

Independent Review into the Over-Representation of  
First Nations People in the ACT Criminal Justice System

**FIRST REPORT – EXECUTIVE SUMMARY**

ACT GOVERNMENT RESPONSE TO THE AUSTRALIAN LAW REFORM COMMISSION'S  
*PATHWAYS TO JUSTICE REPORT* RECOMMENDATIONS

Indigenous Law and Justice Hub, Jumbunna Research

August 2024

**OVERVIEW**

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The First Report covers the First Stage of the Jumbunna Institute for Indigenous Education and Research (Jumbunna Research) *Independent Review into the Over-Representation of First Nations People in the ACT Criminal Justice System* (the Review), commissioned by the ACT Government.

The report assesses the ACT Governments' progress in implementing the 35 recommendations of the Australian Law Reform Commission's (ALRC) Report 133, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017) to determine if and to what extent the recommendations have been implemented.

The purpose of the ALRC Inquiry was to inquire into the over-representation of Aboriginal and Torres Strait Islander people in prison and develop recommendations for reform of laws and legal frameworks to reduce their disproportionate incarceration.

The ALRC Inquiry focussed on the disproportionate incarceration of Aboriginal and Torres Strait Islander *adults*, and there was no particular focus on youth justice issues. However, in the course of this Review we have commented on youth justice matters where stakeholders have raised particular issues of relevance, and in line with the Terms of Reference.

There was no comprehensive government response to the ALRC report, and our Review is in the form of a stocktake of the ACT Government in satisfying the intent of the recommendations (as described by the ALRC), irrespective of whether the actions undertaken occurred prior to or after the release of the ALRC report (2017). Our assessment was made on the basis of information derived from the following sources:

- ACT Government responses to the recommendations and follow-up comments on the draft First Report which have been supplied to the evaluation team.
- Qualitative data from 13 stakeholder interviews (10) and written submissions (3) on implementation, and impacts and barriers to implementation. Stakeholders included both First Nations and non-Indigenous community-based organisations/legal service providers)
- Criminal justice system data where available to assess any changes which have occurred over the period 2017-2023.

**Part 1** of the Report outlines the approach taken by the evaluation team for reviewing and assessing ACT Government implementation of the ALRC Recommendations. **Part 2** is a contextual overview of ACT Government policy and data relevant to the implementation of the ALRC Recommendations. **Part 3** covers broader issues that have been identified in our research as barriers or limitations to implementation of the ALRC Recommendations. **Part 4** is an in-depth discussion of each of the ALRC Recommendations. It presents the government response to each recommendation as well as analysis of the information provided through the stakeholder interviews.

## PROGRESS ON REDUCING OVER-REPRESENTATION

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We note that there has been important progress to date, although not in reducing over-representation. The imprisonment rate for Aboriginal and Torres Strait Islander people in the ACT was approximately **5% lower** in 2023 than it was in 2017, and this occurred while at the same time the national rate of Indigenous imprisonment **increased** by 10%. **The level of Aboriginal and Torres Strait Islander over-representation in the ACT has grown significantly by 27% since 2017** and is much higher than the national average. This outcome is partly explained by the comparatively lower level of non-Indigenous imprisonment in the ACT and the fact that, while the First Nations imprisonment rate fell by 5% between 2017 and 2023, the non-Indigenous rate of imprisonment in the ACT fell far more quickly by 31% over the same time period. **There has been little change since 2017 in prior imprisonment with nearly nine in every ten First Nations men in prison in the ACT having been previously imprisoned.** The percentage of Aboriginal and Torres Strait Islander people on remand in the ACT in 2023 was 49%. This was higher than the national average for First Nations people on remand which was 41%.

There has also been the introduction of innovative and specifically First Nations' programs including Ngurrambai Bail Support, Front Up, Galambany Court and Empowerment Yarning Circles, although as we discuss in the Report, these are hampered by lack of sufficient support and much still needs to be done.

While the ACT government has satisfied the intent the of many of the ALRC Recommendations, there were multiple barriers and limitations to effective implementation which were identified by stakeholders. These included in particular the perceived lack of coordination and accountability, ongoing issues of racism including systemic racism, the absence of data which both inhibited more targeted implementation of programs and the ability to hold government accountable.

