THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Submission to the Australian Law Reform Commission Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (DP 84)

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The NSW Young Lawyers Criminal Law Committee makes the following submission in response to the call for submissions on the Commission's Inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples.

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 16 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Criminal Law Committee (**Committee**) is responsible for the development and support of members of NSW Young Lawyers who practice in, or are interested in, criminal law. The Committee takes a keen interest in providing comment and feedback on criminal law and the structures that support it, and consider the provision of submissions to be an important contribution to the community. The Committee is drawn from prosecution, defence (both private and public), police, the courts and other areas of practice that intersect with criminal law.

Introduction

The Committee welcomes the opportunity to address some of the issues raised in the Australian Law Reform Commission's (**ALRC**) inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (DP 84) (**the Inquiry**).

The Committee is of the view that the Inquiry is a timely one, particularly in relation to Indigenous incarceration in NSW. Figures released by the Australian Bureau of Statistics show that over the course of

2017, the number of Indigenous prisoners in Australian prisons has grown by 7%, to 11,411 persons.[1] The Bureau noted that three states account for almost three-quarters of that number: New South Wales (3,233 persons); Queensland (2,724 persons); and Western Australia (2,542 persons).[2] This trend has been noted elsewhere, with the NSW Bureau of Crime Statistics and Research (**BOCSAR**) finding that between 2013 and 2016 the NSW Indigenous imprisonment rate grew by 25%.[3] This increase means that in NSW the Indigenous imprisonment rate is now 13.5 times higher than the non-Indigenous imprisonment rate.[4]

While the Committee supports many of the changes proposed by the ALRC, it notes that these changes can only be effective if they are accompanied by broader political and societal changes, including the prioritisation of this issue by State and Territory governments. In this regard, the Committee notes that the 1991 Royal Commission into Aboriginal Deaths in Custody (**RCIADC**) recommended many of the changes proposed by the ALRC; that many of these recommendations are still outstanding is of grave concern to the Committee and its members.

In this submission, the Committee restricts itself to four topics of particular significance. These are bail and the remand population, sentencing options, fines and drivers' licences, and access to justice issues.

2. Bail and the Remand Population

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.

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[1] Australian Bureau of Statistics, *4512 Corrective Services, Australia*, 7 September 2017 (accessed at http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0).
[2] Ibid.
[3] D. Weatherburn & J. Holmes, NSW Bureau of Crime Statistics and Research, *Indigenous imprisonment in NSW: A closer look at the trend* (Bureau Brief No. 125) (2017), pg. 1
[4] Ibid.

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. The Committee submits that a discrete provision providing for the consideration of a person's Aboriginality, which is similar to Victoria's s 3A, should be implemented in State and territory bail legislation. The current system of bail laws fails to adequately consider cultural issues Aboriginal and Torres Strait Islander people may face. As the RCIADIC noted in 1991, 'The lack of flexibility of bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in police custody.'[5]

Refusal of bail results in the loss of freedom and the removal of people from support networks. This limits contact with friends and family, causes possible loss of employment and financial distress, and damages a person's reputation. With Indigenous people more likely to be bail refused, they are more likely to suffer these consequences. Indigenous people who are granted bail are better equipped to deal with their charges, provide clear instructions, and have family support networks available when going before the Court than those who are not granted bail.[6] When on remand they are also more likely to plead guilty than those who are not on remand.[7] This is particularly the case when the likely sentence is comparable to (or even less than) the time spent on remand – meaning that a plea of guilty would result in release from custody. Needless to say, this is an undesirable outcome for the individual *and* society.

The Committee submits that the limited consideration of Aboriginality through existing legal avenues, bench books and practice notes does not sufficiently account for the systemic causes of Indigenous overrepresentation in the remand population. Having Aboriginality enshrined as a relevant factor in bail decisions would ensure Aboriginality must be considered in every case. The Committee submits that it should not be left to chance that an Aboriginal offender would have access to legal representation that has the time and resources to make effective submissions or appear before a Magistrate or Judge who is culturally aware.

The need for a provision akin to s 3A has been highlighted in submissions to, and the recommendations of, various law reform commission reports. For example, the NSW Law Reform Commission recorded that a

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[5]Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 3 21.4.2.
[6]Queensland Law Reform Commission, *To bail or not to bail – a review of Queensland's bail law*, Discussion Paper No 35 (1991) 3.
[7]Ibid.

number of submissions to its *2012 Bail Report* "pointed out that bail conditions such as curfews, exclusion zones and non-association orders restrict contact with family networks and prevent Aboriginal people from maintaining relationships, performing responsibilities such as taking care of elderly relatives or attending funerals. Bail conditions that conflict with cultural obligations are often breached, leading to enforcement proceedings and bail refusal."[8] Further, the economic disadvantage experienced by many Indigenous people can create difficulties in complying with bail conditions. Often these are relatively practical problems that may be taken for granted in other contexts. For example, the NSW Law Society's submission to the NSWLRC noted that that "Aboriginal people often breach reporting conditions because they do not have access to public transport, a motor vehicle or a licensed driver"[9]. The Committee echoes these concerns, and submits that they demonstrate a need to ensure that consideration is given to specific issues arising due to a person's Aboriginality when making bail applications, which in turn may reduce the overrepresentation of Indigenous persons in custody.

