

# Reducing incarceration of Aboriginal people: Challenges and choices

## Key issues for the 58th Parliament

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## Key points

- Overrepresentation of Aboriginal people in the NSW criminal justice system continues to worsen. Almost one third of people in prison in NSW are Aboriginal. The increase in imprisonment has been most acute in remand, with almost 40% of Aboriginal people in prison on remand.
- Record high numbers of people in prison, and growing awareness of the social and economic costs of prison, have intensified public discussions about alternatives to prison.
- The main framework for reducing Aboriginal incarceration nationally and in NSW is the National Agreement on Closing the Gap, which includes a target to reduce the incarceration rate of Aboriginal people by at least 15% by 2031.
- The NSW Closing the Gap Implementation Plan 2022–2024 emphasises the need for Aboriginal leadership, expertise and participation in strategies to reduce incarceration. These measures will take different times to mature and scale.
- An important consideration identified by stakeholders is the need to consider how criminal justice legislation and policy contributes to increased numbers of Aboriginal people in prison and overrepresentation at every stage of the criminal justice process.
- Inquiries and research have proposed a range of actions across prevention, early intervention, diversion from the criminal justice system, non-custodial sentencing options and post-release support specific to Aboriginal people.

# Contents

<b>Key points .....</b>	<b>1</b>
<b>1. Introduction .....</b>	<b>4</b>
<b>2. Current issues regarding imprisonment .....</b>	<b>7</b>
2.1 Rising imprisonment rates and rising costs .....	7
2.2 Alternatives to prison .....	8
2.3 Imprisonment as a cost to Aboriginal people .....	9
2.4 Many people in the criminal justice system have complex needs.....	11
<b>3. Data about incarceration and overrepresentation .....</b>	<b>13</b>
3.1 Measuring overrepresentation .....	13
3.2 Trends in overrepresentation.....	13
3.3 Trends in the Aboriginal prison population.....	14
3.4 Factors driving growth in the Aboriginal prison population .....	15
<b>4. NSW and national approaches to reducing Aboriginal incarceration ..</b>	<b>19</b>
4.1 NSW Government policy 2003–2020.....	19
4.2 National Agreement on Closing the Gap.....	24
4.3 Closing the Gap Implementation Plan .....	27
4.4 NSW investment reviews .....	31
4.5 Considering the impacts of legislation .....	32
4.6 Developments in other jurisdictions.....	33
4.7 Australian government actions and investments .....	34

4.8 Risks to successful implementation.....	36
<b>5. Recommendations from key inquiries .....</b>	<b>39</b>
5.1 Australian Law Reform Commission .....	39
5.2 NSW Parliament Select Committee .....	40

# 1. Introduction

Overrepresentation of Aboriginal people in the NSW prisons is growing.<sup>1</sup> In March 2023 almost one third of adults in prison in NSW were Aboriginal (29%), one of the highest proportions on record.<sup>2</sup> Aboriginal men accounted for 29% of the male prison population and Aboriginal women 39% of the female prison population.<sup>3</sup> Almost 40% of Aboriginal people in prison are on remand, that is, they have been refused bail and are in prison waiting court proceedings or sentencing.<sup>4</sup> This situation occurs in the context of plans that aim to reduce the incarceration rate of Aboriginal people by at least 15% by 2031.<sup>5</sup>

In December 2022, the United Nations Committee against Torture highlighted increases in the rate of Indigenous people in prison, particularly on remand, and concluded that ‘a transformational change is required to reverse this trend.’<sup>6</sup>

There is a significant body of research, evidence, and expert opinion on the drivers of Aboriginal incarceration and what matters in the way of reform. One of the comments commonly made by stakeholders about addressing the high incarceration rates for Aboriginal men and women is that the solutions are known but not implemented.<sup>7</sup> In 2021 Aboriginal and Torres Strait Islander Social Justice Commissioner, June Oscar AO said:

For 30 years we have urged Australian governments to implement all the recommendations made by the Royal Commission [into Aboriginal Deaths in Custody]. We have long held the solutions and countless inquiries and reports have given us the way forward. But time and again we fail to effectively implement them and as a result we continue to see First Nations men, women and children dying in our so-called justice system.<sup>8</sup>

Recommendations for reform have stressed that transformation cannot be achieved only through changes in the criminal justice system. Reforms need to address the risk of

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<sup>1</sup> The term ‘Aboriginal’ is used throughout this paper to refer to Aboriginal people, Torres Strait Islanders and people who identify both as Aboriginal and Torres Strait Islander. The terms ‘Indigenous’ and ‘Aboriginal and Torres Strait Islander’ and ‘First Nations’ are also used where original sources use these.

<sup>2</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Custody Statistics: Quarterly Update March 2023](#), BOCSAR, May 2023.

<sup>3</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Custody Statistics: Quarterly Update March 2023](#), BOCSAR, May 2023. The prison population is the number of men and women held in custody, whose confinement is the responsibility of Corrective Services NSW. This includes people on remand (i.e., those refused bail and waiting for court proceedings to be finalised) and people serving a sentence of imprisonment.

<sup>4</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Custody Statistics: Quarterly Update March 2023](#), BOCSAR, May 2023.

<sup>5</sup> NSW Government and NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), [2022-2024 NSW Implementation Plan for Closing the Gap](#), NSW Government, 2022.

<sup>6</sup> United Nations Committee against Torture, [Concluding observations on the sixth periodic report of Australia](#), 5 December 2022, para 33.

<sup>7</sup> See for example, Langton, M, [Thirty years on from the Royal Commission, what needs to change?](#), *Judicial Officer's Bulletin*, 2021, 33 (3), Judicial Commission of NSW.

<sup>8</sup> J Oscar, [Stop mass incarceration to prevent deaths in custody](#), [media release], Australian Human Rights Commission, 14 April 2021, accessed 23 May 2023.

Aboriginal people coming into contact with the criminal justice system in the first place, or repeated contact with the system, including factors related to health, education and economic disparities.

Alongside a focus on broader outcomes, the criminal justice system has a major influence on the number of Aboriginal men and women in prison – shaping trends in the rate in which Aboriginal people are arrested, prosecuted, and imprisoned.<sup>9</sup> In 2018 the NSW Department of Justice assessed that the criminal justice system contributes to overrepresentation through:<sup>10</sup>

- The way law enforcement agencies detect and prosecute crime
- Higher rates of convictions
- Greater likelihood of prison sentences for convictions
- More severe sentences
- More frequent bail refusal
- Greater focus on compliance with bail, parole and community orders.

Reversing the trends in overrepresentation of Aboriginal men and women in prison requires an ongoing legislative and policy focus. Initiatives currently in place have various levels of ambition, and scale, and will take different times to mature into tangible results. The current plan is underpinned by a commitment to change the way government works with Aboriginal people more broadly and base actions on Aboriginal people's priorities.

This paper presents an update on trends and factors driving overrepresentation of Aboriginal people in prison in NSW and current efforts to reduce it. It outlines recent public discussions about alternatives to imprisonment, NSW and Australian government policies and actions, and some risks to implementation. It also recaps key inquiry recommendations on how to reduce Aboriginal incarceration.

While there are strong correlations between youth and adult interactions with the criminal justice system, this paper does not cover issues relating to youth justice.<sup>11</sup> Also, while

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<sup>9</sup> See, D Weatherburn, *Arresting Incarceration: pathways out of Indigenous imprisonment*, Aboriginal Studies Press, 2014.

<sup>10</sup> Department of Justice, Aboriginal Services Unit (Justice Strategy and Policy Division), [Reducing Aboriginal overrepresentation in the criminal justice system 2018-2020](#), NSW Government, 2018, p 6.

<sup>11</sup> For an overview of key themes that have risen from recent reviews and inquiries into youth justice, see, G Clancey et. al, [Youth justice in Australia: Themes from recent inquiries. Trends & issues in crime and criminal justice](#) no. 605, Australian Institute of Criminology, 2020. For issues surrounding the appropriate minimum age for criminal responsibility, see T Drabsch, [Age of criminal responsibility](#), NSW Parliamentary Research Service, 2022.

conditions and treatment in prison can affect the likelihood of returning to prison, this paper does not cover these issues.<sup>12</sup>

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<sup>12</sup> The Inspector of Custodial Services reviews the conditions, treatment and outcomes for adults in NSW prisons. See, NSW Inspector of Custodial Services, [Adult reports](#), 11 May 2023, accessed 23 May 2021. As at May 2023, the NSW Government has not designated a mechanism for oversight of places of detention under the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment (OPCAT). See, Australian Human Rights Commission, [Roadmap to OPCAT compliance](#), 17 October 2022.

## 2. Current issues regarding imprisonment

Overrepresentation of Aboriginal people in prison occurs in the context of the wider issue of historically high numbers of people in prison and the need for alternatives to prison. Discussions have focused on criminal justice reform to address the overuse of incarceration and reduce prison populations.<sup>13</sup>

### 2.1 Rising imprisonment rates and rising costs

Despite declining crime rates, all states and territories have seen rising rates of imprisonment, in what some commentators have described as 'mass incarceration'.<sup>14</sup> Nationally:

- Between 2003 and 2018 Australia's rate of growth of imprisonment was the third highest among OECD countries<sup>15</sup>
- Between 2000 and 2019 the number of people in prison more than doubled from 21,714 in 2000 to 42,028 in 2019<sup>16</sup>
- The proportion of people in prison on remand has nearly doubled in the past 2 decades.<sup>17</sup>

In NSW imprisonment rates have also grown, although there was a decline in 2020 associated with policies introduced in response to the COVID-19 pandemic.<sup>18</sup> The overall prison population rose by 17% between 2000 and 2011, and then grew a further 39% between 2012 and 2019.<sup>19</sup> Against this increase in the overall incarceration rate in NSW, the rate of increase for Aboriginal people has been even greater ([see section 3.2](#)).

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<sup>13</sup> For common global challenges and reform debates, see United Nations Office on Drugs and Crime (UNODC), [United Nations system common position on incarceration](#), United Nations, 2021, p 3-6.

<sup>14</sup> See for example, A Leigh, [The Second Convict Age: Explaining the Return of Mass Imprisonment in Australia](#), IZA Institute of Labour Economics, 2020; A.S. Bell, [Innovative Justice](#), Sir Ninian Stephen Lecture, University of Newcastle, 17 September 2022.

<sup>15</sup> Productivity Commission, [Australia's prison dilemma](#), Australian Government, Commonwealth of Australia, 2021, p 28.

<sup>16</sup> D Weatherburn, [Is tougher sentencing and bail policy the cause of rising imprisonment rates?: A NSW case study](#), *Australian & New Zealand Journal of Criminology*, 2020, 53(4): 563-584, doi:10.1177/0004865820944975.

<sup>17</sup> Productivity Commission, [Australia's prison dilemma](#), Australian Government, Commonwealth of Australia, 2021, Figure 2.11, p 39.

<sup>18</sup> Significant changes to the operation of the Courts and Corrective Services NSW took effect from 15 March 2020 in response to the COVID-19 pandemic. The size of the NSW adult prison population decreased sharply from mid-March to mid-May 2020 consistent with government measures to minimise the risk of COVID-19. See, N Chan, [The impact of COVID-19 measures on the size of the NSW adult prison population](#), Bureau Brief no. 149, NSW Bureau of Crime Statistics and Research, 2020.

<sup>19</sup> D Weatherburn, [Is tougher sentencing and bail policy the cause of rising imprisonment rates?: A NSW case study](#), *Australian & New Zealand Journal of Criminology*, 2020, 53(4): 563-584, doi:10.1177/0004865820944975.



Falling crime rates, high levels of imprisonment, significant overcrowding of prison facilities and high levels of recidivism prompted the Productivity Commission in 2021 to examine, for the first time, criminal justice systems from an economic perspective.<sup>20</sup> As well as looking at trends in imprisonment and policy changes that have contributed to increases in the prison population, the Productivity Commission examined direct costs to taxpayers and indirect costs to people in prison and value for outcomes. The Productivity Commission noted that:<sup>21</sup>

Prisons are expensive, costing Australian taxpayers \$5.2 billion in 2019–20 - more than \$330 per prisoner per day. If Australia's imprisonment rate had remained steady, rather than rising over the past twenty years, the accumulated saving in prison costs would be about \$13.5 billion today.

The report found 'there are alternatives to prison that may perform better in terms of offender outcomes, preserve family and community networks, or improve post-release behaviour at lower fiscal cost.'<sup>22</sup>

## 2.2 Alternatives to prison

The Productivity Commission has not been the only organisation to highlight that non-custodial options can provide better outcomes; this has been a common theme for both government and non-government stakeholders.

The Justice Reform Initiative<sup>23</sup> has put forward that 'jailing is failing' and argues that 'over-reliance on incarceration as a default response to both disadvantage and offending has resulted in a situation where too many people in the justice system are unnecessarily trapped in a cycle of harmful and costly incarceration.'<sup>24</sup> The Justice Reform Initiative suggests this could be avoided if effective supports were available in the community to prevent and divert people from the criminal justice system.

