

# SUBMISSION TO LAW REFORM COMMISSION

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## I ABSTRACT

It was acknowledged over a decade ago that Aboriginal and Torres Strait Islander people are disadvantaged with respect to health, employment and incarceration levels.<sup>1</sup> The Attorney-General of Australia furthermore announced in his media release last year that the imprisonment rate of Indigenous Australians still remains over-represented throughout prisons nationwide.<sup>2</sup> Since then, research on this matter has undertaken and the Law Reform Commission has called for submissions into the inquiry of the incarceration rates of Indigenous people.<sup>3</sup> In this paper I will present my submission by firstly discussing the issue of alcohol-related offences by Indigenous Australians and how section 7(1)(g) of the *Aboriginal Communities Act 1979* (WA) (“Section 7(1)(g)”) aims to target those offences and consequently reduce incarceration. I also address what the rule of law doctrine is and conclude that Section 7(1)(g) does comply with its key principles. Then I will explain how Section 7(1)(g) is actually ineffective in targeting Indigenous alcohol abuse and rather contributes to the over-representation of incarceration rates. Lastly, I will present the findings of my own research regarding a solution, and discuss my recommendations for a new scheme to target alcohol-related offences. The final report of the ‘Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities’ by the Senate Standing Committee on Indigenous Affairs amongst other resources were considered when drafting this paper and will be referred to throughout it in support of my submission.

## II BACKGROUND INFORMATION

The Standing Committee on Indigenous Affairs revealed that the incarceration rate for Indigenous people is a lot higher than the rate for non-Indigenous people.<sup>4</sup> The overall rate of binge drinking by

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<sup>1</sup> National Drug Strategy Reference Group for Aboriginal and Torres Strait Islander Peoples, ‘National Drug Strategy: Aboriginal and Torres Strait Islander Peoples Complementary Action Plan 2003-2009’ (Report, Ministerial Council on Drug Strategy, May 2006) 18.

<sup>2</sup> The Attorney-General of Australia George Brandis MP and Minister for Indigenous Affairs Nigel Scullion ‘ALRC Inquiry Into Incarceration Rate of Indigenous Australians’ (Joint Media Release, 27 October 2016) 1 <<https://www.attorneygeneral.gov.au/MediaReleases/Pages/2016/FourthQuarter/ALRC-inquiry-into-incarceration-rate-of-indigenous-australians.aspx>>.

<sup>3</sup> Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84 (2017) 31.

<sup>4</sup> Senate Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 2.

Indigenous Australians is also over-represented,<sup>5</sup> and although binge-drinking is not an offence alone, it is associated with many offences and can act as the gateway to committing them. In 2009 it was found that alcohol was a related factor in 90% of domestic homicides involving Indigenous people.<sup>6</sup> Also, the health of Indigenous Australians were acknowledged by the Standing Committee on Indigenous Affairs to be poorer than non-Indigenous people.<sup>7</sup> Thus it is important that we aim to prevent alcohol abuse amongst Indigenous Australians not only to target related offences and reduce their rates of incarceration, but to also maintain their health. Keeping people imprisoned furthermore costs a great deal of taxpayers' money,<sup>8</sup> and so it is evidently vital that something needs to be done to avert the Indigenous from being incarcerated. The Attorney-General's terms of reference requested that laws must be considered which contribute to the rate of incarceration.<sup>9</sup> Section 7(1)(g) aims to target issues of alcohol-related offences leading to incarceration, as it provides that Aboriginal community councils may make by-laws about the restriction or regulation of the use or supply of alcohol. There have been several bans implemented in Western Australia through this provision, such as the liquor restrictions in Fitzroy Crossing and in Karratha.<sup>10</sup> However, as will be uncovered throughout my paper, the report by the Standing Committee on Indigenous Affairs along with other publications support that Section 7(1)(g) has only contributed to the over-representation of Indigenous incarceration and they also demonstrate the current gaps in our knowledge about an effective solution. First I will explain the rule of law and analyse whether Section 7(1)(g) complies with it.