The operation of Bail laws in New South Wales in relation to Indigenous persons

Notwithstanding the fact that the *Bail Act 2013* (NSW) does not feature a standalone provision, requiring the consideration of issues relating to an applicant's Aboriginality, it does require a bail authority, when assessing bail concerns, to consider "any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment". Section 18(1)(a) requires a decision-maker to take into account "the accused person's background, including criminal history, circumstances and community ties" when assessing bail concerns. Although this latter subsection does not refer explicitly to a person's community ties by reason of their Aboriginality, it is wide enough to encompass consideration of such ties.

Members of the Committee expressed various views concerning the operation of *Bail Act 2013* (NSW) s 18, particularly in relation to the usefulness of s 18(1)(a). Committee members stated that this provision was often referred to in bail applications; this was particularly the case in submissions made by practitioners working for the Aboriginal Legal Service. One Committee member reported that, in their experience, accused persons were more likely to be granted bail if they could demonstrate the support of their community, and particularly if they had the support of respected Indigenous Elders. It was also reported that bail decision-makers viewed a person's involvement in Indigenous support groups and local cultural groups favourably.

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[8]NSW Law Reform Commission, *Bail*, Report No 133 (2012) 11.54. See also similar commentary made in the Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) 180.
[9] NSW Law Reform Commission, *Bail*, Report No 133 (2012) 11.52.

However, other Committee members expressed concerns that, in their experience, the support networks of Indigenous accused persons were not always adequately considered by bail decision-makers.

Committee members observed that s 18(1)(k) was also often referred to by practitioners and was considered by magistrates. In particular, this provision is referred to on the rare occasion where there was a real necessity to gain bail so that the accused could visit a dying family member or go to a family funeral. Further, if the accused person was able to obtain an approved place in an Indigenous based rehabilitation centre this often supported a release application. Nonetheless, it is apparent that there is scope to improve the operation of s 18(1)(k). 'Special vulnerability' is not defined within the *Bail Act 2013* and its interpretation and importance is left to the discretion of individual judges. The case law indicates that Aboriginality (if considered) focuses upon the overrepresentation of Indigenous people in custody and the cycle of disadvantage, rather than any assessment of culture, kinship and the need to tailor bail conditions for Aboriginal people.[10]

Further, in NSW, the *Equality Before the Law Bench Book* provides the following guidance to bail decision-makers:[11]

> **Relevant considerations** (in line with s 17 of the *Bail Act 2013*) "the unacceptable risk test".
>
> Aboriginal people must not be subjected to any more stringent tests in relation to bail, or any conditions attached to bail, than non-Aboriginal people. A bail condition can be imposed only for the purpose of mitigating an unacceptable risk.
> Paternalism is not appropriate.
> Irrespective of their housing status, Aboriginal people often have very close kinship and family ties to a particular location. Given Aboriginal kinship ties, it may also be less appropriate to attach a condition for an Aboriginal person that the person leave town, than it would be to do so for a non-Aboriginal person.
> Assess bail and bail conditions not just based on police views but also on the views of the defence and respected members of the local Aboriginal community and/or the Local Court Aboriginal Client Service Specialist (if there is one) about the particular person's ties to the community and likelihood of absconding, and about culturally-appropriate options in relation to bail conditions. Community-based support, for example, might provide as viable an option as family-based support.
> Reporting and residential conditions need to be realistic and not unduly oppressive — for example, a condition banning residence in a particular town, or requiring court permission to change, may

[10]See, for example, *R v Michael John Brown* [2013] NSWCCA 178*; Alchin v R* (Unreported, Supreme Court of New South Wales, McCallum J, 16 February 2015); *R v Sandra Lee Morris* (Unreported, Supreme Court of New South Wales, McCallum J, 20 May 2014); *R v Luke Charles Wright* (Unreported, Supreme Court of New South Wales, Rothman J, (7 April 2015).
[11] Judicial Commission of NSW, *Equality Before the Law Benchbook* (2016), 2.3.2.

> be ruled as unduly oppressive if there is a death in the defendant's family requiring their immediate attendance in that town.

The Committee submits that these are appropriate considerations to be taken into account when making bail determinations for Aboriginal and Torres Strait Islander persons.

