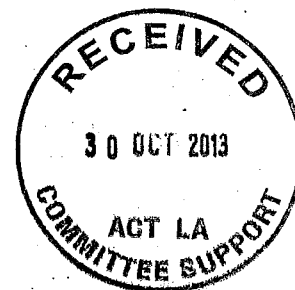




ALS

Aboriginal Legal Service (NSW/ACT) Limited

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Mr Steve Doszpot MLA
Chairperson, Standing Committee on Justice and Community Safety
Legislative Assembly for the ACT
GPO Box 1020
CANBERRA ACT 2601

	A.C.T. LEGISLATIVE ASSEMBLY COMMITTEE OFFICE
SUBMISSION NUMBER	15.
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Dear Mr Doszpot

INQUIRY INTO SENTENCING IN THE ACT

Thank you for your invitation to provide a submission to the inquiry.

I have pleasure in enclosing a submission on behalf of the Aboriginal Legal Service (NSW/ACT) Limited (ALS).

The ALS is an Aboriginal community-controlled company providing representation and advice to Aboriginal and Torres Strait Islander people in criminal, care and protection and family law matters across NSW and the ACT. The ALS has been providing legal services in the ACT community since 1985.

The ALS submission incorporates 5 highlighted recommendations for the Committee's consideration.

Should you or the Committee require more information or clarification of any of the material included in our submission, I would be happy to appear before the Committee at a time of your convenience.

Yours sincerely

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30 October 2013

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INQUIRY INTO SENTENCING IN THE ACT

Submission by the Aboriginal Legal Service (NSW/ACT) Limited

The Aboriginal Legal Service (NSW/ACT) Limited (ALS) is an Aboriginal community-controlled company providing representation and advice to Aboriginal and Torres Strait Islander people in criminal, care and protection and family law matters across NSW and the ACT.

The ALS has been providing legal services in the ACT community since 1985.

ABORIGINAL AND TORRES STRAIT ISLANDER PRISONERS NATIONALLY AND IN THE ACT

National rates of imprisonment

Nationally, there is a disproportionate rate of imprisonment of Aboriginal and Torres Strait Islander people relative to non-Indigenous prisoners and relative to the share of Aboriginal and Torres Strait Islander people in the Australian population.

The most recent figures from the Australian Bureau of Statistics show that their rate of imprisonment was 15 times higher than the rate for non-Indigenous prisoners.¹ This was itself an increase over the previous 12-month period, when the rate of imprisonment was 14 times higher.²

At 30 June 2012, Aboriginal and Torres Strait Islander prisoners made up 27% of the adult prison population.³ This had become 28% overall by the June quarter 2013, following a 7% increase, over the 12-month period, in the number of male and 8% increase in the number of female Aboriginal and Torres Strait Islander persons in custody.⁴

While Aboriginal and Torres Strait Islander prisoners constitute 28% of the prison population, Aboriginal and Torres Strait Islander people make up only 2% of the Australian population.⁵

¹ Australia: Australian Bureau of Statistics, 4517.0, *Prisoners in Australia 2012*, 'Aboriginal and Torres Strait Islander prisoner characteristics: Imprisonment Rates', 2 April 2013.

² *Idem*.

³ *Ibid*, 'Aboriginal and Torres Strait Islander prisoner characteristics: Aboriginal and Torres Strait Islander Prisoners', 2 April 2013.

⁴ Australia: Australian Bureau of Statistics, 4512.0, *Corrective Services, Australia*, 'Summary of Findings: Aboriginal and Torres Island Prisoners', 12 September 2013.

⁵ *Idem*.

ACT rates of imprisonment

Historically, data for Indigenous incarceration rates within the ACT has been scarce. A NSW Bureau of Crime Statistics and Research *Bureau Brief* from August 2009 noted—

Less than one percent of the Australian Indigenous population reside in the ACT. The number of Indigenous adults in prison in the ACT has not risen between 2001 and 2008 but the numbers are very low. Over this period it fluctuated from a minimum of four in 2003 and to a maximum of 16 in 2005. Some Indigenous prisoners from the ACT are held in NSW prisons and are counted in the NSW figures.⁶

More recent figures released from the Australian Bureau of Statistics and ACT Justice and Community Safety suggest that an increase in the general population of Aboriginal and Torres Strait Islander people in the ACT, accompanied by the introduction of adult prison and expanded juvenile detention facilities in the ACT, has translated to an increase in prisoner population.

