13. DIVERSION FROM POLICE CUSTODY (RECOMMENDATIONS 79 - 91)

1. Introduction

The RCIADIC noted that indigenous people account for a disproportionately high percentage of the national custody figures in Australia. This Chapter looks at some of the specific policing and law and order strategies which have been recommended by the RCIADIC to reduce the numbers of Indigenous people in custody. The RCIADIC highlighted one key area of overrepresentation of Indigenous incarceration, being the essentially non-criminal activity of public drunkenness.¹ As set out in the National Report, according to the National Police Custody Survey, of those people placed into custody for public drunkenness, Indigenous people accounted for 46%, with Indigenous females accounting for a staggering 78% of female cases.²

The RCIADIC made a number of recommendations which are aimed at reducing the number of Indigenous people represented in police custody. These areas are:

1. Decriminalisation of the offence of public drunkenness and other related offences (Recommendations 79 - 86);
2. Police policies and alternatives to arrest (Recommendations 87 - 88); and
3. Bail (Recommendations 89 - 91).

This Chapter examines the extent to which these law and order mechanisms recommended by the RCIADIC have been implemented by Federal, State and Territory governments.

2. Decriminalisation of the offence of public drunkenness and the other offences (Recommendations 79 - 86)

As mentioned above, the RCIADIC highlighted the overrepresentation of Indigenous people in custody due to the offence of public drunkenness. The RCIADIC took the view that positive efforts must be made to move public drunkenness outside the realm of the criminal justice system.

Recommendation 79: That, in jurisdictions where drunkenness has not been decriminalised, governments should legislate to abolish the offence of public drunkenness.

The RCIADIC found that in those jurisdictions which still retain public drunkenness as an offence, it is generally a minor offence with little penalty, and commonly bail is

¹ Royal Commission into Aboriginal Deaths in Custody, National Report (1991), paragraph 32.1.2.
² Ibid, paragraph 7.1.11.
set at 10 cents. The majority of offenders do not even appear in a magistrates court. Given that situation, the RCIADIC made the point that to “decriminalise” public drunkenness would do little more than recognise in statute what actually occurs in practice.

At the time of issuing the National Report, the RCIADIC identified three levels of police intervention in relation to public drunkenness in Australia:

1. public drunkenness as an offence (Queensland and Tasmania);
2. apprehension and detention of persons on the grounds of public drunkenness alone (Western Australia and the Northern Territory); and
3. detention of persons in more qualified circumstances (e.g. where the person is incapable of taking proper care of himself or herself) (South Australia, NSW and the ACT).

2.1 Commonwealth

Our research has found no references to public drunkenness in Commonwealth legislation, other than that discussed at section 2.3 below which relates specifically to the Northern Territory.

2.2 New South Wales

In NSW, drunkenness in a public place was decriminalised by the Intoxicated Persons Act 1979 (NSW), but that Act allowed for the detention of persons who were "behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property" or who are "in need of physical protection because the person is intoxicated".

The Intoxicated Persons Act 1979 (NSW) was repealed in 2002 and replaced by the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW). This Act retains the detention provisions outlined above, and also gives the police powers to detain an intoxicated person found in a public place who is behaving in a disorderly manner or a manner likely to cause injury to the person, another person or damage to property. The police also have powers under this Act to give directions to an intoxicated person who is in a public place to move on and leave that place and not return for a specified period, if the police officer believes on reasonable grounds that the person's behaviour is likely to cause injury to any other person or persons, damage to property or otherwise give rise to a risk to public safety; or if the person is

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5 Ibid.
6 Ibid, paragraph 21.1.33.
7 Intoxicated Persons Act 1979 (NSW) (repealed), s. 5(1).
8 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), pt 16.
9 Ibid, s 206.
disorderly.\textsuperscript{10} In the event that a person does not comply with this direction they may be fined up to 2 penalty points,\textsuperscript{11} being $220.\textsuperscript{12}

On 30 September 2011, the \textit{Summary Offences Act 1988} (NSW) was amended to create a new offence for a person who has been given a move-on direction under the \textit{Law Enforcement (Powers and Responsibilities) Act 2002} (NSW) and who is "intoxicated and disorderly in the same or another public place within 6 hours of the move-on direction".\textsuperscript{13} The punishment is a fine of up to 15 penalty points,\textsuperscript{14} being $1,650.\textsuperscript{15} However, a person cannot be proceeded against or convicted of an offence for failing to obey a move-on direction under both the \textit{Summary Offences Act 1988} (NSW) and the \textit{Law Enforcement (Powers and Responsibilities) Act 2002} (NSW), in relation to the same conduct.\textsuperscript{16}

NSW has also established "Alcohol Free Zones",\textsuperscript{17} as an additional form of limiting public drunkenness. Until 2008, it was an offence to drink in an alcohol-free zone after receiving a warning not to do so.\textsuperscript{18} However, persons who had committed this street drinking offence could not be imprisoned or detained for failing to pay the fine, being 0.2 penalty points, for this offence.\textsuperscript{19} On 3 December 2008, the \textit{Local Government Act 1993} (NSW) was amended to allow for alcohol to be seized and disposed of if a person is either drinking alcohol in an alcohol-free zone, or if the police or enforcement officer has reasonable cause to believe that the person is about to drink, or has been drinking, in the alcohol-free zone.\textsuperscript{20}

\section*{2.3 Northern Territory}

The RCIADIC acknowledged the provisions of the \textit{Police Administration Act 1979} (NT), which the RCIADIC described as dealing with "protective custody apprehensions." It was the successor to the 1974 legislation that decriminalised public drunkenness.\textsuperscript{21}

Since then, the position in the Northern Territory regarding the decriminalisation of public drunkenness has altered. However, it is complicated by the existence of differing laws and prohibitions relating to certain areas and/or premises declared as "regulated places", "regulated premises", "restricted areas" and "alcohol protected areas".

\begin{itemize}
\item \textsuperscript{10} Ibid, s 198.
\item \textsuperscript{11} \textit{Intoxicated Persons Act 1979} (NSW) (repealed), s 199.
\item \textsuperscript{12} \textit{Crimes (Sentencing Procedure) Act 1999} (NSW), s 17.
\item \textsuperscript{13} \textit{Summary Offences Act 1988} (NSW), s 9(1).
\item \textsuperscript{14} Ibid.
\item \textsuperscript{15} \textit{Crimes (Sentencing Procedure) Act 1999} (NSW), s 17.
\item \textsuperscript{16} \textit{Summary Offences Act 1988} (NSW), s 9(4).
\item \textsuperscript{17} \textit{Local Government Act 1993} (NSW), pt 4.
\item \textsuperscript{19} \textit{Local Government Act 1993} (NSW) (repealed), s 643.
\item \textsuperscript{20} Ibid, s 642.
\item \textsuperscript{21} Royal Commission into Aboriginal Deaths in Custody, National Report, 1991, at paragraph 21.1.16.
\end{itemize}

13. DIVERSION FROM POLICE CUSTODY (RECOMMENDATIONS 79-91)
Under the *Liquor Act 1979* (NT), it is an offence to consume alcohol in a regulated place, although the penalty is the forfeiture of the liquor, and not detention. A "regulated place" is defined as a place within 2 km of licensed premises, which is in a public place, or on private premises from which the lawful occupier is absent at the time of the consumption. However, if the person causes a nuisance while consuming liquor in the regulated place the maximum penalty is 5 penalty units, being $745.

Further, private premises may be declared as "restricted premises" under the *Liquor Act 1979* (NT) and this attracts a further set of restrictions relating to the possession and consumption of alcohol. The maximum penalty for bringing liquor, possessing liquor or consuming liquor in restricted premises is 100 penalty units, being $14,900.

In "restricted areas", the possession and consumption of alcohol is strictly controlled. The *Liquor Act 1979* (NT) makes it an offence to have liquor in one's possession in a restricted area, unless one has a permit. Restricted areas are areas proclaimed to be such by the Northern Territory Licensing Commission, and include many areas occupied or frequented by Indigenous people. The maximum penalty for failure to comply is 100 penalty units, being $14,900 or imprisonment for 6 months. In 2012, the Commonwealth government passed the *Stronger Futures in the Northern Territory Act 2012* (Cth). This legislation inserted a new Division 1AA into the *Liquor Act 1979* (NT) and introduced the concept of "alcohol protected areas". Alcohol protected areas are defined as areas in the Northern Territory that are prescribed by rules made by the relevant Federal Minister.

Under Division 1AA, it is not only an offence to have liquor in one's possession, but also to consume liquor, bring liquor into, or supply liquor to a third person in an alcohol protected area. The maximum penalties are similar to the penalties under section 75 of the *Liquor Act 1979* (NT), and are 100 penalty units, being $17,000 or imprisonment for 6 months.

The stated aim of the *Stronger Futures in the Northern Territory Act 2012* (Cth) is to introduce "a number of measures aimed at building stronger futures for Aboriginal people in the Northern Territory". Nonetheless, it chooses the path of making mere possession of alcohol, let alone public drunkenness, in certain areas an offence, contrary to the intent of Recommendation 79.

### 2.4 Queensland

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22 *Liquor Act 1979* (NT), ss 101T, 101U(2).
23 The value of 1 penalty unit is currently $149, see *Penalty Units Amendments Regulations 2014* (NT).
24 *Liquor Act 1979* (NT), s 101B.
25 Ibid.
26 *Liquor Act 1979* (NT), s 75.
27 *Penalty Units Amendment Regulation 2014* (NT), s 21.
28 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 27.
29 The value of 1 penalty unit in Commonwealth legislation is currently $170. See s4AA of the *Crimes Act 1914* (Cth).

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In the National Report, the RCIADIC makes reference to section 81 of the *Liquor Act 1912* (Qld), which makes it an offence to be drunk in a public place, and provides for imprisonment for default in paying a fine.\(^{30}\) Although that Act has been repealed, section 10 of the *Summary Offences Act 2005* (Qld) contains this same offence. However, the maximum penalty under section 10 of the *Summary Offences Act 2005* (Qld) is 2 penalty units, being $227.70,\(^{31}\) and there is no provision for imprisonment.

Section 173B of the *Liquor Act 1992* (Qld), makes it an offence for a person to consume liquor in a public place that is a road, land owned by or under the control of a local government, or relevant land prescribed under a regulation. Under section 173C, the local government may designate public places within its area where liquor may be consumed in exception to section 173B. The penalty is 1 penalty unit, being $113.85,\(^{32}\) and there is no provision for detention.

Part 6A of the same Act contains a detailed regime regarding restricted areas, where the consumption and possession of alcohol over a certain amount is strictly regulated. The Part states that its purpose is to provide for the declaration of areas for minimising harm caused by alcohol abuse and misuse, and alcohol-related disturbances.\(^{33}\) However, section 168B provides significant monetary penalties for possession of, or an attempt to take into, more than the prescribed quantity of a type of liquor for that restricted area. For repeat offenders, section 168B also provides for a period of imprisonment. This clearly goes considerably further than prohibiting drunkenness in a public place.

As in the Northern Territory, whilst Queensland appears to have softened its stance outside restricted areas, regulation of public drunkenness in restricted areas can result in significant penalties and imprisonment.

### 2.5 South Australia

In South Australia, it is not an offence for a person of legal drinking age to consume liquor in a public place (except in designated "dry areas", see below paragraph). However, there are provisions for intoxicated persons to be placed into custody. The threshold is quite high in that the detaining officer must be of the opinion that the person "is unable to take proper care of himself", and that he/she may be taken to his/her place of residence, to a police station or a sobering-up centre.\(^{34}\) In particular, pursuant to the *Public Intoxication Act 1984* (SA), when a person is apprehended and taken to a police station, the officer in charge of the station must, within ten hours of the time of apprehension, either discharge the person or cause the person to be transferred to a sobering-up centre for admission as a patient.\(^{35}\) The person can also be discharged into the care of a solicitor, relative or friend if the officer in

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31 The value of 1 penalty unit is currently $113.85. See section 2B of the *Penalties and Sentences Regulation 2005* (QLD).
32 Ibid.
33 *Liquor Act 1992* (QLD), s 173F.
34 *Public Intoxication Act 1984* (SA), s 7.
35 Ibid, s 7(4).
charge of the station considers the solicitor, relative or friend is able and willing to care properly for the person.\textsuperscript{36}

South Australia has also legislated for "dry areas". Within dry areas, the consumption and possession of alcohol is an offence.\textsuperscript{37} An on-the-spot fine can be issued, or the person can be summoned to appear in court. If found guilty, the person can be fined and may have a conviction recorded against them. The maximum penalty is $1,250.\textsuperscript{38}

It appears that dry areas are not permanent arrangements. The relevant regulations detail specific dates on which any dry areas will expire, so that it appears that these are subject to periodic reassessment.\textsuperscript{39} In some circumstances, an area may only be a dry area at a particular time or on a particular day.

In South Australia, a tougher stance is taken on consuming liquor (or being drunk) in specific areas. However, outside of those areas, such conduct is not an offence in itself.

