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14 October 2013,

Mr Steve Doszpot MLA
Chair, Standing Committee on Justice and Community Safety
ACT Parliament
GPO Box 1020
Canberra ACT 2601

Dear Mr Doszpot,

Re: Inquiry into sentencing in the Australian Capital Territory (ACT) - Submission in relation to the sentencing of Indigenous Australians.

Thank you for the opportunity to provide this submission to the Standing Committee on Justice and Community Safety inquiry into sentencing in the ACT. I am a Barrister of the Supreme Court of the ACT and a Professional Associate of the University of Canberra, School of Law and Justice, having taught at that institution for over five years. Prior to that I was employed as a barrister and solicitor at the Central Australian Aboriginal Legal Aid Service in Alice Springs. I have written on the topic of Aboriginality and sentencing in two recent publications (copies can be provided):

- Hopkins A (2012), 'The relevance of Aboriginality in sentencing: 'sentencing a person for who they are' 16(1) *Australian Indigenous Law Review* 37 – 52.
- Lewis C, Hopkins A and Bartels L (2013), 'Aboriginality in sentencing: ACT interview findings', in P Eastaerl (ed), *Justice connections*, Cambridge Scholars Publishing, 37-59.

In the submission that follows, I draw generally upon these publications and the references and cases considered therein.

Overrepresentation in Australia and the ACT:-

As is the case elsewhere in Australia, Indigenous Australians are grossly overrepresented in prison and juvenile detention in the ACT. Though the Indigenous population accounts for less than three percent of the Australian population,¹ on 30 June 2012, Indigenous Australians made up 27% of the adult prison population.² Expressed another way, on 30 June 2012 the rate of imprisonment of Indigenous Australians was 15 times higher than the general population. Tragically, the rate of overrepresentation is trending steadily up rather than down.

According to the Australian Bureau of Statistics, on 30 June 2012³ the rate of imprisonment for Indigenous Australians in the ACT was 15 times higher than the general population. This overrepresentation is higher for female prisoners (> 30% of custodial population nationally) and higher again for Indigenous juveniles (>50% of custodial population nationally).

Overrepresentation in Canada

Canada is often held up as country from which comparisons can fruitfully be drawn with respect to the experience of its Indigenous people, and legislative and judicial efforts to address custodial overrepresentation. The Supreme Court of Canada in *R v Gladue* [1999] 1 SCR 688 at 722 [64] described the overrepresentation of Aboriginal offenders in the Canadian prison population as a “crisis in the Canadian criminal justice system” and as “a sad and pressing social problem”. In the subsequent decision of *R v Ipeelee* [2012] 1 SCR 433 at 466-7 [57] the Supreme Court of Canada described ongoing custodial overrepresentation as “a crushing failure of the Canadian criminal justice system vis-à-vis Aboriginal peoples” (478-9 [74]). This later conclusion was drawn by reference to statistics that disclosed that 17% of federal prisoners were Aboriginal, despite Aboriginal people making up only 3 % of the population. Given that statistics for Australia and the ACT disclose an even more serious overrepresentation of Indigenous Australians, the conclusions of the Supreme Court of Canada are equally applicable here.

¹ Australian Bureau of Statistics 2007, *Population Distribution, Aboriginal and Torres Strait Islander Australians*, 2006 cat no. 4705.0.

² Australian Bureau of Statistics, *Prisoners in Australia*, 2012, Cat No 4517.0 (ABS, 2013)

³ <http://www.abs.gov.au/ausstats/abs@.nsf/Products/BD0021D329F0464FCA257B3C000DCCE0?opendocument>

Reasons for custodial Overrepresentation and relevance to sentencing

The reasons for Indigenous custodial overrepresentation are complex. The 1991 report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) devotes a whole volume to exploring the underlying issues which explain these disproportionate rates of imprisonment.⁴ In summary, the Commissioners found an answer in the history of colonial and post-colonial relations between Indigenous and non-Indigenous Australians and their institutions. They also found an answer in the legacy of discrimination, disadvantage and socio-economic inequality borne of this history.⁵

What the statistics and conclusions of the RCIADIC show is that Indigenous custodial overrepresentation is a consequence of complicated systemic and background factors playing out in the lives of Indigenous offenders coming before the courts; systemic and background factors which are unique to Indigenous Australians. That means that for many Indigenous offenders, their experience as Indigenous Australians is an essential part of the explanation for their offending, and it is an essential part of the identification of their rehabilitative needs. Necessarily then, it is an essential part of reducing recidivism. This is precisely what the Supreme Court of Canada has concluded with respect to its Indigenous population.⁶ And it accords with the conclusions reached by many courts across Australia.⁷

Taking Aboriginality into account: the legal position in Australia:

Generally it is well accepted that the application of the principle of equality before the law requires sentencing courts to take into account material facts that exist in the lives of individual offenders because of their Aboriginality or experience as Indigenous Australians.⁸

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group. So much is essential to the even administration of criminal justice.⁹

⁴ Commonwealth Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991), Vol 2.

