10. Access to Justice

Contents

Summary

10.1 'Access to justice' is an essential element of the rule of law. In essence, access to justice refers to the 'affirmative steps' necessary to 'give practical content to the law's guarantee of formal equality before the law'.[1] It refers to the need to ameliorate or remove barriers to access[2] and 'must be defined in terms of ensuring that legal and judicial outcomes are just and equitable'.[3] It is enshrined in art 14 of the International Covenant of Civil and Political Rights (ICCPR).

10.2 This chapter is focused on specific access to justice issues faced by Aboriginal and Torres Strait Islander people appearing as defendants before the criminal justice system. Communication barriers, alienation and disconnection from mainstream court processes, as well as mental illness and cognitive impairment all contribute to the complexity of Aboriginal and Torres Strait Islander legal needs and limit access to justice. In this chapter, the ALRC makes a suite of recommendations targeted at addressing these needs and improving Aboriginal and Torres Strait Islander peoples' experience with the courts. The ALRC recommends that state and territory governments:

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1 Justice Ronald Sackville, 'Access to Justice: Assumptions and Reality Checks' (Paper, Access to Justice Roundtable, Law and Justice Foundation of NSW, 10 July 2002).

2 Ibid.

3 United Nations Development Programme, *Access to Justice Practice Note*, (2004).

- work with relevant Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system where needed, and monitor and evaluate their use;
- establish specialist Aboriginal and Torres Strait Islander sentencing courts in areas and regions where needed that are designed, implemented and evaluated in partnership with Aboriginal and Torres Strait Islander organisations; and
- where a person is found unfit to stand trial, introduce special hearing processes that provide for a fixed term of detention and regular periodic reviews while the person remains in detention.

10.3 The need for adequate resourcing of legal assistance providers is also discussed in depth in this chapter. Access to legal representation and advice is one of the cornerstones of addressing the disproportionate rates of Aboriginal and Torres Strait Islander incarceration. In the absence of legal representation and advice, a defendant may be incarcerated for a range of reasons, including sentencing following an inappropriate guilty plea, a lack of awareness of available defences or pleas in mitigation.

Access to interpreters

Recommendation 10–1 State and territory governments should work with relevant Aboriginal and Torres Strait Islander organisations to:

- establish interpreter services within the criminal justice system where needed; and
- monitor and evaluate their use.

10.4 There are many Aboriginal and Torres Strait Islander languages spoken throughout Australia, with some estimates placing the current number of Indigenous languages spoken nationwide at around 120.[4] In the Kimberley region alone it has been reported that there are up to 30 spoken languages, ranging from those that are commonly used to language groups that are spoken by a very small number of people.[5]

10.5 Aboriginal and Torres Strait Islander people, particularly in remote and regional areas, are often multilingual. For many people from isolated Aboriginal and Torres Strait Islander communities, English may be a second or third language.[6] The

4 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Australian Languages* (3 June 2015) <www.aiatsis.gov.au>.

5 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 36–7. (the Law Enforcement and Justice Services Inquiry)

6 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2016—Report* (2016) [5.24]. See also North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service, Submission No 31 to Senate Standing Committee on Finance and Public Administration,

Productivity Commission reported that approximately 41% of Aboriginal and Torres Strait Islander people who come from remote areas speak an Aboriginal or Torres Strait Islander language as their first language, compared to about 2% of those living in metropolitan areas.[7] Additionally, Aboriginal and Torres Strait Islander people, particularly in remote and regional areas, may speak 'Aboriginal English'. As identified by the Kimberley Community Legal Centre, 'Aboriginal English... transforms the meanings of many English words and mixes English words with these different meanings with words and concepts drawn from Aboriginal languages'.[8]

10.6 Some Aboriginal and Torres Strait Islander people may find it difficult—if not impossible—to understand legal proceedings without access to an interpreter. In 2016, the Productivity Commission reported that 38% of Aboriginal and Torres Strait Islander first language speakers experience difficulties when communicating with service providers.[9] A 2002 survey conducted by the Office of Evaluation and Audit reported that 63% of Aboriginal and Torres Strait Islander legal services (ATSILS) practitioners experienced difficulty in understanding what their clients were saying, with 13% of those experiencing difficulty 'very often/often'.[10] The issue of ATSILS practitioners experiencing difficulty in taking instructions can be pronounced in some areas. For instance, Wadeye, the largest Aboriginal and Torres Strait Islander community in the Northern Territory (NT), has been identified as a place where 'almost all' individuals seeking legal advice require an interpreter.[11]

10.7 The prevalence of hearing loss makes it equally difficult for many Aboriginal and Torres Strait Islander people to understand and participate in legal proceedings. While there are no formal studies that have looked into the extent of hearing loss among Aboriginal and Torres Strait Islander people engaged with the criminal justice system,[12] the over-representation of Aboriginal and Torres Strait Islander people with hearing loss in prisons has been identified.[13] In the NT, 90% of Aboriginal and Torres Strait Islander prisoners in the Darwin and Alice Springs correctional systems have hearing loss.[14]

Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (7 May 2014).

7 Productivity Commission, above n 6, [5.24].

8 Kimberley Community Legal Services, *Submission 80*.

9 Productivity Commission, above n 6, [5.23]–[5.24].

10 M Schwartz and C Cunneen, 'Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services' (2009) 7(10) *Indigenous Law Bulletin* 2.

11 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 36.

12 Senate Standing Committees on Community Affairs, Parliament of Australia, *Hear Us: Inquiry into Hearing Health in Australia* (2010) [8.74].

13 Australian Hearing, Submission No 58 to House of Representatives Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Inquiry into the Hearing Health and Wellbeing of Australia* (December 2016).

14 Dr D Howard and J Barney, Submission No 98 to House of Representatives Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Inquiry into the Hearing Health and Wellbeing of Australia* (February 2017).

10.8 The right to be able to understand legal proceedings is well-established in both domestic[15] and international law.[16]

10.9 The right to an interpreter is also well recognised. Domestically, the High Court held in *Ebatarinja v Deland* that 'if the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial.'[17] The right to a fair trial itself has been variously described as 'a central pillar of our criminal justice system',[18] and 'the central prescript of our criminal law'.[19] Internationally, art 14 of the ICCPR states that in criminal proceedings, everyone is entitled to 'the free assistance of an interpreter if he cannot understand or speak the language used in court'. In relation to Aboriginal and Torres Strait Islander people with hearing loss, art 13 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) requires:

> effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stage.[20]

10.10 The obligation to provide an interpreter extends beyond court proceedings and into other points in the criminal justice system. In all jurisdictions except the NT, when police are questioning an Aboriginal and/or Torres Strait Islander person, police have a legislative obligation to arrange for the services of an interpreter 'where a person's English is insufficient to enable them to understand the questioning or speak with reasonable fluency'.[21] In the NT, the police manual incorporates the *Anunga rules*, which include the requirement for an interpreter during questioning.[22]

10.11 While the entitlement to an interpreter is clear, practical challenges exist in procuring access to interpreters, both in relation to Aboriginal and Torres Strait Islander languages and where an Aboriginal and/or Torres Strait Islander person experiences hearing loss. The majority of deaf Aboriginal and Torres Strait Islander people do not use Auslan. In the NT alone, there are approximately 55 Aboriginal signing systems, with about eight most commonly used systems. Further, it can often be culturally impermissible to use these signing systems 'away from country', meaning

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15 On a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her: *Ebatarinja v Deland* (1998) 194 CLR 444, [26].

16 In the determination of any criminal charge against him, everyone shall be entitled to ... be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

17 *Ebatarinja v Deland* (1998) 194 CLR 444, [26]–[27].

18 *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

19 *Jago v District Court (NSW)* (1989) 168 CLR 23, 57 (Deane J).

20 *UN Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (Entered into Force 3 May 2008) art 13.

21 L Bartels, 'Police Interviews with Vulnerable Suspects' (Research in Practice Report No 21, Australian Institute of Criminology, July 2011) 4.