Aboriginal and Torres Strait Islander participation in all stages of implementation of measures designed to reduce over-representation was identified by stakeholders as a broader issue needing attention. The limited funding available to Aboriginal and Torres Strait Islander services was also raised as a barrier.

Several stakeholders also pointed out that many of the programs relied upon in the ACT Government response to the implementation of the ALRC Recommendations pre-date the 2017 ALRC report. While we have not taken this into account in determining whether an ALRC Recommendation has been implemented or not, it is relevant to the point of whether the reform agenda to reduce over-representation has stalled in recent years and needs reinvigoration.

### The ALRC Recommendations

Although there were 35 Recommendations in the ALRC, there are two separate parts to Recommendations 5-2 and 9-2). As a result, there were in fact 37 individual recommendations assessed in this report. The results are summarised as follows:

|   |   |  |                                       |
|---|---|--|---------------------------------------|
| <b>Implemented</b><br><b>14</b><br>(5 with caveats) | <b>Partially Implemented</b><br><b>13</b><br>(1 with caveats) | <b>Not Implemented</b><br><b>8</b><br>(3 with caveats) | <b>No Longer Relevant</b><br><b>2</b> |
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| Recommendations (R) |  | Status                         | Caveats, cautions and notes on effectiveness   |
|---------------------|--|--------------------------------|--|
| 4-1                 | National justice reinvestment body                               | Implemented (with a caveat)    | <ul style="list-style-type: none"> <li>• Pending whether final design of the national justice reinvestment body aligns with R4-1.</li> </ul>   |
| 4-2                 | Justice reinvestment trials                                      | Implemented (with caveats)     | <ul style="list-style-type: none"> <li>• Further investment is needed for community-based responses to drivers of justice system contact.</li> <li>• Not clear how First Nations peoples are influencing policy changes in and outside of a criminal justice system context.</li> <li>• The Executive Coordination Group appears government-led and largely consists of government representatives.</li> <li>• There is a need for stronger focus on community-led or community-based approaches.</li> </ul>   |
| 5-1                 | Bail provisions and Aboriginal and Torres Strait Islander status | Not Implemented (with caveats) | <ul style="list-style-type: none"> <li>• The ACT Government is taking steps towards the <i>possible</i> implementation of R5-1 through the current ACT Law and Sentencing Advisory Council review.</li> </ul>  |
| 5-2*                | Guidelines – bail provisions                                     | Not implemented (with caveats) | <ul style="list-style-type: none"> <li>• There are currently no guidelines in place to support implementation of the above standalone bail provisions.</li> <li>• The Law and Sentencing Advisory Council review of bail provisions (as above) may address issues related to effective use of any provisions.</li> </ul>   |
| 5-2*                | Bail support and diversion options                               | Partially implemented          | <ul style="list-style-type: none"> <li>• Unclear whether there has been sufficient <i>identification with Aboriginal and Torres Strait Islander organisation participation</i> of gaps in bail support/diversion followed by appropriate responses to these gaps in alignment with R5-2.</li> <li>• Ngurrambai Bail Support program is only available for adults and more Aboriginal and Torres Strait Islander specific community-based and led programs through which young people in particular could be supervised are needed.</li> <li>• Lack of available supports in community further hindering the effectiveness of the bail program, including gaps in mental health and drug/alcohol services and housing.</li> <li>• Lack of solutions for First Nations people who come to the ACT from interstate and who are arrested and refused bail due in part to issues of reporting.</li> </ul> |

