LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),
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Submission Cover Sheet

Inquiry into Penalties for Minor Offences and Vulnerable People

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JUSTICE REFORM INITIATIVE SUBMISSION TO THE ACT ASSEMBLY JUSTICE AND COMMUNITY SAFETY COMMITTEE INQUIRY INTO PENALTIES FOR MINOR OFFENCES AND VULNERABLE PEOPLE

MAY 2023

ABOUT THE JUSTICE REFORM INITIATIVE

The Justice Reform Initiative (JRI) is a national justice advocacy organisation working to reduce over-incarceration in Australia and to promote a community in which disadvantage is no longer met with a default criminal justice system response. The JRI alliance includes people who share long-standing professional experience, lived experience and/or expert knowledge of the justice system. The Justice Reform Initiative is committed to reducing Australia's harmful and costly reliance on incarceration. We seek to shift public discourse and policy away from building more prisons as the primary response of the criminal justice system and move instead to proven alternative evidence-based approaches that break the cycle of incarceration.

Our patrons include more than 120 eminent Australians, including two former Governors-General, former Members of Parliament from all sides of politics, academics, respected Aboriginal and Torres Strait Islander leaders, senior former judges including High Court judges, and many other community leaders who have added their voices to end the cycle of overincarceration in Australia.

The JRI's patrons in the Australian Capital Territory (ACT) are:

- **Professor Lorana Bartels (co-chair)**, Australian National University (ANU); Adjunct Professor, University of Canberra (UC) and University of Tasmania;

- **Professor Tom Calma AO,** Chancellor, UC; Co-Chair, Reconciliation Australia; former Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner; Senior Australian of the Year 2023;
- **Kate Carnell AO,** former Chief Minister of the ACT; Deputy Chair, BeyondBlue; Australian Small Business and Family Enterprise Ombudsman;
- **Simon Corbell,** former Deputy Chief Minister, Attorney General, Minister for Police and Emergency Services of the ACT; Adjunct Professor, UC;
- **Dr Ken Crispin QC,** former ACT Director of Public Prosecutions, Justice of the ACT Supreme Court, President of the ACT Court of Appeal and ACT Legislative Assembly Commissioner for Standards;
- **Shane Drumgold SC**, ACT Director of Public Prosecutions;
- **Gary Humphries AO (co-chair),** former Chief Minister of the ACT and Senator representing the ACT in the Australian Parliament;
- **Rudi Lammers APM,** former ACT Chief Police Officer;
- **Dr Michael Moore AM PhD,** former Independent Minister for Health and Community Care, ACT Legislative Assembly; Past President, World Federation of Public Health Associations; Distinguished Fellow, The George Institute, University of NSW; Adjunct Professor, UC;
- **The Honourable Richard Refshauge**, Acting Justice of the ACT Supreme Court – Drug and Alcohol Court; former ACT Director of Public Prosecutions; and
- **Dr Helen Watchirs OAM,** President, ACT Human Rights Commission.

We are supported by our ACT Advocacy and Campaign Coordinator, Indra Esguerra.

INTRODUCTION

The Justice Reform Initiative (JRI) welcomes the JACS Committee's inquiry into this topic. It is of concern to us, nationally and locally, that the criminal justice system continues to disproportionately impact vulnerable people. This includes Aboriginal and Torres Strait Islander people, young people, women, those with particular challenges, such as people living with mental illness and/or cognitive disability, people with alcohol and other drug dependency, as well people from other disadvantaged or marginalised groups. You can find more information about the impacts of the criminal justice system on these groups on the JRI website.[1]

The JRI is concerned about the consistent overrepresentation of these vulnerable people in the Alexander Maconochie Centre (AMC). The reasons for this overrepresentation are multiple and complex, and the JRI believes that the penalties for minor offences in the ACT need to be examined more closely to look into not just how these impacts can be tempered, but also to ensure the offences people are being penalised for are just, and the underlying causes for offending are addressed, wherever relevant, with both a trauma-informed approach and a public health approach.

The JRI believes as a principle that people should not be imprisoned for minor offences. The evidence shows that the majority of people entering prison usually arrive

[1] Justice Reform Initiative, *Jailing is Failing*, https://www.justicereforminitiative.org.au/jailingisfailing

there because of an underpinning cycle of poverty and/or disadvantage and that prison both exacerbates and entrenches a broader cycle of disadvantage, which needs to be broken. This is an issue that the JRI has highlighted in our recent report *State of incarceration: Insights into imprisonment in the ACT*.[2]

To reduce people being incarcerated, there is a clear need for:

a) community-based support and services that work to prevent people at risk of entering the justice system;
b) diversion at the point of interaction with police; and
c) diversion when an individual appears in court.

There is a need to invest in policies and programs that divert people from our court and criminal justice systems. It is clear that community led programs that offer holistic case management, support people to gain and retain employment, reduce homelessness and maintain good health are all vital to building a system where disadvantage is no longer met with a criminal justice system response.

There is strong evidence of the efficacy of community-led approaches that address the social drivers of over-incarceration. We believe the ACT has the opportunity to lead the nation in turning around our reliance on incarceration as a default response to disadvantage. We can invest in accessible, evidence-based systems of supports in the community, where people at risk of imprisonment are given genuine opportunities to build productive and meaningful lives in the community.

The JRI understands that it is important for our society that we have a shared rule book, of what is acceptable behaviour, and how transgressions of those rules are treated by our justice system. It is also important that these rules, including both our criminal and civil legislation, are kept up-to-date and relevant to society and our evolving community expectations. However, it is clear is that the penalties assigned to offences often do not give police or magistrates sufficient room to tailor an appropriately informed response (including trauma-informed response) to each situation. There is the need for legislation, processes and programs that better allow for a tailored response, including critically an increase in supports that address the drivers of offending.

The ACT has made a range of positive moves in some of these areas over recent years: introducing a more person-centred response, such as:

- enabling police to move intoxicated people to a place of safety (rather than being punished);
- shifting a range of offence penalties to fines rather than prison terms;
- allowing people to make payment plans for their fines; and
- in some circumstances, allowing community service or work development orders, or even waivers.

However, it is clear that the difficulties in accessing community led alternatives, and the cumulative and criminogenic impact of contact with the justice system (including in some instances the contact with the justice system for non-payment of fines) mean that vulnerable

[2] Justice Reform Initiative, *State of Incarceration: Insights into imprisonment in the Australian Capital Territory* (March 2023).

populations are are still at much higher risk of being imprisoned for offences than populations who have significant financial and social resources.

Fines are generally the least harsh penalty that can be issued by the courts and can operate as a form of diversion and an alternative to more serious penalties. However, for people on low incomes or from a socio-economically disadvantaged background, the consequences of fines can still be severe, as they find it difficult and sometimes impossible to pay.

This submission is concerned with disparities in terms of both fines and other penalties, including the use of imprisonment. It looks the disproportionate effects of fines and penalties on vulnerable people and discusses a range of alternative measures which could be explored in the ACT.

KEY RECOMMENDATIONS

The JRI recommends that the **ACT Government**:

1. urgently reinstates funding to the Aboriginal Legal Service's Driver Licensing program.
2. reviews the impact of minor offences, particularly public space offences and offensive behaviour offences, as to their current relevancy, use and impacts on vulnerable people, particularly First Nations people.
3. further invests in government and community-based programs that support people to address issues related to alcohol and other drug dependency.
4. further investigates how to increase the level of psychiatrist and other mental health support access for ACT residents.
5. develops a framework and a plan to improve implementation of a public health approach to public intoxication.
6. provides secure and ongoing funding for the Ngurrambai Bail Support Program.
7. urgently invests in bail support programs that support people to address underlying issues and reduce reoffending behaviours.
8. consider the impact and over-use of short prison sentences for vulnerable populations.
9. ensures infringement notices include information to assist vulnerable people to find the information they need, such as links to the Canberra Community Law webpages.
10. ensures the process for waivers is simple and data are collected on the number of applications and proportion of applications that are successful and the reasons for this.
11. considers options to apply a sliding scale to infringement notice fines, which is more proportional to a person's ability to pay, such as the day fine structure used in many countries in Europe.
13. expands the types of approved Work and Development Program providers, to enable programs to be tailored to respond to the specific offences and circumstances.
14. investigates introducing a cap that can be placed on the total number of infringement notices or financial penalties from a single interaction with police, to reduce financial impacts on vulnerable people.