- According to the 2011 census, the resident population of Aboriginal and Torres Strait Islander people in the ACT was 5183, up from 3872 in 2006 – an increase of 33.9%. The local population represented 0.9% of the then total Aboriginal and Torres Strait Islander population in Australia of 548,370.⁷
- According to ACT Government figures, the total sentenced Indigenous prisoner population held at 1 June 2013 was 31 in a prison population of 184. The total average of Indigenous prisoners held on remand for the month of June 2013 was 20.4 in a prison population of 86.53.⁸
- In addition, for the June 2013 quarter, a total of 14 Indigenous young people were held in Bimberi on remand or following committal, in a detention centre population of 40.⁹

Nationally and in the ACT, Bureau of Statistics figures show some decrease in the rate of imprisonment of Indigenous prisoners, expressed as a percentage of each 100,000 of the Indigenous population, compared with the period 2002-2012.¹⁰

⁶ NSW: Bureau of Crime Statistics and Research, *Crime and Justice Statistics Bureau Brief*, 'Why are Indigenous Imprisonment Rates Rising?' Issue paper no. 41, Jacqueline Fitzgerald, August 2009.

⁷ Megan Doherty, 'Aboriginal population grows by a third', *The Canberra Times*, 22 June 2012, <http://www.canberratimes.com.au/act-news/aboriginal-population-grows-by-a-third-20120621-20r75.html#ixzz2iafOfQe>.

⁸ ACT: Justice and Community Safety, *ACT Criminal Justice Statistical Profile*, June 2013 Quarter, Table 43.

⁹ *Ibid*, Table 38.

¹⁰ Australia: Australian Bureau of Statistics, 4512.0, *Corrective Services, Australia*, 'Summary of Findings: Aboriginal and Torres Strait Islander prisoners', 12 September 2013; and 4517.0, *Prisoners*

Comparison of rates between the ACT and other States and Territories

Following the Report of the Royal Commission into Aboriginal Deaths in Custody in 1991, all States and Territories committed to reducing the overrepresentation of Indigenous people in prison.

At 30 June 2012, the rate of imprisonment of Aboriginal and Torres Strait Islander people at 15 times the rate of imprisonment of non-Indigenous prisoners coincided exactly with the national average rate. However, the ACT rate was higher than in New South Wales, Victoria, Queensland, Tasmania and the Northern Territory. Only Western Australia (20 times) and South Australia had higher rates of imprisonment of Indigenous prisoners compared to non-Indigenous prisoners.¹¹

Rates of imprisonment of Indigenous people remain at substantially disproportionate levels when compared to the non-Indigenous population.

SENTENCING ABORIGINAL OFFENDERS IN THE ACT

Recently, the High Court of Australia had occasion to consider the line of jurisprudence concerning sentencing of Aboriginal offenders.¹² This jurisprudence has commonly been encapsulated broadly under the heading the '*Fernando* principles'.

In *Bugmy*, the Court held--

39. ... *In each of these respects [relevance of an offender's Aboriginality to sentencing], the propositions enunciated in Fernando conform with the statement of sentencing principle by Brennan J in Neal.*¹³

"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. That done, however, the weight to be attributed to the factors material in a particular case, whether of aggravation or mitigation, is ordinarily a matter for the court exercising the

in Australia, 2012, 'Aboriginal and Torres Strait Islander prisoner characteristics: Imprisonment Rates', 2 April 2013.

¹¹ Australia: Australian Bureau of Statistics, 4517.0, *Prisoners in Australia 2012*, 'Aboriginal and Torres Strait Islander prisoner characteristics: Imprisonment Rates', 2 April 2013.

¹² *Bugmy v The Queen* [2013] HCA 37.

¹³ *Neal v The Queen* (1982) 149 CLR 305, 326.

sentencing discretion of first instance or for the Court of Criminal Appeal."

