorter incarceration sentences for Aboriginal people’.¹³⁵ A comparison of a sub-sample of 42 completed *Gladue* sentencing cases with a matched sample of 42 LSS Aboriginal client cases where there was no *Gladue* report, indicated that ‘fewer *Gladue* clients (23) received a jail sentence than their non-*Gladue* counterparts (32)’; and that median sentence length for *Gladue* clients was substantially lower than for the non-*Gladue* sample (18 days compared to 45 days).¹³⁶

Requirement to consider Aboriginality in Australian sentencing courts

Recommendation 6–1 Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.

6.77 Stakeholders expressed strong support for Australian jurisdictions to introduce a provision requiring sentencing courts to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.¹³⁷ The current approach—to take subjective disadvantage into account—was considered to be an insufficient response to a unique and, often, destructive set of circumstances that only Aboriginal and Torres Strait Islander peoples have experienced in this country.¹³⁸

133 Law Report—ABC Radio National, above n 123.

134 Rudin suggested this was largely as a result of resourcing constraints: Rudin, above n 84, 60; Campbell Research Associates, *Evaluation of Gladue Aboriginal Legal Services of Toronto Gladue Caseworker Program—Oct 2006–Sept 2007* (2008).

135 Legal Services Society of British Columbia, above n 128, 25.

136 *Ibid* 5.2.

137 See, eg, Sisters Inside, *Submission 119*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Community Restorative Centre, *Submission 61*; Australian Lawyers for Human Rights, *Submission 59*; International Commission of Jurists Victoria, *Submission 54*; Victorian Aboriginal Legal Service, *Submission 39*; Mental Health Commission of NSW, *Submission 20*.

138 See ch 2.

For example, partially in response to the High Court in *Munda*,¹³⁹ the International Commission of Jurists in Victoria submitted that it cannot be

right that prison terms calculated without regard to the unique history of social disadvantage recognise the human dignity of Aboriginal offenders. Nor, against a background of long term and worsening overrepresentation in custody, can it be right to proceed to sentence, in the absence of proof to the contrary, on the assumption that Aboriginality has nothing to do with an offender's criminality or to place on the individual offender the full burden of proving the link between his or her offending and his background.¹⁴⁰

6.78 It was the view of most stakeholders that the principles of 'individualised justice' and 'equality before the law'—understood as substantive equality—required sentencing courts to consider unique and systemic factors of Aboriginal and Torres Strait Islander offenders.¹⁴¹ The NSW Bar Association suggested that the introduction of a provision akin to the Canadian provision would 'promote equality before the law by promoting sentencing that is appropriate and adapted to the differences that pertain in the case of Aboriginal and Torres Strait Islander people'.¹⁴² The NSW Bar Association further noted that Australian sentencing courts are 'bound to take into account all material facts including those which exist only by reason of the offender's membership of an ethnic or other group', in which failure to take into account the unique systemic circumstances of Aboriginal and Torres Strait Islander offenders 'thwarts the pursuit of equality and individualised justice'.¹⁴³ Put simply by Change the Record Coalition, the approach taken in Canada represents an 'application of equal justice, not a denial of it'.¹⁴⁴

6.79 While sentencing courts can take disadvantage into account, including disadvantage related to factors systemic to Aboriginal and Torres Strait Islander communities, this relies on submissions by defence to that effect. Stakeholders considered that an explicit provision, requiring consideration of unique systemic and background factors of Aboriginal and Torres Strait Islander offenders in sentencing, would encourage judicial officers (and counsel) to take a proactive approach toward ensuring information relevant to those factors is before the sentencing court.¹⁴⁵ As noted by the International Commission of Jurists, a provision of this type would impose 'a duty to enquire' and to ensure 'all material facts to the determination of sentence have been taken into account'.¹⁴⁶

139 *Munda v Western Australia* (2013) 249 CLR 600, [53] see above.

140 International Commission of Jurists Victoria, *Submission 54*; cf Institute of Public Affairs, *Submission 58*.

141 See, eg, Legal Aid ACT, *Submission 107*; NSW Bar Association, *Submission 88*.

142 NSW Bar Association, *Submission 88*.

143 *Ibid.*

144 Change the Record Coalition, *Submission 84*; also see Justice Stephen Rothman AM, 'The Impact of Bugmy & Munda on Sentencing Aboriginal and Other Offenders.' (Paper Delivered at the Ngara Yura Committee Twilight Seminar, 25 February 2014) 10.

145 See, eg, Legal Aid ACT, *Submission 107*; NSW Bar Association, *Submission 88*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Victorian Aboriginal Legal Service, *Submission 39*; Mental Health Commission of NSW, *Submission 20*.

146 International Commission of Jurists Victoria, *Submission 54*; see also Legal Aid ACT, *Submission 107*; Change the Record Coalition, *Submission 84*.

Previous reviews

6.80 In 2006, the Law Reform Commission of Western Australia (LRCWA) considered the factors that sentencing courts take into account in its Inquiry into Aboriginal customary law, and recommended that WA introduce a provision requiring sentencing courts to consider the cultural background of the offender.¹⁴⁷ The LRCWA ‘firmly rejected’ the argument that permitting courts to take into the cultural background of an offender would be contrary to the principle of equality before the law, noting that ‘all accused, whether Aboriginal or not, are entitled to present relevant facts concerning their social, religious and family background and beliefs’.¹⁴⁸

6.81 The LRCWA also acknowledged that criminal histories of Aboriginal and Torres Strait Islander peoples could be a consequence of systemic bias and that it was critical that sentencing courts examine the circumstances of prior offending before issuing a custodial sentence. It further recommended that WA sentencing statutes expand on the principle of sentencing as a last resort in statute so that ‘when considering whether a term of imprisonment is appropriate the court is to have regard to the particular circumstances of Aboriginal people’.¹⁴⁹ In doing so, it stated:

The Commission wishes to make it clear that its recommendation does not mean that Aboriginal offenders will not go to prison. Nor does it mean that Aboriginal people will be treated more leniently than non-Aboriginal people just on the basis of race. By making this recommendation, the Commission strongly encourages courts in Western Australia to consider more effective and appropriate options for Aboriginal offenders, such as those developed by an Aboriginal community or a community justice group. What the Commission is recommending is that when judicial officers are required to sentence Aboriginal people they turn their minds not just to the matters that are directly relevant to the individual circumstances of the offender but to the circumstances of Aboriginal people generally. These circumstances include over-representation of Aboriginal people in the criminal justice system.¹⁵⁰

6.82 Prior to the decision in *Bugmy* in 2013, the NSW Law Reform Commission (NSWLRC) considered whether a person’s Aboriginality should be a relevant matter in sentencing. It noted that submissions to its Inquiry on sentencing in NSW supported such a proposal, with the Bar Association of NSW and Aboriginal Legal Service NSW/ACT advocating for an amendment to s 5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which prescribes imprisonment to be a last resort, so to read:

A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives (with particular attention to the circumstances of Aboriginal offenders), that no penalty other than imprisonment is appropriate.¹⁵¹

147 Law Reform Commission of Western Australia, *Aboriginal Customary Laws Final Report* (Report 94, 2006) rec 36.

148 *Ibid* 173.

149 *Ibid* rec 37.

150 *Ibid* 177.

