

14 September 2017

Your ref

Our ref: AG

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

By email: tina.obrien@alrc.gov.au

Dear Commissioner/Executive Director

Incarceration Rates of Aboriginal and Torres Strait Islander Peoples (DP 84)

Thank you for the opportunity to provide comment to the *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* discussion paper. Queensland Law Society (the Society) appreciates being consulted on this important issue.

Recently the Society has committed to developing and delivering a reconciliation action plan where we have engaged First Nations people in the profession across the state to direct what we as an organisation believe is needed to address the over-representation of Indigenous people in the criminal justice system and increase the underrepresentation of First Nations professionals in the legal fraternity. We have made positive progress since launching the action plan in July 2017.

In our work, we seek to follow practice culturally appropriate and culturally competent actions to ensure we are acting in an inclusive and respectful manner. In keeping with protocol, the Society would like to formally acknowledge the numerous traditional owners and custodians of this country and respectfully recognise them as the original inhabitants of these lands. They are the keepers of culture and strong traditional practices of law and governance. We pay our deep respects to the Elders past, present and future.

Whilst we commend the fervour of the Attorney General in bringing attention to the crisis we are experiencing with the incarceration rates of Aboriginal and Torres Strait Islander men, women and children, we take the position that the current measures are not and have not been conducive to better outcomes for the people. The Queensland Law Society recognises the appalling rates of incarceration and the impact it has had on First Nations people and would welcome reforms to change this narrative.

Our policy committees and working groups are the engine rooms for the Society's policy and advocacy to government. The Society, in carrying out its central ethos of advocating for good law and good lawyers, endeavours to ensure that its committees and working groups comprise members across a range of professional backgrounds and expertise. In doing so, the Society achieves its objective of proffering views which are truly representative of the legal profession on key issues affecting practitioners in Queensland and the industries in which they practise. This furthers the Society's profile as an honest, independent broker delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

We applaud the ALRC for providing a focus segment that directs important questions and proposals it is greatly appreciated. We have returned comment within this submission in the same vein as detailed below.

RESPONSE TO PROPOSAL AND QUESTION SECTION (pp.11-16)

2. Bail and the Remand Population

Proposal 2-1 Other states and territory bail legislation should adopt similar provisions to the Bail Act 1977 (Vic)

- i. Section 3A of the *Bail Act 1997* (Vic) should be implemented in bail legislation nationally. The Society strongly supports the national implementation of a requirement that the court take into account any issues that arise due to having a First Nations background, including cultural ties to family or place or other cultural extensions and obligations. These factors are highly relevant to determinations around bail.
- ii. A provision of this nature should apply when bail conditions are being considered by courts. Bail conditions are often imposed without having regard to the realities of Aboriginal and Torres Strait Islander culture and communities. For example, child defendants from Woorabinda are frequently made subject to combined curfew and residential conditions, which requires them to remain at a single household between certain hours. Such conditions are frequently breached by children who consider numerous households in the community to be home, or when faced by issues of overcrowding, alcohol misuse and domestic violence. Frequently, children subject to such conditions have their bail revoked due to multiple breaches of these, despite not committing any further offences.
- iii. Communities should be better consulted by the court when tailoring bail conditions, which could be done via Community Justice Groups. Although the *Bail Act 1980* (Qld) allows for Community Justice Group submissions to be heard at bail applications, this does not occur often, particularly as bail applications are often heard at dates and times that Community Justice Groups are not available at court.

Proposal 2-2 State and territory governments should work with peak Aboriginal and Torres Strait Islander organisation

- i. Collaboration between state and territory governments and peak Aboriginal and Torres Strait Islander organisations should occur. Focus should be on promptly implementing

supported bail programs and emergency accommodation services. Further, ensuring that properly funded and staffed services are available to Aboriginal and Torres Strait Islander people in regional and remote areas should be prioritised.

- ii. Not only do bail supports need to be culturally appropriate, they need to be available on demand.
- iii. Bail applications are often refused because a fixed and permanent or culturally appropriate address cannot be identified or a rehabilitation facility does not meet particular standards. This can result in people remaining in custody for longer than necessary until appropriate accommodation becomes available.
- iv. Funding should be directed toward resourcing infrastructure and building facilities rather than spent on 'identifying' the service gaps.

3. Sentencing and Aboriginality

Question 3-1 ...should state and territory governments legislate to expressly require the courts to consider the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples when sentencing...

- i. We strongly support consideration of systematic/ background factors in sentencing.
- ii. In our view, members of the judiciary should be provided with further education to enhance their knowledge and understanding of the unique systemic and cultural factors affecting Aboriginal and Torres Strait Islander peoples and the impact of these factors on criminal behaviour and recidivism.
- iii. Courts should acknowledge the considerable role of intergenerational trauma in offending/ recidivism by First Nations people. This should be taken into consideration when sentencing an Aboriginal and or Torres Strait Islander person.
- iv. The information provided should not be used in a way that causes further detriment or influences negative outcomes for offenders.

Question 3-3 Do courts sentencing Aboriginal and Torres Strait Islander offenders have sufficient information available about the offender's background?

- i. Courts do not consistently have sufficient information available to them when sentencing Aboriginal and or Torres Strait Islander offenders.
- ii. Pre-sentence reports are at times made available by Youth Justice Services in Queensland (under section 151 of the *Youth Justice Act 1992* (Qld)), when prepared by Community Justice Groups or privately funded pre-sentence reports often prepared by psychologists. However, such reports are generally only relied upon for serious offending where it is possible that a sentence of imprisonment will be imposed.

- iii. Reports outlining the person's unique cultural information should be considered by a court before any sentence of imprisonment is imposed for First Nations adults and children.

Question 3-4 In what ways might specialist sentencing reports assist in providing relevant information to the court that would otherwise be unlikely to be submitted?

- i. In practice, lawyers working at Aboriginal and Torres Strait Islander legal services have an extremely high caseload and will represent the majority of their clients in a duty lawyer setting (i.e. providing representation in court on the first occasion that they meet the client). This often leads to limited time spent with and rapport being built between client and lawyer. Important information regarding the client's personal circumstances, disabilities they may have and cultural information is often not put before the court in such settings.
- ii. Specialist reports could ensure that the following information is considered by the court:
 - a) Reasons behind offending i.e. being a victim of domestic violence, having a disability that affects their behaviour, deprived background, unemployment, lack of education, alcohol or drug addiction.
 - b) Ways that reoffending could be addressed i.e. if the offender is unemployed, tailor a probation order that focuses on assisting the offender to obtain employment. If the offender has an untreated medical issue, tailor a probation order that ensures assessment and treatment occurs.

Question 3-5 How could the preparation of these reports be facilitated? For example, who should prepare them, and how should they be funded?

- i. The preparation of such reports should be mandatory where an Aboriginal and or Torres Strait Islander person is likely to be sentenced to a period of imprisonment or courts should have to consider doing so and provide reasons as to why such a report is not ordered (so such a decision can be appealed if appropriate).
- ii. The reports should be prepared by Aboriginal and or Torres Strait Islander professionals (i.e. psychologists, counsellors, social workers) or Community Justice Group members. If the latter is to prepare such reports, sufficient funding and training should be made available and resourced by the courts.

4. Sentencing Options

Question 4-1 a) and b): Noting the incarceration rates of Aboriginal and Torres Strait Islander people should commonwealth, state and territory governments review provisions that impose mandatory or presumptive sentences and which provisions should be prioritised?

- i. The Society adopts a robust mandatory sentencing policy position and strongly opposes the use of the regime (**attachment 1**).

- ii. First Nations people who offend as a result of alcohol addiction (i.e. possessing liquor in a restricted area which is criminalised by the *Liquor Act 1992* (Qld)) should not be punished by imprisonment.

Question 4-2: Should short sentences of imprisonment be abolished as a sentencing option? Are there any unintended consequences that could result?

- i. We understand that rehabilitative courses are not made available in Queensland Corrective Services unless sentences of imprisonment over a certain duration are imposed. This temporary removal of a person from the community without providing access to appropriate rehabilitative programs can have negative flow on effects, especially for the increasing numbers of women facing the courts.
- ii. In the Society's view, short sentences of imprisonment should be abolished as a sentencing option and rehabilitative options should instead be considered.

Question 4-4: Should there be any preconditions for such amendments, for example: that non-custodial alternatives to prison be uniformly available throughout states and territories, including regional and remote areas?

- i. Non-custodial alternatives should be made available with greater emphasis on cultural foundations.
- ii. Restorative justice conferences should be made available to Aboriginal and Torres Strait Islander defendants, as is now the case for children and young people in Queensland.

Proposal 4-1: State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available, particularly in regional and remote areas.

- i. It is common for community service orders and rehabilitative programs not to be completed due to services not being available in remote communities, such as Woorabinda, but noting there are many other remote communities that this would apply to.
- ii. Initiatives that align with community cultural connectedness and which present opportunities for community outcomes should be implemented and resourced adequately.

Question 4-5: Beyond increasing availability of existing community-based sentencing options, is legislative reform required to allow judicial officers greater flexibility to tailor sentences?

- i. Culturally appropriate options should be available for recommendation to the court by legal practitioners and support workers.

5. Prison Programs, Parole and Unsupervised Release

Question 5- 2: What are the best practice elements of programs that could respond to Aboriginal or Torres Strait Islander peoples held on remand or serving short sentences?

- i. Leading practice programs should be made available that address intergenerational trauma, support and empower victims of domestic violence, and upskill in areas that will support Aboriginal women with young children.
- ii. Engaging key community Elders who have cultural knowledge and authority to provide back to country initiatives.
- iii. We refer to and endorse the numerous initiatives and programs developed and led by Indigenous organisations in the May 2017 report *Indigenous incarceration: Unlock the facts*.¹
- iv. With respect to questions 5-2 and proposal 5-2 please refer to section 9-1 on female offenders.

6. Fines and River Licenses

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.

- i. Imprisonment in lieu of unpaid fines is not appropriate.
 - a) The notable Western Australian case of Ms Dhu's death in custody matter is a clear reflection of the need to abolish these enforcement statutes.

Questions 6-2: Should monetary penalties revised under infringement notices be reduced or limited to a certain amount? If so, how?

- i. Special circumstances, including homelessness, financial hardship and mental health issues, need to be taken into consideration before a fine is issued.

