78.

NEW SOUTH WALES

THE CHIEF MAGISTRATE OF THE LOCAL COURT

8 September 2017

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Ms Wynn

Re: Discussion Paper - Incarceration Rates of Aboriginal and Torres Strait Islander Peoples

I am writing in relation to Judge Myers' recent invitation to provide a written submission in relation to the above discussion paper, following my meeting with ALRC in April. I am not in a position to respond to all the questions and proposals raised in the paper, but will make some brief observations on those matters that relate to or impact upon the work of the Local Court of New South Wales, as follows.

Chapter 2 - Bail and the Remand Population

In my view it is unlikely that the adoption of a standalone provision in bail legislation which would require a bail authority to consider any issues arising due to a person's Aboriginality would be likely to significantly affect the approach to bail decisions taken in New South Wales under the *Bail Act 2013*.

As noted in the discussion paper, section 18(2) already requires the court to consider a list of specific matters when making an assessment of bail concerns in the course of a bail decision, which relevantly includes "(k) any special vulnerability or needs the accused person has including because of ... being an Aboriginal or Torres Strait Islander". The extent to which that matter features in the court's assessment is necessarily dependent upon the advocacy on behalf of the accused person.

Chapter 3 - Sentencing and Aboriginality

In this Court, the decision in *Bugmy v The Queen* [2013] HCA 37 is well understood as continuing to reinforce the need for individualised sentencing, such that consideration of a background of deprivation of an Aboriginal offender for the purpose of mitigating a sentence requires the identification in each case of specific material that tends to establish that deprivation.

While the entrenchment in legislation of a principle or factor that requires the sentencing court to consider the unique systemic and background factors affecting Aboriginal or Torres Strait Islander peoples might arguably have the effect of enhancing the prominence of this issue at a societal level, the practical question that remains for the court is *how* such a

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principle or factor is to be taken into account in the context of an individual case. Of course, it is not the role of the court in an adversarial criminal justice system to inform itself of such matters; once again this depends, and will continue to depend, upon the nature and substance of the submissions made on behalf of the offender.

Chapter 4 - Sentencing Options

At this stage, questions in relation to the effectiveness and availability of various sentencing options including short sentences and community-based alternatives to custody are difficult to meaningfully address in the NSW context. Imminent change to the *Crimes (Sentencing Procedure) Act 1999* is expected, which will introduce a new regime of orders that aim to provide greater judicial flexibility in the imposition of conditions directed to the particular circumstances of the matter before the court.

Each order type involves certain standard conditions plus the ability to impose additional and further conditions, with the possibility of increasingly more onerous conditions as the order type escalates. Orders will be supervised by the Community Corrections division within Corrective Services, and are to be available statewide.

The broader question of whether these new options meet their objectives, and more particularly whether there are any specific impacts upon Aboriginal offenders, will need to be addressed at a later point in time.

Chapter 6 – Fines and Driver Licences

The questions raised in this chapter are primarily policy matters for government. However, I note driver licencing is another area in which the NSW Government has recently announced reforms that may have an impact upon Aboriginal individuals who are subject to multiple and/or lengthy licence disqualification periods. Legislation to enable individuals to apply to the Local Court for the removal of driver licence disqualification periods upon the completion of an offence free period (of two to four years) is expected to be enacted and take effect by the end of the year. Again, whether this approach is effective in breaking the cycle of driving while disqualified amongst repeat offenders shall remain to be seen.

Thank you for the opportunity to comment upon the discussion paper. Should the ALRC wish to discuss any of the above observations further, please do not hesitate to contact my office.

Yours sincerely,

Judge Graeme Henson AM
Chief Magistrate
Local Court of New South Wales