

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

FIRST REPORT – COMMUNITY GUIDE

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

Indigenous Law and Justice Hub, Jumbunna Research

August 2024

ABOUT THE REVIEW

The Jumbunna Institute for Indigenous Education and Research (**Jumbunna**) has been commissioned by the ACT Government to undertake an *Independent Review into the Over-Representation of First Nations People in the ACT Criminal Justice System*.

Jumbunna has completed the **first stage** of this Review, assessing ACT Government progress in implementing the 35 recommendations in the Australian Law Reform Commission's (ALRC) *Pathways to Justice* Report aimed at addressing over-representation of Aboriginal and Torres Strait Islander people.¹ Our findings are set out in a First Report, a summary of which is provided in this Community Guide. The full report and executive summary are available for download [here](#).

Jumbunna will host an online information Webinar event on **18 September** 2024. [Register here](#) if you want to hear more about the project, what's in the report and how you can have your say in the Review.

The **second stage** of the Review will identify strategies and approaches prioritised by Aboriginal and Torres Strait Islander people in the ACT as likely to reduce overrepresentation in the justice system. This will be undertaken in consultation with Aboriginal and Torres Strait Islander community members and organisations, and non-Aboriginal organisations with First Nations programs and staff. Input will also be provided from ACT Government stakeholders through interviews.

A **Final Report** will be published in early 2025.

¹ Australian Law Reform Commission (2017) *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* <<https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/>>.

SECOND STAGE COMMUNITY CONSULTATIONS

We invite your input during **Stage 2**, when we will be looking at questions such as:

- What key factors are driving Aboriginal and Torres Strait Islander over-representation in the ACT? How can these best be addressed?
- Do you have any comments on why imprisonment rates in the ACT are falling for non-Indigenous people, but not for Aboriginal and Torres Strait Islander people?
- What's working well at the moment to prevent or limit Aboriginal and Torres Strait Islander contact with the criminal justice system and/or prevent recontact and re-offending? How can this be built on or strengthened?
- What are the main gaps in service provisions and programs?
- What new initiatives or innovations are likely to contribute to reducing over-representation and how might they be progressed?
- What specific law and policy reforms are needed to address over-representation, including around child protection, women and youth justice, policing, courts, prisons, post release support?
- Are there any other comments that you would like to make?

Ways to participate:

Stakeholder Interviews

- **WHO:** Aboriginal and Torres Strait Islander organisations and non-Aboriginal organisations with First Nations programs and staff.
- **WHEN:** 15-18 October and 22-24 October 2024
- **WHERE:** Stakeholder Workshops will be held in person in Canberra (location TBC), or online (at a date TBC with participants). One-on-one interviews, in person or online, can be arranged on request.

Community Dialogues

- **WHO:** Aboriginal and Torres Strait Islander community members
- **WHEN:** 15-18 October and 22-24 October 2024
- **WHERE:** Community Dialogues will be held in person in Canberra (location TBC), or online (at a date TBC with participants). One-on-one interviews, in person or online, can be arranged on request.

Community members will be paid for their participation.

AMC and Bimberi Interviews

- **WHO:** Aboriginal and Torres Strait Islander young people and adults currently incarcerated in the AMC and Bimberi
- **WHEN:** 15-18 October 2024

- **WHERE:** AMC and Bimberi Interviews will be held in person in Canberra

Written Submissions

- **WHO:** Written Submissions are open to anyone
- **WHEN:** From 9 September, closing 15 November 2024
- **WHERE:** Submission can be emailed to ACTReview@uts.edu.au

If you or your organisation are interested in participating, or if you have any questions, please contact Jumbunna Research at ACTReview@uts.edu.au

SUMMARY: FIRST REPORT FINDINGS

Key findings of independent review of over-representation in the ACT

Criminal justice system data²

Imprisonment:

- Despite having the lowest general imprisonment rate in Australia overall, the ACT has the greatest level of over-representation in Australia.
- Aboriginal and Torres Strait Islander people make up **2.1%** of the ACT population yet comprise **27.2%** of the ACT prison population.
- While Aboriginal and Torres Strait Islander imprisonment fell by about **5%** in the ACT from 2017-2023, non-Indigenous imprisonment fell far more quickly by **31%** during the same period.
- Since 2017, Aboriginal and Torres Strait Islander over-representation in the ACT has grown significantly by **27%**. This is much higher than the national average.

