

# Submission on the ALRC inquiry into the incarceration rate of Indigenous Australians

## Your details

<b>Name/organisation</b> <i>(if you are providing a submission on behalf of an organisation, please provide the name of a contact person)</i>	Aboriginal Legal Service of Western Australia (Inc)
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## Your submission

The Aboriginal Legal Service of Western Australia (Inc) ('ALSWA') agrees with the majority of the draft terms of reference for the Australian Law Reform Commission's ('ALRC') inquiry into the incarceration rate of Indigenous Australians. ALSWA sets out below its suggested amendments and/or additions to the draft terms of reference.

### Opening paragraph

The opening paragraph in the draft terms of reference states that the Attorney General refers to the ALRC 'an inquiry into the over-representation of *Indigenous Australians* in our prison systems and what *reforms to the law* could ameliorate this'. ALSWA has three comments concerning this sentence. First, ALSWA prefers the phrase 'Aboriginal and Torres Strait Islander peoples' to the phrase 'Indigenous Australians'. Second, bearing in mind the breadth and content of the draft terms of reference, ALSWA suggests the scope of potential reform should expressly cover legal processes, frameworks and practices as well as laws. Otherwise, there is a risk that the inquiry's recommendations will be limited to legislative reform only. Finally, the inquiry's scope should specifically include juvenile detention centres.

I, Senator the Hon George Brandis QC, Attorney-General of Australia, refer to the Australian Law Reform Commission (ALRC) an inquiry into the over-representation of Aboriginal and Torres Strait Islander peoples in our prison and **juvenile detention** systems and what reforms to the law, **legal processes and legal frameworks** could ameliorate this.

### Recognition of Aboriginal and Torres Strait Islander peoples' law and culture

The ALRC conducted an inquiry into Aboriginal customary law in 1986. More recently, the Western Australian Law Reform Commission conducted an extensive inquiry into Aboriginal Customary Laws culminating in a comprehensive final report, *The Interaction of Western Australian Law with Aboriginal Law and Culture* in 2006. This report made numerous recommendations in relation to the criminal justice system (see [http://www.lrc.justice.wa.gov.au/files/P94\\_FR.pdf](http://www.lrc.justice.wa.gov.au/files/P94_FR.pdf)).

ALSWA considers that the current inquiry will be deficient if it fails to consider the important role of Aboriginal and Torres Strait Islander law and culture as a means of addressing the overrepresentation of Aboriginal and Torres Strait Islander people in custody. From a practical perspective, this is linked to the need to ensure that Aboriginal community controlled organisations have a key role to play in the development and delivery of culturally appropriate solutions. ALSWA recommends that the scope of the reference should include an additional factor, namely:

The extent to which laws and legal frameworks enable Aboriginal and Torres Strait Islander laws and culture to be recognised and inform decisions about holding or keeping Aboriginal and Torres Strait Islander people in custody and the extent to which laws and legal frameworks enable Aboriginal and Torres Strait Islander peoples, communities and Aboriginal community controlled organisations to develop and deliver culturally appropriate and community-led solutions to the overrepresentation of Aboriginal and Torres Strait Islander people in custody.

### **The impact of specific laws on the rate of offending and incarceration**

The third bullet point in the draft terms of reference states:

Whether certain laws and legal frameworks, for example laws that regulate the availability of alcohol, contribute to the rate of Indigenous offending and incarceration.

ALSWA highlights that there a multitude of different laws and legal frameworks that contribute to the rate of offending and incarceration of Aboriginal and Torres Strait Islander peoples. The inclusion of just one example here may result in a number of important areas being overlooked. From the Western Australian perspective these laws and legal frameworks include civil orders such as restraining orders, prohibited behaviour orders and move-on orders; fines enforcement laws and policies; residential tenancy laws and policies; laws that regulate driving and traffic; and child protection laws and policies. With regard to the latter, ALSWA emphasises that there is a high number of Aboriginal children in Western Australia who are under the formal care of the CEO of the Department for Child Protection and Family Support and who are also simultaneously involved in the criminal justice system. In many instances, the incarceration of these children is directly related to their child protection status (eg, a young person under the care of the State may be remanded in custody because there is no accommodation placement available or a young person may be charged with an offence by their caseworker or carer for behaviour that would generally not result in criminal prosecution in other family circumstances).

ALSWA recommends that this term of reference should be expanded to ensure that the abovementioned laws and legal frameworks are included within the scope of the inquiry. This could be achieved by including a non-exhaustive but more expansive list of examples.

### **Legal institutions and law enforcement**

The fourth bullet point under the draft terms of reference refers to 'legal institutions and law enforcement, including police, courts (including courts specialising in dealing with Indigenous offenders), legal assistance services and prisons. ALSWA recommends that government agencies responsible for the supervision of offenders in the community or in custody (eg, in Western Australia, the Department of Corrective Services) should also be expressly listed. Furthermore, juvenile detention centres should be included as well as prisons.

Within this subheading, the terms of reference should state that the inquiry is to consider the extent to which any of these institutions directly or indirectly discriminate against Aboriginal and Torres Strait Islander people and the extent to which any of these institutions lack sufficient cultural awareness and competency.

In regard to legal assistance services, it is noted that the draft terms of reference later refer to the availability of and access to legal assistance and Indigenous language and sign interpreters. ALSWA considers that this is an important aspect of the inquiry and should be expanded to refer to the availability of, access to and resourcing of Aboriginal and Torres Strait Islander specific legal assistance services.

### **Existing data and research**

The draft terms of reference direct the ALRC to have regard to 'existing data and research' in regard to a number of different factors. While ALSWA acknowledges that the existing data and research in relation to the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system is comprehensive, the consideration of these issues should not be limited to 'existing' material. The ALRC should be empowered to conduct its own research and inquiries into any relevant matter; this might include obtaining information via consultations and submissions as well as conducting its own independent research and collecting its own data from other sources.

### **Effects of laws and legal frameworks on the rate of Indigenous incarceration**

The draft terms of reference list three bullet points under the heading 'effects of laws and legal frameworks on the rate of Indigenous incarceration'. ALSWA submits that the link between Aboriginal and Torres Strait Islander children who are under the formal care of the State and subsequent criminal behaviour should also be examined under this heading.

### **Broader contextual factors contributing to Indigenous incarceration**

One of the factors listed is child abuse and neglect. ALSWA submits that child removal should also be included. It is not always the case that a child who is removed from his or her family has in fact been abused or neglected. Furthermore, the concept of 'child removal' enables a broader consideration of the impact of being removed from family, community and culture on future offending behaviour.

### **Timeframe**

The draft terms of reference stipulate that the ALRC is to report to the Attorney General by 15 December 2017. ALSWA considers that this period is insufficient. By the time the terms of reference are finalised and the ALRC formally receives the reference, there will be about 10 months or less to complete the inquiry. The usual process for a law reform commission is to publish a discussion/consultation paper and seek submissions prior to the compilation of a final report and therefore a longer period should be allocated. Otherwise, a short timeframe is likely to result in a series of recommendations for further reviews and ALSWA strongly believes that this is counterproductive. If this inquiry is to result in meaningful and effective change, it must have the necessary time to formulate effective and workable recommendations for reform.

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Aboriginal Legal Service of Western Australia (Inc)  
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