22 Ibid.

deaf Indigenous people may be prevented from teaching community signs to outsiders.[23]

10.12 There was strong support for the ALRC's proposal in the Discussion Paper that state and territory governments work with relevant Aboriginal and Torres Strait Islander organisations to map the need for additional interpreter services. Stakeholders—including many Aboriginal and Torres Strait Islander organisations—also identified existing gaps. The NT Anti-Discrimination Commissioner and the North Australian Aboriginal Justice Agency emphasised the need to monitor and evaluate the use of interpreter services through data collection.[24] The ALRC incorporated this suggestion into rec 10–1.

10.13 With regard to Aboriginal and Torres Strait Islander languages, many jurisdictions with high proportions of remote Aboriginal and Torres Strait Islander populations[25] such as Queensland, South Australia (SA), and Western Australia (WA) currently operate without state-funded dedicated interpreter services for Aboriginal and Torres Strait Islander people. Stakeholders agreed with the ALRC's suggestion that the Aboriginal Interpreter Service (AIS) in the NT was a good model. The AIS is an interpreter service that provides assistance to Aboriginal and Torres Strait Islander defendants who face language barriers. The AIS has over 370 registered interpreters, with interpreter services for up to 100 languages and dialects. It offers a range of interpreting services to those involved in the criminal justice system, but also covers a broad range of other areas where interpreters may be required, for example, in health settings.[26] However, as highlighted by stakeholders, the gaps discussed below also apply to the NT (including the discussion around the need to fund additional interpreters).[27]

10.14 The failure to incorporate interpreters across all parts of the criminal justice system was also identified. A number of stakeholders stated, for example, that interpreters were not used during police interactions, when orders such as restraining orders or domestic violence orders were served, or when explaining bail conditions, bonds or warrants.[28] Stakeholders also emphasised the need to use interpreters in delivering prison programs.[29]

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23 Dr D Howard and J Barney, Submission No 98 to House of Representatives Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Inquiry into the Hearing Health and Wellbeing of Australia* (February 2017).

24 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; Northern Territory Anti-Discrimination Commission, *Submission 67*.

25 Judicial Council on Cultural Diversity, *Cultural Diversity Within the Judicial Context: Existing Court Resources* (2016) 8.

26 Northern Territory Government, *About the Aboriginal Interpreter Service* <https://nt.gov.au>.

27 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; Northern Territory Anti-Discrimination Commission, *Submission 67*.

28 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; Legal Aid WA, *Submission 33*.

29 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; Jesuit Social Services, *Submission 100*; Legal Aid WA, *Submission 33*.

10.15 Australian Lawyers for Human Rights and Josephine Cashman suggested that the use of translation technologies or translated materials could increase the availability of interpreters in particular parts of the criminal justice system. Josephine Cashman recommended funding the AIS to review all court documents (eg, bail, domestic violence orders) and translate them into plain English and the most commonly spoken Aboriginal and Torres Strait Islander languages.[30] Australian Lawyers for Human Rights canvassed the possibility of developing electronic translation services to communicate matters such as bail conditions.[31] The NT Government noted that it commissioned the AIS to produce an app which translates the police caution into 18 common Aboriginal languages. The app is available on all police iPads.[32]

10.16 Stakeholders identified that effective access to interpreters also requires additional funding for interpreter services.[33] While noting that progress towards funding to increase the availability of interpreter services appears to already be ongoing,[34] the ALRC draws the Commonwealth Government's attention to the Law Enforcement and Justice Services Inquiry's recommendation to fund interpreters.[35]

10.17 The need for interpreters who are trained to a professional standard and able to interpret in legal contexts was also raised.[36] The International Commission of Jurists Victoria suggested that interpreter standards should be based on the following criteria, derived from the Canadian decision in *R v Tran*—continuity, precision, impartiality, competence and contemporaneousness.[37]

10.18 Stakeholders emphasised the need to provide training and guidance for police, judicial officers, court staff, corrections and others working within the criminal justice system.[38] On the question of ensuring effective access to interpreters, stakeholders submitted that training should focus on identifying when an interpreter is needed and how to interact with Aboriginal and Torres Strait Islander people through an

30 J Cashman, *Submission 105*.

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

32 Northern Territory Government, *Submission 118*.

33 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Northern Territory Anti-Discrimination Commission, *Submission 67*; Legal Aid WA, *Submission 33*.

34 In June 2017, the Australian government announced $1.6 million in further funding for the Indigenous Interpreting Project run by National Accreditation Authority for Translators and Interpreters: Senator the Hon Nigel Scullion, 'Additional $1.6 Million for Indigenous Language Interpreters' (Media Release, 16 June 2017). The project seeks to increase both the number of available languages and the number of qualified interpreters.

35 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) rec 1.

36 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; J Cashman, *Submission 105*; Criminal Lawyers Association of the Northern Territory, *Submission 75*; International Commission of Jurists Victoria, *Submission 54*; Legal Aid WA, *Submission 33*.

37 International Commission of Jurists Victoria, *Submission 54*.

38 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; Northern Territory Office of the Public Guardian, *Submission 72*.

interpreter.[39] Legal Aid NSW noted the existence in NSW of internal guidelines on matters such as conducting interviews in the presence of interpreters.[40]

10.19 More broadly, in order to ensure effective communication, the need for training covering cross cultural communication, cultural awareness and disability awareness was also canvassed. Cross cultural communication includes matters such as 'gratuitous concurrence' (which means agreeing to any and every proposition) and the possibility of being misunderstood because important body language cues are missed or not given their full significance by the listener.[41] Cultural awareness includes an understanding of kinship, the role of individuals within the community, the historical and ongoing impact of colonisation, intergenerational trauma, and ongoing contemporary experiences of Aboriginal and Torres Strait Islander peoples and communities.[42] Disability awareness refers to matters such as the prevalence of hearing loss and Foetal Alcohol Spectrum Disorder (FASD) among Aboriginal and Torres Strait Islander people. Legal Aid NSW noted, for example, that awareness of FASD requires an understanding that 'sufferers of FASD may confess or agree to any statement due to high suggestibility and eagerness to please'.[43]

Legal services and other supports

10.20 There are four discrete but complementary categories of legal services that provide targeted and culturally appropriate legal assistance to Aboriginal and Torres Strait Islander communities, including Legal Aid Commissions, community legal centres, ATSILs in each state and territory, and the Family Violence Prevention Legal Services (FVPLS). Commonwealth, state and territory governments provide the bulk of funding for the four legal assistance services. While the level and mix of funding sources varies between these different service providers, the past three years has seen much uncertainty around the funding of these services following the expiration of the original National Partnership Agreement on Legal Assistance Services—a 4 year agreement between the Commonwealth and the states and territories—and the re-negotiation of a new agreement for 2015–2020. The recent funding history of these legal services was articulated in the Law Enforcement and Justice Services Inquiry Report,[44] and also comprehensively described in the Access to Justice Inquiry Report.[45]

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39 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Judicial College of Victoria, *Submission 102*; Legal Aid NSW, *Submission 101*.

40 Legal Aid NSW, *Submission 101*.

41 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; Northern Territory Office of the Public Guardian, *Submission 72*. See also Productivity Commission, *Access to Justice Arrangements—Volume 2* (2014) 763; Diana Eades, 'Taking Evidence from Aboriginal Witnesses Speaking English—Some Sociolinguistic Considerations' [2013] (126) *Precedent* 44, 45–47. (Access to Justice Inquiry)

42 See, eg, Dr T Anthony, *Submission 115*; Legal Aid NSW, *Submission 101*.

43 See, eg, Legal Aid NSW, *Submission 101*.

44 Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 115–16.

45 Productivity Commission, *Access to Justice Arrangements—Volume 2* (2014) chs 21–2.

10.21 In the Discussion Paper, the ALRC asked 'in what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?'

10.22 Stakeholders overwhelmingly submitted that increasing access to justice fundamentally requires sufficient, sustainable and ongoing funding. In addition to the need for funding for their core work, many innovative service offerings that could increase access are also reliant on additional funding and support.[46] As discussed above, the adequate resourcing of legal assistance services is a cornerstone of access to justice. The ALRC notes the Commonwealth Government's commitment of an additional $55.7 million over the next three years for community legal centres and ATSILS. However, as noted by stakeholders, ongoing funding beyond 2020 remains uncertain. The ALRC encourages Commonwealth, state and territory governments to implement recommendations from the Access to Justice and Law Enforcement and Justice Services Inquiries relating to funding legal assistance services.