Prior imprisonment:

- Since 2017, there has been little change in prior imprisonment rates for Aboriginal and Torres Strait Islander men in the ACT.
- In 2023, almost **9 out of 10** First Nations men in prison have previously been imprisoned.

Sentenced and remand:

- Aboriginal and Torres Strait Islander people make up **49%** of all people on remand in the ACT.
- This is higher than the non-Indigenous rate of **44%** in the ACT, and the national average of **41%**.

Community-based sentencing:

- In the ACT, Aboriginal and Torres Strait Islander over-representation in prison is **double** the rate of over-representation for community corrections.
- The significantly higher rates of over-representation in prison compared to community corrections suggests a **significant difference in the use of and access to community-based sentencing options compared to prison** for Aboriginal and Torres Strait Islander people. The reasons for this will be explored further in Stage 2.

First Nations programs and services

Some innovative and effective First Nations specific programs have been introduced, including **Ngurrambai Bail Support, Front Up, Galambany Court and Empowerment Yarning Circles**. These programs however need further support and more programs and services of this type are required.

Key gaps include wrap around programs and services specifically for Aboriginal and Torres Strait Islander **women, children and young people, and those on short sentences and remand**. Good programs were also seen as coming and going, disappearing when they are de-funded or when government priorities shift.

Community-based early intervention/prevention approaches were identified as essential to addressing over-representation and its drivers. For example, a lack of available **housing** and gaps in **mental health and drug/alcohol services** were identified as hindering the effectiveness of bail support programs.

² For detailed criminal justice system data, see the full report at Section 2.2 and Appendix 4.

Barriers and limitations

While the ACT government has satisfied the intent the of many of the ALRC Recommendations, there were multiple barriers and limitations to full and effective implementation. These include a perceived lack of **coordination and accountability**, ongoing issues of **racism including systemic racism**, and the **absence of data** which inhibited more targeted implementation of programs and the ability to hold government accountable.

Aboriginal and Torres Strait Islander participation and leadership in all stages of implementation, including monitoring and evaluation, of measures designed to reduce over-representation needs to be increased, alongside proper **funding and resourcing for Aboriginal and Torres Strait Islander community-controlled** programs and services.

Many of the programs identified in the ACT Government response as implementation of the ALRC Recommendations pre-date the 2017 ALRC report. This suggests that the ACT’s reform agenda to reduce over-representation has stalled in recent years and needs reinvigoration.

The ALRC Recommendations

There has been no direct response by the ACT Government to the ALRC report or commitment to implement its recommendations. The ACT Government provided information to enable completion of a stocktake of whether ALRC Recommendations have been implemented, and to what extent implementation has impacted on Aboriginal and Torres Strait Islander over-representation.

We have used this information and input from non-government stakeholders in assessing the extent of implementation for each the ALRC Recommendations. We have also used criminal justice system data, where available, to assess any changes which have occurred over the period 2017-2023. The below is a summary of the results of our assessment of the ACT Governments’ progress. For more detailed responses to each recommendation, see the full report at Section 4.

Implementation coding

Implemented 14 (5 with caveats)	Partially Implemented 13 (1 with caveats)	Not Implemented 8 (3 with caveats)	No Longer Relevant 2
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Assessment summary

Recommendations (R)		Status	Caveats, cautions and notes on effectiveness
4-1	National justice reinvestment (JR) body	Implemented (with caveats)	<ul style="list-style-type: none"> Pending whether final design of the national justice reinvestment body aligns with R4-1.
4-2	JR trials	Implemented (with caveats)	<ul style="list-style-type: none"> Further investment is needed into community-based and led responses in and out of the justice system (including responses to drivers of justice system contact). Not clear how First Nations peoples are influencing JR related policy. E.g., Executive Coordination Group (JR) appears government-led and largely consists of government representatives.