### III THE RULE OF LAW

The 'rule of law' is a doctrine which has no fixed meaning, however entails various different things and is relied on by many nations to guide legal and political frameworks of a democratic society.<sup>11</sup> A deeper look into the doctrine will find that the overall purpose of it is to place restrictions on legal rules and government powers, so that all citizens and government officials are bound by the law and

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<sup>5</sup> Brian Pink, 'Australian Social Trends' (Catalogue No 4102.0, Australian Bureau of Statistics, 23 March 2011) 28

<sup>6</sup> Anthony Morgan and Amanda McAtamney, 'Key Issues in Alcohol-Related Violence' (Research Summary Paper No 4, Australian Institute of Criminology, December 2009) 3.

<sup>7</sup> Senate Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 30.

<sup>8</sup> Margaret Giles, Lisa Paris and Jacqui Whale. 'The Role of Art Education in Adult Prisons: The Western Australian Experience' (2016) 62(6) *International Review of Education* 689, 689.

<sup>9</sup> The Attorney-General of Australia George Brandis MP, *Terms of Reference: ALRC Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (10 February 2017) Australian Law Reform Commission <<https://www.alrc.gov.au/inquiries/indigenous-incarceration/terms-reference>>.

<sup>10</sup> Senate Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 47.

<sup>11</sup> Pietro Costa and Danilo Zolo (eds), *The Rule of Law: History, Theory and Criticism* (Springer, 2007) 4.

no one person is above it.<sup>12</sup> The Law Council of Australia in their 2011 policy statement addressed key principles of the doctrine, which includes that Australian laws must not discriminate and must apply evenly to people of all sex, races, religions and ages.<sup>13</sup> Other principles of the doctrine include that laws must be clear,<sup>14</sup> and that everyone is entitled to a fair and public trial.<sup>15</sup>

It may appear that Section 7(1)(g) does not comply with the rule of law, being it applies to Indigenous people only and being the report by the Senate Standing Committee found that alcohol restrictions on Indigenous communities may come across as marginalisation.<sup>16</sup> However, this provision is merely a form of positive discrimination, meaning a law employed to progress a disadvantaged group.<sup>17</sup> Section 8 of the *Racial Discrimination Act 1975* (Cth) asserted through reference to the International Convention on the Elimination of all Forms of Racial Discrimination,<sup>18</sup> that special measures taken for the purpose of securing advancement of certain racial or ethnic groups will not be deemed racial discrimination. As was previously stated, Indigenous Australians tend to be disadvantaged with respect to employment opportunity, education, health services and particularly imprisonment levels.<sup>19</sup> Thus it can be concluded that Section 7(1)(g) is a special measure created for the purpose of improving Indigenous incarceration rates. The judgment in *Maloney v The Queen* addressed a matter relating to prohibition, and confirmed that a legal framework allowing an alcohol ban in the Indigenous community of Palm Island was a special measure taken for the purposes of citizens to enjoy security against alcohol-related offences, thus it was not discriminatory.<sup>20</sup> This case attracted a lot of media attention, particularly the ABC news report in which Watt backed up the decision and made clear that the ban was not racist, as it intended to promote the best interests of the Indigenous culture and health.<sup>21</sup> Thus Section 7(1)(g) complies with the rule of law and does not breach its key principle that laws must not be discriminatory and must apply evenly. It does however contribute to Indigenous imprisonment rates.

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<sup>12</sup> Augusto Zimmerman, *Western Legal Theory: History, Concepts and Perspectives* (LexisNexis Butterworths, 2013) 83.

<sup>13</sup> Directors of the Law Council of Australia, 'Rule of Law Principles' (Policy Statement, Law Council of Australia, 19 March 2011) 2.

<sup>14</sup> *Ibid* 2.

