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Executive summary

The number of people incarcerated in Australia continues to grow year on year. Aboriginal and Torres Strait Islander people and people with disability are substantially over-represented in Australia’s prison population, while the numbers of incarcerated women and people on remand have increased significantly in the past decade. Experiences of issues such as poverty, homelessness, poor education and literacy, unemployment, mental health conditions, intellectual disability, and histories of alcohol/drug misuse are more prevalent among prisoners than in the general population.

By definition, prisoners have criminal law needs. There are also a number of prisoner-specific legal issues inherent in the incarceration process, including bail, prison disciplinary issues and parole. Many prisoners and detainees also experience civil (such as debt, housing issues and employment issues) and family law issues which can be interconnected with their criminal law issues. Imprisonment often exacerbates the effects of these issues and can provide serious barriers to successful reintegration post-release. Where these issues are not resolved optimally, they can escalate and feed into the cycle of disadvantage experienced by many prisoners which can lead to their eventual return to prison. Recent reviews of many of the juvenile detention systems across Australia indicate that mistreatment is a serious legal issue for some children and young people in these systems.

The barriers to justice which prisoners and detainees face include the physical barriers posed by the prison environment itself, which precludes ready access to legal information or legal practitioners. Cognitive impairment and mental health conditions (including due to frequent experiences of trauma caused by prior histories of violence or abuse), literacy and poor education also form key barriers. Financial difficulties are prevalent, as many prisoners have been unemployed, homeless or in debt prior to incarceration. Additionally, many prisoners who have had negative experiences with the corrections system, police or the justice system may distrust authorities and lawyers, and instead rely on informal and less effective methods to address their issues.

There are several gaps in the critical services which are necessary to deliver access to justice to prisoners and detainees. These include insufficient access to legal assistance services, particularly with respect to civil and family law issues, difficulty accessing civil and family law systems, and a lack of transitions programs designed to address legal issues. While technological and legal capability are often lacking amongst prisoners, their limited access to technologies including audio-visual links and internet-enabled computers can also pose a significant barrier for those individuals who could potentially benefit.

The over-imprisonment of many people experiencing disadvantage has been linked to an over-reliance on certain ‘law and order’ policies without adequate support for diversion options, alternatives to imprisonment or programs focused on rehabilitation. There are concerns that these policies are resulting in overcrowding and poor conditions in prisons, and that many prisoners and detainees – including women, people with disability, young people, Aboriginal and Torres Strait Islander peoples and people on short sentences or remand – are missing out on the rehabilitation and throughcare support they need to reintegrate successfully into the community. The need for greater access to tailored programs which are culturally secure, gender, disability and/or trauma-informed has been emphasised in this regard. Access to secure, safe housing is also an important enabler in avoiding recidivism for many prisoners and detainees post-release, as well as in obtaining bail in the first place.
**Key background information**

**Defining the group**

For the purposes of this paper, the term ‘prisoner’ is defined to include those people who are being held in custody in Australia, regardless of whether they have been sentenced or are on remand. The term ‘detainees’ is generally used to refer to children and young people in juvenile detention and does not refer to those people in immigration detention.

There is significant intersection between this Chapter and the Part 1 Chapters regarding Aboriginal and Torres Strait Islander peoples, Children and Young People, People with Disability and Asylum Seekers. Generally, with the exception of juvenile detainees, issues regarding the imprisonment and/or detention of people are discussed in further depth in those Chapters.

**Demographics**

**Adult prisoners**

The Australian Bureau of Statistics (‘ABS’) found in the *Prisoners in Australia, 2017* Report that, as at midnight 30 June 2017 (the time of the prison ‘census’), 41 202 persons were in prison in Australia.¹ This equates to an imprisonment rate of 215.9 prisoners per 100 000 adult population.²

The ABS found that of those 41 202 persons in prison:

- 37 905 were male (92 per cent) and 3299 were female (eight per cent);
- 28 199 had been sentenced (68.4 per cent), 12 911 were awaiting sentencing (31.3 per cent) and 89 were in post-sentence detention (0.2 per cent); and
- 11 307 were Aboriginal or Torres Strait Islander (27.4 per cent).³

The number of prisoners in custody has increased significantly over the past decade. From 2007 to 2017 the number of prisoners increased by 51 per cent from 27 244 to 41 202 and the imprisonment rate increased by 26 per cent from 171.1 to 215.9 prisoners per 100 000 adult population.⁴ Over the same period, Australia's population has grown by a mere 18 per cent.⁵

---

³ Ibid.
⁴ Ibid.
A summary of prison population growth rates by selected characteristics is provided at Table 1 below.

**Table 1 – Prison population growth rates by selected characteristics**

<table>
<thead>
<tr>
<th></th>
<th>Number (2017)</th>
<th>% of total prisoners</th>
<th>1-year % increase (2016-17)</th>
<th>5-year % increase (2012-17)</th>
<th>10-year % increase (2007-17)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total prisoners</strong></td>
<td>41 202</td>
<td>100.0</td>
<td>6.1</td>
<td>40.2</td>
<td>51.2</td>
</tr>
<tr>
<td><strong>Incarceration rate</strong></td>
<td>215.9</td>
<td>n/a</td>
<td>4.0</td>
<td>29.0</td>
<td>26.2</td>
</tr>
<tr>
<td>(per 100 000 adult population)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Sex</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Males</td>
<td>37 905</td>
<td>92.0</td>
<td>6.0</td>
<td>39.4</td>
<td>50.1</td>
</tr>
<tr>
<td>Females</td>
<td>3299</td>
<td>8.0</td>
<td>6.6</td>
<td>49.9</td>
<td>65.9</td>
</tr>
<tr>
<td><strong>Indigenous status</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aboriginal and Torres Strait Islander</td>
<td>11 307</td>
<td>27.4</td>
<td>6.7</td>
<td>41.6</td>
<td>70.5</td>
</tr>
<tr>
<td>Non-Indigenous</td>
<td>29 870</td>
<td>72.5</td>
<td>5.9</td>
<td>40.4</td>
<td>46.4</td>
</tr>
<tr>
<td><strong>Legal status</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sentenced</td>
<td>28 199</td>
<td>68.4</td>
<td>5.8</td>
<td>25.3</td>
<td>33.4</td>
</tr>
<tr>
<td>Unsentenced</td>
<td>12 911</td>
<td>31.3</td>
<td>6.6</td>
<td>87.9</td>
<td>111.8</td>
</tr>
<tr>
<td>Post-sentence</td>
<td>89</td>
<td>0.2</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Prior imprisonment status</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prior imprisonment</td>
<td>23 268</td>
<td>56.5</td>
<td>6.6</td>
<td>44.8</td>
<td>51.2</td>
</tr>
<tr>
<td>No prior imprisonment</td>
<td>17 932</td>
<td>43.5</td>
<td>5.4</td>
<td>34.8</td>
<td>55.9</td>
</tr>
</tbody>
</table>

**Aboriginal and Torres Strait Islander people**

As also discussed in the Aboriginal and Torres Strait Islander Peoples Chapter (Part 1), the over-incarceration of Aboriginal and Torres Islander persons in prison in Australia is a well-recognised problem.\(^7\)

---


According to the 2016 Census, Aboriginal and Torres Strait Islander people represent only 2.8 per cent per cent of Australia’s population. However, 27.4 per cent of Australia’s prison population are Aboriginal and Torres Strait Islander people.

The Australian Law Reform Commission (‘ALRC’) in its recent *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples Report* (‘Pathways to Justice Report’) calculated that in 2016:

> The national imprisonment rate for Aboriginal and Torres Strait Islander peoples was 2,039 per 100,000 persons. That is, about 20 in every 1,000 Aboriginal and Torres Strait Islander people were incarcerated in 2016.

> To put the rates of Aboriginal and Torres Strait Islander incarceration in perspective, the non-Indigenous rate was 163 per 100,000: less than 2 in every 1,000 persons. Aboriginal and Torres Strait Islander peoples were therefore over-represented in the imprisoned population by a factor of 12.5. In other words, based on census night statistics, Aboriginal and Torres Strait Islander people were 12.5 times more likely to be in prison than non-Indigenous people.

The number of Aboriginal and Torres Strait Islander people in prison has also grown at a significantly faster rate than that of the non-Aboriginal and Torres Strait Islander population over the past decade – 70.5 per cent compared with 46.4.

**Women**

Although women account for a relatively small section of the prison population (8 per cent), the number of women in prison is increasing at an alarming rate. From 2007 to 2017 the number of women in prison has increased by 65.9 per cent (significantly higher than the growth in the male prison population, 50.1 percent). The Ombudsman NT has noted that there has been a ‘huge structural change confronting the justice system generally and Corrections in particular’ as a result of the high increase in female incarceration rates.

The Australian Human Rights Commission has noted that ‘Aboriginal and Torres Strait Islander women are the most significantly over-represented population in Australian prisons and their rate of incarceration is increasing more rapidly than any other group’. Aboriginal and Torres Strait Islander women (471.2 persons per 100,000 population) are incarcerated at more than 20 times the rate of non-Aboriginal and Torres Strait Islander women.

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12 Ibid.


women (23.1 per 100,000 population). As at 30 June 2017, there were 1106 Aboriginal and Torres Strait Islander women in Australian prisons, approximately 34 per cent of the female prison population. The Human Rights Law Centre and the Change the Record Coalition have noted that despite the Royal Commission into Aboriginal Deaths in Custody in 1987 and the many inquiries that have been held since that time, the proportion of female prisoners who identify as Aboriginal and Torres Strait Islander people has doubled over the past 30 years (from 17 per cent to 34 per cent).

**Persons on remand**

According to the ABS the number of unsentenced prisoners in adult corrective services custody increased by 6.6 percent from 2016 to 2017, from 12,111 to 12,911. This increase followed a significant 22 percent increase in the previous year. This is part of a notable trend, as the prison population on remand has grown by 87.9 per cent in the past five years and 111.8 per cent in the past decade.

Following the release of the 2016 Prisoner Census statistics, the ABS noted that the increase in unsentenced prisoners during that year had been ‘accompanied by an increase in the median time spent on remand awaiting trial and/or sentence, which increased 7 per cent from 2.7 to 2.9 months’. In 2017, this figure rose significantly again to 3.3 months.

**Returning prisoners**

It is well-established that being in custody, even for short periods, can increase the likelihood of further offending.

The ABS also found that of 41,202 people in full time custody at the time of the 2017 Prisoner Census, 23,268 (56.5 per cent) had previously served a term of imprisonment. The Productivity Commission’s *Report on Government Services 2018* found that of the prisoners released from custody in 2014-15, 44.8 per cent returned to prison within two

---

16 Ibid. See also Human Rights Law Centre and Change the Record Coalition, Over-represented and Overlooked Report, 10.
17 Human Rights Law Centre and Change the Record Coalition, Over-represented and Overlooked Report, 10.
19 Ibid.
years, while 53.4 per cent had returned to corrective services (ie had returned to prison or had received a community-based order).

In comparing recidivism rates of persons convicted of an offence who received a penalty other than prison compared to those who received a prison sentence, the NSW Bureau of Crime Statistics and Research found that those who received a sentence other than prison had lower rates of reoffending within a 12-month period post-conviction.

Table 2 – Comparison of recidivism rates in NSW – 2013-15

<table>
<thead>
<tr>
<th></th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
</tr>
</thead>
<tbody>
<tr>
<td>Percentage of people who were convicted and</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>received a penalty other than prison who were</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>then convicted of another offence within the</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>next 12 months</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adults</td>
<td>18.0</td>
<td>18.6</td>
<td>20.4</td>
</tr>
<tr>
<td>Juveniles</td>
<td>40.7</td>
<td>43.0</td>
<td>44.7</td>
</tr>
<tr>
<td>Percentage of people exiting prison who were</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>convicted of another offence within the next</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12 months</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Adults</td>
<td>37.6</td>
<td>38.2</td>
<td>41.0</td>
</tr>
<tr>
<td>Juveniles</td>
<td>62.9</td>
<td>63.9</td>
<td>66.2</td>
</tr>
</tbody>
</table>

Repeat offending and re-incarceration are significant contributors to the over-representation of Aboriginal and Torres Strait Islander people in both the juvenile justice and criminal justice systems. At the time of the Prisoners’ Census in 2017, 77.3 per cent of male Aboriginal and Torres Strait Islander prisoners had a known prior imprisonment. This is compared to only 50.1 per cent of non-Indigenous male prisoners. Recidivism rates are also disproportionately high for Aboriginal and Torres Strait Islander women, with 66.3 per cent of Aboriginal and Torres Strait Islander women in prison at the time of the Prisoners’ Census in 2017 having known prior imprisonment – as opposed to just 34.8 per cent for non-Indigenous women.

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26 Ibid.
28 Ibid.
‘Stock’ versus ‘flow’ statistics

Baldry has noted that the ‘stock data’ produced by the ABS through the Prisoner Census has not contained a national accounting of the number of people who enter prison each year – ie the number of people who ‘flow’ in and out of prison.31 The Council of Australian Governments’ *Prison to Work Report* recommended that state and territory governments work with the Commonwealth to share essential de-identified criminal justice data to enable the quantifying of the flow of prisoners through the system.32 It was noted in the *Prison to Work Report* that:

> Without good flow data, and with very little data on the outcomes of ex-prisoners, it is hard to know where effort should be focused and where the system failures are. It is also very difficult to make any observations about how changes to different systems affect outcomes for ex-prisoners.33

In November 2017, the ABS released the first set of ‘flow data’ which contained counts of prisoner receptions by legal status, sex and Indigenous status.34 This dataset replaced the previously published ‘sentenced prisoner receptions’ data item as the ‘new receptions data is deemed a more accurate measure of prisoner flows through the corrective services system than the previous “sentenced prisoner receptions” data’.35 As outlined in the *Corrective Services, March quarter 2017* dataset (released in June 2018), during the previous 12 months there were 65 483 prisoner receptions, of which:

- 56 045 (85.6 per cent) were male and 9 437 (14.4 per cent) were female;
- 21 717 (33.2 per cent) were Aboriginal or Torres Strait Islander people; and
- 48 400 (73.9 per cent) were unsentenced (ie entered prison on remand).36

It has previously been argued that the census statistics understate the numbers of prisoners (sentenced and unsentenced) incarcerated for lesser offences who enter and are released from prison in between census dates, including in particular, the number of Aboriginal and Torres Strait Islander women ‘flowing’ through prison:

> The National Prisoner Census takes a ‘snapshot’ of people in prison at a point in time. Its main drawback is that it cannot capture the flow of prisoners in and out of prison throughout the year. Capturing this flow is important, as the rapid turnover of some cohorts, such as young Aboriginal and Torres Strait Islander females in the corrections system, is likely to distort yearly data collection.37

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32 Ibid 49.

33 Ibid 49.


36 Ibid.

The ABS flow data indicates that these predictions were correct as both women (14.4 percent of the ‘flow’ population compared with 8.0 percent of the ‘static’ population) and Aboriginal and Torres Strait Islander people (33.2 percent compared with 27.4 percent) represented a greater share of the ‘flow’ prisoner count than the ‘static’ count.\(^{38}\)

As part of the development of the Pathways to Justice Report, the ALRC commissioned researchers at Curtin University to provide a deeper statistical overview of the incarceration rates of Aboriginal and Torres Strait Islander peoples, including ‘an interrogation of the “stock” data and an analysis of “flow” statistics’. One key finding was that the ‘flow’ data indicated that 45 per cent of Aboriginal and Torres Strait Islander offenders sentenced to imprisonment received a sentence of less than six months, compared with 27 per cent of non-Indigenous offenders.\(^{39}\)

**Juvenile detainees**

In all Australian jurisdictions, young people can only be detained in a juvenile detention facility if they were between the ages of 10 and 17 years old at the time of the offence.\(^{40}\) Some detainees in youth detention may be older than 17 for the following reasons: if the offence was committed or allegedly committed when they were aged 17 or younger (some young people may continue to be supervised by the youth justice system once they turn 18 while others will be transferred to the adult correctional system); or, if they were deemed to be particularly vulnerable or immature.\(^{41}\)

In the *Youth justice in Australia 2016–17* report released in May 2018, the Australian Institute of Health and Welfare (‘AIHW’) reported that on an average day in 2016-17, 913 young people were in detention.\(^{42}\) Of those young people in detention, 91 per cent were male.\(^{43}\) More than half (61 per cent) of young people in detention were unsentenced (either detained by police (pre-court) or on remand).\(^{44}\)

More than half (58 per cent) of all young people in detention on an average day in 2016-17 were Aboriginal or Torres Strait Islander people and Aboriginal or Torres Strait Islander young people aged 10–17 were 24 times more likely to be in detention than young people who were not Aboriginal or Torres Strait Islander.\(^{45}\)

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\(^{40}\) Australian Institute of Health and Welfare, *Youth justice in Australia 2016–17* (2018) 1. As of 12 February 2018, the maximum age at which young offenders in Queensland would be dealt with in the youth justice system was increased from 16 to 17: *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (Qld).

\(^{41}\) Australian Institute of Health and Welfare, *Youth justice in Australia 2016–17*, 1. Some young people in Victoria are able to access the ‘dual track’ sentencing system under which young people aged 18-20, appearing in courts other than the Children’s Court, can be sentenced to detention in a juvenile facility rather than an adult prison if the young person is assessed as suitable and the court deems this appropriate. The circumstances in which this sentencing option is available were significantly reduced under the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) cl 20-1.


\(^{43}\) Ibid 7.

\(^{44}\) Ibid 15.

\(^{45}\) Ibid 8.
The AIHW also reported that in 2016-17 (excluding the Northern Territory where data was not available), 4194 young people experienced 8243 receptions into detention. Almost half (46 per cent) of young people who were received into detention during the year were received more than once.

Disadvantages

Adult prisoners

Generally

Grunseit et al recognised in Taking Justice into Custody: The Legal Needs of Prisoners (‘Taking Justice into Custody’), that ‘prison inmates are, as a group, disadvantaged’. The report further recognised that there is ‘a concentration of disadvantage experienced in the prison population in terms of higher levels of mental illness, intellectual disability, histories of alcohol and other drug misuse, poverty, poor education, and unemployment than in the general … population’.

Following extensive research regarding the prison populations of many Western nations, including Australia, Canada, the United Kingdom and the United States of America, the Australian Institute of Criminology (‘AIC’) found that the following disadvantages and challenges were highly prevalent across prisoners:

- history of social isolation (including isolation from family and absence of long-term relationships);
- exposure to criminal involvement by family;
- poor employment or unemployment;
- welfare reliance;
- history of sexual, physical, and/or emotional abuse;
- history of substance abuse (licit and illicit);
- mental health conditions;
- poor physical health;
- lack of accessibility for people with physical or cognitive disability;
- poor education, literacy and numeracy;
- poor everyday life skills (such as time management); and,
- poor financial management.