The implementation of the standalone provision in Victoria

A review of the publicly available cases applying *Bail Act 1977* (Vic) s 3A reveals that consideration of cultural issues related to a person's Aboriginality does not dominate the bail decision-making process or risk community safety. An example of this is the decision in *DPP v SE*,[12] where Bell J stated at [20]:

> While s 3A requires the specified considerations to be taken into account in relation [to] all such determinations, the provision does not mandate a particular outcome; depending on the circumstances of the case, bail may be refused to an Aboriginal applicant who, for example, poses an unacceptable risk to community safety (s 4(2)(d)(i)) even after taking s 3A into account.

His Honour went on to discuss five cases where s 3A was taken into account. In two cases bail was not granted, and in three cases bail was granted. Additionally, in *DPP v SE* itself bail was granted. An examination of the decisions made in these cases reveals that the decision to grant or refuse bail was based on a combination of factors, of which issues associated with the bail applicant's Aboriginality was only one factor. For example, in *Re Hume (Bail Application)*[13] Hollingworth J stated at [63]:

> In considering this bail application, I have had regard to the applicant's kinship obligations to his mother, as required by s 3A of the *Bail Act*. However, they are not sufficient to overcome my concerns about the risks he poses to [the victim] if released on bail without adequate support and supervision.

In *Re Mitchell*[14], a case where bail was granted, T. Forrest J commented that, despite his consideration of s 3A, he would have granted bail "regardless of any impact from that provision."[15] Interestingly, s 3A was not referred to in all cases involving bail applications by Indigenous persons. In *Application for Bail by Chatters*,[16] despite the accused person being of Aboriginal heritage (and having identified that heritage), submissions were not made concerning s 3A, indicating that the existence of the provision does not guarantee that it will

[12] [2017] VSC 13
[13] [2015] VSC 695
[14] [2013] VSC 59
[15] *Re Mitchell* [2013] VSC 59 at [13].
[16] [2017] VSC 2

be used.[17] This brief survey of cases indicates that, overall, s 3A is being appropriately applied by bail decision-makers in Victoria. The Committee also notes that the retention of the section was widely supported by submissions to The Hon. Paul Coghlan QC's 2017 Bail Review.[18]

The desirability for a standalone provision in the context of New South Wales bail decisions

Although the responses of Committee members indicate that many bail decision-makers in New South Wales appear to be considering the issues raised by an applicant's Aboriginality, the Committee remains concerned that, in the absence of legislation mandating consideration of ATSI cultural background, kinship systems and connection to place, such ties may be overlooked by some bail decision-makers. This has the potential to lead to inconsistency in the application of the law, which is an unsatisfactory outcome. The Committee submits that if clear legislative guidance is given to decision-makers, specifying what should be taken into account in relation to making any determination under the *Bail Act 2013* (NSW) in relation to an Indigenous person, inconsistency in decision-making may be reduced. Further, such a provision may assist legal practitioners in making targeted submissions when representing an Indigenous accused person, and provide a tool to "pull up" decision makers (to use the words of submissions to the Victorian Law Reform Commission) who do not consider such factors when making bail decisions.[19] This should be combined with further guidance in judicial Bench Books. The NSW *Equality Before the Law Bench Book* provides appropriate guidance for setting bail conditions (see above). However more can be added, such as suggesting that, in appropriate cases, Indigenous persons be bailed to multiple addresses. This recognises that Indigenous Australians may not have one address, but instead may reside at a number of addresses with extended family.[20]

Most importantly in this respect, the *Bail Act 2013* is limited in that the current provisions only explicitly apply to the assessment of 'bail concerns' as part of determining the unacceptable risk test. A bail concern is defined in s 17(2) of the *Bail Act 2013* as:

> ….a concern that an accused person, if released from custody, will:
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> (a) fail to appear at any proceedings for the offence, or
>
> (b) commit a serious offence, or

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[17] *Application for Bail by Chatters* [2017] VSC 2 at [2].
[18] Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017) [4.82].
[19] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) 180.
[20] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) 179.

(c) endanger the safety of victims, individuals or the community, or

(d) interfere with witnesses or evidence.

Therefore, ss 18(1)(a) and (k) do not mandate consideration of a bail applicant's community ties, or special needs or vulnerability arising from their Aboriginality when making other determinations under the *Bail Act 2013*. In contrast, the Victorian standalone provision applies whenever the decision-maker is "…making a determination under [the *Bail Act 1977* (Vic)] in relation to an Aboriginal person….". As Bell J stated in *DPP v SE* at [38], the considerations in that section:

> …must be taken into account when determining whether, in the light of possible conditions, an unacceptable risk has been established (ss (4(2)(d)(i) and 4(3)(f)) or (where relevant) the applicant has not shown cause (s 4(4)) or exceptional circumstances do not exist (s 4(2)(a), (aa) and (b)). The considerations must also be taken into account when determining the content of any such conditions.

