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Dear Commissioner Myers,

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 a Senior Lecturer at the Australian National University College of Law, where I teach Criminal Law and Evidence. I am also a criminal defence barrister practicing in the Australian Capital Territory. I was admitted to practice in Alice Springs in the Northern Territory where I worked for the Central Australian Aboriginal Legal Aid Service and the Northern Territory Legal Aid Commission. As a barrister in the ACT, I have a continued association with the Aboriginal Legal Service (NSW/ACT), accepting briefs and providing advice. I also play an advisory role for students who volunteer at the ALS.

My PhD was, in part, focused on the importance of 'paying particular attention' to the experience of Aboriginal and Torres Strait Islander offenders in the sentencing process in pursuit of the principle of equality, and equality before the law. I have produced a number of research publications on the topic.

I have made submissions to and appeared before an ACT Standing Committee on Justice and Community Safety *Inquiry Into Sentencing*. The submission and evidence given related to the need to enshrine a requirement to pay particular attention to the experience of Aboriginal and Torres Strait Islander offenders, and also to the need to establish a pre-sentence report mechanism, akin to 'Gladue' reports that are used in Canada, to enable the story of the person before the court to be connected to, and understood within the context of, the story of their people.

A summary of my relevant research publications, together with links, is set out in Appendix A. A copy of the submission made to the ACT *Inquiry into Sentencing* is included with this submission. I continue to

hold the views expressed in that submission. The report of the ACT *Inquiry into Sentencing* is included with this submission (Refer to Recommendations 18, 20 and 21). Also included is the ACT Government Response to the *Inquiry* (see 18, 20 and 21).

Overarching Submission:

Paying Particular Attention of the Experience of Aboriginal and Torres Strait Islander People

1. Each year statistics relating to incarceration continue to present a grim, and worsening, picture of the experience of Aboriginal and Torres Strait Islander peoples with and within the criminal justice system. Each year we are incarcerating more and more Aboriginal and Torres Strait Islander people, and further, disproportion in the rates of imprisonment and detention continues to increase. If this trend is to be reversed, we will need to recognise that there has been a failure to understand and respond to the experience of Aboriginal and Torres Strait Islander people at every stage at which they interact with the criminal justice system.

2. Recognition of this failure to understand and respond to the experience of Aboriginal and Torres Strait Islander people amounts to a denial of equality. Part of any remedy for this should be a whole of criminal justice system principle that requires those enacting criminal law, policing those laws or applying them *to pay particular attention to* the experience of Aboriginal and Torres Strait Islander people.

3. This principle is founded on a frank acknowledgement of failure. It is remedial and should not be understood as establishing 'race' or 'status' based differential treatment. Such a principle is an imperative to engage with the lived experience of individuals, understood within the context of the experience of their people. This is consistent with the interpretation given to the principle as it exists in Canada with respect to sentencing pursuant to s 718.2(e) *Criminal Code, RSC 1985*. With respect to the requirement to 'pay particular attention' in sentencing, the Supreme Court of Canada in *R v Ipeelee*[1] held:

> Section 718.2(e) does not create a race-based discount on sentencing. The provision does not ask courts to remedy the overrepresentation of Aboriginal people in prisons by artificially reducing incarceration rates. Rather, sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case. This has been, and continues to be, the fundamental duty of a sentencing judge. *Gladue* is entirely consistent with the requirement that sentencing judges engage in an individualized assessment of all of the relevant factors and circumstances, including the status and life experiences, of the person standing before them. *Gladue* affirms this requirement and recognizes that, up to this point, Canadian courts have failed to take into account the unique circumstances of Aboriginal offenders that bear on the sentencing process.[2]

On this analysis, paying particular attention to the different experiences of Indigenous Canadians is required by fidelity to the principle of equality before the law. That is, the justification *for paying particular* attention is a systemic failure to give *sufficient (or equal)*

[1] *R v Ipeelee* [2012] 1 SCR 433 [118] ('*Ipeelee*').
[2] Ibid [75].

attention to these experiences. In so far as this failure extends beyond sentencing, a requirement to pay particular attention can be extended to facilitate remediation.

