Australian National University

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Dear Colleagues,

ALRC Discussion Paper in relation to the ARLC inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples

Thank you for the opportunity to make this submission.

I am a lawyer with a background in non-profit legal practice, particularly in the ACT, NT and WA and involvement in Indigenous justice issues since the mid-1990s. I have worked for the ANU since 1995, where I teach in the legal practice and masters programs. My master degrees are in International Development, Public and International Law, and Applied Anthropology and Participatory Development. My profile is linked in my signature block.

I have been one of many collaborators in the recently launched Kimberley Community Legal Service – ANU initiative.[1] This initiative aims to enable KCLS to extend civil law capacity in the Kimberley through contributions by ANU law students and legal academics. Since April about 50 ANU law students have contributed, about 35 from the ANU and 15 in Kununurra or Broome and 8 ANU law academics have contributed legal expertise.

KCLS is the largest remotely located civil law legal practice in Australia. The service area is twice the size of Victoria. KCLS has an office in Kununurra and Broome being the largest centres in the East and West Kimberley, respectively. About 85-90% of the clients are Aboriginal people.

[1] Kruijff, Peter de, 'Uni hot-desk to aid civil law' (2017) 17 Aug 2017 *The West Australian, https://thewest.com.au/news/the-kimberley-echo/uni-hot-desk-to-aid-civil-law-ng-b88564928z;* Pindan, peripheries and power: KCLS and ANU Launch Event' (2017) 9 Aug 2017, https://allevents.in/acton/pindan-peripheries-and-power-kcls-and-anu-launch-event/710727615779152; Launch – ANU TV, on YouTube, 9 Aug 2017, Pindan, Peripheries, and Power: First Nations peoples, civil law and justice in the Kimberley, https://youtu.be/4fcBApCIS7M; Photos on Flickr of ANU Law & KCLS partnership launch, 'This launch marks a new partnership between Kimberley Community Legal Services and the ANU through which KCLS aims to substantially innovate and extend civil law legal help for Aboriginal people', at: https://www.flickr.com/photos/anulaw/sets/72157687349130336

I was based in Kununurra from 2011-2015 while working for the ANU and focusing on teaching, studying and research. My work with KCLS related particularly to historical injustice. For example:

- How several hundred Aboriginal people in the Kimberley missed out in applying to the WA Redress Scheme (an ex gratia scheme intended to provide payments of up to $80,000 to people abused or neglected in State care as a child);
- Working with many Aboriginal people, lawyers and other advocates to try to overcome the debacle of the former WA Government's Stolen Wages Reparation Scheme (open from March to November 2012 with a flat payment of $2,000);
- Working with Aboriginal people and many others to try to establish a WA state response to the Stolen Generations (still not achieved);
- Helping to link eligible Aboriginal people in the Kimberley into Stolen Generation litigation and legal action in the NT;
- Working with KCLS staff to try to facilitate input by Aboriginal people in the Kimberley into the Royal Commission into Institutional Responses to Child Sexual Abuse (participation remained disproportionately low).

Since relocating to Melbourne in mid-2015 I have continued to do part-time pro bono legal work for KCLS by distance. Additionally, while on leave from the ANU in the second half of 2016, I acted as locum with KCLS in Broome. At that stage, the office had 2 lawyer positions and no other staff for the West Kimberley.

Focus of this submission

I endorse the KCLS submission to the current inquiry and I make this submission to highlight two aspects, based on my experience, analysis and views. These are:

I. Laws and contextual factors contributing to Indigenous incarceration (TOR 1(c) and 2 (e)) – *my submission relates to Article 1(2) of the ICCPR and how treaties with Indigenous peoples, settlements and reparations are a precondition for reducing Indigenous incarceration rates*.

II. Access to justice issues including the remoteness of communities, the availability of and access to legal assistance (TOR 1(f)) – *my submission relates to how civil law legal assistance is relevant to reducing Indigenous incarceration rates.*

I. Laws and contextual factors contributing to Indigenous incarceration (TOR 1(c) and 2 (e)) –my submission relates to *Article 1(2) of the ICCPR and how treaties with Indigenous peoples, settlements and reparations are a precondition for reducing Indigenous incarceration rates*.