2.6 Australian Capital Territory

In the ACT, public drunkenness is not an offence. However, protective custody provisions exist in order to protect intoxicated persons.

A police officer may detain a person who is believed to be intoxicated in a public place if the person is either behaving in a disorderly way, behaving in a way likely to cause injury to themselves or others or damage to property, or incapable of protecting themselves from physical harm.\textsuperscript{40} However, a person can only be taken into custody if there is no other reasonable alternative for the person's care and protection.\textsuperscript{41}

2.7 Tasmania

It is illegal in Tasmania to consume liquor in a public street or certain public places such as certain parks. The penalty for this offence is a fine of up to 2 penalty units or, for subsequent offences, a fine of up to 5 penalty units.\textsuperscript{42}

The Police Offences Act 1935 (Tas) allows a police officer to take an intoxicated person into custody if they believe that person is likely to cause injury to themselves or another, or damage to property, or if they are incapable of protecting themselves from harm.\textsuperscript{43} If it is not possible to release a person entirely, or release a person to a

\textsuperscript{36} Ibid, s 7(9).
\textsuperscript{37} Liquor Licensing Act 1997 (SA), s 131.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid, s 131(2)(c).
\textsuperscript{40} Intoxicated People (Care and Protection) Act 1994 (ACT).
\textsuperscript{41} Ibid.
\textsuperscript{42} Police Offences Act 1935 (Tas), s 25. The current value of a penalty unit for the purposes of this legislation is $140.
\textsuperscript{43} Ibid, s 4A.
place of safety (including a hospital or appropriate facility) or to a responsible person, the police may hold that person in custody for an initial period of 8 hours.\(^{44}\)

### 2.8 Western Australia

Western Australia has not implemented this Recommendation. Street drinking, that is drinking in any public place, such as on the street or in a park or reserve, is illegal in Western Australia. However, such behaviour is punishable by a fine of up to $2,000 rather than imprisonment.\(^{45}\) It is also an offence in Western Australia to behave in a disorderly manner in a public place, and the penalty is a fine of up to $6,000.\(^{46}\)

Detaining an intoxicated person is permitted in Western Australia in the event that an intoxicated person is in a public place or trespassing on private property and needs to be apprehended to protect either their own, or another person’s, health or safety, or to prevent the person from causing serious damage to property.\(^{47}\) However, the person may not be detained any longer than is necessary to protect their own, or someone else’s, health or safety, or to prevent serious damage to property.\(^{48}\) Such detention must not be in a police station or lock-up unless there are exceptional circumstances or it is unreasonable, for example, to release a person into another person’s care or to an appropriate facility.\(^{49}\)

### 2.9 Victoria

Victoria is another state that has not implemented this Recommendation.

In Victoria, being found drunk in a public place is punishable by 8 penalty units, being $1,180.88, while being drunk and disorderly is an offence of 20 penalty units (being $2,952.20\(^{50}\)) or imprisonment for 3 days, and a second offence of being drunk and disorderly is 20 penalty units (being $2,952.20\(^{51}\)) or one month imprisonment.\(^{52}\) However, the police now have discretion to issue a person with an infringement notice for these offences, rather than to arrest them.\(^{53}\)

**Recommendation 80:** That the abolition of the offence of drunkenness should be accompanied by adequately funded programs to establish and maintain non-custodial facilities for the care and treatment of intoxicated persons.

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\(^{44}\) Ibid, ss 4A(3)-(6A).
\(^{45}\) Liquor Control Act 1988 (WA), s 119.
\(^{46}\) Criminal Code (WA), s 74A.
\(^{47}\) Protective Custody Act 2000 (WA), s 6(1).
\(^{48}\) Ibid, s 7(1).
\(^{49}\) Ibid, s 12(4)(a).
\(^{50}\) The current value of a penalty unit is $147.61: See Victoria Government Gazette No s 123 dated Tuesday 15 April 2014 and the Monetary Units Act 2004 (WA).
\(^{51}\) Ibid.
\(^{52}\) Summary Offences Act 1966 (Vic), ss 13, 14. The current value of a penalty unit is $147.61: See Victoria Government Gazette No s 123 dated Tuesday 15 April 2014 and the Monetary Units Act 2004 (WA).
\(^{53}\) Infringements (General) Regulations 2006 (Vic), sch. 3, item 10AA; Infringements Act 2006 (Vic).
**Recommendation 81:** That legislation decriminalising drunkenness should place a statutory duty upon police to consider and utilise alternatives to the detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons.

Presently, the majority of Australian States and Territories provide an option to police to utilise alternatives to the detention of intoxicated persons, and all States and Territories provide some limited funding for alcohol abuse centres and programs.

### 2.10 Commonwealth

Between 2011 and June 2014, the Commonwealth government granted $20 million to four regions around Australia as part of its program *"Breaking the cycle of alcohol and drug abuse in Indigenous communities"*.\(^{54}\) The communities that benefited from the grants did so because of their need for assistance in combating alcohol abuse and for the commitment their community leaders and members have shown in taking action.

Communities were granted money under the condition they drafted an Alcohol Management Plan.\(^{55}\) An important aspect of this plan was the inclusion of harm reduction activities. These activities included sobering-up facilities, women's shelters, sponsored sobriety groups, management step-down facilities and longer term supported accommodation for people coming out of treatment.\(^{56}\)

These measures are indicative of a general push from the Federal government away from detention in dealing with alcohol abuse.

### 2.11 New South Wales

The New South Wales Government has continually supported community based programs for Indigenous alcohol abuse. The 1999 NSW Government report into the implementation of the RCIADIC Recommendations noted the recurrent funding from the NSW Health Department to the Oolong House (Illawarra), Orana Haven (Far West) and Ngaimpe (Central Coast) drug and rehabilitation programs.\(^{57}\)

Furthermore, the Specialist Homelessness Services, which replaced the Supported Accommodation Assistance Program ('SHS') in December 2011, has over the years provided funding to a number of services which primarily target Indigenous people.

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\(^{54}\) Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, "Breaking the Cycle of Alcohol and Drug Abuse in Indigenous Communities Initiative" (January 2011- 1 June 2014).

\(^{55}\) Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, "Breaking the Cycle of Alcohol and Drug Abuse in Indigenous Communities Initiative Frequently Asked Questions Publication" (January 2011), pg 4.

\(^{56}\) Ibid.

with alcohol addiction. These services are located in Bourke, Brewarrina, Moree and Walgett.

In 2013, following the Federal Government’s lead in focusing on alternatives to detention, the NSW Government announced a mandatory sobering-up centre in the CBD, Kings Cross, the Rocks and Surry Hills, and two non-mandatory sobering-up centres covering the Eastern Beaches and Wollongong. These centres were set up to help shelter those people who pose a threat to themselves or others as a result of intoxication and would otherwise be detained by police. Only intoxicated persons refusing a move-on order or behaving in a disorderly manner will enter a mandatory sobering up centre and will incur a cost recovery charge. The non-mandatory sobering-up centres will incur no such charge.

The *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW) regulates these sobering-up facilities. The Act provides that people being admitted are to be regularly monitored, and "if at any time, the person in charge of an authorised sobering up centre, a health assessment officer or an authorised officer believes that a person who has been taken to an authorised sobering up centre by a police officer or who has been admitted to a centre is in need of urgent medical treatment, the person in charge, health assessment officer or authorised officer is to make arrangements to transport the person to a hospital." The Act also provides that a person cannot be detained for more than 8 hours.

### 2.12 Northern Territory

In the Northern Territory, sobering-up centres are run and funded by Mission Australia in Darwin, Katherine and Nhulunbuy, and further sobering-up shelters are run in Tennant Creek and Alice Springs, by the Drug and Alcohol Services Association. However, there is no legislative requirement that police use sobering-up shelters as an alternative to incarceration.

### 2.13 Queensland

In Queensland, there is no requirement for the police to look for a ‘place of safety,’ but like South Australia (discussed below) the option to do so exists. The police officer has to make the determination whether a particular place of safety is "more appropriate" than police detention.

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58 NSW Department of Family and Community Services, "Specialist Homelessness Services Case Management Resource Kit" (2012) pg. 27.
60 *Intoxicated Persons (Sobering Up Centres Trial) Act 2013* (NSW), s 16.
61 Ibid, s 11.
62 Northern Territory Government Healthy Territory publication, "Alcohol and Other Drug Services across the Northern Territory" pamphlet.
63 *Police Administration Act 1978* (NT).
64 *Police Powers and Responsibilities Act 2000* (QLD), s 378.
The Government has also provided funding for sobering up centres including the Lyons Street Centre in Cairns which was specifically funded in response to the Recommendations of the RCIADIC.  \textsuperscript{65}

\subsection*{2.14 South Australia}

South Australia also provides alternatives to detention as well as allowing police to take intoxicated people to a police station. Unlike the Tasmanian or ACT legislation (discussed below), pursuant to section 7 of the \textit{Public Intoxication Act} 1984 (SA), there is no requirement for the police to first attempt to find a non-custodial place for the individual. Rather the police have four equal options being the person's place of residence, a place approved by the Minister, a police station or a sobering-up centre.  \textsuperscript{66} A 2012 report by the SA Government\textsuperscript{67} illustrated that sobering up centres are being regarded by police as the option of first resort.

The South Australian Government in conjunction with the Salvation Army presently run a sobering up centre in Adelaide and the South Australian Government has provided additional funding through the local Aboriginal Health Service Aboriginal Corporation for the centre in Ceduna, increasing the operation hours. Additional centres also operate as government run centres in Coober Pedy and Port Augusta.  \textsuperscript{68}

\subsection*{2.15 ACT}

In \textit{Intoxicated People (Care and Protection) Act} 1994 (ACT) provides that police detention is only available where there is "no other reasonable alternative for the person's care and protection".  \textsuperscript{69}

CatholicCare and the ACT Police have jointly funded a sobering up shelter.  \textsuperscript{70} In December 2012, it was reported that the pressure on the shelter in the lead-up to Christmas led to it having to turn away people for the first time.  \textsuperscript{71} Nevertheless, it was also reported that ACT Health had no plans to boost the level of funding for the shelter.  \textsuperscript{72}

\subsection*{2.16 Tasmania}

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\textsuperscript{66} \textit{Public Intoxication Act} 1984 (SA), ss 7(3)(a)-(d).
\textsuperscript{67} South Australian Deputy State Coroner, "Report of Action Taken - A response to the Deputy State Coroner's recommendations regarding the deaths of Kummanara Kugena (female) and Kummanara Windlass, Kummanara Peters, Kummanara Kugena (male) Kummanara Gibson and Kummanara Minning" (29 August 2012).
\textsuperscript{68} The Salvation Army (South Australia Division) Social Program 2012/2013, "Annual Report" (2013), p5.
\textsuperscript{69} \textit{Intoxicated People (Care and Protection) Act} 1994 (ACT), s 4.
\textsuperscript{71} The Canberra Times, "‘Seasons’ Drunks Fill Shelter to Overflow" (December 21, 2012).
\textsuperscript{72} Ibid.
\end{flushleft}
In Tasmania, an intoxicated and dangerous person may be held in custody under the *Police Offences Act 1935* (Tas). However, the *Police Offences Act 1935* (Tas) also provides that "[a] person may only be held...if a police officer has made reasonable inquiries to find a place of safety or a responsible person and has been unable to find a place of safety, or a responsible person, willing to take the person into care." Accordingly, the Tasmanian legislature has made it mandatory for police to attempt to locate alternatives to detention. The police must first search for a "place of safety" before detaining the intoxicated person. A "place of safety" can be a hospital, charitable institution or any other appropriate facility. The Place of Safety Program is funded by the Department of Health and Human Services. However, limited details are publicly available. The Department of Health and Human Services also provides substantial funds for the Tasmanian Alcohol Action Framework which focuses on the community safety aspect of alcohol abuse.

As of February 2014, the Tasmanian Police published, as part of its "Safety in Custody" strategies, that "where possible, Aboriginal people will be proceeded against through appropriate use of cautions, summons, 'places of safety', youth justice and drug diversionary processes". It has also undertaken to engage with the Indigenous community to identify non-custodial options for Indigenous people, and has stated that "where it is necessary to detain an Aboriginal person in custody, Tasmania Police will provide a safe environment and exercise vigilance to guard against death or injury in custody."  

**2.17 Western Australia**

The Western Australian Government has shown the largest commitment to limiting incarceration levels for intoxication. It has funded 10 sobering up centres across the state and has legislated that one of these centres is to be the first port of call for police dealing with intoxicated persons. Further, pursuant to section 12 of the *Protective Custody Act 2000* (WA) detention in a police lock up should only occur in exceptional circumstances.

**2.18 Victoria**

In Victoria, there are 7 Koori Community Alcohol & Drug Resource Centres, which operate in a similar way to sobering up centres. The Victoria Police Manual requires that upon arresting an Aboriginal or Torres Strait Islander for public drunkenness a police officer must notify the local Community Alcohol & Drug Resource Centre.

