7. Community-based Sentences

Contents

Summary

7.1 ALRC recommendations in this chapter focus on reform to community-based sentence regimes to make them more accessible and flexible to provide greater support and to mitigate against breach.

7.2 The sentencing of offenders has been described as being at the core of the criminal justice system.[1] Each state and territory, and the Commonwealth, have legislation that guides the sentencing process[2] and all have sentencing regimes that enable courts to order that certain offenders serve their sentences in the community.[3]

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1 Judicial Conference of Australia, *Judge for Yourself: A Guide to Sentencing in Australia* (2014).

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

3 *Crimes (Sentencing) Act 2005* (ACT) ch 5 pt 5.4; *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2 div 3, pt 7; *Sentencing Act* (NT) pt 3 divs 4–5; *Penalties and Sentences Act 1992* (Qld) pt 5 div 2;

7.3 Community-based sentences have some significant advantages over full-time imprisonment where the offender does not pose a demonstrated risk to the community.[4] A community-based sentence offers a sentencing court 'the best opportunity to promote, simultaneously, the best interests of the community and the best interests of the offender.'[5]

7.4 Despite the advantages of community-based sentences, Aboriginal and Torres Strait Islander peoples are less likely to receive a community-based sentence than non-Indigenous offenders and, as a result, may be more likely to end up in prison for the same offence.[6] In addition, even when Aboriginal and Torres Strait Islander people are given a community-based sentence, they may be more likely to breach the conditions of the community-based sentence and may end up in prison as a result.

7.5 This chapter also examines short and suspended sentences of imprisonment,[7] both of which can be problematic as such sentences do not always address the purposes of sentencing and can have significant negative consequences for the offender. Nevertheless, unless access to community-based sentences is improved, the removal of short and suspended sentences of imprisonment as sentencing options may lead to an even greater number of Aboriginal and Torres Strait Islander offenders going to jail. Improving access to community-based sentences is necessary to reduce the incarceration rates of Aboriginal and Torres Strait Islander offenders. Once community-based sentences are uniformly available, consideration could be given to abolishing short terms of imprisonment and suspended sentences.

Background

Legislative regimes

7.6 While all states and territories have sentencing regimes that enable some offenders to serve their sentence in the community, each regime is different. Table 7.1 sets out in broad terms the categories of sentencing options that do not involve full-time imprisonment in a corrections facility. For simplicity, orders relating to fines and compensation have not been included. Release without conviction orders (and equivalent) have also been excluded.

Criminal Law (Sentencing) Act 1988 (SA) pt 6; *Sentencing Act 1997* (Tas) pt 4; *Sentencing Act 1991* (Vic) pt 3a; *Sentencing Act 1995* (WA) pt 9.

4 Community-based sentences are also much less costly than full-time custody. Other benefits of community-based sentences include the avoidance of contaminating effects arising from imprisonment with other offenders, see NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.16]–[9.17].

5 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [114]–[115].

6 Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2017, Cat No 4512.0* (2017) table 19. See also ch 3.

7 A suspended sentence is a community-based sentence but is discussed separately to other community-based sentences because of its link to incarceration (see [7.7] below).

Table 7.1: Community-based sentencing options in each state and territory (December 2017).

Jurisdiction	Orders						
ACT[8]	Good Behaviour Order	Non-Association and Place Restriction Order		Intensive Correction Order		Suspended Sentence	
NSW[9]	Good Behaviour Bond	Community Service Order	Non-Association and Place Restriction Order	Intensive Correction Order	Compulsory Drug Treatment Order	Home Detention Order	Suspended Sentence
NSW from 2018[10]	Community Correction Order			Intensive Correction Order			
NT[11]	Community Based Order	Community Work Order		Community Custody Order		Home Detention Order	Suspended Sentence
QLD[12]	Probation Order	Community Service Order		Intensive Correction Order		Suspended Sentence	
SA[13]	Bond	Community Service Order				Home Detention Order	Suspended Sentence
TAS[14]	Probation Order	Community Service Order			Drug Treatment Order	Suspended Sentence	
VIC[15]	Community Correction Order						
WA[16]	Community Based Order			Intensive Supervision Order		Suspended Sentence	

7.7 A brief description of the general features of each order is as follows:

- **Bond or probation order**: An order of the court that requires an offender to be of good behaviour and not reoffend for a specified period of time. The court can impose conditions that an offender must comply with during the term of the bond.

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8 *Crimes (Sentencing) Act 2005* (ACT) ss 11–13, pt 3.4; *Crimes (Sentence Administration) Act 2005* (ACT) chs 5–6.

9 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 6–9, pts 5–8; *Crimes (Administration of Sentences) Act 2005* (NSW) pts 3–5.

10 Following commencement of Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017 (NSW) in 2018. *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 7–8, pts 5–7.

11 *Sentencing Act* (NT) pt 3, divs 4–5.

12 *Penalties and Sentences Act 1992* (Qld) pts 5–6, 8.

13 *Criminal Law (Sentencing) Act 1988* (SA) s 38, pts 3, 5–6.

14 *Sentencing Act 1997* (Tas) pts 3–5.

15 *Sentencing Act 1991* (Vic) pt 3A, ss 83AD–83AS.

16 *Sentencing Act 1995* (WA) pts 9–12.WA has two types of suspended sentence: a traditional suspended sentence order (pt 11) and another called conditional suspended imprisonment (pt 12) which functions similarly to an intensive order (see next page).

- **Community service order**: A sentencing option where the court orders an offender to perform a number of hours of unpaid work for the benefit of the public (or in some jurisdictions complete program hours). An offender may be required to complete unpaid work directly through a community service order or as a condition of a bond or probation order.
- **Non-association and place restriction order:** Non-association orders can prohibit personal contact and communication between specified people by any means—including post, telephone, facsimile, email or social media. Place restriction orders prohibit the subject from entering specific places or districts for a specified term.
- **Intensive order**: An emerging rehabilitative-focused sentencing option that generally allows an offender to serve a sentence of imprisonment in the community[17]—provided they comply with conditions of intensive rehabilitation, supervision, and sometimes unpaid work.
- **Drug treatment order:** Offenders subject to a drug treatment order have restrictions placed on their freedom of movement and association. Generally, offenders must undergo drug treatment, attend regular meetings, and may have to submit to drug testing, among other conditions.
- **Home detention order**: Home detention is an alternative to full-time imprisonment whereby an offender is confined to an approved residence for specified periods of time for the duration of the sentence of imprisonment.
- **Suspended sentence**: A suspended sentence is considered a significant penalty.[18] Before suspending a sentence of imprisonment a court must be satisfied that a sentence of imprisonment is justified. Once a sentence of imprisonment is imposed, the court may suspend the sentence on condition the offender enters into a bond and complies with all conditions of the bond. In this chapter, suspended sentences are discussed separately to other community-based sentences because of their link to incarceration, particularly for Aboriginal and Torres Strait Islander offenders (see Recommendation 7–4).

7.8 Parole is discussed in Chapter 9. Parole is substantively different to a community-based order, because it typically follows a period of imprisonment and is designed to facilitate a transition from prison back to the community. Nevertheless, as parole requires an offender to submit to supervision by corrective services and to follow conditions, there are some broad similarities with a community-based sentence. Accordingly, where appropriate—for example in the context of the setting of

17 Community-based sentences are generally categorised into 'custodial' (such as suspended sentences, compulsory drug treatment orders, home detention and intensive orders besides WA) and 'non-custodial' sentencing options (such as community service orders, community correction orders, probation and bonds). The key point of difference of a custodial community-based order is that if a custodial community-based order is revoked, there is a presumption the offender will serve a term of full-time imprisonment. There is no such presumption with a non-custodial order, see NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [11.12].

18 Judicial College of Victoria, *Victorian Sentencing Manual* (2017) [19.6.2.1].

appropriate conditions and provision of appropriate supports to reduce breach—examples that involve parole are used even though they are not a community-based sentence.

Effectiveness of community-based sentences

7.9 Community-based sentences are important in reducing the over-representation of Aboriginal and Torres Strait Islander peoples in prison because they enable an offender to serve their sentence in the community. They are designed to be punitive while fulfilling other sentencing purposes, such as rehabilitation and deterrence (see Chapter 6).

7.10 In addition, research suggests that community-based sentences are more effective in reducing reoffending than a short term of imprisonment. For example, NSW BOCSAR found that offenders receiving an intensive correction order (ICO) had:

> significantly lower rates of re-offending than offenders who received a short prison sentence. Using IPTW [inverse probability of treatment weighting] to weigh offenders we found a 31 per cent reduction in the odds of re-offending for those who received an ICO as their principal penalty compared with the short prison group ... [W]hen the prison group was restricted to offenders serving a fixed prison term of 6 months or less; that is, those who received no supervision or treatment post release ... we found reductions in the odds of re-offending, in favour of the ICO group, of ... between 33 and 35 per cent for offenders in the medium to high LSI-R risk categories.[19]

7.11 This is particularly important for Aboriginal and Torres Strait Islander offenders for whom reducing recidivism is integral to reducing overall contact with the criminal justice system. For example, a 10% reduction in recidivism would reduce the number of Aboriginal and Torres Strait Islander court appearances by more than 30%, with a 20% reduction decreasing the number Aboriginal and Torres Strait Islander people appearing in court by 50%.[20]

7.12 Studies have shown that intensive community supervision coupled with targeted treatment is one of the most effective ways of addressing the underlying causes of criminal behaviour. Conservative estimates suggest a 10–20% reduction in recidivism is realistic if treatment is carefully and appropriately targeted.[21]

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19 Joanna Wang and Suzanne Poynton, 'Intensive Correction Orders versus Short Prison Sentence: A Comparison of Re-Offending' (Contemporary Issues in Crime and Justice No 207, NSW Bureau of Crime Statistics and Research, October 2017).

20 Boris Beranger, Don Weatherburn and Steve Moffatt, 'Reducing Indigenous Contact with the Court System' (Issue Paper No 54, NSW Bureau of Crime Statistics and Research, December 2010).

21 Wai-Yin Wan et al, 'Parole Supervision and Re-Offending: A Propensity Score Matching Analysis' (NSW Bureau of Crime Statistics and Research, 2014); 'Parole Supervision and Reoffending (2014)' (Trends & Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014); Steve Aos, Marna Miller and Elizabeth Drake, 'Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates Individual State Developments' (2006) 19 *Federal Sentencing Reporter* 275; Elizabeth Drake, Steve Aos and Marna Miller, 'Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State' (2009) 4 *Victims and Offenders* 170.

Availability and flexibility of community-based sentencing options

Recommendation 7–1 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations and community organisations to improve access to community-based sentencing options for Aboriginal and Torres Strait Islander offenders, by:

- expanding the geographic reach of community-based sentencing options, particularly in regional and remote areas;
- providing community-based sentencing options that are culturally appropriate; and
- making community-based sentencing options accessible to offenders with complex needs, to reduce reoffending.

Recommendation 7–2 Using the Victorian Community Correction Order regime as an example, state and territory governments should implement community-based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions to reduce reoffending.

7.13 Notwithstanding the advantages of community-based sentences, evidence suggests that Aboriginal and Torres Strait Islander offenders are less likely to receive a community-based sentence than non-Indigenous offenders.

7.14 At June 2017, Aboriginal and Torres Strait Islander prisoners represented 27% of the total full-time adult prisoner population, while making up only 2% of the total Australian population aged 18 years and over.[22] While comprising 27% of the prison population, Aboriginal and Torres Strait Islander persons made up only one-fifth (20%) of the total community-based corrections population.[23]

7.15 ALRC recommendations in this chapter focus on reform to community-based sentencing regimes to make them more accessible and flexible for Aboriginal and Torres Strait Islander offenders.

