LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),
Mr Andrew Braddock MLA

Submission Cover Sheet

Inquiry into Dangerous Driving

Submission Number: 041

Date Authorised for Publication: 10 October 2022

Standing Committee on Justice and Community Safety

ACT Legislative Assembly

GPO Box 1020

Canberra ACT 2601

5 October 2022

Dear Officer,

RE: Inquiry into Dangerous Driving

The Australian National University Law Reform and Social Justice Indigenous Reconciliation Project ('ANU LRSJ Indigenous Reconciliation Project') welcomes the opportunity to provide this submission to the Standing Committee on Justice and Community Safety, responding to terms of reference (d), (f) and (g) of the inquiry.

The ANU LRSJ Indigenous Reconciliation Project falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

[redacted]

Summary of Recommendations:

1. **The Committee carefully consider and engage with the recommendations of the Pathways to Justice Report. Specifically, Recommendation 8-1 on mandatory sentencing and Recommendation 9-1 on parole are considered in the context of sentencing regimes for dangerous driving.**
2. **The Committee consider alternative policy strategies to mandatory sentencing regimes aimed at preventing offending behaviour for serious driving offences, such as Justice Reinvestment strategies, which must be empirically supported.**
3. **The Committee engage with First Nations stakeholders in the ACT including First Nations groups, community law clinics and advocacy bodies in policy development involving dangerous driving offences and any proposed reforms of the sentencing regimes in the ACT**.

The ANU LRSJ Indigenous Reconciliation Project requests that our submission is published in full and our information may be included.

Introduction

The ANU LRSJ Indigneous Reconciliation Project acknowledges the seriousness of dangerous driving as a community issue in the ACT. We support the adoption of a policy framework carefully considered to prevent and reduce dangerous driving offences. Recently, there has been discussion in the ACT community raising concerns over the dissatisfaction of sentence lengths for dangerous driving. Calls for longer sentences, mandatory sentencing and no parole schemes for motor vehicle offences need to be carefully considered against the evidence on the effectiveness of the regimes and the disproportionate impact demonstrated to have on First Nations communities. We also propose that alternatives to harsh sentencing regimes be considered, and that these be developed in consultation with First Nations leaders and community organisations.

1. Mandatory Sentencing

Mandatory sentencing regimes have been implemented across different jurisdictions across Australia and have attracted key criticisms regarding the overall efficacy and implications of the regimes on specific groups. The following outlines the positions of different jurisdictions around Australia in respect to mandatory and the impact the regime has demonstrated to have on the overrepresentation of First Nations peoples in the criminal justice system.

We support the Law Council of Australia's position that mandatory sentencing 'imposes unacceptable restrictions on judicial discretion and undermines the rule of law'.[1] In their view, mandatory sentencing laws eliminate factors that can be taken into consideration when determining an appropriate sentence. Through automatically justifying minimum sentences, the regime leaves no regard for the offender's individual circumstances or the manner in which the offence occurred.[2] Further, mandatory sentencing contradicts legal authorities such as *Bugmy v The Queen* (2013) 249 CLR 571 where the High Court confirmed that an offender's personal background of deprivation is a relevant factor in determining an appropriate sentence.[3]

Mandatory sentencing in Australia's jurisdictions:

Victoria

The current sentencing model used in Victoria is a discretionary model, which prescribes maximum penalties and regulates the sentencing discretion of courts via the common law and legislation. The research and analysis arising from this approach to sentencing suggests that

[1] Law Council of Australia, *Mandatory Sentencing* (Policy Discussion Paper, May 2014) 39 [157].
[2] Ibid 46 [190].
[3] *Bugmy v The Queen* (2013) 249 CLR 571.

mandatory sentencing regimes do not necessarily promote consistency in sentencing or deterrence, as concluded by the Sentencing Advisory Council in its Victorian Paper.[4]

