

4 September 2017

The Executive Director
Australian Law Reform Commission
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Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples¹

Thank you for the opportunity to contribute to the Australian Law Reform Commission's consideration of this important topic of inquiry. What follows is a brief submission in response to some of the proposals and questions posed in the Discussion Paper, together with other observations about matters we consider appropriately fall within the Commission's terms of reference.

Caxton Legal Centre Inc.

Established in 1976, Caxton Legal Centre is Queensland's oldest community legal centre. Since inception, criminal law and policing have been key features of our advice and advocacy work. We maintain a watching brief on the use of police powers and have written various law reform submissions on the impact of public order policing over the years.

A. Scale of reforms required to address a 'National Tragedy'

Clearly a 'business as usual' approach to law reform in this area will not deliver the significant changes required to successfully address what the Attorney General George Brandis QC has identified as a 'national tragedy'.

A comprehensive 'whole of Government' approach is required to address the entrenched disadvantage and underlying causes of incarceration through programs in areas including:

- Justice;
- Health (including mental health);
- Education (including early childhood education);
- Housing;

¹ In this submission we have used the terms Indigenous, Aboriginal, and Aboriginal and Torres Strait Islander people, interchangeably. No offence is intended to any person or group through the use of these terms.

- Employment;
- Family violence;
- Alcohol and drug dependency; and
- Child protection.

Accordingly, in our view the ALRC's recommendations of law reform initiatives to reduce incarceration of Aboriginal people need to be framed within a National Plan aimed at broadly addressing Indigenous disadvantage.

As the 10 year Closing the Gap policy comes to an end in December 2017, it is an opportune time for the development of such a National Plan.

B. Governance Issues - A legal framework underpinned by political goodwill

The Terms of Reference call for consideration of the '*laws and legal frameworks including legal institutions and law enforcement that contribute to the incarceration rate of Aboriginal and Torres Strait Islander peoples*'. Within these terms of reference we consider the Commission could and should specifically consider appropriate changes to the Australian Constitution to establish a national Indigenous representative body, as recommended in the 2017 National Constitutional Convention's Uluru Statement, which called for a First Nations Voice to be enshrined in the Constitution 'to empower our people to take a *rightful place* in their own country.'²

A national Indigenous representative body could play a critical role in the development and oversight of a National Plan.³ The creation of such a representative body following a successful referendum to amend the Constitution would of course require political will. However, a successful referendum outcome would also create significant goodwill within both the general Australian community and importantly within Aboriginal communities throughout Australia. The lack of any such "political urgency" has been noted as the source of the failure of previous attempts by a Government to reduce incarceration levels.⁴

We also consider it would be appropriate for the Commonwealth Government to revisit and fund a social justice and economic package as recommended in a report commissioned by then Prime Minister Paul Keating following the *Mabo* decision. This package, intended to accompany the *Native Title Act 1993* but subsequently abandoned, aimed at compensating Aboriginal and Torres Strait Islanders for dispossession, dispersal and lost revenue arising out of non-Indigenous use of

² Referendum Council, Statement of the First Nations Constitutional Convention, *Uluru Statement From the Heart*, 26 May 2017

³ Including a potential role in the scrutiny of legislation for likely impacts on over-representation of Aboriginal and Torres Strait Islander people.

⁴ Cunneen, 'Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement', (2006) 10(4) AILR at 98.

land.⁵ The introduction of such a compensation package could serve to resource Aboriginal and Torres Strait Islander Australians and facilitate some of the components of the National Plan including self-determined responses to over-incarceration.

C. Strategies to curtail over-policing of non-violent crimes

We consider that the related issues of over-policing and poor relationships between police and Aboriginal communities warrants deeper consideration by the ALRC.

It is well established that Indigenous people are charged with low level criminal offences at grossly disproportionate rates compared to non-indigenous individuals.⁶ Furthermore offences arising out of the use of public space continue to make up a vast majority of arrests in Queensland⁷ and have 'significant implications for relations between police officers and members of the public.'⁸ There are also established links between the accumulation of low level 'gateway offences' and the commission of more serious offences and consequent terms of imprisonment.⁹

Whilst a common police response to such statistics is that the charges would not be brought if the offences were not committed, the inescapable conclusion is that a major contributing factor to the over-representation of Aboriginal people in prison is the unrestrained exercise of police discretion to bring charges which has become axiomatic to the normative policing of Aboriginal communities in remote, regional and urban settings.

The Discussion Paper and Inquiry terms of reference identify 'historic factors' as contributing to incarceration, however the link between such history and over-policing of public order offences warrants specific attention.¹⁰

Since the establishment of the Queensland Police Force in 1863, the police have been critical actors at the interface of various official and unofficial policies directed at the dispossession and subsequent 'management' of Aboriginal and Torres Strait Islander people. Given the history of lethal force, which saw tens of thousands of Aboriginal men, women and children killed by Queensland police during the mid to late 19th century, and the subsequent primary role of police in the administration of the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897*,

⁵ Native Title Social Justice Advisory Committee, 'Rights Reform and Recognition' (Aboriginal and Torres Strait Islander Commission, 1995, 4.32, 4.36, 4.40).

⁶ Tamara Walsh, 'Poverty, Police and the Offense of Public Nuisance' (2008) 20.2 *Bond Law Review*, 17.

