Chapter 5

Reasons for high Indigenous imprisonment rates

Introduction

5.1 Both the National Aboriginal and Torres Strait Islander Legal Services (NATSILS) and the Aboriginal Legal Service of Western Australia (ALSWA) stated that the reasons for the high imprisonment rates for Aboriginal and Torres Strait Islander persons are 'well documented'.[1] Further, ALSWA commented that the reasons 'have been repeatedly examined by numerous federal and state inquires'.[2] ALSWA, among others, summarised these factors as follows:

> [T]he reasons fall into two main categories. The first category are underlying factors that contribute to higher rates of offending (eg, socio-economic disadvantage, impact of colonisation and dispossession, stolen generations, intergenerational trauma, substance abuse, homelessness and overcrowding, lack of education and physical and mental health issues). The second category is structural bias or discriminatory practices within the justice system itself (ie, the failure to recognise cultural differences and the existence of laws, processes and practices within the justice system that discriminate, either directly or indirectly, against Aboriginal people such as over-policing practices by Western Australia Police, punitive bail conditions imposed by police and inflexible and unreasonable exercises or prosecutorial decisions by police).[3]

Socio-economic factors

5.2 In his submission, Mr Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, stated that 'it is well understood that extreme levels of poverty and disadvantage faced by Aboriginal and Torres Strait Islander peoples lead to the high incarceration rates'.[4] Mr Gooda continued:

> The bigger picture cannot be ignored: the history of colonisation and dispossession has had enduring effects on Aboriginal and Torres Strait Islander communities and individuals. For example, there is a strong correlation between having a family member removed and arrest and incarceration. The high rate of imprisonment is occurring in the context of poor health, inadequate housing, high levels of family violence, and high levels of unemployment.[5]

---

1 See National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Submission 13*, p. 16; and Aboriginal Legal Service of Western Australia, *Submission 10*, p. 21.

2 *Submission 10*, p. 21.

3 *Submission 10*, pp 21-22. See also National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Submission 13*, p. 16; and Chief Justice Wayne Martin, *Committee Hansard*, 4 August 2015, p. 30.

4 *Submission 5*, p. 4.

5 *Submission 5*, pp 4-5.

5.3 Mr Gooda referred to the work of Dr Don Weatherburn, Director of the NSW Bureau of Crime Statistics and Research, who argued that there are four key risk factors for involvement in the criminal justice system:

- poor parenting (particularly child neglect and abuse);
- poor school performance/early school leaving;
- unemployment; and
- drug and alcohol abuse.[6]

5.4 Available data shows that Indigenous Australians fair significantly worse than non-Indigenous Australians in regard to these four critical factors which influence involvement in crime.[7] These factors have interrelated detrimental impacts and can be seen as forming a vicious cycle:

> Parents exposed to financial or personal stress, or who abuse drugs and/or alcohol are more likely to abuse or neglect their children. Children who are neglected or abused are more likely to associate with delinquent peers and do poorly at school, which in turn increases the risk of involvement in crime. Involvement in crime increases the risk of arrest and imprisonment, both of which further reduce the changes of employment, while at the same time increasing the risk of drug and alcohol abuse. And so the process goes on, a vicious cycle of hopelessness and despair transmitted from one generation of Aboriginal people to the next.[8]

5.5 Reiterating these points, the Law Council of Australia has also outlined the main factors that have been identified as increasing the risk of Indigenous Australians' involvement in crime:

> These include criminogenic needs such as substance abuse, overcrowded living environments, unemployment, and poverty. A number of commentators have noted the impact that substance abuse and high levels of unemployment play in the over-representation of Indigenous Australians in prison. Indeed, it has been suggested that "alcohol is a factor in up to 90% of all Indigenous contact with the criminal justice system." A lack of education, or poor school attendance, has also been identified as a factor that increases the risk of offending later in life. High levels of mental illness and disadvantage within a number of Indigenous communities have also been found to increase the risk of Indigenous Australians becoming involved in crime.[9]

---

6 *Submission 5*, p. 5.

7 Weatherburn, D., *Arresting Incarceration – Pathways out of Indigenous Imprisonment*, Aboriginal Studies Press, 2014, p. 86.

8 Weatherburn, D., *Arresting Incarceration – Pathways out of Indigenous Imprisonment*, Aboriginal Studies Press, 2014, pp 86-87.

9 Law Council of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, submission to the Senate Legal and Constitutional Affairs References Committee for its inquiry into the value of a justice reinvestment approach to criminal justice in Australia, 22 March 2013, p. 15.

5.6 High rates of imprisonment may also lead to the idea that incarceration is a 'rite of passage' within Indigenous communities. As Chief Justice Wayne Martin, of the Supreme Court of Western Australia (WA) explained:

> For kids in the leafy western suburbs of [Perth], being sent to detention would be a horrendous prospect. It would be unthinkable. It would bring shame on their family. It would just be their worst nightmare. For Aboriginal kids, it does not have the same effect, because their cousin is in there, their brother has been there and their father has been in prison. It just does not hold the same threat, the same effect, the same effective sanction. Tragically, in some communities, Aboriginal kids see it as just what you do, one of the things that you do as part of growing up—that you end up in detention or prison—because so many family members have been there.[10]

5.7 The committee focussed its inquiry on two specific socio-economic factors:

- the impact of fetal alcohol spectrum disorders; and
- strict tenancy policies leading to overcrowding, inadequate housing and homelessness.

Fetal Alcohol Spectrum Disorders

5.8 The socio-economic factors contributing to the high incarceration rates of Aboriginal and Torres Strait Islander people are well-known, including the impact of alcohol abuse. On this point, the committee heard evidence about the increasing awareness of Fetal Alcohol Spectrum Disorders (FASD) and the possible contribution of these disorders to the incarceration of Indigenous offenders.

5.9 In a submission to the inquiry Professors Elizabeth Elliott AM and Jane Latimer, on behalf of the Lililwan Project, provided the following explanation of FASD:

> FASD are a group of conditions that may occur when women drink alcohol during pregnancy. Alcohol injures the brain of the developing embryo and fetus and children may demonstrate a range of lifelong behavioural, learning and medical problems.[11]

5.10 Professors Elliott and Latimer outlined the impairments that may affect a person with FASD:

> The impact of alcohol on the brain is substantial – it affects cognition (IQ), memory, executive function, gross and fine motor function, language, behavior, mood and impulse control.[12]

5.11 Gilbert+Tobin Lawyers (Gilbert+Tobin) noted:

> The adverse effects of FASD exist along a continuum, with the complete Fetal Alcohol Syndrome (FAS) at one end of the spectrum and incomplete

10 *Committee Hansard*, 4 August 2015, p. 39.