151 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [17.17].

6.83 The NSWLRC did not recommend this legislative amendment; rather it recommended waiting until post-*Bugmy* for judicial consideration of the issue. It did, however, acknowledge that ‘there may be merit in adding ... to the factors that a court must take into account a reference to the circumstances of Aboriginal and Torres Strait Islander offenders’,¹⁵² and suggested the following wording:

the offender’s character, general background (with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders), offending history, age, and physical and mental condition (including any cognitive or mental health impairment).¹⁵³

6.84 In 2015, the Standing Committee on Justice and Community Safety report *Inquiry into Sentencing in the ACT*, suggested that the current provision requiring sentencing courts in the ACT to consider the ‘cultural background’ of the offender¹⁵⁴ did not go far enough, and recommended legislative change so that the relevant sentencing statute ‘explicitly require courts to consider the Indigenous status of offenders at sentencing’.¹⁵⁵

6.85 In 2017, a report on the over-representation of Aboriginal and Torres Strait Islander women in Australian prisons by the Human Rights Law Centre and Change the Record Coalition commented that

in light of the High Court’s decision [in *Bugmy*], it is now incumbent on state and territory governments to legislate to ensure that historical and systemic factors that have contributed to Aboriginal and Torres Strait Islander people’s over-imprisonment inform decisions by courts about whether or not to imprison.¹⁵⁶

6.86 The NT government advised the ALRC that Aboriginality as a sentencing factor will be considered in the NT as part of the Aboriginal Justice Agreement that is under development.¹⁵⁷

Stakeholders to this Inquiry

6.87 Stakeholders to this Inquiry expressed support for the introduction of provisions to the states and territories that mirrored the Canadian statutory principle of imprisonment as a last resort—requiring the sentencing court to pay particular attention to the circumstances of Aboriginal offenders.¹⁵⁸ Moreover, stakeholders supported the introduction of provisions in state and territory sentencing statutes that represented the interpretation given to s 718(e), that is, requiring sentencing courts to consider the

152 Ibid [17.39].

153 Ibid.

154 *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(m) see above.

155 Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) rec 18.

156 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) 45.

157 Northern Territory Government, *Submission 118*.

158 Jesuit Social Services, *Submission 100*; Judge Stephen Norrish QC, *Submission 96*; NSW Bar Association, *Submission 88*; Public Defenders NSW, *Submission 8*.

unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when making sentencing decisions.¹⁵⁹

6.88 Ultimately, in whatever form, the provision should require sentencing courts—as well as taking account of other sentencing considerations—to undertake a two-stepped approach when sentencing an Aboriginal or Torres Strait Islander offender. As described by the Change the Record Coalition (with reference to the Canadian approach), the sentencing of an Aboriginal and Torres Strait Islander offender should involve the sentencing court first taking judicial notice with respect to the experience of Aboriginal and Torres Strait Islander peoples as a group, including experiences of over-representation and, second, consideration of the extent to which the offender’s individual circumstances can be understood by reference to this group experience.¹⁶⁰ This approach has been described as providing ‘the necessary link between the collective experience *and* the individual circumstances’.¹⁶¹

6.89 A provision to this effect was considered a necessary mechanism to require sentencing courts to consider the impact of the unique and systemic disadvantage of Aboriginal and Torres Strait Islander peoples. For example, Victorian Aboriginal Legal Services (VALS) submitted that, given that the severe impacts of colonisation are unique to Aboriginal and Torres Strait Islander peoples, ‘legislation should direct the courts to consider these impacts as means to reduce the inequality of incarceration that has arisen as a result’.¹⁶²

6.90 Legal Aid ACT strongly supported the introduction of a specific Aboriginal and Torres Strait Islander focused sentencing provision across all jurisdictions that directed sentencing courts to expressly consider the ‘unique systemic and background factors’ affecting Aboriginal and Torres Strait Islander peoples. This would include, for example, the effects of dispossession on Aboriginal and Torres Strait Islander offenders. It stressed that the proposed provision would not be a

mechanism to reduce a sentence by virtue of “race”. Rather, it would function as a “legislative hook”, allowing courts to properly explore relevant cultural factors, with the aim of consistently delivering equitable and apposite sentences.¹⁶³

159 See, eg, Sisters Inside, *Submission 119*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Community Restorative Centre, *Submission 61*; Australian Lawyers for Human Rights, *Submission 59*; International Commission of Jurists Victoria, *Submission 54*; Victorian Aboriginal Legal Service, *Submission 39*; Mental Health Commission of NSW, *Submission 20*.

160 Change the Record Coalition, *Submission 84*; Thalia Anthony, Lorana Bartels and Anthony Hopkins, ‘Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice’ (2015) 39(47) *Melbourne University Law Review* 68.

161 Thalia Anthony et al, ‘Individualised Justice through Indigenous Community Reports in Sentencing’ [2017] (26) *Journal of Judicial Administration* 121, 123.

162 Victorian Aboriginal Legal Service, *Submission 39*.

163 Legal Aid ACT, *Submission 107*.

6.91 The Mental Health Commission supported legislative amendment that would ‘trigger the courts and the legal profession to actively consider and seek out those matters unique to Aboriginal people and which might not be immediately obvious without specialised inquiry’.¹⁶⁴ The NSW Bar Association noted that consideration of systemic and background factors would operate as a ‘check’ before any sentence of imprisonment was imposed, and inform the type of sentence imposed, thereby ‘promoting both proportionality and individualised sentencing’.¹⁶⁵

6.92 Consistency was also a key theme underwriting the need for the provision. Legal Aid ACT acknowledged that, while the *Fernando* principles provided some insight into the situations of Aboriginal and Torres Strait Islander peoples, the principles were ‘often unevenly applied and retained a limited scope’.¹⁶⁶

6.93 The Human Rights Law Centre noted that the provision in Canada had been interpreted by the Canadian courts to include the consideration of matters such as the ‘history of colonialism, displacement and forced removal of children, and how that history continues to translate into lower educational attainment and incomes, higher rates of substance abuse and suicide, and higher imprisonment rates’. The Human Rights Law Centre suggested that a specific legislative provision was ‘central to promoting consistency in how the judiciary considers the impacts of colonisation, discrimination and disadvantage, which underpin the over-imprisonment of Aboriginal and Torres Strait Islander people’.¹⁶⁷

6.94 Criminal Lawyers Association of the Northern Territory (CLANT) suggested that legislative enactment would ensure ‘consideration of such matters occurs on a regular and consistent basis, and would place more of an onus on courts to give them proper weight as a matter of course’. CLANT identified this to be particularly important for sentencing courts in the NT, which deal with a high proportion of Aboriginal and Torres Strait Islander offenders, and where the circumstances of Aboriginal and Torres Strait Islander disadvantage are ‘particularly acute and pervasive’.¹⁶⁸

6.95 Some stakeholders considered there to be no need to legislate such a consideration. It was contended that existing legislative provisions—including sentencing purposes, principles and factors such as parsimony, ‘imprisonment as a last resort’, and consideration of an offender’s general background—along with well established common law principles, already allowed for consideration of all relevant material facts to be taken into account when sentencing Aboriginal and Torres Strait

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

165 NSW Bar Association, *Submission 88*.

166 Legal Aid ACT, *Submission 107*.

167 Human Rights Law Centre, *Submission 68*.

168 Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; also see Mental Health Commission of NSW, *Submission 20*.