The AIHW found in 2015 that:

- 68 per cent of prison entrants had not completed schooling beyond Year 10 (80 per cent of Aboriginal and Torres Strait Islander prison entrants);

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46 Ibid 19.
47 Ibid.
49 Ibid, foreword.
50 Maria Borzycki, Australian Institute of Criminology, Interventions for prisoners returning to the community (2005) 34.
51 Australian Institute of Health and Welfare, The health of Australia’s prisoners 2015 (November 2015). Note ‘prison entrants’ refers to the group of participating prisoners who were interviewed as they were entering the prison system.
• 48 per cent of prison entrants were unemployed in the 30 days prior to entering prison (60 per cent of Aboriginal and Torres Strait Islander prison entrants);
• 25 per cent of prison entrants were homeless in the four weeks prior to imprisonment (27 per cent per cent of Aboriginal and Torres Strait Islander prison entrants);
• 17 per cent of prison entrants had one or more of their parents/carers imprisoned while they were a child (26 per cent of Aboriginal and Torres Strait Islander prison entrants);
• 46 per cent of prison entrants had children who depended on them for their basic needs (53 per cent of Aboriginal and Torres Strait Islander prison entrants);
• 49 per cent of prison entrants had been told by a doctor, psychiatrist, psychologist or nurse that they had a mental health disorder (including drug and alcohol abuse) (44 per cent of Aboriginal and Torres Strait Islander prison entrants);
• 27 per cent of prison entrants were taking medication for a mental health disorder at time of reception (25 per cent of Aboriginal and Torres Strait Islander prison entrants);
• 74 per cent of prison entrants were current tobacco smokers (82 per cent of Aboriginal and Torres Strait Islander prison entrants); and
• 67 per cent of prison entrants admitted illicit drug use in the 12 months prior to imprisonment (60 per cent of Aboriginal and Torres Strait Islander prison entrants).52

Specific to particular groups

Aboriginal and Torres Strait Islander people

Justice Project stakeholders53 emphasised that the high rates of criminal justice interaction experienced by Aboriginal and Torres Strait Islander people are linked to cycles of social disadvantage, poverty, intergenerational trauma and grief, as well as experiences of systemic injustice that accumulate over a lifetime.54 The National Congress of Australia’s First Peoples elaborated:

National Congress stresses the enormous role which feelings of disempowerment play in driving Aboriginal and Torres Strait Islander people towards crime. High rates of unemployment; intergenerational trauma; destruction of land, culture and language; and racial discrimination lead our people, and particularly youths, to feel

52 Ibid.
53 References to Justice Project ‘stakeholders’ mean organisations and people which/who have provided submissions, or engaged in consultations or teleconferences with the Law Council with respect to the Justice Project.
54 Consultation, 05/09/2017, Perth (Aboriginal Legal Service of Western Australia); Consultation, 04/04/2017, Adelaide (Aboriginal Legal Rights Movement); Consultation, 09/14/2017, Sydney (First Peoples Disability Network Australia); Community Legal Centres NSW, Submission No 106; NPY Women’s Council, Submission No 129; National Congress of Australia’s First Peoples, Submission No 97.
as if their lives are hopeless or worthless. These sentiments ultimately lead many individuals to turn to substance abuse or crime and contribute to elevated rates of family violence and abuse.55

The Royal Commission into Aboriginal Deaths in Custody has also emphasised the need to address the systemic economic, social and cultural disadvantage of Aboriginal and Torres Strait Islander people to reduce over-imprisonment.56

Women

A significant proportion of female prisoners is mothers. According to the AIHW, 84 per cent of female prison entrants during the study period had previously been pregnant (79 per cent of Aboriginal and Torres Strait Islander prison entrants) and 4.6 per cent were pregnant while in custody.57

Histories of sexual abuse (including as children) and domestic violence are particularly common for female prisoners.58 Stathopoulos’ review of the research undertaken in Australia to measure the prevalence of child sexual abuse and other forms of victimisation among female prisoners found that between 57 per cent and 90 per cent had been affected.59

There is a complex web of factors driving the increase in imprisonment of Aboriginal and Torres Strait Islander women. National Family Violence Prevention and Legal Services (‘NFVPLS’) has attributed the causes of overimprisonment to intersectional and intergenerational experiences of Aboriginal and Torres Strait Islander women, which are different from those of non-Indigenous women.60 Sisters Inside has also identified poverty, housing issues, racism and sexism as leading causes of criminalisation and incarceration of women.61

Mental health conditions are experienced by a significant proportion of Aboriginal and Torres Strait Islander women in custody. In Queensland, it has been reported that up to 86 per cent of Aboriginal and Torres Strait Islander women incarcerated were suffering from mental disorders.62 Aboriginal women are more than twice as likely as men to experience psychological disability, and a Victorian study showed that 92 per cent of Koori

55 National Congress of Australia’s First Peoples, Submission No 97.
59 Ibid. See also, National Congress of Australia’s First Peoples, Submission No 97; Human Rights Law Centre and Change the Record Coalition, Over-represented and Overlooked Report, 17; Matthew Willis, Non-Disclosure of Violence in Australian Indigenous Communities (Trends & Issues in Crime and Criminal Justice, Australian Institute of Criminology, 2011).
61 Human Rights Law Centre and Change the Record Coalition, Over-represented and Overlooked Report, 17; Sisters Inside, Submission No 79.
women in prison had a recognised a mental health condition during their lifetime and nearly half were suffering from post-traumatic stress disorder.  

_People with disability_

Research, submissions and consultations indicate that there is significant over-representation of people with disability in the criminal justice and corrections system. During consultations, the Mental Health Law Centre described Western Australian prisons as ‘the biggest facility housing people with mental illness in WA’. Human Rights Watch recently reported that people with disability, particularly cognitive or psychosocial disability, comprise around 18 per cent of the Australian population but almost 50 per cent of prisoners. Jesuit Social Services cited a 2011 study by Corrections Victoria which found that ‘42 per cent of men and 33 per cent of women (in a sample of the Victorian prison population) had been diagnosed with an [Acquired Brain Injury] ABI’.

A 2017 report by the Mental Health Commission of New South Wales stated that 50 per cent of adult prisoners have been diagnosed with or treated for a mental health condition and 87 per cent of young people in custody have a past or present psychological impairment. It estimated that between 8 and 20 per cent of prisoners have an intellectual disability and suggests that the rates of cognitive impairment among prisoners are likely to be higher, ‘given that a significant number of inmates report ongoing neurological effects and psychological symptoms because of a traumatic brain injury’.

Aboriginal and Torres Strait Islander prisoners with disability are noticeably over-represented in the criminal justice and corrections system. A 2010 Senate Inquiry found that approximately 98 per cent of Aboriginal and Torres Strait Islander inmates across all jurisdictions have a cognitive disability, commonly hearing loss, and in the Northern Territory, over 90 per cent of Aboriginal and Torres Strait Islander inmates experienced significant hearing loss.

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65 Consultation, 05/09/2017, Perth (Mental Health Law Centre).
67 Jesuit Social Services, *Submission No 30*.
69 Ibid.
People experiencing homelessness

There is a strong correlation between homelessness, criminal offending and incarceration.72 A 2006 study of prisoners in Victoria and NSW by Baldry et al found a significant ‘association between the iterative homelessness and severe social exclusion experienced by ex-prisoners and reincarceration’.73 Out of 339 prisoners surveyed, 20 per cent in NSW and 12 per cent in Victoria experienced homelessness prior to incarceration, and 16 per cent of prisoners expected to be homeless post-release.74 The rate of re-incarceration and homelessness were higher among Aboriginal and Torres Strait Islander participants compared to non-Indigenous participants.75 In 2015, the AIHW reported that 25 per cent of prisoners were homeless in the four weeks prior to entry into prison and 31 per cent of prisoners expected to be homeless upon release.76

Sisters Inside and Women’s Legal Services Australia submitted that an absence of housing (and in particular, crisis accommodation for women experiencing family violence) is a significant contributor to many women entering custody.77 Women’s Legal Services Australia explained that:

Some girls and women tell WLSA members that it is safer for them to be in custody, as it is an escape from violence. In particular, many Aboriginal and Torres Strait Islander girls and young women WLSA members work in Juvenile Justice Centres and other Correctional Centres have been regularly forced to choose between violence or homelessness. Many have also experienced significant physical and sexual violence as children and they identify that being in prison is the first time they have had a sense of control over their lives. It is an indictment on our society that some children and women see prison as a safe refuge and that this is accepted amongst this group because they feel they have nowhere to turn for support and assistance. This is compounded for women in rural and regional areas where there is very limited social housing stock with highly vulnerable people waiting on priority housing lists for many years.78

Homelessness is also a significant issue that faces many people upon release from prison.79 Baldry et al found the rate of homelessness among prisoners increased from 18 per cent prior to incarceration to 21 per cent post-release.80 In 2015, the Victorian Ombudsman found that over 40 per cent of female prisoners in Victoria were homeless upon release from prison.81

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74 Ibid 23.

75 Ibid 27.


77 Sisters Inside, Submission No 57; Women’s Legal Service Australia, Submission No 124.

78 Women’s Legal Service Australia, Submission No 124.

79 See discussion beginning on page 54.


Juvenile detainees

The Australian Law Reform Commission has noted that young people who come into contact with the legal system, including those in the juvenile justice system, are ‘extremely vulnerable in dealing with legal processes’ and that contact with the legal system may be ‘related to disadvantages they already face due to family breakdown, socio-economic and educational disadvantages, systems abuse and disabilities’. The 2015 Young People in Custody Health Survey (‘YPICHS’) found that of those surveyed:

- 27 per cent were attending school prior to being placed in custody;
- 21.1 per cent of young females entering custody were living in unstable accommodation prior to being placed in custody (highest level since the inception of the survey);
- 53.6 per cent had at least parent who had been in prison (67.5 per cent of Aboriginal and Torres Strait Islander participants);
- 83.9 per cent had a history of previous juvenile detention;
- 68.2 per cent had a history of child abuse or trauma;
- 25.0 per cent had a past head injury resulting in loss of consciousness, with females more likely than males to have sustained a head injury (52.6 per cent versus 22.5 per cent);
- 80.3 per cent performed below the average range for their age on core receptive and expressive language measures, with 48.7 per cent of the participants scoring in the range that indicates severe difficulties;
- 45.9 per cent were overweight or obese;
- 41.8 per cent of those who had consumed alcohol in the year before custody reported being drunk at least weekly; and
- 92.5 per cent reported having previously used illicit drugs.

Specific to particular groups

Young people with disability

The YPICHS report also found that comparatively ‘to young people in the community, young people in custody have poorer physical and mental health, high rates of trauma, abuse and neglect, and are more likely to have a history of alcohol and illicit drug use and dependence’. A 2014 study of 65 per cent of youth detainees across eight detention centres in New South Wales (‘NSW’) revealed 45.8 per cent had borderline or lower intellectual functioning. A 2014 survey of 273 young people serving custodial orders in

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84 Ibid 99.
85 Carol Bower et al, ‘Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia’ (2016) 8 *British Medical Journal Open* 1, 2 (‘Fetal alcohol spectrum disorder and youth justice’).
Victoria found 39 per cent had depression, 17 per cent had a positive psychosis screening and 22 per cent had engaged in deliberate self-harm within the previous 6 months.86

Most recently, Telethon Kids Institute conducted a prevalence study with respect to Fetal Alcohol Spectrum Disorder (‘FASD’) among youth detainees at Banksia Hill youth detention centre in Western Australia. The study revealed ‘unprecedented levels of severe neurodevelopmental impairment amongst sentenced youth’:

- 89 per cent of incarcerated young people had at least one form of severe neurodevelopmental impairment;
- two thirds had at least three forms of severe neurodevelopmental impairment;
- 23 per cent had five or more forms of severe neurodevelopmental impairment;
- 36 per cent had FASD; and,
- 25 per cent had an intellectual disability.87

The study also reported that the prevalence of FASD among Aboriginal youth detainees was 47 per cent, which is ‘more than twice that of the highest population estimate of FASD in Australia of 19%, reported in a remote, mainly Aboriginal, population aged 7-8 years’.88 The ALRC similarly reported that ‘FASD-affected youth [are] 19 times more likely to be incarcerated’.89

Young people with experience in child protection systems

In the Pathways to Justice Report, the ALRC noted the strong correlation between out-of-home care, juvenile detention and adult incarceration, particularly for Aboriginal and Torres Strait Islander people.90

21.1 per cent of young people in detention in NSW surveyed as part of the 2015 YPICHS had been placed in care before the age of 16.91 Furthermore, participants in the 2015 YPICHS were:

26 times more likely to have been placed in OOHC [out-of-home care] during their childhood than a child in the general Australian population (211.5 per 1000 vs. 8.1 per 1,000 children).92

As part of the Royal Commission into the Protection and Detention of Children in the Northern Territory (‘NT Royal Commission’), the Royal Commission engaged the Menzies School of Health Research to ‘explore the association between child protection and youth justice involvement for the cohort of children in the Northern Territory born in 1999, who

86 Ibid 2.
89 Australian Law Reform Commission, Pathways to Justice Report, 66.
90 Ibid 486.
92 Ibid 13.
would turn 18 [in 2017]. This project demonstrated that Aboriginal children were significantly more likely to experience child protection or youth justice compared with non-Aboriginal children, and identified that the majority of children in the Northern Territory (75.2% of Aboriginal children and 60% of non-Aboriginal children) who had been found guilty of an offence had previously been reported to child protection. On this basis the NT Royal Commission commented:

_The magnitude of this ‘crossover’ figure for Aboriginal children shows the degree of closeness of the association between youth justice and child protection in the Northern Territory._

The link between experience in child protection systems and incarceration (juvenile and adult) is discussed below as a driver of imprisonment.

**Costs of imprisonment to the wider community**

The Senate Legal and Constitutional Affairs References Committee in the *Value of a justice reinvestment approach to criminal justice in Australia* report (‘Justice Reinvestment Inquiry’), described the direct financial cost of imprisonment as ‘enormous’. The Productivity Commission in the *Report on Government Services 2018* found that total net operating expenditure (including capital costs) of Australian governments on adult corrective services in 2016-17 was $4.1 billion. The total net operating expenditure (including capital costs) per prisoner per day in 2016-17 was $286 (or approximately $104 000 per year).

The costs of juvenile detention are significantly higher than the cost of adult detention. According to the Productivity Commission, in 2016-17, the average cost per day, per young person subject to detention-based supervision was $1482 (or approximately $541 000 per year). Total spending by Australian governments on juvenile detention in 2015-16 was more than $482 million.

Beyond these direct financial costs are a number of additional economic, fiscal and social costs. In the *Indigenous incarceration: Unlock the facts* report, PwC Australia outline the broader economic and fiscal costs to the community associated with imprisonment:

_For the purpose of this analysis, these costs have been categorised as:*

- Economic costs – includes loss of productive output during incarceration, the cost of crime incurred by victims, the cost of increased mortality, forgone taxes and the extra burden of tax collection (dead weight loss).
• **Fiscal costs** – which include:

  o **Justice costs**: costs directly related to the justice system, including police, courts and prison costs, which are incurred before and during incarceration.

  o **Welfare costs**: long term costs, including welfare payments upon release from prison, child protection costs related to providing out-of-home care placements for children whose parents are incarcerated, potential costs of social housing and homelessness services which arise as a result of incarceration and are incurred post release from prison.  

The Senate Legal and Constitutional Affairs References Committee has also noted (with particular regard to juvenile detainees):

> Coupled with the enormous direct economic cost of imprisonment, there are indirect economic costs. These include loss of employment and deterioration of skills. For instance, the imprisonment of juveniles can create a lifecycle of offending that can disrupt schooling and preclude the individual from developing skills. They have little hope of gaining employment.  

In a submission to the Justice Reinvestment Inquiry, the Victorian Equal Opportunity and Human Rights Commission highlighted a number of the social costs of incarceration:

> High rates of imprisonment break down the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system. As a result, as communities become less capable of managing social order through family or social groups, crime rates go up.  

In the context of the high incarceration rates of Aboriginal and Torres Strait Islander people, PwC Australia have noted that:

> In addition to the economic and fiscal costs of Indigenous incarceration, there are significant consequences for individuals, families and communities impacting on this generation and the next. Those who have been incarcerated are at greater risk of poor housing, financial stress, low levels of educational attainment, poor employment prospects, and therefore poor health and wellbeing.

> This also places them at higher risk of reoffending and entrenching the intergenerational cycle of poverty. Incarceration also impacts on families and communities. Family and community networks can be disrupted. Incarceration can also lead to loss of culture, identity and connection to the land. This has a devastating impact on … [individuals’] resilience and self-determination. Children with a parent in prison can be particularly vulnerable, increasing the risk of going on to have contact with the justice system themselves, and repeating the cycle of criminal activity and incarceration.  

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Failure to address the drivers of incarceration discussed above and the issues discussed in the following sections of this Chapter is directly linked to the financial and social costs of imprisonment to the wider community. This reality is also relevant when policies and practices which drive legal need or further entrench disadvantage for prisoners are considered.

**What are the key findings regarding the legal needs of prisoners and detainees?**

Prisoners and detainees often face legal issues in the three interconnected phases of prior to custody, during custody and following release.

**Adult prisoners**

**Prior to imprisonment**

‘Prison inmates by definition have experienced or are experiencing criminal law issues’. The ABS *Prisoners in Australia, 2017 Report* found that the most common ‘most serious offences’ for which persons were in custody (both sentenced and unsentenced) in Australia were:

- acts intended to cause injury (22.7 per cent);
- illicit drug offences (14.9 per cent);
- sexual assault and related offences (11.6 per cent);
- unlawful entry with intent (10.4 per cent);
- offences against justice procedures, government security and operations (8.1 per cent);
- homicide and related offences (7.5 per cent); and
- robbery, extortion and related offences (7.5 per cent).

While prisoners, by definition, will have experienced or be experiencing criminal legal issues, Grunseit et al have noted that ‘the legal needs of prisoners are neither singular nor static’. Imprisonment or detention can also exacerbate the civil or family law issues that the prisoner was experiencing prior to imprisonment and can cause a number of new legal issues, which are related to incarceration, to arise following release.

The focus of this Chapter is those legal needs experienced during and after prison (including those that may have arisen prior to incarceration). Those legal needs which are the cause of imprisonment are discussed in more depth in other Chapters.

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108 Ibid.

During imprisonment

Ongoing legal actions related to imprisonment

While incarcerated, prisoners will often experience a range of criminal justice issues linked to their imprisonment. Many prisoners will continue to deal with issues relating to their principal offence(s) while in custody. As noted above, 34 per cent of persons in custody are awaiting sentence. Additionally, a number of prisoners will be serving custodial sentences while awaiting the outcome of an appeal. For example, Grunseit et al noted that in NSW in 2006, approximately five per cent of all inmates were awaiting the result of an appeal. Furthermore, legal issues such as bail (applying for and organising bail within the confines of custody), disciplinary offences (usually determined by the prison Governor) and parole (eligibility, applications, breaches) arise as a direct result of imprisonment.

WrongTrac and the Griffith University Innocence Project have noted that wrongful conviction, and associated legal actions, are an issue for some sentenced prisoners and some former prisoners. As part of the development of the WrongTrac Exoneration Registry, WrongTrac has identified approximately 80 cases of exoneration since 1984 (cases where a conviction has been upheld by the intermediate appeal court but later officially overridden through a further appeal, commission of inquiry, or pardon). It is also important to note that the prevalence of wrongful convictions is difficult to calculate, and a number of wrongful convictions are unidentified or are yet to result in exoneration.

At the time of the Prisoner Census in 2017, there were 89 people in post-sentence detention. The prospect of being subjected to a continuing detention order (CDO) following the expiration of a current sentence is a legal issue particular to high risk offenders during imprisonment. Currently, CDO regimes are in place for high risk sexual offenders in NSW, the Northern Territory, Queensland, South Australia, Victoria and Western Australia. NSW also has a CDO regime for high risk violent offenders. In 2016, the Commonwealth Government introduced a CDO regime for high risk terrorist offenders. This regime commenced operation on 7 June 2017.