8. Alcohol

Question 8-1: Noting the link between alcohol abuse and offending, how might state and territory governments facilitate Aboriginal and Torres Strait Islander communities, that wish to do so, to:

- a) *Develop and implement local liquor accords with liquor retailers and other stakeholders that specifically seek to minimise harm to Aboriginal and Torres Strait Islander communities, for example, through such things as minimum pricing, trading hours and range restrictions;*
- b) *Develop plans to prevent the sale of full strength alcohol within their communities, such as the plan implemented within the Fitzroy Crossing community?*

¹ PricewaterhouseCoopers, *Indigenous incarceration: Unlock the facts*, May 2017, pp. 83-94.

- i. In Queensland, as many as nineteen heavily populated Aboriginal and Torres Strait Islander communities are subject to Alcohol Management Plans and prohibition of certain types of alcohol is harshly enforced.²
- ii. The criminalisation of alcohol possession has not reduced alcohol abuse or alcohol related crime in these communities.
 - a) People with alcohol addiction disorders have been criminalised, accumulating criminal records relating solely to possessing liquor, and are not provided adequate support to address alcohol addiction such as culturally appropriate counselling and rehabilitation measures.
- iii. Increasingly, individuals accumulate criminal convictions to the point that periods of actual imprisonment are considered appropriate by the courts.
- iv. Imposing alcohol restrictions across communities has failed to address offending and criminogenic behaviours. In our view, enforcing community alcohol restrictions represents a breach of the *Racial Discrimination Act 1975* (Cth) with respect to and referencing the Northern Territory intervention.
- v. Placing restrictions on the sale and availability of liquor cause consumption and sale to become subversive.
- vi. Further, pricing of alcohol in these communities is exorbitant and has financial impacts which further compound lifestyle choices and contribute to vicious living conditions.
- vii. Instead, the causes of alcohol abuse and behaviour which leads to alcohol related offending need to be addressed sufficiently and adequately.

9. Female Offenders

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

- i. Police practices that contribute to stereotyping First Nations women as violent and/or untrustworthy or criminal may contribute to the increase of criminalisation and over-representation of Aboriginal and or Torres Strait islander women in the criminal justice system.
- ii. Programs delivered by First Nations women in a culturally safe and responsive environment is urgently needed. These programs should aim to address intergenerational trauma, empower victims of domestic violence and build capacity in areas that will support Indigenous women with children.
 - a) Incarceration of women has significant implications for families and can lead to family law and child protection issues. Women tend to be primarily caregivers for children and may be the only caregiver in a family. In these circumstances,

² <https://www.datsip.qld.gov.au/programs/alcohol-limits/index.page>

incarceration can lead to children being placed in out of home care and triggering the entire child protection machinery, which often results in trauma to children, separation from family and community and difficulty achieving reunification. It can also place considerable pressure on extended families.

- b) The enormous impact of incarceration on women's family relationships and responsibilities in relation to their children must be considered.
- c) There are ongoing impacts on the health and wellbeing of women where they have lost their children as a result of their imprisonment. This can lead to destructive and self-sabotaging behaviours, for example, increased drug use to self-medicate, which then leads to further offending to support a drug habit.

In relation to family law proceedings, the court cannot make a fair assessment of relevant matters, including the benefit to the child of having a meaningful relationship with each parent, in circumstances where one or both parents are in prison.³ This may unfairly disadvantage mothers or female caregivers by limiting their participation in proceedings. This can protract court proceedings and contribute to significant negative outcomes for children subject to these proceedings.

11. Access to Justice Issues

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

- i. Aboriginal and Torres Strait Islander legal services need to be adequately funded and staffed to ensure that Aboriginal and Torres Strait Islander communities and individuals have appropriate access to legal education, advice and representation, particularly in remote areas where such services are often only available on court days.
- ii. Aboriginal and Torres Strait Islander legal services should have funding sufficient to ensure that services provided are at least on par with non-Indigenous, state-funded Legal Aid services.
- iii. Lawyers in such services should not have caseloads exceeding a reasonable level to ensure that clients can receive a high level of service.
- iv. Aboriginal and or Torres Strait Islander lawyers should be employed where possible.
- v. Non-legally qualified First Nations people court support and field officer staff should be retained to ensure rapport can be built and maintained with clients. However, staff without legal qualification should not be providing legal advice or representation, which can lead to clients making decisions about their criminal matters without proper legal advice.

³ See *Family Law Act 1975* (Cth), section 60CC.

- vi. Appropriate oversight should be implemented in Aboriginal and Torres Strait Islander legal services to ensure that staff are held accountable for the quality of their work and that the same level of representation which is available to all people through Legal Aid services is at least matched. This is often simply not possible due to the extremely large case load and travel requirements carried by lawyers. Funding should take into account quality of work as well as quantity.

**Please note that the discussion paper refers to the Queensland Indigenous Alcohol Diversion Program at 2.60 as being a program still available in Queensland at page 48. We understand that this program no longer exists.*

12. Police Accountability:

- i. In our view, there is considerable need for police services around Australia to implement robust training and education around Aboriginal and Torres Strait Islander disadvantage, discrimination and the historical relationship between police and Indigenous communities. This training is critical in providing context to policing of Indigenous communities and is likely to contribute to more appropriate and sophisticated policing.
- ii. This training should include education around cultural safety, cultural responsiveness and cultural competency fundamentals.

Summary

The overrepresentation of First Nations people in the criminal justice system continues to have devastating impacts on individuals and communities. The Society would like to highlight and reiterate the following key issues which, in our view, must be urgently considered:

- ii. The application and implementation of the 339 recommendations into the Royal Commission into Indigenous Deaths in Custody is 26 years overdue and continues to be urgently required.
- iii. Measures to remove mandatory sentencing around Australia. This policy contradicts fundamental principles of justice and equality and disproportionality effects First Nations people in the criminal justice system.
- iv. The provision and implementation of diversionary programs, rehabilitative programs, restorative justice initiatives as well as better application and implementation of justice reinvestment strategies is critical.
- v. Authority and remit to be placed with key First Nations leaders and Elders in all relevant communities to set up and facilitate cultural healing approaches and for these approaches to be resourced sufficiently and adequately by allied health services.
- vi. Implement programs to build awareness and knowledge for culturally responsive, culturally safe and culturally competent understandings designed, developed and delivered by First Nations people and professionals.

- vii. Increase programs including holistic healing and cultural practices to encourage returning to country initiatives for offenders as part of diversionary, preventative and rehabilitative measures for men, women and especially children.
- viii. Enquiry into the increase in incarceration of Indigenous women and the impacts of this on children and the extended family unit.
- ix. Support for measures to replicate bail and remand provisions as applied by the state of Victoria.
- x. Increase in the provision of language and communication supports including interpreters for First Nations people to ensure the demand is met adequately to enable equitable representations.

We support and endorse the submission and content from the Light Bulb Exchange (**attachment 2**).

Whilst the Society has compiled this response with the assistance of First Nations legal practitioners and legal professionals who have substantial knowledge as content experts in these areas, we have not had an opportunity to address all issues raised in the discussion paper.

The Society appreciates that there is urgency around this matter and consequently the response period has not allowed for a comprehensive review of the paper. It is possible that there are issues relating to fundamental legislative principles or unintended drafting consequences which we have not identified.

The Society would welcome the opportunity to be consulted further in this regard.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Governance Executive/RAP Coordinator, Anita Goon, by phone on (07) 3842 5833 or by email to A.Goon@qls.com.au or our Advocacy team at advocacy@qls.com.au.

Yours faithfully



Christine Smyth
President

Encl. *ATTACHMENT 1 - Mandatory sentencing laws policy position*

ATTACHMENT 2 - Light Bulb Exchange Submission to the ALRC Inquiry into Indigenous incarceration rates

Mandatory sentencing laws policy position

Queensland Law Society (QLS) has long maintained a strong stance against any form of mandatory sentencing. QLS supports the fundamental principles of Australia's legal system, including principles of procedural fairness, judicial precedent, the rule of law, and the separation of powers. We promote these concepts as central to the protection of a citizen's right to justice and equality before the law. In our view, mandatory sentencing laws are unfair and unworkable and run contrary to these fundamental tenets.

We join with other Australian legal professional bodies, including the Law Council of Australia and the Bar Association of Queensland, in voicing concern with mandatory sentencing laws.

QLS supports judicial discretion for sentencing of criminal matters in order to reflect the discrete facts of each case.

- Mandatory sentencing is an undue fetter on judicial discretion.
- Mandatory sentencing regimes undermine sentencing guidelines as set out in section 9 of the *Penalties and Sentences Act 1992* (the Act). The Act states that sentences may be imposed on an offender to an extent or in a way that is just in all the circumstances.¹ In the youth justice system, mandatory sentencing applied to children undermines the principles of the *Youth Justice Act 1992*, and the sentencing principles outlined in section 150.
- Mandatory sentencing laws are arbitrary and contravene the principles of proportionality and necessity.
- Mandatory sentencing laws have the potential to lead to serious miscarriages of justice, exacerbated by the fact that mandatory sentences, by definition, are not reviewable on appeal.
- Removing judicial discretion hinders the court's ability to bring about justice in individual cases. The Northern Territory experience of mandatory sentencing in property law offences offer the following examples of injustice where the facts of offending become irrelevant:
 - A 23 year old Indigenous woman, who was a first offender, was sentenced to 14 days' imprisonment for unlawful entry and stealing a can of beer. She was employed at the time. The magistrate observed that, but for the mandatory requirement, a non-custodial order would have been made.²
 - A 16 year old with one prior conviction received a 28 day prison sentencing for stealing a bottle of spring water.³
 - A 17 year old first offender received a 14 day prison sentence for stealing orange juice and lollies.⁴
 - A 15 year old Indigenous youth was sentenced to 20 days' imprisonment for stealing less than \$100 worth of stationery from his school. He died in custody while serving his sentence.⁵
 - A 21 year old broke into a smoko room on Christmas day and stole biscuits and cordial to the value of \$23. He received one years' imprisonment because he had two previous convictions for property offences.⁶

¹ s 9(1)(a), *Penalties and Sentences Act 1992*

² Mason, A. "Mandatory Sentencing: Implications for judicial independence", 2001, *AJHR* 21; Warner, K. "Mandatory sentencing and the role of the academic", 2007, *Criminal Law forum*, 18(3-4), 344

³ *Ibid*

⁴ *Ibid*

⁵ *Ibid*

⁶ ABC 7.30 Report, Call to review mandatory sentencing laws, 22 December 1999

- The evidence against mandatory sentencing shows there is a lack of cogent and persuasive data to demonstrate that mandatory sentences provide a deterrent effect. A review of empirical evidence by the Sentencing Advisory Council (Victoria) found that the threat of imprisonment generates a small general deterrent effect but increases in the severity of penalties, such as increasing the length of terms of imprisonment, do not produce a corresponding increase in deterrence.¹⁰ Research regarding specific deterrence shows that imprisonment has, at best, no effect on the rate of re-offending and often results in a greater rate of recidivism.¹¹
- Other jurisdictions which have followed the route of penalty increases, such as Texas in the United States, have faced tipping points where they have looked to justice reinvestment strategies to reduce spiralling incarceration costs.

