



31 August 2017

Australian Law Reform Commission
Inquiry into the Rates of Indigenous Incarceration
Level 40, MLC Tower
19 Martin Place
Sydney NSW 2000

By email: indigenous_incarceration@alrc.gov.au

Dear Madam/Sir,

Submission to Inquiry into the Rates of Indigenous Incarceration

Kingsford Legal Centre (KLC) welcomes the opportunity to make a submission to the Australian Law Reform Commission's inquiry into Incarceration Rates of Aboriginal and Torres Strait Islander Peoples.

Aboriginal and Torres Strait Islander people are disproportionately impacted by the criminal justice process. While Aboriginal and Torres Strait Islander people only represent 2% of the Australian population, they account for 27% of those imprisoned.¹

While we hope that the outcomes of this inquiry will have a significant positive impact in reducing Indigenous incarceration rates, and the interaction of Aboriginal and Torres Strait Islander people with the criminal justice system, we note 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 criminal justice system is compounded by a lack culturally

¹ Australian Bureau of Statistics, *4517.0-Prisoners in Australia, 2016* (8 August 2016) Australian Bureau of Statistics
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>>.

sensitive services, and a lack of recognition of, and respect for, the right of self-determination for Aboriginal and Torres Strait Islander people to have input in policy development and implementation that affects them. Unfortunately, there is a lack of genuine consultation and collaboration from policy makers and government with Aboriginal and Torres Strait Islander people and the organisations that represent them.

We recommend that the Australian government engage in sustained, meaningful, and transparent consultation with Aboriginal and Torres Strait Islander people and their representative organisations in implementing any recommendations that arise out of this inquiry.

About Kingsford Legal Centre

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, including discrimination and racial vilification.

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 could 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.

Our Recommendations:

KLC recommends that:

1. Commonwealth, state and territory governments should ensure that Aboriginal and Torres Strait Islander people have access to culturally sensitive rehabilitative programs while on remand.
2. All States and Territories review their mandatory sentencing provisions.
3. The mandatory sentencing provisions contained in section 297 and section 401(4) of the *Sentencing Act* (NT) be repealed.

4. The mandatory sentencing scheme adopted by the Northern Territory should be reviewed as a whole, and in particular, the mandatory sentences imposed for level 1, 2 and 4 offences should be repealed.
5. States and Territories should repeal provisions in fine-enforcement statutes that provide incarceration penalties for unpaid fines.
6. The NSW government should no longer suspend licences or suspend motor vehicle registration as penalties for fine-default.
7. Policy initiatives such as NSW's Work Development Orders should be adopted across Australia.
8. Governments should replace fixed fines with fines proportional to income and assets.
9. The Commonwealth, State and Territory governments review and reform laws that disproportionately criminalise Aboriginal and Torres Strait Islander women, in particular mandatory sentencing laws for minor offences, such as defaulting on fines, which can be dealt with in non-punitive ways, and for which imprisonment is inappropriate.
10. Consideration be given in sentencing of Aboriginal and Torres Strait Islander women to the impact of imprisonment, including remand, on dependent children. Sentencing considerations should include the best interests of the child and recognise the family as the fundamental unit in line with established international human rights principles.
11. Where possible, children under 6 years of age should be able to live with their mothers where the mother has been imprisoned for a non-violent crime.
12. Commonwealth, State and Territory governments provide increased, stable and ongoing funding for diversion programs for Aboriginal and Torres Strait Islander women which are culturally appropriate.
13. Commonwealth, 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 criminal justice system.
14. Specialist sentencing courts be rolled out nationally, including in rural, remote, regional and metropolitan areas.
15. Diversionary programs should be accessible, receive ongoing and stable funding, and be available in rural, remote, regional and metropolitan areas.

16. Laws providing for indefinite detention of persons with cognitive disability should be repealed. Alternatively, limiting terms should be introduced combined with regular reviews of detention orders.
17. The government increase funding for Aboriginal and Torres Strait Islander legal services. This funding should be stable, sufficient and ongoing, and in line with the Productivity Commission's Access to Justice report recommendations.
18. Custody notification services operate nationally. CNS should receive stable, sufficient and ongoing funding from government.
19. Commonwealth, State and Territory governments should establish independent, impartial bodies to investigate police complaints and deaths in custody. Investigations should be transparent, effective and provide access to effective remedies.
20. The NSW Government should take steps to increase access to incarceration data, particularly data relating to alternatives to imprisonment.
21. The NSW Government should reduce legal roadblocks to Justice Reinvestment, particularly mandatory sentencing.
22. All Australian jurisdictions introduce protections against discrimination on the basis of irrelevant criminal record. These protections should give access to an effective remedy.

CHAPTER 2: BAIL AND THE REMAND POPULATION

Aboriginal and Torres Strait Islander people often do not have access to rehabilitation programs while in remand, despite the amount of time they are kept in remand. Rehabilitation programs delivered during remand present an opportunity for prisons to link Aboriginal and Torres Strait Islander people with support that can improve their capacity to reintegrate into the community and avoid future contact with the criminal justice system.

However, in order for rehabilitation programs to be effective, it must be understood that the rehabilitation and treatment needs of Aboriginal and Torres Strait Islander people are distinct from the non-indigenous population. Rehabilitation programs must be sensitive to the specific and unique needs of Aboriginal and Torres Strait Islander people, acknowledging that Aboriginal and Torres Strait Islander people have historically experienced systemic socio-cultural disadvantage. Research conducted by Queensland Corrective Services shows that

culturally-specific and sensitive programs that incorporate Aboriginal and Torres Strait Islander concepts are effective in reducing recidivism among Aboriginal and Torres Strait Islander offenders.²

Recommendation

KLC recommends that Commonwealth, State and Territory governments should ensure that Aboriginal and Torres Strait Islander people have access to culturally sensitive rehabilitative programs while on remand.

CHAPTER 4: SENTENCING OPTIONS

Question 4-1(a) Should Commonwealth, State and Territory governments review provisions that impose mandatory or presumptive sentences?

KLC supports the review by Commonwealth, State and Territory governments of provisions which impose mandatory or presumptive sentences. Mandatory sentences should be reviewed, because they give rise to a number of human rights concerns and tend to have a disproportionate impact on Aboriginal and Torres Strait Islander people, as detailed below.