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73 *Police Offences Act 1935* (Tas), s 4A.
74 Ibid, s 4A(4).
75 Ibid.
78 Ibid.
80 The Victoria Police Manual, s 1.9.
Victoria has also set up Aboriginal Community Justice Panels (CJP), comprised of volunteers who work with police, lawyers and legal field workers as an initial point of contact for diverting Indigenous people from police custody, or at least reducing the amount of time spent in police custody.\textsuperscript{81}

However, this service appears to be significantly stretched. In 2001, the Aboriginal Justice Advisory Committee submitted that “while it is acknowledged that a strength of the Community Justice Panels has been the co-operative relationship established with Victoria Police, ironically the program is recognised as being under-resourced both financially and in terms of human resources. The CJP workers who are volunteers are provided with little training and support. Not surprisingly, the CJP program is seen by Victoria Police as being cost-effective.”\textsuperscript{82}

2.19 Recommendation 82: That governments should closely monitor the effects of dry area declarations and other regulations or laws restricting the consumption of alcohol so as to determine their effect on the rates of custody in particular areas and other consequences. New South Wales

In 2007, the NSW Government released a study on alcohol free zones (‘AFZ’).\textsuperscript{83} This report evaluated the effectiveness of AFZs as an early intervention measure to prevent the escalation of irresponsible street drinking to incidents involving serious crime and impact of AFZ provisions from 1997-2007.

According to the report, 90 of the 116 councils (78\%) that responded to a survey use AFZs as a public safety management tool.\textsuperscript{84} Further, the report stated that “when AFZs are established in appropriate areas and operated with the required level of resources to promote and enforce the zones, they are an effective tool to assist councils and police manage public safety.”\textsuperscript{85}

The report did not consider the effects on custody rates, although it did consider crime statistics. According to the report, “the police statistics available for the evaluation limit the conclusions that can be made about the impacts of AFZs on public safety based on empirical data. This is due to the absence of a correlation between where an offence is carried out and whether it occurs in an AFZ, and the ability to monitor this trend over a period of time.”\textsuperscript{86}

2.20 Northern Territory


\textsuperscript{84} Ibid.

\textsuperscript{85} Ibid.

\textsuperscript{86} Ibid.

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In the Northern Territory, there has been an increase in police reports of alcohol related incidents since the Northern Territory Emergency Response (NTER). On 21 June 2007, the Australian Government announced a national emergency response to protect Aboriginal children in the Northern Territory from sexual abuse and family violence (which became known as “the intervention”). The emergency measures included (amongst other things) widespread alcohol restrictions on Northern Territory Aboriginal communities. Following the announcement, legislation was developed and the *Northern Territory National Emergency Response Bill 2007* and associated bills were passed by the Senate which (amongst other things) prohibited the sale, consumption and purchase of alcohol in prescribed areas.

According to a report by the Australian Government, the number of confirmed alcohol related incidents recorded by police across the NTER communities increased by 30% between 2007-08 and 2008-09. The number stabilised for the next two years before increasing again by 23% between 2010-11 and 2011-12. Unfortunately, the report does not give detail of how many of these incidents culminated in custody.

### 2.21 Queensland

In September 2012, the Government announced a review of Alcohol Management Plans (AMPs) in Aboriginal communities. The review was comprised of three elements:

1. community-specific reviews for each AMP;
2. a general review to assess the overall effectiveness of AMPs; and
3. the ‘Convictions Project’, to assess whether convictions resulting from the implementation of alcohol restrictions have led to the criminalisation of people.

The community-specific reviews are currently still undergoing, with the first community proposal received on 6 March 2014. Twenty-three submissions from members of the public and key stakeholders have been received and are being incorporated into the general review.

The findings of the Convictions Project were published in April 2014. The Convictions Project found that, out of the 5,676 persons with a conviction for breaching alcohol restrictions, 15.2% had no convictions for other offence types.

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88 The *Northern Territory National Emergency Response Act 2007* (Cth) was in operation for 5 years and was repealed in 2012 by the *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth).


90 Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, "Review of the Alcohol Management Plans" (25 September 2012).

during the 10 year study period and 20% of these would later obtain further convictions for a breach of alcohol restrictions. Significantly, almost all (98.6%) of the offenders were of Aboriginal or Torres Strait Islander origin, and were most likely to be male and aged between 30-39 years. Of those offenders who obtained subsequent convictions for a breach of alcohol restraints, 45.5% were of Aboriginal or Torres Strait Islander origin.

In addition, AMPs in Queensland are reviewed 12 months after their introduction to assess their impact and effectiveness and identify any changes. A review team was established by the Department of Aboriginal and Torres Strait Islander Policy to gather and interpret the data and consult with each Community Justice Group, local councils, community members, and other stakeholders. Unfortunately, the reviews are not made public, although Quarterly Reports on key indicators in discrete Indigenous communities are published by the Queensland government.

### 2.22 South Australia, Tasmania and Western Australia

The Tasmanian, South Australian and Western Australian Governments have also had problems reaching conclusions about the effectiveness of dry areas in reducing or limiting rates of custody.

In a 2012 Tasmanian report, it was concluded that there was an absence of an overarching data strategy which limits the extent to which the impacts of alcohol consumption in Tasmania can be monitored.

In 2010, the South Australian Government reported on the Port Augusta Total City Dry Area. The report concluded that there was not enough evidence to measure the unintended consequences of dry areas. The report also noted with concern that one of the unintended consequences of dry areas was the displacement of drinking away from public spaces and back to family homes, and the impact on domestic violence.

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92 Ibid, pg 1.
93 Ibid, pg 4.
94 Ibid, pg 9.
95 Sara Hudson, 'Alcohol Restrictions in Indigenous Communities and Frontier Towns', the Centre for Independent Studies Report, (2011).
97 Ibid.
99 Ibid.
100 Ibid.
Similarly, a Western Australian Report also concluded that less street drinking led to more ‘party houses’.\(^{101}\)

### 2.23 Victoria

There does not appear to be published information on whether this Recommendation has been implemented in Victoria.

### 2.24 Australian Capital Territory

The ACT has a number of permanent alcohol free zones which can be found in the \textit{Liquor Regulation 2010 (ACT)}.\(^{102}\) However, there does not appear to be any published information on whether this Recommendation has been implemented in the ACT with respect to monitoring the effect of dry areas.

**Recommendation 83**: That:

\[ (a) \text{ The Northern Territory Government consider giving a public indication that it will review the two kilometre law at the end of a period of one year in the expectation that all relevant organisations, both Aboriginal and non-Aboriginal, will negotiate as to appropriate local agreements relating to the consumption of alcohol in public that will meet the reasonable expectations of both Aboriginal and non-Aboriginal people associated with particular localities; and} \]

\[ (b) \text{ Other Governments give consideration to taking similar action in respect of laws operating within their jurisdictions designed to deal with the public consumption of alcohol.} \]

**Recommendation 84**: That issues related to public drinking should be the subject of negotiation between police, local government bodies and representative Aboriginal organisations, including Aboriginal Legal Services, with a view to producing a generally acceptable plan.

These two Recommendations are dealt with together below.

### 2.25 Northern Territory

The "Two Kilometre Law"\(^{103}\) was implemented in 1983 and prohibited the consumption of liquor in a public place within two kilometres of licensed premises, or the consumption of liquor on unoccupied private land without the owner's permission. The law was reviewed a year after its implementation by the Northern Territory Department of Health, Drug and Alcohol Bureau. This review cited police reports that the law had led to a reduction in the numbers of people drinking in public places however the numbers of people apprehended for being drunk in public had

\(^{101}\) Aboriginal Affairs Department, Government of Western Australia 2000 Implementation Report: Royal Commission into Aboriginal Deaths in Custody (June 2001). p 50.

\(^{102}\) \textit{Liquor Regulation 2010 (ACT)}, reg 31

\(^{103}\) \textit{Summary Offences Act 1983 (NT)}, s45D.

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continued to increase. Significantly, the review also noted that the law had led to drinkers moving away from public drinking places to local towns. The increase in the amount of drinking and related violence in these towns was directly attributable to this shift.

In relation to part (a) of Recommendation 83, this has not been implemented by the NT Government. The two kilometre laws are still in place. More notably, the *Stronger Futures in the Northern Territory Act 2012* (Cth) provides that a Federal Minister may make a rule prescribing a certain area in the Northern Territory as an "alcohol protected area" without any requirement that all relevant organisations in that area negotiate the agreement themselves. However, the Act provides that there must be public consultation, to the extent that the Minister must make information about the proposal available in the area, must give people living in the area a reasonable opportunity to make submissions, and the Minister must take those submissions into account. Having said that, this does not reflect the intent of Recommendation 84, which suggests that the decisions should be made locally and that local bodies and organisations should have control over the content of the plan.

### 2.26 New South Wales

The *Local Government Act 1993* (NSW) and the associated Ministerial Guidelines on Alcohol-Free Zones together have the effect that councils must publish a notice of any proposal for an alcohol-free zone in a newspaper circulating in the area, allow inspection, and if the local area is listed in the Appendix to the Guidelines, send a copy to the NSW Anti-Discrimination Board and invite representations and objections from it. Councils must also send a copy to any known organisation representing or able to speak on behalf of an identifiable Aboriginal or culturally and linguistically diverse group within the local area and invite representations or objections within 30 days from the date of sending the copy of the proposal.

In NSW, there are also Liquor Accords which are voluntary industry-based partnerships with an aim to introduce practical solutions to liquor-related problems and with a focus on improving the operation of licensed venues so that entertainment venues and precincts are safe and enjoyable. Most liquor accords include members from the local business community, local councils, police, government departments and other community organisations. At present there are a number of liquor accords in place including in Albury, Bankstown, Coffs Harbour, City Central, Eastern Beaches, Eastern Suburbs, Great Lakes, Maitland, Upper Hunter, Tweed Heads/Coast and Wollongong.

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104 Peter d'Abbs, "Restricted Areas and Aboriginal Drinking", *Australian Institute of Criminology* (1990).
105 Ibid.
106 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 27.
107 Ibid.
2.27 Queensland

The Queensland Government offered "qualified support" to Recommendations 83 and 84 in its 1993 Implementation Report\(^{111}\) and considered the status to be "ongoing" in its 1997 Implementation Report.\(^{112}\)

The *Liquor Act 1992* (Qld) provides that "a local government, other than a relevant local government", can allow drinking in certain public places.\(^{113}\) According to the 1997 Implementation Report, this section was introduced as a response to Recommendation 83(b), to negotiate appropriate local agreements relating to the consumption of alcohol in public. However, a large number of the "relevant local governments" listed in the Schedules of the Liquor Regulation are Aboriginal communities, meaning that such communities are not able to determine for themselves whether or not they can allow drinking in certain public places.\(^{114}\)

2.28 South Australia

In South Australia, applications to prohibit the consumption or possession of alcohol in specified public places (dry areas) may be made to the Liquor and Gambling Commissioner as part of the Consumer and Business Services. According to the Dry Area Guidelines issued by the Consumer and Business Services,\(^{115}\) when an application is made for a long term prohibition of alcohol in a certain area, the local council is required to provide details of public consultation which should include consultation with relevant service providers to address displacement issues. Following receipt of the application, the Commissioner’s recommendations are provided to the relevant Minister for approval. There is no mention of any requirement or policy for negotiating appropriate agreements with local residents.\(^{116}\)

In South Australia, the Adelaide Liquor Licensing Accord is a goodwill agreement that assists the local management of liquor-related issues in the Adelaide CBD and North Adelaide. Its principles include ensuring the responsible service of alcohol, providing a safe and secure environment and giving an ongoing commitment to being a good neighbour.\(^{117}\) Liquor accords exist in a number of locations including Adelaide City CBD, Glenelg, Henley and Grange and various regional locations such as Port Pirie, Mount Gambier, Port Augusta, Clare and Ceduna.\(^{118}\)

2.29 Australian Capital Territory


\(^{113}\) *Liquor Act 1992* (Qld), s 173C.

\(^{114}\) *Liquor Regulation 2002* (Qld).


\(^{116}\) Ibid.


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In the ACT, a regulation made pursuant to the Liquor Act 2010 (ACT) may prescribe a place to be a permanent alcohol-free place, and the Commissioner for Fair Trading may declare a place a temporary alcohol-free place, for not more than one month. There is no mention of any requirement to consult with local residents or bodies.

2.30 Tasmania

In Tasmania, Councils also can choose to establish alcohol free zones. Hobart City Council for example has indicated on its website that it is seeking the community's views on a proposal to extend the alcohol-free provisions in relation to Hobart's parks. According to the website, to do so will require amendment to the areas prescribed as public places for the purposes of the Police Offences Act 1935 (Tas), although that definition is already rather broad. It appears however that other councils have simply passed appropriate by-laws to declare alcohol-free zones.

2.31 Western Australia

In Western Australia, a different approach has been taken. The Liquor Control Act 1988 (WA) provides that a licensing authority may impose, vary or cancel a condition of a liquor licence of its own motion, on the application of the licensee, or at the written request of the parties to a liquor accord. A liquor accord means an agreement entered into by two or more licensees in a local community, and persons who represent the licensing authority, departments of the Public Service, State agencies or local government, and other persons, which has the purposes of minimising the harm caused in the local community by the excessive consumption of liquor and promoting responsible practices in the sale, supply and service of liquor in the local community, and which is approved by the Director of the department administering the Act. There are a number of Liquor Accords in place including East Metro, Fremantle, Perth, Mandurah and Vincent.