10.23 More broadly, stakeholders submitted that barriers to access to justice can be reduced by collaborations between non-Indigenous legal assistance providers and Aboriginal and Torres Strait Islander organisations. The importance of collaboration was linked to addressing some Aboriginal and Torres Strait Islander peoples' reluctance to use mainstream services because of a history of racism and culturally insensitive service provision.[47]

10.24 On the broader role of legal services in addressing disproportionate rates of Aboriginal and Torres Strait Islander incarceration, stakeholders noted that access to civil or family law assistance may help reduce rates of incarceration.[48] The role of integrated, holistic wraparound services, and the value of co-locating legal services with other support services was also emphasised.[49]

10.25 The Legal Education and Assistance Program (LEAP) run by the Women's Legal Service, Wirringa Baiya Aboriginal Women's Legal Centre and Western Sydney Community Legal Centre is an example of the role access to civil and family law services can play. LEAP provides culturally appropriate legal services to Aboriginal and Torres Strait Islander women in three metropolitan Sydney correctional services centres. Advice is provided across a range of areas, including civil and family law. Women's Legal Services NSW stated:

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46 See, eg, Law Society of Western Australia, *Submission 111*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Community Legal Centres NSW and the Community Legal Centres NSW Aboriginal Advisory Group, *Submission 95*; National Association of Community Legal Centres, *Submission 94*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Women's Legal Service NSW, *Submission 83*; National Family Violence Prevention Legal Services, *Submission 77*.

47 Victoria Legal Aid, *Submission 56*.

48 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Women's Legal Service NSW, *Submission 83*; Aboriginal Legal Service of Western Australia, *Submission 74*; Victorian Aboriginal Legal Service, *Submission 39*.

49 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Women's Legal Service NSW, *Submission 83*; National Family Violence Prevention Legal Services, *Submission 77*; Victoria Legal Aid, *Submission 56*; Mental Health Commission of New South Wales, *Submission 20*.

> Access to legal services in prison is essential to help reduce the risk of prisoners re-offending and being re-incarcerated. This is because imprisonment often exacerbates civil law and family law issues which are interconnected with the criminal law issues. This can prevent the successful reintegration of people after they are released.... As a statewide service WLS NSW often continues to act for clients after their release. Maintaining this relationship has resulted in women calling us for early legal advice about their safety, arrangements for their children and assistance to avoid parole breaches, for example, by varying reporting conditions. This is particularly important for Aboriginal and Torres Strait Islander women who may have family and community obligations requiring them to move between locations to assist with looking after children and family members.[50]

10.26 National Aboriginal and Torres Strait Islander Legal Services (NATSILS) submitted that co-locating disability and legal services is an important avenue to improve access to justice. Aboriginal and Torres Strait Islander clients with a cognitive impairment or mental illness could be provided with a range of supports by disability support workers embedded within ATSILS including communication assistance, referrals, family assistance and emotional support. Disability support workers are also in a position to assist lawyers to recognise a client's support needs, model good communication, and develop support packages that assist a client as they interact with police, prosecution services and the courts, 'in order to reduce the risk of reoffending'.[51]

10.27 Melbourne University ran a six month Disability Justice Program trial with NATSILS, Victorian Aboriginal Legal Service (VALS) and the Intellectual Disability Rights Service that embedded disability support workers within a community legal centre setting.[52] While the trial has ended, NATSILS and VALS have tried to continue the co-location model but face resourcing constraints.[53] Comments collected as part of the evaluation of the trial demonstrate the crucial role disability support workers can play. For example, in relation to a case where fitness to stand trial was raised with respect to an Aboriginal and Torres Strait Islander client, a lawyer told researchers:

> We had a report prepared whereby some of the psychologists said he was in the lowest one per cent of intellect in the population. The question then is how do you ensure he doesn't come back before the system? And there was a list of treatment options available and [the support person] was going to look at that and help the client engage with those options.[54]

10.28 The end result was that rather than face possible indefinite detention following a finding of unfitness to stand trial, a diversionary order was made 'which did not require that he enter a plea'.[55]

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50 Women's Legal Service NSW, *Submission 83*.
51 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
52 Bernadette McSherry et al, 'Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community' (Melbourne Social Equity Institute, University of Melbourne, 2017) 29.
53 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*.
54 Bernadette McSherry et al, above n 52, 34.
55 Bernadette McSherry et al, above n 52.

10.29 The ALRC encourages Commonwealth, state and territory governments to support initiatives such as LEAP and the disability support worker program above.

Specialist Aboriginal and Torres Strait Islander sentencing courts

Recommendation 10–2 Where needed, state and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts. These courts should incorporate individualised case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.

Recommendation 10–3 Relevant Aboriginal Torres Strait Islander organisations should play a central role in the design, implementation and evaluation of specialist Aboriginal and Torres Strait Islander sentencing courts.

10.30 Criminal offences are divided into two categories: summary and indictable offences. Summary offences are heard in the lower courts (Local or Magistrates courts), whereas indictable offences are generally heard in District/County or Supreme courts. Together, these courts are referred to as 'mainstream' courts, and hear the majority of criminal cases prosecuted in all Australian jurisdictions.

10.31 For Aboriginal and Torres Strait Islander peoples, mainstream courts can be inaccessible or alienating. Specialist Aboriginal and Torres Strait Islander sentencing courts were established against the background of 'the sense of powerlessness and alienation felt by many Aboriginal people caught up in the criminal justice system' revealed by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC).[56] Such courts 'emphasise the importance of giving aboriginal people a meaningful say in the decisions that affect their everyday lives'.[57]

10.32 The Office of Crime Statistics and Research (SA) described the alienation and disconnection of Aboriginal and Torres Strait Islander defendants as follows:

> The overwhelming view that emerged... was that Aboriginal people mistrusted the justice system, including the courts. They felt that they had limited input into the judicial process generally and sentencing deliberations specifically. They also saw the courts as culturally alienating, isolating and unwelcoming to community and family groups. It was clear that Aboriginal people found aspects of the Australian legal system difficult to understand[58]

10.33 The Australasian Institute of Judicial Administration suggests that the process of some specialist Aboriginal and Torres Strait Islander sentencing courts promote concepts such as validation, respect and self-determination. The establishment of such

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56 Justice Jenny Blokland, 'Foreword' in Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders—Aboriginal Courts in Australia* (Federation Press, 2016) v.

57 Ibid.

58 Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010) 2.

courts 'demonstrate respect for Indigenous culture and the Elders who are its authority figures. Their processes, collaborative in nature, promote the resolution of underlying problems that have brought individual offenders to court'.[59]

10.34 A 2010 evaluation of Murri Courts in Queensland observed its 'considerable success' in improving relationships between Aboriginal and Torres Strait Islander communities and Queensland Magistrates Courts.[60] The study found an increase in appearance rates, an increase in opportunity for those appearing to be linked up with rehabilitative services,[61] and that the initiative was 'highly valued' among Aboriginal and Torres Strait Islander community stakeholders.[62]

10.35 The ALRC acknowledges that specialist courts are more resource intensive than mainstream courts.[63] Participants in specialist courts may have to appear multiple times over an extended period (due to case management and judicial monitoring);[64] and treatment and community resource providers are an obligatory component of many specialist courts.[65] However, for the reasons set out above, and because of the complex needs that many Aboriginal and Torres Strait Islander defendants face, the ALRC recommends that, where needed, state and territory governments establish (and continue to support) lower level specialist Aboriginal and Torres Strait Islander sentencing courts. Stakeholders expressed strong support for this recommendation.[66] Submissions reiterated the need to establish such courts in regional areas.[67] Kingsford Legal Centre submitted, for example, that 'the effectiveness of specialist courts ... is impeded by their... high level of concentration in metropolitan areas'.[68]

10.36 While such courts have historically existed in all jurisdictions except Tasmania, their establishment and operation 'has been neither easy nor inevitable'.[69] State and territory governments have taken the view that 'reducing recidivism was the main rationale for the use of specialist Aboriginal courts'.[70] For example, currently, there are no specialist Aboriginal sentencing courts in the NT or WA. WA saw the abolition of

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59 Australasian Institute of Judicial Administration, *Indigenous Issues and Indigenous Sentencing Courts* <www.aija.org.au>.