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<sup>20</sup> Productivity Commission, [Australia's prison dilemma](#), Australian Government, 2021, p 21.

<sup>21</sup> S King, [Australia has fewer criminal offenders but more people in prisons](#), Productivity Commission, 18 October 2021, accessed 23 May 2023.

<sup>22</sup> Productivity Commission, [Australia's prison dilemma](#), Australian Government, 2021, p 65.

<sup>23</sup> The Justice Reform Initiative includes former governors-generals, former members of parliament from all sides of politics, academics, First Nations leaders and judges that advocate for an evidence-based examination of the role imprisonment plays in the justice system. The alliance focuses on the over-use of incarceration in First Nations communities and other over-represented cohorts, including people with mental health conditions, people with disability and people experiencing complex disadvantage. See, Justice Reform Initiative, [Jailing is Failing](#), n.d., accessed 9 May 2023; B Debus and G Smith, [Jailing is failing and NSW is a world-beating failure](#), *Sydney Morning Herald*, 10 December 2021, accessed 9 May 2023.

<sup>24</sup> Justice Reform Initiative, [State of Incarceration: Insights into Imprisonment in NSW](#), Justice Reform Initiative, December 2021.

Opportunities to reduce rates of imprisonment identified by the Productivity Commission and the Queensland Productivity Commission in its 2018 inquiry into imprisonment and recidivism included:<sup>25</sup>

- Narrowing the scope of criminal offences, for example decriminalising some drug-related offences
- Diversion of some low- and medium-risk offenders from prison sentences to community-based options where their underlying issues may be managed better
- Widening sentencing options available to courts which are less disruptive on employment and education and expanding alternative sentencing courts
- Improved treatment of some offenders in prison where mental illness or drug and alcohol issues are the key drivers
- Better support for those leaving custody to help prevent reoffending
- Prioritising community-led and controlled approaches to reducing imprisonment rates for Indigenous people.

These reports noted the need to build a stronger evidence base to guide policy decisions and assess the merit of new approaches in different jurisdictions.<sup>26</sup> The ACT Government, for instance, through its Building Communities Not Prisons program, has commenced a broader ‘justice reinvestment’ focus on alternative approaches to incarceration, at a lower cost (see Box 1 on page 35).<sup>27</sup> It adopts a ‘place-based, point in the system, cohort focus’ and cost model to building an evidence base. This investment approach looks at decision making and funding from the perspective of individuals moving through various stages of the criminal justice system.<sup>28</sup>

### 2.3 Imprisonment as a cost to Aboriginal people

Stakeholders have specifically highlighted imprisonment as a cost to First Nations wellbeing and as a bar to ‘closing the gap’ on health, social and economic outcomes.<sup>29</sup> Advocates of Aboriginal community-led solutions to addressing incarceration highlight that

<sup>25</sup> Productivity Commission, [Australia’s prison dilemma](#), Australian Government, 2021; Queensland Productivity Commission, [Inquiry into Imprisonment and Recidivism](#), Final Report, August 2019.

<sup>26</sup> Productivity Commission, [Australia’s prison dilemma](#), Australian Government, 2021, p 47.

<sup>27</sup> J Hayne and N Burnside, [Canberra’s only jail is running out of cells, but the Government wants to ‘build communities not prisons’](#), ABC, 15 February 2019, accessed 3 March 2023; Justice and Community Safety Directorate (JACS), [Building Communities Not Prisons](#), JACS, ACT Government, n.d., accessed 3 March 2023.

<sup>28</sup> Justice and Community Safety Directorate (JACS), [Building Communities Not Prisons](#), JACS, ACT Government, n.d., accessed 3 March 2023. The ‘place-based, point in the system and cohort focus’ has different initiatives across community-based prevention and early supports for social drivers; a focus on points in the justice system that can divert contact with the system (pre-charge, point of court and post-release); a focus on specific groups who have contact with the justice system and target services to that group.

<sup>29</sup> See for example, T Anthony, [Costs, Consequences and Alternatives to Imprisoning First Nations People](#), Committee For Economic Development for Australia, 13 July 2020, accessed 9 May 2023; S Shephard et al., [Closing the \(incarceration\) gap: assessing the socio-economic and clinical indicators of indigenous males by lifetime incarceration status](#), *BMC Public Health*, 2020, 20(1)710, doi:10.1186/s12889-020-08794-3.

current justice responses are seen as both ineffective and harmful by Aboriginal communities.<sup>30</sup> The Queensland Productivity Commission observed an ‘increasing tendency to use imprisonment is likely to compound existing underlying factors for Indigenous communities that drive imprisonment and undermine efforts to reduce offending.’<sup>31</sup>

For instance, the experience of incarceration may result in poor mental health outcomes, both by exacerbating existing mental health conditions and causing new experiences of mental health harm.<sup>32</sup> Research from NSW has looked at how policing and imprisonment of Aboriginal people with mental health disorders and cognitive disability can have a further negative impact on their health.<sup>33</sup> Evidence also shows that incarceration increases the likelihood of returning to prison and has a negative impact on factors likely to prevent reoffending, such as housing and employment, relationships and wellbeing.<sup>34</sup>

The intergenerational and individual costs of a growing number of women in prison, in particular Aboriginal women, has also gained attention.<sup>35</sup> In 2022 the Legislative Assembly Committee on Children and Young People published its report on the impact on children having an imprisoned parent.<sup>36</sup> Advocates also have brought attention to links between imprisonment and domestic and family violence and sexual violence. Reports suggest the provision of safe and affordable housing, community-led prevention and services, changes to policing practice, expanding diversion and community-based sentencing options, as fundamental to addressing both domestic and family violence and reducing imprisonment.<sup>37</sup>

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<sup>30</sup> F Allison, [Redefining Reinvestment: An opportunity for Aboriginal communities and government to co-design justice reinvestment in NSW](#), Just Reinvest NSW, 2022, p 10.

<sup>31</sup> Queensland Productivity Commission, [Inquiry into Imprisonment and Recidivism](#), Final Report, August 2019.

<sup>32</sup> See for example, Australian Institute of Health and Welfare, [Improving Mental Health Outcomes for Indigenous Australians in the Criminal Justice System](#), July 2021.

<sup>33</sup> R McCausland et al., [Indigenous People, Mental Health, Cognitive Disability and the Criminal Justice System](#), Brief 22, Indigenous Justice Clearing House, August 2017, accessed 26 May 2023.

<sup>34</sup> See for example, The Bugmy Bar Book, [Impacts of Imprisonment and Remand in Custody](#), NSW Public Defenders, November 2022; E Sullivan et al., [Aboriginal mothers in prison in Australia: a study of social, emotional and physical wellbeing](#), *Australian and New Zealand Journal of Public Health*, 43(3), 241-247, 2019, doi: 10.1111/1753-6405.12892.

<sup>35</sup> See for example, M Rémond et al., [Intergenerational incarceration in New South Wales: Characteristics of people in prison experiencing parental imprisonment](#), *Trends & issues in crime and criminal justice*, No.663, Australian Institute of Criminology, February 2023; D Howard-Wagner and C Brown, [Increased incarceration of First Nations women is interwoven with the experience of violence and trauma](#), *The Conversation*, 6 August, 2021, accessed 1 May 2023.

<sup>36</sup> The Committee made recommendations to reduce the number of parents who are incarcerated, in particular to reduce the number of parents who are held on remand or are in custody for short periods. See, Committee on Children and Young People, [Inquiry into the support for children of imprisoned parents in New South Wales](#), NSW Parliament, Report No. 4/57, 2022.

<sup>37</sup> Australia’s National Research Organisation for Women’s Safety (ANROWS), [Women’s imprisonment and domestic, family, and sexual violence: Research synthesis](#), ANROWS, 2020; Committee for Economic Development of Australia (CEDA), [Double jeopardy: The economic and social costs of keeping women behind bars](#), CEDA, 2022; C Caruana et al., [Leaving custody behind: Foundations for safer communities and a gender-informed criminal justice systems](#), Centre for Innovative Justice, RMIT University, July 2021.

## 2.4 Many people in the criminal justice system have complex needs

Factors that contribute to an increased risk of involvement with the criminal justice system, and incarceration and re-incarceration for Aboriginal people, include disadvantage, housing instability, trauma, discrimination, unmet health and social support needs, and disengagement with education and employment.<sup>38</sup>

A snapshot of Aboriginal people in prison in NSW in 2020 highlighted the underlying drivers of incarceration and complex needs of this population:<sup>39</sup>

- 42% receiving mental health treatment
- 82% had a current drug problem
- 33% had a current alcohol problem
- 13% were diagnosed with active psychosis
- 66% did not complete year 10
- 26% were in out of home care as a child
- 39% had a first custody episode before 18
- 92% had a prior custody episode.

These findings are mirrored in research drawing on linked administrative data across health, human services and criminal justice agencies in NSW that illustrated the issue of criminal justice systems becoming the 'default manager' of complex disadvantage and needs.<sup>40</sup> The research highlighted that Indigenous people in the study were:<sup>41</sup>

... significantly more likely to have experienced earlier and greater contact with criminal legal agencies; more likely to have been in OOHC [out of home care], to have come into contact with police at a younger age and at a higher rate as both a victim and offender, and to have higher numbers and rates of convictions, more episodes of remand and higher rates of homelessness than their non-Indigenous peers ... Indigenous people had the highest rates of complex support needs (multiple diagnoses and disabilities), and Indigenous women with complex support needs had significantly more convictions and episodes of incarceration (although, on average, served shorter sentences) than their male and non-Indigenous peers ... However, most offences by Indigenous people in the cohort were in the less serious categories of offences...

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<sup>38</sup> For research on social determinants of incarceration see, [The Bugmy Bar Book](#), NSW Public Defenders, 5 May 2023, accessed 11 May 2023.

<sup>39</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [What is driving Aboriginal adult incarceration in NSW? Workshop on Target 10: reduce the rate of Aboriginal adult incarceration](#), Slide 4, 2021, accessed 11 February 2023

<sup>40</sup> R McCausland and E Baldry, [Who does Australia Lock Up? The Social Determinants of Justice](#), *International Journal for Crime, Justice and Social Democracy*, April 2023, doi:10.5204/ijcjsd.2504.

<sup>41</sup> R McCausland and E Baldry, [Who does Australia Lock Up? The Social Determinants of Justice](#), *International Journal for Crime, Justice and Social Democracy*, April 2023, doi:10.5204/ijcjsd.2504, p 7.

Recent inquiries and reviews have examined the interface between the justice system and the health system and made recommendations to shift focus and resources from criminal justice responses to disadvantage to the health and community-sector.<sup>42</sup> Common themes from these inquiries include:

- That there has been a lack of investment in community-based health services with the justice system becoming a ‘provider of last resort’<sup>43</sup>
- That there is a lack of coordination between the health and justice systems, and poor support for people who leave prison and need health care in the community
- That there has been a failure to recognise ‘illicit drug use as a health and social problem rather than a criminal justice issue’<sup>44</sup>
- The need to intervene earlier to prevent people with complex needs and disadvantage ending up in the criminal justice system.

The Royal Commission into Victoria’s Mental Health System found ‘a lack of mental health services in the community combined with a criminal justice system that is not sufficiently resourced to support recovery is a key cause of current over-representation’ of people living with mental illness in prisons.<sup>45</sup>

Recommendations from these inquiries covered a range of different issues relating to mental health, approaches to dealing with illicit drug use, coordination of services and sectors, early intervention and diversion responses. A common theme across these recommendations was the need for a more ‘modern and rehabilitation-focused approach to justice.’<sup>46</sup> The importance taking a holistic approach to supporting people who experience overlapping social and health deprivations that does not rely on police or legal responses has also been emphasised.<sup>47</sup>

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<sup>42</sup> See for example, State of Victoria, Royal Commission into Victoria’s Mental Health System, *Final Report – Volume 3 – Promoting inclusion and addressing inequities*, 2021; D Howard, *Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants*, NSW Government, Report – Volume 1a, 2020, p xxvi; Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria’s criminal justice system, Volume 1*, Parliament of Victoria, 24 March 2022, p 69-245.

<sup>43</sup> State of Victoria, Royal Commission into Victoria’s Mental Health System, *Final Report – Volume 3 – Promoting inclusion and addressing inequities*, 2021, p 350.

<sup>44</sup> See, D Howard, *Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants*, NSW Government, Report – Volume 1a, 2020, p xxvi.

<sup>45</sup> State of Victoria, Royal Commission into Victoria’s Mental Health System, *Final Report – Volume 3 – Promoting inclusion and addressing inequities*, 2021, p 359.

<sup>46</sup> Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria’s criminal justice system, Volume 1*, Parliament of Victoria, p xv.

