Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia

Report | February 2023

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1 February 2023

The Honourable Kyam Maher MLC
Minister for Aboriginal Affairs
Attorney-General
Kaurna Country
GPO Box 464
ADELAIDE SA 5001

Dear Attorney-General

Report of the Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia

On 27 September 2022, you appointed us as members of the Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia.

Our task was to inquire into the over-representation of Aboriginal people in custody in South Australia and to develop options by which to address this disparity within the justice system.

We have the honour of presenting this report to you of our inquiry into these matters.

Yours sincerely

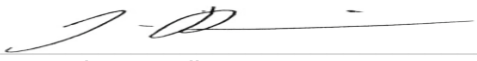
Heather Agius

Distinguished Professor Larissa Behrendt AO

Chris Larkin

Leanne Liddle

Professor Tracey McIntosh MNZM



Jonathan Rudin

Major Sumner AM

Adjunct Associate Professor Scott Wilson

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Acknowledgment of Country

The Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia (Commission) acknowledges and respects Aboriginal peoples as the state's First Peoples and nations, and recognises Aboriginal peoples as Traditional Owners and occupants of lands and waters in South Australia.

The Commission recognises:

- the spiritual, social, cultural and economic practices of Aboriginal peoples come from their connection to traditional lands and waters
- maintaining cultural and heritage beliefs, languages and lores are of ongoing importance to Aboriginal peoples today, and
- Aboriginal peoples have made and continue to make a unique and irreplaceable contribution to South Australia.

The Commission also acknowledges Aboriginal peoples have endured past injustice and dispossession of their traditional lands and waters and that the effects of such injustice and dispossession are still felt today.

Please be aware that the content in this document may be distressing or raise issues of concern for some readers.

There are a range of services available if you need support.

Lifeline provide 24/7 crisis support and can be contacted on 131 114. Beyond Blue also provide support services and can be contacted on 1300 224 636.

The task of the Commission

By Letters of Appointment dated 27 September 2022, the Attorney-General, the Honourable Kyam Maher MLC, appointed an eight-member commission to serve as an Advisory Commission into the incarceration rates of Aboriginal peoples in South Australia. The Commission's members included Aboriginal Elders, community representatives and academics.

The Terms of Reference required the Commission to inquire into and provide advice on lowering the over-representation of Aboriginal people in custody in South Australia.

The Terms of Reference further provided that the Commission was to operate as a time-limited group until 31 December 2022. A short extension to this timeframe was granted, requiring the Commission to report early in 2023.

Scope

The scope of the Commission was to:

- consider factors contributing to the disproportionate incarceration of Aboriginal peoples in South Australia
- identify ways to address the disparity in incarceration rates, with a focus on Aboriginal peoples in contact with the criminal justice system, and
- make recommendations for how Government could reduce this disparity.

While the Commission was limited by the Terms of Reference to focus on the factors that contribute to the disproportionate incarceration rates of Aboriginal peoples *at all points in the criminal justice system*, in the Commission's view, without addressing the historical, social and economic disadvantage suffered by Aboriginal people, any attempt at reducing the disproportionate incarceration rates of Aboriginal people will fail or, at the very least, the impact will be limited.

Accordingly, the Commission has focused its advice on the practical, targeted interventions and reforms that must be made within the criminal justice system to address the disparate incarceration rates of Aboriginal people in South Australia. Reforms must also be made outside the criminal justice system, to address the impact of historical and socio-economic disadvantage on Aboriginal people.

We recognise that some members of the community, and indeed of this Commission, consider themselves abolitionists. That is, they are of the view that prisons should be abolished, and the system should shift from one of punishment and institutionalisation, to support and rehabilitation with a focus on creating the conditions for a just society. This Commission did not explore this concept, however we acknowledge advocates for this reform.

Terminology

Aboriginal

The Commission respectfully uses the term 'Aboriginal' to refer to people who identify as being of Aboriginal origin, Torres Strait Islander origin, or both.

The Commission recognises there are a number of people with Torres Strait Islander heritage living in South Australia and does not intend to diminish or deny the importance of this cultural and linguistic diversity.

Incarceration

The Commission understood the term 'incarceration' to be synonymous and interchangeable with 'custody' and 'imprisonment'.

South Australia

Some Aboriginal cultures and communities regard state borders and other geographical borders as immaterial, and instead view land as an inseparable and important part of cultural identity.[1]

Whilst recognising this and the joint land and policing arrangements in the far north of the state, the Commission relied on data provided by the Australian Bureau of Statistics,

and South Australian Government agencies and the methodologies underpinning the collection, analysis and release of such data.

Methodology

Many inquiries, reviews, reports and political statements have focused on issues relating to the incarceration of Aboriginal people and the death of Aboriginal people whilst in custody. The Commission located its role in the context of these many previous reports and inquiries. That is, the Commission saw its role as complementing and augmenting the significant number of findings and recommendations of previous inquiries and reports.

Accordingly, the Commission focussed its deliberations on four discrete yet interrelated topics:

1. The drivers of repeated contact with the criminal justice system
2. The interactions police and courts have with Aboriginal people, and the impact of those interactions on incarceration rates
3. Bail and remand, and
4. Culturally responsive custodial options and alternatives to custody.

The Commission met on seven occasions between October 2022 and January 2023 to deliberate and deliver a report in early 2023 as required by our terms of reference. Our inquiry was constrained by this timeline.

As such, while we have endeavoured to thoroughly consider the primary factors that contribute to the disproportionate incarceration rates of Aboriginal peoples in South Australia, given the limits of the timeframe and our Terms of Reference, we may not have considered *all* factors. The absence of consideration of matters in this report should not be interpreted as this Commission having considered those matters immaterial or inconsequential, or as not having considered those matters at all.

It must also be acknowledged that some of the recommendations in this report would, if implemented, benefit the organisations represented by some members of this Commission.[2] Nevertheless, the recommendations throughout this report are supported by all members of this Commission.

The need for change

The over-representation of Aboriginal people in our prisons is a longstanding, widely acknowledged and wholly unacceptable fact.

In 1991 the Royal Commission into Aboriginal Deaths in Custody (Royal Commission) identified, and made recommendations to address, the over-representation of Aboriginal people in custody. Since that time, in South Australia the Aboriginal adult proportion of the total prisoner population has increased from 14% in 1991 to 25% in 2022.[3]

The over-representation of Aboriginal adults on remand in South Australia is even more pronounced; 61% of all Aboriginal adults in prison are on remand, compared to 46% of all prisoners (i.e., both Aboriginal and non-Aboriginal) being on remand.[4]

Alarmingly, while Aboriginal young people represent 4.8% of the general population aged 10 to 17 years in South Australia, in 2020-21 43% of the young people in detention or under supervision in the community were Aboriginal. In 2020-21, an Aboriginal young person was 24 times more likely to be in detention than a non-Aboriginal young person.[5]

All Australian governments have committed to Closing the Gap and reducing the rate of Aboriginal young people and adults in incarceration. However, the rate at which Aboriginal adults are incarcerated is worsening both nationally and in South Australia. It is distressing and unacceptable that Aboriginal people in Australia are the most incarcerated people in the world.

Aboriginal people in South Australia are incarcerated at higher rates than non-Aboriginal people, and are also paroled and sentenced to community-based sentences at lower rates. In addition, anecdotal evidence shared by Commission members disclosed examples of over-policing, excessive responses when police are called upon for assistance or attendance and other behaviour bordering on harassment.

The current justice system is not working and is failing Aboriginal children, young people, and adults.

The impact that this failing system has on Aboriginal people cannot be understated. Episodes of imprisonment disrupt a person's life, development, social-connections, education and employment, and can fracture a family unit, risking children entering the child protection system. This disruption, and the experiences in prison, can exacerbate the risk of further involvement in the criminal justice system following release.

There is also a strong economic argument for change. The total expenditure per prisoner per day in South Australia in 2020-21 was $219.97, or $80,300 per year.[6] Modelling by PwC in 2017 found that the incarceration of Aboriginal peoples was costing the Australian economy $7.9 billion per year in prison costs. It also predicted that if nothing was done to address incarceration rates, that cost would rise to $19.8 billion per year in 2040.[7] These costs significantly increase when you consider other impacts associated with imprisonment, such as police and courts, as well as the devastating related social costs including homelessness and mental health impacts.

The current system could be characterised as a significant investment in failure. Transformative change will be expensive, but the status quo is both expensive and failing.

Diversion and early intervention investment has clear long term cost benefits. One study concluded that every one dollar spent in this way in Australia would result in up to $2.40 in savings for criminal justice and tertiary health and human services.[8]

The recommendations and reforms in this report will require ongoing commitment and investment from government to achieve the transformational change that is required. If government is serious about change, it must transform the criminal justice system by investing in evidence-based reforms that will address the drivers of incarceration and reduce offending. Government cannot continue to invest in the existing criminal justice system that fails Aboriginal South Australians.

> *We're not going to police our way out of racism. We're not going to incarcerate our way out of racism. We're not going to incarcerate our way out of poverty.*
>
> - Professor Tracey McIntosh MNZM -

A transformed criminal justice system must be based on the following six pillars. A consolidated list of the recommendations in each of these pillars is provided at the end of the report.

Six Pillars of Transformative Change

Address and eliminate racism

Racism in all its forms pervades the criminal justice system and, as a destructive relic of colonisation, contributes to the over-representation of Aboriginal people in custody.

Actors within the criminal justice system, particularly those with whom Aboriginal people are likely to have first contact such as police, prosecutors, defence counsel and members of the judiciary, must have an advanced understanding of Aboriginal culture, the intergenerational disadvantage experienced by Aboriginal people and the unconscious bias towards Aboriginal people that permeates the system.

Racism must also be eliminated throughout society, whose attitudes fuel the “tough on crime” narrative, the practical application of which disproportionately affects Aboriginal people. This starts with education in schools and kindergarten.

Increase accountability

There is an absence of genuine introspection and accountability from the Government of South Australia with respect to the criminal justice system failing Aboriginal people. An independent, statutory body must be established to monitor and audit justice initiatives affecting Aboriginal people. Providers must also be held responsible for the services they deliver to Aboriginal people, to ensure better justice outcomes.

Discriminatory barriers that discourage or prevent Aboriginal people from accessing complaint mechanisms must be identified and removed.

