

2016

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**GOVERNMENT RESPONSE TO THE
STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY'S
REPORT ON THE *INQUIRY INTO SENTENCING***

Presented by
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Attorney-General

On 7 May 2013, the Standing Committee on Justice and Community Safety (the Committee) resolved to conduct an inquiry into sentencing in the ACT and agreed to the Terms of Reference.

The Committee tabled its report on the *Inquiry into Sentencing* on 24 March 2015. At the time of tabling this response, an electronic copy of the report is available at:

http://www.parliament.act.gov.au/data/assets/pdf_file/0019/707212/JACS-Ctee-report-for-Inquiry-into-Sentencing-FINAL.pdf

The ACT Government welcomes the report by the Standing Committee on Justice and Community Safety, *Inquiry into Sentencing*.

In the Committee's view, the most important reforms recommended in this report are:

- to establish and properly resource an intensive corrections orders regime;
- to review and reform the ACT bail regime such that it is consistent with the spirit and letter of the proposed intensive corrections orders regime;
- to implement minor adjustments to the ACT parole regime that will see it strengthened in terms of protecting public safety and have its criteria and processes more accessible to the public; and
- to institute a sentencing council, charged with processing, researching and publishing on sentencing in the ACT, and acting as a mediator between the courts, the ACT Government and the ACT public.

The Committee has presented a majority report that is based on the evidence presented by key witnesses from public hearings and written submissions. The report has not explored the practical or resource implications of all its recommendations and has not, in some cases, provided evidence to justify the recommendation. A number of recommendations note the need to assess resource implications further, for example on the proposed intensive corrections order regime, (rec 5), the ThroughCare Program (rec 16), the resources of the Sentence Administration Board (rec 42) and the implementation of phase 2 of the Restorative Justice scheme (rec 49). Some recommendations raise options that have been implemented in the ACT for some time.

Sentencing represents one of the most important roles performed by the courts. To ensure the ACT has a robust and effective justice system, the Government is committed to exploring in further detail many of the Committee's recommendations. The Government will consider funding and implementation options to enhance the resources and expertise of those who are connected with the ACT's justice system.

The Justice and Community Safety (JACS) Directorate is consulting on many of the issues raised in the report, as part of the Government's Justice Reform Strategy (JRS). The JRS is a two year project which will work to inform proposals for community based sentencing alternatives to imprisonment and identify how sentencing legislation and practice can improve outcomes and reduce recidivism.

As part of the JRS, the Crimes (Sentencing and Restorative Justice) Amendment Bill 2015, introduced in November 2015, proposes a new sentencing option, to be known as an ‘intensive correction order’ and abolishes periodic detention in the ACT. The intensive correction order will be a term of imprisonment to be served in the community and supported by supervision and programs provided by ACT Corrective Services.

The JRS will also guide the development of proposals for government reforms to sentencing and related laws and programs designed to support the principles of sentencing. Further information on the work of the JRS can be found at

<http://www.justice.act.gov.au/page/view/3830/title/justice-reform-strategy>

The work of the JRS is guided by strong engagement with the community and stakeholders. The Government is doing this through a range of mechanisms including thematic Core Design Workshops which have been held throughout 2015. To date, seven workshops have been held on the following themes:

- therapeutic jurisprudence;
- intensive corrections orders;
- drug and alcohol issues relating to sentencing;
- mental health issues relating to sentencing;
- youth justice issues;
- disability and cognitive impairment issues; and
- Aboriginal and Torres Strait Islander issues.

Participants in each workshop have been invited based on experience, expertise and specialist knowledge. Expert facilitators have been engaged for each of the workshops to facilitate high level and robust discussions. The JRS aims to access evidence and practice-based suggestions to inform proposals for reform. The Government notes and appreciates the engagement of key stakeholders in contributing to the response to the Committee’s Inquiry.

The ACT Government has considered the 55 recommendations and Agrees to 19 recommendations, Agrees in Principle to 20 recommendations, has Noted five recommendations and has Not Agreed with 11 recommendations.

A table providing a snapshot of the recommendations and the Government’s response is provided below (note that in some instances, initiatives identified as ‘agreed in principle’ are in progress but described as such because they are subject to future budget considerations):

| Recommendation | Theme | Response |
|-----------------------|------------------------|-----------------|
| 1 | ACT Sentencing Council | Noted |
| 2 | ACT Sentencing Council | Noted |
| 3 | ACT Sentencing Council | Noted |

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| 4 | Intensive Correction Orders | Agreed |
| 5 | Intensive Correction Orders | Agreed in principle |
| 6 | Intensive Correction Orders | Agreed in principle |
| 7 | <i>de novo</i> appeals | Noted |
| 8 | Appeals processes | Agreed in principle |
| 9 | Forfeiture of property | Agreed in principle |
| 10 | Costs for delays | Agreed in principle |
| 11 | Alternatives to remand | Agreed in principle |
| 12 | ACT Magistrates Courts listings | Agreed |
| 13 | Prisoner rehabilitation programs - evaluation | Agreed in principle |
| 14 | Tabling of evaluation | Not Agreed |
| 15 | Victim Impact Statements | Agreed in principle |
| 16 | ThroughCare funding | Agreed in principle |
| 17 | Reporting on recidivism | Agreed in principle |
| 18 | Consider Indigenous status of offenders | Agreed |
| 19 | Recognise Galambany Circle Court under statute | Agreed |
| 20 | Report informing court of offender's Indigenous status | Agreed in principle |
| 21 | Indigenous case-workers contribute to court reports | Agreed in principle |
| 22 | Engagement with ACT Indigenous community | Agreed |
| 23 | Drug Court | Not Agreed |
| 24 | Drug diversion | Agreed |
| 25 | Expand ACT Community and Work Order Program | Agreed in principle |
| 26 | Remove DPP's right of veto due to | Not Agreed |