Although not apparently in wide use, it would appear that in principle this approach is in line with the spirit of Recommendation 84.

2.32 Victoria

In Victoria, various local councils have declared alcohol-free zones, but there is limited data on whether there is any coherent approach and whether councils are obliged to consult with various community groups in relation to certain decisions.

The Local Government Act 1989 (Vic) provides that council meetings must be open to the public. There are also education programs under Liquor Accord Australia which seek to educate youth about alcohol at their formative stage.

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119 Liquor Act 2010 (ACT), s 198.
120 Liquor Regulation 2010 (ACT), s 31.
121 Police Offences Act 1935 (Tas), s3(1).
122 See, for example, Kingborough Council By-Law 2 of 2011.
123 Liquor Control Act 1988 (WA), s 64.
124 Ibid.
125 Local Government Act 1989 (Vic), s 89(1).
The establishment of liquor licensing forums and accords in local communities is a pro-active means by which Responsible Alcohol Victoria, Victoria Police, licensees, councils and community representatives can work together to improve community safety. These forums and accords exist in the Loddon Mallee, Grampians, Hume, Gippsland, Eastern, Southern, North Western and Barwon South West regions.\(^{126}\)

**Recommendation 85**: That:

- a. Police Services should monitor the effect of legislation which decriminalises drunkenness with a view to ensuring that people detained by police officers are not being detained in police cells when they should more appropriately have been taken to alternative places of care;

- b. The effect of such legislation should be monitored to ensure that persons who would otherwise have been apprehended for drunkenness are not, instead, being arrested and charged with other minor offences. Such monitoring should also assess differences in police practices between urban and rural areas; and

- c. The results of such monitoring of the implementation of the decriminalisation of drunkenness should be made public.

As described above in relation to Recommendation 79, those jurisdictions in which public drunkenness has been decriminalised are NSW, South Australia, the Northern Territory and the ACT.

### 2.33 New South Wales

Regarding Recommendation 85(a), a December 2012 Issues Paper by the NSW Ombudsman stated that “in practice, where police are unable to find a family member or friend willing and able to take responsibility, and the case is not serious enough to call an ambulance, the intoxicated may be detained … [which could have] an impact on custody numbers.”\(^{127}\) However, there does not appear to be, publicly available, any NSW Police review of the effect of decriminalisation of public drunkenness.

Regarding Recommendation 85(b), section 206(1) of the *Law Enforcement Powers and Responsibilities Act 2002* (NSW) (LEPRA) provides that police are not to detain intoxicated people for the purposes of charging them with an offence under any law, including under section 9 of the *Summary Offences Act 1988* (NSW) (which makes it an offence to continue being drunk and disorderly in a public place after a move-on direction). As such, police are generally prohibited from detaining a person for their own protection under section 206 of LEPRA, and then initiating proceedings against them for an offence.

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\(^{126}\) Available at: <http://www.liquoraccord.org/liquor-accords/vic>.

\(^{127}\) Ombudsman New South Wales, "Issues Paper, Summary Offences Act 1988, Section 9: Continuation of intoxicated and disorderly behaviour following move-on direction" (December 2012), pg 14.
Questions have been raised about whether section 9 of the Summary Offences Act 1988 (NSW) is a way of indirectly reintroducing an offence of public drunkenness. In 2011 the amendments to the LEPRA and the Summary Offences Act 1988 (NSW) were introduced to broaden police powers, to allow police to issue legally enforceable move-on directions to "drunken and violent hooligans".\(^{128}\) Despite section 206 of LEPRA and section 9 of the Summary Offences Act 1988 (NSW), the NSW Ombudsman found 47% of all people who were fined or charged for an offence under section 9 during the review period had also been detained for their own protection.\(^{129}\)

Further, the Law Enforcement (Powers and Responsibilities) Amendment (Move On Directions) Act 2011 (NSW) required the NSW Ombudsman to scrutinise use of the new provisions for the first 12 months.\(^{130}\) The NSW Ombudsman’s focus was ensuring that the powers were being used appropriately and consistently with the government’s commitment to addressing problem social drinking and not to be directed at the homeless and disadvantaged in society.

Regarding Recommendation 85(c), other than the NSW Ombudsman’s Papers referred to above, this Report has not found any public results of monitoring.

### 2.34 Tasmania

Regarding Recommendation 85(a), according to a Tasmanian Police report, in 2007-2008, 1,171 people were detained in custody for drunkenness and 266 people were detained due to level of intoxication.\(^{131}\) Accordingly, notwithstanding the requirement that police must "make reasonable inquiries to find a place of safety or a responsible person",\(^{132}\) there are still large numbers of people being detained in custody for public drunkenness in Tasmania.

Regarding Recommendations 85(b) and 85(c), the Tasmania Police Manual requires that inspectors and supervisors monitor the arresting and charging of persons for multiple offences, and also requires that a sergeant of police be notified and where practicable be present at the charging “to ensure the propriety of the charging procedures in relation to the offences”.\(^{133}\) However, this Report has not been able to find evidence of any systematic review by Tasmanian Police, nor any publication of data.


\(^{129}\) Ibid.

\(^{130}\) Summary Offences Act 1988 (NSW), s 36.


\(^{132}\) Police Offences Act 1935 (Tas), s 4A(4).

\(^{133}\) Tasmania Police Manual, s. 7.6.3. Note that as at September 2014, the Tasmania Police Manual included information relating to monitoring the arresting and charging of persons, however as it is no longer publicly available, this Report cannot confirm whether that remains the case.

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2.35 Northern Territory

This Report has been unable to find evidence that the Northern Territory has adopted this Recommendation.

2.36 Queensland

Regarding Recommendation 85(a), 85(b) and 85(c), the Queensland Government confirmed that it supported this Recommendation in its 1993 Implementation Report. However, this Report has been unable to find evidence that Queensland has adopted these Recommendations.

2.37 South Australia

Regarding Recommendation 85(a), 85(b) and 85(c), a report covering the period 1991 to 2000 in South Australia found that the sobering-up centre in Ceduna in South Australia provided evidence that such centres played an important role in averting the known harms of a custodial response to public drunkenness, as well as avoiding the potential harm of alcohol-related injury among vulnerable Aboriginal people.

However, while there is evidence that the police monitor the link between alcohol and crime rates (particularly public disorder offences), there appears to be no evidence of monitoring drunken people being detained in cells rather than alternative places, or arrests for minor offences rather than drunkenness.

2.38 Australian Capital Territory

The Commonwealth Ombudsman issued a detailed report in 2008 in relation to the Australian Federal Police's Use of Powers under the Intoxicated People (Care and Protection) Act 1994 (Cth). Amongst the detailed findings of that report is the following finding relevant to Recommendation 85.

Regarding Recommendation 85(a), the AFP’s eligibility criteria for referral to the Sobering Up Shelter were different from those of the Shelter itself, and included that a person to be referred must not be a "person at risk". In turn, the definition of "person at risk" includes a person in custody who is an Indigenous Australian. The Shelter's guidelines on the other hand do not exclude Indigenous persons.

The Report recommended that the AFP amend its Sobering Up Facility guidelines so that Indigenous people are not excluded (although we have not been able to ascertain whether this has happened). As the report states, "it is contrary to the spirit of the Royal Commission's findings to exclude Indigenous people from diversion

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135 "The role of a rural sobering-up centre in managing alcohol-related harm to Aboriginal people in South Australia", Maggie Brady et.al., Drug and Alcohol Review, 1 January 2006.
137 Ibid.

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from police custody to those services on the basis that they are an "at risk" group in police custody. It is also likely to be a contravention of human rights and discrimination laws to deny Indigenous people the opportunity for diversion on the basis of their race.\textsuperscript{138} Interestingly, the report also found that police were largely unaware of the position in the AFP guidelines and were still referring Aboriginal people to the Shelter (4% of police referrals to 13 April 2008).\textsuperscript{139}

This Report has been unable to find published data for the ACT in relation to Recommendations 85(b) and 85(c).

2.39 Western Australia

Regarding Recommendation 85(a), both the 2002 National Police Custody Survey and the Government of Western Australia 2000 Implementation Report regarding RCIADIC indicate that not only have Indigenous custody rates in WA been declining, but the percentage detained in police custody rather than in sobering up centres has also dramatically declined.\textsuperscript{140}

However, more recently there are suggestions that the trend has slowed. In an interview on the ABC's radio show PM on 5 October 2014, the Chief Justice of Western Australia, Wayne Martin, was reported as saying that as the prison population in Australia had been growing in general terms, the rate of increase for Aboriginal people was faster. He said that in Western Australia, Aboriginal adults made up less than 4 per cent of the population, and 38 per cent of prisoners. In the Chief Justice's view, the single greatest cause of all criminal behaviour in Western Australia was alcohol abuse.\textsuperscript{141}

With respect to Recommendation 85(b) and (c) this Report has found no evidence to show whether such monitoring is occurring in Western Australia.

2.40 Victoria

As Victoria has not decriminalised public drunkenness, these Recommendations have not been implemented. The Victorian government has stated its support for the decriminalisation of public drunkenness but argues it cannot do so until adequate alternative facilities exist.

**Recommendation 86:** That:

(a) The use of offensive language in circumstances of interventions initiated by police should not normally be occasion for arrest or charge; and

(b) Police Services should examine and monitor the use of offensive language charges.

\textsuperscript{138} Ibid, p 44.
\textsuperscript{139} Ibid, pp 43-44.
\textsuperscript{140} National Police Custody Survey 2002, p.51; Government of Western Australia, Implementation Report 2000, p.15.
\textsuperscript{141} WA Chief Justice says Indigenous incarceration rates are getting worse, available at: <http://www.abc.net.au/pm/content/2012/s3604955.htm>.
2.41 New South Wales

In NSW, the police can charge those who use offensive language under section 4A of the Summary Offences Act 1988 (NSW) which can include a penalty of $660 and/or 100 hours of community service.\footnote{142} NSW Police Service instructs police officers not to arrest an alleged offender for a minor offence when a summons would be effective in having the person appear before the court.\footnote{143} Statistics from the On-Line-Charge system show that all patrols with a substantial Aboriginal population maintain a low incidence of charges for “offensive language” and “offensive conduct”.\footnote{144}

However, it is to be noted that the NSW Ombudsman found that Aboriginal people received 14% of all offensive language fines issued in the period between 1 November 2007 and 31 October 2008, despite the fact that they made up only 2.1% of the NSW population. The Ombudsman also found that Aboriginal recipients were unlikely to challenge the fines in court, perhaps arising out of a deep distrust of the legal system, or an inability to afford legal assistance. Further, if a recipient cannot or will not pay the fine, such refusal may result in the commencement of enforcement action, leading to involvement with the criminal justice system.\footnote{145}

The NSW Law Reform Commission has recommended that offensive language laws be abolished.\footnote{146}

There appears to be no monitoring process by NSW Police Services as to the use and extent of offensive language charges.

2.42 Northern Territory

In the Northern Territory, offensive language is an offence under the Summary Offences Act 1978 (NT), the penalty for which is a fine or imprisonment.\footnote{147} This is notwithstanding that as part of a review of the Summary Offences Act 1978 (NT) in October 2010, the Legal Policy Division of the Department of Justice recommended the following in relation to section 47(a) of the Summary Offences Act 1978 (NT):

"The offence should be separated into two sections, one for behaviour offences and another for language offences. The behaviour offence should cover disorderly, offensive and threatening behaviour. See for example WA section 74.1 It should include behaviour in a police station."
The offensive language section should be modelled on NSW s. 4A.2

**Penalty:** The behaviour offence should carry 3 months (at present 6 months) to bring NT in line with other jurisdictions.

The language offence should not carry imprisonment."^{148}

To date the recommendations of the Department of Justice have not been adopted.

## 2.43 Queensland

In Queensland, the *Summary Offences Act 2005* (Qld) prohibits people from committing a "public nuisance offence", which includes the use of offensive, obscene, indecent or abusive language.\(^{149}\) The penalty for doing so is a fine or up to 6 months imprisonment.

However, a magistrate in 2010 found that merely using the words "*f*** off*" to a police officer did not of itself amount to a nuisance to the public. The magistrate said that the overall conduct of the defendant in this case was not a nuisance to the public because it did not interfere with fellow night club goers.\(^{150}\)

Whilst it is assumed that this case might have had some effect on police practice in this area, there does not appear to be any published information on whether this Recommendation has been formally implemented in Queensland.