Facilitate self-determination and leadership

Improving justice outcomes for Aboriginal people is the shared responsibility of government, Aboriginal communities and service providers. The necessary transformations to the criminal justice system need to be led by Aboriginal people. The Government of South Australia must invest in the capability and capacity of Aboriginal Community Controlled Organisations to deliver culturally responsive services that meet the needs of Aboriginal people across the state.

Steps must also be taken to increase the representation of Aboriginal people in key decision-making roles.

Six Pillars of Transformative Change

Intervene early

Aboriginal children and young people comprise a significant proportion of those involved in both the child protection and youth justice systems.

There is a strong link between children being placed in State care and subsequent risk of contact with the youth justice system. This, in turn, increases the risk they will become enmeshed within the adult criminal justice system.

To break this cycle, early intervention must be prioritised using culturally responsive early intervention support services and programs. It is also critical that the government raises the minimum age of criminal responsibility to 14 years.

Support and rehabilitate

Prison is a profoundly non-therapeutic environment. It is important that Aboriginal people have access to culturally responsive rehabilitation and other support services whilst in prison, including on remand.

Support for rehabilitation must start at first contact with the criminal justice system and continue after release. A case management approach that ensures the integration of all necessary services (particularly accommodation) would maximise the prospects of effective reintegration.

Particular attention needs to be given to the support and rehabilitation needs of Aboriginal women.

Reform service responses

Aboriginal values and justice practices are largely absent from the court process and policing, leaving the court system and policing practices embedded with structural and systemic biases.

The operation of the Nunga Courts needs to be expanded to hear bail applications; the number of Aboriginal Community Courts must be increased; the requirement to plead guilty to access intervention programs must be removed; and the use of cultural reports needs to be mandated.

Legislative shortcomings (particularly in relation to cautioning, bail, parole and the imposition of conditions on bail, parole and community-based sentences) must also be addressed.

Address and Eliminate Racism

Racism is the problem.

- Heather Agius -

The criminal justice system is an institution of colonial infrastructure imposed on Aboriginal people since first contact. While the system has evolved over time, the basic structure remains the same and is designed in a way that creates an inherent disadvantage for Aboriginal people. The racism that exists in the criminal justice system is just part of the broader systemic and individual racism that is pervasive in all other areas of society.

There is a slow violence of racism that builds over an Aboriginal person's lifetime. That exposure, whether directly or indirectly, to poverty, to interactions with the child protection system, to the treatment or witnessing the treatment of Aboriginal people by police and in the justice system, all have a significant, cumulative impact on the trajectory of an Aboriginal person within the criminal justice system.

Considering the high proportion of criminal matters being heard involving Aboriginal people as both victims and perpetrators of crime, it is vital that criminal justice officers have a working understanding of Aboriginal culture.

There is a clear lack of representation of Aboriginal people in the judiciary, police and the legal profession. Too often, non-Aboriginal people are making decisions that impact Aboriginal people and communities despite not having knowledge about Aboriginal people and culture, or a full understanding of the ongoing impacts of colonialism. This lack of knowledge leads to unconscious biases, racist behaviours and poor decision-making.

Consequently, all people involved in decision-making for Aboriginal people must have appropriate knowledge, skills and understanding of Aboriginal issues and the likely consequences of those decisions. There is no room for ignorance, unconscious bias or conscious racism.

This Commission believes that ongoing and mandatory cultural competency training and education for the judiciary is vitally important and recommends the implementation of recommendation 96 of the Royal Commission.

Recommendation 1

That, in accordance with recommendation 96 of the Royal Commission into Aboriginal Deaths in Custody, the National Judicial College of Australia and the Australasian Institute of Judicial Administration mandate ongoing professional development for judges and magistrates in the areas of cultural competence and unconscious bias, including systemic and institutional racism and intergenerational disadvantage of Aboriginal people. Training should be tailored to the region and delivered by Aboriginal Community Controlled Organisations and / or Aboriginal Elders and community leaders.

Recent media reports highlighting the racist attitudes of some police officers reflect a common experience of Aboriginal people and underscore the importance of a top-down approach to training and culture change within police.

It is essential that police officers at all levels be required to participate in training as a means of achieving full scale cultural change within the organisation. We are of the view that South Australia Police's (SAPOL) current cultural awareness training is insufficient in scope, does not appear to be mandatory for all staff, and does not appear to differentiate between new recruits and long-term employees (including the most senior police and decision-makers within SAPOL).

Recommendation 2

That, in accordance with recommendation 228 of the Royal Commission into Aboriginal Deaths in Custody, South Australia Police mandate comprehensive and ongoing training for police officers in the areas of:

(a) cultural competence and unconscious bias, including systemic and institutional racism and intergenerational disadvantage of Aboriginal people

(b) interaction between police and Aboriginal people, and

(c) communication and consultation with Aboriginal communities regarding the de-escalation of youth offending.

Training should be tailored to the region and delivered by Aboriginal Community Controlled Organisations and / or Aboriginal Elders and community leaders.

Shifting the narrative

While some things can be done to address the biases inherent in the justice system, these changes will not be effective or withstand changes in government unless accompanied by a broader shift in community attitudes. Throughout our inquiry we noted instances of prejudice and injustice that stemmed from faulty assumptions.

The media play a significant role in driving the narrative surrounding Aboriginal people in Australia. Whether it be contact with the criminal justice system, or the disadvantage experienced by Aboriginal people, deficit-lens reporting fuels the negative stereotypes and racism that contributes to a lack of appetite for change.

One of the many myths perpetuated by the media and society generally, is that Aboriginal disadvantage is no longer caused by systemic issues, but by individual choices. However, the main drivers of offending continue to exist outside the criminal justice system and are closely linked to the social and economic disadvantage experienced by Aboriginal people.

Poverty, trauma, poorer health outcomes, child protection and incarceration; these are not things Aboriginal people choose. It must be acknowledged that these issues exist in Aboriginal communities as a result of both historic and current colonial practices.

The “tough on crime” approach fuels intolerance within the community and is a barrier to support for the therapeutic interventions that are known to work. Because of this rhetoric, evidence-based approaches are perceived as being “soft” on crime. This is another myth that needs to be corrected.

This “tough on crime” approach can result in reactionary legislative changes which negatively impact on and discriminate against Aboriginal people.

Recommendation 3

That the Government of South Australia commission an independent review of all criminal justice legislation to identify and amend provisions that unfairly discriminate against and prejudice Aboriginal people.

Culture and education

You've got people learning about Aboriginal culture too late, when they are already set in their old ways … Growing up, we learnt all about non-Aboriginal people ... I know everything about you. You know nothing about me.

- Major Sumner AM -

There is a distinct lack of education in our schools about Aboriginal culture, language and history, which is in direct contrast to the breadth of material on British history and language. This sends a message to young Aboriginal and non-Aboriginal people alike that Aboriginal history and culture has little value in wider Australian society.

This Commission emphasises the importance of getting back to culture. Aboriginal culture and belief systems guide Aboriginal peoples' morals, values, traditions and customs. The importance of sharing cultural knowledge and stories with Aboriginal children cannot be overstated.

Aboriginal people have known for a long time that their children have stronger emotional wellbeing and improved life outcomes if they have a strong cultural identity.

In addition to supporting a connection to culture for Aboriginal children, more also needs to be done to ensure non-Aboriginal children grow up with a greater understanding and deeper respect for Aboriginal culture. There is a duty to take action for the next generation. This is the only way to really stamp out racism.

We need to look at culture and bring that back … That worked for us for thousands and thousands of years … All the laws that were brought from England; we need to pack them into a box and send them home.

- Major Sumner AM -

This Commission believes awareness of Aboriginal culture for all children needs to start at school, or ideally before school, to challenge biases before they become ingrained.

Recommendation 4

That the Department for Education, Catholic Education South Australia, and the Association of Independent Schools South Australia ensure more comprehensive education is provided in schools and kindergarten with respect to Aboriginal history and culture, as well as colonialism. This should include programs where Aboriginal Elders and community leaders educate Aboriginal and non-Aboriginal children and young people about Aboriginal culture, belief systems, values, traditions and customs.

Increase Accountability

Government accountability

There is not enough self-reflection and accountability from government as to how internal structures cause, contribute to and perpetuate Aboriginal offending.

Reviews of government processes often privilege evidence of compliance, rather than seek a reflective, qualitative audit of how implementation of programs and services perform and work.

The Royal Commission made 339 recommendations aimed ultimately at preventing the death of Aboriginal people in custody. On 24 October 2018, the Deloitte Access Economics review of the implementation of the Royal Commission's recommendations was tabled in the Australian Senate. It found that 78% (or approximately 264) of the 339 recommendations had been completely or mostly implemented.[9] There have been several criticisms levelled at the review, including by the Centre for Aboriginal Economic Policy Research at the Australian National University.[10] Observing that the findings of the review were rendered 'largely worthless'[11] by the systematic methodological flaws, the Centre recommended the establishment of national independent monitoring to review the real implementation status of the Royal Commission's recommendations.[12]

We agree with the views expressed by the Centre for Aboriginal Economic Policy Research with respect to the need for independent monitoring of the implementation of all recommendations relating to the rate at which Aboriginal people are incarcerated.

The South Australian Government should wholly, meaningfully, and consistently implement the Royal Commission's recommendations.

We believe that self-regulation of criminal justice and adjacent agencies, particularly in addressing complaints, reinforces feelings of mistrust of government bodies within the Aboriginal community.

To increase confidence and trust in the criminal justice system, complaints processes (such as those through which complaints against police, corrections and courts are made) must be easily accessible, culturally appropriate and impartial.

In this regard, we strongly support implementation of recommendation 226 of the Royal Commission, and in particular that complaints against police should be made to, be investigated by or on behalf of and adjudicated upon by a body or bodies totally independent of police.

Further, this Commission recommends that the independent body responsible for managing police complaints should have the power to make recommendations to SAPOL to change their policies and procedures which are considered to be unreasonably discriminatory against Aboriginal people.

To support Aboriginal people to exercise the rights to which they are entitled, the Aboriginal Legal Rights Movement should be funded to assist Aboriginal people to engage with the various criminal justice complaints and oversight bodies. We recommend Aboriginal Legal Rights Movement be provided adequate funding to perform a state-wide legal representation and advocacy service (including with respect to accessing and engaging with complaint services) below, at recommendation 41.