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| | mental incapacity | |
| 27 | Expand options to dismiss on grounds of defendant's mental incapacity | Not Agreed |
| 28 | Expert assessment of defendant's mental capacity | Not Agreed |
| 29 | Conditional release for primary carer's of young children | Agreed in principle |
| 30 | Facilities allowing primary carers to care for child at AMC | Agreed in principle |
| 31 | Research on early-life exposure to drug use – criminogenic implications | Agreed in principle |
| 32 | Ongoing survey of health and wellbeing of children in the youth justice system | Agreed |
| 33 | Coordinated resources on services available for offenders | Agreed |
| 34 | Proclaim Phase 2 – Restorative Justice | Agreed |
| 35 | Diversion Plan for young offenders | Agreed |
| 36 | Public interest test for parole | Not agreed |
| 37 | Give courts power to make parole orders | Not agreed |
| 38 | Discretion to SAB to determine balance of sentence | Not agreed |
| 39 | Technical amendment to s149 <i>Crimes (Sentence Administration) Act 2005</i> | Agreed |
| 40 | Set out circumstances to revoke parole in legislation | Not agreed |
| 41 | Require the SAB to publish its decisions | Agreed in principle |
| 42 | Resourcing to the SAB to support publication of its decisions | Agreed in principle |
| 43 | Review bail arrangements and propose amendments to the <i>Bail Act 1992</i> | Noted |
| 44 | As part of proposed amendments to the <i>Bail Act</i> , continue to provide legislative foundations for the ACT Family | Agreed |

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|----|--|---------------------|
| | Violence Intervention Program | |
| 45 | Service and Programs be made available to those on remand and bail | Agreed in principle |
| 46 | Proclaim Phase 2 – Restorative Justice | Agreed |
| 47 | Proclaim Phase 2 – Restorative Justice | Agreed |
| 48 | Restorative Justice – funding and resourcing to be reported in Annual Report | Agreed |
| 49 | Restorative Justice – funding and resourcing | Agreed |
| 50 | Restorative Justice – reporting | Not agreed |
| 51 | Restorative Justice – formalise arrangements | Not agreed |
| 52 | Galambany Circle Sentencing Court – legislative amendments to establish the objects and purposes of the Court. | Agreed |
| 53 | Galambany Circle Sentencing Court – reporting | Agreed |
| 54 | Galambany Circle Sentencing Court – resourcing | Agreed in principle |
| 55 | Establish Ngunnawal Bush Healing Farm | Agreed |

Recommendation 1

The Committee recommends that the ACT Government propose legislation to the ACT Legislative Assembly that, if passed, would create an ACT Sentencing Council.

Response: Noted

The Government acknowledges the benefits of establishing a Sentencing Council in the ACT. In 2012, the Government committed to alternative methods of achieving the objectives of Sentencing Council without establishing a new body. In the 2012-2013 Budget, the Government allocated \$2.2 million over four years for the development and ongoing maintenance of an ACT Sentencing Database hosted by the NSW Judicial Commission. The database was launched in December 2013. There are existing statistical and profiling data collections occurring by way of the criminal statistical profiles and independent ACT sentencing snapshots.

Furthermore, the Government adequately covers these functions through the ACT Law Reform Advisory Council. The ACT Law Reform Advisory Council is available to consider sentencing specific references on a case by case basis.

The Government will monitor the effectiveness of the current arrangements over the coming years, acknowledging that the database is more useful after a number of years' data is aggregated.

Recommendation 2

The Committee recommends that this legislation would give an ACT Sentencing Council responsibility to: conduct research on sentencing, recidivism, and related matters in the ACT; draw on, analyse and produce publications using data from the ACT Sentencing Database; engage and educate the ACT community on matters relevant to sentencing and criminal justice; and provide policy advice to Government relevant to sentencing and criminal justice.

Response: Noted

See response to recommendation 1.

Recommendation 3

The Committee recommends that the ACT Sentencing Council should be created as an independent statutory body on the model of the Victorian Sentencing Advisory Council.

Response: Noted

See response to recommendation 1.

Recommendation 4

The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly that would, if passed, see an intensive corrections order regime established in the ACT.

Response: Agreed

The Government presented the Crimes (Sentencing and Restorative Justice) Amendment Bill 2015 to the Legislative Assembly in the November sittings as part of the work of the Justice Reform Strategy. The intention of this Bill is to follow on from the *Crimes (Sentencing) Amendment Act 2014*, by abolishing periodic detention and introducing a new sentencing option. The new Intensive Corrections Order scheme commenced on 2 March 2016. The new Intensive Correction Order while being a sentence of imprisonment is an alternative sentence to full-time custody.

Recommendation 5

The Committee recommends that the ACT Government accurately assess resource requirements for an intensive corrections order(s) regime in the ACT and ensure that adequate resources are applied to any future intensive orders regime.

Response: Agreed in principle

The Government notes that an intensive correction orders regime is likely to require significant resources to be effective. However, the long term benefits of reducing the recidivism rate as well as reducing the costs of imprisonment through the introduction of an intensive correction orders regime are well recognised.

The 2015-16 ACT Budget provided \$3.228M over three years to enhance community corrections under the banner of the Justice Reform Strategy. This funding will assist ACT Corrective Services to meet current pressures, respond to growth, and prepare for and implement arrangements for the new Intensive Corrections Order scheme which commenced on 2 March 2016.

The Government has provided this funding for a fixed term of three years in recognition that it is not currently possible to accurately forecast all the impacts of the repeal of periodic detention and the new sentencing option. The government is committed to reforms that support robust sentencing options, including rehabilitation, to reduce crime, enhance community safety and break the cycle of reoffending. The Minister for Justice and Consumer Affairs and the JACS Directorate will progress costing assessments through future budget processes.

Recommendation 6

The Committee recommends that the ACT Government investigate reports that the number of custodial sentences has increased in NSW when periodic detention was abolished and with an intensive corrections order regime in place, and apply any lessons learned to a future ACT intensive corrections orders regime.