11 *Submission 48*, p. 2.

12 *Submission 48*, p. 2.

> features of FAS, including more subtle cognitive-behavioural deficits with no physical features at the other. FASD characteristics change over a person's lifespan and vary from one person to another. The effects of FASD can range from mild impairment to serious disability.[13]

5.12 Gilbert+Tobin added:

> [W]ithout a proper diagnosis and early intervention, secondary symptoms (also referred to as secondary disabilities) may be triggered in a person with FASD, including mental illness, dependence on others, disengagement from school, employment problems, inappropriate sexual conduct, alcohol and drug misuse, trouble with the law and legal confinement (in prison or mental health facilities).[14]

5.13 Professor Elliot emphasised the importance of evidence-based prevention programs for FASD:

> Prevention must be the key because it is too late once the horse has bolted. We can optimise outcomes but we cannot reverse that brain injury. We need evidence-based prevention programs. This involves controlling drug and alcohol use and also improving social disadvantage in communities. We definitely need clinician training. There is a lack of awareness of the impact of alcohol use in pregnancy across Australia, so we need screening tools and diagnostic tools. We are currently developing those with some federal funding.[15]

5.14 On the efforts to prevent FASD, Professor Elliott commented:

> There is not political will around alcohol in this country. We are amongst the highest consumers in the world. We have our cricketers—our role models—wearing advertising for alcohol. We have alcohol sponsorship of sport. We have children exposed to alcohol at a young age. We have pubs that are open all day and all night. In vulnerable towns like Alice Springs you can get grog cheaply at any time of the day or night. We know what works. We know that we should restrict advertising and promotion, we should increase taxation and pricing, and we should decrease opening hours.[16]

Prevalence of FASD

5.15 Amnesty International noted that there is no official diagnostic tool for FASD in Australia, meaning there is little evidence available about the prevalence of the

13 *Submission 49*, p. 4.

14 *Submission 49*, pp 4-5.

15 *Committee Hansard*, 23 September 2015, p. 7.

16 *Committee Hansard*, 23 September 2015, p. 8.

disorders.[17] Professor Elliott indicated that screening and diagnostic tools are currently being developed and this is being funded by the Commonwealth Government.[18]

5.16 Professor Elliott explained that the diagnosis for FASD is one of exclusion:

> [I]f I see a child I have to make sure that they do not have some other chromosome or abnormality or some sort of syndrome—that they have not had meningitis, they were not extremely pre-term, they have not had head injuries et cetera. And I have to take into account early-life trauma and social circumstances et cetera. But the diagnosis is made through a combination of alcoholic exposure, presence of facial features and growth deficit and then neurodevelopmental problems across about 10 domains of impairment. They will include things like memory, IQ, communication, adaptive behaviour and social communication, and motor skills. We really have to tick at least three of those boxes in addition to alcohol exposure to make that diagnosis, and that usually requires assessment by a paediatrician, definitely a psychologist and sometimes a speech therapist, an occupational therapist and a physiotherapist. Ideally you would have a multidisciplinary team, or access to that team, that is able to give you an assessment, and you can then look at the child in toto and see whether they…tick the boxes.[19]

5.17 Professors Elliott and Latimer presented some of the results of their work on the prevalence of FASD in the Fitzroy Valley of WA:

> In the Lililwan Project we assessed every 7 and 8 year old residing in any of the 45 very remote communities in the Fitzroy Valley. Similar to non-indigenous women, we found that 55% of Aboriginal mothers drank alcohol during their pregnancy. However 87% drank at high risk levels - commonly 10 or more drinks, 2 or more times each week. Using conservative diagnostic criteria we found that approximately 20% (or 1 in 5 children) had a FASD, one of the highest prevalence rates worldwide.[20]

5.18 At the public hearing in Sydney, Professor Latimer provided a comparison for the findings of the Lililwan Project in the broader Australian context:

> We did our study in the Aboriginal communities [of the Fitzroy Crossing] because those are the women that invited us to come and were honest in telling us about their alcohol consumption. We reported one of the highest prevalence rates in the world, and people were shocked. They could not believe it. There was just alarm and concern. Yet, if we had done a prevalence study in metropolitan Sydney, all the information from overseas suggests that we would have had a prevalence of somewhere between two to five per cent of children falling on the FASD spectrum. There would be absolute alarm and concern about that. But it is because we have started

17 *Supplementary Submission 39*, Amnesty International Australia, *A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia*, May 2015, p. 29.

18 *Committee Hansard*, 23 September 2015, p. 7.

19 *Committee Hansard*, 23 September 2015, p. 10.

20 *Submission 48*, p. 3.

> with Aboriginal communities that people think that that is where all the concern is. There is no doubt that those remote communities are high-risk communities. I think that once you start looking across metropolitan Sydney and some of the urban areas people will be shocked to see the impact that alcohol is having on the next generation.[21]

FASD and the criminal justice system

5.19 Professor Latimer described how the symptoms and behaviours of a person with a FASD increase the likelihood of interaction with the processes of the criminal justice system:

> [I]n effect, a child or adult may never understand the differences between right and wrong or the consequences of their actions and may not learn from experiences. Due to their impaired cognition and memory, they may not be able to accurately recollect past events and thus may not be deemed a reliable witness. They may confess to something they do not have the capacity to remember. Their poor memory might mean that they forget to come to court or do not recognise the importance of such. They might make a false confession because they are very easily led and keen to please. Their poor impulse control, their aggressive behaviour and their frequent reoffending are common behaviours in this vulnerable population that often results in contact with juvenile justice systems and may lead to incarceration.[22]

5.20 In its November 2012 report, *FASD: The Hidden Harm*, the House of Representatives Standing Committee on Social Policy and Legal Affairs, noted the evidence it received on international research demonstrating the high prevalence of youth and adults with FASD in the criminal justice system:

> The Alcohol and Other Drug Council of Australia (ADCA) cited statistics from the National Organization on Fetal Alcohol Syndrome in the US, which stated that 61 per cent of adolescents and 58 per cent of adults with FASD in the US have been in trouble with the law, and that 35 per cent of those with FASD over the age of 12 had been incarcerated at some point in their lives. Another US study found that 60 per cent of people with FASD have been in contact with the criminal justice system.[23]

5.21 In terms of the prevalence of FASD among the prison population in Australia, the joint submission by the North Aboriginal Justice Agency and the Central Australian Aboriginal Legal Aid Service, referred to statistics from Tennant Creek:

> The [Legislative Assembly of the Northern Territory's Select Committee on Action to Prevent FASD] cited a study conducted by the Aboriginal Health Service in Tennant Creek in 2011, Anyinginyi Health Aboriginal Corporation, in conjunction with a Tennant Creek Youth Service

21 *Committee Hansard*, 23 September 2015, p. 8.