Recommendation 5

That the Government of South Australia identify and remove the systemic barriers that prevent or discourage Aboriginal people from accessing complaint mechanisms in the criminal justice system.

Recommendation 6

That the Government of South Australia implement recommendation 226 of the Royal Commission into Aboriginal Deaths in Custody, which relates to police complaints management and investigation.

Recommendation 7

That the independent body responsible for managing and investigating complaints against police have the power to make recommendations to South Australia Police to change their policies and procedures which are considered to be unreasonably discriminatory against Aboriginal people.

Some states and territories[13] have implemented the recommendation of the Australian Law Reform Commission to enter into Aboriginal Justice Agreements, which demonstrates those governments' commitment to, and accountability for, improving outcomes for Aboriginal people. Commission members have been involved in negotiating these agreements and believe that they go some ways to balancing the

underlying power dynamic. They can also provide a mechanism for ongoing dialogue and consultation between Aboriginal people and the respective state governments on justice issues.

However, these agreements must be accompanied by infrastructure and resourcing that sufficiently support the desired objectives. We believe a key component of this infrastructure is bipartisanship. In the Northern Territory, bipartisan support for the development and implementation of the Aboriginal Justice Agreement 2021–2027 ensured that its objectives were clear and more likely to be supported over the long-term. It also had the effect of attracting significant investment from philanthropists. Addressing the incarceration rates of Aboriginal peoples in South Australia must transcend politics. However, any lack of bipartisan support should not be a barrier to entering into and Aboriginal Justice Agreement. The time to act is now. This is a crisis.

Due to the complex nature of accountability, we are of the view that an independent body consisting of Aboriginal representatives should be established by legislation to review Aboriginal justice issues. The intention is that this body would have responsibility for monitoring and auditing the progress of implementation of Aboriginal justice initiatives and be given sufficient statutory powers to ensure the government is held accountable to Aboriginal justice targets.

Recommendation 8

That the Government of South Australia fund and establish through legislation an independent Aboriginal justice body to monitor, audit and maintain accountability of the Government of South Australia in relation to justice initiatives affecting Aboriginal people, including the recommendations contained within this report.

This body should also be responsible for:

(a) monitoring the development and implementation of an Aboriginal Justice Agreement

(b) commissioning a review into the implementation of:
    i. the recommendations of the Royal Commission into Aboriginal Deaths in Custody by an appropriately qualified person (including having sufficient cultural knowledge)
    ii. the recommendations of previous coronial inquests following the death of an Aboriginal person in custody, and

(c) commissioning a review into the existence and impact of racial bias and discrimination in the youth and adult criminal justice sectors.

Accountability of non-government service providers

A large proportion of programs and services to support Aboriginal people and communities are provided by non-government service providers. However, many of these services are not provided by Aboriginal Community Controlled Organisations (ACCOs). This decision is made in direct opposition to evidence that outcomes for Aboriginal people are improved when services are developed and provided by ACCOs.

Too often we see programs being touted as filling a gap or benefitting Aboriginal people, with no publicised information about their effectiveness. More should be done to hold providers of services to Aboriginal people to account (including services provided by ACCOs), to ensure the funding delivers positive outcomes for Aboriginal people.

> *It's all about accountability. When funding is provided to non-government organisations, particularly non-Aboriginal organisations, those organisations must be held accountable for delivering programs and services that are appropriate and responsive to the unique needs of Aboriginal people.*
>
> - Heather Agius -

Recommendation 9

That the Government of South Australia establish a formal, centralised system to annually audit non-government service providers who provide services and programs to Aboriginal people, to ensure those services are achieving best outcomes for Aboriginal people. At a minimum, audits must cover expenditure, service quality, service outcomes and cultural competence of service delivery, and include the perspectives of service recipients.

Data

The National Agreement on Closing the Gap recognised shared access to data as a priority reform to achieve the socio-economic targets, including the reduction of over-representation of Aboriginal adults and young people in the criminal justice system.

It is critical that transformational change to the justice system is supported by evidence to ensure improved outcomes for Aboriginal people. As partners in this change, Aboriginal people must have access to, and the capability to use, relevant data and information. Shared understanding leads to evidence-based, culturally-informed solutions.

We are of the view that an Aboriginal justice data strategy is needed to improve the collection of data relating to Aboriginal people in contact with the criminal justice system, particularly data which can demonstrate the trajectory of offenders into and through the child protection and criminal justice system, and those at risk of offending.

This strategy should be based on the principles of Aboriginal data sovereignty.[14]

Recommendation 10

That the Government of South Australia develop an Aboriginal justice data strategy.

Facilitate Self-determination and Leadership

Self-determination is a fundamental right under the UN Declaration on the Rights of Indigenous Peoples, as well as a key recommendation of the Royal Commission. Self-determination can be achieved, in part, by investing in, empowering and partnering with Aboriginal people and communities, and ACCOs.

This Commission firmly believes that services designed and delivered by ACCOs produce better outcomes for Aboriginal people, and that this principle applies equally to the criminal justice system. However, the current capacity and capability of ACCOs must be strengthened. To do so, the Government of South Australia must focus on sustainably resourcing ACCOs to design, deliver and lead the services and programs they provide.

Procurement and contracting arrangements should not reinforce colonising or neo-colonising practices. Current procurement processes disadvantage ACCOs given their lower economies of scale and limited competitive tendering expertise and experience when compared to larger not-for-profit organisations.

To facilitate self-determination and respect the expertise of ACCOs, contracting terms should empower and enable ACCOs to design and deliver services by avoiding prescription and dictation.

Further, a commitment to long-term funding is needed if ACCOs are going to attract and retain talent and develop long-term capabilities and succession planning.

Recommendation 11

That the Government of South Australia provide secure, long-term funding to Aboriginal Community Controlled Organisations to promote the self-determined delivery of culturally appropriate and safe services to Aboriginal people.

Aboriginal representation

Aboriginal people are both over-represented in the criminal justice system and under-represented in leadership and executive decision-making positions. Decisions about and for Aboriginal people in key areas are not being made or informed by Aboriginal people, despite the growing body of evidence that Aboriginal community-driven services produce the best outcomes for Aboriginal people. The criminal justice system is no exception.

Judiciary

This Commission is concerned about the judicial appointment process, noting that current arrangements do little to promote diversity within the judiciary. Cultural competence, awareness or experience working with Aboriginal communities does not appear to be a minimum mandatory requirement for potential nominees.

> *I've asked people, "do you respect the person sitting there?" They say, "no, I don't." I ask, well do you respect the Elders here. They say "yeah, I do." We need to put our people up there on the bench.*
>
> - Major Sumner AM -

The required qualifications and the process for appointing judicial officers is governed by several pieces of legislation, including the *Constitution Act 1934* (SA) and separate legislation for the different South Australian courts. The Attorney-General identifies a preferred candidate and then obtains approval from Cabinet, before submitting a recommendation to the Governor.

The Commission is of the view that the judicial appointment process should be reformed to be open and transparent and promote diversity in the judiciary.

Recommendation 12

That the Attorney-General establish an open judicial appointment process where opportunities for appointment are advertised and candidates apply and are interviewed by a panel with Aboriginal representation. The panel should be charged with making recommendations on judicial appointments to the Attorney-General.

Police

The Independent Review of Sex Discrimination, Sexual Harassment and Predatory Behaviour in South Australia Police, conducted by the Equal Opportunity Commissioner, found bullying, disability discrimination and racism had been perpetrated in SAPOL.[15] Given these findings, and the lack of Aboriginal employees generally,[16] we are concerned there is a lack of support for Aboriginal people working within SAPOL.

There are significant barriers to Aboriginal people pursuing a policing career. When an Aboriginal person applies to be a part of the police force, they are entering an institution that is seen by their community as a continuation of colonisation. They are becoming linked to an institution which is seen to be responsible for disproportionately arresting and incarcerating Aboriginal people. This is a heavy burden to carry.

Steps must be taken to ensure SAPOL provides a culturally safe working environment. Aboriginal-specific recruitment programs are not sufficient. SAPOL needs to provide an environment that is safe, supportive and conducive to Aboriginal people being able to effectively perform their important role.

Recommendation 13

That the Government of South Australia commission an independent review into the experiences of current and former Aboriginal employees of South Australia Police. This review should, at a minimum, identify barriers to the recruitment and retention of Aboriginal staff, as well as their progression into leadership positions. The review should propose ways to create a culturally safe and responsive working environment.

In South Australia, Community Constables are employed by SAPOL to provide a specialist support service to sworn police officers and to improve relations between Aboriginal people and communities, and local policing. The Royal Commission also recognised the importance of police aides or community constables, as well as others involved in community policing. We strongly support the concept of Community Constables, as well as the implementation of Royal Commission recommendations relating to community police and police aides.

A Community Constable is issued with an Instrument of Appointment pursuant to section 30 of the *Police Act 1998* (SA). They therefore have limited authority while working alone and with other Community Constables, but their authority differs when working in company with and at the direction of a police officer.[17]

This Commission is of the view that Community Constables are underutilised within the confines of their current authority, and further that the scope of their authority should be expanded to provide them with greater powers and autonomy.

We heard devastating examples of police call outs involving Aboriginal people that could have resulted in better outcomes if Community Constables were either first responders, present at the scene or, at a minimum, providing advice to attending officers.

Community Constables can provide cultural context and information about the family and community circumstances surrounding a person of interest to the police. We are of the view that this advice is crucial to inform appropriate policing responses and to minimise the unnecessary escalation of matters. We recognise there are various models by which this advice could be provided.

Recommendation 14

That the review undertaken in response to recommendation 13 also include the following:

(a) identify current limitations to the use and role of Community Constables

(b) identify opportunities to increase the scope, authority and use of Community Constables, including the involvement of Community Constables as either first responders or as being present to advise on policing approaches to actions such as enforcing warrants, conducting arrests and undertaking welfare checks

(c) identify any barriers to career progression for Community Constables to become sworn Officers, and

(d) identify appropriate structural governance for Community Constables within South Australia Police, including consideration of supervision by Aboriginal Commissioned Officers dedicated to community policing.

Parole Board

The Parole Board of South Australia (Parole Board) must consist of 11 members, at least one of whom must be an Aboriginal person.[18]

We are critical of the limited representation of Aboriginal people on the Parole Board, particularly when considering the sheer disproportion of Aboriginal people in prison. This speaks to Aboriginal peoples' exclusion from roles of critical importance and decision-making, and the disempowerment of Aboriginal people within the criminal justice system more broadly.

