



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: CLC/CLIC/IIC/PWak:1229559

4 January 2017

Mr Jonathan Smithers  
Chief Executive Officer  
Law Council of Australia  
DX 5719 Canberra

By email: [Natasha.Molt@lawcouncil.asn.au](mailto:Natasha.Molt@lawcouncil.asn.au)

Dear Mr Smithers,

**Consultation draft terms of reference – Australian Law Reform Commission inquiry into the incarceration rate of Indigenous Australians**

I write on behalf of the Law Society of NSW. Thank you for the opportunity to provide feedback on the draft terms of reference to the Australian Law Reform Commission (ALRC) inquiry into the incarceration rate of Indigenous Australians (the inquiry).

This submission includes contributions from the Indigenous Issues, Criminal Law and Children's Legal Issues Committees of the Law Society.

The Law Society notes with concern that the rates of incarceration of Aboriginal people have worsened since the Report of the Royal Commission into Aboriginal Deaths in Custody was released 25 years ago. The NSW prison population grew by 14 per cent last year and is now at a record high. The Law Society recognises that significant drivers of Indigenous incarceration in NSW are laws that incarcerate people for default on driving related fines; the lack of non-custodial sentencing options in rural, regional and remote regions; and the impact of breaches of justice related procedures such as bail and AVOs. We also note that mandatory minimum penalties are another key driver of high Indigenous incarceration rates, particularly where they involve alcohol related offences.

The Law Society has consistently advocated for reforms to the criminal justice system to address the increasing rates of Indigenous incarceration. The Law Society supports the introduction of measures to divert people and, in particular, Indigenous offenders away from the criminal justice system. We have also consistently supported the introduction of initiatives that aim to address the underlying causes of offending and to reduce overall recidivism. The Law Society also continues to advocate for jurisdictions, including the Commonwealth, to set justice-specific Close the Gap targets.

We provide the following specific comments on the draft terms of reference of the inquiry.

**Review of health programs**

The Law Society notes that the draft terms of reference state the ALRC should have regard to *“the availability and effectiveness of programs that intend to reduce Indigenous offending*

THE LAW SOCIETY OF NEW SOUTH WALES

170 Phillip Street, Sydney NSW 2000, DX 362 Sydney  
ACN 000 000 699 ABN 98 696 304 966

T +61 2 9926 0333 F +61 2 9231 5809  
[www.lawsociety.com.au](http://www.lawsociety.com.au)



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and incarceration". However, the accompanying footnote notes that "...it is not the intention that the ALRC will undertake an independent research or evaluation of existing programs, noting that it falls outside of its legislative responsibilities and expertise."

The Law Society considers that crimes legislation and the adequacy of health programs and services cannot be looked at independently. Further, recommendations for reforms to diversionary options will not be meaningful without the existence of a strong evidence base to demonstrate their effectiveness.

In particular, we note the NSW Law Reform Commission's Report 135 *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, which states that:<sup>1</sup>

"Diversion of people with cognitive and mental health impairments generally involves them engaging with a range of providers of treatment and services that have a rehabilitative focus. The relationship between the criminal justice system (police and courts) and the service sector is crucial to effective diversion. Both are complex systems. Effective diversion relies on connecting offenders with the right services and maintaining that connection when problems arise. Understanding and communication between the criminal justice system and services is crucial for diversion to work well. Significant challenges include: the great multiplicity of agencies providing services; different disciplinary understandings; different perspectives on key issues; gaps in the availability of services; and problems of integrating service delivery for people whose needs are complex."

The Law Society submits that a review of the current health services, especially for mental health and drug and alcohol issues, should be undertaken alongside the ALRC inquiry. This will enable policy-makers to understand the full picture in relation to the availability of diversionary options and alternatives to imprisonment, as well as the availability of programs in prisons.

### **Self-determination**

The Law Society submits that issues of self-determination should be at the forefront of the inquiry, and any review of services should include the availability of Indigenous service providers and/or culturally appropriate services.

### **Justice Reinvestment initiatives**

Justice Reinvestment initiatives should be specifically included in the ALRC's terms of reference. In particular, the Law Society suggests that the inquiry examine the current work being undertaken by Just Reinvest NSW in Bourke.

### **Investigation into the cultural competence of agencies in the criminal justice system and participation of Indigenous people within these agencies**

The Law Society considers that the terms of reference should include an investigation of the cultural competence of agencies in the criminal justice system, such as police, prosecution, community corrections, judiciary, legal services and the Justice and Forensic Mental Health Network. In particular, the terms of reference should have particular regard for the need for agencies to be able to understand and take appropriate account of culturally-specific practices that may influence a particular person's behaviour in relation to the matter(s) before the court. For example, this includes recognition of the importance of the concept of

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<sup>1</sup> NSW Law Reform Commission, *Report 135: People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* (June 2012), xv, accessed at: <http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-135.pdf>.

kinship in defining or shaping the attitudes, values and behaviour of many Indigenous people.<sup>2</sup>

The inquiry should also identify the extent and nature of cultural competency training available to employees in these agencies, and whether further education and training should occur. We note that training should not be a “one size fits all”, but should be informed, co-designed, guided and delivered in consultation with local Aboriginal communities and elders.

The Law Society submits that it is also important to examine the proportion of Indigenous people working in criminal justice agencies. This would assist in identifying the need for Indigenous participation and leadership in these agencies to improve cultural competence on an ongoing basis. Such an analysis would also enable leaders within these agencies to identify issues and develop policy changes, which ideally would lead to funding and pathways programs to boost participation and elevation of Indigenous people to leadership roles.

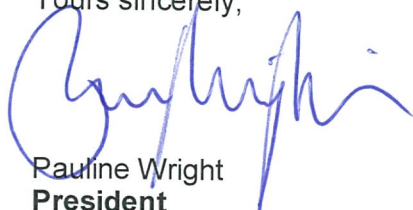
### **Consultation**

The Law Society acknowledges the inquiry’s intention to consult with relevant stakeholders. In particular, the Law Society submits that the ALRC should undertake consultations directly with Indigenous community members, in regional areas across Australia.

The Law Society’s Indigenous Issues Committee has previously facilitated consultations directly with community members for NSW Parliamentary inquiries. We would be happy to facilitate similar consultations for this inquiry.

Thank you for considering this submission. I would be grateful if questions could be directed at first instance to Anastasia Krivenkova, Principal Policy Lawyer, on 9926 0354 or [anastasia.krivenkova@lawsociety.com.au](mailto:anastasia.krivenkova@lawsociety.com.au).

Yours sincerely,



Pauline Wright  
**President**

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<sup>2</sup> Judicial Commission of NSW, *Equality Before the Law Benchbook*, (July 2016), 1107, accessed at: [https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Equality before the Law Bench Book.pdf](https://www.judcom.nsw.gov.au/wp-content/uploads/2016/07/Equality%20before%20the%20Law%20Bench%20Book.pdf).