5-1	Bail provisions and Aboriginal and Torres Strait Islander status	Not Implemented (with caveats)	<ul style="list-style-type: none"> Possible implementation through the current ACT Law and Sentencing Advisory Council review.
5-2	Guidelines – bail provisions	Not Implemented (with caveats)	<ul style="list-style-type: none"> No guidelines are currently in place to support implementation of bail provisions identified in R5-1.
5-2	Bail support and diversion options	Partially Implemented	<ul style="list-style-type: none"> Unclear if there has been sufficient participation of Aboriginal and Torres Strait Islander organisations in identifying gaps in bail support/diversion. Key gaps include: Ngurrambai Bail Support program is for adults only; lack of available supports in community, including gaps in mental health and drug/alcohol services and housing; lack of solutions for First Nations people who come to the ACT from interstate, are arrested and refused bail due in part to issues of reporting. No available data on Aboriginal and Torres Strait Islander people on remanded/sentenced and for which offences (for mapping gaps).
6-1	Legislated sentencing provisions and Aboriginal and Torres Strait Islander status	Not Implemented	<ul style="list-style-type: none"> No amendment made to legislation in the ACT requiring courts to take into account unique factors affecting Aboriginal and Torres Strait Islander peoples in sentencing.
6-2	Experience Reports – superior courts	Implemented (with caveats)	<ul style="list-style-type: none"> The Aboriginal Court Experience Reports are currently a pilot scheme. Issues include potential reluctance of justice reps (including DPP/courts) to engage with reports, reports only available for certain offences and being administratively burdensome.
6-3	Factors – summary courts	Partially Implemented	<ul style="list-style-type: none"> No information on options for use of Experience Reports in courts of summary jurisdiction.
7-1	Community-based options	Partially Implemented	<ul style="list-style-type: none"> No specific evidence provided that Empowering Yarning Circles address offenders with complex needs (incl. disability, mental illness). Factors contributing to significantly higher rates of over-representation in prison compared to community corrections are required to be explored and addressed.
7-2	Flexibility of community-based options	Implemented	<ul style="list-style-type: none"> Conditions considered by courts may lack flexibility, potentially impeding effectiveness of available options (based on the lack of progress in reducing recidivism rates).
7-3	Completion of community-based options	Partially Implemented	<ul style="list-style-type: none"> Further consideration is required to identify and address gaps in programs/supports likely to increase completion rates (e.g. traffic offender programs, access to community service orders for people from interstate incl. Jervis Bay, additional community-based supports addressing drivers of recidivism).

7-4	Suspended sentences	Implemented	<ul style="list-style-type: none"> ACT Government has no intention of abolishing suspended sentences.
7-5	Short sentences	Implemented	<ul style="list-style-type: none"> ACT Government has no intention of abolishing short sentences.
8-1	Mandatory sentencing	Implemented (with caveats)	<ul style="list-style-type: none"> Recent legislative changes may lead to what are effectively presumptive terms of imprisonment. 'Tough on crime' approaches for certain offences (e.g. driving offences, DV/FV) may have potential to introduce mandatory minimum sentences
9-1	Prison programs	Partially Implemented	<ul style="list-style-type: none"> Proper resourcing and supports are needed for both new and existing First Nations designed and led prison programs/services. Gaps in prison programs/services for Aboriginal and Torres Strait Islander women, young people, people on short sentences and remand need to be addressed.
9-2	Court-ordered parole	Not Implemented	<ul style="list-style-type: none"> Parole decisions are currently made by the Sentence Administration Board, not courts.
9-2	Street time	Implemented (with caveats)	<ul style="list-style-type: none"> Less complex processes related to street time (credit for time served) are required.
10-1	Interpreters	Partially Implemented (with caveats)	<ul style="list-style-type: none"> Limited to DV/FV matters (through Safer Families initiative – Enhancing Access to Justice for Non-English Speakers). Can be difficult to ascertain who is responsible for organising/paying for services.
10-2	Specialist courts	Implemented	<ul style="list-style-type: none"> Concerns raised about requirement for plea of guilt and extent of community representation and buy-in in courts.
10-3	Aboriginal participation in courts	Partially Implemented	<ul style="list-style-type: none"> Further First Nations engagement around ongoing design, development and evaluation is required.
10-4	Unfit to stand trial	Implemented	<ul style="list-style-type: none"> Potential issues around implementation include courts prioritising community concerns related to culpability and bypassing the Mental Health Act and not ordering forensic mental health reports frequently enough.
10-5	Periodic review	Implemented	<ul style="list-style-type: none"> Recent review/recommendations by Chief Psychiatrist of s.180 of the <i>Crimes Act</i> to be considered by ACT Government.
11-1	Programs/services for women	Partially Implemented	<ul style="list-style-type: none"> Programs designed to meet the specific needs of Aboriginal and Torres Strait Islander women (incl. remanded, sentenced) are required (e.g. childcare arrangements, debt, DV/FV). No information on female staffing for most programs and extent of First Nations women's involvement in design and delivery of programs/services is unclear. No women's shelter and no prison specifically for Aboriginal and Torres Strait Islander women.