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113 WrongTrac, Submission No 39; Griffith University Innocence Project, Submission No 27.
114 WrongTrac, Submission No 39.
117 Crimes (High Risk Offenders) Act 2006 (NSW) pt 3; Serious Sex Offenders Act 2013 (NT) pt 2; Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) pt 2; Criminal Law (High Risk Offenders) Act 2015 (SA) pt 3; Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic) pt 3; Dangerous Sexual Offenders Act 2006 (WA) pt 2.
118 Crimes (High Risk Offenders) Act 2006 (NSW) pt 3.
120 Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016 (Cth) s 2(1).
Issues arising tangentially to imprisonment

It is common for civil and/or family issues to arise due to, or be exacerbated by, a person’s time in incarceration. Imprisonment often abruptly uproots people from their daily lives and ongoing civil or family issues are often overlooked as criminal issues take priority.\(^{121}\) Grunseit et al note that experience of the following issues is common among prisoners:

- business and employment (difficulties maintaining employment or a business while in custody);
- housing (loss of public housing or rented housing);
- personal property (protecting property from damage or theft, lost documents, property taken into custody);
- social security;
- debt, victim’s compensation fines and other fines;
- injury and illness in prison;
- reputational damage;
- immigration; and
- family law issues (divorce, custody, substitute care for children).\(^{122}\)

Issues specific to women in the criminal justice system

In addition to these issues, incarcerated women often also face additional issues. In its submission to the Productivity Commission’s Access to Justice Arrangements inquiry, Prisoners’ Legal Service (Queensland) noted that ‘[w]omen in prison experience high levels of legal need in relation to child custody, including Department of Child Safety disputes, family law issues, domestic violence, victims of crime (both as the victim and as the perpetrator), housing and debt’.\(^{123}\)

The Human Rights Law Centre and the Change the Record Coalition have noted that ‘when women are taken into custody, even for short periods, the impacts ripple throughout families and communities and can have long-term cumulative effects.’\(^{124}\) Justice Project stakeholders noted the significant consequences of imprisonment for mothers and pregnant women, as well as concerns about their treatment in prison. For example, in consultations with Sisters Inside and during visits to Silverwater and Darwin Correctional Centres, concerns were expressed about the overly swift removal of children from mothers following their incarceration.\(^{125}\) It was noted that in South-East Queensland, women were often only in jail for a matter of weeks, but that a single week could result in the removal of a child.\(^{126}\) Concerns were also raised that mothers had ‘consented’ to their children’s removal in questionable circumstances.\(^{127}\)

\(^{121}\) Grunseit et al, Taking Justice into Custody, xxvii.
\(^{122}\) Ibid 66-92.
\(^{123}\) Prisoners’ Legal Service, Submission No 82 to Productivity Commission, Access to Justice Arrangements, 11 November 2013, 3.
\(^{124}\) Human Rights Law Centre and Change the Record Coalition, Over-represented and Overlooked Report, 13.
\(^{125}\) Consultation, 31/08/2017, Brisbane (Sisters Inside); Silverwater Correctional Centre Visit with Women’s Legal Service NSW, 22/08/2017; Darwin Correctional Centre Visit with Top End Women’s Legal Service, 03/08/2017.
\(^{126}\) Consultation, 31/08/2017, Brisbane (Sisters Inside).
\(^{127}\) Silverwater Correctional Centre Visit with Women’s Legal Service NSW, 22/08/2017.
Women’s Legal Services Australia similarly submitted to the Justice Project that during sentencing courts should consider primary caregiving responsibilities for children, any history of violence experienced and histories of mental health and substance abuse, consistent with the UN Bangkok Rules, with attention to Rule 58 and Rule 64:128

**Rule 58:** 
Women offenders shall not be separated from their families and communities without due consideration being given to their families and communities. Alternative ways of managing women who commit offences, such as diversionary measures and pre-trial and sentencing alternatives, shall be implemented wherever appropriate and possible.

**Rule 64:** 
Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after considering the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.129

The ALRC also considered that more attention should be given to the Art 3.1 of the Convention on the Rights of the Child in the sentencing process:130

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.131

To this end the ALRC ‘suggests that the impact that incarceration of a primary care-giver has on his or her children should be taken into account by sentencing courts’ and found the concerns raised in respect of the impact of incarceration on children to be of ‘sufficient importance for governments to consider reviewing sentencing considerations in light of these concerns.’132

Submissions by Sisters Inside and the National Congress of Australia’s First Peoples also raised specific concerns about ‘invasive and disempowering prison routines’ that can ‘trigger’ past traumas for women.133 One particular example of this is strip searching.134

The *Over-represented and Over-looked Report* linked strip searching to experiences of family violence and sexual assault, making the following observation:

…prisons are not sites of safety and support and are ill-equipped to help women build lives free from violence. Many of the systems of prisons replicate the dynamics of power and control in violent relationships and can re-traumatise women. Routine strip searching is one such practice.135

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128 Women’s Legal Services Australia, *Submission No 124*.
130 Australia has ratified the convention but has not implemented it into domestic law.
133 National Congress of Australia’s First Peoples, *Submission No 97*.
135 Human Rights Law Centre and Change the Record Coalition, *Over-represented and Overlooked Report*, 17.
The Report goes on to quote Vicki Roach:

*Well in how many domestic violence relationships does the man actually strip you before he starts smashing you around? It’s happened to me. Because it makes you more vulnerable, it makes you more exposed, it makes their control over you ultimate. And the state uses it in a similar way.\(^{136}\)*

Research indicates that these kinds of internal prison processes affect the psychological welfare of female prisoners and undermine rehabilitative progress.\(^{137}\)

**After imprisonment**

The Prisoners’ Legal Service (Queensland) has identified three key issues that face former prisoners, beyond those continuing from before or during prison:

- employment discrimination;
- housing; and
- debt.\(^{138}\)

**Employment discrimination**

Former prisoners often face several disadvantages in finding employment because of issues related to their life prior to prison such as low levels of education, limited employment history or mental health conditions.\(^{139}\) These disadvantages can be exacerbated by the common discrimination against those with irrelevant criminal records despite the fact that they have served their time.\(^{140}\) In the period July 2010 – July 2011, 23 per cent of all complaints received by the Australian Human Rights Commission (‘AHRC’) under the Australian Human Rights Commission Act 1986 (Cth) were on the basis of criminal record discrimination.\(^{141}\) Further, Graffam et al have reported that the prospects of employment for those with criminal histories are lower than for those of other disadvantaged groups such as people experiencing chronic illness or disability.\(^{142}\)

Discrimination against former prisoners, particularly in employment or business situations, can have a significant effect on the ability of former prisoners to reintegrate and is strongly linked to recidivism. When prisoners cannot access legal services to overcome the ‘stain’ of imprisonment (for example, assistance in filing an AHRC complaint), issues such as

\(^{136}\) Ibid.
\(^{140}\) The Law Council acknowledges that not all prisoners should have access to all jobs. For example, legislation implementing requirements for working with children is in place in all jurisdictions to prevent certain offenders working with children: see, eg, *Child Protection (Working with Children) Act* 2012 (NSW).
\(^{142}\) Joe Graffam, Criminology Research Council, *Attitudes of employers, corrective services workers, employment support workers, and prisoners and offenders towards employing ex-prisoners and ex-offenders* (2004).
housing or debt are often exacerbated causing new issues to arise and old issues to worsen.

**Housing**

Baldry et al have noted that a consistent issue ‘across time and continents’ is that ‘a large minority of people being released from prison does not have suitable accommodation to which to go’,143 Sowerwine and Adams have noted that prisoners are vulnerable to homelessness because they face ‘serious barriers in accessing and securing accommodation upon release from prison’.144 Housing issues are often related to difficulty in maintaining public housing during incarceration (for example, falling off the waiting list for housing) and inability to continue to rent private housing (for example, being unable to organise with a landlord to maintain rent payments during imprisonment).145

The Productivity Commission has noted that ex-prisoners who are homeless are ‘vulnerable to multiple and substantial legal problems’, including credit and debt issues, infringement issues, housing problems and fines.146 Homelessness significantly increases the risk of reoffending by recently released prisoners. For example, Baldry et al found that ex-prisoners in Victoria and NSW are more than twice as likely to return to prison within nine months of release if they are homeless.147

Limited post-release accommodation and housing support is discussed below as a critical gap in the services which are necessary to deliver justice to prisoner and detainees.

**Debt**

Imprisonment often makes it difficult for prisoners to address debts either for financial reasons (such as limited income during imprisonment) or for practical reasons (such as lack of access to phones to organise payment or deferral with the creditor).148 This can leave ex-prisoners with significant debt burdens upon release which can be exacerbated by and/or exacerbate employment and housing issues noted above.

**Juvenile detainees**

**Principal offences**

According to the *Recorded Crime – Offenders, 2016-17* report released by the ABS, the most common offences committed by young people include: theft (35.5 per cent of all offences committed by young people in Australia); acts intended to cause injury (16.2 per

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cent); illicit drug offences (10.7 per cent); public order offences (9.8 per cent); and, unlawful entry with intent (8.4 per cent). \(^{149}\)

This Chapter focuses on those young people who are in juvenile detention and thus the legal issues commonly facing young people in detention, over and above their primary offence(s). Further information on the broader legal issues faced by young people (such as those listed above) can be found in the Children and Young People Chapter (Part 1).

**Mistreatment during detention**

The conditions and treatment of young people in detention has become a prominent issue in Australian public debate over recent years. For example, on 25 July 2016, the ABC’s Four Corners program aired an episode entitled *Australia’s Shame*, which revealed alleged mistreatment and abuse of juvenile detainees in the Northern Territory’s Don Dale Youth Detention Centre. \(^{150}\) The program sparked nationwide concern and led to the commissioning of several independent reviews into the policies and practices of State and Territory juvenile detention centres. These included the NT Royal Commission, the Victorian *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian juvenile justice system* (‘Same Four Walls Report’), and the Queensland *Independent Review of Youth Detention*. \(^{151}\)

The recent inquiries into juvenile detention have each identified systemic mistreatment as a serious issue facing juvenile detainees. Findings of the NT Royal Commission included that:

- youth detention centres were not fit for accommodating, let alone rehabilitating, children and young people
- children were subject to verbal abuse, physical control and humiliation, including being denied access to basic human needs such as water, food and the use of toilets
- children were dared or bribed [by staff] to carry out degrading and humiliating acts, or to commit acts of violence on each other
- youth justice officers restrained children using force to their head and neck areas, ground stabilised children by throwing them forcefully onto the ground, and applied pressure or body weight to their ‘window of safety’, being their torso area, and
- isolation has continued to be used inappropriately, punitively and inconsistently with the Youth Justice Act (NT) which has caused suffering to many children and young people and, very likely in some cases, lasting psychological damage. \(^{152}\)

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\(^{152}\) NT Royal Commission, *Final Report* – Report Overview, 4. In response to the findings of the NT Royal Commission, in May 2018, the Youth Justice Legislation Amendment Bill 2018 (NT) was passed by the Northern Territory Legislative Assembly to limit mistreatment in Northern Territory youth detention facilities, including limiting use of force, use of restraint devices and isolation or separation.
The Northern Territory Government announced that it would ‘accept the intent and direction of all 227 Royal Commission recommendations’ and indicated that work has been done to map 217 of the recommendations into a framework of 17 work programs.\textsuperscript{153} It noted that the other 10 recommendations relate to actions required by the Commonwealth Government and other organisations. The main objectives of the 17 work programs are to put children and families at the centre, improve the care and protection system, improve youth justice and strengthen governance and systems.\textsuperscript{154} Some of the key reforms that have been underway since August 2016 include investment of $18.2 million into a Better Outcomes for Youth Justice reform package, investment in bail support services and accommodation facilities and recruitment of Transition Care Officers.\textsuperscript{155}

The \textit{Same Four Walls Report} found that in Victorian youth justice facilities:

*decisions to isolate, separate or initiate a lockdown were not made or recorded in accordance with relevant legislative and policy requirements. Young people were denied access to fresh air, exercise, meaningful activities, education, support programs and visits, sometimes for extended periods. In the case of operational lockdowns, where whole units were locked in their rooms for operational reasons, children and young people were isolated for reasons that had nothing to do with their behaviour. This was often distressing and frustrating for young people, creating additional tensions and management pressures for staff.*\textsuperscript{156}

On 23 March 2017, the Victorian Minister for Families and Children noted in the Victorian Legislative Council that the Victorian Government ‘accepts or accepts in principle all 21 recommendations in the report’.\textsuperscript{157}

Mistreatment, such as has been identified in these reports, can give rise to civil legal issues. For example, the Northern Territory Supreme Court awarded four juvenile detainees $53,000 in compensation against the Northern Territory Government for an incident involving tear gassing in 2014 at Don Dale Youth Detention Centre.\textsuperscript{158}

Recent issues of abuse have also arisen in regard to juvenile offenders detained in adult prisons. The Victorian Supreme Court in \textit{Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children ('Certain Children')} found that the detention of 40 young people in Barwon Prison (an adult prison) following riots which occurred in the Parkville Youth Residential Centre in November 2016 was unlawful.\textsuperscript{159} Detention in the adult prison was found to give rise to a number of legal


\textsuperscript{154} Ibid.

\textsuperscript{155} Ibid.

\textsuperscript{156} Commission for Children and Young People, \textit{Same Four Walls Report}, 13.

\textsuperscript{157} Victoria, Parliamentary Debates, Legislative Council, 23 March 2017, 1591-2 (Jenny Mikakos, Minister for Families and Children).

\textsuperscript{158} \textit{LO v Northern Territory of Australia; EA v Northern Territory of Australia; KT (as Litigation Guardian for KW) v Northern Territory of Australia; and LB (as Litigation Guardian for JB) v Northern Territory of Australia} [2017] NTSC 22.

\textsuperscript{159} \textit{Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children} [2016] VSC 796. See also, \textit{Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)} [2017] VSC 251.
issues for the detainees and limit the ability of the detainees’ to resolve these issues. As Garde J stated in *Certain Children*:

*The establishment of a new remand centre and youth justice centre within the walls of Barwon Prison has widespread ramifications for the young persons who may be transferred to these facilities. They include the sense of security or insecurity felt by the young persons, and the level of physical security. They include physical, social, emotional, intellectual, cultural and spiritual impacts. They include the capacity of the new centre to receive visits from parents, relatives, friends and legal advisors, and affect the ability to meet medical, religious and cultural needs. They include the capacity of the young person to receive information and make complaints about the standard of care, accommodation and treatment afforded to the young person.*

While the Victorian Government responded to this case by removing the young people from Barwon prison and placing them back into juvenile centres,161 this case does illustrate the kinds of legal issues (including access and process issues) that can arise for young people in detention.

Of itself, mistreatment during detention is a serious legal issue faced by many juvenile detainees. However, it can lead to other significant legal issues during or after detention, particularly when a young person has experienced trauma or abuse in the past. The Victorian Commissioner for Children and Young People has noted that ‘[i]n custody, experiences such as being isolated, body searches, threats from others and conflict with peers may trigger memories of abuse, neglect, abandonment or conflict’ and is ‘then likely to activate an aggressive or self-harming response’.162

**How do prisoners and detainees respond to their legal problems?**

**Adult prisoners**

Grunseit et al have noted that the capability of prisoners to address their legal needs is often affected by their lives before prison; financial capacity; previous experience in legal processes; comprehension capacity; and life skills.163 These factors are recurrent themes throughout the below discussion regarding the barriers that constrain many prisoners from accessing justice and must be considered in conjunction with the 'systemic context' of prison.164

*To successfully address legal issues, it helps for inmates to be motivated, tenacious, articulate, patient, organised and familiar with the law and the relevant legal processes. In contrast, the profile of the prisoners … is characterised by poor literacy, mental health issues, histories of alcohol and other drug misuse and cognitive impairment. Many prisoners have had limited or interrupted education. Periods in custody, separated from*

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164 Ibid.
Issues such as mental health issues, history of alcohol/drug use, limited education, poor literacy, and cognitive impairment are also common for young people in detention. However, as Pleasence et al have noted, children and young people (including those in detention) are often also impeded by factors including: reliance on others (financially, physically and mentally); lack of experience and life skills; lack of income; or damaging relationships with family and/or friends.

**Access to information and support**

Accessing legal information and support is significantly more difficult for prisoners than for the general population. Grunseit et al note that the:

> … range of choice of sources of information is narrower … and the opportunities to consult those sources they can access may be subject to strictures generated by other prison functions.

Given these barriers, prisoners generally access legal information or support in the following ways:

- visiting legal advice services;
- private lawyers;
- prison staff;
- other prisoners;
- telephone and audio-visual technology (connecting with family, friends or legal support);
- prison libraries; and
- computers with restricted internet access.

Although procedures are in place to facilitate inmate participation in law processes, especially criminal law processes, a range of barriers related to the personal legal capacity of prisoners, Grunseit et al have noted that the systems for accessing legal support and prison culture significantly impede many prisoners’ ability to address their legal problems as opportunities may be compromised or missed. The barriers to accessing justice that often arise for prisoners and detainees through the above methods are outlined below.

Grunseit et al have noted that there is an inverse relationship between the availability of legal support and the quality of support. More available sources such as other inmates
or prison staff are relatively accessible but provide low levels of support, whereas services such as legal aid or private legal assistance which provide a generally higher level of support can be comparatively difficult to access.\(^{172}\)

Lack of available support often means that prisoners are often forced to self-represent. This issue is discussed further below.

**Informality**

A significant issue identified by Grunseit et al, was the tendency for prisoners, before during and after imprisonment, to resolve issues outside of the legal system.\(^{173}\) Grunseit et al observed that:

> … prior to coming to prison, prisoners tend to have arranged their affairs without recourse to formal legal transactions or processes. This can manifest as informal money lending, sub-leasing of housing, unofficial care arrangements for children and the use of violence to settle matters. The tendency towards having informal rather than formal arrangements appears to be, at least, partly the result of a suspicion of the legal processes and a general isolation from conventional opportunities and processes.\(^{174}\)

Grunseit et al further observed that ‘prisoners and ex-prisoners were often quite suspicious of the law and legal process and its capacity to deliver positive outcomes for them’ and thus would tend towards informal arrangements.\(^{175}\)

There are two main access to justice concerns with this informal approach. First, the outcomes generated outside the legal system are likely to be sub-optimal and give rise to additional issues in the future.\(^{176}\) Second, previous informality may make it more difficult to call on the legal system if required in the future.\(^{177}\)

**Juvenile detainees**

As with adult prisoners, issues such as mental health conditions, history of alcohol/ drug use, limited education, poor literacy, and cognitive impairment are common for young people in detention.\(^{178}\) However, as Pleasence et al have noted, children and young people (including those in detention) are often also impeded by factors including reliance on others (financially, physically and mentally), lack of experience and life skills, lack of income, or damaging relationships with family and/or friends.\(^{179}\)

The way in which young people, including juvenile detainees, respond to legal problems is likely to differ depending on age, location, education, family support, and wealth. For example, young people aged 15 to 17 years are more likely to ignore a legal problem

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172 Ibid.
174 Ibid 119.
175 Ibid.
176 Ibid 118.
177 Ibid.
179 Pleasence et al, Reshaping legal assistance services, 124-7.
compared to young people aged 18 to 24 years. However, as a group, younger people are significantly less likely to seek advice in response to legal problems and most likely to handle legal problems without advice. This can be attributed to factors such as: lack of legal knowledge; low personal legal capability (discussed below); reliance on others (particularly family); or, lack of independence and distrust of the legal system. Such factors can be exacerbated by the physical barriers imposed by detention.

The Victorian Commissioner for Children and Young People has noted that custodial experience may adversely affect young people, particularly those with a history of trauma or disadvantage, and lead to aggressive or self-harming responses to problems:

Most children and young people in youth justice centres have a history of trauma or disadvantage. Trauma and abuse affect children’s physiological, emotional and cognitive development in many ways, making them more vulnerable to involvement with the criminal justice system. The negative effects of trauma on a child’s brain and behaviour also influence that child’s response to being detained.

Children’s experience of violence can affect how they respond to perceived threats in custody. Many learn to use and rely on physical force to meet their needs... In custody, experiences such as being isolated, body searches, threats from others and conflict with peers may trigger memories of abuse, neglect, abandonment or conflict. These are then likely to activate an aggressive or self-harming response.

Further information regarding how young people respond to legal issues can be found in the Children and Young People Chapter (Part 1).

What are the barriers constraining prisoners and detainees from accessing justice?

Adult prisoners

Physical and systemic limitations

The Prisoners’ Legal Service (Queensland) state that ‘the prison itself should be considered a barrier to accessibility of civil justice’. Inherent in the physical barriers imposed by imprisonment are added difficulties in accessing justice over and above those faced by other disadvantaged groups. Unlike the general public, prisoners cannot visit

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182 Grunseit et al, Taking Justice into Custody, ch 5.
183 Commission for Children and Young People, Same Four Walls Report, 13.
184 Ibid 37.
186 Grunseit et al, Taking Justice into Custody, 193.
or call the local lawyer or community legal centre (‘CLC’) at their convenience. Grunseit et al note that common physical difficulties faced by prisoners include:

- limitations on access to resources (such as the prison library or internet);
- difficulty contacting legal support providers (such as limitations on the length of phone calls);
- lockdowns, segregation and other prison procedures which limit access to information and/or support at various times; and
- lack of privacy and effective client legal privilege (open meetings with lawyers, monitored mail if not clearly from a lawyer).\(^{187}\)

Such limitations are often the result of factors including:

- a lack of ‘resources in the form of staff and facilities that support access to legal information’;
- conflicting priorities of the custodial system (for example, the focus of prison staff may be on security and process issues rather than supporting prisoners to obtain access to legal assistance);
- conflicts between external agencies and prison systems (for example, coordinating phone calls to legal support or court visits with prison systems such as out-of-cell times or prison transport); and
- reliance on systems that are not conducive to optimal outcomes (for example, reliance on completing forms (court forms, legal aid forms, etc) when a significant number of prisoners do not have the capacity to read or understand the forms).\(^{188}\)

The following extract from the submission of a current South Australian prisoner highlights his concerns regarding the difficulties that the physical and systemic limitations of prison place on the ability of prisoners to interact with the justice system (particularly if they are self-represented and have been unable to engage legal assistance):

### Case Study

I submit that no one who is not in prison could ever properly understand the oppressive environment that prison comprises. Prison is an environment that is not at all conducive to pursuing personal legal matters.

