UNIVERSITY OF CANBERRA
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1 September 2017

His Hon Judge Matthew Myers AM, Federal Circuit Court of Australia
Adjunct Professor of Law, University of New South Wales
Commissioner in Charge
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Dear Judge Myers,

Re: *Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*

Thank you for the opportunity to provide this submission to the Australian Law Reform Commission (the Commission).

I am an Associate Professor and the Head of the School of Law and Justice at the University of Canberra. I am also a member of the ACT Law Reform Advisory Council, the ACT Justice Reinvestment Advisory Group, the ACT Law Society Criminal Law Committee and the management committee of Prisoners Aid ACT. I have published extensively on a range of criminal justice issues, especially sentencing and the treatment of Aboriginal and Torres Strait Islander peoples in the criminal justice system. A summary of my most relevant research publications is set out in Appendix A.

Please find below my comments on the questions posed in the Commission's Discussion Paper.

I agree with all of the proposals set by the Commission (**Proposals 2-1, 2-2, 4-1, 5-1, 5-2, 5-3, 5-4, 6-1, 7-1, 10-1, 11-1, 11-2, 11-3**). Except where otherwise stated, I also agree with each of the questions posed by the Commission.

In the context of **Question 3-1**, I draw the Commission's attention to the paper I co-wrote with Anthony and Hopkins (2015; Publication 3 in Appendix A). I note that the *Crimes (Sentencing) Act 2005* (ACT) already makes reference to cultural background in section 33(1)(m) in the following terms:

Lorana Bartels BA LLB LLM PhD GDLP GCTE
Associate Professor and Head, School of Law and Justice
University of Canberra ACT 2601
T (02) 6201 5767
E lorana.bartels@canberra.edu.au

> (1) In deciding how an offender should be sentenced (if at all) for an offence, a court must consider whichever of the following matters are relevant and known to the court:…
> (m) the cultural background, character, antecedents, age and physical or mental condition of the offender.

This therefore provides a model for other jurisdictions to emulate to ensure an offender's cultural background is taken into account as a sentencing factor. In order to ensure that the relevant systemic and background factors are appropriately recognised, however, it would be better for Australian jurisdictions to adopt the Canadian model contained in s 718.2(e) of the *Criminal Code, RSC 1985, c C-46*, which would more fully reinforce the principle of imprisonment as a sentence of last resort and the particular importance of this for Aboriginal and Torres Strait Islander peoples.

In respect of **Question 3-3** (see also **Questions 3-4, 3-5)**, it is clear from analysis of sentencing decisions (see eg Anthony, Bartels and Hopkins 2015 (Publication 3); Lewis, Hopkins and Bartels 2013 (Publication 5)) and anecdotal evidence that some courts do not have adequate information available to consider offenders' background, including relevant cultural and historical factors. The ACT is about to pilot a model based on the 'Gladue report' approach in Canada. This is likely to provide important insights into how to communicate relevant considerations, including the impacts of intergenerational trauma, to courts in an effective and efficient way. In order to ensure that the reports are considered independent, they should ideally be prepared by an organisation run by Aboriginal and Torres Strait Islander people, but not one definitively associated with the defence (eg, Aboriginal Legal Services), as this would likely undermine their perceived impartiality and credibility.

As I have previously noted (Bartels 2015; see Publication 2), judicial education on cultural issues relating to Aboriginal and Torres Strait Islander peoples is generally voluntary (except for in South Australia, where it is mandatory for all new staff). Other jurisdictions should also consider making such training – including the systemic issues that affect Aboriginal and Torres Strait Islander peoples – mandatory for judicial and court officers.

In the context of **Question 4-1(b)**, a review of all offences relating to assaulting police that result in mandatory or presumptive sentences should be prioritised.

