The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

12 October 2017

Ms Sabina Wynn
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Australian Law Reform Commission
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SYDNEY NSW 2001

By email: sabina.wynn@alrc.gov.au

Dear Ms Wynn

AUSTRALIAN LAW REFORM COMMISSION DISCUSSION PAPER: INCARCERATION RATES OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES (DISCUSSION PAPER)

The Law Society provides the following comments on the questions and proposals noted in the above Discussion Paper. I also note the Law Society's briefing papers, which set out the Society's position on a number of issues relevant to the inquiry, are available at https://www.lawsocietywa.asn.au/law-reform-and-advocacy/#closing-the-gap.

2. Bail and the Remand Population

Proposal 2–1 *The Bail Act 1977 (Vic) has a standalone provision that requires bail authorities to consider any 'issues that arise due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the Bail Act.*

Other state and territory bail legislation should adopt similar provisions. As with all other bail considerations, the requirement to consider issues that arise due to the person's Aboriginality would not supersede considerations of community safety.

Agreed.

Proposal 2–2 *State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.*

Agreed.

3. Sentencing and Aboriginality

Question 3–1 *Noting the decision in Bugmy v The Queen [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders?*

If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

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Yes. This should be taken into account as a sentencing principle.

Question 3–2 *Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?*

Yes.

Question 3–3 *Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?*

Not always. This factor often depends on the offender's legal representation. Ideally, the level of information available should be consistent across all matters.

Question 3–4 *In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?*

Currently in Western Australia, only standard sentencing reports are provided to the Court. This often means that only a limited amount of information about cultural factors or factors affecting the community is brought to the Court's attention. The main source of that information is currently the Office of the Director of Public Prosecutions ('DPP') through victim impact statements. Specialist reports would assist in that regard.

Question 3–5 *How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?*

There should be an independent body that deals with issues affecting Aboriginal and Torres Strait Islander people for both the victim and the offender. Currently, the information has to be sought from multiple agencies, including the defence lawyer, the DPP, Department of Corrective Services, Department of Aboriginal Affairs, Department for Child Protection, Department of Health, etc.

It is noted that the Magistrates Court deals with a very high volume of police prosecutions, which have a significant impact on the community, usually without the assistance of any significant source of information about cultural or historical factors. A specialised agency capable of preparing such reports is desirable to create a body of such information applicable and available to Magistrates Court matters.

4. Sentencing Options

Question 4–1 *Noting the incarceration rates of Aboriginal and Torres Strait Islander people:*

(a) should Commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences; and

Yes. All mandatory sentencing provisions should be repealed.

(b) which provisions should be prioritised for review?

This is not a question of priority: the Law Society maintains its longstanding opposition to mandatory sentencing of any kind, and its position is that all mandatory sentencing provisions should be abolished. It is however noted that the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2014* (WA) is particularly draconian and Western Australia is the only state to impose mandatory sentencing on juvenile offenders. This is in a context where, as at 31 March 2016, 72% of the young people held at the Western Australian youth detention centre are of Aboriginal and Torres Strait Islander heritage[1] and where it is well known that mandatory sentencing has a discriminatory and disproportionate effect leading to the over-representation of Aboriginal and Torres Strait Islander people in the prison system.[2] Western Australia has the highest rate of over-representation of Aboriginal and Torres Strait Islander youth in detention in Australia - Aboriginal young people are 53 times more likely to be in detention than their non-Aboriginal peers.[3]

Question 4–2 *Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?*

Yes. Unintended risks may be that:

- judicial officers impose longer imprisonment terms than they otherwise would in order to surpass the minimum (but the same has not, so far, been borne out statistically); or
- higher fines are imposed instead which cannot be paid and eventually lead to imprisonment (see part 6).

Question 4–3 *If short sentences of imprisonment were to be abolished, what should be the threshold (eg, three months; six months)?*

The minimum in Western Australia is six months.[4] The Society's view is that the status quo should be maintained in Western Australia.

Question 4–4 *Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?*

Yes. It is noted that alternatives to imprisonment are not well resourced – for example, often there will not be an officer available to supervise community work in remote areas, so community based orders are not available. The alternatives are not uniformly available across Western Australia.

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[1] Western Australia Department of Corrective Services, Young People in Detention Quick Reference Statistics – 31 March 2016, available at <http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/statistics/2016/quick-ref/201603-qrs-youth-custody.pdf>

[2] Amnesty International, *There's always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, May 2015, 37. Available at <https://static.amnesty.org.au/wp-content/uploads/2016/02/CIE_WA-Report_low-res.pdf?x85233>

[3] Ibid, 5.

[4] *Sentencing Act 1995* (WA), s86

There is also a lack of men's behaviour change programmes and psychological support.