<sup>15</sup> *Ibid* 3.

<sup>16</sup> Senate Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 11–12.

<sup>17</sup> Duncan Watts, *A Glossary of UK Government and Politics* (Edinburgh University Press, 2007) 199.

<sup>18</sup> International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 4.

<sup>19</sup> National Drug Strategy Reference Group for Aboriginal and Torres Strait Islander Peoples, 'National Drug Strategy: Aboriginal and Torres Strait Islander Peoples Complementary Action Plan 2003-2009' (Report, Ministerial Council on Drug Strategy, May 2006) 18.

<sup>20</sup> (2013) 252 CLR 168, 306.

<sup>21</sup> Elizabeth Watt, 'Is It Racist to Ban Alcohol from Some Aboriginal Communities?', *ABC News* (online) 18 December 2012 < <http://www.abc.net.au/news/2012-12-18/watt-booze-bans-the-principle-and-practice/4433434>>.

#### IV THE CONTRIBUTORS TO INDIGENOUS INCARCERATION RATES

This segment analyses how alcohol bans such as those implemented through Section 7(1)(g) play a role in the over-representation of Indigenous incarceration, and acknowledges other socio-economic factors that contribute. Although it is self-evident that Section 7(1)(g) aims to target alcohol-related offences and reduce incarceration, various research disputes its effectiveness. The report by the Standing Committee on Indigenous Affairs noted that while prohibition on wine reduced its consumption, there was an increase in beer consumption instead.<sup>22</sup> A submission to the aforementioned Standing Committee also found that when alcohol bans are in place, members of the community still find ways to buy it, whether it involves buying from illegal sellers or even travelling to areas where there is no ban.<sup>23</sup> It was confirmed in the final report by the Committee that prohibition only displaces the problem elsewhere.<sup>24</sup> Research undertaken for the National Drug Research Institute at Curtin University additionally found that alcohol restrictions cause issues such as the increasing abuse of other drugs.<sup>25</sup> This was affirmed by the Senate Standing Committee's report which noted that drug use will increase when alcohol is unavailable.<sup>26</sup> The Committee's report also referred to a submission to their initial inquiry,<sup>27</sup> which found that parents in Fitzroy Crossing travelling to other areas to buy alcohol resulted in them leaving children at home to do so, or taking them out of school to go with them and consequently committing offences of child neglect and abuse.<sup>28</sup> These studies therefore corroborate the ineffectiveness of Section 7(1)(g) and demonstrate that instead of reducing alcohol related-offences, it has only led to other wrongdoings. The Attorney-General has acknowledged however that apart from legal frameworks such as these which contribute to the Indigenous incarceration rate, there are other social, economic and historic factors which do so.<sup>29</sup> The Senate Standing Committee on Indigenous Affairs made clear that one of the contributors of alcohol abuse leading to incarceration is poor education and lack of access to

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<sup>22</sup> Senate Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 126.

<sup>23</sup> Shire of Halls Creek, Submission No 81 to Senate Standing Committee on Indigenous Affairs, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities*, 17 April 2014, 5.

<sup>24</sup> Senate Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 38.

<sup>25</sup> Tanya Chikritzhs, Dennis Gray, Zaza Lyons and Sherry Saggars, 'Restrictions on the Sale and Supply of Alcohol: Evidence and Outcomes' (Research Paper, National Drug Research Institute, 2007) 144.

<sup>26</sup> Senate Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 88.

<sup>27</sup> *Ibid* 14.

<sup>28</sup> Leedal Pty Ltd, Submission No 18 to Senate Standing Committee on Indigenous Affairs, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities*, 11 April 2014, 10.