15. establishes a specialist list in the Magistrates Court to hear cases from vulnerable people, especially those with mental illness or disorder, or substance use problems.
16. reconsiders its policy around people in prison being able to retain their ACT Housing property to reduce the likelihood of releasing people into homelessness.

The JRI also recommends that the **JACS Committee** examines recent levels of use of Work and Development programs, to ensure that they are accessible and promoted to those who would benefit from accessing them.

THE OVER-REPRESENTATION OF VULNERABLE POPULATIONS IN THE JUSTICE SYSTEM

Just as the criminal justice system continues to disproportionately impact vulnerable people, we also know that the impacts of fines are much greater on disadvantaged and low-income populations. The ACT Council of Social Services has highlighted that "around 40,000 Canberrans live in low-income households and many of them have told us that they must compromise on food, gas and electricity, clothing and education expenses and make some really tough choices between basics such as medicine or keeping the car running. Fines can be the final straw for some people and being unable to pay can spiral into crisis and put them into contact with the justice system which can cause life-long harm".[3]

Although we have not had the opportunity to interrogate the reasons for this yet, Australian Bureau of Statistics (ABS) data show that, in every other jurisdiction, 'justice procedure offences' account for 4 to 11% of fines imposed in the Australian courts, with the national average being 9%[4]. In the ACT, this figure is 52%, which is an alarming outlier and needs further interrogation, as it is likely to impact disproportionately on vulnerable people. The level of fines for traffic and vehicle regulatory offences in the ACT is 35%, also very high.

Some of the key findings in our recent report *State of Incarceration: insights into imprisonment in the ACT*[5] include:

» People leaving prison have higher rates of homelessness and unemployment than those going in.
» Almost two-thirds of people who leave prison in Australia do not have a job.
» Aboriginal and Torres Strait Islander adults make up 26.4 % of the prison population[6] despite making up just 2% of the general population.[7]
» More than half of the adults in prison in Australia have had a mental illness.

[3] ACT Council of Social Services, 2022, *ACTCOSS supports call for review of fines compliance and enforcement system*, Media release, 24 March.
[4] Australian Bureau of Statistics, 2023. *Criminal Courts, Australia*, *2021-22*, see data cubes by jurisdiction, March 2023. https://www.abs.gov.au/statistics/people/crime-and-justice/criminal-courts-australia/latest-release#data-downloads
[5] Justice Reform Initiative, 2023, *State of Incarceration: Insights into imprisonment in the Australian Capital Territory*,.
[6] ABS, 2022. *Corrective services, Australia, September quarter 2022*, Table 1.
[7] ABS, 2022. *Estimates of Aboriginal and Torres Strait Islander Australians*.

40% of the adult prison population in Australia have been diagnosed with a mental illness – 65% among women and 36% among men.[8] The ACT Detainee Health and Wellbeing Survey 2016 found that the most prevalent mental disorders among prisoners in the ACT were depression (30%), anxiety disorder (22%), and substance use disorder (16%).[9] The ACT Inspector of Corrective Services' 2022 Healthy Prison Review noted that 71% of people in prison said that it was difficult to access psychology services while in prison.[10] Three-quarters (74%) reported that they had been receiving treatment in prison, leaving 26% of people with mental health issues without treatment while imprisoned. Over a third of respondents (35%) reported ever attempting suicide.

People coming out of prison more often than not face homelessness, joblessness and ongoing health and social issues. While there are valuable services operating in the ACT, there is still more that needs to be done to invest in community-led interventions for people leaving prison.

FIRST NATIONS PEOPLE IN THE AMC

The over-representation of Aboriginal and Torres Strait Islander people in the ACT's prison both reflects and reproduces systemic disadvantage. It is impossible to disconnect this over-representation of First Nations peoples from the social drivers of incarceration identified so clearly by the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), including the impact of colonisation, structural racism and dispossession.

» The ACT has the highest crude ratio of Indigenous to non-Indigenous imprisonment:
- Aboriginal and Torres Strait Islander adults are 21 times more likely to be in prison than the non-Indigenous adult population.[11]
- This rate more than doubles for Aboriginal and Torres Strait Islander women, who are 47.4 times more likely to be imprisoned than non-Indigenous women.[12]

» Over the past decade, the ACT recorded a 115% increase in the Aboriginal and Torres Strait Islander adult prison population.[13]

» While the incarceration rate for non-Indigenous people in the ACT is 86.5 per 100,000 adults, the incarceration rate for Aboriginal and Torres Strait Islander people is 1,770 per 100,000 adults.[14]

» Aboriginal and Torres Strait Islander detainees are more likely to return to prison within two years of release (44%) compared to the non-Indigenous rate of 36%.[15]

[8] Australian Institute of Health and Welfare, 2019. *The health of Australia's prisoners 2018*, pp. 18-19.
[9] Young J.T., van Dooren, K., Borschmann R., & Kinner S.A., 2017. *ACT detainee health and wellbeing survey 2016: Summary results*, ACT Government, Canberra, ACT.
[10] ACT Inspector of Correctional Services, 2022. *Healthy Prison Review of the Alexander Maconachie Centre 2022*.
[11] ABS, 2023. *Prisoners in Australia 2022*, Table 17.
[12] Ibid.
[13] Productivity Commission, 2023. *Report on government services 2023*, Table 8A.6.
[14] Ibid.
[15] ACT Inspector of Correctional Services, 2022. *Healthy Prison Review of the Alexander Maconachie Centre 2022*,.

First Nations organisations and communities have for decades been providing leadership and advocacy in this space, as well as clearly stating what is needed to prevent this over-representation continuing. Some of the reforms required are legislative. Other reform areas are about increasing accessibility to services and supports that are Aboriginal-led, and culturally safe. Some of these approaches are outlined in this submission.

The *Pathways to Justice* Report[16] has examined these problems and looked at decades of reports, recommendations and the progress of their implementation, including those of RCIADIC. The recommendations of the *Pathways to Justice* Report are now the best guidance on overdue reforms in this area, and must be of high priority to the ACT Government if it is serious about reducing the overrepresentation of Indigenous detainees in the AMC.

The ACT Government acknowledged the need to address the specific issues facing Aboriginal and Torres Strait Islander people in the ACT in its submission to the Australian Law Reform Commission's *Pathways to Justice* inquiry:

> Aboriginal and Torres Strait Islander people experience significant barriers to obtaining and sustaining a licence relating to low level literacy, low income, challenges navigating a mainstream system and limited access to both licensed drivers and registered vehicles for supervised practice. What starts as a social justice issue often becomes a criminal justice issue.[17]

More specifically, the Australian Institute of Criminology in conjunction with the Standing Committee of Attorneys-General's Indigenous Justice Clearinghouse produced a very helpful paper entitled *Reducing the unintended impacts of fines* in 2011, which is still highly relevant today.[18]

SOCIAL DETERMINANTS OF JUSTICE

A recent report *Who Does Australia Lock Up? The Social Determinants of Justice* published in the International Journal for Crime, Justice and Social Democracy by Professors Ruth McCausland and Eileen Baldry of UNSW[19] outlines the social determinants of justice and the 8 factors that increase your risk of imprisonment.

An article published by them in the Conversation condenses this analysis and shows that the risk of imprisonment is greatly increased by 8 key factors:

1. having been in out of home (foster) care
2. receiving a poor school education
3. being Indigenous

[16] Australian Law Reform Commission (ALRC), 2017. *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133).

[17] ACT Government, Submission 110, cited in ALRC, ibid, 414. See generally Chapter 12 for discussion.

[18] Spiers Williams, M. & Gilbert, R., 2011. *Reducing the unintended impacts of fines*, Current Initiatives Paper 2, Indigenous Justice Clearinghouse.

[19] McCausland, R. & Baldry, E., 2023. Who does Australia lock up? The social determinants of justice, *International Journal for Crime, Justice and Social Democracy*. https://doi.org/10.5204/ijcjsd.2504.

4. having early contact with police
5. having unsupported mental health and cognitive disability
6. problematic alcohol and other drug use
7. experiencing homelessness or unstable housing
8. coming from or living in a disadvantaged location.

