Customary Law and Aboriginality

Northern Territory Law Reform Committee

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- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
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- Tasmanian Bar
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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council of Australia is grateful to its Indigenous Legal Issues Committee, Indigenous Incarceration Working Group, National Criminal Law Committee and National Human Rights Committee, as well as the Law Society Northern Territory, for assistance in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) and the Law Society Northern Territory (**LSNT**) appreciate the opportunity to provide input to the Northern Territory Law Reform Committee's (**NTLRC**) inquiry into Customary Law and Aboriginality (**the inquiry**). The Law Council and the LSNT were pleased to attend a virtual consultation with the NTLRC on 2 September 2020. The organisations understand the NTLRC has been asked to look into the following issues, after the Northern Territory Legislative Assembly passed a motion requesting the Northern Territory Government petition the Federal Government to review section 16AA of the *Crimes Act 1914* (Cth):

    - whether section 16AA of the *Crimes Act 1914* (Cth) should be repealed;
    - what, if any, laws should be passed to give effect to the Australian Law Reform Commission's (**ALRC**) *Pathways to Justice* report, which recommended that when sentencing Aboriginal offenders, courts should take into account the unique systemic and background factors affecting Aboriginal people; and
    - the operation of section 104A of the *Sentencing Act 1995* (NT), which provides a procedure for presenting information regarding customary law in sentencing backgrounds.

2. The Law Council and LSNT welcome this renewed consideration of section 16AA of the *Crimes Act 1914* (Cth) and continues to support its repeal. More generally, this submission provides a preliminary overview of the Law Council and LSNT's views regarding customary law and sentencing. While the Law Council and LSNT generally support the recognition of customary law in sentencing, both require substantial additional consultation with relevant constituent bodies, committees and sections before coming to a present position on the detail of what this might involve.

Background

Australian Sentencing Law

3. In Australia, each jurisdiction has its own legislation that guides the sentencing process: *Crimes Act 1914* (Cth), *Sentencing Act 1995* (NT), *Penalties and Sentences Act 1991* (Qld), *Crimes (Sentencing Procedure) Act 1999* (NSW), *Crimes (Sentencing) Act 2005* (ACT), *Sentencing Act 1991* (Vic), *Sentencing Act 1997* (Tas), *Criminal Law (Sentencing) Act 1988* (SA), and *Sentencing Act 1995* (WA).[1] These statutes 'vary in form', including in whether the purposes and principles of sentencing are provided, as well as the list of factors that judges must take into account, whether this list is exhaustive or non-exhaustive, and whether this list is expressed as aggravating and mitigating factors or as factors for judges to generally have regard to when sentencing.[2] 'Most include the maximum penalty for the offence, the nature of

[1] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report 133, December 2017) 187, [6.8] <https://www.alrc.gov.au/wp-content/uploads/2019/08/fr133_06._sentencing_and_aboriginality_sm.pdf>.

[2] Ibid 187-188. For an example of a jurisdiction where factors are not expressed to be aggravating or mitigating, see the *Sentencing Act 1991* (Vic). As an example of variations among jurisdictions including whether and how the sentencing purposes and principles developed through the common law are incorporated, the common law principle that imprisonment is a sanction of last resort has been enacted in the *Crimes Act 1914* (Cth) s 17A, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1), *Penalties and Sentences Act 1991* (Qld) s 9(2)(a), *Criminal Law (Sentencing) Act 1988* (SA) s 11, *Sentencing Act 1991* (Vic) s 5(4), and *Sentencing Act 1995* (WA) s 6(4): Thalia Anthony, *Sentencing Indigenous Offenders* (Indigenous Justice Clearinghouse, Research Brief No 7, March 2010) 2. The purposes of sentencing are

and harm caused by the offence, the identity and age of the victim, the offender's criminal record, character, prospects of rehabilitation and remorse'.[3]

4. Currently, only three sentencing statutes explicitly refer to an offender's cultural background as relevant to the sentencing process: the *Sentencing Act 1995* (NT), *Crimes (Sentencing) Act 2005* (ACT) and *Penalties and Sentences Act 1991* (Qld). In addition, sections 16A(2A) and 16AA of the *Crimes Act 1914* (Cth) explicitly limit the ability of judges to consider 'customary law or cultural practice' in sentencing offenders under Commonwealth and Northern Territory laws.

5. The text of section 16AA, which is the focus of the present inquiry, is as follows:

> *16AA Matters to which court to have regard when passing sentence etc Northern Territory offences*
>
> *(1) In determining the sentence to be passed, or the order to be made, in relation to any person for an offence against a law of the Northern Territory, a court must not take into account any form of customary law or cultural practice as a reason for:*
>
> *(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or*
>
> *(b) aggravating the seriousness of the criminal behaviour to which the offence relates.*
>
> *(2) Subsection (1) does not apply in relation to an offence against the following:*
>
> *(a) sections 33, 34 and 35 of the Northern Territory Aboriginal Sacred Sites Act of the Northern Territory;*
>
> *(b) paragraph 33(a) of the Heritage Conservation Act of the Northern Territory;*
>
> *(c) section 4 of the Aboriginal Land Act of the Northern Territory;*
>
> *(d) sections 111, 112 and 113 of the Heritage Act of the Northern Territory;*
>
> *(e) any other law prescribed by the regulations that relates to:*
>
> *(i) entering, remaining on or damaging cultural heritage; or*
>
> *(ii) damaging or removing a cultural heritage object.*
>
> *(3) In subsection (1):*
>
> *criminal behaviour includes:*
>
> *(a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and*
>
> *(b) any fault element relating to such a physical element.*

outlined in all the sentencing statutes except South Australia, Tasmania and Western Australia: Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 187.

[3] Thalia Anthony, *Sentencing Indigenous Offenders* (Indigenous Justice Clearinghouse, Research Brief No 7, March 2010) 1.

6. Under the common law, the relevance of cultural background in sentencing has been considered in several distinct contexts, including:

   - the unique systemic and background factors affecting Aboriginal people;
   - the existence of customary law to explain the offending; and
   - the dispensation of punishment pursuant to customary law to explain the offending.[4]

7. In 2013, in the cases of *Bugmy v The Queen* (2013) 249 CLR 571 (**Bugmy**) and *Munda v Western Australia* (2013) 249 CLR 600 (**Munda**), the High Court held that the factors courts may have regard to when sentencing an offender include any background of disadvantage on the part of the offender.