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|     |   |                            | <ul style="list-style-type: none"> <li>Lack of availability of data on remanded/sentenced Aboriginal and Torres Strait Islander people and for which offences (for mapping gaps).</li> </ul>   |
| 6-1 | Legislated sentencing provisions and Aboriginal and Torres Strait Islander status | Not implemented            | <ul style="list-style-type: none"> <li>There has been no amendment to legislation in the ACT to require courts to take into account unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples.</li> </ul>   |
| 6-2 | Experience Reports – superior courts  | Implemented (with caveats) | <ul style="list-style-type: none"> <li>The Aboriginal Court Experience Report are currently operating as a pilot scheme.</li> <li>Issues impacting effectiveness include: <ul style="list-style-type: none"> <li>Potential reluctance of key players (including the DPP/courts) to draw links between offending and the historical and ongoing impacts of colonisation, and the tempering down of factors unique to Aboriginal people.</li> <li>Reports are not available for certain offences and are administratively burdensome.</li> </ul> </li> </ul> |
| 6-3 | Factors – summary courts  | Partially implemented      | <ul style="list-style-type: none"> <li>As above.</li> <li>Further, the pilot is limited to Galambany Circle Sentencing List operating in the Supreme Court, where background factors <i>may</i> be considered through s 33(1)(m) of the <i>Crimes (Sentencing) Act 2005</i>.</li> <li>Information was not provided relating to options for the use of Experience Reports in the courts of summary jurisdiction.</li> </ul>   |
| 7-1 | Community-based options   | Partially implemented      | <ul style="list-style-type: none"> <li>The only specific option identified is the Empowering Yarning Circles, run by Yeddung Mura in and outside of AMC.</li> <li>There is no specific evidence that it addresses offenders with complex needs, including disability and mental illness.</li> <li>Significant difference in the use of and access to community-based sentencing options compared to imprisonment (see Report Section 2.2.4).</li> </ul>  |
| 7-2 | Flexibility of community-based options  | Implemented                | <ul style="list-style-type: none"> <li>The effectiveness of current mechanisms requires further consideration.</li> <li>There is virtually no difference between 2017 and 2023 in the proportion of First Nations men who have been previously imprisoned (89% in 2017</li> </ul>  |

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|     |                                       |                             | <p>compared to 88% in 2023) (see Part 2 of this Report).</p> <ul style="list-style-type: none"> <li>• Recommendations for sentencing made to the court frequently include conditions that lack flexibility in number and nature, potentially impeding effectiveness of mechanisms in place.</li> <li>• There are also subtle differences when compared to Victoria scheme. For example, in Victoria an Adjourned Undertaking and a Community Corrections Order can also include a justice plan for offenders with intellectual disability.</li> </ul>  |
| 7-3 | Completion of community-based options | Partially implemented       | <ul style="list-style-type: none"> <li>• Gaps in programs/supports related to geography and cohort require further consideration to increase completion rates, including: <ul style="list-style-type: none"> <li>○ Over-reliance on Yeddung Mura and a lack of ancillary community-based supports addressing drivers of recidivism.</li> <li>○ Absence of traffic offender programs.</li> <li>○ Significant portion of people from interstate, as well as those residing in Jervis Bay, who are unable to access community service orders in the ACT. (Difficulties accessing this data is also noted).</li> </ul> </li> </ul> |
| 7-4 | Suspended sentences                   | Implemented                 | <ul style="list-style-type: none"> <li>• ACT Government identifies having no intention to abolish suspended sentences.</li> </ul>  |
| 7-5 | Short sentences                       | Implemented                 | <ul style="list-style-type: none"> <li>• ACT Government identifies having no intention to abolish short sentences.</li> </ul>  |
| 8-1 | Mandatory sentencing                  | Implemented (with a caveat) | <ul style="list-style-type: none"> <li>• Recent legislative changes that would allow the DPP to make sentencing submissions to the court (s. 34AA) may lead to what are effectively presumptive terms of imprisonment.</li> <li>• Impacts of ‘tough on crime’ approaches for certain offences (e.g. driving offences, DV/FV) may influence the potential for introducing mandatory minimum.</li> </ul>   |
| 9-1 | Prison programs                       | Partially implemented       | <ul style="list-style-type: none"> <li>• Existing programs/services are predominantly mainstream.</li> <li>• Lack of Aboriginal and Torres Strait Islander designed and led programs/services</li> <li>• Capacity/resourcing issues for existing programs/services (e.g. reliance on Yeddung Mura to provide both pre- and post-release support;</li> </ul>  |

