



Terms of reference – ALRC inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples

9 February 2017

I, Senator the **Hon George Brandis QC, Attorney-General of Australia,**

refer to the **Australian Law Reform Commission**, an inquiry into the over-representation of Aboriginal and Torres Strait Islander peoples in our prisons.

It is acknowledged that while laws and legal frameworks are an important factor contributing to over-representation, there are many other social, economic, and historic factors that also contribute. It is also acknowledged that while the rate of imprisonment of Aboriginal and Torres Strait Islander peoples, and their contact with the criminal justice system - both as offenders and as victims - significantly exceeds that of non-Indigenous Australians, the majority of Aboriginal and Torres Strait Islander people never commit criminal offences.

Scope of the reference

- 1) In developing its law reform recommendations, the Australian Law Reform Commission (ALRC) should have regard to:
 - a. Laws and legal frameworks including legal institutions and law enforcement (police, courts, legal assistance services and prisons), that contribute to the incarceration rate of Aboriginal and Torres Strait Islander people and inform decisions to hold or keep Aboriginal and Torres Strait Islanders in custody, specifically in relation to:
 - i. the nature of offences resulting in incarceration,
 - ii. cautioning,
 - iii. protective custody,
 - iv. arrest,
 - v. remand and bail,
 - vi. diversion,
 - vii. sentencing, including mandatory sentencing, and
 - viii. parole, parole conditions and community reintegration.
 - b. Factors that decision-makers take into account when considering (1)(a)(i-viii), including:
 - i. community safety,
 - ii. availability of alternatives to incarceration,
 - iii. the degree of discretion available to decision-makers,
 - iv. incarceration as a last resort, and
 - v. incarceration as a deterrent and as a punishment.
 - c. Laws that may contribute to the rate of Aboriginal and Torres Strait Islander offending and including, for example, laws that regulate the availability of alcohol, driving offences and unpaid fines.
 - d. Aboriginal and Torres Strait Islander women and their rate of incarceration.
 - e. Differences in the application of laws across states and territories.

- f. Other access to justice issues including the remoteness of communities, the availability of and access to legal assistance and Aboriginal and Torres Strait Islander language and sign interpreters.
- 2) In conducting its Inquiry, the ALRC should have regard to existing data and research¹ in relation to:
- a. best practice laws, legal frameworks that reduce the rate of Aboriginal and Torres Strait Islander incarceration,
 - b. pathways of Aboriginal and Torres Strait Islander peoples through the criminal justice system, including most frequent offences, relative rates of bail and diversion and progression from juvenile to adult offending,
 - c. alternatives to custody in reducing Aboriginal and Torres Strait Islander incarceration and/or offending, including rehabilitation, therapeutic alternatives and culturally appropriate community led solutions,
 - d. the impacts of incarceration on Aboriginal and Torres Strait Islander peoples, including in relation to employment, housing, health, education and families, and
 - e. the broader contextual factors contributing to Aboriginal and Torres Strait Islander incarceration including:
 - i. the characteristics of the Aboriginal and Torres Strait Islander prison population,
 - ii. the relationships between Aboriginal and Torres Strait Islander offending and incarceration and inter-generational trauma, loss of culture, poverty, discrimination, alcohol and drug use, experience of violence, including family violence, child abuse and neglect, contact with child protection and welfare systems, educational access and performance, cognitive and psychological factors, housing circumstances and employment, and
 - iii. the availability and effectiveness of culturally appropriate programs that intend to reduce Aboriginal; and Torres Strait Islander offending and incarceration.
- 3) In undertaking this Inquiry, the ALRC should identify and consider other reports, inquiries and action plans including but not limited to:
- a. the Royal Commission into Aboriginal Deaths in Custody,
 - b. the Royal Commission into the Protection and Detention of Children in the Northern Territory (due to report 1 August 2017),
 - c. Senate Standing Committee on Finance and Public Administration’s Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services,
 - d. Senate Standing Committee on Community Affairs’ inquiry into Indefinite Detention of People with Cognitive and Psychiatric impairment in Australia,
 - e. Senate Standing Committee on Indigenous Affairs inquiry into Harmful Use of Alcohol in Aboriginal and Torres Strait Islander Communities,
 - f. reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner,
 - g. the ALRC’s inquiries into Family violence and Family violence and Commonwealth laws, and
 - h. the National Plan to Reduce Violence against Women and their Children 2010-2022.

The ALRC should also consider the gaps in available data on Aboriginal and Torres Strait Islander incarceration and consider recommendations that might improve data collection.

- 4) In conducting its inquiry the ALRC should also have regard to relevant international human rights standards and instruments.

Consultation

- 5) In undertaking this inquiry, the ALRC should identify and consult with relevant stakeholders including Aboriginal and Torres Strait Islander persons and their organisations, state and territory governments, relevant policy and research organisations, law enforcement agencies, legal assistance service providers and the broader legal profession, community service providers and the Australian Human Rights Commission.

¹ It is not the intention that the Australian Law Reform Commission will undertake independent research or evaluation of existing programs, noting that this falls outside its legislative responsibilities and expertise.

Timeframe

6) The ALRC should provide its report to the Attorney-General by 22 December 2017.