QLS supports greater public education to increase public confidence in sentencing decisions.

- QLS supports increased research and education to ensure public awareness and understanding of sentencing decision processes. Current research suggests the following:
 - "The public at large is often misinformed about trends in crime and criminal justice and this lack of accurate knowledge is associated with lack of confidence in sentencing."¹²
 - Increasing criminal penalties is unlikely to result in a change to public perception.¹³ International and Australian research consistently shows that the public consider the sentences imposed in criminal matters to be too lenient.¹⁴
 - The perception of sentencing changes as additional information about a matter is provided. A study published by Professor Kate Warner from the University of Tasmania asked jurors to assess the appropriateness of the judge's sentence for the case they were involved in. The jurors, who were not informed of the sentence imposed by the judge in the case, were asked what sentence they would impose. More than half of the jurors surveyed indicated they would have imposed a more lenient sentence than the trial judge imposed. When subsequently informed of the actual sentence imposed, 90% said the judge's sentence was (very or fairly) appropriate.
- The community has limited or no access to comprehensive evidence on criminal justice sentencing and trends. Public education on these matters is paramount when seeking to enhance community confidence in the criminal justice system. The Queensland Sentencing Advisory Council, prior to its dissolution, was charged with functions that included:
 - To provide information to the community to enhance knowledge and understanding of matters relating to sentencing
 - To publish information relating to sentencing
 - To research matters relating to sentencing and publish the results of the research.

Government support for these educative functions is essential in order to promote public awareness and community understanding of sentencing processes.

For more information

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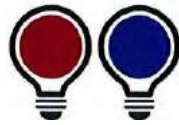
¹⁰ Sentencing Advisory Council "Does Imprisonment Deter? A Review of the Evidence", April 2011, Melbourne, p.2

¹¹ Ibid

¹² Jones, C. & Weatherburn, D. "Public Confidence in the NSW Criminal Justice System: A Survey of the NSW Public", 2010, p. 507

¹³ Roberts L., Spiranovic, C., & Indermaur, D. "A country not divided: A comparison of public punitiveness and confidence in sentencing across Australia", 2011, Australian and New Zealand Journal of Criminology, 44(3) 370-386 at 381

¹⁴ For example, Jones, C., & Weatherburn D. "Public Confidence in the NSW Criminal Justice System: A Survey of the NSW Public", 2010, Australian and New Zealand Journal of Criminology, 43: p.506-525; Robert, J., Crutcher, N., & Verbrugge, P. "Public attitudes to sentencing in Canada: Exploring recent findings", 2007, Canadian Journal of Criminology and Criminal Justice, 49(1), 75-107



THE LIGHT BULB EXCHANGE

**Submission to the Australian Law Reform Commission
Inquiry into Indigenous Incarceration Rates**

July 2017

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Executive Summary

Any reference to 'Indigenous peoples' in this report includes 'First Nations peoples'.

The ongoing social injustices faced by Indigenous Australians comprise one of the greatest tragedies and failures of successive Australian governments. While commending the efforts of many individuals and institutions over the years in addressing this issue, including the Attorney-General in calling for this inquiry, we want to highlight that this area has been consistently and severely under-resourced both in a fiscal and culturally appropriate context. Australia has been built on the blood, sweat and tears of our Indigenous peoples. Our hospitals and public infrastructure have been funded by wages owed to unpaid Indigenous workers.¹ And yet, First Nations peoples today are still not the primary agents behind many of the policies that affect them.

When any community in our country suffers, no matter the size of their population, the entire country suffers. Equally, when any community prospers, the entire nation prospers. Vibrant, healthy communities foster economic growth, meaningful democratic participation, and safe, culturally-flourishing public spaces and institutions. Indigenous communities offer the oldest and some of the richest cultural traditions in this country. The empowerment of these communities should be a priority for all Australians.

It should be noted that what constitutes 'culturally-appropriate' or 'cultural-competency' remains a point of debate. Further exploration is needed into how these methods are measured, in order to ensuring it is not in reference to Euro-centric norms. As a starting point, 'culturally-appropriate' methods need to be developed in the context of an elevated level of self-determination, and involve an appropriate education on historical policies and contemporary impacts of this history.

Accordingly, we offer the following recommendations:

Systemic Injustice

- The Australian government should commission an investigation into alternatives to punitive criminal sentences, with a specific focus on rehabilitative programs that incorporate specific cultural rights of Indigenous peoples, based upon sound knowledge of those historically discriminatory policies and practices, and with Aboriginal and Torres Strait Islander legal professionals and executives leading the work.

¹ Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006).

- 2 The Australian Government should develop sentencing guidelines to streamline practices between courts of different levels, which take into account the specific circumstance of Indigenous offending.
- 3 The Magistracy and Judiciary should be required to undertake mandatory professional training in cultural competency and multi-day cultural immersions.
- 4 State and federal criminal codes should be revised to de-criminalise non-violent offences where the underlying cause is a health or social issue, including mental health problems, cognitive disability, addiction, or homelessness. Governments should design responses that focus on rehabilitation, medical treatment and social support services, rather than punitive measures. These responses should be designed in conjunction with existing Aboriginal and Torres Strait Islander specialty services.
- 5 The Australian Government should provide and expand funding for rehabilitative, culturally appropriate alternatives to traditional courts, such as drug, alcohol and mental health courts, or diversionary programs.

Mandatory Sentencing and Justice Reinvestment

- 6 Mandatory sentencing laws should be repealed in all states and territories.
- 7 Funding should be reallocated away from correctional services and policing to provide justice reinvestment programs that target poverty, education, housing, healthcare and public amenities.
- 8 Mandatory sentencing provisions in the *Criminal Law Amendment (Home Burglary and other Offences) Act 2015* (WA) should be repealed.
- 9 State and territory governments should reallocate funding from incarceration of juveniles to proven and long-term community diversionary programs that recognise the collective cultural rights of Indigenous juveniles provided by article 3(1) of the CRC.

Circle Sentencing

- 10 State and territory governments should provide funding to implement or expand Circle Sentencing court systems in each jurisdiction, in consultation with the local Indigenous community, in order to provide appropriate, culturally sensitive, and effective alternatives to the mainstream criminal justice process.
- 11 Aboriginal and Torres Strait Islander peoples, especially Elders, should take the central position in designing, implementing and monitoring these programs.
- 12 All alternative sentencing programs should include fair, impartial and appropriately

informed third-party monitoring and evaluation, which should be led by Indigenous peoples. Monitoring and evaluation systems should include accessible and anonymous feedback opportunities for participants.

- 13 All staff involved with the design, implementation and monitoring of alternative sentencing programs should be required to undertake adequate cultural competency training.

Consultation and Self-Determination

- 14 Policy decisions should be made in partnership with Aboriginal and Torres Strait Islander organisations and legal services, with a human rights-based approach.
- 15 The Australian government should amend the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include a recognition of the relevance of UNDRIP, and review existing legislation, policies and programs to ensure conformity with the principles of UNDRIP.
- 16 In relation to the right of self-determination, a justice reinvestment approach to address the social factors which influence crime may be beneficial if there are clear aims and balanced involvement from government, Aboriginal and Torres Strait experts (including legal professionals) and the community.
- 17 State and federal governments should provide more opportunities for Indigenous individuals and communities to participate in decision-making, including the planning, implementation and evaluation of Indigenous programs. Governments should also continue to progress consultations regarding constitutional recognition and a treaty agreement with Indigenous communities.
- 18 State and federal governments should promote maintenance and knowledge of Indigenous cultures, while also supporting Indigenous education programs among the non-Indigenous population as well.
- 19 Governments should increase funding and investment in local community-based employment opportunities and training programs, and support Aboriginal and Torres Strait Islander tertiary students, in order to increase the number of Aboriginal and Torres Strait Islander professionals.
- 20 Financial support should be given to Aboriginal and Torres Strait Islander peak professional bodies to support the work they are already doing. Aboriginal and Torres Strait Islander peoples are the highest consumers of justice services, which makes justice reinvestment a sound fiscal investment. Funding should also be provided for an independent monitoring body that includes Aboriginal and Torres Strait Islander legal professionals.

1.0 SYSTEMIC INJUSTICE

Following the Recommendations of the Royal Commission into Aboriginal Deaths in Custody handed down in 1991 all state and territory governments in Australia claimed to be implementing the recommendations of the inquiry. Since that time, however, both the number of Indigenous deaths in custody, and the number of incarcerated Indigenous people has continued to rise. At that time, Indigenous Australians were eight times more likely to be incarcerated than non-Indigenous Australians.² Today it is almost 15 times more likely.³ Critically, this increase in Indigenous incarceration exceeds the increase in the crime rate. There must be other factors at play to explain these disproportionately increasing figures.⁴

The disproportionate rate of Indigenous incarceration is a national tragedy. A review of existing literature and studies show that certain aspects of the criminal justice system are tilted against Australia's Indigenous peoples. This section will explore issues including the over-policing of Indigenous populations and the criminalisation of health problems, arguing that these policies and practices have contributed to the disproportionate and growing rate of Indigenous incarceration in Australia.

1

The Australian government should commission an investigation into alternatives to punitive criminal sentences, with a specific focus on rehabilitative programs that incorporate specific cultural rights of Indigenous peoples, based upon sound knowledge of those historically discriminatory policies and practices, and with Aboriginal and Torres Strait Islander legal professionals and executives leading the work.

Indigenous peoples have a highly problematic relationship with the criminal justice system. By addressing the key drivers of over policing and criminalisation of health and social issues the disproportionate rate of Indigenous incarceration can begin to be addressed. Currently there are tilts in the criminal justice system which disproportionately affect Indigenous peoples as they are more likely to be targeted by the police, more likely to be exposed to the systemic bias of the criminal justice system. Increasingly incarceration is being used as a method to treat

² Stephen Gray, 'Scoring the intervention: fail grades on closing the gap, human rights' (2016) 8(23) *Indigenous Law Bulletin* 10, 12-13.