8. As summarised by the ALRC in its *Pathways to Justice* report:

> *Sentencing courts in all jurisdictions have the ability to take account of an offender's background of disadvantage, relying on submissions on the relevant issues being made or as provided in court-ordered pre-sentence reports. Courts can consider a range of subjective factors arising from the offender's history. This may include, for example, where the offender experienced deprivation, poverty, trauma or abuse and those factors that may affect a person's moral culpability (*Bugmy v The Queen *249 CLR 571). These can be taken into account irrespective of an offender's cultural or racial background.*[5]

9. It is important to note that the High Court in these cases did not sanction the consideration of a *systemic* background of disadvantage, but rather an *individual* background of disadvantage. Accordingly, the principles from Bugmy and Munda 'do not automatically apply to all cases involving an Aboriginal or Torres Strait Islander offender',[6] and Aboriginality *per se* is not a relevant consideration.

> *Sentencing courts are able to consider the relevance and impact of systemic and background factors affecting an Aboriginal or Torres Strait Islander offender when taking into account subjective characteristics at sentencing, but are not required to do so. The High Court determined that, in the absence of legislative authority, to take 'judicial notice' of the 'systemic background of deprivation of Aboriginal offenders' more generally would be 'antithetical to individualized justice'.*[7] …
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> *[In Bugmy] [t]he High Court referred to Australian case law and principles that provide for consideration of disadvantage generally, which also applies within Aboriginal communities. Ultimately, however, it rejected the argument that 'courts ought to take judicial notice of the systemic*

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[4] See, eg, *Bugmy v The Queen* (2013) 249 CLR 571; *Munda v Western Australia* (2013) 249 CLR 600; Law Council of Australia, Submission to the Law Reform Commission of Western Australia, Aboriginal Customary Law, 29 May 2006, 19-20 citing Unreported, Supreme Court of Northern Territory, SC 20418849, Transcript of sentence by Chief Justice Brian Martin available at <http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2005/08/gj_20050811.html>; Thalia Anthony, *Sentencing Indigenous Offenders* (Indigenous Justice Clearinghouse, Research Brief No 7, March 2010) 2.

[5] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 189, [6.15].

[6] Ibid 186.

[7] Ibid 186, [6.3], citing *Munda v Western Australia* (2013) 249 CLR 600, [50] and *Bugmy v The Queen* (2013) 249 CLR 571, [41].

> *background of deprivation of Aboriginal offenders', on the basis that it would be 'antithetical to individualised justice'.*[8]

10. As Carloyn Holdom also explains in an article for the *Queensland University of Technology Law Review*: [9]

> *Australian courts have been reluctant to accept that Aboriginality per se is a mitigating factor, with the High Court of Australia recently losing a rare and important opportunity [in Bugmy and Munda] to reconsider Aboriginal disadvantage and the intergenerational effects of colonisation in sentencing.*[10] …
>
> *While the majority of the High Court in Bugmy held that a background of social deprivation was a relevant factor to be taken into account in sentencing, they stated that, in accordance with Neal,*[[11]] *the 'weight to be afforded to the effects of social deprivation in an offender's youth and background is in each case for individual assessment'*.[12]…
>
> *The majority stated that in sentencing an Aboriginal offender there is no warrant to apply a method of analysis different to that which is applied when sentencing a non-Aboriginal offender.*[13]…
>
> *The High Court rejected defence counsel's submission that judicial notice be taken of the systemic deprivation suffered by Aboriginal offenders, as doing so would, again, go against individual justice.*[14]

11. Moreover, both Bugmy and Munda require that there be evidence of a link between the offender's disadvantaged background and the offending behaviour. The Law Council and LSNT note that various groups are in the process of considering or implementing the development of guidance for legal practitioners and judicial officers on the application of what are now commonly referred to as 'the Bugmy Principles'. These include the Bugmy Bar Book, an online resource begun in New South Wales with the support of the Public Defenders (NSW); the Bugmy Evidence Library established by the Aboriginal Legal Service NSW/ACT in partnership with Norton Rose Fulbright; and the proposal for community written court reports from the Victorian Aboriginal Legal Service.

12. In Munda, the High Court also made the following *obiter dicta* reference to one particular aspect of customary law – traditional punishment. The High Court seemed

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[8] Ibid 196, [6.42].
[9] Carolyn Holdom, 'Sentencing Aboriginal Offenders in Queensland: Toward Recognising Disadvantage and the Intergenerational Impacts of Colonisation During the Sentencing Process' (2015) 15(2) *Queensland University of Technology Law Review* 50.
[10] Ibid 51.
[11] See *Neal v The Queen* (1982) 149 CLR 305. *Neal v The Queen* placed emphasis on the importance of individualised justice without taking into account the collective Aboriginal experience when sentencing an Aboriginal offender. The Court stated: 'The same principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group … but in imposing sentences, courts are bound to take into account in accordance with those principles, all material facts, including those facts which exist only by reason of the offender's membership of an ethnic or other group … emotional stress, which accounts for criminal conduct, is always material to the consideration of an appropriate sentence.' See also *Rogers & Murray v The Queen* (1989) 44 A Crim R 301; *R v Fernando* (1992) 76 A Crim R 58.
[12] Carolyn Holdom, 'Sentencing Aboriginal Offenders in Queensland: Toward Recognising Disadvantage and the Intergenerational Impacts of Colonisation During the Sentencing Process' (2015) 15(2) *Queensland University of Technology Law Review* 50, 59.
[13] Ibid 60.
[14] Ibid 60, citing *Bugmy v The Queen* (2013) 302 ALR 192, 203.

to suggest there must be some limitation on how far recognition of customary law would go under the common law. It did not appear supportive of the idea of the consideration of customary law in sentencing extending to the consideration of traditional punishment (such as the concept of 'payback'):

> *There is something to be said for the view that the circumstance that the appellant is willing to submit to traditional punishment, and is anxious that this should happen, is not a consideration material to the fixing of a proper sentence. Punishment for crime is meted out by the state: offenders do not have a choice as to the mode of their punishment.* …[15]

> *In these circumstances [of the question not being in issue], this case does not afford an occasion to express a concluded view on the question whether the prospect of such punishment is a consideration relevant to the imposition of a proper sentence, given that the courts should not condone the commission of an offence or the pursuit of vendettas, which are an affront and a challenge to the due administration of justice. It is sufficient to say that the appellant did not suffer any injustice by reason of the circumstance that the prospect of payback was given only limited weight in his favour by the courts below.*[16]

13. While the court appeared hostile in this case, some members of the Law Council's expert committees have suggested that the common law on extra-curial punishment may permit punishment inflicted outside of the courtroom to be taken into account in some circumstances. Other members, while recognising the issue of an offender being subject to 'additional' punishment, maintained the difficulty in a sentencing court condoning an act of tribal punishment that is, subject to consent and the extent of the injury, an assault.