7.16 Issues of accessibility and flexibility are interrelated, particularly in relation to offenders with complex needs.[24] This is because inflexible community-based sentencing regimes are likely to either exclude offenders with complex needs or result in high rates of breach and revocation.[25] Inflexible community-based sentencing

22 See ch 3.
23 In the June quarter of 2017, see Australian Bureau of Statistics, above n 6, table 19.
24 See ch 1 for further information on complex needs and trauma-informed approaches.
25 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.37]–[10.39].

regimes may also have the effect of preventing the imposition of treatment conditions that address the underlying causes of reoffending.[26]

Remoteness

7.17 One of the reasons that Aboriginal and Torres Strait Islander offenders are less likely to receive a community-based sentence is that those sentences are often not available in many locations and, in particular, in areas outside of metropolitan and inner regional areas.[27]

7.18 A significant number of Aboriginal and Torres Strait Islander people live in regional and remote communities. The Productivity Commission estimated in 2011, the proportion of Aboriginal and Torres Strait Islander people living outside a regional area or major city was four times that of non-Indigenous people (44% and 11%), with less than half the proportion of Aboriginal and Torres Strait Islander people living in a major city compared to non-Indigenous people (35% and 71%).[28]

7.19 Remoteness has been tied to higher rates of imprisonment and disadvantage for Aboriginal and Torres Strait Islander people. Up to 80% of the Aboriginal and Torres Strait Islander prisoner population in the NT originate from regional or remote communities.[29] In 2014–15 the Council of Australian Governments reported that, of all Aboriginal and Torres Strait Islander males aged 35 and above, more than one-in-five (22%) described being incarcerated at some time in their life. The proportion was 16% in metropolitan areas, doubling to 31% in remote areas.[30]

7.20 Further, in NSW in 2015, ICOs were used much less frequently in remote and very remote regions compared with major cities (out of 1,337 people sentenced to ICOs, the split was 74% sentenced in major cities, 19% in inner regional areas, and 0.6% in remote and very remote areas).[31]

7.21 In their submission, National Aboriginal and Torres Strait Islander Legal Services (NATSILS) emphasised that:

> A lack of alternative community based sentencing options in regional and remote areas has resulted in Aboriginal and Torres Strait Islander people being sentenced to a term of imprisonment which would not have been imposed had they lived in a metropolitan area.[32]

7.22 According to NATSILS, 'this is largely because alternatives to incarceration are more readily available in metropolitan areas.'[33]

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26 Ibid [11.10], [11.43], [11.51].
27 Ibid [12.66]; NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.79]; NSW Sentencing Council, *Abolishing Prison Sentences of Six Months or Less* (2004) 4.
28 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) figure 3.4.1.
29 Australian Bureau of Statistics, *Population Distribution, Aboriginal and Torres Strait Islander Australians, 2006, Cat No 4705.0* (2007).
30 Council of Australian Governments, *Prison to Work Report* (2016) 138. 27% in very remote areas.
31 NSW Sentencing Council, *Intensive Correction Orders: Statutory Review* (2016) figure 2.4.
32 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
33 Ibid.

7.23 Even in areas where community-based sentences are technically available, significant barriers have been experienced due to limited local opportunities for community service work and appropriate rehabilitation programs (discussed below).[34] A 2011 review noted that in NSW, ICOs were not being used outside of major cities and regional centres because of:

> operational issues in relation to offenders, who would otherwise appear suitable for an ICO, being assessed as unsuitable for reasons such as the unavailability of work in a particular region that the offender could complete; and a lack of availability of rehabilitation programs for an offender with an unresolved drug or alcohol problem, notwithstanding that ICOs were specifically designed to address these issues.[35]

7.24 The submission from the NSW Government noted in relation to ICOs:

> the new ICO[36] will remove barriers to offenders, including Aboriginal offenders, accessing intensive supervision under the current ICO... For example, the mandatory 32 hour per month work requirement is very difficult for people in parts of rural and regional NSW to comply with, because there is not enough work in those areas to comply with it. In addition, people with mental health and cognitive impairments, substance abuse issues, or who are otherwise unfit, are assessed as unsuitable for the ICO because it is unrealistic to expect them to be able to do this much work per month ... The amended ICO will be available throughout NSW, including regional and remote areas where a lack of community service work can lead to short prison sentences rather than community corrections orders being imposed.[37]

7.25 Where issues related to remoteness limit the usage of community-based sentences, the consequences can be severe, and may result in net widening and penalty escalation.[38] In submissions to an earlier Inquiry, a solicitor from Far North West NSW noted:

> In recent months our firm has represented clients placed on s.12 'suspended sentences' because they lived too far from 'town' and were unlicensed, not because they were unsuitable [for a CSO]. The issue here is if a client re-offends at a later time and faces sentence, the court may in its discretion assume the s.12 bond was imposed due to the 'objective criminality' of the previous offence as opposed to the lack of an available option. This may have the effect of distorting a person's criminal history.[39]

7.26 Previous reviews of home detention have each recommended that the geographical availability of home detention be expanded to cover all of NSW.[40]

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34 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.24], [12.64].

35 Chief Magistrate of the Local Court (NSW), Submission No 2 to NSW Sentencing Council, *Suspended Sentences: A Background Report* (29 July 2011) 5; NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.85].

36 See Table 7.1 The new ICO is also discussed below at [7.82]–[7.86].

37 NSW Government, *Submission 85*.

38 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [5.78–5.85]. See section titled 'Suspended Sentences' for more on net widening and penalty escalation.

39 R Waterford, Submission No 16 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (14 March 2005) 3.

40 For a full list, see NSW Auditor-General, *Home Detention: Corrective Services NSW*, Auditor-General's Report, Performance Audit (2010) 19.

Despite these recommendations, submissions to the 2013 NSW Law Reform Commission (NSWLRC) review on sentencing raised the lack of sufficient geographical coverage of home detention as an ongoing issue.[41] Practical barriers identified in regional and remote areas preventing access to home detention include lack of supervision, and issues around telephone monitoring for offenders without a landline.[42]

7.27 In relation to home detention and ICOs, Mission Australia submitted to this Inquiry:

> Recent research demonstrates that alternatives to detention are not used as effectively as they could be, particularly for Aboriginal and Torres Strait Islander people ... [NSW BOCSAR] identified that the most common offences committed by Aboriginal and Torres Strait Islander people were Assault ABH, Intimidation/Stalking, Common Assault, Breaching a s.12 Bond, Breaching an AVO and Breaching a s.9 Bond. They note that despite the benefits of home detention and Intensive Correction Orders (ICOs) in reducing recidivism, these methods are not often used for these offences. In 2015 no Aboriginal or Torres Strait Islander person convicted of one of these offences received home detention. ... If just half of the Indigenous offenders given a prison sentence in 2015 for one of the [above] offences ... had instead been given an ICO or home detention, 689 fewer Indigenous offenders would have received a prison sentence.[43]

Working with regional and remote communities

7.28 In order to expand the availability of community-based sentencing options in rural and remote areas additional resources will be required. When considering the principle of equality before the law—a founding principle of the rule of law—those funds should be provided expeditiously.[44] The type of sentence a person receives should not be determined by where they live.

7.29 Resourcing alone will not be sufficient. The NSW Public Defenders have previously argued that:

> What works in metropolitan centres will often be unviable or inappropriate in remote settings. It is in this context that local representatives should be consulted to a greater extent to determine what is feasible and appropriate for their areas, thereby putting the community element back into community sentences not merely at the execution stage, but also in the planning process, although this may require greater flexibility in approach than has previously been the case.[45]

7.30 Accordingly, one way of expanding the availability of community-based sentencing options in non-metropolitan areas involves working with regional and

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41 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.25].

42 Ibid.

43 Mission Australia, *Submission 53*.

44 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) Preamble.

45 Public Defenders NSW, Submission No 10 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (11 March 2005) 4. See also Public Defenders NSW, Submission No 24 to NSW Law Reform Commission, *Sentencing*, Report No 139 (20 August 2012) 11.

remote communities to expand the range of programs and services that support offenders serving community-based sentences.

7.31 This would mean that, where community services or work placements are provided to Aboriginal and Torres Strait Islander offenders serving a community-based sentence, then ideally the local Aboriginal and Torres Strait Islander community should administer them and, where this is not possible, they 'should have some input into the cultural aspects that need to be included in a program'.[46] Such an approach was integral to a number of recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC),[47] and in particular, Recommendation 113:

> **Recommendation 113**
>
> That where non-custodial sentencing orders provide for a community work or development program as a condition of the order the authorities responsible for the program should ensure that the local Aboriginal community participates, if its members so choose, in the planning and implementation of the program. Further, that Aboriginal community organisations be encouraged to become participating agencies in such programs.[48]

7.32 This approach is also consistent with the recommendations of the NSW Legislative Council Standing Committee on Law and Justice's 2006 review of community-based sentences.[49] The ALRC notes a 'place-based' approach was again advocated for in 2017, through the recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory, which emphasised the need for implementing 'local solutions for local problems'.[50]

7.33 Submissions to this Inquiry were highly supportive of Aboriginal and Torres Strait Islander communities taking a greater role in the design, implementation and staffing of services and programs that could form part of a community-based sentence.[51] NATSILS argued that:

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46 Western Aboriginal Legal Service, Submission No 44 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (15 June 2005) 3.

47 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5 recs 111, 113–4, 116, 235–6.

48 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 3 [22.5.13].

49 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) rec 4–5, 23.

50 Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) recs 7.1–7.3.

51 Dr T Anthony, *Submission 115*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Judicial College of Victoria, *Submission 102*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Judge Stephen Norrish QC, *Submission 96*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; National Congress of Australia's First Peoples, *Submission 73*; Office of the Director of Public Prosecutions NSW, *Submission 71*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Community

> Consultation in developing alternative community based sentencing options must focus on the expertise and knowledge that Aboriginal and Torres Strait Islander communities and organisations have in relation to unmet need for community based sentences. It is essential that community based sentences are designed and driven by community and supported if necessary by community correction officers and other appropriate support structures. It is essential that resources are provided to communities and their representative organisations to obtain their free, prior and informed consent before adopting [or] developing alternatives ... so ... engagement is able to be facilitated.[52]

7.34 The submission by the NSW Bar Association drew attention to the NT Department of Attorney-General and Justice's 2016 *Hamburger Report* on the need for a community-level approach to justice by states and territories which empowers Aboriginal and Torres Strait Islander people to be 'part of the solution to their gross over-representation':

> Working with communities means empowering communities to help themselves. It means bringing everyone to the table—not just the policy makers or service providers but representatives of all sections of the community. It means working within an appropriate framework, recognising that there is something or things that work well in every community, helping the community to identify and build on those strengths. It also means working with the community and providers of services and programs to achieve a joined-up-approach to service delivery in, and with, the community.[53]

7.35 The submission from the Criminal Lawyers Association of the Northern Territory (CLANT) noted that:

> It is imperative that any funding for infrastructure or programs must be guaranteed for 3 to 5 year periods, to allow for better staff retention, development of expertise by those running the program, and to enable those programs to earn the trust of the ATSI community.[54]

Implementation

7.36 The ALRC recognises that there are a number of practical matters that need to be overcome to effectively implement community-based sentences across the country including:

- occupational health and safety (OH&S) and public liability concerns;
- reluctance in some communities to participate in community-based sentencing schemes;[55]
- the difficulty of attracting qualified staff in some regional and remote communities,[56] particularly in relation to support services;

Restorative Centre, *Submission 61*; Victoria Legal Aid, *Submission 56*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Public Health Association of Australia, *Submission 31*; Associate Professor L Bartels, *Submission 21*; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*.

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

53 NSW Bar Association, *Submission 88.*

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

55 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) xiv.

- supporting greater integration and information sharing between Aboriginal and Torres Strait Islander communities and community corrections staff;[57] and
- provision of accessible, available and legal transport in regional and remote areas. [58]

7.37 Electronic supervision may assist in the practical implementation of community-based sentences.[59] In particular, it may aid offenders to meet reporting obligations, particularly in rural and remote communities where distance and lack of transport makes in-person reporting impossible or overly arduous. One example of electronic supervision is 'supervision kiosks', which are 'automated machines ... to which supervisees can report in lieu of in-person reporting to a probation, parole or pretrial supervision officer'.[60]

Suitability requirements

7.38 Expanding the availability of community-based sentences to individuals with complex needs would reduce the imprisonment of Aboriginal and Torres Strait Islander offenders in two ways: directly as an alternative sentence to imprisonment, and in the longer term by reducing recidivism.[61]

7.39 Aboriginal and Torres Strait Islander offenders are more likely than their non-Indigenous counterparts to have complex needs and experience multiple forms of disadvantage such as childhood and ongoing trauma, homelessness or unstable housing, marginal histories of employment, illiteracy, innumeracy, mental health issues, alcohol or drug dependency and cognitive impairment.[62] However, such individuals are often found ineligible for a community-based sentence. As a result they are likely to be given a sentence of imprisonment or a sentence that increases the risk of imprisonment in the longer term.[63]

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56 Dr T Anthony, *Submission 115*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid ACT, *Submission 107*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

57 Dr T Anthony, *Submission 115*; Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Criminal Lawyers Association of the Northern Territory, *Submission 75*.

58 Driver licence issues are discussed in ch 12.

59 Electronic supervision includes use of the following technologies: automated reporting; remote alcohol detection devices; programmed contact systems; and continuous signalling devices.

60 Jesse Jannett and Robin Halberstadt, 'Kiosk Supervision for the District of Columbia' (Urban Institute Justice Policy Center, January 2011) 2.

61 Boris Beranger, Don Weatherburn and Steve Moffatt, above n 20.

62 Eileen Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (University of New South Wales, 2015) 45, 117–8; Victorian Alcohol and Drug Association, Submission No 92 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013) 4.