40. *Of course, not all Aboriginal offenders come from backgrounds characterised by the abuse of alcohol and alcohol-fuelled violence. However, Wood J [author of the Fernando principles] was right to recognise both that those problems are endemic in some Aboriginal communities, and the reasons which tend to perpetuate them. The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.*

Wood J in *R v Fernando*¹⁴ had found that many Aboriginal communities, where alcohol abuse and resulting violence are endemic, are characterised by—

... grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

And further that--

*It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.*¹⁵

While the line of authority commenced by the decision in *Fernando* has been approved by the High Court (and had been considered and approved by the Supreme Court of the ACT in 2011),¹⁶ the subtle remedies called for by Wood J remain the subject of controversy within and without the judicial system.

The decisions in *Fernando* and *Bugmy* were considered in the context of the NSW sentencing legislation which may be distinguished from the ACT system in material respects.

Section 33 of the *Crimes (Sentencing) Act 2005* (ACT) contains a number of matters that must be considered where relevant and known to the Court in deciding an appropriate

¹⁴ *R v Fernando* (1992) 76 A Crim R, 62 (E).

¹⁵ *Ibid*, 62 (C).

¹⁶ *TM v Karapanos and Bakes* [2011] ACTSC 74, [118].

sentence for an offender. Of particular relevance is s.33(1)(m), requiring the Court to consider—

the cultural background, character, antecedents, age and physical or mental condition of the offender;

The section provides helpful direction to a sentencing court of a kind that is perhaps lacking in NSW legislation.¹⁷ It should be noted that the NSW Law Reform Commission in its report on sentencing (tabled in the NSW Parliament in September 2013) has recommended an amendment to the NSW sentencing legislation to incorporate a statement of sentencing principle (referring to ‘general background’ and ‘character’ of the offender) that essentially mirrors s.33(1)(m) of the ACT Act.¹⁸

Nevertheless, while providing some clarity in relation to considering an offender’s background, there remains an ambiguity surrounding the terms ‘cultural background’ and ‘character’, which could be removed by amendment of the ACT legislation. An appropriate amendment would allow for the unique circumstances of Aboriginal offenders to be taken into account in sentencing, while preserving the dictate of individualised justice in sentencing. An amendment similar to that recommended below was considered to have merit by the NSW Law Reform Commission in its recent Report into NSW Sentencing law.¹⁹

Recommendation 1

That s.33(1)(m) of the *Crimes (Sentencing) Act 2005* (ACT) be amended to state—

the cultural background (with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders), character, antecedents, age and physical or mental condition of the offender;

¹⁷ In *Bugmy*, the High Court was asked to approve the proposition that a Court could pay ‘particular attention to the circumstances of Aboriginal offenders’ when applying s.5(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which states—

A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate.

The Court did not accept this submission – see *Bugmy* at par 36—

There is no warrant, in sentencing an Aboriginal offender in New South Wales, to apply a method of analysis different from that which applies in sentencing a non-Aboriginal offender.

¹⁸ NSW: New South Wales Law Reform Commission, Report 139, *Sentencing*, Recommendation 4.2, p 83.

¹⁹ *Ibid*, Recommendation 17.35, p 372.

COMMUNITY BASED SENTENCING ORDERS AND CORRECTIVE SERVICES

As noted above, in *R v Fernando*, Wood J stated that symptoms of Aboriginal disadvantage, such as alcohol abuse and alcohol related violence, are best met by 'more subtle remedies than the criminal law can provide by way of imprisonment'.

While there is controversy as to what these subtle remedies may incorporate, they are the responsibility of the courts, which have, over time, built up a significant number of empirical studies related to restorative justice sentencing for Aboriginal offenders.

