



Submission to Australian Law Reform Commission
Inquiry into Incarceration Rate of Aboriginal and
Torres Strait Islander Peoples

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1. Introduction

1. ANTaR welcomes the opportunity to make this submission to the Australian Law Reform Commission Inquiry into Incarceration Rate of Aboriginal and Torres Strait Islander Peoples.
2. As an organisation with 20 years experience working on issues impacting Aboriginal and Torres Strait Islander people, including racial discrimination, and with 40,000 supporters, ANTaR would welcome the opportunity to enter into a dialogue with the Australian Law Reform Commission (ALRC) around any aspect of this submission.

2. About ANTaR

1. ANTaR is a national advocacy organisation dedicated specifically to the rights - and overcoming the disadvantage - of Aboriginal and Torres Strait Islander people. We do this primarily through lobbying, public campaigns and advocacy.
2. ANTaR is the pre-eminent, non-Indigenous national organisation dedicated specifically to supporting the realisation of Justice, Rights and Respect for Aboriginal and Torres Strait Islander people. ANTaR focuses on education and engagement of the broader community so that the rights and cultures of Aboriginal and Torres Strait Islander people are respected and affirmed across all sections of society. Approximately 40,000 Australians are direct supporters of our work.
3. ANTaR also seeks to persuade governments to show genuine leadership and build cross-party commitment to Aboriginal and Torres Strait Islander policy.
4. ANTaR works to generate in Australia a moral and legal recognition of, and respect for, the distinctive status of Aboriginal and Torres Strait Islander Australians as First Peoples.
5. ANTaR is a non-government, not-for-profit, community-based organisation.
6. ANTaR works on a range of issues including incarceration and family violence, health equality, Aboriginal and Torres Strait Islander policy approaches, racism and other significant issues.
7. ANTaR has been working with Aboriginal and Torres Strait Islander organisations and leaders on rights and reconciliation issues since 1997.
8. ANTaR believes that it is self evident that Aboriginal and Torres Strait Islander Peoples are entitled to the full realisation of their rights as articulated in relevant human rights treaties, including the Universal Declaration of Human Rights and the United Nations Declaration on the Rights of Indigenous Peoples.

3. Submission outline

1. This ANTaR submission has a particular focus on engagement and accountability. It is ANTaR's view that without these issues being adequately addressed with further concrete measures, Australian Governments will not give effect to necessary law reforms to reduce the numbers of Aboriginal and Torres Strait Islander people in custody.
2. We are now more than 25 years on from the delivery of the Royal Commission into Aboriginal Deaths in Custody Report (Royal Commission), the recommendations of which were supported by the Federal Government and all State and Territory Governments. The national response to the Royal Commission Report promised significant change but has delivered very little.
3. Successive Australian Governments have failed to exercise national leadership during that time to ensure the recommendations of the Royal Commission are acted upon. Not only does the Australian Government have the authority to provide that leadership through Section 51 (xxvi) and/or Section 51 (xxix)¹ of the Australian Constitution, it is obligated to do so as a signatory to a number of international Treaties discussed later in this submission.
4. The Australian Government also has a moral obligation to stem the tide of increasing incarceration of Aboriginal and Torres Strait Islander people and the well documented impact it is having on First Peoples' human rights and wellbeing. A central thrust of this submission therefore, is that the time has come for clear and accountable national leadership.
5. Alongside the Australian Government, State and Territory Governments have failed to honour their promises to Aboriginal and Torres Strait Islander people and the wider Australian community with regard to the issues reported on.
6. ANTaR is therefore calling for the Australian Government to drive a consensus position with States and Territories through COAG on establishing core national minimum benchmarks for the laws and legal frameworks which contribute to the systemic discrimination against Aboriginal and Torres Strait Islander people in the criminal justice system. This consensus position must be enshrined in a COAG agreement and include necessary funding support for implementation where required.
7. Should the Federal Government fail to achieve an agreement of this type, we are calling on it to exercise its constitutional authority through the passage of Federal legislation to bind States and Territories to such national benchmarks.