63 See, eg, Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [5.1]–[5.38]; Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [2.34]–[2.39], [2.47]–[2.52]; House of Representatives Standing Committee on Indigenous Affairs, Parliament of Australia, *Alcohol, Hurting People and Harming Communities: Inquiry into the Harmful Use of Alcohol in Aboriginal and*

7.40 This is despite the fact that community-based sentences are likely to be particularly beneficial for offenders with complex needs—if tailored appropriately—due to the success of treatment combined with supervision in responding to the factors contributing to, and supporting, offending behaviours.[64] Shopfront Youth Legal Centre have previously recognised this as a key benefit of community-based sentences:

> The flexibility of community based sentences and their ability to address the root causes of the offending makes them ideally suited to disadvantaged offenders. The only disadvantage of community based sentencing is that some options are not widely available to disadvantaged offenders.[65]

7.41 Unstable housing, homelessness and substance abuse issues have tended to exclude offenders from accessing home detention.[66] In NSW, community service work has been identified as the 'key barrier' preventing access to community-based sentences which have a mandatory work component—such as ICOs and CSOs—in relation to offenders who have a cognitive impairment, mental illness, substance dependency, homelessness or unstable housing.[67] This is because, as the NSWLRC stated:

> substance dependency or [a] significant mental health issue ... might give rise to work safety issues (both for the offender and for co-workers). Additionally any instability—in terms of housing, substance dependency, cognitive impairment or mental health—can mean that the offender will be considered unlikely to comply with the work component.[68]

7.42 Submissions to this Inquiry noted the importance of availability of non-custodial options that do not exclude female Aboriginal and Torres Strait Islander offenders with childcare and parenting responsibilities.[69] Female Aboriginal and Torres Strait Islander prisoners are a group known to experience high rates of trauma and have complex needs—with up to 80% being mothers.[70]

Torres Strait Islander Communities (2015) [1.4]–[1.16], [1.26]–[1.47], [1.67]–[1.86], [1.97–1.111]; Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (2013) [4.24]–[4.26]. See also chs 4 and 11.

64 NSW Sentencing Council, *Intensive Correction Orders: Statutory Review* (2016) [0.11–0.14].

65 Shopfront Youth Legal Centre, Legislative Council Submission No 25 to Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (18 March 2005) 8.

66 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.25].

67 Ibid [9.75]; NSW Sentencing Council, *Intensive Correction Orders: Statutory Review* (2016) [0.12].

68 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.75].

69 Dr T Anthony, *Submission 115*; Community Legal Centres NSW and the Community Legal Centres NSW Aboriginal Advisory Group, *Submission 95*; NSW Bar Association, *Submission 88*; Women's Legal Service NSW, *Submission 83*; Human Rights Law Centre, *Submission 68*; Australian Lawyers for Human Rights, *Submission 59*; Top End Women's Legal Service, *Submission 52*; Kingsford Legal Centre, *Submission 19*.

70 Baldry et al, above n 62, 45; Women's Legal Service NSW, *Submission 83*; North Australian Aboriginal Family Violence Legal Service, Submission No 55 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013).

7.43 On this issue, the Women's Legal Service NSW submitted that:

> There should be an increased focus on rehabilitation and alternatives to custody for women offenders ...
>
> Rule 64 of the Bangkok Rules stipulates that "Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger ..."
>
> Women tell us they want to be able to access safe, stable long-term housing and long-term drug and alcohol rehabilitation programs. We submit such support would in some cases prevent offending as well as reduce recidivism.[71]

7.44 Legislation may exclude offenders who commit certain types of offences from receiving a community-based sentence. Where offences are excluded by legislation, the types of offences excluded under some community-based sentencing regimes may be contributing to Aboriginal and Torres Strait Islander offenders being under-represented as recipients of community-based sentences compared to imprisonment.[72] The NT and SA, for example, have restrictions on the types of offences that attract a suspended sentence, including violent offences.[73] The effect of these eligibility criteria is that Aboriginal and Torres Strait Islander people may be sentenced to short terms of imprisonment when they commit low-to-mid range violent offences—a criminal justice response which is unlikely to aid in terms of rehabilitation or reducing reoffending.[74]

7.45 Public Defenders NSW have previously noted:

> There are ... differences in indigenous patterns of offending which may account for some of the disproportion in the range of offending (for example, indigenous offenders are more likely to commit personal violence offences, which are less likely to be considered suitable for community based sentencing), but we would suggest that significant developments could nevertheless be made in this area, especially by using community sentences instead of short prison terms of imprisonment ... We would therefore exhort that increasing the availability and use of community sentences for indigenous offenders be considered a matter of the highest priority.[75]

7.46 Evidence previously provided by a member of the Probation and Parole Officers' Association highlighted the cyclical nature of offending committed by people excluded from community-based orders:

> Because [prisoners serving short terms] are in gaol for less than six months they cannot access the programs that are available in custody because—I suppose it is quite ironic—they are not in gaol for long enough. So they go in, they are temporarily contained, they come out, nothing has changed so they reoffend. They just keep clicking through the turnstiles. This is the population that we most need to target.

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71 Women's Legal Service NSW, *Submission 83* [42–5].

72 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 76; *Sentencing Act* (NT) pt 3 div 6A–6B; *Criminal Law (Sentencing) Act 1988* (SA) ss 20AAC, 37; *Sentencing Act 1991* (Vic) s 10.

73 *Sentencing Act* (NT) pt 3 div 6A–6B; *Criminal Law (Sentencing) Act 1988* (SA) s 20AAC.

74 See ch 9.

75 Public Defenders NSW, Submission No 10 to Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (11 March 2005) 6.

> Many of them are Aboriginal. We have in NSW an embarrassingly large proportion of Aboriginal offenders, in particular Aboriginal women, in custody.[76]

7.47 Similarly, Shopfront Youth Legal Centre have stated that the exclusion of violent offenders from community-based sentences operates unfairly against Aboriginal and Torres Strait Islander offenders and ignores the broader social context in which the offending takes place:

> While we do not suggest that violent offences are a trivial matter, we believe that such exclusions operate unfairly against particular groups in the community, such as indigenous offenders. It is an unfortunate fact that many indigenous communities are beset by violence, which is often alcohol related ... In order to break the cycle of violence which is often linked with poverty and disadvantage, the eligibility criteria must be broadened.[77]

Combining treatment and work requirements

7.48 The Victorian experience of community correction orders (CCOs), introduced in 2012, suggests that the imposition of unpaid community work in combination with rehabilitation and treatment services can work.

7.49 In 2015, unpaid community work and community rehabilitation and treatment were imposed by the Magistrates' Court in about 75% of CCOs, with community assessment and treatment, unpaid work, and supervision being the most commonly imposed combination of conditions.[78] In the intermediate and superior courts, between May and December 2015, assessment and treatment were imposed in 87.9% of CCOs and unpaid work in 85.6% of CCOs.[79] This suggests that the existence of drug or alcohol dependency or other complex needs does not automatically exclude offenders from accessing community-based sentences with a work component, so long as appropriate support is identified and provided where needed.

Pre-work programs for offenders with complex needs

7.50 Another approach to addressing the issue of suitability assessments excluding access to community-based sentencing options is that 'pre-work' or 'work-ready' programs be made available to offenders with complex needs who are sentenced to some form of community service work. These programs would allow corrective services to address—prior to commencement of community service requirements—an offender's drug or alcohol dependency, illiteracy, lack of work training, or other issues which currently prevent access to community service.[80]

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76 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [3.78].

77 Shopfront Youth Legal Centre, Legislative Council Submission No 25 to Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (18 March 2005) 6. See ch 13.

78 Sentencing Advisory Council (Vic), *Community Correction Orders: Third Monitoring Report (Post-Guideline Judgment)* (2016) figure 6, 8.

79 Ibid figure 13.

80 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.80]–[9.81].

7.51 Such an approach has been endorsed by the NSWLRC, Corrective Services NSW and the NSW Sentencing Council, with the NSWLRC noting:

> The high level of illiteracy and innumeracy and consequent marginal histories of employment within the prison population is of serious concern. The provision of basic vocational and pre-vocational training can have a significant rehabilitative effect, not only in improving self-esteem but also in opening the way for employment. Counting participation in intervention programs, educational and literacy/numeracy programs, counselling or drug treatment towards the work hours requirement would, in our view, be an effective and appropriate method of expanding access [to community-based sentences] ... Work and Development Orders, which are used as a fine enforcement option under the *Fines Act 1996* (NSW), already provide one example of this in practice.[81]

7.52 Allowing an offender to meet the condition of their community-based sentencing by participating in mental health treatment, drug or alcohol counselling, vocational or pre-vocational training, and other life skills courses aligns with a number of recommendations of the RCIADIC,[82] in particular Recommendation 94:

> **Recommendation 94**
>
> (a) Sentencing and correctional authorities should accept that community service may be performed in many ways by an offender placed on a community service order; and
>
> (b) Consistent with the object of ensuring that offenders do not re-offend, approval should be given, where appropriate, for offenders to perform Community Service work by pursuing personal development courses which might provide the offender with skills, knowledge, interests, treatment or counselling likely to reduce the risk of re-offending.[83]

7.53 Submissions to this Inquiry were supportive of an approach that would allow offenders with substance dependency issues, cognitive impairment, poor mental health or physical disability greater access to community-based sentencing options.[84]

7.54 JustReinvest NSW stated:

> Rather than exclude these offenders, the mandatory conditions could be tailored to address the underlying causes of offending and expanded to include orders to attend rehabilitative programs or violent offender programs, as an alternative to the work component.[85]

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81 Ibid [9.80–9.81]. Work and Development Orders are discussed in ch 12.

82 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5 recs 94, 103, 109–16, 119.

83 Ibid [22.3.11].

84 Dr T Anthony, *Submission 115*; North Australian Aboriginal Justice Agency, *Submission 113*; Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Women's Legal Service NSW, *Submission 83*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; Australian Red Cross, *Submission 15*.

85 Just Reinvest NSW, *Submission 82*.

7.55 Similarly, Dr Thalia Anthony noted:

> There should be greater availability of programs in regional and remote communities and more appropriate programs for Indigenous people, including the distinct needs of Indigenous women, Indigenous youths or elderly and Indigenous people with disabilities. Work should be oriented towards developing the individual's skills or education that can build the capacity.[86]

7.56 The NSW Attorney General Mark Speakman has noted, in relation to sentencing reforms due to commence in NSW 2018:

> home detention orders and intensive correction orders [are both sentencing options that] give offenders intensive supervision that tackles their offending behaviour. However, at the moment these orders have structural issues that stop many offenders with complex needs from accessing these orders and, instead, they are given short prison terms or suspended sentences. These sentencing reforms will help offenders receive the supervision and programs that address their offending behaviour, resulting in less crime and fewer victims.[87]

Fulfilment of sentence requirements through treatment and programs

7.57 Adopting some aspects of the NSW Work and Development Order (WDO) scheme has been suggested by the NSWLRC as an option to improve the availability of community-based sentences. Under such a proposal offenders could satisfy community-based sentence requirements through participation in community service work, medical or mental health treatment, education, vocational or life skills courses, financial or other counselling, drug or alcohol treatment, or any combination of these activities.[88]

7.58 A 2015 independent evaluation of the WDO program, found that 95% of work sponsors said the scheme had helped reduce the level of stress and anxiety their clients felt about their fines debt—with 87% saying the scheme had enabled clients to address the factors that made it hard for them to pay or manage their debts in the first place. Most clients received no further fines during their participation in the scheme.[89] Key client outcomes noted in the WDO evaluation included:

- engagement with counselling and treatment services that otherwise would not have occurred;
- incentive to commit to drug and alcohol recovery;
- benefits derived from a case management approach; and
- modelling of better relationships with government agencies.[90]

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86 Dr T Anthony, *Submission 115*.
87 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 1–14 (Mark Speakman). See also NSW Government, *Submission 85*.
88 *Fines Act 1996* (NSW) s 99A.
89 Inca Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component* (Final Report, 2015) 2.
90 Ibid. See ch 12.

Flexibility to tailor

7.59 Research has consistently shown that the level of intervention under a sentence served in the community should be proportionate to the risk level of the offender.[91] To achieve this, the sentencing regime for sentences served in the community needs to be as flexible as possible so that an individual sentence can be tailored by the judicial officer.[92]

Existing challenges

7.60 The inflexibility of existing community-based sentencing regimes may be increasing the use of sentences of imprisonment over other alternatives to full-time custody.

7.61 For example, in Queensland, there are restrictions on placing conditions on suspended sentences—including attendance at rehabilitation or treatment programs. This is because courts are unable to impose conditions on a suspended sentence, other than a condition that the offender not commit another offence punishable by imprisonment during the term of the order.[93]

7.62 In Queensland, sentences of imprisonment served entirely on parole have increased as a result of both restrictions on, and the lack of flexibility of, existing community-based sentencing options.[94]

7.63 The perceived lack of flexibility of community-based orders in Queensland has potentially adverse consequences, including increasing the size of the prison population,[95] as well as increasing the usage of parole in situations where an offender has spent no time in prison and thus has no need for prison-to-community reintegration.[96]

7.64 WA has the additional option of a conditional suspended imprisonment (CSI) order, which must contain at least one program, supervision or curfew requirement.[97] The submission by Legal Aid WA raised concerns in relation to the perceived inflexibility of CSI orders—which under current legislation can only be made in Perth-based specialist courts[98]—and submitted that they be available statewide.[99]

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91 See, eg, Wai-Yin Wan et al, 'Parole Supervision and Reoffending' (Trends & Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, September 2014); Elizabeth Drake, Steve Aos and Marna Miller, above n 21; Don Andrews, James Bonta and Stephen Wormith, 'The Recent Past and Near Future of Risk and/or Need Assessment' (2006) 52(1) *Crime & Delinquency* 7.