They found that "the more of these factors you experience, the more likely you are to be incarcerated and reincarcerated. The people in our data set are often in custody on remand (not yet sentenced) and for minor offences, going in and out of the system on a criminal legal conveyor belt. This damages lives and doesn't make our communities safer long term."[20]

These factors are exacerbated by increasing cost of living pressures at the moment as well as the national housing crisis which is also being felt strongly by people on low incomes in the ACT.

ACTCOSS has noted that there were "improvements made by legislation introduced by former Greens MLA Caroline Le Couteur in 2020 which enabled payment plans and community service in place of fines. However, this relies on the availability of community service programs, which have been scarce during COVID-19"[21]. It is unknown what the level of community service/work development program availability is now in 2023.

HOMELESS PEOPLE IN THE AMC

» Over half of the people who leave prison in Australia expect to be homeless.
People who are homeless or are at risk of homelessness face a number of factors and situations that place them at significant risk of being drawn into the criminal justice system and becoming incarcerated. These factors are a combination of personal, situational and institutional or structural.

Many people who experience homelessness also exhibit certain personal characteristics such as disability, mental illness or alcohol or other drug dependency, that make them vulnerable to criminal justice involvement. The very publicness of their living arrangements, their increased use of public space and their lack of access to appropriate support services make them highly vulnerable to law enforcement processes given their public visibility. Behaviour or conduct which would not come to the attention of police if they had safe and secure accommodation place them at increased risk of being subject to policing attention.

There are also institutional and structural factors that significantly contribute to the criminalisation of people who are homeless. The way particular offences are defined and policed, the processes for charging, the operation of punitive bail laws, and the way offences are prosecuted all contribute to homeless people being drawn into the criminal justice system. In addition, diversionary sentencing options such as home detention or community service orders/intensive corrections orders that require secure accommodation

[20] Ibid.
[21] ACT Council of Social Services, 2022. *ACTCOSS supports call for review of fines compliance and enforcement system,* Media release, 24 March.

are not available for people who are homeless, making them more likely to receive a custodial sentence.

Finally, those exiting prison face significant barriers in securing safe and secure accommodation, heightening the risks of reincarceration.

The fact that nearly a third of people entering prison were homeless just prior to their incarceration, and nearly a half of people exiting prison expect to be homeless again, illustrates the viscous cycle of homelessness-incarceration-homelessness. As the incidence of homelessness continues to increase, the various personal, situational and structural factors that result in people who experience homelessness being drawn into the criminal justice system need to be addressed in order to break this cycle.

This submission later explores a range of opportunities that the ACT Government could take up to reduce the impacts of fines and minor offences on homeless people in the ACT.

PENALTIES, FINES AND ALTERNATIVE MEASURES

FINES AND CRIMINAL INFRINGEMENT NOTICES

People experiencing homelessness, particularly rough sleepers, are more likely to receive certain fines and Criminal Infringement Notices (CINs), placing them under considerable financial strain.[22]

Several quantitative and qualitative legal needs studies in Australia have consistently identified that the incurrence of fines and CINs are one of the most common legal problems experienced by people who are homeless.[23]

CINs are the most common penalty issued by criminal justice systems in Australia.[24] They are a type of fine that cover very minor offences including traffic infringements (parking, speeding), offensive language, being drunk or disorderly, or smoking on public transport. Such infringements are considered by the legislature and the courts to not be serious enough to warrant a term of imprisonment. The penalty received under a CIN is fixed and

[22] Parliament of Victoria, Legislative Council, Legal and Social Issues Committee (Victoria Parliament LSIC), 2021. *Inquiry into homelessness in Victoria* (Final Report 189).

[23] See Forell, S., McCarron E., & Schetzer, L. 2005. *No Home No Justice? – The legal needs of homeless people in NSW*. Law and Justice Foundation of NSW. 105-108; Schetzer, L., 2018. 'Housing and homelessness', Chapter 13 in Rice, S., Day, A., & Briskman, L. (eds). 2018. *Social work in the shadow of the law*. Fifth edition. Federation Press. 225-227; Galtos, E. & Golledge, E., 2006. *Not such a fine thing – Options for reform of the management of fines matters in NSW*. Homeless Persons Legal Service, Public Interest Advocacy Centre; Coumarelos, C. & People, J. 2013. *Home is where the heart of legal need is – A working paper on homelessness, disadvantaged housing and experience of legal problems*. Law and Justice Foundation of NSW.

[24] NSW Law Reform Commission (NSWLRC), 2012. *Penalty Notices*, Report No 132 (Report 132), paragraphs 1.26–1.28.

cannot be tailored to the circumstances of the recipient. CINs can be challenged in court, although this rarely happens.[25]

Fines are generally the least harsh penalty that can be issued by the courts. They can operate as a form of diversion and an alternative to more serious penalties. However, for people on low incomes or from a socio-economically disadvantaged background, the consequences of fines can still be severe, as they find it difficult and sometimes impossible to pay.[26]

In 1992, the RCIADIC recommended that all governments ensure that sentences of imprisonment were not automatically imposed for the default of payment of a fine.[27] However, fine enforcement regimes can still result in imprisonment.[28] While in most states and territories, statutory provision for imprisonment in lieu of, or as a result of, unpaid fines or CINs has been abolished, provisions do not completely remove the ability of a court to order imprisonment for fine default altogether.[29]

When a person is unable to pay a fine/CIN and has not made other arrangements for payment or applied for extra time to pay the amount there are a series of enforcement actions which are undertaken. For instance, when a person is unable to pay a fine/CIN, after a certain period of time, the relevant state debt recovery agency can direct the roads and traffic authority to suspend a person's driver licence. Licence suspension due to fine default entrenches disadvantage and can result in further penalties, including further fines or even imprisonment, particularly for Aboriginal and Torres Strait Islander people.[30]

Whilst we do not readily have recent detailed ACT figures to hand, the JRI is concerned about the disproportionate impacts on Indigenous people. Relevant statistics in NSW show that:

- In 2013, 67% of licence suspensions were the result of fine enforcement measures;[31]
- Aboriginal and Torres Strait Islander people were suspended for fine default in NSW at over three times the rate of non- Indigenous people;[32]
- from January 2016 to March 2017, 5% of defendants who received a sentence of imprisonment for driving while disqualified had a proven prior offence of driving while licence suspended/cancelled due to fine default, where they had received a penalty of

[25] ALRC (n 16) paragraphs 12.46-12.48.

[26] Quilter, J. & Hogg, R. 2018. Hidden punitiveness of fines, *International Journal for Crime, Justice and Social Democracy*, 7(3), pp. 9-40; ALRC, ibid, paragraph 12.49

[27] ALRC, ibid, paragraph 12.32

[28] Ibid; Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, Rec 117.

[29] For example, in Victoria, if a person does not pay their fine, Fines Victoria will apply to court for an enforcement warrant. This warrant stays in place until the fine has been paid. The warrant allows the sheriff to take action to recover the debt. If the person does not have enough property to cover what is owed, the sheriff can arrest them. The person may be released on a community work permit or may be bailed to appear in the Magistrates' Court. As a last resort, the magistrate can send the person to jail.

[30] ALRC (n 16) paragraph 12.110.

[31] Roads and Maritime Services (NSW), 2016. *Monthly Trend in Licence Suspensions and Cancellations by All Licence Holders (Suspensions and Cancellations Commencing during Month)* Table 3.1.1.

[32] Audit Office of New South Wales, 2013. *New South Wales Auditor-General's Report: Performance Audit—Improving Legal and Safe Driving among Aboriginal People* p 3.

licence disqualification. Of these, 17% were Aboriginal and Torres Strait Islander people; and

- the median prison sentence for Aboriginal and Torres Strait Islander people who had lost their licence due to fine default was four months.[33]

This trend is reflected in the ACT. In 2018, the *Canberra Times* reported that "in the year to June 2017, 277 Indigenous people were charged by police for traffic offences, compared to 163 in the year up to June 2013, a 69 per cent increase".[34]

The JRI's position is that a person should not be exposed to the risk of imprisonment merely for defaulting on payment of a fine, or any associated secondary offending regarding a penalty imposed for fine default.