(i) Human Rights Concerns

Australian governments have promoted mandatory sentencing, arguing it is intended to reflect community standards of behaviour and provide deterrence through harsh penalties.³ However, this rationale is outweighed by the detrimental impact mandatory sentences have on the human rights and the welfare of Aboriginal and Torres Strait Islander people, and the lack of evidence that mandatory sentencing has a deterrent effect. Mandatory sentencing undermines the fundamentals of the Australian legal system such as the Rule of Law and is inconsistent with the separation of powers, by allowing the executive branch of government to direct the exercise of judicial power and to limit judicial discretion. Mandatory sentences also contradict a number of sentencing principles, such as that Courts must have regard to the gravity of the offence, the impact on the victim, and the circumstances of the offending and the accused

² Queensland Corrective Services, 'Rehabilitative needs and treatment of Indigenous offenders in Queensland' 2010
<<https://www.premiers.qld.gov.au/publications/categories/reports/assets/rehabilitative-needs.pdf>> 19.

³ Lenny Roth, 'Mandatory sentencing laws' (NSW Parliamentary Research Service, E-brief 1/2014, January 2014) 2.

when imposing a sentence. In particular, mandatory sentences which impose a sentence of imprisonment go against the presumption that imprisonment should be a measure of last resort and only where no other sentencing option is sufficient.

Additionally, mandatory sentences raise international human rights law concerns. Specifically, Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) provides that 'no one shall be subjected to arbitrary arrest or detention.'⁴ A key impact of mandatory sentences is to remove judicial discretion from the sentencing process. When the circumstances of the offender and the crime cannot be taken into account, there is a distinct possibility that sentences imposing imprisonment will be arbitrary. Moreover, these sentences may not be proportionate to the circumstances of the particular crime and may further this arbitrariness.

The impact which mandatory sentencing has on the right to a fair trial and equality before the Courts is also likely to place Australia in breach of its obligations under article 14(1) of the ICCPR.⁵ Whilst Australian jurisdictions have maintained a right to appeal a criminal conviction, mandatory sentences prevent review of the penalty imposed.⁶ This brings into doubt the proportionality of mandatory sentences in balancing the need for adequate punishment with the rights of the offender. Mandatory sentences also have the effect of creating inequality before the Courts. Mandatory sentences are often justified on the basis that they apply equally to all defendants. However, a number of the crimes in Australian jurisdictions to which a mandatory sentence is attached are 'crimes of poverty' relating to property offences and theft. As a result, mandatory sentences have a discriminatory impact on people of a low socio-economic status and particular racial groups, including Aboriginal and Torres Strait Islander people, as detailed further below.

Mandatory sentencing is also particularly detrimental to the human rights of children in Australia. Under Article 14(4) of the ICCPR, Courts are required to take into account the age of juvenile offenders in sentencing, whilst under Article 3 of the Convention on the Rights of the Child (CROC), Courts must have 'the best

⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1).

⁵ *Ibid* art 14(1).

⁶ Law Council of Australia, 'Policy Discussion Paper on Mandatory Sentencing' (May 2014) 23.

interests of the child' as a 'primary consideration.'⁷ As noted above, mandatory sentences remove judicial discretion in sentencing and subsequently remove any consideration of the child's best interests, as a primary consideration or otherwise.

Furthermore, Article 14(4) of the ICCPR requires that rehabilitation is a core consideration when sentencing juvenile offenders. This requirement is echoed in Article 40 of the CROC, which calls for sentences to promote the child's reintegration and provide the opportunity to have 'a constructive role in society.'⁸ Mandatory sentencing removes the opportunity for diversionary programs and limits the range of sentencing options available for young offenders.⁹

Mandatory sentences are also likely to create cycles of criminality, which are particularly harmful for juvenile offenders. This is especially evident in Western Australia, where property crimes such as burglary attract a mandatory sentence. Property crimes such as theft and burglary tend to be on a lower scale of criminality and are therefore more likely to be committed by young people. As a result, in jurisdictions where property crimes attract a mandatory sentence, juvenile offenders are more likely to obtain convictions earlier in life.¹⁰ Given that the criminal history of an offender is often a key consideration in sentencing, the imposition of mandatory sentences for juvenile offenders can increase the likelihood of more serious sentences later in life.

CASE STUDY: Three-strike mandatory sentence scheme in Western Australia

The 'three-strike' scheme for burglary offences in Western Australia under section 401(4) of the Criminal Code Act Compilation Act 1913 (WA) illustrates how mandatory sentences can cause cycles of criminality, particularly for children. The imposition of a mandatory term of imprisonment following three burglary offences was initially intended to ensure that imprisonment was a measure of last resort. However, the legislation did not operate in this manner and instead, offenders were frequently charged for three separate offences within one incident. This meant that the 'three-strike' protection threshold was effectively

⁷ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).

⁸ *Ibid* art 40.

⁹ Chris Cunneen, 'Contemporary Comments: Mandatory Sentencing and Human Rights' (2002) 13(3) *Current Issues in Criminal Justice* 323.

¹⁰ *Ibid*.

non-existent. This has caused further problems where defendants have their criminal history and convictions taken into account in sentencing, in that they are more likely to have a longer and more serious record with the three-strike policy. This has been particularly detrimental for juvenile offenders in Western Australia. Indeed, Dennis Reynolds has noted that 37 of 93 young people in detention in Western Australia were imprisoned due to the 'third strike' mandatory sentence regime.¹¹

(ii) Disproportionate Impact on Aboriginal and Torres Strait Islander People

Mandatory sentencing disproportionately impacts Aboriginal and Torres Strait Islander people, as offences targeted by the legislation are often committed by people from a low socio-economic background,¹² and in particular Aboriginal and Torres Strait Islander people.¹³ Notably, white-collar crimes such as fraud tend not to attract mandatory sentences and are not frequently committed by Indigenous Australians.¹⁴ In this way, mandatory sentencing indirectly discriminates against Aboriginal and Torres Strait Islander people and has accordingly been criticised by the UN Committee on the Elimination of all Forms of Racial Discrimination.¹⁵ In particular, the impact of mandatory sentencing schemes on Aboriginal and Torres Strait Islander people breaches Article 5(a) of the Convention for the Elimination of all Forms of Racial Discrimination which mandates 'the right to equal treatment before tribunals and all other organs administering justice.'¹⁶ In 2010, the UN Committee on the Elimination of all Forms of Racial Discrimination specifically called for the abrogation of Western Australia's mandatory sentencing scheme for the impact it had on Indigenous

¹¹ Tammy Solonec, ' "Tough on Crime": Discrimination by Another Name. The Legacy of Mandatory Sentencing in Western Australia' (2015) 8(18) *Indigenous Law Bulletin* 8.