<sup>47</sup> R McCausland and E Baldry, *Who does Australia Lock Up? The Social Determinants of Justice*, *International Journal for Crime, Justice and Social Democracy*, April 2023, doi:10.5204/ijcsd.2504.

## 3. Data about incarceration and overrepresentation

### 3.1 Measuring overrepresentation

The simplest way to think about overrepresentation is to compare the proportion of the NSW population who identify as being Aboriginal and/or Torres Strait Islander origin with the proportion of Aboriginal people at specific stages within the justice system.<sup>48</sup> This shows that Aboriginal people make up a disproportionate share of people in prison and at other stages of the criminal justice system:<sup>49</sup>

- 3.4% of the general NSW population<sup>50</sup>
- 25.5% of people in court
- 39.5% of people refused bail by police
- 21% of people refused bail by the court
- 17.7% of people sentenced to prison
- 28.4% of the male prison population
- 38.1% of the female prison population
- 31.4% of people exiting prison and returning to prison within 12 months.

### 3.2 Trends in overrepresentation

Overrepresentation of Aboriginal people in NSW prisons is worsening. In 2022, the Aboriginal adult imprisonment rate in NSW was 12.2 times higher than the non-Indigenous rate.<sup>51</sup> Between 2012 and 2022, the Aboriginal adult imprisonment rate grew by 37%, compared to 9% for non-Indigenous adults (Figure 1).

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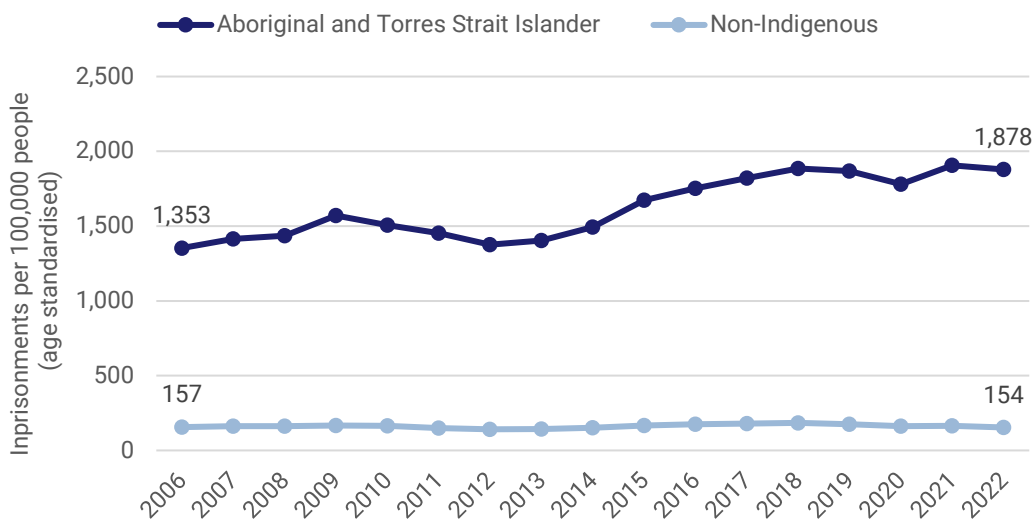
<sup>48</sup> BOCSAR publishes a quarterly update on Aboriginal overrepresentation in the criminal justice system. These updates report on trends since 2019 in 2 key indicators – Aboriginal people in prison, and Aboriginal people in court – and several secondary indicators (police, bail, courts, custody, and reoffending). See, NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Criminal Justice Aboriginal over-representation, Quarterly Report December 2022](#), BOCSAR, March 2023.

<sup>49</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Criminal Justice Aboriginal over-representation, Quarterly Report, December 2022](#), BOCSAR, March 2023.

<sup>50</sup> Australian Bureau of Statistics, [Census of Population and Housing - Counts of Aboriginal and Torres Strait Islander Australians](#), released 31 August 2022, accessed 9 May 2023.

<sup>51</sup> Australian Bureau of Statistics, [Prisoners in Australia, 2022](#), Data Table 18, released 24 February 2023.

**Figure 1: Age-standardised imprisonment rate per 100,000 population, NSW, 2006–2022**



Source: The 2006 to 2021 figures are from ABS, [Prisoners in Australia 2021](#), Table 42, released 9 December 2021. The 2022 figures are from ABS, [Prisoners in Australia, 2022](#), released 24 February 2023, Data Table 18.<sup>52</sup>

### 3.3 Trends in the Aboriginal prison population

In March 2023, there were 3,709 Aboriginal adults imprisoned in NSW which represented almost one third (29.5%) of the total adult prison population.<sup>53</sup> This comprised 2,210 sentenced Aboriginal adults (60%) and 1,499 Aboriginal adults on remand (40%).<sup>54</sup> Women make up less than 10% of Aboriginal people in prison.<sup>55</sup> Aboriginal women make up 39% of women in prison and 52% of these women are on remand.<sup>56</sup> The number of Aboriginal adults in prison grew by 206 people in the year to March 2023.<sup>57</sup>

<sup>52</sup> The Productivity Commission [notes](#) that age-standardised rates ‘show what the rates would be if Aboriginal and Torres Strait Islander population and non-Indigenous population had the same age distribution’.

<sup>53</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Custody Statistics: Quarterly Update March 2023](#), BOCSAR, May 2023.

<sup>54</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Custody Statistics: Quarterly Update March 2023](#), BOCSAR, May 2023.

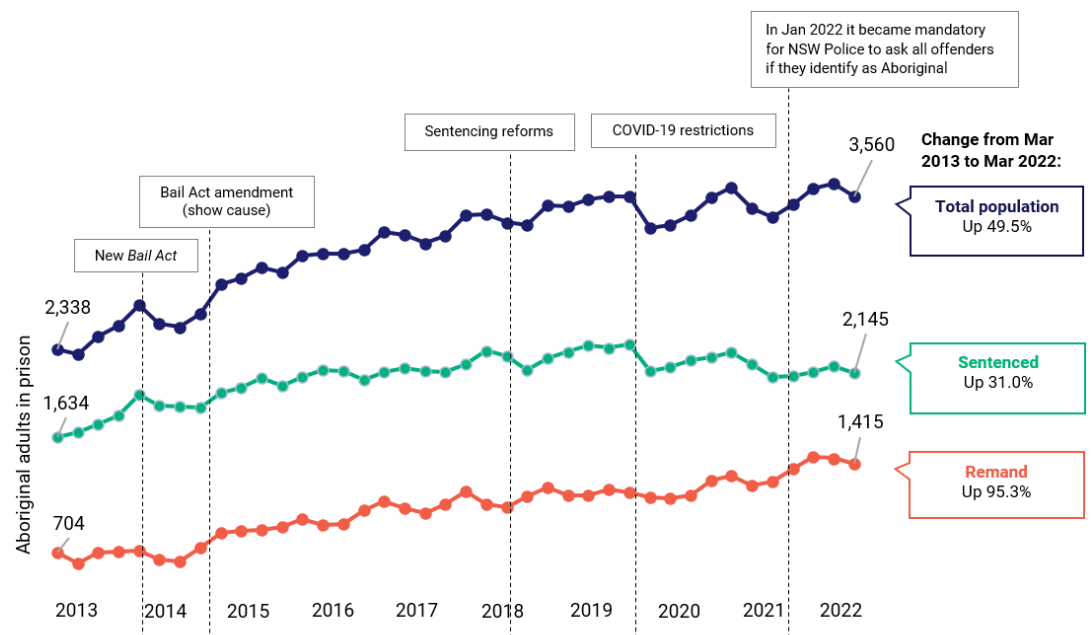
<sup>55</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Custody Statistics: Quarterly Update March 2023](#), BOCSAR, May 2023.

<sup>56</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Custody Statistics: Quarterly Update March 2023](#), BOCSAR, May 2023.

<sup>57</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [NSW Custody Statistics March 2023](#), BOCSAR, April 2023.

Looking at long-term trends, while both the remand and sentenced population of Aboriginal people in prison has increased over the last decade, the remand population has increased more rapidly. Between 2012 and 2022, the number of Aboriginal adults in prison increased by 1,222 or 50% (Figure 2). The sentenced population increased by 511 (31%), while the remand population increased by 711 (95%).

**Figure 2: Growth of the Aboriginal adult prison population by legal status in NSW, 2013–2022**



Source: NSW Bureau of Crime Statistics and Research<sup>58</sup>

### 3.4 Factors driving growth in the Aboriginal prison population

As shown in Figure 2, the increase in the number of Aboriginal people in NSW prisons over the last decade appears to be mostly driven by an increase in the number of Aboriginal people in prison on remand.

<sup>58</sup>Adapted from NSW Bureau of Crime Statistics and Research (BOCSAR), [What is driving Aboriginal adult incarceration in NSW? Workshop on Target 10: reduce the rate of Aboriginal adult incarceration](#), accessed 11 February 2023, to include updated data from NSW Bureau of Crime Statistics and Research (BOCSAR), [Custody statistics: Data table 1 'Adult stock'](#), BOCSAR, New South Wales Government, 2023, accessed 28 February 2023.



Factors (common across various time intervals) contributing to the growth in people on remand are an increase in the:<sup>59</sup>

- Proportion of people refused bail by the police and courts
- Number of Aboriginal people bought before the courts
- Length of time spent on remand, largely because of court delays.

### 3.4.1 Factors in bail refusal

Policy and legislative changes in NSW designed to enhance community safety have seen a growth in the number of Aboriginal men and women in prison on remand. The NSW Bureau of Crime Statistics and Research (BOCSAR) has suggested that at least some of the growth in the remand population is due to bail laws that were introduced in 2014, and later amended in 2015, including the introduction of the show cause requirement. This 2015 legislative amendment 'reinstated offence-based presumptions, setting bail refusal as the default for a particular set of offences known as "show cause" offences'.<sup>60</sup> For these offences, the onus is on the accused to 'show cause' why their detention is not justified.<sup>61</sup>

Evaluating the impact of these changes, a 2018 study found that the introduction of the show cause requirement 'increased the probability that the average defendant is refused bail by the courts by about 11 per cent. This represents an additional 1,500 bail refusals by NSW courts in the 2-year post reform period.'<sup>62</sup> An even greater impact on bail refusal rates was observed for those with prior prison sentences and adult Aboriginal defendants.<sup>63</sup>

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<sup>59</sup> S Yeong and S Poynton, [Did the 2013 Bail Act Increase the Risk of Bail Refusal? Evidence from a Quasi-Experiment in New South Wales](#), Contemporary Issues in Crime and Justice No 212 (NSW Bureau of Crime Statistics and Research, 2018); D Weatherburn and J Holmes, [Indigenous imprisonment in NSW: A closer look at the trend](#), Bureau Brief No. 126, NSW Bureau of Crime Statistics and Research, 2017; NSW Bureau of Crime Statistics and Research (BOCSAR), [What is driving Aboriginal adult incarceration in NSW? Workshop on Target 10: reduce the rate of Aboriginal adult incarceration](#), Slide 11, 2021, accessed 11 February 2023; D Weatherburn, [Is tougher sentencing and bail policy the cause of rising imprisonment rates?: A NSW case study](#), *Australian & New Zealand Journal of Criminology*, 2020, 53(4): 563-584, doi:10.1177/0004865820944975; A Pisani et al., [Trends in the Aboriginal female adult custodial population in NSW: March 2012 to February 2021](#), Bureau brief no. 161, NSW Bureau of Crime Statistics and Research, 2022; [NSW Criminal Courts Statistics Jul 2017 - Jun 2022](#); the Bugmy Bar Book, [Incarceration in Australia since 1967: Trends in the Over-representation of Aboriginal and Torres Strait Islander Peoples](#), NSW Public Defenders Office, September 2022.

<sup>60</sup> I Klauzner and S Yeong, [What factors influence police and court bail decisions?](#), Crime and Justice Bulletin no. 236, NSW Bureau of Crime Statistics and Research, 2021, p 2. A subset of serious offences (including certain child sex, serious violence, commercial drug, or firearm offences) are subject to the show cause requirement. For a complete list see, [Section 16B](#) of the Bail Act 2013.

<sup>61</sup> See G Brignell and A Jamieson, [Navigating the Bail Act 2013](#), *Sentencing Trends & Issues*, Number 47, Judicial Commission of NSW June 2020. An examination of drivers and effects of bail reforms on access to bail in NSW over the last decade, found 'the strong trajectory of contemporary bail law reform has been to restrict rather than expand access to bail.' See L Auld and J Quilter, [Changing the Rules on Bail: an analysis of recent legislative reforms in three Australian jurisdictions](#), *UNSW Law Journal*, 2020, 43(2): 642-673, doi: 10.53637/FLIR9959.