4. In my view there is little doubt that there has been a failure, at every stage of the criminal justice system, to pay sufficient attention to the experience of Aboriginal and Torres Strait Islander people(s). Accordingly, establishing principles and mechanisms across that system to promote understanding and engagement with this experience is a necessary step to remedying the failure. Further, this understanding – connecting the story of a person to the story of their people – should be seen as a foundation for collaborative solutions that draw upon and develop the strengths existing in Aboriginal and Torres Strait Islander communities

5. An explicit recognition of survival and strength counteracts the tendency for Indigeneity to be considered as synonymous with disadvantage. This deficit model is profoundly disempowering. The analysis given by the High Court in *Bugmy* [17] with respect to the relevance of Aboriginality in sentencing tends to emphasize this deficit model (See discussion at Pg 71 and following of Anthony, Bartels and Hopkins).

6. Understanding experience must be seen as a platform for genuine criminal justice partnerships between communities and agencies and actors in the criminal justice system. Thus, paying particular attention requires identifying and engaging with individual and community strengths borne of a history of survival, identity and pride.

Genuine Criminal Justice Partnerships

7. Understanding, through paying particular attention, is a platform for solutions, but it is not sufficient in and of itself to achieve these solutions. In so far as it is acknowledged that there has been a failure at every point of the criminal justice system to understand Aboriginal and Torres Strait Islander people and communities, this opens the way to working to deepen this understanding and *respond* with targeted, resourced, community driven or endorsed initiatives.

8. Such responses should be considered and targeted at each point at which interaction occurs with the criminal justice system. These responses cannot simply arise from the justice system itself and the institutional actors within it. This is a critical part of the problem faced. Instead of a justice system that engages and supports the interests, insights and initiatives of Aboriginal and Torres Strait Islander communities, too often the system simply acts upon rather than with.

9. To take an example: policing can be understood as policing *of* a community or policing *with* a community. The Commissioner has already identified a number of examples of policing *with* community initiatives (ie in Redfern and Burke). There are far too many examples of counterproductive policing *of* communities documented from at least the time of the RCIADIC, often associated with the phenomena of over-policing and under-policing.

10. The point I seek to make is that at every point of interaction with the justice system, whether it be policing, bail, sentencing, parole and reintegration, there is an opportunity to work with community in genuine criminal justice partnerships. This requires fostering relationships and funding community initiatives, not as pilots but as long-term solutions, and providing research support to enable evaluation.

11. The burden should not be placed on the Aboriginal and Torres Strait Islander community to fund programs that have the potential to provide solutions. Responsibility ultimately lies with the successive governments under whose watch the rates of incarceration and disproportion in incarceration have increased. This is not to say that communities and individuals should not be empowered to take responsibility and supported to do so, but that, whichever way one looks at the issue, it is a systemic consequence of state action or inaction across generations.

Specific Responses to the Commission's Discussion Paper Proposals and Questions:

12. **Proposals 2-1 and 2-3:** I agree that these are important proposals consistent with the need to remedy a failure to pay sufficient attention to the experience of Aboriginal and Torres Strait Islander people in relation to bail and remand. These issues are most significant given the extent and increase in the remand population Australia wide. However, understanding the circumstances of Indigenous offenders at this point must be coupled with genuine resourcing to address the issues, including bail support and accommodation.

13. **Question 3-1:** Agree. All jurisdictions should legislate a requirement that courts *pay particular attention to systemic and background factors affecting Aboriginal and Torres Strait peoples*. Ideally this should be done in a similar way to Canada, making it somewhat akin to an overarching sentencing principle, rather than simply adding it as a factor. However, even were this to be added as a specific factor to be considered, it would be a significant advance.