The criminal law and justice statistics, including incarceration rates, continue to be appalling for Aboriginal people in Western Australia. Some of the statistics are:

> *Aboriginal people make up about 3.7% of the population of Western Australia but about 38% of the adult prison population, being about 16 times the WA non-Aboriginal adult imprisonment rate.* [2]

[2] Australian Bureau of Statistics, 3238.0.55.001 - Estimates of Aboriginal and Torres Strait Islander Australians, June 2011, http://www.abs.gov.au/ausstats/abs@.nsf/PrimaryMainFeatures/3238.0.55.001?OpenDocument;

Both Aboriginal men and women are disproportionately over represented. Aboriginal women are 2.8% of women in WA aged 20 and older, but Aboriginal women make up 46.5% of the adult female prison population.[3]

Additionally, the rate of Aboriginal youth over-representation in youth justice supervision in WA is the highest among the Australian states and territories.[4] *In 2015-6 the rate of representation was 279 per 10,000 which was 27 times as likely as non-Indigenous youth.*[5]

From my experience in working with Aboriginal people in the Kimberley, and from collaborating with many Aboriginal groups, lawyers and advocates – I endorse the KCLS submission at 1.5, which states:

> "Many Aboriginal people in the Kimberley have strong views about the reasons for extraordinarily high levels of contact with the criminal justice system, including youth and adult corrections. These reasons centre on the historical and ongoing treatment of Aboriginal people.
>
> Bernadette Atuahene's description of property-induced invisibility coincides with the views of many Aboriginal people in the Kimberley about what has occurred:
>
> > [T]he widespread or systematic confiscation or destruction of real property with no payment of just compensation executed such that dehumanization occurs; the act is perpetrated by the state or other prevailing power structure(s), and adversely affects powerless people or people made powerless by the act such that they are effectively left economically vulnerable and dependent on the state to satisfy their basic needs.[6]
>
> For generations, the law of the state has been complicit in denying justice to Aboriginal people in the Kimberley. Law has not protected Aboriginal people from the state, dominant economic interests or majoritarianism.
>
> A common discourse heard by KCLS from Aboriginal people in the Kimberley is that the state and society are the root causes of disproportionate rates of Aboriginal incarceration and contact with the criminal justice system. Indigenous incarceration is seen as 'a white thing', in that it is produced by white injustices towards Aboriginal people.
>
> Non-Indigenous society in Australia has taken many steps along various paths to reconciliation. Acceptance of responsibility for the appallingly disproportionate incarceration rates of Aboriginal people of the Kimberley, and of Indigenous peoples in other jurisdictions, is another important step in this process.

Australian Bureau of Statistics, 12 August 2016, '4517.0 - Prisoners in Australia, 2016: Western Australia Snapshot at 30 June 2016', http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2016~Main%20Features~Western%20Australia~22

[3] Peta MacGillivray and Eileen Baldry, Australian Indigenous Women's Offending Patterns, Research Brief 19, June 2015, Indigenous Justice Clearinghouse, p.1, https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/brief019.pdf

[4] Australian Institute of Health and Welfare, Youth justice in Australia 2015–16, Bulletin No 139, March 2017, p. 8

[5] Ibid

[6] Bernadette Atuahene, From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility, 60 SMU Law Review. 1419 (2007)

> The decolonisation of criminal law and justice in the Kimberley, and in Australia, requires justice on the broadest scale for Indigenous peoples. The solutions are not the responsibility of criminal justice systems, but of Australian leaders and society."

Additionally, Aboriginal people in the Kimberley have been abused and marginalised for generations. Forced from their country, or made to stay in certain locations - the conditions, the treatment and the results in many cases were abusive and inhumane. Kimberley artists paint about many things including massacres which occurred in the Kimberley. As a result, Aboriginal people in the Kimberley know about the killing times and about being rounded up, starved and about having children taken away. [7]

In the Kimberley, Aboriginal people including Aboriginal children, were used as free or low cost labour, from the early 1900s until the early 1970s.[8] Many older Aboriginal people in the Kimberley live with uncompensated injuries and health conditions relating to this work or how they were treated. The use of Aboriginal peoples' labour in these ways changed when pastoral stations went through economic transitions due to changing markets, increased mechanisation and wage determinations aimed at overcoming underpayment of Aboriginal workers.[9] However, this ushered in a further wave of dislocation, marginalisation and associated problems.