¹² *Ibid.*

¹³ Megan Davis, 'Mandatory Sentencing and the Myth of the Fair-Go' (Paper presented at the 4th National Outlook Symposium on Crime in Australia, New Crimes or New Responses convened by the Australian Institute of Criminology, Canberra, 21-22 June 2001) 2.

¹⁴ Berit Winge, 'Mandatory sentencing laws and their effect on Australian indigenous population' (2002) 33(3) *Columbia Human Rights Law Review* 693, 697.

¹⁵ Committee on the Elimination of Racial Discrimination, 'Concluding observations of the Committee on the Elimination of Racial Discrimination – Australia' (77th Session, 2-27 August 2010) 6[20].

¹⁶ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) art 5(a).

Australians.¹⁷ Mandatory sentencing also raises concerns under Article 2 of the ICCPR, which prohibits discrimination on the basis of race.

¹⁷ Committee on the Elimination of Racial Discrimination 'Concluding observations of the Committee on the Elimination of Racial Discrimination – Australia' (77th Session, 2-27 August 2010) 6[20].

Question 4-1(b) Which provisions should be prioritised for review?

There are a number of Australian jurisdictions which have mandatory sentences for criminal offences. KLC supports all State and Territories reviewing their mandatory sentencing provisions. However, we note that the most relevant jurisdictions, with regards to the impact on Indigenous Australians, are the jurisdictions of the Northern Territory and Western Australia. The Northern Territory has the highest percentage of Indigenous citizens in its population of any State or Territory within Australia, comprising 30% of the overall population.¹⁸ Western Australia has the third highest percentage of Indigenous citizens, comprising 3.8% of the overall population.¹⁹ Further to this, Western Australia has had one of the highest rates of Indigenous incarceration of any State or Territory,²⁰ and its rate of incarceration for Indigenous youth was double the national average.²¹

Recommendation

KLC recommends that all States and Territories review their mandatory sentencing provisions.

Provisions from Western Australia

There are two key provisions in the *Criminal Code Act Compilation Act 1913* (WA) which should be prioritised for review.

(i) Section 297- Grievous bodily harm

This section requires that a mandatory sentence of 10 years' imprisonment be imposed for unlawfully causing grievous bodily harm, and a sentence for 14 years be imposed if there are aggravating circumstances. Whilst it is a generally accepted principle of sentencing that a higher sentence may be imposed where there are aggravating factors, it is similarly a principle that a lower sentence may be appropriate if there are mitigating circumstances. This provision does not call for any consideration of mitigating factors, and therefore stipulates that the

¹⁸ Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* (27 January 2016) Australian Bureau of Statistics
<<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>.

¹⁹ Ibid.

²⁰ Solonec, above n 11.

²¹ Ibid.

mandatory sentence must be imposed, even where such factors are present. Accordingly, this provision should be prioritised for review.

(ii) Section 401(4)-Burglary

This provision sets out the ‘three-strike’ scheme for burglary offences in Western Australia. It requires a mandatory minimum penalty of 12 months’ imprisonment once an offender has committed three burglary offences. There has been much criticism of not only Western Australia’s scheme of mandatory sentences for burglary offences, but also of mandatory minimums for property offences more generally. Winge has noted that there is no evidence that property crimes are a greater source of harm to the community than other crimes.²² Moreover, no link has been shown between imposing mandatory sentences for property offences and a decrease in these types of crimes.²³ The lack of relevance and tangible impact of mandatory sentences on property crimes leave the scheme without justification and in need of review.

Recommendation

KLC recommends that the mandatory sentencing provisions contained in section 297 and section 401(4) of the Sentencing Act (NT) be repealed.

Provisions from the Northern Territory

In 2013, the Northern Territory introduced a mandatory sentencing scheme involving five levels of violent offences which had corresponding mandatory sentences.²⁴ Whilst the offences targeted under the scheme are of a serious nature, implementing a scheme of systematic mandatory sentences creates the perception that a mandatory term of imprisonment is the only appropriate sentence. This can become especially problematic where there are multiple offenders within a particular family or community, as having friends and family serving a prison sentence becomes the norm.

The mandatory sentences in levels 1, 2 and 4 are of particular concern with respect to Aboriginal and Torres Strait Islander people. Level 1 requires a mandatory term of imprisonment ‘for any other violent offence’,²⁵ where the

²² Winge, above n 14, 698.

²³ Ibid.

²⁴ *Sentencing Act 1995* (NT).

²⁵ *Sentencing Act 1995* (NT) s 78CA(5).

offender has previously been convicted of a violent offence.²⁶ Although the qualification in s 78DF(1)(b) was intended to act as a protection for defendants, it instead creates a cycle of criminality by imposing a term of imprisonment that may then be used to bring offenders within the mandatory sentence scheme for later offences. Level 2 mandates a term of actual imprisonment,²⁷ for 'any person who unlawfully causes harm to another.'²⁸ Imposing a mandatory sentence for such a broad crime is concerning, as no consideration is given to the gravity of the harm caused. In addition, a mandatory term of imprisonment is called for 'whether or not the offender has previously been convicted of a violent offence.'²⁹

A mandatory sentence is also imposed for a level 4 offence, namely an assault on 'a worker who is working in the performance of his or her duties.'³⁰ With the extremely high levels of Indigenous incarceration, Aboriginal and Torres Strait Islander people are more likely to be placed in a position where they may commit a level 4 offence in prison, thus making them more susceptible to the mandatory sentencing provisions.