Access to legal information and resources do [sic] not exist! Study resources such as computers are often not available and, when they are, they are not always easily accessible.

The structured prison day of many institutions does not allow for personal study time. Movement to various areas of the prison is dictated by daily regimes which apply to inmates’ employment and accommodation within the prison.

There are frequent lock downs and time intrusive security operations, closure of Education Centres, movement regimes and strict regime which oversee access to facilities.

\(^{187}\) Ibid. 96.

\(^{188}\) Grunseit et al, Taking Justice into Custody, 193-4.
Access to educational resources is only possible during prison day working hours. Even then they are often very restricted and only available to students enrolled in education courses. If you are not a student or do not work in education, then your prison day sees you elsewhere …

There is absolutely no access to computer resources outside working hours. No prisoner has access to a computer in their cell and no prisoner has access to the Internet—ever! Computer systems are closed networked systems with very restricted abilities to introduce external files.

To merely type a letter (and to ensure an electronic record) can take several days to arrange computer access and then a request ‘authority’ may need to be completed to arrange a printout of your letter. If being charged for the printout (at 20c/page) an additional ‘authority to deduct monies’ form is required. Inmates do not have access to scanning equipment and the preservation of documents and files is an ongoing problem which I’ve found can only be achieved with the good graces of an education coordinator who is willing to assist and has the spare time with which to do so.

(Confidential, Submission No 71)

However, Grunseit et al have also stated that these difficulties are often exacerbated by the way in which the justice system (legal services, courts and tribunals), custodial system (prison services, prison discipline services and parole services) and bureaucratic system (government services such as welfare and health) interact to create significant difficulties for prisoners and detainees.\(^{189}\) For example, reliance on paper-based systems in prison can have a significant impact on the ability of many prisoners to access services and understand important documents. As noted by the Prisoners’ Legal Service (Queensland), this is a particular issue for prisoners with little education, who are illiterate, have little English proficiency or have a cognitive impairment:

> Many prisoners do not speak English well, and many are not literate. It is a big problem that the process is paper based. The group of people being communicated to by courts/lawyers/government agencies cannot understand this style of communication.\(^{190}\)

Another example, provided by a welfare officer at an urban prison to Grunseit et al, is the systematic limitations on remandees placing phone calls, particularly if they are unable to deal with civil issues:

> Usually what the intake screener will do is, a lot of them are happy with one free phone call at that time, which may be to mum. … But it maybe they need more. They may need one to wife or, or mother, they need one to their mate to move their car or get the dog out [of] the flat or, you know, whatever. … And he may need one to his boss to say ‘Look, you know, sorry, the work car is by the side of the road, unfortunately the key’s in here [jail].’\(^{191}\)

There are many other examples of the policies and practices of the legal, custodial and bureaucratic systems that exacerbate other barriers faced by prisoners accessing prison. Active consideration of the impact of processes on how prisoners access justice is a


\(^{190}\) Consultation, 23/08/2017, Brisbane (Prisoners’ Legal Service).

serious gap which requires attention going forward. This issue is further explored in the Broader Players Chapter (Part 2).

**Technological barriers**

An increasingly common way for prisoners and detainees to access legal services (including both access to legal advice and access to court systems) is the use of technology, and in particular audio-visual link (‘AVL’) technology such as videoconferencing.\(^{192}\) The use of technology to provide services, including legal services, to prisoners has grown significantly in recent times. In her submission to the Justice Project, McKay stated:

> *The use of AVL in criminal justice has increased rapidly over the last decade globally and in Australia. The state of NSW leads in AVL usage with 2015-2016 statistics showing 54,456 court and parole appearances being facilitated by AVL (approximately 65% of all court appearances). I have found that this represents an increase in AVL usage of 532% since 2002-2003. In the same period, 31,200 legal conferences were conducted by AVL, and I have found that represents an increase of 3,226% since 2003-2004.*\(^{193}\)

The use of technology to provide services to prisoners has developed significantly as, in theory, it allows the services to access prisoners in a more cost and time effective manner.\(^{194}\) When announcing a trial program of expanded use of AVL to connect prisoners with the Victorian Magistrates’ Court, Chief Magistrate of Victoria, Mr Peter Lauritsen, stated that:

> *Expanding the use of video conferencing to also include communication between prisoners and the legal profession provides an opportunity to reduce further the need for prisoner movements across the system, and will reduce the administrative burden associated with legal practitioners attending prisons.*\(^{195}\)

Technology can be particularly effective in reducing travel costs to prisons (particularly rural prisons), time costs of attending prison (for example, clearing security can be quite time-consuming) and reducing travel of prisoners to and from court.\(^{196}\) The time efficiency offered by technology was observed by a prisoner surveyed by McKay:

> *A lady [lawyer] who was helping me was all the way in the city and I’m just one of the many that she helps today. She probably helps someone in Emu Plains, and then someone in Mulawa, and then someone in the John Morony Centre, and then someone down at Bega. So she needs to be there and access us where we are, but not have to do the travelling*

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\(^{195}\) Magistrates’ Court of Victoria, ‘Video Conference project commences’ (Media Release, 22 April 2015) [9]. Following this trial (starting 12 September 2016) use of AVL was significantly expanded in the Victorian Magistrates’ Court, with the default position becoming that all accused will appear before the court by way of AVL: Magistrates’ Court of Victoria, AVL Information: Frequently asked questions (2016) <https://www.magistratescourt.vic.gov.au/sites/default/files/Default/160907%20AVL%20FAQs.pdf>.

between [us]. So I think its not a bad idea, you know, using technology to maximize the amount of help she can give people.\textsuperscript{197}

While technology is now widely used to facilitate the provision of legal assistance to those in prison, there have been very few formal evaluations of this approach.\textsuperscript{198} Given the current funding shortages faced by legal assistance service providers, the time and cost efficiencies offered by technological solutions cannot be ignored. However, Forell et al have argued that these solutions cannot be described as anything more than ‘functional’.\textsuperscript{199}

On its face, technology can improve how often (and how long) advice is given to prisoners. However, it is important to note that access to information or services, does not necessarily mean access to justice. McKay notes that for prisoners, in addition to the ability to obtain legal advice and representation, access to justice also includes the ability to ‘participate in and comprehend legal proceedings’.\textsuperscript{200} Over-reliance on technology for lawyer-client interaction, legal education and court proceedings can severely impact on prisoners’ ability to ‘participate in and comprehend’ their legal issues.\textsuperscript{201}

Capability of prisoners to use technology can be limited by two compounding factors. First, prisons have commonly been acknowledged as ‘technological dead zones’ and that many prisoners, particularly older and long-term prisoners, may be ‘technically illiterate’.\textsuperscript{202} For example, the following comments were made to McKay:

“It’s pretty much computer illiterate to be honest” – 54 y.o. male.

“It freaks me out, yeah technology, it scares me” – 32 y.o. Aboriginal woman who suffers from memory loss as a result of a severe concussion.

“If they walked me into a room and they sat me down in front of a computer and said, ‘You’ve got video link’ and I [said], ‘I don’t know how to use a [f……] computer’. I’d never seen one. I’ve been in goal since I was 13.” – 40 y.o. male inmate describing his first experience using AVL.\textsuperscript{203}

Second, many prisoners suffer from issues such as low education, poor literacy or mental health conditions and often are highly distrustful of the legal system. These issues make it highly difficult for many prisoners to interpret information provided or openly provide information to a lawyer other than in a face-to-face format.\textsuperscript{204} In particular, self-help tools using technology (such as access to legal information over the internet or on DVD), if not supported by face-to-face support is highly unlikely to be effective.\textsuperscript{205}

It is important to note, as is evident in the extract from the submission of a current South Australian prisoner above, that the physical and systemic barriers of prison including

\textsuperscript{197} McKay, ‘Face-to-interface Communication’, 110.
\textsuperscript{198} Ibid 116-7. See also, Suzie Forell, Meg Laufer and Erol Digiusto, Law and Justice Foundation of New South Wales, Legal assistance by video conferencing: what is known? (2011) 9.
\textsuperscript{199} Forell, Laufer and Digiusto, Legal assistance by video conferencing: what is known?, 11.
\textsuperscript{200} McKay, ‘Face-to-interface Communication’, 107.
\textsuperscript{201} Ibid.
\textsuperscript{202} Ibid 112.
\textsuperscript{203} Ibid 108.
\textsuperscript{204} Grunseit et al, Taking Justice into Custody, 130-1.
\textsuperscript{205} Pleasence et al, Reshaping legal assistance services, 142-4.
limited access to computers, the structure of the prison day, lockdowns, time intrusive security operations and reliance on prison staff, can exacerbate these technological barriers. Physical detraction from court proceedings when technological solutions are engaged can also significantly impact on how prisoners interact in those proceedings. Issues with AVL systems, including difficulty confidentially communicating with their lawyer, appearing in prison uniform and difficulty understanding the proceedings have been noted as detracting from the sense of fairness or justice that is felt by many prisoners. McKay in her submission, argues that such issues ‘subtly and incrementally erode the rights of prisoners and common law principles that structure prisoners’ legal engagement and access to justice’.

Conversely, during consultations the Prisoners Legal Service (Queensland) identified that lack of access to technology and reliance on communication systems such as mail and telephone is often a significant barrier to access to justice for prisoners. These issues make it difficult for lawyers to collect information from their clients impacting on the completeness of legal advice that can be offered. Lack of access to technology can also impede the way prisoners can access information to work on their own case. For example, Prisoners Legal Service (Queensland) estimated that 50 per cent of the mail it has received is from prisoners asking them to print information that they had been unable to access themselves. Additionally, reliance on postal mail as the primary form of communication (in order to protect privilege) creates significant difficulties for illiterate prisoners.

As discussed in the Children and Young People Chapter (Part 1) and People – Building Legal Capability and Awareness Chapter (Part 2), while the use of the internet among young people is high, young people have low rates of using the internet to access government services and to resolve legal problems. Technology and online services may not necessarily enhance legal capability or increase access to justice for children and young people. This is especially the case for at risk young people who often have lower education levels and more limited access to technology, making it challenging to navigate online legal services. At risk young people may also require ‘emotional and motivational support to engage with and to progress what may be confronting legal problems’.

Pleasence et al found that children and young people with lower personal and legal capability often lack the necessary skills to identify and use online legal information and assistance. This lower legal capability and restricted ‘information and concept’ literacy may account for the general preference among young people for intensive and personal forms of service delivery. This suggests that for many young people in the juvenile justice system, the use of technology is unsuitable and that legal advice and information should be supported by face-to-face conversations. The Law Society of New South

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206 Confidential, Submission No 71.
208 Carolyn McKay, Submission No 58.
209 Consultation, 23/08/2017, Brisbane (Prisoners’ Legal Service).
210 Ibid.
211 Ibid.
212 Coumarelos et al, Collaborative Planning Resource, 98.
213 Ibid 32.
214 Ibid 33.
215 Pleasence et al, Reshaping legal assistance services, 146.
216 Ibid 29.
Wales (‘LSNSW’) has also previously outlined the issues of using AVL facilities to engage with children:

… particularly in the first appearance at court, it is crucial to have proper face to face contact with the client. The majority of ALS [Aboriginal Legal Service] juvenile clients in custody have poor literacy skills and varying degrees of intellectual disabilities. It is therefore essential to have in person contact to detect fitness issues, establish rapport, receive coherent instructions and gauge whether the child understands the court process.217

Furthermore, Principle D1 of the LSNSW’s Representation Principles for Children’s Lawyers (breach of which constitutes breach of the practising requirements of the NSW legal profession) outlines that:

Other than in exceptional circumstances, his or her legal representative must see every child before going to court. The practitioner should see the child as soon as possible after their appointment, and, where possible, well before the first hearing.218

The NSWLs in the Commentary on Principle D1 noted that in-person interaction is necessary in most circumstances to allow the practitioner to explain the processes, establish a relationship of trust with the child allow the practitioner to ‘get a sense of who they are representing and to assess the child’s circumstances, often leading to a greater understanding of the case’.219

While it can be argued that for every advantage technology can create for prisoners and detainees in accessing services, there may be an associated disadvantage, the use of technology is only likely to further increase.220 The existence of these disadvantages, does not necessarily mean that technology should not be used to provide legal services to prisoners or juvenile detainees. In fact, there is an argument to be made that exposure to technology is vital to prisoners’ rehabilitation and re-entry, as it allows them to keep pace with changes in the world outside of prison.221 However, anecdotal evidence suggests that use of technology is likely to be most effective and efficient where those tasked with providing legal support are able to establish an initial trust and rapport through face-to-face interaction,222 and where prisoners have sufficient legal and technical capability engage with it.

**Cognitive impairment**

Grunseit et al have noted that although prisoners ‘are by no means the only people to face difficulties in reading and understanding legal documents, as a group, they are disproportionately affected by cognitive impairment and poor comprehension skills’.223

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219 Ibid.
220 Carolyn McKay, Submission No 58.
223 Grunseit et al, Taking Justice into Custody, 127.
Particular impairment disproportionately experienced by inmates include: intellectual or cognitive impairment; limited education; poor literacy; acquired brain injury; alcohol and other drug impairment; and, mental health conditions.\textsuperscript{224} The Disability Justice Centre noted in consultations that there is ‘a real issue’ that in order to take advantage of the available interventions that would help many prisoners with disability to obtain bail or parole, a certain intellectual level is required.\textsuperscript{225}

Although ongoing issues, such as intellectual or cognitive impairment may significantly hinder a prisoner’s ability to comprehend information or participate in the legal process, especially where no or insufficient accessibility measures are adopted, Grunseit et al particularly note that:

\ldots temporary forms of impairment [stress or alcohol or drug intoxication/withdrawal] tend to coincide with crucial points in the legal processes, such as at the time of arrest and police interview, and attending initial court hearings. This is critical because it is at these times when inmates must draw on their skills to engage with the process \ldots [but] appear to have the least capacity to do so.\textsuperscript{226}

Temporary impairment is an issue particularly affecting prisoners on remand. Although short term issues such as intoxication or stress may be alleviated over time (for example, after better medical attention or detoxing),\textsuperscript{227} the impact of failing to address legal issues early in the incarceration process due to short-term impairment can cause these issues to have a more severe impact, both during and after incarceration. For example, failure to address a simple housing issue such as applying to retain a tenancy early after imprisonment,\textsuperscript{228} can have a significant impact post imprisonment including homelessness and loss of personal property.

**Legal literacy and system experience**

Grunseit et al have noted that although many inmates could draw on previous experiences to navigate legal and custodial systems, ‘the level of knowledge among inmates of the laws and legal processes is not consistently high, accurate or broad enough to cover the range of criminal and civil matters they may face’.\textsuperscript{229} Grunseit et al particularly note that many prisoners struggle to:

- recognise where they have a legal issue (particularly civil or family issues);
- identify remedies or pathways to remedies to their issues;
- identify how to initiate a legal process; and
- seek assistance.\textsuperscript{230}

\textsuperscript{225} Consultation, 05/09/2017, Perth (Disability Justice Centre).
\textsuperscript{226} Grunseit et al, *Taking Justice into Custody*, 127.
\textsuperscript{227} Ibid 129-30.
\textsuperscript{228} For example, in New South Wales, a tenant of public housing can apply to the Department of Family and Community Services to retain the tenancy for up to six months: Department of Family and Community Services, Government of New South Wales, *Tenancy Policy Supplement* (20 January 2017) <http://www.housingpathways.nsw.gov.au/additional-information/policies/tenancy-policy-supplement#tenants1>.
\textsuperscript{229} Grunseit et al, *Taking Justice into Custody*, 122.
\textsuperscript{230} Ibid 104.
Negative experiences with the legal system and the custodial system can have a highly detrimental impact on how many prisoners seek legal assistance. Pleasence et al note that:

*Previous negative experience, such as failing to obtain assistance or failing to obtain a satisfactory outcome through self-help ... may erode self-efficacy concerning ability to use the legal system to resolve disputes, resulting in ‘learned helplessness’ or ‘frustrated resignation’.*

Frustration with the legal or custodial systems can also lead a prisoner to an ‘us versus them’ mentality. Much has been written about the ‘oppositional code’ of prisoners under which the legal and custodial systems and the people within them (such as police, lawyers, judges and prison staff) are considered the opposition. There is some opinion that this subculture stems from distrust built by experience prior to prison (for example interaction with police or the legal system at a young age).

When prisoners become resigned to a belief that the legal system cannot help them, the likelihood that they invest the time and effort required to obtain legal assistance while in custody significantly diminishes. This, in turn, exacerbates the impact of other barriers discussed in this section. The effect of this can often be that prisoners become a barrier to their own access to justice. As Grunseit et al observed, before, during and after imprisonment ‘many inmates habitually operate outside formal processes and are usually ignorant or, at least, mistrustful of them’ and have a ‘tendency towards having informal arrangements around important issues such as housing, finance, and child care needs.’

**Limited resources**

Financial disadvantage is a significant problem for many prisoners and detainees. As noted above, a significant proportion of prisoners are unemployed and/or homeless prior to entering prison. Debt is also a severe issue for many prisoners before, during and after imprisonment. Debts including fines, child support, housing, credit, illicit debts (for example, money owed for gambling or drugs) and loans from family or friends can severely limit access to legal support. Furthermore, the earning capacity of many prisoners post release are severely impacted by their time in prison thus restricting their

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238 Ibid 76-7.
ability to address financial issues once released. For example, according to the AIHW, 79 per cent of prisoners expected to receive Centrelink payments following release. Due to this financial disadvantage, many current or former prisoners are unable to afford to address legal issues. Free or heavily subsidised services provided by legal assistance organisations do provide support to many of the most disadvantaged at times of particular need during criminal proceedings (for example, at the time of bail application). However, according to Grunseit et al, ‘there is a sizeable group of people who are not wealthy, but have enough income or assets to render them ineligible for legal aid for their criminal matter’. Assistance for civil and family issues is often even harder to access.

**Self-representation**

Where prisoners are unable to access legal advice or support, they may be forced to represent themselves - an option made all the more difficult by the systemic and physical barriers of prison. The following statement from a probation and parole officer at an urban area prison recorded by Grunseit et al, highlights the shortfall in available legal aid assistance, how this can lead to self-representation and the impact that this can have on the ability of many prisoners’ ability to access justice:

... I don’t think Legal Aid is that available ... people have to have zero money in the bank and like no job and be really in dire straits. Where there are a lot of people that might have, you know, a few thousand dollars or a job, and they can’t afford to pay for a solicitor, but they’re not eligible for Legal Aid either. So a lot of those people go to court unrepresented. They represent themselves and they don’t know what to expect. I think it’s really tough for the people going to court.

The issue of a person in custody representing themselves is evident in the NSW case, *Miles v R*. Although Mr Miles was refused bail pending an appeal to the Court of Criminal Appeal, the Court considered the impact that custody has on the ability to prepare for a court appearance, particularly when the person is unrepresented. The following comments of RS Hulme J highlight the impact that the physical and systemic barriers can have on self-represented litigants’ ability to put their best case forward:

**Case Study**

‘[o]ne of the matters referred to ... which the Court is required to take into account in considering whether to grant bail is in the interests of the applicant having regard to the needs of the person to be free to prepare for the person’s appearance in Court or to obtain legal advice or both. Those needs are obviously greater in circumstances such as those we are informed exist here where the Legal Aid authorities have declined to assist the applicant in his appeal. ...”

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241 Grunseit et al, *Taking Justice into Custody*, 120.


244 *Miles v R*[2012] NSWCCA 88 (1 May 2012).

Recently I had occasion to grant bail to someone who would not otherwise have received it because on the evidence in that case the Corrective Services Department was not providing reasonable facilities for the applicant to prepare his case. The applicant today makes a similar complaint.

It is apparent that since December of last year the applicant has made a number of representations to the authorities for access to a legal library or cases contained therein and for time in which to prepare his appeal. Although in the documentation it is clear that to some degree the applicant’s requests have received favourable treatment, it is by no means apparent that he has been provided with reasonable time and facilities. The limited evidence which the applicant put before the court … does tend to reinforce the impression I have derived in other cases that the Corrective Services Department do not provide what an outsider would regard as reasonable facilities for someone such as the applicant in the circumstances that he is in.

