



4 October 2017

The Law Council of Australia
The Justice Project
GPO Box 1989
Canberra ACT 2601



By email: justiceproject@lawcouncil.asn.au

Dear Madam/Sir,

Response to the Justice Project Issues Paper on Aboriginal and Torres Strait Islander People

Kingsford Legal Centre (KLC) welcomes the opportunity to respond to the Law Council of Australia's Justice Project consultations. In this submission, we focus on the general priority areas identified in the Justice Project Issues Paper on Aboriginal and Torres Strait Islander People. KLC does not propose to address in detail the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system in this submission. KLC directs you to our recent submission to the Australian Law Reform Commission's Inquiry into Indigenous Incarceration Rates (**attached**) for further detail on this issue.

Summary of recommendations

KLC recommends:

- State, territory and federal governments should respect the right of self-determination for Aboriginal and Torres Strait Islander people through meaningful engagement in policy development and implementation.
- The federal government should provide ongoing funding for National Congress of Australia's First Peoples and also for National Aboriginal and Torres Strait Islander Legal Services.
- The government should provide funding for Aboriginal and Torres Strait Islander identified positions within all legal assistance services
- The government should implement the Productivity Commission's recommendation for an additional \$200 million to the legal assistance

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sector, including funding for systemic advocacy work and additional funding to ATSILS and FVPLSs.

- Increased funding be provided to ATSILS, FVPLSs and community legal centres to undertake community legal education for community members and community workers.
- Federal, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish and fund high quality, culturally appropriate and accessible interpreter services within the justice system.
- The NSW government should take steps to increase access to incarceration data, particularly data relating to alternatives to imprisonment. The NSW government should also reduce legal roadblocks to Justice Reinvestment, particularly mandatory sentencing.

Self-determination

We welcome the recognition in the issues paper of the importance of involving Aboriginal and Torres Strait Islander people and their representative organisations in policy development and implementation.

In our view, the disadvantage experienced by Aboriginal and Torres Strait Islander people in the justice system is compounded by a lack of culturally sensitive services, and a lack of recognition of, and respect for, the right of self-determination for Aboriginal and Torres Strait Islander people. This includes the right to influence policy development and its implementation. Unfortunately, there is a lack of genuine consultation and collaboration from government with Aboriginal and Torres Strait Islander people and the organisations that represent them. In order to effectively engage with Aboriginal and Torres Strait Islander people and their representative organisations, the government should:

- Provide adequate, stable and ongoing funding for representative and community-controlled organisations, including the National Congress of Australia's First Peoples and National Aboriginal and Torres Strait Islander Legal Services. Since 2013, the Federal Government has failed to make any allocations to Congress in its annual budgets. This is highlighted in the recent Australian non-governmental organisation coalition report to the United Nations Human Rights Committee.¹

¹ Australian NGO Coalition, *Australia's Compliance with the International Convention on Civil and Political Rights - Australian NGO Submission to the UN Human Rights Committee* (18 September 2017)

<<http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/Australian%20NGO%20coalition%20s ubmission%20to%20the%20Human%20Rights%20Committee.pdf>>

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- Implement the Redfern Statement.² The Redfern Statement was launched in June 2016, and outlines Aboriginal and Torres Strait Islander expectation and priorities for engagement by Australian Governments. It provides measures to address disadvantage and inequality, and addresses issues including meaningful engagement, health, justice and preventing violence.

Recommendations:

State, territory and federal governments should respect the right of self-determination for Aboriginal and Torres Strait Islander people through meaningful engagement in policy development and implementation.

The Federal Government should provide ongoing funding for National Congress of Australia's First Peoples and also for National Aboriginal and Torres Strait Islander Legal Services.

KLC's services for Aboriginal and Torres Strait Islander clients

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law and legal system can be improved.

In 2016, KLC provided 1540 advices and ran 272 cases. In 2016, 6% of KLC's advice clients identified as Aboriginal and Torres Strait Islander, and 11% of our casework was for Aboriginal and Torres Strait Islander clients. KLC provided 247 advices in the area of discrimination, which was over 11% of all advice provided. Discrimination law was the largest area of advice and casework for Aboriginal and Torres Strait Islander clients.

KLC has always aimed to provide a flexible, respectful and responsive service to its Aboriginal and Torres Strait Islander clients. In keeping with this commitment,

² The Redfern Statement (June 2016) < http://nationalcongress.com.au/wp-content/uploads/2017/02/The-Redfern-Statement-9-June-_Final.pdf>

KLC launched its Aboriginal Access Program in 2009. As part of the program, KLC created a new Aboriginal Access Worker position and established an Aboriginal Advisory Group to advise and guide the work of the worker and suggest areas of potential law reform.