Islander offenders.¹⁶⁹ This includes consideration of any background of disadvantage and available sentencing alternatives.

6.96 It was suggested by the Office of the Director of Public Prosecutions (NSW) (NSW ODPP) that Australian courts already take into account an offender's deprived background when sentencing offenders, relying on submissions from the parties and supporting evidence to establish the extent and nature of deprivation and other relevant information specific to the individual offender.¹⁷⁰ NSW Chief Magistrate Henson submitted that *Bugmy* was well understood in the Local Court of NSW as

continuing to reinforce the need for individualised sentencing, such that consideration of a background of deprivation of an Aboriginal offender for the purpose of mitigating a sentence requires the identification in each case of specific material that tends to establish that deprivation.¹⁷¹

6.97 The Institute of Public Affairs (IPA) opposed the introduction of any provision on different grounds, arguing that disadvantage did not always play a 'material role' in the offending of disadvantaged people. The IPA pointed out that many Aboriginal and Torres Strait Islander people living in adverse circumstances do not commit crime, and that there should be no 'presumption that socioeconomic circumstances are or should be considered mitigatory'.¹⁷² The IPA agreed with the High Court, suggesting that assuming Aboriginality is a 'disadvantage sufficient to diminish culpability expresses a denial of the agency, and thus dignity, of disadvantaged individuals, and risks portraying all Indigenous communities as inherently disordered'. IPA argued that:

Judges have, and should retain, discretion to consider how a specific offender's actions have harmed society, and the proper role of specific punishments in addressing that harm, but this discretion is bounded by the demands of equal justice and proportionality and therefore does not include racial considerations.¹⁷³

Obstacles

6.98 There may be legal obstacles to introducing a provision of this type. Stakeholders have raised two such possibilities: s 10 of the *Racial Discrimination Act 1975* (Cth) (*RDA*), and, in the NT, s 16AA of *Crimes Act 1914* (Cth). These are discussed below.

Racial Discrimination Act 1975

6.99 In the Discussion Paper, the ALRC asked stakeholders whether states and territories should introduce a statutory requirement to consider Aboriginality in sentencing in light of the decision in *Bugmy v the Queen*. In *Bugmy v the Queen*,¹⁷⁴ the High Court raised, without further comment, the question of whether a state law

169 Chief Magistrate Graeme Henson Local Court of NSW, *Submission 78*; Office of the Director of Public Prosecutions NSW, *Submission 71*.

170 Office of the Director of Public Prosecutions NSW, *Submission 71*.

171 Chief Magistrate Graeme Henson Local Court of NSW, *Submission 78*.

172 Institute of Public Affairs, *Submission 58*.

173 *Ibid.*

174 *Bugmy v The Queen* 249 CLR 571.

requiring consideration of Aboriginality in sentencing could be invalid by reason of inconsistency with s 10 of the *RDA*, which states:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.¹⁷⁵

6.100 The ALRC considers that the *RDA* is unlikely to be an impediment to enacting such a statutory requirement—a view supported by stakeholders.¹⁷⁶

6.101 Where a state or territory law confers a right or benefit which does not have universal operation, questions of invalidity do not arise. Instead, s 10(1) of the *RDA* would operate to extend the right or benefit to persons of any race, colour, or national or ethnic origin. Australian sentencing courts are already ‘bound to take into account all material facts including those which exist only by reason of the offender’s membership of an ethnic or other group’.¹⁷⁷ The recommended statutory requirement seeks to encourage judicial officers (and counsel) to take a proactive approach toward ensuring information relevant to those factors is put before the court. It does not contain a prohibition, and nor does it deprive a person of a right they previously enjoyed, and therefore would not be invalid. Section 10 of the *RDA* would operate to direct the court to consider factors arising from an accused person’s membership of any racial or ethnic group as part of the sentencing process.¹⁷⁸

6.102 Legal Aid ACT submitted that the issue may be side-stepped by ‘careful and broad’ drafting to direct courts to contemplate any ‘unique systemic background factors’ that may have impacted a defendant, with an example of the effect of dispossession on Aboriginal people highlighted in the explanatory note.¹⁷⁹

6.103 Some stakeholders suggested that the recommended statutory requirement does not engage s 10 of the *RDA* at all, either because it does not involve an unequal enjoyment of a fundamental right or freedom, or because the provision constitutes a ‘special measure’ under the exception in s 8 of the *RDA*.¹⁸⁰

Crimes Act 1914 (Cth)

6.104 The other legislative provisions that stakeholders raised as a possible impediment applied to sentencing in the NT. Sections 16A(2A) and 16AA of the

175 *The Constitution 1901* (Cth) s 109. The position with regard to territories is similar. In the ACT, legislation inconsistent with a Commonwealth law has no effect: *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28. In the Northern Territory, inconsistent legislation is invalid: *Attorney-General (NT) v Minister for Aboriginal Affairs* (1989) 25 FCR 345.

176 See, eg, *Ibid*; M Jackson, *Submission 62*; Australian Lawyers for Human Rights, *Submission 59*; International Commission of Jurists Victoria, *Submission 54*; Victorian Aboriginal Legal Service, *Submission 39*; Dr A Hopkins, *Submission 24*; R Casey, *Submission 6*.

177 NSW Bar Association, *Submission 88*.

178 The ALRC notes that states and territories would need to give careful consideration to the drafting of the provision in order to ensure that the only in

179 Legal Aid ACT, *Submission 107*.

180 See, eg, Legal Aid ACT, *Submission 107*; M Jackson, *Submission 62*; International Commission of Jurists Victoria, *Submission 54*; Victorian Aboriginal Legal Service, *Submission 39*; Dr A Hopkins, *Submission 24*; R Casey, *Submission 6*.

Crimes Act 1914 (Cth) prohibits sentencing judges in the NT from considering customary law and cultural practice to mitigate criminal conduct:

- (1) In determining the sentence to be passed, or the order to be made, in relation to any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:
 - (a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
 - (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

6.105 Section 16A(2A) provides the same prohibition for federal offenders. Stakeholders, including the NT Anti-Discrimination Commissioner, called for these provisions to be repealed.¹⁸¹

6.106 The Commonwealth provisions were introduced to ‘prevent customary law from being used to mitigate the seriousness of any offence that involves violence against women and children’.¹⁸² The Northern Territory 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 character of the accused.¹⁸³

6.107 It is not clear how s 16AA may have an impact on the operation of the recommended provision to consider the unique and systemic background factors affecting Aboriginal and Torres Strait Islander offenders in the NT. As customary law and cultural practice can be considered to provide context for offending, the effect of s 16AA on the operation of the recommended provision may be minimal. Nonetheless, the ALRC was advised by CLANT that, in order to give statutory consideration to Aboriginal and Torres Strait Islander disadvantage when sentencing in the NT, ‘necessary amendments will need to be made to other legislation that seeks to regulate how evidence of custom and culture is to be presented’.¹⁸⁴ Accordingly, the ALRC encourages the Commonwealth Government to review the operation of ss 16A(2A), 16AA of *Crimes Act 1914* (Cth) to ensure that they are operating as intended, and to consider repealing or narrowing the application of the provisions if necessary to the successful implementation of a statutory requirement to consider unique and systemic factors of Aboriginal and Torres Strait Islander offenders when sentencing in the NT.