³ *Ibid.*

⁴ Patrick Dodson, '25 Years on from royal commission into aboriginal deaths in custody recommendations' (2016) 8(23) *Indigenous Law Bulletin* 24, 24-25.

health and social problems. Moreover, this has left indigenous people who interact with the criminal justice system feeling hopeless. Control and self-determination need to be restored.

While the rates of Indigenous incarceration have worsened over the last 26 years, much thought and effort has gone into finding ways to reverse this disturbing trend. Shifting the focus towards initiatives that address the key drivers of Indigenous incarceration should form part of a new approach. Part of the solution to reduce over policing and high rates of incarceration is to focus of rehabilitation rather than criminalisation of certain issues. Target intervention initiatives are one such way in which we can make inroads into reducing Indigenous incarceration rates. These initiatives need to place Aboriginal and Torres Strait Islander peoples in the driving seat at the strategic policy and development level, not just in service delivery.

Systemic bias in the justice system

There is a persistent feeling among Indigenous communities and legal experts alike that police treat Indigenous people differently. Indigenous legal experts agree.⁵ These policies increase the likelihood that Indigenous peoples will be exposed to the criminal justice system.⁶ Contact with the criminal justice system shouldn't be 'normalised' for any population.⁷ If incarceration is intended to deter crime, then this normalisation as a 'fact of life' is a clear failure of this objective and indicates a weakness in the justice system.⁸ Empirical research has shown that police are less likely to caution Indigenous peoples and are more likely to refer them directly to court.⁹ Offences that do not pose a threat to public safety should not be dealt with in this way. This is one opportunity to reduce the normalisation of the interaction with mainstream systems, including the criminal justice system that Indigenous people report. Further, outcomes of the criminal justice system may be skewed by evaluative and reporting methods that are not culturally appropriate or sensitive to issues such as gratuitous concurrence.

It should be noted the concept of what is 'public safety' should be explored. The justice system and police comprise non-Indigenous peoples making calls on Indigenous behaviour that may be misunderstood as a threat to public safety. Adequate police training that goes beyond cultural liaison officers should be a requirement for all police officers.

⁵ Interview with Linda Ryle LLB, President Indigenous Lawyers Association (Telephone Interview, 18 August 2017).

⁶ The Senate Finance and Public Administration References Committee, 'Aboriginal and Torres Strait Islander experience of law enforcement and justice services' October 2016, 70.

⁷ House Standing Committee on Aboriginal and Torres Strait Islander Affairs, 'Doing time – Time for doing: Indigenous youth in the criminal justice system. Canberra: Parliament of Australia' (2011).

⁸ Ibid.

⁹ Snowball, L, 'Diversion of Indigenous juvenile offenders' (2008) AIC, Canberra.

Institutional racism and systematic bias may be difficult to demonstrate, yet figures show that Indigenous peoples are more likely to be imprisoned when compared to non-Indigenous people.¹⁰ The Federal Court acknowledged this when deciding on police tactics after the Palm Island riots.¹¹ A consequence of this bias is the feeling of hopelessness that Indigenous peoples have when they interact with the criminal justice system.¹² In interviews with prisoners, parolees, individuals pre-trial and during trial, Indigenous respondents voiced an alarming sense of hopelessness which pervades their interactions with the criminal justice system.¹³ While causation can be difficult to firmly establish, support for this argument can be found in the disproportionate rate of Indigenous incarceration as opposed to non-Indigenous incarceration.

Our justice system shouldn't leave those who interact with it feeling hopeless. We need to fundamentally re-examine the manner in which the criminal justice system operates – a move to a holistic approach could be beneficial to reducing the rates of indigenous incarceration.

... some of the black inmates just won't ask for help. Because they're used to not getting it.

Custodial manager, rural prison

I've given up on trying to get some legal action while I'm in jail. It's just too hard. It just drains you of all that get up and go.

Dean, sentenced prisoner on protection, 35+ years, Aboriginal

By the time it all gets into court and everything they just want to get it over and done with. So whether they're guilty or not, they'll go, 'Guilty your Honour.' just to get it over and done with.

Langdon, sentenced inmate, maximum security, 35+ years, Aboriginal

Sentencing disparities

A number of studies have investigated the disparity that exists in sentencing courts for an Indigenous offender. The outcomes vary depending on the Court. At a state level, higher courts (i.e. District and Supreme) were determined to have no significant level of difference between Indigenous peoples and non-indigenous offenders in receiving custodial sentences.¹⁴ The

¹⁰ *Wotton v Queensland (No 5)* [2016] FCA 1457.

¹¹ Ibid.

¹² Anne Grunseit, Suzie Forell & Emily McCarron, 'Taking Justice Into Custody: The Legal Needs of Prisoners' (2008) *Law and Justice Foundation of New South Wales* 30, 140-142.

¹³ Ibid.

¹⁴ Catherine Bond and Samantha Jefferies, 'Differential Sentencing of Indigenous Offenders: What does the research tell us?' (2013) 8(7) *Indigenous Law Bulletin* 15, 17-18.

evidence indicates that Higher Courts were likely to take into account an offender's Indigenous heritage and on this basis, a greater degree of leniency was afforded to them – for offences committed under similar circumstances.¹⁵

The same cannot be said for lower courts. Studies of lower courts suggest that imprisonment is a more likely outcome for Indigenous people who have offended than for non-Indigenous people. A contributing factor to this discrepancy is a lack of consideration of gratuitous concurrence and the misunderstanding this causes in the provision of evidence.¹⁶ Further investigation is needed to fully understand the contributing factors to higher sentencing rates.

2

The Australian Government should develop sentencing guidelines to streamline practices between courts of different levels, which take into account the specific circumstance of Indigenous offending.

3

The Magistracy and Judiciary should be required to undertake mandatory professional training in cultural competency and multi-day cultural immersions.

De-criminalisation of health and social issues

The criminal justice system has proven itself capable of dealing with offenders who pose a threat to public safety. It is not designed to act as the front line of treatment for issues of mental health and addiction. The increasing criminalization of health and social issues drives incarceration rates higher, for communities that have higher incidents of health and social issues it will inevitably lead to higher rates of incarceration in these populations.

Particular health issues drive imprisonment rates, notably mental health conditions, alcohol and other drug use, substance abuse disorders and cognitive disabilities. The manner in which

¹⁵ Ibid.

¹⁶ Interview with Linda Ryle LLB, President Indigenous Lawyers Association (Telephone Interview, 18 August 2017).

we deal with these issues can only be characterised as an overreaction.¹⁷ Addiction can act as an encouragement to theft, robbery and violent crimes. These offences can be serious and should be treated accordingly, but rates of recidivism demonstrate that the criminal justice response doesn't seem to be working. The underlying causative behaviour should be addressed rather than merely seeking to punish the offending behaviour. The response to-date has not adequately provided for First Nations involvement in the development solutions.

A Queensland examination of mental illness in incarcerated Indigenous peoples reveal shocking figures – 73% of Indigenous men and 86% of Indigenous women have some form of mental illness¹⁸ – when compared to non-indigenous (20%).¹⁹ While just one example this statistic is representative of nation figures. It provides evidence that currently the criminal justice system is being used to deal with problems which would be more appropriately dealt with by health care services. The treatment of health issues by the criminal justice system is just one more example of over policing that plagues Australia's indigenous peoples.

4

State and federal criminal codes should be revised to de-criminalise non-violent offences where the underlying cause is a health or social issue, including mental health problems, cognitive disability, addiction, or homelessness. Governments should design responses that focus on rehabilitation, medical treatment and social support services, rather than punitive measures. These responses should be designed in conjunction with existing Aboriginal and Torres Strait Islander specialty services.

Case study: Aboriginal Justice Program in Canada

A promising approach to reduce recidivism rates is to provide greater support for self-determination. The Canadian Aboriginal Justice Strategy (AJS) is a flexible program which allows communities to tailor initiatives to their own needs as long as they meet a set criteria and are rigorously analysed. The majority of these programs are diversionary in nature (about 80%).²⁰ The community based programs emerged as an alternative to the mainstream justice system and encourage resolution of conflicts in a culturally sensitive manner.

¹⁷ Ibid.

¹⁸ Anna Treloar, 'Mental health illness rife in prison' (August 2012) 20(2) *Australian Nursing Journal* 34, 35.

¹⁹ Edward Heffernan, 'Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons' (2012) 197(1) *Medical Journal of Australia* 37.

²⁰ Evaluation Division, 'Aboriginal Justice Strategy evaluation: final report. Office of Strategic Planning and Performance Management, Department of Justice, Canada, www.justice.gc.ca/eng/rp-pr/cp-pm/eval/rep-rap/11/ajs-sja/ajs-sja.pdf. Accessed March 2017.

Vehicles through which this has been achieved include the development of community Elders' advisory panels and circle sentencing initiatives.²¹ Over 8 years, the Canadian Department of Justice evaluated the re-offending patterns of 3361 participants who took part in the AJS initiatives, compared to 885 who participated in a non-AJS initiative. The study found that those who participated in the AJS initiatives were half as likely to re-offend compared to the control group.²²

The Canadian example clearly demonstrates the impact that specialist problem solving courts, programs and initiatives – such as drug, alcohol and mental health courts – can have on reducing Indigenous incarceration rates. Recidivism rates of Indigenous peoples demonstrate that the current policing strategy is flawed.²³ Indigenous male prisoners are 1.5 times as likely to have previously been incarcerated as non-Indigenous prisoners.²⁴ The disparity in reoffending is just as evident in women, with 67 per cent of Indigenous women having previously served time in prison compared to 36 per cent of non-Indigenous women.²⁵

Programs which are used as an alternative to mainstream courts can identify vulnerable people for whom typical responses of the criminal justice system may be ineffective or inappropriate. These programs aim at addressing the underlining problem for the offending behaviour, rather than punishing the symptoms. For these programs to be effective, however, Indigenous specific voices need to be centred at the development level. Including 'black-faces' on the Court, without truly engaging with their views, will not be enough.

Australian examples

In Australia there are a few existing programs which are aimed at a more holistic and therapeutic approach to treat offending behaviour. These programs provide treatment for residents to overcome the causes that have led to (re)offending, which include addiction, intergenerational and historical traumas, grief and loss.²⁶ Red Dust is one such program, which aims to improve the mental and physical well-being of Indigenous peoples. These programs aim to treat these underlying drivers of offending behaviour by drawing on the strength, wisdom and spirit of Aboriginal ancestors, Elders and the land to heal the spirit of Aboriginal people and strengthening their connections to family, community, land and culture.²⁷ They provide hope for those individuals who feel left out in the cold by the justice system.