22 *Committee Hansard*, 23 September 2015, p. 1.

23 House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm*, November 2012, p. 137. See also Gilbert+Tobin Lawyers, *Submission 49*, p. 5.

> organisation into FASD. The health service used the Canadian Medical Association's to screen 220 clients for FASD and found 70% exhibited one or more indicator for FASD, and of those youth, all had been recidivist offenders in the criminal justice system.[24]

5.22 There does not appear to be further data on the prevalence of FASD among people in prison, or otherwise in contact with the criminal justice system in Australia. However, Gilbert+Tobin referred to anecdotal evidence in Australia that suggests people with FASD are over-represented in the Australian legal system:

> The First Peoples Disability Network, for example, has stated that it is not uncommon to meet Aboriginal people who are either in jail or who are in contact with the criminal justice system who it would appear have some form of FASD. Similarly, Legal Aid NSW has noted that the behaviours that are symptomatic of FASD are what bring people with FASD to the attention of the criminal justice system.[25]

5.23 On this point, Professor Latimer stated:

> [I]n our opinion, many Aboriginal and Torres Strait Islander people who come into contact with the justice system do so because they have a health condition associated with developmental delay; namely one of the foetal alcohol spectrum disorders. Mandatory sentencing regimes are inappropriate for this population of Aboriginal and Torres Strait Islander people because they fail to acknowledge that the FASD should be managed by health professionals rather than the justice system.[26]

5.24 During a Senate Legal and Constitutional Affairs References Committee's inquiry in 2013, Dr Raewyn Mutch, a Post-Doctoral Research Fellow with the Telethon Institute for Child Health Research, commented on the negative aspects of detention for a young person with FASD:

> If someone has a high sensory drive, which is quite common among children and youth with FASD, they may have behaviours as a result of that—sensory seeking behaviours—which may make them invade people's personal body space or reach for substances. But, if you put someone with a high sensory drive like that in lockdown for 12 or 18 hours a day, that is not going to help them at all. That is going to upregulate them; it is not going to calm them down.
>
> …
>
> Some of the routine management protocols for dealing with youth do not necessarily work with people with this type of neurocognitive impairment. If that were understood then they would be managed differently, and if they

---

24 *Submission 31*, p. 14.

25 See Gilbert+Tobin Lawyers, *Submission 49*, pp 5-6. See also House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm*, November 2012, pp 136-139.

26 *Committee Hansard*, 23 September 215, p. 2. Mandatory sentencing regimes are discussed later in this chapter in the context of structural bias.

> were managed differently then the outcome would be more effective and more helpful.[27]

5.25 Dr Mutch continued:

> Similarly, they do not respond to punitive measures. They do not understand punitive measures; they respond to positive measures. They do not necessarily respond to sequential instructions; they need singular instructions. They do not understand the fact that they have done something wrong on a Saturday morning and they get punished for it on Monday; they will not understand that. They do not necessarily generalise their learning. If they learn in the morning how to do something and then in the afternoon they do not replicate that, that behaviour is presumed to be wilful, naughty and purposeful, but in fact it is not. The underlying brain behaviour is that they did not understand or they cannot remember and generalise.[28]

Previous inquiries

5.26 As can be seen from the evidence above, this inquiry is not the first time that a parliamentary committee has considered the issue of FASD and the incarceration of Indigenous offenders. The work and recommendations of those previous committees has significantly contributed to the recognition of FASD and the impact that it has on incarceration and provides the context for the current policy framework. Appendix 4 summarises the work and recommendations in this area from the following inquiries:

- House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time - Time for Doing: Indigenous youth in the criminal justice system*, June 2011;
- House of Representatives Standing Committee on Social Policy and Legal Affairs, *FASD: the hidden harm – Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, November 2012;
- Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013; and
- House of Representatives Standing Committee on Indigenous Affairs, *Alcohol, hurting people and harming communities*, June 2015.

Current situation

5.27 In answers to questions on notice the Department of Health provided the committee with an update on the current status of the National FASD Action Plan.[29] The Commonwealth Government is spending $9.2 million on FASD-related programs

---

27 Senate Legal and Constitutional References Committee, Inquiry into the value of a justice reinvestment approach to criminal justice in Australia, *Committee Hansard*, 17 April 2013, p. 5.

28 Senate Legal and Constitutional Affairs References Committee, Inquiry into the value of a justice reinvestment approach to criminal justice in Australia, *Committee Hansard*, 17 April 2013, p. 5.

29 See Department of Health, *Answers to questions on notice*: *Question No. 1*, received 8 April 2016.

and initiatives, including $500,000 on the finalisation and dissemination of the National FASD Diagnostic Tool, which will be ready for release in mid-2016.[30] The Department of Health stated:

> The utilisation of the soon-to-be finalised diagnostic tool will assist the Department in improving data collection regarding prevalence.[31]

5.28 The Department of Health also indicated that issues regarding improvements to data collection are also the focus of discussions of the FASD Technical Network.[32]

5.29 The Commonwealth is also providing a number of projects to support pregnant woman with alcohol dependence, including:

- Funding of $414,000 to the Foundation for Alcohol Research and Education to further promote and evaluate the What Women Want to Know Project. This project is due to cease in June 2016.
- Funding of $118,745 to National Drug and Alcohol Research Centre to evaluate the best practice resource for drug and alcohol dependent women. This project is due to cease in June 2016.
- Funding of $145,000 to NOFASD Australia to provide services to individuals and families affected by FASD to 30 June 2016.[33]

5.30 In terms of specific measures targeted to prevent and manage FASD in Indigenous communities, the Department of Health noted $4 million had been provided for the following project:

> The Menzies School of Health Research has been contracted to develop a FASD Prevention and Health promotion resource. The resource was developed by the Ord Valley Aboriginal Health Service. The resource will be rolled out nationally through the New Directions: Mother and Babies Programme. Services will be provided with training and support as part of the implementation. An evaluation will also be undertaken.[34]