Issues Under Consideration of the Inquiry

Whether section 16AA of the *Crimes Act 1914* (Cth) should be repealed

14. As documented below, the Law Council has never supported section 16AA of the *Crimes Act 1914* (Cth), or the provisions that preceded its enactment. It continues to recommend the repeal of section 16AA (as well as section 16A(2A), which is the twin provision relating to Commonwealth offences). The LSNT has previously conducted limited advocacy on section 16AA, recommending its repeal in 2008 and 2012.

Law Council and LSNT Past Positions

2006 - Law Reform Commission of Western Australia's Inquiry

15. As early as 1986, the ALRC's *The Recognition of Aboriginal Customary Laws* report recommended that 'Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system'.[17]

16. Twenty years later, in 2006, the Law Reform Commission of Western Australia (**LRCWA**) conducted an inquiry into the interaction of Western Australian law with

[15] *Munda v WA* [2013] HCA 38, [61].
[16] Ibid [63].
[17] Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (ALRC Report No 31, 11 June 1986) <https://www.alrc.gov.au/publication/recognition-of-aboriginal-customary-laws-alrc-report-31/>.

Aboriginal law and culture.[18] The Law Council made a submission to the LRCWA, which contained the following views:[19]

- The Law Council believes the existence of customary law has long since been established and supports its full recognition in all jurisdictions.
- The Law Council does not believe customary law is, or can be, used to support violent or abusive practices, particularly domestic violence and offences against women and children.

  The following excerpt from the same submission provided important context around this statement:

  As a statement of principle, customary law should continue to be recognised as a factor in sentencing of offenders without interference from the legislature. However, customary law has never been accepted as a defence or justification for abusive or violent behaviour.

  Detractors often point to practices such as promised marriages and community sanctioned violence to justify legislative intervention to restrict the matters a court may consider. A recent example was in the much publicised 2005 case, The Queen v GJ, in the Northern Territory, referred to by the media as 'the promised bride case' (though it is acknowledged the practice referred to is common within some Indigenous communities). The defendant, an elder in the Yarrapingu community of the Northern Territory, was charged and convicted of having intercourse with a minor after sexually assaulting a 14 year old girl who had been promised to him as his bride under the customary laws of his community. In sentencing the man to a 2 year jail term, with 23 months of that term suspended on the condition that the man did not re-offend for the period of the sentence, Chief Justice Martin took into account that the man spoke little English and was unaware that what he did was in breach of the law. …

  Following the initial sentence, State and Federal Ministers condemned the sentence and called for the law to be changed, to rule out consideration of customary law in sentencing of Indigenous offenders … The Law Council submits that this is an ill-informed and simplistic approach to a highly complex issue. It is common ground among Indigenous communities that violence against women and children is not, and never has been, a part of Aboriginal culture or customary law.

  … the customary context in which a crime was carried out has been taken into account by courts for many years, along with all other factors affecting the disposition of the accused. In The Queen v GJ, it was also taken into account that the child was upset and distressed, that the court has a duty to protect vulnerable members of the community, including women and children, that the penalty imposed should act as a deterrent and reflect the seriousness of the offence, that the offenders behaviour was regarded as a very serious crime in the eyes of the wider community, that the law of the Northern Territory must prevail and that this was the defendant's first offence, he had pleaded guilty, thereby saving the child from giving

[18] See Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture* (Final Report, Project 94, September 2006) <https://www.lrc.justice.wa.gov.au/_files/P94_FR.pdf>.
[19] Law Council of Australia, Submission to the Law Reform Commission of Western Australia, *Aboriginal Customary Law*, 29 May 2006.

evidence, he was a respected elder in his community, was not a sexual predator and was considered unlikely to re-offend.

The Law Council submits that removal of the power of courts to consider all factors relevant to the state of mind of an accused in criminal matters would be inimical to the principles upon which the law in Australia is based. The disposition and circumstances of the accused will always be relevant to the commission of a crime, whether it is murder, assault or trespass.[20]

- The Law Council supports the continued recognition of customary law issues by the courts and strongly recommends that the legislature not intervene to prevent consideration by the court of any matter relevant to the circumstances of an accused, Indigenous or otherwise.
- The Law Council does not support a 'customary law defence' to any offence under the criminal laws of this country, except in the context of trespass. However, the Law Council supports measures requiring the court to consider the circumstances of the accused during the proceedings, when sentencing and when considering bail.
- The Law Council supports proposals to recognise community justice mechanisms and proposals aimed at reducing rates of Indigenous incarceration and recidivism.
- The Law Council supports substantially increased investment toward culturally appropriate programs to educate Indigenous communities about the laws which apply to them, and toward cultural awareness training for all government officers, court officials and service providers dealing with Indigenous people.
- The Law Council raises concerns with respect to any legislative measures to sanction traditional punishment or 'payback' and highlights the need for adequate safeguards before such a move is considered.
- The Law Council supports the right of self-determination for Indigenous communities and believes that provision of infrastructure and services necessary to support community governance is critical to dealing with the problems faced by many Indigenous communities.

2006 - Crimes Amendment (Bail and Sentencing) Act 2006 (Cth) - Subsection 16A(2A)

17. Later in 2006, the Law Council also made submissions to the Council of Australian Governments (**COAG**)[21] and to the Senate Legal and Constitutional Committee[22] in opposition to the passage of the Crimes Amendment (Bail and Sentencing) Bill 2006 (Cth).

18. This Bill sought to amend the *Crimes Act 1914* (Cth) to insert, among other provisions, subsection 16A(2A), which prohibits courts, when sentencing in relation to federal offences, from having regard to customary law or cultural practice for the purpose of assessing the seriousness of criminal behaviour.

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[20] Law Council of Australia, Submission to the Law Reform Commission of Western Australia, Aboriginal Customary Law, 29 May 2006, 19-20 citing Unreported, Supreme Court of Northern Territory, SC 20418849, Transcript of sentence by Chief Justice Brian Martin available at <http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2005/08/gj_20050811.html>.

[21] Law Council of Australia, Submission to the Council of Australian Governments, *Recognition of Cultural Factors in Sentencing*, 10 July 2006.

[22] Letter from the Secretary-General of the Law Council of Australia, Peter Webb, to the Acting Secretary of the Senate Standing Committee on Legal and Constitutional Affairs, Julie Dennett, *Crimes Amendments (Bail and Sentencing) Bill 2006*, 26 September 2006.