14. Drawing on lessons from Canada, it should be acknowledged that a requirement to pay particular attention is itself insufficient if there is no or limited evidence before the court that links the experience of a particular offender to the experience of their people. This is the key point to be taken from *Bugmy*. Unless there is evidence before the court of the systemic and background factors at work in the life of the individual offender, a requirement to pay particular attention to that experience will be ineffective. As stated by the majority:

> *Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indices, ... to recognise this is to say nothing about a particular Aboriginal offender.*

15. With respect to the question of whether a 'pay particular attention' principle or provision would be racially discriminatory within the meaning of the *Racial Discrimination Act*, I refer to the analysis above and in publications in Appendix A with respect to understanding that equality has been denied. Also, I endorse and commend the arguments and views expressed in the **thesis submitted to the Commission by Ronan Casey on 17 August 2017**. I was the supervisor of this thesis and agree with the opinions expressed and analysis undertaken by Mr Casey.

16. **Question 3-2:** Agree generally but do not have a specific submission. A focus on reparation and restorative justice is consistent with my understanding of the views of many Indigenous peoples when it comes to healing. Healing in this context can be understood as healing of victim, offender and community.

17. **Question 3-3:** See 3-1 above and publications. Courts do not generally have sufficient evidence about Aboriginal and Torres Strait Islander offenders to enable them to pay particular attention to the systemic and background factors operating in the life of those offenders. This information must focus on shining a light on the person's path to offending but also on identifying culturally relevant pathways to desistance and healing.

18. **Question 3-4:** See 3-3 above and publications. Following discussions with Jonathan Rudin https://www.legalaid.vic.gov.au/about-us/news/aboriginal-expertise-key-to-ending-over-representation-in-justice-system-says-canadian-expert it is clear that it is important that these reports should not be considered as akin to 'expert reports' with contestable conclusions. Instead, they should aim to set out the raw lived experience of the offender, in the offender's words, and the words of family members whom the offender nominates for the writer to speak with. This evidence of raw experience is then set amidst reference to the background and systemic factors at play in the lives of members of the offender's community more generally, with this material coming from unimpeachable sources. It is then for the judicial officer, assisted by legal submissions, to draw the connection between the experience of the person and the experience of their people. This evidence can be relevant to the exercise of the sentencing discretion in myriad ways (see Hopkins 2012).

19. In order for such reports not to become further instances of the justice system acting upon rather than with Aboriginal and Torres Strait Islander communities, report writers should either be Aboriginal or Torres Strait Islander people, or, at minimum, the reports should be prepared with the input of members of those communities. The core attribute of the report writer is the capacity to engage with the offender, assisting them to tell their story and have it told through trusted family or community members. Cultural safety is paramount. Finally, these reports must seek to identify pathways to desistance and healing, recognising that understanding is only part of the picture and that culturally appropriate support and action is required to address the cycle of recidivism.

20. Having regard to questions arising in relation to taking judicial notice of the experience of Aboriginal and Torres Strait Islander peoples, in my view, it is important that knowledge of this experience is drawn from documents 'the authority of which cannot reasonably be questioned' (see s 144(1)(b) Uniform Evidence Law). Government statistics and Royal Commission and other Inquiry Reports provide such knowledge.

21. Moreover, in my view, the concern expressed by the High Court in *Bugmy* is not with taking judicial notice of facts relating to the experience of Aboriginal and Torres Strait Islander peoples generally, but in taking judicial notice of those facts as existing in, or having shaped, the life of the particular offender. Thus the concern is the link between individual and group experience, not with facts relating to group experience. This is addressed in (Anthony, Bartels and Hopkins, 2015).

22. **Question 3-5:** In my view, such reports should not be prepared by correctional services, though if a specialist unit was set up within correctional services, this would still be a significant advance on the current position. That said, it is essential that the organisation responsible for preparation of the reports has a close relationship with correctional services and all other relevant program and service providers.

23. I recognise that there are valid partisanship concerns with a proposal that Aboriginal and Torres Strait Islander Legal Services (ALS) host report writers, due to the fact that writer and defence counsel will then come from the same organisation. This differs from Canada where the ALS equivalent does not provide defence counsel for the sentencing process. Success depends on the sentencing courts and prosecutors accepting the legitimacy of these reports.