Recommendation 15

That the Government of South Australia amend the *Correctional Services Act 1982* (SA) to:

(a) increase the number of Aboriginal members on the Parole Board of South Australia

(b) require consultation with Aboriginal community members for appointments to the Parole Board of South Australia, and

(c) require that an Aboriginal member is present for all Parole Board of South Australia hearings involving an Aboriginal prisoner.

Intervene Early

Children and young people

Throughout our inquiry, this Commission has repeatedly noted the importance of providing culturally responsive support services to Aboriginal children and their families who are at risk of coming into contact with the child protection and justice systems.

There is a strong link between the disproportionate detention rate of Aboriginal children and young people and the disproportionate imprisonment rate of Aboriginal adults.[19] These findings have been validated by several studies, including one which found that 90% of Aboriginal children who appeared in a children's court went on to appear in an adult court within eight years.[20] Every year that we can delay a child's first criminal sentence can significantly reduce the likelihood of them reoffending.[21]

These studies, together with the experience of this Commission, highlight the importance of early intervention as a means of breaking the relationship between contact with the youth justice system and subsequent involvement in the adult criminal justice system.

Early intervention can be achieved through justice reinvestment by diverting money back into the community. The Maranguka Justice Reinvestment program in Bourke is an example of an alternative approach that decolonises the system. Evaluation of the Maranguka project found that $3.1 million in savings were made in a one-year period, with significant reductions in incidents of violence and related crimes in the area.[22]

Child protection and subsequent contact with the youth justice system

> *There needs to be a real examination of this pipeline that happens between child protection and the criminal justice system. Children are too quickly criminalised when they're in out-of-home care.*
>
> - Distinguished Professor Larissa Behrendt AO -

This Commission is gravely concerned with the relationship between Aboriginal children placed in State care and subsequent contact with the youth justice system. As discussed above, contact with the youth justice system is a strong indicator a person will subsequently become involved in the adult criminal justice system, and potentially be incarcerated.

The Australian Institute of Health and Welfare has reported that Aboriginal children and young people comprised 46% of all children and young people involved in both the child protection and youth justice systems in South Australia.[23]

Given the nexus between placement in the child protection system and contact with the youth and adult criminal justice systems, greater investment must be made in programs that aim to intervene earlier with children in State care who display behaviours that risk involvement in the youth justice system.

Recommendation 16

That the Government of South Australia fund evidence-based programs to disrupt the relationship between children being placed in State care and the risk of contact with the criminal justice system. These programs should take a holistic approach to supporting the family unit as well as the child or young person, and be designed and delivered by Aboriginal Community Controlled Organisations.

Minimum age of criminal responsibility

These children... You are taking them away from their comfort zone, taking them away from their home, their families and their relatives and putting them there in detention. That needs to change.

- Major Sumner AM -

This Commission believes it is essential that the age of criminal responsibility be raised.

Currently, a child as young as 10 years of age can be held criminally liable.[24] The principle of *doli incapax*[25] provides that children aged between 10 and 14 years do not have the necessary knowledge to have criminal intent, unless proven otherwise.[26]

Despite this, the data shows that children between 10 and 14 years of age are still receiving custodial orders.

	Aboriginal children		Non-Aboriginal children	
	2019–20	2020–21	2019-20	2020-21
Children who received a guilty outcome	24	21	38	17
Children who received a custodial order	6	0	0	3
Children who received a non-custodial order	18	18	38	12

Table 1: Defendants with a guilty outcome (excluding traffic offences), principal sentence by Aboriginal status for South Australian children aged between 10 and 14 years[27]

Children under the age of 14 do not belong in the criminal justice system.

Incarceration of children under the age of 14 years is inconsistent with medical evidence that shows children within this age group are developmentally and neurologically unable to form criminal intent. Evidence shows that young people demonstrate impulsive, short-term and peer-influenced decision making and behaviours and therefore do not have the same ability as adults to avoid criminal situations.[28]

The effects of the removal of Aboriginal children from communities to detention are reminiscent of those felt by Aboriginal people who were subjected to the forced removals that taint our colonial history. The same factors that compounded the traumas of the stolen generation, of being removed from country and family, and being unable to use language or practice culture, reinforce the intergenerational trauma already being experienced by our people.

> *The majority of these kids are 13 and 14 anyway, so raising the age to 12 is not really going to have that much of an impact. Raising the age to 14 will, but you need to make sure that diversionary activities and programs are available.*
>
> - Adjunct Associate Professor Scott Wilson -

Accordingly, we are of the view that the minimum age of criminal responsibility must be increased to 14 years in South Australia.

Recommendation 17

That the Government of South Australia legislate to raise the minimum age of criminal responsibility to 14 years.

Raising the age of criminal responsibility does not mean that children under 14 years should be left without any intervention or support. Instead, intensive, holistic, family-based early interventions and services are required to provide support to address the causes of their behaviour. Such interventions and services should not just be targeted at children who display offending behaviours, but also at children whose needs are not being met. Providing support to children when they begin to display what would otherwise be considered criminal behaviour is too late.

A whole-of-family approach is required to bring siblings and young people together, rather than focussing on one child who is showing offending behaviours at the expense of the rest of the family. This is how we build stronger family relationships and stronger young people.

To support raising the age, alternative intervention options should take a behaviour change and health-based approach and be devised, implemented, and run by ACCOs.

Recommendation 18

That the Government of South Australia fund Aboriginal Community Controlled Organisations to develop and implement health and behavioural intervention programs and support services for young people under 14 years of age who display offending behaviours, or behaviour associated with needs not being met, and their family members.

Support and Rehabilitate

A key tenet of supporting and rehabilitating Aboriginal offenders is ensuring that strengths-based supports are provided at all critical junctures of the criminal justice system and post-release, access to which is facilitated by culturally responsive case management. This is known as throughcare; services that provide comprehensive case management for a prisoner in the lead up to their release from prison and throughout their reintegration within the community.[29]

This Commission believes it essential that support and rehabilitation services (if necessary) are provided to Aboriginal people as soon as they are in contact with the criminal justice system, and continue after release, including when on parole and bail. Active and rehabilitation-focused throughcare supports during and after such releases will have a greater effect on reducing recidivism.[30]

It is essential that case management services are provided by the right people who have a genuine appreciation and understanding of Aboriginal people, community and culture.

Remand

The numbers of both sentenced and unsentenced Aboriginal people in custody in South Australia has been increasing. However, the growth in Aboriginal people on remand has been more rapid.[31]

Remand is also where the disparity between Aboriginal and non-Aboriginal incarceration rates is most apparent. In South Australia, Aboriginal adults are 16 times more likely to be in prison on remand than non-Aboriginal adults.[32] Aboriginal adults are also over-represented on remand at 61% of the Aboriginal adult prison population.[33] We are of the view that this disparity, and the harm that results, must be addressed.

Remand prisoners do not have the same access to rehabilitation and other programs that sentenced prisoners do while in custody. This is problematic given some people can be on remand for up to 18 months or more.

Furthermore, we understand that a greater proportion of Aboriginal people are released from remand due to “time served” than non-Aboriginal people, due in part to the barriers of being granted bail and delays in court timeframes. This means that Aboriginal people are more likely to serve their whole time in prison on remand, without the same access

to treatment and programs as a sentenced prisoner. In this way, the presumption of innocence – which is relied upon as justification for the absence of criminogenic programs in remand facilities – actively works against remand prisoners.

The limited availability of support services and rehabilitation programs to Aboriginal people on remand for those who want them, let alone those that are culturally responsive, is unacceptable.

This Commission recommends that the Government of South Australia provide funding to ACCOs to design and deliver culturally responsive support and rehabilitative programs to Aboriginal people on remand.

We acknowledge the practical considerations that limit the availability of programs to people on remand, including the inability to accurately assess when a person held on remand will be released and whether there will be sufficient time to complete a program. Serious consideration must therefore be given to ensuring participants can access programs while on remand, as well as upon their release, as one means of supporting their transition back into the community.

Recommendation 19

That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations to design and deliver culturally responsive support and rehabilitative programs to Aboriginal people on remand.

Accommodation

The Commission is concerned about the lack of holistic case management and support services available to people on conditional release (such as bail and parole), particularly Aboriginal people.

We consider one of the most beneficial services to those exiting prison to be one that provides access to accommodation. Not only is it particularly difficult for people on bail and parole to access private accommodation upon their release, providing appropriate accommodation allows for the integration of services targeted at residents' needs.

Bail accommodation and programs are rarely culturally responsive and merely shift the carceral into communities. Resourcing must go into Aboriginal-led bail support programs that are delivered using a wellbeing, healing, cultural and strengths-based approach.

This Commission is particularly interested in the Canadian Indigenous-led bail supervision programs that provide culturally-based supports.

We are also of the view that current accommodation options available in South Australia are not appropriate for Aboriginal people, and particularly for those with drug and alcohol dependencies.

> *For a lot of Aboriginal folk, they might not have appropriate places to go. ... There needs to be an Aboriginal Community Controlled bail accommodation service in Adelaide and Port Augusta. … Some of the hostels that currently exist can be hundreds of miles away from where the person needs to be.*
>
> - Adjunct Associate Professor Scott Wilson -

Housing Aboriginal people in unsuitable accommodation that is a great distance from both their family and their obligations is problematic and is fostering an environment for continued drug and alcohol dependence and removal from Country. Instead, there needs to be ACCO-developed and delivered bail accommodation options that facilitate drug and alcohol supports.

Without appropriate supports, the risk of further involvement with the criminal justice system can be exacerbated when someone is released from prison, due to the disruption in the person's life.[34] People who have been released from prison require timely, location-specific, and culturally sensitive services for a period of time after their release to ensure they are supported in this transition.

Recommendation 20

That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations to establish bail accommodation options, at a minimum in Adelaide and Port Augusta. The services must also link clients to drug and alcohol support services.

Recommendation 21

That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations to establish culturally responsive step-down accommodation for parolees.

Recommendation 22

That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations to provide case management, culturally appropriate supervision and wraparound supports for Aboriginal people on conditional release.

Mental health

Having police responses to mental health call outs is dangerous for our people. … We need to have alternatives.