Legislative form

6.108 The ALRC does not draft legislation. There has, however, been discussion about the best form for the provision to take in sentencing statutes. Some stakeholders have

181 NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Northern Territory Anti-Discrimination Commission, *Submission 67*.

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

183 *The Queen v Wunungmurra* [2009] NTSC 24 [3]; *Ibid* [2.5].

184 Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*.

advocated for the statutory requirement of courts to take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples to be included in the purposes or principles of sentencing, while others consider it better placed as a sentencing factor.

6.109 For example, the Public Defender (NSW) suggested that, as the issue is exceptional and requires a specific direction to sentencing judges, the provision should form part of the purposes of sentencing.¹⁸⁵ The NSW Bar Association suggested that any new provision should be introduced *along with* statutory recognition of the purposes of sentencing as:

- ameliorating the over-representation of Aboriginal and Torres Strait Islander peoples in custody;
- reparation for harm done by the offender;
- restoration of harmony within Aboriginal and Torres Strait Islander communities, and
- providing equal justice in sentencing decisions.¹⁸⁶

6.110 The NSW Bar Association also suggested that the statute should set out that there need not be a causal link between the factor and the offending conduct.

6.111 ALS NSW/ACT suggested the introduction of a statutory sentencing principle that recognises the following as unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples:

- the history of dispossession of land;
- the history of paternalistic attitudes and policies imposed by government; and
- removal of children.¹⁸⁷

6.112 The Law Society of WA and Legal Aid WA suggested that the provision to consider unique and systemic background factors be incorporated as a sentencing principle.¹⁸⁸

6.113 Legal Aid NSW considered that courts should be expressly required to pay particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders and that this requirement should be incorporated into the sentencing factors of s 21A in the *Crimes (Sentencing Procedure) Act 1999* (NSW):

The character, general background (with particular attention to the circumstances of Aboriginal offenders), offending history, age, physical and mental condition of the offender (including any cognitive or mental health impairment).¹⁸⁹

185 Public Defenders NSW, *Submission 8*.

186 NSW Bar Association, *Submission 88*; also see Judge Stephen Norrish QC, *Submission 96*.

187 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*.

188 The Law Society of Western Australia, *Submission 111*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Community Restorative Centre, *Submission 61*; Australian Lawyers for Human Rights, *Submission 59*; Legal Aid WA, *Submission 33*.

6.114 Careful consideration of the legislative drafting of any provision will be needed to give effect to the intention to require sentencing courts to take into account unique and systemic factors of Aboriginal and Torres Strait Islander offenders. Where adopted, the provisions should be uniform across the states and territories.

Indigenous Experience Reports for Australian sentencing courts

Recommendation 6–2 State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of ‘Indigenous Experience Reports’ for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.

Recommendation 6–3 State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.

6.115 The introduction of such a provision raises questions about how best sentencing courts should receive information showing the ‘necessary link’ between the collective and individual Aboriginal experience. Pre-sentence reports (PSRs) and submissions to the court by counsel for the defence can go some way, but there remains a need for courts to be able to receive objective reports that provide insightful and accurate accounts of the experiences of Aboriginal and Torres Strait Islander offenders.

6.116 The ALRC recommends that this information be submitted in the form of ‘Indigenous Experience Reports’ (IERs) in superior courts (District/County and Supreme Courts) and be able to be submitted using less formal methods in the courts of summary jurisdiction (Local or Magistrates Courts).

Summary and superior courts—incidence

6.117 Courts of summary jurisdiction usually hear matters that are less serious in nature than the superior courts. For example, in NSW the Local Court has jurisdiction to sentence an offender to a term of imprisonment of up to two years, or for five years when imposing a cumulative sentence.¹⁹⁰ Courts of summary jurisdiction hear the majority of criminal matters. In 2015–16, the courts of summary jurisdiction nationally

189 Legal Aid NSW, *Submission 101*; also see Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*.

190 *Criminal Procedure Act 1986* (NSW) ss 267–268.

heard 97% (559,884) of all finalised adult criminal matters,¹⁹¹ of which 88% were proven guilty.¹⁹²

6.118 The rest of the matters, that is, matters that attract a sentence of imprisonment of more than two years (referred to as ‘indictable matters’) are heard in the superior courts. In 2015–16 this amounted to 15,971 finalised matters nationally,¹⁹³ of which 79% were proven guilty.¹⁹⁴ These matters are more serious, so the likelihood of a prison sentence on a guilty finding is increased. For example, in the courts of summary jurisdiction, 6% (30,826) of matters proven guilty received a sentence of imprisonment,¹⁹⁵ with an average length of seven months,¹⁹⁶ whereas in the superior courts, 68% (8,608) of those found guilty received a sentence of imprisonment,¹⁹⁷ with an average length of 38 months.¹⁹⁸

Aboriginal and Torres Strait Islander defendants

6.119 It is not possible to know the number of Aboriginal and Torres Strait Islander people that come before the superior and summary courts nationally. Aboriginal and Torres Strait Islander status in court finalisation data is not collected for all states and territories.¹⁹⁹ Table 6.1 below shows the number of Aboriginal and Torres Strait Islander people in court finalisations per court jurisdiction in NSW, the NT, Queensland and South Australia, and the percentage of all matters before those courts that had Aboriginal or Torres Strait Islander defendants.

Table 6.1: Matters before the courts by state and territory, jurisdiction and by Aboriginal and Torres Strait Islander status (2015–2016)

State or territory	Number & % of matters finalised in superior courts with ATSI defendants	Number & % of matters finalised in summary courts with ATSI defendants	Total number of custodial sentences* imposed on ATSI offenders
NSW	496 (12%)	8,797 (11%)	3,360
Northern Territory	309 (68%)	5,266 (77%)	3,481
Queensland	666 (14%)	20,159 (21%)	4,485
South Australia	165 (10%)	3,904 (17%)	975
Total number & mean %	1,636 (26%)	38,126 (32%)	12,301

Source: Australian Bureau of Statistics, *Criminal Court Statistics*, Cat. No. 4513DO003_201516 (2015-2016) table 13, 14. These data exclude traffic offences. *Custodial sentence includes prison, community-based and suspended sentences.

191 Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16*, Cat No 4513.0 (2016) table 6.

192 Ibid table 2.

193 Ibid table 6.

194 Ibid table 2.

195 Ibid table 9.

196 Ibid table 48b.

197 Ibid table 9.

198 Ibid table 48a.

199 See ch 3.

6.120 Aboriginal and Torres Strait Islander peoples were defendants in 10% to 68% of all matters in the superior courts, and 11% to 77% of those in the summary courts. Accordingly, on average, Aboriginal and Torres Strait Islander peoples represented 26% of defendants in matters before the superior court, and 32% in front of the courts of summary jurisdiction in 2015–2016.

6.121 The available statistics do not provide data on Aboriginal and Torres Strait Islander defendants found guilty by each jurisdiction. This number would provide an indication as to how many matters would be affected by a provision to consider unique and systemic factors. Assuming that 79% of matters heard in the superior courts and 88% in the summary courts result in a finding of guilt,²⁰⁰ it can be inferred that, in those states and territories, up to 1,290 Aboriginal and Torres Strait Islander defendants in the superior courts would be affected, and 33,550 in the courts of summary jurisdiction.