The Victorian Advisory Council acknowledges consistency as one of the key rationales for mandatory sentencing. In sanctioning offenders, retributive sentences satisfy the disapprobation of the public and give greater levels of consistency between sanctions in the justice system.[5] However, as noted by the Australian Law Reform Commission, when mandatory sentencing is only applied to select sentences (for example, dangerous driving offences) it interferes with the hierarchy of sentences. That is, by inflating the severity of sentences for some types of conduct, while not doing so for crimes of similar culpability, it decreases the overall consistency of the sentencing regime. Furthermore, punishing materially different levels of culpability with the same single arbitrary sanction raises the risk of a sanction being wholly inconsistent with an offender's culpability.[6] Thus, although it may appear that mandatory sentencing requirements lead to an increase in consistency, the fact that varying levels of culpability are brought under the same sentence demonstrates that this is not the case.

Mandatory sentencing is frequently contended as providing an extra level of deterrence by ensuring that the cost of illegal behaviour is substantial and guaranteed. While this may intuitively make sense, it lacks an empirical basis.[7] Many academic papers have found no clear correlation between the severity of a sanction and levels of offending.[8] This may be attributable to the fact that offending is rarely a rational act that is weighed up beforehand.[9] Therefore, it is our opinion that neither consistency of sentences or deterrence of crime are necessarily achieved through mandatory sentencing.

Western Australia

Western Australia gives several examples of how mandatory sentencing, especially to specific crimes, can be ineffective and cause adverse social impacts.

Mandatory sentencing laws were first enacted in Western Australia in 1992 under the *Crimes (Serious and Repeat Offenders) Act 1992* (WA). These laws targeted violent repeat offenders who had committed three violent crimes within 18 months. This was in response to a high-profile accident involving a stolen car and imposed a mandatory minimum sentence of 18 months in custody. Empirical research demonstrates that car theft did not reduce following the introduction of mandatory minimum sentences, and as such these laws ceased after 1994.[10]

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[4] Adrian Hoel and Karen Gelb, *Sentencing Matters: Mandatory Sentencing* (Sentencing Advisory Council, August 2008).
[5] Ibid 12.
[6] Ibid 13.
[7] Ibid 14.
[8] Ibid.
[9] Ibid 13.
[10] Roderic Broadhurst and Nini Loh, 'Selective Incapacitation and the Phantom of Deterrence' in RW Harding (ed), *Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia* (University of Western Australia, 1993) 55.

A second example was the 1996 Three Strike Home Burglary Laws which provided a 12 month minimum sentence for repeated home burglary offences.[11] Under the regime, courts were prohibited from suspending these sentences.[12] Despite such increased sentencing, both a government commissioned review and an independent review found that the laws had failed to deter crime, reduce recidivism or promote rehabilitation.[13]

Finally, in 2014, the introduction of a second *Criminal Law Amendment (Home Burglary and Other Offences)* Act 2015 further tightened rules on young offenders, stating that 16 or 17-year-olds charged with three counts of home burglary will be detained or imprisoned for one year.[14] This bill garnered attention from international organisations for breaches to human rights standards.[15]

Northern Territory

The Northern Territory has a long history of mandatory sentencing, beginning with the *Sentencing Act 1995* (NT), which provided that anyone over the age of 18 found guilty of certain property offences shall be subject to mandatory prison from the first offence.[16] These provisions stated that the minimum term of imprisonment was to be 14 days for a first offence, 90 days for a second property offence and one year for a third property offence.[17] More recently, there has been commentary from the North Territory Law Reform Commission, which has criticised all mandatory sentencing provisions.[18] In particular, this report found that these provisions failed to act as a deterrent, increased recidivism and had a disproportionate effect on First Nations People.[19] The Northern Territory mandatory sentencing regime provides another example of the ineffectiveness of mandatory sentencing in deterring the commission of crime and highlights the adverse effects these policies have towards First Nations communities.