²¹ Ibid.

²² Ibid.

²³ Andrew Day, 'Reducing the Risk of Re-Offending in Australian Indigenous Offenders: What Works for Whom?' (2003) 37(2) *Journal of Offender Rehabilitation* 1, 10.

²⁴ Lorana Bartels, 'Sentencing of Indigenous Women', (2012) *Indigenous Justice Clearing House*, Brief 14.

²⁵ Ibid.

²⁶ Sophie Cull, 'The road to healing: identity and the over-representation of indigenous men in the Australian criminal justice system' (2009) *University of New South Wales*.

²⁷ Ibid 37.

For these varying programs to be effective, the driving voices behind the organisations need to be Indigenous. We currently have specialised courts for specific issues, such as Drug Courts, which involve experts in the relevant field. Courts and programs offering Indigenous-specific alternatives should similarly ensure that Indigenous peoples and legal professionals inform the content and implementation of these alternatives, rather than becoming ‘whitewashed’ at the decision making level.²⁸

5

The Australian Government should provide and expand funding for rehabilitative, culturally appropriate alternatives to traditional courts, such as drug, alcohol and mental health courts, or diversionary programs.

²⁸ Interview with Linda Ryle LLB, President Indigenous Lawyers Association (Telephone Interview, 18 August 2017).

2.0 MANDATORY SENTENCING

Mandatory sentencing in Australia is a product of the 'tough on crime' attitude adopted in the mid 1990's across various state parliaments. It is an ineffective form of punishment because it encourages recidivism, fails to rehabilitate offenders, and removes judicial discretion. Statistics show that mandatory sentences have increased the incarceration rates of Indigenous populations to a disproportionate extent. This section will highlight the weakness of mandatory sentencing, with a focus on the regimes adopted in Western Australia and the Northern Territory. This section endorses community-based solutions such as justice reinvestment, which include First Nations people and experts, in order to tackle the underlying causes behind Indigenous incarceration.

6

Mandatory sentencing laws should be repealed in all states and territories.

In WA, section 46(3) of the *Young Offenders Act 1994* contains special provisions relating to repeat offenders, defined as persons who have served at least two previous periods of detention and who have a high likelihood of re-offending within a short period of release from detention.²⁹ In the NT, sections 53AH-AM of the *Juvenile Justice Act 1983* (NT) provide for a 'punitive work order' as a sentencing option with the minister determining the sort of work which can be designated as part of a punitive work order.³⁰

In both WA and NT, repeat offenders are targeted. Sections 53AE-AG of the *Juvenile Justice Act 1983* (NT) provide mandatory imprisonment of young people found guilty of more than one property offence.³¹ These provisions apply regardless of how minor the second property offence. s 401(4) of the Criminal Code (WA) provide mandatory sentences for repeat property offences ('three strikes and you're in' legislation).³²

Mandatory sentences are ineffective because of their high costs and disproportionate effect on Indigenous populations. On 30 June 2016, the rate of imprisonment for Aboriginal and Torres Strait Islander peoples (prisoners per 100,000 Aboriginal and Torres Strait Islander

²⁹ *Young Offenders Act 1994* (WA) s 46(3).

³⁰ *Juvenile Justice Act 1983* (NT) ss 53AH-AM.

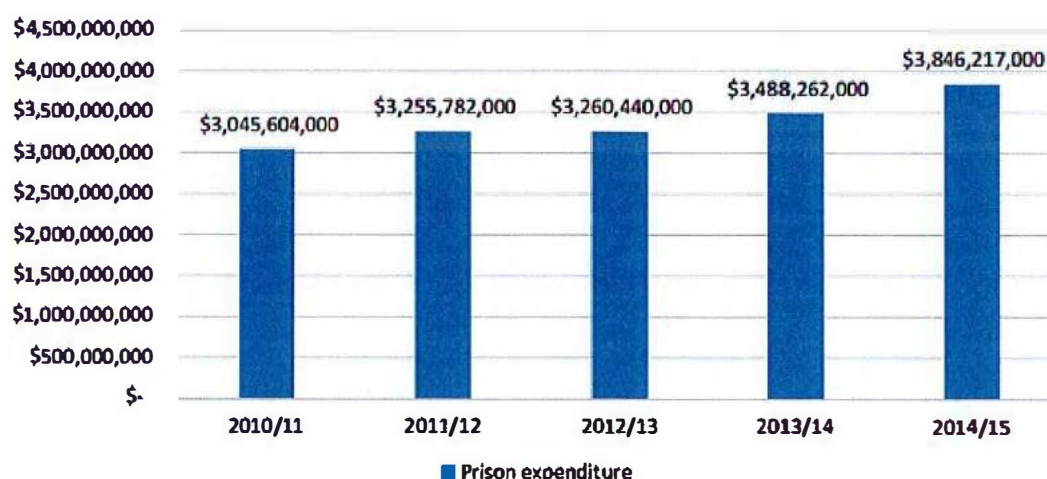
³¹ *Juvenile Justice Act 1983* (NT) ss 53 AE-AG.

³² *Criminal Code Act Compilation Act 1913* (WA) s 401(4).

population) increased from 2,253 at 30 June 2015 to 2,346.³³ However, non-Indigenous imprisonment rate increased from 146 to 154 prisoners per 100,000 non-Indigenous population. The highest rate was in Western Australia (3,997), followed by the Northern Territory (2,914) per 100,000 Aboriginal and Torres Strait Islander population.³⁴

Additionally, mandatory sentences are highly costly. The diagram below depicts the aggregate cost of imprisonment in Australia. Note that the cost of imprisonment in Australia continues to rise, up 26 per cent from \$3 billion in 2010/11 to \$3.8 billion in 2014/15.³⁵

Australia's total net recurrent prison expenditure, 2010/11 to 2014/15



Sources: Productivity Commission (2016) *Report on Government Services 2016, Corrective services, Attachment table 8A.6, Expenditure of prisons and community corrections, 2014-15*, Productivity Commission, Canberra.

It has been observed that mandatory sentences are a large contributor to these increased rates of incarceration. The Chief Magistrate of the Northern Territory provided evidence to the Legal and Constitutional Affairs References Committee that incarceration rates increased as a result of the imposition of mandatory sentencing in the Northern Territory from 1997 to 2001.³⁶ He noted that the imprisonment rate was 50 per cent higher during this period than following

³³ Australian Bureau of Statistics, *Prisoners In Australia 2016*, available at <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Imprisonment%20rates~12>>.

³⁴ Ibid.

³⁵ Australian Institute of Criminology, *Chapter 7: Criminal Justice Resource*, available at <http://www.aic.gov.au/publications/current%20series/facts/1-20/2012/7_resources.html>.

³⁶ Parliament of Australia, *The drivers behind the growth in the Australian imprisonment rate*, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/c02>.

repeal of the laws. Non-custodial orders such as home-detention and community work were almost unused for property offences during the mandatory sentencing era.³⁷

However, mandatory sentences were reintroduced in 2013 as part of the 'tough on crime' regime for serious assaults and repeat offenders. Once again, the Chief Magistrate presented evidence that these changes led to a significant increase in imprisonment, which disproportionately affected Indigenous populations. The legislation discussed here is still in force today.

Repealing mandatory sentencing laws

- Section 46(3) of the *Young Offenders Act* 1994
- Sections 53AH-AM of the *Juvenile Justice Act* 1983 (NT)
- Sections 53AE-AG of the *Juvenile Justice Act* 1983 (NT)
- Sections 401(4) of the *Criminal Code* 1913 (WA)

The relevant acts should be repealed on the basis that a) mandatory sentencing is inconsistent with the principle of proportionality, and b) it is inconsistent with Australia's international human rights obligations. This will be discussed further in section 4.0 below.

The key behind mandatory sentences is the removal of judicial discretion. This is at odds with the principle of proportionality, which requires that the penalty imposed be proportional to the offence in question. The High Court of Australia has observed:

*...there are many conflicting and contradictory elements which bear upon sentencing an offender. Attributing a particular weight to some factors, while leaving the significance of all other factors substantially unaltered, may be quite wrong... [T]he task of the sentence is to take account of all of the relevant factors and to arrive at a single result which takes due account of them all.*³⁸

An illustration of this is when Jamie Wurramara, a 22-year-old adult, was sentenced to 12 months in prison for walking into an open shed with his friends to eat biscuits due to hunger. The presiding judge expressed deep sympathies for the defendant, but was bound by statute to impose the heavy punishment.³⁹ This encroaches upon the independence of the judiciary and is repugnant to the notion of fairness in justice.

³⁷ See also, Arie Freiberg, 'Explaining Increases in Imprisonment Rates' (Paper presented at 3rd National Outlook Symposium on Crime in Australia, Mapping the Boundaries of Australia's Criminal Justice System, Canberra, 22-23 March 1998).

³⁸ *Wong v R* (2001) 207 CLR 584, at [611] per Gaudron, Gummow, and Hayne JJ.

³⁹ Creative Spirits, *Mandatory Sentencing*, available at <<https://www.creativespirits.info/aboriginalculture/law/mandatory-sentencing#axzz4jMeXqq6g>>.

Justice reinvestment as an alternative to mandatory sentencing

Justice reinvestment is centred around the development of policies to tackle the drivers of crime in specific communities. In other words, solutions are tailored to the local issues which cause high incarceration rates. These issues may consist of poor educational background, unemployment or underemployment, homelessness, or merely changes in justice policies. By tackling these issues, justice reinvestment isn't just about individual offenders, but also about providing a benefit to the wider community that offenders exist in. The core principle of justice reinvestment is that these facilities are funded by a reallocation of money which would otherwise be spent on correctional services.

7

Funding should be reallocated away from correctional services and policing to provide justice reinvestment programs that target poverty, education, housing, healthcare and public amenities.

There are four steps necessary for the implementation of justice reinvestment: demographic/justice mapping and analysis of data; development of options; implementation; and evaluation.⁴⁰ The first step is obtaining justice data which is extrapolated by cross-referencing against indicators of gaps in available services to help identify the underlying causes of crime in these communities.⁴¹ The second step in the process is choosing the relevant option which would reduce incarceration.⁴² Programs and services are generally focused on poverty, education, housing, healthcare and public amenities. The third step is the implementation of the devised program into the respective communities. This step should be undertaken with the advice of Indigenous Elders along with the cooperation, support and resourcing (as opposed to control) of all levels of government.