Response: Agreed in principle

The Intensive Correction Orders regime is evidence-based and tailored to focus on the unique requirements of the ACT's jurisdiction.

The Government notes the submission by the ACT Council of Social Services, noting evidence presented to the NSW Law Society that with the abolition of periodic detention in NSW, there has been an increase in full-time custodial sentences. The NSW Law Society did not expressly reach this conclusion, but holds the view that removing periodic detention will lead to the use of full-time imprisonment in circumstances where it is not necessarily the most appropriate response. Further, the NSW Law Society advocated retaining periodic detention as a sentencing option. The Government notes this position and has worked closely with key stakeholders in the ACT to appropriately tailor the intensive correction order.

The Government will keep sentencing trends under review in the context of the implementation and evaluation of the new intensive correction order.

Recommendation 7

The Committee recommends that the ACT Government propose legislative amendments to the Legislative Assembly that would, if passed, see the ACT adopt *de novo* appeals as employed in NSW, specifically on the pattern of appeals to the NSW District Court regarding cases initially heard by the NSW Local Court.

Response: Noted

The Inquiry noted that the current ACT procedure was a 'complex and resource intensive process' in contrast to 'the relatively simple *de novo* sentencing process' used in 'appeals from the NSW Local Court to the NSW District Court, in accordance with part 3 of the *Crimes (Appeal and Review) Act 2001* (NSW)'.

The Attorney-General progressed consultation on this issue with the release of a discussion paper on 20 August 2015.

The key questions for consideration in the discussion paper are:

1. Should appeals against sentence in the ACT be reformed to reflect the system in New South Wales, which provides a right of appeal on sentence without a finding that the sentence is manifestly excessive or inadequate or that the magistrate made an error of law?
2. Should recommendation 5.1 (2) of New South Wales Law Reform Commission Report 140 *Criminal Appeals* be adopted in the ACT, that "[a]ppeals against sentence from the Local Court to the District Court should be by way of rehearing on the basis of the material before the Local Court and the magistrate's reasons. Fresh evidence should be given only with leave of the District Court, if it is in the interests of justice"?
3. What other administrative or legislative changes should be adopted as part of reforms to appeals against sentence in the ACT?

The Government is considering submissions to the discussion paper to inform whether, on balance, adopting the NSW approach to sentencing appeals is warranted.

Recommendation 8

The Committee recommends that the ACT Government propose legislative amendments to the Legislative Assembly that would, if passed, see the ACT adopt legislative provisions requiring that appeals be lodged with courts within 28 days of sentence decisions being brought down.

Response: Agreed in principle

The Government notes the judgment in [R v Meyboom \[2012\] ACTCA](#), observing anomalies in timelines and requirements for appeals on sentence and conviction. The court's decision in this case considered when the time for appeal begins in criminal matters, managing delays and the duality of appealing a conviction and sentence. Justice Refshauge said that at the time of a guilty finding by a single judge, the court accepts the verdict and the conviction. Commonly, proceedings can then be adjourned for the purposes of hearing submissions on sentence.

The ACT Law Society's submission to the inquiry has highlighted the unintended consequence of this being that defendants are required to lodge conviction appeals before their sentence. This is a problem because contrition is a matter to be taken into account as a mitigating factor in sentencing. If the defendant is forced to appeal prior to sentence, the court would be unlikely to find that the defendant showed contrition for the offence.

The Government is progressing consultation on the practical considerations of this recommendation for the ACT's courts and practitioners as part of the Justice Reform Strategy.

Recommendation 9

The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly, which, if passed, would allow greater judicial discretion over sentencing in cases which include forfeiture of property by an offender.

Response: Agreed in principle

Consistent with other jurisdictions' practice, the ACT allows some judicial discretion in this area. As raised in the *Inquiry into Sentencing*, some clarification should be given as to whether the discretion over the forfeiture is over the proceeds of an offence, instruments of offences or pecuniary penalty orders which relate to benefits in excess of profits derived from the commission of the offence. The current Victorian legislation allows discretion over the forfeiture of an instrument of an offence, and the pecuniary penalty order.

In 2012, the ACT Government made an electoral commitment to introduce unexplained wealth laws in the Territory to prevent enrichment from unlawful activities. Efforts are currently underway through the Law, Crime and Community Safety Council for a proposed national model for unexplained wealth laws. The ACT is currently working with the Commonwealth and other jurisdictions to develop a national approach.

The ACT is exploring the possibility of enacting unexplained wealth laws which would, if passed, allow appropriate judicial discretion at the time of making an order for a defendant to repay an amount to the Territory. The Government will consider legislative reform to the *Confiscation of Criminal Assets Act 2003* in conjunction with the introduction of unexplained wealth laws in the Territory.

Recommendation 10

The Committee recommends that the ACT Government introduce legislation in the Legislative Assembly which, if passed, would provide a remedy in statute for delays causing loss to an accused through no fault of that accused.

Response: Agreed in principle

The Government notes the ACT Supreme Court judgment in *R v MT* [2013] ACTSC 152, where former Chief Justice Higgins considered the issues of an acquitted person receiving a costs order and the impact on the rights to liberty, fair trial and to be tried without unreasonable delay under the Human Rights Act.

The Government will consider the introduction of legislation that will address the human rights of an accused in the ACT, in particular sections 18(5) and 22(2)(c) of the *Human Rights Act 2004* providing that people awaiting trial usually should not be detained as a general rule and a person should not be subject to unreasonable delay before trial, respectively.

If it is reasonable to do so, the Government will consider introducing a remedy in statute, as part of the Justice Reform Strategy, for delays causing loss to an accused through no fault of that accused.

Recommendation 11

The Committee recommends that the ACT Government propose legislative changes to the Legislative Assembly which, if passed, would increase options available to judicial officers so as to provide alternatives to placing accused persons on remand.