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[11] *Criminal Code Amendment Act (No 2) 1996* (WA).
[12] Ibid s 5.22.
[13] Neil Morgan, Victoria Williams and Harry Blagg, *Mandatory Sentencing in Western Australia & the Impact on Aboriginal Youth* (Aboriginal Justice Council, 2001) 5-8.
[14] *Criminal Law Amendment (Home Burglary and Other Offences)* Act 2015.
[15] Amnesty International, 'Joint Statement to the Western Australian Government on the Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014' (Media Release, 18 March 2015), <http://www.amnesty.org.au/images/uploads/about/Home_Burglary_Bill_joint_statement.pdf>.
[16] *Sentencing Act 1995* (NT) s 78A.
[17] Ibid.
[18] Dean Mildren, 'Northern Territory Law Reform Commission's Report on Mandatory Sentencing and Community-Based Options' (2022) 96(3) *Australian Law Journal* 159.
[19] Ibid.

Overrepresentation of First Nations peoples in the Criminal Justice System:

It is widely acknowledged the lack of judicial discretion offered by mandatory sentencing and similar punitive sentencing regimes have a disproportionate impact on particular groups. First Nations peoples, young offenders, persons with mental illness or cognitive impairment and the impoverished are among these groups.[20] Nationwide the 29% of peoples detained in prison are First Nations peoples whilst making up 3% of the general population.[21] Moreover, rates of incarceration have almost doubled since the Royal Commission into Aboriginal Deaths in Custody in 1991.[22] The ACT's position is a microcosm of the wider issue of overrepresentation of First Nations peoples in the criminal Justice System across Australia. The Productivity Commission's Report on Government Services reported in the 2021 and 2022 period that First Nations peoples people make up less than 2% of the general population in the ACT, but 24.4% of the population in the Alexander Maconochie Centre.[23] First Nations peoples are imprisoned at 19 times the rate of non-Indigenous people, sitting above the national average ratio of 16.[24]

Numerous factors contribute to the disproportionate presence of First Nations peoples in the criminal justice system compared to non-Indigenous people. These factors stem from significant disadvantages faced by First Nations communities ensuing colonisation and its enduring impact. The history of government intervention, including the removal of children from their families and the experience of intergenerational trauma, mental health issues, substance abuse, education disadvantage, unemployment, overcrowded housing and family violence are all among many factors contributing to the overrepresentation of First Nations people in the Criminal Justice System.[25]

Impact of mandatory sentences on incarceration rates of First Nations peoples:

In 2013, the most commonly-recorded offences in Western Australia were all mandatory sentencing offences.[26] During this same period, Western Australia recorded the highest ratio of Aboriginal and Torres Strait Islander prisoners in Australia, 21 times that of non-Indigneous prisoners.[27] First Nations adults were approximately 8.6 times more likely than non-Indigenous

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[20] Law Council of Australia (n 1) 5.
[21] 'Corrective Services, Australia, June Quarter 2022', *Australian Bureau of Statistics* (15 September 2022) <https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>.
[22] Mathew Lyneham and Andy Chan, *Deaths in Custody in Australia to 30 June 2011* (Monitoring Report No 20, Australian Institute of Criminology, 2013) ii.
[23] *Report on Government Services 2022: Part C, Section 8* (Report on Government Services, Australian Productivity Commission, 28 January 2022) Table 8A.21. <https://www.pc.gov.au/ongoing/report-on-government-services/2022/justice/corrective-services>.
[24] Ibid.
[25] Patricia Anderson and Julie Nicholson, *Little Children Are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007) 67; *Aboriginal and Torres Straight Islander Wellbeing: A focus on Children and Youth* (Report, Australian Bureau of Statistics, April 2011) 226.
[26] *Prisoners in Australia* (2013 Report, Australian Bureau of Statistics, 5 December 2013).
[27] Ibid.

adults to receive a mandatory prison term under the 1997 mandatory sentencing regime in the Northern Territory.[28] Supported by robust research and evidence in this area, it is widely recognised that State and Territory mandatory sentencing regimes have disproportionately affected the incarceration rates and the overrepresentation of Indigenous people in the corrective system.[29]

