

OUR REFERENCE

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YOUR REFERENCE

DATE

11 September, 2017

Ms Sabina Wynn  
Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
Sydney NSW 2001  
By Email: indigenous-incarceration@alrc.gov.au

Dear Ms Wynn

**ALRC Discussion Paper:  
Incarceration Rates of Aboriginal and Torres Strait Islander People**

Thank you for the opportunity to provide comment in relation to the above Discussion Paper. I have confined my remarks to some of the areas of most concern to my Office. As such, I provide the following comments:

**Proposal 2-1** Adoption by other State and Territories of a similar provision to section 3A of the Victorian *Bail Act 1977* re taking into account any issues that arise due to a person's Aboriginality.

As noted in the Discussion Paper, the NSW *Bail Act 2013* presently includes, in section 18(1)(a) and (k), provisions that allow a Court to consider a person's Aboriginality and any special vulnerability or needs that arise as a result. Anecdotally, it appears that these provisions are not always fully utilised, although it cannot be said that they are universally overlooked, as they are not. A specific provision in line with section 3A of the Victorian legislation may assist in focusing attention on such considerations. As such, I would support consideration of such a specific measure being inserted into the NSW *Bail Act 2013*.

**Question 3-1** Should State and Territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing such offenders?

In my experience, courts in NSW do consider such factors as part of the sentencing process and express legislation is not required. Education - of the Judiciary and of legal practitioners - in relation to the relevance of Aboriginality or a Torres Strait Islander background to offending behaviour and to the sentencing process should, though, be an ongoing process.

**Question 3-3** Do courts have sufficient information available about an offender's background, including cultural and historical factors that relate to the offender and their community?

Counsel submissions, along with pre-sentence reports and any expert reports, such as that of a psychologist, do generally provide sufficient background information to NSW sentencing courts.



And, as I indicated above re Question 3-1, consideration of relevant systemic and background factors is part of the NSW sentencing process. Therefore, I do not believe there is an overriding need for specialist sentencing reports dealing with the underlying causes of Aboriginal and Torres Strait Islander offending. Although, if, as with the Canadian *Gladue* reports, these specialist reports are prepared with the assistance of someone who has a connection to and understanding of the offender's community, they may add value in terms of more specific information re the offender's community. This wider community context is not generally reflected in pre-sentence reports prepared by Community Corrections. As noted in the Discussion Paper, such reports will have implications in terms of time. There will also be financial implications and there would need to be much work done to identify and train appropriate persons to author these reports.

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

Abolishment of short sentences (six months or less) would, in my opinion, limit the options available to a sentencing court and could, in terms of reducing the incarceration rates of Aboriginal and Torres Strait Islander offenders, be counter-productive unless alternatives to full-time custody are equally available to all offenders irrespective of where they live.

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

I note the arguments put forward in the Discussion Paper for and against removal of offensive language provisions from CIN schemes. In my opinion, the best way to reduce the negative effects of CIN schemes is to adopt the recommendation made by the NSWLRC in its 2012 *Penalty Notices* report. That is, make the issuing of CINs for offensive language subject to review by a senior police officer (who has received culturally appropriate training). This should mean less Aboriginal and Torres Strait Islander people are issued CINs and therefore less people enter fine enforcement systems. I do not support having these matters dealt with by courts.

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

As noted in the Discussion Paper, NSW has an alternate sentencing process, a specialised drug court and court-diversion programs. To strengthen these existing options requires the investment of funds and the "rolling out" of those measures which are not currently available State-wide. Given the success of the Drug Court of NSW and its intensive case management model, and mindful that the Court now sits in three locations, I would particularly support the Court sitting in an area or areas closer to a regional centre or centres with a large Aboriginal population and identified drug-use issues.

I also support many of the other proposals put forward in the Discussion Paper, such as:

**Proposal 4-1** re making community based sentence more readily available, particularly in regional and remote areas;

**Proposal 5-2** re encouraging the development of culturally appropriate prison programs that are readily available to Aboriginal and Torres Strait Islander female prisoners;

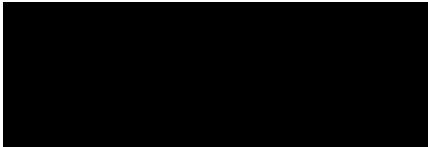
**Proposal 6-2** re States and Territories adopting the NSW Work and Development Orders scheme, thereby allowing a person who cannot pay fines due to hardship, illness, etc to discharge their debt through other means such as community work or medical treatment;

**Proposal 7-1** re States and Territories engaging with Aboriginal and Torres Strait Islander organisations to identify gaps and build the infrastructure required for culturally appropriate community based sentencing options and support services; and

**Proposal 11-1** re State and Territories working, where needed, with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services with the criminal justice system.

Please do not hesitate to contact me should you wish to discuss any of the above comments.

Yours faithfully



**Lloyd Babb SC**  
**Director of Public Prosecutions**