60 Anthony Morgan and Erin Louis, 'Evaluation of the Queensland Murri Court: Final Report' (Technical and Background Paper No 39, Australian Institute of Criminology, 2010) 150.

61 Ibid.

62 Ibid iii.

63 Richard Coverdale, Centre for Rural Regional Law and Justice Deakin University, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria* (2011) 37–8.

64 Lorana Bartels, 'Challenges in Mainstreaming Specialty Courts' (Trends and Issues in Crime and Criminal Justice No 383, Australian Institute of Criminology, October 2009) 4.

65 Ibid 1–2.

66 UNICEF Australia, *Submission 104*; Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Kimberley Community Legal Services, *Submission 80*; Legal Aid WA, *Submission 33*; Kingsford Legal Centre, *Submission 19*.

67 Legal Aid NSW, *Submission 101*; NSW Bar Association, *Submission 88*; Kingsford Legal Centre, *Submission 19*.

68 Kingsford Legal Centre, *Submission 19*.

69 Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders—Aboriginal Courts in Australia* (Federation Press, 2016) 1.

70 Ibid 71. In making this point, Bennett refers to: Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 443.

two specialist Aboriginal sentencing courts in 2015, both following evaluations of the courts that found that recidivism either did not significantly reduce, or because it in fact increased.[71] In January 2015, the Barndimalgu Court—a specialist Aboriginal family violence court—was abolished[72] following a 2014 evaluation that found that while rates of reoffending were lower, the difference was not statistically significant.[73] The Kalgoorlie Community Court was abolished following an evaluation that found that recidivism rates were higher than in mainstream courts. In Queensland, although they have since been re-established, Murri courts were abolished in 2012 on the basis that they did not reduce recidivism rates.[74]

10.37 This approach to evaluating specialist Aboriginal and Torres Strait Islander courts can be quite a blunt approach. Recidivism is only one of a number of aims for such courts, including increased attendance rates, and 'providing a better and more culturally relevant sentencing process'.[75] Most of the other aims have been achieved to some extent.[76]

Key elements

10.38 Specialist courts, aim to be inclusive and culturally appropriate. They seek to directly engage people who appear before them, to provide individualised case management, and to address underlying issues in culturally appropriate ways,[77] including by having Elders participate in the sentencing discussion.[78]

10.39 Such courts should:

- involve active participation by the defendant and the community;

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71 It is worth noting that a 2009 study of the Nowra Circle Court cautioned against the accuracy of an exclusively statistical or quantitative analysis of rates of recidivism. It advocated for a mix of qualitative and statistical data, to get a better understanding of recidivism on the basis that 'desistance from offending' is an uneven process: K Daly, G Proietti=Scifoni, G, *Defendants in the Circle: Nowra Circle Court, the Presence and Impact of the Elders and Reoffending* (School of Criminology and Criminal Justice, Griffith University, 2009) 108–110.

72 Amanda Banks, 'Special Domestic Violence Court Axed' *The West Australian* (Perth), 23 January 2015 <www.thewest.com.au>.

73 Department of the Attorney General, Policy and Aboriginal Services Directorate (WA), *Evaluation of the Metropolitan Family Violence Court and Evaluation of the Barndimalgu Court—Evaluation Report* (2014) 11.

74 Bennett, above n 69, 71.

75 Ibid.

76 Jacqueline Fitzgerald, 'Does Circle Sentencing Reduce Aboriginal Offending?' (Crime and Justice Bulletin No 115, NSW Bureau of Crime Statistics and Research, 2008) 7.

77 See, eg, Marchetti, Elena, 'Indigenous Sentencing Courts' (Research Brief No 5, Indigenous Justice Clearinghouse, December 2009) 1; Elena Marchetti and Kathleen Daly, above n 70, 1; Office of Crime Statistics and Research, *Aboriginal (Nunga) Courts—Information Bulletin* (2010) 3–4.

78 See, eg, Elena Marchetti and Janet Ransley, 'Applying the Critical Lens to Judicial Officers and Legal Practitioners Involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?' (2014) 37(1) *University of New South Wales Law Journal* 15; Nigel Stonns and Geraldine Mackenzie, 'Evaluating the Performance of Indigenous Sentencing Courts' (2009) 13(2) *Australian Indigenous Law Review* 90; Michael S King and Kate Auty, 'Therapeutic Jurisprudence: An Emerging Trend in Courts of Summary Jurisdiction' (2005) 30(2) *Alternative Law Journal* 69, 69.

- provide individualised case management for the defendant and wraparound services that address criminogenic factors;
- be culturally appropriate and competent; and
- have its design, implementation and evaluation led by relevant Aboriginal and Torres Strait Islander organisations.

Active participation

10.40 Specialist courts aim to increase active participation through the inclusion of key community members, such as Elders, and the use of plain English to ensure that processes and requirements imposed by the court are well understood by the person appearing.[79]

10.41 The Koori Courts in Victoria have a legislated purpose of 'ensuring greater participation of the Aboriginal community in the sentencing process'.[80] The legislative aims of NSW Circle Sentencing include increased participation of Aboriginal offenders, victims, and community members in sentencing processes, and to improve community confidence in sentencing processes.[81]

10.42 Such participation has also been found to correlate with high satisfaction levels by users, and greater engagement with the system.[82]

Individualised case management of the defendant and availability of wraparound services

10.43 As discussed above, a number of evaluations of specialist Aboriginal and Torres Strait Islander sentencing courts suggest that these courts may have limited short-term success in reducing reoffending. Bennett argues that these findings should be unsurprising, stating:

> As a number of the studies have observed, the Aboriginal Courts generally do not have integrated pre- or post-sentence programs to address issues frequently related to Aboriginal offending (anger management, mental health, alcohol and substance abuse).[83]

> 10.44 He also stated that 'the need for a broader approach combining the Aboriginal Court process with rehabilitative programs to address the major causes of offending has been recommended by a number of studies'.[84]

10.45 For example, the 2010 study into the Murri Court considered such an approach crucial to meaningfully address reoffending, stating:

> Realistically, for the Murri Court to have any impact on reoffending (while not moving away from the philosophy of involving Indigenous community

79 King and Auty, above n 78, 69–71.
80 *Magistrates' Court (Koori Court) Act 2002* (Vic) s 1.
81 *Criminal Procedure Regulation 2017* (NSW) reg 39.
82 Bennett, above n 69, 62–3.
83 Ibid 70.
84 Ibid 71.

> representatives in the sentencing process), strategies are required to enhance the capacity of rehabilitative programs to address those factors recognised as being associated with the disproportionate rate of offending among Indigenous offenders.[85]

10.46 The NSW Bar Association made similar points regarding circle sentencing in NSW:

> whilst circle sentencing gives Aboriginal and Torres Strait Islander people direct involvement in the sentencing of Indigenous offenders... such involvement by itself does not necessarily lead to a reduction in reoffending. Specialist Aboriginal and Torres Strait Islander courts must also have available to them specialist programs, a capacity for continued court monitoring after sentence and the resources to conduct drug testing.[86]

10.47 The NSW Bar Association submitted that the proposed District Court of NSW Koori Court (the Walama Court) was a good example of a court operating under a model incorporating individualised case management and wraparound services. Under this model, a program would be determined for the defendant during a 'sentencing conversation' that includes Elders and a Koori Court officer, among others. In addition to a cultural component, and the content of the program itself (which can incorporate referral to services), it is proposed that the Court would be empowered to engage in individualised case management through the incorporation of the following elements:

- release of the defendant on a suspended sentence to undertake the program;
- phases of low, medium and high supervision, including breath-testing, urinalysis and progress appearances in the Koori Court; and
- sanctions for breach of program requirements.[87]

10.48 While not a lower level court, the ALRC supports the establishment of the Walama Court.

10.49 The Neighbourhood Justice Centre (NJC) operating in Victoria also provides a useful model.[88] The NJC is a Victorian Magistrates' Court of first instance established in 2007, and is Australia's first community justice centre.[89] The NJC is co-located with treatment and support services and seeks to resolve disputes by 'addressing the underlying causes of harmful behaviour and tackling social disadvantage'.[90]

10.50 Bennett sounded a note of caution around the operation of specialist Aboriginal and Torres Strait Islander sentencing courts, outlining that the incorporation of pre-sentence programs requires an active judicial role in ongoing monitoring to ensure compliance with diversion programs. He cautioned that the adoption of a problem-

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85 Morgan and Louis, above n 60, 146.