24. An alternative would be hosting the writers within an Aboriginal and Torres Strait Islander organisation such as one that provides medical, wellbeing or justice services. The advantage of this would be that the writers will then be well placed to engage with rehabilitation and wellbeing programing.

25. Finally, an alternative, which I consider optimal, is that the report writers be attached to existing Aboriginal or Torres Strait Islander courts, expanding the function and reach of the expertise that has already developed in and around such courts. It is imperative, though, that the reports are not simply prepared for these specialist courts.

26. Funding should be provided by State, Territory or Commonwealth governments, in acknowledgement of the successive failure to pay sufficient attention to the experience of Aboriginal and Torres Strait Islander offenders, and in recognition that facilitating offenders to take steps towards desistance and healing provides significant benefits to the whole community.

27. **Question 4-1:** Mandatory or presumptive sentences contravene the principle or equality by preventing sentencing courts from taking an individualised approach. In effect, they require unlike cases to be treated as like. All such provisions should be reviewed, with priority given to review and abolition of any mandatory sentences that relate to offending which does not involve personal violence.

28. **Question 4-2:** There is merit in considering the abolition of short sentences. However, this should not be done unless it can be achieved with a clearly expressed legislative intent that the measure is designed to reduce reliance on imprisonment as a sentence. Otherwise there is a very real risk it will simply see offenders being locked up for longer than they otherwise would.

29. Also, it is essential that any abolition of short sentences not prohibit solution focused or therapeutic justice initiatives such as judicial supervision in drug courts or otherwise (see submission of Lorana Bartels in relation to HOPE). In such programs, short sentences may be imposed, for example, in circumstances where a person missed a drug test or tested positive. The offender then has an opportunity to be released and continue in the program. It is noted that such programs may be consistent with the abolition of short sentences where they involve a suspended sentence that is above the minimum. In such a situation, the short prison term is not a discrete short sentence, but a short-term lifting of the suspension.

30. **Question 4-3:** I do not have a particular view.

31. **Question 4-4:** I do not have a particular view, though I support the funding and expansion of non-custodial alternatives and see this as more important than any minimum term restriction. The key is to have viable alternatives to prison. Where such viable alternatives exists, it is my experience that judicial officers are not generally reluctant to construct a sentence to enable participation.

32. **Proposal 4-1:** Agree. This is critical to establishing viable and effective criminal justice partnerships (discussed above).

33. **Question 4-5:** No particular view. However, in so far as mandatory minimums or presumptive sentences exist, they restrict flexibility. Also, if a principle of ‘paying particular attention’ was enacted, and if this was linked, as it is in Canada, to incarceration as a last resort, this would support flexible tailoring of sentences.

34. **Proposals and Questions 5-12:** I agree with all of the proposals set by the Commission (**Proposals 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.

35. **Police Accountability:** I commend the submission of Tamar Hopkins to the Commission with respect to racial profiling, stop and search powers and the importance of establishing reporting mechanisms for all interactions between police and members of the Aboriginal and Torres Strait Islander communities. The recommendations made by Ms Hopkins are integral to establishing a culture of open policing *with* community, assisting to facilitate the development of trust and respectful relationships.

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

Yours sincerely

Anthony Hopkins

Appendix A: Hopkins' publications on Aboriginal and Torres Strait Islander peoples and Sentencing

1. 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.

2. 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.

3. Hopkins A, "The Relevance of Aboriginality in Sentencing: 'Sentencing a Person for Who They Are'" (2012) 16(1) AILR 37 http://www.austlii.edu.au/au/journals/AUIndigLawRw/2012/3.pdf

   This article predates *Bugmy* but draws upon judicial decisions that remain critical to understanding the ways in which the experience of Indigenous offenders have been and can be taken into account. It argues that whilst sentencing law permits background and systemic factors of Indigenous offenders to be taken into account as being relevant in sentencing, there is often an absence of evidence informing the court of this experience. It argues that the pursuit of equal justice points us to the experience in Canada with respect to the need to ensure that evidence of Indigenous experience is before the court.