While the implications of a person's Aboriginality have also been considered outside of assessing bail concerns in NSW, such deliberation is not necessarily explicit. For example, assessing bail concerns is connected with the imposition of bail conditions,[21] and the Bench Book cited above refers to a number of issues that should be considered when setting bail conditions for Aboriginal and Torres Strait Islander persons. Further, in *A1 v The Queen*,[22] Garling J observed at [36]-[37] in relation to bail applications for show cause offences:

> Although a two-step decision-making process is required, similar matters may be relevant to both steps. In many cases, matters that are relevant to the unacceptable risk test will also be relevant to the show cause test...the Bail Act does not prohibit the court from considering, at the stage of applying the show cause test, that there are no bail concerns, or that the risks if bail is granted are not unacceptable.

The discussion paper refers to an unreported case in the NSW Supreme Court where it was found that the separation from family that remand entails could perpetuate cycles of disadvantage, amounting to "cause" under the show cause provisions. In that case, consideration was also given to the cycle of disadvantage faced by the applicant's family (reflective of that faced in many Indigenous communities more generally) in imposing bail conditions.[23] However, in *R v S*,[24] a case requiring the respondent show cause as to why her detention was not justified, no reference was made to specific cultural issues arising from the respondent's Aboriginality. While reference was made to community ties, no reference was made to Aboriginal kinship

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[21] *Bail Act 2013* s 18(1)(p)
[22] [2016] NSWSC 1288
[23] *R v Alchin* (Unreported, NSWSC 16 February 2015), [3].
[24] [2016] NSWCCA 189

ties. The only mention of the respondent's Aboriginality can be found in Counsel's submission that the respondent was "a vulnerable young aboriginal woman, suffering from mental health issues."[25]

Accordingly, the Committee submits that there should be an express legislative requirement for decision-makers to consider such factors, even if they are not determinative of the outcome of the particular bail application. We submit that the best way to do so is through a standalone provision similar to section 3A in the *Bail Act 1977* (Vic). A provision of this nature directs bail decision-makers' attention to the cultural issues arising due to a person's Aboriginality, whilst ensuring that this consideration does not overwhelm the bail decision-making process and risk community safety. For the reasons discussed above, a standalone provision that applies to all determinations under the *Bail Act 2013* is more desirable than a more confined provision, such as the one that currently exists in New South Wales. The Committee is also of the view that the provision that currently exists in Queensland is too confined, and may be difficult to implement. Such a provision may create problems if a representative is not available for a particular applicant or if a Community Justice Group (or similar) is not active in the relevant area.

The Committee notes that the changes proposed only mandate for *consideration* to be given to cultural issues arising from a person's Aboriginality. This suggests that the overall unacceptable risk test (as it stands in NSW) would remain unchanged, and applicants would still need to satisfy decision-makers that any bail concerns, such as the safety of victims or witnesses, could be mitigated by the imposition of bail conditions.

Finally, and importantly, consistency in approach across the states and territories is desirable, so that Aboriginal and Torres Strait Islander persons are given the same opportunity across all states, and a uniform approach is taken to directing bail decision-makers to consider issues such as cultural background, kinship and community ties, and ties to place.

Proposal 2–2 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.

The Committee supports this proposal and notes that without greater cooperation between State and Territory governments and Aboriginal and Torres Strait Islander organisations, the changes discussed in Proposal 2-1 could not be effective.

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[25] *R v S* [2016] NSWCCA 189 at [60].

A brief review of the case law supports these concerns. For example, in the Victorian case of *Re Hume (Bail Application)*,[26] Hollingworth J referred to the applicant's kinship obligations to his mother, as required by the standalone provision. However, her Honour was also concerned about the history of domestic violence towards the victim, and the lack of appropriate support services, supervision and structures in place to prevent the applicant reoffending towards the victim. This led to bail being refused.

Similarly, in *R v Brown*,[27] an unalleviated concern of the NSW Court of Criminal Appeal was that "no…culturally appropriate alternative supervision is proposed or available" and the circumstances of the respondent's residence did not "allow for supervision by law enforcement agencies to a sufficient degree that any condition we might impose involving abstention from alcohol can be policed, or which completely safeguards the possibility of travel to the victim's location."[28] This was one of the factors the Court considered in coming to the conclusion that it was not satisfied that there were exceptional circumstances justifying the grant of bail. Although this case considered the now repealed *Bail Act 1978* (NSW), it provides a good illustration of the importance of having culturally appropriate accommodation and drug and alcohol rehabilitation services available to Indigenous accused persons. In fact, the Court stated in that case:

> In the cases of Aboriginal accused, particularly where the applicant for bail is young, alternative culturally appropriate supervision, where available, (with an emphasis on cultural awareness and overcoming the renowned anti-social effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to a remand in gaol[29].