KLC submits that the mandatory sentencing scheme adopted by the Northern Territory should be reviewed as a whole, and in particular, the mandatory sentences imposed for level 1, 2 and 4 offences.

Recommendation

KLC recommends that the mandatory sentencing scheme adopted by the Northern Territory should be reviewed as a whole, and in particular, the mandatory sentences imposed for level 1, 2 and 4 offences should be repealed.

CHAPTER 6: FINES AND DRIVERS LICENCES

Proposal 6-1: Fine default should not result in the imprisonment of the defaulter. State and Territory governments should abolish provisions in fine enforcement statutes that provide for imprisonment in lieu of unpaid fines.

²⁶ *Sentencing Act 1995* (NT) s 78DF(1)(b).

²⁷ *Sentencing Act 1995* (NT) s 78DE(2).

²⁸ *Criminal Code Act 1983* (NT) s 186.

²⁹ *Sentencing Act 1995* (NT) s 78DE(1).

³⁰ *Criminal Code Act 1983* (NT) s 188A(1).

The Impact of Fines on Rates of Indigenous Incarceration

Enforcement of fines through incarceration affects a disproportionate number of Aboriginal and Torres Strait Islander people, and has serious flow on effects. In Western Australia, incarceration is still available as a penalty for defaulting on fines. In WA, between 2006 and 2015, an average of 803 people were entered into the prison system for not paying fines,³¹ with Aboriginal and Torres Strait Islander people making up 64% of the females incarcerated and 38% of the males.³² The disproportionate number of Aboriginal and Torres Strait Islander people, particularly women, incarcerated for these offences has significant consequences for family life. This includes the increased risk of child placement in out of home care.

The majority of fine-default incarcerations arise from offences of relatively low seriousness, with 54% of persons incarcerated for traffic related offences.³³ Indigenous people are also more likely to face licence related fines due to the barriers that exist in gaining a drivers licence including difficulty accessing identification documents (such as birth certificates) which are essential to get a licence, costs associated with the graduated licensing system and lack of access to a car and a supervising driver.³⁴

In other states, such as New South Wales, fine defaults are linked to penalties such as suspended licences and suspended motor vehicle registration. The link between fine recovery and loss of licences provides a barrier to employment, particularly in remote areas where public transport is unavailable or inadequate. This either hinders the ability to pay back fines, or leads to people driving without a licence and incurring further penalties and disqualification. Fines have significant impacts, including financial and emotional stress, secondary offences (ie, driving while unlicensed), and social exclusion. Additionally, those who exit prison with outstanding fines often face barriers to reintegration, particularly if the fines will prevent them from driving or act as a disincentive to employment if there is a garnishee order in place.

³¹ Morgan, N, 'Fine defaulters in the Western Australian prison system' (2016) *Government of Western Australia, Office of the Inspector of Custodial Services*, ii.

³² *Ibid* v.

³³ *Ibid* v.

³⁴ Rebecca Ivers and Jake Byrne, *Indigenous Australians need a licence to drive, but also to work* (19 September 2014) *The Conversation* <<https://theconversation.com/indigenous-australians-need-a-licence-to-drive-but-also-to-work-31480>>.

KLC submits that the current use of Work Development Orders (WDO) in NSW is a policy initiative that should be adopted nationwide. A WDO is made by Revenue NSW for eligible people who have a mental illness, intellectual disability or cognitive impairment, are homeless, are experiencing acute economic hardship, or have a serious addiction to drugs/alcohol/volatile substances to satisfy their fine debt through unpaid work with an approved organisation or by undertaking certain courses or treatment.³⁵ Unpaid work through an approved organisation reduces fines by \$30 per hour, and approved educational/vocational courses reduce an individuals' outstanding fine debt by \$50 per hour. Additionally, compliance with a drug or alcohol treatment program provides a \$1000 per month reduction on an outstanding fine. KLC's view is that a WDO program directly reduces incarceration of highly vulnerable ATSI peoples by offering a non-financial method of repaying fines, whilst simultaneously incentivising participation in educational and counselling services.

KLC submits that governments should re-consider the fixed-nature of fines. By having a fixed penalty for offences, the government is indirectly targeting the most vulnerable sections of society. Given the socio-economic disadvantage experienced by Aboriginal and Torres Strait Islander people, it is clear that the fixed fine system currently disproportionately punishes indigenous Australians. This outcome would be directly resolved if fines were instead proportionally adjusted relative to an individual's income and financial security.

Recommendation

KLC recommends that States and Territories should repeal provisions in fine-enforcement statutes that provide incarceration penalties for unpaid fines.

The NSW government should no longer suspend licences and suspended motor vehicle registration as penalties for fine-default.

Policy initiatives such as NSW's Work Development Orders should be adopted across Australia. Governments should replace fixed fines with fines proportional to income and assets.

³⁵ NSW Government, *Work and Development Factsheet*, (30 July 2017) NSW Revenue Website <<http://www.revenue.nsw.gov.au/fines/eo/factsheet/wdo>>.

CHAPTER 9: FEMALE OFFENDERS

Question 9-1: *What reforms to laws and legal frameworks are required to strengthen diversionary options and improve criminal justice processes for Aboriginal and Torres Strait Islander female defendants and offenders?*

Laws that disproportionately criminalise Aboriginal and Torres Strait Islander Women

The UN Special Rapporteur on Contemporary Forms of Racism and Racial Discrimination, Xenophobia and Related Intolerance noted with concern following his 2016 visit to Australia that ‘the incarceration rate of indigenous women is on the rise and they are the most overrepresented population in prison.’³⁶ Aboriginal and Torres Strait Islander female offenders are the fastest growing prison cohort in Australia, representing 34% of all incarcerated women, despite representing only 2% of the adult female population.³⁷ This is exacerbated by laws that disproportionately criminalise Aboriginal and Torres Strait Islander women.

KLC submits that Commonwealth, state and territory governments should review and reform laws which disproportionately criminalise Aboriginal and Torres Strait Islander women. In particular, it is well known that Aboriginal and Torres Strait Islander women are disproportionately affected by punitive punishment for low level offending such as failure to pay fines, public drunkenness and mandatory sentencing attached to low level offences.