86 NSW Bar Association, *Submission 88*. Other stakeholders also expressed strong support for the need for individualised case management and the greater availability of support services: Change the Record Coalition, *Submission 84*; Legal Aid WA, *Submission 33*; Kingsford Legal Centre, *Submission 19*.

87 NSW Bar Association, *Submission 88*.

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

89 The NJC is provided for and operates under the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic).

90 Neighbourhood Justice Centre, *About Us* <www.neighbourhoodjustice.vic.gov.au>.

solving model into specialist Aboriginal and Torres Strait Islander courts requires a careful balance between this additional monitoring role and ensuring that Elders and the community remain central to the process and that it continues to be an Aboriginal and Torres Strait Islander process. The ALRC considers that these issues demonstrate the importance of ensuring that the design of such courts are led by Aboriginal and Torres Strait Islander organisations.

Culturally appropriate and competent

10.51 A 2013 study concluded that a culturally appropriate court process was 'critical when providing a justice response for Aboriginal and Torres Strait Islander people'.[91] The Kimberley Community Legal Centre provided some useful guidance in determining what is culturally appropriate, cautioning against making assumptions about 'what is culturally appropriate or likely to be wanted or supported' by Aboriginal and Torres Strait Islander people in an area.[92] It submitted that 'models such as specialist courts... have lower prospects of being successful unless they are worked through and developed for the particular, local context'.[93] This requires that the design, implementation and evaluation of these courts be led by relevant Aboriginal and Torres Strait organisations.

10.52 When considering how courts might be appropriately evaluated, Eleni Marchetti emphasised the importance of ensuring that Aboriginal and Torres Strait Islander values and knowledge informs evaluations of specialist Aboriginal and Torres Strait Islander sentencing courts.[94] The use of 'positivist methods of evaluation' mean that existing evaluations of specialist Aboriginal and Torres Strait Islander sentencing courts 'often focus on measures and criteria that are difficult to apply within a non-mainstream setting and may not reflect Indigenous cultural values and aspirations'.[95]

Other specialist courts, lists and diversion programs

10.53 There are other specialist courts that address criminogenic factors, such as drug addiction and mental health issues. These courts are available to Aboriginal and Torres Strait Islander peoples, but are not specific to them. Diversion programs—which divert a defendant or offender out of the criminal justice stream in order to address such factors prior to trial or sentencing—can also assist some Aboriginal and Torres Strait Islander people who come before the courts. Some examples of these courts and diversion programs that were drawn to the ALRC's attention during this Inquiry are described briefly below.

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91 Cultural and Indigenous Research Centre Australia, *Evaluation of Indigenous Justice Programs Project A: Aboriginal Sentencing Courts and Conferences, Attorney General's Department Final Report* (2013) 87.

92 Kimberley Community Legal Services, *Submission 80*.

93 Ibid.

94 Elena Marchetti, 'Nothing Works? A Meta-Review of Indigenous Sentencing Court Evaluations' (2017) 28(3) *Current Issues in Criminal Justice* 257, 257.

95 Ibid citing M Walter, 'The Politics of the Data: How the Australian Statistical Indigene is Constructed'(2010) 3(2) *International Journal of Critical Indigenous Studies*, 45–56.

Specialist courts

The Drug Court of NSW

10.54 The Drug Court of NSW is a specialist court that takes referrals from the NSW Local Court or the District Court of NSW. The Drug Court sits in Parramatta, Toronto and Sydney[96] and aims to address drug dependencies related to criminal offending.[97] Issues of drug dependency are addressed through intensive case management between court teams, community agencies, and the judge. It is also achieved through participant sanctions for non-compliance with program conditions—including the sanction of imprisonment, which is used as a last resort. Participants are regularly tested for drugs.[98] The registrar and Drug Court team considers the number of Aboriginal and Torres Strait Islander applicants in determining the number of places available.[99]

10.55 In 2008, a NSW Bureau of Crime Statistics and Research evaluation of the Drug Court showed it to be more cost effective than prison in reducing the rate of reoffending among offenders whose crime was drug-related.[100] This included a 38% decrease in recidivism for a drug offence during the follow-up period, and a 30% decrease in recidivism for a violent offence.[101]

Victorian Neighbourhood Justice Centre

10.56 The NJC employs Koori Justice Workers to support Aboriginal and Torres Strait Islander clients and provide advice to the Court in relation to culturally specific programs and services.[102] The NJC also holds a monthly Aboriginal Hearing Day during which all cases involving Aboriginal defendants are heard, in order 'to provide better support for Aboriginal clients and to increase court attendance'.[103]

10.57 The NJC was evaluated in 2010. It was found that recidivism rates for participants reduced by 7%. The opening of the NJC also aligned with a reduction in the crime rate in the City of Yarra by 12% in the first two years.[104] A later 2015 AIC evaluation of the NJC revealed that

> [T]he City of Yarra has the highest crime rate of any Victorian Local Government Area (LGA) other than the City of Melbourne, with an aggregate crime rate in 2007–08 of around 18,000 per 100,000 population... In the period after the NJC was established, crime rates in Yarra have fallen, with a 31 percent decline in total crime, largely as the result of a 40 percent decline in property crime. Crime rates have

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96 The NSW Drug Court is established by and operates under the *Drug Court Act 1998* (NSW). Like many other specialist courts, the Drug Court requires a guilty plea before participants are accepted, see *Drug Court Act 1998* (NSW) s 5(1)(c).

97 Don Weatherburn et al, 'The NSW Drug Court: A Re-Evaluation of Its Effectiveness' (Crime and Justice Bulletin No 121, NSW Bureau of Crime Statistics and Research, September 2008) 1.

98 Ibid 3.

99 Ibid 16.

100 Ibid 2.

101 Ibid 9.

102 The NJC currently employs two Koori Justice Workers.

103 Neighbourhood Justice Centre, *Aboriginal and Torres Strait Islander Support Services* <www.neighbourhoodjustice.vic.gov.au>.

104 Department of Justice (Vic), *Evaluating the Neighbourhood Justice Centre in Yarra 2007–2009* (2010) ii.

> generally fallen in Victoria over the same period... but the decline in Yarra is greater than that observed in comparable inner urban LGAs... or LGAs with high levels of social disadvantage[105]

Court diversion programs and specialist lists

10.58 Court diversion programs allows judicial officers to adjourn matters while defendants engage in support services. These diversion programs can provide services for people accused or convicted in the summary jurisdiction who require assistance with addiction or mental health issues.

10.59 Diversion programs include, but are not limited to:

- the **Australian Capital Territory (ACT) Court Alcohol and Drug Assessment Service**, which incorporates drug and alcohol counselling during court proceedings or as part of sentencing orders.[106]
- the **Statewide Community and Court Liaison Service** (SCCLS) (NSW) is a service of the Justice Health & Forensic Mental Health Network. This service provides court-based identification and assessment of defendants with mental health issues and cognitive impairments, resulting in a pathway for diversion under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).
- the **Cognitive Impairment Diversion Program** (NSW), which was launched as a pilot in September 2017 in the Gosford and Penrith Local Courts. The program involves expanding the SCCLS to include court-based identification, assessment and diversion of defendants with cognitive impairment, and linking them with the National Disability Insurance Scheme.
- **Magistrates Early Referral into Treatment program** (NSW and Queensland), which allows people whose offending is related to their substance abuse issues to voluntarily enter into rehabilitation as part of the bail process;[107]
- the **NT Mental Health List**, which was established as a pilot in 2016 in Darwin. The list diverts all defendants with possible mental health issues or cognitive impairments to this list. The Court relies on a 'therapeutic framework that allows for the management and treatment of such offenders'.[108]

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105 Stuart Ross, 'Evaluating Neighbourhood Justice: Measuring and Attributing Outcomes for a Community Justice Program (2015)' (Trends and Issues in Crime and Criminal Justice No 499, Australian Institute of Criminology, November 2015).