92 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [56].

93 *Penalties and Sentences Act 1992* (Qld) s 144(5). Also see *Sentencing Act 1995* (WA) ss 76–80.

94 Queensland Law Society, *Submission 86*; Associate Professor T Walsh, *Submission 51*.

95 Queensland Corrective Services, *Queensland Parole System Review: Final Report* (2016) [499], rec 4; Tamara Walsh, 'Defendants' and Criminal Justice Professionals' Views on the Brisbane Special Circumstances Court' (2011) 21(2) *Journal of Judicial Administration* 93, 107–8. See also Associate Professor T Walsh, *Submission 51*.

96 Queensland Corrective Services, above n 95, [454]–[455].

97 *Sentencing Act 1995* (WA) ss 81–84R.

98 Ibid s 81; *Sentencing Regulations 1996* (WA) s 6B.

99 Legal Aid WA, *Submission 33*.

7.65 As noted above, submissions to this Inquiry have pointed to the importance of flexible and accessible non-custodial options for Aboriginal and Torres Strait Islander women with childcare and parenting responsibilities.[100]

7.66 The Women's Legal Service NSW submitted that:

> Imprisonment of women and particularly pregnant women and women caring for children should be as a last resort. Flexible and accessible, non-custodial alternatives to prison should be available throughout all states and territories, including in rural, regional and remote areas.[101]

7.67 The NSW Legislative Council Standing Committee on Law and Justice has also noted that Aboriginal and Torres Strait Islander women face 'particular difficulties' within the criminal justice system generally; that 'non-custodial sentencing alternatives are not being utilised for Aboriginal women';[102] and that:

> community-based sentencing options may be effectively denied to women because of an absence of suitable work, alternative child care arrangements are not available, or public transport is inaccessible.[103]

Improving flexibility

7.68 Stakeholders to this Inquiry supported granting judicial officers greater flexibility to tailor community-based sentences, particularly in order to promote greater use of alternatives to full-time imprisonment, and to allow for the imposition of treatment and programs which aim to address underlying criminogenic factors.[104]

7.69 Judge Stephen Norrish submitted that:

> Greater flexibility [is required] for making sentencing orders and more alternatives to 'full' time imprisonment—such as:
>
> (a) where terms of imprisonment are imposed diversion of offenders from remote and semi remote communities from 'gaol' custody to 'custodial settings' within or near communities, such as group residences under Corrective Services supervision i.e. gaols without bars for suitable inmates.
>
> (b) community service/community employment orders as conditions of other community based supervision— such as good behaviour bonds.

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100 Dr T Anthony, *Submission 115*; Community Legal Centres NSW and the Community Legal Centres NSW Aboriginal Advisory Group, *Submission 95*; NSW Bar Association, *Submission 88*; Women's Legal Service NSW, *Submission 83*; Human Rights Law Centre, *Submission 68*; Australian Lawyers for Human Rights, *Submission 59*; Top End Women's Legal Service, *Submission 52*; Kingsford Legal Centre, *Submission 19*.

101 Women's Legal Service NSW, *Submission 83*.

102 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [3.77].

103 Ibid [3.113].

104 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Judge Stephen Norrish QC, *Submission 96*; Just Reinvest NSW, *Submission 82*; Chief Magistrate of the Local Court (NSW), *Submission 78*; Aboriginal Legal Service of Western Australia, *Submission 74*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Associate Professor T Walsh, *Submission 51*.

(c) power to order particular types of community work.

(d) periods of residential rehabilitation in lieu of periods of imprisonment.[105]

7.70 Similarly, NSWLRC noted suggestions to increase flexibility from stakeholders in their 2013 *Sentencing* report.[106]

7.71 In contrast, Australian Lawyers for Human Rights (ALHR) stressed the importance of ensuring the availability of community-based sentencing options, but did not see a need for greater flexibility to tailor:

> Other than the abolition of mandatory and presumptive sentencing, and an increase in the availability of community based sentencing options, ALHR is of the view that the wide scope of the sentencing judge's discretion provides sufficient flexibility to tailor sentences appropriate for Aboriginal and Torres Strait Islander people.[107]

The Victorian approach

7.72 The ALRC suggests that the Victorian CCO regime represents an example of a sentencing model that allows for flexibility in both the sentencing structure and the imposition of conditions.[108]

7.73 There is evidence that the CCO regime is potentially contributing to reductions in recidivism in Victoria. Recent crime statistics show a general decrease in crime in Victoria.[109] In particular, crime decreased for those offences that Aboriginal and Torres Strait Islander offenders have been most likely to be imprisoned for.[110]

7.74 The maximum length of a CCO imposed in the County or Supreme Court of Victoria for one or more offences is five years. In the Magistrates' Court, a single CCO can be imposed for a maximum of two years (in relation to one offence), four years (in relation to two offences) and five years (in relation to three or more offences).[111] An offender who breaches a condition of a CCOs may be resentenced for the original offence and may face up to three months additional imprisonment for the breach.[112]

7.75 As part of a CCO, the court must impose at least one additional condition of either unpaid work, treatment, supervision, non-association, residence restriction, place exclusion, curfew, alcohol abstinence, a bond condition, or a judicial monitoring condition.[113] This encourages the judicial officer determining the sentence to consider which condition(s) are likely to best achieve sentencing purposes, such as community

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105 Judge Stephen Norrish QC, *Submission 96*.
106 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.76].
107 Australian Lawyers for Human Rights, *Submission 59*.
108 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [113]–[115].
109 Crime Statistics Agency Victoria, 'Latest Crime Statistics Show a Decrease in Recorded Offences, Incidents, Victim Reports and Family Incidents' (Media Release, 14 December 2017).
110 Ibid. Notable reductions included stalking/harassment (down 7%), burglary (down 9.6%), theft (down 8.6%) and justice procedure offences (down 8.4%). Imprisonment data as at 30 June 2016, see ch 3.
111 *Sentencing Act 1991* (Vic) ss 38–41A.
112 Ibid ss 83AD–83AS.
113 Ibid ss 48C–48K.

safety, punishment and rehabilitation of the offender, in a manner which is proportionate to the level of offending.[114]

7.76 The Victorian Court of Appeal in *Boulton* noted that the flexibility of the CCO as a sentencing option was a key factor in a CCO meeting multiple sentencing purposes and responding to a wide range of offending.[115]

7.77 The Court of Appeal further stated:

> the Attorney-General submitted [that] the CCO is intended to be available in serious cases where an offender may be at risk of receiving an immediate custodial sentence, but the Court considers that immediate custody is not necessary to fulfil the statutory purposes of sentencing given the range of options provided by a CCO. In this sense, the Attorney submitted, the CCO has 'the robustness and flexibility to be imposed in a wide variety of circumstances'. We agree.[116]

7.78 Section 5(4C) of the *Sentencing Act 1991* (Vic) further reinforces the ability of the CCO to respond to a wide range of offending:

> **Section 5—Sentencing Guidelines**
>
> (4C) A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order ... to which one or more of the conditions referred to in sections 48F, 48G, 48H, 48I and 48J are attached.[117]

7.79 Conditions referred to in subsections 48F–48J of the *Sentencing Act 1991* (Vic) are non-association, residence restriction or exclusion, place or area exclusion, curfew, and alcohol exclusion. The purpose of s 5(4C) has been described as 'intend[ing] to 'highlight' the punitive potential of a CCO'.[118]

7.80 The Victorian Court of Appeal described the effects of s 5(4C) on the sentencing regime in that jurisdiction:

> What is most powerful about s 5(4C) is that it prohibits the imposition of a sentence of imprisonment unless the sentencing court has paid specific and careful attention to: (a) the purposes for which sentence is to be imposed on the offender; and (b) whether those purposes can be achieved by a CCO to which one or more of the specified (onerous) conditions is attached. ... The sentencing court should ask itself a question along the following lines: Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there any feature of the offence, or the offender, which requires the conclusion that imprisonment, with all of its disadvantages, is the only option?[119]

7.81 Victoria's CCO regime is not unique. There are many features of the Victorian regime in other states and territories which each have sentences that may be served in

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114 Queensland Corrective Services, above n 95, [491]–[494].
115 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [2], [24]–[25].
116 Ibid [116].
117 *Sentencing Act 1991* (Vic) s 5(4C).
118 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [118].
119 Ibid [120–1].

the community under conditions that include supervision, community work and other therapeutic and punitive conditions as a court may consider appropriate.[120] NSW amended its sentencing legislation in October 2017, incorporating many of the features of the Victorian regime.[121] On 25 October 2017, the Queensland Government released Terms of Reference directing the Queensland Sentencing Advisory Council to conduct an inquiry with regard to

> the observations made in the [2016 *Queensland Parole System Review*] regarding the lack of flexibility of community based sentencing options available to a court and the likely adverse impact this has upon the prison population and the need to improve Queensland's sentencing laws.[122]

7.82 Unlike in Victoria, other states and territories generally have two tiers of community-based orders: the first tier applies in cases where a court considers a sentence of imprisonment would normally be required in the circumstances; the second tier applies in circumstances where the court considers a penalty lesser than imprisonment would normally be imposed.[123] This process of deciding whether or not offending is such that it would normally require a sentence of imprisonment, can limit the flexibility that a court may have in setting the scope and conditions of the order—reflecting that the two orders are designed to serve different purposes. In Victoria, the characterisation of the CCO as a 'non-custodial' order that applies to offending that would require a sentence of imprisonment in other states and territories, adds flexibility in the design and scope of the conditions that attach to the order.[124] It is not a substitution for imprisonment as it is in states that have custodial community-based orders such as NSW, Queensland and WA where the correction order is served in lieu of a sentence of imprisonment that has otherwise been determined to be appropriate.[125]

7.83 The Victorian model enables a community-based sentence to be applied over a longer period. In Queensland a court may only order an intensive correction order where it has sentenced an offender to a term of imprisonment for one year or less.[126] In WA, an intensive service order may only be made for a period between 6 months and two years.[127] The nature of the conditions and the ability to mix therapeutic and punitive conditions give the greatest flexibility in Victoria.[128] For example, Queensland's intensive correction order has a presumption that offender requirements be split into one-third treatment or programs and two-thirds unpaid community work,[129] whereas the Victorian CCO regime has no such presumption, providing

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120 Queensland Corrective Services, above n 95, [491]–[494].
121 Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017 (NSW). This bill will come into effect in 2018 having been passed by the NSW parliament in late 2017.
122 Queensland Sentencing Advisory Council, *Terms of Reference* (25 October 2017) <www.sentencingcouncil.qld.gov.au>.
123 See footnote 17.
124 Queensland Corrective Services, above n 95, [494].
125 See *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 2, div 2; *Penalties and Sentences Act 1992* (Qld) pt 6; *Sentencing Act 1995* (WA) pt 10.
126 *Penalties and Sentences Act 1992* (Qld) s 112.
127 *Sentencing Act 1995* (WA) s 69.
128 Queensland Corrective Services, above n 95, [491]–[494].
129 *Penalties and Sentences Act 1992* (Qld) s 114.

greatest flexibility to judicial officers in emphasising punishment, deterrence, rehabilitation or denunciation according to the specific circumstances of the case.

7.84 The Victorian CCO regime also allows for judicial officers to 'mix-and-match' an initial short term of imprisonment with the imposition of a lengthier CCO—a feature which the Court of Appeal considered:

> adds to the flexibility of the CCO regime. It means that, even in cases of objectively grave criminal conduct, the court may conclude that all of the purposes of the sentence can be served by a short term of imprisonment coupled with a CCO of lengthy duration, with conditions tailored to the offender's circumstances and the causes of the offending.[130]

7.85 Notwithstanding this flexibility, the Victorian CCO regime excludes a limited number of offences, including 'causing serious injury in circumstances of gross violence', aggravated home invasion or carjacking, and certain offences against emergency workers and custodial officers on duty.[131] The NSWLRC has recommended that, in relation to ICOs, no offences be excluded other than murder, domestic violence offences committed against a likely co-resident,[132] and offences carrying a penalty of more than five years under Part 3 Divisions 10 and 10A[133] of the *Crimes (Sentencing Procedure) Act 1999* (NSW), stating:

> Broad-based generic exclusions do not seem to be necessary for retaining public confidence in sentencing. ... Rigid exclusions that pay no regard to the objective circumstances of the case, or to the subjective circumstances of the offender, can operate to inappropriately limit the sentencing discretion that is important for a viable sentencing system. We also recognise that crimes in the most serious category of offending are most unlikely to attract sentences that would be sufficiently short to qualify for an ICO or home detention. As a consequence their generic exclusion is unnecessary.[134]

7.86 The ALRC notes that the incoming NSW sentencing reforms due to commence in 2018—which will abolish home detention and suspended sentences, combine bonds and CSOs into a single order known as a community correction order, and retain a modified version of the ICO—retain previous offence exclusions in relation to ICOs, but appear to have no offence exclusions in relation to the community correction order (which is to replace good behaviour bonds and community service orders).[135]

Resourcing flexibility

7.87 The Victorian Department of Justice's *Annual Report 2016–17* and the Victorian Auditor-General's report *Managing Community Correction Orders* illustrate the resourcing difficulties that are likely to arise if demand for community services under

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130 *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342 (22 December 2014) [141].