Proposal 4–1 *State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.*

Agreed, however the proposal should not be limited to 'peak' organisations – rather, the governments should be working with the relevant community based organisations which offer support on the ground.

Question 4–5 *Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?*

This is more of a resourcing problem than a lack of legislative power. However, more flexibility for judicial officers in sentencing is always beneficial.

5. Prison Programs, Parole and Unsupervised Release

Proposal 5–1 *Prison programs should be developed and made available to accused people held on remand and people serving short sentences.*

Agreed. The obvious benefit of these programmes is the link to decreased recidivism rates. However there are other equally important flow-on effects, including, for example, being the only tool for people in custody to demonstrate to the Department for Child Protection that they are addressing issues or concerns that the Department might have.

The programmes should also be available for people who are in custody awaiting appeal.

Question 5–1 *What are the best practice elements of programs that could respond to Aboriginal and Torres Strait Islander peoples held on remand or serving short sentences of imprisonment?*

Tailored behaviour modification and education programmes are critical. The most important areas include:

- counselling;
- financial management education;
- the impact of the offending on the victim, community, family etc; and
- education regarding family violence, drugs and alcohol.

Proposal 5–2 *There are few prison programs for female prisoners and these may not address the needs of Aboriginal and Torres Strait Islander female prisoners. State and territory corrective services should develop culturally appropriate programs that are readily available to Aboriginal and Torres Strait Islander female prisoners.*

Agreed.

Question 5–2 *What are the best practice elements of programs for Aboriginal and Torres Strait Islander female prisoners to address offending behaviour?*

The most critical element is that any programme is selected based on the individual's needs. The cause of the offending should be considered along with the best way to support the person on release. There should be housing support and education in relation to foetal alcohol spectrum disorders.

Proposal 5–3 *A statutory regime of automatic court ordered parole should apply in all states and territories.*

Agreed, however any automatic regime should still give the Court discretion to take unique factors into account relevant to the individual and be conditional on increased support for people released on parole.

The Society notes that many Aboriginal prisoners do not apply for parole because it can be too easy to breach parole conditions due to the limited support received on release. The system can in some cases set the person up for failure.

There is also a lack of legal support for parole paperwork due to lack of funding and many parole applications are rejected due to the parole plans being insufficient.

Question 5–3 *A statutory regime of automatic court ordered parole applies in NSW, Queensland and SA. What are the best practice elements of such schemes?*

No comment.

Proposal 5–4 *Parole revocation schemes should be amended to abolish requirements for the time spent on parole to be served again in prison if parole is revoked.*

Agreed. Parole is still part of a sentence and is often not an easy road for the offender.

6. Fines and Driver Licences

Proposal 6–1 *Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.*

Agreed.

Question 6–1 *Should lower level penalties be introduced, such as suspended infringement notices or written cautions?*

Yes. It is noted that these penalties would likely be at police decision-making level and subject to police discretion; however, having more available lower penalty options would in any event be beneficial.

Question 6–2 *Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how?*

Yes. There should be the ability for fines to be reduced based on the circumstances of the offender. The current system is biased against economically and socially disadvantaged people.

Question 6–3 *Should the number of infringement notices able to be issued in one transaction be limited?*

Yes. Where the offences arise out of a single set of circumstances, the total amount of the notices should reflect the circumstances and seriousness of the offences.

Question 6–4 *Should offensive language remain a criminal offence? If so, in what circumstances?*

No. Offensive language should not be a standalone offence. It should only be capable of criminal sanction where it forms part of a more serious set of circumstances giving rise to a breach of the peace.

Question 6–5 *Should offensive language provisions be removed from criminal infringement notice schemes, meaning that they must instead be dealt with by the court?*

N/A – offensive language should not be a standalone offence.

Question 6–6 *Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.*

Yes.

Proposal 6–2 *Work and Development Orders were introduced in NSW in 2009. They enable a person who cannot pay fines due to hardship, illness, addiction, or homelessness to discharge their debt through:*

- *community work;*
- *program attendance;*
- *medical treatment;*
- *counselling; or*
- *education, including driving lessons.*

State and territory governments should introduce work and development orders based on this model.

Agreed.

Question 6–7 *Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?*

Yes.

Question 6–8 *What mechanisms could be introduced to enable people reliant upon driver licences to be protected from suspension caused by fine default? For example, should:*

(a) recovery agencies be given discretion to skip the licence suspension step where the person in default is vulnerable, as in NSW; or

(b) courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?

N/A – suspension caused by fine default should not be available.

Question 6–9 *Is there a need for regional driver permit schemes? If so, how should they operate?*

Yes. These schemes should operate for all non-metropolitan areas. They should also be administered locally as, at least in Western Australia, each community will differ as to what is required. There should be capacity for a variety of testing options depending on the individual's needs.