The need for accommodation and support services to be culturally appropriate and staffed by Indigenous persons has been highlighted by the Victorian Law Reform Commission. In its 2007 Report, the VLRC stated

> "[a]ddressing the problem of alcohol and drug misuse in the Indigenous community requires a multifaceted response. Part of this response should include drug and alcohol programs run by Indigenous workers for Indigenous Australians on bail. Indigenous Australians are more likely to comply with their bail conditions if they are given appropriate support to address the underlying causes of their offending."[30]

The Committee echoes these comments and submits that the effectiveness of the legislative change discussed in Proposal 2-1 would be diminished if culturally appropriate bail support and diversion options are not available to Indigenous accused persons. In this respect, we note that this requires a sustained political

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[26] [2015] VSC 695
[27] [2013] NSWCCA 178
[28] *R v Brown* [2013] NSWCCA 178, [34], [36].
[29] *R v Brown* [2013] NSWCCA 178, [35]
[30] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) 176.

commitment and must be undertaken in concert with Indigenous leadership. The Committee submits that State and Territory governments prioritise consultation with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop appropriate infrastructure. The Committee recommends that State and Territory governments should also implement mechanisms for consulting service providers and legal practitioners to identify gaps in services in specific areas.

4. Sentencing Options

Question 4–1 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; and

(b) Which provisions should be prioritised for review?

The Committee submits that the Commonwealth, State and Territory governments should review provisions that impose mandatory or presumptive sentences on offenders. Governments should prioritise a review of those provisions which concern offences for which a high proportion of Aboriginal and Torres Strait Islander people are convicted, including, for example, "lower end" assault and property offences.[31]

The negative impacts of mandatory sentencing are best illustrated by a number of cases arising from Western Australia[32] and the Northern Territory[33]. Examples include a 16 year old, with one prior conviction, receiving a 28-day sentence for stealing a bottle of water, and that of a 15-year-old Aboriginal boy who received a 28-day mandatory sentence for stealing school stationery.[34]

Mandatory sentences, such as the above, clearly violate the principle of proportionality as enunciated by the High Court in *Veen v The Queen [No 2]* (1988) 164 CLR 476. Further, the imposition of a mandatory minimum prevents the sentencing body from properly weighing objective and subjective factors in the sentencing procedure, thereby limiting judicial discretion.

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[31] It should be noted that in NSW, which does not have a wide-ranging mandatory sentencing regime, that Indigenous imprisonment is most likely to arise from 'acts intended to cause injury' or 'justice procedure offences', D. Weatherburn & J. Holmes, NSW Bureau of Crime Statistics and Research, Indigenous *imprisonment in NSW: A closer look at the trend* (Bureau Brief No. 125) (2017) 5
[32] Western Australiaenacted mandatory sentencing legislation in 1996 through amendments to the *Criminal Code* (WA) 1913
[33] The Northern Territory enacted mandatory sentencing for property offences in 1997 and then for assaults in 2008.
[34] Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (2014) [20]

Further, there is little evidence that mandatory sentencing regimes reduce the rate of offending within a jurisdiction. In fact, statistics from the Northern Territory indicate that the Territory experienced an increase in property crime following the introduction of mandatory sentencing and a decrease after its repeal.[35] These statistics must necessarily weaken any deterrence argument made in support of mandatory sentencing.

Research has shown that Indigenous people are significantly more likely to receive a mandatory sentence for property offences.[36] This in turn contributes to the over-representation of Indigenous people in Australia's corrective facilities. Accordingly, the Committee recommends that legislative amendments should focus on sections that involve property or lesser violence offences. However, the Committee submits that a review should be made of all mandatory sentencing regimes in Australia. When the social and economic costs of incarceration are not outweighed by the deterrent or rehabilitative benefits of imprisonment, it is clear that review is in order.

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

Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) lists the purposes for which a court may impose a sentence on an offender. Included amongst those purposes are the deterrence of the offender and other persons and the rehabilitation of the offender.

One of the principal arguments for the use of short-term sentences, in particular against those who are first-time offenders, is deterrence. However, NSW BOCSAR research has found that those who were sentenced their first term of imprisonment, for 12 months or less, had the same rate of recidivism as those placed on suspended sentences under s 12 of the *Crimes (Sentencing Procedure) Act 1999*; thus suggesting that short custodial sentences exert no more deterrent effect than comparable community orders.[37]

As has been noted elsewhere, the imposition of short-term sentences of imprisonment can greatly affect the rates of recidivism. As the discussion paper notes, the impacts of short term sentences of imprisonment can include loss of employment and housing, dislocation from family, removal of children, and marginalisation in

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[35] Northern Territory Office of Crime Prevention, *Mandatory Sentencing for Adult Property Offenders – the Northern Territory Experience* (2003) 10
[36] Ibid, p 13; Stephen Jackson and Fiona Hardy, National Judicial Conference, *The Impact of Mandatory Sentencing on Indigenous Offenders*, (2010) 3; Australian Bureau of Statistics, *Prisoners in Australia*, (5 December 2013).
[37] J Trevena and D Weatherburn, NSW Bureau of Crime Statistics and Research, *Does the first prison sentence reduce the risk of further offending?* (Contemporary Issues in Crime and Justice No. 187) (2015) 1

the community affecting the ability of the newly released to rehabilitate themselves. Further, those serving short sentences are often denied the opportunity to partake in courses and educational opportunities nullifying any argument that short-term sentences promote rehabilitation.