Many Aboriginal people were then forced off pastoral stations and into Aboriginal town reserves. Josie Farrer, Member for the Kimberley in the WA Legislative Assembly, is one of those who remembers being trucked off Moola Bulla Station, outside Halls Creek, and taken with other children to the mission in Fitzroy Crossing.[10]

When Aboriginal people were forced off stations, there was nothing in place to deal with the dislocation. Peter Yu, for example, has written about the refugee influx of Aboriginal people from Kimberley stations into Aboriginal town reserves.[11] These reserves had few facilities, they were sites of welfare provision, there was little work and contact with police increased exponentially.

I agree that property-induced invisibility, as described by Bernadette Atuahene, coincides with the views of many Aboriginal people in the Kimberley about what has occurred and also what must be addressed. In relation to what occurred, this includes outrageously racist ideas, such as:

- 'They (Aboriginal people) had nothing in the first place' – meaning that no taking could occur from Aboriginal people, so there is no injustice, and so there can be no case for amends.
- 'They (Aboriginal people) didn't think of land as property' – meaning that as Aboriginal people did not see country as 'property', nothing Aboriginal people considered to be property was taken. If no 'property' was taken, if there was any injustice it was only small.

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[7] Anna Haebich, *Broken Circles: Fragmenting Indigenous Families, 1800-2000* (Fremantle Arts Centre, 2000)
[8] Mary Anne Jebb, *Blood, Sweat and Welfare: A History of White Bosses and Aboriginal Pastoral Workers* (University of Western Australia Press, 2002); Western Australian Stolen Wages Taskforce, *Reconciling The Past: Government Control of Aboriginal Monies in Western Australia, 1905-1972* (Western Australian Department of Aboriginal Affairs, 2008)
[9] Peter Yu, 'The Kimberley: From Welfare Colonialism to Self-Determination' (1992) 35(4) *Race and Class* 21; Fiona Skyring, 'Low Wages, Low Rents, and Pension Cheques: The introduction of equal wages in the Kimberley, 1968-1969' in Natasha Fijn et al (eds), *Indigenous Participation in Australian Economies II: Historical engagements and current enterprises (e-book)* (2012) 153;
[10] Steve Kinnane, Judy Harrison and Isabelle Reinecke, ' 'Finger money: the black and the white of stolen wages in the West' (2015) 47 Griffith Review
[11] Op. cit.

- ‘They (Aboriginal people) were so uncivilised and poor they didn’t have clothes or even care’ - meaning there was no real possibility of loss because any change could not make things worse, in fact change could only help.

I am attaching a short piece titled ‘Conditions of observability’ to expand on preconditions for recognising injustice.[12]

The historical use of law of the state against Aboriginal people in the Kimberley is a case study in how law can be a tool to normalise, legitimise and authorise – the taking, the humiliation and the abuse of peoples. It is also a case study about how law of a settler state can be complicit by withholding redress from Indigenous peoples.[13]

On the other hand, as many people alive today vote, and there are elected representatives who form parliaments which make laws, it is also easy to imagine a tipping point where rationalisations about why amends are not due, warranted or possible will no longer be sustainable.

Even though Australia has ratified the *International Covenant on Civil and Political Rights*, the Australian state has ignored the historical, moral, and progressive import of Article 1(2) which stipulates in part that:

> ‘In no case may a people be deprived of its own means of subsistence.’[14]

Amends for depriving Indigenous peoples of their own means of subsistence, will be substantial taking into account what occurred, what is continuing to occur, and the historical and transgenerational effects.

I endorse the statement in the KCLS submission at 1.5, that it is a widely held view among Aboriginal people in the Kimberley that:

> “.. the state and society are the root causes of disproportionate rates of Aboriginal incarceration and contact with the criminal justice system. Indigenous incarceration is seen as ‘a white thing’, in that it is produced by white injustices towards Aboriginal people.”

