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FOR
HUMAN RIGHTS

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4 September 2017

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By email: info@alrc.gov.au

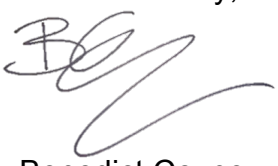
Dear Executive Director

Re: Submission to the Australian Law Reform Commission Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples

Please find attached a submission from the Australian Lawyers for Human Rights (ALHR) to the Australian Law Reform Commission Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples.

If you would like to discuss any aspect of this submission, please contact Benedict Coyne, President Australian Lawyers for Human Rights, by email at president@alhr.org.au

Yours faithfully,



Benedict Coyne
President
Australian Lawyers for Human Rights

Submission

to the Australian Law Reform Commission Inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

Introduction

Australian Lawyers for Human Rights (ALHR) welcomes the opportunity to make a submission to the ALRC Inquiry into the over-representation of Aboriginal and Torres Strait Islander people in Australian prisons. The sections below correspond to selected elements of Discussion Paper 84, 'Incarceration Rates of Aboriginal and Torres Strait Islander Peoples'.

About Australian Lawyers for Human Rights (ALHR)

ALHR was established in 1993 and is a national network of over 800 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees as well as specialist national thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international human rights law in Australia in order to advocate for greater Australian compliance with international human rights standards at a domestic and international level and promote and support lawyers' practice of human rights law in Australia.

2.2 Criminal Justice Pathways for Bail and Remand Populations

ALHR is of the view that current Australian bail and remand processes significantly contribute to the unnecessary imprisonment of Aboriginal and Torres Strait Islander people. ALHR gratefully draws from the Commission's summary of Weatherburn and Ramsay's findings: "Around 40% of Aboriginal and Torres Strait Islander defendants who were held on remand at their final court appearance in NSW in 2015 did not receive a custodial penalty on conviction."[1] Reforming Australia's flawed bail and remand laws and procedures must be a priority for the states and territories and the Federal Government.

[1] Don Weatherburn and Stephanie Ramsay, 'What's Causing the Growth in Indigenous Imprisonment in NSW?" (Bureau Brief Issue Paper No 118, NSW Bureau of Crime Statistics and Research, 2016) at 8.

ALHR supports the Commission's draft proposals 2-1 (with additional words proposed below under the heading "Geographic restrictions and electronic monitoring") and 2-2 in the Discussion Paper. ALHR wishes to draw the Commission's attention to the following issues, which are either not addressed or only summarily addressed in the Discussion Paper.

Bail presumptions

ALHR notes and regrets the Commission's decision not to discuss bail presumptions in the Discussion Paper. Bail presumptions are often the decisive legislative factor in bail applications. Just as importantly, where legislation imposes a presumption against bail for a low level offence this can result in defendants spending longer on remand than they would likely serve as a sentence. For example, ALHR notes that in the Northern Territory a defendant who has a recent prior conviction for a "technical"[2] breach of a domestic violence order and is again arrested for a technical breach will face a presumption against bail. This is so notwithstanding that, at the sentencing stage, such a defendant may stand good prospects of a very short prison sentence or a non-custodial disposition.[3] ALHR hopes that the Commission will address this issue in its final report.

Bail sureties ("cash bail")

A number of Australian jurisdictions have bail legislation that allows for the imposition of bail surety conditions.[4] The effect of these provisions, and the practice of requiring bail sureties, is that defendants without ready access to significant funds will have more difficulty securing bail than those with such access. This practice has the potential to operate to the detriment of Aboriginal and Torres Strait Islander people who are without a steady source of income or who are in receipt of government benefits (especially those benefits linked to cashless welfare cards).

Many states in the USA have abolished analogous practices of requiring indigent (often African-American) defendants to provide cash security before being granted bail.[5] ALHR encourages the Commission to consider the desirability of amendments to State, Territory and Commonwealth bail legislation such that Courts cannot impose "cash bail" conditions (except perhaps in certain circumstances – such as where a defendant presents an international flight risk – or for a small sub-set of offences – such as "white collar" and organised crime).