5.31 In terms of increasing awareness regarding the effect of consuming alcohol during pregnancy, the Department of Health stated:

> The Foundation for Alcohol Research and Education (FARE) and *DrinkWise* have each been funded by the Department to promote the 2009 National Health and Medical Research Council (NHMRC) Australian Guidelines to Reduce Health Risks from Drinking Alcohol (Alcohol Guidelines) message that for women who are pregnant, planning a pregnancy, or breastfeeding, not drinking is the safest option.[35]

---

30 Department of Health, *Answers to questions on notice*: *Question No. 1*, received 8 April 2016.

31 Department of Health, *Answers to questions on notice*: *Question No. 7*, received 8 April 2016.

32 Department of Health, *Answers to questions on notice*: *Question No. 7*, received 8 April 2016.

33 Department of Health, *Answers to questions on notice*: *Question No. 1*, received 8 April 2016.

34 Department of Health, *Answers to questions on notice*: *Question No. 1*, received 8 April 2016.

35 Department of Health, *Answers to questions on notice*: *Question No. 4*, received 8 April 2016.

5.32 Funding to *Drinkwise* was for 2011-12 to 2012-13 to:

> [D]evelop 'point of sale' information for consumers at liquor retailers, clubs, pubs and hotels to supplement and to explain the new consumer messages on alcohol labels. The project was designed to engage retailers and producers in providing responsible messages to consumers about reducing harmful drinking, particularly during pregnancy and to promote and explain the pregnancy warning label on alcohol products.[36]

5.33 Funding of $595,000 was provided to FARE's 'What Women Want to Know Project' for the 2011-12 to 2012-13 period:

> [W]ork with health professionals to support their role in raising awareness and to have meaningful conversations with women about the risks of consuming alcohol during pregnancy and to give the consistent message that no alcohol is the safest option when planning a pregnancy, during pregnancy and while breastfeeding.[37]

Tenancy issues

5.34 Homelessness, inadequate housing and over-crowded housing, are part of the broader social and economic disadvantage which have the potential to contribute to higher rates of Aboriginal and Torres Strait Islander people in incarceration. Given this, evidence to the committee highlighted the disproportionate impact that policies such as WA's Disruptive Behaviour Management Strategy, or 'three strikes' policy, have on homelessness of Aboriginal and Torres Strait Islander people:

> The three strikes policy is contributing to higher rates of eviction for Western Australian tenants in comparison to other states, and high rates of eviction from public housing for Aboriginal people. We understand that 402 households who received strikes have been moved on from their Department of Housing home in the 3 years from May 2011 – May 2014. Half of these evictions resulted from proceedings for 3 strikes, the other half of the evictions arose from terminations for rent arrears, tenant liability, water bills. Our understanding is that tenants who receive strikes are scrutinised for other grounds of terminations as well. In our view this is not consistent with an approach of seeking to sustain tenancies.[38]

5.35 Tenancy WA's submission continued:

> The issue of over crowding and cultural obligation to accommodate family members in need is seriously compounded by the disruptive behaviour management strategy, commonly referred to as 'three strikes'. Three strike evictions of Aboriginal tenants has a real propensity to snowball. If one

---

36 Department of Health, *Answers to questions on notice*: *Question No. 4*, received 8 April 2016.

37 Department of Health, *Answers to questions on notice*: *Question No. 4*, received 8 April 2016. The Department of Health notes that a further $414 000 in funding was provided to FARE for the period 2013-2014 to 2016-2017 for the continuation of the 'What Women Want to Know Project', although this program is due to cease in June 2016, see *Answers to questions on notice: Question No. 1 and 4*, received 8 April 2016.

38 TenancyWA, *Submission 32*, p. 10.

> family is evicted for three strikes, often they then seek accommodation with extended family. The family who take them in are then in violation of the [WA Department of Housing's] overcrowding policies and are also more at risk of having strikes for noise and disturbance complaints. Too often this leads to further evictions, and further homeless people seeking accommodation with extended family. The argument that people should not put themselves at risk of strikes and eviction by taking in family members (who might otherwise by homeless) fails to take into account the cultural obligations and expectations that exist amongst Aboriginal families, and fails to acknowledge the very real risks to children living on the streets.[39]

5.36 Tenancy WA noted the link between homelessness and incarceration, and also stated '[h]omeless adults may commit crimes for the purposes of being incarcerated'.[40] Tenancy WA provided the following case study:

> In the worst example, we know of 6 tenants of the same extended family who all had their tenancies terminated. Each termination worsened the overcrowding at other family member's households, and the evictions snowballed. Some of these clients are now in prison.[41]

5.37 At the public hearing in Perth, Mrs Mary McComish, Director of the Daydawn Advocacy Centre, informed the committee that often the tenants have a defence:

> Yet we find when we sit down and talk to them that they have a defence; they can defend these actions: it was not their fault that there was disruptive behaviour, because relatives had come around and smashed up the house, or a violent ex-partner had come over and smashed up the house, or they had gone away up north for a funeral and someone else had moved into the house unknown to them and caused trouble with the neighbours and caused complaints.
>
> These eviction applications can be defended, but they turn into big trials; they are big matters. They are not just small matters in the magistrate's court. You need legal expertise and quite a lot of work and preparation. I am very concerned that a lot of people are being evicted from their homes needlessly, that they could be defended and that it is leading to all these other ripple-effect consequences that we see in incarceration rates and other Aboriginal disadvantage.[42]

5.38 Mrs McComish also emphasised that the strikes are not able to be appealed:

> If you have a high water bill or a tenant liability bill, you can appeal to their three-tier appeal system, but if you have a strike that you do not think is fair or right you cannot appeal. It is just a very strict policy.[43]

---

39 *Submission 32*, p. 11.

40 *Submission 32*, pp 6-7.

41 *Submission 32*, p. 11.

42 *Committee Hansard*, 4 August 2015, p. 48

43 *Committee Hansard*, 4 August 2015, p. 49.