<sup>62</sup> S Yeong and S Poynton, [Did the 2013 Bail Act Increase the Risk of Bail Refusal? Evidence from a Quasi-Experiment in New South Wales](#), Contemporary Issues in Crime and Justice No 212 (NSW Bureau of Crime Statistics and Research, 2018).

<sup>63</sup> I Klauzner and S Yeong, [What factors influence police and court bail decisions?](#), Crime and Justice Bulletin no. 236, NSW Bureau of Crime Statistics and Research, 2021.

In 2022 a review by the NSW Law Reform Commission into discrete aspects of the *Bail Act 2013* noted:

The show cause requirement does not mean that, as a matter of law, bail will normally be refused for show cause offences. However, statistics show that bail is more likely to be refused for those offences. Between July 2021 and June 2022, courts refused bail for 60.6% of show cause offences, compared with 37.9% of offences subject only to the unacceptable risk test.<sup>64</sup>

According to BOCSAR, the most significant factor influencing police and court bail decisions is whether the defendant is charged with a show cause offence.<sup>65</sup> Other factors that have an impact on police and court decisions to refuse bail include prior and concurrent offending. As such, the high imprisonment rate of Aboriginal people can in part be explained by more extensive prior contacts with the justice system: 86% of Aboriginal defendants have had a prior offence compared to 59% of non-Aboriginal defendants; 36% had a prior prison history compared to 13% of non-Aboriginal defendants.<sup>66</sup> BOCSAR also found that Aboriginality had no association with the likelihood of court bail, but was significantly associated with the police bail decision, even after accounting for relevant case characteristics.<sup>67</sup> Aboriginal defendants were 20.4% more likely to be refused bail by police.

### 3.4.2 Trends in police and legal actions

A study by BOCSAR of the increasing rate of Aboriginal imprisonment observed between 2012 and 2016 found that the growth was due to:<sup>68</sup>

- An increase in the number of Indigenous defendants convicted of criminal offences, especially those in the categories of stalking/intimidation, breaching an apprehended violence order, breaching good behaviour bonds and suspended sentences
- An increase in the proportion of convicted Indigenous offenders receiving a prison sentence for the offence of stalking/intimidation.

Examining these trends more closely, BOCSAR found the large increase was more likely to reflect changes in the police response to domestic violence rather than a change in criminal

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<sup>64</sup> NSW Law Reform Commission (NSWLRC), *Report 150 – Bail: Firearms and Criminal Associations*, NSWLRC, NSW Government, 2022, p 12.

<sup>65</sup> I Klauzner and S Yeong, *What factors influence police and court bail decisions?*, Crime and Justice Bulletin no. 236, NSW Bureau of Crime Statistics and Research, 2021.

<sup>66</sup> See, NSW Bureau of Crime Statistics and Research (BOCSAR), *What is driving Aboriginal adult incarceration in NSW? Workshop on Target 10: reduce the rate of Aboriginal adult incarceration*, Slide 11, 2021, accessed 11 February 2023.

<sup>67</sup> I Klauzner and S Yeong, *What factors influence police and court bail decisions?*, Crime and Justice Bulletin no. 236, NSW Bureau of Crime Statistics and Research, 2021.

<sup>68</sup> D Weatherburn and J Holmes, *Indigenous imprisonment in NSW: A closer look at the trend*, Bureau Brief No. 126, NSW Bureau of Crime Statistics and Research, 2017.

behaviour.<sup>69</sup> The number of Aboriginal people proceeded against to court for domestic violence-related stalking/intimidation increased 274.4% from 2012 to 2021 (from 720 to 2,696).<sup>70</sup> In 2021, the rate of legal proceedings against Aboriginal people for stalking/intimidation was 7 times higher than the equivalent rate for all people charged with these offences.<sup>71</sup>

Over the 5 years between 2015 and 2019, BOCSAR found nearly two thirds of the growth in the Aboriginal sentenced population was due to violent offences and one quarter was due to breaches of sentencing orders.<sup>72</sup>

### 3.4.3 Factors driving imprisonment of Aboriginal women

The number of Aboriginal women in NSW prisons increased by 28% between 2013 and 2021, from 224 to 287.<sup>73</sup> This growth was mainly from 2013 to 2017, and was due to several factors including an increase in bail refusal following amendments to the Bail Act and an increase the number of Aboriginal women proceeded against to court by police.<sup>74</sup> Over 7 years from 2013 to 2020, the number of Aboriginal women proceeded against to court by police increased 61.9% from 3,230 to 5,230. In the same time period the number of non-Aboriginal women proceeded against to court increased 28.9%.<sup>75</sup>

### 3.4.4 Rates of return to prison after release

In 2022, 75% of Aboriginal adults who were in prison in NSW had served a prior prison sentence, compared to 48% of non-Aboriginal adult prisoners.<sup>76</sup> Almost two-thirds (63%) of Aboriginal adults who are released from prison in NSW return to prison with a new sentence within 2 years, compared to 42% of non-Aboriginal adults.<sup>77</sup>

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<sup>69</sup> S Ramsey et al., *Trends in domestic violence-related stalking and intimidation offences in the criminal justice system: 2012 to 2021*, Bureau Brief no. 159, NSW Bureau of Crime Statistics and Research, 2022.

<sup>70</sup> S Ramsey et al., *Trends in domestic violence-related stalking and intimidation offences in the criminal justice system: 2012 to 2021*, Bureau Brief no. 159, NSW Bureau of Crime Statistics and Research, 2022.

<sup>71</sup> S Ramsey et al., *Trends in domestic violence-related stalking and intimidation offences in the criminal justice system: 2012 to 2021*, Bureau Brief no. 159, NSW Bureau of Crime Statistics and Research, 2022.

<sup>72</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), *What is driving Aboriginal adult incarceration in NSW? Workshop on Target 10: reduce the rate of Aboriginal adult incarceration*, Slides 9-11, 2021, accessed 11 February 2023. Violent offences include assault and related (domestic violence and non-domestic violence), intimidation and stalking, abduction and harassment, sexual assault, and homicide/murder. Violent offences have proportionally higher imprisonment rates.

<sup>73</sup> A Pisani et al., *Trends in the Aboriginal female adult custodial population in NSW: March 2013 to February 2021*, Bureau brief no. 161, NSW Bureau of Crime Statistics and Research, 2022.

<sup>74</sup> A Pisani et al., *Trends in the Aboriginal female adult custodial population in NSW: March 2013 to February 2021*, Bureau brief no. 161, NSW Bureau of Crime Statistics and Research, 2022.

<sup>75</sup> A Pisani et al., *Trends in the Aboriginal female adult custodial population in NSW: March 2013 to February 2021*, Bureau brief no. 161, NSW Bureau of Crime Statistics and Research, 2022, p 8.

<sup>76</sup> Australian Bureau of Statistics, *Prisoners in Australia, 2022*, Table 29 'Prisoners, Indigenous status, sex and prior imprisonment by state/territory', Australian Government, released 24 February 2023, accessed 28 February 2023.

<sup>77</sup> Productivity Commission, *Report on Government Services 2023, Justice*, Table CA.4 'Adults released from prison who returned to prison or to corrective services with a new correctional sanction within two years', released 31 January 2023, accessed 5 April 2023.

## 4. NSW and national approaches to reducing Aboriginal incarceration

### 4.1 NSW Government policy 2003–2020

Improved criminal justice system outcomes for Aboriginal people has been a goal of strategic policy frameworks and plans for some time. Understanding these approaches and the outcomes of them provides important context for current approaches to policymaking in this area.

Policies and initiatives in this period have included different levels of decision making, scope and accountability including<sup>78</sup>:

- State-wide *negotiated* plans between Aboriginal representatives and the NSW government focused on underlying contributing factors as well as those within the criminal justice system
- State-wide plans for Aboriginal affairs focused on improving outcomes for Aboriginal communities
- Departmental strategies focused on factors within the criminal justice system contributing to overrepresentation
- Agency-specific strategic plans for working with Aboriginal people.

#### 4.1.1 Aboriginal Justice Agreement

The NSW Aboriginal Justice Agreement (2003) and Aboriginal Justice Plan (2004–14) was the first *negotiated* agreement between Aboriginal representatives and the NSW government to address consistently high rates of Aboriginal incarceration.<sup>79</sup> The plan aimed for system and whole-of-government reforms in both criminal justice approaches and underlying issues that contribute to incarceration rates (for example, health and housing).

The plan proposed an unprecedented level of partnership between NSW government and Aboriginal communities and coordinated action across government departments. However, in 2010 a leading criminologist, Professor Chris Cunneen, said the plan was challenged by:<sup>80</sup>

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<sup>78</sup> For an overview of NSW government policies and agency policies and programs on reducing reoffending see, L Roth, [Reducing adult reoffending](#), NSW Parliamentary Research Service, 2015.

<sup>79</sup> Aboriginal Justice Advisory Council and the NSW Attorney General, [Aboriginal Justice Agreement](#), NSW Government, 2002. See also, NSW Aboriginal Justice Advisory Council, [NSW Aboriginal Justice Plan: Beyond Justice 2004-2014](#), NSW Aboriginal Justice Advisory Council, 2005.

<sup>80</sup> F Allison and C Cunneen, [The role of Indigenous justice agreements in improving legal and social outcomes for Indigenous people](#), *Sydney Law Review*, 32:645-669, 2010.

- Constant shifts in government policy that disrupted processes of reform and accountability including a shift away from community participation to control by government agencies
- Several policy 'black holes' where for substantial periods of time agencies allowed strategic policies to lapse
- Failure to support the community-based and Aboriginal leadership structures
- Deficiencies in monitoring and evaluation, including a reliance on agency self-reporting of progress.

There is no public assessment of performance of the plan and its strategic directions.<sup>81</sup> The plan was not renewed after lapsing in 2014.

In 2018, the Australian Law Reform Commission recommended all states and territories develop or renew Aboriginal justice agreements, with the following components:<sup>82</sup>

- Be developed as a partnership between state and territory governments and relevant Aboriginal and Torres Strait Islander organisations
- Have clear objectives and measurable action plans
- Be subject to independent evaluation.<sup>83</sup>

#### 4.1.2 NSW Government policies

A number of strategies and plans within the Aboriginal affairs and criminal justice portfolios included commitments directly related to, or intersecting with, the goal of reducing Aboriginal incarceration. Key strategies and plans in this period were:

- **Two Ways Together – NSW Aboriginal Affairs Plan 2003–2012:** this plan outlined a broad social and economic framework that included reducing Aboriginal incarceration rates as one of 5 high priority areas. A performance report on the plan from the NSW Audit Office in 2011 found it had not delivered the intended improvements for Aboriginal people. Similar shortfalls were identified by the NSW Ombudsman.<sup>84</sup>

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<sup>81</sup> Evaluation was provided for within the plan but it was not carried out. See, F Allisson and C Cunneen, [The role of Indigenous justice agreements in improving legal and social outcomes for Indigenous people](#), *Sydney Law Review*, 32:645-669, 2010.

<sup>82</sup> See [Aboriginal Justice Agreements](#) in Australian Law Reform Commission, *Pathways to Justice: Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, ALRC, Australian Government, Final Report No. 133, 2017.

<sup>83</sup> Aboriginal Justice Agreements are operational in the ACT, Northern Territory, and well established in Victoria where an [evaluation](#) found it to be a 'mature, robust and effective' model.

<sup>84</sup> Audit Office of NSW, *NSW Auditor General's Report Two Ways Together – NSW Aboriginal Affairs Plan*, Audit Office of NSW, May 2011; NSW Ombudsman, [Addressing Aboriginal disadvantage: the need to do things differently A Special Report to Parliament under s 31 of the Ombudsman Act 1974](#), NSW Ombudsman, October 2011.

- **Opportunity Choice Healing Responsibility Empowerment (OCHRE):** this plan was released in 2013 as a response to recommendations of the NSW Auditor General and NSW Ombudsman.<sup>85</sup> While there is no specific reference in the plan to justice issues or the over-representation of Aboriginal people in the justice system, OCHRE outlines several initiatives including a local decision making model which has supported devolution of local decision making to Aboriginal people to improve service delivery in areas such as health, employment and education through negotiated accords.<sup>86</sup> Aboriginal incarceration rates and interactions with the justice system, in particular the police, have been a priority theme of some accord negotiations.<sup>87</sup>
- **Reducing Aboriginal Overrepresentation in the Criminal Justice System Plan 2018–2020:** this plan was developed by the Department of Justice to address the overrepresentation of Aboriginal people in the criminal justice system. The plan focused on the responses of justice agencies to Aboriginal people in contact with the criminal justice system and had 3 main goals:<sup>88</sup>
  - Helping Aboriginal people avoid coming into contact with the criminal justice system
  - Reducing the length of time Aboriginal people spend in custody – either on remand or sentenced
  - Reducing the rate of Aboriginal reoffending.

