



Mental Health Commission
of New South Wales



Incarceration rates of Aboriginal and Torres Strait Islander Peoples

Submission to the Australian Law Reform Commission
by the Mental Health Commission of NSW

September 2017

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Submission to the Australian Law Reform Commission on Incarceration rates of Aboriginal and Torres Strait Islander Peoples: Discussion Paper 84 (July 2017)

<http://www.alrc.gov.au/publications/indigenous-incarceration-rates-dp84>

1. The Mental Health Commission of NSW

The Mental Health Commission of NSW is an independent statutory agency responsible for monitoring, reviewing and improving mental health services and the mental health and wellbeing of the people in NSW. It works with government agencies and the community to secure better mental health and wellbeing for everyone, to prevent mental illness, and to ensure the availability of appropriate supports in or close to home when people are unwell or at risk of becoming unwell.

The Commission promotes policies and practices that recognise the autonomy of people who experience mental illness and support their recovery, emphasising their personal and social needs and preferences as well as broader health concerns. The Commission is guided in all of its work by the lived experience of people with a mental illness.

The Commission works in three main ways:

- Advocating, educating and advising about positive change to mental health policy, practice and systems in order to support better responses to people who experience mental illness, and their families and carers.
- Partnering with community-managed organisations, academic institutions, professional groups or government agencies to support the development of better approaches to the provision of mental health services and improved community wellbeing, and promote their wide adoption.
- Monitoring and reviewing the current system of mental health supports and progress towards achieving the actions in *Living Well: A Strategic Plan for Mental Health 2014 - 2024*, and providing this information to the community and the mental health sector in ways that encourage positive change.

Should you wish to discuss any of the issues raised in this submission in more detail please contact Ms Sarah Hanson, Executive Officer, on 02 9859 5215 or at sarah.hanson@mhc.nsw.gov.au

2. Overview

The Commission largely agrees with the Discussion Paper's identification of the issues behind the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system.

Without meaning to oversimplify this complex matter, the Commission submits that increasing cultural competency and trauma informed approaches across the entire criminal justice system, from first contact with the police through to parole programs, has the potential to significantly reduce the rate of incarceration of Aboriginal and Torres Strait Islander peoples. The Commission further submits, while recognising that it is beyond the scope of this review, that better provision of early intervention services would also have a significant impact.

There have been numerous reports establishing what is needed in terms of cultural competence and why this is important, and many successful pilot programs. Despite this, little progress has been made to develop cultural competence across the criminal justice system.

The criminal justice system is adversarial and transactional, which can work in opposition to the sort of relational approach that supports culturally competent responses. Funding and sustained government commitment will be essential to overcome these orientations within the system in order to reduce the number of Aboriginal people in prison.

For example, Legal Aid organisations are unable to fully adopt practices to ensure that all of their services are culturally competent, because they lack the resources to invest in the time required both to develop sustainable organisational relationships with Aboriginal community groups and to provide culturally appropriate case support. If government is strategically committed to building a culturally competent criminal justice system, it needs to adequately fund Legal Aid and similar organisations to provide culturally competent, trauma informed services.

This submission deals with the following matters:

1. The Commission's work in relation to the criminal justice system
2. The need for cultural expert witnesses
3. *Bugmy v The Queen*
4. Increasing culturally competent, trauma-informed services
5. Developing specific programs and services for female offenders
6. Health justice partnerships

3. Our work in relation to the criminal justice system

Since 2013, the Commission has undertaken a broad program of work directed to developing a better understanding of the interaction between people with mental illness and the criminal justice system. We know that many prisoners live with mental health or cognitive impairments. At least half of all adult inmates in NSW have been diagnosed or treated for a mental health problem¹ and 87 per cent of young people in custody in NSW have a past or present psychological disorder². Rates are higher for Aboriginal people in custody³.

In highlighting the overrepresentation of people with mental illness in prisons and reoffending statistics, we are not suggesting a simple cause and effect relationship. Rather, these statistics in large part reflect a failure to provide appropriate services and supports to people with mental illness in our community⁴. This work is of particular relevance to Aboriginal incarceration, given the high rates of mental illness among the Aboriginal prison population when compared with the general population⁵.

¹ The figure is likely higher as inmates who could not consent to participate in the survey due to mental health impairments were excluded: Indig, D., Topp, L., Ross, B., Mamoon, H., Border, B., Kumar, S. & McNamara, M. (2010) *2009 NSW Inmate Health Survey: Key Findings Report*. Justice Health. Sydney

² Indig, D., Vecchiato, C., Haysom, L., Beilby, R., Carter, J., Champion, U., Gaskin, C., Heller, E., Kumar, S., Mamone, N., Muir, P., van den Dolder, P. & Whitton, G. (2011) *2009 NSW Young People in Custody Health Survey: Full Report*. Justice Health and Juvenile Justice. Sydney.