Response: Agreed in principle

As part of the Justice Reform Strategy, the Government is considering initiatives that support people charged with offences to get bail rather than going to prison.

The Australian Institute of Criminology has prepared a report on existing bail support services inside and outside of the ACT to help develop evidence-based bail support initiatives for the ACT. The Government will consult widely with relevant stakeholders to develop options that judicial officers can consider as an alternative to placing accused people on remand.

The report shows that structured bail support programs that follow a set of best practice principles contribute to reduced remand populations, reduced reoffending among participants and improved sentencing and long term outcomes for accused people and for the criminal justice system. These programs are more likely to be effective when approached collaboratively by government and non-government stakeholders.

Recommendation 12

The Committee recommends that the ACT Government advocate for, encourage and support reform of listing practices in the ACT Magistrates Court with the anticipated outcome that cases be resolved in shorter, and more predictable, timeframes.

Response: Agreed

There is no financial implication for the Government in agreeing to this recommendation. The Government notes the Magistrates Court implementation of Practice Direction No 1 of 2014, which commenced operation on 8 January 2015. This Practice Direction outlines the practice of block listing of criminal hearings, thereby increasing flexibility by having more than one Magistrate available in respect to hear matters during those periods, while maintaining flexibility to list outside block periods as required. The Government supports this reform and will monitor its effects over future years. Furthermore, the government is working with the Magistrates Court through the Family Violence Intervention Program Coordinating Committee to consider administrative and other mechanisms to improve the conduct of criminal matters in the Family Violence Court. Note that the orderly and prompt discharge of Magistrates Court business is the statutory responsibility of the Chief Magistrate under section 5 of the *Magistrates Court Act 1930*.

Recommendation 13

The Committee recommends that the ACT Government evaluate all prisoner rehabilitation programs offered by or under the auspices of Corrective Services, and that evaluation is made an integral part of planning and implementation for all future prisoner rehabilitation programs.

Response: Agreed in principle

The Government agrees that ACT Corrective Services programs be evaluated and this is already practice. The Extended Throughcare program is being evaluated in 2015-16 utilising funding identified as part of the 2014-15 budget announcement for this purpose, while a process evaluation was conducted for the Solaris Therapeutic Program in the first two years of its operation. It is important to note that in a relatively small jurisdiction evaluation can be resource intensive and when this is considered with potentially a small sample population, it is typically more effective for the ACT to draw on the findings of evaluations of the same programs in other jurisdictions or participate in such evaluations. This will be the case in regard to a NSW evaluation of vocational education and training and post-release employment outcomes being undertaken in association with the University of NSW, Curtin and Deakin universities.

Evaluation of the effectiveness of youth justice services and interventions will be guided by the evaluation framework developed for the *Blueprint for Youth Justice in the ACT 2012-22*.

Recommendation 14

The Committee recommends that evaluation of prisoner rehabilitation programs be tabled in the Legislative Assembly within 90 days of the due date for completion of the evaluation report.

Response: Not agreed

Evaluations are published through other means. It is neither appropriate nor necessary to table any evaluation of prisoner rehabilitation programs in the Legislative Assembly.

Recommendation 15

The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly that, if passed, would make ACT legislation consistent with the Sentencing Act 1995 (WA) in explicitly providing that courts were able to adjourn the sentencing of an offender to enable a Victim Impact Statement to be given to the court.

Response: Agreed in Principle

The ACT Government supports allowing a victim, or the victim's representative, to give a victim impact statement to a court to assist the court in determining the proper sentence for the offender. The Government further agrees with the Committee in noting the importance of procedural fairness for victims of crime, including the importance of having victim impact statements, accurately reflecting victims' experience, factored into the process of courts.

The victim impact statement is not to address the way in which or the extent to which the offender ought to be sentenced. The purpose is to allow the victim to have their say and the impact on them acknowledged by the court. The Government acknowledges that there may be administrative opportunities to support the writing of the victim impact statement through existing victim support arrangements.

Recommendation 16

The Committee recommends that the ACT Government assess the resources required to adequately fund the ThroughCare program and apply that level of resourcing to the program.

Response: Agreed in Principle

The ACT Government will consider funding and resources for the ThroughCare program as part of future ACT Budget processes.

Recommendation 17

The Committee recommends that the ACT Government institute enhanced reporting on recidivism in the ACT and focus on measuring performance against those figures.

Response: Agreed in principle

The Government already reports recidivism rates for the ACT in the Justice and Community Safety Directorate Annual Report and in the Report on Government Services (ROGS). These rates are determined using ROGS counting rules. The impact of the Extended Throughcare program on the ACT's recidivism rate cannot be examined for at least another 12 months as

the subject cohort must have been released from custody at least two years before the rates apply.

Alternative and more nuanced measuring of recidivism is possible and is being considered in the Extended Throughcare program. Such measuring may not, however, be comparable with rates in other jurisdictions and is likely to be most useful in future years when comparing past-performance of a program.

Recommendation 18

The Committee recommends that the ACT Government introduce changes to legislation in the Legislative Assembly which, if passed, would explicitly require courts to consider the Indigenous status of offenders at sentencing.

Response: Agreed

The Government is engaging stakeholders to determine the most appropriate mechanism to implement this recommendation, noting the current list of factors for consideration include the cultural background of an offender (s 33(1)(m), Crimes (Sentencing) Act). The Government advocates the use of the term ‘experience as an Aboriginal or Torres Strait Islander person’ rather than ‘Indigenous status’ to genuinely acknowledge and engage those in the Aboriginal and Torres Strait Islander community.

Informing a court that an offender is an Aboriginal or Torres Strait Islander person will not, of itself, necessarily work to address the inherent disadvantage faced by Aboriginal and Torres Strait Islander people. However it may lead the court to seek further information.