19. At the time, the Law Council provided the following rationale for its strong opposition to subsection 16A(2A):

- preventing consideration of the cultural background of an offender would result in discrimination against those persons whose customs and beliefs differ from the majority of Australians;[23]
- for example, preventing courts from drawing any distinction between an Anglo-Australian person raised and educated in Canberra, and a person with limited English or formal education, who has lived their entire life in a remote Aboriginal community according to their traditional laws and customs, risks perpetuating disadvantage under our legal system;[24]
- courts have generally been 'getting it right' with respect to the balancing of different concerns in bail and sentencing and the Law Council considers that judicial discretion should be preserved;[25] and
- provisions like this place an unreasonable fetter on the ability of a court to reach appropriate sentencing decisions based on all of the material before the court;[26]
- restricting consideration of cultural practices or customary law in sentencing, if adopted nationally, has the potential to neutralise recent constructs, including Aboriginal courts that have been established and tested with outstanding success in a number of jurisdictions. Such provisions may also threaten the role of community justice groups and the contributions made by communities to the sentencing process;[27] and
- the provision runs contrary to the recommendations made by the Royal Commission into Aboriginal Deaths in Custody in 1991 and the ALRC's Same Crime, Same Time: Sentencing of Federal Offenders report.[28]

20. However, the Law Council was unsuccessful in its advocacy.[29] The *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) (**CABS Act**) came into force, and subsection 16A(2A) remains in the *Crimes Act 1914* (Cth) today.

2007 - Northern Territory National Emergency Response Act 2007 (Cth) - Section 91 (precursor to subsection 16AA(1))

21. The following year, with the advent of the Commonwealth Government's Intervention in the Northern Territory, a similar prohibition was imposed on Northern Territory courts through the *Northern Territory National Emergency Response Act 2007* (Cth) (**NTNER Act**).

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[23] Ibid 4.
[24] Ibid.
[25] Ibid 5.
[26] Ibid 6.
[27] Ibid.
[28] Ibid 8.
[29] See also Council of Australian Governments, *Communique*, 14 July 2006, 12 <http://ncp.ncc.gov.au/docs/Council%20of%20Australian%20Governments%20Meeting%20-%2014%20July%202006.pdf>: 'COAG agreed that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment.' See also See Commonwealth of Australia, Senate Standing Committee on Legal and Constitutional Affairs, *Crimes Amendment (Bail and Sentencing) Bill 2006* (Report, 16 October 2006) <https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2004-07/crimes_bail_sentencing/report/index>.

22. Section 91 in Part 6 of the NTNER Act prohibited courts, when sentencing in relation to Northern Territory offences, from having regard to customary law or cultural practice for the purpose of assessing the seriousness of criminal behaviour.

2008-2011 - Law Council Advocacy for Repeal of Legislative Framework

23. In 2008, the Law Council wrote to the Attorney-General's Department upon its announcement of a review of this legislative framework.[30] The Law Council submitted 'that the relevant provisions [of the CABS Act and NTNER Act] should be repealed, in their entirety, as soon as possible', stating that the restriction of the Court's discretion to consider relevant matters in bail and sentencing was 'neither necessary nor reasonable' as a response to the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities and had 'virtually no impact on the protection of Aboriginal and Torres Strait Islander women and children'.[31] This position was endorsed by the LSNT in its own submission to the Commonwealth Attorney-General's Department.[32]

24. However, in 2010, the Attorney-General ultimately decided that 'the provisions should be monitored for a further 12 months before a decision is made on whether reform is required'.[33]

25. Once this period had lapsed, the Law Council wrote to the Attorney-General, questioning the Government's lack of action and again recommending that the provisions be repealed.[34] It stated that 'restrictions on judicial discretion through the CABS Act and Part 6 of the NTNER Act are inimical to the objectives and principles underlying the National Indigenous Law and Justice Framework and the findings and recommendations of the Royal Commission into Aboriginal Deaths in Custody'.[35]

2012 - Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012 (Cth) - Section 16AA

26. In 2012, both the Law Council and LSNT made submissions to the Senate Community Affairs Legislation Committee regarding a package of legislation, which included the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011.[36]

27. Schedule 1 of this Bill repealed the NTNER Act, but Schedule 4 amended the *Crimes Act 1914* (Cth) to introduce new section 16AA into the *Crimes Act 1914* (Cth) (see Appendix 1 below). Subsection 16AA(1) effectively reproduced word for word the prohibition under section 91 of the NTNER Act.

28. The Bill extended the prohibition on courts in relation to federal offences under section 16A of the *Crimes Act 1914* (Cth) to Northern Territory offences under section 16AA of the *Crimes Act 1914* (Cth). The Law Council opposed this action, instead

[30] Letter from the President of the Law Council, W Ross Ray QC, to the Assistant Secretary of the Criminal Law Branch of the Attorney-General's Department, Karl Alderson, *Review of Customary Law Amendments to Bail and Sentencing Legislation*, 14 November 2008.
[31] Ibid 2.
[32] Advice received from the Law Society Northern Territory.
[33] See letter from the President of the Law Council, Alexander Ward, to the Commonwealth Attorney-General, the Hon Robert McClelland MP, *Customary Law and Cultural Background*, 29 September 2011.
[34] Ibid.
[35] Ibid 3.
[36] Letter from the Acting Secretary-General of the Law Council, Margery Nicoll, to the Committee Secretary of the Senate Community Affairs Legislation Committee, *Stronger Futures in the Northern Territory Bill 2011 and Related Legislation*, 3 February 2012.

recommending that the Bill repeal both the CABS Act and the NTNER Act, but the Bill passed.[37]

29. The LSNT welcomed repeal of the NTNER Act and the reinstatement of the *Racial Discrimination Act 1975* (Cth).

30. The *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth) (**CTP Act**) entered into force and section 16AA remains in the *Crimes Act 1914* (Cth) today.

Further Concerns

Section 16AA impedes judicial discretion

31. In the opinion of the Law Council and LSNT, it is inappropriate to restrict judicial discretion in sentencing.[38] Judges must always retain discretion to ensure sentences are appropriate to the facts of a case. It is widely recognised that, '[i]n the context of sentencing, discretion is fundamental to ensuring that a sentence is individualised and proportionate; in other words, that the "punishment fits the crime".'[39]Judges are well-practiced in weighing different factors, including multiple and conflicting sentencing considerations, and in the rare instances where mistakes are alleged then their decisions can be appealed.

32. In exercising discretion, judges do not have unchecked power. Rather, their choices are constrained by legal limits and structures, including: precedent; sentencing guidelines, purposes and principles under both legislation and case law; the requirement to explain their reasoning; and the principles for review of discretionary decisions by appellate courts, with 'appealable errors' including 'allowing extraneous or irrelevant matters to guide the discretion'.[40]

Section 16AA is an inappropriate legacy from the Northern Territory Intervention

33. The Law Council and LSNT also question the appropriateness of the Commonwealth Government continuing to legislate in this respect in the Northern Territory, given the criticism of the Northern Territory Intervention but also the comparative position of other states and territories.