As I have indicated, I express no concluded view in this case. I merely wish to record that what I have seen is a cause for concern and I would urge the Department to ensure that the applicant is provided with sufficient time and sufficient facilities in which to prepare his case’.

(Extract from Miles v R[2012] NSWCCA 88 (1 May 2012) [2]-[4], [6])

Personal barriers and dependence on others

Due to the isolation prisoners face, they are heavily reliant on intermediaries outside prison for support in addressing legal issues. However, Grunseit et al note that the ‘chaotic and often desperate lives inmates lead prior to incarceration could have detrimental effects on their personal relationships, and the resulting level of support they could draw on to address legal issues’. Issues such as mental health conditions, drug or alcohol addiction or a tendency for violent or erratic behaviour can strain the relationships that prisoners have with family, friends, government agencies and other support services, which in turn can make it difficult to draw on support from these sources. Furthermore, as issues increase, these sources of support may become less willing (for example, family may refuse to help a family member who has not addressed issues with previous support) or less able to provide support for repeating or ongoing issues (for example, a family may rally around a family member when they first experience legal trouble, but may not be able to provide the same level of support with later issues).

Juvenile detainees

There are a number of common barriers that prevent young people (including detainees) from effectively accessing justice. These barriers include: dependency on adults; financial limitations; communication barriers; psychological barriers; and general systemic barriers.

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246 Grunseit et al, Taking Justice into Custody, 195.
247 Ibid 112.
249 Ibid 113.
250 Ibid 121.
Further discussion of these issues is included in the Children and Young People Chapter (Part 1).

During consultations, the National Children’s Commissioner noted that lack of knowledge of their legal rights and how to enforce them is a significant barrier to access to justice for many children and young people in detention. This barrier has been linked to limited access to resources (including induction materials) in forms understandable for young people.

As with adult prisoners, the physical barriers of custodial facilities mean that juvenile detainees rely on a number of intermediaries to access to legal advice or support. Intermediaries can include family, friends, support providers (such as government child safety services) and detention centre staff. Unfortunately, many juvenile detainees struggle to rely on intermediaries. Many juvenile detainees have experienced domestic violence and/or have experienced time in child protection which can make it difficult to receive family support. Furthermore, by the time many juvenile detainees have reached the point of being detained, they have experienced difficulties with police and government service providers, which may make it difficult for them to interact with support providers.

These issues are often exacerbated by difficulties in accessing assistance arising from the physical and systemic barriers of detention. For example, in Certain Children (although in the context of a juvenile detention centre established within an adult prison) when discussing the ability of a CLC lawyer (Ms Leikin) to meet with a detained client (Mr Aleksov):

**Case Study**

‘On 11 December 2016, Ms Leikin attempted to arrange a time for Sascha Aleksov, a young person detained in the Grevillea unit, to sign an affidavit in this matter. She was told that it was not possible to speak with Mr Aleksov, because she was not on his call list. When she asked about organising a legal visit for Mr Aleksov, Ms Leikin was advised that Mr Aleksov was on lockdown and would not be allowed out of his cell until 5.30pm at the earliest. A 6pm curfew applies to the entire unit.

Given the time of her enquiry, the time required to travel to Barwon Prison, and the small window of time in which it would be possible to see Mr Aleksov, it was suggested to Ms Leikin that she call again at 8am on 12 December to enquire about a visit to Mr Aleksov’.

(Extract from Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children [2016] VSC 796 [97]-[98])

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251 Consultation, 25/08/2017, Canberra (National Children’s Commissioner).


Are there critical gaps in services which are necessary to deliver justice to prisoner and detainees?

Availability of legal assistance for civil and family law matters

Mason CJ and McHugh J in *Dietrich v The Queen* found that:

…”it should be accepted that Australian law does not recognise that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.”

The principle that a trial may be stayed, or a decision overturned, where a person accused of a serious criminal offence has not received legal representation and therefore will not, or did not, receive a fair trial, has led legal assistance providers to focus funds on these cases. Given the limited availability of resources, the focus upon serious criminal issues has come at the expense of the provision of legal assistance for less serious criminal issues (those giving rise to the possibility of short sentences) and civil and family law issues.

It is noted in the Legal Services Chapter (Part 2) that lack of funding for legal assistance services including legal aid organisations and CLCs has a severe impact on the ability of many people experiencing disadvantage to access justice. In particular, lack of legal assistance funding has an impact on the ability of disadvantaged Australians to obtain assistance in dealing with civil or family issues. In 2014 the Productivity Commission recommended an immediate injection of $200 million for civil legal assistance services. It found that civil law matters constituted ‘the poor cousin in the legal assistance family’. Noone notes that ‘this privileging of criminal law matters over family and civil law has an ongoing impact on the poor’s social exclusion and access to justice’. Rice remarks on the arbitrary nature of this distinction:

> It is simply not possible to say, as a general rule, that a person who loses their liberty loses ‘more’ or ‘less’ than a person who loses their home, their livelihood, their children, their reputation, their earning capacity, their freedom of expression, their right to vote and so on.

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257 Consultation, 23/08/2017, Brisbane (Prisoners’ Legal Service).
259 Ibid recommendation 21.4.
260 Ibid 703.
Nevertheless, the ‘incarceration is more serious’ argument persists and is commonly treated as a relevant factor in deciding whether a right to legal aid arises’. 262

The Prisoners’ Legal Service (Queensland) and Victoria Legal Aid have noted that additional legal assistance funding directed to assisting prisoners with non-criminal legal issues, such as family law, wills and estates and debt, is needed. 263 While, those facing imprisonment could be considered ‘the lucky ones’ because legal aid support is so often reserved for those facing imprisonment, it was noted during the Victorian Government’s Access to Justice Review that prisoners, as with many vulnerable groups, ‘have limited or no access to legal help for issues other than their criminal law issues’. 264 A 2011 Report by the Public Interest Law Clearing House (PILCH, now Justice Connect) on the legal issues faced by prisoners in Victoria found that ‘there is significant unmet need for civil law assistance for prisoners particularly in the areas of housing and debt and issues regarding conditions of detention (notably access to health care)’. 265

Furthermore, Grunseit et al note that:

… prisons, as an integral part of the criminal justice system, have a range of mechanisms that serve the resolution of inmates’ criminal matters. However, in the case of civil matters it appears that access to assistance and the ability to participate in legal processes is more difficult from prison. One reason for this is an apparent lack of ready access to legal advice on civil issues. 266

As one example, despite the strong linkage between histories of domestic and sexual violence, and women offending, 267 Community Legal Centres NSW has identified the lack of information available in rural, regional or remote (‘RRR’) prisons about domestic violence support services (including regarding family law matters such as reclamation of children) as a critical gap:

263 Consultation, 23/08/2017, Brisbane (Prisoners’ Legal Service); Consultation, 14/08/2017, Melbourne (Victoria Legal Aid).
265 Public Interest Law Clearing House, Prisoners Scoping Study: Investigating the feasibility of a PILCH civil law program for prisoners (July 2012), 22 (‘Prisoners Scoping Study’).
266 Grunseit et al, Taking Justice into Custody, 159-60.
**Case Study**

‘Access to information regarding domestic abuse support services is very low in RRR prisons, and as a result very few women who have been victims attempt to get [counselling] or request assistance or reclamation.

This was noted when a solicitor at one of these prisons held a discussion with victims of domestic abuse, which at that point was largely identified as impacting a large portion of the incarcerated women, with only 6 attendances and 5 follow-ups, despite the hundreds of incarcerated women. Of the 5 follow-ups, none of these individuals were previously aware of this service’.

(Western NSW CLC Solicitor, Community Legal Centres NSW, Submission 106)

**Access to specialist Prisoners’ Legal Services**

In Australia there are few legal services that specialise in providing legal assistance only to prisoners. In New South Wales the Prisoners’ Legal Service is a program conducted by Legal Aid NSW that ‘provides advice, minor assistance and representation to prisoners’ including in prisoner-specific matters such as bail, appeals, legal aid, parole, classification and other prison issues, as well as family law and civil law matters. In Queensland, the Prisoners’ Legal Service is a CLC that provides legal advice, information and assistance, community legal education and an integrated financial counselling service, to prisoners and their families. The Prisoners’ Legal Service (Queensland) provides assistance on a range of legal issues connected with incarceration including administrative and migration law. However, it does not practise in criminal law and cannot provide advice or representation for criminal issues.

No recent formal evaluations of these services are available. A review of the NSW service was conducted in 2005 and found that the increasing prison population was placing increased burdens on capacity of the Service to provide wide-ranging support, in particular the capacity to provide civil and family law advice. Anecdotal evidence suggests that these organisations are working well to provide outreach support to prisoners. However, given increasing prison populations and the limited resources available, the ability to meet the demand for prisoner legal services remains a significant issue.

In Victoria, Victoria Legal Aid operates Prisoner Legal Help, a phone service that provides legal help to people in Victorian prisons. It opened in February 2017 and is currently available for prisoners in five facilities across the state, who can make free 12-minute calls to the service between 9.00 am and 3.00 pm, Monday to Friday. This service replaced Victoria Legal Aid’s visiting service in those facilities, where lawyers travelled to prisons to provide in-person legal information and advice. The evaluation of the project’s first

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271 Ibid.

272 Email from Victoria Legal Aid to the Law Council of Australia, 20 August 2018.

273 Ibid.
phase, and recommendations for expansion to other prisons will be released shortly. Additionally, Justice Connect runs a Tenancy Legal Help for Prisoners program which specialises in providing assistance to prisoners to help them avoid losing their tenancies due to eviction and deal with any outstanding housing debts owed to previous landlords (particularly the Victorian Office of Housing).

The Federation of Community Legal Centres has previously identified the lack of a specialist prisoners’ legal service in Victoria as a significant gap in the provision of legal assistance in Victoria which has resulted in people in custody in Victoria having ‘limited or no access to legal help for issues other than their criminal law issues’.

In the 2015 discussion paper entitled, A sector-wide approach to the legal needs of Victorian Prisoners, the Victorian Legal Assistance Forum (‘VLAF’) noted that a number of general legal services (including Victoria Legal Aid, the Victorian Aboriginal Legal Service and a number of CLCs) provide some kind of advice service for prisoners. However, VLAF also found evidence of significant unmet legal need amongst prisoners, including regarding civil and family law issues and suggested that a ‘more co-ordinated, well-invested approach’ is needed to address unmet need. This scoping exercise could be replicated in other jurisdictions.

Access to civil and family law systems

Not only can access to legal assistance for civil and family issues be limited, physical access for prisoners to the civil and family law systems can be significantly restricted.

The difficulties faced by prisoners in accessing these systems was summarised by a financial counsellor interviewed by Grunseit et al:

One of the things that occurs, of course, is that if you are an inmate and you’ve got further charges, Corrective Services will ferry you all around the State to appear in court, where possible. There isn’t any such service available that I know of for people to attend court in civil matters. And the result is that they can’t protect property. They can’t be heard in a court environment and the, as you’d know, there’s lot of situations where there are time limits on taking an action and ... if a matter is heard way down the track, you might not be able to get access to witnesses or information, or other things to support their claim. So functionally it, I see that it really does restrict their access to justice. In particular, I see that it restricts their access to justice in various consumer forums. ... In all of those areas a person who is not in custody can go [and], for a very small fee, have a matter heard. They don’t need legal representation and the matter is, you know, resolved in an expeditious way. If you’re in custody that’s not available to you.

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274 Ibid.
276 Federation of Community Legal Centres, Submission No 69 to Department of Justice and Regulation (Vic), Access to Justice Review, August 2016, 15-6.
278 Ibid 19.
280 Ibid 161.
Service gaps

Rehabilitation and transition programs

In order to achieve the sentencing aim of rehabilitation, it is important that prison programs and services are accessible to prisoners during their period of incarceration. Internal prison programs can be designed with the aim to ease transition back into the community following release, from the earliest stage of incarceration. It is critical that programs identify the issues underlying imprisonment and provide an ongoing program designed to address those issues in the short and long term.

Best practice elements of rehabilitation and transition programs, including specific program design considerations for Aboriginal and Torres Strait Islander people, women, children and young people and people with disability are discussed in the Critical Support Services Chapter (Part 2).

General programs

Prison can provide a timely opportunity to address legal problems. Although prison can increase or generate a number of barriers, it is an important time, away from many of the destructive influences that can lead to the chaotic lives lived by many prisoners before incarceration, to address the issues leading to criminal behaviour and prepare for re-entry. Grunseit et al note that:

services need to be made available during the more stable, sentenced phase of incarceration so that inmates can address their (potential) legal issues before the demands of release and reintegration are upon them.

General rehabilitation and transition systems are provided in each state and territory prison. Such programs play a vital role in preparing prisoners for many of the legal issues that may occur after release. Programs throughout prisons include: counselling, rehabilitation and support for issues such as mental health conditions or drug/alcohol dependency; education and vocational training (including prison industry); health care; and specific programs (such as art programs, women-specific programs or Aboriginal and Torres Strait Islander people-specific programs). Although not specifically designed to assist prisoners deal with legal issues, these programs can have a significant effect on the underlying causes of many legal issues. As Grunseit et al note:

Judicious timing of assistance and services may ensure that help comes when inmates can best capitalise on it and that legal issues are averted before they become problems. For example, skilling or re-skilling inmates in the management of their time, money and interactions with authorities before release may assist ex-inmates to remain independent and avoid resorting to solutions outside the law.

Although there are numerous general rehabilitation and transition programs operating across Australia, the Prison to Work Report undertaken by the Council of Australian Governments has identified three common issues including lack of support for those on

281 Ibid 277-8, 284-5.
282 Ibid 284.
remand or on short sentences, limited access to these services and lack of formal evaluation:

A lot of the problems identified by prisoners and service providers were exacerbated for prisoners either on remand or serving short sentences. In particular, in most prisons these prisoners were unable to access services and programs, which meant that they had no structured activity during the day to help them prepare for release, but they still faced the same problems (for example lack of housing, unstable family relationships, drug and alcohol abuse, poor levels of literacy, no job) on release.

Prisoners on remand have difficulty focusing on their post release life when they don’t know when that life might start.

Availability of evidence-based services to support a prisoner to transition to the community is scarce. Where there are services, the ability for ex-prisoners to access them is limited. Services may be unavailable due to small intake sizes, provider capacity or geographical isolation. Services may be available but potential clients are not aware of, or referred to, them, sometimes because of the lack of connections between services. Services are also rarely rigorously tested to measure their impact, making it difficult to gauge if they have a positive, negative or no impact at all. There is also a tendency for service providers to overstate their success as a result of using poor evaluation methodologies.

While, as discussed in the Critical Support Services Chapter (Part 2), rehabilitation and transition programs would seem to play an important role in assisting rehabilitation, including overcoming legal issues, evaluation of their effectiveness is a critical knowledge gap. Justice Project research, consultations and submissions also described key gaps in prison-based rehabilitation programs and/or prison responses to prisoners’ needs, including:

- Insufficient rehabilitation programs to meet demand.
- A lack of availability of rehabilitation programs for people on short services or on remand, which was described as a missed opportunity to assist prisoners at a critical time. The Prisoners Legal Service (Queensland) observed that short sentences were enough time for a prisoner to lose all outside social and financial support, but not enough for them to be able to take advantage of prison programs that are available for long term prisoners, that may prepare them for their release. Due to the limited availability of limited programs for this group, it stated that ‘the goals of sentencing are not being met by short sentences’;
- The need for prison systems to better respond to the unique needs of women, including Aboriginal and Torres Strait Islander women.

The Prison to Work Report previously highlighted that Aboriginal and Torres Strait Islander female prisoners ‘face additional challenges, such as (usually) poorer access to

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286 Knowmore, Submission No 102.
287 Consultation, 23/08/2017, Brisbane (Prisoners’ Legal Service); Legal Aid ACT, Submission No 115.
288 Consultation, 23/08/2017, Brisbane (Prisoners’ Legal Service).
289 Ibid.
290 Human Rights Law Centre and Change the Record Coalition, Over-represented and Overlooked Report, 8.
education and training opportunities while in prison. In this context, Sisters Inside argues that the needs of women prisoners are consistently overlooked, and that prison processes and practices often exacerbate pre-existing trauma. The National Congress of Australia’s First Peoples’ submission lamented the lack of funding for therapeutic rehabilitative programs directed towards Aboriginal and Torres Strait Islander women. Legal Aid ACT also submitted that there was a dearth of prisoner-based, women-focused, community alcohol and drug rehabilitation programs in the Australian Capital Territory, and more generally, a lack of reintegrative and social supports to prepare women for their eventual release. Women’s Legal Services Australia’s submission suggested that specific corrections strategies were needed to respond to women in custody in trauma-informed and empowering ways.

The ALRC recently recommended that programs designed for female Aboriginal and Torres Strait Islander prisoners should be designed and delivered by Aboriginal and Torres Strait Islander organisations and services.

- The Commissioner for Children and Young People WA articulated the importance of rehabilitative programs in youth detention centres, which particularly targeted young people’s mental health, wellbeing and education needs, with a special focus on girls’ needs, as these were often overlooked.

- An absence of specific programs designed for people with disability in the prison system. During consultations, the Mental Health Law Centre and the Disability Justice Centre observed that people with cognitive impairment or mental health conditions were not always able to take advantage of existing prison programs, as they often require tailored or intensive support. Involvement in programs such as drug and alcohol programs help prisoners to obtain parole, and limited access to them can therefore increase prison time for people with disability.\footnote{Jesuit Social Services\textquotesingle submission underlined its concerns regarding a generally poor identification or accommodation of disability, particularly acquired brain injury, within prison systems.}\footnote{See, eg, Neil Morgan, \textit{Recidivism rates and the impact of treatment programs} (Office of the Inspector of Custodial Services, Government of Western Australia, 1 September 2014).}

\textbf{Integration of legal advice and support}

Health, addiction, and education services are most commonly cited as important factors in preventing recidivism. However, it is just as vital that a prisoner’s legal issues are optimally addressed prior to release. PILCH has noted the effect that failing to address...
legal issues can have, and the importance of availability of ‘adequate and targeted’ legal support in breaking the cycle of disadvantage and preventing future offending:

The relationship between social and economic disadvantage and the perpetration of criminal offences is well documented. While the legal issues prisoners face may be a result of their disadvantage, their disadvantage in turn shapes the legal issues they face. Less discussed, is the role that adequate and targeted free legal assistance can play in breaking this cycle. Scholars and service providers agree that a more holistic approach to prisoners’ needs is necessary to address the underlying problems which contribute to their offending.

Service providers argue that it is extremely difficult to establish a stable life on release when income and housing options are significantly reduced by debts owed to agencies such as Centrelink and the Office of Housing. A debt to Centrelink upon release can mean no access to funds for basic living expenses. A debt to the Office of Housing can mean exclusion from housing or place[s] on the waiting list or prevention from entering an already lengthy waiting list. These problems strongly hinder any ability to escape the cycle of disadvantage which may well have caused their initial imprisonment.

Commonwealth Attorney-General’s Access to Justice Taskforce has noted generally that early intervention can be a significant factor in preventing legal problems from occurring and escalating, and that “[f]ailure to address legal problems has been shown to lead to entrenched disadvantage”. Incarceration can be a circuit-breaker for many of the legal issues that prisoners often face. Effective services and custodial systems that address legal as well as other common issues, such as health and employability, can play a significant part in reducing recidivism.

Throughcare programs

So-called ‘throughcare’ programs, provide ongoing support across several areas (health, education, legal issues) in the periods immediately before and after release. The Prison to Work Report defines throughcare in the following terms:

Prisoner throughcare programs provide comprehensive case-management for a prisoner in the lead up to their release from prison and throughout their transition to life outside. Projects aim to make sure prisoners receive the services they need for successful rehabilitation into the community…Good throughcare ‘starts in custody well before walking out of the prison gate’ and provides hands-on, intensive support, especially at the moment of release.