A useful collection of key principles for consideration in framing sentencing options for Indigenous offenders has been collated by the National Justice Chief Executive Officers Group, in their report *Staying Strong on the Outside: Indigenous Young Adults*, as follows—

1. Begin efforts to assist offenders to successfully rehabilitate promptly upon imprisonment, and continue after release until reintegration is completed (throughcare).
2. Create effective partnerships between government and non-government organisations. (Information sharing and joined up service delivery are fundamental to the success of initiatives.)
3. Ensure that programs are designed, developed and delivered in a culturally appropriate manner. (Evidence suggests that participants in programs that are delivered in a culturally appropriate manner are more likely to complete the program and less likely to re-offend.)
4. Acknowledge the strengths of young Indigenous offenders and recognise achievements, ability and potential, while addressing the need to build capacity.
5. Recognise and address the needs of victims, particularly where the victim lives in the same community as the offender.
6. Address the cognitive and behavioural causes of offending including mental health and cognitive disability issues. (Research suggests that cognitive-behavioural skills programs are among the most effective in offender rehabilitation.)

7. Address substance abuse. (Drug and alcohol abuse are risk factors for offending.)
8. Address the individual in a holistic way and, in particular, ensure that practical health, welfare and accommodation needs are met so that the client can effectively address behavioural change.
9. Acknowledge that young offenders are in transition to adulthood, and ensure that connections are made with education, vocational training and employment services.
10. Empower individuals by imparting practical life skills, building self-sufficiency and encouraging active participation in rehabilitation.
11. Where possible, maintain, re-establish and strengthen family and community relationships, and involve family members and elders in the reintegration process.
12. Address staff needs for ongoing professional development and job stability. (Trained and committed staff are key elements in program integrity.)
13. Match treatment styles with the learning styles of participants.
14. Invest in lengthy and intensive programs. (Evidence indicates that programs of at least 100 hours are necessary to gain significant reductions in recidivism.)²⁰

The above principles reinforce conclusions drawn from the ALS's own service delivery, namely that community-based programs (as part of sentencing options available to a court) must retain a flexibility in delivery in order to be effective. It is also of vital importance to have Aboriginal community involvement in the design and delivery of programs to ensure that those programs are both culturally appropriate and relevant to Aboriginal participants.

Recommendation 2

That the ACT Government begin consultation with Aboriginal and Torres Strait Islander community organisations and other key stakeholders with a view to expanding existing, and developing new, non- custodial alternatives for sentencing courts.

²⁰ Australia: National Justice Chief Executive Officers Group, *Staying Strong on the Outside: Indigenous Young Adults: Final Report*, September 2009, <http://www.indigenousjustice.gov.au/stayingstrong.pdf>, p 3.

PRE-SENTENCE REPORTING TO THE COURT

As referred to above, section 33 of the *Crimes (Sentencing) Act* 2005 (ACT) states—

... a court must consider whichever of the following matters are relevant and known to the court... [our emphasis].

While the proposed amendment to s.33(1)(m) would mandate a court to consider the unique subjective circumstances of each Aboriginal and Torres Strait Islander offender, there remains a practical difficulty for the court in informing itself as to these matters. The problem was summarised by the Hon Justice Dean Mildren, who, in commenting on the need for the trial process to operate more fairly in respect of Aboriginal accused persons and witnesses stated—

It is widely recognised that the trial process operates unfairly to Aboriginal witnesses and accused, because that process is often outside their experience, either linguistically or culturally. Apart from the occasional use of interpreters, very little effort has been made to make the process fairer and more understandable to those involved. It is trite to say that counsel, judges, juries and witnesses all need to be culturally educated.²¹

In the ACT, courts primarily inform themselves by the taking of evidence on oath or by the reception of pre-sentence reports. The difficulties in taking evidence from indigenous offenders are by nature consistent with Mildren J's comments above.

Where a custodial sentence is a possible outcome of a finding of guilt, in order to consider sentencing an offender to a non-custodial alternative, a sentencing court must order that a pre-sentence report be prepared. (This is so that the court can properly consider all alternatives to imprisonment – the legislated option of last resort.) Pre-sentence reports are therefore of great importance to the sentencing exercise in the ACT.