The current methods for submitting information to sentencing courts

6.122 Sentencing courts do not have to comply with the same rules of evidence that trial courts do. Evidence Acts in the states and territories prescribe that, unless a court orders otherwise, the relevant Evidence Act does not apply in sentencing.²⁰¹ The common law rules of evidence may, however, apply where there is a dispute.²⁰² It is well established, for example, that in sentencing, for the prosecution to establish an aggravating factor, the onus is on the prosecution to establish it beyond reasonable doubt. For the offender to establish a mitigating factor, it need only be done on the balance of probabilities.²⁰³

6.123 A sentencing court can inform itself about the offender in a multitude of ways: it can receive information through written or oral submissions regarding the characteristics and background of the defendant submitted by the parties or via reports ordered by the court. In certain matters, sentencing courts can also receive victim impact statements, which can be submitted in writing or read in court by the victim or family member.²⁰⁴

Submissions by the parties

6.124 The court can receive any information that the court considers appropriate to enable it to impose the proper sentence.²⁰⁵ Evidence can be submitted by the defence or prosecution orally or through written submissions.

200 Data provided in ch 3 show little variation in the proportion of guilty findings for Aboriginal and Torres Strait Islander defendants and non-Indigenous defendants.

201 See, eg, *Evidence Act 1995* (NSW) s 4; *Evidence Act 2008* (Vic) s 4.

202 *R v Bourchas* (2002) 133 A Crim R 413, [55].

203 *Olbrich v The Queen* (1999) 199 CLR 270; see *Sentencing in the District Court* <www.publicdefenders.nsw.gov.au>.

204 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29.

205 See, eg, *Penalties and Sentencing Act 1992* (Qld) s 15(1).

6.125 During consultations, a number of stakeholders to this Inquiry advised the ALRC that sentencing submissions made on behalf of Aboriginal and Torres Strait Islander offenders progressing through mainstream courts were often rushed. Stakeholders commented on the time constraints of the courts, and the limited time that lawyers have to prepare comprehensive information about a client's background and community.

6.126 The Mental Health Commission submitted that some courts do not have adequate information available to consider offenders' backgrounds, including relevant cultural and historical factors.²⁰⁶ Australian Lawyers for Human Rights suggested this gap was due to under-resourced legal aid lawyers, who did not have sufficient training or time to elicit such information, as well as due to the limited availability of interpreters.²⁰⁷

6.127 The lack of information was considered to be a widespread problem. VALS submitted that there was little information in 'mainstream courts' regarding cultural backgrounds of Aboriginal and Torres Strait Islander offenders, and that there was no legislative requirement for the court to consider such information.²⁰⁸ The Human Rights Law Centre noted that it was

left to the discretion of judges and magistrates as to how (if at all) they will take into account the historical and contemporary systemic discrimination and disadvantage that contributes to the over-representation of Aboriginal and Torres Strait Islander people in criminal justice systems and to the offending of particular individuals.²⁰⁹

6.128 VALS advised that, even in the Koori Court, where the historical impacts of colonisation and the person's individual background are generally considered, if the Elders did not know the offender or their family, there may still be information lacking.²¹⁰

Pre-sentence reports

6.129 Pre-sentence reports (PSRs) are reports produced to assist 'Judges or Magistrates to select the most appropriate sentence for offenders who have pleaded guilty to, or have been found guilty of, an offence'.²¹¹ PSRs have a statutory basis in all states and territories, except NSW where PSRs operate by agreement.²¹² PSRs in written form may take up to six weeks to complete, for which the matter is adjourned, and the offender is either bailed or held on remand.²¹³

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

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

208 Victorian Aboriginal Legal Service, *Submission 39*.

209 Human Rights Law Centre, *Submission 68*.

210 Victorian Aboriginal Legal Service, *Submission 39*.

211 Corrective Services NSW, *Policy and Procedures Manual* (2015) [2.1].

212 *Crimes (Sentencing) Act 2005* (ACT) s 41; *Sentencing Act 1997* (NT) s 105; *Penalties and Sentences Act 1992* (Qld) s 15; *Criminal Law (Sentencing) Act 1988* (SA) s 8; *Sentencing Act 1997* (Tas) s 82; *Sentencing Act 1991* (Vic) s 8A; *Sentencing Act 1995* (WA) s 20; Corrective Services NSW, *Policy and Procedures Manual* (2015) [2.2.1]; also see Thalia Anthony et al, above n 160, 124.

213 Thalia Anthony et al, above n 160, 124.

6.130 PSRs are to include certain matters in relation to the offender, known as ‘pre-sentence report matters’. These include, for example: the offender’s age, medical and psychiatric history; the offender’s educational background, employment and financial histories; any prior management by corrective services and the level of compliance under management; and an assessed level of risk.²¹⁴ PSRs may contain any other information requested by the court,²¹⁵ including information regarding the suitability of sentence types, noting the ‘possible benefits of a particular intervention’.²¹⁶

6.131 The majority of statutory provisions that outline pre-sentence report matters do not identify Aboriginality or cultural background as a pre-sentence report matter at all.²¹⁷ While some jurisdictions refer to the offender’s ‘social history and background’,²¹⁸ only the ACT includes ‘the offender’s social history and background (including cultural background)’ as a pre-sentence matter.²¹⁹

6.132 Research conducted in NSW and Victoria by academics Anthony, Marchetti, Behrendt and Longman, and published in 2017, highlighted the ‘pivotal role’ PSRs have in the sentencing decision. It suggested that PSRs are ‘very influential’ to the sentencing decision to the extent that, for example, in the ACT, a court must provide reasons where it deviates from the recommendations of a PSR.²²⁰ The research noted the absence of information relevant to offenders’ Aboriginal and Torres Strait Islander experience in PSRs. It concluded that sentencing courts do not receive sufficient information relevant to Aboriginal and Torres Strait Islander background factors in sentencing, noting that submissions by counsel and PSRs are generally not enough.²²¹

6.133 This finding was reaffirmed by stakeholders to this Inquiry.²²² Legal Aid ACT submitted that PSRs contain only ‘rudimentary’ information about the offence and the offender, and lack the ‘necessary depth and substance required to provide the court with a holistic, accurate picture’. The ‘routine’ format means that PSRs are ‘unable to map the full impact of inter-generational and historical trauma on ATSI offenders’. Legal Aid ACT recognised that, while the current approach of providing information to the sentencing court may satisfy the ‘interests of justice with regard to sentencing non-

214 *Sentencing Act 1997* (NT) s 106; *Sentencing Act 1997* (Tas) s 83; *Sentencing Act 1991* (Vic) s 8B.

215 See, eg, *Sentencing Act 1997* (NT) s 106; *Sentencing Act 1991* (Vic) s 8B; *Sentencing Act 1995* (WA) s 21.

216 Corrective Services NSW, *Policy and Procedures Manual* (2015) section B, pt 2.

217 Ibid [2.6.19] The NSW Corrective Services manual includes one paragraph on ways to deal with Aboriginal or Torres Strait Islander offenders, but does not go to the content of the report.