The aim of the program is to:

- develop, maintain and extend links between KLC and the local Aboriginal community, organisations and service providers;
- provide support to Aboriginal clients;
- provide legal information and referral to appropriate legal and non-legal services;
- advise and assist in the promotion of KLC to the Aboriginal Community; and
- provide cultural awareness training for KLC staff, students and volunteers.

The program has had a significant impact on increasing our services to Aboriginal and Torres Strait Islander members of our community. The proportion of our clients that identify as Aboriginal or Torres Strait Islander has approximately doubled since the project commenced. In 2008, the year before the commencement of the AAP, 3 % of our clients identified themselves as Aboriginal or Torres Strait Islander. In 2016, this had increased to 6%. The presence of an Aboriginal Access Worker has been crucial to reaching these clients.

KLC also has policies, services and resources that enhance our capacity to reach and provide services to Aboriginal and Torres Strait Islander clients. For example, we give priority to Aboriginal and Torres Strait Islander clients. If a client calls or attends the centre and identifies as Aboriginal or Torres Strait Islander they are asked if they would like the assistance of the KLC's Aboriginal Access Worker and are put through to a solicitor immediately. If a solicitor is not available at the time, we collect their contact details and let them know that one of our solicitors will be in touch with them as soon as possible.

On a fortnightly basis, KLC provides an outreach service to the local Aboriginal community in La Perouse. The service is conducted at the La Perouse Community Health Centre.

In 2013, KLC launched our Aboriginal Service Provision manual, aimed at helping staff, students and volunteers at KLC to build strong, culturally appropriate relationships with Aboriginal Clients and communities. The manual was produced by KLC's Aboriginal Access Worker in consultation with the local Aboriginal

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community. The manual was originally funded by Randwick City Council with additional funding from the University of New South Wales Law Faculty.

Recommendation:

The Government should provide funding for Aboriginal and Torres Strait Islander identified positions within all legal assistance services.

ACCESS TO JUSTICE FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

Unmet legal need

Aboriginal and Torres Strait Islander people experience significant unmet legal need.³ There is evidence that the majority of Aboriginal and Torres Strait Islander people with a legal issue do not seek advice and seek advice less often than non-Indigenous people.⁴

The *Legal Australia-Wide Survey: Legal Need in Australia* found that Aboriginal and Torres Strait Islander respondents to the survey were:

- 30 per cent more likely than non-Indigenous respondents to have multiple legal problems;
- significantly more likely than non-Indigenous respondents to have legal needs in the areas of government, health and rights; and
- significantly less likely than non-Indigenous respondents to have their problem finalised (possibly reflecting the multiple nature of the problems).⁵

Although the primary provider of legal service to Aboriginal and Torres Strait Islander Australians is the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Family Violence Prevention Legal Services (FVPLSs), community legal centres are a significant provider, with approximately 15.4% of CLC clients in 2016 identifying as Aboriginal or Torres Strait Islander.⁶

³ Productivity Commission, *Access to Justice Arrangements*, Inquiry report, Volume 2.

⁴ Law and Justice Foundation, *Legal Australia-Wide Survey: Legal Need in Australia*, August 2012, p 35.

⁵ Productivity Commission Inquiry Report, above n 3, p 770.

⁶ National Association of Community Legal Centres, *National Census of Community Legal Centres 2016* <

With ATSILS and FVPLSs focussing mainly on crime and violence prevention, family and other civil law needs often go unmet. Statistics provided to the Productivity Commission indicated that civil law casework and advice is dwarfed by criminal and family or domestic violence casework and advice.⁷ The findings of the Indigenous Legal Needs Project have also identified problems in accessing civil and family law advice.⁸

In NSW, Aboriginal communities have identified tenancy, racial discrimination, neighbourhood disputes, debt and social security as legal problems frequently experienced but without a satisfactory resolution. There also appears to be substantial unrecognised legal need in Aboriginal and Torres Strait Islander communities, particularly in the areas of victims' compensation and wills.⁹

Funding for legal assistance services

Increased funding is required for legal assistance services for Aboriginal and Torres Strait Islander communities including Legal Aid Commissions, Community Legal Centres, ATSILS and FVPLSs. In particular, ATSILS and FVPLSs provide tailored, culturally competent and holistic legal services to Aboriginal and Torres Strait Islander people by taking into account a number of factors which may affect the client. Whilst a high and rising demand for these services prevail, they have been insufficiently supported by a lack of funding.