⁷ Queensland Treasury, *Recorded crime – offenders Queensland, 2014 – 5* (24 February 2016) Queensland Government Statistician's Office <<http://www.qgso.qld.gov.au/products/reports/recorded-crime-offenders/recorded-crime-offenders-2014-15.pdf>>.

⁸ Tamara Walsh, 'Poverty, Police and the Offense of Public Nuisance' (2008) 20.2 *Bond Law Review*, 17.

⁹ Tamara Walsh, 'No Offence: The Enforcement of Offensive Language and Offensive Behaviour Offences in Queensland' (University of Queensland, 2006) 14.

¹⁰ Rob White (2002) 'Indigenous Young Australians, Criminal Justice and Offensive Language', *Journal of Youth Studies*, 5:1, 21-34.

it is unsurprising that the relationship between Queensland's Indigenous community and police has been fraught in many communities.

The impact of this continuing dynamic on the relationship between state power and Queensland's Indigenous communities remains unaddressed .

An Aboriginal Justice Agreement, signed by Premier Beattie in 2000, committed to halving the rate the Indigenous imprisonment by 2010, yet provided inadequate actions or resources to address relationships between Aboriginal people and police. By 2006 the rate of Indigenous imprisonment in Queensland had in fact increased.¹¹

In 2007 the Queensland Police Union's unqualified support for Sgt Chris Hurley during his trial for the manslaughter of Mulrinji, included evocative televised images of hundreds of uniformed police officers attending a large meeting at the Broncos Leagues Club adorned with arm bands embossed with Hurley's police rank number. The damaging effect of such a public display of political power was not confined to individual Indigenous police officers¹² and had a substantial negative impact on relations between police and Indigenous communities throughout Queensland.

In more recent history, there are examples of the continuing prominent role of police in remote Aboriginal communities including in matters unrelated to the justice portfolio, such as the closure of educational facilities¹³, and the refusal of Queensland Police to offer an apology to the residents of Palm Island despite a Federal Court finding that the actions of riot police were racially discriminatory.¹⁴

Reforms within the area of police accountability should consider requirements to encourage police to exercise discretion to divert offenders, such as introducing a requirement to table in parliament annual reports identifying the cost to the justice system of bringing charges for public order offences against Indigenous people.

D. Strategies to limit the impact of new laws and police powers

The Discussion Paper has not sought input about the impact on incarceration rates of legislative decision making processes. Rather than relying upon police and the judiciary to stem the tide of over- incarceration, attention must be given to the role of parliaments, in particular State

¹¹ It does not appear that a final evaluation was conducted.

¹² The role this incident played in the termination of Indigenous police officer, Matt Bond's career, was depicted in *Through American Eyes*, broadcast by ABC on 27 June 2017, <http://www.abc.net.au/foreign/content/2016/s4692630.htm>

¹³ On 26 May 2016, in the wake of the closure of a school the Courier Mail reported that the Queensland Government intended to appoint police officer Senior Sergeant Brendan McMahon as senior government co-ordinator. <http://www.couriermail.com.au/news/queensland/aurukun-leaders-say-there-needs-to-be-zero-tolerance-by-police-following-second-teacher-evacuation/news-story/0263c30a50f4ab8ab43306eba03ba65f>

¹⁴ *Wotton v State of Queensland (No 5)* [2016] FCA 1457.

governments, which are more susceptible to populist law and order agendas. In this regard of particular concern is the impact on incarceration rates of the introduction of new offences, changes to criminal justice procedure and expanded police powers.

Human rights legislation can play an important role in the scrutiny of new laws. The ALRC 'Freedoms Inquiry' report quoted a submission from the Law Council of Australia suggesting that the role of preparing statements of compatibility could be given to an independent body such as the Australian Human Rights Commission.¹⁵ A similar proposal might be to also provide this role to the proposed national Indigenous representative body as a mechanism for providing a voice in the Australian Parliament (see above).

We recommend reviewing and strengthening parliamentary committee processes throughout Australia to ensure the impact of new laws on Aboriginal and Torres Strait Islander communities is given a full and proper consideration before passage rather than a perfunctory and superficial assessment.¹⁶ We are also strongly of the view that there is a need to adopt domestic human rights legislation 'against which government policies can be benchmarked'.¹⁷

Summary

Front and centre in any consequential plan to reduce indigenous incarceration must be measurable actions designed to shift the behavioural norms of police officers to ensure discretion is exercised to divert Indigenous people from the criminal justice system. Naturally, these actions must be accompanied by:

- resourcing of the engagement of Aboriginal communities in the development and implementation of community justice initiatives and other disadvantage redress schemes;
- a proportionate commitment under a long term National Plan to resourcing diversionary programs such as justice reinvestment initiatives, mental health screening¹⁸ etc.;
- demonstrated 'change agent' public leadership amongst the highest levels of Australia's justice portfolios, law enforcement agencies and Aboriginal and Torres Strait Islander communities;

¹⁵ Traditional Rights and Freedoms—Encroachments by Commonwealth Laws, ALRC Report 129 at 3.75. Law Council of Australia, *Submission 140*. This was supported in Civil Liberties Australia, *Submission 94*.

¹⁶ Recent changes to Queensland's parliamentary committee system removed a committee dedicated to scrutiny of legislation against "fundamental legislative principles". "As a consequence, the more technical questions of law, including many that will have a significant impact on rights and liberties, are often given comparatively less focus". Renee Easten, Queensland's Approach to the Scrutiny of Legislation, July 2016, p6.