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[2] That is, a breach that occasions no harm to the protected person.
[3] *Bail Act* (NT), s 7A(1)(dh).
[4] *Bail Act* (NT), s 27(2)(c), (d), (e) and (f).
[5] See, generally, Samuel R Wiseman, "Pretrial Detention and the Right to Be Monitored" (2014) 123 *Yale Law Journal* 1344.

Geographic restrictions and electronic monitoring

A number of Australian jurisdictions have bail legislation that allows for the imposition of geographic restrictions and electronic monitoring bail conditions. ALHR registers two concerns about the effects of such conditions on Aboriginal and Torres Strait Islander people (especially those people from remote locations).

First, as is noted in [2.26] of the Discussion Paper, Aboriginal and Torres Strait Islander people from remote communities sometimes live more itinerate lives than other Australians (due to, amongst other things, extended family networks, geographically dispersed cultural commitments, weather extremes that render remote communities uninhabitable or inaccessible for parts of the year, and other exigencies of very remote living). Defendants in this position may have more difficulty than the average Australian in complying with bail conditions (especially electronic monitoring conditions) requiring strict confinement in a single community or area.

Secondly, ALHR understands that electronic monitoring is not available in all remote Aboriginal and Torres Strait Islander communities. The result is that defendants from urban communities that have access to electronic monitoring have better prospects of bail than defendants from extremely remote (often primarily Aboriginal and Torres Strait Islander) communities. ALHR is of the view that it is an injustice that people from such remote communities are deprived of a consideration that would otherwise weigh in favour of bail, and are only deprived of that consideration by the government's non-provision of electronic monitoring services. Where electronic monitoring is not available in a remote community, this should be a factor that a bail authority can take into account.

In order to address the above two issues, ALHR recommends a slight addition to the Commission's proposed legislative amendment in proposal 2-1 so that it requires a bail authority to consider "any issues that arise due to the person's Aboriginality, including cultural background, ties to family and place, *residence in a remote location or locations*, and cultural obligations."

Language difficulties

At [2.23] of the Discussion Paper, the Commission notes the potential impact of language barriers on grants of bail. ALHR endorses the proposition that language barriers can negatively affect bail determinations made by defendants who, not being fluent in English and unassisted by an interpreter, may have difficulty explaining their living arrangements, familial support networks, cultural obligations and other relevant matters to their lawyer or the court.

ALHR wishes to alert the Commission to a separate but related problem, namely, how language barriers can detract from a defendant's understanding of their bail conditions.

Bail conditions are often explained to defendants by police, lawyers, judicial officers and court staff who operate in the time-poor environment of a busy list court or circuit court. Furthermore, such conditions are often expressed in convoluted legalese, such as: "The defendant is not to purchase, possess or consume alcohol and is to submit to testing whenever required to do so by a probation or parole officer." It is hardly surprising that some Aboriginal and Torres Strait Islander defendants might leave such a transaction without a full appreciation of the nature of their obligations or the consequences of not complying with those obligations.

ALHR notes that the most effective way to combat these potential miscommunications is to increase the training and availability of interpreters. The ALHR further notes that, absent an available interpreter, there may be scope to develop electronic translation services by which police could communicate a defendant's bail conditions to them in their first language. In this regard, ALHR notes that a similar project is in operation in the Northern Territory in relation to the translation of police "cautions" into Aboriginal languages via iPad software.[6]

Review of police bail refusals in remote communities

ALHR generally agrees with the Commission's summary of the operation of bail laws and legal frameworks at [2.10]-[2.11]. However, ALHR notes that, in some jurisdictions, there is often an intermediate step between a police bail refusal and the police transporting the defendant to court. If the arresting police officers are in a remote location, or if the arrest occurs over a weekend, a defendant may be given an opportunity to speak to a judicial officer via telephone to seek review of the police bail refusal.[7]

ALHR understands that in the Northern Territory, defendants in this situation are not represented (although they will likely have had an opportunity to speak to a lawyer on the telephone at an earlier time). This can result in a defendant being unable to formulate a legally attractive bail proposal and the judicial officer refusing bail. The defendant will then be held in custody until court is next sitting. If the defendant is in a remote location, the defendant will often be driven or flown distances of up to a thousands kilometres (in the Northern Territory), in order to present at Court to seek bail with the assistance of a lawyer. It is often the case that once at Court, with the benefit of legal assistance, the defendant will be granted bail and required to travel back to the remote community from which they have just been transported at great public expense.