As part of the Justice Reform Strategy’s targeted consultation, a Core Design Workshop on Aboriginal and Torres Strait Islander issues, which covered sentencing, took place in December 2015. The workshop was a key opportunity to engage with the community on a breadth of issues affecting the Aboriginal and Torres Strait Islander community and the criminal justice system. There were approximately 40 attendees at the workshop, including representatives from the Indigenous community in the ACT and stakeholders who advocate for the needs of Aboriginal and Torres Strait Islanders.

Recommendation 19

The Committee recommends that the ACT Government introduce changes to legislation in the Legislative Assembly which, if passed, would formally recognise the Galambany Circle Sentencing court under statute.

Response: Agreed

The Galambany Court is recognised under 291M of the Magistrates Court Act. This recommendation is duplicated at recommendation 52.

Recommendation 20

The Committee recommends that the ACT Government create a specific mechanism for the creation of reports similar to *Gladue* reports in Canada, informing courts of any relationship between an accused’s offending and his or her Indigenous status.

Response: Agreed in principle

The Government is working with the Aboriginal Legal Service (NSW/ACT) to conduct a pilot of *Gladue* style pre-sentence assessments of offenders' Aboriginal and Torres Strait Islander experience. Discussions include the options available to pilot this model using existing resources.

Recommendation 21

The Committee recommends that the ACT Government ensure that Indigenous case-workers make a significant contribution to the creation of reports informing courts of any relationship between an accused's offending and his or her Indigenous status.

Response: Agreed in principle, see response to recommendation 20.

Aboriginal Client Service Officers employed by ACT Corrective Services participate in interviews with offenders and other Community Corrections Officers, supporting non-Indigenous officers as required in the preparation of court reports. This ensures that relevant cultural information can be considered and reflected in court reports and that engagement with the offender is culturally appropriate and that appropriate intervention providers are matched to the offender's needs.

Recommendation 22

The Committee recommends that the ACT Government ensure that it engages the ACT Indigenous community, and provides a diversity of sentencing options, so as to foster appropriate pathways for the punishment and rehabilitation of Indigenous offenders and reduce rates of Indigenous imprisonment in the ACT.

Response: Agreed

Through the work of the Justice Reform Strategy, the Justice and Community Safety Directorate continues to engage with the ACT Indigenous community to address the high incarceration rates of Indigenous people. As noted under recommendation 18, the Directorate held a Core Design Workshop in December 2015 to bring experts and key stakeholders together to discuss opportunities for reform that would support the needs of the ACT's Indigenous communities. The Directorate also engages with the Aboriginal and Torres Strait Islander Elected Body on sentencing policy matters and is committed to the objectives of the Aboriginal and Torres Strait Islander Justice Partnership.

The ACT Government is working with key stakeholders, through the Coordinator-General for Domestic and Family Violence, to progress key priorities from the 'We Don't Shoot our Wounded' report. The Government notes the in depth work done in the 2009 'We Don't Shoot our Wounded' report by the ACT Victims of Crime Commissioner.

Recommendation 23

The Committee recommends that the ACT Government introduce legislation to the Legislative Assembly that would, if passed, create a drug court in the ACT as a separate jurisdiction of the ACT Magistrates Court.

Response: Not agreed

The Government will undertake further consultation on this recommendation, including establishing a Working Group to develop an evidence-based position on the implementation of solution-focused approaches to drug offenders in the criminal justice system.

In the case of young people, a recent trial of a Youth Drug and Alcohol Court (YDAC) suggests that there were not sufficient young people who were both eligible and suitable to undertake the program offered by the YDAC. A therapeutic jurisdictional court program may be more appropriate for young offenders than a specialised court and has the added advantage that it can be provided to a larger cohort of young offenders. This may extend the scope of young people who may be considered suitable for and benefit from such an approach.

Recommendation 24

The Committee recommends that the ACT Government work toward a coordinated suite of drug diversion programs as recommended by the 2012 Evaluation of ACT Drug Diversion Programs, including through the adequate collection of data and ongoing evaluation of programs.

Response: Agreed

Work is continuing in this area through the draft Alcohol, Tobacco and Other Drugs Strategy for 2016-20. The draft strategy was released in late 2015 for public consultation and is expected to be finalised by the ACT Government in 2016. In that draft strategy, one of the actions currently proposed is to:

Investigate the feasibility of piloting a range of alcohol, tobacco and other drug specific conferencing approaches, new interventions/services for detainees to reduce the risk of recidivism and community sentencing options to divert people away from custody, reduce harms caused by alcohol and other drug use and increase participation in specialised drug treatment programs including through the Justice Reform Strategy.

Recommendation 25

The Committee recommends that the scope of the ACT Community and Work Order Program be expanded so that it becomes a sentencing option available to courts with respect to drug and drink driving and the Simple Cannabis Offence Notice Scheme.

Response: Agreed in principle

There is good evidence to suggest that people convicted of high range drink driving offences and recidivist drink driving are likely to have a health problem associated with their use of alcohol and could therefore benefit from drug treatment and support offered as part of the ACT Community and Work Order Program. This recommendation will be considered further within existing resources. The Government also acknowledges that the cost of fines can create further problems for people unable to pay. A more community-focused penalty may be appropriate for drug and drink driving offenders.

Recommendation 26

The Committee recommends that the ACT Government introduce in the Legislative Assembly amendments to legislation that would, if passed, remove the Director of Public Prosecutions' right of veto for dismissal of criminal charges due to mental incapacity under s 334 of the *Crimes Act 1900*, in this way supporting judicial discretion on questions of defendant's mental capacity.

Response: Not agreed

The Government has considered this recommendation and supports the use of the Director of Public Prosecutions' rights of veto for dismissal of criminal charges due to mental incapacity under s 334 of the Crimes Act. The veto is a successful case management tool and further consultation has informed the Government that this mechanism is being appropriately used.

Recommendation 27

The Committee recommends that the ACT Government introduce in the Legislative Assembly amendments to legislation that would, if passed, expand the options open to the ACT Magistrates Court under the Crimes Act where it is considered that a charge should be dismissed on grounds of defendant's mental incapacity.