¹ Section 51(xxix) gives the Australian Government the power to legislate for "external affairs"; and section 51 (xxvi) gives the Australian Government the power to legislate for "the people of any race, for whom it is necessary to make special laws." Regarding the race power however, note the concerns from many advocates and academics and the last CERD review of Australia in 2010 that the power itself raises issues of racial discrimination in its current form. UN doc. CERD/C/AUS/CO/15-17, 13 September 2010, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CERD%2fC%2fAUS%2fCO%2f15-17&Lang=en.

8. The laws and frameworks referred to in point 6 above were highlighted in the Royal Commission recommendations and are again the subject of this ALRC Inquiry. Based on the indications given in the Discussion Paper we believe and hope that the Commission itself will make strong and positive recommendations for reform.
9. However laudable the recommendations of this ALRC Inquiry may be, history demonstrates that they again risk gathering dust on the shelf unless the need for Australian Government leadership as advocated in this submission is progressed.

4. Accountability

1. The Royal Commission into Aboriginal Deaths in Custody was a landmark Royal Commission which had the backing of every Government in Australia. It inquired into the deaths of 99 Aboriginal and Torres Strait Islander people and produced a report with 339 Recommendations directed to the Australian Government as well as State and Territory Governments.
2. The recommendations of the Royal Commission were focussed not only on law and justice reforms but also on the necessary changes in public policy required to address the underlying issues which the Commission found gave rise to the hugely disproportionate rate of Aboriginal and Torres Strait Islander imprisonment. The Commission called for a whole of Government response to these underlying issues and called on all Governments to empower Aboriginal and Torres Strait Islander people and communities.
3. The Australian Government led the Royal Commission response and supported every recommendation the Commission made except for one and that related to the proposal to take ATSIC outside the operation of the Public Service Act. It is understood that this recommendation was not supported because Aboriginal and Torres Strait Islander people did not support it.
4. In their formal responses to the Royal Commission, States and Territories supported, almost without exception, every recommendation of the Commission which was directed to them in relation to law reforms in the criminal justice system. Those recommendations were extensive and touched on all aspects of the criminal justice system as it impacted on Aboriginal and Torres Strait Islander people and contributed to their disproportionate incarceration rate. Not only did each jurisdiction support the recommendations of the Royal Commission but within each State and Territory and the Federal Parliament there was cross party support for their implementation.
5. There can be no excuse for the bipartisan failure to act over the past 25 years. It cannot be contested that State and Territory Governments have failed to give effect to those law and justice recommendations.
6. This has been confirmed by a litany of academic research, learned articles and media reports over the past 25 years. The failure was again highlighted in a report commissioned by Amnesty International Australia and prepared by Clayton Utz and released in 2015. The full report can be viewed at:
<https://changetherecord.org.au/review-of-the-implementation-of-rciadic-may-2015>

7. The ALRC discussion paper again highlights the problem of the inconsistent, inadequate and ad hoc laws across the country which so adversely contribute to the disproportionate numbers of Aboriginal and Torres Strait Islander people in prison.
8. Rather than imprisonment being a last resort, as envisaged by the Royal Commission, the record of Governments has been, with limited exceptions, truly shocking and there has been a meteoric rise in the numbers of Aboriginal and Torres Strait Islander people in custody since the time of the Royal Commission. As the ALRC itself notes, the rate of incarceration has increased 77% between the years 2000 to 2015.
9. ANTaR believes that unless the ALRC creatively and ambitiously addresses the future mechanisms whereby State and Territory Governments are held accountable for the implementation of the necessary changes in the criminal law and associated criminal justice processes, the demonstrable systemic discrimination impacting on Aboriginal and Torres Strait Islander people through the administration of these laws will continue, and with it the rates of imprisonment.
10. As the ALRC has acknowledged, Australia has international human rights obligations and the terms of reference for this Inquiry make specific reference to these. These treaties including the International Covenant on Civil and Political Rights (ICCPR) and the International Convention for the Elimination of all forms of Racial Discrimination (ICERD) both have individual complaints mechanisms which may be utilised to hold our country accountable internationally. Australia is also a signatory to the UN Declaration on the Rights of Indigenous People.
11. Australia is likely to already be in breach of a number of important international commitments. Firstly Article 10 of the International Covenant on Civil and Political Rights requires that "the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." Even the most charitable observer could not agree that Australian prison systems comply with this provision in their treatment of Aboriginal and Torres Strait Islander people.
12. The statistics confirm that our prisons are little more than a revolving door of incarceration - a phenomena also recorded by the Royal Commission into Aboriginal Deaths in custody.
13. In addition, the International Convention for the Elimination of All Forms of Racial Discrimination in Article 2 (1) (c) requires each State party to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists."
14. There is also a strong case to be made that Aboriginal and Torres Strait Islander people living in remote communities are subject to systemic discrimination in the provision of basic services, in breach of ICERD. This is relevant to the disproportionate rate of imprisonment. It was the lack of such services and opportunities in health, employment, education etc. which the Royal Commission found to be a key part of the underlying issues contributing to the marginalisation of Aboriginal and Torres Strait Islander people and their over-representation in the criminal justice system.