Proposal 4-1 calls for governments to work with relevant peak organisations to ensure community-based sentences are more readily available. In this context, I draw the Commission's attention to the potential relevance of an intensive probation program developed in Hawaii, Hawaii's Opportunity Probation with Enforcement (HOPE). The program can briefly – if incompletely – described as follows:

> HOPE … relies on swift and certain, but modest, sanctions to improve compliance.

> The probationers are warned in open court that if they violate probation rules they will immediately go to jail. During this warning hearing, probationers are assigned a color. Probationers are required to call a hotline each weekday morning to hear whether their color is being called for a random drug test that day. Random drug testing occurs at least six times a month for the probationer's first two months in the program (testing frequency is reduced in response to good performance). If probationers test positive, they are arrested immediately. If they fail to appear for the test or violate other terms of probation, an arrest warrant is issued immediately. Violators are sentenced to a short jail term, typically a few days. Repeat offenders are ordered into drug treatment. (Hawken A (2012), 'Lessons from a field experiment involving involuntary subjects 3000 miles away', *Journal of Experimental Criminology*, 8: 227-239, 228).

The National Institute of Justice funded a randomised-controlled trial evaluation comparing 330 high-risk drug offenders on HOPE with 163 similar offenders on standard probation (Hawken A and Kleiman M (2009), *Managing drug involved probationers with swift and certain sanctions: Evaluating Hawaii's HOPE,* National Institute of Justice). Compared with the control group, HOPE offenders were:

- 55% less likely to be arrested for a new crime;
- 53% less likely to have their probation revoked;
- 72% less likely to test positive for illegal drugs; and
- 61% less likely to miss appointments with their probation officers.

Offenders on HOPE also spent 48% fewer days in prison.

In *Arresting Incarceration—Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014), Don Weatherburn, the Director of the NSW Bureau of Crime Statistics and Research (BOCSAR), wrote approvingly about the potential for this program to reduce the over-imprisonment of Aboriginal and Torres Strait Islander peoples.

I have written extensively on this program:

- Bartels L (2015a), 'Swift and certain sanctions: Does Australia have room for HOPE?', *The Conversation*, 17 June https://theconversation.com/ swift-and-certain-sanctions-does-australia-have-room-for-hope-40158
- Bartels L (2015b), 'Swift and certain sanctions: Is it time for Australia to bring some HOPE into the criminal justice system?' *Criminal Law Journal*, 39: 53-66
- Bartels L (2016), 'Hawaii's Opportunity Probation with Enforcement (HOPE) program: Looking through a therapeutic jurisprudence lens', *QUT Law Review*, 16: 30-49

- Bartels L (2017), *Swift, certain, and fair: Does Project HOPE provide a therapeutic paradigm for managing offenders?* Palgrave Macmillan

In my first significant article on this program, I noted that:

> If a HOPE-style project were to be developed in Australia, a balance would need to be struck between adherence to the core tenets of the HOPE model, and the desirability of ensuring the program is appropriate for the Australian justice system and informed by consultation with relevant stakeholders. The implications for Indigenous offenders would also need to be considered carefully, although the program may have the potential to reduce their over-representation in custody (Weatherburn 2014: 111). Any pilot program that includes a significant number of Indigenous offenders should be developed in consultation with relevant community representatives (Bartels 2015b: 65).

After I wrote this article, Alm visited Australia, including the Northern Territory, in August 2015. This prompted the then Northern Territory Attorney-General to commit to a pilot program modelled on HOPE. The final report of the National Ice Taskforce, released in December 2015, recommended that:

> The Commonwealth Government should work with at least one state or territory government to pilot a Swift and Certain Sanctions programme for ice offenders on probation, drawing on lessons learned from implementing these models in the United States, including the Hawaii Opportunity Probation with Enforcement Project trial in Hawaii.

In response, the Council of Australian Governments agreed that the Northern Territory will 'pilot the Swift, Certain and Fair Sanctions model and share the results with other jurisdictions' (Bartels 2016: 31, references omitted).