Notably, the Australian Law Reform Commission's *Pathways to Justice* report concluded that mandatory sentencing increases incarceration, disproportionately affects First Nations peoples, is a costly criminal justice policy, and is not effective as a crime deterrent.[30]

Moreover, stakeholders in the Australian Law Reform Commission's Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples, which led to the *Pathways to Justice* report, noted that mandatory or presumptive penalty provisions:

- 'are ineffective—there is little evidence that mandatory sentences act as deterrents; · constrain the exercise of judicial discretion';
- 'heighten the impact of charging decisions that are within the discretion of police and prosecutors';
- 'contradict the principles of proportionality and "imprisonment as a last resort"'; and
- 'reduce incentives to enter a plea of guilty, resulting in increased workloads for the courts.'[31]

In their submission to the Inquiry, National Aboriginal and Torres Strait Islander Legal Services and Aboriginal Legal Service of Western Australia, referred to the following case study when discussing mandatory sentences in relation to driving offences:

> 'John' was charged with one count of reckless driving, one charge of driving without a licence and one charge of failing to stop. John made a rash and unfortunate decision to drive a motor cycle to work because his employer, who normally picked him up for work, was unable to do so. When he saw the police he panicked, sped off, drove through a red light and veered onto the wrong side of the road. He had a relatively minor record—his only prior offences were failing to stop, excess 0.02% and driving without a licence. These offences were dealt with in 2010 by the imposition of fines and John had not offended since that time. ... The magistrate indicated that, if it was not for the mandatory sentencing regime, the sentence would have been less or possibly not one of imprisonment at all.[32]

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[28] Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders: The Northern Territory Experience* (Report, 2003) 13.
[29] Law Council of Australia (n 1) 30 [190].
[30] Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 273 ('*Pathways to Justice*').
[31] Ibid 275 [8.9].
[32] Australian Law Reform Commission, *Pathways to Justice* (n 14) 43; National Aboriginal and Torres Strait Islander Legal Services, Submission No 109 to Australian Law Reform Commission, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*; Aboriginal Legal Service of Western

This case study highlights the arbitrary outcomes of mandatory sentencing in cases where more appropriate outcomes could have been to meet the specific circumstances of an offender.

International and National commentary on mandatory sentencing in Australia:

The impact of mandatory sentencing on First Nations peoples in Australia has been recognised by United Nations Committees. In particular, the Concluding Observations of the Commitee Against Torture in April of 2008 recommended that Australia abolish mandatory sentencing due to its disproportionate and discriminatory impact on the Indigenous population.[33]

The former Australian Human Rights and Freedom Commissioner, Mr Tim Wilson, has argued against mandatory sentencing schemes on the basis that such laws undermine the fundamental principle of equality before the law, through creating arbitrary outcomes, which often lack proportionality to the crime and raise serious concerns over the operation of the separation of powers.[34] Thus, mandatory sentencing raises serious concerns for both Australia's commitment to the rule of law and position in conforming to international standards.

Economic Cost of Mandatory Sentencing:

Mandatory sentencing regimes result in significant economic cost to the community. Due to the nature of mandatory sentencing, individuals who may have otherwise received non-custodial sentences are automatically detained, which results in higher rates of imprisonment and thus increase in the prison population. Naturally, a greater number of people imprisoned leads to increased costs in the administration of justice.[35] This is evidenced by the two States with the highest rates of imprisonment, the Northern Territory and Western Australia, are also the two States with the longest operation of mandatory sentencing schemes in Australia.[36]

Mandatory sentencing captures all offenders of the specified conduct where alternative sanctions could be more appropriate and well-suited to the individual offender.[37] Further, mandatory sentencing regimes could potentially increase the likelihood of reoffending, as periods of incarceration are known to promote recidivism.[38] Therefore, mandatory sentencing

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Australia, Submission No 74 to Australian Law Reform Commission, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.

[33] *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention,* 40th sess, UN Doc CAT/C/AUS/CO/1 (22 May 2008) 8 [27].