15. It should be again stressed that these are obligations binding on the nation state of Australia. It is not the States and Territories which must be accountable internationally for the failure to uphold them.
16. These international obligations are a compelling reason why the Australian Government must take the responsibility and be accountable for ensuring that Australia has criminal justice and other reforms which will reduce the disproportionate rate of Aboriginal and Torres Strait Islander people in custody. **The Australian Government must lead a nationally coordinated response to this issue and be accountable to the Australian public and international community.**
17. ANTaR believes, given the seriousness of the incarceration crisis (which is getting worse rather than better), and the likely breach of our international obligations in this regard, the Australian Government must utilise whatever lever is available to meet its obligations and address the crisis.
18. There is an additional very crucial law reform argument for proposing Australian Government leadership in putting in place a national framework for ongoing accountability for the States and Territories. That reason relates to the wide disparity in the numerous State and Territory laws and legal frameworks which determine the incarceration rates of Aboriginal and Torres Strait Islander people. These wide disparities are reflected throughout the ALRC Discussion Paper.
19. ANTaR believes that at the end of the second decade of the new millennium, our country should have national consistency in these critical matters impacting on the human rights of the First Peoples of the land and determining their incarceration rates.
20. The ALRC discussion paper gives a myriad of examples of these widely divergent State and Territory laws disproportionately impacting on Aboriginal and Torres Strait Islander people. Just one of those examples is given at table 1 at page 118 of the ALRC Discussion Paper in relation to the Offensive Language provisions in legislation of the States and Territories, setting out widely divergent penalties in each State and Territory. As noted in the ALRC Discussion Paper, the NSW Ombudsman and others have highlighted that Aboriginal and Torres Strait Islander people are overrepresented as recipients of CINs (Criminal Infringement Notices) and that 89% of Aboriginal and Torres Strait Islander people failed to pay on time.
21. As the ALRC Discussion Paper notes at page 119 the issues regarding offensive language provisions and how they are applied to Aboriginal and Torres Strait Islander people have been well ventilated. Citing the NSW Law Reform Commission, it is noted that “primarily these arguments are that most offensive language CINs are issued for language directed at police; and if tested in court, may not meet the legal definition of offensive.”
22. By way of further example of widely divergent State and Territory practices, regard should be paid to the reference in the ALRC Discussion Paper at 6.8 which states that Aboriginal and Torres Strait Islander Peoples are “overly represented as fine recipients and less likely than non-Indigenous people to pay a fine at first notice

(attributed financial capacity, itinerancy, and literacy levels) and are consequently susceptible to escalating fine debt and fine enforcement measures.”