The Commissioner of Children and Young People Western Australia noted the importance of throughcare programs for young people in youth detention, and the role of the youth justice system in providing a thorough, holistic approach to its application:

Throughcare is a consistent and progressive case management approach to young people’ rehabilitation …Policy and practice need to prepare and support

303 Public Interest Law Clearing House, Prisoners Scoping Study, 12 (emphasis added).
305 Grunseit et al, Taking Justice into Custody, 277.
young people leading up to an upon release from detention to ensure that their human rights are protected, but also to avoid recidivism.307

However, currently throughcare programs are not available to all prisoners and detainees. For example, COAG’s *Prison to Work Report* identified that many Aboriginal prisoners on remand or serving short-sentences do not have adequate access to services and programs to assist them once the term of remand or imprisonment has finished (this also applies to non-Indigenous prisoners on remand or serving short-sentences).308 As a result many of these prisoners do not have structured activity during the day to help them prepare for release, but often face the same problems as longer-serving prisoners such as ‘lack of housing, unstable family relationships, drug and alcohol abuse, poor levels of literacy [and] no job’.309

Throughcare support programs are further discussed in the Critical Support Services Chapter (Part 2).

**Post-release accommodation and housing support**

As discussed throughout this Chapter, lack of housing is a critical issue for many prisoners prior to prison, when applying for bail or parole and when exiting prison. Housing issues are often related to difficulty in maintaining public housing during incarceration and inability to continue to rent private housing.310 This point was reflected by TEWLS which outlined the difficulties faced by former prisoners attempting to obtain public housing and noted that many ‘have no housing solutions beyond temporary accommodation’.311

Walsh, writing on behalf of the National Study on the Criminalisation of Homelessness and Poverty, submitted that ‘there is a need for resources to be invested in programs that support prisoners to retain their housing where they are serving short sentences, and to obtain housing upon release’.312 Queensland Advocacy Incorporated made a similar point, and proposed changes that would ensure prisoners who apply for public or community housing are eligible for priority housing on release from prison.313 Similarly, Jesuit Social Services emphasised the need for:

> **…long term and increased funding to homelessness and tenancy support services to provide assistance for people who have exited prison, to sustain their tenancies and provide support to address underlying issues that may place their tenancies at further risk.**

Submissions and consultations also raised the need for supported accommodation for young people exiting youth detention, with the former Tasmania Children’s Commissioner observing that often young people have nowhere to stay, and therefore return to detention for shelter.315 The need for specific accommodation for Aboriginal and Torres Strait Islanders is discussed further in Part 2 of this Report.

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307 Western Australia Commissioner for Children and Young People, *Submission No 37*.
309 Ibid.
311 Consultation, 03/08/2017, Darwin (Top End Women's Legal Service).
312 Tamara Walsh, *Submission No 101*.
313 Queensland Advocacy Inc, *Submission No 43*.
314 Jesuit Social Services, *Submission No 30*.
315 Consultation, 15/08/2017, Tasmania (Tasmania Children's Commissioner).
Islander young people linked with opportunities for education and cultural integration was also raised in consultation.\textsuperscript{316}

Specialised post-release accommodation for people with disability leaving prison or detention facilities is also required, and submissions and consultations indicate that not enough is available, which is especially problematic as existing mainstream services are often unsuitable.\textsuperscript{317} The Office of the Public Advocate South Australia (‘OPA’) explained:

\begin{quote}
It is OPA’s view that appropriate accommodation is an essential element of achieving stability for people leaving prison with cognitive impairments and mental health conditions. A ‘one-size-fits-all’ approach does not ensure the type of stability and support that a person with a disability and a history of offending may require to reduce the risk of reoffending and returning to prison. It is vital that supported housing options be diversified and moved in the direction of small scale and independent accommodation with individualised support to meet the specific needs of the service user.\textsuperscript{318}
\end{quote}

### Safe housing for women exiting custody

Lack of access to safe and affordable housing can have serious consequences for women exiting custody, especially Aboriginal and Torres Strait Islander women.\textsuperscript{319} A study in NSW and Victoria found that 68 per cent of Aboriginal and Torres Strait Islander women surveyed between 2001 and 2003 returned to prison within nine months of being released.\textsuperscript{320} Of those that returned to prison, none lived in stable family housing after being released and half of those that remained out of prison were still homeless after nine months.\textsuperscript{321} Without safe and secure housing, women may be more likely to reoffend or breach the conditions of parole.

Human Rights Law Centre and the Change the Record Coalition have noted that Aboriginal and Torres Strait Islander women are the group of prisoners least likely to find suitable housing and support services upon release, especially if they have dependent children.\textsuperscript{322} An example provided by Community Legal Centres NSW illustrates the challenges faced by criminalised women without secure housing and who have experienced domestic violence, when exiting the prison system:

\begin{quote}
**Case Study**

‘On release from Wellington Prison, a woman was given a train pass and now cannot be located for after prison services. It is known that this woman was the victim of domestic abuse and that she feared for her safety upon release. As a result, it is anticipated that she is staying with a close friend or family member, but she cannot be
\end{quote}

\begin{footnotes}
\textsuperscript{316} Consultation, 02/08/2017, Maningrida (Burnawarra Elders).
\textsuperscript{317} Office of the Public Advocate South Australia, Submission No 49; Queensland Advocacy Inc, Submission No 43; Mental Health Commission NSW, Submission No 96; Jesuit Social Services, Submission No 30.
\textsuperscript{318} Office of the Public Advocate South Australia, Submission No 49.
\textsuperscript{319} Human Rights Law Centre and Change the Record Coalition, Over-represented and Overlooked Report, 18. See also Sisters Inside, Submission 79, 3-4.
\textsuperscript{320} Human Rights Law Centre and Change the Record Coalition, Over-represented and Overlooked Report, 18.
\textsuperscript{321} Ibid.
\end{footnotes}
reached to ensure her protection because of the methods she is using to remain hidden. A lack of post-release support provided by the prison itself to disadvantaged individuals such as this is an indication of an area, which needs to be amended. Despite the fact that her history of abuse was known to correctional centre staff, she was not provided any additional support, or given any information for support services to contact.’

(Community Legal Centres NSW, Submission 106)

Sisters Inside has also noted that criminalised women are often excluded from mainstream domestic and family violence services which can lead to issues such as homelessness and financial dependence on those who have perpetrated the violence.323

Prison and detention facility oversight

Concerns regarding the conditions within prisons and detention facilities around Australia have been linked to failures in monitoring and reporting, and a lack of effective oversight by government.324 The NT Royal Commission highlighted the importance of monitoring and oversight in youth detention:

Youth detention centres are closed environments, with limited access to them and limited visibility of their internal operations. They are necessarily characterised by a power imbalance between detainees and staff members.

Robust oversight of these centres is essential to protect the rights of detainees. This requires mechanisms which can penetrate the closed environment and monitor the power imbalance. Oversight mechanisms can include:

- internal and external inspections and reporting
- processes for accepting and responding to complaints, and
- avenues for reviewing and appealing decisions made within the institution.

The mere existence of oversight bodies, if effective and resourced adequately, can deter the inappropriate treatment of children and young people.325

An important development involves Australia’s recent ratification of the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (‘OPCAT’) under which new approaches to oversight of prisons and detention facilities must be developed.326 The implementation of OPCAT is further discussed in the Broader Justice System Players Chapter (Part 2).

323 Sisters Inside, Submission 79.
325 NT Royal Commission, Final Report, ch 22, 88.
326 Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 18 December 2002, A-24841, (entry into force 22 June 2006).
Are there laws, policies and practices which exacerbate access to justice barriers for prisoners and detainees?

Focus on punishment

It is a common aim of all custodial systems in Australia to rehabilitate a prisoner and thus prevent future offending. However, several Justice Project stakeholders have queried the balance of this aim against the aim of law and order policies which focus on punishment rather than rehabilitation and reintegration. Focus on punishment appears to be driving a lack of support to prevent recidivism, which, counterproductive to the purpose of preventing crime, is in fact driving reoffending and recidivism. While Australia’s prison population numbers and expenditure on prisons continue to rise, recidivism rates remain high.

Recidivism is a serious issue, both for those who reoffend and may become stuck in a cycle of disadvantage, and for those in the broader community who are affected by recidivist behaviour, whether directly (for example, those who are victims of crimes perpetrated by former prisoners) or indirectly (such as, the effect on general community safety or the costs of re-incarceration). Therefore, greater consideration of how incarceration can be prevented, and when necessary, used to address those issues which lead to criminal behaviour is required.

Key drivers of imprisonment

Although the focus of this Chapter is the access to justice issues facing those already in prison or detention, there a number of laws, policies and practices which have been identified as helping to drive the disproportionate incarceration of disadvantaged people. These are also inextricably linked to the access to justice outcomes for those people once they are in prison.

‘Law and order’ policies

Cunneen notes that a common political platform for politicians in Australia is to claim the position of ‘being tough on crime’. Policies which have been identified as creating the appearance of being ‘tough on crime’ (referred to below as ‘law and order’ policies) often involve a focus on limiting access to diversion programs, additional imprisonment, increased periods of imprisonment or mandatory imprisonment.

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331 See, eg, Chris Cunneen, ‘How “tough on crime” politics flouts death-in-custody recommendations, The Conversation (online), 14 April 2016 <http://theconversation.com/how-tough-on-crime-politics-flouts-death-in-custody-recommendations-57491>. In this article the author identifies a number of policies instituted by Australian governments since the 1990s which have been described as tough on crime.
332 Ibid.
The effect of government and court policies on incarceration rates was noted by the Senate Legal and Constitutional Affairs References Committee’s report, *Value of a justice reinvestment approach to criminal justice in Australia.* In that report, the Committee noted that the factors behind the growth in the Australian imprisonment rate included: changes to the justice system and attitudes to incarceration (in particular a tendency across many jurisdictions to institute ‘tough on crime’ or punitive, penalty driven systems); the introduction of mandatory sentencing; stringent bail and parole laws; and, other factors (such as increased police numbers and increased police response rates to family violence matters).

Law and order policies often disproportionally affect the disadvantaged. The Human Rights Law Centre and the Change the Record Coalition has noted that:

> Aside from being an ill-informed and short-sighted response, ‘tough on crime’ approaches also tend to rely on stereotyped ideas of who offenders are, with little consideration of who else may be affected – too often the most vulnerable members of our community, such as Aboriginal and Torres Strait Islander women, are unfairly swept up into the criminal justice system.

> The result of punitive ‘tough on crime’ approaches is a swelling of prison populations – caused more by an increased use of and reliance on imprisonment rather than increases in crime.

Law and order policies are often described by politicians and the media as providing a deterrent to crime. However, there does not appear to be a ‘discernible link’ between falling crime rates and increasing imprisonment rates. Bagaric and Pathinayake, after analysing the link between offender rates and imprisonment rates, found that:

> From the perspective of changes to the offender and imprisonment rates, a similar discord emerges, that is, there is no evidence of an association between the two events …

> Therefore, on the basis of the above data, there is no correlation (let alone a causal nexus) between the number of offenders in a jurisdiction and either the number of offenders in prison or the changes in the portion of offenders sentenced to imprisonment.

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334 Ibid 3-17.


337 Mirko Bagaric and Athula Pathinayake, ‘Jail up; crime down does not justify Australia becoming an incarceration nation’ (2015) 40 *Australian Bar Review* 64, 83 (‘Jail up; crime down’).
Similarly, the NSW Bureau of Crime Statistics and Research (BOSCAR) found that a 10 per cent increase in imprisonment only results in a one or two per cent decrease in crime.\footnote{Wan et al, Bureau of Crime Statistics and Research, The effect of arrest and imprisonment on crime (Crime and Justice Bulletin No 158, February 2012).}

If increasing imprisonment is not a significant factor in decreasing crime, general intuition may suggest that as crime rates fall, so should imprisonment rates. However, Weatherburn has noted that although crime rates have fallen significantly since 2000, there has not been a similar fall in imprisonment or a change in public attitudes towards offenders.\footnote{Rachel Olding, ‘BOSCAR crime stats boss Don Weatherburn calls for lighter prison sentences’, Sydney Morning Herald (online), 17 February 2016 <http://www.smh.com.au/nsw/weatherburn-comes-out-swinging-20160216-gmvavn.html>.

Ibid.}

Weatherburn attributes the lack of a decrease in the imprisonment rate to continual ‘tough-on-crime’ political rhetoric that has favoured imprisonment over more rehabilitative approaches such as diversion programs.\footnote{Bagaric and Pathinayake, ‘Jail up; crime down’, 96.}

Similarly, Bagaric and Pathinayake have stated that:

\begin{quote}
Ultimately, the increase in the Australian incarceration rate is a concession to an unthinking and reflexive tough-on-crime policy. The policy is easy to implement given that there is little empathy for criminal offenders. It is a difficult policy to negate given the limited scope for criminological and legal analysis to influence public opinion and, therefore, political decision-making.\footnote{Law Council of Australia, Submission No 97 to Senate Legal and Constitutional Affairs Committee, Value of a justice reinvestment approach to criminal justice in Australia, 22 March 2013, [42].}
\end{quote}

It is also worth noting that law and order policies can have a strong impact on the ability of prisoners to access justice (from pre-arrest until post-release),\footnote{Australia’s imprisonment rate rose 26 per cent from 2007-2017: Australian Bureau of Statistics, 4517.0 - Prisoners in Australia, 2017 (2017) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>.}

by causing:

- an increase in the number of people exposed to the barriers of imprisonment to access to justice;\footnote{Noone, ‘Challenges facing the Australian Legal Aid System’, 31.}
- an increase in the demand for legal assistance without a comparable increase in the pool of legal assistance resources available;\footnote{See, eg, Editorial, ‘Give our weak legal system new strength’, Daily Telegraph (online), 7 June 2017 <http://www.dailYTELEGRAPH.COM.AU/news/opinion/editorial-give-our-weak-legal-system-new-strength/news-story/2cb497b46b5d69927197d9e1cf1ed996>.


and

\begin{itemize}
\item an increase in pressure on the courts to provide ‘tough’ sentences that are not necessarily compatible with the effective rehabilitation of offenders;
\item an increase in pressure on court resources which can in turn cause significant delays and longer periods of remand;
\end{itemize}
• overcrowding of police cells and prisons and thus poor conditions for prisoners and remandees and added difficulty in accessing programs and services.  

Accessibility problems in prisons may be linked to overcrowding and trial delays. The Legal Services Commission of South Australia noted that the surge in the prison population of South Australia in recent years has not seen the building of any new prisons. This has resulted in ‘inhumane conditions of incarceration,’ particularly for remand prisoners who can spend significant periods of time in police holding cells. It has also led to the inability of legal representatives and other professionals to access their clients, which may therefore affect their prospects of a fair trial. The following case study was provided by the Legal Service Commission of South Australia to illustrate these points:

**Case Study**

‘A client facing serious major indictable offences spent five weeks in custody in police cells immediately before a District Court hearing where he was required to give evidence. The in-house lawyer representing him could not take adequate instructions to prepare the client’s case. The practitioner was only permitted a one-hour visit and was placed in a small cubicle with a small bench and chair which overlooked a thick pane of glass separating him from the client who was on the opposite side. The glass pane made it difficult for the client and the practitioner to hear each other. They had to talk with raised voices for much of the interview requiring constant repetition of questions and answers because they could not be heard. In addition, there was little privacy. Correctional staff stood immediately outside the interview room for much of the meeting. The practitioner found it difficult to organise papers and other legal documents in the space provided. The client complained he had not been able to change his clothing for four days. He had been denied domestic visits and had been locked in his cell for up for 23 hours a day requiring him to use the toilet in front of other prisoners.’

As a result of the above effects of law and order policies, a significant and growing number of prisoners receive sub-optimal (or no) resolution to their legal issues. This

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347 In 2016-17, prison utilisation in Australia was 115.8 per cent and as high as 122.9 per cent in New South Wales: Productivity Commission, *Report on Government Services 2018*, 8.14-8.15, table 8A.13. ‘Prison utilisation’ is defined as the annual daily average prisoner population as a percentage of the number of single occupancy cells and designated beds in shared occupancy cells provided for in the design capacity of the prisons. According to the Productivity Commission, ‘percentages close to but not exceeding 100 per cent are desirable’.

348 Email from Legal Services Commission from South Australia to the Law Council of Australia, 17 November 2017; Consultation, 03/04/2017, Adelaide, (Legal Services Commission of South Australia).

349 Email from Legal Services Commission from South Australia to the Law Council of Australia, 17 November 2017; Consultation, 03/04/2017, Adelaide, (Legal Services Commission of South Australia).

350 Email from Legal Services Commission from South Australia to the Law Council of Australia, 17 November 2017.

351 For example, it has been reported that due to increasing imprisonment and lack of resourcing, ‘duty’ lawyers on call at courts can see as many as 30 clients per day with sessions lasting as little as 15 minutes: see, eg, ABC Radio National, ‘Legal aid lawyers suffer stress, sleepless nights’, *The World Today*, 6 September 2011 (Brendan Trembath) <http://www.abc.net.au/worldtoday/content/2011/s3310872.htm>.
was noted by the Victorian Council of Social Service in its submission to the Productivity Commission’s Access to Justice Arrangements inquiry:

_The design of legislation and regulation and its enforcement can have significant impact on the prevalence and nature of legal problems. It is important to address systemic issues that give rise to unnecessary legal problems if we are to truly provide access to justice._

_In criminal law, there is increasing evidence that tough on crime approaches that couple expanded monitoring and enforcement with more severe penalties do not have a significant impact on the incidence of crime. Such approaches give rise to a range of other issues including increased costs to the administration of justice and the perpetuation of disadvantage and social exclusion._

More specific drivers which fall under the law and order policy umbrella which often disproportionately affect disadvantaged people are listed below.

**Bail refusal and conditions**

In the _Pathways to Justice Report_, the ALRC noted that there has been a ‘general upsurge in remand populations nationwide’.\(^{352}\) Over the past ten years, Australia's remand population has grown 111.8 per cent (ie more than doubled).\(^{354}\) In comparison, the sentenced prison population has grown by 33.4 per cent.\(^{355}\)

Overly prescriptive bail conditions (as well as similar conditions for parole or non-custodial sentences), such as orders ‘not to consume alcohol’ (particularly when support services are unavailable), curfews, exclusion orders and non-association orders, have been identified by the ALRC in the _Pathways to Justice Report_,\(^ {356}\) and by a number of Justice Project stakeholders as problematic and potentially ‘setting up offenders to fail’.\(^ {357}\)

Prescriptive bail conditions are also often problematic as they can have a compounding effect. Not only may a person return to prison for breaching their bail conditions in the initial circumstances, if they reoffend in the future they may be unable to obtain bail due to a history of breach.\(^ {358}\)

A presumption against bail for people who have breached bail in the past is especially problematic when the original offence is minor, and the breach of a technical bail condition triggers the presumption, to which the courts are obliged to adhere.\(^ {359}\) The ALRC noted

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\(^{353}\) Australian Law Reform Commission, _Pathways to Justice Report_, 152.


\(^{355}\) Ibid.

\(^{356}\) Australian Law Reform Commission, _Pathways to Justice Report_, 149, 158-61. See also Law Council of Australia, Submission No 108 to the Australian Law Reform Commission, _Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples_, 6 October 2017, 9.

\(^{357}\) Legal Aid ACT, Submission No 115; Consultation, 02/08/2017, Maningrida (Judge Cavanagh Bush Court); Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)).

\(^{358}\) Law Council of Australia, Submission No 108 to the Australian Law Reform Commission, _Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples_, 6 October 2017, 9.

\(^{359}\) Consultation, 29/08/2017, Brisbane (Prisoners Legal Service). See also Don Weatherburn, _Arresting Incarceration: Pathways Out of Indigenous Imprisonment_ (Aboriginal Studies Press, 2014), 96 (‘Arresting Incarceration’).
that the facts of *Re Mitchell* provide an example of how prior low-level offending can affect bail determinations (particularly for Aboriginal and Torres Strait Islander people).  

### Case Study

‘Mitchell, a pregnant 22-year-old Aboriginal sole parent, had been charged with offences related to begging and obtaining a ‘financial advantage by deception’ because she had been travelling on the train using a children’s ticket. Mitchell was initially refused bail at the Magistrates’ Court of Victoria where that court found that, due to similar past offending, Mitchell represented an unacceptable risk of committing further offences. Mitchell had previous convictions for shoplifting, burglary, obtaining property by deception and breach of a Community Corrections Order.