It is important to note that a one-size-fits-all approach is not appropriate. Justice reinvestment should be based on the specific drivers of crime and the 'community assets' of that community. Finally, the last step is evaluating the progress of the implemented program. This step is crucial to the process because the nature of justice reinvestment is dynamic. The services provided should be specific to target the main drivers of crime, and should recognise that these can shift overtime. Evaluations should also be undertaken to determine the sustainability of the program and its effectiveness.

⁴⁰ Commonwealth, Senate Legal and Constitutional References Committee, *Value of a justice reinvestment approach to criminal justice in Australia* (2013) 45.

⁴¹ *Ibid*, 46.

⁴² *Ibid*.

Justice reinvestment is not without challenges. Implementation of justice reinvestment in Australia requires multi-partisan support from all levels of government and the approval of a majority of parties within each level of government. Multi-partisan support is necessary to ensure long term commitment to the implementation of programs and services.⁴³ In the past, funding of programs has reflected the election cycle, however, for a justice reinvestment approach to achieve its long-term goals successive governments will need to commit to a continuous funding model.

Another challenge posed is that justice reinvestment may be viewed as 'soft on crime'. The 'tough on crime' attitude was the reason why mandatory sentences were introduced in the first place. A shift in attitude is needed regarding low level crime, especially non-violent crime. Tough punishments affect vulnerable populations, and do not necessarily prevent recidivism. It is recommended that greater expenditure be funnelled to commissioned investigations, and public awareness campaigns to highlight the detriment of harsh punishments.

The benefits of justice reinvestment greatly outweigh these potential challenges. This type of community-based solution should be preferred over punitive punishments like mandatory sentencing because of its ineffectiveness in cost and reducing rates of crime. Targeting the root of community problems benefits offenders and the community alike.

⁴³ Ibid, 56.

3.0 DEALING WITH CHILD OFFENDERS

The introduction of mandatory sentencing laws in the Northern Territory and Western Australia raised concerns of potential breaches under the *Convention of the Rights of the Child* (CRC) with respect to Indigenous children.⁴⁴ In 1999, the Senate Legal and Constitutional References Committee addressed the issue in the Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 and concluded that, in their view, the relevant provisions breached many parts of the CRC.⁴⁵ The Northern Territory laws were highlighted as being particularly severe.

The CRC, signed by Australia in December 1990, is implemented in domestic legislation only as a 'international instrument'.⁴⁶ Australia does not propose to implement the CRC by enacting the Convention as domestic law; however, policies from the convention have informed both the Northern Territory⁴⁷ and Western Australian⁴⁸ mandatory sentencing statutes.⁴⁹ The Committee expressed concern at the enactment of these provisions, predicting that it would lead to a high rate of incarceration for Indigenous juveniles.⁵⁰

Convention on the Rights of the Child

Given our scope, only four of the most relevant articles under the CRC are considered here.

Art 3(1) – The best interests of the child

The United Nations Committee on the Rights of the Child established that the 'best interests principle' in article 3(1) applies to children who are in conflict with the criminal justice system as an accused, by ensuring that 'traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives'.⁵¹ In particular, the Committee specifies Indigenous children as possessing 'collective cultural rights'⁵² that require special consideration.

⁴⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UNTS, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 8 June 2017]

⁴⁵ Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill* (1999).

⁴⁶ *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46MB(6)(v).

⁴⁷ *Criminal Code Act 2006* (NT).

⁴⁸ *Working with Children (Criminal Record Checking) Act 2004* (WA).

⁴⁹ L. M. Bromfield and P. J. Holzer (2008) *A national approach for child protection: Project report*, Australian Institute of Family Studies: National Child Protection Clearinghouse, available at <<https://aifs.gov.au/cfca/sites/default/files/publication-documents/cdsmac.pdf>>.

⁵⁰ UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Australia*, 21 October 1997, CRC/C/15/Add.79.

⁵¹ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013)* on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14.

⁵² *Ibid.*

In light of this provision, the North Australian Aboriginal Legal Aid Service (NAALAS) raised concerns about the overrepresentation of Indigenous children in Australian prisons.⁵³ Despite the modern approach to sentencing for juveniles, which that recognises early, repeated detention is not in the best interests of children, Indigenous children today constitute 75% of juvenile detainees in the Northern Territory following the introduction of mandatory sentencing laws. NAALAS claims that the enforced detention can be harmful for children later reintegrating into society. Likewise, the National Children's and Youth Law organisation claims that mandatory sentencing regimes do not permit judicial officers to take account of a child's best interests when sentencing.

Both these concerns were rebutted by the Senate Committee on the basis of broad definitions and indistinguishable causation. The Committee emphasised that: a) the best interests of the child are to be only one primary consideration, rather than the sole primary consideration; b) there is no evidence that high incarceration rates are causatively related to mandatory sentences, though a correlation may be established; and c) mandatory sentencing limits, but does not remove, the judicial officer's capacity to sentence coherently with the child's best interests. However, the Committee conceded that mandatory sentencing does 'nothing to address the underlying causes of offending,' and found that 'many' provisions of the CRC have been breached by legislation, particularly in the Northern Territory.⁵⁴

Art 37(b) – Detention or imprisonment a measure of last resort

According to the Joint Standing Committee on Treaties, 'minimum sentences' can contravene Article 37(b) of the CRC if arbitrary deprivation of liberty and detention is used other than as a last resort only. The inability of Courts to take into account a child's personal circumstances under the mandatory sentencing laws raised concerns of inquirers. However, Dr Robert Fitzgerald, representing the Western Australian Government, contended that the Court is able to place the young offender on a conditional release. It is only after failing to comply with the conditions that the children are subject to the 12-month detention. Nonetheless, the Senate Committee considered the mandatory 12-month-detention to contravene the provision in its excessiveness. The Committee recommended, following the recommendations of the Joint Standing Committee, that the period be shortened to a more justifiable 28 days instead, but the suggestion was ignored by the Australian Government.⁵⁵

Art 40.2(b) – Right to competent tribunal and review

The mandatory sentencing rules regarding the Northern Territory's 'third strike offenders' and Western Australia's 'three strike laws' are incompatible with the CRC due to denial of any

⁵³ Senate Legal and Constitutional References Committee, above n 41, 5.60.

⁵⁴ Ibid 5.61, 5.77, 5.78.

⁵⁵ Ibid 5.57, 5.67.

opportunity to review or appeal decisions.⁵⁶ The legislation sentences juveniles to a minimum of a 28-day period of detention for second convictions, with penalties escalating for subsequent offences.

Art 40(4) – Range of sentencing options required

In the report, the Senate Committee recommended diversionary programs in small communities to be provided with adequate resources and funding, especially relative to that allocated to incarceration. The Committee encouraged culturally appropriate, cost effective services that focus on rehabilitating Indigenous youth, especially those overcoming addictions.⁵⁷ It follows that the Committee agreed with the Human Rights Law Commission's assertion that the laws violate the 'principle of proportionality' under article 40(4) which requires 'facts... and circumstances' of the offender to be considered in sentencing.⁵⁸ The Attorney-General through SCAG was encouraged to persuade Western Australia and the Northern Territory to repeal the mandatory sentencing laws. Unfortunately, the recommendation was not followed.

Repealing the Legislation

Following further criticism from the UN Committee Against Torture in 2000,⁵⁹ the Northern Territory legislation was repealed in 2001. The action was praised by Dr Jonas, Aboriginal and Social Justice Commissioner, as the 'beginning of a new relationship with Indigenous people in the Territory'.⁶⁰ However, Western Australia remains the only state in Australia that imposes mandatory terms of imprisonment for property offences. In the past, the Attorney-General stated having no intention of repealing the legislation, despite concerns of its impact on Indigenous peoples. Rather, the Attorney-General sought to distinguish the law from the Northern Territory legislation, by asserting that it only related to *serious* offences of burglary.⁶¹

In 2014, the Legislative Assembly of Western Australia passed the *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* to extend the state's mandatory sentencing regime, which contains similar contraventions to the CRC as the Northern Territory legislation that resulted in its repeal.⁶²

⁵⁶ Ibid 5.80.

⁵⁷ Ibid 5.82 – 5.85.

⁵⁸ Ibid 5.71.

⁵⁹ UN Committee Against Torture (CAT), *Report of the UN Committee against Torture: Twenty-fifth Session* (13-24 November 2000) and *Twenty-sixth Session* (30 April-18 May 2001), 26 October 2001, A/56/44.

⁶⁰ Australian Human Rights Commission, *Commission welcomes repeal of mandatory sentencing laws in NT* (October 2001) <<https://www.humanrights.gov.au/news/media-releases/commission-welcomes-repeal-mandatory-sentencing-laws-nt>>.

⁶¹ Australia Law Reform Commission, *Chapter 4: Laws mandating minimum terms of imprisonment ('mandatory sentencing') and Indigenous people*, Social Justice Report (2001).

⁶² *Criminal Law Amendment (Home Burglary and Other Offences) Bill 2014* (WA) ss4(a)(ii) and 4(b)(ii).

8

Mandatory sentencing provisions in the *Criminal Law Amendment (Home Burglary and other Offences) Act 2015* (WA) should be repealed.

Community diversionary programs

Highlighting the rights protected in the CRC, the Human Rights and Equal Opportunity Commission created a list of nine 'Best practice principles' for juvenile diversion – especially for Indigenous youth – to inform all diversionary programs in Australia.⁶³

- 1 Viable alternatives to detention - A wide range of easily-accessible, culturally appropriate and adequately resourced alternatives to detention.
- 2 Availability – Options should be available at every stage of the criminal justice process, irrespective of severity or recurrence of the option.
- 3 Criteria – Agencies are bound by established criteria informing non-custodial measures.
- 4 Training – Law enforcement must be trained to meet the needs of juveniles.
- 5 Consent and participation – Consent from both child and their parents along with information.
- 6 Procedural safeguards – Respect procedural safeguards under international obligations, particularly CROC.
- 7 Human rights safeguards – Respect further provisions under CRC that expresses a child's fundamental human rights.
- 8 Complaints and review mechanisms – Ability to make a complaint about the referral process and autonomy of the diversionary process.
- 9 Monitoring – Provide independent monitoring of the scheme, including collection and analysis of statistical data.
- 10 Self-determination – The right for Indigenous peoples to self-determine culturally appropriate justice in criminal contexts.