This recommendation was also supported by the Human Rights Law Centre and Change the Record Coalition, in their report titled “*Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women’s growing over-imprisonment*” (**Joint Report**).³⁸ The Joint Report outlines that laws should be reviewed in order to decriminalise minor offences which can be dealt with in

³⁶ Mutuma Ruteere, *Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on his mission to Australia*, UN Doc A/HRC/35/41/Add.2 (9 June 2017) 45.

³⁷ Australian Bureau of Statistics, *4517.0-Prisoners in Australia, 2016* (8 August 2016) Australian Bureau of Statistics, Tables 2, 4
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~5>>.

³⁸ Human Rights Law Centre and Change the Record Coalition, ‘Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women’s growing over-imprisonment’ (May 2017).

non-punitive ways, prepare alternatives for low-level offending and public drunkenness and abolishing laws that lead to imprisonment for people who cannot pay their fines.³⁹

Article 14 of the ICCPR provides that all persons are equal before the courts and tribunals.⁴⁰ The right of Aboriginal and Torres Strait Islander female offenders to equality before the law is compromised by the lack of consideration of the existing social, economic and cultural factors, sex and race discrimination that affect their offending and over-imprisonment. The failure to address or consider the issues that impact the disproportionate over-imprisonment of female Aboriginal and Torres Strait Islander offenders and the lack of diversionary options for their offences compromises their right to equality before the law.

Recommendation

KLC recommends that the Commonwealth, state and territory governments review and reform laws which disproportionately criminalise Aboriginal and Torres Strait Islander women, in particular mandatory sentencing, laws containing minor offences which can be dealt with in non-punitive ways, and abolish the use of imprisonment for defaulting on fines.

The impact of imprisonment, including remand, on dependent children

KLC supports greater consideration being given in sentencing to the primary caregiving responsibilities of mothers. An estimated 80% of Aboriginal and Torres Strait Islander women in prison are mothers,⁴¹ and up to 90% Aboriginal and Torres Strait Islander women in prisons are survivors of family/domestic and/or sexual violence.⁴² As many Aboriginal and Torres Strait Islander women care for their own children and those of their extended families, incarceration of Aboriginal and Torres Strait Islander women results in disruption to families and

³⁹ Ibid 7, recommendation 3.

⁴⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14.

⁴¹ Juanita Sherwood and Sacha Kendall, 'Reframing Space by Building Relationships: Community Collaborative Participatory Action Research with Aboriginal Mothers in Prison' (2013) 46 *Contemporary Nurse: A Journal for the Australian Nursing Profession* 83, 85.

⁴² Human Rights Law Centre and Change the Record Coalition, above n 38, 17.

communities, and has significant implications for parenting, income, child care and role modelling.⁴³

Research has found that the children of incarcerated mothers are more likely to experience poor health and disrupted education and housing arrangements, which increase their risk of entering child protection or justice systems.⁴⁴ KLC believes that consideration of these factors in sentencing is significant in the context of intergenerational trauma and incarceration. This is because of the correlation between children in out of home care and increased interaction with the criminal justice system and homelessness.⁴⁵

Australia is obliged under ICESCR, ICCPR and CROC to ensure broad protection and assistance to families, non-discriminatory treatment of women and children, child protection, and respect the rights and responsibilities of parents.

In sentencing Aboriginal and Torres Strait Islander mothers, consideration should be given to the right to family under Article 10 of ICESCR, the right of the child to not be separated from their parents, and the best interests of the child under Article 9 of CROC.

KLC also notes with approval the recommendation of the Joint Report that where possible children under six years of age should be able to live with their mothers, where she has been imprisoned for a nonviolent crime.⁴⁶ This model is currently in operation at the Emu Plains Correctional Centre. There is evidence that the maintenance of the relationship between children and their mother serves as a strong factor in reducing recidivism and conversely a link between recidivism and an inability of mothers to maintain contact with their children.⁴⁷

⁴³ Hannah Payer, Andrew Taylor and Tony Barnes, 'Who's Missing? Demographic Impacts from the Incarceration of Indigenous People in the Northern Territory, Australia' (Crime, Justice and Social Democracy: Proceedings of the 3rd International Conference, 2015, vol 1).

⁴⁴ Human Rights Law Centre and Change the Record Coalition, above n 38.

⁴⁵ Australian Institute of Health and Welfare, 'Children and young people at risk of social exclusion: Links between homelessness, child protection and juvenile justice' (Canberra, 2012).

⁴⁶ Human Rights Law Centre and Change the Record Coalition, above n 38.

⁴⁷ Julie-Anne Toohey, 'Children and Their Incarcerated Parents: Maintaining Connections – How Kids' Days at Tasmania's Risdon Prison Contribute to Imprisoned Parent-Child Relationships', Changing the Way We Think About Change, The Australian and New Zealand Critical Criminology Conference 2012 at 33.

Recommendation

KLC recommends that when sentencing Aboriginal and Torres Strait Islander women consideration be given to the impact of imprisonment, including remand, on dependent children. Sentencing considerations should include the best interest of the child and recognise the family as the fundamental unit in line with established international human rights principles.

Where possible, children under 6 years of age should be able to live with their mothers where the mother has been imprisoned for a non-violent crime.

Increased Investment in Diversion Programs

As well as experiencing high rates of sexual and domestic violence, Aboriginal and Torres Strait Islander women in prison also have higher rates of disability and mental illness. There is a significant overlap between mental health issues and substance abuse among women in prison, with the majority of women who are substance dependent also reporting a mental illness.⁴⁸ These factors can lead to reoffending if proper supports are not made available.⁴⁹ Additionally, prison practices such as strip searching, separation from family and removal from country can re-traumatise women in prison.

Diversion programs which provide culturally appropriate services, reduce rates of reoffending and address trauma are integral to reducing incarceration rates. Unfortunately, diversion programs, particularly through the lower courts are unavailable in many jurisdictions and non-metropolitan areas. KLC supports increased funding for diversion programs such as justice reinvestment, health, alcohol and drug programs. In order to implement successful diversion programs, these programs should be developed with Aboriginal and Torres Strait Islander communities to ensure that culturally appropriate services that empower communities, respect the right to self-determination and cater for the complex needs of Aboriginal and Torres Strait Islander female offenders are put in place. Such programs should be community-led. Commonwealth, state and territory governments should provide adequate funding and resourcing for diversion programs to ensure they are available to offenders.