218 *Sentencing Act 1997* (NT) s 106(b); *Sentencing Act 1997* (Tas) s 83(b); *Sentencing Act 1991* (Vic) s 8B(1)(b).

219 *Crimes (Sentencing) Act 2005* (ACT) s 40A(b).

220 Thalia Anthony et al, above n 160, 124.

221 Ibid 123.

222 See also, Dr Thalia Anthony, *Submission 115*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; The Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Jesuit Social Services, *Submission 100*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Community Restorative Centre, *Submission 61*; Australian Lawyers for Human Rights, *Submission 59*.

Indigenous offenders ... with respect to Aboriginal and Torres Strait Islander offenders and particularly in light of the *Bugmy* decision, it requires significant revision'.²²³

6.134 The Aboriginal Legal Services WA (ALSWA) had 'longstanding concerns' about the use of PSRs in WA, which, in their experience, did not 'canvass issues of Aboriginality and systemic issues such as deprivation, intergenerational trauma and discrimination' and, as such, were 'rarely culturally appropriate'.²²⁴ In the view of ALSWA some PSRs were prepared well and provided information that may be new to the court, such as information about the offender's prior involvement with the child protection system or experience of family violence. Critically, however, the ALSWA suggested that the reports mainly supported 'systemic bias within the system', as:

- interviews were often between an Aboriginal or Torres Strait Islander offender and a non-Indigenous corrective services staff member, and may even be conducted over the phone.²²⁵ This likely leads to mistrust and a non-productive interview where the interviewer considers the offender to be without remorse;
- there may not be an interpreter;
- the report writer may 'cut and paste' from previous reports on the offender; and
- in the text of the report, the report writer may present their view as *fact* and the offender's comments as *claims*.²²⁶

6.135 The ALSWA provided the following case study and commentary, which highlights some of the issues of PSRs when developed for Aboriginal and Torres Strait Islander offenders:

In 2017, the District Court sentenced A to 9 months' imprisonment for Aggravated Burglary. For the sentencing hearing, the court had a PSR prepared by a community corrections officer (CCO) and a Psychological Report. A was in custody in a regional prison; however, the CCO who prepared the PSR was from a metropolitan office. The CCO interviewed A over the phone. The report stated that A had poor insight, was reluctant to discuss the offence and his personal history and contended that this suggested 'potential difficulties with him engaging meaningfully with interventions that meet his cognitive and treatment needs'. The PSR was a typical deficit-focused report with constant references to his failings, 'cognitive deficits' and poor past compliance with community based dispositions. The Psychological Report made similar references to his 'lack of insight' and reluctance to discuss the offences and his background. The PSR mentioned that because his assessment was conducted by telephone it was 'difficult to gauge physical cues which may have been utilised to encourage an open discussion'. It is concerning the author of the PSR acknowledges that it is only 'difficult' to gauge physical cues over the telephone—one would have thought it was impossible! What is even more alarming is that neither the CCO nor the psychologist was aware that A had significant hearing loss in both ears.

223 Legal Aid ACT, *Submission 107*.

224 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

225 See also Thalia Anthony et al, above n 160, 125.

226 Aboriginal Legal Service of Western Australia Limited, *Submission 74*. *Emphasis added*.

Fortunately, this was known by the ALSWA lawyer, who was able to elicit significant information about A's life and background from family members.²²⁷

6.136 The Change the Record Coalition also suggested that the current mechanisms for obtaining relevant background information in PSRs was 'unsuitable as they often do not contextualise offending in light of historical and systemic factors (including intergenerational trauma and socioeconomic disadvantage) and further fail to examine culturally safe sentencing options'.²²⁸ The NSW Bar Association submitted that the

absence of such information can represent difficulty for a sentencing judge that cannot be overestimated. Without such information, a sentencing judge is constrained in his/her ability to take into account material relevant to the individual being sentenced.²²⁹

6.137 VALS believed that there needed to be a mandated, community-led and culturally appropriate method to obtain such information that would assist the courts in finding alternative sentencing measures to prison. The method needed to directly address the impacts of colonisation and disadvantage experienced by Aboriginal and Torres Strait Islander peoples. VALS submitted that such a process would ensure the courts are 'playing a vital role', not only in addressing the inequality of incarceration, but in 'lowering prison rates for Aboriginal and Torres Strait Islander peoples'.²³⁰

Moves to *Gladue*-style reports in Australia

6.138 Steps have been taken to provide for *Gladue*-style reports in Australia. These steps have varied in scope. For example, the Aboriginal Legal Service NSW/ACT are developing a 'Bugmy Evidence Library'—a body of material containing information about the 'social disadvantage of certain Aboriginal communities',²³¹ for use as evidence in sentencing matters. According to the Law Council of Australia submission to this Inquiry, these reports will provide 'narrative and statistical information about Aboriginal communities in NSW where the essential aim of the project is to provide background community evidence supporting an individual's personal experience in that community, which is often of social disadvantage'.²³²

6.139 In the NT, the Law and Justice Group's 'reference writing processes' are designed to facilitate pre-court meetings with members of the Aboriginal and Torres Strait Islander community and community leaders in order to write pre-sentence recommendations in reference letters to the presiding judge. The North Australian Aboriginal Justice Agency (NAJAA) provided information on the reference letters:

These reference letters communicate important background information about the offender, including important cultural information and also provide community views on offending and where appropriate suggest alternative to jail options for sentencing.

227 Ibid.

228 Change the Record Coalition, *Submission 84*. See also NSW Bar Association, *Submission 88*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; Legal Aid ACT, *Submission 107*.

229 NSW Bar Association, *Submission 88*. See also Jesuit Social Services, *Submission 100*.

230 Victorian Aboriginal Legal Service, *Submission 39*.

231 Law and Justice Foundation, *Awarded Grants in 2015/2016* <<http://www.lawfoundation.net.au>>.

232 The Law Council of Australia, *Submission 108*.

In 2017 the Kurdiji Law and Justice group extended this work to include sitting in court with the presiding judge and providing input to the court system where appropriate. Kurdiji members have reported an increase in community support since they began sitting in court with the Judge. Kurdiji members placed great emphasis on the importance and symbolic nature of Kurdiji being seen by defendants as sitting alongside the Judge (and as being respected by the Judge as a source of authority) and have spoken very positively about the possibility of Kardia (Western mainstream legal system) and Yapa (Warlpiri) laws working together.