106 Department of Health (ACT), *Diversion Services—Court Alcohol and Drug Assessment Service* <http://www.health.act.gov.au/our-services/alcohol-and-other-drugs/diversion-services>.

107 Department of Justice (NSW), *Magistrates Early Referral Into Treatment* <http://www.merit.justice.nsw.gov.au/>.

108 Northern Territory Government, *Submission 118*.

- the **Victorian Court Integrated Services Program**,[109] which includes Aboriginal and Torres Strait Islander controlled and mainstream organisations;[110] and
- the **Victorian Assessment and Referral Court** list, which provides 'case management to participants including psychological assessment, referral to welfare, health, mental health, disability, housing services and drug and alcohol treatment'.[111]

Fitness to stand trial regimes

10.60 High rates of cognitive impairment and mental illness have been observed in the Australian general prison population. For example, in NSW, people with a mental illness or cognitive impairment were found to be 3 to 9 times more likely to be in prison than the general population.[112] This over-representation is particularly pronounced for Aboriginal and Torres Strait Islander prisoners with research finding that Aboriginal and Torres Strait Islander people with mental illness and cognitive impairment are 'significantly more likely to have experienced earlier and more frequent contact with the criminal justice system'.[113]

10.61 Where cognitive impairment or mental illness is acute, the issue of a person's fitness to stand trial may be raised.[114] If found unfit to stand trial, in jurisdictions without fixed terms, a person may face a particularly stark access to justice issue—the prospect of indefinite detention or detention that far exceeds the maximum sentence for the offence.[115] As observed in the Indefinite Detention Inquiry:

> justice diversion provisions [without limiting terms] have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being

109 Magistrates' Court of Victoria, *Court Integrated Services Program (CISP)* <www.magistratescourt.vic.gov.au>.

110 Magistrates' Court of Victoria, *Court Integrated Services Program (CISP) Koori Brochure* (2008).

111 Magistrates' Court of Victoria, *Assessment and Referral Court List* <www.magistratescourt.vic.gov.au>.

112 Ruth McCausland et al, 'People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-Benefit Analysis of Early Support and Diversion' (UNSW, PwC, August 2013) 3.

113 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) 10.

114 More broadly, research indicates that 'across Australia, thousands of people with mental and cognitive disability are being 'managed' by criminal justice systems rather than being supported in the community, a disproportionate number of them Indigenous': Ibid 12. Breaking this cycle requires a culturally sensitive, trauma informed, therapeutic approach that takes into account of and address this criminogenic factor at all points of the criminal justice system discussed in this Report.

115 See, eg, National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Law Council of Australia, *Submission 108*; Northern Territory Anti-Discrimination Commission, *Submission 67*; Legal Aid WA, *Submission 33*. See also, Jesuit Social Services, Submission No 53 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016); National Aboriginal and Torres Strait Islander Legal Services, Submission No 34 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016).

> convicted of a crime, and for periods that may significantly exceed the maximum period of custodial sentence for the offence.[116]

10.62 Indefinite detention regimes disproportionately affect Aboriginal and Torres Strait Islander peoples. A 2012 study found, for instance, that all nine individuals who were indefinitely detained in WA, following a finding of unfitness to stand trial, were Aboriginal.[117] Evidence submitted to the Indefinite Detention Inquiry indicated that of the 100 people detained across Australia without conviction under forensic mental health provisions, at least 50 were Aboriginal and Torres Strait Islander peoples.[118]

10.63 The Australian Human Rights Commission (AHRC) reviewed the status of three Aboriginal men found unfit to be tried and held under indefinite detention in the NT,[119] and found that:

- the men had been held in a maximum security prison in Alice Springs because no suitable places for forensic patients existed;[120]
- one of the men had been in detention for six years, despite the maximum penalty of the crime he was accused of committing being 12 months imprisonment under regular criminal processes;
- another of the men had been in detention for over four years, despite a maximum criminal penalty of 12 months imprisonment; and
- the third man had also been in detention for over four years, and remained so at the time of the AHRC's reporting date.[121]

Special hearings

Recommendation 10–4 Where not already in place, state and territory governments should introduce special hearing processes to make qualified determinations regarding guilt after a person is found unfit to stand trial.

10.64 The question of fitness to stand trial is determined by reference to whether the accused person is 'of sufficient intellect to comprehend the course of proceedings in the trial so as to make a proper defence, to know that he may challenge any of you to

116 Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 6.

117 Mindy Sotiri, Patrick McGee and Eileen Baldry, 'No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment' (Report for the National Justice Chief Executive Officers Working Group) 33.

118 Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 14.

119 Australian Human Rights Commission, *KA, KB, KC and KD v Commonwealth of Australia [2014] AusHRC 80: Report into Arbitrary Detention, Inhumane Conditions of Detention and the Right of People with Disabilities to Live in the Community with Choices Equal to Others* (2014).

120 A forensic patient facility was constructed in March 2013.

121 Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) 35–6.

whom he may object and to comprehend the details of the evidence'.[122] Circumstances that may give rise to a finding of unfitness to plead include an inability to understand the charge, the proceedings, the substantial effect of evidence led against the accused, or an inability to instruct counsel.[123]

10.65 In all jurisdictions except WA and Queensland, if a person is found unfit to stand trial, a qualified determination relating to guilt is made following a 'special hearing', during which the prosecution case is tested. Other than under Commonwealth law, such proceedings must be conducted in a manner as near as possible to a criminal trial,[124] where the criminal standard of proof must be met—beyond reasonable doubt. In most jurisdictions, if a person is found unfit to stand trial, a qualified determination is made about whether that person committed the offence.[125]

10.66 Stakeholders submitted that a requirement to conduct a special hearing is necessary in order to test the evidence against the defendant.[126] NATSILS, in particular, submitted that such a process should adopt the Victorian model where proceedings are conducted in a manner as close to a criminal trial as possible. The model requires that where findings are made that an accused 'committed the offence charged', such finding must be proven to the criminal standard of proof, [127] and be subject to appeal.[128]

10.67 In Queensland, the Mental Health Court—constituted by judges of the Supreme Court of Queensland and advised by two psychiatrists—is required to determine whether a person charged with a serious offence is unfit for trial.[129] Where the Court finds that the defendant is permanently unfit to stand trial, proceedings must be discontinued.[130] The Mental Health Court is then required to make a custodial or non-custodial order relating to that person. Where the court considers it necessary to do so 'because of the person's mental condition, to protect the safety of the community, *including* from the risk of serious harm to other persons or property', the court will make a custodial order regardless of whether the person was guilty of the offence

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122 *R v Pritchard* (1836) 173 ER 135, 304.

123 *R v Presser* [1958] VR 45, 48.

124 *Crimes Act 1900* (ACT) s 316(1); *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21(1); *Criminal Code Act 1983* (NT) s 43W(1); *Criminal Justice (Mental Impairment) Act 1996* (Tas) s 16(1); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 16(1).

125 *Crimes Act 1900* (ACT) s 316(1); *Mental Health (Forensic Provisions) Act 1990* (NSW) s 21(1); *Criminal Code Act 1983* (NT) s 43W(1); *Criminal Justice (Mental Impairment) Act 1996* (Tas) s 16(1); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 16(1).

126 Law Society of Western Australia, *Submission 111*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Legal Aid NSW, *Submission 101*; Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; NSW Bar Association, *Submission 88*; Aboriginal Legal Service of Western Australia, *Submission 74*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*.

127 *Crimes Act 1900* (ACT) s 316(9)(c); *Crimes Act 1914* (Cth) s 20B(3); *Mental Health (Forensic Provisions) Act 1990* (NSW) s 19(2); *Criminal Code Act 1983* (NT) s 43V(1); *Criminal Law Consolidation Act 1935* (SA) ss 269M(B)(1), 269N(A)(1); *Criminal Justice (Mental Impairment) Act 1996* (Tas) s 15(2); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) ss 3, 15.