The above situation is not only expensive for the police and the defendant (and any family who travel to support the bail application), but also results in defendants

[6] Northern Territory Government, "Media release: Police cautions in language aid communication barriers" (27 August 2015) accessed 30 August 2017 at: <<http://newsroom.nt.gov.au/mediaRelease/14557>>.
[7] *Bail Act* (NT), s 33.

spending longer in police custody than necessary. This could be avoided by the provision of funding for Aboriginal legal aid lawyers to represent such defendants by phone or video link at the time of their review of the initial police bail refusal.

Breach of bail as a criminal offence

Australian jurisdictions differ as to whether they regard breach of bail as a criminal offence. This issue is not addressed in the Discussion Paper. ALHR hopes that the Commission will consider this issue in its final report and consider whether characterising breach of bail as a criminal offence contributes to the disproportionate imprisonment of Aboriginal and Torres Strait Islander people.

Bail and youths

ALHR regrets that the Commission has not specifically considered the particular issues facing Aboriginal and Torres Strait Islander youths in the context of Australian bail and remand procedures. ALHR hopes that the Commission's final report will contain consideration of this important issue.

2.3 Sentencing and Aboriginality

ALHR is of the view that Australian laws and processes surrounding the sentencing of Aboriginal and Torres Strait Islander people are in dire need of legislative and policy intervention. ALHR welcomes the Commission's in depth consideration of this area. ALHR submits the following answers to the questions posed in the Discussion Paper.

Question 3-1: Noting the decision in *Bugmy v The Queen* [2013] HCA 38, should state and territory governments legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander offenders? If so, should this be done as a sentencing principle, a sentencing factor, or in some other way?

ALHR is of the view that state and territory governments *should* legislate to expressly require courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander offenders. This would best be achieved by the legislative insertion of a sentencing principle in terms similar to those used in Canada or New Zealand.

ALHR accepts, as the High Court stated in *Bugmy*[8], that Australian people of all cultures, races and ethnicities may experience extreme social disadvantage, and that all such people are entitled to have that disadvantage taken into account at the sentencing stage of criminal proceedings. However, ALHR is of the view that the deeply ingrained historical and contemporary social challenges confronting Aboriginal and Torres Strait Islander peoples are unique. Furthermore, due to the intergenerational nature of many of these challenges, they are difficult to isolate and quantify for any individual person. It is for this reason that, as a practical matter and as is noted at [3.16], it is often difficult or impossible for busy legal aid lawyers to put comprehensive evidence before a sentencing court as to the history of disadvantage suffered by a particular client from a particular community or social context.

The Discussion Paper refers to two non-legislative means of addressing this practical difficulty. First, the Commission notes at [3.16], with reference to Judge Stephen Norrish's commentary,[9] that Courts might more often take judicial notice of the history of disadvantage suffered by Aboriginal and Torres Strait Islander peoples. ALHR supports this idea in principle but anticipates that there might be mixed views amongst practitioners and judicial officers as to the permissible extent of such judicial notice. Secondly, the Commission refers at [3.86] to the development of a library of evidentiary material that lawyers could rely upon in support of sentencing submissions concerning the socio-historic disadvantage suffered by a particular client. ALHR is excited by the prospect of such a resource but notes that the project is, at this stage, limited to New South Wales.

In light of the limits of the above two approaches, ALHR supports the idea of explicit legislative intervention in this area. ALHR supports the idea of an amendment in similar terms to the Canadian legislation but seeks to draw the Commission's attention to another workable alternative, namely the New Zealand legislation.