The plan set out existing justice policies related to sentencing, parole, driver disqualification, ongoing programs and pilot initiatives.<sup>89</sup> On the working relationship with OCHRE, the plan stated that the Department of Justice provided 2 negotiators to support local decision making accords.<sup>90</sup> The plan expired in 2021 and was replaced by the 2022–24 Closing the Gap NSW Implementation Plan.<sup>91</sup> There was no public reporting against the plan or information on its impact.

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<sup>85</sup> Aboriginal Affairs NSW, [OCHRE](#), NSW Government, April 2013.

<sup>86</sup> Aboriginal Affairs NSW, [Signed Accords](#), NSW Government, n.d., accessed 17 May 2023.

<sup>87</sup> See, D Howard-Wagner et al., [Local Decision Making Accords Negotiation Evaluation: Synthesis Report](#), Centre for Aboriginal Economic Policy Research, Australian National University, October 2022.

<sup>88</sup> Aboriginal Services Unit (Justice Strategy and Policy Division), [Reducing Aboriginal overrepresentation in the criminal justice system 2018-2020](#), NSW Government, 2018. The plan aligned with the state priority to reduce adult reoffending 5% by 2019 and the Premier's Priority to reduce domestic violence reoffending by 25% by 2021.

<sup>89</sup> For pilot and ongoing programs see, Department of Justice, Aboriginal Services Unit (Justice Strategy and Policy Division), [Reducing Aboriginal overrepresentation in the criminal justice system 2018-2020](#), NSW Government, 2018, p 9-11.

<sup>90</sup> Department of Justice, Aboriginal Services Unit (Justice Strategy and Policy Division), [Reducing Aboriginal overrepresentation in the criminal justice system 2018-2020](#), NSW Government, 2018, p 13.

<sup>91</sup> NSW Government and NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), [2021–22 NSW Closing the Gap Annual Report](#), NSW Government, 2022, p 63.

#### **4.1.3 Evidence of what works and what does not**

BOCSAR has conducted evaluations of some of the initiatives that were introduced to reduce incarceration and offending in this period (Table 1). Policy interventions that were found to be effective include release to parole, circle sentencing and the NSW Drug Court. BOCSAR also found that that some behaviour change programs were not effective.

**Table 1: BOCSAR evaluation findings of key NSW actions to reduce incarceration of Aboriginal people**

Actions	Evaluation aim	Key findings
Parole supervision	Compare recidivism outcomes for offenders who were released to parole with those who were released from prison unconditionally <sup>92</sup>	Being released to parole reduces the likelihood that a person will re-offend. Findings suggested larger reductions in more serious re-offending for 'high-risk' and Aboriginal people on parole
Sentencing reforms (2018)	Evaluate the impact of the NSW sentencing reforms on the risk of re-offending <sup>93</sup>	Although the reforms significantly increased the proportion of individuals sentenced to a supervised community sentence (relative to short-term prison and unsupervised community sentences), they did not reduce short-term re-offending rates
Circle sentencing	Examine whether circle sentencing is associated with a change in rates of imprisonment and reoffending <sup>94</sup>	Circle sentencing is associated with lower rates of incarceration and recidivism
NSW Drug Court and recidivism	Understand the long-term effect of the NSW Drug Court on recidivism <sup>95</sup>	The NSW Drug Court appears to have long term beneficial effects on the total number of reconstructions and reducing the risk of some offences
Behaviour change programs such as 'What's your plan'	Understand the role and impact of 'What's your plan' on increasing compliance of Aboriginal defendants with court orders issued to protect victims of domestic violence <sup>96</sup>	There is no evidence that the 'What's Your Plan' program has any impact on reducing breaches of orders or domestic violence related charges. This suggests that a program like 'What's Your Plan' may be interdependent with other initiatives
Drivers' license reform (2017)	Evaluate the impact of correcting overly burdensome or disproportionate penalties for unauthorised driving offences <sup>97</sup>	The reforms resulted in significant reductions in the severity of penalties for unauthorised driving offences, particularly for Aboriginal offenders, including a reduction in the probability of receiving a prison sentence. Consistent with other research, the reforms did not affect court volume or reoffending

<sup>92</sup> E J Ooi and J Wang, [The effect of parole supervision on recidivism](#), Crime and Justice Bulletin no. 245, NSW Bureau of Crime Statistics and Research, 2022.

<sup>93</sup> N Donnelly et al., [Have the 2018 NSW sentencing reforms reduced the risk of re-offending?](#), Crime and Justice Bulletin no. 246, NSW Bureau of Crime Statistics and Research, 2022.

<sup>94</sup> S Yeong and E Moore, [Circle Sentencing, incarceration and recidivism: Summary](#), Crime and Justice Bulletin no. 226, NSW Bureau of Crime Statistics and Research, 2020.

<sup>95</sup> D Weatherburn et al., [The long-term effect of the NSW Drug Court on recidivism](#), Crime and Justice Bulletin no. 232, NSW Bureau of Crime and Statistics and Research, 2020.

<sup>96</sup> M Kim, [The impact of the 'What's Your Plan?' program on ADVO breaches and domestic violence](#), Crime and Justice Bulletin no. 242, NSW Bureau of Crime Statistics and Research, 2021.

<sup>97</sup> [The impact of the NSW Driver Licence Disqualification Reforms on sentencing and reoffending](#), Crime and Justice Bulletin no. 243, NSW Bureau of Crime Statistics and Research, 2021.



## 4.2 National Agreement on Closing the Gap

The NSW Government signed the new national agreement on Closing the Gap in July 2020.<sup>98</sup> The national agreement includes 19 socio-economic targets and outcomes, including, for the first time, national targets to reduce Aboriginal overrepresentation.<sup>99</sup>

All governments and the Coalition of Peaks share accountability for the outcomes and achieving targets under the national agreement.<sup>100</sup> This is particularly important for the outcome areas relating to justice where states and territories hold many of the legislative and policy levers.

### 4.2.1 Justice targets

Three of the targets in the national agreement relate to justice:<sup>101</sup>

- **Outcome 10: Adults are not overrepresented in the criminal justice system**  
By 2031, reduce the rate of Aboriginal and Torres Strait Islander adults held in incarceration by at least 15%
- **Outcome 11: Young people are not overrepresented in the criminal justice system**  
By 2031, reduce the rate of Aboriginal and Torres Strait Islander young people (10-17 years) in detention by 30%
- **Outcome 13: Aboriginal female and young victims of violence**  
By 2031, the rate of all forms of family violence and abuse against Aboriginal and Torres Strait Islander women and children is reduced at least by 50%, as progress towards zero

It is also anticipated that progress towards other Closing the Gap targets (such as out-of-home care, health, housing, education and employment) will assist in the achievement of these justice outcomes.<sup>102</sup>

The targets have been agreed nationally and in partnership between all governments and the Coalition of Peaks. However, some states and territories have supported stronger

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<sup>98</sup> Australian Department of the Prime Minister and Cabinet, [National Agreement on Closing the Gap](#), Australian Government, 2020.

<sup>99</sup> While the 2012 National Indigenous Reform Agreement (Closing the Gap) included health, education and employment targets, there were no targets specific to justice or incarceration. Australia Department of the Prime Minister and Cabinet, [National Agreement on Closing the Gap](#), Australian Government, 2020, p 32.

<sup>100</sup> The [Coalition of Peaks](#) formed in 2019. It includes more than 50 community-controlled organisations. It came together to change the way Australian governments work with Aboriginal and Torres Strait Islander people, organisations and communities on 'closing the gap'. An [Implementation Tracker](#) shows progress for parties delivering against commitments and corresponding clauses in the national agreement.

<sup>101</sup> Australian Department of the Prime Minister and Cabinet, [National Agreement on Closing the Gap](#), Australian Government, 2020.

<sup>102</sup> See, National Indigenous Australians Agency (NIAA), [Commonwealth Closing the Gap Annual Report 2022](#), NIAA, Australian Government, Commonwealth of Australia, 2022. p 90.

targets that aim to end overrepresentation of First Nations people in prison, and achieve equity more quickly, for example:

- ACT aims for a reduction and parity between non-Indigenous and Indigenous imprisonment rates by 2031<sup>103</sup>
- Victoria aims to close the gap in the rate of Aboriginal adults under justice supervision (in custody and the community) by 2031.<sup>104</sup>

The NSW Government did not support committing to a stronger target as had been recommended by the Legislative Council Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody.<sup>105</sup>

#### 4.2.2 Monitoring progress

BOCSAR has charted how many fewer Aboriginal people need to be in prison each year to illustrate the level of change required to meet the 2031 target in NSW. In 2019 population terms, a reduction of 15% requires a reduction in the Aboriginal prison population of approximately 500 prisoners each year.<sup>106</sup> The modelling also showed, however, that without any change, a continuation of the historical growth trend would actually lead to a 69% increase in the Aboriginal prison population by 2031.<sup>107</sup>

Progress towards the targets is documented annually on a dashboard managed by the Productivity Commission.<sup>108</sup> As at 30 June 2021 there has been no progress towards the target in NSW or nationally.<sup>109</sup>

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<sup>103</sup> ACT Government, [Closing the Gap Jurisdictional Implementation Plan](#), ACT Government, 4 August 2021, p. 27.

<sup>104</sup> Aboriginal Justice Caucus and Koori Justice Unit, [Burra Lotjpa Dungalujda: Victorian Aboriginal Justice Agreement Phase 4](#), Victorian Government, 2018, p 32.

<sup>105</sup> The Select Committee considered whether NSW needs to set more ambitious targets than what was agreed at the national level, noting that the national target of 15 per cent by 2031 does not envisage achieving parity until 2093. See, Legislative Council Select Committee, [The high level of First Nations people in custody and oversight and review of deaths in custody](#), NSW Parliament, Report No. 1, October 2021, p 12-14; [NSW Government response: Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody](#), p 2.

<sup>106</sup> The linear trajectory is mapped against current incarceration rates to monitor if progress is on track toward the agreed outcome. See, NSW Bureau of Crime Statistics and Research (BOCSAR), [What is driving Aboriginal adult incarceration in NSW? Workshop on Target 10: reduce the rate of Aboriginal adult incarceration](#), Slide 5, 2021, accessed 11 February 2023. See also, NSW Bureau of Crime Statistics and Research (BOCSAR), [Closing the Gap](#), 4 May 2023, accessed 29 May 2023.

<sup>107</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), [What is driving Aboriginal adult incarceration in NSW? Workshop on Target 10: reduce the rate of Aboriginal adult incarceration](#), Slide 5, 2021, accessed 11 February 2023.

<sup>108</sup> Productivity Commission, [Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system – Dashboard](#), Australian Government, 30 June 2021, accessed 9 May 2023.

<sup>109</sup> Nationally, progress from the target baseline has gone backwards. At 30 June 2021, the age-standardised rate of Aboriginal and Torres Strait Islander prisoners was 2222.7 per 100 000 adults. This is an increase from 2142.9 per 100 000 adult population in 2019 (the baseline year). Productivity Commission, [Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system – Dashboard](#), Australian Government, 30 June 2021, accessed 9 May 2023. Assessment of progress from 2019 to 2021 for NSW suggested no real change has occurred. See, NSW Government and NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), [2021–22 NSW Closing the Gap Annual Report](#), NSW Government, 2022, p 44-45.

Reporting under the national agreement has not yet started against measures that assist in understanding Aboriginal people's increased contact with the justice system. These measures include:

- Police arrest and charge rates of Aboriginal people
- Entry rate to prisons
- Proportion of Aboriginal prisoners by legal status (unsentenced versus sentenced)
- Previously incarcerated
- Prisoners by offence types
- Mental health, substance abuse issues, family history of incarceration, employment post-release, and a history of victimisation.<sup>110</sup>

#### 4.2.3 Priority reforms

New priority reforms that aim to change the way in which governments work with First Nations people are foundational to the national agreement. The priority reforms are:

- Formal partnerships and shared decision making
- Building the community-controlled sector
- Transforming government organisations
- Shared access to data and information at a regional level
- Employment, business growth, and economic prosperity (NSW-specific)<sup>111</sup>

These priority reforms are important because they provide the basis or 'tools' for how to work toward the targets, including those related to reducing rates of incarceration. Pat Turner, Lead Convener of the Coalition of Peaks described the priority reforms as a 'game changer': 'Targets alone don't drive change ... whereas the priority reforms do.'<sup>112</sup> In their opening statement to 2022–2024 NSW Implementation Plan for Closing the Gap, Charles Lynch and Robert Skeen, Co-Chairs, NSW Coalition of Aboriginal Peak Organisations said:<sup>113</sup>

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<sup>110</sup> Productivity Commission, *Aboriginal and Torres Strait Islander adults are not overrepresented in the criminal justice system – Dashboard*, Australian Government, 30 June 2021, accessed 9 May 2023.