The amount of funding provided to Aboriginal and Torres Strait Islander legal services has been declining since 2013 regardless of the fact that the cost of providing services has increased.¹⁰ In the 2017-2018 Federal Budget, the Government has committed to funding an additional \$16.7 million in the Aboriginal and Torres Strait Islander Legal Services over the next 3 years.¹¹ However, after 2020, Aboriginal and Torres Strait Islander Legal Services will be subject to cuts in funding due to the Government's 2013 ongoing savings

<http://www.naalc.org.au/resources/NAC008%20NACLC%20Census%202016%20Infographic%20FA%20LR.pdf>>

⁷ Productivity Commission Inquiry Report, above n 3, pp 768-9.

⁸ Indigenous Legal Needs Project, *Submission to Productivity Commission Inquiry: Access to Justice Arrangements*, James Cook University, 2013 p 2.

⁹ *Ibid*, pp 2-3.

¹⁰ Australian Government, *Budget Measures 2013-14: Part 2: Expense Measures*, Budget Paper No. 2.

¹¹ Attorney General for Australia, 'Record federal funding for legal assistance' (Joint Media Release, 24 April 2017).

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measure.¹² Given that Aboriginal and Torres Strait Islander people already experience a socio-economic disadvantage at all levels of Australia's justice system, a reduction in the accessibility to such services will have a detrimental impact on the incarceration rates for Aboriginal and Torres Strait Islander people.

Despite the national focus on family and domestic violence, FVPLSs, which provide culturally safe services to women and children experiencing family violence remain underfunded. The lack of access to these services is even worse in rural and remote communities. This calls for better governance as continuous cuts to funding will deny Aboriginal and Torres Strait Islander people from accessing legal services that are desperately needed if access to justice is to be safeguarded.

Recommendation:

The Government should implement the Productivity Commission's recommendation for an additional \$200 million to the legal assistance sector, including funding for systemic advocacy work and additional funding to ATSILS and FVPLSs.

Early intervention is crucial

Access to timely legal advice is crucial in preventing small legal problems from snowballing into larger problems with growing debts and potentially criminal law implications. For example, we commonly advise clients on penalty notice fines. If left unpaid, fines can increase, and result in licence and registration suspensions, further fines and criminal charges for driving without a licence or an unregistered vehicle. With early intervention, we can assist clients to have fines reviewed or to set up repayment plans that prevent further issues from arising.

Case study: Tyrone

Tyrone is a local Aboriginal man, with caring responsibilities for his nephews. He bought a car and, after paying for his compulsory third party insurance, he went to his local Roads and Maritimes Services (RMS) office to pay for his rego. Tyrone

¹² Australian Government, *Budget Measures 2013-14: Part 2: Expense Measures*, Budget Paper No. 2.

is on a pension, and so he did not need to pay for his rego. The RMS officer told him all was good and he proceeded to drive his car.

Shortly after he was pulled over by police for driving uninsured and given a substantial fine, which he could not afford to pay. Tyrone was shocked as he thought he had done all that he needed to do to get his car registered. He now had a massive fine, no car to transport his nephews to and from school, and a mess to sort out getting his car registered and insured.

Tyrone contacted KLC for advice. We applied for review of the fine, which was withdrawn, and negotiated for the RMS to reimburse the cost of registering his car again.

If Tyrone hadn't been able to access KLC it's possible his situation would have spiralled out of control. An unpaid fine can lead to license suspension. Due to his caring responsibilities there would be pressure on him to drive. Driving while suspended is a criminal offence which can lead to licence disqualification & a very hefty fine. If there are repeat offences, a jail term is a possibility, along with a lengthy period of license disqualification. The impact on Tyrone and on his family would be huge.

Additional funding in this area is required to recognise the complex and multi-dimensional nature of legal issues that Aboriginal and Torres Strait Islander people face. As KLC's Aboriginal Access Program has shown, providing quality legal services to Aboriginal and Torres Strait Islander people requires culturally appropriate services which have capacity to respond promptly to client's needs. It must be recognised that due to the impact of economic and social disadvantage that some Aboriginal and Torres Strait Islander people will require ongoing support and help from a legal service provider for most of their life. Services are not currently adequately funded to address this need.

Case study: Tabitha

Tabitha is an Aboriginal woman. Many years ago, she came to KLC for help in relation to some housing problems. KLC was able to help her. Since that time Tabitha has been a client of the Centre many times for a range of legal issues including domestic violence, making a complaint about the police and problems with her neighbours. Tabitha's children have also accessed KLC for help.