¹⁷ ABC Radio National, 'We have a government that's ideologically opposed to human rights', *Radio National Breakfast*, 26 July 2017 (Gillian Triggs) < <https://radio.abc.net.au/programitem/pgrGamOIPG?play=true>>, 1:59.

¹⁸ See Lubica Forsythe and Antonette Gaffney, 'Mental disorder prevalence at the gateway to the criminal justice system' Trends & issues in crime and criminal justice no. 438 Australian Institute of Criminology, July 2012.

- other structural reforms to incentivise changed behaviour by all of those involved in affecting incarceration reduction outcomes;
- Justice Targets, at National and State levels, with independent transparent monitoring and reporting mechanisms;¹⁹
- Strengthening of legislative scrutiny processes through the adoption of human rights legislation; and
- Changes to police training and recruitment practices including the paid engagement of local Indigenous people in the development and delivery of police training and community orientation of new police.

We are happy to provide supplementary submissions on the above matters or to consult further with the ALRC on those topics.

This submission was prepared by Ms Melody Valentine, Solicitor, and the writer. For further information, please contact the writer on 07 3214 6333.

Yours faithfully,



Scott McDougall
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¹⁹ E.g. such as by the independent Office of the Auditor-General.

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.

‘But we must understand that Australia’s success has had a price – and surely the highest price has been paid by Aboriginal and Torres Strait Islander Australians. They often paid with their lives; with their rights, their dignity and happiness; with their land.’

Paul Keating²⁰

1. When assessing whether a person is an unacceptable risk to allow for the grant of bail in Queensland, the *Bail Act 1980* (Qld) requires the court or police officer to consider cultural considerations only where a submission has been made by a representative of the Community Justice Groups in the person’s community.²¹ Community justice groups play an important role in improving justice outcomes for Aboriginal and Torres Strait Islander Queenslanders.²² However, a 2010 review indicated that the Community Justice Group program was able to support only 25 per cent of all offenders identifying as Indigenous in Queensland in 2009/2010.²³ Additionally, in recent years many significant justice initiatives such as the Murri Court have been subject to defunding and refunding at the whim of successive governments. In this context, consideration of cultural factors by bail authorities are impacted upon by both the reach of the Community Justice Group program and the goodwill of incumbent State governments to adequately fund such programs.
2. Given this, we are supportive of the proposal to widen the scope of the bail legislation, including the *Bail Act 1980* (Qld), to include consideration of cultural factors more broadly, as per the proposal, and without the need for reports to be submitted. We are also supportive of ensuring that Community Justice Groups are adequately funded, such that their reach can be extended whilst the broader legislative requirement account for the interim shortfall in bail report services.
3. As noted above, we are also of the view that there is a need for wider systemic reform,

²⁰ Paul Keating, *Mabo – An Address to the Nation*, 15 November 1993.

²¹ *Bail Act 1980* (Qld), s 16(2)(e).

²² Michael Limerick, ‘Indigenous Community Justice Groups: the Queensland Experience’ (2002) 8 *Australian Law Reform Commission Journal*, 15 – 21.

²³ KPMG, *Evaluation of the Community Justice Groups*, Department of Justice and Attorney General, November 2010 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0003/88905/evaluation-of-the-community-justice-group-program.pdf>, 4.

including the introduction of stronger legislative review processes to require genuine consideration of the impact of new laws on Aboriginal and Torres Strait Islander communities. Further submission on executive reform is set out in paragraph [10] below. By way of example, we recently made a submission to the Queensland Legal Affairs and Community Safety Committee regarding proposed amendments to the *Bail Act 1980* (Qld) which reversed the onus of proof in breach of domestic violence related offences.²⁴ Our view was that there was a ‘clear risk that if a reverse onus provision was legislated, many individuals would be refused bail and would spend much longer in custody on remand than a sentence that they might receive upon conviction’. Given that Aboriginal and Torres Strait Islander adults represent around one third of those arrested for breach of bail, we are particularly concerned about the impact on those defendants.²⁵ Despite our submissions, these changes were enacted.

4. Further, systemic and legislative reform must be considered as only one facet of change required to improve bail outcomes for Aboriginal and Torres Strait Islander offenders. A 2017 report from PricewaterhouseCoopers recommends a ‘comprehensive, co-ordinated and holistic approach, which involves leadership and partnership from the Federal, state and territory governments to shift more investment into preventative and early intervention approaches’ and suggests a broad suite of community based approaches to reducing imprisonment rates.²⁶ Similarly, submissions to the Independent Inquiry into Youth Detention in Queensland recommended the need for investment in community based bail programs, wrap-around community services and justice reinvestment programs to ensure the success of re-integrating remand populations into the community.²⁷ We are supportive of the appropriate allocation of resources in those areas.

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 affective 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?

5. The *Penalties and Sentences Act 1992* (Qld) allows submissions made by a Community Justice Group about an Aboriginal and Torres Strait Islander offenders ‘relationship to ... community ... any cultural considerations’ and availability of programs run by the

²⁴ <https://www.parliament.qld.gov.au/documents/committees/LACSC/2017/BDVAAAB2017/submissions/024.pdf>.

²⁵ Queensland, *Annual Statistical Review 2015/2016*, Queensland Police Service, 2016
<https://www.police.qld.gov.au/corporatedocs/reportsPublications/statisticalReview/Documents/2015-16/AnnualStatisticalReview_2015-16.pdf>, 108.

²⁶ PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017), 7.