<sup>111</sup> NSW has a fifth priority reform which emerged as a priority in community consultations and is supported by the NSW partnership between the NSW Coalition of Aboriginal Peak Organisations and the NSW Government. See: Aboriginal Affairs NSW, *Closing the Gap in NSW priority reforms*, n.d., accessed 19 May 2023.

<sup>112</sup> L. Allam, *A real turning point: new Closing the Gap agreement to move beyond targets*, *The Guardian*, 30 July 2020, accessed 3 May 2023.

<sup>113</sup> NSW Government and NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), *2022-2024 NSW Implementation Plan for Closing the Gap*, NSW Government, 2022, p 9. The NSW Coalition of Aboriginal Peak Organisations represent Aboriginal service providers and communities, and other Aboriginal partners. It is a coalition that represents the interests of Aboriginal Community Controlled Organisations (ACCOs) and Aboriginal

This plan reflects a shift towards a new way of working, in which Aboriginal communities can have a real say in what is being done. The initiatives and approaches included in this plan have been driven by principles of self-determination, decided based on what communities have told us in consultations, and developed through shared decision-making with our government partners.

### 4.3 Closing the Gap Implementation Plan

#### 4.3.1 NSW government actions and investments

The NSW Implementation Plan for Closing the Gap is overseen by a council jointly chaired by the Minister for Aboriginal Affairs and the NSW Coalition of Peak Organisations co-chairs. The NSW Attorney General and Department of Communities and Justice are accountable for Outcome 10. The Aboriginal Legal Service (NSW/ACT) is the lead on this outcome for the NSW Coalition of Aboriginal Peak Organisations.

The **2021–22 Closing the Gap NSW Implementation Plan** set out actions for the first year of implementation.<sup>114</sup> This plan replaced the expired Reducing Aboriginal Overrepresentation in the Criminal Justice System 2018–2020 plan.<sup>115</sup> The plan focused on how the partnership between the NSW Government and NSW Coalition of Aboriginal Peak Organisations would function and existing policies and programs.<sup>116</sup>

The **2022–2024 Closing the Gap NSW Implementation Plan** is the second implementation plan released by the NSW Government. The plan describes 6 key action areas to address Outcome 10, as well as new policies and pilot services that will be implemented between 2022 and 2024 (Table 2).<sup>117</sup>

Despite being the key authority for arrest and sharing authority for bail with the courts, the NSW Police Force has not published what actions it will take in relation to Outcome 10. NSW Police Force's most recent Aboriginal Strategic Direction 2018–2023 was developed prior to the national agreement.<sup>118</sup>

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peoples of NSW. For justice sector case studies that incorporate self-determination in principle see, L Behrendt et al., *Indigenous self-determination within the justice context: Literature review*, Jumbunna Indigenous House of Learning, University of Technology Sydney, 2017. For an overview of self-determination as a policy framework in NSW, see, Aboriginal Affairs NSW, *Transforming the relationship between Aboriginal peoples and the NSW Government: Research Agenda 2018–2023*, NSW Government, 2017, p 83-92.

<sup>114</sup> NSW Government and NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), *2020–2021 NSW Implementation Plan for Closing the Gap*, NSW Government, 2021.

<sup>115</sup> NSW Government and NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), *2021–22 NSW Closing the Gap Annual Report*, NSW Government, 2022 p 63.

<sup>116</sup> For a full list of existing actions and status under Outcome 10 see, NSW Government and NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), *2021–22 NSW Closing the Gap Annual Report*, NSW Government, 2022 p 63-73.

<sup>117</sup> NSW Government and NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), *2022–2024 NSW Implementation Plan for Closing the Gap*, NSW Government, 2022, p 89-95.

<sup>118</sup> NSW Police Force (NSWPF), *Aboriginal Strategic Direction 2018-23*, NSW Government, 2018.

**Table 2: Actions to reduce Aboriginal incarceration, NSW Implementation Plan for Closing the Gap, 2022–2024**

Action area	Issue/problem	What is needed	Commitments planned
Transforming the justice system to support the needs and aspirations of Aboriginal communities	‘Business as usual’ solutions will not be enough to achieve the commitments in the national agreement	A structural shift in the way the justice system works for Aboriginal communities	Establish an ‘Aboriginal Justice Partnership’ for NSW to facilitate shared decision making on justice issues at the local, regional and state level Strategies and framework to address systemic racism and bias in government agencies and service providers
Preventing entry into the justice system and diverting from arrest	Higher rates of arrest leading to more court proceedings and more convictions	Leverage police discretion around prosecutions and facilitate equal access to court diversion programs	Co-design and implement a place-based community policing model Identify best practice diversion programs for trial in NSW Identify gaps in existing court diversion programs and develop improvements
Increasing adults receiving and complying with bail	Increase in bail refusals and remand, and breaches of bail conditions	Remove barriers to bail for Aboriginal people	Co-design an improved bail system and test new ways of delivering bail Establish an Aboriginal led, multidisciplinary wraparound bail advocacy and support program
Increasing community-based sentences and reducing imprisonment	Significant numbers of Aboriginal people receive short prison sentences that, where appropriate, could be served in the community	Strategies to increase completion of community-based orders	Test new ways of sentencing Aboriginal defendants Expand circle sentencing to high priority areas Co-design options for tailored court responses that increase community involvement Explore new ways to consider the circumstances of Aboriginal offenders in sentencing Identify barriers to the use of community-based sentences and codesign options to increase use of these types of sentences
Increasing the successful completion of orders	A significant factor in the increase in Aboriginal people coming before the courts is a rise in the number of procedural offences for breaches of	Culturally appropriate, community-based support services and sentencing options	Co-design and trial an initiative to include Aboriginal Elders and respected community members in the management of community-based orders Review the current framework for community-based orders (including

Action area	Issue/problem	What is needed	Commitments planned
	parole and community-based orders		legislative settings) to help remove barriers and address disproportionate impacts Co-design options to increase the number of Aboriginal people obtaining parole at earliest release date
Providing effective supports to reduce returns to prison	Re-imprisonment is a significant factor in the growing numbers of Aboriginal people in custody	Preparing people for release from prison while in prison and supporting them on return to the community	Co-design and establish a culturally appropriate, trauma-informed model for Aboriginal people in prison Explore opportunities to increase access to complete sentences at home rather than in prison Develop the Aboriginal Throughcare Strategy, which is a culturally appropriate model to support Aboriginal people in and after release from prison, including increased involvement of Aboriginal community-controlled organisations

Source: Aboriginal Affairs NSW <sup>119</sup>

In addition to the commitments outlined in the implementation plan, in 2022 the NSW Government made some specific announcements initiatives to reduce Aboriginal incarceration (Table 3).

<sup>119</sup> NSW Government and NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), [2022-2024 NSW Implementation Plan for Closing the Gap](#), NSW Government, 2022, p 90-96.

**Table 3: Selected justice investments announced by the NSW Government, 2022**

Initiative	Amount	Description
Walama List Pilot	Not announced	Commencing in January 2022, a list in the NSW District Court at the Downing Centre to bring more community involvement into the judge's sentencing process <sup>120</sup>
Circle sentencing	\$4.2 million over 4 years	Expansion of an alternative sentencing method for Aboriginal people in operation since 2002 from 12 local courts to 20 high-priority areas <sup>121</sup>
Aboriginal Throughcare Strategy	\$600,000 of \$1.2 million package	Pre-and post-release support for Aboriginal men and women exiting prison <sup>122</sup>
Aboriginal Bail and Advocacy Support Service	\$10 million over 4 years	Trial bail and advocacy support services for First Nations young people and women <sup>123</sup>
Justice reinvestment	\$9.8 million over 4 years	New justice reinvestment pilots to divert people away from the criminal justice system with preventative, diversionary and community development initiatives <sup>124</sup>
Magistrates Early Referral into Treatment (MERIT) program	\$35.1 million over 4 years	Expansion of a diversion program in local courts that commenced as a pilot in 2000 providing access to alcohol and drug treatment services <sup>125</sup>
NSW Drug Court	\$27.9 million over 4 years	A specialist court that began in 1999 providing an alternative to prison for participants with drug dependencies that have committed certain crimes. Expansion of the Dubbo Drug Court and the Aboriginal list operating in the Parramatta Drug Court to operate more widely <sup>126</sup>

<sup>120</sup> Department of Premier and Cabinet, [The NSW Government's response to the Special Commission of Inquiry into the Drug 'ice'](#), NSW Government, p 9. See also, Aboriginal Affairs NSW, [Walama List Factsheet](#), NSW Government, n.d, accessed 12 May 2023.

<sup>121</sup> Aboriginal Affairs NSW, [Investing in better justice outcomes for Aboriginal people](#), 2 March 2023, accessed 4 May 2023.

<sup>122</sup> NSW Government, NSW Budget 2022-23, [No.02 Outcomes Statement Budget Paper](#), June 2022, p 8-21.

<sup>123</sup> Department of Communities and Justice, [\\$2 billion investment in the state's justice system](#), NSW Government, 21 June 2022, accessed 29 May 2023.

<sup>124</sup> Aboriginal Affairs NSW, [Investing in better justice outcomes for Aboriginal people](#), 2 March 2023, accessed 4 May 2023

<sup>125</sup> Department of Premier and Cabinet, [The NSW Government's response to the Special Commission of Inquiry into the Drug 'ice'](#), NSW Government, p 9.

<sup>126</sup> Department of Premier and Cabinet, [The NSW Government's response to the Special Commission of Inquiry into the Drug 'ice'](#), NSW Government, p 9.

#### 4.4 NSW investment reviews

The national agreement calls on governments to review and identify current spending on First Nations programs and services to identify opportunities for prioritisation.<sup>127</sup>

In NSW, expenditure in prisons rose from \$434 million in 2017–18, to \$660 million 2020–21, with the bulk of this expenditure on adult facility-based detention.<sup>128</sup> In 2021 NSW Treasury's Comprehensive Indigenous Expenditure Report found that:

NSW prisons expenditure on First Nations people has remained stable at 29 per cent over the period of analysis (FY 2017–18 to FY 2020–21), although this percentage share indicates significant overrepresentation for First Nations people, who make up only 3.4 per cent of the NSW population.<sup>129</sup>

Noting evidence of the effectiveness of parole in reducing reoffending, the report points to:

... an opportunity to improve outcomes by reviewing the efficiency and effectiveness of preventative programs, alongside culturally appropriate pre- and post-release support programs. Reform in this area could result in savings on expenditure on prisons, as well as improve economic and social outcomes for First Nations people more broadly.<sup>130</sup>

The report also observes that the NSW Police Force is the fourth largest agency in the general government sector and expenditure on policing has been linked to downstream justice services expenditure.<sup>131</sup> NSW Treasury will include police expenditure analysis in future reports to support a better understanding of the impacts of NSW Police Force's work on First Nations communities.<sup>132</sup>

NSW Treasury's Outcome Budgeting Landscape Report 2020–21 analysed alignment and expenditure (targeted and non-targeted) between state outcomes and Closing the Gap.<sup>133</sup> It recommended the 'NSW Government further explore opportunities for cross-Cluster collaboration to drive co-ordinated and outcome-focused investment in First Nations outcomes.'<sup>134</sup> One of the initiatives noted in the report was an Aboriginal impact statement introduced by the Department of Communities and Justice for all Cabinet submissions and

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<sup>127</sup> See Clause 113, Australia Department of the Prime Minister and Cabinet, [National Agreement on Closing the Gap](#), Australian Government, 2020, p 40.

<sup>128</sup> This expenditure captures the NSW Government expenditure associated with Corrective Services NSW and Youth Justice. See, NSW Treasury, [Comprehensive Indigenous Expenditure Report 2021-22](#), NSW Government, 2022, p. 60.

<sup>129</sup> NSW Treasury, [Comprehensive Indigenous Expenditure Report 2021-22](#), NSW Government, 2022, p 62.

<sup>130</sup> NSW Treasury, [Comprehensive Indigenous Expenditure Report 2021-22](#), NSW Government, 2022, p 62.

<sup>131</sup> NSW Treasury, [Comprehensive Indigenous Expenditure Report 2021-22](#), NSW Government, 2022, p 27.

<sup>132</sup> NSW Treasury, [Comprehensive Indigenous Expenditure Report 2021-22](#), NSW Government, 2022, p 27.

<sup>133</sup> NSW Treasury, [Aboriginal and Torres Strait Islander Outcome Budgeting Landscape Report 2020-21](#), NSW Government.

<sup>134</sup> NSW Treasury, [Aboriginal and Torres Strait Islander Outcome Budgeting Landscape Report 2020-21](#), NSW Government, p 4.



any other initiative expected to have an impact on Aboriginal and Torres Strait Islander peoples.<sup>135</sup>

#### 4.5 Considering the impacts of legislation

Legal stakeholders in NSW have repeatedly called for routine consideration on how new justice policies and legislation can contribute to overrepresentation, and that any potential impacts on Aboriginal incarceration are identified and informed by consultation and evidence. Despite legal stakeholders calling for special consideration of legislative impacts, it has not always occurred.

