NSW Bar Association president Arthur Moses SC

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The justice system has failed to adequately deal with the problems associated with the indigenous community that have led to their over-representation in prison.

This assessment, from NSW Bar Association president Arthur Moses SC, has triggered a push by the Bar for big changes to the state’s justice system.

In a move timed to coincide with national reconciliation week, Mr Moses has unveiled a proposal to establish an indigenous court, to be known as the Walama Court, that would be able to impose longer-term intensive supervision orders as an alternative to prison.

“This is not a soft-on-crime option,” Mr Moses said. “Offenders will be made more — not less — accountable for their actions.”
The new court, which would incorporate aspects of Victoria’s Koori Court and the NSW Drug Court, would become a division of the District Court.

If enacted, judges would be given authority to impose community-based sentences with intensive supervision for those convicted of offences with a non-parole period of three years or less.

“The court monitoring of community-based orders will be more onerous. There will be in certain cases weekly drug and alcohol testing,” Mr Moses said.

The sentencing options for the Walama Court are not available under the framework established by the Crimes (Sentencing Procedure) Act.

Mr Moses said the Bar’s proposal would allow longer monitoring by the court and more intensive supervision by Community Corrections officers.

“The fact is that the justice system has failed to adequately deal with the problems associated with the indigenous community which has led to rising rates of incarceration,” he said.

“This means we need to look at new proposals because we cannot continue to lock up generation after generation of our indigenous brothers and sisters.”

The idea of a Walama Court — the name means “return” in the Eora language — was raised informally with former attorney-general Gabrielle Upton in May 2015, and this was followed by a formal proposal in November of that year.

The Bar also called on the state government to delay planned changes to the criminal justice system to ensure there were no unforeseen consequences for the indigenous community.

Those changes, which were announced by Attorney-General Mark Speakman last month, would increase supervision of prisoners once they are released on parole, provide stronger incentives for early guilty pleas, replace suspended sentences with intensive correction orders and make it possible to revoke parole over concerns for community safety even where there has been no breach of parole conditions.

However, Mr Moses called on the government to wait until after the Australian Law Reform Commission publishes its report later this year on the indigenous incarceration rate.
That report, which is due to be handed to federal Attorney-General George Brandis in August, will cover sentencing, parole, community reintegration, diversion programs and legal frameworks that reduce indigenous incarceration.

Mr Moses said the Bar Association believed it would contribute to an understanding of indigenous incarceration. High imprisonment rates for Aborigines and Torres Strait Islanders could not be meaningfully addressed without examining “the cycle of criminal justice which begins before a person enters the system and continues after he or she leaves”.

“The impact that socio-economic factors such as housing, drug and alcohol dependence, education and families have on preventing incarceration and/or minimising the risk of recidivism should not be disregarded,” Mr Moses said.

The commission “may wish to have regard to the extent to which factors such as institutional racism and a lack of cultural competency at all levels of law enforcement contribute to the increasing rate of incarceration of indigenous Australians”, he said.

The Bar’s proposals are in line with its longstanding view that the disproportionate incarceration rate for indigenous people is a national shame.

At the time of the 1991 royal commission into Aboriginal deaths in custody, 14.3 per cent of the national prison population consisted of Aborigines or Torres Strait Islanders. This proportion has now almost doubled to 27 per cent, according to data assembled by the Bar Association.

In NSW, the deterioration has been even worse: the Bar’s figures show that the indigenous incarceration rate has jumped from 9.3 per cent in 1991 to 24 per cent.

Mr Moses said the Walama Court proposal was an attempt to address “their inequality evidenced by the disproportionate rate of indigenous incarceration”.

“The aim of all governments should be to reduce recidivism and increase compliance with court orders to better protect the community,” he said.

Because the model proposed by the Bar would involve greater supervision, it would also require more resources, but Mr Moses said it would save money “because we cannot continue to lock people up at increasing rates. The community cannot tolerate generations of people being lost.”
Since 2002, NSW has used “circle sentencing” courts in an attempt to reduce recidivism.

This requires indigenous offenders who plead guilty to matters in the Local Court to confront their community’s elders during sentencing.

Victoria’s County Koori Court, which opened in 2008, was the nation’s first to deal with serious indictable offences. In 2015, a report by Victoria’s Ombudsman Deborah Glass found that Koori Courts operating in Melbourne and regional centres had led to a reduction in recidivism.

However, she noted that government funding for this and other programs aimed at reducing reoffending had been “very limited when compared to funding for the corrections system more broadly”.

The same report said Corrections Victoria had noted that “the number of Koori prisoners in Victorian prisoners had increased by 32 per cent in the past 16 months”.