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|      |                      |                                      | <p>limited access to housing programs and other supports).</p> <ul style="list-style-type: none"> <li>• Gaps in specific programs/services for focus cohorts of Aboriginal and Torres Strait Islander women, young people, those on short sentences and/or remand.</li> <li>• Lack of medium-long term funding for cohort focused programs/services.</li> <li>• Extent to which Throughcare and TAP are working with focus cohorts of women, those on short sentences and/or remand is not clear.</li> </ul>  |
| 9-2* | Court-ordered parole | Not implemented                      | <ul style="list-style-type: none"> <li>• Parole decisions are currently made by the Sentence Administration Board.</li> </ul>   |
| 9-2* | Street time          | Implemented (with caveats)           | <ul style="list-style-type: none"> <li>• The Sentencing (Parole Time Credit) Legislation Amendment Bill (2019) (ACT) gives certain offenders credit for time served for period complying with parole obligations and is noted. Methods of calculation are identified as in line with those used in other jurisdictions. However, in reality/practice calculations are complex. Automatic court-ordered parole (R 9-1) or easier processes related to street time would be preferable to the above legislative amendment.</li> <li>• Issues related to eligibility, complicated legal processes and discretionary decision-making to be addressed.</li> <li>• Push for avoiding release on bail/parole in current political, media and public discourse is a risk factor for implementation.</li> <li>• Information was not provided regarding the extent of First Nations peoples' access to the scheme (e.g. number of applications submitted/considered/successful).</li> </ul> |
| 10-1 | Interpreters         | Partially implemented (with caveats) | <ul style="list-style-type: none"> <li>• Limited to DV/FV matters (through Safer Families initiative – Enhancing Access to Justice for Non-English Speakers).</li> <li>• Can be difficult to ascertain who is responsible for organising/paying for interpreter services.</li> </ul>  |
| 10-2 | Specialist courts    | Implemented                          | <ul style="list-style-type: none"> <li>• Circle sentencing available in children and magistrates courts; in the Supreme Court currently as a pilot (from March 2024).</li> <li>• A guilty plea is a common requirement for specialist courts in Australia. However, concerns</li> </ul>   |

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|      |                                    |                       | <p>that informal inducements can lead to a guilty plea and the requirement of acceptance of individual responsibility can be dealt with ways that do not require a guilty plea (e.g. the Aotearoa New Zealand model for restorative justice referral).</p> <ul style="list-style-type: none"> <li>• Some concerns that there is not sufficient Aboriginal and Torres Strait Islander community buy-in.</li> </ul>  |
| 10-3 | Aboriginal participation in courts | Partially implemented | <ul style="list-style-type: none"> <li>• Some engagement of Aboriginal and Torres Strait Islander organisations in design and evaluation, but more notably in implementation.</li> <li>• Room for improvement in engagement around ongoing design, development and evaluation.</li> </ul>  |
| 10-4 | Unfit to stand trial               | Implemented           | <ul style="list-style-type: none"> <li>• Potential issues around implementation, e.g. courts are seen by some as responding to community concerns related to culpability and bypassing the <i>Mental Health Act</i>; courts less frequently ordering forensic mental health reports as a matter of course when fitness is raised by defence, with pushback on lawyers to obtain reports.</li> </ul>  |
| 10-5 | Periodic review                    | Implemented           | <ul style="list-style-type: none"> <li>• s. 180 of the <i>Crimes Act</i> was recently the subject of a Review by the Chief Psychiatrist. The Government has announced an ACT Government taskforce to consider and respond to the Chief Psychiatrist's Report.</li> </ul>   |
| 11-1 | Programs/ services for women       | Partially implemented | <ul style="list-style-type: none"> <li>• Significant gaps remain, including no prison specifically for Aboriginal and Torres Strait Islander women and no Aboriginal and Torres Strait Islander women's shelter, as well as capacity issues for meeting community needs.</li> <li>• Further programs/services are required for Aboriginal and Torres Strait Islander women, both on remand and sentenced, that are culturally safe, trauma informed and designed to meet their needs (e.g. childcare arrangements, debt, DV/FV).</li> <li>• Information was not provided regarding First Nations female staffing of most programs identified. However, Mulleun Mura identifies its female staff as First Nations and Winnunga and Yeddung Mura are both ACCOs.</li> <li>• It is also not clear to what extent Aboriginal and Torres Strait Islander women have been involved in the development of these programs or the extent</li> </ul> |