⁵ *Ibid.*

⁶ *R v Gladue* [1999] 1 SCR 688 [69], [70]-[74].

⁷ For a detailed discussion see Hopkins A (2012), 'The relevance of Aboriginality in sentencing: 'sentencing a person for who they are' 16(1) *Australian Indigenous Law Review* 37 – 52.

⁸ *Ibid.*

⁹ *Neal v The Queen* (1982) 149 CLR 305 at 326 (Brennan J) approved in *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [39].

This is expressed in general terms relating to ethnicity and group membership, according with s 33(1)(m) *Crimes (Sentencing) Act 2005* (ACT). However, there are continuing lines of authority that make clear that it will often be necessary to direct specific attention to the Aboriginality of offenders in the exercise of the sentencing discretion.¹⁰

Notwithstanding this, there has been an ongoing tension evident in case law as to when Aboriginality should be considered and what facts that exist by reason of an offender's Aboriginality may be relevant. Following on from the NSW decision of *R v Fernando* (1992) 76 A Crim R 58 there have been decision of the NSW Supreme Court and the ACT Supreme Court¹¹ that apparently restrict consideration of Aboriginality to cases involving an offender whose experience as an Aboriginal person falls within a particular category. For example, in *Crawford v Laverty* [2008] ACTSC 107 at [32] Penfold J stated:

It is apparent that the Fernando principles are of primary relevance to offences committed by Aboriginal offenders within Aboriginal Communities, and in particular where the offences are associated with alcohol abuse and resulting violence within those communities.

Whilst this restrictive approach has not been followed by other judges on the ACT Supreme Court,¹² there is a concern that without legislative guidance the tendency to consider some experiences of Aboriginality as relevant and not others fails to appreciate the complexity of Indigenous post colonial experience and disadvantage.¹³

The Victorian Court of Criminal Appeal in *DPP v Terrick*¹⁴ has established a series of principles applicable to sentencing Aboriginal offender's that do not seek to restrict consideration by reference to any particular experience of Aboriginality. Refshauge J has applied these in the ACT.¹⁵

In the recent decision of *Bugmy v The Queen* [2013] HCA37 (2 October 2013) the plurality of the High Court confirmed the general principle in *Neal* and did not countenance its restriction to a particular class of Indigenous offender:

¹⁰ Hopkins, above n 7, 44-48.

¹¹ *Crawford v Laverty* [2008] ACTSC 107 (Penfold J)

¹² *TM v Karapanos and Bakes* [2011] ACTSC 74 [114] (Refshauge J).

¹³ For a detailed discussion of this see Hopkins A (2012), 'The relevance of Aboriginality in sentencing: 'sentencing a person for who they are' 16(1) *Australian Indigenous Law Review* 37, 40-44.

¹⁴ (2009) 24 VR 457 ('*Terrick*').

¹⁵ *TM v Karapanos and Bakes* [2011] ACTSC 74 [114] (Refshauge J) for discussion see Hopkins A (2012), 'The relevance of Aboriginality in sentencing: 'sentencing a person for who they are' 16(1) *Australian Indigenous Law Review* 37, 44-48.

Aboriginal Australians who live in an urban environment do not lose their Aboriginal identity and they, too, may be subject to the grave social difficulties discussed in *Fernando*.¹⁶

However, the plurality of the Court also made clear that sentencing courts are not permitted to take judicial notice of the systemic background of deprivation of many Aboriginal offenders.¹⁷ Accordingly, the plurality stated:

Aboriginal Australians as a group are subject to social and economic disadvantage measured across a range of indicies, but to recognise this is to say nothing about a particular Aboriginal offender.¹⁸

These statements taken collectively establish two propositions:

1. An Indigenous offender's experience of disadvantage because of their Aboriginality may be critically relevant to the exercise of the sentencing discretion no matter what environment they live in;
2. This experience of disadvantage must be established by evidence presented to the sentencing court rather than by a process of taking judicial notice of the general experience of Indigenous Australians as a group.

Accordingly, the critical issues in terms of ensuring that an Indigenous offender has his or her experience as an Indigenous person taken into account are twofold: Firstly, it is necessary to ensure that sentencing courts are focused on the importance of taking Indigenous experience into account in sentencing in pursuit of the goal of equality before the law. And secondly, it is necessary to consider ways in which to obtain and present evidence of that experience to the court. In other words, whilst overrepresentation may be explained through an understanding of complicated systemic and background factors playing out in the lives of Indigenous offenders, these factors cannot be assumed to exist in the life of any particular offender. The link between the experience of the group and the experience of the individual must be explicit.¹⁹

¹⁶ *Bugmy* [41].