Structural bias

5.39 In his submission, Chief Justice Martin commented on 'systemic discrimination' which contributes to the overrepresentation of Indigenous people in incarceration:

> The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people. Aboriginal people are also significantly over-represented amongst those who are detained indefinitely under the Dangerous Sexual Offenders legislation. So at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.[44]

5.40 Chief Justice Martin explicitly stated that he did not accept 'that the people in the system are racist'. However, Chief Justice Martin did observe 'there are nevertheless tilts in the system which work significantly against Aboriginal people and which I think have contributed to their overrepresentation'.[45]

5.41 As noted in Chapter 4, the imprisonment rate for Aboriginal and Torres Strait Islander people varies between the different jurisdictions. Chief Justice Martin's comments relate to the overrepresentation of Indigenous people incarcerated in WA, which has the highest imprisonment rate for Aboriginal and Torres Strait Islander people at 17 times the rate for non-Indigenous people. In relation to the variation in overrepresentation between different jurisdictions, NATSILS stated:

> Crime statistics (e.g., rates of arrest and rates of imprisonment) [do not] measure prevalence of crimes or who are responsible for committing those crimes. Instead crime statistics measure the rate and/or demographics of those people who are caught and punished for criminal behaviour.
>
> If higher rates of offending among Aboriginal and Torres Strait Islander people were the sole cause of higher incarceration rates then there should be no difference in the rate of overrepresentation between different states and territories.[46]

5.42 The remainder of this chapter considers some of the structural biases which contribute to the overrepresentation of Indigenous Australians in prison, specifically:

- mandatory sentencing regimes;

---

44 *Submission 1*, pp 8-9.

45 *Committee Hansard*, 4 August 2015, p. 31.

46 *Submission 13*, p. 16.

- the refusal of bail and the imposition and enforcement of onerous bail conditions; and
- over-policing.

The effect of mandatory sentencing regimes on Indigenous incarceration rates

5.43 The Law Council of Australia (Law Council), in a discussion paper, provides the following definition of mandatory sentencing:

> Mandatory sentencing regimes direct courts as to how they must exercise their sentencing powers. These laws require offenders to be automatically imprisoned – or in some cases detained for a minimum prescribed period for particular offences.[47]

5.44 The types of offences which attract a mandatory sentence vary among jurisdictions in Australia. The Law Council provided the following summary as at May 2014:

> - Western Australia for repeat adult and juvenile offenders convicted of residential burglary, grievous bodily harm or serious assault to a police officer;[48]
> - the Northern Territory for murder, rape and offences involving violence;
> - New South Wales for murder of a police officer or where a person dies as a result of an assault and the offender was intoxicated;
> - Queensland for certain child sex offences, murder, and motorcycle gang members who assault police officers or are found in possession or trafficking in firearms or drugs;
> - South Australia for certain serious and organised crime offences and serious violent offences;
> - Victoria for an offence of intentionally or recklessly causing serious harm to a person in circumstances of gross violence; and
> - the Commonwealth for certain people smuggling offences.[49]

5.45 Submissions and witnesses outlined a number of objections to mandatory sentencing regimes. For example, the Law Council listed the following concerns:

> - potentially results in harsh and disproportionate sentences where the punishment may not fit the crime;

---

47 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing, May 2014*, p. 9.

48 Since May 2014, the Western Australian Parliament has passed the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* which introduced mandatory minimum penalties of up to 15 years for people who committed a serious crime, such as rape or murder, during an aggravated burglary, see Law Council of Australia, *Submission 41*, p. 14.

49 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing, May 2014*, p. 9. Since May 2014, WA has passed legislation expanding the mandatory sentencing regime in that state, namely the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015 (WA)*, which is discussed further later in this chapter.

- potentially increases the likelihood of recidivism;
- wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole;
- dangerously displaces direction to other parts of the criminal justice system, most notably law enforcement agencies and prosecutors;
- results in significant economic costs to the community; and
- is not consistent with Australia's commitments under the *International Covenant on Civil and Political Rights and the Convention on the Rights of the Child*.[50]

5.46 Some submissions argued that there is no evidence that mandatory sentencing regimes work as a deterrent. For example, NATSILS stated:

> [I]n places in Australia where mandatory sentencing schemes are applied there is a lack of evidence as to whether they actually achieve the desired deterrent effects. In general however, there is little evidence that longer prison sentences are effective in deterring would-be criminals, especially disadvantaged and vulnerable persons, because higher penalties are highly unlikely to influence persons with mental impairment, alcohol and/or drug dependency or those who are socially and economically disadvantaged.[51]

5.47 The UNSW Law Society commented that 'mandatory sentencing undermines the essential role of judicial discretion in sentencing'.[52] The UNSW Law Society continued:

> Judicial discretion in sentencing allows for a non-arbitrary judgement to be made about the appropriateness of sentence after the offence has been committed, with knowledge of the full circumstances. Mandatory sentencing reverses this principle. Parliament, often motivated by "tough on crime" political aims, prescribes the punishment of the offence before it has even taken place, leaving no room for the individuality of circumstances to mitigate sentence.[53]

Disproportionate impact on Indigenous people

5.48 Submissions noted the disproportionate impact that mandatory sentencing regimes have on Indigenous people. For example, the Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Mick Gooda, stated:

> Mandatory sentencing regimes, particularly those which prescribe imprisonment for property offences as in Western Australia and the Northern Territory, have a disproportionate impact on disadvantaged, vulnerable people. Further, they impact on 'low level' offenders

50 *Submission 41*, pp 12-13.

51 *Submission 13*, p. 14. See also: Queensland Association of Independent Legal Services, *Submission 8*, p. 14.

52 *Submission 14*, p. 5.

53 *Submission 14*, p. 5.

> disproportionality, as more serious offenders would be sentenced to imprisonment regardless of the mandatory sentencing laws.
>
> It is therefore unsurprising that mandatory sentencing has a disproportionate impact on Aboriginal and Torres Strait Islander people, in particular young people.[54]

5.49 The National Association for Community Legal Centres argued:

> …mandatory sentencing laws are arbitrary and undermine basic rule of law principles by preventing courts from exercising discretion and imposing penalties tailored appropriately to the circumstances of the case and the offender. Of particular concern is the disproportionate impact of such laws on Aboriginal and Torres Strait Islander peoples in light of the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.[55]

5.50 Liberty Victoria, in outlining its opposition to mandatory sentencing, also referred to the disproportionate impact on Indigenous people:

> Mandatory sentencing rails against long held principals of taking into account an accused's circumstances in sentencing and the value of judicial discretion. This will have a particularly deleterious effect on those impacted by mental health issues and histories of gross disadvantage. Further, mandatory sentencing disproportionately [a]ffects Aboriginal and Torres Strait Islander people both as a result of the over representation of these groups in the justice system but in terms of the prevalence of ongoing systemic and social disadvantage leaving these communities on the very fringes of society. There is little to no evidence to suggest that high police presence reduces rates of crime, yet Aboriginal communities continue to experience greater policing. Further, there is no evidence to support the deterrent effect or the beneficial impact of mandatory sentencing.[56]