²⁷ Kathryn McMillan and Megan Davies, *Independent Review of Youth Detention Report* (2016), Chapter 7.

Community Justice Group to be taken into account in sentencing.²⁸ There is no explicit requirement, as per *Bugmy v The Queen* [2013] HCA 38, for a sentencing Court in Queensland to take into account the ongoing systemic and background factors that uniquely affect Aboriginal and Torres Strait Islander offenders, although the High Court decision will carry precedent weight. However, the wording of the Queensland legislation and the refusal by the High Court in *Bugmy v The Queen* 'to accept that judicial notice should be taken of the systemic background of deprivation of many Indigenous offender'²⁹ without evidence means that whilst cultural considerations, including systemic deprivation, can and will be taken into account on sentence in Queensland, they must have some evidentiary basis.

6. The evidentiary burden Aboriginal and Torres Strait Islander offenders to raise such matters has been described as 'another hurdle for usually vulnerable and disadvantaged defendants with limited resources'.³⁰ The legislative model in Queensland has also been critiqued on the basis that there here is no requirement that submissions be sought from Community Justice Groups and, if obtained, no legislative requirement on judges to accept recommendations.³¹ We are strongly in support of the need for Community Justice Groups, or their like, to be integrally involved in criminal justices because 'real change ... can only be achieved when Indigenous people have a meaningful stake in the implementation, design, delivery and evaluation of solutions'.³² However, given the limitations within the Queensland model and the refusal by the High Court in *Bugmy v The Queen* 'to accept that judicial notice should be taken of the systemic background of deprivation of many Indigenous offender'³³ there is clearly some need for legislative redress.
7. In our view, sentencing principles should explicitly take into account individual and systemic factors arising out of an offenders Aboriginal or Torres Strait Islander background because 'individualised justice requires recognition of the relevant facts'.³⁴ Such background and systemic issues could be considered broadly, in a similar manner as under

²⁸ *Penalties and Sentences Act 1992* (Qld), s 9(2)(p).

²⁹ Thalia Anthony, Lorna Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39 *Melbourne University Law Review*, 47.

³⁰ Carolyn Holdom, 'Sentencing Aboriginal Offenders in Queensland: Towards Recognising Disadvantage and the Intergenerational Impacts of Colonisation during the Sentencing Process' (2015) 15.2 *QUT Law Review*, 67.

³¹ Carolyn Holdom, 'Sentencing Aboriginal Offenders in Queensland: Towards Recognising Disadvantage and the Intergenerational Impacts of Colonisation during the Sentencing Process' (2015) 15.2 *QUT Law Review*, 67-68.

³² PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017), 9.

³³ Thalia Anthony, Lorna Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39 *Melbourne University Law Review*, 74.

³⁴ Thalia Anthony, Lorna Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39 *Melbourne University Law Review*, 74.

the Victorian Bail legislation highlighted in the Discussion Paper. Further, the adoption of *Gladue* style reports, following the Canadian model, could provide a strengthened evidentiary source for information of systemic disadvantage. Broadening the requirement for legislative consideration of such reports and adequate funding of Community Justice Groups or similar would be an important facet of any such legislative change.

Question 4–1 (a): 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?

Whatever might be said about its successes and failures, it's clear that 25 years after the Royal Commission into Aboriginal Deaths in Custody tabled its final report, Australia has become much less compassionate, more punitive and more ready to blame individuals for their alleged failings. Nowhere is this more clear than in our desire for punishment. A harsh criminal justice system – in particular, more prisons and people behind bars – has apparently become a hallmark of good government.

*Chris Cuneen*³⁵

8. It is clear that mandatory and presumptive sentences significantly and disproportionately increase incarceration rates for Aboriginal and Torres Strait Islanders.³⁶ Such laws usurp 'fundamental principles of Australia's legal system, including principles of procedural fairness, judicial precedent, the rule of law and the separation of powers.'³⁷ They also contravene Australia's international human rights obligations.³⁸ If genuine progress is to be made on the issue of over-incarceration, a starting point must be a departure from 'tough on law and order' policies that are popular with politicians but have no measurable impact on crime.³⁹
9. Queensland is the most recent state to have introduced mandatory sentencing. Sweeping changes to criminal law, including mandatory sentences, were introduced under the Liberal Government in 2012 including mandatory sentences and non-parole periods for a range of offences.⁴⁰ The impact of the changes included that they deterred guilty pleas 'resulting in

³⁵ Chris Cuneen, 'How 'tough on crime' politics flouts death-in-custody recommendations', on The Conversation, April 14 2016, <<https://theconversation.com/how-tough-on-crime-politics-flouts-death-in-custody-recommendations-57491>>.

³⁶ Dato' Param Kumaraswamy, 'Mandatory Sentencing: The Individual and Social Costs' (2001) 14 *Australian Journal of Human Rights*, 7.

³⁷ Queensland Law Society, *Mandatory sentencing laws policy position*, <http://www.qls.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper>.

³⁸ Queensland Law Society, *Mandatory sentencing laws policy position*, <http://www.qls.com.au/Knowledge_centre/Areas_of_law/Criminal_law/Mandatory_sentencing_policy_paper>, 2.

³⁹ Chris Cuneen, 'How 'tough on crime' politics flouts death-in-custody recommendations', on The Conversation, April 14 2016, <<https://theconversation.com/how-tough-on-crime-politics-flouts-death-in-custody-recommendations-57491>>.