However, as noted by the NSW Sentencing Council, there is a fundamental imbalance in non-custodial sentencing options available across jurisdictions, particularly, in regional Australia. As such, immediately abolishing short-term prison sentences might have negative and unintended consequences including the potential for sentence creep (noting the evidence in the discussion paper that the Western Australian experience has not produced such results). Moreover, abolishing short term imprisonment without ensuring that a range of non-custodial options are consistently available would constrain the discretion of judicial officers and eliminate flexibility in sentencing.

Accordingly, the Committee considers that it would be appropriate to abolish short-term sentences of imprisonment provided there is uniformity in the availability of well-structured non-custodial sentencing alternatives.

Question 4–3 If short sentences of imprisonment were to be abolished, what should be the threshold (e.g., three months; six months)?

The Committee submits that any threshold should be calibrated by reference to prison population data, and following extensive research on the outcomes of such sentences, in order to ensure that the objective of such a change is achieved.

Proposal 4–1 State and Territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.

The Committee supports the proposal and considers it both necessary and appropriate for ensuring that non-custodial sentencing options are available in all jurisdictions and areas of Australia. This change should be made with a view to reducing or abolishing the use of short-term sentences of imprisonment.

The Committee considers that community based sentencing options are an appropriate mechanism for combating the overrepresentation of Aboriginal and Torres Strait Islander people in prisons. However, this type of sentencing requires adequate supervision resources to be available in the community together with support services, for example, drug and alcohol rehabilitation. It is therefore necessary for State and Territory governments to work with community organisations in order to effectively implement such changes.

The Committee supports the idea that community organisations in regional and remote areas should be prioritised by State and Territory governments, as the Committee is of the view that an offender's location should not limit the availability of sentencing options.

Question 4–5 Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?

Yes, the Committee supports legislative reform to allow for judicial officers to tailor sentencing options. Discretion in sentencing is necessary to ensure the right outcome in any given case. Sentencing Judges are tasked with resolving the complex and competing concerns of punishment, denunciation, and rehabilitation. This can only be satisfactorily achieved with flexible sentencing options, supported by fully resourced restorative and rehabilitative programs.

Solely focusing on the punitive role of sentencing is flawed in principle and ultimately counterproductive because it fails to address the behaviour underlying offending – or acknowledge the social determinants of criminality. As reflected in the Committee's submission under **Question 4-2** above, terms of imprisonment are equally as effective in deterring second offences, as are community-based options.

The Committee is particularly concerned with the moves towards removing or replacing non-custodial sentencing options by the Victorian and NSW governments. While the effects of these changes have not yet been felt, the reduction in types of non-custodial order might see an increase in prison populations within these two jurisdictions.

6. Fines and Driver Licences

Proposal 6–1 Fine default should not result in the imprisonment of the defaulter. State and territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.

Imprisonment should be the measure of last resort when dealing with the punishment of an offender. Fines are imposed as punishment for offences that Parliament considers do not merit a maximum penalty of imprisonment. It is the Committee's view that the deprivation of the liberty of a human being should never be carried out lightly and it offends both principle and pragmatism to imprison those who by the dint of their economic, social and historical disempowerment are most likely to default on paying their fines.

From a practical perspective it is counterproductive for the State to incarcerate a fine defaulter – and incur the costs associated with that incarceration which will vastly exceed the cost of the fine in the ordinary course of events. The Committee supports the adoption of elements of the NSW Work and Development Orders as the last resort in fine default proceedings. Orders, which include financial counselling, educational courses or drug and alcohol treatment, have positive effects on the defaulters, which in turn create positive outcomes for society as a whole.[38]

The Committee therefore supports the abolition of provisions that provide for imprisonment in lieu of unpaid fines.

Question 6–1 Should lower level penalties be introduced, such as suspended infringement notices or written cautions?

The Committee supports fines or penalties being suspended for a short period of time (for example, a couple of weeks) to enable an issue to be addressed. For example, somebody who is driving whilst suspended due to ignorance of an unpaid fine debt could be given two weeks to resolve the matter with the relevant roads authority; if the fine situation is resolved then the penalties can be removed from the system. If the fines are not paid or resolved then the penalty would be confirmed.

This would reduce the amount of 'honest and reasonable mistake of fact' cases in which Indigenous clients who live between different addresses or in large families do not receive the notices from the motor registries or police, and then commence a cycle of a 'Drive Whilst Suspended' and 'Drive Whilst Disqualified' offences.

