Dear Attorney-General,

Thank you for your letter received 12 December 2016 regarding the proposed Australian Law Reform Commission (ALRC) inquiry into the incarceration rate of Indigenous Australians, and the opportunity to provide comments on the draft Terms of Reference for the inquiry.

As you note in your correspondence, Aboriginal people are over-represented in rates of incarceration, and any action towards reducing these rates is welcomed by the Andrews Government.

I am encouraged that you note in the draft Terms of Reference that laws and legal frameworks are important, but not the only factors that contribute to the rate of Aboriginal incarceration.

The Victorian Aboriginal Justice Agreement (AJA) is a partnership between the Victorian Government and the Koori community, which aims to improve justice outcomes and minimise Koori over-representation in the criminal justice system by improving the accessibility, use and effectiveness of justice-related programs and services.

The AJA was launched in 2000 as the Victorian Government's response to the recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody. Government and Koori community representatives have subsequently reviewed and built upon the AJA. Second and third phases of the agreement were launched in 2006 and 2013, renewing the commitment to improving justice outcomes for Koories.

I would urge you to include the AJA in the list of reports, inquiries and action plans to be considered by the ALRC.

In addition please find attached a set of specific recommendations in relation to the draft Terms of Reference. These have been developed on the basis of consultations with other Victorian Government ministers and departments, as per your request.
Thank you again for the opportunity to comment on the draft Terms of Reference. Should you have any further queries about this, the contact officer in the Department of Justice and Regulations is Antoinette Gentile, Director, Koori Justice Unit, email [redacted] telephone [redacted]

Yours sincerely

THE HON MARTIN PAKULA MP
Attorney-General

19.01.17.
Victorian Government comment on the draft Terms of Reference for the Australian Law Reform’s Commission Inquiry into the incarceration rate of Indigenous Australians

The Victorian Government supports the inquiry's consideration of broader social issues, in particular, alcohol and drug abuse, family violence, trauma and mental health issues, low educational attainment, unemployment and unstable housing as key drivers for offending and increased rates of recidivism.

It is also important to acknowledge, as the Victorian Government has done through a policy of self-determination and commitment to work on treaty, that a resolution to the underlying issues needs to be found in order to resolve the issues being considered by the ALRC.

Although the TOR explicitly acknowledges that 'the majority of Indigenous Australians never commit criminal offences', it should further emphasise:

- the right of Aboriginal people to participate as equal partners in decision-making that affects them;
- the importance of strength, cultural identity, and connection to culture as protective factors in building the resilience, skills, economic participation and wellbeing of Aboriginal people; and
- the success of Aboriginal community led approaches to addressing over-representation in the justice system.

Consideration should be given to legal recommendations from previous reports including the Royal Commission into Aboriginal Deaths in Custody, which have not been implemented, including a discussion of possible reasons, barriers, and solutions.

It is also recommended that the Victorian Aboriginal Justice Agreement (AJA) be included in the list of reports, inquiries and action plans that will be considered in this inquiry. The AJA was launched in 2000 as the Victorian Government’s response to the recommendations of the 1991 Royal Commission into Aboriginal Deaths in Custody. Now in its third phase, AJA3 is a formal agreement between the Victorian Government and the Victorian Aboriginal community to work together to improve justice outcomes and reduce rates of over-representation in the criminal justice system.

The TOR should specify the United Nations Declaration on the Rights of Indigenous Peoples as an example of a relevant international human rights instrument.

It is also recommended that the ALRC consider the following in relation to laws and legal frameworks that might improve data collection:

- the paths of Aboriginal people into (in addition to 'through') the criminal justice system, including the impact of factors including poverty, discrimination, education, inter-generational trauma and disadvantage and experience in other government institutions;
- the legal and broader contextual factors that contribute to recidivism;
- the role of racial unconscious bias and institutional/structural racism in contributing to poor outcomes for Aboriginal people particularly in relation to the use of police and prosecutorial discretion and the importance of cultural safety in mainstream services; and
- The diversity of experiences within Aboriginal communities and the impact of this on offending and incarceration, including the particular experiences of women, LGBTI people, and young people. This should include mapping the trajectory of these groups’ contact with the justice system in a way that illustrates intergenerational patterns of contact.
When reviewing factors within laws and legal frameworks that affect decisions to hold or keep Indigenous Australians in custody, consideration should be given to:

- access to legal representation;
- whether legal incentives to plead guilty to offences are resulting in wrongful convictions; and
- the availability of community-based support services.

In relation to the paragraph in the TOR regarding the ‘differences in the application of laws in different contexts’, consideration of the status of Aboriginal customary law and its interaction with other laws should be included.

In relation to 'legal institutions and law enforcement', it is recommended that the ALRC consider Victoria's Koori Court model as part of a general review of equivalent courts across all States and Territories, and whether the jurisdiction of these courts should be expanded beyond sentencing.

Regarding 'broader contextual factors contributing to Indigenous incarceration', the inclusion of the following is suggested:

- the characteristics of the Indigenous prison population including trends and profile changes over time, which may point to some cohorts being impacted more than others;
- the availability of culturally competent, effective programs aimed at reducing Indigenous offending and reoffending;
- family violence, in addition to the ‘experience of violence’;
- the extent to which laws and legal frameworks have contributed to increased incarceration rates, relative to the impact of broader factors including health, education, inter-generational trauma and economic participation; and
- conditions such as 'foetal alcohol spectrum disorder' and mental health more broadly.