⁴⁸ Australian Institute of Health and Welfare 2013, 'The Health of Australia's Prisoners 2012'.

⁴⁹ Eileen Baldry et al *A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system*. UNSW, <<https://www.mhdcd.unsw.edu.au/>>.

Recommendation

KLC recommends that Commonwealth, state and territory governments provide increased, stable and ongoing funding for diversion programs for Aboriginal and Torres Strait Islander women which are culturally appropriate.

CHAPTER 11: ACCESS TO JUSTICE ISSUES

Interpreter Services

Proposal 11-1: Where needed, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to establish interpreter services within the criminal justice system

KLC supports Proposal 11-1. It is integral to ensure due process that Aboriginal and Torres Strait Islander who come into contact with the criminal 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 and resulting higher incarceration rates. As such, the provision of high-quality interpreting services for Aboriginal and Torres Strait Islander people when they are brought into contact with the criminal justice system is essential.

Article 14 of the ICCPR provides that all individuals have a right to 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”⁵⁰. 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.

⁵⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Recommendation

KLC recommends that 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 criminal justice system.

Specialist Courts and Diversion Programs

Question 11-1: What reforms to laws and legal frameworks are required to strengthen diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander peoples?

KLC submits that diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander people must be reformed and strengthened in order to properly cater for Aboriginal and Torres Strait Islander people. We stress the importance of providing culturally appropriate processes for Aboriginal and Torres Strait Islander people given the alienating experience they may have in mainstream courts.

Understandably, many Aboriginal and Torres Strait Islander people hold a distrust of the justice system and government due to past treatment. Because of the stark cultural disparities that exist between the Australian legal system and Aboriginal and Torres Strait Islander culture and practice, the courtroom experience may be isolating and compound disadvantage. Court is often an intimidating and confusing experience for defendants. The benefits of specialist sentencing courts include direct engagement with the Aboriginal and Torres Strait Islander defendants, the provision of case management and the ability to help address the legal issue in a culturally appropriate way by allowing Indigenous Elders to be part of the sentencing process.⁵¹ Currently, there exist specialist sentencing courts in New South Wales, Queensland, South Australia and Victoria. KLC believes that it is fundamental to have specialist sentencing courts rolled out nationally and across metropolitan and remote areas.

Diversionary programs provide support services to Aboriginal and Torres Strait Islander defendants who suffer from addiction or mental health problems by allowing magistrates or judicial officers to adjourn the legal matter when defendants are accessing these services. These programs can effectively reduce

⁵¹ Australian Law Reform Commission, *Incarceration rates of Aboriginal and Torres Strait Islander peoples*, Discussion Paper 84, (2017), 192.

the potential for Aboriginal and Torres Strait Islander people to come into contact with the criminal justice system. Additionally, there are greater prospects for positive outcomes from diversionary programs if the concerns of Aboriginal and Torres Strait Islander defendants are directly addressed through the involvement of Indigenous Elders or facilitators that would allow for better delivery.⁵²

However, the effectiveness of specialist courts and diversionary programs is impeded by their lack of accessibility coupled with the high level of concentration in metropolitan areas. This is hugely problematic as diversionary options and specialist sentencing courts for Aboriginal and Torres Strait Islander should be available spread throughout all areas, including remote and rural areas. KLC recommends that adequate, ongoing and stable funding is required for specialist courts and diversionary programs to ensure that Aboriginal and Torres Strait Islander defendants are given the opportunity to access justice.

Recommendation

KLC recommends that specialist sentencing courts be rolled out nationally, including in rural, remote, regional and metropolitan areas.

Diversionary programs should be accessible, receive ongoing and stable funding, and be available in rural, remote, regional and metropolitan areas.

Indefinite Detention When Unfit To Stand Trial

Proposal 11-2 Where not already in place, state and territory governments should provide for limiting terms through special hearing processes in place of indefinite detention when a person is found unfit to stand trial.

Cognitive Impairment in the Criminal Justice System

People with cognitive disabilities are over-represented in the criminal justice system.⁵³ Aboriginal and Torres Strait Islander people with cognitive disabilities face particular challenges in having their disability-related needs both identified and met. The Aboriginal Disability Justice Campaign (ADJC) has stated that people with cognitive disabilities (compared to the non-disabled population) are more

⁵² Australian Institute of Health and Welfare & Australian Institute of Family Studies, *Diverting Indigenous offenders from the criminal justice system*, Resource sheet no. 24 (2013).

⁵³ Eileen Baldry, Leanne Dowse and Melissa Clarence, *People with Mental and Cognitive Disabilities: Pathways into Prison* (Background Paper for the National Legal Aid Conference, Darwin, 2011), 2.

likely to come to the attention of police, more likely to be charged and are more likely to be imprisoned.⁵⁴ Those with cognitive disabilities also spend longer in custody, have fewer opportunities in terms of program pathways when incarcerated, are less likely to be granted parole and have substantially less access to programs and treatments (such as drug and alcohol support) both in prison and in the community when released.⁵⁵

Not only are Aboriginal and Torres Strait Islander people with cognitive disabilities more likely to be incarcerated, legislative frameworks in Western Australia, Northern Territory, Queensland and Tasmania all provide for indefinite detention of people with cognitive disabilities.⁵⁶ Indefinite detention occurs when a person is found unfit to plead, or found not guilty by reason of their cognitive disability. An assessment then occurs to determine whether they are a risk to themselves or the community and if such a risk is found the court makes a 'supervision' or 'custodial' order. In Queensland and Tasmania these orders are often carried out in psychiatric hospitals but in Western Australia and the Northern Territory custodial orders are carried out in prison.⁵⁷ This situation is further worsened as mental and cognitive impairments are often confused. This tends to lead to mistaken cases of indefinite detention.

Indefinite detention of people with cognitive disabilities is in breach of article 9(3) of the ICCPR and article 14(1)(b) of the Convention on the Rights of Persons with Disabilities.