As set out in Bartels (2017: 174-175, references omitted), the Northern Territory Department of Correctional Services subsequently scoped the viability of trialing a program modeled on HOPE and sent representatives from the Northern Territory Government to Hawaii to see HOPE in action. A steering committee was established in January 2016, chaired by a Supreme Court judge and including representatives from correctional services, police, policy, defense counsel and prosecutors. It also includes representatives from the North Australian Aboriginal Justice Agency and Central Australian Aboriginal Legal Aid Service. A 12-month pilot program, Compliance Management or Incarceration in the Territory (COMMIT), commenced in June 2016. Anecdotal evidence indicates that the program is supported by judicial officers and participants. In August 2017, the Northern Territory Government passed legislation to enable the COMMIT program to be extended to parolees (see McLennan C, 'New parole laws passed', *Katherine Times*, 23 August 2017 http://www.katherinetimes.com.au/story/4873728/new-parole-laws-passed/).

The aspects of HOPE I reported on in Bartels 2016 related to my visit to Hawaii to observe HOPE in action. This demonstrated to me that the features that I and others had previously

commented on, namely, the court's swift, certain and proportionate sanctions model, told only part of the story. The program also featured many aspects of drug courts and adopted the principles of therapeutic jurisprudence. Significantly, the judge provided extensive encouragement, praise and support to participants. For example, he made statements such as 'Good work!', 'I'm impressed!', 'Wow, you're doing a really good job!', 'What awesome work', 'You can do this!', and 'I think you're going to go great on this' (see Bartels 2016; 2017: Chapter 3). In the words of a former HOPE participant I met during my visit to Hawaii.

> [Judge Alm] is like your parent. … He taught me about consequences and rewards…Without HOPE, I think I'd still be using drugs. The monitoring, the calling. Probation had to come first, before family, work, study. I just got my life in order…I don't have any criticism. I think it's a great program. He's really encouraging. I never got praise like this in my life. He makes it really easy for us to get into that mode of success ... HOPE is the best…He makes you want to change your behavior. He would encourage me. He gives me self-esteem. He was really firm…He had hope in us. He really wanted us to make it…He believes we can change ... .HOPE Probation is saving a lot of lives (cited in Bartels 2017: 51).

In light of this, the program model may hold significant promise for Aboriginal and Torres Strait Islander populations *if* it is implemented as intended, that is, as a therapeutic program that supports and encourages participants. In addition, there may be scope to adapt the program so that it utilises non-custodial sanctions in response to violations. When I discussed the the pilot program in the Northern Territory with Alm during my visit, we considered how participation in a cultural awareness program could be used as a sanction and might help to reduce incarceration, but also acknowledged the challenges of making sure such a response is delivered in a way that is both swift and certain (see Bartels 2017: 175). The findings from the COMMIT pilot will provide important lessons about the application of the HOPE model in an Australian context. Importantly, given the Northern Territory's particular population composition and traditionally high imprisonment rates, these findings will have particular relevance for the scope of the Commission's present inquiry.

I have included a copy of Bartels (2016) for the Commission's consideration. Copies of Bartels 2015a, 2015b and 2017 are available on request.

In the context of **Proposal 5-3**, the Commission should be aware of recent research by BOCSAR, which found that NSW offenders released on court-ordered parole were more likely to reoffend than those released by the State Parole Authority (see Stavrou E, Poynton S and Weatherburn D, *Parole release authority and re-offending*, Crime and Justice Bulletin No 194, BOCSAR). This does not negate the proposal, but may suggest that additional

support is required for offenders released on court-ordered parole to reduce their chances of reoffending.

There is abundant evidence about the discriminatory impact of offensive language provisions. In response to **Question 6-4**, I strongly suggest that this offence be removed in all jurisdictions (as is already the case in South Australia, Tasmania and the ACT).