23. We also note the observation at 6.9 in the Discussion Paper pointing out the “detrimental impact of fine enforcement processes on Aboriginal and Torres Strait Islander peoples, particularly the likelihood of prison in some jurisdictions following ongoing fine default, noting that Aboriginal women are disproportionately affected.”
24. ANTaR believes that there is no sound public policy reason why an Aboriginal or Torres Strait Islander person in one state should be sent to prison for conduct which in another state could not result in this outcome.
25. We also make the point that even though some jurisdictions have substantially reformed the law in this area there is nothing to stop a future State or Territory government coming to power and reversing the previous law.
26. The only way to avoid this is to ensure that there are core minimum standards across Australia which must be sustained. This will either require the Federal Government to work with the States and Territories to ensure national consistency, and/or the Federal Government to legislate using the authority enshrined in Section 51 (xxvi) or Section 51 (xxix) of the Australian Constitution.
27. The assertion of Australian Government leadership is consistent with the Blueprint for Change developed by Change the Record which is a national coalition led by Aboriginal and Torres Strait Islander organisations, and supported by a wide range of non-Indigenous organisations including ANTaR and the Law Council of Australia. ANTaR supports the full adoption of the Blueprint for Change, and the Change the Record Campaign’s recommendations to this inquiry.
28. The Blueprint for Change and the work of Change the Record can be accessed through the following link:
<https://changetherecord.org.au/policy-framework-blueprint-for-change>
29. While we note the observation at 1.34 of the Discussion paper that “Much of the criminal law that is the subject of this Inquiry falls within State and Territory jurisdictions,” we would again draw attention to the fact that the Australian Government has power under the Australian Constitution to enact the legislation to advance the human rights of the people of any race including Aboriginal and Torres Strait Islander peoples.
30. We also make the point that all of the following subject areas of current Commonwealth legislation and regulation were once regarded as matters of State/Territory jurisdiction: environmental protection; disability rights (NDIS); rights of women and human rights more generally; the direct regulation of industrial conditions through Work Choices; school curriculum development; consumer protection; Aboriginal and Torres Strait Islander native title rights and many others.
31. ANTaR notes that the Australian Law Reform Commission Act 1996 (Cth) provides that one of the functions of the ALRC during its inquiry process is to consider proposals for uniformity between State and Territory laws and to consider proposals

for complimentary Commonwealth, State and Territory laws. We believe the following recommendations give effect to that function.

5. ANTaR recommendations

Recommendation 1: That the Australian Government works with Aboriginal and Torres Strait Islander people to establish core national minimum benchmarks for the laws and legal frameworks which contribute to the systemic discrimination against Aboriginal and Torres Strait Islander people in the criminal justice system.

Recommendation 2: That, following genuine engagement with Aboriginal and Torres Strait Islander people, the Australian Government forges an agreement with States and Territories through COAG to establish core national minimum benchmarks for the laws and legal frameworks which contribute to the systemic discrimination against Aboriginal and Torres Strait Islander people in the criminal justice system.

Recommendation 3: That, should the Australian Government be unable to forge an agreement through COAG, it exercise its constitutional authority to introduce Federal legislation binding States and Territories to core national minimum benchmarks in relation to the laws and legal frameworks which contribute to the systemic discrimination against Aboriginal and Torres Strait Islander people in the criminal justice system

Recommendation 4: That the Federal Government forge 'justice targets' that set a goal for closing the incarceration gap between First Peoples and other Australians through the COAG closing the gap framework. The development of such targets must be done in partnership with Aboriginal and Torres Strait Islander people.

Recommendation 5: That the Federal Government adopts in full the Change the Record Blueprint for Change recommendations for addressing Aboriginal and Torres Strait Islander incarceration and rates of family violence.

1. In raising these proposals, we note that it would be within the power of State and Territory Governments to enact legislation reforming their criminal justice processes in a similar manner in respect of non-Indigenous offenders and there would be obvious merit in doing that.
2. This however is a matter within the constitutional responsibility of those Governments. However, it could be an area of intergovernmental co-operation and discussion as the Commonwealth progresses the recommended national approach through COAG discussions.
3. By way of example, should Federal legislation be required, an Australian Aboriginal and Torres Strait Islander Criminal Justice Reform Act could be enacted on the following basis:
 - a. The legislation would be enacted by the Commonwealth utilising the constitutional power contained in either Section 51 (xxvi) or Section 51 (xxix) following engagement with Aboriginal and Torres Strait Islander people and organisations, and following consultation with the States and Territories.