131 *Sentencing Act 1991* (Vic) ss 9A–10AD.

132 Due to the possibility of an ICO being combined with a curfew or home detention condition, see *Crimes (Administration of Sentences) Act 2005* (NSW) cl 186.

133 Pt 3 Divs 10–10A deal with certain sexual offences where the victim was under the age of 16.

134 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [9.41], rec 9.2.

135 Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017 (NSW) pt 7.

community-based sentencing options significantly expands. The *Annual Report 2016–17* noted that in relation to the completion rate of CCOs:

> Performance in 2016–17 has decreased due to a combination of factors, including growth in offender numbers and a more complex cohort of offenders following the abolition of suspended sentences. Additional investment in CCS [Community Corrective Services] from 2016–17 is expected to result in improved outcomes in future years, including an improved successful completion rate.[136]

7.88 The Auditor-General's report found that demand for services in 2015–16—with up to 85% of CCOs imposed having an alcohol or drug program condition attached to their sentence—had led to delays and an average of 20 business days' wait for offenders to access community alcohol and drug services.

7.89 The Auditor-General stated:

> The number of CCOs with rehabilitation conditions is increasing due to there being more offenders in the system and more CCOs with multiple conditions. This has led to increasing demand for support programs and services which, in turn, has led to offenders facing significant wait times when trying to access programs. ... Almost 40 per cent of serious risk offenders on the OBP [offending behaviour program] screening priority list waited more than three months for a pre-assessment screening. For mental health conditions, some offenders on CCOs may have to make a gap payment for their treatment, which can prevent or discourage them from participating.[137]

7.90 The Victorian experience demonstrates the importance of ensuring community services are sufficiently well-resourced to be able to quickly address newly sentenced offenders who have drug and alcohol issues, mental health issues, or other treatment needs. As was noted by the Sentencing Advisory Council (Vic) in their 2017 report:

> The period immediately after a CCO commences proved to be critical in terms of managing an offender's risk of reoffending. Nearly half (44%) of offenders who contravened their CCO by further offending did so within the first three months of their CCO commencing. Four per cent reoffended in the first week and 18% reoffended in the first month. Over nine out of 10 contraventions by further offending (92%) occurred within the first 12 months of commencement. These findings highlight how crucial it is to actively engage offenders early during their CCO.[138]

7.91 There are no remote communities in Victoria,[139] and consequently other states and territories that move towards a Victorian CCO approach are likely to have additional resourcing issues that are amplified by remoteness.

Resourcing

7.92 Recommendation 112 of the RCIADIC stated:

> **Recommendation 112**

136 Department of Justice and Regulation (Vic), *Annual Report 2016–17* (2017) 31.
137 Auditor-General (Vic), *Managing Community Correction Orders* (2017) x.
138 Sentencing Advisory Council (Vic), *Contravention of Community Correction Orders* (2017) xiii.
139 Council of Australian Governments, above n 30, 74.

> That adequate resources be made available to provide support by way of personnel and infrastructure so as to ensure that non-custodial sentencing options which are made available by legislation are capable of implementation in practice. It is particularly important that such support be provided in rural and remote areas of significant Aboriginal population.[140]

7.93 This remains a problem today. Even where intermediate sentencing options are technically available, research from NSW demonstrates that a significant number of offenders on supervised bonds do not receive the services, support and supervision required for rehabilitation due to cost, long waiting lists and unavailability of services.[141] This suggests that improvement to provision of community-based sentences will require changes in community corrections practice and state and territory government resourcing of community infrastructure.[142]

7.94 Stakeholders to this Inquiry supported greater resourcing of community supports and programs—particularly in regional and remote communities where a lack of these supports and programs presents a barrier to Aboriginal and Torres Strait Islander people accessing community-based sentences.[143] For example NATSILS submitted that:

> Many Aboriginal and Torres Strait Islander peoples subject to community based orders are "*not able to access services designed to address the core reasons for their offending behaviour*" such as counselling or mental health services which may not be available in remote communities.[144]

Breach of community-based sentences

Recommendation 7–3 State and territory governments and agencies should work with relevant Aboriginal and Torres Strait Islander organisations to provide the necessary programs and support to facilitate the successful completion of community-based sentences by Aboriginal and Torres Strait Islander offenders.

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140 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5 rec 112.

141 Don Weatherburn and Lily Trimboli, 'Community Supervision and Rehabilitation: Two Studies of Offenders on Supervised Bonds' (Contemporary Issues in Crime and Justice No 112, NSW Bureau of Crime Statistics and Research, February 2008) 17–8.

142 NSW Sentencing Council, *Intensive Correction Orders: Statutory Review* (2016) [9.23]–[9.28].

143 Law Council of Australia, *Submission 108*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Judge Stephen Norrish QC, *Submission 96*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Women's Legal Service NSW, *Submission 83*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Human Rights Law Centre, *Submission 68*; Victoria Legal Aid, *Submission 56*; Victorian Aboriginal Legal Service, *Submission 39*; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.

144 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*. Italics in original.

7.95 Improving compliance with the conditions attached to a community-based sentence is integral to reducing the incarceration of Aboriginal and Torres Strait Islander peoples.

7.96 In 2015–16, Aboriginal and Torres Strait Islander offenders sentenced to a community correction order were 12.5% less likely than non-Indigenous offenders to complete their order,[145] and Aboriginal and Torres Strait Islander offenders constituted a larger proportion of the cohort imprisoned for breaching a condition of their community-based sentence.[146] This has been attributed, in part, to a lack of culturally appropriate non-custodial sentencing options and supports to facilitate completion of such sentences.

7.97 Research suggests that compliance with community-based orders would increase if programs and conditions were relevant to Aboriginal and Torres Strait Islander offenders and if offenders were given greater support.[147] In addition, stakeholders to this Inquiry suggested that Aboriginal and Torres Strait Islander offenders were breaching their order because of inappropriate conditions and programs while under sentence, combined with a lack of support.[148]

Circumstances related to breach of community-based sentences

7.98 In the Discussion Paper, the ALRC outlined the circumstances of a woman known as AH who was the subject of a judgment in *AH v Western Australia*.[149] In this case, a young illiterate and innumerate adult Aboriginal woman with complex needs, including cognitive impairment and serious mental health issues, was sentenced to a community-based order following a short history of stealing cars. Under the order, the woman (AH) was to receive support from services and undergo treatment. AH had been suffering physical and mental abuse, had never been employed, was itinerant—living between two regional towns—and was unable to name all the months in a year, tell the time, and could not name the seasons. Services were not provided by corrective services as directed by the court under the order. AH was, however, subjected to requirements to report at particular times. AH did not comply, and subsequently stole another car. AH was sentenced to a further community-based order, under which services were again not provided, and AH again reoffended.

7.99 In relation to this case, the Aboriginal Legal Service WA (ALSWA) noted that:

> This young Aboriginal woman with extremely complex needs was not provided with any services or support yet [AH] was expected to report to her community corrections officer at regular times. ... ALSWA highlights that after AH was placed on her second community-based order by the District Court, for the subsequent six weeks she 'was

145 Productivity Commission, 'Report on Government Services 2017' (Volume C: Justice, Produced for the Steering Committee for the Review of Government Service Provision, 2017) table 8A.20.

146 See ch 3.

147 Fiona Allison and Chris Cunneen, 'The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People' (2010) 32 *Sydney Law Review* 645.

148 Legal Aid NSW, *Submission 101*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*; Legal Aid WA, *Submission 33*; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*.

149 *AH v Western Australia* [2014] WASCA 228 (10 December 2014).

> spoken to only once' by her community corrections officer and this was immediately after the order was imposed. The Court of Appeal observed that while 'the various agencies involved communicated with each other during that period, none of them actually did anything to provide any form of support or assistance to AH, who then reoffended'. ALSWA has experienced this in other cases; where government and non-government agencies communicate and 'collaborate' about a particular 'client' but little is done with them or for them.[150]

7.100 The circumstances of AH's case highlight some of the factors that may affect compliance by Aboriginal and Torres Strait Islander offenders with the conditions of community-based sentences, including:

- cultural and intergenerational factors that may result in transience and homelessness;
- the lack of a coordinated service response in regional areas, and a lack of available services, particularly culturally appropriate services for Aboriginal and Torres Strait Islander women;
- corrective services or other decision makers not setting relevant conditions and reporting requirements that are underpinned by the provision of services; and
- the impact of offenders' mental health or cognitive impairment in understanding and meeting reporting requirements and other conditions.

7.101 Despite legislative requirements that obligations attached to a community-based sentence be explained to offenders in a manner that they can understand,[151] compounding factors resulting in Aboriginal and Torres Strait Islander offenders having difficulty in understanding the obligations of their community-based sentence may include:

- poor literacy;
- the use of legal terminology by solicitors and court staff when explaining bond conditions;
- lack of plain language and translated material for non-English and Aboriginal and Torres Strait Islander first language speakers;
- the stress of being in court; and
- offenders experiencing high levels of emotion after receiving a non-custodial sentence.[152]

7.102 Even where conditions are understood, cultural and intergenerational factors may have contributed to high breach rates for Aboriginal and Torres Strait Islander people subject to community-based orders. Research from the United States has noted

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

151 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 72, 83, 92, 96, 100B, 100P.

152 NSW Sentencing Council, *Good Behaviour Bonds and Non-Conviction Orders* (2011) [5.13]; Productivity Commission, above n 28, [5.24].

the interaction between socioeconomic disadvantage and the burden of complying with the conditions of a community-based sentence.[153] Legal Aid WA noted that:

> Laws requiring offender reporting can be particularly onerous for Aboriginal people who are more likely to be transient, live in communities without a police station to easily report to, and are less likely to have access to working mobile phones (with credit) and less likely to keep track of dates in the same way as non-Aboriginal people.[154]

7.103 In relation to standard parole conditions, Legal Aid ACT noted:

> In our experience, ATSI offenders are likely to breach orders that require they remain confined to a particular place, particularly when (for their cultural and spiritual health) they feel compelled to visit a sacred community site and reorient themselves after a traumatic period of incarceration.[155]

7.104 In an earlier Inquiry, the President of the ACT Law Society's Criminal Law Committee gave evidence that:

> The circumstances are that often you will have people who live quite a long way away from where they are expected to report, so there is always difficulty around getting transport to, in fact, meet their obligations of reporting to their parole officer. Whether it is the case that they simply do not have a motor vehicle or whether it is the case that they cannot afford the bus fare at the time.
>
> ... [I]f you are in a lower socioeconomic group and you are confronted with a choice of meeting a reporting obligation, meeting with a parole officer or someone from Corrective Services, versus a day's employment, that decision is much harder than it is for someone who is employed in stable employment.[156]

7.105 The issue of unequal impact of conditions has been raised as elevating the importance of providing judicial officers with wide discretion in response to minor breaches.[157]

Reducing breach

7.106 Reductions in breach may be accomplished through engagement and collaboration with relevant Aboriginal and Torres Strait Islander organisations to provide sentencing options and assistance in meeting conditions, partnering with agencies and service providers to provide co-location of services.[158] Breach rates may also be reduced by the use of graduated sanctions in order to provide an alternative to imprisonment for breach (discussed below).

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153 See,eg, Kelli Stevens-Martin, Olusegun Oyewole and Cynthia Hipolito, 'Technical Revocations of Probation in One Jurisdiction: Uncovering the Hidden Realities' (2014) 78(3) *Federal Probation* 1; Jeffrey Lin, Ryken Grattet and Joan Petersilia, '"Back-End Sentencing" and Reimprisonment: Individual, Organizational, and Community Predictors of Parole Sanctioning Decisions' (2010) 48 *Criminology* 759.

154 Legal Aid WA, *Submission 33*.

155 Legal Aid ACT, *Submission 107*.

156 Standing Committee on Justice and Community Safety, ACT Legislative Assembly, *Inquiry into Sentencing*, Report Number 4 (2015) [4.120]–[4.121].