11-2	Police and DV/FV	Partially Implemented	<ul style="list-style-type: none"> FV Unit's training package does not include Aboriginal and Torres Strait Islander specific content (currently under review).
12-1	Abolish imprisonment for unpaid fines	Not Implemented	<ul style="list-style-type: none"> Referral for prosecution is discretionary and it is not clear whether prosecution might lead to imprisonment.
12-2	Reducing impacts of fines/notices	Partially Implemented	<ul style="list-style-type: none"> No available data on Aboriginal and Torres Strait Islander people accessing and completing current initiatives in this area (e.g. Work Development Orders) Extent to which Aboriginal and Torres Strait Islander people are involved in developing relevant initiatives is unclear.
12-3	Driver licensing services	Partially Implemented	<ul style="list-style-type: none"> Information not provided on road fatalities specific to Aboriginal and Torres Strait Islander people (but commitment to do so is noted). Data is not collected on Aboriginal and Torres Strait Islander driver licensing, vehicle safety or proof of ID cards. There are no policies/procedures related to licensing services for Aboriginal or Torres Strait Islander people specifically.
12-4	Offensive language provisions	Not Implemented	<ul style="list-style-type: none"> s. 392 of the <i>Crimes Act</i> refers to an offence of 'offensive behaviour'. Whether this offence could be narrowed to align more closely with R12-4 is not under active consideration.
13-1	Alcohol initiatives (First Nations developed and led)	Implemented	<ul style="list-style-type: none"> A whole-of-community approach to design/implementation is needed. An ACT-based Indigenous-specific rehabilitation facility (currently only available interstate) and enhanced access to interstate rehabilitation facilities would be beneficial.
13-2	Government support for alcohol management	Not Implemented (with caveats)	<ul style="list-style-type: none"> R13-2 is not particularly relevant to the ACT as there are no current restrictions of alcohol sales to First Nations people or communities in the ACT and it is aimed more at local communities developing alcohol management plans rather whole jurisdictions like the ACT.
14-1	Review police practice/procedure	Partially Implemented	<ul style="list-style-type: none"> Stronger mechanisms to enforce accountability for racism and racial profiling in police service, and increased use of cautions/diversions are required.
14-2	Review police complaints process	Not Implemented	<ul style="list-style-type: none"> 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. Police complaints processes were identified as torturous, lengthy and difficult without satisfactory outcomes.

14-3	Custody Notification Service	Implemented (with caveats)	<ul style="list-style-type: none"> Information not available to indicate the number of Aboriginal and Torres Strait Islander people in custody, compared with the number of notifications made.
14-4	Cultural change	Partially Implemented	<ul style="list-style-type: none"> Record keeping practices need to be improved for First Nations Peoples. Community engagement and consultation strategy is currently under development by police.
15-1	National inquiry – child protection	No Longer Relevant	<ul style="list-style-type: none"> Not relevant to the ACT (directed to the Commonwealth Government to establish a national inquiry). Implementation of ACT Our Booris Our Way recommendations is progressing. Numbers of children in placements have not reduced and heavier investment is required.
16-1	Justice targets	No Longer Relevant	<ul style="list-style-type: none"> The National Agreement on Closing the Gap incorporates justice targets.
16-2	Justice Agreement	Implemented	<ul style="list-style-type: none"> Potential issues include the Agreement not having sufficient community understanding/engagement or capacity to ensure government accountability.