A general lack of identification documents can be a significant problem for some Aboriginal and Torres Strait Islander people and can often prevent them from being eligible to apply for a driver's licence. This has flow on effects, as it can lead to charges for driving without a licence and possible subsequent incarceration. The lack of photo identification can also mean that those Aboriginal and Torres Strait Islander people are not even able to access their mail and this can mean that housing notices or Court papers are not received.

Question 6–10 *How could the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities be improved?*

Schools should play a role in assisting students to obtain their driver's licences. There is currently too high a burden on parents. The Law Society supports the suggestions in paragraph 6.100 of the Discussion Paper in that regard.

7. Justice Procedure Offences—Breach of Community based Sentences

Proposal 7–1 *To reduce breaches of community-based sentences by Aboriginal and Torres Strait Islander peoples, state and territory governments should engage with peak Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community-based sentencing options and support services.*

Agreed.

8. Alcohol

Question 8–1 *Noting the link between alcohol abuse and offending, how might state and territory governments facilitate Aboriginal and Torres Strait Islander communities, that wish to do so, to:*

(a) develop and implement local liquor accords with liquor retailers and other stakeholders that specifically seek to minimise harm to Aboriginal and Torres Strait Islander communities, for example through such things as minimum pricing, trading hours and range restriction;

(b) develop plans to prevent the sale of full strength alcohol within their communities, such as the plan implemented within the Fitzroy Crossing community?

It is noted that local liquor accords have been successful in the Kimberley, and the Law Society supports the initiatives that have been implemented in Western Australia. However any accord must not be imposed – it must be something that the community wants and the community need to be involved in the implementation.

Question 8–2 *In what ways do banned drinkers registers or alcohol mandatory treatment programs affect alcohol-related offending within Aboriginal and Torres Strait Islander communities? What negative impacts, if any, flow from such programs?*

It is noted that the current implementation of such initiatives in WA has been discriminatory. These measures should apply equally to every person in the community, not just to the Aboriginal people.

9. Female Offenders

Question 9–1 *What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?*

It has been reported that in cases of family violence, women can be so afraid that their children will be removed from the family that there is a tendency to not report violence.[5] Better support for women in this regard is crucial.

The Law Society also notes the Women Lawyers of Western Australia *20th Anniversary Review of the 1994 Chief Justice's Gender Bias Taskforce Report* (September 2014)[6] and in particular chapter nine of that report relating to 'Women and Punishment'. The report makes a number of important recommendations, which the Society supports.

10. Aboriginal Justice Agreements

Proposal 10–1 *Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.*

Agreed.

Question 10–1 *Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?*

Yes. The Law Society supports the position of the Law Council of Australia.

11. Access to Justice Issues

Proposal 11–1 *Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.*

Agreed.

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[5] The Sydney Morning Herald, '*Your baby or your safety: the terrible choice facing too many Indigenous women*', 30 July 2017, available at <http://www.smh.com.au/comment/indigenous-babies-the-next-stolen-generation-20170727-gxkg8m.html>

[6] Available at: <http://www.wlwa.asn.au/2014_GenderBiasReviewReport_September2014.pdf>

Question 11–1 *What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?*

The Law Society notes the success of the Koori and Murri Courts. However, Western Australia implemented an Aboriginal Sentencing Court in Kalgoorlie in 2006. This Court no longer exists. An evaluation of the Court in 2009 found that the Court was under-resourced, and stated:

> There is considerable goodwill and positive affect generated by those involved in the project and that the program as designed is good practice and therefore, if operating as designed, has the capacity to improve outcomes; however, operating without sufficient supports, the one-half to three-quarters of an hour that the client spends within the Community Court is insufficient to result in sustained behavioural change.[7]

These courts can be problematic in that if they are not sufficiently resourced, they can be merely tokenistic. Another issue is that sometimes community court panellists are not paid for their work, or are not paid at a fair rate.

These courts seem to work best in close knit communities where the offenders have respect for the community and the Elders.

The Law Society notes that the Aboriginal Legal Service of Western Australia supported the Community Courts in Western Australia and advocated for a roll out of similar courts throughout WA, particularly in remote communities (subject to various recommendations).[8]

Proposal 11–2 *Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.*

Agreed.

Question 11–2 *In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?*

Aside from increased funding (and, in particular, from the state governments), legal service providers would benefit from increased autonomy in deciding which matters to provide assistance to.

Proposal 11–3 *State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.*

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[7] Shelby Consulting, Evaluation of the Aboriginal Sentencing Court of Kalgoorlie, Final Report, 16 October 2009, available at <http://www.courts.dotag.wa.gov.au/_files/Kalgoolie_Sentencing_Court_Report.pdf>

[8] Aboriginal Legal Service of Western Australia (Inc), Submission to the WA Attorney General on the Aboriginal Community Courts Kalgoorlie-Boulder and Norseman, June 2009, available at <http://www.als.org.au/wp-content/uploads/2010/08/publications_Submissions_Aboriginal_Community_Courts_WA.pdf>

Agreed. The Law Society strongly supports the Custody Notification Service that has been implemented in NSW and the ACT. This service should be expanded to be available all states and territories.