In May 2008, the Crime and Misconduct Commission published a report reviewing public nuisance offences.\(^{151}\) In order to determine to what type of behaviour police apply the public nuisance offence, the report examined a random sample of narrative information recorded by police in the police crime reports database describing the behaviour and circumstances relating to a public nuisance incident. One in six of the narratives sampled described the use of offensive language, with just over half being directed at police and one in three of all offensive language cases involving an Indigenous offender.\(^{152}\)

The report also acknowledged that in some situations, the offensive language directed at police acted as the trigger for the arrest or charge (in situations where the behaviour might otherwise have been dealt with informally),\(^{153}\) and that in the cases involving Indigenous offenders there was a sense of tension between police and Indigenous people.\(^{154}\) In particular, the report suggested that police often responded to offensive language used by Indigenous people despite the language not posing

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\(^{148}\) Legal Policy Division, Policy Coordination, Department of Justice, "Issues Paper: Review of the Summary Offences Act", October 2010.

\(^{149}\) s 6 of the *Summary Offences Act 2005* (Qld).


\(^{152}\) Ibid, pgs. 41 and 43.

\(^{153}\) Ibid, pg. 41.

\(^{154}\) Ibid, pg. 43.

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any real 'interference' with the police carrying out their duties. For example, in one instance, as the offender (who was affected by alcohol) drove past police, the offender leaned out the window and yelled at the police using obscene language. Police pursued and charged the offender.\textsuperscript{155} However, the report concluded that without further consideration of all the circumstances, it was impossible to conclude that police were exercising their discretion inappropriately.

In terms of Recommendation 86(a), the report noted that over a two year period for adult public nuisance offenders, police dealt with 60\% of the cases by way of an arrest and 39\% by way of notice to appear. Less than 0.1\% was dealt with by way of caution, conferencing or other counselling.\textsuperscript{156} Further, Indigenous adults were 1.6 times more likely than non-Indigenous adults to be dealt with by way of arrest, and the same applied for those dealt with by way of notice to appear.\textsuperscript{157} However, despite the over-representation of Indigenous people, the report concluded this was not amplified since the introduction of the legislation and generally, the legislation is being used fairly and effectively.

\section*{2.44 South Australia}

In South Australia, police can charge an individual for offensive language.\textsuperscript{158} There does not appear to be any publicly available evidence of whether part (a) or (b) of Recommendation 86 has been implemented in South Australia.

\section*{2.45 Australia Capital Territory}

In the ACT, there is no offence relating to offensive language, although under the \textit{Crimes Act 1900} (ACT) "a person shall not in, near, or within the view or hearing of a person in, a public place behave in a riotous, indecent, offensive or insulting manner".\textsuperscript{159}

There does not seem to be any publicly available evidence this Recommendation having been implemented in the ACT.

\section*{2.46 Tasmania}

Recommendation 86 has been implemented in full in Tasmania.

In Tasmania, since 19 December 2014, police now have the option to issue Penalty Infringement Notices for matters such as the use of offensive language.\textsuperscript{160} However, the Tasmania Police Manual states that "members are reminded that in the exercise of their discretion, they should not arrest or charge members of the public for offensive language type offences except when the intervention was not initiated by them, and except when the exchange is one in which the language is clearly open to

\begin{footnotes}
\item[155] Ibid, pg. 43.
\item[156] Ibid, pg. 86.
\item[158] Summary Offences Act 1953 (SA), s 7.
\item[159] Crimes Act 1900 (ACT), s 392.
\item[160] Police Offenses Act 1935 (Tas) s 12.
\end{footnotes}
having been heard by members of the public. Supervisors are directed to monitor the arresting and charging of persons by police officers to ensure adherence to the above principle."  

2.47 Western Australia

The Western Australian 2000 Implementation Report stated that the WA Police Service had "adopted the principle of arrest being the sanction of last resort, with the preferring of charges of this type being monitored by supervisors and senior officers". Amendments to the Bail Act 1982 (WA) reflect the requirements of this Recommendation.  

This Report has not found any published information as to the outcome of any internal monitoring of this principle by police.

2.48 Victoria

In Victoria, according to official crime statistics published annually by Victoria Police, the total number of alleged offenders processed for behaving in an indecent, offensive or insulting manner and using profane, indecent or obscene language fell from 2009-2013 but has since increased marginally in 2013-2014 from 3,926 in 2012/13 to 3,953 in 2011/12.  

In June 2011, the Victorian Government introduced increased fines (currently up to $240) for swearing in public. According to The Age newspaper:

"Attorney General Robert Clark said immediate fines meant the matters could bypass courts and, in turn, free up police time. But Victoria Police crime statistics show the introduction of the trial powers by the Brumby Government in July 2008 also led to a police crackdown on public behaviour offences, including swearing.

The number of offences related to public behaviour shot up nearly 29 per cent between 2009/2010 and 2008/2009 year with most of the 8,266 offences committed on footpaths, streets and lanes.

Victoria Police partly attributed the rise to the introduction of on-the-spot fines for offences including using ‘profane indecent or obscene language or insulting words’.  

Liberty Victoria president Spencer Zifcak said the instant fines had made police the judges of decency. He said that cases should be heard in courts where

161 Tasmania Police Manual, para. 7.6.4 (2) and (3). Note that as at September 2014, the Tasmania Police Manual included information relating to offensive language charges, however as it is no longer publicly available, this Report cannot confirm whether that remains the case.  

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magistrates could ensure the law was applied in a consistent manner as otherwise “amongst members of the police force there will be different standards applied by different individual police officers...So whether a person gets fined or not will be somewhat arbitrary and probably very inconsistent and that doesn’t promote certainty in the law and that’s a real problem.”\textsuperscript{166} However, this does not accord with the spirit of Recommendation 86.

3. **Police policies and alternatives to arrest (Recommendations 87 - 88)**

**Recommendation 87(a):** That All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders.

This Report has found that the extent to which Recommendation 87(a) has been implemented in the States and Territories is variable. While the majority of jurisdictions have prerequisite circumstances or considerations that should be taken into account when deciding whether to arrest, the bulk do not have a definitive statement on the principle of arrest being a last resort.

3.1 **New South Wales**

The NSW Police Force Code of Practice for crime goes part way to complying with part (a) of Recommendation 87. It requires police to “be mindful of competing requirements between the rights of individuals to be free and the need to use the extreme action of arrest....”\textsuperscript{167} It also advises police that “you must not arrest unless it is necessary to achieve one or more of the purposes set out in section 99(3) of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) (‘LEPRA’).\textsuperscript{168}

3.2 **Tasmania**

There is nothing in the Tasmania Police Manual to indicate that the principle of "arrest being the sanction of last resort" has been implemented. The Tasmania Law Reform Institute recommended in 2011 that this be specified by statute, but to date this has not happened.\textsuperscript{169} In fact, the law in Tasmania is phrased negatively in that a police officer must arrest offenders "unless he has reasonable grounds for believing that the purposes of this Act, or of the Act conferring such power, as the case may be, will be adequately served by proceeding against the offender by summons" as opposed to having to assess other options prior to making an arrest.\textsuperscript{170}

3.3 **South Australia**

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\textsuperscript{165} ibid.
\textsuperscript{166} ibid.
\textsuperscript{167} NSW Police Force, "Code of Practice for CRIME" (as at January 2012), p.14.
\textsuperscript{168} ibid, p.15.
\textsuperscript{170} Police Offences Act 1935 (Tas), s 55.

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The South Australia Police General Order - Arrest and Custody Management provides that arrest should be the last resort when dealing with intoxicated persons, but does not go so far as to make this a principle in all other cases.\textsuperscript{171}

3.4 Australian Capital Territory/Commonwealth

In respect of adult offenders, there does not appear to be any publicly available information as to whether the AFP is obliged to consider arrest as a last resort.

In respect of youth offenders, the \textit{Children and Young People Act 2008 (ACT)} specifies principles including that a child or young person may only be detained in custody for an offence “as a last resort and for the minimum time necessary.”\textsuperscript{172} However, according to the Law Society of the ACT, police should only exercise the power of arrest as a last resort.\textsuperscript{173} The \textit{Crimes Act 1900 (Cth)} does require police to at least consider whether a Summons would achieve the required outcome before proceeding with arrest for all crimes except domestic violence crimes.\textsuperscript{174}

3.5 Western Australia

In its 2000 Implementation Review of the RCIADIC Recommendations, the WA Government stated that the WA Police Service “has adopted the principle of arrest being the sanction of last resort, with the preferring of charges of this type being monitored by supervisors and senior officers”.\textsuperscript{175}

However, in 1995 the Australian Human Rights Commission found that Aboriginal people were 17.3 times more likely to be arrested than non-Aboriginal people and that the rate in WA was four times the national average.\textsuperscript{176} According to the 2006 Census, Aboriginal people in WA continued to be arrested at a highly disproportionate rate.\textsuperscript{177} Under the \textit{Criminal Investigation Act 2006 (WA)}, a police officer has a right to proceed with an arrest without a warrant only if the officer reasonably suspects that if the arrest does not occur:

- it will not be possible, in accordance with law, to obtain and verify the person’s name and other personal details;
- the person will continue or repeat the offence or will commit another offence;
- the person will endanger another person’s safety or property;
- the person will interfere with witnesses, conceal or disturb a thing relevant to the offence or otherwise obstruct the course of justice; or

\textsuperscript{171} South Australia Police, "General Order - Arrest and Custody Management" (1 May 2013, PCO ref 2009/0177-04)
\textsuperscript{172} Children and Young People Act 2008 (ACT), s 94(1)(f).
\textsuperscript{173} ACT Law Society pamphlet “Under Arrest?” (2014)
\textsuperscript{174} Crimes Act 1900 (Cth), s 212.
\textsuperscript{176} Australian Human Rights Commission, "Indigenous Deaths in Custody: Arrest, Imprisonment and Most Serious Offence" (1996), para. 4.1
\textsuperscript{177} Australasian Institute of Judicial Administration, 'Chapter Four: Aboriginal People in Western Australia', Aboriginal Benchbook for Western Australian Courts (2008), para. 4.2.2.
3.6 Queensland

Queensland has not made arrest a sanction of last resort in relation to adults, but has implemented this Recommendation in respect of juveniles. In a manner similar to WA and Victoria, arrest without a warrant is regulated so that police must consider the necessity of arrests when making them. Further, the Queensland Police are empowered to issue on-the-spot notices to appear. These notices are in lieu of a summons and do not need to be sworn, so can be issued at the scene of a would be arrest without significant administrative issue. Additionally, if the police do make an arrest, they are also empowered to “discontinue” an arrest that has occurred in certain circumstances.

3.7 Victoria

Victoria Police takes a similar approach to the police in NSW, in that the Victoria Police Manual states that the exercise of the discretion to arrest a person "involves balancing the rights of individuals to liberty against the need to take action to ensure the safety of persons or to take action against those who break the law". Further, "arrest is only to be used to prevent the harm, or support the purpose, for which the arrest power has been conferred, considering the need:

- to investigate offences and enforce appropriate legislation
- to ensure a person’s appearance before a court
- to preserve public order
- to prevent the continuation or repetition of the offence or the commission of a further offence
- to ensure the safety or welfare of members of the public or offender
- to apprehend a person who has escaped from legal custody"

This is supported by the Crimes Act 1958 (Vic), which codifies the above list for all people (including police officers) who may effect an arrest.

3.8 Northern Territory

The Northern Territory has recently implemented 'Paperless Arrest' laws that go against this Recommendation. The new laws will allow police to detain a person for 4 hours without charge if police believe they have committed, were committing or were about to commit a minor offence that could otherwise be dealt with by way of

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178 Criminal Investigation Act 2006 (WA), s 128, Part 12, Div. 2.
179 Youth Justice Act 1992 (Qld), ss 11, 12 and 13.
180 Police Powers and Responsibilities Act 2000 (Qld), s 365.
181 Ibid, s 382.
184 Crimes Act 1958 (Vic), s 458.
infringement notice. The law is considered to predominantly affect the Northern Territory's Indigenous community.  

**Recommendation 87(b):** Police administrators should train and instruct police officers accordingly and should closely check that this principle is carried out in practice.

As the majority of jurisdictions have not implemented Recommendation 87(a), there is very little evidence of the implementation of Recommendation 87(b).

### 3.9 New South Wales

There does not appear to be any publicly available evidence of how the "arrest as a sanction of last resort" principle may be monitored in practice. However, specific "Policing Aboriginal Communities Training" is offered for police officers in the NSW Police Force, and is required for police officers working in a Local Area Command with a significant Aboriginal population. It is to be assumed that such training would involve the discussion of this principle.

### 3.10 Other jurisdictions

As for South Australia, Tasmania, the ACT, Western Australia, Queensland, Victoria and the Northern Territory, as discussed above, part (a) of Recommendation 87 does not appear to be fully implemented, and therefore part (b) of Recommendation 87 has not been implemented.