In determining the appeal, the Supreme Court found that the magistrate’s conclusion that Mitchell presented an unacceptable risk of reoffending was ‘unassailable’. Nonetheless, at the time of the appeal determination, Mitchell had spent seven weeks in prison on remand—longer than any sentence she would have received for the charges. It was likely that, if not bailed, she would spend up to nine months on remand before trial’.  

(Australian Law Reform Commission, *Pathways to Justice Report*, 154, citing *Re Mitchell* [2013] VSC 59 (8 February 2013) [7], [12], [13])

Housing requirements are a significant factor in many disadvantaged people being unable to be granted bail. During consultations, the Disability Justice Centre noted the importance of housing in positive justice outcomes and reintegration:

> If someone doesn’t have a home then this affects their ability to re integrate - having a home affects justice outcome, you need housing in place, for example, to get bail, reintegrate from prison or detention, or address the underlying issues.  

Presumptions against bail where there is no accommodation leads to a different, discriminatory outcome applied to those who are homeless or in care. During consultations, Bourke ALS raised an example of a young person who had never been convicted of a crime before refused bail because he did not have an address. Perth ALS noted that sometimes young people are held on remand simply because child protection services are unable to find suitable housing for young people with challenging behaviours. Women in particular are affected by difficulties obtaining safe, secure and stable accommodation. This problem must be addressed through the provision of sustainable housing and accommodation options, including bail accommodation.

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361 Consultation, 05/09/17, Perth (Disability Justice Centre).  
362 Western Australia Commissioner for Children and Young People, *Submission No 37*; YFoundations, *Submission No 98*; Consultation, 05/09/17, Perth (Aboriginal Legal Service).  
363 Consultation, 14/09/17, Bourke (Aboriginal Legal Service (NSW/ACT)).  
364 Consultation, 05/09/17, Perth (Aboriginal Legal Service).  
366 See Critical Support Services Chapter (Part 2).
Bail support and bail accommodation (Critical Support Services Chapter (Part 2)) are critical in ensuring that those experiencing disadvantage are not subjected to unnecessary imprisonment, remain in employment and housing while their matters are dealt with, and remain connected with their community and family ties.\textsuperscript{367}

Beyond amending bail laws to adapt to experiences of disadvantage (see further discussion in the Governments and Policymakers Chapter (Part 2)), it is also critical that all people are adequately supported to apply for bail, meet bail conditions, access support services and access diversionary options. The Critical Support Services Chapter (Part 2) explains the importance of resourcing and expanding bail support programs to enable this to occur.

\textbf{Aboriginal and Torres Strait Islander women}

For discussion of issues related to the impact of problematic bail laws for Aboriginal and Torres Strait Islander people generally, see the Aboriginal and Torres Strait Islander People Chapter (Part 1).

Aboriginal and Torres Strait Islander people are disproportionately affected by bail laws and restrictions and are less likely to be granted bail compared to non-Indigenous people.\textsuperscript{368} However, in the \textit{Pathways to Justice Report}, the ALRC found:

\begin{quote}
Aboriginal and Torres Strait Islander women are a fast-growing group within the remand population. For example, the Inspector of Custodial Services in WA reported that WA had seen a 150\% growth in Aboriginal and Torres Strait Islander women being held on remand from 2009 to 2016, describing the statistic as ‘especially sharp and alarming’. It was reported that, in Victoria in 2012, 60\% of Aboriginal and Torres Strait Islander women held on remand were released without sentence.\textsuperscript{369}
\end{quote}

Sisters Inside has stated that criminalised and/or Aboriginal and Torres Strait Islander women are often excluded from mainstream domestic and family violence support services which can result in homelessness, criminal offending and imprisonment.\textsuperscript{370} Difficulty in securing stable and suitable accommodation has been identified as a reason why Aboriginal and Torres Strait Islander women are denied bail or diversion opportunities, or placed on remand.\textsuperscript{371} In absence of suitable accommodation and treatment options, remand ‘may be viewed by police as an appropriate environment into which to place a woman’.\textsuperscript{372} This was noted by the ALRC:

\begin{quote}
The Victorian Equal Opportunity and Human Rights Commission observed that Aboriginal and Torres Strait Islander women were often denied bail due to a lack of safe, stable and secure accommodation to which Aboriginal and Torres Strait Islander women could be bailed, particularly in regional locations. Finding suitable accommodation was especially
\end{quote}

\begin{thebibliography}{99}
\bibitem{367} Consultation, 29/08/2017, Brisbane (Prisoners Legal Service); Sisters Inside, \textit{Submission 79}.
\bibitem{368} Weatherburn, \textit{Arresting Incarceration}, 95; Australian Law Reform Commission, \textit{Pathways to Justice Report}, 154.
\bibitem{370} Sisters Inside, \textit{Submission 79}.
\bibitem{371} Human Rights Law Centre and Change the Record Coalition, \textit{Over-represented and Overlooked Report}, 37.
\bibitem{372} Ibid 38.
\end{thebibliography}
difficult for women with substance dependencies resulting in both Aboriginal and Torres Strait Islander women and non-Indigenous women being placed in custody for therapeutic reasons, designed to stabilise their addictions and remove them from unsafe environments that may include family violence.373

Children and young people

As discussed in Aboriginal and Torres Strait Islander People (Part 1) and Children and Young People (Part 1) Chapters, state and territory bail laws and practices often exacerbate barriers to justice for at risk children and increase the number of children on remand.374 In New South Wales, proceedings for breach of bail have risen rapidly in recent years and are a major driver of the increase in the size of the juvenile Aboriginal and Torres Strait Islander remand population.375 A 2018 Victorian Parliamentary Inquiry found a significant rise in children on remand in Victoria compared to ten years prior, including an over-representation of Aboriginal and Torres Strait Islander young people.376 In November 2017, noting the ‘growing numbers of children and young people on remand’ all Australian Children’s Commissioners and Guardians expressed, through a joint statement, the need for government efforts to ensure that children are detained only as a last resort.377 The Change the Record Coalition has called for the detention of unsentenced children and young people to be ceased altogether.378

The granting of bail is often contingent on a number of requirements which may be difficult for some young people to meet, including the availability of suitable housing options379 and the ability to provide financial security.380 Presumptions against bail where there is no available support accommodation can lead to different and discriminatory outcomes for children and young people who are poor, homeless or in care as they may be unable to meet bail requirements and therefore may remain detained on remand for longer periods.381 In consultations, Aboriginal Legal Service in Bourke raised an example of a young person who had never been convicted of a crime before refused bail because he did not have an address.382 Aboriginal Legal Service in Perth noted that sometimes young

377 Australian Children’s Commissioners and Guardians, Statement on Conditions and Treatment in Youth Justice Detention (November 2017) 5.
379 See, eg, Bail Act 2013 (NSW) s 28. For discussion of how this section disproportionately affects young people in NSW experiencing homelessness, see Katherine McFarlane, ‘NSW bail laws mean well but are landing homeless kids in prison’, The Conversation (online), 16 December 2016 <https://theconversation.com/nsw-bail-laws-mean-well-but-are-landing-homeless-kids-in-prison-68490>.
380 See, eg, Bail Act 2013 (NSW) s 26.
381 Western Australia Commissioner for Children and Young People, Submission No 37; YFoundations, Submission No 98; Consultation, 05/09/2017, Perth (Aboriginal Legal Service).
382 Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)).
people are held on remand simply because child protection services are unable to find a suitable place for young people with challenging behaviours.\footnote{Ibid.}

Staff at the Aboriginal Legal Service in Bourke expressed concern that in some circumstances, the decision to remand a young person or deny bail can be used as a form of initial punishment.\footnote{Ibid.}

Once bail is granted it will most often also be dependent on meeting a number of strict conditions, such as: curfews; attendance at school; or attendance at health treatment programs.\footnote{Legal Aid Commission NSW, Submission to the New South Wales Law Reform Commission, Young people with cognitive and mental health impairments in the criminal justice system (March 2011) 3.} These stringent bail conditions may be difficult for some young people to continually meet and in some jurisdictions, this can result in a return to detention.\footnote{For example, in New South Wales, in the 2015-16 financial year ‘there were 67 remand stays of young people who were granted conditional bail and were unable to meet their bail conditions, and had no other custodial order’: New South Wales Department of Justice, Annual Report 2015-2016 (2016) 92.}

The WA Children’s Commissioner stated that it is:

\begin{quote}
concerning that young people are being held on remand or returned to custody due to their failure to comply with onerous or unreasonable bail conditions, which can ultimately perpetuate the cycle of involvement with the youth justice system.\footnote{Western Australia Commissioner for Children and Young People, Submission No 37.}
\end{quote}

The Commissioner submitted the following case study of a young person explaining the effect of inflexible bail conditions:

\begin{quote}
Case Study

When I was on curfew I was one minute late. And boy yeah, I walked around the corner and the cops was sitting there. I got locked up and went straight back to Banksia. I was one minute late! I was coming home! It was one minute, I was one-minute home! They didn’t give me time to get into my house.

(Western Australia Commissioner for Children and Young People, Submission No 37)
\end{quote}

The Aboriginal Legal Service in Bourke noted concern that in some circumstances, bail conditions are sometimes applied by courts as a means of shaping young people’s behaviour, as opposed to simply fulfilling their intended purpose of ensuring court attendance.\footnote{Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)).} Similarly, the NT Royal Commission also found that:

\begin{quote}
Decision makers on occasion impose conditions that are not necessary to secure the objectives of ensuring the young person appears at court to answer the charges, and of preventing further offending behaviour.\footnote{NT Royal Commission, Final Report, vol 2B, 290.}
\end{quote}
Parole requirements and conditions

Standard parole conditions, much like standard bail conditions, can create significant compliance issues for a range of reasons, including where they are inadvertently culturally insensitive, or do not have regard to barriers experienced by parolees. The ALRC Pathways to Justice Report, and the COAG Prison to Work Report noted compliance with standard parole conditions (and in particular technical parole conditions such as residing at an approved address) can be difficult for many parolees, particularly when they are simultaneously searching and competing for employment opportunities, live in non-metropolitan communities, or are reliant on limited public transport options to meet their parole requirements (ie reporting for parole, visiting Centrelink, and attending interviews).

The following remarks of McCallum J in New South Wales v Bugmy (preliminary hearing) [2016] NSWSC 1128, highlight the importance of access to support services to compliance with parole conditions, particularly in RRR Australia:

Case Study

‘The defendant, Mr Damien Bugmy, is serving a sentence of imprisonment for manslaughter. The victim was Mr Bugmy’s de facto partner. She died of a single stab wound to the back inflicted by Mr Bugmy at a time when he was extremely intoxicated by alcohol. He pleaded guilty to manslaughter on the basis of a dangerous and unlawful act and that plea was accepted by the Crown.

As it happens, Mr Bugmy was sentenced by me, in 2011. It was a sentencing task which involved complex and competing considerations. Mr Bugmy is an Aboriginal man from Wilcannia, which is within the traditional lands of the Barkindji people. It is a town which exemplifies the over-representation of indigenous people in the criminal justice system and has been the focus of calls for diversionary programs and flexible sentencing options that respond to needs specific to regional communities.

…

One of the complexities of the sentencing task was the obvious link between Mr Bugmy’s dependence on alcohol and his tendency to violence when drunk. He was on parole at the time the offence was committed. It was a condition of his parole that he not consume alcohol. There were further conditions requiring Mr Bugmy to seek assistance for the control of his abuse of drugs and alcohol “if so directed by his supervising probation and parole officer”. However, so far as the material before me at the proceedings on sentence revealed, Mr Bugmy had not in fact been directed by a probation and parole officer to undertake any drug or alcohol rehabilitation programs or to seek any assistance of the kind evidently contemplated by the conditions of his parole.

The explanation for that surprising circumstance appeared to be a lack of adequate funding for the appropriate services. As recorded at [57] of the sentencing judgment, I was informed at the proceedings on sentence that the town of Ivanhoe, where Mr Bugmy went to live at some point after being released on parole, does not have its own probation and parole officer. Mr Bugmy’s supervision was intended to be affected by a fortnightly or monthly visit by an officer from Griffith District Office. The offence occurred before any such visit took place. Accordingly, it was not a question of Mr

390 Legal Aid ACT, Submission No 115.
Bugmy’s being incapable of responding to or accepting the kind of intensive supervision he obviously required. Rather, the difficulty was that the resources available in the rural communities in which he lived did not extend to the provision of services of the kind evidently contemplated in the conditions of his parole.

(Extracted from the judgment of McCallum J in *New South Wales v Bugmy (preliminary hearing)* [2016] NSWSC 1128 (16 August 2016) [3]-[4], [6]-[7])

Although this case provides an extreme example of the importance of adequate support programs in meeting the conditions of parole, the consequences of minor or technical breaches can be significant, including returning to prison. Legal Aid ACT has raised particular concern with parole cancellation in various jurisdiction, including the ACT, which mandate that if a parole order is cancelled for breach of a condition ‘the offender is taken not to have served any period (the remaining period) of imprisonment for the sentence that remained to be served on the offender’s parole release date’. The ALRC has also acknowledged that statutory provisions that stipulate that time spent on parole does not count as time served if the parolee returns to prison are unnecessarily punitive and create a significant disincentive to eligible inmates to apply for parole. As noted by Legal Aid ACT, the results of fewer people applying for parole include upward pressure on the prison population and inmates being eventually released from prison without the undergoing supervised or support that could have been available if released on parole at an earlier stage.

**Lack of diversion options and alternatives to imprisonment**

A lack of diversion options and alternatives to imprisonment including community-based sentencing options have been identified by Justice Project stakeholders as a significant cause of unnecessary imprisonment of disadvantaged people, particularly people in RRR Australia, and Aboriginal and Torres Strait Islander people. The ALRC recently found that Aboriginal and Torres Strait Islander people are less likely to receive community-based sentences than non-Indigenous offenders, and as a result, may be more likely to be imprisoned for the same offence.

Limited access to specialist courts (eg Drug Courts and Koori Courts), and the therapeutic justice programs and services which are more often available in the Magistrates’ Courts of non-RRR areas, were identified as significant causes of over imprisonment of RRR Australians. Limitations on electronic monitoring technology in remote areas were also

391 See, eg, *Crimes (Sentence Administration) Act 2005* (ACT) ss 160-1.
393 Legal Aid ACT, *Submission No 115*.
identified as a barrier to implementation of non-custodial sentences in RRR areas.\textsuperscript{398} Minimal access to culturally competent support services in RRR areas, is a particular issue preventing Aboriginal and Torres Strait Islander people in RRR areas from accessing services.\textsuperscript{399}

Jurisdictions vary in how much flexibility judicial officers have in tailoring sentences. The ALRC recently found that inflexible community-based sentencing regimes ‘are likely to either exclude offenders with complex needs or result in high rates of breach and notification’.\textsuperscript{400} The ALRC therefore recommended that state and territory governments implement community-based sentencing options that allow for the greatest flexibility in sentencing structure and the imposition of conditions to reduce offending.\textsuperscript{401}

Diversion options and alternatives to imprisonment are also discussed in the Critical Support Services Chapter (Part 2), the Courts and Tribunals Chapter (Part 2) and the RRR Chapter (Part 1).

**Imprisonment for minor offences**

**Short-term imprisonment**

Justice Project stakeholders have identified imprisonment, in particular short-term imprisonment (ie less than six months), for minor offences as a key driver of imprisonment of people experiencing disadvantage and an area of urgently needed reform.\textsuperscript{402} Linked to lack of diversion options discussed above, is the consequence that many minor offenders are sentenced to periods of short term imprisonment.

Justice Project stakeholders expressed concern about the ineffectiveness of short term prison sentences in providing rehabilitation and the disproportionate impact that short sentences can have on those imprisoned for relatively minor offences. For example, Prisoners Legal Service (Queensland) commented that short sentences are enough time for a prisoner to lose all outside social and financial support, but not enough for them to take advantage of prison programs that are available for long term prisoners and that can help equip them for their release.\textsuperscript{403}

Sisters Inside stated that the ‘vast majority’ of female prisoners are charged with minor, non-violent offences, and noted that the average prison sentence served by women in Queensland is less than five weeks.\textsuperscript{404} The ALRC also noted that short sentences can


\textsuperscript{400} Australian Law Reform Commission, *Pathways to Justice Report*, 234.

\textsuperscript{401} Ibid.

\textsuperscript{402} See, eg, Consultation, 14/09/2017, Bourke (Aboriginal Legal Service (NSW/ACT)); Consultation, 29/08/2017, Brisbane (Prisoners Legal Service); Consultation, 08/08/2017, Canberra (Aboriginal and Torres Strait Islander Women’s Legal Services); Consultation, 17/08/2017, Melbourne (Justice Connect Homeless Law Clinic); Consultation, 05/09/2017, Perth (Aboriginal Legal Service); Consultation, 08/09/2017, Kalgoorlie (Youth Justice Service).

\textsuperscript{403} Consultation, 23/08/2017, Brisbane (Prisoners’ Legal Service).

\textsuperscript{404} Sisters Inside, *Submission 79*. 
lead to negative consequences for women, including the removal of children after as little as one week of imprisonment.\textsuperscript{405}

The possibility of abolishing short-term sentences was recently explored by the ALRC. The ALRC noted that:

\textit{[t]he imposition of a short term of imprisonment would appear to be inconsistent with the principle of “imprisonment as a last resort” which ought to be reserved only for those offenders who represent a serious risk to the community, and for whom no other penalty is appropriate.}\textsuperscript{406}

Further, it was noted that short terms of imprisonment:

- expose minor offenders to more serious offenders in prison;
- do not serve to deter offenders;
- have significant negative impacts on the offender’s family, employment, housing and income; and
- potentially increase the likelihood of recidivism through stigmatisation and the flow on effects of having served time in prison.\textsuperscript{407}

In its submission to the ALRC, the Law Council of Australia (‘Law Council’) contended that short sentences can be financially costly, and highly ineffective in providing rehabilitation and preventing recidivism as rehabilitation programs are often not available to short-term prisoners.\textsuperscript{408} On this basis, the Law Council supported abolition of short-term sentences, if and when alternatives to imprisonment are uniformly available.\textsuperscript{409} Similar submissions were made by other ALRC stakeholders.\textsuperscript{410} Several stakeholders to the ALRC noted that until such alternatives are uniformly available, abolition of short-term sentences risks ‘sentence creep’ whereby judicial officers ‘sentence offenders for longer periods because of a lack of alternative sentencing options, particularly in the absence of community-based sentencing alternatives’.\textsuperscript{411} In accordance with the submission of the Law Council, the ALRC ultimately recommended that ‘in the absence of the availability of appropriate community based sentencing options, short sentences should not be abolished’.\textsuperscript{412}

\textbf{Fine default imprisonment}

Justice Project stakeholders indicated that penalty/infringement notices are increasingly used to respond to minor criminal behaviour, including public nuisance, offensive


\textsuperscript{407} Ibid.

\textsuperscript{408} Law Council of Australia, Submission No 108 to Australian Law Reform Commission, \textit{Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples}, 6 October 2017, 35. See also discussion of the financial costs of imprisonment beginning at page 20 above.

\textsuperscript{409} Ibid.

\textsuperscript{410} Ibid 270-1.

\textsuperscript{411} Ibid 15.
behaviour and fare evasion. People experiencing disadvantage are not only less able to pay fines once received, but are also more likely to receive a fine due to difficulty complying with system requirements in the first place (for example, purchasing public transport tickets or obtaining a drivers licence).

In some circumstances, continued fine default can lead to imprisonment. Fine default imprisonment can be broken down into three categories:

- imprisonment solely on the basis of continued fine default;
- imprisonment following failure to comply with a community service order (or alike) imposed following fine default; and
- imprisonment for a secondary offence (for example, driving without a licence after the licence was lost for continued failure to pay a fine).

Imprisonment solely on the basis of continued fine default is currently only possible in Western Australia. In Western Australia, during the financial year 2014/2015, 603 people were imprisoned solely on the basis of continued fine default, representing 7.2 per cent of the total prison receptions during that period. In each year between July 2006 and June 2015, an average of 803 people entered the prison system in Western Australia for unpaid fines.

Fine default imprisonment disproportionally affects the disadvantaged. The Law Society of Western Australia has noted the ‘discriminatory’ effect of the Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA). For example, the Western Australian Inspector of Custodial Services review of Fine defaulters in the Western Australian prison system (‘Morgan Review’), found that ‘[p]eople with lower-paying or nonprofessional jobs and the unemployed make up a high proportion of incarcerated fine defaulters’. The Morgan Review also determined that fine default imprisonment in Western Australia disproportionally affects Aboriginal women:

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413 National Congress of Australia’s First Peoples, Submission No 97; WA Commissioner for Children and Young People, Submission No 37; National Study on the Criminalisation of Poverty and Homelessness, Submission No 101.