In particular, we are concerned about the high level of people in the AMC due to traffic offences, notably higher than that of other jurisdictions. This is also impacting more highly on First Nations people. The ACT has the highest over-representation of First Nations people in prison in Australia.[35] Although the number of people incarcerated for traffic offences is small, First Nations people in the ACT are more likely than anywhere else in Australia to have traffic offences as their most serious offence, as Table 1 demonstrates.

Table 1: Proportion of prisoners with traffic offence as their most serious offence, by Indigenous status and jurisdiction

Jurisdiction	Indigenous	Non-Indigenous
ACT	6%	3%
NSW	1%	1%
NT	2%	0%
Qld	1%	1%
SA	0%	2%
Tas	5%	3%
Vic	1%	0%
WA	1%	2%
Aus	1%	1%

Source: ABS (2021)

The ACT Government previously funded a program delivered by the Aboriginal Legal Service (NSW/ACT) (ALS), which supported Indigenous people to get their licence. Although there is still information about this program on the website,[36] we were advised by the ALS late last year that this is not currently operational, due to COVID. The program was previously the subject of an independent evaluation,[37] which found that, between December

[33] NSW Bureau of Crime Statistics and Research, 2017. *Sentences of Imprisonment for Driving While Disqualified (S54(1)(a) of the Road Transport Act 2013), NSW Reoffending Database January 2016 to March 2017, Ref No 17–15537*.

[34] O'Mallon, F., 2018, Indigenous Canberrans stuck in 'vicious cycle' of offending*, Canberra Times*, 27 May.

[35] ABS, 2023. *Prisoners in Australia 2022*, Table 17.

[36] Aboriginal Legal Service (NSW/ACT), *Driver Licensing,* https://www.alsnswact.org.au/driver_licensing, accessed 14 May 2023.

[37] Porykali, B. et al, 2019. *Evaluation Report of the Australian Capital Territory Aboriginal and Torres Strait Islander Driver Licensing Pilot Project*, The George Institute for Global Health.

2017 and October 2019, the program reached 74 Aboriginal and Torres Strait Islander people, with 50 clients successfully obtaining a provisional licence. It was found that '[a] key strength of the project was the provision of flexible case management in a culturally safe environment, that was highly acceptable to Aboriginal and Torres Strait Islander people seeking a licence in the ACT'.[38] We support urgently reinstating and appropriately funding this program, taking on board the recommendations of the evaluation to further improve the program. This will help to promote safety on the roads and reduce the overrepresentation of Aboriginal and Torres Strait Islander people in the ACT prison due to relatively minor offences.

Recommendation 1: That the ACT Government urgently reinstates funding to the Aboriginal Legal Service's Driver Licensing program.

REVIEW OF OFFENCES IN THE ACT

There are a number of offences that target vulnerable populations, including public order offences such as using offensive behaviour, public nuisance and loitering.

ACT Policing has a list of CINs people may be fined for on their website[39]. Canberra Community Law's Street Law service has helpfully summarised the public space offences for which fines can be imposed. This information is available on their factsheet on types of fines.[40] Examples of these are:

- Fighting in a public place. Maximum penalty **$3200**.
- Behaving in a riotous, indecent, offensive or insulting manner near, or within the view or hearing of a person in a public place. Maximum penalty **$3200**.
- Indecent exposure (eg nudity). Maximum penalty **$3200**, imprisonment for **1 year** or both.
- Urinating in a public place (other than in a toilet). Maximum penalty **$1600**.
- Not moving on, when you are directed to by a police officer (as outlined above). Maximum penalty **$320**.
- Drinking alcohol, or having an open container of alcohol, in certain public places, such as bus stations, bus interchanges, within 50 metres of bus stations or interchanges, or alcohol free places. Maximum penalty **$800**.

In the ACT, offensive behaviour matters are heard before a court. If the matter proceeds to court, the usual penalty is a court-imposed fine.

These offences have a disproportionate effect on people most like to frequent public spaces. The ALRC received evidence that Aboriginal people in Queensland are up to 12 times more likely to be charged with or receive infringement notices for public nuisance/offensive language than non-Indigenous people. Where these matters were dealt

[38] Ibid, p.3.

[39] ACT Policing, Criminal Infringement Notices, https://www.police.act.gov.au/crime/criminal-infringement-notices, accessed 14 May 2023.

[40] Canberra Community Law, 2021. *Factsheet on Sleeping/Loitering in Public Places*.

with in the court, Aboriginal and Torres Strait Islander people were more likely to receive a custodial sentence.[41]

ACT	***Crimes Act 1900*** **s392 Offensive Behaviour** 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. Maximum penalty: 20 penalty units.

The JRI's position is that the offence of offensive behaviour in a public place should be abolished in all states and territories. It disproportionately impacts Aboriginal and Torres Strait Islander people, young people and homeless people; it is reliant on police discretion; and the vast majority of the time the application does not reflect the intent of the legislation.

Recommendation 2: That the Government evaluates minor offences, particularly public space offences and especially the use of offensive behaviour, as to their current relevancy, use and impacts on vulnerable people, particularly First Nations people.

PUBLIC INTOXICATION

Along with most states and territories in Australia, the ACT has repealed public drunkenness offences. These offences criminalise individuals and unnecessarily bring them into contact with the legal system, whether through the offence of public drunkenness (where the offence has not been removed) or through the operation of the protective custody legislative regimes in those states and territories which have repealed public drunkenness offences.

It is important to recognise that the decriminalisation of public drunkenness of itself has failed to eliminate the incarceration of people who are intoxicated. The absence of adequately resourced health-based responses has perpetuated the overuse of detention in police cells of people who are found intoxicated in a public place. This reinforces the need to replace the criminal justice-focused model of dealing with public intoxication with a public health approach that ensures the safety and wellbeing of individuals, as well as promoting access to appropriate services and supports to minimise the incidences of public intoxication.[42]

Alcohol offences, like simple possession and use drug offences, should not be seen as a criminal justice issue, but as a social and health problem. A public health approach to public intoxication would shift the focus away from a narrow and reactive criminal justice intervention towards an approach that provides individuals at risk of public intoxication with the information, supports and services they need.[43]

[41] ALRC (n 16), paragraph 12.172, Submission from Professor Tamara Walsh, Queensland University of Technology.

[42] Expert Reference Group on Public Drunkenness, 2020. *Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness*. Report to the Victorian Attorney-General, pp. 21, 33.

[43] Ibid p.39.

PUBLIC INTOXICATION AND POLICE DETENTION

There is significant evidence to indicate that people found intoxicated in public spaces are continuing to be detained in police cells, including in states/territories that have decriminalised public drunkenness. Police in these jurisdictions are continuing to use the protective custody legislative regimes to place intoxicated people into police cells.

While these reforms were introduced with the aim of ensuring police had powers to apprehend individuals as a last resort to keep them and the community safe, it is clear that these powers are not being used as a last resort. It also illustrates the failure to develop and implement effective health responses that can provide more appropriate places of safety for people who are intoxicated and have immediate health needs.[44]

Table 2 indicates the continued use of police cells for public intoxication in states and territories that have decriminalised public drunkenness.[45] The ACT has a high rate of watchhouse use compared to other states.

Table 2: Use of police watchhouse for intoxicated people

	Total number of people taken into custody over previous 12-month period*	**Proportion of total number of people taken into custody who identify as Aboriginal or Torres Strait Islander (%)**
NSW	1802	18.1%
SA	330	41.5%
Tas	447	17.4%
ACT	829	13.5%
NT	8247	92.8%
WA	Not available	Not available

* 12-month period varies slightly between jurisdictions but includes data obtained from 2014 to 2019.

The continued use of police cells under the operation of protective custody regimes has a disproportionate impact on Aboriginal and Torres Strait Islander people and people experiencing homelessness.

Unfortunately, the long wait lists for some key alcohol and drug support services in the ACT do not allow people with alcohol and other drug issues to address them in a timely manner. There is currently a 12-week waitlist to get into the Arcadia House residential rehabilitation program. A three-month wait to get support to address alcohol and other drug dependency creates an unrealistic expectation for most people in these situations. For people with comorbid mental health disorders, it is also worth noting that the lack of easy and timely access to psychiatrists in the ACT has also reduced people's ability to address these issues, sometimes with fatal results.

[44] Ibid 34.

[45] Ibid.

Whilst people may wish to address their underlying alcohol and other drug dependencies, or mental ill-health, waitlists such as these will mean that they may find it extremely difficult to ever get sufficient treatment or support.