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

129 *Mental Health Act 2016* (Qld) s 21(1).

130 Ibid s 122.

charged.[131] Such a test is broader than the criteria that applies when making a treatment order under the *Mental Health Act 2016* (Qld)—where a person may be detained for treatment only if they pose a risk of imminent serious harm to themselves or others.[132]

10.68 In WA, a judge must be satisfied, by reference to a number of factors including the strength of the available evidence, that it would be appropriate to make a custodial order.[133] A judge is not required to follow any particular process to satisfy him or herself of the appropriateness of the order. For instance, in *Western Australia v Tax*, Martin CJ released the defendant unconditionally where the court gave weight to representations by counsel, including in relation to alibi evidence in favour of the defendant and concessions by the State relating to the identification of the defendant.[134] In another case, McKechnie J made a custodial order on the basis that 'the prosecution case was "objectively strong" because the High Court had recently ordered a retrial' instead of quashing the case.[135]

Fixed term of detention

Recommendation 10–5 Where not already in place, state and territory governments should implement Recommendation 7–2 of the ALRC Report *Equality, Capacity and Disability in Commonwealth Laws* to provide for a fixed term when a person is found unfit to stand trial and ensure regular periodic review while that person is in detention.

10.69 A person charged with a serious indictable offence found unfit to stand trial may be ordered to spend time in forensic custody under supervision. Custodial supervision regimes[136] fall into four broad categories:[137]

- **detention without a nominated end date:** the court makes a custodial supervision order of indefinite length. The term of detention rests in the hands of administrative decision-makers who conduct reviews.[138]

131 Ibid s 134.
132 Ibid s 18(3).
133 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(6)(a), 19(5)(a).
134 *Western Australia v Tax* [2010] WASC 208 (18 June 2010) [3].
135 *Western Australia v Stubley [No 2]* [2011] WASC 292 (24 October 2011). Both this case and the case cited in n 134 were referred to in Piers Gooding et al, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change' (2017) 40 *Melbourne University Law Review* 816, 846.
136 Supervision in custody is described in a number of ways, including 'forensic orders' and 'supervision orders'. In this report, these are generically referred to as custodial supervision orders.
137 Piers Gooding et al, above n 135, 851.
138 *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) ss 16(5), 19(4), 35; *Mental Health Act 2016* (Qld) ss 134, 137–8. Tasmania also operates under an indefinite detention model. However, the decision about whether to discharge a person from detention rests with the Supreme Court of Tasmania. An application for discharge can be made every two years: *Criminal Justice (Mental Impairment) Act 1996* (Tas) ss 24, 26. It is a hybrid of the nominal term and indefinite detention models.

- **custody for a nominal term:** the court fixes a term for custodial supervision, [139] at the end of which, the court initiates, under its own motion, a 'major review'. The court must release the person, unless satisfied that the person would be a serious risk to themselves or members of the public.[140] This approach has been described as being broadly consistent with preventative detention regimes applicable to serious sex offenders.[141]
- **custody for a limiting term**: the court orders that the person be detained for a period that is the best estimate of the sentence the court would have imposed following a full criminal trial.[142] However, upon an application, the court may extend the term of detention if the person would present an unacceptable risk of serious harm to others.[143]
- **custody for a fixed term**: detention can only be for a specific period.[144] Under Commonwealth law, this term cannot exceed the maximum term for the offence. In the ACT and SA, the maximum term is the term that the court would have imposed following a 'normal' criminal trial. The person cannot be detained for longer than this period.[145]

10.70 Regimes that can lead to indefinite detention[146] raise two key access to justice issues: the potential for detention that far exceeds the sentence that may have been imposed for the offence charged; and the concomitant possibility that a person chooses to plead guilty and end up in the criminal justice system instead of being treated as part of the mental health system or assisted through guardianship regimes.

10.71 Indefinite detention regimes enforced after a finding of unfitness have received international criticism. The United Nations Committee on the Rights of Persons with Disabilities criticised the operation of WA's unfitness to stand trial regime, which

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139 *Criminal Code Act 1983* (NT) ss 43ZC, 43ZG; *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) ss 27–8. In Victoria, the nominal term is 25 years for murder or treason, the maximum term for any serious offence other than murder or threats to kill, half the maximum term for other offences with a statutory maximum term. Where no statutory maximum term is prescribed, the judge determines the length of custodial supervision. In the NT, the nominal term is set by reference to the sentence the person would have received if found guilty as part of the 'normal' criminal trial process.

140 *Criminal Code Act 1983* (NT) s 43ZG(5); *Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997* (Vic) s 35(3).

141 Piers Gooding et al, above n 135, 853.

142 *Criminal Law Consolidation Act 1935* (SA) s 269O(2), Note 1. NSW operates under a hybrid model. A person found unfit to stand trial may be detained for what is referred to as a 'limiting term'

143 *Mental Health (Forensic Provisions) Act 1990* (NSW) sch 1 cl 2. This differs from the nominal term model as the person ceases to be a forensic patient at the end of the limiting term *unless* an application is made seeking an extension.

144 *Mental Health Act 2015* (ACT) s 183; *Crimes Act 1914* (Cth) s 20BC(2); *Criminal Law Consolidation Act 1935* (SA) ss 269(2)–(3). Although the ACT and SA refer to these terms as 'limiting terms', these are referred to as 'fixed terms' for the purposes of this Inquiry.

145 *Mental Health Act 2015* (ACT) s 183; *Criminal Law Consolidation Act 1935* (SA) s 269O(2).

146 Of the four categories described above, all but the fixed term regimes can lead to a person found unfit to stand trial being detained indefinitely.

resulted in the detention of an Aboriginal and Torres Strait Islander man for nearly a decade.[147]

10.72 In order to avoid indefinite detention, a person may rely on legal advice to plead guilty.[148] For example, NATSILS provided the following case study in its submission to the Indefinite Detention Inquiry:

> 'Mary' is a CAALAS client who suffers from a cognitive disability. Mary is from Central Australia, but was found unfit to plead in WA and detained there indefinitely. By agreement between the WA and NT Governments, Mary was released from detention in WA and returned to Central Australia where public housing accommodation had been arranged. Unfortunately Mary was taken back into police custody following the commission of further offences. CAALAS was able to take instructions from Mary in relation to these offences, and the matter resolved to a plea with Mary receiving a term of imprisonment. In CAALAS' observation, being detained indefinitely due to a question of fitness to plead was far more distressing and traumatic for Mary than receiving a finite term of imprisonment. Whilst indefinitely detained, Mary was extremely frustrated and upset and would frequently ask her lawyer when she was getting out, and when she was going home. CAALAS observed the lack of certainty to be utterly tortuous for her.[149]

10.73 Where people plead guilty in order to avoid indefinite detention they enter the criminal justice system instead of the forensic mental health system and may not receive necessary treatment or care. This could affect the likelihood of recidivism and runs counter to legal principles that underpin fair trials and access to justice.[150]

10.74 The ALRC's recommendations contained in the ALRC's Report *Equality, Capacity and Disability in Commonwealth Laws*, relating to detention following a finding of unfitness to stand trial were supported by the Senate Community Affairs References Committee in 2016.[151] The Law Reform Commission of WA also recommended that custody orders should not be indefinite.[152] Inquiries by the NSW Law Reform Commission (NSWLRC) and Victorian Law Reform Commission (VLRC) recommended the adoption of limiting terms and indefinite detention regime with rolling five year reviews respectively on the basis that the possibility of detention

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147 United Nations Committee on the Rights of Persons with Disabilities, *Views Adopted by the Committee under Article 5 of the Optional Protocol, Concerning Communication No. 7/2012*, UN Doc CRPD/C/16/D/7/2012 (10 October 2016).

148 Bernadette McSherry et al, above n 52, 18; First Peoples Disability Justice Consortium, Submission No 39 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016). See also, Queensland Advocacy Incorporated, *Submission 60*.

149 National Aboriginal and Torres Strait Islander Legal Services, Submission No 34 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016).

150 NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) 31–5.

151 Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) xiii.