⁴⁰ Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36 *Sydney Law Review*, 15 – 16.

more trials, occasioning more financial cost to the State, emotional cost to the victims, and longer delays for defendants in custody who may ultimately be found not guilty' and dramatically increased costs of incarceration and instances of custodial overcrowding.⁴¹ The Queensland laws were 'passed with a minimum period of consultation hardly indicative of a bona fide consultation process'⁴² by a government holding an overwhelming majority of seats, that 'could not point to any evidence to substantiate the ... measures'.⁴³ Many of these laws were subsequently repealed at enormous expense following a change in government. However, the breadth of changes, and unfettered prerogative of the government to introduce them, remain a stain on Queensland's legal landscape and a warning as to the regressive potential of unfettered executive power.

10. We are strongly in support of the need to depart from utilising mandatory and presumptive sentences. The proposal to review provisions that impose mandatory or presumptive sentences is commendable. However, respectfully, there has been sufficient legal and academic review of these laws to show that they are a failed crime reduction measure without the need for further review. In our view, Parliaments across Australia should also be required to strengthen legislative review processes such that laws are more frequently referred to parliamentary committees, and that those committees are required to genuinely consider the impact of such legislative measures on Aboriginal and Torres Strait Islander Communities enactment. A Law Society of New South Wales submission to an inquiry into the Legislative Council Committee system in that state made a number of relevant recommendations that could be adopted throughout Australia, including implementing a procedure 'similar to the procedure of the Australian Senate to ensure that bills are more regularly referred to Legislative Council committees for substantive scrutiny' and a 'scrutiny mechanism...that expressly considers the core seven human rights treaties'.⁴⁴
11. Additionally, we are of the view that the introduction of Human Rights Act at both federal and state levels, requiring legislatures to contemplate human rights obligations to which Australia is a signatory when passing legislation, would provide a further measure of protection. There are numerous international examples of the benefits of regional systems

⁴¹ Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36 *Sydney Law Review*, 15 – 16.

⁴² Andrew Trotter and Harry Hobbs, 'The Great Leap Backward: Criminal Law Reform with the Hon Jarrod Bleijie' (2014) 36 *Sydney Law Review*, 17.

⁴³ Jodie O'Leary, 'Out of Step and Out of Touch: Queensland's 2014 Youth Justice Amendments' (2014) 26.2 *Current Issues in Criminal Justice*, 159.

⁴⁴ The Law Society of New South Wales, Submission to the Inquiry into the Legislative Council Committee System, 3 March 2016, 5.

and human rights instruments that be ‘called in aid to rein in draconian sentencing legislation’.⁴⁵

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

‘Proportionately, we are the most incarcerated people on the planet. We are not innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.’

*First Nations National Constitutional Convention*⁴⁶

12. The recent Independent Review into Youth Detention in Queensland examined the issue of prison programming⁴⁷ and remand.⁴⁸ The submissions to that review almost uniformly recommended review of bail legislation, increasing bail support programs and community based programs to address remand rates.⁴⁹ Similarly, a 2013 National Research Project on Remand emphasised the need for bail programs, diversionary measures and mental health and rehabilitation facilities⁵⁰ concluding that ‘a lack of access to community-based services not only increases the likelihood of receiving custodial remand in order to receive formal support ... but may also contribute to their propensity to repeatedly reoffend.’⁵¹
13. The positive benefits of custodial programming to assist those already in contact with the justice system is not disputed.⁵² However, in our view, expenditure on remand prisoning programming remand fails to take into account the criminalising effects of imprisonment and the ‘devastating impact on individual’s resilience and self-determination’⁵³ that results from custodial time. Rather, the emphasis should be on examining strengthening community based bail programs and wrap around community reintegration services. In this

⁴⁵ Angela Ward, ‘Mandatory Sentencing and the Emergence of Regional Systems for the Protection of Human Rights’ (2001) 7.2 *Australian Journal of Human Rights*, 61.

⁴⁶ Referendum Council, Statement of the First Nations Constitutional Convention, *Uluru Statement from the Heart*, 26 May 2017

⁴⁷ Kathryn McMillan and Megan Davies, *Independent Review of Youth Detention Report* (2016), 165 – 170.

⁴⁸ Kathryn McMillan and Megan Davies, *Independent Review of Youth Detention Report* (2016), 159 – 163.

⁴⁹ Kathryn McMillan and Megan Davies, *Independent Review of Youth Detention Report* (2016), 162.

⁵⁰ Kelly Richards and Lauren Renshaw, ‘Bail and remand for young people in Australia: A national research project’ (2013) 125 *Research and Public Policy series*, Australian Institute of Criminology, 105.

⁵¹ Kelly Richards and Lauren Renshaw, ‘Bail and remand for young people in Australia: A national research project’ (2013) 125 *Research and Public Policy series*, Australian Institute of Criminology, 99.

⁵² PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017), 32.

⁵³ PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017), 40.

regard, we prefer the universal prevention⁵⁴ and justice reinvestment⁵⁵ approaches to service and program funding allocation requiring ‘the redirection of government funding from the ‘back end’ of the criminal justice system towards initiatives that are designed to strengthen communities and prevent crime. The approach is based on the premise that there are long-term cost savings for government in prevention by targeting initiatives that strengthen communities that reduce the underlying causes of crime’.⁵⁶

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

‘Chris Hurly, who had endured every insult in existence, heard something more offensive, and this time he decided not to let it go.’