34. While all federal, state and territory governments came to an agreement at the Council of Australian Governments (**COAG**) meeting on 14 July 2006 that their laws would reflect their opinions that 'no customary law or cultural practice excuses, justifies, authorises, requires or lessens the seriousness of violence or sexual abuse', only the Northern Territory has been held to this promise.[41] As far as the Law Council and

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[37] Ibid 5.
[38] See, eg, Law Council of Australia, 'Parliament Should Not Interfere with Judicial Discretion' (Media Release, 3 September 2019) <https://www.lawcouncil.asn.au/publicassets/a6a60f9c-16ce-e911-9400-005056be13b5/1953%20--%20Parliament%20should%20not%20interfere%20with%20judicial%20discretion.pdf>.
[39] Jonathan Dobinson, 'Structuring Judicial Discretion in Australia' (2005) 86 *Australian Law Reform Commission Reform Journal* 49 <http://www5.austlii.edu.au/au/journals/ALRCRefJl/2005/12.html>.
[40] See, eg, Wendy Lacey, 'Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere' [2004] 5 *Melbourne Journal of International Law* <https://law.unimelb.edu.au/__data/assets/pdf_file/0008/1680425/Lacey.pdf> citing *House v The King* (1936) 55 CLR 499.
[41] See Council of Australian Governments, *Communique*, 14 July 2006, 12 <http://ncp.ncc.gov.au/docs/Council%20of%20Australian%20Governments%20Meeting%20-%2014%20July%202006.pdf>: 'COAG agreed that no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment.'

LSNT know, no other state or territory has received substantial political pressure on this issue from the Commonwealth.

35. From a purely legal standpoint, the Commonwealth Government does have the power under section 122 of the Constitution to make laws directly regulating Northern Territory matters. However, from a normative standpoint, this continuing intervention via the addition of section 16AA in the *Crimes Act 1914* (Cth) appears unreasonably paternalistic. This is particularly the case because the Australian Capital Territory, which is in the same legal position as the Northern Territory,[42] has been free to develop its own legislation and, as noted above, recognises an offender's cultural background as relevant to the sentencing process.

36. The Law Council and LSNT further note that, in the explanatory memorandum to the Northern Territory National Emergency Response Bill 2007 (Cth), the Minister intimated that section 91 – the precursor to section 16AA – was supposed to be a temporary measure:

> *Northern Territory legislation lists the factors a court shall have regard to in sentencing an offender. This list refers generally to any aggravating or mitigating factor concerning the offender and the extent to which the offender is to blame for the offence, but does not specifically refer to customary law or cultural practice.*
>
> *The Government wishes to ensure that the decisions of COAG, as implemented by the Bail and Sentencing Act, apply in relation to bail and sentencing discretion for Northern Territory offences.*
>
> *Section 122 of the Constitution provides the Commonwealth with a very broad power to make laws directly regulating Territory matters, including in relation to bail and sentencing. The Commonwealth provisions in Part 6 will prevail over any inconsistent Territory laws. It is the Government's intention that, if the Northern Territory enacts sufficiently complementary provisions, the amendments made by Part 6 would be repealed. …*
>
> *Clause 91 expressly prohibits a court from taking into account customary law or cultural practice as an excuse or justification for criminal behaviour when sentencing a person for having committed a Northern Territory offence, thus preventing a court from reducing the sentence imposed on an offender on the basis of customary law or cultural practice. This clause also precludes a court taking into account customary law or cultural practice as a reason for aggravating the seriousness of criminal behaviour, thus preventing a court from increasing the sentence imposed on an offender on the basis of customary law or cultural practice.*[43]

Section 16AA ignores the principle of substantive equality

37. In the opinion of the Law Council and LSNT, the issue is one of substantive equality versus formal equality. The ALRC has summarised the difference as follows:

> *Formal equality suggests that all people should be treated the same regardless of their differences. Substantive equality is 'premised on the basis that rights, entitlements, opportunities and access are not equally distributed throughout society and that a one size fits all approach will not*

[42] *Australian Constitution* s 122: 'The Parliament may make laws for the government of any territory …'.
[43] Explanatory Memorandum, Northern Territory National Emergency Response Bill 2007, 52-53 <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/bill_em/ntnerb2007541/memo_0.html>.

> *achieve equality'.*[44] *The ALRC does not propose a 'parallel system' of justice for Aboriginal and Torres Strait Islander people, as warned against by the Institute of Public Affairs.*[45] *However, it recognises, as Brennan J observed in Gerhardy v Brown, that formal equality may be 'an engine of oppression destructive of human dignity if the law entrenches inequalities "in the political, economic, social, cultural or any other field of public life"'.*[46] *Achieving substantive and not formal equality before the law includes, for example, the consideration upon sentencing of the unique and systemic factors affecting Aboriginal and Torres Strait Islander offenders. It also includes not only consistency in the provision of sentence options and diversion and support programs across the country, but also ensuring that these are culturally appropriate.*[47]

38. Some scholars have questioned whether section 16AA is consistent with section 10 of the *Racial Discrimination Act 1975* (Cth).[48] The Law Council and LSNT note the interplay between section 16AA and the *Racial Discrimination Act 1975* (Cth) is complex both historically and legally, and has not been specifically tested. Neither the Law Council nor LSNT has formed its own position in this regard.

Recommendation

- **The federal government should repeal section 16AA of the *Crimes Act 1914* (Cth).**

What laws, if any, should be passed to give effect to the ALRC's *Pathways to Justice* report recommendations

39. The Law Council has publicly called upon the Commonwealth Government to respond to and implement the recommendations of the ALRC's *Pathways to Justice* report.[49] It notes that the terms of reference for the present inquiry identify Recommendation 6-1 from the report that 'sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and backgrounds factors affecting Aboriginal and Torres Strait Islander peoples'.[50]

40. Within the bodies of both its summary and final report, the ALRC discussed how this might work in practice, explaining:

> *For reasons of fairness, certainty, and continuity in sentencing Aboriginal and Torres Strait Islander offenders, the majority of stakeholders to this Inquiry supported the introduction of provisions requiring sentencing*

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[44] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report 133, December 2017) 23, citing Australian Human Rights Commission, The Declaration Dialogue Series: Paper No 5—Equality and Non-Discrimination (2013) 8.
[45] Ibid citing Institute of Public Affairs, Submission 58.
[46] Ibid citing *Gerhardy v Brown* (1985) 159 CLR 70, 129.
[47] Ibid.
[48] See, eg, Jack Maxwell, '"Two Systems of Law Side by Side": The Role of Indigenous Customary Law in Sentencing' (2015/2016) 19(2) *Australian Indigenous Law Reporter* 97, 103-107 <http://www.austlii.edu.au/au/journals/AUIndigLawRw/2016/16.pdf>.
[49] See, eg, Law Council of Australia, 'One year on, Government fails to respond to ALRC's Indigenous over-incarceration report' (Media Release, 28 March 2019) <https://www.lawcouncil.asn.au/media/media-releases/one-year-on-government-fails-to-respond-to-alrcs-indigenous-over-incarceration-report>.
[50] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Summary Report 133, December 2017) 24, Recommendation 6-1 <https://www.alrc.gov.au/wp-content/uploads/2019/08/summary_report_133_amended.pdf>.