³ Ibid

⁴ Mental Health Commission of NSW (2017) *Towards a Just System: Mental illness and cognitive impairment in the criminal justice system*, p 8

⁵ Mental Health Commission of NSW (2014) *Living Well: A Strategic Plan for Mental Health in NSW 2014 – 2024*, Sydney, p 21

There have been numerous reviews into the criminal justice system and people with mental illness or cognitive impairment. Rather than seek to rewrite the reports, the Commission brought together the various inquiries and reports that already existed to provide a high level synthesis of work undertaken to date. The Commission's aim was to provide a useful framework for ongoing discussion and planning across government about how to alter the trajectory of individuals with a mental illness or cognitive impairment away from the criminal justice system. The Commission worked closely with an expert advisory group to review these issues and develop a report, *Towards a Just System: Mental illness and cognitive impairment in the criminal justice system*, which was tabled in the Parliament of NSW in July 2017.

This report is directly relevant to the current inquiry into the incarceration rates of Aboriginal and Torres Strait Islander peoples and the Commission does not seek to repeat the content of this report here. Instead a copy is appended to this paper and forms part of this submission. The report highlights those areas where change is needed most, relevant to the Australian Law Reform Commission's (ALRC) current remit:

1. State-wide access to diversion
2. Adjustments to investigative and court processes
3. Reorientation of youth justice
4. Best practice service provision in the criminal justice system
5. Building the Aboriginal workforce
6. Alternatives to prison for women
7. Better through care and transitional support
8. Supporting victims

The following Commission papers are referenced throughout this submission and are also provided for the ALRC's consideration:

1. A discussion paper on the implementation of recovery-oriented, trauma-informed approach in criminal justice and forensic settings, *Inside Outside: Recovery research project*; and
2. The Commission's submission to the inquiry into the indefinite detention of people with cognitive and psychiatric impairment in Australia.

4. Sentencing and Aboriginality

As touched on in the Discussion Paper, when making sentencing decisions there is scope for the court to take into account subjective factors arising from an offender's history⁶. This, in theory, allows for consideration of the impact of deprivation, poverty, trauma or abuse where those factors may affect a person's moral culpability⁷. However, the success or otherwise of this mechanism is entirely dependent on the quality of the information provided to the court about a person's background and the court's capacity to evaluate that information.

The Hon Justice Peter McClellan AM, Chair, Royal Commission into Institutional Responses to Child Sexual Abuse, said in an address to the International Society for the Study of Trauma and Dissociation:

"the legal system, and particularly the judges, have a responsibility to listen and understand what you are telling us. When relevant your learning [about trauma] must inform our decisions...

How do we ensure that the knowledge you have of human behaviour and the response to trauma is known by the judge when assessing the credibility of a witness, deciding the money damages for a plaintiff or sentencing an offender? It may surprise you to learn that the issue has not often been addressed by lawyers.

The consequence has been that, particularly in relation to sexual assault, there have been some significant difficulties and almost certainly injustices.

The difficulties have not been for lack of opportunity. Opportunity was provided but the law failed to adequately respond.⁸"

4.1 Cultural expert witnesses

There is a need to improve understanding of the impacts of trauma and in particular, intergenerational trauma, as well as relevant cultural factors for Aboriginal and Torres Strait Islander people.

The recent Criminal Justice Report by the Royal Commission of Inquiry into Institutional Responses to Child Sexual Abuse touches on this issue in respect of trauma⁹.

One mechanism is to have cultural expert witnesses. In NSW, a collaboration between the University of NSW (UNSW) and the Aboriginal Legal Services NSW/ACT (ALS) is providing support to mental health professionals and social workers in presenting to the court, in a

⁶ Australian Law Reform Commission *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper 84 (July 2017), at 3.6

⁷ Ibid

⁸ The Hon Justice Peter McClellan AM, Chair, Royal Commission Into Institutional Responses to Child Sexual Abuse (2015), "Addressing the International Society for the Study of Trauma and Dissociation – 'Broken Structures, Broken Selves: Complex Trauma in the 21st Century'", 28 November 2015, accessed via <https://childabuseroyalcommission.gov.au/media-centre/speeches/international-society-for-the-study-of-trauma-and>

⁹ Royal Commission into Institutional Responses to Child Sexual Abuse (2017) *Criminal Justice Report* (14 August 2017), accessed via <https://www.childabuseroyalcommission.gov.au/policy-and-research/our-policy-work/criminal-justice>

culturally appropriate manner, important cultural issues within mental health and social work evaluations. The collaboration is also seeking to educate the courts and legal profession with respect to cultural competence in Aboriginal mental health and social work contexts.

