



BRIEFING NOTE

Indigenous Incarceration and The Walama Court

ISSUE

The unacceptable rates of incarceration for Indigenous people in NSW demand a fresh approach to sentencing. The NSW Bar Association and the Police Association of NSW agree that the establishment of a specific Indigenous Sentencing Court – the Walama Court – in this state will meaningfully address the underlying issues that give rise to repeat offending so as to reduce the disproportionate rate of indigenous incarceration. The social impact that incarceration has on Aboriginal families and communities is seen on the ground every day by the members of our Police Force.

BACKGROUND

A. Indigenous incarceration rates

The NSW Bar Association has had a long standing view that the disproportionate representation of Aboriginal people in prison is a national shame.

On 15 March 2018, the Australian Bureau of Statistics (ABS) reported that as at December 2017, 28% (3, 205) of the NSW prison population identified as Aboriginal and Torres Strait Islander. As at 30 June 2017, 24% of the NSW prisoner population identified as Aboriginal and Torres Strait Islander - that is, 3, 197 out of the 13, 149 prisoners in this State. Nationally, 11, 307 prisoners out of 41, 202 identified as Aboriginal and Torres Strait Islander, representing 27% of the national prison population. This is an increase of 7% (711 prisoners) since 30 June 2016.

Although Aboriginal and Torres Strait Islander adults comprise 2% of the population, they make up 27% of prisoners nationwide. This figure has almost doubled since the time of the 1991 Report of the Royal Commission into the Aboriginal Deaths in Custody when 14.3% of total prisoners in Australia identified as Aboriginal.

B. The Walama Court

The recent Australian Law Reform Commission's Report "Pathways to Justice— An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples" released in March 2018 provides a comprehensive blueprint for urgent action to address the over-representation of Aboriginal and Torres Strait Islander people in our prisons. The ALRC Report makes a number of recommendations to improve justice outcomes for Indigenous Australians, including the establishment of specialist Aboriginal and Torres

Strait Islander sentencing courts.¹ Swift and decisive action on the establishment of a specialist court which will provide improved justice outcomes for Indigenous Australians and impact on our rate of Indigenous incarceration in NSW can be realised within 12 months.

The NSW Government has an opportunity **now** to take the lead in demonstrating its commitment to implementing the recommendations made in the ALRC Report and more importantly, to proactively reducing the rates our Indigenous Australians residing in NSW are incarcerated.

Investing in long term economic and social gains for NSW

The Bar Association and the Police Association both believe that the spiralling trend in indigenous incarceration requires swift and decisive action and innovative solutions on the part of Government to tackle the systemic issues that underpin the over representation of Indigenous persons in prisons.

The Walama Court proposal involves a hybrid model incorporating aspects of the Victorian Koori Court and the NSW Drug Court. Attached is an article from the National Indigenous Times from 2 May 2018 which outlines the success of the Victorian model over the last decade, along with an article from The Guardian from 7 May 2018 which documents the widespread support for the model among Elders involved in a 2015 youth Koori Court trial which was conducted in Parramatta.

The model proposes a community-based option where the judge has the capacity to monitor the progress of the individual post sentence. The monitoring will include an intensive period of monitoring including more intensive supervision by Community Corrections in the community. It is important that the court has a legislative foundation and framework.

The Association has maintained that the establishment of the Walama Court is critical in reducing Indigenous incarceration rates for two reasons:

1. **The long term economic cost savings for NSW:** The Walama Court will need to be adequately resourced and funded to ensure its success. However in the long term it will save the Government money as fewer Indigenous persons will be imprisoned and the reduced rates of recidivism will mean generations of people will not continue to cycle through the criminal justice system.
2. **The social benefit to the NSW community:** the proposed model would involve community participation and more supervision resulting in reduced recidivism and increase compliance with court orders to better protect the community.

¹ Recommendation 10-2 of the ALRC Report says: Where needed, state and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts. These courts should incorporate individualized case management, wraparound services, and be culturally competent, culturally safe and culturally appropriate.'

1. *The long term economic cost savings for NSW*

Currently, it costs the NSW Government \$181 per day to incarcerate one adult offender. This does not include the cost of social and medical services provided to offenders while they are in prison and when they leave and return through the criminal justice system. There is also the unquantifiable cost of the social impact that incarceration has on Aboriginal families and communities, women and children, parents and grandparents which is seen on the ground every day by the members of our Police Force.

In 2015, the Walama Working Group² arranged for cost/benefit projections regarding the savings and benefits flowing from the establishment of the Walama Court based on reduced rates of recidivism of 20%, 37% and 50%. To provide context, in about 2015, the reduction in recidivism rates of individuals who had their matters considered by the NSW Drug Court was 37%. We are confident that if the Walama Court were to be established that it would achieve at least a similar result.

On that basis, our analysis showed that if the rate of reduced recidivism was 37% with an investment of over \$8 million over 4 years, it would result in a 64% annualised return on the investment (the benefit). That is for every \$181 per day spent in incarcerating an adult Aboriginal offender, the Government would recoup \$115.84 per day. On a conservative analysis where we assume the rate of reduced recidivism is 20% with a financial investment of over \$4 million over 4 years, it would result in a benefit of 36% annualised return on the investment. That is a saving of \$65 for every \$181 per day spent on incarcerating an adult Aboriginal offender.