courts to take a two-step approach: first, to take into account the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples; and then to proceed to review evidence as to the effect on that particular individual offender.[51]

41. There were also further recommendations relevant to the present inquiry, including:

- State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations, should develop and implement schemes that would facilitate the preparation of 'Indigenous Experience Reports' for Aboriginal and Torres Strait Islander offenders appearing for sentence in superior courts.[52]
- State and territory governments, in partnership with relevant Aboriginal and Torres Strait Islander organisations and communities, should develop options for the presentation of information about unique systemic and background factors that have an impact on Aboriginal and Torres Strait Islander peoples in the courts of summary jurisdiction, including through Elders, community justice groups, community profiles and other means.[53]
- Where needed, state and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts. These courts should incorporate individualised case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.[54]

42. Given the limitations of the High Court's decision in Bugmy, discussed above, it is up to the legislature to provide for the ability of courts to take into account systemic factors in Australia, by amending sentencing legislation.

43. Some members of the Law Council's expert advisory National Criminal Law Committee suggest that sentencing courts should also be able to consider, where applicable, factors such as removal from country, serving time away from country, and lack of access to family and community in this context.

44. Legislative provisions are also necessary to effect Recommendation 6-2, noting that the 'Indigenous Experience Reports' referred to are akin to Canadian Gladue Reports, which have previously received support from advocates in Australia.[55]

45. The High Court distinguished Bugmy from Gladue, because the Criminal Code of Canada instructed sentencing judges to take into particular account the circumstances of Aboriginal offenders, something that no sentencing legislation in Australia does.[56]

46. Most criminal offences and procedures in Canada are codified. Section 718.2(e) of the Canadian Criminal Code stipulates that all available sanctions other than

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[51] Ibid 14-15.
[52] Ibid 24, Recommendation 6-2.
[53] Ibid 24, Recommendation 6-3.
[54] Ibid 26, Recommendation 10-2.
[55] Anthony Hopkins, of the Australian National University, has argued that reports akin to *Gladue* reports should be adopted in Australia: Carolyn Holdom, 'Sentencing Aboriginal Offenders in Queensland: Toward Recognising Disadvantage and the Intergenerational Impacts of Colonisation During the Sentencing Process' (2015) 15(2) *Queensland University of Technology Law Review* 50, 67. See also Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) *Melbourne University Law Review* 47. In Victoria, the Victorian Aboriginal Legal Service has proposed the development of a community written court report, based on the Canadian Gladue Reports.
[56] Carolyn Holdom, 'Sentencing Aboriginal Offenders in Queensland: Toward Recognising Disadvantage and the Intergenerational Impacts of Colonisation During the Sentencing Process' (2015) 15(2) *Queensland University of Technology Law Review* 50, 60 citing *Bugmy v The Queen* (2013) 302 ALR 192, 201 [35]-[36].

imprisonment should be considered 'with particular attention to the circumstances of Aboriginal offenders', with the aim of the section being to reduce the overrepresentation of Aboriginal people in prisons.[57]

47. In the Canadian Supreme Court case, *R v Gladue* [1999] 1 SCR 688, the Canadian Supreme Court considered section 718.2(e) of the Canadian Criminal Code and stipulated that it would be *necessary* for a judge to take judicial notice of systemic factors when sentencing an Aboriginal offender.[58] The Court in *R v Ipeelee* [2012] 1 SCR 433 then stated that these 'Gladue principles' applied to all offences, including violent ones, and that systemic factors relating to Aboriginal offenders *must* be taken into account in every case.[59]

48. Currently in Canada, 'Gladue reports' are utilised to provide evidence of material facts existing by reason of an offender's Aboriginality. The reports are similar to the pre-sentence custody reports utilised, for example, by Queensland courts in Australia, *however they address the offender's Aboriginality directly*. Gladue reports are written by Aboriginal Canadians who have the same collective experience as the defendants they assist. The reports assist in explaining offending behaviour within the context of the collective history of Aboriginal Canadians.[60]

49. Carolyn Holdom suggests that 'perhaps the first step toward addressing the broad systemic issues suffered by Aboriginal Australians is to provide a similar legislative provision whereby courts are able to give special consideration to Aboriginal offenders looking to the effects of colonisation'.[61]

50. In relation to Recommendation 10-2, the Law Council and LSNT draw attention to the successful Koori Court in Victoria;[62] the Youth Koori Court in New South Wales, which was evaluated in its pilot stage as 'an effective and culturally appropriate means of addressing the underlying issues that lead many Aboriginal and Torres Strait Islander young people to engage with the criminal justice system';[63] and the repeated calls for

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[57] Ibid, 65.
[58] Ibid 60.
[59] Ibid.
[60] Ibid 66.
[61] Ibid 65.
[62] See, eg, Bridget McAsey, 'A Critical Evaluation of the Koori Court Division of the Victorian Magistrates' Court' (2005) 10(2) *Deakin Law Review* 654; Danielle Roddick, 'Report: Koori Court effective for young offenders', *Western Sydney University News Centre* (Online, 7 May 2018) <https://www.westernsydney.edu.au/newscentre/news_centre/story_archive/2018/report_koori_court_effective_for_young_offenders>. See also State of Victoria, Sentencing Advisory Council, *Sentencing in the Koori Court Division of the Magistrates' Court: A Statistical Report* (October 2010). Following the Royal Commission into Aboriginal Deaths in Custody, the Victorian Government resolved to put into place strategies to reduce the Indigenous custody rate. One such initiative, first piloted in 2002, was the establishment of the Koori Court Division of the Victorian Magistrates' Court. The County Koori Court was established in Victoria in 2008 as the first sentencing court for Aboriginal and Torres Strait Islander offenders in the higher jurisdiction in Australia. It follows the successful Koori Court model introduced at the Magistrates' and Children's Courts and sits at Latrobe Valley, Melbourne, Mildura and Shepparton. As provided on the County Koori Court website, 'Aboriginal elders or respected persons advise the Judge on cultural issues relating to the accused and his or her offending behaviour. Their voices are a powerful cultural feature and send a clear message to the accused the offences are not condoned by Koori or non-Koori communities. Elders and respected persons provide information on the background of the accused and possible reasons for offending behaviour. They may also explain relevant kinship connections, how particular crimes have affected the Indigenous community and provide advice on cultural practices, protocols and perspectives relevant to sentencing.' The Koori Court cannot hear certain offences and the Indigenous accused must elect to go to the Koori Court, consent to the jurisdiction and plead guilty. See County Court Victoria, *County Koori Court* (online, 28 May 2020) <https://www.countycourt.vic.gov.au/learn-about-court/court-divisions/county-koori-court>.
[63] Judge Peter Johnstone, *Children's Court Update 2019 (Criminal Jurisdiction)* (Local Court Regional Conference, Port Macquarie, 27-29 March 2019) <https://www.judcom.nsw.gov.au/publications/benchbks/children/CM_Johnstone_Updates_2019.html>.

the Walama Court in New South Wales.[64]

51. The interaction between Recommendation 6-1, which supports consideration of a systemic background of disadvantage, and section 16AA of the *Crimes Act 1914* (Cth), which restricts consideration of customary law (as discussed above and below), is not entirely clear.