Recommendation 3: That the ACT Government further invests in government and community-based programs that support people to address issues around alcohol and other drug dependency.

Recommendation 4: That the ACT Government further investigates how to increase the level of psychiatrist and other mental health support access for ACT residents.

A PUBLIC HEALTH APPROACH TO PUBLIC INTOXICATION

The JRI endorses the proposed framework for implementing a public health approach to public intoxication which was developed by the Victorian Expert Reference Group on Decriminalising Public Drunkenness as a response to the tragic and unnecessary death of Tanya Day. That model had the following underlying implementation themes:

Police cells are not safe or appropriate - Detaining an intoxicated person in a police cell is unsafe and cannot be an option in a health-based response. No one should be placed into a police cell, simply because they are intoxicated in public.

Availability of places of safety - In order to eliminate the use of police cells for public intoxication, there must be safe places available that are accessible and appropriate to meet the health and safety needs of people who are intoxicated (eg. going home to family or friends, health and community-based services, etc).

Consent and voluntariness - A consent-based model is central to an effective health response to public intoxication at all stages of possible intervention.

Culturally responsive service system - There is a need for a service system that is capable of supporting people with diverse backgrounds, including Aboriginal and Torres Strait Islander people and culturally and linguistically diverse communities.

Intersection with drug intoxication - Public intoxication often co-occurs with drug use. An intoxicated person should be subject to a health-based response.

Intersection with mental health - There is a high correlation between public intoxication and mental health issues. A health-based response can best respond to people experiencing mental illness.

Community and cultural change - A transition to a health-based approach to public intoxication requires a shift in community and cultural attitudes about public intoxication - that public intoxication is a public health issue that requires holistic responses capable of addressing the underlying causes of public intoxication.[46]

[46] Expert Reference Group on Public Drunkenness, 2020. *Seeing the Clear Light of Day: Expert Reference Group on Decriminalising Public Drunkenness*. Report to the Victorian Attorney-General, pp. 36-37.

Whilst the Act has some elements of this framework already in place, such as the *Intoxicated Persons (Care and Protection) Act 1994,* and the Sobering Up Shelter at Ainslie Village, there are still many improvements to be made in this area.

Recommendation 5: That the ACT Government develops a framework and a plan to improve implementation of a public health approach to public intoxication.

BAIL SUPPORT PROGRAMS

Given that people can be remanded in custody for relatively minor offences, it is important that there are also sufficient and effective bail support programs to support people at this time.

The Ngurrambai Bail Support Program, delivered by the Aboriginal Legal Service (NSW/ACT), is designed to ensure successfully completed bail conditions, creating a care plan that helps with support, treatment and monitoring and supervision during the period. It may be undertaken on a voluntary basis or mandated as a condition of bail.[47] It is important that this program has sufficient and continued funding. We understand that there have at times been issues in ensuring adequate staffing in the ALS to operate this program effectively, which is of great concern to the JRI.

This program is only available to First Nations people, leaving many people without appropriate support at the point of bail. Although First Nations people are over-represented in the justice system and rightly the focus of significant interventions, there is also a need (in addition and separate to the existing service) for a more generic bail support program.

Additional bail support programs interstate should be investigated for their application in the ACT. There are multiple models of potential programs in other jurisdictions. The Magistrates Early Referral into Treatment (MERIT) program in NSW is a voluntary pre-plea program for adults to take 12 weeks to get support to treat their drug or alcohol problems before their hearing. This program shows good results, including a cost-benefit analysis yielding a benefit of between $2.41 and $5.54 for every dollar spent,[48] and could be replicated in the ACT.

Another suitable program is the **Court Integrated Services Program (CISP)**. CISP is a case management program that operates in 20 magistrates' courts across Victoria. It is a wider-reaching bail support program than MERIT, and offers:

- drug and alcohol treatment services;
- crisis and supported accommodation;
- disability and mental health services;
- acquired brain injury services; and
- Koori-specific services.

[47] Aboriginal Legal Service (NSW/ACT), 2023. *Ngurrambai Bail Support*, https://www.alsnswact.org.au/driver_licensing, accessed 14 May 2023.

[48] Passey, M. et al, 2003. *Evaluation of the Lismore MERIT Pilot Program – Final Report*. Northern Rivers University Department of Rural Health, Lismore, NSW.

Independent evaluations of CISP[49] found that it:

- reduced reoffending;
- improved health outcomes;
- saved money, with a return on investment of $1.70-5.90 for every dollar spent;
- increased referrals to treatment; and
- improved assessment, providing magistrates with access to timely, accurate and objective information about CISP clients' risk of reoffending and support needs, to address the causes of their offending behaviour.

Recommendation 6: That the ACT Government provides secure and ongoing funding for the Ngurrambai Bail Support Program.

Recommendation 7: That the ACT Government urgently invests in bail support programs that support people to address underlying issues and reduce reoffending behaviours.

PRISON SENTENCE LENGTH

We know that there is a high rate of people in prison in the ACT sentenced to very short stays. This certainly increases our recidivism rate, increases ciminogeneity, and does not truly allow for rehabilitative support models to be used.

It is very clear that prison is ineffective when it comes to controlling crime or protecting the community.[50] Evidence shows that sending people to prison does not reduce offending behaviours and increasing the length of a sentence doesn't reduce the likelihood of occurrence either. In summary, **imprisonment often leads to more crime – not less**.

Nearly 40% of adults leaving prison in the ACT return within two years of their release[51] and 78% of adults in prison in the ACT have been incarcerated before, the highest rate in the country.[52] The evidence is entirely clear that imprisonment is itself 'criminogenic', making it more likely for people to commit crime, and more likely to return to prison again.

Professor Tamara Walsh notes that "in Western Australia, sentences of six months or less have been abolished, and in some other jurisdictions they are discouraged".[53]

Recommendation 8: That the ACT Government review the impact and over-use of short prison sentences for vulnerable populations.

[49] See Victorian Department of Justice, 2010. *Court Integrated Services Program: Tackling the Causes of Crime – Executive Summary Evaluation Report*. This summarises separate evaluations of CISP conducted by Stuart Ross and PriceWaterhouseCoopers.

[50] Productivity Commission, 2021. *Australia's prison dilemma.*

[51] Productivity Commission, 2022. *Report on government services*.

[52] Australian Bureau of Statistics, 2021. *Prisoners in Australia, 2021*, Table 29.

[53] Walsh, T., 2021. *Dealing with nuisance behaviour: Logical alternatives to traditional sentences*, University of Queensland, https://isrcl.com/wp-content/uploads/2021/12/Walsh.pdf.

PAYMENT OF FINES

Canberra Community Law's (CCL) Street Law website has clear, well summarised resources and information sheets on fines. However the majority of people would not think to look on the CCL website or call them if they are given a fine. The ACT Government could assist people by including information on the infringement notices about how to access this simple, plain English information.

Their website helpfully clarifies that people who receive traffic fines do have a range of options:

1. Apply to pay the fine by instalments through an infringement notice management plan (INMP);
2. Apply to participate in a community work or development program instead of paying the fine;
3. Ask for the fine to be withdrawn;
4. Ask for more time to pay the fine; or
5. Apply for a waiver of the fine.[54]

People who receive a parking fine or traffic fine and are not able to pay it immediately can apply for more time to pay the fine (up to a maximum of 6 months). Under this option, they can be given longer to save to pay the fine in full. If they prefer, they can also pay a fine by instalments. Instalment plans are not time limited.

Recommendation 9: That the Government infringement notices include information to assist vulnerable people to find the information they need, such as links to the Canberra Community Law webpages.

WAIVERS OF FINES

The ACT Policing website clarifies that there are "currently no provisions in the *Road Transport (General) Withdrawal of Infringement Notices Guidelines 2019 (No1),* for infringements to be withdrawn on the basis of financial hardship or compassionate grounds. However, you can submit a request … to enter into a payment plan or apply to waive the penalty (subject to certain criteria)."[55]

Canberra Community Law has helpful factsheets that outline the process for applying for a waiver.[56] They clarify that when a traffic or parking fine is waived, the person no longer has to pay it, and that waivers are only granted in very limited circumstances:

> For waiver to be considered, the applicant must be able to show that:
> - they do not have the financial ability to pay the fine; **and**
> - they have special circumstances (e.g. a disability, homelessness); **and**

[54] Canberra Community Law, 2021. *Factsheet on traffic & parking fines*. https://canberracommunitylaw.org.au/fact_sheet/street-law-1/

[55] ACT Policing website, *Traffic fines,* https://www.police.act.gov.au/road-safety/traffic-fines, accessed 14 May 2023.