12. Police Accountability

Question 12–1 *How can police work better with Aboriginal and Torres Strait Islander communities to reduce family violence?*

Specially designated liaison officers with specialised training in family violence issues should be funded.

Question 12–2 *How can police officers entering into a particular Aboriginal or Torres Strait Islander community gain a full understanding of, and be better equipped to respond to, the needs of that community?*

There should be specialised cultural awareness training both at the Police Academy level and on the ground from the particular community's Elders. General human rights and cultural awareness training may also be of assistance.

Question 12–3 *Is there value in police publicly reporting annually on their enga gement strategies, programs and outcomes with Aboriginal and Torres Strait Islander communities that are designed to prevent offending behaviours?*

Yes. The Law Society notes that in its report "*There is always a brighter future: Keeping kids in the community and out of detention in Western Australia*",[9] Amnesty International recommended:

> "That the Police Manual be amended to require that a 'failure to caution notice' be prepared on all occasions where a young person is proceeded against by way of Juvenile Justice Team referral or charge; and that the form be:
>
> - provided to the legal representative of the young person appearing before the court, and to the magistrate
> - centrally recorded for data collection purposes so that the reason for the discrepancy in referral of Aboriginal and non-Aboriginal young people can be better understood."

The Law Society supports this recommendation.

Question 12–4 *Should police that are undertaking programs aimed at reducing offending behaviours in Aboriginal and Torres Strait Islander communities be required to: document programs; undertake systems and outcomes evaluations; and put succession planning in place to ensure continuity of the programs?*

Yes.

[9] Amnesty International, above n 2, 8.

Question 12–5 *Should police be encouraged to enter into Reconciliation Action Plans with Reconciliation Australia, where they have not already done so?*

Yes.

Question 12–6 *Should police be required to resource and support Aboriginal and Torres Strait Islander employment strategies, where not already in place?*

Yes.

13. Justice Reinvestment

Question 13–1 *What laws or legal frameworks, if any, are required to facilitate justice reinvestment initiatives for Aboriginal and Torres Strait Islander peoples?*

Justice reinvestment must include initiatives targeted toward addressing the underlying issues that lead to aboriginal homelessness, including sexual trauma, drug and alcohol abuse, various mental health issues and providing housing support to these vulnerable people. Given that 25% of Australia's homeless are Aboriginal or Torres Strait Islander[10], despite making up only 3% of the total population, and that homelessness has long been recognised as a factor which often leads to criminal behaviour, combatting those issues is crucial to reducing rates of crime, and therefore Aboriginal and Torres Strait Islander incarceration rates.

The Australian Institute of Criminology's (AIC) "Drug Use Monitoring in Australia program" (DUMA) has been recording information relating to homelessness since 1999. The early data shows that a one in ten people apprehended by police were homeless at the time of arrest. DUMA recently expanded its survey to capture a broader view of homelessness, including housing stress. This suggests that 22% of police detainees were experiencing homelessness prior to arrest.

The AIC's findings also suggest that though a disproportionate number of homeless people have a criminal history, their crimes are normally less-serious in nature. Living in public spaces, people who are homeless are more susceptible to committing public order offences like trespassing and public urination. Those struggling to survive living rough often report they have no choice but to participate in "survival crime" to support themselves, like shoplifting and squatting, and that they use drugs to cope with trauma, which leads them to commit other crimes to support their addiction. The AIC's study also acknowledges that "*police may specifically target homeless populations because of perceived community safety issues, or because homeless populations are more visible to street policing operations.*"

The AIC drew on these results to conduct ground-breaking research examining the factors underlying homelessness among Australian police detainees. It found a diverse range of reasons for homelessness, and that an individual, tailored approach to address underlying issues is important in reducing crime. Therefore addressing Aboriginal and Torres Strait Islander incarceration rates requires an adequate and planned response to both substance use and housing stress in tandem. Greater appreciation for the potential of Aboriginal and Torres Strait Islander homelessness

[10] ABS Census of Housing and Population 2011.

to undermine treatment retention and relapse prevention should help to inform strategies for responding quickly and in a timely fashion to homelessness. Finally, justice reinvestment should include adding support for current approaches that identify safe and secure housing as a significant priority for the successful post-release reintegration of Aboriginal and Torres Strait Islander detainees, in order to prevent reoffending.

If you wish to discuss the above further, please do not hesitate to contact me.

Yours sincerely

Alain Musikanth
President