In June 2022 the Aboriginal Legal Service NSW/ACT (lead partner on the Closing the Gap NSW Implementation Plan) questioned the extent to which amendments to the *Bail Act 2013* were consistent with national Closing the Gap reforms.<sup>136</sup> The amendments require bail to be refused following conviction and before sentencing for an offence for which the offender will be sentenced to imprisonment.<sup>137</sup> The Law Society emphasised the need for adequate consultation to ensure any reform is based on evidence and considers potential negative consequences.<sup>138</sup>

Some stakeholders have considered the potential negative consequences of further potential legislative change on increasing Aboriginal imprisonment. In July 2022, the NSW Bail Monitoring Group providing practitioner perspectives on the operation of the current bail system noted there is a particular risk that tightening bail laws ‘may disproportionately increase the Aboriginal remand population and impact the Government’s capacity to reach Closing the Gap targets.’<sup>139</sup>

A subsequent NSW Law Reform Commission review on discrete aspects of the *Bail Act 2013* in October 2022 set out key principles to guide assessment of legislation. These principles included that any changes should not unnecessarily increase the remand population, further contribute to Aboriginal overrepresentation, or further complicate the law or burden the judicial system.<sup>140</sup>

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<sup>135</sup> NSW Treasury, [Aboriginal and Torres Strait Islander Outcome Budgeting Landscape Report 2020-21](#), NSW Government, p 23.

<sup>136</sup> Aboriginal Legal Service NSW/ACT (ALSNSWACT), [Aboriginal Legal Service blindsided by rushed bail amendments that will risk widening the gap](#) [media release], 22 June 2022, accessed 3 March 2023.

<sup>137</sup> See, [Bail Amendment Act 2022 No 27](#) (NSW); The amendments were enacted in 2 days see, NSW Parliament, [Bail Amendment Bill 2022](#), n.d, accessed 23 May 2023.

<sup>138</sup> Law Society of NSW, [Bail amendment: Rushed reform can be flawed](#) [media release], 22 June 2022, accessed 3 March 2023.

<sup>139</sup> For the Bail Act Monitoring Group July 2022 report see, M Speakman, [Bail Act Monitoring Group Reports](#), [media release], NSW Government, 16 August 2022, accessed 3 May 2023.

<sup>140</sup> NSW Law Reform Commission (NSWLRC), [Report 150 – Bail: Firearms and Criminal Associations](#), NSW Government, 2022.

A review by the Law Enforcement Conduct Commission in 2023 on operation of amendments to consorting laws<sup>141</sup> found that during the review period, 1,797 (42%) of the 4,257 people who were the subject of the consorting law identified as Aboriginal.<sup>142</sup> The report recommended amendments aimed at increasing appropriate and fair use of the law by NSW Police Force.

#### 4.6 Developments in other jurisdictions

Aboriginal justice agreements in some other jurisdictions recognise that the current levels of overrepresentation require legislative reforms aimed at reducing Aboriginal contact with the criminal justice system. For example, Burra Lotjpa Dunguludja, phase 4 of the Victorian Aboriginal Justice Agreement has a stated outcome that 'disproportionate impacts of existing justice policies and legislation are identified and remedied.'<sup>143</sup> New opportunities identified for reducing the number of Aboriginal people in the criminal justice system in Victoria include:<sup>144</sup>

- Examining the impact of 2017–18 bail reforms on Aboriginal people accused of an offence(s)
- Considering pre-sentence reports on Aboriginality as part of a broader review of the operation of the *Sentencing Act 1991* (Vic)
- Considering mechanisms to identify the possible impact of new justice policies and legislation on Aboriginal Victorians
- Trialling Aboriginal community justice reports to improve sentencing processes and outcomes.

The Northern Territory Justice Agreement commits to 'review and reform legislative provisions within the justice system that are unfair, discriminatory or detrimental to Aboriginal people'.<sup>145</sup> A key action is to '[o]utline and prioritise the legislative reforms required to achieve this commitment in a report to government', including an examination of criminal law legislation across bail, parole, sentencing and police administration to

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<sup>141</sup> [Section 93X](#) of the *Crimes Act 1900* (NSW) makes it a criminal offence for a person to continue to associate or communicate with at least two people who have previously been convicted of an indictable offence, after receiving an official police warning. See also NSW Police Force, [Fact sheet about consorting](#), n.d., accessed 14 May 2023;

<sup>142</sup> Law Enforcement Conduct Commission (LECC), [Review of the operation of amendments to the consorting law under Part 3A Division 7 of the Crimes Act 1900: Final Report](#), New South Wales Government, 2023, p 39.

<sup>143</sup> Aboriginal Justice Caucus and Koori Justice Unit, [Burra Lotjpa Dunguludja Aboriginal Justice Outcome Framework](#), Victorian Government, n.d., accessed 3 March 2023.

<sup>144</sup> Aboriginal Justice Caucus and Koori Justice Unit, [Burra Lotjpa Dunguludja Aboriginal Justice Outcome Framework](#), Victorian Government, n.d., accessed 3 March 2023.

<sup>145</sup> Department of Attorney-General and Justice, [Northern Territory Aboriginal Justice Agreement 2021–2027](#), Northern Territory Government, 2021, p 15.

identify any discriminatory impacts on Aboriginal people and identify how these can be addressed.<sup>146</sup>

#### 4.7 Australian government actions and investments

The Australian Government, and all states and territories have developed implementation plans for the national agreement. At the national level the Attorney-General and Minister for Indigenous Australians are responsible for Outcome 10.<sup>147</sup>

The Justice Policy Partnership is the first of 5 policy partnerships set up by the Australian Government to accelerate progress under the national agreement. It brings together representatives from the Coalition of Peaks, Aboriginal and Torres Strait Islander experts, and Australian, state and territory governments in a forum to take a 'joined up' approach to justice policy and make recommendations to reduce over-incarceration. NSW Government is represented by the Deputy Secretary, Department of Communities and Justice.<sup>148</sup> In 2021–2022 the Justice Policy Partnership workplan included a focus on cross-sector approaches between justice and human services, reviewing partnership arrangements with police agencies and identifying what elements are in step with the national agreement (or not).<sup>149</sup>

In the 2022–23 Budget the Australian Government announced the First Nations Justice Commitment. This initiative includes \$81.5 million over 4 years for new and ongoing funding for community-led justice reinvestment initiatives and a national independent justice reinvestment unit to assist develop and evaluate initiatives (see Box 1).<sup>150</sup> An additional \$17.5 million was committed for culturally appropriate legal and non-legal support.<sup>151</sup>

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<sup>146</sup> Department of Attorney-General and Justice, [Northern Territory Aboriginal Justice Agreement 2021–2027](#), Northern Territory Government, 2021, p 15.

<sup>147</sup> National Indigenous Australians Agency (NIAA), [Commonwealth Closing the Gap Implementation Plan 2023](#), NIAA, Australian Government, Commonwealth of Australia, 2023. For a full appendix of new and existing measures being undertaken by the Commonwealth to support Closing the Gap efforts see, [Commonwealth Closing the Gap Actions Table](#).

<sup>148</sup> Joint Council on Closing the Gap, [Agreement to implement the justice policy partnership](#), Attorney-General, Australian Government, September 2021, p 2.

<sup>149</sup> Attorney-General, [Justice Policy Partnership Work Plan 2021-2022](#), n.d., accessed 3 May 2023.

<sup>150</sup> H Maclean, [Budget Review October 2022-23](#), Department of Parliamentary Services, Parliament of Australia, 2022, p 54–7; M Dreyfus and L Burney, [Albanese Government delivers landmark first nations justice investment](#) [joint media release], Attorney-General, Australian Government, 2022.

<sup>151</sup> Attorney-General's Department, [National Agreement on Closing the Gap](#), Australian Government, n.d., accessed 3 March 2023; H Maclean, [Budget Review October 2022-23](#), Department of Parliamentary Services, Parliament of Australia, 2022, p 54–7.

**Box 1: What is justice reinvestment?**

Justice reinvestment is a strategy to reduce incarceration of Aboriginal people by targeting drivers of incarceration.<sup>152</sup> The Australian Law Reform Commission describes it as a set of 'place-based, community-led initiatives... using a distinct data-driven methodology to inform strategies for reform.'<sup>153</sup> It has been advocated as a key strategy for reducing the over-incarceration of First Nations people by the Australian Law Reform Commission, parliamentary inquiries, as well as current and past Aboriginal and Torres Strait Islander Social Justice Commissioners.<sup>154</sup>

A feature of justice reinvestment initiatives is its uptake by Indigenous organisations and communities. Emphasis is placed on improving First Nations justice and other outcomes through strengthening self-determination and community-based leadership.<sup>155</sup> The Justice Reinvestment Network of Australia identified 5 common elements of initiatives in Australia: evidence and data informed, place based, community development focused, economically rational, and First Nations focused.<sup>156</sup>

In Australia, 2 different models of justice reinvestment have emerged: a jurisdiction-wide or government-initiated approach in the ACT, and a community-led, placed-based model such as the Maranguka project in Bourke, NSW. In 2013, Bourke became the first place in Australia to implement an Aboriginal-led place-based model of justice reinvestment. An evaluation of the Maranguka project estimated that in 2017 it saved the NSW economy \$3.1 million and achieved outcomes such as a 23% reduction in police recorded rates of domestic violence, 31% increase in Year 12 retention, 14% reduction in bail breaches and 42% reduction in days spent in custody.<sup>157</sup> Justice reinvestment approaches have also commenced in Mt Druitt and Moree.<sup>158</sup>

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<sup>152</sup> See, L Roth, [Justice reinvestment](#), NSW Parliamentary Research Service, December 2016; F Allison, [Redefining Reinvestment: An opportunity for Aboriginal communities and government to co-design justice reinvestment in NSW](#), Final Report, Just Reinvest NSW, 2022.

<sup>153</sup> Australian Law Reform Commission (ALRC), [Pathways to Justice: Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples](#), ALRC, Australian Government, Final Report No. 133, 2017, p 125.

<sup>154</sup> Jumbunna Institute for Indigenous Education and Research, [Justice Reinvestment Discussion Paper](#), Attorney-General, Australia Government, n.d., accessed 17 May 2023, p 4.

<sup>155</sup> F Allison and C Cunneen, [Justice Reinvestment in Australia – A Review of Progress and Key Issues](#), Jumbunna Institute for Indigenous Education and Research, University of Technology, Sydney and the Justice Reinvestment Network Australia, July 2022, p 4.

<sup>156</sup> Jumbunna Institute for Indigenous Education and Research, [Justice Reinvestment Discussion Paper](#), Attorney-General, Australia Government, n.d., accessed 17 May 2023, p 4; For a compilation of resources relating to justice reinvestment see, [Justice Reinvestment Network Australia](#), n.d, accessed 17 May 2023.

<sup>157</sup> KPMG, [Maranguka Justice Reinvestment Project: Impact Assessment](#), November 2017.

<sup>158</sup> F Allison, [Redefining Reinvestment: An opportunity for Aboriginal communities and government to co-design justice reinvestment in NSW](#), Just Reinvest NSW, 2022

#### 4.8 Risks to successful implementation

The national agreement has placed renewed focus on shared decision making and partnerships, and provided the basis for unprecedented collaboration amongst all levels of government and peak Aboriginal bodies.<sup>159</sup>

Initial feedback from Aboriginal and Torres Strait Islander people and organisations, and government on the first phase of implementation of the national agreement indicated that:<sup>160</sup>

- Actions in implementation plans could be more transparent and with more accountability placed on responsible agencies
- Some government actions seemed to go against the intent of reforms, for example 2 jurisdictions have introduced justice reforms that increase custodial mandates
- Policies often do not address or reflect the relationships between justice and socioeconomic drivers and outcomes such as mental health and housing
- Governments do not focus enough of their effort on prevention and early intervention
- It is unclear how proposed governance and decision making under the implementation plan would be coordinated with existing structures and models, such as the accords that have been negotiated under OCHRE in NSW.

In addition to these issues, researchers have identified challenges to successful implementation of the new priority reforms that have the potential to change criminal justice practice.

##### 4.7.1 Shared decision making on justice reforms

A discussion paper from the Centre for Aboriginal Economic Policy Research in 2021 highlighted that while success in closing the gap depends on substantive involvement by Indigenous and community-controlled services, there is also a lack of specificity about how decision making will be shared.<sup>161</sup> The paper highlights that there is little clarity about the level of decision making Indigenous interests will have in policy processes.<sup>162</sup>

Research commissioned by the Australia and New Zealand School of Government in 2023 explored barriers that confront public servants when they seek to partner and share

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<sup>159</sup> See Clause 18 and 19, Australia Department of the Prime Minister and Cabinet, [National Agreement on Closing the Gap](#), Australian Government, 2020, p 4.

