

# The incarceration equation

ALRC report seeks reductions in Indigenous remand population



*A Pathway to Justice,*  
by Gilimbaa artist/  
designer Rachael Sarra,  
Goreng Goreng

The Australian Law Reform Commission has reported to the Federal Government on its examination of incarceration rates for Aboriginal and Torres Strait Islander peoples.

Its recommendations include facilitating the release on bail for accused Aboriginal and Torres Strait Islander people, when risk can be appropriately managed.

## Bail likely to be refused

Some 28% of all accused people held in prison on remand are Aboriginal and Torres Strait Islander people.<sup>1</sup>

In its report, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (2017),

the ALRC found that a large proportion of Aboriginal and Torres Strait Islander people held on remand did not receive a custodial sentence upon conviction, or may have been sentenced to time served while on remand.

This suggests many Aboriginal and Torres Strait Islander prisoners may be held on remand for low-level offending. This particularly affects female Aboriginal and Torres Strait Islander prisoners.

Aboriginal and Torres Strait Islander peoples are less likely to be granted bail than non-Indigenous people.<sup>2</sup> Irregular employment, language barriers, previous convictions for often low-level offending or breach of court orders, and a lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail. Aboriginal and Torres Strait Islander people may also be unlikely to meet pre-release requirements, especially sureties.

In 1991, the Royal Commission into Aboriginal Deaths in Custody received a submission from the Queensland Attorney-General's Department acknowledging that high rates of mental and physical disability, lifestyle, communication difficulties, and lack of education could lead to Aboriginal and Torres Strait Islander people being held on remand, not because they were attempting to 'escape justice', but because of the particular difficulties they faced in appearing at a court at an 'appointed place or time'.

Further, when bail was granted, cultural obligations to attend sorry business following a death in the community or to take care of family could conflict with commonly issued bail conditions—such as curfews and exclusion orders—and could lead to breach of bail conditions, revocation of bail and subsequent imprisonment.

The Australian Law Reform Commission (ALRC) report on Indigenous incarceration rates was tabled in Federal Parliament on 28 March. The ALRC's **Sallie McLean** discusses its recommendations.



The 2011 report, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*, observed that compliance with 'standard' conditions (curfews, resident restrictions, reporting requirements and alcohol bans) was difficult for some Aboriginal and Torres Strait Islander people.

The report concluded that "[f]ailure to comply with these conditions along with the stringent policing of minor breaches in some locations increased the risk of custodial remand for Indigenous defendants, with court delays then contributing to the length of time defendants remained in remand".<sup>3</sup>

### Bail Act 1980

There are mechanisms in place to permit or encourage bail authorities to take into account issues that arise due to Aboriginality when making bail determinations. These include legal frameworks that provide guidance to judicial decision-making, and statutory provisions to consider Aboriginality or culture in bail determinations in New South Wales, the Northern Territory and Queensland.

In Queensland, section 16(2)(e) of the *Bail Act 1980* permits bail authorities to consider submissions from a community justice group (CJG) regarding the defendant's relationship to their community, any cultural considerations, or any considerations relating to programs and services in which the community justice group participates. CJGs were established in 1993, and consist of elders, traditional owners, and other respected Aboriginal and Torres Strait Islander community members.

The ALRC found that this provision was rarely used and, when used, statutory construction had limited the application and effectiveness of the provisions. The provision permits, rather than requires, the bail authority to receive evidence relating to culture and Aboriginality. CJGs received strong support from Queensland stakeholders, although reliance on ongoing funding of CJGs renders the Queensland provision vulnerable.

### Model from Victoria recommended

The ALRC seeks to enable Aboriginal and Torres Strait Islander peoples accused of low-level offending to be granted bail in circumstances in which risk can be appropriately managed.

To this end, the ALRC recommends that all states and territories adopt a provision similar to the standalone Victorian provision, s3A of the *Bail Act 1977* (Vic.). Section 3A requires bail authorities to take into account any issues that arise due to person's Aboriginality, including cultural background and ties to family or place, and any other relevant cultural issue or obligation.

Victorian courts have interpreted s3A to also permit consideration of the over-representation of Aboriginal and Torres Strait Islander people in prison and the effects of policing practices (*Re Mitchell* [2013] VSC 59). The Supreme Court of Victoria has, however, stressed that the provision does not operate to grant bail to an Aboriginal or Torres Strait Islander applicant who presents an unacceptable risk to community safety (*DPP v SE* [2017] VSC 13; *R v Chafer-Smith* [2014] VSC 51; *Re Hume (Bail Application)* [2015] VSC 695).

The ALRC considers that a s3A provision would fill the gap in jurisdictions that currently do not have a statutory requirement to consider issues relating to a person's Aboriginality, and be a better option for those that do. Section 3A is prescriptive; it requires (rather than permits) the court to consider issues related to Aboriginality, and it is wide enough to be of broad application and to include considerations of appropriate bail conditions. Under s3A, the court can hear evidence from any person or group, including the defendant, regarding cultural issues.

The ALRC suggests that the introduction of provisions similar to s3A in bail statutes would require bail authorities to contextualise issues that arise due to a person's Aboriginality when making bail determinations and in setting conditions. The provisions should:

- require bail authorities to consider community supports, the person's role in their community and cultural obligations when determining risk. These considerations

can be balanced against the lack of otherwise permanent residency, employment and immediate family supports.

- require bail authorities to consider any previous offending – especially low-level offending – in context, particularly where a person has experienced historical and continuing disadvantage
- require bail authorities to consider remoteness, flexible living arrangements and mobility when setting bail conditions
- lower the likelihood of bail authorities imposing inappropriate conditions, including sureties, that are difficult, if not impossible, to meet
- decrease the risk that considerations of cultural practice and obligations by bail authorities will be taken into account inconsistently
- reduce the number of Aboriginal and Torres Strait Islander peoples in prison on remand – especially critical for women on remand, who may lose accommodation and custody of their children while in prison.

The ALRC further recommends that governments work with relevant Aboriginal and Torres Strait Islander organisations and legal bodies to produce guidelines for the judiciary and legal practitioners, and to identify gaps in the provision of bail supports.

*Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133) is available at [alrc.gov.au/publications](http://alrc.gov.au/publications).

Sallie McLean is principal legal officer at the Australian Law Reform Commission.

#### Notes

<sup>1</sup> Australian Bureau of Statistics, *Prisoners in Australia 2017*.

<sup>2</sup> Lucy Snowball et al, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act*, NSW Bureau of Crime Statistics and Research, July 2010, 5.

<sup>3</sup> Jennifer Sanderson, Paul Mazerolle and Travis Anderson-Bond, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*, final report, Griffith University, 2011, 4.