152 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 243.

beyond the end of the nominated term is sometimes necessary for community protection.[153]

10.75 While many stakeholders expressed support for 'limiting terms',[154] a number noted that the time spent in detention as part of the criminal justice process must be *finite*.[155] The Mental Health Commission of NSW submitted, for example, that it 'remains concerned about the indefinite detention of individuals found unfit to be tried, including by way of extension of court order limiting terms'.[156]

10.76 NATSILS submitted to the Indefinite Detention Inquiry that the absence of finite orders leads to

> the paradoxical result... that there are rightfully limits on the time spent in custody for those convicted of crimes, including those who are mentally impaired, whilst the current legislation allows for indefinite detention, of those mentally impaired accused who are not convicted in law of any crime.[157]

10.77 NATSILS provided the following case study to illustrate the risk of indefinite detention once a custodial supervision order is made—even where that order is for a term reflective of the sentence that would have been given if ordinarily convicted of the offence:

> 'Ronald' is an Aboriginal man who required criminal law assistance from CAALAS. Ronald was subject to an adult guardianship order. Despite being subject to an adult guardianship order, Ronald was not receiving enough support or resources from the Department of Health and this prompted his guardian to raise the issue of fitness to plead at Ronald's court hearing. Ronald was assessed as unfit to plead. As a result, Ronald was in custody at the Alice Springs Correctional Centre from August 2007 – July 2013, and at the time of writing remains in the Secure Care facility. Ronald's period of detention was initially set at a nominal term of 12 months, however when

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153 Victorian Law Reform Commission, *Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997*, Report No 28 (2014) rec 84; NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013) rec 11.1. The VLRC recommended indefinite detention with rolling five year reviews conducted by the court. NSWLRC recommended that the court have the power, upon application by the Minister, to make an extension order for a period of five years at the end of a limiting term (or period of extension).

154 North Australian Aboriginal Justice Agency, *Submission 113*; Law Society of Western Australia, *Submission 111*; 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*; NSW Bar Association, *Submission 88*; Change the Record Coalition, *Submission 84*; Aboriginal Legal Service of Western Australia, *Submission 74*; Northern Territory Anti-Discrimination Commission, *Submission 67*; Aboriginal Legal Service (NSW/ACT), *Submission 63*; Victorian Aboriginal Legal Service, *Submission 39*; Legal Aid WA, *Submission 33*; Mental Health Commission of New South Wales, *Submission 20*; Kingsford Legal Centre, *Submission 19*.

155 Law Society of New South Wales' Young Lawyers Criminal Law Committee, *Submission 98*; Aboriginal Legal Service of Western Australia, *Submission 74*; Northern Territory Anti-Discrimination Commission, *Submission 67*; International Commission of Jurists Victoria, *Submission 54*; Legal Aid WA, *Submission 33*; Mental Health Commission of New South Wales, *Submission 20*.

156 Mental Health Commission of New South Wales, *Submission 20*.

157 National Aboriginal and Torres Strait Islander Legal Services, Submission No 34 to Senate Standing Committee on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment* (April 2016).

> this nominal term has been reviewed, Ronald's period of detention has been further extended due to a lack of community supports and alternatives. CAALAS estimates that if Ronald had been found guilty of the criminal charges, he would have received a sentence of imprisonment of approximately 4 months. In contrast, he has now been in custody for almost 9 years and it is unclear when he will be released.[158]

10.78 The Law Council of Australia, in its submission to this Inquiry noted that 'defendants, once found to lack legal capacity and consigned to a "mental health facility"... have little prospect of demonstrating a change in capacity and effectively remain in custody for an indeterminate period'.[159]

10.79 The criminal justice system is not the appropriate pathway for the ongoing management of people with mental illness or cognitive impairment. As stated in the ALRC's *Equality Capacity and Disability in Commonwealth Laws* Report: 'if [the person is] a threat to themselves or the public at [the time their set period of detention ends], they should be the responsibility of mental health authorities, not the criminal justice system'.[160] The ALRC notes that states and territories also have in place disability or guardianship legislation that permits detention of persons with a cognitive impairment who present a risk to themselves or others.[161]

Regular periodic reviews

10.80 As a matter of broad principle, the ALRC considers that, within the constraints of the fixed term model discussed above, it is important to facilitate the recovery and gradual reintegration of persons held under custodial supervision orders, and that the term of a custodial supervision order should be 'the maximum period that forensic patients spend in prison'.[162] The provision of trauma-informed, culturally appropriate services to assist a person while in custody is a crucial step in this process. The ALRC considers that the provision of such services should be supplemented by a regular periodic review while the person is in detention. The purpose of such a review would be to determine both whether the person should be released prior to the expiry of the fixed term, and to monitor and evaluate the services that are made available while the person is under the order.

158 Ibid.
159 Law Council of Australia, *Submission 108*.
160 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) [7.91].
161 See discussion in Senate Standing Committees on Community Affairs, Parliament of Australia, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) [8.3]–[8.27].
162 Ibid [3.99].

Judicial discretion—non-custodial supervision orders

10.81 Stakeholders to this Inquiry submitted that the criminal justice system should adopt a health-based, therapeutic approach to the treatment of persons found unfit to stand trial.[163] In all jurisdictions except WA, the court has the power to make conditional non-custodial orders with regard to a person found unfit to stand trial. In WA, where a person is found unfit to stand trial, the court has two options: a custodial supervision order or unconditional release. It cannot make a conditional non-custodial supervision order. A case study provided by Legal Aid WA demonstrates how the lack of judicial discretion can perpetuate a cycle of contact with the criminal justice system:

> A young Aboriginal man from a remote East Kimberley community, suffers Foetal Alcohol Spectrum Disorder, and as a result is severely impaired in his cognitive functioning. Since about the age of 13, he has been repeatedly arrested and charged by Police for committing stealing and burglary offences, always in company with other young people, who are less impaired than him or cognitively able. These offences have never been at the high end of the scale in terms of seriousness. Although his participation in this type offending has seemed to increase as he has grown older, he remains as suggestible and vulnerable to peer direction as he has always been.... [He is repeatedly] found unfit to stand trial, and his matters continue to be dismissed, followed by his unconditional release.... There are no social supports available for him because he cannot be subject to youth corrections orders.[164]

10.82 The ALRC considers that courts should be given the power to impose a range of orders—including non-custodial supervision orders—a view supported by stakeholders.[165] Legal Aid WA, in the same case study, demonstrated that such a holistic approach could reduce the likelihood that a person with cognitive impairment and complex needs comes into contact with the criminal justice system again:

> Recently, in finalising the last set of charges against him, the young man's defence counsel and a proactive youth justice officer, worked with the family to explore other options. They supported a referral to a social and emotional wellbeing program run by the local Aboriginal health service. This is a one on one mentor program that is very flexible to adapt to an individual's needs, and may assist the young man to be proactively engaged in his community and family life, without becoming caught up in antisocial behaviour. This option was not and could not be provided by the criminal justice system—it is a health system program, which may well prevent further involvement in the criminal justice system for a young person with complex mental health needs.... [This case] highlights the need for a more flexible and medically supportive judicial approach to managing FASD sufferers within the structures of the court system.[166]

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163 See, eg, North Australian Aboriginal Justice Agency, *Submission 113*; National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Jesuit Social Services, *Submission 100*; Legal Aid WA, *Submission 33*.

164 Legal Aid WA, *Submission 33*.

165 National Aboriginal and Torres Strait Islander Legal Services, *Submission 109*; Jesuit Social Services, *Submission 100*; Aboriginal Legal Service of Western Australia, *Submission 74*; Legal Aid WA, *Submission 33*.

166 Legal Aid WA, *Submission 33*.

10.83 In the above case study, a court with the flexibility to order non-custodial supervision orders would have the power to require the young man attend the mentor program, and could require the program to report to the court on its efficacy.

10.84 A holistic, therapeutic approach should be applied both to non-custodial supervision orders and the custodial orders discussed in the previous section. This approach should extend to the services and assistance available to a person while under a custodial supervision order, and following their release. The principles discussed elsewhere in this Report about the need for flexible, culturally appropriate, trauma-informed approaches should underpin the development of such services.