Dear Commissioners,

My name is Caitlin Joensson and I am a law student in Western Australia. I welcome the opportunity to have input into the Australian Law Reform Commission’s inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples.

I Abstract

I wish to submit my thoughts and recommendations in regards to laws that contribute to the rate of Aboriginal and Torres Strait Islander people offending. The opinions expressed in this report have been developed through my own research with specific consideration given to the Final Report of the Royal Commission Into Aboriginal Deaths in Custody,[[1]](#footnote-1) The Report by the Aboriginal and Torres Strait Islander Social Justice Commissioner[[2]](#footnote-2) and the recommendations provided by the Australian Law Reform Commission in the discussion paper published for the purposes of this inquiry.[[3]](#footnote-3)

The primary aim of this submission is to address two key areas of concern: the high imprisonment rates of Aboriginal and Torres Strait Islander People for non payment of fines and the disproportionately high amount of fines that are issued. I will examine each of these points individually and provide suggestions as to the options available to minimise the impact of these offences on Indigenous communities. I will conclude this report by highlighting the inconsistencies that can be seen in Australia’s criminal justice system in upholding the Rule of Law. Specifically I will discuss how the laws highlighted in this report fail in promoting the Rule of Law and how high incarceration rates of Aboriginal and Torres Strait Islander peoples is a stark example of why we need to give more focus to such a concept.

II Recommendations

A *Imprisonment For Fine Default Should Be Abolished*

Aboriginal prisoners are disproportionately represented as offending for less serious offences, including fine default.[[4]](#footnote-4) Non-payment of fines may not be the offence for which we see the biggest issue in our justice system, however the high turn over of prisoners it accumulates largely effects prison dynamics and creates socially undesirable groups in both prisons and Indigenous communities. It is therefore incumbent for this issue to be addressed as part of the commission’s inquiry.

This section will argue that the current legislation in Australia allowing for imprisonment for fine default should be abolished. Therefore agreeing with proposal 6-1 that was put forth in the discussion paper.[[5]](#footnote-5) Alongside exploring this recommendation, this section of my report will make specific reference to current legislation in Western Australia, the state in which fine default is most prevalent.[[6]](#footnote-6)

1 *Imprisonment for Fine Default in Western Australia*

*(a) Current Legislation*

In Western Australia, where the state debt recovery agency imposes community service or a work development order, and the person fails to comply with this order or is ineligible to do so, the agency can issue a warrant of commitment for their imprisonment.[[7]](#footnote-7) In 2008, amendments were made to this legislation that allowed people to serve time in custody for multiple fines concurrently. This meant that in some instances, fine debts could be ‘cut out’ more quickly through a prison sentence then by performing community work.[[8]](#footnote-8) This has created in some instances an appeal to serving time in prison, with offenders seeing it as their fastest option to abolish a debt they are unable to pay.

*(b) Recommendation: Abolishment of the Legislation*

Fines are penalties imposed for minor infractions. Therefore it seems disproportionate for someone to be imprisoned for such an offence. The negative impact of imprisonment for fine default was highlighted in a report released by the Inspector of Custodial Services in April 2016. After examining this report there is no denial that this legislation is costly and impacts negatively on prison population and operation. I believe that this legislation should be abolished, with the opportunity for the development of more appropriate legislation over time.

Other bodies, such as the Coroner’s Court of Western Australia, have suggested that rather then abolishing the legislation we should instead amend it to include a provision that requires a trial to be held prior to sentencing. While I can see the benefits of this, rather then putting money and time towards what would be a large number of trials, other mechanisms should be adopted.

B *Penalties Should Be Altered to Reflect Circumstance[[9]](#footnote-9)*

Aboriginal and Torres Strait Islander peoples are more susceptible to escalating fine debt than non-Indigenous people. This can be attributed to reduced financial capacity, itinerancy and lower literacy levels.[[10]](#footnote-10) Research suggests that people experiencing economic or social disadvantage face numerous barriers to paying fines such as: high fine amounts, the inability to manage the fines processing system, barriers to accessing courts and legal advice and barriers to seeking special consideration. In lieu of this information, the following recommendations explore the ideas that fines should be administered with consideration given to the circumstances of the offender and that there are other mechanisms that can be implemented to replace the issuing of fines.

1 *Implement Provisions for the Consideration of Special Circumstances*

Penalties received under an infringement notice are currently fixed in price and cannot be altered. In order to address the high incarceration rate for fine default offences we must also address the circumstances behind the offenders receiving these fines. Currently legislation does not consider the disproportionate impact that fines have on people who are disadvantaged financially or socially. For example, the issuing of a speeding infringement on someone of high economic status has much less of an impact than on someone who relies on social welfare benefits or has a disability. Legislation that governs the issuing of fines should be reviewed and amended to include provisions that allow for more discretion in the calculation of monetary amounts. In addition to this, restrictions should be placed on issuing officers so they are unable to hand out multiple fines for the same category of offence in a single interaction. This would give offenders an opportunity to evaluate the initial offence in order to make change to their actions, rather then being caught up in one interaction in which they will accumulate a debt they cannot pay off.

2 *Allow Concession Infringement Notices*

The implementation of concession infringement notices would allow for those disadvantaged to receive more proportionate punishments while also implementing limits on who is able to claim this disadvantage. If a person is eligible for automatic entitlement to a payment plan (such as *Centrepay*) it seems appropriate that they would also be eligible to receive a concession infringement notice. This idea was originally suggested by the Sentencing Advisory Council of Victoria who recommended a fixed reduction model of 50% for people experiencing financial hardship. I support this model however suggest there should be discretion in the reduction rates issued due to the varying disadvantages faced. The use of concession infringement notices would allow offenders to remove themselves from the fine enforcement system early and reduce the impact they have on the criminal justice system in the long term.

