



11 January 2017

ALRC
Legal
Attorney-General's
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BARTON ACT 2600.

Incarceration
Assistance

National

Inquiry
Branch
Department
Circuit

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[Redacted]

Submission on the Terms of Reference for the Australian Law Reform Commission (ALRC) inquiry into the over-representation of Indigenous Australians

Dear Legal Assistance Branch of the Attorney General’s Department,

This is a short submission on the Terms of Reference (ToR) for the Australian Law Reform Commission (ALRC) inquiry due 13 January 2013.

To make things easier below in green highlight are the suggested additions to the ToR. Grid: LC = Liz Curran.

This input has been informed by many years of legal practice and research and working in and alongside indigenous communities it is also informed by work undertaken in consulting indigenous communities when heading up a human rights agency. It has been heavily informed by research conducted for my Doctoral thesis



which examined indigenous incarceration, impacts, alternative approaches and made some good practice framework suggestions. I am happy to provide a full copy of this Thesis and the Appendixes, the latter which also suggest good practice and outline some of the impacts on incarceration of history and current trauma.

Scope of the reference

In developing its recommendations, the ALRC should have regard to laws and legal frameworks that contribute to the incarceration rate of Indigenous Australians, including:

- laws and legal frameworks that inform decisions to hold or keep Indigenous Australians in custody, including decisions in relation to:
 - cautioning
 - protective custody
 - arrest
 - remand and bail
 - diversion
 - sentencing, including mandatory sentencing
 - parole, parole conditions and community reintegration and justice reinvestment
 - appropriateness of the adversarial system and consideration of other problem solving approaches or sentencing approaches
- factors within laws and legal frameworks that affect decisions to hold or keep Indigenous Australians in custody, including:
 - consideration of community safety
 - the nature of the offences resulting in incarceration
 - availability of alternatives to incarceration
 - degree of discretion available to decision-makers
 - consideration of incarceration as a last resort
 - consideration of incarceration as a deterrent and as a punishment
 - resourcing of community and legal service agencies to enable responsiveness
 - increasing opportunities for Aboriginal community input, involvement and advice e.g. the Koori Youth Court and Koori Court in Victoria
 - consideration of barriers to the implementation of the Recommendations of the Royal Commission into the Aboriginal Deaths In Custody and other similar initiatives and suggestions and to how these barriers and impediments might be overcome in future
- whether certain laws and legal frameworks, for example laws that regulate the availability of alcohol, contribute to the rate of Indigenous offending and incarceration
- legal institutions and law enforcement, including police, courts (including courts specialising in dealing with Indigenous offenders), legal assistance services and prisons
- differences in the application of laws in different local contexts.
- Culture change needed to reduce racism and discrimination in policing, the court system, prison and service delivery

In conducting its inquiry, the ALRC should have regard to existing data and research that demonstrates:

- best practice laws and legal frameworks both in Australia and internationally that reduce the rate of Indigenous incarceration (LC Comment: See author Thesis referred to above and available to the ALRC on request)
- the effects of laws and legal frameworks on the rate of Indigenous incarceration, including:
 - the paths of Indigenous Australians through the criminal justice system, including most frequent offences, relative rates of bail and diversion and progression from juvenile to adult offending
 - the availability of alternatives to custody in reducing Indigenous incarceration and/or Indigenous offending, including rehabilitation, therapeutic alternatives and community reintegration supports
 - the availability of and access to legal assistance and Indigenous language and sign interpreters
- the experiences of the legal system and incarceration and its impacts for Indigenous Australians, including in relation to employment, housing, health, education and families and vice versa, i.e. the impacts of employment, housing, health, education on engagement with the legal system and incarceration.
- the broader contextual factors contributing to Indigenous incarceration and any laws and legal frameworks with regard to these, including:
 - the characteristics of the Indigenous prison population
 - the relationships between Indigenous offending and incarceration and alcohol and drug use, trauma including inter-generational trauma, loss of culture, poverty, discrimination, experience of violence, child abuse and neglect, educational access and performance, availability of disability supports, housing circumstances, racism, discrimination, disempowerment and employment
 - availability and effectiveness of programs that intend to reduce Indigenous offending and incarceration.¹

In undertaking this reference, the ALRC should identify and consider other reports, inquiries and action plans that relate to this issue, including:

- the Royal Commission into Aboriginal Deaths in Custody
- the Royal Commission into the Protection and Detention of Children in the Northern Territory (due to report 31 March 2017)
- Senate Standing Committee on Finance and Public Administration's inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services
- Senate Standing Committee on Community Affairs' inquiry into Indefinite detention of people with cognitive and psychiatric impairment in Australia
- Senate Standing Committee on Indigenous Affairs inquiry into Harmful use of alcohol in Aboriginal and Torres Strait Islander communities
- reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner
- the ALRC's inquiries into Family violence and Family violence and Commonwealth laws
- the National Plan to Reduce Violence against Women and their Children 2010-2022.
- Previous empirical and evidence based studies into indigenous experiences both nationally and internationally and what works and does not work and why or why not.

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

The ALRC should also consider the gaps in available data on Indigenous incarceration and consider recommendations with regard to laws and legal frameworks that might improve data collection.

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



Consultation

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

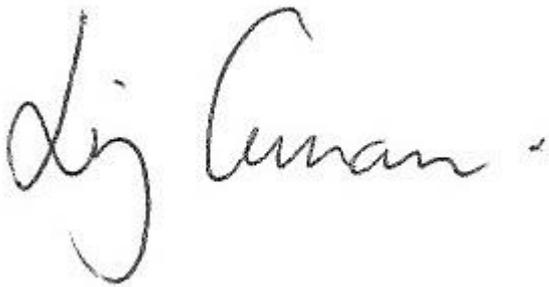
Timeframe

The ALRC should provide its report to the Attorney-General by 15 December 2017.

I hope this input into the TOR will prove useful.

Please do not hesitate to contact me if you have any queries.

Yours faithfully,

A handwritten signature in black ink that reads "Dig Arman".