¹⁷ *Ibid.*

¹⁸ *Ibid.*

The inclusion of a specific legislative edict to take Aboriginality into account – merit of the legal position in Canada

The High Court has endorsed an approach to sentencing that facilitates the taking into account of Indigenous experience of disadvantage in the interests of ensuring equality before the law. However, the differences of approach evident in lower courts, not least in the ACT, are such that there is merit in enacting a legislative amendment to the *Crimes (Sentencing) Act 2005* which specifically directs the attention of sentencing courts to the circumstances of Indigenous offenders. No such provision exists in any jurisdiction in Australia. With respect to the value of such an amendment, the Canadian experience is instructive.

Section 718.2(e) of the Canadian Criminal Code requires sentencing courts to take into account the principle that:

All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders.* (emphasis added)

Properly understood, these words do not undermine the principle of equality before the law, rather they ensure a focus on the particular experience of Indigenous offenders because this is necessary to ensure equality before the law.

In *R v Gladue*²⁰ the Supreme Court of Canada held that these words ‘do not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender’.²¹ Rather, the subsection is a legislative direction ‘that sentencing judges should pay particular attention to the circumstances of aboriginal offenders *because those circumstances are unique*, and different from those of non-aboriginal offenders’.²² And further, that the direction to pay particular attention is applicable in sentencing ‘all aboriginal offenders’.²³

The Court held that section 718.2(e) requires sentencing courts to adopt a different ‘process’ for the sentencing of Aboriginal offenders in order to achieve a ‘truly fit and proper sentence in the particular case’.²⁴ The sentencing process remains individualised,²⁵ but the individual offender before the court is

²⁰ [1999] 1 SCR 688.

²¹ Ibid 706 [33].

²² Ibid 708 [37] (emphasis in original).

²³ Ibid 735 [91].

²⁴ Ibid 706 [33].

understood to exist within the context of the collective experience of Aboriginal Canadians. This requires explicit recognition of 'unique background and systemic factors which may have played a part in bringing the particular offender before the courts'.²⁶ These include dislocation, discrimination, child removal, socioeconomic disadvantage, substance abuse and community fragmentation that all too often lead to incarceration at grossly disproportionate rates.²⁷ The Court recognised that collective experience may provide an explanation for the individual's offending behaviour. And, critically, the Court also recognised that the same collective experience offers the potential for innovation in sentencing process and uniquely Aboriginal pathways for punishment, healing and reform.²⁸

Providing evidence of Indigenous experience and rehabilitation needs – the need for formal reports.

The Canadian experience is again instructive in terms of approaches to ensuring that evidence of the particular background and systemic factors playing out in the life of an Indigenous offender are brought before the court.

According to Jonathan Rudin, Program Director of the Aboriginal Legal Services of Toronto Legal Clinic, 'in the weeks, months and years that passed following the *Gladue* decision, little changed in the Canadian legal landscape'.²⁹ Material facts which existed by reason only of the Aboriginality of offenders remained unidentified and were not acted upon. To remedy this, *Gladue* courts were established, specifically charged with the task of giving full effect to the decision. Aboriginal caseworkers were appointed to provide Gladue reports to these courts, setting out the systemic and background issues affecting the lives of Aboriginal offenders, together with available culturally relevant sentencing options.³⁰ The reports explain offending behaviour within the collective history of Aboriginal Canadians, highlighting the link between individual and collective experience. And further, they explore options for healing and reform from the vantage point of this collective experience.³¹

²⁵ Ibid 728 [76].

²⁶ Ibid 725 [69].

²⁷ See especially ibid 719, 724–5 [58], [67]–[68].

²⁸ Ibid [70]–[74].

²⁹ Jonathan Rudin, Aboriginal Legal Services of Toronto Legal Clinic, *A Court of Our Own: More on the Gladue Courts* (2006) <<http://www.nanlegal.on.ca/upload/documents/a-court-of-our-own---more-on-gladue-courts.pdf>>.

³⁰ Campbell Research Associates, *Evaluation of the Aboriginal Legal Services of Toronto Gladue Caseworker Program: Year Three, October 2006–September 2007* (2008) 2, 10 <http://aboriginallegal.ca/docs/Year_3.pdf> ('*Evaluation of the Gladue Caseworker Program*').

³¹ Kelly Hannah-Moffat and Paula Maurutto, 'Re-contextualizing Pre-sentence Reports: Risk and Race' (2010) 12 *Punishment & Society* 262, 266.