While this current work is an important step towards making the current system slightly more culturally accountable, there are a number of limitations to this work including elders having to volunteer their time and the process largely unsupported by key agencies in the criminal justice system. In order for pre-sentence reports to be meaningful and have weight with the court, they ought to have legislative authority.²³³

6.140 The ACT Government advised the ALRC of an intention to trial the use of ‘Aboriginal and Torres Strait Islander Experience Court Reports’ in sentencing courts in the ACT. The proposed trial is in response to a 2015 ACT Standing Committee on Justice and Community Safety report, *Inquiry into Sentencing in the ACT*. As noted above, that report recommended that the ACT Government legislate to ‘explicitly require the courts to consider the Indigenous status of offenders’.²³⁴ It further recommended that the ACT Government create a specific mechanism for the ‘creation of reports similar to *Gladue* reports in Canada, informing courts of any relationship between an accused’s offending and his or her Indigenous status’.²³⁵

6.141 The ACT Government has commissioned Legal Aid ACT to design a framework for the creation of specialised reports similar to *Gladue* reports in Canada. Legal Aid ACT recommended the creation of Aboriginal and Torres Strait Islander ‘Experience Court Reports’ that aimed to provide the courts with pre-sentence information about an offender’s community, family and personal circumstances and the impact of the cultural, social and historical issues confronted by Aboriginal and Torres Strait Islander peoples. The development of a trial for the Experience Court Reports is under consideration.²³⁶

6.142 VALS released a discussion paper on ‘Aboriginal Community Justice Reports’ in 2017 that proposed a trial for such reports to be written by Aboriginal and Torres Strait Islander communities in Victoria. These reports are proposed to be produced when sentencing offending that may attract a jail sentence and for ‘a variety of justice scenarios, including bail, sentencing, child protection, and for young people’.²³⁷

233 North Australian Aboriginal Justice Agency (NAAJA), *Submission 113*.

234 Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) rec 18.

235 ACT Government, *Submission 110*; Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) rec 20.

236 ACT Government, *Submission 110*; also see Mental Health Commission of NSW, *Submission 20*.

237 Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports: Addressing Over-Incarceration—Discussion Paper* (2017).

Nomenclature

6.143 There has been some discussion about how to refer to such reports in the Australian context. In Canada, they are ‘*Gladue* reports’. ‘*Bugmy* reports’ are not appropriate in Australia because, in Bugmy’s case, there was no such report. The Discussion Paper to this Inquiry termed them ‘specialist sentencing reports’, but this could indicate that the focus of the report would be on the sentence. ACT Legal Aid suggested the term ‘Experience court reports’, arguing this phrase more accurately describes the ‘purpose and nature’ of the reports.²³⁸

6.144 VALS suggests using the term ‘Aboriginal Community Justice Reports’, which is the title given to the proposed trial of the reports in Victoria.²³⁹ Dr Thalia Anthony suggested ‘Indigenous Community Reports’.²⁴⁰

6.145 The ALRC suggests that ‘Indigenous Experience Reports’ (IERs) accurately describes the nature of the reports, but encourages courts in each state and territory to work with Aboriginal and Torres Strait Islander organisations to determine the most suitable title for the reports in that jurisdiction.

Stakeholders to this Inquiry

6.146 The majority of stakeholders to this Inquiry supported the introduction of IERs, to operate alongside of PSRs, for Aboriginal and Torres Strait Islander offenders, arguing that IERs would provide invaluable contextual and individualised information about an offender that would further and better assist judges when tailoring a sentence for that offender.²⁴¹

6.147 There were some considerations about the production of such reports. These include who should author and resource IERs, as well as the kind of information that they should contain.

Independent Aboriginal authorship

6.148 It was generally agreed that corrective services should not prepare IERs.²⁴² These reports should instead be prepared by an Aboriginal and Torres Strait Islander person or group, preferably with a connection to the offender’s community. At the very least, stakeholders suggested the reports should be prepared by a person with a good understanding of the offender’s particular Aboriginal or Torres Strait Islander community and history.²⁴³

238 Legal Aid ACT, *Submission 107*.

239 Victorian Aboriginal Legal Service, *Aboriginal Community Justice Reports: Addressing Over-Incarceration—Discussion Paper* (2017).

240 Thalia Anthony et al, above n 160.

241 Australian Lawyers for Human Rights, *Submission 59*; NSW Bar Association, *Submission 88*; Thalia Anthony et al, above n 160.

242 See, eg, Northern Territory Anti-Discrimination Commission, *Submission 67*; Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*; Dr A Hopkins, *Submission 24*.

243 See, eg, Dr Thalia Anthony, *Submission 115*; North Australian Aboriginal Justice Agency (NAAJA), *Submission 113*; Legal Aid NSW, *Submission 101*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; NSW Bar Association, *Submission 88*; Queensland Law

6.149 Some stakeholders suggested that Aboriginal legal services would be best placed to author the reports. Others identified the need for authorship to be independent of the defence,²⁴⁴ so as to not undermine the perceived impartiality and credibility of the reports.²⁴⁵ The ALRC supports the independent production of IERs, where possible.

Content of reports

6.150 The content of an IER would be distinct from a PSR as their ‘fundamental purpose’ would be to ‘identify material facts which exist only by reason of the offender’s Aboriginality’.²⁴⁶ Broadly speaking, stakeholders acknowledged that the introduction of IERs would ‘play a vital role in bringing the entirety of complex factors that may influence Indigenous offending to the fore’.²⁴⁷

6.151 The ALHR suggested that IERs should include information regarding ‘past trauma, past abuse, substance abuse, information as to loss of culture, and positive cultural issues’.²⁴⁸ The Community Restorative Centre suggested the reports should give family and community background, and other ‘important contextual information’, such as

intergenerational trauma pervading communities, known histories of local massacres, harsh mission life, stolen children as well as the life experiences of the accused, that may include removal from family, early school leaving, domestic and family violence.²⁴⁹

6.152 ALSWA suggested that IERs could also include information about the offender’s experiences with corrective services and other relevant government and non-government agencies.²⁵⁰ Other suggested content included any underlying developmental or health issues, such as foetal alcohol syndrome disorders,²⁵¹ and loss of language.²⁵²

6.153 It was also suggested that IERs identify any available and appropriate alternative sentencing options.²⁵³ ALS NSW/ACT suggested that IERs could draw from the ‘Bugmy Evidence Project’ under development in NSW (discussed above) to provide information to a sentencing court on the background of an individual and their community, and of available community-based rehabilitation options and alternatives to custody.²⁵⁴

Society, *Submission 86*; Criminal Lawyers Association of the Northern Territory (CLANT), *Submission 75*; Aboriginal Legal Service of Western Australia Limited, *Submission 74*; Australian Lawyers for Human Rights, *Submission 59*; Victoria Legal Aid, *Submission 56*; Dr A Hopkins, *Submission 24*.

244 Dr A Hopkins, *Submission 24*; Associate Professor L Bartels, *Submission 21*.

245 Associate Professor L Bartels, *Submission 21*.

246 NSW Bar Association, *Submission 88*.

247 Legal Aid ACT, *Submission 107*.

248 Australian Lawyers for Human Rights, *Submission 59*. See also Queensland Law Society, *Submission 86*.

249 Community Restorative Centre, *Submission 61*.

250 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

251 NSW Bar Association, *Submission 88*.

252 Legal Aid NSW, *Submission 101*.

253 North Australian Aboriginal Justice Agency (NAAJA), *Submission 113*.

254 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*. See also Queensland Law Society, *Submission 86*; NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*.

Resourcing

6.154 It is difficult to estimate how many IERs would be required to be produced annually. It is estimated that, in the four states and territories itemised in Table 6.1 above, around 1,290 IERs could have been ordered by the superior courts if available during the 2015–2016 period. Nearly half of these would have been ordered in Queensland.