<sup>160</sup> Productivity Commission, [Review of the National Agreement on Closing the Gap: Review paper 3 What we have heard to date – first phase of engagement](#), Australian Government, 2023, p 3-15.

<sup>161</sup> M Dillion, [The new policy architecture for closing the gap: Innovation and regression](#), Discussion paper no. 298, Centre for Aboriginal Economic Policy Research, Australian National University, 2021.

<sup>162</sup> M Dillion, [The new policy architecture for closing the gap: Innovation and regression](#), Discussion paper no. 298, Centre for Aboriginal Economic Policy Research, Australian National University, 2021.

decision making with First Nations people and organisations to meet national agreement commitments.<sup>163</sup> The findings raised the issue of First Nations people's role in decision making about broader mainstream policies and services reforms because these settings also impact First Nations people.<sup>164</sup>

Shared decision making is important because broader criminal justice policies shape local prevention and service delivery:

Without co-ordination – the river is going to reverse its flow – “downstream” decisions will increase the number of people in the criminal justice system, resulting in high demand and overload on “upstream” services. Under the new Closing the Gap strategies, what this will mean in practice is an overburdening of Indigenous community-controlled organisations, services, and communities. We have already seen this pattern in shifts to services in the New South Wales child protection system.<sup>165</sup>

#### 4.7.2 Reframing success

Indigenous academics caution that if reforms are to succeed, key lessons from past experiences in Indigenous affairs policymaking need to be heeded.<sup>166</sup> Previous decisions to dismantle Aboriginal advisory and representative bodies have led to concerns that governments have ‘high expectations and short patience’ in assessing the impact of working with Indigenous community-controlled organisations.<sup>167</sup>

Concerns have been expressed that ‘if there are not immediate shifts in rates of contact with criminal justice system, the blame will be placed on Indigenous community-controlled organisations.’<sup>168</sup> These academics argue that fully understanding the impact of the priority reforms in the national agreement may require defining success differently so that ongoing improvements in self-determination models are reported on, as well as reoffending rates.<sup>169</sup>

#### 4.7.3 Culturally relevant decision making

Research examining evaluations of Indigenous sentencing courts suggests that it would be valuable to rethink how evaluations of Indigenous-focused criminal justice initiatives are

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<sup>163</sup> A Cowley and P Tremblay, *The Devolution Dilemma*, Charles Darwin University, February 2023, p 55.

<sup>164</sup> A Cowley and P Tremblay, *The Devolution Dilemma*, Charles Darwin University, February 2023, p 55.

<sup>165</sup> K Lockwood and H Loban, *Upstream and downstream strategies to close the gap in criminal justice*, James Martin Institute for Public Policy, 16 March 2023, accessed 23 May 2023.

<sup>166</sup> K Lockwood and H Loban, *Upstream and downstream strategies to close the gap in criminal justice*, James Martin Institute for Public Policy, 16 March 2023, accessed 23 May 2023; Jumbunna Institute Indigenous Policy Hub, *Accountability Frameworks between States and Indigenous peoples—a literature review*, University of Technology, Sydney, 2020.

<sup>167</sup> K Lockwood and H Loban, *Upstream and downstream strategies to close the gap in criminal justice*, James Martin Institute for Public Policy, 16 March 2023, accessed 23 May 2023; Jumbunna Institute Indigenous Policy Hub, *Accountability Frameworks between States and Indigenous peoples—a literature review*, University of Technology, Sydney, 2020.

<sup>168</sup> K Lockwood and H Loban, *Upstream and downstream strategies to close the gap in criminal justice*, James Martin Institute for Public Policy, 16 March 2023, accessed 23 May 2023.

<sup>169</sup> K Lockwood and H Loban, *Upstream and downstream strategies to close the gap in criminal justice*, James Martin Institute for Public Policy, 16 March 2023, accessed 23 May 2023.

framed and conducted when determining ‘what works’ to ensure that Indigenous-focused aims are captured.<sup>170</sup>

The importance of valuing culture and adequately capturing relevant culturally specific considerations has also been raised in relation to the appropriateness of risk assessment tools in the criminal justice system.<sup>171</sup> Research has also raised the importance of cultural appropriateness in considering the effectiveness of prison programs, community-based sentencing alternatives and parole supervision.<sup>172</sup>

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<sup>170</sup> E Marchetti, [Nothing Works? A Meta-Review of Indigenous Sentencing Court Evaluations](#), *Current Issues in Criminal Justice*, 2018, 28:3, 257-276, doi: 10.1080/10345329.2017.12036074.

<sup>171</sup> See for example, S Venner et al., [Aboriginal and Torres Strait Islander perspectives on forensic risk assessment](#), *Psychiatry, Psychology and Law*, 2023, doi:10.1080/13218719.2023.2192254; D Coulter et al., [Pre-sentence reports for Aboriginal and Torres Strait Islander people: An analysis of language and sentiment](#). *Trends & issues in crime and criminal justice* no. 659. Australian Institute of Criminology, 2022.

<sup>172</sup> See for example, [Availability and flexibility of community-based sentencing options](#) in Australian Law Reform Commission, [Pathways to Justice: Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples](#), Australian Government, Final Report No. 133, 2017; J Beaufils et al., [Exploratory Research into Post-Release Community Integration and Supervision: The Experiences of Aboriginal People with Post-Release Parole Supervision and Reintegration in NSW](#), *Jumbunna Institute for Indigenous Education and Research*, University of Technology Sydney, 2021.

## 5. Recommendations from key inquiries

A common approach in recent inquiries is to reflect that there has been several significant inquiries and reports on issues, causes and consequences of Aboriginal incarceration over the past 3 decades. There is strong consensus among stakeholders that the recommendations from the 1991 Royal Commission into Aboriginal Deaths in Custody and the 2017 Australian Law Reform Commission's Pathways to Justice report should be prioritised in implementing change.<sup>173</sup>

### 5.1 Australian Law Reform Commission

In 2017 the Australian Law Reform Commission published its report on legal frameworks and processes relating to the incarceration rate of Aboriginal and Torres Strait Islander peoples.<sup>174</sup> In undertaking the inquiry, the commission considered other reports, inquiries and action plans including the 1991 Royal Commission into Aboriginal Deaths in Custody. The report 'delivered a blueprint for reforms, underpinned by a justice reinvestment approach.'<sup>175</sup> The commission made 35 recommendations across a range of different areas including:

- **Justice reinvestment:** Australian and state and territory governments should provide support for the establishment of an independent justice reinvestment body, and should support justice reinvestment trials in partnership with Aboriginal and Torres Strait Islander communities
- **Bail:** Bail laws should be amended to include standalone provisions that require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations
- **Community-based sentencing:** State and territory governments should work with Aboriginal and Torres Strait Islander and community organisations to improve access to community-based sentencing options for Aboriginal and Torres Strait Islanders

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<sup>173</sup> Legislative Council Select Committee, *The high level of First Nations people in custody and oversight and review of deaths in custody*, NSW Parliament, Report No. 1, October 2021, p 5-10; See also, K Jordan et al., *Joint Response to the Deloitte Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody*, Working Paper No. 140/2021, Centre for Aboriginal Economic Policy Research, Australian National University, 2021.

<sup>174</sup> Australian Law Reform Commission, *Pathways to Justice: Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, Australian Government, Final Report No. 133, 2017.

<sup>175</sup> T Calma and M Gooda, *Australia must commit to ambitious targets to reduce incarceration. Indigenous lives depend on it*, *The Guardian*, 10 July 2020, accessed 17 May 2023.



- **Sentencing:** Sentencing legislation should provide that, when sentencing Aboriginal and Torres Strait Islander offenders, courts take into account unique systemic and background factors affecting them
- **Prison programs and parole:** Corrective services agencies should develop prison programs with relevant Aboriginal and Torres Strait Islander organisations that address offending behaviours and/or prepare people for release
- **Access to justice:** Where needed, state and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts that have individual case management, wraparound services, and are culturally appropriate
- **Women:** Programs and services delivered to female Aboriginal and Torres Strait Islander offenders within the criminal justice system should take into account their particular needs to improve their chances of rehabilitation
- **Fines:** State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of, or as a result of, unpaid fines
- **Police accountability:** Australian, state and territory governments should review police procedures and practices so that the law is enforced fairly, equally and without discrimination with respect to Aboriginal and Torres Strait Islander peoples
- **Justice targets:** The Australian Government, in consultation with state and territory governments, should develop national criminal justice targets.

## 5.2 NSW Parliament Select Committee

In April 2021 the Legislative Council Select Committee into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody published its report.<sup>176</sup> The report made 22 recommendations to address the overrepresentation of First Nations people in custody, all relating to the criminal justice system.<sup>177</sup> The committee also stated that ‘a commitment to self-determination must be at the core of any solution to the overrepresentation of First Nations people in the criminal justice system’.<sup>178</sup> The NSW Government’s October 2021 response supported 7 of the 22 recommendations in full or ‘in principle’, noted 4, did not support 2, and stated that 9 others were ‘under consideration’ (Table 4).<sup>179</sup>

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<sup>176</sup> Legislative Council Select Committee, [The high level of First Nations people in custody and oversight and review of deaths in custody](#), NSW Parliament, Report No. 1, October 2021.

<sup>177</sup> The Committee also made 17 recommendations in relation to deaths in custody.

<sup>178</sup> Legislative Council Select Committee, [The high level of First Nations people in custody and oversight and review of deaths in custody](#), NSW Parliament, Report No. 1, October 2021, p 18.

<sup>179</sup> NSW Government, [NSW Government response: Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody](#), October 2021. The table includes all recommendations from Chapters 1 and 3 of the Committee report.

**Table 4: Recommendations from the Legislative Council Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody and government responses**

Committee recommendation	Government response
<b>Previous recommendations and Closing the Gap targets</b>	
1. Commit to the immediate and comprehensive implementation of all outstanding recommendations from the 1991 Royal Commission into Aboriginal Deaths in Custody report and 2017 Australian Law Reform Commission's Pathways to Justice report	Noted
2. Monitor and report annually on progress made in relation to the implementation of any recommendations relating to First Nations people and achievement towards the Closing the Gap targets	Supported
3. Commit to achieving parity in prison rates by 2031 in the NSW Closing the Gap Implementation Plan	Not supported
<b>Women</b>	
4. Conduct research into growing number of First Nations women in custody	Supported
5. Ensure long-term funding for projects such as the Miranda Project and other post release support programs for women who have been in prison, including expansion to rural, regional and remote areas	Supported
6. Urgently expand the number of post release housing beds for First Nations women coming out of prison that can support women and their children to find long-term housing	Noted
<b>Data collection and reporting</b>	
7. That the NSW Bureau of Crime Statistics and Research lead a project to identify ways in which data collection and reporting could be enhanced in relation to the contact First Nations people have with the criminal justice system	Supported
<b>Legislative reforms</b>	
8. Amend the Bail Act 2013 to require a bail decision maker to take into account any issues that arise due to the person's Aboriginality	Under consideration
9. Introduce Gladue style Aboriginal Community Justice Reports that would be considered as part of bail and sentencing decisions	Under consideration
10. Amend the Summary Offences Act 1988 to ensure that the offence of offensive language only captures a situation where there is intimidation and/or an actual threat of harm, except in or near a school	Under consideration
11. Raise the minimum age of criminal responsibility and the minimum age of children in detention to at least 14	Under consideration
12. Establish a taskforce to develop a whole of government approach to therapeutic pathways that integrate health, education and housing approaches to youth behaviour for children aged 10 to 14	Under consideration

Committee recommendation	Government response
<b>Expansion of diversionary programs and specialty courts</b>	
13. Amend the Young Offenders Act 1997 to expand the offences in which the Act can apply and remove the caps on the number of cautions young people can be given	Under consideration
14. Amend the Law Enforcement (Powers and Responsibilities) Act 2002 and the Children (Criminal Proceedings) Act 1987 to state that the arrest, detention or imprisonment of a person should be used only as a measure of last resort and for the shortest appropriate period of time	Not supported
15. Allocate long-term funding to community-led justice reinvestment initiatives	Supported in-principle
16. Establish a dedicated court list in the Children’s Court for care and protection proceedings involving First Nations children	Under consideration
17. Increase the areas in which Circle Sentencing is available	Under consideration
18. Expand the Drug Court to Dubbo and make plans for further expansion into other regional, rural and remote areas	Supported
19. Expand the Drug Treatment Centre at Parklea Correctional Centre	Noted
20. Provide adequate funding to ensure that drug and alcohol rehabilitation services are available to support referrals from the Drug Courts	Supported in principle
21. Provide adequate funding for the establishment of the Walama Court in the District Court of NSW	Under consideration
<b>Police Suspect Target Management Program</b>	
22. That in the reviews of the Suspect Target Management Program, there be consideration of the removal of the program for under 14 year olds	Noted

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