⁶³ Australia Law Reform Commission, *Best practice principles for the diversion of juvenile offenders*, Human Rights Brief No. 5 (2001).

In regards to self-determination, it is important that the approach taken is non-tokenistic. Rather than 'checking the box' by employing Indigenous peoples at service levels, technically capable, tertiary trained First Nations executives should be included at the decision-making stage. Acknowledging that this may not be a measure that can be enacted overnight, it should, for that very reason, be included as a key objective in these policies, with specific measures outlined for its achievement.

Using to these guidelines, the HREOC Commission investigated various community-based mechanisms for Indigenous people. They found that both the Ngunga court (South Australia) and circle sentencing (New South Wales) were among the most successful initiatives.

In South Australia's Ngunga court, Aboriginal traditional customary law is used to sentence Aboriginal offenders within the framework of existing legislation. Within the courtroom, the Elder is able to advise the magistrate about sanctions. Prior to the introduction of the Ngunga court system, court attendance for Indigenous offenders was below 50%. Since its commencement in 1999, it has risen 80%, suggesting a viable alternative for Indigenous children opting for alternative sentencing options. Replicating its successful model, Queensland has now implemented a Murri court in Brisbane.

In a similar vein, circle sentencing consists of a circle of relevant people, including a magistrate, the offender, the victim, family members, and Aboriginal Elders. In an informal setting, the circle attempts to achieve a consensus on the sentence, review the progress of the offender or status of the sentence, and establish a support group for the offender that reports to the Community Justice Group, who in turn reports to the magistrate. The Commission endorsed circle sentencing for its exceptional recidivism rate, where only one person committed further offences in 1999. A more recent 2008 study, however, concluded that circle sentencing may not have any short-term impact on reoffending. Nevertheless, the study acknowledges that the potential to 'strengthen informal social controls that exist in Aboriginal communities... may have a crime value that cannot be quantified.'⁶⁴

9

State and territory governments should reallocate funding from the incarceration of juveniles to community diversionary programs that recognise the collective cultural rights of Indigenous juveniles provided by article 3(1) of the CRC.

⁶⁴ Jacqueline Fitzgerald, 'Does circle sentencing reduce Aboriginal offending?' (2008) *BOCSAR NSW Crime and Justice Bulletins*, 11.

4.0 CIRCLE SENTENCING

In 1999, the NSW Aboriginal Justice Advisory Council (AJAC) adapted the Canadian circle sentencing model so that it was suitable for the needs of Indigenous peoples in New South Wales (NSW). The AJAC advocated an alternative model of sentencing that could actively engage the Indigenous community in the sentencing process, reduce the number of people coming into contact with the criminal justice system, and involve victims of crime in the judicial process.

The flexible framework of the model was designed to reflect the diversity of Indigenous communities in NSW and to allow for local community control of the process. Specifically, the model was designed to allow local Indigenous communities to adapt processes to meet their own local cultures and experiences.⁶⁵ This circle sentencing model was introduced on a trial basis in Nowra, NSW in 2002. Since then, it has been implemented in ten NSW locations which have cumulatively decided on more than 500 sentences in this format.⁶⁶

In 2008, a review of the Circle Sentencing Program was conducted by the Cultural and Indigenous Centre Australia (CICA). Upon CICA's recommendations, the NSW government adopted a number of improvements including intervention plans which help offenders tackle their behaviour. All Australian jurisdictions, with the exception of Tasmania, now operate an Indigenous sentencing court of some type. The Victorian Koori Court has considerable similarities to circle sentencing in NSW.⁶⁷

This is a radical justice scheme that brings Australian Indigenous offenders face to face with victims in the presence of legal counsel, the Magistrate and respected Indigenous elders in a formal judicial environment. This regime aims to allow Indigenous Elders to provide advice on sentencing with the objective of establishing a rehabilitation plan to bring the offender back into the community with the following objectives:

- empower Australian Indigenous communities in the sentencing process by reducing the barriers that currently exist between courts and Australian Indigenous Peoples;
- provide more relevant and meaningful sentencing options for Australian Indigenous defendants, including more effective community support for them when serving their sentences;

⁶⁵ Potas, I.L., et al, *Circle sentencing in New South Wales: a review and evaluation*. Sydney, Australia: Judicial Commission of New South Wales. (8 Austl. Indigenous L. Rep. 2003-2004, 73, 75).

⁶⁶ The Circle Sentencing Program had been established in Nowra, Dubbo, Walgett, Brewarrina, Bourke, Lismore, Armidale, Kempsey, Nambucca and Mount Druitt.

⁶⁷ Fitzgerald, J., 'Does circle sentencing reduce Aboriginal offending?' (2008) *BOCSAR NSW Crime and Justice Bulletins*, 11, 12.

- improve the support provided to victims of crime and promote healing and reconciliation; and
- break the cycle of recidivism -- the revolving door that has characterised the relationship of many Australian Indigenous Peoples entering the criminal justice system.⁶⁸

Unfortunately, these objectives have not been realised in Queensland, where a number of problems with the system have been noted. This will be discussed in detail below.

If the system can be implemented effectively, however, it presents an opportunity to depart from traditional sentencing procedures, where the emphasis is on the punishment of the offender, toward community participation in decision-making, which ensures that the social dimensions relating to the offending behaviour is addressed. This can help to reduce the rates of recidivism. The presence of the offender's family and members of their community in the circle results in wider community awareness and support for the offender as well as more accountability for the offender while serving the sentence and beyond. Rather than merely being held accountable to the court and law enforcement, these offenders are accountable to their whole community.

Circle sentencing operates on the philosophy that local Indigenous communities are best placed to solve their own problems. Responsibility for reducing the level of violence, substance abuse, domestic violence and crime rests with the community itself. The process seeks to provide a mechanism where local Indigenous people can actively take responsibility for their own local problems, where they are given authority to make decisions about solutions to their problems, and are empowered to implement them. By empowering the community, circle sentencing can provide an opportunity to raise the dignity, self-esteem, pride and integrity of Indigenous people, a benefit not restricted solely to the Indigenous community itself but shared by the wider community.

New South Wales

During the review and evaluation of the Circle Sentencing regime in NSW jointly conducted by the Judicial Commission of NSW and AJAC, it was concluded that the Circle Sentencing regime was a success because the survey of participants recorded a high level of satisfaction with the process.⁶⁹ The Circle Sentencing regime allowed both the offender and the victim to take an active role in the process. The effect of this was that offenders more often came to accept responsibility for their offences and were prepared to apologise to their victims. Conversely, victims were more ready to forgive the offender than might otherwise be the case. Due in large

⁶⁸ Potas, I.L. above n 65, 78.

⁶⁹ Ibid, 74.

part to this aspect of the process, the sentences imposed by this regime were typically perceived to be 'fair' or 'very fair'.

Circle Sentencing in NSW provided an example of how the Court can share its authority with the local Indigenous communities, and how the traditional justice system and Indigenous cultural practice and values can be successfully merged. The involvement of the Indigenous community in the sentencing process can foster not only a stronger foundation within the Australian Indigenous community, but also a stronger bond between the Australian Indigenous community and the rest of the Australian legal system and society.

Queensland

In Queensland, attempts have been made to include Indigenous Elders in the sentencing processes through the Murri Courts. The Murri Courts were reinstated last year after they were defunded in 2012. However, the reinstatement of the Murri Courts in Queensland has fallen short as it appears not to be focused on reforming the system, but on educating Aboriginal and Torres Strait Islander peoples on how to operate in the system as it already is.

Involvement of Elders and Community Groups

While Elders can make recommendations as to the appropriate sentence, the Magistrate is not required to follow these suggestions.⁷⁰ Elders are trained by the Department of Justice in the ways of the system, rather than creating space for Aboriginal and Torres Strait Islander voices to be heard and acted upon. Few cultural practices are incorporated in the process and no clear definition of what is 'culturally-appropriate' is given. Further, Elders and respected persons are only paid \$100 per day they are part of a Murri Court Panel and only two Elders will be paid for the same sitting day.⁷¹ In order to ensure these payments are not taxed, Elders are required to declare this activity as a 'hobby'.

There may be some circumstances where Magistrates have to take notice of community-justice groups⁷² – but as they are funded by the Department of Justice, their capacity and involvement is limited. One community organisation, Five Bridges, was overtaken by John Pearson Consulting to widen their auspices but in doing so took 10% of their funding. This impacts on the quality of service provided by the justice-group. Lastly, there are no checks completed as to whether the Elders appointed are actually suitable persons.

Process for Defendants

The quality of feedback currently being received by defendants in regards to the Murri Courts is also questionable. A questionnaire is completed by the defendant at the time of the Murri

⁷⁰ Murri Court Procedure Manual.

⁷¹ Murri Court Elders and Respected Persons Manual.

⁷² Murri Court Procedure Manual.

Court Sentence Report (before their sentence is received) to gather the defendant's opinions and experiences so far.⁷³ As they have not yet received sentence, a defendant may feel pressured into providing positive feedback in the hope this will result in a lesser sentence.

Some Magistrates have been known to automatically refer any Aboriginal or Torres Strait Islander person that comes in contact with the courts to the Murri Court. As the process in the Murri Court is ultimately more lengthy and arduous, this arbitrary approach is discriminatory. By not having Aboriginal and Torres Strait Islander peoples in the driving seat, the Queensland Murri Courts, while positive in theory, ultimately result in a paternalistic and assimilationist process.

10

State and territory governments should provide funding to implement or expand Circle Sentencing court systems in each jurisdiction, in consultation with the local Indigenous community, in order to provide appropriate, culturally sensitive, and effective alternatives to the mainstream criminal justice process.

11

Aboriginal and Torres Strait Islander peoples, especially Elders, should take the central position in designing, implementing and monitoring these programs.

12

All alternative sentencing programs should include fair, impartial and appropriately informed third-party monitoring and evaluation, which should be led by Indigenous peoples. Monitoring and evaluation systems should include accessible and anonymous feedback opportunities for participants.

13

All staff involved with the design, implementation and monitoring of alternative sentencing programs should be required to undertake adequate cultural competency training.

⁷³ Murri Court Procedure Manual p 21.

5.0 CONSULTATION, RESPECT AND INDIGENOUS SELF-DETERMINATION

Australia's history of not upholding human rights of Indigenous Peoples is a cyclical issue that has resulted in higher rates of imprisonment.⁷⁴ Articles 1(4) and 2(2) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) require Australia to take special measures to ensure the adequate development and protection of Indigenous peoples. Both federal and state governments should be doing more to uphold rights provided in international conventions.