Question 6–2 Should monetary penalties received under infringement notices be reduced or limited to a certain amount? If so, how?

The Committee submits that the monetary penalties received under infringement notices could be subject to a sliding scale, as opposed to being reduced wholesale. For example, a person who has never been the subject of a fine would receive a lower amount than a person who has incurred a large number of the same kind of notices. Although this scale would result in more work for those who impose such notices, they would significantly reduce the burden on those subject to such fines. Failing that, greater discretion for the RMS to

[38] In an evaluation of the Work and Development Scheme by INCA Consulting, 87% of service providers reported that the Scheme had enabled clients to address the factors that led to them defaulting on their fines in the first place. INCA Consulting, *Evaluation of the Work and Development Order Scheme: Qualitative Component*, http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/25218/WDO-Final-Evaluation-Report-May-2015.pdf , (accessed 20/09/17).

reduce fines and awareness by police of the impact of the amount of a fine imposed for people on Centrelink would assist greatly.

Of more assistance would be the proactive cooperation of Centrelink, motor vehicle registries and state government fine enforcement agencies to assist Indigenous people with access to Work and Development Orders (in NSW) or financial counselling and rehabilitation programs. For example, a certain level of fine debt could trigger recovery agencies to assist with solutions, rather than further punish people who accumulate fine debt.

Question 6–3 Should the number of infringement notices able to be issued in one transaction be limited?

The Committee submits that this is not necessarily the preferable approach. A more measured approach would be to cap the total financial penalty of a single transaction or set of fines unless certain aggravating circumstances could be demonstrated. Aggravating circumstances could include the number of repeat infringements within a certain amount of time.

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

Yes. However, the Committee considers that there should be an additional element to the offence to make the offence less likely to be laid in circumstances where no offence was ever likely to be caused to a reasonable member of the public.

The current elements under the *Summary Offences Act 1988* in NSW include:

> The accused used offensive language;
> In or near, or within hearing distance from, a public place or school.

The additional elements could raise the bar by including where the offensive language was used:

> At a time or in circumstances at which it was likely to be heard by a reasonable member of the public; and
>
> It caused offence or was done in a manner likely to cause offence to a reasonable member of the public.

In a society where the impact of swearing has been lessened by the normalisation of words through changes in popular culture the Committee submits that offensive language charges should be restricted to situations where offence is actually caused or is likely to be occasioned to a reasonable member of the public. The

Committee submits that offensive language offences should not be founded where words are merely uttered; a finding that such words are offensive should be made by a tribunal of fact representing community values.

Question 6–6 Should state and territory governments provide alternative penalties to court ordered fines? This could include, for example, suspended fines, day fines, and/or work and development orders.

Yes, and noting our response to question 4-5, above, the Committee submits that there needs to be a more nuanced and diverse set of tools at the disposal of decision makers within the criminal system. Broader discretion enhances the ability of courts to provide individualised justice. Culturally appropriate options in communities would assist Indigenous offenders to achieve better outcomes long-term. Consultation with communities about how counselling, training or work orders could best be tailored for them would be a vital part of making such schemes more effective.

Proposal 6–2 Work and Development Orders were introduced in NSW in 2009. They enable a person who cannot pay fines due to hardship, illness, addiction, or homelessness to discharge their debt through:

community work;

program attendance;

medical treatment;

counselling; or

education, including driving lessons.

State and territory governments should introduce work and development orders based on this model.

Work and Development Orders are a promising and fair way of encouraging people to make a change in their lives without being overly paternalistic or punishing to those who are struggling. Moreover, a number of Committee members have reported that these orders achieve excellent outcomes for Indigenous peoples in NSW who are often referred to the program through Aboriginal court liaison officers and the Aboriginal Legal Service's Field Officers. It is a pragmatic, balanced and sensible measure for accused persons and the community. The Committee submits that these programs should be available nationwide.

Question 6–7 Should fine default statutory regimes be amended to remove the enforcement measure of driver licence suspension?

The Committee submits that driver licence disqualification has a role to play in the suite of tools for fine enforcement. However, there should be a higher threshold before suspensions take effect. Committee members have noted the number of matters before the Local Court in which people have had their licences suspended following fine default, in which the person alleges no knowledge of the fines.

The Committee submits that an appropriate solution would be to legislate to allow the courts to stay licence suspensions subject to persons satisfying the outstanding fines, either through payment or as per our submission above at **4-5** and **6-6**.

Question 6–8 What mechanisms could be introduced to enable people reliant upon driver licences to be protected from suspension caused by fine default? For example, should:

(a) recovery agencies be given discretion to skip the licence suspension step where the person in default is vulnerable, as in NSW; or

(b) courts be given discretion regarding the disqualification, and disqualification period, of driver licences where a person was initially suspended due to fine default?