- Professor Tracey McIntosh MNZM -

A police response to an Aboriginal person, or indeed any person, experiencing a mental health issue is unsuitable in many circumstances, and a health approach is more appropriate.

Police officers are usually the first, and in some cases only, responders to mental health crises.[35] This is often due to the 24/7 nature of their work and as a result of community perceptions that people experiencing a mental health crisis pose a threat or are dangerous.[36]

As a result of this policing response, people experiencing mental ill-health are often inadvertently directed to the justice system, as opposed to the health system. This Commission appreciates the challenges that arise out of acute mental health stress and mental health call-outs. However, as a first principle there should be a 'do no harm' element. This is urgent and will require community and cross-agency collaboration and significant funding.

This Commission acknowledges police should not be expected to undertake clinical diagnostic assessments. This is a role we believe best suits specialist mental health clinics. Nevertheless, we recommend that police officers receive mental health awareness training so that they are familiar with, can recognise and respond appropriately to the symptoms of a person experiencing an acute mental illness or crisis.

Recommendation 23

That South Australia Police ensure the provision of mental health awareness training for new and current police officers so that they can recognise the symptoms of, and appropriately respond to, a person experiencing an acute mental episode or crisis.

The Commission heard that the Mental Health Co-Response trial program, involving SAPOL and Northern Adelaide Local Health Network, commenced in September 2022. This 12-month pilot program involves an experienced mental health clinician working with police officers to respond to call-outs and provide expert assessment and advice where a person may be experiencing a mental health crisis.

We commend the intent of this program, but this should not be limited to a 12-month pilot, or to the Northern Adelaide region. Research has found that it is more disruptive to put programs into a community and rip them out, than to not put them in at all.[37] Commitments must be made for long-term, sustainable funding to support effective programs.

An evaluation of this program should be undertaken to ensure it is meeting the needs of, and improving outcomes for, Aboriginal people. If the program is found to be effective, the program should be expanded to other regions.

Recommendation 24

That the Department for Health and Wellbeing and South Australia Police evaluate the Mental Health Co-Response Program to ensure it meets the needs of, and improves outcomes for, Aboriginal people. If found to be effective, the program should be expanded to other regions of the state.

It is about more than just having cultural competence training for judges and magistrates. They need to also undertake Foetal Alcohol Spectrum Disorder awareness so judges can identify defendants who have a cognitive issue, and make the appropriate referrals.

- Adjunct Associate Professor Scott Wilson -

The courts often play an important role in ensuring defendants are referred to, and have the opportunity to access, appropriate supports. It is therefore critical that the judiciary

have an awareness of key factors impacting Aboriginal communities, such as the cognitive impairments linked to Foetal Alcohol Syndrome Disorders (FASD), domestic and family violence and drug dependency, to understand the drivers of the offending behaviours before them.

The prevalence of FASD in Australia is currently unknown. It is true that 'Aboriginal people with cognitive disabilities, such as FASD, are at an increased risk of contact with the justice system'.[38] However, despite common misconceptions, this problem also pervades the broader community and is part of a broader societal issue.[39]

Although we discuss FASD in the context of Aboriginal offending, we do not intend to contribute to incorrect stereotypes. Rather, we discuss FASD in this context because it exists as a result of systemic and colonial practices. We acknowledge that, absent these systemic and colonial practices, FASD would continue to exist in the broader population.

Recommendation 25

That the National Judicial College of Australia and the Australasian Institute of Judicial Administration mandate professional development for judges and magistrates in the areas of mental health, family and domestic violence, drug dependency and cognitive issues (such as those precipitated by Foetal Alcohol Spectrum Disorders).

Women

In our experience, while many Aboriginal women will never come into contact with the criminal justice system, those who do have experienced multiple forms of discrimination, victimisation, trauma and disadvantage. These experiences must be kept in mind when implementing the recommendations we make in this report.

In South Australia, Aboriginal women are being incarcerated in increasing numbers. In 2006, there were an average of 25 Aboriginal women in full time custody in South Australia on any given day.[40] In the June quarter of 2022, this number had increased to 76.[41] These figures represent a 204% increase in the number of Aboriginal women in full time custody in South Australia over the course of approximately 16 years.

Aboriginal women are the fastest growing prison population of all prisoner cohorts. In 2016, Aboriginal women were 21.2 times more likely to be incarcerated than non-Indigenous women.[42] The rate of imprisonment for Aboriginal women was also far higher

than non-Aboriginal men (464.8 per 100,000 compared to 291 per 100,000, respectively).[43]

This Commission acknowledges that many Aboriginal men have significant histories of trauma and victimisation. We do not intend to diminish or deny these experiences. However, we also recognise the significant impact of intergenerational trauma and victimisation as both triggers of, and matters which perpetuate, the cycle of offending by and imprisonment of Aboriginal women.

Aboriginal women and girls are more likely to be survivors of domestic, family and sexual violence. As at 24 July 2022, for example, 59% of Aboriginal women in South Australian prisons were named as the protected person on an Intervention Order.[44] Aboriginal women in South Australian prisons were also approximately twice as likely as non-Aboriginal women to be listed as a protected person on an Intervention Order.[45]

The incarceration of Aboriginal women has severe consequences. Incarceration jeopardises housing and employment opportunities and further compounds Aboriginal women's experiences of trauma, dispossession and marginalisation. It can also precipitate the pathway for Aboriginal children to enter the child protection system, thereby exposing them to the unjust likelihood they will become enmeshed within the youth and criminal justice systems. It is counter-productive that the initial response or responses to a person's experience of trauma and victimisation is a carceral one.

We acknowledge the positive work underway in other jurisdictions to more appropriately address the unique circumstances and needs of Aboriginal women, such as the Life Skills Camp in Alice Springs. Women who participate in this program receive targeted rehabilitation based on cultural values and leadership.[46]

It is essential that therapeutic programs are available to all Aboriginal women, and not just those who are in prison, which addresses trauma and victimisation. Such a program must be developed and delivered by Aboriginal women and, of course, be trauma-informed.

The pivotal role of Aboriginal women in family and community structures must be recognised. Any responses must strengthen and enable communities to positively engage with anti-violence strategies.

Women experiencing domestic and family violence must be adequately supported when reporting violence to the police and through any court proceedings.

Recommendation 26

That the Government of South Australia fund Aboriginal Community Controlled Organisations to design, develop and deliver a service that provides culturally responsive trauma and victimisation supports to Aboriginal women, regardless of whether they have been convicted of an offence or are currently in custody.

Recommendation 27

That adequate funding be provided to an appropriate Aboriginal legal service, such as the Family Violence Legal Service Aboriginal Corporation (SA), to provide support and legal advice to Aboriginal women experiencing domestic and family violence.

Reform Service Responses

The structural and systemic biases that exist in criminal justice frameworks, practices and processes contribute to the over-representation of Aboriginal peoples in custody.

Each interaction with the criminal justice system builds upon a history. Negative interactions can serve to entrench adverse perceptions of police, courts and corrections, and thereby cause both short- and long-term negative outcomes. However, when these interactions are positive, the opposite can also be true.

To improve outcomes for Aboriginal people and reduce over-representation in the criminal justice system, transformational change is required to the service responses when a person interacts with the criminal justice system.

Aboriginal courts

In South Australia, there are two types of Aboriginal-specific courts, each with its own model of operation and purpose; the Nunga Court and the Aboriginal Community Court.

Nunga Court

> *We need to put our people up there or sitting around the table. Sentencing, it comes from us. We can get advice from the Magistrates and the prosecutor on what we can do, but we should turn it around, and we should put it our way.*
>
> - Major Sumner AM -

Colonisation has shaped the court system in a way that excludes Aboriginal values and justice practices. While the Nunga Court model has made some progress, overall, the westernised court system embeds systemic racism and inequalities, creating a system that impedes Aboriginal peoples' access to justice.

The Nunga Court incorporates Aboriginal community participation in the court sentencing process through the involvement of Elders and Respected Persons from the community. Where possible, these persons sit with the Magistrate and may give background information and cultural advice to the Magistrate concerning the defendant's circumstances, family or community. They may also talk to the defendant about their offending and their future plans before the Magistrate makes a decision on sentencing.[47]

Often the success of the Nunga Court is driven to a large degree by the personality, awareness, attitude and commitment of the presiding Magistrate. We believe more must be done to encourage Magistrates to drop convention and embrace the Nunga Court model.

Eligibility for the Nunga Court requires the Aboriginal adult defendant to plead guilty.[48] This Commission objects to the fact that a defendant must plead guilty to be eligible to appear before the Nunga Court and recommends that this restriction be removed.

This Commission is also of the view that Nunga Courts should be expanded to not only deal with sentencing, but also bail applications. This would ensure Aboriginal Elders and community leaders are engaged to provide guidance and advice when the court is considering whether to grant bail and the conditions to be imposed. Such an approach would increase cultural safety and better address cultural and language barriers.

The Commission appreciates that this transformative action will take time. In the interim, funding should be provided to increase the locations in which sentencing Nunga Courts operate, and to ensure Nunga courts sit frequently and consistently in regional areas.

Recommendation 28

That the Government of South Australia expand Nunga Courts to hear bail applications (not just sentencing).

Recommendation 29

That the Government of South Australia provide funding for a Nunga Court to sit frequently and consistently in regional areas, starting with Port Augusta and the APY Lands.

Court intervention programs

After a person has been found guilty, the court can defer their sentencing and grant them bail for the purposes of participating in rehabilitation or intervention programs.[49] During this time, defendants undertake an intensive intervention program to address the underlying conditions that contribute to their offending. Sentencing occurs only after the treatment intervention is complete and the person's treatment outcomes can be taken into account in sentencing. The Courts Administration Authority provide both mainstream and Aboriginal specific intervention courts.

We believe that the mainstream treatment intervention courts do not meet the needs of Aboriginal defendants. While it is acknowledged that some of the intervention programs provided through the Treatment Intervention Court are specially tailored for Aboriginal clients, very few take up this opportunity.

Aboriginal Community Courts only operate in the Elizabeth and Adelaide Magistrates Courts. These are available for Aboriginal defendants only and operate on a deferral of sentence model.

Intervention programs in the Aboriginal Community Courts provide 'wraparound' services and focus on harm minimisation. We understand they provide a culturally appropriate mechanism for sentencing with a focus on reducing drug dependence. The model has merit and should be expanded.