**Recommendation 87(c):** Administrators of Police Services should take a more active role in ensuring police compliance with directives, guidelines and rules aimed at reducing unnecessary custodies and should review practices and procedures relevant to the use of arrest or process by summons and in particular should take account of the following matters:

(i) all possible steps should be taken to ensure that allowances paid to police officers do not operate as an incentive to increase the number of arrests;

(ii) a statistical data base should be established for monitoring the use of summons and arrest procedures on a State wide basis noting the utilisation of such procedures, in particular divisions and stations;

(iii) the role of supervisors should be examined and, where necessary, strengthened to provide for the overseeing of the appropriateness of arrest practices by police officers;

(iv) efficiency and promotion criteria should be reviewed to ensure that advantage does not accrue to individuals or to police stations as a result of the frequency of making charges or arrests; and

(v) procedures should be reviewed to ensure that work processes (particularly relating to paper work) are not encouraging arrest rather than the adoption of other options such as proceeding by summons or caution.

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185 Police Administration Act 1978 (NT), s 133AB.
186 NSW Police Force, "Aboriginal Strategic Direction 2012-2017".

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This Report has found very little public information on whether this Recommendation had been implemented.

3.11 New South Wales

In NSW, the Computerised Operational Policing System (‘COPS’) seems to be capable of being used to perform the function described in Recommendation 87(c)(ii), although there appears to be no published evidence on whether it is used in this way. As for Recommendation (c)(iii), this Report found no evidence of “arresting supervisors” in the policy documents. However, the Code of Practice for CRIME sets out detailed requirements for custody managers who take over the process from when the arrested person arrives at the police station.

There is no apparent published evidence on whether the remaining parts of (c) of Recommendation 87 have been implemented in NSW.

3.12 Tasmania

This information does not appear to be publicly available in relation to Tasmania and was not produced on an FOI request.

3.13 Queensland

In relation to Queensland, like NSW, the QPRIME system could be used to perform the function described in Recommendation 87(c)(ii), however, no evidence was found on whether or not QPRIME is used for this purpose.

3.14 Other jurisdictions

There does not appear to be any publicly available information regarding the implementation or otherwise of part (c) of Recommendation 87 in the other jurisdictions.

The Australian Bureau of Statistics collates data on crime including arrests on an annual basis, but frequently excludes certain statistics (including those regarding Indigenous arrests) where it considers the data unreliable. In any event, this adds no information as to whether the individual state police forces or their administrators are monitoring the data.

**Recommendation 87(d):** Governments, in conjunction with Police Services, should consider the question of whether procedures for formal caution should be established in respect of certain types of offences rather than proceeding by way of prosecution.

Generally, cautions have long been part of the philosophy in the juvenile justice system in all jurisdictions. There is little evidence however that there has been a systematic move to establish cautioning for other offences. The exception to this is drug offences. According to a briefing paper from the Queensland Criminal Justice Commission in 1999, “drug offences (particularly offences involving cannabis)
constitute a major focus of most cautioning programs currently operating (or being trialled) in Australia".  

A brief summary of the way in which cautions are applied to juvenile offences in the different states is set out below:

### 3.15 New South Wales

The *Young Offenders Act 1997* (NSW) provides for both informal cautions and formal cautions. This may involve an apology.  

### 3.16 Tasmania

The *Youth Justice Act 1997* (Tas) provides for informal cautions and formal cautions, and undertakings may be required. Where a formal caution is to be given to an Aboriginal youth, the police are to ensure, where practicable, the caution is given by an Elder of an Aboriginal community or a representative of a recognised Aboriginal organisation, rather than a police officer. Police may also give informal cautions.

### 3.17 South Australia

The *Young Offenders Act 1993* (SA) provides for both informal and formal cautions, which may involve the giving of undertakings.

### 3.18 Australian Capital Territory

The *Children and Young People Act 2008* (ACT) provides that if practicable and appropriate, decisions about an Aboriginal and Torres Strait Islander child or young person should be made in a way that involves his or her community. While other jurisdictions have specific provisions in applicable legislation that provide police with the power to caution a child (rather than arresting them), the *Children and Young People Act 2008* (ACT) does not expressly provide this option to ACT Police. However, the Act's "Youth Justice Principles" (at section 94 of the Act) include the principle that children are to be "dealt with" taking into account their needs and in a manner that "that will provide the opportunity to develop in socially responsible ways" (section 94(1)(b)). This arguably could include the use of cautions however, no information was found to confirm whether this is the approach of the ACT Police.

### 3.19 Western Australia

The *Young Offenders Act 1994* (WA) provides for both informal and formal cautions but no undertakings.

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187 Criminal Justice Commission, Research and Prevention Division (Qld), "Police Cautioning of Adults: Drug and Other Offences, a briefing paper" (April 1999), p 5.
188 *Young Offenders Act 1997* (NSW), s 23.
189 *Youth Justice Act 1997* (Tas), ss 8-10.
190 Ibid, s 11.
191 *Young Offenders Act 1993* (SA), ss 6-7.
192 *Young Offenders Act 1994* (WA), Part 5, Div. 1.

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3.20 Queensland

The Youth Justice Act 1992 (Qld) provides for both informal and formal cautions but no undertakings. If the youth is an Indigenous youth, the police must consider whether there is available a respected person of the community who is willing to administer the caution. If such a person is available, the police must ask that person to perform the caution.

3.21 Victoria

The Victoria Police Operating Procedures Manual provides for both informal and formal cautions but no undertakings. Submissions made by the Law Institute of Victoria paper in 2012 suggested that cautions could be legislated into the Children and Families Act 2005 (Vic), however, no action appears to have been taken to implement this Recommendation.

3.22 Northern Territory

The Youth Justice Act (NT) provides for a diversion program which includes both informal and formal cautions.

Recommendation 88: That Police Services in their ongoing review of the allocation of resources should closely examine, in collaboration with Aboriginal organisations, whether there is a sufficient emphasis on community policing. In the course of that process of review, they should, in negotiation with appropriate Aboriginal organisations and people, consider whether:

a. There is over-policing or inappropriate policing of Aboriginal people in any city or regional centre or country town;

b. The policing provided to more remote communities is adequate and appropriate to meet the needs of those communities and, in particular, to meet the needs of women in those communities; and

c. There is sufficient emphasis on crime prevention and liaison work and training directed to such work.

Most jurisdictions have implemented a strategy, developed a role or set up a department to increase communication between the police and the Indigenous community. It is difficult, based on the publicly available information to determine the relative success of these programs. However, in New South Wales, statements by the Ombudsman indicate that the newer programs are making inroads into Indigenous communities and commencing a dialogue.

That said, although the dialogue itself is increasing, available information does not clearly indicate whether the issues identified in Recommendation 88 are on the agenda, or if they are being adequately considered.

193 Youth Justice Act 1992 (Qld), Part 2, Div. 2.
194 Ibid, s 17.
195 Youth Justice Act (NT), Part 3.
3.23 New South Wales

There does not appear to be any published material as to whether part (a) of this Recommendation has been reviewed by the NSW Police.

It appears that parts (b) and (c) of Recommendation 88 have been at least partly implemented in NSW. The NSW Police Force has instituted the role of Aboriginal Community Liaison Officer (‘ACLO’). According to a NSW Police Force publication “the ACLO is a member of the Local Area Command, Crime Management Team with the responsibility for providing advice and support to police in the management of Aboriginal issues across the Local Area Command (‘LAC’). ACLOs assist in developing, implementing, monitoring and reviewing programs that bring about positive outcomes between police and Aboriginal people and which are in line with NSW Police policy. The ACLO works closely with the Aboriginal community, Aboriginal community organisations and other service providers in their day to day activities. The ACLO promotes an awareness of NSW Police to Aboriginal people and communities and promotes an awareness of Aboriginal issues to police”.  According to the Australian Institute of Criminology, the ACLOs are unsworn and do not have any policing powers.

Further, the current Strategic Direction released by the NSW Police in 2012, also discussed new initiatives implemented in the 2007-2011 Strategic Direction to provide support to and communicate with the local Indigenous communities, including:

- Police Aboriginal Consultative Committees (‘PACC’) - these have been formed to specifically address Aboriginal issues associated with crime and crime prevention and meet quarterly in areas where there is a high level of Indigenous residency. The committees are open to the public (i.e. are not by invitation) and will be run by the LACs, bringing in specialist police groups where necessary to discuss particular issues.

- Aboriginal Strategic Direction Steering Committee (‘ASDSC’) - this monitors the application and implementation of the Strategic Direction by the LACs. The ASDSC will also make recommendations based on the information of the PACC committees on crime prevention strategies and operational procedures.

- Police Aboriginal Strategic Advisory Council (‘PASAC’) - this is the oversight committee, which is an advisory body chaired by the Commissioner of Police and comprising senior representatives of NSW Government agencies and Aboriginal peak bodies. It considers issues of State-wide relevance and concern to Aboriginal communities across NSW.

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196 NSW Police Force, "Aboriginal Strategic Direction 2007 - 2011", pamphlet titled "ACLOs".


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The Strategic Direction also specifically discusses policing and Indigenous women as per Recommendation 88(b), noting that, in particular, there are certain steps should take to ensure, where possible, cultural sensitivities are taken into account.

In 2005, the NSW Ombudsman conducted an audit of the NSW Police, in reference to the ACLO role and highlighted some areas in which the role of ACLOs could be improved. He found that "community expectations of an ACLO are often quite different from how police envisage the ACLO role. A common complaint from the community is that the ACLO is used solely or predominantly as a “taxi service” or “police informant”. In fact what stood out for us in almost every command was how little the broader community knew about the ACLO role. While a formal position description exists, it was also clear that there was limited understanding by police of how ACLOs might be better used in relationship building and operational policing”. 198

The Ombudsman recommended that “there should be a more integrated approach in utilising ACLOs in crime prevention and community safety strategies, and better coordination and liaison with other specialist officers in important areas like working with young people and dealing with family violence.” He also noted that "we have observed situations where there is a significant and valuable role for ACLOs to play in operational matters, particularly where their presence might reduce tension, or where involving them in planning means that they can provide input from the community’s perspective to reduce the likelihood of conflict.”199 However, a 2011 Report produced by the Ombudsman also discussed that the audit had shown that the NSW Police Force has achieved some important breakthroughs in its relationship with Aboriginal communities via this program.

3.24 Tasmania

There does not appear to be any published material as to whether part (a) of this Recommendation has been reviewed by the Tasmania Police.

As to parts (b) and (c) of Recommendation 88, District and Assistant Aboriginal Liaison Officers are responsible for liaison between Tasmania Police and the Aboriginal community at the District level. According to the Tasmania Police Aboriginal Strategic Plan published in 2014, the role of these liaison officers includes liaison, providing advice to police, and assisting other Tasmania Police members with their duties affecting Aboriginal people.200

According to the Australian Institute of Criminology 2010 report, these officers are sworn and have full policing powers. Liaison functions are performed by nominated officers in each region as part of general duties policing role.201

3.25 South Australia

199 Ibid, p.14
200 Tasmania Police, “Aboriginal Strategic Plan” (13 February 2014), p.4
In South Australia, Aboriginal Police Liaison Officers have been established on a trial basis on the Anangu Pitjantjatjara Yankunytjatjara (‘APY’) Lands, with apparently rather mixed success. According to the Anangu Lands Paper Tracker, which describes itself as an online project of Uniting Communities which monitors government activities and issues of concern in South Australia, in early 2008, South Australian Police appointed four Anangu as Police Aboriginal Liaison Officers, but as of 2 February 2012, there was only one Liaison Officer on the APY Lands.\(^{202}\) The Police Aboriginal Liaison Officers are unsworn and have no policing powers.\(^{203}\)

Separately, the South Australia Police also have Community Constables, who are sworn. The extent of their powers varies on an individual basis dependent on training.\(^{204}\) According to a press report in The Advertiser in May 2012, the South Australia Police were having difficulty finding sufficient Community Constables in the APY Lands. The article ascribed this partly to a backlash against the Federal Government’s Northern Territory Intervention Scheme, and partly due to other factors such as the threat of family payback against Community Constables.\(^{205}\)

### 3.26 Australian Capital Territory

The Australian Federal Police (‘AFP’) has an Indigenous community liaison team which operates in the ACT and liaises with the Indigenous community. The Indigenous community liaison team is committed to developing and maintaining a network of contacts between the police and the local Indigenous community. The officers are unsworn and have no policing powers.\(^{206}\) There does not appear to be any significant published literature on how successful this team is in its role although it is specifically noted that they work with the AFP’s Crime Prevention Unit.

### 3.27 Western Australia

The Australian Human Rights Commission reported in 1996 that the over-policing of Indigenous people in public places and the under-policing of Aboriginal communities was a continuing problem, citing statistics to the effect that reported spousal violence of Indigenous women in Western Australia was 36.2 times that of non-Indigenous women.\(^{207}\)

Whilst WA Police has had an Aboriginal Police Liaison Officer (‘APLO’) scheme for some time, it was formally discontinued in 2005. APLOs were given the opportunity to transition to sworn officer status and many did so. A small number wished to remain as APLOs and their status has been maintained. Whilst Aboriginal people

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\(^{203}\) Australian Government, Australian Institute of Criminology, "Community Policing in Australia" (2010) p.46.
\(^{204}\) Ibid.
\(^{205}\) Ibid.
\(^{206}\) The Advertiser, “Aboriginal Community Constable scheme "struggling" due to Intervention backlash” (18 May 2012).

