The Public Defenders

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The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

21 August 2017

By email: indigenous-incarceration@alrc.gov.au

Dear Executive Director,

RE: Submission on Discussion Paper 84 – Incarceration Rates of Aboriginal and Torres Strait Islander Peoples.

Please find attached a submission on behalf of the Public Defenders.

Yours faithfully,

[redacted]

Craig J Smith SC
Deputy Senior Public Defender

Submission by The Public Defenders (NSW) on ALRC Discussion Paper 84 concerning Incarceration Rates of Aboriginal and Torres Strait Islander Peoples.

Introduction

1. Our submission is informed by our practice in New South Wales[1]. It recognises five realities. It suggests three categories of fundamental change.

The Realities

2. First, that the authorities will continue to arrest and prosecute indigenous offenders. It is likely that the rate of arrest and prosecution will increase. The approach of the police to protecting the community will increasingly involve more interventionist (or in your face) policing of indigenous accused, offenders and their communities. This will be so whether or not they are subject to any form of conditional liberty.

3. Second, governments will continue to legislate in ways that may directly or indirectly increase incarceration rates.

4. Third, the financial cost of current rates of indigenous incarceration is very high and will likely continue to grow.

5. Fourth, every individual interaction with every individual indigenous person may contribute, even slightly, to their overrepresentation in custody.

6. Fifth, this issue is exceptional. It requires exceptional change.

The Changes

7. First, a different way of thinking about how government creates legislation which effects indigenous incarceration is required.

8. Second, there should be amendment to sentencing and bail laws.

9. Third, there should be established immediately an Indigenous Court. Such a Court means more than the cost of its creation.

Thinking About All Legislation

10. A broad, overarching approach should be taken to the way Government thinks about legislation. This should be complemented by reform to specific pieces of legislation.

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[1] Public Defenders are salaried barristers independent of the government. We appear in serious criminal cases (e.g. jury trials and appeals) for clients who have legal aid or are represented by an Aboriginal Legal Service.

11. The government should legislate to ensure that there is some measure of the impact of legislative change, whatever it is, to the rates of indigenous incarceration. Whenever a piece of legislation is passed there must be a statement of the likely impact on indigenous incarceration as a result of that change in the law.

12. The purpose is simple: make government pause, and consider, the impact that a new piece of legislation may have on indigenous incarceration.

Thinking About Specific Legislation

Sentencing (Canadian provision, short sentences and flexibility)

13. We support the enactment of a provision that reflects that expressed in s718.2(e) of Canada's Criminal Code (3.71 of the Discussion Paper). Such a provision should form part of the purposes of sentence for two reasons. First, a fundamental recognition in sentencing law that the issue is exceptional. Second, a specific direction to sentencing judges to pay particular attention to the circumstances of indigenous offenders (3.57 of the Discussion Paper). There needs to be more than reliance on the common law to address this issue.

14. Sentences of six months or less should be abolished. They should be replaced by flexible sentencing options (discussed below). There is a harmony between the abolition of such sentences and flexible, well-resourced sentencing alternatives. Judicial discretion is not compromised. Such a proposal recognises that this issue is exceptional and directs sentencing discretion down a different path.

15. There must be a more flexible suite of sentencing options which are directed towards alternatives to immediate incarceration. There is likely to be the introduction of a relatively flexible option in the form of Intensive Corrections Order (ICOs) in New South Wales in the coming months. That flexibility is encouraging. The likelihood that it will be adequately funded such that it makes a difference on this issue is not.

16. There must be adequate funding of appropriate programs to support sentencing Judges imposing ICOs on indigenous Australians wherever they live. Those programs must be community based and culturally appropriate[2].

17. The Government should legislate to make it clear that if there is not such a program available to the Sentencing Judge, in circumstances where had there been such a sentence would have been imposed, then the Court has the option of 'de-escalating'

[2] There must be similar and parallel funding to indigenous prisoners. More culturally appropriate programmes (in custody) targeting education, mental health and vocational training is essential.

the sentence. That is, not sending the person to full time gaol but stepping down in the ladder of sentencing options. This would stop or minimise sentence creep.

18. The option for ICOs will likely be limited to 2 (or possibly 3) years. That should be increased to a period of 5 years to give Judges in more serious cases the flexibility of finding that a period of imprisonment of more than 2 years is warranted but, in the circumstances of the particular case, it is appropriate to divert the person from immediate incarceration.

Bail Laws

19. We support the strengthening of provisions relating to indigenous accused in our bail laws. New South Wales has a limited recognition of the importance of the issue (paragraphs 2.14, 2.32 & 2.33 Discussion Paper). The Victorian provision (Proposal 2-1) should be implemented. It would achieve similar benefits to those described in paragraph 13 above (relating to the Canadian sentencing provision).

20. Our practical experience is that when the current provision is mentioned in bail applications in New South Wales, (section 18(1)(k) Bail Act NSW) it rarely makes a practical difference. Simply put, a stronger message needs to be sent.

21. We repeat paragraph 16 above as it applies to the context of bail.

Indigenous Courts

22. That there be an expansion of Indigenous courts. In, particular there be established immediately an Indigenous District Court in New South Wales. A proposal for such a Court is currently being considered by the New South Wales Government.

23. We strongly emphasise that such a Court means more than its actual results. The establishment of the Court would signal to our community in a clear and compelling way the exceptional nature of the issue. That message has its own importance.

24. It is without doubt that such a Court would actually work. It would reduce recidivism. Experience from the Victorian Court and the Children's Indigenous Courts tells us these things. It would undoubtedly be more engaging, inclusive and less intimidating than a mainstream court (11.26 of the Discussion Paper).

25. The expected reduction in recidivism rates would likely make such a Court revenue neutral over the years (on the assumption that such a consideration is of significance given the importance of the actual reform).

26. An added advantage to such a Court is the ability of the Court to test and examine new sentencing alternatives and programmes for participants. This will allow the refining of alternatives to full-time gaol within the Indigenous Court. Such refinements will assist in designing culturally appropriate programmes for the future in areas not covered by a single Indigenous Court.

Conclusion

27. We support many other proposals referred to in the Discussion Paper but have determined to make a submission on those areas which are central to our practice.

28. The approach, from a Justice or Courts perspective, should be at two levels.

29. First, a global and message sending approach. Second, a suite of more discrete and practical reforms.

30. We are more than happy to discuss this submission should that be of assistance.

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