Prison often becomes the destination for Aboriginal and Torres Strait Islander people with a cognitive impairment who come into contact with the law. Whilst in prison, it is difficult to provide the appropriate services and support. Interventions mistakenly focus on offending behaviour without targeting complex social disadvantages and disability. It has been suggested that the response needed to remedy these social issues revolve around empowering local

⁵⁴ Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Mental Illness and Cognitive Disability in Aboriginal and Torres Strait Islander Prisoners – A Human Rights Approach* (Speech delivered at 22nd Annual THeMHS Conference – National Mental Health Services Conference: 'Recovering Citizenship', Cairns, 23 August 2012).

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

communities to promote self-determination and communal responsibility.⁵⁸ The answer does not rest with the law and criminal justice services until they become capable of responding in a culturally appropriate way.⁵⁹

The current legislative framework, criminal justice system and procedural conduct by police create a harmful and restrictive environment that simplifies cognitive impairments and disregards the disabling effects of systemic disadvantages.⁶⁰ When providing care and support for people with mental and cognitive disabilities, it is paramount that this be done in the least restrictive and intrusive environment possible.⁶¹

KLC submits that currently, there is a lack of special support for those with a cognitive disability in the criminal justice system. Greater understanding regarding the complexity and differentiation of cognitive disability and mental impairments is required so courts and police can more accurately and sensitively provide assistance and support. Policy innovations should be angled to provide Aboriginal and Torres Strait Islander people with more accessible support and protections that are community-based, culturally appropriate, diversionary in nature, and ultimately enable self-determination.⁶²

Recommendation

KLC recommends that laws providing for indefinite detention of persons with cognitive disability should be repealed.

Alternatively, limiting terms should be introduced combined with regular reviews of detention orders.

⁵⁸ Eileen Baldry, Ruth McCausland, Leanne Dowse, Elizabeth McEntyre & Peta McGillivray, 'It's just a big vicious cycle that swallows them up: Indigenous People with Mental and Cognitive Disabilities in the Criminal Justice System' (2016), *Indigenous Law Bulletin*, 8(22), 12.

⁵⁹ *Ibid* 13, 15.

⁶⁰ Eileen Baldry, 'Disability at the Margins: Limits of the Law' (2014) *Griffith Law Review*, 372.

⁶¹ *Ibid* 380.

⁶² Janani Muhunthan, Anne-Marie Eades & Stephen Jan, 'UN-led Universal Periodic Review highly critical of Australia's record on human rights and health for Indigenous Australians' (2016) *BMJ Global Health*, 4.

Provision of Legal Services and Supports

Question 11-2: *In what ways can availability and access to Aboriginal and Torres Strait Islander legal services be increased?*

The Discussion Paper highlights four categories of legal assistance services that provide for Aboriginal and Torres Strait Islander communities including: Legal Aid Commissions, Community Legal Centres, Indigenous Legal Assistance providers; and the Family Violence Prevention Legal Services.⁶³ These services 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.⁶⁴ 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.⁶⁵ 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 measure.⁶⁶ 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. Moreover, 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.

⁶³ Australian Law Reform Commission, *Incarceration rates of Aboriginal and Torres Strait Islander peoples*, Discussion Paper 84, (2017), 203.

⁶⁴ Australian Government, *Budget Measures 2013-14: Part 2: Expense Measures*, Budget Paper No. 2.

⁶⁵ Attorney General for Australia, 'Record federal funding for legal assistance' (Joint Media Release, 24 April 2017).

⁶⁶ Australian Government, above n 64.

Recommendation

KLC recommends that the government increase funding for Aboriginal and Torres Strait Islander legal services. This funding should be stable, sufficient and ongoing, and in line with the Productivity Commission's Access to Justice report recommendations.

Custody Notification Service

Proposal 11-3: State and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service, or equivalent service, immediately on detaining an Aboriginal and Torres Strait Islander person.

KLC supports Proposal 11-3 of the Discussion Paper that state and territory governments should introduce a statutory custody notification service that places a duty on police to contact the Aboriginal Legal Service (or equivalent), immediately on detaining an Aboriginal and Torres Strait Islander person.⁶⁷ The Custody Notification Service (CNS) is a crucial element in advancing Aboriginal and Torres Strait Islander people's to access justice.

When an Aboriginal and Torres Strait Islander person is detained in police custody, the CNS operates to notify an Aboriginal Legal Service practitioner. In New South Wales, this is an obligation provided for in statute,⁶⁸ ultimately functioning to prevent Aboriginal and Torres Strait Islander deaths in custody. It has been highly effective in its operation with no Aboriginal and Torres Strait Islander deaths in custody where the CNS has been used. KLC believes that it is fundamental to have CNS offered nationally, so that every Aboriginal and Torres Strait Islander person taken into custody has access to culturally appropriate legal services. Additionally, CNS should receive stable and sufficient funding for their operation.

Recommendation

KLC recommends that custody notification services operate nationally. CNS should receive stable, sufficient and ongoing funding from government.

⁶⁷ Australian Law Reform Commission, above n 63, 204.

⁶⁸ *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW) reg 37.

CHAPTER 12: POLICE ACCOUNTABILITY

Investigation of Police Complaints

Under international human rights law, all people, including Aboriginal and Torres Strait Islander people are entitled to equality before the law and to not be discriminated against in interactions with police.⁶⁹ In order to ensure equality before the law and fair treatment by police, it is integral that independent, transparent and effective complaints mechanisms and effective remedies are available to complainants.

Australia has yet to establish an effective, independent system to investigate police complaints and deaths in custody. Currently, many complaints made against police are dealt with internally, raising concerns about procedural fairness. This has a disproportionate impact on Aboriginal and Torres Strait Islander people who have more contact with the police than other demographic groups.

In NSW, less serious police complaints are dealt with internally, by the Local Area Command which conducts the investigation and is monitored by the Police Commissioner's staff. The lack of an independent investigation means that less serious complaints have the potential to not be adequately dealt with, with investigations often finding that the complaint is not sustained. If a complainant wants to view information held by police in relation to the complaint, they are often required to make an application under the *Government Information (Public Access) Act 2009* (NSW) and this can be a very time-consuming process. It is imperative that the current mechanisms in place for the investigation of police complaints be reviewed and undergo reform to ensure due process, efficiency and effective remedies.