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|      |                                       |                       | <p>of their engagement with most of them (except where self-evident e.g. Mulleun Mura).</p> <ul style="list-style-type: none"> <li>It is also noted that usage data for services shown in Appendix 3 is limited in the identification of whether clients are male or female (with the exception of Ngurrumbai and Front Up).</li> </ul>  |
| 11-2 | Police and DV/FV                      | Partially implemented | <ul style="list-style-type: none"> <li>Unclear how the Mandatory First Nations Cultural Literacy Training Program relates to policing DV/FV specifically.</li> <li>FV Unit's training package does not include Aboriginal and Torres Strait Islander specific. However, this is currently under review.</li> <li>The ACT Police acknowledge issues associated with the risk of misidentification of primary aggressor.</li> </ul>  |
| 12-1 | Abolish imprisonment for unpaid fines | Not implemented       | <ul style="list-style-type: none"> <li>Referral for prosecution is discretionary and it is not clear whether imprisonment might arise as a sentence resulting from prosecution.</li> <li>Further data is needed that clearly demonstrates that the focus is on community service not incarceration. The majority of infringement notices are issued for parking and traffic offences, followed by failure to vote. However, infringement notices also can be issued for some public order offences (e.g. being intoxicated in public places and public disorder). These are typically the offences where Aboriginal and Torres Strait Islander people are over-represented. There was no data available on the use of infringement notices for these latter offences.</li> </ul> |
| 12-2 | Reducing impacts of fines/notices     | Partially implemented | <ul style="list-style-type: none"> <li>Initiatives identified either have no focus on Aboriginal and Torres Strait Islander people and/or there is no data available on their application to this group (e.g. Work Development Orders are identified as very valuable by stakeholders, but it is not clear how many Aboriginal and Torres Strait Islander people are making use of and completing these orders).</li> <li>The 2023 Legislative Assembly Inquiry (Penalties and Minor Offences and Vulnerable People) includes some focus on Aboriginal and Torres Strait Islander people and issues and may lead to relevant reform. However, the extent to which Aboriginal and Torres Strait Islander people are</li> </ul>  |



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|      |   |                                 | involved in developing relevant initiatives is unclear.  |
| 12-3 | Driver licensing services                             | Partially implemented           | <ul style="list-style-type: none"> <li>• The ACT Government points to the Nations Justice Branch-led Commissioning process: At this point, it is not clear whether and how this process will ultimately support implementation of this recommendation.</li> <li>• Road Safety Action Plan: Information was not provided regarding road fatalities specific to Aboriginal and Torres Strait Islander people. (However, commitment to do so is noted).</li> <li>• Access Canberra: <ul style="list-style-type: none"> <li>○ Aboriginal and Torres Strait Islander data related to driver licensing, vehicle safety or proof of ID cards is not collected.</li> <li>○ There are no policies and procedures specific to providing services relating to the licensing of a driver specific to Aboriginal or Torres Strait Islander people.</li> </ul> </li> </ul> |
| 12-4 | Offensive language provisions                         | Not implemented                 | <ul style="list-style-type: none"> <li>• s. 392 of the <i>Crimes Act</i> provides an offence for ‘offensive behaviour’ that prohibits behaving in a riotous, indecent, offensive or insulting manner. The issue of whether this offence could be narrowed to align more closely with R12-4 is not under active consideration.</li> </ul>   |
| 13-1 | Alcohol initiatives (First Nations developed and led) | Implemented                     | <ul style="list-style-type: none"> <li>• Implemented through co-design of the Aboriginal and Torres Strait Islander specific residential rehabilitation service and detainee health and wellbeing strategy, the funding of Winnunga health services (where related to AOD) and the Aboriginal and Torres Strait Islander designated position on the Liquor Advisory Board (currently unfilled). However, not as whole-of-community approaches, as is effectively the focus of R13-1.</li> <li>• The importance of having an ACT-based Indigenous-specific rehabilitation facility (currently only available interstate), and clearer access or pathways to interstate rehabilitation facilities would be beneficial.</li> </ul>  |
| 13-2 | Government support for alcohol management             | Not implemented (with a caveat) | <ul style="list-style-type: none"> <li>• It could be considered R13-2 is not particularly relevant to the ACT as there are no specific arrangements which restrict the sale of alcohol to First Nations people or communities in the ACT.</li> </ul>   |