Chloe Hooper⁵⁷

14. We are unequivocally in support of decriminalising offensive language provisions. It is indisputable that the offence has a disproportionate criminalising impact on Aboriginal and Torres Strait Islanders. The 1991 Royal Commission into Aboriginal Deaths in Custody made a number of recommendations related to restraining the policing of offensive language and decriminalising minor offences.⁵⁸ Twenty-six years later arrests for offensive language and other public order offences continue to soar. A devastating consequence of the failure to heed those recommendations was the 2004 arrest of Mulrinji a ‘36 year old Palm Islander man who had no significant criminal record and was known for his happy-go-lucky character’ for allegedly swearing at police officer Senior Constable Chris Hurly and who died in police custody forty minutes later sparking years of legal, emotional and social turmoil in the community.⁵⁹
15. Since 2004 offensive language has been regulated under the broader offence of public nuisance in Queensland. A person may be charged for behaving in an offensive way by using ‘offensive, obscene, indecent and abusive language’.⁶⁰ In a review prompted by concerns arising out of the introduction of a revised public nuisance offence in 2008 the (then) Crime and Misconduct Commission concluded that Aboriginal and Torres Strait Islander people

⁵⁴ PricewaterhouseCoopers, *Indigenous Incarceration: Unlock the Facts* (2017), 42.

⁵⁵ KPMG, *Unlocking the future: Maranguka Justice Reinvestment project in Bourke – Preliminary assessment*, Just Reinvest NSW, September 2016 < <http://www.justreinvest.org.au/wp-content/uploads/2016/11/KPMG-Preliminary-Assessment-Maranguka-Justice-Reinvestment-Project.pdf>>.

⁵⁶ KPMG, *Unlocking the future: Maranguka Justice Reinvestment project in Bourke – Preliminary assessment*, Just Reinvest NSW, September 2016 < <http://www.justreinvest.org.au/wp-content/uploads/2016/11/KPMG-Preliminary-Assessment-Maranguka-Justice-Reinvestment-Project.pdf>>, p viii.

⁵⁷ Chloe Hooper, *The Tall Man* (Penguin Group Australia, 2008) 24.

⁵⁸ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Volume 3, Recommendations 79 and 86.

⁵⁹ Thalia Anthony, ‘Manifestations of Moral Panics in the Sentencing of Palm Islander Lex Wotton’ (2009) 20.3 *Current Issues in Criminal Justice*, 1.

⁶⁰ *Summary Offences Act 2005* (Qld), s 6 (2)(a)(ii) and 6(3)(a).

'were over-represented as public nuisance offenders under both the old and the new offence' and that the 'use of arrest was relied upon by police in around 60 per cent of public nuisance incidents' and that Aboriginal and Torres Strait Islander offenders were more likely to be arrested,⁶¹ '4.5 times more likely to receive a custodial sentence for public nuisance, 3.4 times more likely to have a conviction recorded, and 1.6 times more likely to be dealt with by way of arrest, as opposed to a notice to appear.'⁶² The 2014 – 2015 recorded crime statistics concluded that public order offences 'of which public nuisance is the primary sub-category'⁶³ were 'the most prevalent principal offence type for Aboriginal and Torres Strait Islander offenders in Queensland over the period 2009 – 10 to 2014 – 2015'.⁶⁴

16. Viewed in light of these statistics we are forced to re-iterate our submission to the 2004 CMC review that the criminalisation of public space offences has failed in their aim to discourage behaviour which impedes the ability of the public to enjoy access to its space. The penalty provisions do not affect the prevalence of these offences or increase the ability of the public to enjoy these spaces more peacefully. Additionally, the statistics 'demonstrate that the concerns raised by the Royal Commission into Aboriginal Deaths in Custody...remain unaddressed.'⁶⁵ The potential for the offensive language charges to escalate interactions between Aboriginal and Torres Strait Islander people and the police were specifically highlighted in the RCADIC Report on the basis that 'charges about language just become part of an oppressive mechanism of control of Aboriginals. Too often the attempt to arrest or charge an Aboriginal for offensive language sets in train a sequence of offences by that person and others - resisting arrest, assaulting police, hindering police and so on, none of which would have occurred if police were not so easily 'offended'.⁶⁶
17. It seems clear that there is a gap between police perceptions of offensiveness and the narrower interpretation adopted by Australian Courts that 'according to contemporary standards of conduct, most swearing should be considered legally inoffensive'.⁶⁷ Critics have long cited the fact that policing methods and culture 'unfairly or improperly target Indigenous Australians'⁶⁸ with police intervention 'often premised on wider social agendas, that specific charges and powers used being less reflective of actual offensive behaviour or

⁶¹ Crime and Misconduct Commission, *Policing Public Order: A Review of the Public Nuisance Offence* (2008), xvii.

⁶² Tamara Walsh, 'Poverty, Police and the Offense of Public Nuisance' (2008) 20.2 *Bond Law Review*, 9.

⁶³ Tamara Walsh, 'Poverty, Police and the Offense of Public Nuisance' (2008) 20.2 *Bond Law Review*, 6.

⁶⁴ Queensland Government Statistician's Office, *Recorded crime – offenders, Queensland, 2014 – 2015*, <<http://www.qgso.qld.gov.au/products/reports/recorded-crime-offenders/recorded-crime-offenders-2014-15.pdf>>, p 12.

⁶⁵ Tamara Walsh, 'Poverty, Police and the Offense of Public Nuisance' (2008) 20.2 *Bond Law Review*, 6.