Section 42 of the Act states--

- (1) *A pre-sentence report must address—*
 - (a) *each pre-sentence report matter, or any other matter, stated in the court order for the report; and*
 - (b) *any other pre-sentence report matter, or any other matter, that, on investigation, appears to the assessor to be relevant.*

²¹ The Hon Justice Dean Mildren, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System', (1997) 21 *Criminal Law Journal* 7, p 12. quoted in *The Aboriginal Cultural Awareness Benchbook for Western Australian Courts* (Stephanie Fryer-Smith, Australian Institute of Judicial Administration Incorporated, 2002), p 7:1.

At present, s.40A of the *Crimes (Sentencing) Act 2005 (ACT)* lists a number of matters that are 'pre-sentence report matters' for the purposes of section 42. Of particular relevance is s.40A(b), which states that—

- (b) *the offender's social history and background (including cultural background);*

is a pre-sentence report matter.

Recommendation 3

That s.40A(b) of the *Crimes (Sentencing) Act 2005 (ACT)* be amended to state—

- (b) *the offender's social history and background (including cultural background with particular attention to the circumstances of Aboriginal and Torres Strait Islander offenders);*

The ALS has had the benefit of reading the submission of Mr Anthony Hopkins, Barrister. We note Mr Hopkins' comments regarding the need for specialised report writers in dealing with Indigenous offenders and further that those report writers be informed by Indigenous people. We support Mr Hopkins' observations.

Recommendation 4

- (i) **That the ACT Government begin a program of training (in consultation with Aboriginal and Torres Strait Islander community organisations) with a view to better educating pre-sentence report assessors to the unique circumstances of Indigenous offenders.**
- (ii) **That the ACT Government consider employing specialised Indigenous pre-sentence report assessors.**

THE GALAMBANY (CIRCLE SENTENCING) COURT

The Galambany Court aims to—

- (i) *involve Aboriginal and Torres Strait Islander communities in the sentencing of Aboriginal and Torres Strait Islander defendants;*
- (ii) *increase the confidence of Aboriginal and Torres Strait Islander communities in the sentencing process;*
- (iii) *reduce barriers between the ACT Magistrates Court and Aboriginal and Torres Strait Islander communities;*
- (iv) *provide culturally relevant and effective sentencing options for Aboriginal and Torres Strait Islander defendants;*

- (v) *provide Aboriginal and Torres Strait Islander defendants with support services that will assist them to overcome their offending behaviour;*
- (vi) *provide support to victims of crime and enhance their rights and participation in the Galambany Circle Sentencing Court process; and*
- (vii) *reduce repeat offending by Aboriginal and Torres Strait Islander defendants.*²²

The NSW Law reform Commission has opined that—

*... Circle may not reduce reoffending. Instead, the key purposes of Circle must be to reduce perceptions of cultural alienation, ensure that sentencing orders are appropriate to the cultural needs of Aboriginal and Torres Strait Islander offenders and to better educate magistrates about the needs of Aboriginal and Torres Strait Islander offenders.*²³

The ALS agrees with the NSW Law Reform Commission position. We submit that the effectiveness of Circle (both as to reducing recidivism and for the purposes listed above) will be enhanced by enabling more culturally appropriate and relevant sentencing options being available to the Circle (see Recommendation 2 above).

Recommendation 5

- (i) **That the purpose and aims (including procedure) of circle sentencing be legislated, similarly to the *Crimes (Restorative Justice) Act 2004* (ACT).**
- (ii) **That the ACT Government begin consultation with Aboriginal and Torres Strait Islander community organisations and other key stakeholders with a view to expanding the jurisdiction of circle sentencing to Supreme Court matters (noting that legislation concerning the Galambany Court is currently located in Chapter 4C of the *Magistrates Court Act 1930* (ACT)).**
- (iii) **That s.33(1)(y) of the *Crimes (Sentencing) Act 2005* (ACT) be amended to state—**

if the offender has accepted responsibility for the offence to take part in restorative justice under the Crimes (Restorative Justice) Act 2004, or to participate in sentencing in the Galambany Court -- that fact.

**Michael Lalor
Aboriginal Legal Service (NSW/ACT) Limited**

30 October 2013

²² ACT: Magistrates Court of the ACT, Practice Direction No 1 of 2012, *Galambany Court*, [8].

²³ NSW: New South Wales Law Reform Commission, Report 139, *op cit*, [16.98].