157 Ibid [4.126].

158 Also known as a 'wrap around' model.

7.107 The RCIADIC recommended that non-custodial sentences be available, accessible and culturally appropriate, and that authorities work with Aboriginal and Torres Strait Islander groups in implementing programs.[159] The goal of increasing alternatives to prison has also been a key feature of the Victorian Aboriginal Justice Agreements.[160] Stakeholders to this Inquiry agreed with an approach to community-based sentencing options which maximised collaboration with Aboriginal and Torres Strait Islander organisations and allowed for flexibility in responding to breach.[161]

7.108 In relation to the need for culturally appropriate community-based orders, ALSWA submitted:

> ALSWA supports Proposal 7–1 [of the Discussion Paper][162] not only because a reduction in imprisonment for justice procedure offences will reduce the number of Aboriginal and Torres Strait Islander people in prison but also because more culturally appropriate and effective community-based orders is vital to ensure that Aboriginal and Torres Strait Islander people are provided with the right support to prevent reoffending.[163]

7.109 The Aboriginal Legal Service NSW/ACT (ALS NSW/ACT) undertook a consultative process for this Inquiry, engaging Aboriginal and Torres Strait Islander community members from across the ACT and NSW. ALS NSW/ACT noted:

> Participants consistently emphasised the need for greater use of community-based sentencing options over custodial sentences. Participants noted, in particular, that community-based sentencing options are more appropriate and effective for young people and those with mental health, alcohol and/or other drug issues. There was strong support for expansion of the MERIT (Magistrates Early Referral In to Treatment) program across regional and remote NSW, and to individuals suffering from alcohol abuse. Other examples of effective community-based sentencing options

159 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 5 recs 111, 116.

160 See ch 16.

161 Dr T Anthony, *Submission 115*; North Australian Aboriginal Justice Agency, *Submission 113*; Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Legal Aid ACT, *Submission 107*; Judicial College of Victoria, *Submission 102*; Legal Aid NSW, *Submission 101*; Jesuit Social Services, *Submission 100*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Judge Stephen Norrish QC, *Submission 96*; NSW Bar Association, *Submission 88*; Queensland Law Society, *Submission 86*; Change the Record Coalition, *Submission 84*; Just Reinvest NSW, *Submission 82*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; National Congress of Australia's First Peoples, *Submission 73*; Office of the Director of Public Prosecutions NSW, *Submission 71*; Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Community Restorative Centre, *Submission 61*; Victoria Legal Aid, *Submission 56*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Public Health Association of Australia, *Submission 31*; Associate Professor L Bartels, *Submission 21*; Commissioner for Children and Young People Western Australia, *Submission 16*; Australian Red Cross, *Submission 15*.

162 Proposal 7–1 of the Discussion Paper was 'To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services'.

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

> cited by participants included rehabilitation farms, health facilities and alcohol or drug programs centred on identity development and Aboriginal culture.[164]

Engaging relevant Aboriginal and Torres Strait Islander organisations

7.110 In Victoria, support services and programs have been developed in collaboration with peak Aboriginal and Torres Strait Islander organisations, and include the Local Justice Worker Program and the Wulgunggo Ngalu Learning Place, which were developed under the Victorian Aboriginal Justice Agreement.[165]

7.111 The Local Justice Worker Program (LJWP) aims to increase the completion rate of Aboriginal and Torres Strait Islander offenders sentenced to community-based sentences in Victoria. The LJWP was independently evaluated in 2013.[166] The evaluation observed a narrowing of the gap between the proportions of Aboriginal and Torres Strait Islander offenders compared to non-Indigenous offenders who had successfully completed their orders since the program was first piloted. The evaluation further found that 'statewide data on improved completion rates of orders by Aboriginal offenders suggest that the programs may be making a contribution to these improved rates'.[167] The program was noted to have high Aboriginal and Torres Strait Islander female participation.[168]

7.112 The evaluation suggested that the LJWP may operate to decrease Aboriginal and Torres Strait Islander incarceration through:

- decreasing the number of Aboriginal and Torres Strait Islander offenders who breach the conditions of their community-based sentence orders/parole orders resulting in imprisonment;
- decreasing the number of Aboriginal and Torres Strait Islander offenders who lose their driver licences as a result of defaulting on fine repayments and then being charged with driving offences;
- increasing access via connections to necessary services, such as alcohol programs, housing, parenting workshops, and financial counselling; and
- increasing skill based work experience, in combination with mentoring, leading to better employment opportunities.[169]

7.113 CLANT's submission highlighted the role of Aboriginal Liaison Officers (ALOs) in reducing breach in the NT:

> It is regularly the case that those participating in community based programs will cease to engage for short periods of time. This may be due to a lack of motivation, but it can also be due to a conflict between participants' legal and cultural obligations,

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164 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.
165 See ch 16.
166 Attorney-General's Department (Vic), *Evaluation of Indigenous Justice Programs Project B: Offender Support and Reintegration—Final Report* (2013).
167 Ibid 86.
168 Ibid 98.
169 Ibid 89.

> such as a requirement to attend a funeral or ceremony. Frequently breakdowns in communication occur at this point between the participant and the supervising agency. Engagement of an Aboriginal Liaison Officer who takes the time to go to the participant's house or speak with the participant's family and to discuss with them their options would be highly desirable and would, in our submission, result in fewer breaches of orders..[170]

7.114 Given the value of ALOs in terms of communication, they could explain any difficulties an offender was having in complying with the conditions of a sentence to the supervising agency. ALS NSW/ACT also noted the importance of corrections and other government bodies engaging with local Aboriginal and Torres Strait Islander community members:

> Participants noted that many external lawyers and psychologists have difficulty communicating with Aboriginal clients due to their lack of connection with the local community. Accordingly, many participants noted the importance of the ALS Field Officer to facilitating the development of relationships with community members. The ALS Field Officer is crucial to assist Aboriginal clients to go to court and provide them with an understanding of the court process.
>
> ...Participants also demonstrated strong support for community justice groups. These groups provide members of Aboriginal and Torres Strait Islander communities and organisations with authority and funding to work cooperatively with justice agencies and staff to develop strategies within their communities for dealing with justice-related issues. Participants suggested that these groups would further promote the leadership of Aboriginal and Torres Strait Islander people and organisations within the community.[171]

7.115 ALS NSW/ACT highlighted the problem of inappropriate conditions:

> participants suggested that CSOs could more frequently use Aboriginal organisations, and that CSOs should always be served in the community of the offender. Some ALS staff also noted that a significant number of clients who get a CSO do not complete it, resulting in custody. This is often due to the fact that clients do not understand their responsibilities under a CSO or the consequences of non-completion, or because probation and parole staff do not comprehend cultural differences that may affect a client's ability to complete a CSO. To address this issue, ALS staff suggested: better education for clients as to their responsibilities under a CSO and consequences for non-completion; cultural competence training for Magistrates to ensure they set achievable conditions under a CSO; cultural competence training for Probation and Parole staff to assist them to understand the history and experience of clients' lives and give clients the best chance of completing the CSO.[172]

Co-location of services

7.116 The Victorian Neighbourhood Justice Centre (NJC) is one example of a mainstream community-based sentencing support and assistance model that has been evaluated positively.

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170 Criminal Lawyers Association of the Northern Territory, *Submission 75*.
171 Aboriginal Legal Service (NSW/ACT) Supplementary Submission, *Submission 112*.
172 Ibid.

7.117 The NJC operates as an official Magistrates' Court of Victoria, with 'drug and alcohol assessment and counselling, dispute mediation, mental health assessments and counselling, employment and training support, housing support and financial counselling services' all co-located within the same building. The NJC utilises a problem-solving approach to offending, with the use of judicial monitoring allowing for personalised responses to issues around offender compliance, and is partnered with a range of government bodies and service providers including Victoria Police, Community Correction Services, Victoria Legal Aid, and Fitzroy Legal Service.[173]

7.118 The NJC was independently reviewed and it was found that the NJC improved completion of community work orders, reduced imprisonment, reduced reoffending and improved community safety while reducing costs.[174]

Graduated sanctions

7.119 An approach to breach of community-based orders and parole which has had some success is a form known as 'graduated', 'escalating' or 'swift, certain and fair' (SCF) sanctions. Graduated sanctions have been adopted in relation to parole in NT and Queensland, and announced or trialled in relation to community-based orders in NSW and Victoria.[175] The NSWLRC has previously recommended an approach to breach of parole modelled on the Queensland graduated system be adopted in NSW in order to promote responses to breaches that are 'proportionate, swift and certain'.[176]

7.120 Graduated sanctions may provide a more flexible and receptive range of responses than an 'all or nothing' approach to breach—and include measures such as:

> additional reporting burdens, participating in programming, attending "day reporting" centers, short-term confinement in violation centers, and extending probation terms. In many cases, these reforms are designed to intervene earlier in a supervisee's history of violations, providing a mild sanction immediately following the violation rather than the pattern of ignoring a series of violations and then filing for revocation. Research suggests that such alternative sanctions can be just as effective in reducing future violations as jail terms, while ameliorating jail "churning" and easing local budgets ...[177]

7.121 A United States based community-based sentence that received positive attention and evaluation is the Hawaiian Opportunity Probation Enforcement (HOPE)

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173 Auditor-General (Vic), *Managing Community Correction Orders* (2017) 33.

174 Ibid.

175 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 1–14 (Mark Speakman); Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders* (2017); Lorana Bartels, 'Looking at Hawaii's Opportunity Probation with Enforcement (HOPE) Program Through a Therapeutic Jurisprudence Lens' (2016) 16(3) *Queensland University of Technology Law Review* 30; NSW Law Reform Commission, *Parole*, Report No 142 (2015) [10.29–32].

176 NSW Law Reform Commission, *Parole*, Report No 142 (2015) rec 10.1.

177 Michelle Phelps and Caitlin Curry, 'Supervision in the Community: Probation and Parole' [2016] *Oxford Research Encyclopedia of Criminology and Criminal Justice* 18. The HOPE program is discussed below.

Program—a specialist court program that specifically focuses on offending related to drug and alcohol dependency.[178]

7.122 HOPE relies on 'swift and certain, but modest, sanctions to improve compliance' with participants warned at the outset that each time they violate HOPE rules they will be immediately met with an escalating custodial sanction.[179] Sanctions range from a few hours in a cell-block to up to 30 days of imprisonment—with U.S. research finding that swiftness and certainty of punishment has a larger deterrent effect than increased severity.[180]

7.123 A randomised control trial evaluation of HOPE found that participants spent 48% fewer days in prison, were less likely to be arrested for a new crime, less likely to test positive for drugs, and less likely to have their probation revoked.[181]

7.124 In relation to Australian implementation of a HOPE-style program in Australia, Association Professor Bartels considered that:

> The implications for Indigenous offenders would also need to be considered carefully, although the program may have the potential to reduce their over-representation in custody ... Any pilot program that includes a significant number of Indigenous offenders should be developed in consultation with relevant community representatives.[182]

7.125 The Victorian Sentencing Advisory Council's report, *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders*, was released in October 2017. In that report, the Sentencing Council recommended against the introduction of a HOPE-style scheme of 'swift, certain and fair' sanctions specifically in the context of family violence offending.[183] Nevertheless, the Sentencing Advisory Council did note broad stakeholder support for greater use of—and flexibility in relation to—judicial monitoring as a condition of a CCO for family violence offenders, and made several recommendations to that effect.[184]

7.126 The ALRC notes that research has found that '[r]ecent efforts to replicate the HOPE program in other jurisdictions have not been successful'.[185] Judge Alm, the key judicial officer in the original HOPE program, suggested that efforts to expand the

178 Bartels, above n 175, 31.
179 Ibid 34.
180 Eric Helland and Alexander Tabarrok, 'Does Three Strikes Deter?: A Nonparametric Estimation' (2007) 42(2) *Journal of Human Resources* 309; Elizabeth Drake, 'Chemical Dependency Treatment for Offenders: A Review of the Evidence and Benefit-Cost Findings' (Report, Washington State Institute for Public Policy, December 2012) 1, 5; Steven Durlauf and Daniel Nagin, 'Imprisonment and Crime: Can Both Be Reduced?' 10(1) *Criminology & Public Policy* 13, 16–18; Steven Durlauf and Daniel Nagin, 'The Deterrent Effect of Imprisonment' (Paper, George Mason University, 2010) 43.
181 Bartels, above n 175, 38.
182 Associate Professor L Bartels, *Submission 21*.
183 Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders* (2017) rec 1.
184 Sentencing Advisory Council (Vic), *Swift, Certain and Fair Approaches to Sentencing Family Violence Offenders* (2017) xii, rec 3–7.
185 Phelps and Curry, above n 177, 19.

program have failed because 'replicators did not include the efforts to materially support probationers and instead took a punitive "sanctions only" approach'.[186]

7.127 Associate Professor Bartels also noted that:

> the court's swift, certain and proportionate sanctions model, told only part of the story. The program also featured many aspects of drug courts and adopted the principles of therapeutic jurisprudence. Significantly, the judge provided extensive encouragement, praise and support to participants … In light of this, the program model may hold significant promise for Aboriginal and Torres Strait Islander populations *if* it is implemented as intended, that is, as a therapeutic program that supports and encourages participants.[187]

Culturally appropriate community-based sentencing options

7.128 There are a number of examples of culturally appropriate community-based sentencing options that have been developed with or by Aboriginal and Torres Strait Islander organisations.