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may no longer enter the police as APLOs, Aboriginal people are encouraged to join as police officers, police auxiliary officers or as civilian staff. In evidence presented to a 2006 Senate inquiry into petrol sniffing, the Western Australian Police Service argued that, while Aboriginal Community Police Officers, when available, often provided liaison between sworn police officers and community residents, the service was more interested in encouraging Aboriginal people to enter the Police Service itself.

However, WA Police has established an Aboriginal Corporate Development Unit. The Unit coordinates information, programs and advice on Aboriginal issues impacting on WA Police. It was developed to facilitate conversations with the Indigenous community in WA and Encouraging Indigenous people to seek employment with the WA Police. There does not appear to be any significant published literature on how successful this team is in its role.

3.28 Queensland

With regard to part (a) of this Recommendation, Hansard records that on 4 December 2002 the then Premier Anna Bligh mentioned a Bill to amend the Summary Offences Act (Qld) in 2002 aimed at addressing over-policing of Indigenous peoples. The Bill was never introduced into Parliament.

With regard to parts (b) and (c) of Recommendation 88, according to the Queensland Police website, Community Policing is an operational goal of the Queensland Police Service. Community Police Officers may be appointed by an Indigenous local government. Indigenous Community/Police Consultative Groups (‘ICPCGs’) are established to develop better relationships between police and Aboriginal and/or Torres Strait Islander communities in Queensland.

The police engage unsworn Police Liaison Officers, whose role is to promote trust and understanding between community and the Queensland Police Service.

Each region also has Cross-Cultural Liaison Officers (‘CCLOs’) who serve as a higher level liaison between police and Indigenous communities. CCLOs are sworn police officers responsible for maintaining effective links between police, Aboriginal, Torres Strait Islander and multicultural communities by managing and coordinating community-based policing programmes and cultural support activities such as open days, celebrations, festivals, school events, etc. within their respective District.

Despite this plethora of roles, there does not seem to be any evidence that the efficacy of these roles is regularly reviewed by Queensland Police.

3.29 Victoria


13. DIVERSION FROM POLICE CUSTODY (RECOMMENDATIONS 79-91)
In Victoria, sworn Police Aboriginal Liaison Officers are nominated officers who perform additional functions part of their policing role in areas where there are a significant number of Aboriginal and Torres Strait Islander people residing and coming into police contact. These officers have full police powers. There are also Aboriginal Community Liaison Officers who are unsworn full-time employees who are members of the Aboriginal community elected by a panel.\(^\text{211}\)

Further, in December 2013, the Victoria Police established "Priority Communities Division", which has been established to communicate with the Indigenous community, along with other priority communities. The new division has developed an "Equality is not the Same" Action Plan and Developed and "Community Engagement Strategy" to engage with communities like the Indigenous community.\(^\text{212}\)

There does not appear to be any published information on the efficacy of these roles, or whether Victoria Police is reviewing over-policing of Aboriginal people in Victoria.

### 3.30 Northern Territory

In the Northern Territory, sworn Aboriginal Community Police Officers ('ACPOs') are engaged via a jointly funded partnership between NT Police and Aboriginal communities.\(^\text{213}\) In order to apply to become an ACPO, the applicant must be of Aboriginal/Torres Strait Islander descent and have "good character".

The position in the Northern Territory is also affected by the *National Emergency Response Act 2007* (Cth), which was later superseded by the *Stronger Futures in the Northern Territory Act 2012* (Cth), and which, amongst other measures, increased policing levels in prescribed communities, including requesting secondments from other jurisdictions to supplement NT resources.

A 2010 independent review of policing in remote Indigenous communities in the Northern Territory issued a number of recommendations involving community policing. According to that review, the "overarching principle is that all communities that do not currently have a permanent policing presence should have improved access to more regular policing services. The review recommends additional policing resources to ensure adequate relief staff, transition [Taskforce] Themis stations to either permanent or overnight facilities, allocate appropriate resources to hub stations, and extend overnight facilities in communities where needed."\(^\text{214}\)

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\(^{214}\) Allen Consulting Group, "Independent Review of Policing in Remote Indigenous Communities in the Northern Territory, a report to the Australian Government and the Northern Territory Government" (April 2010), p.100
However, the review itself acknowledges the possible spectre of over-policing, saying that "a key consideration ..... is how many police are enough to provide an appropriate coverage of remote communities in the Northern Territory. In one sense, there can never be enough policing, as additional police numbers invariably lead to higher levels of reporting, and the increased offence statistics at face value seem to justify additional policing".\[215\]

On 26 June 2013, the Commonwealth Parliamentary Joint Committee on Human Rights published a report on the *Stronger Futures in the Northern Territory Act 2012* (Cth). The report "broadly acknowledged the legitimacy of the policy intent of the Stronger Futures measures, being to reduce disadvantage and promote equal enjoyment of human rights, particularly in relation to Indigenous Australians. However, the [report] noted that a number of Indigenous and other groups had expressed significant concerns about the compatibility of the Stronger Futures measures with human rights, as well as doubts in relation the efficacy of the measures."\[216\] As a result, the Committee announced that it would undertake a 12-month review of the measures, and to report in mid-2015.\[217\]

4. **Bail (Recommendations 89 - 91)**

Under Section 68 of the *Judiciary Act 1903* (Cth), the relevant laws of a State or Territory are applied to Commonwealth matters. For example, the *Evidence Act 1995* (NSW), the *Bail Act 1978* (NSW) and *Criminal Procedure Act 1989* (NSW) apply in Commonwealth matters heard in NSW state courts. As result, the Commonwealth is largely not considered in the section below. Where a matter is dealt with by the Australian Federal Police, this has been specifically noted for the purposes of the Australian Capital Territory.

**Recommendation 89:** That the operation of bail legislation should be closely monitored by each government to ensure that the entitlement to bail, as set out in the legislation, is being recognised in practice. Furthermore the Commission recommends that the factors highlighted in this report as relevant to the granting of bail be closely considered by police administrators.

This Report has found that some jurisdictions have implemented some type of review of bail legislation. However, it also shows that:

- there tends to be a limited government response to Recommendations made, or, at a minimum, a reluctance to undertake legislative changes as a result of any review; and
- the reviews were once-off, rather than part of an ongoing close monitoring of the legislation.

\[215\] Ibid, Executive Summary, p. (v)

\[217\] Ibid.
4.1 New South Wales

In NSW, according to a 1999 report by the NSW Government, the Police Service Handbook encourages the use of Court Attendance Notices (‘CAN’) for all persons who would have been charged and given unconditional bail.

Again according to the NSW Government, by December 1998, the Service’s Charge Management System was fully operational throughout the State, and provided up to date information on the numbers of people who receive bail.218

There does not appear to be any published data however on whether, or how, the NSW Government reviews or monitors the data referred to above. Despite this, the use of CANs is still dealt with in the current Police Handbook.

Since the 1999 NSW Government report from which the above information has been taken, a new Bail Act has been introduced in NSW.219 The Law Reform Commission had previously recommended that the government should, as soon as practicable, establish a process to improve the collection and reporting of data required for an effective review of a new Bail Act.220 According to a recent media release from the NSW Bar Association, the NSW Government originally stated that an independent bail monitoring group would be set up to include representatives from the NSW Police Force, the Office of the Director of Public Prosecutions, Legal Aid and the Bureau of Crime Statistics and Research, to monitor the new Act.221 A media release from early 2015 provided an indication that the Bail Monitoring Group is still in operation.222

The reason for the media release referred to in the preceding paragraph was to counsel against the Government’s intention, announced in the second last week of June 2014, that a review of the new Bail Act (which only commenced operation on 20 May 2014) would be conducted by the Hon. John Hatzistergos, a former NSW parliamentarian. The review, which was handed down in July 2014, was a self-described “underlying policy” base review and was not therefore hampered by lack of data due to the recent nature of the changes being reviewed.223 As a result, the review does not appear to satisfy the requirements set out in Recommendation 89.

4.2 Tasmania

There does not appear to be any published information suggesting that this Recommendation been implemented in Tasmania. The Tasmanian Law Reform
Institute has issued a couple of papers on particular aspects of bail, but nothing comprehensive.\textsuperscript{224}

4.3 South Australia

In South Australia, the only readily available published reports on the operation of bail legislation pre-date the RCIADIC, so it is unknown whether this Recommendation has been implemented.

4.4 Western Australia

In 2010, in response to the death in custody of an Aboriginal Elder, the Western Australian Government completed a review of the \textit{Bail Act 1982 (WA)}. The Aboriginal Legal Service of Western Australia made submissions with 39 recommendations, including some legislative amendments.\textsuperscript{225} However, this Report has not located any Government response to these submissions and no significant legislative amendments to the \textit{Bail Act 1982 (WA)} were passed in the year following the submissions and no significant overhauls of the \textit{Bail Act 1982 (WA)} appear to have occurred since that report.

4.5 Queensland

In Queensland in 2011, a review was done on bail and its impact on Indigenous communities, specifically referring to the National Report and its findings that bail experiences are different in the Indigenous community. The report itself indicates that previous research had been undertaken in Queensland in respect of this issue. The report considered bail data from 3 separate sources and made 24 recommendations. The Queensland Government published a response to these recommendations, but largely cited current programs, rather than an intention to make significant changes to current offerings. It is not clear if another review will happen in the near future.\textsuperscript{226}

4.6 Victoria

As for Victoria, a review of the \textit{Bail Act 1977 (Vic)}, including its practical application was undertaken by the Victorian Law Reform Commission in 2007.\textsuperscript{227} The review recommended a complete rewrite of the \textit{Bail Act 1977 (Vic)}. However, no significant changes were made to the \textit{Bail Act 1977 (Vic)} following the release of the findings of the review.

4.7 Other jurisdictions

\textsuperscript{225} Aboriginal Legal Service of Western Australia, Inc, “Submission to the Department of the Attorney General, Government of Western Australia Review of the Bail Act 1982 (WA)” (October 2010).
No information appears to be published concerning the implementation of this Recommendation in the ACT or the Northern Territory.

**Recommendation 90:** That in jurisdictions where this is not already the position:

a. Where police bail is denied to an Aboriginal person or granted on terms the person cannot meet, the Aboriginal Legal Service, or a person nominated by the Service, be notified of that fact;

b. An officer of the Aboriginal Legal Service or such other person as is nominated by the Service, be granted access to a person held in custody without bail; and

c. There be a statutory requirement that the officer in charge of a station to whom an arrested person is taken give to that person, in writing, a notification of his/her right to apply for bail and to pursue a review of the decision if bail is refused and of how to exercise those rights.

The extent to which these Recommendations have been implemented in Australian jurisdictions is variable. In respect of Recommendations 90(a) and (b), NSW appears to have implemented the Recommendations, with Custody Notification Services that open a line of communication between Indigenous individuals held on remand and Aboriginal Legal Services which is provided for by legislation. Tasmania has also taken similar steps.

In respect of the requirement for the police to provide information regarding rights to apply for bail or review of decisions to refuse bail, most jurisdictions have partially implemented the Recommendations of the RCIADIC.

### 4.8 New South Wales

Recommendation 90 appears to have been implemented in NSW. Parts (a) and (b) are given effect pursuant to the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), at regulation 33.

The provision of notification to the Aboriginal Legal Service (‘ALS’) occurs as part of the Custody Notification Service in which a number of Aboriginal and Torres Strait Islander Legal Services provide 24 hour phone access to a lawyer for Indigenous individuals who have been arrested. After such notification is provided, if the Aboriginal detainee wishes to, he or she can speak with a solicitor at the ALS who will arrange for there to be legal representation should there by a court hearing as to bail arrangements.

As to part (c) of the Recommendation, a police officer must ensure that, as soon as reasonably practicable after a person in police custody is charged with an offence, the person is given "bail eligibility information", which is defined as written information of a kind prescribed in the Bail Regulations, about eligibility for bail and the entitlement to request a review of a bail decision made by a police officer.\(^\text{228}\)

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\(^{228}\) *Bail Act 2013* (NSW), s 44.
4.9 Tasmania

In Tasmania, parts (a) and (b) of Recommendation 90 appear to have been implemented. Tasmania Police have issued a policy which requires that "the Aboriginal Legal Service will be notified in every case where an Aboriginal person is in custody and an effort shall be made to notify a relative or friend of the person. Details of the notification of the Aboriginal Legal Service shall be recorded on the Online Charging system".229

Part (c) of Recommendation 90 has not been implemented in Tasmania. A person in custody may communicate with a legal practitioner before any questioning may commence230 but there does not appear to be any obligation on the police to inform the person in custody of their rights with regard to bail.

4.10 South Australia

Neither part (a) nor part (b) of this Recommendation appears to have been implemented in South Australia. Whilst the Aboriginal Legal Rights Movement ('ALRM') provides Field Officers to assist Aboriginals requiring support, there does not appear to be any obligation on police or courts to contact ALRM. The ALRM's website states that "if you are charged with committing an offence by the police, you are within your rights to request a phone call to ALRM before any interview is conducted...you can contact a Field Officer 24 hours a day, 7 days a week at our toll free number...".231

The South Australian Department of Correctional Services also employs Aboriginal Liaison Officers, and the South Australian Courts Administration Authority appoints Aboriginal Justice Officers, the roles of both being to assist Aboriginal offenders. Nevertheless, it does not appear that police or courts are legally obliged to notify them in the circumstances referred to in the Recommendation.