[56] Canberra Community Law, 2021. *Factsheet: Apply for waiver of a fine* https://canberracommunitylaw.org.au/fact_sheet/street-law-6/

- Enforcement action (like suspension of your license) is unlikely to make them pay the fine; **and**
- they are not able to complete an approved community work or social development program.

JRI is not aware of how many people are successful in attaining such a waiver through this process.

Recommendation 10: That the ACT Government ensures the process for waivers is simple and data are collected on the number of applications and proportion of applications that are successful and the reasons for this.

PROPORTIONALITY OF FINES

There is clearly a very disproportionate impact of the same level of fine on people, depending on their income and circumstances. Our fines system has not been drawn up with any nuance of the proportional impact of fines on people. For example, a fine of $3000 may be completely manageable penalty for a person who is on an income of say $120,000pa. However, if a person is on a very low income, and maybe has a number of dependents and a high ratio of rent costs, that same fine of $3000 can be a terrifying prospect that is unmanageable to pay.

There are also the impacts of prosecution on vulnerable people for non-payment of fines to consider. If people are being fined but cannot afford to pay the fine, even on a six month payment plan, rather than applying further penalties, this is an opportunity for the government to offer supports to the person. This is where case-workers should be available to support people to explore other options, this may just need a referral to Canberra Community Law and/ or Care Financial Counselling Service, but might instead be a referral to drug and alcohol or mental health support services.

When people are already living under the poverty line, putting them further into financial stress is unlikely to help them change behaviours. The last thing they need, or our community needs, is people being sent to prison for non-payment of fines. As well as being a recipe for disaster for them personally, the impacts on their families are massive. It is particularly problematic if the person is a parent, and the impacts on children really exacerbate the cycle of disadvantage if their mother is sent to prison.

As a result of the disproportionate impacts of fines for people on low-incomes, the JRI is concerned about the number of people who as a result are imprisoned – usually for a short-term period. We do not have access to the data on the number of people in the AMC who were on low-incomes before entering prison as the ACT Government does not have access to information about incomes.

We note previous pushes for reform on this issue in the ACT to create income-based fines, however the ACT Government has resisted this proposal to date, stating that only the Federal Government has access to information about people's incomes, thus it would be unworkable for the ACT Government to monitor it. The JRI notes that there are other ways

to approach this issue. The Government may choose instead to approve evidence of a Healthcare Card or the previous year's tax statement as proof of income or concession.

DAY FINES AND CONCESSIONAL CIN PENALTY AMOUNTS

"Day fines" (which are employed in Germany, Estonia, Finland, France, Sweden and Switzerland) are a sentencing structure in which the fine for an offence is set according to both the person's financial circumstances – the daily rate or amount the person is able to pay – and the nature of the offense – the number of days a person is required to pay the daily rate.[57] Concessional CIN penalty amounts would involve a fixed reduction model for people experiencing financial hardship or concession card holders.

Recommendation 11: That the ACT Government considers options to apply a sliding scale to infringement notice fines, which is more proportional to a person's ability to pay, such as the day fine structure used in many countries in Europe.

WORK AND DEVELOPMENT PROGRAM ALTERNATIVES TO FINE PAYMENT

Work and Development Orders or Programs allow people to pay off debts by working, engaging in training and education, attending medical and mental health treatment or other forms of counselling and mentoring. In the ACT we have a Work and Development Program (WDP) option for eligible people. While these programs provide an innovative solution to address fine debt and disadvantage, the lack of sponsor sites in regional and remote areas mean that many disadvantaged people unable to pay their fines are unable to access these alternatives.

We have not seen an evaluation of the ACT WDP, however, a report commissioned for the NSW Department of Justice in 2015 looked into the Work and Development Order (WDO) Scheme which started in 2009, called *Evaluation of the Work and Development Order Scheme: Qualitative Component – Final Report*[58] and found it highly successful. It found that "there was broad agreement amongst sponsors (94%) that the WDO scheme is achieving its objective of enabling vulnerable people to resolve their outstanding NSW fines by undertaking activities that benefit them and the community."

By December 2016, nearly $74 million in fine debt had been cleared.[59] WDOs or similar schemes have also been introduced in Tasmania (2008), Queensland (2017), South Australia (2017) and Western Australia (2020). WDOs were introduced for traffic infringement fines in 2017 in Victoria and the ACT.

[57] ALRC (n 16) paragraph 12.72.

[58] Inca Consulting, 2015. *Evaluation of the Work and Development Order Scheme: Qualitative Component - Final Report*. https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/25218/WDO-Final-Evaluation-Report-May-2015.pdf

[59] ALRC (n 16) paragraph 12.115.

Canberra Community Law has also helpfully summarised the process for completing a work and development program (WDP).[60] It states:

> It is now possible to pay off your traffic, parking and traffic camera fine(s) by completing approved volunteer work, a course, mentoring or counselling/ medical treatment. Each hour that you attend works off part of the fine. If your licence has been suspended for not paying the fine(s), that suspension will be lifted once you are approved to complete a WDP.
>
> **This option for dealing with a fine is not available to everyone**. You must show:
> - current or ongoing serious financial hardship;
> - mental or intellectual disability or mental disorder;
> - physical disability or disease or illness;
> - addiction to alcohol or other drugs;
> - family violence; or
> - homelessness, living in crisis, transitional or supported accommodation.

Table 3: The rates at which fines will be reduced using work and development programs

Activity	Cut out rate
Volunteer work	$37.50 per hour worked
Educational, vocational or life skills course	$50 per hour or $350 per full day, up to a maximum of $1,000 per month
Financial and other counselling	
Participation (as a mentee) in a mentoring program	$1,000 per month for full compliance (or a proportion for partial compliance)
Medical or mental health treatment in accordance with a doctor's treatment plan	
Alcohol or other drug treatment	

Source: Canberra Community Law

The Access Canberra website clarifies that: "if you are applying for a WDP on the grounds of addiction to drugs, alcohol or another substance, you can only participate in alcohol and other drug treatment."[61]

There needs to also be consideration for people in some circumstances who may not have time to undertake community work, such as a single-parent with a low-paid full-time job. There also need to be options that allow magistrates or Access Canberra to give people alternative orders or WDPs, such as for their community work or a course they must attend to be relevant to the offence. For example, if an offence was dangerous driving related, ordering the person to attend a Reducing Aggressive Driving course or similar.

[60] Canberra Community Law, 2021. *Completing a work and development program (WDP):* https://canberracommunitylaw.org.au/fact_sheet/street-law-7/

[61] Access Canberra, ACT Government. *Work and development programs* https://www.accesscanberra.act.gov.au/s/article/traffic-and-parking-infringements-tab-work-and-development-programs, accessed 14 May 2023.

For the majority of vulnerable people, wrestling with the bureaucracy of the process to apply for a waiver or convert a fine into a WDP, would need legal support. It is highly disappointing that the Aboriginal Legal Service ACT/NSW has reduced funding at this time, making it more difficult for many Indigenous people to access legal support.

Recommendation 12: That the JACS Committee examines recent levels of use of Work and Development Programs to ensure that they are accessible and promoted to those who would benefit from accessing them.

Recommendation 13: That the ACT Government expands the types of approved Work and Development Program providers, to enable programs to be tailored to respond to the specific offences and circumstances.