New Zealand has a sentencing principle requiring courts to "take into account the offender's personal, family, whanau,[10] community, and cultural background in imposing a sentence or other mean of the dealing with the offender with a partly or wholly rehabilitative purpose."[11] Furthermore, s 27(1) of the New Zealand *Sentencing Act* provides a mechanism for defendants to put such information before the court by calling witnesses. It is generally acknowledged that these legislative provisions and their predecessors were "born out of the desire to reduce sentencing judges' reliance on

[8] *Bugmy v The Queen* (2013) 249 CLR 571 at 592 [37] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
[9] Stephen Norrish, "Sentencing Indigenous Offenders – Not Enough 'Judicial Notice'?" (Speech, Judicial Conference of Australia Colloquium, 13 October 2013).
[10] A Maori word translated as 'extended family' but also having spiritual, physical and emotional dimensions.
[11] *Sentencing Act* (NZ), s 8(i).

imprisonment in light of Maori overrepresentation."[12] Section 16 was introduced in 1985 after a Justice Department report was released that addressed the "disparity between Maori and non-Maori imprisonment rates even when comparison was drawn between persons of similar socio-economic status."[13] This report encouraged alternatives to imprisonment for Maori offenders as a solution.[14] At the time, the Statutes Revision Committee stated that parliament was supportive of the judiciary taking account of "matters specific to Maori offenders including background and historic disadvantage."[15] These provisions have subsequently been interpreted by New Zealand courts in attempts to alleviate the overrepresentation of Maori in prison.[16]

A statutorily enshrined principle, along the lines of that long in place in Canada and New Zealand, would be the surest way to ensure that the unique factors confronting Aboriginal and Torres Strait Islander people will be taken into account by Australian sentencing courts. ALHR is confident that legislative action of this sort would not be unlawfully discriminatory.[17]

Question 3-2: Where not currently legislated, should state and territory governments provide for reparation or restoration as a sentencing principle? In what ways, if any, would this make the criminal justice system more responsive to Aboriginal and Torres Strait Islander offenders?

ALHR is of the view that it could be of benefit to include reparation or restoration as a sentencing principle within existing sentencing legislation. However, the incorporation of restorative justice principles into Australian sentencing legislation would require more than the insertion of a single sentencing principle. What would be required is something closer to the Canadian legislative schemes,[18] which create mechanisms for different restorative justice processes (such as victim-offender conferences) with the sentencing court's oversight.

As to the second element of Question 3-2, ALHR notes that restorative justice principles appear, from some of the literature on the subject, to harmonise with certain notions of justice held by some Aboriginal and Torres Strait Islander people.[19] ALHR encourages

[12] Sam Jeffs, "Maori Overrepresentation and the Sentencing Act: The Role of Cultural Background," at http://nzhumanrightsblog.com/policy; Ministry of Justice *Speaking about cultural background at sentencing* (November 2000) at 137-138
[13] Department of Justice *Criminal Justice Bill No.2* (22 April 1985) at 2; Nina W. Harland, *R v Mika: An investigation of the Court of Appeal's neglect of s 27 of the Sentencing Act 2002* (2014) Faculty of Law, Victoria University of Wellington, 14.
[14] Department of Justice *Criminal Justice Bill No.2* (22 April 1985) at 3.
[15] Above n 1, 15.
[16] See, eg, *Wells v Police* [1987] 2 NZLR 560; *Nishikata v Police* HC Wellington AP126/99, 22 July 1999
[17] See, eg, *Racial Discrimination Act* 1975 (Cth), s 10, referred to in *Bugmy v The Queen* (2013) 249 CLR 571 at 592, footnote 99, per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.
[18] See, eg, Zachary T Courtemanche, "*The Restorative Justice Act*: An Enhancement to Justice in Manitoba?" (2015) 28 *Manitoba Law Journal* 1.
[19] Kathleen Daly, "Racializing Restorative Justice: Lessons from Indigenous Justice Practices" (Plenary address to the second Restorative Justice Conference, San Antonio, Texas, 13-15 May 2009).

the Commission to seek out, and take on board, the views of Aboriginal and Torres Strait Islander peoples and organisations on this issue in particular.

Question 3-3: Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community?