[34] Tim Wilson (Speech at the Queensland Law Society Mandatory Sentencing Policy Paper Launch, Brisbane, 4 April 2014) <https://humanrights.gov.au/about/news/speeches/queensland-law-society-mandatory-sentencing-policy-paper-launch>.

[35] Law Council of Australia (n 1) 9; *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (Legal and Constitutional Affairs References Committee, June 2013) 7.

[36] *Prisoners in Australia* (n 10).

[37] Law Council of Australia (n 1) 99.

[38] *Value of a Justice Reinvestment Approach to Criminal Justice in Australia* (n 18) 7.

regimes may be especially economically burdensome as they may increase recidivism and thus increase the associated costs with further imprisonment.

Recommendation 1: The Committee carefully consider and engage with the recommendations of the Pathways to Justice Report. Specifically, Recommendation 8-1 on mandatory sentencing and Recommendation 9-1 on parole are considered in the context of sentencing regimes for Dangerous Driving.

The Pathways to Justice Report includes the following recommendations:

> *'Recommendation 8–1*
>
> *Commonwealth, state and territory governments should repeal legislation imposing mandatory or presumptive terms of imprisonment upon conviction of an offender that has a disproportionate impact on Aboriginal and Torres Strait Islander peoples.'*
>
> *'Recommendation 9–2*
>
> *To maximise the number of eligible Aboriginal and Torres Strait Islander prisoners released on parole, state and territory governments should: introduce statutory regimes of automatic court-ordered parole for sentences of under three years, supported by the provision of prison programs for prisoners serving short sentences; and abolish parole revocation schemes that require the time spent on parole to be served again in prison if parole is revoked.'*[39]

[39] Australian Law Reform Commission, *Pathways to Justice: Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 273 ('*Pathways to Justice*').

2. Alternatives to harsh sentencing regimes

The Project welcomes the ACT Government's promise to allocate $11.5 million over four years to fund coordinated programs and initiatives with First Nations organisations in an effort to reduce the number of First Nations peoples in the criminal justice system.[40] The Project recommends the use of these programs and initiatives in addressing the specific opportunities to re-educate and prevent dangerous driving offences.

Moreover, the Project recognises that Justice Reinvestment strategies aimed at reducing crime have demonstrated to be effective and culturally appropriate alternatives to punitive sentencing regimes. The Aboriginal Legal Service of Western Australia submitted to the Pathways to Justice inquiry that 'investment in early intervention, prevention and rehabilitation is substantially more effective for long-term community safety and significantly cheaper than continuing to imprison the most marginalised and disadvantaged members of the community'.[41] The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' report on the over-incarceration of Indigenous young people, *Doing Time – Time for Doing*, similarly lent its support to Justice Reinvestment schemes.[42]

The former Aboriginal and Torres Strait Islander Social Justice Commissioner ('ATSISJC') Tom Calma, argued for the adoption of Justice Reinvestment as 'a pragmatic solution to the problem of Indigenous imprisonment ... based on some sound principles that meld with Indigenous perspectives and approaches'.[43] The following ATSISJC, Mick Gooda, emphasised the importance of the place-based and community-driven focus to Justice Reinvestment, stating that 'the real underlying power of Justice Reinvestment has always been in the place-based approach of community involvement and capacity building to create safer communities.'[44]

We further note that the NSW Government's submission in response to the NSW Sentencing Council's Consultation Paper on Repeat Traffic Offences identified that drivers with multiple offences in the previous five years were over-represented in serious injury crashes, while those

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[40] 'Additional Funding to Reduce over Representation of First Nations People in ACT Justice System', *ACT Government* (Media Release, 25 July 2022). <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2022/additional-funding-to-reduce-over-representation-of-first-nations-people-in-act-justice-system>.
[41] Australian Law Reform Commission, *Pathways to Justice* (n 14) 130; Aboriginal Legal Service of Western Australia, Submission No 74 to Australian Law Reform Commission, *Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.
[42] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time - Time for Doing: Indigenous Youth in the Criminal Justice System* (Report, June 2011) 321.
[43] *2009 Social Justice Report* (Report, Australian Human Rights Commission, 23 December 2009) <https://humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport09/pdf/sjr_2009_web.pdf> 56.
[44] Ibid 115.