It is hoped that the collaboration will improve the quality of information given to criminal trial and sentencing courts by enhancing the quality of reports presented on behalf of Aboriginal and Torres Strait Islander clients in criminal matters. It is also hoped that, as a result of the work undertaken by the collaboration, there will be increased awareness of the importance of employing Aboriginal and Torres Strait Islander mental health professionals, social workers and other personnel within criminal justice agencies.

This project is important, but to be truly effective it needs to be scaled up and funded at either the state or national level, beyond the scope of the collaboration.

Alongside the development of cultural expert witnesses, there needs to be recognition that, at least in the early stages, there will be a gap between need for, and availability of, Aboriginal expert witnesses. Therefore, there is a need to also support non-Aboriginal workers to develop the necessary cultural competence.

A model for how this can be achieved is Weave, a non-Aboriginal community managed organisation based in Redfern, NSW, which has developed close and enduring ties with the local Aboriginal community – 66 per cent of people who access Weave's services are Aboriginal or Torres Strait Islander¹⁰. The Commission has recently produced several video profiles of Weave, showcasing its good practice around building relationships to develop cultural competence. This can be accessed via

https://www.youtube.com/watch?v=CFMRHiezkak&index=6&list=PLmdoKlibCmXbDqiQ_7O8ggmmBq9DWhQKo

4.2 *Bugmy v The Queen*

Aboriginal people have a very specific understanding of social and emotional wellbeing. Closely tied up in this is the impact of intergenerational trauma. This has a unique impact on Aboriginal communities that is directly relevant to any assessment of the impact of a person's background on their 'moral culpability'.

In view of the decision in *Bugmy v The Queen*¹¹ (Bugmy), the Commission supports the introduction of legislation for courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander people when making sentencing decisions.

As addressed above, while courts are currently able to take into account subjective factors at sentencing, this mechanism is only as effective as the information provided to the courts. The use of cultural expert witnesses will, hopefully, address this issue. However, this needs to be supported by a formal mechanism which triggers the courts and the legal profession to actively consider and seek out those matters unique to Aboriginal people and which might not be immediately obvious without specialised inquiry.

The Commission specifically notes the view reported in the Discussion Paper at 3.96:

¹⁰ Weave Youth and Community Services, "About Weave", accessed via <http://www.weave.org.au/b/index.php/about-weave/>

¹¹ *Bugmy v The Queen* [2013] HCA 37

“Some also took the view that Australian courts and counsel are already expert in responding to Aboriginal and Torres Strait Islander offenders. The high volume of Aboriginal and Torres Strait Islander defendants coming through courts make them ‘bread and butter’ work for courts and criminal lawyers¹².”

This view needs to be balanced against the clear evidence that Aboriginal people are overrepresented in the criminal justice system and that despite more than 10 years since the release of *Close the Gap*, the gap is patently not decreasing. Requiring specific consideration of the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples would ensure a more consistent approach, rather than depending on the court or counsel to have the requisite background knowledge. Turning again to The Hon Justice Peter McClellan’s AM, address to the International Society for the Study of Trauma and Dissociation he notes:

“The practice of judges relying on their own understandings of human behaviour, however ill-informed, to determine the content of decisions and judge made legal rules is centuries old. The practice of judges, at least explicitly, relying on scientific research to make decisions and determine legal rules has a much more complicated history¹³.”

5. Prison programs, parole and unsupervised release

5.1 Increase culturally competent trauma-informed service provision

It is impossible to consider the issue of overrepresentation of Aboriginal people in the criminal justice system without also considering people’s experience of trauma. Experience of trauma in the justice population is common¹⁴. For example, among women in correctional centres/ forensic hospitals, it is estimated that 90 per cent have experienced trauma of some kind¹⁵. In fact, the prevalence of trauma among prison populations is so common that it should be treated as the norm, rather than the exception. If we continue to design a criminal justice system that deals with trauma only as an add-on then we will never resolve the issue of overrepresentation of Aboriginal people.