Response: Not agreed

The Crimes Act includes a number of mechanisms available to the Magistrates Court. Furthermore, the *Mental Health (Treatment and Care) Amendment Act 2014* includes a new Forensic Mental Health Order that can be made by the ACT Civil and Administrative Tribunal in appropriate circumstances.

Recommendation 28

The Committee recommends that the ACT Government introduce in the Legislative Assembly amendments to legislation that would, if passed, stipulate in legislation the power of the ACT Magistrates Court to order expert assessment of a defendant's mental capacity to face charges.

Response: Not agreed

The power to order the assessment exists under section 311 of the Crimes Act and section 28 of the *Criminal Code 2002*. Additionally there are options under section 336 of the Crimes Act if the court considers there might be an intellectual disability that might affect the defendant's mental capacity to face charges. Section 315A of the Crimes Act also allows that the court to inform itself by requesting a psychiatric assessment and report in relation to the defendant.

Recommendation 29

The Committee recommends that the ACT Government introduce in the Legislative Assembly legislative amendments which would, if passed, allow the conditional release in certain circumstances of a detainee who is the primary carer of a young child or young children, to serve the sentence in an appropriate and approved environment away from the Alexander Maconochie Centre.

Response: Agreed in principle

The Government will consider further if legislation is necessary to allow for the conditional release of a detainee who is a primary carer noting that the introduction of a new intensive corrections order may assist. This is consistent with recommendations made by the Human Rights Discrimination Commissioner in her [2014 Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre](#). The Government notes the provision in s 26(2)(1) the *Crimes (Administration of Sentences) Act 1999* (NSW) as a legislative model. There are facilities available within the AMC to accommodate the needs of mothers and children in custody. Additionally there are facilities at Emu Plains in New South Wales which adequately address the needs of female offenders who are mothers (see response to recommendation 30).

Recommendation 30

The Committee recommends that if it is not considered practicable for the primary carer of a young child or young children, to serve a sentence in an appropriate and approved environment away from the AMC, then facilities should be provided, and permission given, so that they can continue to be primary carer within the confines of the Alexander Maconochie Centre.

Response: Agreed in principle

ACT Corrective Services has reviewed its Women and Children Program (Care in Custody) Policy in consultation with stakeholders in order to improve and streamline processes and the revised policy was notified earlier this year. This policy provides an opportunity for women coming into custody who are carers for young children (including babies) to continue to care for children during the custody event. Women with longer sentences and custody of older children may also be accommodated in facilities such as the NSW Jacaranda facility at Emu Plains. ACT Corrective Services is developing a Memorandum of Understanding to allow for transfers to NSW within existing resources.

Recommendation 31

The Committee recommends that the ACT Government undertake targeted research on the criminogenic implications of early-life exposure to drug use and frame remedial action to reduce and prevent this exposure.

Response: Agreed in principle

The Government will explore options to undertake this research within existing resources, for example through the Criminology Research Advisory Council or similar bodies.

Recommendation 32

The Committee recommends that the ACT Government initiate an ongoing survey of the health and wellbeing of children involved in the youth justice system.

Response: Agreed

ACT Health and the Community Services Directorate in consultation with other key agencies are conducting the Young People in Custody Health Survey. The Survey commenced on 1 February 2015 and will continue until at least 31 January 2016. The ACT Government will consider options to publish de-identified survey results and key findings.

Recommendation 33

The Committee recommends that the ACT Government create a coordinating function that ensures that courts and other agencies are provided with up-to-date information on services that are available for the referral of children, young people and adult offenders in the ACT.

Response: Agreed

The Government notes the reported lack of coordination between services and courts which led to instances of courts referring young people to services that were not available. The Government notes the comprehensive Online Directory of the ACT Alcohol, Tobacco and Other Drug Services. The Mental Health Foundation (ACT) provides an online services directory for various mental health related issues in and around the ACT and surrounding areas of NSW. The Government will consult with the ACT Law Society with a view to developing a Continuing Legal Education information session for practitioners to be aware of the resources in the ACT.

Recommendation 34

The Committee recommends that the Attorney-General proclaim Phase 2 of the *Crimes (Restorative Justice) Act 2004*, thus allowing young people to be referred to restorative conferencing for a broader range of crimes.

Response: Agreed

The passing of the Crimes (Sentencing and Restorative Justice) Amendment Act 2016 has made amendments to the *Crimes (Restorative Justice) Act 2004* to facilitate the proclamation of phase 2.

Recommendation 35

The Committee recommends that the ACT Government develop an ACT Diversion Plan for young offenders.

Response: Agreed

The ACT Government's strategic approach to youth justice is set out in the *Blueprint for Youth Justice in the ACT 2012-22* (the Blueprint). Diverting young people from entering or continuing in the youth justice system with custody being a measure of last resort is a key strategy under the Blueprint. Part of this approach includes delivery of the After Hours Crisis Service. This service assists young people who have come into contact with police or are

subject to bail conditions by providing alternative community-based options to being remanded in custody and supporting young people to comply with the conditions of their justice orders.

Recommendation 36

The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would require the courts to apply a public interest test as to whether parole should be cancelled in instances where a person is accused of an offence while on parole.

Response: Not agreed

The Government notes Legal Aid ACT's concern over anomalies in timelines for parole set out in ACT legislation, particularly in relation to court ordered parole for short sentences. However the Government does not consider a public interest test is an appropriate mechanism to determine the cancellation of parole. The Sentence Administration Board is empowered under section 120 of the *Crimes (Sentence Administration) Act 2005* to consider parole breaches.

Recommendation 37

The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would for shorter sentences give courts the power to make parole orders and set parole conditions at the time the offender is sentenced.

Response: Not agreed.