ALHR is of the view that in many cases courts sentencing Aboriginal and Torres Strait Islander offenders *do not* have sufficient information available about the offender's background, including cultural and historical factors that relate to the offender and their community. The reasons for this are myriad and include: under-resourced legal aid lawyers not having sufficient legal and cultural training to elicit such information, those same lawyers not having sufficient time to take detailed instructions from a client as to their background, and interpreters and other cultural liaisons not being available to assist lawyers in taking such instructions. ALHR addresses this concerning issue in response to questions 3-4 and 3-5 below.

Question 3-4: In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?

ALHR is of the view that specialist sentencing reports, if taken by trained (and preferably Aboriginal and Torres Strait Islander) report writers, would be of great assistance in providing relevant information to the court that would otherwise be unlikely to be submitted. The information that these reports would likely delve into would include such topics as past trauma, physical and sexual abuse, substance abuse and loss of culture (as well as, of course, positive cultural issues). It is simply unreasonable and unrealistic to expect a defendant or family member to provide information on these sensitive topics to hurried lawyers without specialist training in eliciting information about such issues. On the other hand, culturally competent and specifically trained report writers would likely have the time and skills to discuss such issues with clients and then relay the information to the courts. ALHR supports the adoption, in Australia, of a Canadian-style *Gladue* report system.[20]

Question 3-5: How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?

Such reports would best be funded by either (i) providing additional funding to legal aid organisations for in-house report writing positions; or (ii) providing additional funding to existing Aboriginal and Torres Strait Islander health, wellbeing and justice organisations

[20] See: *R v Gladue* [1999] 1 SCR 688 (Supreme Court of Canada), the authority for sentencing principles which seek to ensure consideration of an offender's Aboriginality.

to create positions for report writers. ALHR wishes to emphasise that the reports would be most beneficial if produced by Aboriginal and Torres Strait Islander people versed in the local culture and specially trained in eliciting the sort of information that has been discussed above.

2.4 Sentencing Options

ALHR supports the Commission's draft proposal 4-1 in the Discussion Paper. ALHR submits the following answers to the questions posed in the Discussion Paper.

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

ALHR supports the repeal of mandatory sentences for the reasons outlined at [4.24]-[4.26] of the Discussion Paper. Accordingly, Commonwealth, state and territory governments *should* review provisions that impose mandatory or presumptive sentences.

(b) which provisions should be prioritised for review?

Provisions most commonly affecting Aboriginal and Torres Strait Islander people should be prioritised. These would likely involve the Northern Territory's suite of mandatory sentencing laws, including for violent and sexual offences,[21] property offences,[22] drug offences,[23] and breaches of domestic violence orders.[24]

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

In principle, ALHR supports the abolition of short sentences of imprisonment. Short sentences of imprisonment have little deterrent and rehabilitative effect. As is noted at [4.46] of the Discussion Paper, short sentences can in fact disrupt employment, living arrangements, family commitments and education such as to make a person *more* likely to reoffend than if they had not been sentenced to prison at all. However, ALHR is concerned by the possibility of "sentence creep" resulting from the abolition of short sentences (adverted to in the Discussion Paper at [4.49], [4.52], [4.56]-[4.61]). ALHR encourages the Commission to review the data for the length of Western Australian prison sentences following the abolition of short sentences in that jurisdiction.

[21] *Sentencing Act* (NT), Pt 3, Div 6A.
[22] *Sentencing Act* (NT), Pt 3, Div 6.
[23] *Misuse of Drugs Act* (NT), s 37(2) and (3).
[24] *Domestic and Family Violence Act* (NT), s 121(2), 122(2).

ALHR notes that an alternative to the abolition of short prison sentences is the selective abolition of short prison sentences for certain categories of offence, for example, offences not causing physical or psychological harm to members of the public (such as drug offences, public order offences, and breach of bail offences). This might be helpfully considered in the context of driving offences, which are a significant source of short prison sentences for Aboriginal and Torres Strait Islander people.[25]

Question 4-3: If short sentences of imprisonment were to be abolished, what should be the threshold (eg, three months; six months)?

ALHR takes no position on the exact threshold but encourages the Commission to be informed by the Western Australian experience of having initially abolished three month sentences of imprisonment and subsequently moving to abolish six month sentences of imprisonment.