Breach diversion

7.129 Under the Victorian Aboriginal Justice Agreement, a sustainable work program based in the grounds of Weeroona Cemetery has reportedly contributed to an increase in the rate of successful order completion by Aboriginal and Torres Strait Islander offenders in Victoria.[188]

7.130 Victoria has also introduced the Wulgunggo Ngalu Learning Place, which provides a voluntary residential program for Aboriginal and Torres Strait Islander men serving community-based orders. The Victorian Aboriginal Legal Service (VALS) submitted a case study in relation to the Wulgunggo Ngalu Learning Place:

> Adam is a 43 year old Aboriginal male who has a long history with substance abuse whom VALS assisted through our ReConnect program. ...
>
> Adam advised [his VALS] caseworker that he had long standing issues with drugs and alcohol and wanted to attend Wulgunggo Ngalu Learning Place. The caseworker assisted Adam to submit an application and supported him through the assessment process. Adam was able to secure a place at Wulgunggo Ngalu where he received assistance with drugs & alcohol, mental health, life skills and cultural strengthening. Adam was also assisted with his art and was supported and guided by the caseworker in how to advertise and sell his artwork to earn income. Adam was also supported to undertake cultural strengthening activities which he reported as never having done before but being needed in order to address the disconnect from family and culture he felt. After being discharged from Wulgunggo Adam reported, over the proceeding months, as being committed to staying out of jail and indicated an intention to support his family and undertake a TAFE course on art.[189]

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186 Ibid.
187 Associate Professor L Bartels, *Submission 21*.
188 Victorian Government, *Victorian Aboriginal Justice Agreement Phase 3 (AJA3): A Partnership between the Victorian Government and the Koori Community* (2013) 47.
189 Victorian Aboriginal Legal Service, *Submission 39*.

7.131 In NSW, the Balunda-a (Tabulam)—'be good now you have a second chance down by the river'—program was developed in 2008 for male offenders aged over 18 years. The program is primarily a diversion program under which offenders in NSW are referred while under a bond prior to sentencing.[190] The program also operates as a place of referral by community corrections staff. It has been described as a 'last-chance opportunity before [people] enter into custody'.[191]

7.132 The ALRC recognises that each state and territory faces different challenges. The NT and WA, for example, have numerous remote communities, and implementing community-based sentencing options in some areas would be challenging. To overcome this, a 2016 independent review of NT Corrective Services recommended the appointment of probation and parole officers to remote communities who are from that community to provide local supervision and support to offenders.[192] The recommendation makes clear that this should only be implemented with community agreement.

Supervision by community

7.133 Stakeholders in this Inquiry raised the possibility of supervision by community.[193] For example, VALS submitted that:

> VALS advocates not only for community based sentences, but for community adjudicated sentences via a community council of elders, in particular for low level offences and in cases of children and young people. For example, Aboriginal Legal Services in Toronto have developed a community council, whereby the sentencing is decided by a council of Indigenous elders. Essentially, the offender is referred by the judge and will not return to court, unless the community sentence as directed by the elders is not completed. As such, it is up to the community council to ensure the right sentence is undertaken, with appropriate supports.
>
> This option is only open to low-level offences, and if the offender does not comply with the Community Council's sentencing regime, they do not get another chance with this process. The aim of this is to take Indigenous offenders out of the colonial justice system and to provide a level of autonomy within the community to make their own justice decisions, in a manner that is culturally appropriate.[194]

7.134 Legal Aid WA highlighted the benefits of a co-design approach:

> Co-design is about engaging consumers and users of products and services in the design process with the idea that it will lead to improvement and innovation. In harnessing the expertise of citizens towards these certain programs in this instance, people of the community as well as the creators of these programs can benefit as

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190 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11.

191 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [7.26].

192 Northern Territory Government, *A Safer Northern Territory through Correctional Interventions: Report of the Review of the Northern Territory Department of Correctional Services, 31 July 2016—Statement of Response* (2016) rec 133.

193 *R v Yakayaka and Djambuy* (Unreported, Supreme Court of Northern Territory, 17 December 2012); Thalia Anthony and Will Crawford, 'Northern Territory Indigenous Community Sentencing Mechanisms: An Order for Substantive Equality' (2013) 17(2) *Australian Indigenous Law Review* 79.

194 Victorian Aboriginal Legal Service, *Submission 39.*

> active members in the change process. Here the people involved will be much more valued as a co-designer of innovation and this will essentially allow for the effectiveness of such programs. ... Critical to the success of co-design, is for local Aboriginal Corporations to be actively and consistently involved in a community's approach to reducing crime and enhancing community safety.[195]

7.135 Stakeholders were generally supportive of this approach.[196] However CLANT noted that the success or failure of supervising offenders in this way is likely to hinge on the level of pre-existing organisation, leadership and health of the community—factors which are unlikely to be uniformly present in all Aboriginal and Torres Strait Islander communities.[197]

Appropriateness of alternative sentencing options

Suspended sentences

Recommendation 7–4 In the absence of the availability of appropriate community-based sentencing options, suspended sentences should not be abolished.

7.136 Aboriginal and Torres Strait Islander offenders may be disproportionately represented as recipients of suspended sentences compared to non-Indigenous offenders.[198]

7.137 Victoria began phasing out suspended sentences in 2011.[199] The NSW Parliament passed a Bill on 18 October 2017 to phase out suspended sentences from 2018.[200] Tasmania has also released a draft exposure Bill titled the Sentencing Amendment (Phasing Out Of Suspended Sentences) Bill 2017 which, if implemented, would also abolish suspended sentences.[201] On 19 November 2017, the Bill passed with amendments from the Tasmanian Legislative Council. The amendments prevent

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195 Legal Aid WA, *Submission 33*.

196 Dr T Anthony, *Submission 115*; Jesuit Social Services, *Submission 100*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; Aboriginal Legal Service of Western Australia, *Submission 74*; Victorian Aboriginal Legal Service, *Submission 39*.

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

198 In NSW in 2015–16, 8.5% of Aboriginal and Torres Strait Islander defendants found guilty were given a suspended sentence compared with 6.3% of their non-Indigenous counterparts; in Queensland 5.5% of Aboriginal and Torres Strait Islander defendants found guilty were given a fully suspended sentence compared with 4.5% of their non-Indigenous counterparts. See Australian Bureau of Statistics, *Criminal Courts, Australia, 2015-16, Cat No 4513.0* (2017) table 12; Australian Bureau of Statistics, above n 6, tables 1, 19; NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [7.25].

199 Sentencing Advisory Council (Vic), *Key Events for Sentencing in Victoria* <https://goo.gl/TSWGue>.

200 NSW Government, *Tough and Smart Justice Reforms—Safer Communities FAQs* (May 2017). NSW Law Reform Commission made a recommendation in 2013 that suspended sentences be abolished if the proposed community detention order was implemented. See NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) rec 10.1.

201 Department of Justice (Tas), *Sentencing Amendment Legislation* <www.justice.tas.gov.au/community-consultation/sentencing_amendment_legislation2>; Sentencing Advisory Council (Tas), *Phasing out of Suspended Sentences: Final Report* (2016) xiv–xix.

imposition of suspended sentences for certain offences,[202] with the Tasmanian Parliament to consider fully removing suspended sentences within two years.[203]

7.138 In the second reading of the Crimes (Sentencing Procedure) Amendment (Sentencing Options) Bill 2017, NSW Attorney General Mark Speakman noted:

> there are significant problems with suspended prison sentences—44 per cent of them are unsupervised and only require offenders to be of good behaviour. ... Many offenders are not receiving the supervision and programs under a suspended sentence that would compel them to address their offending behaviour in the community.
>
> ... Community safety is not just about incarceration. Imprisonment under two years is commonly not effective at bringing about medium- to long-term behaviour change that reduces reoffending. Evidence shows that community supervision and programs are far more effective at this.[204]

7.139 Stakeholders drew attention to the need to ensure that intermediate sentencing options are uniformly available before suspended sentences are phased out—with particular attention to ensuring that Aboriginal and Torres Strait Islander people living in regional and remote communities are not disproportionately affected by the removal of a uniformly available sentencing option that is able to be served in the community.[205]

7.140 Queensland and WA have restrictions in relation to placing conditions on suspended sentences, including conditions requiring attendance at rehabilitation or treatment programs.[206] There are also states and territories with restrictions on the types of offences that potentially attract a suspended sentence, including SA and the NT.[207]

Issues with suspended sentences

7.141 Issues that have been identified in relation to suspended sentence regimes include their potential for net widening, their conceptually flawed nature,[208] and the potentially harsh consequences for offenders who breach them due to their 'all or nothing' nature.

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202 See Sentencing Amendment (Phasing Out Of Suspended Sentences) Bill 2017 (Tas) schedule 1.

203 Ibid cl 2(2)–2(9).

204 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 1–14 (Mark Speakman).

205 Legal Aid NSW, *Submission 101*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*.

206 Queensland does not allow the court to impose conditions on a suspended sentence, other than that the offender not commit another offence punishable by imprisonment during the term of the order, see *Penalties and Sentences Act 1992* (Qld) s 144(5). Western Australia's standard suspended sentence is similar to Queensland—but with the additional option of a conditional suspended imprisonment order, which must contain at least a program, supervision or curfew requirement, however this order is not available in the Magistrates Court, see *Sentencing Act 1995* (WA) ss 76–80, 81–84R.

207 *Sentencing Act* (NT) ss 78B–78EA, 78F; *Criminal Law (Sentencing) Act 1988* (SA) s 20AAC.

208 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.26]–[10.31]; NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.3]–[4.16].

Net widening

7.142 Research suggests that the reintroduction of suspended sentences in NSW in 1999 resulted in 'net widening'—whereby offenders who would previously have been dealt with by way of a good behaviour bond or CSO were instead given a suspended sentence.[209] According to NSW BOCSAR, it is:

> clear that suspended sentences have been used where non-custodial sanctions would otherwise have been employed. This is particularly true for CSOs in both court jurisdictions, but also for good behaviour bonds in the Higher Criminal Courts.[210]

7.143 Homeless Legal Persons' Service (HPLS) submitted to an earlier Inquiry that net widening is particularly acute in relation to:

> offences that may not warrant a term of actual imprisonment; namely, where an offender is not suitable for a community based order due to their homelessness, drug or alcohol dependence, disability, mental illness, or other chronic illness ... in such circumstances, suspended sentences are the only appropriate and available option, despite the fact that the offending in question does not warrant a term of imprisonment.[211]

7.144 Despite the potential for net widening, stakeholders in this Inquiry stated that suspended sentences provide a useful sentencing option as a 'last chance' for Aboriginal and Torres Strait Islander offenders to avoid full-time custody. There is research to support this view.[212]

7.145 In consultations and submissions, suspended sentences were emphasised by stakeholders to be particularly useful in relation to Aboriginal and Torres Strait Islander women because they are a type of sentence that is able to be structured such that there are few reporting obligations or onerous conditions—making them more suitable for offenders with kinship and cultural obligations than other types of community-based orders. For example, Sisters Inside submitted that:

> Aboriginal and Torres Strait Islander women are at high risk of breaching community-based sentences, due to sentence obligations which are incompatible with their parenting/caring responsibilities and statutory obligations. ... We support a process to identify the gaps and failures of supervised community-based sentences (including court-ordered parole). Sentencing Advisory Councils may be well-placed to undertake

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209 Rohan Lulham, Don Weatherburn and Lorana Bartels, 'The Recidivism of Offenders given Suspended Sentences: A Comparison with Full-Time Imprisonment' (Contemporary Issues in Crime and Justice Number 136, NSW Bureau of Crime Statistics and Research, September 2009) 12; Patricia Menéndez and Don Weatherburn, 'The Effect of Suspended Sentences on Imprisonment' (Issue paper 97, NSW Bureau of Crime Statistics and Research, August 2014) 1, 4–5; Lia McInnis and Craig Jones, 'Trends in the Use of Suspended Sentences in NSW' (Issue Paper No 47, NSW Bureau of Crime Statistics and Research, May 2010) 1, 4.

210 McInnis and Jones, above n 209, 4.

211 Homeless Persons' Legal Service, Submission No 3 to NSW Sentencing Council, *Suspended Sentences: A Background Report* (26 July 2011) 3, 8; NSW Sentencing Council, *Suspended Sentences: A Background Report* (2011) [4.20].