5.51 Redfern Legal Centre used the example of mandatory sentencing legislation in NSW for alcohol-fuelled violence to illustrate the disproportionate impact:

> We have concerns that the recent introduction of mandatory sentencing laws in NSW targeting alcohol related violence in the Sydney CBD will have an unintended disproportionate impact on the ATSI community due to the high rates of alcohol related violence within this community. In 2010, [Bureau of Crime Statistics and Research] NSW noted that alcohol was a factor in a high proportion of assaults committed by Indigenous offenders. The introduction of mandatory custodial sentences for assaults committed under the influence of alcohol is therefore highly likely to have a significant impact on rates of incarceration of Indigenous offenders. These concerns reflect many of the concerns put forward by Indigenous Legal Assistance

54 *Submission 5*, p. 5.

55 *Submission 42*, p. 8.

56 *Submission 44*, p. 3.

> schemes at the time the proposed laws were introduced, as well as forming part of the basis for the Law Society's opposition to the scheme.[57]

5.52 In its policy discussion paper on mandatory sentencing, the Law Council provided a number of examples which it described as 'anomalous or unjust cases where mandatory sentencing has applied':

- a 16-year-old with one prior conviction received a 28-day prison sentence for stealing one bottle of spring water;
- a 17-year-old first time offender received a 14-day prison sentence for stealing orange juice and minties;
- a 15-year old Aboriginal boy received a 20-day mandatory sentence for stealing pencils and stationery. He died while in custody; and
- an Aboriginal woman and first-time offender who received a 14-day prison sentence for stealing a can of beer.[58]

5.53 Several submissions noted the United Nations has recommended that Australia abolish mandatory sentencing due, partly, to the discriminatory impact on Indigenous Australians.[59]

Western Australia

5.54 In September 2015, the WA Parliament passed legislation expanding the mandatory sentencing regime for that jurisdiction. Prior to the passage of that legislation, Ms Tammy Solonec, Indigenous Rights Manager, Amnesty International, summarised for the committee the proposed new laws in WA:

> One of the reasons we are really concerned about the home burglary bill before the WA parliament is it will extend mandatory sentencing to 16- and 17-year-olds. That will be three years of detention if it is considered in the circumstances of 'aggravated'. Aggravated can be in circumstances when it is with a whole bunch of kids, which we know a lot of kids are doing.[60]

5.55 Ms Solonec gave the following example of the potential operation of the proposed law:

> If this law goes through, a 16-year-old girl who is pressured by an older boyfriend to stand guard but does not do anything wrong—she is caught up in all of that—will be mandatorily detained for three years, which means she spends at least one year in an adult prison. That could be her first

57 *Submission 30*, p. 6

58 Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing, May 2014*, p. 11.

59 See, for example, Mr Mick Gooda, Aboriginal and Torres Strait Islander Justice Commissioner, *Submission 5*, p. 6; Amnesty International, *Supplementary Submission 39, A brighter tomorrow: Keeping Indigenous kids in the community and out of detention in Australia*, May 2015, p. 17; National Justice Coalition, *Submission 40*, p. 9; Law Council of Australia, *Submission 41*, p. 12.

60 *Committee Hansard*, 4 August 2015, pp 6-7.

> offence. There would be no mitigating circumstances taken into account because it is mandatory sentencing.[61]

5.56 Ms Solonec outlined her concerns with the proposed law:

> So we have real concerns about that. Western Australia is the only jurisdiction that has these tough laws. And, surprise, surprise, we are the jurisdiction that locks up more kids than anywhere else.[62]
>
> There is a real need to look at that. I think there is a real need to look at these particularly young children. For a start, 10- or 11-year-olds should not be in prison at all under the convention. Secondly, they are so vulnerable—they are babies. They do not need to be put into jail with older kids. We really do need strategies for those younger children.[63]

5.57 NATSILS outlined the anticipated impact of the bill:

> It has been stated by the Western Australian Corrective Services Commissioner that as a consequence of these amendments it is an anticipated that an extra 60 juveniles and 208 adults over three years will be imprisoned or detained at a cost of $93 million dollars.[64]

5.58 NATSILS continued:

> NATSILS is gravely concerned that the vast majority of these will be Aboriginal and Torres Strait Islander people and that the extension of mandatory sentencing laws will only serve to increase the already unacceptable level of overrepresentation of Aboriginal and Torres Strait Islander peoples in custody in Western Australia.[65]

5.59 Chief Justice Martin informed the committee there is 'very good reason to believe that the [new] mandatory sentencing legislation…will have a significant effect upon incarceration rates, particularly amongst juveniles'.[66]

Unintended consequences of mandatory sentencing

5.60 Chief Justice Martin also spoke about 'unintended consequences' of mandatory sentencing legislation, specifically: the non-reporting of offences; the downgrading of charges; and fewer guilty pleas in court. Chief Justice Martin gave the following examples to illustrate his point:

> I will give you an example from the mental health area…When the assaulting the public officer legislation was introduced, there was enormous concern within that community of mental health carers. They were very concerned about notifying police of violent behaviour on the part of the

61 *Committee Hansard*, 4 August 2015, p. 7.

62 *Committee Hansard*, 4 August 2015, p. 7.

63 *Committee Hansard*, 4 August 2015, p. 7.

64 *Submission 13*, p. 15.

65 *Submission 13*, p. 15.

66 *Committee Hansard*, 4 August 2015, p. 32.