Question 4-4: Should there be any pre-conditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including in regional and remote areas?

Any move to abolish short sentences should be implemented uniformly across the entirety of a jurisdiction. If such a change were limited to urban environments it would have a disproportionate impact on Aboriginal and Torres Strait Islander people living in remote locations.

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?

Other than the abolition of mandatory and presumptive sentencing, and an increase in the availability of community based sentencing options, ALHR is of the view that the wide scope of the sentencing judge's discretion provides sufficient flexibility to tailor sentences appropriate for Aboriginal and Torres Strait Islander people.

9. Aboriginal and Torres Strait Islander Female Offenders

In response to Term of Reference 1(d), ALHR recommends the Human Rights Law Centre report, *"Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment"*.[26] ALHR echoes the concern that

[25] See, Julian R Murphy and Hugo Moodie, "Driving Whilst Disqualified – A case for change" (2016) 3 *Northern Territory Law Journal* 93.
[26] Human Rights Law Centre, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017):

the Australian criminal justice system is penalising Aboriginal and Torres Strait Islander women and children for being victims. The incarceration of women, even for short periods on remand, may result in the removal of their children and their exposure to neglect and abuse, contributing to the cycle of disadvantage experienced by these communities.

Of the deaths in custody examined by Royal Commission into Aboriginal Deaths in Custody, all of the women in question were in custody for minor offences. Unfortunately, the Recommendations of the Royal Commission have not been implemented effectively. This is particularly obvious in relation to Indigenous women, whose rate of incarceration is now 2.5 times greater than at the time of that report, with Aboriginal and Torres Strait Islander women now 34% of the women behind bars even though they make up only 2% of the adult female population.[27] The rate of women on remand is particularly high, with many women imprisoned on charges of which they will later be acquitted or for which they are unlikely to receive a custodial sentence. The fact that Aboriginal and Torres Strait Islander girls made up 53% of the female youth detention population in 2015-2016 is cause for serious concern.[28] The incarceration rate for women is rising twice as fast as for men, surging by nearly 40 per cent since 2005, compared to 18 per cent for men, according to Australian Bureau of Statistics figures.[29] There are now more women being locked up in Australian prisons than ever before. However, while there has been a surge in the incarceration of women generally, much of the increase has been concentrated among Indigenous women.

ALHR calls on the Commission to recognise that Aboriginal and Torres Strait Islander women are over-policed as perpetrators and under-policed as victims of crime. Aboriginal and Torres Strait Islander women represent the fastest growing prison population in Australia, yet 70 to 90 per cent of this population has experienced family violence.[30] These women are at the epicentre of the national family violence crisis and are currently 34 times more likely to be hospitalised as a result of family violence than non-Indigenous women and 10 times more likely to be killed as a result of violent assault.[31] Further, a disproportionate number of Indigenous women in custody are suffering from mental illness, disability, the effects of trauma, homelessness and poverty. Imprisonment may be, in many cases, an inappropriate response to the circumstances experienced by these women. This is particularly the case since 80 per

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https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf

[27] Ibid, 4.

[28] Ibid, 10.

[29] Ibid, 10.

[30] Ibid, 13.

[31] Antoinette Braybrook and Shane Duffy, 'Calling for smarter approaches to violence, offending that address underlying causes of crime', *Croakey (online)*, 23 February 2017: https://croakey.org/calling-for-smarter-approaches-to-violence-offending-that-address-underlying-causes-of-crime/

cent of these women are mothers, so their incarceration is also punishing their children and communities.[32]

ALHR notes Questions 5-1 and 5-2 of the Discussion Paper, recommending the development of culturally appropriate prison programs that are readily available to Aboriginal and Torres Strait Islander female prisoners. While ALHR supports this proposal, we submit that the Commission ought also to consider whether most women prisoners ought to be released and most female prisons closed.