6.155 Stakeholders to this Inquiry were alert to the requirement for enhanced resources to support the preparation of IERs. For example, Sisters Inside noted:

If these reports were to be introduced, dedicated funding would have to be made available through Legal Aid commissions for this purpose, with the presumption that all Aboriginal and Torres Strait Islander peoples are eligible for funding if they choose to rely on a report. Aboriginal and Torres Strait Islander peoples must not languish in prisons waiting for funding for reports or for availability of report writers.²⁵⁵

6.156 The Community Restorative Centres noted the need to fund Aboriginal legal services and community groups such as Wirringah Baiya Aboriginal Women's Legal Service.²⁵⁶ ALS NSW/ACT suggested the resourcing model from Ontario, Canada, where Legal Aid funds the preparation of the reports by local Aboriginal organisations. Membership on the panel requires certain levels of training and competence, and they are authorised to bill five additional hours in making a submission.²⁵⁷

6.157 The resourcing requirements for Australia would stretch beyond the actual preparation of the report. Alternative sentencing options, support networks and appropriate training and guidelines (see below) would also need to be developed and supported.²⁵⁸ As identified by VALS, an IER model needs to be supported by 'case management workers post-sentence, adequately resourced culturally appropriate and community-led programs, and training and support of the judiciary'.²⁵⁹ If community-led alternative sentences were not funded then the information contained in IERs would be 'redundant'.²⁶⁰

Arguments against the introduction of IERs

6.158 An argument against the introduction of IERs was advanced by NSW Chief Magistrate Henson, who contended that it was not the role of the court to inform itself, and that information of this type was best left for submissions by the defence:

While the entrenchment in legislation of a principle or factor that requires the sentencing court to consider the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples might arguably have the effect of enhancing the prominence of this issue at a societal level, the practical question that remains for the court is how such a principle or factor is to be taken into account in

255 Sisters Inside, *Submission 119*.

256 Community Restorative Centre, *Submission 61*.

257 Aboriginal Legal Service (NSW and ACT) Ltd, *Submission 63*.

258 For a discussion on the availability of community-based sentences see ch 7.

259 Victorian Aboriginal Legal Service, *Submission 39*.

260 Ibid. See also Legal Aid ACT, *Submission 107*.

the context of an individual case. Of course, it is not the role of the court in an adversarial criminal justice system to inform itself of such matters; once again this depends, and will continue to depend, upon the nature and substance of the submissions made on behalf of the offender.²⁶¹

6.159 The NSW ODPP submitted that consideration of relevant systemic and background factors was already part of the NSW sentencing process and that ‘counsel submissions, along with PSRs and any expert reports, such as that of a psychologist, do generally provide sufficient background information to NSW sentencing courts.’²⁶² The NSW ODPP did, however, acknowledge that reports prepared with the assistance of someone connected to the offender’s community may add value, as this was generally missing in PSRs.²⁶³

Flexible approach in courts of summary jurisdiction

6.160 It would be ideal for an IER to be produced for every matter, or even just in matters when a sentence of imprisonment was likely. The ALRC is aware, however, that resourcing and time may make it implausible to produce IERs in all, or even limited, circumstances, and so recommends that a more flexible approach be taken in courts of summary jurisdiction.

6.161 Some stakeholders considered that a flexible approach to receiving the relevant information should be taken, regardless of the jurisdiction of the sentencing court. The Human Rights Law Centre suggested that IERs should be ‘just one example of an alternative approach to ensuring courts are properly equipped to appropriately sentence Aboriginal and Torres Strait Islander offenders’. The Human Rights Law Centre emphasised the need for state and territory governments to work with Aboriginal and Torres Strait Islander representatives to determine the most appropriate way to ensure that cultural factors and systemic discrimination and disadvantage are adequately taken into account by courts.²⁶⁴ The Law Council submitted it to be ‘critical’ that Aboriginal and Torres Strait Islander legal, health and community organisations are consulted as to the best way to put information before the courts.²⁶⁵

6.162 Other stakeholders suggested the need for the limited application of IERs. The ALSWA considered that it would be ‘cost prohibitive’ to require an IER for every criminal matter. The ALSWA suggested that such reports be a feature of courts hearing indictable matters (District/County or Supreme Courts) or where requested by magistrates in Local or Magistrates Courts, particularly when an offender may be facing prison in the lower court.²⁶⁶ The Community Restorative Centre with the Miranda Project also submitted concerns regarding the practicalities of providing an IER in Local Courts, particularly when an offender may be unrepresented. In their view, an Aboriginal Court Support service would be needed in the lower courts to

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

262 Office of the Director of Public Prosecutions NSW, *Submission 71*.

263 *Ibid*.

264 Human Rights Law Centre, *Submission 68*; also see Change the Record Coalition, *Submission 84*.

265 Legal Aid ACT, *Submission 107*.

266 Aboriginal Legal Service of Western Australia Limited, *Submission 74*.

prepare people on the day of appearance, with quick access to information about communities, with ‘carefully structured, sensitive questions concerning the individual’s life experiences’.²⁶⁷

6.163 The Law Society in WA recommended the constitution of a specialised agency to provide reports, including to Magistrates Courts.²⁶⁸

6.164 Local and Magistrates Courts handle the bulk of criminal matters in all jurisdictions. They are where most people who are in prison have been sentenced, including Aboriginal and Torres Strait Islander offenders. The ALRC considers that the volume of matters demands more flexible and responsive options. The importance of Aboriginal and Torres Strait Islander involvement is widely recognised. For this reason, the ALRC recommends partnerships that bring together governments and Aboriginal and Torres Strait Islander organisations and communities to develop mechanisms to do this. In designing ‘from the ground up’, it is more likely that the outcomes will reflect local knowledge, strengths and opportunities, and consequently deliver better outcomes.

Training and guidelines for use

6.165 The Judicial College of Victoria identified the need for judicial education in support of the introduction of provisions requiring sentencing courts to take into account unique and systemic background factors of Aboriginal and Torres Strait Islander offenders. It also noted the benefits of having ‘all involved in delivering justice, including the judiciary, receive cultural awareness and cultural competence education relating to Aboriginal and Torres Strait Islander people’. The College suggested that training should include material relating to the historical and ongoing impact of colonisation on Aboriginal and Torres Strait Islander peoples, identity, intergenerational trauma, in addition to education about contemporary issues such as the exposure to racism that many experience daily. It should also include cultural competence education, regarding how to work with Aboriginal and Torres Strait Islander peoples. This would involve training on modes of communication, body language, the need for and use of interpreters and related issues. Training was also required to inform the judiciary on the availability of culturally appropriate programs and services.²⁶⁹

6.166 Ongoing education and training of the judiciary and legal practitioners to support the introduction of provisions and IERs were widely supported by stakeholders.²⁷⁰ The ALRC considers training to be a necessary concomitant to the introduction of the recommended provision. Some examples of best-practice training are outlined in Chapter 5, with regard to the requirement to support a similar provision

267 Community Restorative Centre, *Submission 61*.

268 The Law Society of Western Australia, *Submission 111*.

269 Judicial College of Victoria, *Submission 102*.

270 See, eg, NATSILS National Aboriginal & Torres Strait Islander Legal Services, *Submission 109*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Legal Aid WA, *Submission 33*; Mental Health Commission of NSW, *Submission 20*.

in bail statutes. In that chapter, the ALRC recommends the development of guidelines for use by the judiciary and legal practitioners.²⁷¹ If developed, there would be value in also including material in support of the recommendations of this chapter regarding sentencing and Aboriginality.

271 See ch 5 rec 5.2.