<sup>29</sup> Attorney-General of Australia, *Terms of Reference: ALRC Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (10 February 2017) Australian Law Reform Commission <<https://www.alrc.gov.au/inquiries/indigenous-incarceration/terms-reference>>.

health services.<sup>30</sup> The government must focus on evidence-based, health-focused solutions for reducing alcohol associated offences and incarceration rates, rather than using inadequate strategies such as alcohol restrictions.<sup>31</sup>

## V RECOMMENDATIONS

The Attorney-General requested information regarding effective legal frameworks that reduce Indigenous incarceration.<sup>32</sup> After close consideration of the discussed publications, a gap in research and knowledge is evident. Early-intervention is a strategy not considered in much depth in the Senate Standing Committee's report or the Law Reform Commission's Discussion Paper, which is perhaps a sign that we need to regard it as a potential solution to target the over-representation of Indigenous incarceration. The Senate Standing Committee did suggest that interventions with younger people entailing education and training can be highly effective, however they did not explore that approach.<sup>33</sup> A study published in 2010 found that early-intervention targeting alcohol problems were successful for both Aboriginal and non-Aboriginal people.<sup>34</sup> My proposal thus involves making mandatory early-intervention (involving alcohol education) mandatory for Indigenous children during their early teens. The Wirrpanda Foundation is just one of the many types of government supported organisations able to facilitate interventions, as they provide services to improve the wellbeing and quality of life for Indigenous Australians.<sup>35</sup> The Attorney-General's terms of reference furthermore requested for research into alternatives to custody,<sup>36</sup> and since intervention is clearly effective in preventing wrongdoing, another suggestion is to direct those offenders into alcohol rehabilitation rather than sending them to prison. My recommendations target the advancement of Indigenous people by aiming to improve their health and reduce incarceration rates. Although they

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<sup>30</sup> Senate Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 3.

<sup>31</sup> Gillian Triggs and Robynne Quiggin, 'Social Justice and Native Title Report 2016' (Report, Australian Human Rights Commission, 19 October 2016) 54.

<sup>32</sup> Attorney-General of Australia, *Terms of Reference: ALRC Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (10 February 2017) Australian Law Reform Commission <<https://www.alrc.gov.au/inquiries/indigenous-incarceration/terms-reference>>.

<sup>33</sup> Senate Standing Committee on Indigenous Affairs, Parliament of Australia, *Inquiry into the Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities* (2015) 67.

<sup>34</sup> Christopher Mushquash, M Comeau, Brian McLeod and Sherry Stewart, 'A Four-Stage Method for Developing Early Interventions for Alcohol Among Aboriginal Adolescents' (2010) 8(2) *International Journal of Mental Health and Addiction* 296, 305.

<sup>35</sup> Wirrpanda Foundation, *About Us* <<https://www.wf.org.au/about>>.

<sup>36</sup> Attorney-General of Australia, *Terms of Reference: ALRC Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (10 February 2017) Australian Law Reform Commission <<https://www.alrc.gov.au/inquiries/indigenous-incarceration/terms-reference>>.

only apply to Aboriginal and Torres Strait Islander people, they represent a special measure aimed to target the disadvantaged group and so as previously discussed, they comply with the rule of law.

## VI CONCLUSION

Section 7(1)(g) clearly aims to implement alcohol bans and reduce the Indigenous over-representation of alcohol-related offences and incarceration rates. Although it seems discriminatory, my discussion shows that it upholds the rule of law. However, its operation has evidently failed. My analysis demonstrates that the report by the Standing Committee of Indigenous Affairs, amongst other studies, respond to the Attorney-General's terms of reference by revealing that these alcohol bans placed are legal frameworks which instead contribute to the high rates of Indigenous incarceration. However, the aforementioned resources demonstrate gaps in existing research and knowledge relating to alcohol abuse and effective solutions. Thus my recommendations are worth considering. In relation to placing my early-intervention provision into statute, it would be most appropriate to insert it into the *Australian Education Act 2013* (Cth) or the *School Education Act 1999* (WA) while the rehabilitation provision could be inserted into the *Aboriginal Communities Act 1979* (WA) or any sentencing act.

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