Recommendation

KLC recommends that Commonwealth, state and territory governments should establish independent, impartial bodies to investigate police complaints and deaths in custody. Investigations should be transparent, effective and provide access to effective remedies.

⁶⁹ See for example, Articles 2 and 26 ICCPR.

CHAPTER 13: JUSTICE REINVESTMENT

KLC currently sits upon the steering committee of Justice Reinvest NSW. In our view, Justice Reinvestment and the initiatives of Just Reinvest NSW are extremely worthwhile and have proven to be effective. KLC recommends that Justice Reinvestment should be explored in further depth by all state and territory governments.

The KLC understands that Justice Reinvestment represents the redirection of resources set aside for incarceration and imprisonment toward grass-roots preventative measures. Importantly, Justice Reinvestment is distinguished as a data-driven process. The data collected is used to identify areas in which incarceration is heavily concentrated, and the trends that contribute to high incarceration. Through the data modelling process, Justice Reinvestment is able to demonstrate the extent to which these communities benefit from funding redirection.

One of the earliest and most well-known examples of Justice Reinvestment occurred in Texas.⁷⁰ In 2007, the Texas legislature rejected plans to spend \$531 million on additional prisons. Instead, \$241 million was directed toward the expansion of substance abuse, mental health, and intermediate sanction facilities and programs.

Between the period of January 2007 and December 2008, the Texas prison population was projected to increase by 5141.⁷¹ Following the resource redirection, the Texas prison population instead climbed by only 529, a decrease of nearly 90 percent on the initial projection. Over the same period, probation revocations to prison declined by 25 percent and parole board approvals rose by 5 percentage points.

In the next fiscal year, the Texas budget reported a net savings of \$443.9 million, driven by the savings on prison construction and bed space contracting alone. Not included in this total was the societal benefit garnered from lower incarceration rates, and improved mental health and supervision programs funded by the justice reinvestment.

⁷⁰ Kate Allman, 'Breaking the Prison Cycle' (2016) 25 *Law Society of NSW Journal* 28, 30.

⁷¹ Justice Center, The council of State Governments, *Justice Reinvestment in Texas* (April 2009) <https://csgjusticecenter.org/wp-content/uploads/2012/12/Texas_Bulletin.pdf>.

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.⁷² 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.⁷³ In 2013, 90 percent of Aboriginal young people under 18 in Bourke released from custody/imprisonment had within 12 months a new proven court appearance, caution or youth justice conference.⁷⁴ 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.⁷⁵

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 publically available data. As such, 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,

⁷² 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>>.

⁷³ Ibid 22.

⁷⁴ Ibid 18.

⁷⁵ Ibid 24.

availability and effectiveness of alternatives to imprisonment.⁷⁶ The NSW government could assist Reinvestment schemes by providing better historical 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 delivered by the Marunguka Project, and explore the possibility of additional reinvestment schemes.

Recommendation

KLC recommends that 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.

ADDITIONAL COMMENTS

Discrimination

Racial discrimination is a significant problem for Aboriginal and Torres Strait Islander people. In the 2014-2015 period, 24% of the Australian Human Rights Commission complaints were received under the *Racial Discrimination Act 1975* (Cth).⁷⁷ Of the total number of Aboriginal and Torres Strait Islander complainants, 38% of their complaints were made under the *Racial Discrimination Act 1975* (Cth).⁷⁸ Racial discrimination is a significant barrier, preventing Aboriginal and Torres Strait Islander peoples from securing stable housing and employment, accessing services and education, in interactions with police, and increasing the likelihood of future incarceration. A recent survey showed that Aboriginal and

⁷⁶ 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>>.

⁷⁷ Australian Human Rights Commission, *Annual Report 2014-2015*, (2015), 140.

⁷⁸ *Ibid* 141.

Torres Strait Islander people routinely face racism in employment and housing, with 35% of respondents experiencing racism in housing and 42% experiencing racism in employment.⁷⁹ Aboriginal and Torres Strait Islander families often face discrimination when applying for rental properties, forcing them into homelessness. In 2011, Aboriginal and Torres Strait Islander people made up 28% of Australia's homeless population, meaning they were 14 times as likely as non-Indigenous Australians to be homeless.⁸⁰ Even when housing is secured, 23% of all Aboriginal and Torres Strait Islander people live in overcrowded housing, compared to 5% of non-indigenous Australians.⁸¹

Discrimination against people with a criminal record in employment and housing is prevalent for Aboriginal and Torres Strait Islander people. Many employers hold a blanket-rule style policy against hiring candidates with a criminal record, even if the criminal offence is irrelevant to the inherent requirements of the job, or the candidate has not committed an offence in recent times. The barrier posed by this type of discrimination plays a role in preventing reintegration into society and increases reoffending. The *Australian Human Rights Commission Act 1986* (Cth) offers a small amount of protection to those affected by discrimination on the basis of a criminal record.⁸² This protection fulfils Australia's duties under the ratified International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958*. Through this mechanism, a criminal record discrimination complaint can be made to the Australian Human Rights Commission and it can progress to a conciliation stage. However, if the complaint is not settled at conciliation, there is no power to pursue the complaint through the court system. New South Wales, Victoria, Queensland and South Australia do not have any protections against discrimination on the basis of criminal records in their anti-discrimination laws. This means that victims of criminal record discrimination do not have access to an effective remedy.

⁷⁹ Angeline Ferdinand, Yin Paradies and Margaret Kelahar, 'Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experience of Racism Survey' (2013), *The Lowitja Institute Melbourne*, 10.

⁸⁰ Australian Government, Department of Prime Minister and Cabinet, *Aboriginal and Torres Strait Islander Health Performance Framework 2014 Report* AHMAC (2014), 78.

⁸¹ *Ibid.*

⁸² *Australian Human Rights Commission Regulations 1989* (Cth) reg 4; *Australian Human Rights Commission Act 1986* (Cth) ss 30, 31, 32.

Recommendation

KLC recommends that all Australian jurisdictions introduce protections against discrimination on the basis of irrelevant criminal records. These protections should give access to an effective remedy.

Please contact us on (02) 9385 9566 if you would like to discuss our submission further.

Yours faithfully,
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