with no previous offences were under-represented.[45] Between 2013 and 2017, 3% of licence holders had committed multiple offences, however this group accounted for 12% of drivers involved in a serious injury crash.[46] We therefore recognise the importance of corrective schemes which prioritise intervention aimed at reducing recidivism. We also note that the NSW Government in their 'Road Safety Plan' uses sanction and re-education programs for repeat, and on occasion first-time, offenders, such as the 'Mandatory Alcohol Interlock Program', the 'Traffic Offender Intervention Program', and 'Increased Traffic Offender Penalties.'[47] The Project supports the use of sanction and re-education programs in response to dangerous driving, in contrast to mandatory sentencing or imprisonment.

In the context of the ACT's sentencing regimes for dangerous driving offences, we support a shift in the government's approach to this issue away from 'law and order populist' style policies towards more effective early intervention, diversionary and rehabilitative models. We encourage this change in order to create a more effective justice model that is garnered towards long-term reductions in the overrepresentation of First Nations peoples in the criminal justice system. Moreover, we support the consideration in this Inquiry of Recommendations 4-1 and 4-2 of the *Pathways to Justice* Report, which propose state and territory adoption of independent justice reinvestment bodies overseen by First Nations leadership and in partnership with First Nations community organisations.[48]

Recommendation 2: The Committee consider alternative policy strategies to mandatory sentencing regimes aimed at preventing offending behaviour for serious driving offences, such as Justice Reinvestment strategies, which must be empirically supported.

The Pathways to Justice Report includes the following recommendations:

> *'Recommendation 4-1*
>
> *'Commonwealth, state and territory governments should provide support for the establishment of an independent justice reinvestment body. The purpose of the body should be to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and incarceration, and to provide expertise on the implementation of justice reinvestment.*
>
> *'Recommendation 4-2*

[45] NSW Government, Submission to NSW Sentencing Council, *Consultation Paper - Repeat Traffic Offenders* (February 2019) 4.
[46] Ibid.
[47] Ibid 5.
[48] Law Council of Australia (n 1).

'Commonwealth, state and territory governments should support justice reinvestment trials initiated in partnership with Aboriginal and Torres Strait Islander communities…'[49]

Recommendation 3: The Committee engages with First Nations stakeholders in the ACT including First Nations groups, community law clinics and advocacy bodies in policy development involving reform of the sentencing regimes in the ACT.

3. Conclusion

The ANU LRSJ Indigenous Reconciliation Project is grateful for the opportunity to contribute to this inquiry. We recognise the seriousness of dangerous driving in the ACT, and we support moves to reduce incidents of dangerous driving. However, we are deeply concerned about calls for longer sentences, mandatory sentencing, and no-parole schemes for motor vehicle offences. Such calls must be very carefully considered against the evidence regarding the ineffectiveness of these regimes, as well as the disproportionate impact that they have on First Nations communities. Alternatives to harsh sentencing regimes should be considered, and this should be done in consultation with First Nations leadership and First Nations community organisations.

If further information is required, please contact us at anulrsj.indigenousproject@gmail.com.

On behalf of the ANU LRSJ Indigenous Reconciliation Project,
Authors: Saskia Teale, Mathew Snibson
Editors: Isabella Keith, Sarah Thomson

The students of the ANU LRSJ Indigenous Reconciliation Project would like to acknowledge we live and study on the lands of the Ngunnawal and Ngambri Peoples. We pay our respect to Elders past, present and emerging. We would also like to acknowledge sovereignty over these lands has never been ceded and it always was and always will be Aboriginal land.

[49] *Pathways to Justice* (n 38) 13.