3 *Provide access to community based programs to discourage re-offending*

There is clear evidence that many non-violent offences can be dealt with more cost-effectively using community based programs. The programs should combine close supervision with treatment.[[11]](#footnote-11) Rather then issuing numerous fines to the same person, authorities should recognise that other avenues are required in order to effect positive change. The implementation of community based programs would allow those with a history of offending to seek assistance and forge a path to rehabilitation.

III A Failure to Uphold the Rule of Law

Incarceration of Aboriginal and Torres Strait Islander peoples for fine default is clear evidence of a failure to uphold the Rule of Law in the Australian criminal justice system. Within the definition of the Rule of Law[[12]](#footnote-12) key aspects can be distinguished in regards to how the legal system should operate. The following points I believe demonstrate which issues require the most attention when examining the laws surrounding the issuing of fines and imprisonment for fine default.

1 *Legal process should be accessible*

The Rule of Law states that legal processes should be accessible to all. The legal processes attached to the laws discussed in this report are not accessible to Aboriginal and Torres Strait Islander peoples due to a range of issues. Firstly, many Indigenous people have a deep mistrust of government agencies resulting from their direct experiences of government assimilation following colonisation. The perception of criminal justice services as unsafe reduces the chances of Indigenous people engaging with services that could assist them in progressing through the system. Secondly, a large proportion of the Indigenous community lives in regional and remote areas, creating an added barrier to accessing legal services, courts and educational opportunities. Thirdly, there is a lack of willingness to implement programs that educate and inform Indigenous communities on their rights and obligations under the law. In order to adhere to the Rule of Law the Australian government needs to review the accessibility of legal services and institutions.

2 *Justice should be delivered by those who reflect the makeup of the communities they serve*

The Rule of Law provides that justice should be delivered by those who reflect the makeup of the communities they serve. In order to provide culturally responsive and effective services to Aboriginal and Torres Strait Islander peoples, it is important to employ Indigenous staff to deliver justice in their own communities. While there have been some initiatives to increase the amount of Indigenous staff members employed by the justice system, numbers still remain low.[[13]](#footnote-13) Many reports have highlighted this concern, arguing that this overrepresentation is caused partially by the differential treatment of Indigenous people by justice agencies who are not culturally sensitive or culturally competent in their work.[[14]](#footnote-14) In order to combat this issue more effort should be implemented in establishing Aboriginal and Torres Strait Islander people in the Criminal Justice system, such as in fine enforcement positions. This would allow for greater trust in the system and also create policing authorities who have the ability to demonstrate cultural sensitivity and discretion in their implementation of the law.

3 *Legal process should be fair*

As can be seen throughout this report, the lack of discretion given to Indigenous people who are disadvantaged in some way is an unfair aspect of the Australian criminal justice system. By not implementing change to address the disproportionate amount of Indigenous people who are incarcerated for fine default and who receive numerous fines with no alternatives provided to them Australia will continue to enforce an unfair legal process. In order to effect positive change in this area, law should be reviewed, as suggested above, and consideration must be given to how laws effect people of every social and economic status.

IV Conclusion

Research for this report has demonstrated that imprisonment for fine default and the laws governing the issuing of fines are issues requiring consideration during the Commission’s inquiry. The recommendations in this report support those of other government agencies and address numerous questions posed by the Commission in the submission paper. The preferred outcome of this inquiry would be an amendment of the laws discussed in this report, and overall a reduction in the high incarceration rates of Aboriginal and Torres Strait Islander peoples for such offences.

1. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991). [↑](#footnote-ref-1)
2. Australian Human Rights Commission, *Social Justice and Native Title Report* (2016). [↑](#footnote-ref-2)
3. Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples Submission Paper* (2017). [↑](#footnote-ref-3)
4. Above n 1. [↑](#footnote-ref-4)
5. Above n 3, 111. [↑](#footnote-ref-5)
6. Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016). [↑](#footnote-ref-6)
7. *Fines, Penalties and Infringement Notices Enforcement Act 1994 (*WA) s 53. [↑](#footnote-ref-7)
8. Above n 6, 1 [2.3]. [↑](#footnote-ref-8)
9. This section addresses question 6-1, 6-2 and 6-3 proposed by the Australian Law Reform Commission in the discussion Paper. [↑](#footnote-ref-9)
10. Parliament of New South Wales, Legislative Assembly of New South Wales Committee on Law and Safety, *Driver Licence Disqualification Reform,* Report 3/55 (2013) [3.68]. [↑](#footnote-ref-10)
11. S Aos et al, ‘Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates’ (2006) *Olympia: Washington, State Institute For Public Policy Journal.* [↑](#footnote-ref-11)
12. For the purposes of this report I have taken the World Justice Project's definition of the rule of law, This definition is comprised of four universal principles: accountability, just laws, open government and accessible and impartial dispute resolution. [↑](#footnote-ref-12)
13. Andrew Day, Glenn Giles and Brian Marshall, ‘The Recruitment and Retention of Indigenous Criminal Justice Agency Staff in an Australian State’ (2004) *International Journal of Offender Therapy and Comparative Criminology* 347. [↑](#footnote-ref-13)
14. Aboriginal and Torres Strait Islander Commission (1997). [↑](#footnote-ref-14)