In respect of **Question 11-1** and **11-2**, there is a clear need for adequate ongoing funding for appropriate diversionary options and legal services. Governments across Australia have a poor record of defunding programs, including those that appear to be working effectively. A recent example of this is the decision to cease funding for the 'Bush Mob' program in the Northern Territory (see Sorensen H, 'NT rehabilitation centre BushMob shuts down', *NT* News, 13 July 2017 http://www.ntnews.com.au/lifestyle/nt-rehabilitation-centre-bushmob-shuts-down/news-story/8dacc2f7226b2d29fab9fdd035c0927f; see also Bartels 2010a (Publication 12) in the context of funding for programs for women).

Question 12-3 asks about the value in police publicly reporting on their engagement strategies, program and outcomes with Aboriginal and Torres Strait Islander communities (see also **Question 12-4**). The risk in such contexts is that this will be done in a tokenistic way. As I have noted previously, 'there is a critical need for ongoing *independent* evaluation of policing agencies to ensure more than mere lip service to the RCIADIC recommendations and contribute to lasting improvements by police in relation to Indigenous people' (Bartels 2012: 193 (Publication 6)).

I hope these comments are of assistance. I am happy to expand on anything in this submission as required.

Yours sincerely

LBartels

Lorana Bartels

Appendix A: Bartels' publications on Aboriginal and Torres Strait Islander peoples in the criminal justice system

1. Bartels L, Bolitho J and Richards K (2016), 'Indigenous young people and the New South Wales Children's Court: Magistrates' perceptions of the Court's criminal jurisdiction', *Australian Indigenous Law Review*, 19: 34-44. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028546

This article explores the perceptions of New South Wales (NSW) Children's Court magistrates concerning the issues and challenges facing Indigenous young people coming before the Court in its criminal jurisdiction. Drawing from the NSW component of a national study into Australia's Children's Courts, 12 in-depth, semi-structured interviews were thematically analysed. The main challenges for Indigenous young people in the Court are considered and magistrates' attitudes to potential court reform explored, with a specific focus on Indigenous youth sentencing courts. The NSW findings are contextualised within the broader findings on Indigenous young people from the national study of the Children's Courts.

2. Bartels L (2015), *Indigenous-specific court initiatives to support Indigenous defendants, victims and witnesses*, Brief No 17, Indigenous Justice Clearinghouse. https://www.indigenousjustice.gov.au/publications/indigenous-specific-court-initiatives-to-support-indigenous-defendants-victims-and-witnesses/

This brief highlights some current initiatives in operation in Australian courts which seek to make the court process more responsive to the needs of Indigenous participants, along with some examples from New Zealand and Canada. Further sources of support, for example Aboriginal legal and victim support services and judicial education, including judicial benchbooks, are also considered, along with issues around language and communication. While it is acknowledged that most of the initiatives described have not been formally evaluated, some initiatives have been identified as examples of good or promising practice which can provide lessons for policy makers.

3. Anthony T, Bartels L and Hopkins A (2015), 'Lessons lost in sentencing: Welding individualised justice to Indigenous justice', *Melbourne University Law Review*, 39: 1-28. http://www.austlii.edu.au/au/journals/UTSLRS/2015/23.pdf

Indigenous offenders are heavily over-represented in the Australian and Canadian criminal justice systems. In the case of *R v Gladue*, the Supreme Court of Canada held that sentencing judges are to recognise the adverse systemic and background factors that many Aboriginal Canadians face and consider all reasonable alternatives to imprisonment in light of this. In *R v Ipeelee*, the Court reiterated the need to fully acknowledge the oppressive environment faced by Aboriginal Canadians throughout their lives and the importance of sentencing courts applying appropriate sentencing options. In 2013, the High Court of Australia handed down

its decision in *Bugmy v The Queen*. The Court affirmed that deprivation is a relevant consideration and worthy of mitigation in sentencing. However, the Court refused to accept that judicial notice should be taken of the systemic background of deprivation of many Indigenous offenders. The High Court also fell short of applying the Canadian principle that sentencing should promote restorative sentences for Indigenous o enders, given this o - present deprivation and their over-representation in prison. In this article, we argue that *Bugmy v The Queen* represents a missed opportunity by the High Court to grapple with the complex interrelationship between individualised justice and Indigenous circumstances in the sentencing of Indigenous offenders.