⁶⁶ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Volume 3, 21.1 citing J.H. Wooten, Report of the Inquiry into the Death of Malcolm Charles Smith, RCIADIC N/2, AGPS, Canberra, 1989, 39-44.

⁶⁷ Tamara Walsh, *No Offence: The enforcement of offensive language and offensive behaviour offences in Queensland*, (2006), 23.

⁶⁸ Christine Feerick, 'Policing Indigenous Australians: Arrest as a method of oppression' (2004) 29.4 *Alternative Law Journal*, 188.

social harms than concerns to manage specific population groups deemed to be problematic or unsightly.⁶⁹ Whether resulting from these factors, differences in the use of public space⁷⁰ or the penalisation of ‘those of limited vocabulary in circumstances where a more ‘studied’, less emotive response might have escaped the law’s notice’⁷¹ the offence is obsolete and discriminatory, and should be abandoned.

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?

‘...the extent to which such laws are necessary in our modern society is a debatable issue. It might be argued that since members of the community are protected from indecent exposure, conduct that amounts to harassment, contempt and ridicule based on certain personal characteristics, nuisance behaviour that threatens public safety or health, riotous conduct, public fights or affray, threatening conduct and assault through other laws, little room is left for a law against ‘offensiveness’.

Tamara Walsh⁷²

18. As stated above, we support the decriminalisation of offensive language and other public order offences. We do not view the creation of a criminal infringement notices schemes as a solution to the excessive incarceration rates. Currently, Queensland legislation requires police to issue an infringement notice for a ‘prescribed public nuisance offence’ and any ‘associated offence’ where the person has been arrested and taken to a police station, is not being detained for questioning in relation to an indictable offence and it is not practicable to bring them before a court promptly.⁷³ A ‘prescribed public nuisance offence’ means public nuisance, including offensive language, or public urination⁷⁴ and an ‘associated offence’ includes the offences of obstructing police or refusing to state a person’s correct name offence only where they arise in relation to the public nuisance or public urination offence.⁷⁵
19. The Queensland Government first trailed the ticketing scheme for the public nuisance offence in the South Bank and Townsville Police Districts in 2009 following a recommendation in the CMC’s Policing Public Order review.⁷⁶ The trial was extended state-wide in 2010 with the Premier quoting a Griffith University Report in support of the

⁶⁹ Rob White, ‘Indigenous Young Australians, Criminal Justice and Offensive Language’ (2002) 5.1 *Journal of Youth*, 1.

⁷⁰ Tamara Walsh, ‘Who is the public in public space?’ (2004) 29.2 *Alternative Law Journal*, 81.

⁷¹ Tamara Walsh, *No Offence: The enforcement of offensive language and offensive behaviour offences in Queensland*, (2006), 5 - 6 citing *Ball v McIntyre* Unreported, Townsville District Court, 26 October 1990 (Wylie DCJ).

⁷² Tamara Walsh, *No Offence: The enforcement of offensive language and offensive behaviour offences in Queensland*, (2006), 23.

⁷³ *Police Powers and Responsibility Act 2000* (Qld), s394 (1) and (2) (ca).

⁷⁴ *Police Powers and Responsibility Act 2000* (Qld), s394 (5).

⁷⁵ *Police Powers and Responsibility Act 2000* (Qld), s394 (5).

⁷⁶ Queensland Cabinet, ‘Public Nuisance Ticketing to be extended statewide’ (Premier and Minister for the Arts Hon Anna Bligh, Media Statement, 15 June 2010).

conclusion that ‘the overrepresentation of indigenous people did not increase with ticketing’ during the trial.⁷⁷ In fact, whilst it recommended the state-wide roll out of the trial, the Griffith University Report found that arrest rates for Aboriginal and Torres Strait Islander public nuisance offending had grown in Townsville during the trial and that tickets amounted to a ‘much smaller proportion of all actions for public nuisance offending’⁷⁸ concluding that ‘ticketing did not diminish the overall rate of public nuisance-related arrests’ and notices to attend Court.⁷⁹ In Southbank, it was noted that whilst the ticketing system appeared to have ‘at least in part’⁸⁰ reduced arrest rates during the trial, interventions such as ticketing do not address ‘underlying social and economic conditions’ or take into account regional variations in crime trends and access to services.⁸¹

20. Our concerns about the ticketing system include that there has not been sufficient examination of the debt implications for vulnerable people arising out of the infringement notices. Unpaid infringement notices, including for public nuisance, in Queensland are sent to the State Penalties Enforcement Registry where the addition of fees and escalation of enforcement options magnify the impact. The Griffith Report highlighted the need to closely examine the payment outcomes for Aboriginal and Torres Strait Islander people.⁸² This echoed earlier criticism of the CMC recommendation as being typical of an ‘inappropriate intervention’ with the fine becoming an ‘unpayable debt’.⁸³
21. Additionally, we hold concerns about the role of the police in the ticketing process. The ongoing criminalisation of public nuisance does not reduce interactions between police and Aboriginal and Torres Strait Islander people, it merely hands the police more discretion. We are concerned that as a result ‘swearing could become over-criminalised, in the sense that tickets could be issued in circumstances where a court would not determine the words to be offensive within the meaning of the section’⁸⁴ and that ticketing ‘virtually eliminates police accountability’.⁸⁵

⁷⁷ Crime and Misconduct Commission, ‘Policing Public Order: A Review of the Public Nuisance Offence’ (2008), xix.