Part (c) of this Recommendation appears to have been implemented in South Australia. The Bail Act 1985 (SA) provides that the police "must, as soon as reasonably practicable after delivering the arrested person to a police station after making the arrest, take reasonable steps to ensure that the arrested person...understands that the arrested person is entitled to apply for release on bail...".232 The police must also ensure that "the arrested person...receives...a written statement, in the prescribed form, explaining how, and to what authorities, an application for release on bail may be made ....."233 The prescribed form appears in the Regulations, and in addition to explaining how to apply for bail, contains an explanation of how to ask for a review if the application for bail fails.234

230 Criminal Law (Detention and Interrogation) Act 1995 (Tas), s 6.
233 Ibid, s13.
234 Bail Regulations 2000 (SA), sch. 2.
4.11 Australian Capital Territory

The Australian Federal Police Guidelines provide that "where an Indigenous Australian is taken into custody, the arresting member must ensure the ALS is notified and notification is sent by facsimile. Members must record all ALS notifications and notification attempts in the relevant PROMIS incident". This reflects section 23H of the Crimes Act 1914 (Cth).

The Bail Act 1992 (ACT), however only partially implements Recommendation 90(c). The police are only obliged to supply information regarding eligibility for bail orally. There is an obligation to inform the person in custody that he or she may contact someone to assist. However, the police are not bound to notify the Aboriginal Legal Service.

4.12 Western Australia

Parts (a) and (b) of Recommendation 90 appear to have been implemented in Western Australia. The Western Australian Police Service and the Aboriginal Legal Service (ALS) WA Inc implemented an accord on detainee advice in 1995. The accord requires that, with the approval of the individual, whenever an Aboriginal person is charged, members advise the local office of the ALS. All Aboriginal persons detained and charged are to be asked if they wish the ALS to be notified of their details. However, there is no indication as to whether this still operates.

It is possible that that these services are no longer in operation. In October 2014, following the death in custody of an Indigenous woman who owed $1000 in fines, the ALS CEO, Dennis Eggington, called for round-the-clock access to lawyers via a custody notification service like those that operate in NSW and the ACT, which he asserted could prevent further deaths in police custody.

Part (c) of the Recommendation has been implemented in Western Australia. Section 8 of the Bail Act 1982 (WA) provides that the accused must be provided written information about the effect of the Bail Act 1982 (WA), forms to complete designed to disclose to the judicial officer or authorised officer all information relevant to the decision and any assistance a non-English speaker may require in order to fill in the forms.

4.13 Queensland

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235 AFP Governance, "AFP National Guideline of persons in custody and Police custodial facilities" para. 7.4
239 Bail Act 1982 (WA), s 8.

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In Queensland, this Recommendation has largely not been implemented, despite the recommendation of the Queensland Law Reform Commission. The Police Powers and Responsibilities Act 2000 (Qld) goes part way towards implementing parts (a) and (b) of recommendation 90, by requiring that prior to the questioning of an Aboriginal or Torres Strait Islander defendant, and unless the defendant had arranged their own lawyer, the police officer had to inform a legal aid representative that such a defendant was being held in custody as soon as reasonably practicable, subject to certain provisos.

4.14 Victoria

In Victoria, as to parts (a) and (b) of Recommendation 90, the Victoria Police Manual prescribes that when an Indigenous person is taken into custody, a police officer should "complete the Attendance module within 60 minutes of arrival at the police station to ensure automatic Victorian Aboriginal Legal Service ('VALS') notification is triggered". Further, the initial attendance module entry should be made prior to any interview or related procedures taking place. Where an officer does not return to the police station, he or she must contact the Record Services Division who will advise VALS. The Manual also states that a police officer should contact the local Aboriginal Community Justice Panel ('ACJP'), which provides advice to the police on medical conditions, takes custody of Indigenous people arrested for minor offences and can organise welfare and legal advice, along with providing other related services. If the arrest is for public drunkenness, the police are also directed to notify the local Sobering Up centre.

In 2006, VALS made submissions to the Victorian Law Reform Commission that these procedures are not always implemented. It states that VALS is not always notified, or not in a timely manner, that a person is in custody and this increases the likelihood of bail being refused. It is not clear whether these issues subsist today, although the VALS website now specifically notes that Victoria Police is required to notify VALS within an hour when a person of Aboriginal and/or Torres Strait Islander descent is taken into custody.

There appears to be no attempt to implement part (c) of Recommendation 90 in Victoria.

4.15 Northern Territory

In the Northern Territory, the Bail Act (NT) says that the police "may", as an alternative to bringing the arrested person before a justice or a court, inform the person of their right to apply for bail, and ensure that he or she is able to

241 Police Powers and Responsibilities Act 2000 (Qld), s 420.
243 Ibid, s. 1.9.
communicate with a legal practitioner or person of his or her choosing in connection with an application for bail. In addition, section 33 of the same Act requires police to inform an arrested person of his or her right to have the bail determination reviewed. This only goes part-way toward implementation of this Recommendation.

**Recommendation 91:** That governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation:

a. to enable the same or another police officer to review a refusal of bail by a police officer,

b. to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people; and

c. to enable police officers to release a person on bail at or near the place of arrest without necessarily conveying the person to a police station.

This Report indicates that, instead of creating a review system where a police officer reviews another's decision, the law in each jurisdiction generally provides a presumption of bail unless the offence is serious. However, the recommendation that a police officer may review a refusal of bail by another police officer has been implemented in some jurisdictions.

In some jurisdictions it appears that criteria which inappropriately restrict the granting of bail to Indigenous people have been revised, but this is not universal. Recommendation 91(c) does not appear to have been implemented in any jurisdiction. This Report indicates that any flexibility in the legislation tends to relate to the decision to arrest the suspect, rather than the approach to bail that occurs after an arrest has been made.

### 4.16 New South Wales

In NSW, Recommendation 91(a) appears to have been partially implemented pursuant to the *Bail Act 2013* (NSW), which allows for a senior police officer to conduct a review of a bail decision.

As to Recommendation 91(b), the *Bail Act 2013* (NSW) and the NSW Police Handbook provide that in making a determination as to whether bail should be granted police should take into account the interests or "particular vulnerabilities" of the person, including whether he/she is Aboriginal or Torres Strait Islander.

The Handbook also states that when determining whether bail should be granted, police should take into account the probability of a person's appearance or non-appearance at court, having regard only to certain factors. The first of those factors listed is "background and community ties (if Aboriginal or Torres Strait Islander, ties to extended family/kinship, traditional ties to place) prior criminal history".

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246 *Bail Act (NT)*, s 16.

247 *Bail Act 2013* (NSW), s 47.

Recommendation 90(c) has not been implemented in NSW. The *Bail Act 2013* (NSW) gives the police power to make a bail decision if the person accused of the offence is present at a police station.\(^{249}\) There is no power for the police to make a bail decision at any other place.

### 4.17 Tasmania

The Tasmania Police have on 13 February 2014 issued an Aboriginal Strategic Plan 2014-2022 which espouses a primary objective "to reduce the number of Aboriginal people who are detained in custody, and provide a safe environment should a viable alternative not be readily available". As a number one strategy to achieve this aim, it lists "where practicable and as set out in legislation, Aboriginal people should be admitted to bail and not detained in custody".\(^{250}\) The *Justices Act 1959* (Tas) states that where a person has been taken into custody, the relevant police officer "must inquire into the case and must, unless there is reasonable ground for believing that such a course would not be desirable in the interests of justice, admit that person to bail".\(^{251}\) However, there is no review mechanism set out in the *Justices Act 1959* (Tas), which suggests review by a Court would be required.

It would appear therefore that Recommendation 91(b) has been at least partially implemented in Tasmania, although Recommendations 91(a) and (c) do not appear to have been addressed.

### 4.18 South Australia

In South Australia, where an application for bail is made by a person who has been charged with an offence but not convicted, the bail authority (which can include a member of the police force who is of a rank equal to sergeant or above) should release the person on bail unless any of a list of factors applies (none of those factors appears to particularly discriminate against Aboriginals).\(^{252}\) There are provisions for the bail decision to be reviewed, but the review can only be carried out by the Supreme Court or a magistrate. Notwithstanding this, the review may be conducted by video link or telephone call, to assist with access in rural communities.\(^{253}\) Part (c) of this Recommendation does not appear to have been addressed at all.

The South Australian Legal Services Commission has published advice to legal practitioners working with Indigenous defendants. As part of that advice, the Commission urges practitioners to emphasise in their submissions in an application for bail any impending family issues such as a funeral or birth which the person wants to attend, and also to explain the circumstances where an Indigenous client does not have a fixed address, and to emphasise that this is not necessarily

\(^{249}\) Ibid, s 43.  
\(^{251}\) *Justices Act 1959* (Tas), s 34.  
\(^{252}\) *Bail Act 1985* (SA), s 10.  
\(^{253}\) Ibid, ss 14, 15.
inconsistent with the person being reliable when it comes to court appearances. All of this however only serves to emphasise that this Recommendation has not been implemented in South Australia.

4.19 **Australian Capital Territory**

In the ACT, an accused person may request a review of an adverse bail decision by the authorised officer who made the decision, or any other authorised officer. Also, there is a presumption for bail in the case of certain minor offences. However, the ACT government has not implemented part (c) of this Recommendation, in that the *Bail Act 1992 (ACT)* only provides that an authorised officer may grant bail to an accused person who is present at a police station.

4.20 **Western Australia**

In Western Australia, bail may be granted by a police officer and there is a presumption of bail in all cases except serious indictable offences. The *Bail Act 1982 (WA)* further requires that bail must be considered regardless of whether the accused has applied for it. However, only a judge may review a decision in relation to bail, and even then only in very limited circumstances. Recommendation 91(c) does not appear to have been implemented in Western Australia.

4.21 **Queensland**

This Recommendation has not been implemented in Queensland. Under the *Bail Act 1980 (Qld)*, a defendant held in custody who has been refused bail or feels aggrieved by the amount or the conditions of bail may make application to a court for an order granting or varying bail. There does not appear to be any published material to indicate whether Recommendation 91(b) has been implemented in Queensland. However the 2011 review of the *Bail Act 1980 (Qld)* suggested legislative changes to the Government's decision to maintain records of all minor offences (rather than determining to not add certain offences to a person's criminal record, or clearing those records after a certain amount of time), which were seen to disadvantage Indigenous people (along with other minority groups, who were seen to be more likely to have these types of offences on their records) in applications for bail. The suggestion was rejected by the Queensland Government.

4.22 **Victoria**

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254 Legal Services Commission of South Australia, "Working with Aboriginal Defendants", *Duty Solicitor Handbook*.
255 *Bail Act 1992 (ACT)*, s.38.
256 Ibid, s 8.
257 Ibid, s 14.
258 *Bail Act 1982 (WA)*, s 6A.
259 Ibid, s 6.
260 Ibid, s.14 and sch.1, pt. B.
261 *Bail Act 1980 (Qld)*, s 19.
In Victoria, Recommendation 91(a) has not been implemented as further applications for bail may only be made to a court. In 2010 a new section 3A was inserted into the *Bail Act 1977* (Vic) which provides that "in making a determination under this Act in relation to an Aboriginal person, a court must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including (a) the person's cultural background, including the person's ties to extended family or place; and (b) any other relevant cultural issue or obligation". This appears to be at least in part an implementation of part (b) of this Recommendation.

As to part (c) of this Recommendation, the *Bail Act 1977* (Vic) provides that a person shall be discharged on bail if it is not practicable to bring him or her before a court within 24 hours after being taken into custody. However this fails to remedy the problem raised by the RCIADIC in this part of the Recommendation.

### 4.23 Northern Territory

In the Northern Territory, Recommendation 91(a) has not been implemented. Pursuant to section 33 of the *Bail Act 1982* (NT), only a magistrate or Justice can review a refusal of bail by a police officer ("authorised member").

From 2007 to 2012, the extent to which Recommendation 91(b) is implemented in the NT was affected by the *Northern Territory National Emergency Response Act 2007* (Cth), which stated that in determining whether to grant bail to a person charged with, or convicted of, an offence against a law of the Northern Territory, or in determining conditions to which bail granted to such a person should be subject, "a bail authority must not take into consideration any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates or aggravating the seriousness of the alleged criminal behaviour to which the alleged offence relates, or the criminal behaviour to which the offence relates". The *Northern Territory National Emergency Response Act 2007* (Cth) was repealed in 2012.

Recommendation 91(c) does not appear to have been implemented in the Northern Territory.

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263 *Bail Act 1977* (Vic), s 18.
264 Ibid, s 3A.
265 Ibid, s 4.
266 *Northern Territory National Emergency Response Act 2007* (Cth) (repealed), s 90.