KLC continues to help Tabitha even though she has moved out of the area. The Centre recognises that due to a number of factors outside her control Tabitha will always need access to legal help and support. KLC recognises the importance of continuity of service to Tabitha in helping her to address her legal issues.

Lack of awareness of legal issues

A major obstacle in accessing legal services is a lack of awareness that an issue has legal aspects and that legal advice may be of use. KLC regularly sees clients whose legal problems could more easily have been solved had they sought advice from us earlier. Our experience corresponds with the findings of the Indigenous Legal Needs Project, which identifies low levels of understanding of and engagement with civil and family law as a major barrier to Aboriginal and Torres Strait Islander people's access to justice.¹³

Case study: Elsa

Shortly after her brother died, Elsa saw a television ad for a funeral fund plan. She and her family had struggled to meet the costs of her brother's funeral and she was worried that her children would face the same burden when she died. She thought she had found the solution and signed up over the phone for \$10,000 of cover. Over the following 20 years, her monthly payments increased and once or twice she missed a payment. She had also spoken to the company to arrange for her payments to be capped to prevent further increases.

She came to KLC for advice because she didn't understand why her cover was now half of what it once was. She had also kept detailed notes of her payments and realised that she had already paid more than her total cover and was confused as to why she had to keep paying more money.

We assisted Elsa to call the company and explained to her the terms of her agreement and the changes that had been made to it over time. We also talked to Elsa about her options going forward.

After seeing us, Elsa was frustrated that she had not sought advice from us earlier, when she had first signed up to the plan and when she had agreed to changes to

¹³ Allison, Cunneen & Schwartz, *Indigenous Legal Needs Project submission to the Senate Inquiry into Access to Legal Assistance Services*, May 2015, p 5.
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the plan. She felt that she would have made different decisions had she fully understood the agreement.

Raising awareness about legal rights and issues, as well as services that can assist in resolving legal problems, is essential to improving access to justice for Aboriginal and Torres Strait Islander Australians. In particular, training and education needs to be funded and provided to both community members and to community workers. Community workers are in close and regular contact with community members and are well placed to identify the legal nature of issues and put people in contact with appropriate services.

KLC has an active community legal education program, where KLC solicitors and students work to provide interactive workshops to the local community and community workers to raise awareness of common legal issues and promote an early intervention approach to legal problems.

Case study: Community Legal Education

Through her regular outreach visits to the Aboriginal community at La Perouse, KLC's Aboriginal Access Worker became aware that the elders had many concerns about the cost and accessibility of burial on their lands. The elders developed a list of questions about multiple use of burial plots, the potential for separate Aboriginal sections in existing cemeteries, whether a former historic cemetery could still be used, whether human remains can be moved, whether bodies can be buried outside a cemetery, and whether it is possible to arrange a funeral without using a funeral director. A KLC solicitor and KLC students researched the answers to the questions and met with the elders in February 2016 to talk with them about results of the research. A further list of questions was generated at this meeting, and after further research a second meeting was held with the elders in September 2016.

Recommendation:

Increased funding be provided to ATSILS, FVPLSs and community legal centres to undertake community legal education for community members and community workers.

Access to interpreters

It is integral to ensure access to justice that Aboriginal and Torres Strait Islander who come into contact with the justice system are able to access interpreters to ensure they understand the legal process and any charges against them, and can properly instruct their lawyers. For a vast number of Aboriginal and Torres Strait Islander people, especially those located in regional and remote areas, their Aboriginal and Torres Strait Islander language is the first language spoken. This means that for many Aboriginal and Torres Strait Islander first language speakers, they may experience significant communication difficulties when trying to access and navigate the legal system. Poor communication can result in a number of negative ramifications including lack of understanding of legal rights and obligations, inability to give instructions due to language barriers, and higher incarceration rates. The provision of high-quality interpreting services for Aboriginal and Torres Strait Islander people when they are brought into contact with the justice system is essential.

Article 14 of the ICCPR provides that all individuals have a right to a fair trial. In particular, Article 14(3)(a) of the ICCPR states, “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality: To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”¹⁴. Accordingly, Aboriginal and Torres Strait Islander people who become involved in the criminal justice system have the right to be informed of their charge in a language that he or she understands.

Recommendation

Federal, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish and fund high quality, culturally appropriate and accessible interpreter services within the justice system.

Justice Reinvestment

Considering the severe over-representation and increasing rates of Aboriginal and Torres Strait Islander people in Australian jails and youth detention facilities, it is important that successful, evidenced-based policy be employed to

¹⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

address this urgent crisis. KLC supports the development of justice reinvestment policies and trials as a potential way of addressing the over-imprisonment of Aboriginal and Torres Strait Islander people as well as preventing crime and strengthening communities.