OTHER ALTERNATIVES TO FINES

As well as these options we have covered, the JRI also considers the following options identified by the Australian Law Reform Commission (ALRC) to be more appropriate measures than fines for people who are socially and financially disadvantaged, particularly homeless people:

- **Informal or written cautions or warnings** – The use of warnings and cautions allow for a less restrictive or punitive measure, which may be appropriate in circumstances of very minor offending, or where the person is vulnerable or disadvantaged.[62] Official cautioning schemes with supporting guidelines as to how the scheme should operate, can divert people away from fine enforcement systems. The requirement for cautions to be issued only where an infringement notice usually would be issued minimises the potential for 'net widening'.[63]

- **Cap the total penalty amount able to be received in one incident** – Penalties received under multiple infringement notices for a single transaction or set of events can be disproportionate to the offending conduct. This might involve an incident where there is an escalation of the conflict from the original offending action (eg. riding on public transport without a valid ticket or concession pass, with associated incidents of swearing at the issuing officer). This can result in a significant fine debt arising from a single incident. Imposing a restriction that issuing officers could only issue one infringement notice per interaction or placing a cap on the total financial penalty able to be imposed in a single transaction, serves to minimise the difficulty large fines can place on vulnerable people.[64]

- **Discretion to 'skip' licence suspension as an enforcement measure** - In 2017, NSW introduced a statutory discretion allowing State Debt Recovery Office (SDRO) to forgo

[62] NSW Law Reform Commission (NSWLRC), 2012. *Penalty Notices*, Report No 132 (NSWLRC Report No 132); paragraph 5.7.

[63] ALRC (n 16) paragraph 12.61

[64] Ibid, paragraphs 12.84-12.87.

licence suspension, where the person in fine default is deemed to be 'vulnerable'.[65] In these circumstances, the SDRO may decide that civil enforcement action is preferable in the 'absence of and without giving notice to, or making inquiries of, the fine defaulter'.

Recommendation 14: That the ACT Government investigates introducing a cap that can be placed on the total number of infringement notices or financial penalties from a single interaction with police, to reduce financial impacts on vulnerable people.

SPECIALIST COURT LISTS AND PROGRAMS

The Drug and Alcohol Sentencing List (DASL) has been shown to be largely very effective for people appearing before it in the Supreme Court, and an evaluation has found that the results thus far have both helped reduce re-offending as well as improved social outcomes for participants[66]. However, there are still many restrictions on who is eligible to go on this list. The DASL is restricted to matters before the Supreme Court, and is generally targeting people with longer, more serious offences than this inquiry covers.

The DASL has been shown to be effective as an alternative approach for people with drug or alcohol dependency who have offended. However, the majority of people with lower-order fines, as would be covered by this inquiry, would appear before the Magistrates Court, would highly likely be on low-incomes and would fit into one or more categories of vulnerable people.

Professor Tamara Walsh notes that in Victoria a specialist list, presided over by a specially-trained magistrate, has been created to deal with people who have been judged unable to pay a fine due to 'special circumstances' including mental illness and substance misuse problems. Such cases are most commonly disposed of via discharges and adjournments, often with treatment and welfare conditions attached. **The special circumstances list operates at no additional cost, and its establishment required no legislative amendments.[67]**

Recommendation 15: That the ACT Government establishes a specialist list in the Magistrates Court to hear cases from vulnerable people, especially those with mental illness or disorder, or substance use problems.

SPECIALIST MAGISTRATES COURT LISTS FOR HOMELESSNESS

Specialist court homeless programs have been employed to address the challenges facing homeless offenders. These programs usually take the form of specialist homeless lists in mainstream courts or dedicated specialist homeless courts. The programs allow

[65] *Fines Amendment Act 2017* (NSW). Fix spacing here.

[66] Rossner, M, Bartels, L, Gelb, K, Wong, G, Payne, J and Scott-Palmer, S, 2022. *ACT Drug and Alcohol Sentencing List: Process and Outcome Evaluation Final Report*, ANU.

[67] Walsh, T., 2021. *Dealing with nuisance behaviour: Logical alternatives to traditional sentences*, University of Queensland, https://isrcl.com/wp-content/uploads/2021/12/Walsh.pdf.

magistrates, prosecutors, support services and defence lawyers to work together holistically, to address the underlying causes of offending. These programs can assist homeless people to make earlier exits from the criminal justice system into secure housing with supports and reduce the risk of reoffending. They seek to address the participants' basic human needs, as well as their legal need, as well as encouraging participants to take responsibility for their actions.

Unfortunately, as outlined earlier, we know that there are a disproportionate number of people who are homeless and/or unemployed at the point when they enter the AMC. Thus there are times where magistrates would prefer to release someone on bail, but cannot, due to a lack of a home to allow their release to. Across Australia, people are leaving prison with higher rates of homelessness and unemployment than those who are entering prison.[68] People leaving prison are often immediately thrust into unstable and difficult situations that place them at high risk of reoffending and returning to custody.

Unfortunately, this situation is exacerbated in Canberra by the Housing ACT policy, whereby people lose their right to keep their public housing tenancy if they are in prison for three months or more[69]. This means that it is highly likely that anyone being sent to prison who lived in public housing before being incarcerated will likely be released into homelessness, unless they are fortunate enough to be accepted into the Justice Housing Program.

Recommendation 16: That the ACT Government reconsiders its policy around tenants who are incarcerated not being able to retain their ACT Housing property, to reduce the likelihood of releasing people into homelessness.

In two Australian jurisdictions (Victoria and Queensland) the magistrates' courts have established special circumstances lists. These specialist lists seek to provide an alternative to mainstream court processes and sentencing outcomes for defendants charged with minor offences who are homeless and suffering from mental illness or intellectual disability. They provide an avenue for their circumstances to be considered in a therapeutic setting when determining sentencing and assist some of the most disadvantaged people coming before the court to exit the justice system with long-term, therapeutic outcomes.[70]

Special Circumstances List, Melbourne Magistrates' Court	The creation of the Melbourne Magistrates' Court special circumstances list was initiated by the court and the Sheriff's office and commenced operation in June 2002. The list is presided over by a single magistrate who has a personal commitment to the goals of the program. The list was initially only targeted at persons with mental illness, intellectual disability, acquired brain injury, physical disability or drug or alcohol addiction. However, the definition of "special circumstances" was also extended to include homelessness, where it results in a person being unable to control conduct which constitutes an offence. A person with special circumstances can only be dealt with under the special circumstances list if s/he has received one or more infringement notices for an offence, has failed to pay the infringement penalty, has forwarded an application for

[68] Australian Institute of Health and Welfare, 2018. *The health of Australia's prisoners 2018*.

[69] This is further explored in the paper by Dhurrawang Aboriginal Human Rights Program for Canberra Community Law (2019). Exiting prison into homelessness, *Ethos: The ACT Law Society Journal*.

[70] Victoria Parliament LSIC 2021, n 22 above, 192-193.

	revocation of these fines, and the infringements registrar is satisfied that the matter would be more appropriately dealt with by the court. Cases involving "special circumstances" in Melbourne most often result in an adjournment or dismissal, often with an undertaking to be of good behaviour and/or to comply with a treatment regime. The list has been heralded a great success, with most defendants taking their undertakings to the court seriously and continuing their treatment as ordered.[71]
Special Circumstances Court, Brisbane Magistrates' Court	In 2006, a "special circumstances list" was established at the Brisbane Magistrates' Court. The list was aimed at finding an alternative way of dealing with defendants charged with public order-type offences who had impaired capacity at the time of the offence, as a result of mental illness or intellectual disability, and homelessness. A person is eligible to be dealt with under the special circumstances list if s/he is 17 years of age or older, homeless, and appears to be suffering from impaired decision-making capacity as a result of either mental health issues, intellectual disability or brain/neurological disorder. Further, s/he must have been charged with, and pleaded guilty to, an "eligible offence" (i.e. an offence which arises from circumstances which have an aspect of "public order", including offences such as failing to appear, breach of bail, etc in respect of another eligible offence). This also includes offences like public nuisance, begging, public drunkenness and failing to properly dispose of a syringe. Serious drug offences, sexual offences and serious offences of personal violence are disqualifying offences.[72] Court observation of the Brisbane special circumstances list was conducted for a period of nine weeks between August and October 2006. The penalties imposed on participants for the designated offences were more likely to be aimed at addressing the underlying causes of offending (i.e. court supervision, referral to for psychiatric or drug/alcohol treatment, referral to cognitive/life skills course) than for defendants facing similar charges in the generalist courts.[73]

SPECIALIST HOMELESS COURTS

Specialist homeless courts have been developed in New Zealand and the United States. They have also been suggested for Australia.[74] Some of the models involve participants voluntarily signing up through a homeless service provider and engaging in a series of program activities before appearing in court. These program activities serve as a "sentence" for participants, even though they are completed prior to the court appearance. After the completion of services, participants present proof of their participation at a homeless court session. Most cases are then dismissed. In some jurisdictions, court sessions are held somewhere other than the courthouse, eg., onsite at a service provider or at another location easily accessible to homeless people.[75] Other models operate as form of pre-

[71] Walsh, T, 2007. The Queensland special circumstances court, *Journal of Judicial Administration,* 16, 223-234, p.225.