⁷⁸ Paul Mazerolle, Meredith McHugh, Robin Fitzgerald, Jennifer Sanderson, Travis Anderson-Bond, Matthew Manning, *Ticketing for public nuisance offences in Queensland: An evaluation of the 12-month trial* (2010), xvii – xix.

⁷⁹ Paul Mazerolle, Meredith McHugh, Robin Fitzgerald, Jennifer Sanderson, Travis Anderson-Bond, Matthew Manning, *Ticketing for public nuisance offences in Queensland: An evaluation of the 12-month trial* (2010), xxxiii.

⁸⁰ Paul Mazerolle, Meredith McHugh, Robin Fitzgerald, Jennifer Sanderson, Travis Anderson-Bond, Matthew Manning, *Ticketing for public nuisance offences in Queensland: An evaluation of the 12-month trial* (2010), xix.

⁸¹ Paul Mazerolle, Meredith McHugh, Robin Fitzgerald, Jennifer Sanderson, Travis Anderson-Bond, Matthew Manning, *Ticketing for public nuisance offences in Queensland: An evaluation of the 12-month trial* (2010), xxxiii.

⁸² Paul Mazerolle, Meredith McHugh, Robin Fitzgerald, Jennifer Sanderson, Travis Anderson-Bond, Matthew Manning, *Ticketing for public nuisance offences in Queensland: An evaluation of the 12-month trial* (2010), xxv

⁸³ Queensland Public Interest Law Clearing House, *Homeless Person’s Legal Clinic Submission in response to the Australian Government’s Green Paper on Homelessness* (2008), 7.

⁸⁴ Tamara Walsh, ‘Ten years of public nuisance in Queensland’ (2016) 40 *Criminal Law Journal*, 62.

⁸⁵ Tamara Walsh, ‘Ten years of public nuisance in Queensland’ (2016) 40 *Criminal Law Journal*, 59.

22. Finally, we share concerns of earlier critics of the CMC recommendation, that the move towards ticketing denies individuals the option of having their matters dealt with in special circumstance courts 'aimed at finding alternative, more appropriate and effective ways of dealing with defendants'⁸⁶ and as usurping the role of the Courts in their 'critical role in reviewing the lawfulness of public nuisance charges.'⁸⁷

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

'Without information, there can be no accountability. It follows that in an atmosphere of secrecy or inadequate information, corruption flourishes. Wherever secrecy exists, there will be people who are prepared to manipulate it.'

Tony Fitzgerald⁸⁸

23. Against the backdrop of the 1989 Fitzgerald Inquiry and the ongoing prevalence of complaints against police⁸⁹ in Queensland, confidence in policing must be linked to public accountability. Whilst the reporting of engagement strategies may create positive impetus for their use, our view is that such reporting should also include full coverage of areas where police have discretionary powers including on the use of criminal infringement notices and the issuing of move on directions.⁹⁰ Implementing such changes would shed light on how the use of discretionary police powers impacts on the involvement of Aboriginal and Torres Strait Islander individuals and the criminal justice system. For example, in relation to move on powers, it has been suggested that the collation of data, including by identifying ethnicity, and making this information public would 'increase police accountability by exposing the relevant ethnicity of those subjected to move on directions. It is hoped that by making such records public police would be deterred from having too many Indigenous entries on the record.'⁹¹ The adoption of such processes would seem to take on particular urgency in light of the roll out of broader discretionary policing powers under the guise of terrorism laws Australia wide.
24. We believe there is also a need to view the economics of crime reduction as a relevant factor in the allocation of police resources. In this regard, direct reporting of the economic costs associated with the use of discretionary policing powers should be introduced. That

⁸⁶ Tamara Walsh, 'Poverty, Police and the Offense of Public Nuisance' (2008) 20.2 *Bond Law Review*, 6.

⁸⁷ Tamara Walsh, 'Poverty, Police and the Offense of Public Nuisance' (2008) 20.2 *Bond Law Review*, 15.

⁸⁸ Gerald Edward Fitzgerald, *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989), 124.

⁸⁹ Crime and Corruption Commission, 'Fighting crime – results for 1 February to 30 April 2017', <<http://www.ccc.qld.gov.au/crime/results>>.

⁹⁰ For a comprehensive overview of the discretionary and discriminatory use of move on powers in Queensland, see Dan Rodgers, 'Crime and misconduct commission: Review of police move-on powers', (2011) 31 *The Queensland Lawyer*, 33.

⁹¹ Dan Rodgers, 'Crime and misconduct commission: Review of police move-on powers', (2011) 31 *The Queensland Lawyer*, 38 – 39.

is, the cost associated with the attendance and services of police with respect to public order offences, such as public nuisance, where infringement notices are issued. This would enable the costs of those services to be measured against the value of the services to the community, and allow the allocation of resources to such policing strategies to occur with full knowledge of the range of future financial burdens on the community, including fine enforcement and the unnecessary involvement of individuals in the criminal justice system in the long term. Such an economic analysis would, we have no doubt, contribute greatly to the abandonment of 'broad, unexaminable police discretion'⁹² by requiring the police to financially justify their use of such powers. It would also facilitate assessment of alternative 'justice reinvestment' strategies.

⁹² Elyse Methven, 'A Very Expensive Lesson': Counting the Costs of Penalty Notices for Anti-Social Behaviour', (2014) 26.2 *Current Issues in Criminal Justice*, 249, 3.