52. In its *Pathways to Justice* report, the ALRC briefly discussed the effect of the Northern Territory's legislative framework on a court's ability to consider a background of disadvantage in sentencing. However, it did not come to any firm conclusion, stating:

> *It is not clear how s 16AA may have an impact on the operation of the [ALRC's] recommended provision to consider the unique and systemic background factors affecting Aboriginal and Torres Strait Islander offenders in the NT. As customary law and cultural practice can be considered to provide context for offending, the effect of s 16AA on the operation of the recommended provision may be minimal. Nonetheless, the ALRC was advised by CLANT that, in order to give statutory consideration to Aboriginal and Torres Strait Islander disadvantage when sentencing in the NT, 'necessary amendments will need to be made to other legislation that seeks to regulate how evidence of custom and culture is to be presented'. Accordingly, the ALRC encourages the Commonwealth Government to review the operation of ss 16A(2A), 16AA of Crimes Act 1914 (Cth) to ensure that they are operating as intended, and to consider repealing or narrowing the application of the provisions if necessary to the successful implementation of a statutory requirement to consider unique and systemic factors of Aboriginal and Torres Strait Islander offenders when sentencing in the NT.*[65]

53. In any case, it is not necessary that the ALRC Recommendation 6-1 underpin either a process of repeal of section 16AA, as there are broader reasons to support this as indicated above, or new legislation allowing for consideration of customary law.

54. With respect to this latter question, the Law Council and LSNT generally support the recognition of customary law in sentencing. However, significant time has passed since the Law Council or LSNT last advocated on the interaction between customary law and sentencing law. In the intervening period the landscape of Aboriginal and Torres Strait Islander legal perspectives and advocacy has continued to evolve. The Law Council and LSNT therefore expect that coming to a position on the *detail* of how customary law might be recognised in sentencing throughout Australia, including in the Northern Territory, will require substantial consultation with its constituent bodies, committees and sections. In responding to this inquiry at the present time, it is guided by the following general considerations.

- Aboriginal customary law continues to have authority and legitimacy in Aboriginal communities, and continues to guide communities in the conduct of their day-to-day lives. Recognition is often a secondary matter that does not undermine the authority of Aboriginal law for Aboriginal peoples.

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[64] Michaela Whitbourn, 'Indigenous Walama Court would deliver millions in savings, costings show', *Sydney Morning Herald* (Online, 24 June 2020) <https://www.smh.com.au/national/indigenous-walama-court-would-deliver-millions-in-savings-costings-show-20200622-p554yy.html>; Naomi Neilson, 'NSW Bar renews calls for Walama Court', *Lawyers Weekly* (Online, 28 May 2020) <https://www.lawyersweekly.com.au/biglaw/28451-nsw-bar-renews-calls-for-walama-court>.

[65] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report 133, December 2017) 212.

- Customary law is one example of community justice mechanisms, which are recognised as having the potential to reduce rates of Indigenous incarceration and recidivism by returning control to communities.
- The Law Council and LSNT support the right to self-determination for Indigenous communities and believes that provision of the legal frameworks, infrastructure and services necessary to support community governance is critical to dealing with the problems faced by many Indigenous communities.
- In a wider context, the Law Council and LSNT support the redirection of funds from punitive criminal justice approaches to therapeutic, place-based, community-led programs that provide holistic, culturally appropriate services directed towards rehabilitation and addressing complex needs.[66]
- Any recognition of customary law within the criminal justice system should occur through consultation with Aboriginal and Torres Strait Islander controlled organisations and communities.
- To this end, the Law Council and LSNT note comments from some members of the LSNT who would like to see structure around the identification and use of customary law. Aboriginal and Torres Strait Islander people have had limited opportunities to consider the contemporary application of their laws in the criminal justice system, including to put forward customary law protocols. There is a risk of legal practitioners attempting to apply what they hear is customary law from the loudest, though not necessarily most authoritative, voice. To this end, adequate resources and expertise must be provided to assist in identifying contemporary customary law. (This a recommendation which is relevant not only to the area of criminal law, but also family law, heritage protection law, land rights law, etc. In the context of heritage protection, the Law Council has emphasised the importance of Traditional Owners having the leading voice in the management of their own cultural sites.[67])
- Customary law has never been accepted by the Law Council or LSNT as a defence to any criminal offence except trespass or as a justification for violent or abusive behaviour.
- The Law Council and LSNT support consideration by sentencing courts of matters relevant to the circumstances of an accused, including customary law.
- The High Court has recently signalled in its obiter that with respect to the common law, it may draw the line on traditional punishment forming part of sentencing considerations.
- Legislators should be careful not to use reservations around traditional punishment to dismiss customary law outright. The Law Council has received advice from its expert committees that the concept of traditional punishment (eg 'payback') is a very small part of customary law and popular concerns around this concept are overplayed.

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[66] The first major justice reinvestment project in Australia is the Maranguka Justice Reinvestment Project in Bourke NSW, which involves Just Reinvest NSW working in partnership with local community groups to disrupt cycles of offending and disadvantage for individuals and communities. It has recently been in its implementation phase (2016-2019); it underwent a preliminary assessment in 2016, which found significant quantitative and qualitative improvements including a 23 per cent reduction in police recorded incidence of domestic violence, a 14 per cent reduction in bail breaches and a 42 per cent reduction in days spent in custody, as well as a gross economic impact of $3.1 million. See Law Council of Australia, 2019-20 Pre-Budget Submission (12 February 2019) <https://www.lawcouncil.asn.au/publicassets/b8630bd9-6440-e911-93fc-005056be13b5/3578%20-%20Pre-Budget%20Submission%202019.pdf>.

[67] See, eg, Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) 28 <https://www.lawcouncil.asn.au/publicassets/24891840-2ef3-ea11-9434-005056be13b5/3864%20-%20Juukan%20Caves%20Submission.pdf>.