414 National Congress of Australia’s First Peoples, Submission No 97; WA Commissioner for Children and Young People, Submission No 37; National Study on the Criminalisation of Poverty and Homelessness, Submission No 101. For further discussion see the People Experiencing Economic Disadvantage (Part 1), Homeless People (Part 1) and Children and Young People (Part 1) Chapters.

415 Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA) s 53.


418 Fines, Penalties and Infringement Notices Enforcement Act 1994 (WA) s 53.

419 Neil Morgan, Office of the Inspector of Custodial Services (WA), Fine defaulters in the Western Australian prison system (3 April 2016) ii.

420 Ibid.


422 Morgan, Fine defaulters in the Western Australian prison system, ii.
Across the whole review period, Aboriginal women comprised only 15 per cent of total prisoner receptions but 22 per cent of fine default receptions. Furthermore, Aboriginal people comprised 64 per cent of female fine defaulters and only 38 per cent of male final defaulters.\footnote{Ibid v.}

As identified by the Human Rights Law Centre and the Change the Record Coalition, a fine can be a significant burden, especially for women with children, women with a disability and women who are unemployed, leaving those who are poorest at risk of imprisonment.\footnote{Human Rights Law Centre and Change the Record Coalition, \textit{Over-represented and Overlooked Report}, 24.} Aboriginal and Torres Strait Islander women are more likely to be living in poverty, and therefore more likely to be imprisoned for unpaid fines in Western Australia.\footnote{Ibid 22 citing Morgan, \textit{Fine Defaulters in the Western Australian Prison System}, 13; Aboriginal Legal Service of Western Australia, \textit{Addressing Fine Default by Vulnerable and Disadvantaged Persons: Briefing Paper} (August 2016).} The case of Ms Dhu provides an example of the tragic consequences of imprisonment for fine default:

\begin{quote}
\textit{Case Study}

‘Ms Dhu, a 22-year-old Yamatji woman, was taken into custody when police attended a house and took her former partner into custody for breach of an intervention order. While at the house, police acted on an old warrant and arrested and imprisoned Ms Dhu for non-payment of fines amounting to $3,662.34.

Ms Dhu had no realistic way of paying the fines. Despite repeated requests for medical assistance while in custody, she was not provided with adequate care. Police later said they thought she was ‘faking illness’ and was ‘coming down from drugs’.

She subsequently died in police custody, from an infected broken rib, an injury she had sustained from domestic violence. The coronial inquiry found that the police had been “inhumane and unprofessional”

\textit{(Human Rights Law Centre and Change the Record Coalition, \textit{Over-represented and Overlooked Report}, 24)}
\end{quote}

Similarly, in September 2017, a 35-year-old Aboriginal woman and single mother of five from rural Western Australia was reportedly arrested and sentenced to two weeks in prison for fines totalling $3900 after a ‘standard-practice background check’ was carried out when police were called to her residence to respond to issues of domestic violence against her.\footnote{See Sarah Collard, ‘Aboriginal woman jailed over unpaid fines after police call, 10 months on from Ms Dhu inquest’, ABC News (online), 30 September 2017 <http://www.abc.net.au/news/2017-09-29/indigenous-woman-jailed-over-unpaid-fines-after-police-call/9002656>.} This case, and the case of Ms Dhu, are examples of how inappropriate responses to offending by women is contributing to the increasing incarceration of women (see discussion below).

As imprisonment statistics generally record final or most serious offences, statistics are limited in regard to imprisonment following failure to comply with a community service order imposed following fine default and imprisonment for a secondary offence (such as
driving without a licence). However, it is likely that disadvantaged groups are also most affected by these issues.427

**Mandatory sentencing**

Western Australia, the Northern Territory, Queensland, New South Wales and Victoria have each introduced minimum terms of imprisonment for a variety of different offences.428 The Law Council's policy is that mandatory sentencing regimes impose unacceptable restrictions on judicial discretion and independence, disproportionately affect particular social groups and undermine fundamental rule of law principles.429 National Aboriginal and Torres Strait Islander Legal Services submitted that Aboriginal and Torres Strait Islander people are disproportionately caught by a range of mandatory sentencing offences. Similar observations were made by the ALRC in the *Pathways to Justice Report*. In that report, the ALRC outlines the disproportionate impact of specific mandatory sentencing regimes.430

Mandatory sentencing is further discussed in the Aboriginal and Torres Strait Islander Peoples Chapter (Part 1).

**Criminalisation of women**

As noted above, an increasing number of women have been facing imprisonment in the past decade.431 This issue is even more severe for Aboriginal and Torres Strait Islander women.432 Sisters Inside states that the ‘vast majority’ of female prisoners are charged with minor, non-violent offences, and notes that the average prison sentence served by women in Queensland is less than five weeks.433 Flat Out has observed that the majority of women in Victoria are imprisoned for non-violent offences and are serving short sentences.434 Flat Out also noted that 36 per cent of women imprisoned in Victoria are on remand, and 60 per cent of those are released at court.435

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428 Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012 (Qld); Weapons and Other Legislation Amendment Act 2012 (Qld); Youth Justice and Other Legislation Amendment Act 2014 (Qld); Criminal Law (Criminal Organisations Disruption) Amendment Act 2013 (Qld); Crimes Amendment (Murder of Police Officers) Act 2011 (NSW); Sentencing Amendment (Violent Offences) Act 2008 (NT); Sentencing Amendment (Mandatory Minimum Sentence) Act 2013 (NT); Criminal Law (Sentencing) Act 1988 (SA); Criminal Code Amendment Act (No 2) 1996 (WA); Criminal Code Amendment Act 2009 (WA); Criminal Code Amendment Act (No. 2) 2013 (WA); Sentencing Legislation Amendment Act 2014 No. 6 (WA) Criminal Organisations Control Act 2012 (WA); Crimes Amendment (Gross Violence Offences) Act 2013 (VIC).
432 Ibid.
433 Ibid.
Sisters Inside have noted that this trend (particularly in the case of Aboriginal and Torres Strait Islander women) can be attributed to imprisonment for minor offences and the criminalisation of female victims of violence:

*Indigenous women are frequently the victims of family violence and may be stuck in a cycle between victimisation and offending. This can create dangerous situations whereby they are fearful to contact police during incidence of family violence. When police attend these incidence [sic] they may charge the women with assault, based on her attempts to defend herself. Similarly if she has pre-existing charges which have not been resolved then she may be arrested also. As indicated by the AJAC [Aboriginal Justice Advisory Council] report, Indigenous women are then 16.5 times more likely to be detained for an outstanding warrant. Therefore Indigenous women may be too fearful to contact the police and the vicious cycle is perpetuated.*

Criminalisation of female victims of family violence was also noted by the Perth Aboriginal Legal Service as an issue of significant concern.\(^\text{437}\)

The over-policing of Aboriginal and Torres Strait Islander people, especially in remote communities, has particular consequences for women. In the experience of Sisters Inside, Aboriginal and Torres Strait Islander women are more likely to be charged with an offence, less likely to be granted police bail, more likely to be imprisoned on remand, more likely to receive a prison sentence, and less likely to be released on parole, compared with both non-Aboriginal and Torres Strait Islander women, and criminalised men.\(^\text{438}\) In a 2017 report, the Human Rights Law Centre and the Change the Record Coalition noted:

> Outcomes in Australia’s criminal justice system are distinctly racialised and gendered.

> Many ‘tough’ laws, policies and practices that appear racially and socio-economically neutral on their face, operate to the detriment of Aboriginal and Torres Strait Islander people, particularly women … There is a long history of over-policing of Aboriginal and Torres Strait Islander communities, including high numbers of Aboriginal and Torres Strait Islander women being picked up for very low level offending, like the use of offensive language. At the same time, there is a history of police responding poorly to Aboriginal and Torres Strait Islander women who experience violence. Many Aboriginal and Torres Strait Islander women understandably hold a deep distrust of the police.\(^\text{439}\)

In order to address the growing female prison population, the Human Rights Law Centre and the Change the Record Coalition have called on state and territory governments to

> review laws and policies to identify those which unreasonably and disproportionately criminalise Aboriginal and Torres Strait Islander women, with a view to:

> - decriminalising minor offences that are more appropriately dealt with in non-punitive ways

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\(^{436}\) Debbie Kilroy, Sisters Inside, *The over-representation of Aboriginal and Torres Strait Islander women in prison* (no date).

\(^{437}\) Consultation, 05/09/2017, Perth (Aboriginal Legal Service).

\(^{438}\) Sisters Inside, *Submission 79*.

\(^{439}\) Human Rights Law Centre and Change the Record Coalition, *Over-represented and Overlooked Report*, 22.
implementing alternative non-punitive responses to low level offending and public drunkenness [and]

abolishing laws that lead to the imprisonment of people who cannot pay fines.  

Juvenile Detainees

Bail refusal and conditions

Children and young people are particularly affected by inability to be granted bail and the imposition of overly strict bail conditions.

These issues are further discussed above and, in the Children and Young People Chapter (Part 1).

Care and protection systems

Experience of care and protection systems is a well-recognised driver of juvenile detention and adult imprisonment. In the Young people in child protection and under youth justice supervision 2013–14 report, the AIHW noted the strong links between experience in child protection systems and youth detention:

Over one-third (40.8%) of the 1,909 young people in detention in 2014–15 were also in the child protection system at some time in the same year … which means they were 19 times as likely as the equivalent general population to be in the child protection system …

About half of Indigenous and non-Indigenous young women in detention during the year were also in the child protection system (51.9% and 49.2%, respectively).

Research conducted by the Menzies School of Health Research as part of the NT Royal Commission also demonstrated:

the much higher proportion of Aboriginal children in child protection or youth justice compared with non-Aboriginal children, and clearly identified that the majority of children in the Northern Territory, (75.2% of Aboriginal children and 60% of non-Aboriginal children), who had a proven guilty offence had previously been reported to child protection …. The magnitude of this ‘crossover’ figure for Aboriginal children shows the degree of closeness of the association between youth justice and child protection in the Northern Territory.

This link has been strongly emphasised by a number of Justice Project stakeholders. Several Justice Project stakeholders have also identified the concerning correlation

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440 Human Rights Law Centre and Change the Record Coalition, Over-represented and Overlooked Report, 25.


443 NT Royal Commission, Final Report, ch 35, 10.

443 National Aboriginal and Torres Strait Islander Legal Services, Submission No 121; Western Australia Commissioner for Children and Young People, Submission No 37; Office of the Guardian for Children and Young People, Submission No 48; Commissioner for Children and Young People Tasmania, Submission No 84; Legal Aid ACT, Submission No 115; Consultation, 14/08/2017, Melbourne (Victorian Aboriginal Legal
between the over-representation of Aboriginal and Torres Strait Islander children in child protection systems or out-of-home-care and the over-representation of Aboriginal and Torres Strait Islander children in juvenile detention. This correlation is discussed in further detail in the Aboriginal and Torres Strait Islander People (Part 1) and Children and Young People (Part 1) Chapters.

The Drift from Care to Crime issues paper developed by Legal Aid New South Wales noted that many of the factors trigger entry into child protections systems, such as experience of abuse, mistreatment or neglect, or the parents’ inability to provide adequate care due to family conflict, domestic violence, substance abuse or imprisonment, are ‘similar to those [factors] that predicted later contact with the juvenile justice system’. The link between experiences prior to entering child protection systems and later detention was acknowledged by the NT Royal Commission. However, the NT Royal Commission also noted:

> Although part of the reason for this increased risk is likely to be a direct consequence of the maltreatment experience prior to being placed, research has also shown that certain placement factors are likely to compound initial placement difficulties.

One factor which has been noted as contributing to the common links between experience in child protection systems and youth detention is the criminalisation of people in child protection systems. In the 2010 From Care to Custody report, McFarlane concluded that there is often practice in child protection systems of ‘relying on police and the justice system in lieu of adequate behavioural management’ and a tendency for young people to be charged for relatively minor property damage offences that occur in residential care. Justice Project stakeholders have raised concerns that such criminalisation can result in young people in out-of-home care being over-penalised for behaviour that if they lived at home or were not part of a child protection system, would not result in the risk of criminal penalty (such as when police are called for incidents that involve minor property damage). The Western Australia Commissioner for Children and Young People has noted that:

> There is anecdotal evidence to suggest that there is a "criminalising" of behaviour for children and young people in OOHC [out-of-home care], where challenging behaviours which would normally be managed within the home (for example, smashing a plate or damaging furniture in anger) are reported to police and young people are charged with

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445 National Aboriginal and Torres Strait Islander Legal Services, Submission No 121; Legal Aid ACT, Submission No 115; Consultation, 14/08/2017, Melbourne (National Aboriginal and Torres Strait Islander Legal Services and Victorian Aboriginal Legal Service). See also, NT Royal Commission, Final Report, ch 35; Australian Law Reform Commission, Pathways to Justice Report, 385-92.

446 Legal Aid New South Wales, The Drift from Care to Crime: a Legal Aid NSW issues paper (2011) 3.

447 Ibid 15.


450 Consultation, 31/03/2017, Darwin (North Australian Aboriginal Justice Agency); Consultation, 14/08/2017, Melbourne (National Aboriginal and Torres Strait Islander Legal Services and Victorian Aboriginal Legal Service); Consultation, 26/09/2017, Mildura (Private practitioner); Office of the Guardian of Children and Young People South Australia, Submission No 48; Confidential, Submission No 72.
offences such as property damage. There is a clear need for the effective implementation of trauma-informed approaches in OOHC in responses to such scenarios.  

However, the factors which contribute to the links between experience in child protection systems and youth detention are largely unexplored. On this basis the ALRC (at a national level) and the NT Royal Commission (at the Northern Territory level) have recommended that inquiries be undertaken into child protection laws and processes and their links to detention and imprisonment, particularly for Aboriginal and Torres Strait Islander people.  

Similarly, in submissions to the Justice Project, the Western Australia Commissioner for Children and Young People and the Office of the Guardian for Children and Young People (South Australia), supported calls for further investment in researching the connection between out-of-home care and the juvenile justice system.

Minimum age of criminal responsibility

The Beijing Rules recommend that the minimum age of criminal responsibility should ‘not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’. The UN Committee on the Rights of the Child has stated that a minimum age of criminal responsibility below the age of 12 years is not ‘internationally acceptable.’

As noted above, currently in all Australian jurisdictions, the minimum age of criminal responsibility is 10 years of age. However, there is a rebuttable presumption (known as doli incapax) that children aged between 10 and 14 years are incapable of committing a criminal act.

There have been numerous calls for the age of criminal responsibility to be raised to at least 12 years, consistent with international standards and brain development research. The Change the Record Coalition in the Free to Be Kids: National Plan of Action has called for the age of criminal responsibility to be raised to 14. Other organisations such as Amnesty International, the Federation of Community Legal Centres and Victoria Legal Aid, have recommended the age be lifted to 14. The NT Royal Commission, recently

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451 Western Australia Commissioner for Children and Young People, Submission No 37. The North Australian Aboriginal Justice Agency raised similar concerns: Consultation, 31/03/2017, Darwin (North Australian Aboriginal Justice Agency).
453 Western Australia Commissioner for Children and Young People, Submission No 37; Office of the Guardian for Children and Young People, Submission No 48.
454 Committee on the Rights of the Child, General Comment No 10: Children’s rights in juvenile justice, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) 11.
455 Committee on the Rights of the Child, General Comment No 10: Children’s rights in juvenile justice, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) 11.
recommended the age of criminal responsibility be raised to 12 years, and that it be legislated that children under 14 years should be detained for serious crimes.\footnote{460 NT Royal Commission, \textit{Findings and Recommendations}, 46 (rec 27.1).}

\textit{To reflect more recent scientific evidence about the developing brain of children and young people, their limited capacity for reflection before action, and their overall immaturity, the Commission recommends that the age of criminal responsibility be raised to 12 years. While this would be a first for Australia, other countries with similar systems of law and government have a minimum age of 12 and many much older. Juvenile offending under 12 is seen as largely a welfare issue in those countries. Consistently with those considerations and the strong evidence that children are damaged by entry into detention, the Commission also recommends that no child under the age of 14 years be sentenced to detention, except in cases of the utmost criminal seriousness.}\footnote{461 Ibid 28.}


The Law Council has previously recommended and continues to support raising the age of criminal responsibility to at least 12 years, subject to doctrine of \textit{doli incapax} remaining in place, consistent with the position of the UN Committee on the Rights of the Child.\footnote{463 Law Council of Australia, ‘NT Royal Commission: “Game-changing” recommendation raising age of criminal responsibility needs urgent adoption’ (Media Release, 17 November 2017) <https://www.lawcouncil.asn.au/media/media-releases/nt-royal-commission-game-changing-recommendation-raising-age-of-criminal-responsibility-needs-urgent-adoption>}. It further supports legislation of a rule that children under 14 years of age not be detained, except in the most serious of cases, consistent with the Northern Territory Royal Commission.\footnote{464 Ibid.} Additionally, the Law Council has previously cautioned that raising the minimum age of criminal responsibility should not be used to justify the removal of the doctrine of \textit{doli incapax} which presumes that a child under 14 does not know that his or her conduct is wrong unless proved otherwise.\footnote{465 Ibid.}

\textbf{Laws, policies, practices and systems specific to particular groups}

As noted above, Aboriginal and Torres Strait Islander people, people experiencing disadvantage, people who are homeless and people with disability are over-represented in imprisonment and detention. The factors which contribute to the over-incarceration of people within these groups and which exacerbate the barriers to access to justice faced

\begin{itemize}
\item \footnote{460 NT Royal Commission, \textit{Findings and Recommendations}, 46 (rec 27.1).}
\item \footnote{461 Ibid 28.}
\item \footnote{464 Ibid.}
\item \footnote{465 Ibid.}
once in prison, are discussed in further detail in the respective Chapters related to each of these groups.

As discussed throughout this Chapter, sub-optimal resolution of legal problems is linked to the continuing cycle of disadvantage that many prisoners and ex-prisoners face, affecting many areas of daily life (housing, employment, family, finances, etc) and can create significant social and financial costs for the wider community.

**Priorities**

- Commonwealth, state and territory governments should increase the availability of legal assistance services to prisoners, with a particular emphasis on civil and family law matters, and on expanding the availability of specialised prisoner legal services where needed.

- State and territory governments should expand access to legal assistance and information to prisoners through the use of technology (including videoconferencing) that complements rather than replaces face-to-face legal services and court processes.

- Having regard to the underlying causes and drivers of imprisonment, Commonwealth, state and territory governments should shift towards evidence-based policies and laws which are designed to keep communities safe and to respond to effectively to crime, while avoiding the disproportionate and costly imprisonment or detention of particular groups, including:
  
  - Aboriginal and Torres Strait Islander peoples (including women and young people)
  - people on remand; and
  - people with disability.

- Commonwealth, state and territory governments should prioritise investment in bail accommodation and bail support programs for remandees, and post-release accommodation for former prisoners and parolees, particularly for women and people with disability.

- Commonwealth, state and territory governments should develop criminal justice policies and procedures that recognise the distinct criminogenic profile of women offenders.

- State and territory governments should increase funding and support for prison/detention based therapeutic programs and throughcare programs, including those which are linked to legal assistance, with adequate provision for robust evaluation. Such programs should have a particular focus on meeting women’s and young people’s needs, be culturally competent, and be accessible to people with disability and people on remand or serving short sentences.

- Corrections and youth detention facilities should review, and where necessary establish, protocols which:
  
  - facilitate access to legal advice by prisoners and juvenile detainees;
  - increase staff cultural competence and awareness;
- build more informed awareness and identification of people with disability and referrals to appropriate support;

- increase staff awareness of family violence amongst prisoners and juvenile detainees, and provide appropriate support as necessary;

- refer people to culturally secure, gender and disability informed rehabilitative programs as appropriate; and

- adopt trauma-informed approaches to respond to the needs of prisoners and juvenile detainees who have experienced high levels of trauma, such as many women prisoners and young people.

To implement OPCAT, compliance frameworks with clear accountability and transparency mechanisms should be developed by each state and territory government, in consultation with the Commonwealth Government.