The Committee supports both proposals. A further option could be to allow people to apply for work or family licences, if they are disqualified, which could include conditions such as: that their vehicles be equipped with interlock devices for alcohol testing; speed limits; or work-hours-only limits. Courts should embrace technological solutions to provide people with additional options in circumstances where they are faced with either breaking the law or not being able to do things like to take their children to medical appointments. Being able to apply for an order from the Local Court for an exceptional circumstances-type licence would reduce the number of Indigenous people in prison for driving whilst disqualified because they originally drove whilst suspended.

Question 6–9 Is there a need for regional driver permit schemes? If so, how should they operate?

Driver permits are one option, however, the overall savings to the justice system, police resources and the communities of providing adequate training and opportunities for Indigenous peoples to get their licences in

both rural and urban areas would far outweigh the benefit of such a scheme. Other community members may more readily accept that proposal compared to a two-tiered licence system for rural and urban areas.

Question 6–10 How could the delivery of driver licence programs to regional and remote Aboriginal and Torres Strait Islander communities be improved?

Programs targeting Aboriginal and Torres Strait Islander young people in relation to helping them to get their Learner's licence early through education, subsidising application fees and providing driver training through employing local members of the community would be of ongoing benefit to communities where opportunities for young persons to get their licences and secure local employment are limited. Early intervention and support would circumvent the pattern of Indigenous peoples being in prison because they never got a licence and simply never caught up to the ever-extending disqualification period they started at a young age.

11. Access to Justice Issues

Proposal 11–1 Where needed, State and Territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system.

11-1 What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for ATSI peoples?

The Committee submits that there are a number of reforms to laws and frameworks, which could be implemented to improve the effectiveness of diversionary options and specialist sentencing courts.

One of the goals of diversionary options and specialist sentencing courts is to assist in reducing incarceration and reoffending. Thus, in some appropriate cases, the Committee submits that specialist sentencing courts and diversionary options should be made available to Indigenous peoples even when the offence is not their first.

The Committee also submits that improvements need to be made to the functioning of drug diversion and treatment programs to ensure ATSI peoples completion of and access to programs. To further the success rates of ATSI participants, the Committee submits that a holistic approach needs to be taken where Aboriginal and Torres Strait Islander peoples involved in diversionary programs are given access to services and other practical requirements to ensure they finish their programs.

Finally, the Committee recommends that States and Territories that have not implemented the ATSI sentencing principles do so.

11-2 Where not already in place, State and Territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.

Indefinite detention regimes should be abolished and replaced with special hearing processes and limited term detention for people who are diagnosed with forensic mental health conditions. Indefinite detention regimes are fundamentally unfair because they result in defendants being held in detention for longer than the maximum sentence for the crime they committed.

Question 11–2 In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?

Proposal 11–3 State and Territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

The Committee submits that although some states and territories already operate a notification system, whereby the ALS or equivalent is contacted when an Aboriginal or Torres Strait Islander person is detained in police custody, this system should be a legislated obligation. Through this legislation, non-compliance with notification requirements could have legal and professional consequences.

A legislated Custody Notification Service (**CNS**) is important because of the special support and understanding that Aboriginal and Torres Strait Islander people require due to the cultural, social, medical and other intergenerational issues they regularly face.

The CNS system is relatively cheap and cost effective to run[39] and assists more than 15,000 Aboriginal and Torres Strait Islander people per year throughout NSW and the ACT[40] through the provision of timely and culturally sensitive legal advice. As such, the Committee submits that there are no reasons why the CNS system should not be statutorily mandated and thus strongly encourage the ALRC to adopt this view.

In October 2016 the Indigenous Affairs Minister, offered to fund the first three years, including the initial setup, of a CNS for any state or territory that does not currently have a similar system already. The New South Wales CNS was set up in 2000 and has been funded through one-off Commonwealth grants. In December 2015, the Minister announced that the Federal Government would commit to a grant until June 2019, providing the service with assurance and stability.

As such, the Committee also recommends consideration by State, Territory and Federal governments of permanently funding the system so that uncertainty and insecurity does not taint the effectiveness and quality of the service currently offered in NSW and ACT.

Concluding Comments

The Committee welcomes the valuable work of the Australian Law Reform Commission in considering reforms to the criminal justice system, and looks forward to the final recommendations in this regard. However, we reiterate our earlier observations. Effectively responding to the crisis in Indigenous incarceration goes beyond the legal system; fundamental societal and institutional change needs to occur. The Committee hopes that the ongoing commitment of the ALRC and the other respondents to this inquiry can affect institutional change within the States and Territories.

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. Should you have any further queries, please do not hesitate to contact the undersigned.

[39] The ACT and NSW CNS costs just $526,000 per year, Aboriginal Legal Service (NSW/ACT), *Quick Facts* www.alsnswact.org.au (accessed 10/09/17).
[40] Aboriginal Legal Service (NSW/ACT), *Quick Facts* www.alsnswact.org.au (accessed 10/09/17).

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