Whilst we support the premise of court-based interventions aimed at addressing the underlying causes of offending, the requirement to enter a guilty plea to access these interventions is severely limiting and effectively discourages defendants from participating.

Furthermore, the sanctions for non-compliance, which may include bail revocation or a period of incarceration, have the potential to increase a participant's risk of incarceration, as opposed to reducing it.

Deferred sentencing options can extend a person's engagement with the criminal justice system. This Commission understands that defendants who might benefit from such a program often instead choose to have their matter dealt with and serve their sentence quickly, rather than extending the time they may be subject to involvement with the criminal justice system, at the ongoing risk of incarceration.

Recommendation 30

That the Government of South Australia expand the number of Aboriginal Community Courts to increase the participation of Aboriginal people in culturally responsive court diversionary programs.

Recommendation 31

That the Government of South Australia remove the requirement of a guilty plea for eligibility for Nunga Court and court intervention programs.

Cultural reports

Understanding the underlying causes of offending is incredibly important at the sentencing stage of the trial process. Courts need to look at why offences are committed in a broader social context. Cultural reports are one mechanism to achieve this and may mitigate the lack of knowledge displayed by some members of the bench to cultural and social issues experienced by Aboriginal people, as well as challenge long-embedded stereotypes.

Gladue reports, for example, arise from the principles from the decision of *R v Gladue* in Canada.[50] The Gladue principles require judges to consider two factors when sentencing an Indigenous offender; the unique systemic and background factors that may have played a part in bringing the offender before the courts, and the types of sentencing procedures that may be appropriate because of their Indigenous heritage or connection. Gladue reports are a way of providing this vital information to the courts.

The Gladue principles require judges to consider whether those factors have played a significant role in the offender being brought before the courts,[51] and what options (non-custodial or custodial) might address the root causes of the offending. Gladue reports have shown themselves to be an excellent way of providing this information. These reports should be prepared 'with the help of someone who has a connection to and understands the Aboriginal Community.'[52]

Importantly, analysis showed that Gladue reports may 'contribute to fewer and shorter incarceration sentences for Aboriginal recipients'.[53]

Cultural reports should be enshrined in legislation and contain information about the offender, including family, community, criminal background, education, employment, appropriate alternative options to incarceration, and any other relevant information.

Recommendation 32

That the Government of South Australia legislate the requirement for the court to take into account the unique systemic and background factors affecting Aboriginal defendants when determining appropriate sentencing options.

Cultural reports, similar to Gladue reports, should be introduced to support the implementation of this recommendation, and adequate funding provided to enable the compilation of these reports by Aboriginal Community Controlled Organisations.

Police practices

Police officers have significant discretionary powers and play an important role as the entry point to the justice system, as well as the first point of possible diversion away from the justice system. It is important that police have sufficient powers to respond to situations in ways other than charge and arrest.

Aboriginal people are more likely to be arrested than non-Aboriginal people, even when taking into account other factors such as the offence and previous offending history,[54] and are less likely to receive a police caution than non-Aboriginal offenders.[55]

In South Australia, there are two complementary adult cautioning processes: an operational adult cautioning model based on autonomous police discretion, and a prosecution caution which is grounded in public interest principles. Each process aims to divert matters away from the courts.

Many offences are eligible to be considered for the issue of an adult caution (including breach of bail, minor assaults, public order and minor dishonesty offences). There are, however, multiple offences that are excluded.

This Commission believes that the number of offences that can be resolved with a caution should be expanded, particularly where the offending would be considered relatively minor. We support the implementation of recommendation 86 of the Royal Commission, that 'the use of offensive languages in circumstances of interventions initiated by police should not normally be an occasion for arrest or charge' and recommends that a police caution is an appropriate response.

Recommendation 33

That the Government of South Australia expand the types of offences that can be resolved with an adult police caution (including but not limited to use of offensive language in circumstances of interventions initiated by police, breach of bail and some forms of drug possession and drug equipment possession).

Pursuant to the *Public Intoxication Act 1984* (SA) (PIA Act), the police have the power to apprehend an intoxicated person who is in a public place and unable to take care of themselves. This Commission strongly believes that public intoxication is not a policing

matter, and an appropriate response to public intoxication is one that is responsive to the person's social and health needs, while also ensuring their safety.

When a person is apprehended under the PIA Act, they should only be apprehended at a police station as a last resort, and where strictly necessary. The apprehended person's residence, when safe to do so, and sobering up units should be the preferred location.

The PIA Act should be amended to allow for the apprehension of a person who is behaving in a disorderly or offensive manner, or using offensive language, whilst intoxicated. Apprehension under the PIA Act should be the preferred response to these situations and arrest should only be used as a last resort.

Drug addiction should be treated as a health issue, and not a justice issue. Non-victim related addiction offending should be decriminalised and supports should be provided to address the underlying addiction.

Recommendation 34

That the Government of South Australia amend the *Public Intoxication Act 1984* (SA) to include apprehension of a person who is behaving in a disorderly or offensive manner, or using offensive language, whilst intoxicated.

Bail

Presumption against bail

There is generally a presumption in favour of bail being granted.[56] However, in some cases there is a presumption against bail. In these circumstances, a defendant must not be granted bail unless there are 'special circumstances'.

We are critical of presumptions against bail and agree with the Australian Law Reform Commission's findings that the prescription of circumstances which attract a presumption against bail 'has likely affected' the Aboriginal remand population.[57]

Discretion to grant bail

The considerations that may be taken into account when determining whether to grant bail are a barrier to Aboriginal people achieving bail and must be reconsidered. These

considerations include prior offending, stable employment and a stable place of residence.[58]

While access to appropriate or stable accommodation is not legislated as a bail requirement, in practice, the requirement that a person have appropriate accommodation, or an appropriate address, has become a proxy for being satisfied that the person will attend court. This reflects a faulty assumption that if you don't have an address, you shouldn't be released. This false dichotomy is leading to people being detained needlessly.

To dismantle the systemic racism in the bail system, these assumptions must be questioned and challenged.

Consideration of individual and cultural history and social impact

A decision to refuse bail can impact that person's ability to maintain employment, accommodation, social connections, and their relationships with children. This can damage the ability of a family unit to remain strong and together and creates a risk of children entering the child protection system.

It is critical that social impact, including cultural factors and community expectations, are considered when making bail decisions.

Currently there is no requirement in the *Bail Act* that a person's cultural background, cultural obligations or ties to family or place, be taken into account. Not considering these matters can compound the historic and continuing disadvantage faced by Aboriginal people in their contact with the criminal justice system.[59]

Breach of bail

Research undertaken in New South Wales has shown that approximately 35% of bail breaches were for a technical violation only.[60] The most common bail breaches for Aboriginal defendants involved 'reporting to police' (19%), 'curfew' (11%) and 'residence' (11%), and not new offending.

This Commission is of the view that there is a culture of over-policing the bail conditions of Aboriginal accused offenders, which can result in the harassment of individuals and their families.

We note that breaches of bail are predominately administrative and technical breaches. Many bail breaches are not about new offending or criminal behaviour. Noting this, we consider the current approach to breach of bail to be an example of structural racism that should be addressed.

Recommendation 35

That the Government of South Australia amend the *Bail Act 1985* (SA) to:

(a) remove presumptions against bail which disproportionately impact Aboriginal people

(b) prescribe that accommodation, in isolation of other factors, should not be a requirement for the granting of bail

(c) mandate that a bail authority must take into account an Aboriginal person's individual and cultural history, including consideration of family, community and social impacts of a person being remanded to custody, such as the risk of their children entering the child protection system, and

(d) decriminalise technical and administrative breaches of bail.

Custody and community-based sentences

> *Far too often prison can be a very criminogenic environment. The fact is that prisons are not a healing environment and are largely non-therapeutic. The research is clear; they are injurious to people at a social level, at a spiritual level, often at a physical level and most certainly at a cultural level.*
>
> - Professor Tracey McIntosh MNZM -

This Commission is of the view that prison environments neither facilitate the rehabilitation of Aboriginal prisoners, nor are responsive to their needs.

Prisons are places within which coercive control is the main regulatory mechanism. They are heavily contradictory environments. On the one hand they are designed to hold people accountable, while simultaneously imposing conditions that strip away autonomy.

For those of us who sit on the abolitionist continuum, reforming the existing custodial environments within South Australia is simply not enough. Embedding cultural elements in South Australian prisons can, in fact, lead to the incarceration of Aboriginal culture. Thus, whilst we make recommendations for the reform of prison environments, this Commission is of the view that Aboriginal culture and rehabilitation and support programs and services do not solely belong within the walls of a prison, and rehabilitation is best achieved in community.

Prison environments

Prison has a symbolic significance in the lives of Aboriginal people as a reinforcement of the absolute power of the State. This contributes to feelings of vulnerability and powerlessness. Hope and the restoration of dignity is needed to change behaviours. One way this can be achieved is by reforming prison environments and providing access to culture during periods of incarceration.

If you're making people well and you're setting up the right programs, then why do we still have people in prison?

- Heather Agius -

Incarceration environments and options that support and immerse prisoners in culture are more effective in rehabilitating Aboriginal offenders.

Recommendation 36

That the Government of South Australia, in partnership with Aboriginal community, investigate and implement culturally responsive environments within prisons to support Aboriginal peoples' connection to culture.

Recommendation 37

That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations and / or Aboriginal Elders and community leaders to deliver cultural programs in prison.

Parole

Aboriginal people are not being released on parole at the same rate as non-Aboriginal people. When Aboriginal people are released on parole, their liberty is quickly taken away when they breach their conditions. We consider this to be another reflection of the structural racism deeply rooted throughout the criminal justice system.

> *The parole system is particularly Byzantine … What you see is that Indigenous people… don't get the early option of a non-custodial sentence and then they don't get parole. But then when they do get parole, they get breached more often and for what appears to be merely trivial behaviours.*
>
> - Jonathan Rudin -

We understand that, in some cases, Aboriginal prisoners reject the notion of parole as they believe they cannot comply with the conditions. These sentiments highlight the more systemic issues regarding parole.

Discretion to release a person on parole

There is a presumption that prisoners who are liable to serve a period of imprisonment of less than five years and for whom a non-parole period has been fixed are to be automatically released on parole upon the expiry of their non-parole period.[61] However, there are a number of carve-outs to this presumption, such as for an offence of personal violence or for breaking a parole condition.[62]

We are critical also of presumptions against release on parole due to their disproportionate effect on Aboriginal people.