- b. The central objectives of the legislation would be to facilitate and increase the engagement of Governments with Aboriginal and Torres Strait Islander people and contribute to reducing the disproportionate impact of the criminal justice laws and practices on the incarceration of Aboriginal and Torres Strait Islander people including reducing the number of juvenile offenders.
- c. It should be noted that the proposed legislation is not intended to be a new comprehensive national Criminal law code applying to Aboriginal and Torres Strait Islander people but rather something much narrower which focusses on ensuring a core minimum national approach to the priority reforms that will make the greatest difference in reducing the Aboriginal and Torres Strait Islander incarceration rates.
- d. The benchmark national standards for State and Territory Laws dealing with criminal justice issues impacting on Aboriginal and Torres Strait Islander people would thus include the key priority areas for reform which we anticipate will be advanced in the final report of the Australian Law Reform Commission such as:
- A requirement that all bail authorities are to be required to consider any "issues which arise due to the person's Indigeneity" including cultural background, ties to family and place, and cultural obligations. These considerations are in addition to any other requirements in State and Territory Bail Acts. See ALRC Proposal 2-1
 - A requirement to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing Aboriginal and Torres Strait Islander offenders. See ALRC Question 3-1
 - Short sentences of imprisonment of less than 6 months be abolished as a sentencing option unless the court deems there to be a considerable risk of harm to another person (s) (e.g. risk of family violence). See ALRC Question 4-2
 - A requirement that corrective services must develop culturally appropriate prison programs that are available to Aboriginal and Torres Strait Islander women and men in prison. See ALRC Proposal 5-2
 - Fine default not resulting in the imprisonment of the defaulters and provisions in State and Territory fine enforcement statutes that provide for imprisonment for unpaid fines to be abolished by this law. See ALRC Proposal 6-1
 - A requirement to put in place a Custody Notification Service within 6 months from the passage of this legislation that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately upon detaining an Aboriginal and Torres Strait Islander person. See ALRC. Proposal 11-3

- Additional Criminal Justice and process reform provisions to be included resulting from engagement with Aboriginal and Torres Strait Islander people and on the Proposals forthcoming in the ALRC final ALRC report.
5. Such legislation must be accompanied by the provision of appropriate funding of services and agencies associated with these measures, particularly in relation to Aboriginal and Torres Strait Islander Legal Services, and Aboriginal Family Violence Prevention Legal Services.
 6. The proposal for Commonwealth legislation of this kind is of course only indicative given that extensive consultation needs to be had with Aboriginal and Torres Strait Islander people and a detailed and considered drafting process needs to be undertaken.
 7. ANTaR is asking the ALRC to embrace the concept of national leadership through forging an agreement on core minimum principles for reform and give some indication of what the Commission regards as these principles, based on the views of Aboriginal and Torres Strait Islander people and the Royal Commission into Aboriginal Deaths in Custody.
 8. ANTaR is also asking that the ALRC propose measures that remove any doubt as to the obligation and power of the Australian Government to take on this leadership.
 9. For those who argue that all matters concerning the criminal law and processes which impact on the disproportionate rate of Aboriginal and Torres Strait Islander incarceration must be left to the States and Territories, we ask that the evidence of the consequence of adopting this approach since the time of the Royal Commission be examined.
 10. The evidence is undeniable that there has been a failure of National, State and Territory Governments for decades, leaving a generation of Aboriginal and Torres Strait Islander people enormously over-represented in Australian prisons.
 11. Finally, we remind the Commission that action by Governments which deals only with the criminal justice and process reforms will of itself fail to address the need to hold all Governments accountable for addressing the underlying issues which were found by the Royal Commission into Aboriginal Deaths in Custody to be the major reason for the hugely disproportionate numbers of Aboriginal and Torres Strait Islander people in custody.
 12. This reality is recognised by the ARLC Discussion Paper at 1.9 which refers to the broader contextual factors contributing to Aboriginal and Torres Strait Islander incarceration.
 13. ANTaR notes that a strong framework exists through which the Federal, State, and Territory governments can hold themselves accountable for addressing many of these underlying issues - the mechanism of the closing the gap targets under the Closing the Gap Strategy framework.

14. ANTaR strongly believes that those processes should be further developed to include justice targets that set a goal for closing the incarceration gap between First Peoples and other Australians. The development of such targets must be done in partnership with Aboriginal and Torres Strait Islander people.