The Committee report is unclear on the reasons for this recommendation. The Sentence Administration Board (SAB) considers whether the parole condition 'is, or would be, no longer suitable for the offender' and there is not sufficient evidence to justify a deviation from this. While other jurisdictions set out the circumstances in which parole can be revoked, it is not clear that this is necessary or beneficial in the ACT.

Recommendation 38

The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed would in cases of breaches of parole give the Sentence Administration Board a discretion to determine how much of the balance of the sentence ought to be served having regard to when the breach occurred and the nature of the breach.

Response: Not agreed

The Sentence Administration Board has discretion to suspend or cancel parole. An offender whose parole is cancelled may reapply for parole from the time they return to full-time imprisonment.

Recommendation 39

The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would amend the wording of section 149 of the

Crimes (Sentence Administration) Act 2005 to make it consistent with previous amendments to section 150 and section 151, to require that the breaching offence be committed while the parole order is in force before the section operates to cancel the parole order.

Response: Agreed

Legal Aid ACT noted that following the decision of His Honour Justice Refshauge in *Blundell v Sentence Administration Board* [2010] ACTSC 151 the legislature amended sections 150 and 151 of the *Crimes (Sentence Administration) Act* to accord with His Honour's decision. Legal Aid submitted to the Inquiry that section 149 ought also to have been amended to require that the breaching offence be committed while the parole order is in force before the section operates to cancel the parole order. The existing provision requires that the offender be convicted or found guilty of an offence. The Government endorses the need for this amendment.

Recommendation 40

The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would amend the *Crimes (Sentence Administration) Act 2005* so that it set out the circumstances in which parole can be revoked.

Response: Not agreed

Similar to recommendation 37, the Government is not persuaded of the need for the amendment at this time.

Recommendation 41

The Committee recommends that the ACT Government introduce legislative amendments to the Legislative Assembly which, if passed, would require the Sentence Administration Board to publish its decisions as a matter of course.

Response: Agreed in Principle

The Government notes that it may promote confidence and transparency in the administration of justice for the SAB to publish the factors it takes into account in determining parole revocations. The Government is supportive of an approach that assists the transparency and predictability of the Sentence Administration Board. However, it may not be possible administratively and would be subject to consideration of resource implications. The Government will consider this recommendation further as part of broader reforms under the Justice Reform Strategy.

Recommendation 42

The Committee recommends that the ACT Government provide further resources to the Sentence Administration Board to support publication of its decisions, if legislation so provides.

Response: Agreed in principle

The Government is considering this recommendation, together with recommendation 41, as part of the broader administrative reforms under the Justice Reform Strategy.

Recommendation 43

The Committee recommends that the ACT Government conduct a review of arrangements for bail in the ACT and introduce in the Legislative Assembly legislative amendments to the *Bail Act 1992* which, if passed, would introduce a focus on risk management, with reasonable and proportionate bail conditions.

Response: Noted

The current bail system in the ACT has a strong focus on risk management, with reasonable and proportionate bail conditions. The ACT Government supports evidence-based improvements to bail laws. Bail law reform is being considered in the context of the Justice Reform Strategy and also in relation to domestic violence and counter terrorism.

The Joint Commonwealth and New South Wales Review of the Martin Place Siege (the Review) found that there is an opportunity to consider strengthening the bail laws to require a bail authority to take into account an accused person's links with terrorist organisations or violent extremism. The Review also found that while NSW Police and the Office of the Director of Public Prosecutions have long established processes to consider and request a review of a bail decision, there would be benefits in capturing these processes, particularly in relation to contentious bail issues, in a formal memorandum of understanding between the two agencies. On 22 May 2015, the Law, Crime and Community Safety Council agreed that Victoria would lead a working group to consider options for strengthening bail policies across jurisdictions.

Further consultation will be undertaken to determine what alternatives could be proposed. The Government is addressing the high proportion of prisoners on remand in the ACT, including through initiatives discussed in response to recommendation 11. The Government will be in a position to respond further to this recommendation when outcomes from national consideration and the Justice Reform Strategy are known.

Recommendation 44

The Committee recommends that the ACT Government, as part of proposed amendments to the *Bail Act 1992* to be introduced in the Legislative Assembly, continue to provide legislative foundations for the ACT Family Violence Intervention Program (FVIP).

Response: Agreed

The FVIP is a coordinated criminal justice and community response to criminal family violence. This coordinated inter-agency response was recommended by the ACT Community Law Reform Committee in 1995 and commenced in May 1998.

The FVIP's focus is on improving the criminal justice system response to family violence by ensuring all members work cooperatively; maximise safety and protection for victims of family violence; provide opportunities for offender accountability and rehabilitation; and work towards continual improvement of the FVIP.

The Government will continue to strengthen the FVIP through legislative measures where appropriate. New provisions introduced as part of the *Crimes (Domestic and Family*

Violence) Legislation Amendment Act 2015 include new provisions to allow police interviews of complainants' statements in relation to a domestic violence offence to be used as evidence-in-chief during a trial. These changes support and strengthen the effectiveness of the FVIP and reinforce victim safety and offender accountability. The changes will commence on 4 May 2016.

Recommendation 44 will be considered as part of broader legislative reform to implement the joint Australian Law Reform Commission/ NSW Law Reform Commission's report *Family Violence – A National Legal Response* [Report 114] (Family Violence Report). In particular, chapter 10 of the Family Violence Report addresses bail and family violence.

The first stage of reforms addressing this recommendation are expected to be introduced in 2016.

Recommendation 45

The Committee recommends that services and programs available to sentenced prisoners be made available to accused persons on bail and prisoners on remand on a voluntary basis.

Response: Agreed in principle

Some rehabilitation programs require participants to acknowledge their offending behaviour which can be a barrier to participation for offenders who have not admitted guilt or been found guilty. The Government notes, however, that a range of programs, including rehabilitation programs and education, is already available to detainees on remand in the ACT. Offenders on bail are already able to voluntarily access community-run programs.