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|      |                                      |                             | <ul style="list-style-type: none"> <li>• R13-2 is aimed more at local communities developing alcohol management plans rather than the distinct situation of the ACT as a whole territory (jurisdiction).</li> </ul>  |
| 14-1 | Review police practice/<br>procedure | Partially implemented       | <ul style="list-style-type: none"> <li>• It is noted that ACT Policing have engaged and/or conducted reviews of practice and procedure and at least some of the Commonwealth/ACT Ombudsman recommendations (e.g. with respect to training, engagement) have been implemented.</li> <li>• Stronger mechanisms to enforce accountability for racism and racial profiling are required, as is mechanisms increased use of cautions/diversions.</li> </ul>   |
| 14-2 | Review police complaints process     | Not implemented             | <ul style="list-style-type: none"> <li>• Although there is reference to internal reviews and the establishment of Workplace Issues and Complaint Resolution (WICR) team within the AFP, without further detail it is not possible to identify what the stated reforms to the complaint management process mean or what has been done to implement internal and Ombudsman recommendations so as to <i>ensure greater practical independence, accountability and transparency of investigations</i> as required by 14-2.</li> <li>• The extent to which legislative protections against discrimination or breaches of human or cultural rights are utilised to positive effect by Aboriginal and Torres Strait Islander people is not clear.</li> <li>• Police complaint processes were identified as torturous, lengthy and difficult without satisfactory outcomes.</li> </ul> |
| 14-3 | Custody Notification Service         | Implemented (with a caveat) | <ul style="list-style-type: none"> <li>• Information was not provided indicating the number of Aboriginal and Torres Strait Islander people in custody, compared with the number of notifications made.</li> </ul>   |
| 14-4 | Cultural change                      | Partially implemented       | <ul style="list-style-type: none"> <li>• Partially implemented by the AFP RAP and responses to the Ombudsman investigation recommendations (including the development of the ACT Policing Strategy for Engagement with First Nations People and Communities and training). Police are also making attempts to increase Aboriginal and Torres Strait Islander employment. The creation of a First Nations Branch within ACT Policing is positive.</li> </ul>  |

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|      |                                     |                    | <ul style="list-style-type: none"> <li>• It was acknowledged by government that ACT Policing’s record keeping practices need to be improved for First Nations Peoples.</li> <li>• An engagement and consultation strategy with the Aboriginal and Torres Strait Islander community is under development.</li> </ul>  |
| 15-1 | National inquiry – child protection | No relevant        | <ul style="list-style-type: none"> <li>• Recommendation 15-1 is not relevant to the ACT as it is directed to the Commonwealth Government to establish a national inquiry.</li> <li>• Implementation of Our Booris Our Way recommendations is progressing. However, numbers of children in placements have not reduced and heavier investment is required. We note in the Report further areas for improvement within the ACT.</li> </ul> |
| 16-1 | Justice targets                     | No longer relevant | <ul style="list-style-type: none"> <li>• The <i>National Agreement on Closing the Gap</i> sets targets including those relevant to Recommendation 16-1.</li> </ul>   |
| 16-2 | Justice agreement                   | Implemented        | <ul style="list-style-type: none"> <li>• Potential issues/areas for improvement were raised, including: <ul style="list-style-type: none"> <li>○ Lack of community understanding/ engagement with the Agreement.</li> <li>○ Importance of a robust Agreement that can hold government agencies to account.</li> </ul> </li> </ul>  |

\* ALRC Recommendation where there were two parts to the Recommendation.