Many women in prison do not pose a risk to the public and could safely serve their sentences in the community with suitable support. Nearly 75 per cent of the increase in prison population since 2005 has been due to convictions for non-violent crimes and, according to BOCSAR director Don Weatherburn, this is almost entirely attributable to increased policing and increasingly tough sentences delivered in court.[33] In this context, ALHR endorses the conclusion of Bagaric, that the judiciary are applying a policy of "equality with a vengeance," resulting in a rate of over-imprisonment of women that constitutes "a blight on our sentencing system and one of the most gratuitous human rights violations currently in Australia."[34] When sentencing women the judiciary must acknowledge the distinct profile of female offenders, including their lower reoffending rates, greater caregiving responsibilities, increased suffering in jail and histories of trauma. This is particularly important in the case of Aboriginal and Torres Strait Islander women who experience intersectional discrimination on the basis of both their race and gender.

In response to Question 9-1 of the Discussion Paper, ALHR endorses the Human Rights Law Centre's recommendations for strengthening diversionary processes. Funding must be increased for community led prevention and early intervention programs in relation to violence against women. Funding cuts to existing legal and other support services accessed by Aboriginal women, including women's refuges, should be immediately reversed. ALHR also recommends that presumptions against bail should not operate in the case of mothers who are engaged in providing care to their children and alternative diversionary programs should be made available to these women. There should also be a positive prohibition against incarceration for unpaid fines or in relation to minor offences. ALHR also submits that courts should be required to take account of the impact upon dependent children when making bail determinations or when sentencing women, particularly Aboriginal and Torres Strait Islander women. Such legislative provisions would constitute special measures as envisaged by Article 4 of the *Convention for the Elimination of All Forms of Discrimination Against Women*.

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[32] Above, n 24, at 5.
[33] Patrick Begley and Inga Ting, 'Female imprisonment numbers soar amid calls to free the majority of inmates', *Sydney Morning Herald (online)*, 18 June 2016: http://www.smh.com.au/nsw/female-imprisonment-numbers-soar-amid-calls-to-free-the-majority-of-inmates-20160614-gpiy08.html
[34] Ibid.

Finally, ALHR recommends the collection and monitoring of data regarding police charging, bail determinations and sentencing of women, particularly Aboriginal women, and the use of this data to inform ongoing training and education of the police and judiciary on the gendered nature of violence, including the particular impacts on Aboriginal women of colonisation and racially motivated social policies. This should include awareness raising in relation to the impact of current "child protection practices leading to widespread removal of Aboriginal children, including newborns, from their mothers at rates exceeding those that occurred under the discriminatory era of The Stolen generations".[35]

11.1 Access to Justice Issues – Interpreter Services

ALHR supports the Commission's draft proposal 11-1 regarding the need for state and territory governments to work closely with peak Aboriginal and Torres Strait Islander organisations to establish interpreting services within the criminal justice system. The Productivity Commission reported that, in 2016, 38% of Aboriginal and Torres Strait Islander first language speakers experienced difficulties when communicating with service providers. These language difficulties inevitably manifest in a criminal justice system where Indigenous people are vastly overrepresented.

Interpreting services must be funded appropriately to ensure Aboriginal and Torres Strait Islander people have equality in access to the criminal justice system and to ensure that the *Anunga* guidelines are abided by. In Western Australia, funding cuts to interpreting services have been felt acutely, in particular in the context of the Kimberley Interpreting Service. The recent much publicized acquittal of Kirwirrkurra man Gene Gibson by the Court of Appeal of Western Australia should serve as a clarion call for the need to ensure proper interpreting services for Indigenous people in criminal proceedings.

Mr Gibson was charged with murder over the death of young Broome man, Josh Warneke, in 2010. In 2014, the Supreme Court of Western Australia deemed inadmissible a video record of interview Mr Gibson had completed at Kirwirrkurra when first questioned by police on a number of grounds, most significantly due to the absence of an interpreter.[36] In *Gibson v The State of Western Australia* [2017] WASCA 141, the Western Australian Court of Appeal acquitted Mr Gibson of the murder of Mr Warneke, on the basis that a miscarriage of justice had occurred. The court expressed concerns over the suitability of interpreting services that were afforded to Mr Gibson by the chronically under-funded Kimberley Interpreting Service throughout his criminal proceedings: "Although he (the interpreter) has an accreditation from the National Accreditation Authority for Translators and Interpreters for interpreting between English