For the Walama Court to be administered successfully, the Government would need to allocate approximately \$15, 528 247 million over 5 years (or approximately \$3.1 million each year) for the Court to operate on a trial basis for that duration. \$12, 178 387 million of that sum is for Corrective Services NSW while the only funding sought by the District Court of NSW for the successful establishment of the Walama Court is \$60, 000 per year for a 5 year period for the purposes of employing an additional court officer. This is a relatively small sum of money compared to the long term social and economic costs to the NSW community. The sooner we act to invest in reducing rates of indigenous incarceration the sooner we can halt and in time reduce the numbers of Aboriginal persons in NSW prisons

2. *The social benefit to the NSW community*

² The Walama Working Group comprised of Her Honour Judge Yehia SC (Chair), Mr Brendan Thomas (CEO Legal Aid NSW), Ms Annmarie Lumsden (Director – Criminal Law, Legal Aid NSW), Mr Richard Funston (Executive Director of Crime, Legal Aid of NSW), Mr Lloyd Babb (Director of the NSW DPP), Ms Janet Manuell SC (Public Defender), Ms Nadine Miles (Chief Legal Officer, Aboriginal Legal Service), Mr Craig Hyland (Solicitor for Public Prosecutions), Ms Teela Reid (Solicitor, Legal Aid NSW), Ms Rosemary Caruana (Assistant Commissioner / Executive Director – Community Corrections, Western District) and Mr Luke Grant (Assistant Commissioner, Corrections Strategy and Policy).

Criticism that the Walama Court would create two systems of justice demonstrates a lack of understanding as to how the court will work. The Walama Court will still be required to deal with proceedings in accordance with the legislative regime and sentencing principles that apply to proceedings generally. It will be bound to have regard to the purposes of sentencing contained in sentencing legislation and the various legal principles relevant to sentencing set by decisions of the Court of Criminal Appeal.

The difference in approach is related to the objectives of the Walama Court which include seeking to:

- a) reduce the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system;
- b) reduce the frequency and seriousness of offending by Aboriginal and Torres Strait Islander offenders;
- c) increase the level of compliance by Aboriginal and Torres Strait Islander offenders with community-based orders;
- d) promote community safety by reducing recidivism;
- e) enhance the level of court support provided to indigenous offenders and victims; and
- f) enhance the confidence of indigenous communities in the courts and the administration of justice by promoting closer engagement.

The Walama Court proposes an effective way to sentence Indigenous offenders which would reduce the disproportionate rate of incarceration and to meaningfully address the underlying issues that give rise to repeat offending. This will be achieved in the following ways:

- a) It will involve Elders and other respected community members in the sentence proceedings. This will serve to involve people whom the offender respects and who can serve as mentors throughout the process. The involvement of Elders will also mean that offenders will be held to account in a more substantive way.
- b) The Walama Court's proceedings will involve a multi-agency approach to sentencing which will provide wraparound services such as medical and mental health services, substance abuse treatment, employment programs and housing. This will provide meaningful support to the offender which will thereby reduce the likelihood of reoffending.
- c) Proceedings before the Walama Court will involve more intensive supervision on the part of service providers and more intensive monitoring by the Court. Under the present system the court has no power to monitor the offender post-sentence. Under the proposed model, the Walama Court will have power to continue monitoring the offender and holding him/her to account even after sentence has been imposed.

The success of the Walama Court will have a significant social impact on the overall community safety and reduce reoffending in NSW. The social and economic benefits call for an innovative approach to be adopted by Government so we can start seeing results and real impact in reducing the overrepresentation of Indigenous people in NSW prisons and the criminal justice system.

COMMENT:

The following comments can be attributed to Arthur Moses SC, President of the NSW Bar Association and Pat Gooley, Secretary of the Police Association of NSW respectively.

Arthur Moses SC:

“The justice system has failed to adequately deal with problems associated with the indigenous community which has led to rising rates of incarceration. This means that we need to look at new proposals to reform the justice system. We cannot continue to lock-up generation after generation of our indigenous brothers and sisters.

The Walama Court is an attempt to address the inequality evidenced by the disproportionate rate of indigenous incarceration. There are increasing numbers of aboriginal women and children being imprisoned and we must look to new options. The aim of all governments should be to reduce recidivism and increase compliance with court orders to better protect the community. This model would involve community participation and more supervision.

This is not a soft on-crime option. The court monitoring of community based orders will be more onerous. There will be in certain cases weekly drug and alcohol testing. Offenders will be made more not less accountable for their actions. It will involve more resources but it will save money because we cannot continue to lock people up at the increasing rates that we have seen. The community cannot tolerate generations of people being lost to life of crime and prison”.

Pat Gooley:

“The Police Association of NSW has supported this proposal for some time. Police are sick of the rhetoric to gain political mileage. This is a genuine solution that will reduce the number of victims of crime and reduce the incidence of predominately young men being incarcerated.”

“The social impact that incarceration has on Aboriginal families and communities is seen on the ground every day by the members of our Police Force. The Walama Court proposal is designed to reduce recidivism rates of Indigenous people through the use of more rigorous supervision orders and diversionary programs in the sentencing process, as well as increased cooperation between the criminal justice system and respected persons in the Indigenous community.”

Arthur Moses SC and Pat Gooley:

“We believe that the establishment of the Court will reduce recidivism and increase compliance with court orders to better protect the community and we urge the Government to urgently fund a trial of the Walama Court model”