Justice reinvestment has developed in overseas contexts to address both the rising cost of imprisonment and to strengthen communities with high rates of incarceration by reducing imprisonment and preventing crime. In Australia it has been considered a potential way of addressing Aboriginal and Torres Strait Islander over-imprisonment and the dramatic impact this has on communities. The focus on reinvesting funds that would ordinarily be spent within the prison system is also seen as a way of better resourcing Aboriginal and Torres Strait Islander communities, which are often economically and socially disadvantaged. In 2013 the Senate Legal and Constitutional Affairs Committee comprehensively examined the potential value of justice reinvestment in this context.¹⁵ The Committee made recommendations about the development of strategies and data collection to facilitate justice reinvestment in Australia. We support the recommendations including recommendation 7 that the Government fund trials of justice reinvestment in Australia.

Case Study – Marunguka Project

The Bourke pilot scheme, the Marunguka Project, is seeking to demonstrate the viability and effectiveness of Justice Reinvestment in the Australian context.

The Marunguka Project is characterised by its aim of diverting funding toward the underlying causes of youth incarceration, while maintaining a focus on a long term, ‘whole of population’ solution.¹⁶ Data collected by the Just Reinvest NSW indicates that Aboriginal children and young people in Bourke have the highest incarceration rates among all 620 postcodes in NSW.¹⁷ In 2013, 90 percent of Aboriginal young people under 18 in Bourke released from custody/imprisonment

¹⁵ Commonwealth of Australia, *Value of a justice reinvestment approach to criminal justice in Australia*, Senate Committee (Legal and Constitutional Affairs Committee), 2013.

¹⁶ KPMG, ‘Unlocking the Future: Marunguka Justice Reinvestment Project in Bourke. Preliminary assessment’ (September 2016), 57 <<http://www.justreinvest.org.au/wp-content/uploads/2016/11/KPMG-Preliminary-Assessment-Marunguka-Justice-Reinvestment-Project.pdf>>.

¹⁷ Ibid 22.

had within 12 months a new proven court appearance, caution or youth justice conference.¹⁸ At the same time Aboriginal young people in Bourke attend high school at a 24 percentage point lower a rate than non-indigenous, state-wide average.¹⁹

Through thorough analysis of the data and econometric models, Just Reinvest and the Marunguka Project are positioned to provide a tailored response to Bourke's community needs. The Bourke scheme is currently in its implementation stage. Over the next 5-10 years, econometric modelling of the Bourke data will illustrate the financial savings generated by the reinvestment scheme.

KLC submits that current NSW government policy may substantially inhibit current or future justice re-investment schemes. KLC recommends the improvement of data availability for initiatives such as Just Reinvest NSW. Data is essential for the identification of underlying causes of incarceration, and the ability of Just Reinvest to specifically tailor its responses according to local needs. Just Reinvest currently relies upon analysis of publicly available data. KLC recommends that the NSW government improve the availability of all relevant data, and reduce the cost of its acquisition wherever possible. For instance, currently Australia suffers from a lack of data regarding the costs, availability and effectiveness of alternatives to imprisonment.²⁰ The NSW government could assist Reinvestment schemes by providing better historical data relating to government expenditure on justice services, rehabilitation schemes and monitoring services.

Furthermore, current NSW laws that have effects contrary to the goals of Justice Reinvestment represent significant roadblocks. While the NSW government persists with mandatory sentencing, the ability of re-investment schemes to successfully reduce incarceration spending will be handicapped.

KLC supports justice reinvestment and the work of Just Reinvest NSW. We invite the NSW government to closely monitor the social and economic benefits

¹⁸ Ibid 18.

¹⁹ Ibid 24.

²⁰ Alexandra Bratanova and Jackie Robinson, 'Cost effectiveness analysis of a "justice reinvestment" approach to Queensland's youth justice services' *University of Queensland*, 20 <<http://www.uq.edu.au/economics/abstract/537.pdf>>.

delivered by the Marunguka Project, and explore the possibility of additional reinvestment schemes.

Recommendation:

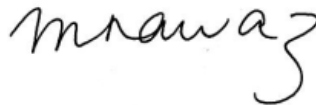
The NSW Government should take steps to increase access to incarceration data, particularly data relating to alternatives to imprisonment. The NSW Government should also reduce legal roadblocks to Justice Reinvestment, particularly mandatory sentencing.

If you wish to discuss our submission, please contact us on (02) 9385 9566 or at legal@unsw.edu.au.

Yours faithfully,
KINGSFORD LEGAL CENTRE



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