Recommendation 46

The Committee recommends that the Attorney-General proclaim 'phase 2 application day' provided for under the *Crimes (Restorative Justice) Act 2004*.

Response: Agreed

The Government has committed \$2.058M over 4 years to expand the restorative justice scheme to allow for the referral and management of serious crimes as well as less serious crime for both juveniles and adults. In February 2016 the Attorney General proclaimed 'phase 2 application day' to be a two-staged process which would see domestic violence offences and sexual offences delayed for a further 18 to 24 months.

Recommendation 47

The Committee recommends that the expansion of the ACT restorative justice scheme, subsequent to the Attorney-General's proclamation of 'phase 2 application day', take the form of a stepped or incremental expansion which sees restorative justice applied to 1) more serious offences of which young offenders are accused and (2) adult offenders, beginning with less serious offences.

Response: Agreed

An incremental expansion will occur but not in alignment with this recommendation. The Crimes (Restorative Justice) Act has been amended to delay domestic violence and sexual

offences which will be commenced in 2018. This will allow for the recruitment and training of new and existing staff to ensure the unit has the competency and capacity required to work safely and effectively in these complex areas.

Recommendation 48

The Committee recommends that the Attorney-General, asks his officers to generate accurate assessments of the funding and resource cost of supporting restorative justice processes for real-world scenarios, and for this to be reported in JACS' annual reports.

Response: Agreed

JACS reporting currently includes a comprehensive description of resource and activities supporting restorative justice as well as survey results. The Restorative Justice Unit also incorporates case studies in regular community education activities. JACS will consider including case studies in future publications, including annual reports.

Recommendation 49

The Committee recommends that the restorative justice scheme be funded and resourced consistent with these assessments of the funding and resource cost of supporting restorative justice processes for real-world scenarios.

Response: Agreed

It is not anticipated that demand for restorative justice in phase 2 will outstrip allocated resources to a degree that risks the quality of service and stakeholder accessibility to the scheme. Phase 2 commenced on 25 February 2016.

Recommendation 50

The Committee recommends that the JACS Directorate, in its Annual Reports, report on costs and saving in other parts of the criminal justice system as a result of the expanded use of restorative justice processes, and its effect on key indicators such as recidivism.

Response: Not agreed

Early diversion from court processes for less serious matters for young adults and first time adult offenders will result in savings where restorative justice is an alternative to court as the latter is more resource intensive. However, determining the specific impact of participating in restorative justice on recidivism would require isolating that experience from the other influences on an offender and as such would be very resource intensive and would be unlikely to provide reliable results that could inform future policy. The Restorative Justice Unit will collaborate with local universities for evaluation purposes with a strong focus on the main objectives behind restorative processes, namely, meeting the unmet justice needs of victims and offenders.

Recommendation 51

The Committee recommends that the ACT Government take further steps to formalise the restorative justice scheme so that restorative justice in the ACT develops a more formal series

of precedents and conventions; develops its own jurisprudence; and integrates more effectively with the other components of the ACT criminal justice system.

Response: Not agreed

The ACT's Restorative Justice Scheme is guided by its own legislation, Crimes (Restorative Justice) Act which makes provision for the referral and safe management of offences using restorative processes. This legislation embeds procedural safeguards which uphold the legal and human rights of victims and offenders and allows a less formal process with much greater participation and empowerment for the people affected by crime. It is the very absence of formality and constrictive precedent-bound convention that equips the Restorative Justice Unit to effectively meet the emotional, spiritual and material needs of victims and offenders. The Restorative Justice Unit is meeting with key stakeholders to support the commencement of phase 2. This will help ensure a comprehensive understanding of how the restorative justice scheme can most effectively be integrated with the broader criminal justice system in ways that maximise the personal 'restorative' benefits for participants while acknowledging the broader public interest for appropriate and consistent justice outcomes.

Recommendation 52

The Committee recommends that the ACT Government introduce in the Legislative Assembly legislative amendments which would, if passed, result in the Galambany Circle Sentencing Court being provided for and recognised under statute, and that these amendments set out the objects and purposes of the Court.

Response: Agreed

Galambany Court is a restorative process for defendants and victims, involving Aboriginal and Torres Strait Islander people in their sentencing through the recommendations of a panel made up of Elders and community members. The Government will explore, as part of the Justice Reform Strategy, the opportunity to set out the objects and purposes of the Court through a legislative amendment to the Magistrates Court Act.

Recommendation 53

The Committee recommends that the JACS Directorate develop and report on key indicators for the Galambany Circle Sentencing Court in its Annual Report for the next and subsequent reporting periods.

Response: Agreed

Key indicators might be the ongoing involvement of the Aboriginal and Torres Strait Islander community as panel members, evidence of the increase of confidence through satisfaction surveys, the services defendants are referred to, and the culturally relevant programs developed to meet the needs of defendants and their families. The Government agrees that reporting on these key indicators would increase the visibility of the successes of the Galambany Court.

Recommendation 54

The Committee recommends that the ACT Government further develop, and fund appropriately, the suite of programs to which the Galambany Circle Sentencing Court can refer offenders.

Response: Agreed in principle

Further to other reforms proposed under the Justice Reform Strategy, the Government will consider the options to provide resourcing to the Galambany Court for further programs.

Recommendation 55

The Committee recommends that the ACT Government construct and commission the Ngunnawal Bush Healing Farm, to be completed by or before December 2017.

Response: Agreed

The Ngunnawal Bush Healing Farm initiative involves the establishment of an Aboriginal and Torres Strait Islander alcohol and other drug residential rehabilitation service implementing culturally appropriate prevention and education programs. The service will be founded on reconnecting Aboriginal and Torres Strait Islander people to land and culture, using participation in land management activities and programs, with the aim of assisting residents to better respond to life's challenges. Construction has commenced. For further information, see : <http://www.health.act.gov.au/public-information/consumers/health-infrastructure-program/planning-or-design/ngunnawal-bush-healing>