4. Spiranovic C, Clare J, Bartels L, Clare M and Clare B (2015), 'Aboriginal young people in the Children's Court of Western Australia: Findings from the National Assessment of Australian Children's Courts', *University of Western Australia Law Review*, 38: 86-116. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2586825

This article presents the findings of recent research involving stakeholders in the Children's Court of Western Australia (CCWA). This research found that the needs of Aboriginal children and their families are not being properly addressed due to resource deficiencies, especially in rural and remote areas. There was a clear awareness that the CCWA is responding to behavioural symptoms of disenfranchisement and poverty amongst Aboriginal people, and that solving these deeply embedded systemic issues was beyond the scope of the CCWA. The urgent need to address systemic issues in an inclusive and empowering way was also identified.

5. Lewis C, Hopkins A and Bartels L (2013), 'The relevance of Aboriginality in sentencing: Findings from interviews in the ACT, in P Easteal (ed), *Justice connections*, Cambridge Scholars Publishing, 37-59. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295815

This chapter explores the way in which Aboriginality is taken into account in the sentencing process to shed light on an offender's background, reasons for offending and prospects for rehabilitation. It examines the approach taken by courts in the ACT and the impact of pre-sentence reports. The paper concludes that, though pre-sentence report writers are in a unique position to explore and illuminate the relevance of post-colonial Aboriginal identity in the sentencing process, present experience in the ACT indicates this is not being done. It is argued that this exploration and illumination should be undertaken in the interests of ensuring equal justice.

6. Bartels L (2012), 'Twenty years on: Indigenous deaths in custody and lessons from the frontline', in I Bartkowiak-Théron and N Asquith (eds), *Policing vulnerability*, Federation Press, 181-197. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188718

This chapter highlights the key findings of the Royal Commission into Aboriginal Deaths in Custody relevant to police operations. It then presents the most recent data available on Indigenous deaths in police custody and, on the basis of publicly available information,

considers some of the steps Australian state and territory police have taken to implement the Commission's recommendations.

7. Bartels L (2012), 'Painting the picture of Indigenous women in custody in Australia', *Queensland University of Technology Law and Justice Journal*, 2: 1-17. https://lr.law.qut.edu.au/article/view/487

This article seeks to paint the contemporary picture of Indigenous women in custody in Australia. In particular, the article presents and analyses the most recent data available on prisoner numbers, imprisonment rates, age, sentence length, offence type and recidivism. The article then considers some of the characteristics of Indigenous female prisoners, including their physical and mental health, their role as mothers, and their exposure to family violence. The implications of Indigenous women's representation and circumstances in Australian prisons are also examined.

8. Bartels L (2012), 'Violent offending by and against Indigenous women', *Indigenous Law Bulletin*, 8(1): 19-22. http://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/IndigLawB/2012/27.html

This paper considers the issue of Indigenous women and violence - both the violence they perpetrate and the violence they experience. As will be discussed further below, however, most Indigenous women who offend are themselves victims, and the nexus between offending and victimisation must therefore be considered. The paper also examines current and future responses to this violence and victimisation.

9. Bartels L (2012), *Sentencing of Indigenous women*, Brief No 14, Indigenous Justice Clearinghouse. https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/brief014.pdf

In this research brief the sentencing of Indigenous women in Australia is examined. Quantitative and qualitative data on sentencing patterns and practices are presented in relation to Indigenous women in Australia, although the limitations of these data should be acknowledged (see Bartels 2010a; 2010b; forthcoming a; Manuell 2009 for discussion). Some examples of non-custodial and custodial sentencing options for Indigenous women in Australia are discussed. A brief overview of Indigenous women's offending patterns will also be presented, along with relevant developments in Canada and New Zealand.