For many people, the prison environment is highly triggering and can be re-traumatising. Within justice settings many everyday occurrences may be perceived as threatening for people experiencing trauma - for example, body searches, lack of privacy, confined spaces,

¹² Australian Law Reform Commission *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper 84 (July 2017)

¹³ The Hon Justice Peter McClellan AM, Chair, Royal Commission Into Institutional Responses to Child Sexual Abuse (2015), “Addressing the International Society for the Study of Trauma and Dissociation – ‘Broken Structures, Broken Selves: Complex Trauma in the 21st Century’”, 28 November 2015, accessed via <https://childabuseroyalcommission.gov.au/media-centre/speeches/international-society-for-the-study-of-trauma-and>

¹⁴ Butler, T, Andrews, G, Allnutt, S, Sakashita, C, Smith, N, Basson, J (2006) “Mental Disorders in Australian Prisoners: A Comparison with a Community Sample”, in *Australian and New Zealand Journal of Psychiatry*, 40 (3), 272–276.

¹⁵ Australian Institute of Family Studies (2012) “Addressing women’s victimisation histories in custodial settings”, in *ACSSA Issues*, No 13, accessed via <https://aifs.gov.au/publications/addressing-womens-victimisation-histories-custodial-settings/profile-women-prison>

control and restraint techniques, shouting, musters, loud noises and banging doors¹⁶. One particular legacy of childhood trauma is the ongoing problems with authority figures and institutions which frequently lead to conflict with police, the law and incarceration. However, sadly, for some people prison can be a place of safety and access to resources. This is particularly so for those whose lives in the outside world were marked by homelessness, domestic violence and a lack of availability of services to deal with the impacts of childhood trauma¹⁷.

We need a system that provides a trauma-informed response from first contact with police and contact with the courts through to correctional centres and parole programs.

The Commission acknowledges that there are some obvious tensions between the principles underpinning a trauma-informed approach and the emphasis in the criminal justice system on risk management and the maintenance of security. To better understand how these tensions can be reconciled, the Commission engaged Dr Leanne Craze AM to document the evidence base for implementing recovery-oriented, trauma-informed approaches in justice settings across NSW. Dr Craze undertook a literature review and a targeted survey of people with lived experience of mental illness and the criminal justice system and with professionals who work in the system.

Much of the literature and research available when looking at implementing recovery-oriented, trauma-informed approaches in justice settings is focused on forensic hospitals, rather than other justice settings. The literature is also primarily concerned with the provision of mental health services in justice settings, rather than the application of recovery-oriented, trauma-informed approaches across the entire justice system.

Despite these drawbacks, the research showed that the concepts of recovery-oriented, trauma-informed care are not entirely new to the justice system. The principles align with contemporary justice theory and models including rehabilitation models, restorative and community justice models, reintegration and re-entry approaches, therapeutic jurisprudence models, early intervention, gender and culturally safe models and relational approaches.

We have developed the results of Dr Craze's research into a discussion paper, which was circulated among key stakeholders in late July 2017, and feedback has been requested by 11 September. The discussion paper is provided for reference.

6. Female offenders

The criminal justice system was designed for men and has been subsequently 'patched up' to accommodate women. Given the rapidly increasing numbers of women in prisons, there is a need to develop fit for purpose facilities and programs designed specifically for women and within that, taking into account the particular needs of Aboriginal women. The Commission would also reiterate its comments in relation to trauma, at point 5 above. Developing a culturally competent, trauma informed system is essential to support female offenders.

¹⁶ Bateman, J.; Henderson, C. (MHCC); Kezelman, C. (ASCA). (2013) *Trauma-Informed Care and Practice: Towards a cultural shift in policy reform across mental health and human services in Australia*, A National Strategic Direction, Mental Health Community Coalition NSW, p.9, accessed via http://www.mhcc.org.au/media/32045/ticp_awg_position_paper__v_44_final___07_11_13.pdf

¹⁷ Mental Health Commission of NSW (2017) *Inside Outside: Recovery research project discussion paper*

7. Access to justice

7.1 Indefinite detention

The Commission remains concerned about the indefinite detention of individuals found unfit to be tried, including by way of extension of court order limiting terms. The Commission's submission to the Commonwealth Community Affairs References Committee on indefinite detention of people with cognitive and psychiatric impairment in Australia is provided for the ALRC's consideration.

7.2 Health justice partnerships

Health justice partnerships are a good example of a model that seeks to improve access to justice through a relational approach to legal service provision. Health justice partnerships build on the person's pre-existing relationship with their health service provider and tap into other existing community supports to provide legal services to people who may otherwise never seek out legal assistance. Such models, grounded in the needs of the individual and the community, recognise the complexity of disadvantage and occupy the space where health and social justice issues overlap.

However, largely based on relationships – between the service and people accessing the service and between professionals – health justice partnerships require time and organisational commitment, which can be hard to carve out in otherwise busy services already stretched to capacity without dedicated funding being made available.