In cases where parole is not automatically granted, an application must be made to the Parole Board for the prisoner's release on parole.[63] It is this Commission's view that the considerations that must be taken into account by the Parole Board when determining an application for parole are a barrier to Aboriginal people and must be removed.

Similarly, the behaviour of the applicant during any previous release on parole must be considered by the Parole Board.[64] Given the tendency for inappropriate and incompatible parole conditions to be imposed upon Aboriginal people, Aboriginal people are more likely to be considered to have misbehaved when on parole, even though the impugned behaviour is considered normal outside of the parole environment

Accordingly, to address the racial and systemic bias underpinning the parole system, the discretion provided to the Parole Board and the considerations it must take into account when deciding whether to grant parole must be reviewed.

Recommendation 38

That the Government of South Australia commission a review to identify, assess and remove all barriers, both legislative and non-legislative, that disproportionately impact upon Aboriginal people being granted parole, including the availability or otherwise of prison programs which support the granting of parole.

Healing lodges

Aboriginal prisoners have varying and different needs to the non-Aboriginal prisoner population. In our experience, some of those needs include being accommodated on or very close to traditional country and maintenance of connections with family, kin and community.

Despite these needs, the availability of culturally responsive alternatives to traditional custodial environments are concerningly lacking in South Australia. We understand that in January 2022, the Department for Correctional Services commenced an 18-month Community Transition and Learning Centre pilot, known as Lemongrass Place. Lemongrass Place is a Gazetted Probation Hostel located adjacent to the Port Augusta Prison secure perimeter. At present, this is the only Aboriginal-specific custodial environment in South Australia.

We consider the Indigenous healing lodges in Canada to be a unique example of culturally responsive alternatives to custody that are on, or close to, prisoners' home country and where families and kin of prisoners can visit more easily. The healing lodges provide opportunities to access culturally appropriate services to address the needs of offenders, including sentenced prisoners and those who have been released on parole.[65]

Aboriginal prisoners can be sentenced to spend all or part of their sentence in these healing lodges, or request a transfer to one, provided they are deemed of minimum-security risk. The healing lodges are either run by Correctional Service Canada or are managed by Aboriginal community or partner organisations.[66]

We are of the view that should the healing lodge model be adopted in South Australia, they must be designed and operated by ACCOs. The importance of ACCOs operating such lodges lies in their unique service model, including the critical role that Elders and community leaders play as spiritual and cultural teachers. In our view, only Aboriginal people, Elders and organisations have the competency to deliver these services.

Given the scarcity of truly culturally responsive custodial environments in South Australia, we recommend that ACCOs be funded to establish and continue operating centres similar to Canada's Indigenous healing lodges.

In our view, it is essential that such facilities:

- Have expansive eligibility criteria
- Incorporate local Aboriginal culture, including stories, lores and languages
- Be physically separate to and distinguishable from existing correctional facilities
- Incorporate significant involvement from Aboriginal Elders and community leaders, and
- Be available to Aboriginal prisoners considered of low to medium security risk.

Recommendation 39

That the Government of South Australia fund Aboriginal Community Controlled Organisations to establish and operate appropriately located culturally responsive environments for Aboriginal offenders, based on the Indigenous healing lodge model in Canada.

Release conditions

The issue around compliance seems to be another way that the State pulls the chain on Indigenous peoples. You should be looking at the outcomes you want rather than making a demand for obedience.

- Professor Tracey McIntosh MNZM –

The history of colonisation is firmly articulated in the conditions that are set by the court when making orders for release on bail, community-based sentence, parole, and extended supervision.

The imposition of inappropriate conditions can increase an Aboriginal person's chance of being reincarcerated. It is also this Commission's view that inappropriate conditions, and compliance monitoring, can be used as a form of harassment of Aboriginal people and their families.

Often conditions are placed on Aboriginal people that are not cognisant of the person's individual circumstances, including their culture and cultural obligations, or are unsupported by available evidence that it will secure the person's safety or that of the community in which they reside. This imposition of inappropriate bail and parole conditions set a person up for failure, increasing the likelihood of reincarceration, and do little to support rehabilitation.

Examples of conditions that can have a disproportionate negative impact on Aboriginal defendants include to:

- reside at a particular address
- provide monetary security or a monetary guarantee that will be given up if bail is breached
- not associate with certain people, including family members, which presents particular challenges to the ability to restore relationships and meet kinship responsibilities that may comprise effective reintegration
- be supervised by community corrections
- remain at home unless leaving for authorised reasons (known as home detention bail), and
- abide by curfew restrictions.

This Commission heard several examples of conditions that were focused on the availability of a stable address. As discussed earlier in this report with respect to bail conditions, this appears to be based on an assumption that having an address is the only way to ensure someone will turn up to court or corrections appointments. However, we are not aware of any evidence to confirm that having a fixed and stable address secures such compliance.

We also consider curfew restrictions to have a discriminatory effect on Aboriginal people, as compliance monitoring is over-policed.

The Courts, bail authorities and the parole board also have powers to impose additional conditions if they believe it is reasonably necessary to ensure the applicant complies with their conditions of release. It is the view of this Commission that because of the inherent racial bias in the criminal justice system, when discretion is exercised, it is exercised to the detriment of Aboriginal people.

We heard reports that under this discretion, abstention from drugs and alcohol, and exclusion from licensed premises conditions are often imposed on Aboriginal people.

The use of abstention clauses is senseless. Addiction to alcohol or drugs does not necessarily have a relationship to criminal behaviour. If an abstention clause is imposed on someone who has addiction issues, it is likely they will breach this condition which will in turn cause continued issues for access to bail due to the breach of conditions.

Restrictions which prohibit a person from attending a licensed premises can be similarly unjust. An increasingly broad range of venues are now classified as a licensed premises, effectively barring people on bail from a range of activities such as attending a cinema or bowling alley. These restrictions can further exacerbate social isolation and disrupt family activities.

Conditions should be limited to those *strictly necessary* to secure the offender's safety and that of the community, as well as to support any continued rehabilitation of the offender where appropriate.

Recommendation 40

That the Government of South Australia amend legislative provisions to:

(a) ensure that conditions that are imposed for bail, community-based sentence, parole and extended supervision orders are restricted to those that are *strictly necessary*, having regard to:

(i) the circumstances of the applicant, including any cultural obligations

(ii) the applicant's and community's safety

(iii) supports needed for the rehabilitation of the applicant, and

(b) ensure that any applications for review of bail conditions imposed is heard by the court at the earliest opportunity.

Advocacy and legal representation

Legal practice often gets overlooked when considering improvements to the criminal justice system. The advice that an Aboriginal person receives is an important factor in their path through the system.

Aboriginal legal services must be funded adequately and appropriately to support Aboriginal defendants, particularly in relation to obtaining bail or community-based sentencing. It is counterintuitive that Aboriginal people are significantly over-represented in the criminal justice system, and yet Aboriginal legal services are funded less than legal aid commissions.

Recommendation 41

That adequate funding be provided to Aboriginal Legal Rights Movement to perform a state-wide legal representation and advocacy service that includes supporting Aboriginal people to access and engage with the various criminal justice complaint mechanisms.

Implement this Report

Too often we have gone to these meetings, sat down and shared our pain and trauma. Nothing happens at the end of it, because the people holding the meetings go off and do something else, or nothing at all.

- Heather Agius -

Commissions such as these are held, research is compiled and analysed, reports and recommendations are made. Each report says the same things. Each time the Aboriginal people involved relive their traumas in telling their stories, hoping to be heard and have the issues addressed, only to see the reports pushed aside until the next one is commissioned.

There is an opportunity to remedy this trend. Following through on the recommendations of this report will help build trust between the community and the criminal justice system.

There is a tendency for governments to ignore, partially implement or implement in a manner that contradicts the intent of a recommendation. In addition, a number of the recommendations in this report will take some time to implement and only result in demonstrable outcomes in the long term. We are concerned this could increase the likelihood that impetus for change could wane and that Government will abandon the reforms, programs and services recommended throughout this report.

An appropriately adapted accountability framework should be established to monitor the implementation of our recommendations. Such a framework should seek to ensure accepted recommendations are fully implemented, and in the spirit in which they were made.

Whilst regular and public reporting is an essential component of any accountability framework, such reporting must be at arm's length from the agency or agencies responsible for implementing the recommendations. Regular reporting by the Ministers or departments responsible for implementing recommendations is therefore not sufficient.

The independent Aboriginal justice body we recommend be established and funded above at recommendation 8 should perform this function.

Recommendations

Address and Eliminate Racism

1 That, in accordance with recommendation 96 of the Royal Commission into Aboriginal Deaths in Custody, the National Judicial College of Australia and the Australasian Institute of Judicial Administration mandate ongoing professional development for judges and magistrates in the areas of cultural competence and unconscious bias, including systemic and institutional racism and intergenerational disadvantage of Aboriginal people. Training should be tailored to the region and delivered by Aboriginal Community Controlled Organisations and / or Aboriginal Elders and community leaders.

2 That, in accordance with recommendation 228 of the Royal Commission into Aboriginal Deaths in Custody, South Australia Police mandate comprehensive and ongoing training for police officers in the areas of:

(a) cultural competence and unconscious bias, including systemic and institutional racism and intergenerational disadvantage of Aboriginal people

(b) interaction between police and Aboriginal people, and

(c) communication and consultation with Aboriginal communities regarding the de-escalation of youth offending.

Training should be tailored to the region and delivered by Aboriginal Community Controlled Organisations and / or Aboriginal Elders and community leaders.

3 That the Government of South Australia commission an independent review of all criminal justice legislation to identify and amend provisions that unfairly discriminate against and prejudice Aboriginal people.

4 That the Department for Education, Catholic Education South Australia, and the Association of Independent Schools South Australia ensure more comprehensive education is provided in schools and kindergarten with respect to Aboriginal history and culture, as well as colonialism. This should

include programs where Aboriginal Elders and community leaders educate Aboriginal and non-Aboriginal children and young people about Aboriginal culture, belief systems, values, traditions and customs.

Increase Accountability

5 That the Government of South Australia identify and remove the systemic barriers that prevent or discourage Aboriginal people from accessing complaint mechanisms in the criminal justice system.