10. Bartels L (2011), *Police interviews with vulnerable adults*, Research in Practice No 21, Australian Institute of Criminology. http://www.aic.gov.au/publications/current%20series/rip/21-40/rip21.html

In this paper, some of the key issues police are likely to encounter when dealing with

vulnerable adult suspects are considered and an overview of the Australian legislation and police policies governing police interviews in such circumstances is presented.

11. Bartels L and Gaffney A (2011), *Good practice in women's prisons: A literature review*, Technical and Background Paper No 41, Australian Institute of Criminology, 92 pp. http://www.aic.gov.au/publications/current%20series/tbp/41-60/tbp041.html

Good prison practices are essential for the wellbeing of prisoners and the wider community. Not only do they provide assistance to one of the most disadvantaged and vulnerable groups within society, but they also benefit the wider community by providing adequate support and services to a group of people who will ultimately return to the community. The purposes of incarceration not only include retribution, punishment, deterrence and incapacitation, but also rehabilitation. In order for a prison to achieve this, it is essential to have prison practice models that support reintegration, facilitate personal development and reduce recidivism rates. In this paper, the literature concerning examples of good practice in women's prison systems in Australia is reviewed. Key international developments are also considered, although it is acknowledged that the potential for transfer of such models may at times be limited.

12. Bartels L (2010a), *Diversion programs for Indigenous women*, Research in Practice No 13, Australian Institute of Criminology, 1-12. http://www.aic.gov.au/publications/current%20series/rip/1-10/13.html

This paper discusses diversion programs available for Indigenous women throughout all stages of the criminal justice system in Australia, New Zealand and Canada and shows that there is a scarcity of programs and reliable information on the effectiveness of such programs.

14. Bartels L (2010b), *Emerging issues in domestic and family violence research*, Research in Practice No 10, Australian Institute of Criminology, 1-11. http://www.aic.gov.au/publications/current%20series/rip/1-10/10.html

This paper presents an overview of the key emerging issues in Australian domestic and family violence research. In particular, the paper considers this research in the context of gay, lesbian, bisexual, transgender and intersex communities; the elderly; those with disabilities; people from culturally and linguistically diverse backgrounds; Indigenous communities; homelessness; the impact on children; and issues around perpetrator programs.

15. Bartels L (2010c), *Indigenous women's offending patterns: A literature review*, Research and Public Policy Series No 107, Australian Institute of Criminology, 47 pp. http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp107.html

This report is a literature review on Indigenous women's offending patterns and therefore

provides an important contribution to understanding an often neglected area of criminal justice. The report presents information on Indigenous women as offenders and prisoners, as well as considering the issue of over-policing, including for juvenile Indigenous females. Data are also presented on community corrections and periodic detention and the under-utilisation of juvenile diversion. The majority of information in the report relates to Indigenous women as prisoners, including information on imprisonment rates and numbers. Significantly, the rate of imprisonment of Indigenous women across Australia rose from 346 to 369 per 100,000 between 2006 and June 2009. In addition, Indigenous women outnumbered Indigenous men as a proportion of the relevant prison population in almost all jurisdictions. Indigenous women generally serve shorter sentences than their non-Indigenous counterparts, which suggests that Indigenous women are being imprisoned for more minor offences, especially public order offences. Indigenous women are also more likely to be on remand than non-Indigenous women. The characteristics of Indigenous female prisoners are considered in this report, with particular reference to the comparatively high rates of hospital admissions for mental disorders and post-release mortality rates. Examination of Indigenous women's role as mothers and carers highlights the need for further research and relevant services. Policing, court and corrections data provide an overview of the types of offences committed by Indigenous women, with particular reference to the offences of public drunkenness, assault and homicide. The relationship between Indigenous women's offending patterns and their exposure to family violence is explored and highlights the need for further examination.