[35] Hannah McGlade, 'For Aboriginal women, International Women's Day is not a celebration', *ABC News (online)*, 10 March 2017: http://www.abc.net.au/news/2017-03-09/international-womens-day-aboriginal-women-no-celebration/8338282

[36] *The State of Western Australia v Gibson* [2014] WASC 240.

and each of Kukatja and Kriol, he is not an accredited interpreter between English and Pintupi."[37]

The problem that faced Mr Gibson was his lack of access to an accredited interpreter capable of interpreting complex legal concepts to him in the Pintupi language. Mr Gibson's interpreter was responsible for explaining, among other things, the solicitor's advice regarding a plea to a charge of manslaughter.[38] Ultimately, Mr Gibson's failure to comprehend the nature of the advice provided to him formed one of the main planks of the Court of Appeal's decision to acquit Mr Gibson on the basis of a miscarriage of justice. The Gibson case is demonstration that the provision of adequate funding of services that interpret for Aboriginal people who do not speak English as a first language is essential for the just operation of the criminal justice system.

International Human Rights Standards and Instruments

As noted in the Discussion Paper, at [1.37], Australia is a signatory to a number of human rights treaties which impose obligations relevant to the incarceration of Aboriginal and Torres Strait Islander peoples. Under international law, these treaties are regarded as imposing binding obligations regardless of the extent to which Australia has incorporated their provisions into domestic law or practice. As acknowledged in the *Declaration on the Rights of Indigenous Peoples*, Indigenous peoples are entitled to the full enjoyment of all the human rights standards contained in international law.[39]

ALHR calls on the Commission to recommend that all Australian jurisdictions take guidance from the United Nations Human Rights Council Resolution 24/12. This resolution addresses human rights in the administration of justice, including juvenile justice, and makes a number of recommendations directly to governments. Of particular note in the context of the incarceration rates among Aboriginal and Torres Strait Islander populations are the Human Rights Council's recommendations that governments:

- Fully implement human rights standards in domestic legislation bearing on the administration of justice;
- Link legal aid funding to the protection of human rights for persons in the criminal justice system; and
- Employ, where possible, alternatives to pre-trial detention.[40]

Further, as noted in the Discussion Paper, Australia has endorsed the *Declaration on the Rights of Indigenous Peoples*. ALHR submits that a more nuanced understanding of

[37] *Gibson v The State of Western Australia* [2017] WASCA 141 [168].
[38] *Gibson v The State of Western Australia* [2017] WASCA 141 [123]
[39] Article 1, *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, A/RES/61/295 (2007)
[40] *Human rights in the administration of justice, including juvenile justice*, HRC Res 24/12, UN Doc A/HRC/RES/24/12 (8 October 2013).

the significance of this action could helpfully inform the Commission's recommendations. As the Commission states, the *Declaration* is not a binding treaty under international law. However, depicting the *Declaration* as merely aspirational "undermines the capacity of the Australian government to engage in authentic and consultative decision-making with Aboriginal and Torres Strait Islander rights holders".[41] Such a characterisation also weakens efforts to ensure government accountability to standards voluntarily agreed to on the international plane.

ALHR submits that the Commission could helpfully interpret the *Declaration* as an authoritative interpretation of human rights obligations Australia already bears under international law, in relation to the interactions between Aboriginal and Torres Strait Islander peoples and the criminal justice system. Such an approach has been endorsed by the Parliamentary Joint Committee on Human Rights, which expects the Commonwealth parliament to draw on the *Declaration* as an influential source of guidance for policy-making and legislative drafting.[42]

[41] Amy Maguire, 'The UN Declaration on the Rights of Indigenous Peoples and Self-Determination in Australia: Using a Human Rights Approach to Promote Accountability' (2014) *New Zealand Yearbook of International Law* 105, 111.
[42] Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Stronger Futures in the Northern Territory Act 2012 and related legislation* (Canberra, Eleventh report of 2013) at 15-16.