Gladue reports are distinct from pre-sentence reports in that their fundamental purpose is to identify material facts which exist only by reason of the offender's Aboriginality. And, critically, *Gladue* reports are written by Aboriginal Canadians employed by Aboriginal organisations.³² Accordingly, the authors of the reports exist within the same collective experience as the offender before the court. But like pre-sentence reports, *Gladue* reports provide an independent source of evidence from which facts material to sentencing can be established and acted upon. As a consequence, identification of the relevance and importance of an offender's Aboriginality is not left solely to the defence lawyer. Nor does it depend on the resources that lawyer has available to them. In a mark of the extent to which the Canadian judiciary values these reports, they are now accepted in, and sought by, *Gladue* and non-*Gladue* courts alike, faced with the task of sentencing Aboriginal Canadians.³³

According to the plurality of the Supreme Court of Canada in *R v Ipeelee* [2012] 1 SCR 433 [60]:

In current practice, it appears that case-specific information is often brought before the court by way of a *Gladue* report, which is a form of pre-sentence report tailored to the specific circumstances of Aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at a sentencing hearing for an Aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*.

The alternative – presentence reports focused on Aboriginality

At present in the ACT, pre-sentence reports give very limited attention to the Aboriginality of offenders. This is made clear in research findings drawn from interviews with lawyers working for the Aboriginal Legal Service in the ACT.³⁴ There appears to be little if any consideration given in pre-sentence reports to the systemic and background factors that may be playing out in the lives of Indigenous offenders, nor to how the offenders experience as and Indigenous person may be material to the sentencing discretion.

This could be remedied to an extent through training to ensure that report writers are alive to these issues and better able to provide this evidence to courts. It is suggested that following the Canadian experience,

³² *Evaluation of the Gladue Caseworker Program*, above n 103, 21.

³³ Hannah-Moffat and Maurutto, above n 104, 266, 274.

³⁴ Lewis C, Hopkins A and Bartels L (2013), 'Aboriginality in sentencing: ACT interview findings', in P Eastaugh (ed), *Justice connections*, Cambridge Scholars Publishing, 37-59.

such education and report writing is better delivered or at least directly informed by Indigenous people who fully comprehend the complexities of post-colonial Indigenous experience.

Need for Indigenous specific rehabilitation pathways

Ultimately, though, identification of background and systemic factors playing out in the lives of Indigenous Australians and presenting this experience in court is only part of the challenge. A more critical part of the challenge is to develop Indigenous specific pathways to healing and reform that address these disadvantages and offer offenders a way forward. As part of this, it is critical to recognise that Indigenous Australians themselves must be involved in the design and delivery of such programs to ensure their relevance and efficacy.

I am aware of two such programs in the ACT, which have yet to come to fruition, though I am not aware of the reasons for this or the precise nature of either proposal:

1. The Ngunnawal Healing Farm, which I understood from a website which is no longer accessible, was a proposed Indigenous residential rehabilitation program to which a land grant had been allocated.
2. Circuit Breaker - A University of Canberra non-residential Indigenous education/life education program developed by Wayne Applebee in collaboration with others.

I am also aware that University of New South Wales has recently conducted research into what works and why with respect to currently operating Indigenous run healing programs, though I am not sure that this has been published yet (I would expect this to be available by the time the committee commences deliberation). Included in its evaluation was a program run from Darwin by the Balunu Foundation,³⁵ which has achieved real positive outcomes for Aboriginal young people caught in or at risk of being caught up in criminal justice system. It is an example of the potential for these programs.³⁶

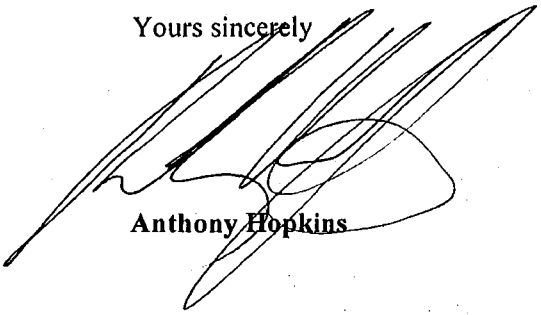
³⁵ <http://www.balunu.org.au/main.html>

³⁶ For a useful overview of the Indigenous healing programs and their key principles see Caruna, C 'Healing Service for Indigenous People' *Family Relationships Quarterly* No. 17
<http://www.aifs.gov.au/afrc/pubs/newsletter/frq017/frq017-1.html>

Specific Recommendations:

1. That s 33 *Crimes (Sentencing) Act 2005* be amended to include a requirement that sentencing courts pay particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders.
2. That a pilot project be implemented to enable the provision of Indigenous specific pre-sentence reports to sentencing courts where offenders consent to the production of such reports.
3. That immediate steps be taken to investigate and implement Indigenous specific pathways for rehabilitation and reform following best practice programs available in other Australian jurisdictions.

Yours sincerely



Anthony Hopkins