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

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16. Laws providing for indefinite detention of persons with cognit disability should be repealed. Alternatively, limiting terms should be introduced combined with regular reviews of detention orders.
17. The government increase funding

culturally-

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

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

Australians.[17]

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 jusisdictions 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 strikes' 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).

TheImpact of F

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

CHAPTER 9: FEMALE OFFENDERS

Question 91:

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.'[86] 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.[87] This is exacerbated b0.001 4616 (s)2 bmo[(e)-1um12w 125L(m)4tt14.1 (a)4 (d)10.1 aan

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

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 retraumatise 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 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,

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.

Interpreter Services

Proposal 11-1:

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

Recommendation

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

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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 cour

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.

Provision of Legal Services and Supports

Question 11-12:

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.

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

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 re-direction, 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/2012/08/JR_in_Texas_Powerpoint.pdf>.

availability and effectiveness of alternatives to imprisonment.[76] 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 justice reinvestment 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 2012-2015 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 reinvestmet" 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

Recommendation
KLC recommends t