[72] Ibid p. 223.

[73] Ibid p. 228-229.

[74] Quilter, J., et al. 2020. Homelessness and contact with the criminal justice system: Insights from magistrates in Australia. *Journal of Judicial Administration*, 30, pp 64-80; McNamara, L., et al. 2021. Homelessness and contact with the criminal justice system: Insights from specialist lawyers and allied professionals in Australia", *International Journal for Crime, Justice and Social Democracy*, 10, pp. 111-129.

[75] Center for Court Innovation (CCI), 2015. *Responding to homelessness - 11 jdeas for the justice system*. p.4.

sentence specialist court, where the court will facilitate access to housing and support services, with the aim of addressing the underlying causes of criminal offending.

<table>
<tr><td colspan="2">United States
Several US states have developed homeless courts to help homeless individuals who have committed minor offences or who have outstanding warrants. Homeless Courts have been established in South Carolina, California, Texas, Arizona, New Mexico, Missouri, Utah, Washington, Colorado, and Michigan. The goal of these courts is to help the participants navigate their legal matters while also working toward becoming self-sufficient. These courts attempt to make the legal process less intimidating for the participants and give them the opportunity to address the roots of their social problems.
To participate in a homeless court program a person must first meet the necessary requirements (i.e. qualifying misdemeanors or low-level felonies). The sentence normally imposed to satisfy outstanding fines, fees, and warrants includes community service and participation in an approved transitional care program. The approach in a homeless court is to find alternatives to custody.[76]</td></tr>
<tr><td>San Diego Homeless Court Program</td><td>Created in 1989, the San Diego Homeless Court Program (HCP) was the first homeless court in the US. The HCP helps people experiencing homelessness resolve a range of misdemeanor cases and some low-level felonies. Individuals with pending cases sign up through a homeless services provider and work with the provider to create a plan tailored to their needs. Service providers report on participants' progress to the public defender. The public defender submits the names of participants who have completed their service plans to the court, which coordinates with the prosecutor to schedule court appearances. Court sessions are held monthly, rotating between two local homeless shelters. At the court session participants present proof of their completion of services and advocacy letters from the service providers. Most cases are dismissed, thus removing potential obstacles to housing entitlements and other benefits.[77]</td></tr>
<tr><td colspan="2">New Zealand
The New Beginnings Court (Auckland) and the Special Circumstances Court (Wellington) are specialist Homeless Courts. The aim is to help homeless people deal with the social and health issues in their life that contribute to criminal offending and to assist them to get their life back on track. Serious drug and violence offences and sexual offences cannot go through these courts.
To access the court a person must have pleaded guilty or accepted responsibility for their offending. This is a voluntary court and the person can withdraw and return to the usual court system at any stage. The court process brings a number of agencies together to help with the causes of both their homelessness and their offending. The person will be assigned a community worker who will develop a rehabilitation plan. The plan is presented to the court and monitored frequently.</td></tr>
<tr><td>Te Kooti o Timatanga Hou – The Court of New Beginnings, Auckland</td><td>The Te Kooti o Timatanga Hou (TKTH), also known as the Court of New Beginnings was established in Auckland in 2010 and sits once a month to hear matters involving alleged offenders who are experiencing homelessness. The Court provides individuals with support services to address the underlying causes related to offending and homelessness.[78]
Participation is voluntary and a participant can withdraw from the programme at any time. To be eligible for the TKTH court process, the defendant must:
• have committed on-going, low-level reoffending within Auckland's inner city;
• be 17 years or over;
• be homeless and/or have no fixed address;
• be affected by mental health concerns and/or intellectual disability or be affected by chronic alcohol and/or substance abuse issues; and</td></tr>
</table>

[76] Claudia Lopez, 2017. *Trends in state courts - Homeless courts*. Report, National Centre for State Courts.

[77] CCI 2015 (n 76) p.4.

[78] District Court of New Zealand Te-Kōti ā-Rohe o Aotearoa. https://www.districtcourts.govt.nz/criminal-court/criminal-jurisdiction/specialist-criminal-courts/new-beginnings-court/.

	• plead guilty or not contest charges. In addition, the person must agree to engage fully in the program put in place for them. The criteria for eligibility are generally enforced, with a few exceptions. Offences of a serious nature, such as serious drug offences, sexual offences, or serious offences of personal violence, are disqualifying offences. Participants can also be excluded if they breach community-based sentences.[79] A 2012 review found that the number of arrests dropped by two-thirds during participation in the program, and this was sustained in the six months following participation. The number of people arrested fell by 26% during participation and by 42% in the six months following the programme. In addition of those who had been arrested, the number of times they were arrested fell from an average of 7.7 times prior to participation, to 2.6 times during and after the programme.[80] In 2015, the District Court reported that evaluations showed that the New Beginnings Court had reduced reoffending rates by 66% and saved on nights spent in prison by 78% and hospital admissions by 57%.[81]

Access to stable and secure accommodation is a critical foundation for successful reintegration into the community.[82] People who return to community without stable accommodation struggle to have their needs met, or engage with education and employment opportunities while also attending support services. Secure accommodation is a base need and without it, people are more likely be forced into situations that make reoffending more likely.[83]

The JRI considers that it is essential for people exiting prison to have access to appropriate models of supportive housing (such as the Common Ground model) that will facilitate their transition back into society, assist them to address particular identified needs such as mental illness or drug and alcohol problems, and to provide them with the necessary supports and assistance to make re-offending less likely. The JRI sees the value of supportive housing to assist people exiting prison and the opportunity for that model to provide the specific needs support and assistance for people exiting prison. Supportive housing ensures people have access to a range of health, medical and social support services as well as giving them stable and secure housing.

CONCLUSION

The JRI looks forward to the JACS Committee's exploration of issues around minor offences and the impacts of fines and penalties on the broad range of vulnerable people in the ACT. We are particularly concerned about the disproportionate impacts on Aboriginal and Torres Strait Islander people who are currently significantly over-represented in the AMC. We bring to the Committee's attention the new research outlining the social determinants of justice, in the effort to ensure policy-makers understand the clear links

[79] Alex Woodley, 2012. *A Report on the Progress of Te Kooti O Timatanga Hou – The Court of New Beginnings*, p.12.

[80] Ibid p.17.

[81] District Courts of New Zealand, 2015. *Annual Report, 2015*, p.15. https://www.districtcourts.govt.nz/assets/Uploads/DCAnnualReport-2015.pdf

[82] UNSW Sydney, 2020. *Obstacles to effective support of people released from prison: Wisdom from the field*, p.25.

[83] Ibid 26; Council of Australian Governments (COAG), 2016. *Prison to work report*. p.7.

between key factors like poverty, the child protection system and housing, and people entering the criminal justice system. We also hope that the Committee looks into the various potential legal and infringement reforms to improve the lives of homeless people in the ACT. We have made a broad range of suggestions for reform or further investigation, with the aim of achieving a more inclusive and supportive city for people from diverse backgrounds, including First Nations people. We would like to see the ACT Government strive harder to achieve its goal of reducing recidivism by 25% by 2025, and many of the reforms we have outlined would contribute positively to this plan.

This submission also discusses issues around prison and bail, despite these not being obviously linked with minor offences. Our proposals include increasing funding for bail support programs, ensuring that vulnerable people are fully aware of the options and processes for having fines waived, making the impact of fines more proportional to people's ability to pay, increasing options for and access to work and development programs and capping the penalties that can be put on a single person in one incident.
More specifically for homeless people, we suggest examination of various public order offences, removing punitive bail conditions that result in homeless people being denied bail, and the establishment of court-based specialist homeless initiatives.

Ultimately, the most important measure to break the cycle of homelessness and incarceration is to significantly increase the availability and accessibility of affordable housing, social housing and supportive accommodation. Not having safe and stable accommodation is one of the most significant risk factors for criminalisation and subsequent re-offending post-release from prison. Provision of more social and supportive housing is an essential response to reduce this risk.