212 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.24]; Sentencing Advisory Council (Tas), *Phasing out of Suspended Sentences: Final Report* (2016) 13.

this review in relevant jurisdictions. Any further review must take into account the unique needs of Aboriginal and Torres Strait Islander women.[213]

Breach and revocation

7.146 A breach of a suspended sentence will generally require the court to reinstate the entirety of the sentence of imprisonment that was initially suspended.[214] This means that time spent in the community under a suspended sentence is generally not counted as 'time served' in the event of revocation, even if a considerable amount of time has passed.[215] For example, revocation occurring at 11 months of a 12 month suspended sentence would result in a total of 23 months under sentence.[216]

7.147 This quirk of suspended sentences means that the longer an offender complies fully with the conditions of his or her order, the harsher the consequences of a breach resulting in revocation of the suspended sentence. Revocation of a suspended sentence, resulting in the offender being required to serve the term in prison, may also undo any rehabilitative progress made and increase the risk of future reoffending.[217]

7.148 As noted above, academics in the US have described policy movement towards graduated sanctions as providing a more flexible and receptive range of responses than an 'all or nothing' approach to breaches of community-based orders.[218]

Conclusion

7.149 Suspended sentences are problematic. In particular, research has demonstrated that they have resulted in net widening while being perceived as too lenient by the public. While offering some offenders a last chance, suspended sentences can and do 'set people up to fail', particularly people with complex needs.[219]

7.150 Nevertheless, the removal of suspended sentences without improving access to community-based sentences is likely to lead to even greater number of Aboriginal and Torres Strait Islander offenders going to jail. Improving access to community-based sentences is necessary to reduce the incarceration rates of Aboriginal and Torres Strait

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213 Sisters Inside, *Submission 119*.

214 Exceptions to this rule are the ACT and the Commonwealth; see *Crimes (Sentencing) Act 2005* (ACT) ss 12–13; *Crimes Act 1914* (Cth) ss 20–20A., although some Australian jurisdictions allow a discretionary exception to this rule in cases where it would be 'unjust to do so', the breach was 'trivial' or 'trivial in nature', or there are 'good' or 'proper' reasons for excusing the breach. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98; *Penalties and Sentences Act 1992* (Qld) s 147; *Criminal Law (Sentencing) Act 1988* (SA) s 58(3); *Sentencing Act 1997* (Tas) s 27(4C); *Sentencing Act 1995* (WA) s 80(3).

215 See, eg, Judicial Commission of New South Wales, *NSW Sentencing Bench Book* [5-790]–[5-800]; NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.27].

216 Legislative Council Standing Committee on Law and Justice, Parliament of NSW, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [5.107-5.115].

217 See, eg, Vera Institute of Justice, *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* (2013) 14; Lynne Vieraitis, Tomislav Kovandzic and Thomas Marvell, 'The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002' (2007) 6(3) *Criminology & Public Policy* 589.

218 Phelps and Curry, above n 177, 18.

219 NSW Law Reform Commission, *Sentencing*, Report No 139 (2013) [10.26]–[10.30].

Islander offenders. Once this is addressed, consideration could safely be given to abolishing suspended sentences.

Short sentences

Recommendation 7–5 In the absence of the availability of appropriate community-based sentencing options, short sentences should not be abolished.

7.151 The ALRC adopts a similar approach to short sentences of imprisonment. That is, short sentences of imprisonment are highly problematic. However, in the absence of implementing the preceding recommendations, the abolition of short sentences is likely to be detrimental.

7.152 Aboriginal and Torres Strait Islander offenders are more likely to be sentenced to short terms of imprisonment than their non-Indigenous counterparts.[220] It has been suggested that short sentences of imprisonment are not only ineffective in reducing offending but are particularly damaging to Aboriginal and Torres Strait Islander offenders. Short terms of imprisonment:

- expose minor offenders to more serious offenders in prison;
- do not serve to deter offenders;[221]
- have significant negative impacts on the offender's family, employment, housing and income;[222] and
- potentially increase the likelihood of recidivism through stigmatisation and the flow on effects of having served time in prison.[223]

7.153 Two case studies identified by Just Reinvestment (NSW) highlight some of the issues with short sentences for Aboriginal and Torres Strait Islander defendants:

> We recently had a matter where a woman received a two month sentence for stealing $5 worth of chicken from the IGA, another where a man with an intellectual disability was given 3 weeks for breaching an AVO by making contact with his ex-partner. These are clients with drug and alcohol and mental health problems—none of which get addressed in custody in those short stints. Then there is no supervision or support on release. It doesn't make sense.[224]

7.154 The imposition of a short term of imprisonment would appear to be inconsistent with the principle of 'imprisonment as a last resort' which ought to be reserved only for those offenders who represent a serious risk to the community, and for whom no other

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220 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016) table 25. See also ch 3.

221 Judy Trevana and Don Weatherburn, 'Does the First Prison Sentence Reduce the Risk of Further Offending?' (Bureau of Crime Statistics and Research, October 2015).

222 Dr T Anthony, *Submission 115*.

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

224 Just Reinvest NSW, *Policy Paper: Key Proposals #1–Smarter Sentencing and Parole Law Reform* (2017) prop 2.

penalty is appropriate. Most Aboriginal and Torres Strait Islander offenders who receive a short sentence of imprisonment do so when convicted of minor or low-level offending.

7.155 Prisoners serving short sentences are less likely to be able to access programs or training, and in that regard, the time in prison does little to address offending behaviour or to develop skills that might later promote desistence from offending.[225] Offenders on short sentences are generally released into the community without supervision or supports to assist reintegration into the community on release.[226]

7.156 Short terms of imprisonment are costly. For example, 2002 research found that if all offenders in NSW prisons serving six months or less instead received a non-custodial penalty, the prison population would drop by about 10%, resulting in savings (at that time) of between $33m–47m per year.[227]

7.157 Aboriginal and Torres Strait Islander offenders also have higher recidivism rates than non-Indigenous offenders.[228] This experience of 'cycling' through the system also has significant health impacts:

> the high rates of repeated short-term incarceration experienced by Aboriginal people in Australia have a multitude of negative health effects for Aboriginal communities and the wider society, while achieving little in terms of increased community safety.[229]

7.158 Short terms of incarceration for female Aboriginal and Torres Strait Islander offenders are particularly damaging.[230] Several stakeholders commented that a short period in prison for many women frequently triggered other significant life events that often spiralled the women back into prison. The common scenario was described as a prison term resulting in a woman losing her rental property, and subsequently having her children removed because she no longer had a residence. This then resulted in the woman turning to drugs and/or alcohol, which in turn led to further offending.

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225 Mark Hughes, 'Prison Governors: Short Sentences Do Not Work', *The Independent* (20 June 2010) cited in Don Weatherburn, above n 23. See also NSW Bar Association, *Submission 88*.

226 NSW expressly precludes prisoners serving prison terms of 6 months or less from parole supervision on release. See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46. The NSW Sentencing Council has recommended repeal or amendment of s 46: NSW Sentencing Council, *Abolishing Prison Sentences of 6 Months or Less* (2004) 5. Other jurisdictions restrict parole to prisoners sentenced to terms over 12 months: *Crimes (Sentencing) Act 2005* (ACT) s 65; *Sentencing Act 1997* (NT) s 53; *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(a); *Sentencing Act 1991* (Vic) s 11; *Sentencing Act 1995* (WA) s 89(2).

227 Bronwyn Lind and Simon Eyland, 'The Impact of Abolishing Short Prison Sentences' (Contemporary Issues in Crime and Justice No 73, NSW Bureau of Crime Statistics and Research, September 2002) 5.

228 See, eg, Boris Beranger, Don Weatherburn and Steve Moffatt, 'Reducing Indigenous Contact with the Court System' (Bureau Brief Issue Paper No 54, NSW Bureau of Crime Statistics and Research, December 2010); Peta MacGillivray and Eileen Baldry, 'Australian Indigenous Women's Offending Patterns' (Brief No 19, Indigenous Justice Clearinghouse, June 2015).

229 Anthea S Krieg, 'Aboriginal Incarceration: Health and Social Impacts' (2006) 184(10) *Medical Journal of Australia* 534.

230 NSW Sentencing Council, above n 226; 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).

7.159 Just Reinvest NSW argue, that in NSW alone, a 90% reduction in the number of sentences of less than six months would:

- cut the number of prison sentences handed down in NSW courts and the number of people coming through the prison system by almost 40%;
- result in a 5% reduction in the overall prison population; and
- free up approximately $30 million the government currently spends on locking up people for less than 6 months each year–not including potential savings in capital expenditure.[231]

The problem with abolishing short sentences of imprisonment

7.160 A key concern regarding the potential abolition of short sentences is the risk of sentence creep, that is, the risk that judicial officers will ultimately sentence offenders for *longer* periods because of a lack of alternative sentencing options, particularly in the absence of community-based sentencing alternatives.

Sentence creep

7.161 There is evidence that abolishing short sentences has the unintended consequence of increasing the length of incarceration. In 1995, WA abolished terms of imprisonment of three months or less.[232] In 2003, the WA legislature increased the threshold to six months.[233] These reforms were not accompanied by any changes to the practical availability of community-based sentencing options or diversion programs.

7.162 In 2007, the Department of Correction Services (WA) reviewed the impact of increasing the threshold for a sentence of imprisonment to six months. That report indicates that sentence creep did occur.[234] Stakeholders similarly identified sentence creep as a particular problem arising out of the abolition of sentences of less than six months in WA. A key reason for the sentence creep in WA appears to be the absence of alternative sentencing options such as appropriate community-based options.[235]

7.163 Accordingly, Sisters Inside were 'concerned about the real possibility of 'sentence creep', and the likelihood that this would 'have a disproportionate and negative effect on women.' NAAJA submitted that:

> what occurred in Western Australia was the factor of 'sentence creep' where sentences which ordinarily would be in terms of days, weeks and months increased to sentences of 6 months and 1 day imprisonment. In order to protect against such incursions of inflated sentences there must be clear provisions for alternatives to

231 Just Reinvest NSW, *Policy Paper: Key Proposals #1–Smarter Sentencing and Parole Law Reform* (2017) prop 2.

232 *Sentencing Act 1995* (WA) s 86. There are limited exceptions: See ss 86(a)–(c).

233 *Sentencing Legislation Amendment and Repeal Act 2003* (WA) s 33(3).

234 Department of Corrective Services (WA), 'Report on the Effects on Rates of Imprisonment Following the Sentencing Legislation Reforms of 2003' (June 2007) 107.That finding has been questioned by the Director of NSW Bureau of Crime Statistics and Research, see Don Weatherburn, 'Rack 'em, Pack 'Em and Stack 'Em: Decarceration in an Age of Zero Tolerance' (2016) 28(1) *Current Issues in Criminal Justice* 137.

235 Department of Corrective Services (WA), above n 234, 107–8.

> prison to be resourced and supported appropriately and clear provisions for imprisonment as a last result.[236]

7.164 Similarly, NATSILS submitted that:

> short sentences of imprisonment should only be abolished if supported by an increase in the availability of culturally responsive diversion and rehabilitative programs. The abolition of short sentences of imprisonment cannot assist the position of Aboriginal and Torres Strait Islander people who are in contact with the criminal justice system if the courts are not provided alternative sentencing options. It is vital that we increase the number of culturally responsive diversion and rehabilitation programs available.[237]

7.165 Jesuit Social Services suggested that:

> If short sentences of imprisonment were to be abolished, there should be pre-conditions as to the availability of a comprehensive range of community sanctions as non-custodial alternatives to prison, with a requirement that these be uniformly available in regional and remote areas and all states and territories.[238]

7.166 A similar view was expressed by the Law Council of Australia who were 'concerned that if short prison sentences were abolished without the introduction of uniformly available diversionary sentencing options, offenders may be sentenced to longer periods of imprisonment or forced into inappropriate alternatives'.[239] This view was shared by other stakeholders such as the Human Rights Law Centre, and ALS NSW/ACT.[240]

Judicial discretion and family violence

7.167 Another reason for opposing the abolition of short sentences put forward in submissions was that it restricted judicial discretion. NATSILS stressed that:

> It is essential that judicial discretion is retained in all sentencing practices. ... [J]udicial discretion is critical to ensuring that the individual circumstances of a person are taken into account, and accords with the principle of proportionality.[241]

7.168 Change the Record Coalition highlighted another potential benefit of short sentences of imprisonment:

> In certain circumstances, short term sentences can serve an important community safety purpose; for example, a short prison sentence may provide sufficient time for a victim/survivor of domestic violence to extricate themselves from the circumstances surrounding the trauma, for example, by moving homes or seeking counselling or other support.[242]

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236 North Australian Aboriginal Justice Agency, *Submission 113*.
237 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
238 Jesuit Social Services, *Submission 100*.
239 Law Council of Australia, *Submission 108*.
240 Human Rights Law Centre, *Submission 68*; Aboriginal Legal Service (NSW/ACT), *Submission 63*.
241 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
242 Change the Record Coalition, *Submission 84*.

7.169 A similar view was expressed by the Law Council of Australia.[243] National Family Violence Prevention Legal Services supported the retention of short sentences but noted that:

> While short prison sentences might in some situations provide a brief period of safety for the victim/survivor of family violence, there needs to be increased access to programs that address the violent behaviour of perpetrators, and are delivered in community.[244]

243 Law Council of Australia, *Submission 108*.
244 National Family Violence Prevention Legal Services, *Submission 77*.