- However, the concept of traditional punishment (eg 'payback') does engage an ongoing tension in human rights literature between universalism and cultural relativism. Numerous commentators suggest that universal human rights can exist within a culturally sensitive universal framework, but concerns would remain if traditional punishment was sanctioned without safeguards. The Law Council and LSNT suggest that Indigenous peoples and communities should be consulted on any issue of recognising traditional punishment in the Northern Territory's sentencing legislation, including on any question of safeguards around traditional punishment.

Recommendation

- **Federal, state and territory governments should respond to and implement the recommendations in the ALRC's *Pathways to Justice* report.**

The operation of section 104A of the *Sentencing Act 1995* (NT)

55. Under section 104 of the *Sentencing Act 1995* (NT), a court has a broad discretion to receive such information as it thinks fit to enable it to impose the proper sentence or make the proper order. Section 104A applies only if a party to proceedings seeks to present certain cultural information – this being information about 'an aspect of any form of customary law' or 'a cultural practice'.[68] It provides that, before agreeing to receive this information, a court must have regard to how the party intends to present the information and whether any other parties to the proceedings have been given notice of and a reasonable opportunity to respond to the information.[69] It is silent, however, on whether these considerations should positively or negatively influence a court to receive the information. While the clarity of section 104A is affected by the qualifying phrase that begins subsection 104A(2) ('[d]espite section 104A'), it appears a court would have broad discretion under the provision, able on the one hand to facilitate the presentation of cultural information and on the other hand to refuse. The Second Reading Speech focuses on a court applying the provision to affect the first mentioned outcome:

> *The Bill proposes amendment to section 104A of the* Sentencing Act *to … provide the court with discretion regarding compliance with the procedural requirements, thereby giving the court the option of ordering parties to provide information in an evidentiary manner. This amendment is designed to alleviate any inconsistency with the* Racial Discrimination Act *of the Commonwealth by ensuring the court may receive information regarding customary law or cultural practice during the sentencing process without restriction. It is envisaged the court would exercise discretion to receive information on oath, in affidavit form, or by statutory declaration in appropriate cases, having regard to the difficulties in some remote communities with literacy, the time and resource constraints on agencies providing legal assistance, and the suitability of informal processes in the majority of cases.*[70]

56. The exact effect of section 16AA of the *Crimes Act 1914* (Cth) on section 104A of the *Sentencing Act 1995* (NT) is unclear. Section 109 of the Constitution provides that in the event of an inconsistency between a federal statute and a state or territory statute,

[68] *Sentencing Act 1995* (NT) s 104A(1).
[69] *Sentencing Act 1995* (NT) s 104A(2).
[70] Northern Territory, Legislative Assembly, Second reading Speech.

the federal statute prevails and the other statute is invalid to the extent of the inconsistency. However, a court should attempt to interpret a state or territory statute to as far as possible avoid such inconsistencies and preserve state or territory power.[71] The likely effect is therefore that section 16AA curtails the purposes for which a court can use the cultural information it might receive under section 104A: while it can receive it as part of the sentencing process as per section 104A, it cannot use it for the purpose of aggravating or mitigating the seriousness of the offence as per section 16AA. Those aspects of sentencing that are distinct from seriousness (and which therefore could be influenced by cultural information) include the offender's character, the prevalence of the offence, and the rehabilitation of the offender.[72] This approach to reading section 104A is supported by the ALRC, which has said:

> *The Commonwealth provisions were introduced to 'prevent customary law from being used to mitigate the seriousness of any offence that involves violence against women and children'. The Northern Territory Supreme Court has found that provisions of this type did not prevent courts from considering customary law or cultural practice to: provide context for offending; establish good prospects of rehabilitation (relating to sentencing); and to establish the character of the accused.*[73]

57. That such was the intention of the drafters of the legislation is again supported by the Second Reading Speech:

> *However, the amendments to section 104A should not be read so as to allow the court to take into account any form of customary law or cultural practice as a reason for exercising, justifying, authorising, requiring, lessening or aggravating the seriousness of the defendant's actions contrary to section 16AA of the* Crimes Act *which was introduced by the Commonwealth's* Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012*. It is intended that information is to be received under section 104A in order to provide a context and explanation for an offender's actions and to provide information about their role in the community, predisposition to offend, rehabilitation prospects and the impact of their offending on the community so that the court can make an assessment of the offender's particular circumstances.*[74]

58. In practice, however, it might be that the effect of section 16AA on section 104A is confined to a small number of cases. In 2012, then President of the Criminal Lawyers Association of the Northern Territory (**CLANT**), Russel Goldflam, suggested that:

> *In a sense, this particular storm is taking place in a teacup … the actual incidence of cases which come before the Supreme Court of the Northern Territory involving questions of customary law has been remarkably low.*

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[71] Peter Hanks, '"Inconsistent" Commonwealth and State Laws: Centralizing Government Power in the Australian Federation' [1986] 16 *Federal Law Review* 107.
[72] *Sentencing Act 1995* (NT) s 5. See also, eg, Supreme Court of the Northern Territory, *Sentencing Principles* (2009) <https://supremecourt.nt.gov.au/__data/assets/pdf_file/0009/748980/Sentencing_Principles.pdf>; Melinda Schroeder and Rennie Anderson, 'Sentencing', *Northern Territory Law Handbook* (AustLII, 1 May 2016) <http://ntlawhandbook.org/foswiki/NTLawHbk/Sentencing#What_does_the_court_take_into_account_63>.
[73] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report, December 2017) 212, [6.106] citing *The Queen v Wunungmurra* [2009] NTSC 24, [3]; Parliamentary Joint Committee on Human Rights, Parliament of Australia, *2016 Review of Stronger Futures Measures* (2016).
[74] Northern Territory, Legislative Assembly, Second reading Speech.

In the 12 years from 1994 to September 2006, of 1798 Aboriginal offenders sentenced by the Court, only 13 submitted that their offending was related to customary law: 5 cases in which the offence was committed as punishment for a breach of customary law; 4 in which the offender was provoked by a breach of customary law; 2 in which the victim was a promised bride; and 2 in which the offender was acting in accord with customary law. Some of these submissions were accepted, and others were not.[75]

[75] Russel Goldflam, *The (Non-) Role of Aboriginal Customary Law in Sentencing* (Legalwise Seminars, July 2012) <http://customarylawproject.yolasite.com/resources/The%20(Non-)%20Role%20of%20Aboriginal%20Customary%20Law%20in%20Sentencing%20-%20Goldflam.pdf> citing Melanie Warbrooke, 'To what extent is customary law raised as a mitigating factor in criminal cases in the Northern Territory?' (LLB Research Paper, Charles Darwin University, 2006) 34.