The rights to self-determination, culture and meaningful employment are protected in a number of conventions ratified by Australia and are linked to increased incarceration rates. If Indigenous peoples are not empowered to enjoy these rights, they may be more likely to commit an offence. At the same time, the historic vilification and stereotyping of many Indigenous peoples as 'criminals' has contributed to the nation turning a blind eye to the systematic violation of Indigenous peoples human rights for decades. The executives in public service that are tasked with Indigenous justice programs are frequently inadequately trained in First Nations disadvantage. Decisions are often made without reference to the historical context nor an adequate understanding how Aboriginal and Torres Strait Islander families will be impacted.

14

Policy decisions should be made in partnership with Aboriginal and Torres Strait Islander organisations, with a human rights-based approach.

Self-determination

While Australia has adopted numerous policies, such as the Indigenous Advancement Strategy, to address socio-economic disadvantage among Indigenous populations, these policies fail to uphold the right to self-determination, resulting in less effective outcomes. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides that Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social and cultural development.⁷⁵ It prescribes the right to autonomy or self-government in matters

⁷⁴ Victoria Tauli-Corpuz, 'End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz on her visit to Australia' (Speech delivered at End of Mission Press Conference, United Nations Information Centre Canberra, 3 April 2017) available at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21473&LangID=E>>.

⁷⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, UN Doc A/RES/47/1 (2007), art 3 ('UNDRIP').

relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.⁷⁶ Policies that don't support these rights have less significant and sustainable outcomes.⁷⁷

15

The Australian government should amend the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) to include a recognition of the relevance of UNDRIP, and review existing legislation, policies and programs to ensure conformity with the principles of UNDRIP.

The Indigenous Advancement Strategy (IAS) funds programs for services such as jobs, land and economy, education and safety and wellbeing in order to close the gap. Initiated in 2014, the policy actually entailed a cut of 534 million dollars to Aboriginal and Torres Strait Islander programs.⁷⁸ It required competitive tender bids from organisations to provide these services, around 55% of which were awarded to non-Indigenous organisations including important services such as legal advocacy services.⁷⁹ These non-indigenous organisations have forced local organisations to downsize and reduce services they were providing, resulting in a less culturally appropriate approach.⁸⁰

UN Special Rapporteur for the rights of Indigenous peoples Victoria Tauli-Corpuz said this runs contrary to principles of self-determination, undermines the key role played by Aboriginal and Torres Strait Islander organisations in providing services for their communities, and reduces trust and collaboration with the government.⁸¹ As social rights issues are cyclical, it is important to consider self-determination in the context of the legal process. If there are not culturally appropriate and autonomous legal services available we may see rates of incarceration continue to rise.

16

In relation to the right of self-determination, a justice reinvestment approach to address the social factors which influence crime may be beneficial if there are clear aims and balanced involvement from government, Aboriginal and Torres Strait Islander experts (including legal professionals) and the community.

⁷⁶ UNDRIP, art 4.

⁷⁷ Tauli-Corpuz, above n 70.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

Consultation and Participation in Decision-Making

The right to collaborate in decision-making should be applied in conjunction with the right to self-determination. It is protected in article 18 of UNDRIP: 'Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.'⁸² In accordance with this article, the National Congress of Australia's First Peoples was established in 2010 to represent Australia's Indigenous Populations and give them a political voice. However, the defunding of the Congress in 2014 suggests a lack of commitment to upholding this right. A lack of political representative power means the domestic legal framework is not representative. If Indigenous voices are not engaged with, it will be much more difficult to find effective solutions to incarceration rates. Upholding the rights to self-determination and decision-making in Indigenous communities will lead to improved cultural awareness and recognition.

17

State and federal governments should provide more opportunities for Indigenous individuals, legal experts and communities to participate in decision-making, including the planning, implementation and evaluation of Indigenous programs. Governments should also continue to progress consultations regarding constitutional recognition and a treaty agreement with Indigenous communities.

Cultural Awareness and Recognition

The weak legal recognition and lack of protection of Indigenous social rights, including cultural rights and the right to employment, are also linked to high incarceration rates. As prescribed in UNDRIP, 'Indigenous peoples have the right to practice, develop and teach their cultural traditions, spiritual and religious traditions, customs and ceremonies and to transmit to future generations their histories, languages and traditions. States shall take effective and transparent measures to ensure this right is protected.'⁸³ Recognising the need for cultural connection is key to achieving sustainable improvement.⁸⁴ Further, recognition and equal engagement with Aboriginal and Torres Strait Islander legal professionals is necessary for an appropriately informed First Nations perspective. Cultural norms and idiosyncrasies are currently glossed

⁸² UNDRIP, art 18.

⁸³ UNDRIP, art 11-13.

⁸⁴ Australian Human Rights Commission, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (Paragon Australasia Group, 2010).

over in the provision of legal services. There is a need for cultural and gender focused provision of legal services. Even if an Aboriginal man represents an Aboriginal woman, this can result in miscommunications that can have detrimental effects on the defendant's case.⁸⁵

Programs that protect Indigenous traditions take many different forms. For example, the International Reparation Program recognises the tradition of many communities to have their ancestors' remains returned. Since 2001, the International Reparation Program has supported communities to see the return of over 1300 ancestral remains and 1300 sacred objects. NAIDOC week is another initiative which celebrates Indigenous achievements and culture. However, there is still a lack of understanding of cultural traditions within the non-Indigenous population, which contributes to increasing inequality.⁸⁶ Employing non-Indigenous peoples in professional roles that involve decision-making in regards to Indigenous peoples can perpetuate this misunderstanding. There is an increasing number of Aboriginal and Torres Strait Islander peoples that are tertiary qualified and experts in their respective fields, and these people should be placed in decision-making positions.

The recognition and celebration of indigenous culture can lead to improvements in a number of critical social justice areas, such as mental health.⁸⁷ For example, Indigenous peoples' connection to land is an essential part of life, and ownership may lead to greater autonomy and economic independence.⁸⁸ Upholding these cultural rights can lead to a stronger connection to community, and reduce recidivism and reoffending.⁸⁹ Cultural and spiritual programs delivered authoritatively by First Nations peoples should be available both in and out of prison, especially in juvenile detention, to ensure this right is protected.

18

State and federal governments should promote maintenance and knowledge of Indigenous cultures, while also supporting Indigenous education programs among the non-Indigenous population as well.

⁸⁵ For example, see *R v Kina* [1993] QCA 480.

⁸⁶ James Anaya, Special Rapporteur, *Report on the situation of human rights and fundamental freedoms of indigenous peoples in Australia*, 15th session, Agenda Item 3, UN Doc A/HRC/15/37/Add.4 (1 June 2010) ('*Rights of Indigenous peoples in Australia*').

⁸⁷ Jens Korff, *12 ways to reduce Aboriginal Incarceration Rates* (13 March 2017) Creative Spirits, available at <<https://www.creativespirits.info/aboriginalculture/law/reducing-aboriginal-incarceration-rates#toc2>>.

⁸⁸ *Rights of Indigenous peoples in Australia*, UN Doc A/HRC/15/37/Add.4, p 4 para 4-5.

⁸⁹ Jens Korff, *12 ways to reduce Aboriginal Incarceration Rates*, above n 82.

Employment

Addressing Australian Indigenous employment policies is also significant in addressing the issue of recidivism. The right to meaningful work is protected in article 17 of UNDRIP, which provides that Indigenous peoples should be given the same employment rights as other people in Australia, free from discriminatory conditions or policies.⁹⁰ This right is further protected in the ICESCR, which states that guidance and training programs and policies should aim to achieve productive employment.⁹¹ Employment opportunity programs that aim to eliminate discrimination and promote equality have increased the number of Indigenous peoples in the Australian Public Service.⁹² The Norforce program, established in 1981, is one example of successful investment in Indigenous employment.⁹³ Norforce monitors Australia's northern coast for suspicious activity and 70% of the employees are Aboriginal. Indigenous elders and traditional owners endorse Norforce because it protects country which includes their ancestral lands. 'To young Aboriginal males the job helps them live and breathe their warrior role.'

However, there is still a large gap in unemployment rates between Indigenous and non-Indigenous Australians. The Indigenous employment rate fell from 53.8% in 2008 to 48.4% in 2014-15.⁹⁴ In rural areas, unemployment rates are 28.1% for Indigenous and 2.8% for Non-Indigenous people.⁹⁵ This lack of opportunity could contribute to offending or reoffending. As shown in the Norforce program, autonomous employment programs may give Indigenous peoples a connection to their community and could reduce incarceration rates. Further, as noted above, tertiary trained, technically capable Aboriginal and Torres Strait Islander peoples should be placed into decision-making positions.

19

Governments should increase funding and investment in local community-based employment opportunities and training programs, and support Aboriginal and Torres Strait Islander tertiary students, in order to increase the number of Aboriginal and Torres Strait Islander professionals.

⁹⁰ UNDRIP, art 17.

⁹¹ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, (entered into force 3 January 1976), art 6.

⁹² Tauli-Corpus, above n 70.

⁹³ Jens Korff, *Aboriginal employment, jobs & careers* (21 March 2017) Creative Spirits, available at <<https://www.creativespirits.info/aboriginalculture/economy/aboriginal-employment-jobs-careers#axzz4jh4UH9WZ>>.

⁹⁴ Jobs Australia, *Closing the Gap 2017 - Indigenous Employment Rate Going Backwards* (17 February 2017) Jobs Australia, available at <<https://www.ja.com.au/news/closing-gap-2017-indigenous-employment-rate-going-backwards>>.

⁹⁵ *Ibid.*

The social and cultural rights of Indigenous peoples as a whole are significant in the discussion of incarceration rates. As long as these rights are not upheld there will be over-representation of Indigenous people in custody, and while this over-representation is not addressed, there will be limited progress in awarding these rights equally and justly. For this reason, Australian state and federal governments need to pay closer attention to the human rights aspects of all laws and policies regarding Indigenous communities, and in particular in connection with the criminal justice system.

20

Financial support should be given to Aboriginal and Torres Strait Islander peak professional bodies to support the work they are already doing. Aboriginal and Torres Strait Islander peoples are the highest consumers of justice services, which makes justice reinvestment a sound fiscal investment. Funding should also be provided for an independent monitoring body that includes Aboriginal and Torres Strait Islander legal professionals.