> family member that they were caring for in case the police turned up and were then assaulted as a result of which the family member would stare down the barrel of a mandatory sentencing term. So it discourages reports.
>
> Secondly, it results in the downgrading of charges so that I am sure that the low number of charges of assaulting a public officer over the last three years has come about because police, when they are reviewing the charge, say, 'This is not an appropriate case for a mandatory sentence, so we'll forget the assault on the public officer.' So the offender is not actually being charged with the offence that best suits the conduct to avoid the consequences.
>
> The third consequence is that there are many fewer pleas of guilty in relation to offences covered by mandatory sentencing. That has two consequences: first of all, it increases the stress on victims who then have to participate in a trial process they would not otherwise have to participate in; and, secondly, it puts a lot of stress on the system, because we have to undertake a lot of trials that we would not have to undertake.[67]

5.61 The National Aboriginal Family Violence Prevention Legal Services Forum noted that the prospect of mandatory sentencing may deter reporting in cases of family violence:

> In the context of family violence, mandatory sentencing can have significant adverse impacts on victims. For example, there is a risk that mandatory sentencing could deter reporting from Aboriginal and Torres Strait Islander victims/survivors due to pressures from their community not to report a perpetrator who would be imprisoned as a result. Rather than a focus on imprisonment, a greater emphasis should be placed on early intervention and prevention activities that focus on education before offending begins and/or escalates.[68]

Bail laws

5.62 Submissions and witnesses provided evidence on the refusal of bail, strict bail conditions and stringent enforcement of bail conditions and the impact on the incarceration rates of Aboriginal and Torres Strait Islanders, and in particular on young offenders.

5.63 According to the Australian Bureau of Statistics, at 30 June 2015, Aboriginal and Torres Strait Islander people accounted for 27 per cent of all unsentenced prisoners.[69] Law Council of Australia noted:

---

67 *Committee Hansard*, 4 August 2015, p. 32.

68 *Submission 46*, p. 23.

69 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. See also the joint submission of the North Australian Aboriginal Justice Agency and the Central Australian Aboriginal Legal Aid Service, which states: 'The overwhelming majority of NT prisoners are serving short sentences or are in custody having been refused bail. One-quarter of prisoners are unsentenced or on remand having been refused bail', *Submission 31*, p. 9.

> [In] several jurisdictions, a very high proportion of Indigenous prisoners are being held on remand for lengthy periods of time, indicating that bail laws in those jurisdictions may be significantly inflating the rate of imprisonment.[70]

5.64 Chief Justice Martin noted the factors taken into account in the decision of whether or not to grant bail contribute to Aboriginal and Torres Strait Islander people being overrepresented in this category of prisoners:

> There is no doubt about that, because the criteria we do use, like prior offending, like stable employment, like a stable place of residence, like mental health issues—all of those criteria result in Aboriginal people being overrepresented amongst those who are denied bail, and move-on notices are much more often issued to Aboriginal people than to non-Aboriginal people.[71]

Young offenders

5.65 Specifically in relation to young offenders, NATSILS observed that there have been:

> An increasingly rigid approach to bail which has had a particularly discriminatory effect on Aboriginal and Torres Strait Islander young people, causing an increase in the number of Aboriginal and Torres Strait Islander young people on remand[.][72]

5.66 Amnesty International provided the following data on the refusal of bail for Indigenous youth:

> Indigenous young people are also more likely than non-Indigenous young people to be held in detention on remand due to inadequate bail accommodation options and other factors. On average 57 per cent (250 out of 437) of all unsentenced young people in detention from June 2013 to June 2014 were Indigenous.[73]

5.67 In a factsheet, Balanced Justice outlined the negative impact that being denied bail had on young people:

> [C]hildren held in remand report feeling isolated and frustrated by the experience of being denied bail and held on remand; they feel as if they have already been found guilty[.][74]

5.68 The Public Interest Advocacy Centre (PIAC) referred to work by the Australian Institute of Criminology (AIC):

---

70 *Submission 41*, p. 16. See also Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission 5*, Appendix A, p. 28.

71 *Committee Hansard*, 4 August 2015, pp 30-31.

72 *Submission 13*, p. 18.

73 *Submission 39*, p. 11.

74 See Queensland Association of Independent Legal Services, *Submission 8*, Attachment: Balanced Justice, *Detention and bail for children*, p. 2.

> In a study of bail conditions imposed on young people across all Australian jurisdictions, the Australian Institute of Criminology found that bail conditions were unduly onerous, difficult for young people to adhere to and often appear 'arbitrary and unrelated to the young person's offending'.
>
> …
>
> Excessive monitoring of bail conditions was also reported to the AIC, which found an Australia-wide practice of 'overzealous policing of young people's bail compliance and in some cases, a 'zero tolerance' approach to bail breaches'.[75]

5.69 The committee also received a number of examples of stringent bail compliance checking leading to 'technical breaches' of bail conditions. Ms Solonec, provided the following example to illustrate the impact of policing of bail conditions in WA:

> We had one situation with a family up in Broome where the boy was put on a curfew which was quite inflexible. The family chose to take him up to One Arm Point for Christmas. The boy did not have a choice. He went with the family, which breached his bail, and he was then sent down to Perth, to Hakea, to a men's prison. It was not even his fault. There needs to be better communication and there needs to be a little bit more flexibility, especially if you are looking at the Christmas period and weekends and especially if the child does not have a say in a lot of these things and they are detained as a result.[76]

5.70 Ms Solonec also gave evidence about the 'heavy enforcement' of curfews:

> [W]e have heard these mainly coming from the Kimberley where police will ensure that the child is complying with the curfew by staying in their house. They will knock on the doors of the house, shine torches through the windows and insist that the child present themselves at all forms of the night, waking up all of the household members, including children and elderly people.[77]

5.71 Ms Solonec stated that these practices were discouraging people from becoming the 'responsible adult' necessary in order for a child to get bail:

> We had one family say that they did not want the boy who was on bail to be left with them, because the police kept coming around the house and harassing everyone. These sorts of conditions are preventing responsible persons from taking the children. They then either have to find a bail hostel—which there are not many of—or the kids come down to Perth to detention. That is a real issue.[78]

5.72 Balanced Justice cited a similar scenario which occurred in New South Wales:

---

75 *Submission 17*, pp 11 and 12.

76 *Committee Hansard*, 4 August 2015, p. 5.

77 *Committee Hansard*, 4 August 2015, p. 5.

78 *Committee Hansard*, 4 August 2015, pp 5-6.