6. Economic case for reform

1. There are strong economic arguments for reducing Aboriginal and Torres Strait Islander incarceration which further justifies the criminal justice reforms we are advocating in this submission.
2. We note and draw the attention of the ALRC to a report by PwC's Indigenous Consulting in association with Change the Record *Indigenous Incarceration: Unlock the Facts*, which was publicly released on 25th May this year see: <https://www.pwc.com.au/indigenous-consulting/assets/indigenous-incarceration-may-17.pdf>
3. The PwC/Change the Record report calculated that Indigenous incarceration is costing nearly \$8 billion annually and will grow to almost \$20 billion per annum by 2040 without further intervention. The report also highlights the social costs of incarceration and points to the economic and social benefits of Aboriginal and Torres Strait Islander-led, evidence-based approaches in addressing the issue which we are advocating in this submission.
4. The report concludes that in 2016 the justice system costs related to Aboriginal and Torres Strait Islander incarceration were \$3.9 billion, and are forecast to grow to \$10.3 billion annually by 2040. Welfare costs associated with the issue will rise to \$110 million by 2040, while economic costs will reach over \$9 billion annually.
5. The report further concluded that social costs and consequences are no less significant. Those who have been incarcerated are at greater risk of financial stress, low levels of educational attainment, poor employment prospects, and find it harder to access accommodation. As a result, they have a greater chance of recidivism, poor health and wellbeing. The impacts on the individual can also have intergenerational consequences, flowing onto families and communities. All this was also confirmed by the Royal Commission into Aboriginal Deaths in Custody more than 25 years ago.
6. The PwC/Change the Record report further concluded that there would be annual savings to the economy achieved of nearly \$19 billion by 2040 if the gap between Indigenous and non-Indigenous rates of incarceration were closed. This is based on the implementation of specific evidence-based recommendations including; putting Indigenous self-determination at the heart of the solution; establishing a set of national targets against which progress can be measured; improving cultural awareness across the system; investing more in prevention and early intervention; designing better throughcare and reintegration programs to reduce recidivism, and; investing more in innovation and evaluation to better identify what really works.
7. In calculating the overall impact of Indigenous incarceration fiscal costs, policing, prison services, welfare, homelessness, and forgone taxation were included. On the economic side, the impacts of crime, lost productivity, and the excess burden of

raising taxation revenue were considered. Based on population growth, and holding constant the proportion of Indigenous people who enter prison each year, the costs of incarceration are forecast to rise to almost \$20 billion annually by 2040.

8. There is thus a powerful economic case for reform and this case is even more powerful if Governments also focus scarce public resources into Justice Reinvestment initiatives which have the capacity to strengthen individuals and communities and enhance their life opportunities. Initiatives of this kind are increasingly gaining public support in a range of jurisdictions in the United States of America, and with cross party support. A number of projects have also emerged in Australia which should be supported.
9. It should be noted that prison and criminal justice reform in the United States of America has a growing band of legislators backing it from across the political spectrum and in many states, Republican legislators are the ones driving the reform including states such as Louisiana, Texas and others.
10. Organisations such as Right on Crime, an avowed conservative think tank see: <http://rightoncrime.com/> are championing the need for a significant reduction in prison populations because, as in Australia the ever increasing \$80 Billion US dollar expenditure on incarceration is simply not sustainable.
11. Those organisations and conservative legislators who support them are increasingly recognising that the old criminal justice systems have simply not produced results and the investment is not warranted. The incarceration rates in the United States, as in Australia, remain through the roof and with a high recidivism rate, the current system fails both offenders and the community miserably, essentially feeding on itself.
12. Strategies which reduce the numbers of non-violent offenders in prisons and look towards alternative sentencing approaches and a smarter attitude to justice are now being supported in the US. Importantly they also realise that investments in education and employment opportunities for offenders are critical in breaking the cycle.
13. We have yet to see these developments in Australia to any real extent but, as the PwC Indigenous Consulting and Change the Record Report noted above demonstrated, the costs of continuing on the path we are on is financially and socially unsustainable, and such costs will necessarily drive change.

7. Proposals and questions

1. While we have made reference to many of the questions and proposals in relation to our proposal for national leadership, including if necessary Federal Legislation, as a foundational member of the Change the Record Campaign, we endorse the Campaign's position on each of the proposals and questions. We therefore will not be canvassing detailed arguments in favor or against proposal/question.