6 That the Government of South Australia implement recommendation 226 of the Royal Commission into Aboriginal Deaths in Custody, which relates to police complaints management and investigation.

7 That the independent body responsible for managing and investigating complaints against police have the power to make recommendations to South Australia Police to change their policies and procedures which are considered to be unreasonably discriminatory towards Aboriginal people.

8 That the Government of South Australia fund and establish through legislation an independent Aboriginal justice body to monitor, audit and maintain accountability of the Government of South Australia in relation to justice initiatives affecting Aboriginal people, including the recommendations contained within this report.

This body should also be responsible for:

(a) monitoring the development and implementation of an Aboriginal Justice Agreement

(b) commissioning a review into the implementation of:

i. the recommendations of the Royal Commission into Aboriginal Deaths in Custody by an appropriately qualified person (including having sufficient cultural knowledge)

ii. the recommendations of previous coronial inquests following the death of an Aboriginal person in custody, and

(c) commissioning a review into the existence and impact of racial bias and discrimination in the youth and adult criminal justice sectors.

9 That the Government of South Australia establish a formal, centralised system to annually audit non-government service providers who provide services and programs to Aboriginal people, to ensure those services are achieving best outcomes for Aboriginal people. At a minimum, audits must cover expenditure, service quality, service outcomes and cultural competence of service delivery, and include the perspectives of service recipients.

10 That the Government of South Australia develop an Aboriginal justice data strategy.

Facilitate Self-determination and Leadership

11 That the Government of South Australia provide secure, long-term funding to Aboriginal Community Controlled Organisations to promote the self-determined delivery of culturally appropriate and safe services to Aboriginal people.

12 That the Attorney-General establish an open judicial appointment process where opportunities for appointment are advertised and candidates apply and are interviewed by a panel with Aboriginal representation. The panel should be charged with making recommendations on judicial appointments to the Attorney-General.

13 That the Government of South Australia commission an independent review into the experiences of current and former Aboriginal employees of South Australia Police. This review should, at a minimum, identify barriers to the recruitment and retention of Aboriginal staff, as well as their progression into leadership positions. The review should propose ways to create a culturally safe and responsive working environment.

14 That the review undertaken in response to recommendation 13, also include the following:

(a) identify current limitations to the use and role of Community Constables

(b) identify opportunities to increase the scope, authority and use of Community Constables, including the involvement of Community Constables as either first responders or as being present to advise on policing approaches to actions such as enforcing warrants, conducting arrests and undertaking welfare checks

(c) identify any barriers to career progression for Community Constables to become sworn officers, and

(d) identify appropriate structural governance for Community Constables within South Australia Police, including consideration of supervision by Aboriginal Commissioned Officers dedicated to community policing.

15 That the Government of South Australia amend the *Correctional Services Act 1982* (SA) to:

(a) increase the number of Aboriginal members on the Parole Board of South Australia

(b) require consultation with Aboriginal community members for appointments to the Parole Board of South Australia, and

(c) require that an Aboriginal member is present for all Parole Board of South Australia hearings involving an Aboriginal prisoner.

Intervene Early

16 That the Government of South Australia fund evidence-based programs to disrupt the relationship between children being placed in State care and the risk of contact with the criminal justice system. These programs should take a holistic approach to supporting the family unit as well as the child or young person, and be designed and delivered by Aboriginal Community Controlled Organisations.

17 That the Government of South Australia legislate to raise the minimum age of criminal responsibility to 14 years.

18 That the Government of South Australia fund Aboriginal Community Controlled Organisations to develop and implement health and behavioural intervention programs and support services for young people under 14 years of age who display offending behaviours, or behaviour associated with needs not being met, and their family members.

Support and Rehabilitate

19 That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations to design and deliver culturally responsive support and rehabilitative programs to Aboriginal people on remand.

20 That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations to establish bail accommodation options, at a minimum in Adelaide and Port Augusta. The services must also link clients to drug and alcohol support services.

21 That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations to establish culturally responsive step-down accommodation for parolees.

22 That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations to provide case management, culturally appropriate supervision and wraparound supports for Aboriginal people on conditional release.

23 That South Australia Police ensure the provision of mental health awareness training for new and current police officers so that they can recognise the symptoms of, and appropriately respond to, a person experiencing an acute mental episode or crisis.

24 That the Department for Health and Wellbeing and South Australia Police evaluate the Mental Health Co-Response Program to ensure it meets the needs of, and improves outcomes for, Aboriginal people. If found to be effective, the program should be expanded to other regions of the state.

25 That the National Judicial College of Australia and the Australasian Institute of Judicial Administration mandate professional development for judges and magistrates in the areas of mental health, family and domestic violence, drug dependency and cognitive issues (such as those precipitated by Foetal Alcohol Spectrum Disorders).

26 That the Government of South Australia fund Aboriginal Community Controlled Organisations to design, develop and deliver a service that provides culturally responsive trauma and victimisation supports to Aboriginal women, regardless of whether they have been convicted of an offence or are currently in custody.

27 That adequate funding be provided to an appropriate Aboriginal legal service, such as Family Violence Legal Service Aboriginal Corporation (SA), to provide support and legal advice to Aboriginal women experiencing domestic and family violence.

Reform Service Responses

28 That the Government of South Australia expand Nunga Courts to hear bail applications (not just sentencing).

29 That the Government of South Australia provide funding for a Nunga Court to sit frequently and consistently in regional areas, starting with Port Augusta and the APY Lands.

30 That the Government of South Australia expand the number of Aboriginal Community Courts to increase the participation of Aboriginal people in culturally responsive court diversionary programs.

31 That the Government of South Australia remove the requirement of a guilty plea for eligibility for Nunga Court and court intervention programs.

32 That the Government of South Australia legislate the requirement for the court to take into account the unique systemic and background factors affecting Aboriginal defendants when determining appropriate sentencing options.

Cultural reports, similar to Gladue reports, should be introduced to support the implementation of this recommendation, and adequate funding provided to enable the compilation of these reports by Aboriginal Community Controlled Organisations.

33 That the Government of South Australia expand the types of offences that can be resolved with an adult police caution (including but not limited to use of offensive language in circumstances of interventions initiated by police, breach of bail and some forms of drug possession and drug equipment possession).

34 That the Government of South Australia amend the *Public Intoxication Act 1984* (SA) to include apprehension of a person who is behaving in a disorderly or offensive manner, or using offensive language, whilst intoxicated.

35 That the Government of South Australia amend the *Bail Act 1985* (SA) to:

(a) remove presumptions against bail which disproportionately impact Aboriginal people

(b) prescribe that accommodation, in isolation of other factors, should not be a requirement for the granting of bail

(c) mandate that a bail authority must take into account an Aboriginal person's individual and cultural history, including consideration of family, community and social impacts of a person being remanded to custody, such as the risk of their children entering the child protection system, and

(d) decriminalise technical and administrative breaches of bail.

36 That the Government of South Australia, in partnership with Aboriginal community, investigate and implement culturally responsive environments within prisons to support Aboriginal peoples' connection to culture.

37 That the Government of South Australia provide funding to Aboriginal Community Controlled Organisations and / or Aboriginal Elders and community leaders to deliver cultural programs in prison.

38 That the Government of South Australia commission a review to identify, assess and remove all barriers, both legislative and non-legislative, that disproportionately impact upon Aboriginal people being granted parole, including the availability or otherwise of prison programs which support the granting of parole.

39 That the Government of South Australia fund Aboriginal Community Controlled Organisations to establish and operate appropriately located culturally responsive environments for Aboriginal offenders, based on the Indigenous healing lodge model in Canada.

40 That the Government of South Australia amend legislative provisions to:

(a) ensure that conditions that are imposed for bail, community-based sentence, parole and extended supervision orders are restricted to those that are *strictly necessary*, having regard to:

i. the circumstances of the applicant, including any cultural obligations

ii. the applicant's and community's safety

iii. supports needed for the rehabilitation of the applicant, and

(b) ensure that any applications for review of bail conditions imposed is heard by the court at the earliest opportunity.

41 That adequate funding be provided to Aboriginal Legal Rights Movement to perform a state-wide legal representation and advocacy service that includes supporting Aboriginal people to access and engage with the various criminal justice complaint mechanisms.

Acronyms and abbreviations

ACCOs	Aboriginal Community Controlled Organisations
Commission	Advisory Commission into the Incarceration Rates of Aboriginal Peoples in South Australia
FASD	Foetal Alcohol Spectrum Disorder
Parole Board	Parole Board of South Australia
PIA Act	*Public Intoxication Act 1984* (SA)
Royal Commission	Royal Commission into Aboriginal Deaths in Custody
SAPOL	South Australia Police

Endnotes

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[4] Australian Bureau of Statistics, *Corrective Services, Australia, June Quarter 2022* (15 September 2022).

[5] Australian Institute of Health and Welfare, *Youth justice in Australia, 2020-21* (31 March 2022).

[6] Australian Government Productivity Commission, Report on Government Services 2022.

[7] PwC, *Indigenous incarceration: Unlock the facts* (Report, May 2017) 7.

[8] David Brown et al, *Justice Reinvestment: Winding Back Imprisonment* (Palgrave Macmillan, 2016) 147, citing Eileen Baldry, 'Disability at the Margins: Limits of the Law' (2014) 23(3) *Griffith Law Review* 370.

[9] Deloitte Access Economics, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Report, August 2018) xi.

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[11] Ibid 7.

[12] Ibid.

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[14] Aboriginal data sovereignty may be defined as 'the right of Indigenous peoples to govern the collection, ownership and application of data about Indigenous communities, peoples, lands, and resources.' See Gawaian Bodkin-Andrews et al, 'Delivering Indigenous Data Sovereignty', *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Web Page, 2 July 2019) <https://aiatsis.gov.au/publication/116530>.

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[17] *Police Act 1998* (SA) s 30.

[18] *Correctional Services Act 1982* (SA) s 55(3)(f).

[19] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing time – time for doing: Indigenous youth in the criminal justice system* (Report, June 2011) 8.

[20] Shuling Chen et al, 'The transition from juvenile to adult criminal careers' (2005) 86 *Crime and Justice Bulletin* 4.

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[24] *Young Offenders Act 1993* (SA) s 5.

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[50] [1999] 1 SCR 688.

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