> In NSW a young girl was arrested for breaching a bail condition which required her to be home by 9.00 p.m. She was arrested as she was making her way home when the train pulled in at five minutes past nine. She spent at least a month in custody, even though when convicted she did not receive a custodial sentence for the shoplifting charge. The young girl gave up her schooling after these events.[79]

5.73 In its supplementary submission, Amnesty International commented on the consequences of these bail condition breaches:

> A representative of the ALSWA in Broome noted that by the time Aboriginal young people attend court, bail conditions mean they may have already received a punishment far greater than the offence could attract, or that an adult would attract for the same offence. An example given by another ALSWA lawyer was where a young person is arrested for stealing goods below the value of $1000, for which detention is not an option, released by police on bail with a curfew, which would not be imposed on an adult. The curfew is vigorously monitored and the young person is then arrested for failing to comply with it and could ultimately end up in detention on remand.[80]

5.74 Further, Balance Justice noted:

> It is important to note that there is no evidence that monitoring, arresting and detaining young people for breaches of their bail condition reduces re-offending among juvenile offenders. The more likely outcome of a 'breach offence' is the further criminalisation of the child and an increased likelihood of the child being placed in custody, thereby further entrenching the child in the criminal justice system.[81]

5.75 However, Chief Justice Martin argued that there have been some positive steps taken recently in relation to bail for young offenders in WA:

> Accommodation is now available [in the Pilbara, Kimberley and the Goldfields] for children who intersect with the law so they are not now being flown to Perth and put in detention simply because there is nowhere safe for them to live.
>
> In the metropolitan area there is another programme for children which involves looking very hard to locate a responsible adult who then provides appropriate care and supervision.[82]

---

79 Queensland Association of Independent Legal Services, *Submission 8*, Attachment: Balanced Justice, *Detention and bail for children*, p. 3.

80 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 36.

81 Queensland Association of Independent Legal Services, *Submission 8*, Attachment: Balanced Justice, *Detention and bail for children*, p. 2.

82 *Submission 1*, p. 12.

Over-policing

5.76 In its submission, the Redfern Legal Centre (RLC) noted that over-policing was a key cause of the high incarceration of Indigenous people. RLC stated that policies which target individuals granted noncustodial sentences, such as good behaviour bonds and the targeting of those on bail through frequent bail compliance checks, can result in higher levels of arrest, contributing to higher incarceration rates.[83] At the public hearing, Mr David Porter, Senior Solicitor, RLC, referred to one such policy, New South Wales' Suspect Target Management Plan (STMP):

> The STMP is a policy rather than legislation. It is an internal police policy. [The police] formulate a list of targeted offenders within any catchment area. They do not need to apply for any extra powers. They have been given sufficient discretionary powers under legislation that they can provide someone with an overwhelming level of attention, and the primary purpose is to get that person off the streets and it does not really matter what for. That is the way in which the policy is framed.[84]

5.77 RLC's submission explained the impact of the STMP policy:

> [STMP] encourages the targeting of previous offenders, including those on good behaviour bonds or other alternatives to imprisonment, as well as increasing bail compliance checks, in order to increase efficiency within the policing system. While we recognise that prioritisating previous offenders improves the efficiency of police resources, it is our observation that there has been no differentiation between those who have been convicted of minor offences, such as property or traffic offences, and those convicted of violent offences. This has led to individuals on good behaviour bonds for minor offences feeling harassed, negatively affects their relationship with police, and increases the risk of further offending and incarceration through breach of conditions.[85]

5.78 RLC noted that the anecdotal evidence of their clients reporting increased use, and overuse, of proactive police powers is reflected in statistics collected by the NSW police:

> Between 2000 and 2010 the use of the 'move on' power increased from 22,531 to 77,391[;]
>
> Between 2005 and 2010 the number of bail compliance checks grew from 3541 to 88,617[;]
>
> Between 2000 and 2010 the number of person searches increased from 18,238 to 200,132.[86]

---

83 *Submission 30*, p. 6.

84 *Committee Hansard*, 23 September 2015, p. 53.

85 *Submission 30*, pp 6-7.

86 *Submission 30*, p. 7.

5.79 The Public Interest Advocacy Centre (PIAC) also described changes to policing practices in recent years which have contributed to the increasing contact Aboriginal and Torres Strait Islander people have with the criminal justice system:

> In PIAC's experience, this shift to a proactive policing model has had a largely detrimental impact on Aboriginal and Torres Strait Islander people, drawing them into the criminal justice system when it is unnecessary, leading to largely irreversible and adverse consequences for the individual, his or her family and indeed whole communities. It has also continued to cement the precarious relationship between Aboriginal young people and adults with the police officers in their communities. Aboriginal Australians report a high level of discrimination across a range of settings, with one of the highest occurrences being when interacting with police, security people, lawyers or in a court of law. The very perception of discrimination has an impact on Aboriginal and Torres Strait Islander people's well being; research has shown that just a perception can lead to changes in job seeking behaviour or dropping out of the work force. Discrimination can also be linked to negative health outcomes.[87]

5.80 At the public hearing in Perth, Mr Peter Collins, Director of Legal Services, Aboriginal Legal Service of WA, outlined how the police 'move on' powers, in concert with Prohibited Behaviour Orders, can disproportionately impact on Indigenous people:

> There are also the laws that are passed in this state, in particular move-on laws which enable police to move people on from an area for up to 24 hours. Those laws were introduced in 2005. A breach of a move-on law is punishable by jail. There is also what is called the Prohibited Behaviour Orders [PBO] Act, which came into operation in 2011. That act allows courts to ban people from engaging in otherwise lawful activity—for example, entering a certain area, say the Perth CBD, associating with certain individuals or engaging in otherwise lawful conduct; for example, drinking alcohol. A breach of a PBO, as we call them, is also punishable by jail. These laws have been used to target the most vulnerable Aboriginal people in Western Australia: the homeless, those with acute alcohol and drug problems, the mentally ill, those with cognitive impairments, and on it goes.[88]

5.81 Mr Collins provided the committee with the following example:

> In 2013 I acted for a man who had been homeless in Perth for 16 years. He lives on the streets in and around Perth CBD and the Northbridge area, which adjoins the CBD. He is a chronic alcoholic, he is a solvent sniffer and he sniffs paint, glue and petrol on a daily basis and has done so for 20 years. He is wholly reliant on the services provided by those organisations that assist homeless people and provide those services in the Perth CBD and Northbridge. He is highly reliant upon them to live. The PBO was made against him and it proposed that he be banned from entering

87 *Submission 17*, p. 15.

88 *Committee Hansard*, 4 August 2015, p. 20.

> the Perth CBD and Northbridge areas. At the time of the application for the PBO, he had been issued with 463 move-on notices since 1 January 2006. When I told him that the PBO would, if granted, ban him from entering Northbridge, his answer was, 'But that's where I live.' He fell asleep in court and snored loudly during the proceedings for the PBO. He had earlier been unable to complete an affidavit that the ALS wanted to compile on his behalf because he could not stay awake for long enough to complete it.[89]

89 *Committee Hansard*, 4 August 2015, p. 21.