I also agree that reconciliation and all dimensions of significant progress, measured through Closing the Gap or other methods, requires justice on the broadest scale for Indigenous peoples. Justice for Indigenous peoples is a precondition for reconciliation and for overcoming contact between Indigenous people and the criminal justice system and disproportionate Indigenous incarceration rates.

Assuming Australian society will reach the point of truly enabling progress, it is likely that reparations would then be manifested through:

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[12] Published 15 Sept 2017 at: https://legalworkshop.law.anu.edu.au/news-and-events/news/conditions-observability

[13] Wolfe, Stephanie, *The Politics of Reparations and Apologies* (Springer, 2014); Lenzerini, Federico, 'Reparations for Indigenous Peoples in International and Comparative Law: An Introduction ' in Federico Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008); Cunneen, Chris, 'Colonialism and Historical Injustice: Reparations for Indigenous Peoples' (2005) 15(1) *Social Semiotics* 59; Ulrich, George and Louise Krabbe Boserup, *Human Rights in Development Yearbook 2001: Reparations : Redressing Past Wrongs* (Kluwer Law International, 2003)

[14] *International Covenant on Civil and Political Rights,* 999 UNTS 171, [1980] ATS 23 (entry into force generally except Article 41 on 23 March 1976; entry into force for Australia except Article 41 on 13 November 1980; Article 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993)

1. Treaties or similar between Aboriginal and Torres Strait Islander peoples the state and potentially other parties, and
2. Settlements formulated by Aboriginal and Torres Strait Islander peoples and achieved with the state and potentially other parties, and
3. Implementation of treaties and settlements - resulting in immediate, longer term and continuing measures.

Reparations as described would of course change the position of Indigenous peoples in Australian society. One of the ways this would happen, would be to conclusively lift Indigenous peoples out of poverty. Reparations would:

- Increase the status and rights of Indigenous peoples.
- Contain iron clad guarantees of non-repetition.
- Change the balance within Australian society, whereby Indigenous people would no longer be marginalised and alienated.
- Dramatically improve the health, wellbeing, life expectancy and agency of Indigenous peoples.
- Cause Indigenous crime rates and incarceration rates to plummet.
- Aim to leave no stone unturned in acknowledging and working to make amends for injustices of the past and the effects.
- Enable Indigenous peoples to have self-determination.
- Strongly facilitate Indigenous resurgence.

In short, any kind of reasonable settlement would comply with the *United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*.[15] Indigenous peoples have a right to determine what amends and reparations they wish to stipulate. Having also formed positions, they have the right to expect and require good faith negotiation. Settlement/s when reached, would meet Indigenous peoples' terms, and be completed with their free, prior and informed consent.

While principles of justice and fairness should lead Australian society and institutions to the negotiation table, there are also instrumental reasons. Win-win, economic efficiency, and social inclusion are three examples.

<u>Recommended positions and findings by the ALRC:</u>

1. That the root causes of over-representation of Indigenous people in the criminal justice system, including incarceration, are associated with the historical and continuing injustices towards Indigenous people arising from colonisation and settlement. At the present time, the direct root cause is that these injustices remain unaddressed.

2. That progress to reduce over-representation of Indigenous people in the criminal justice system, including incarceration, requires the negotiation of just, ample and freely entered settlements (reparations) by the state with Indigenous peoples.

[15] GA Res 60/147, UN GAOR, 60th sess, UN Doc A.RES.60/147 (16 December 2005)

3. That all Australian Governments and society should work towards comprehensive processes for full and honourable negotiation and just and ample settlements (reparations) on terms suitable to, and freely approved by, Aboriginal and Torres Strait Islander peoples.

II. Access to justice issues including the remoteness of communities, the availability of and access to legal assistance (TOR 1(f)) – *my submission relates to how civil law legal assistance is relevant to reducing Indigenous incarceration rates*

I endorse references in the KCLS submission to how civil law assistance is relevant to reducing Indigenous incarceration rates.[16] This applies in the Kimberley where many Aboriginal people have multiple, interlinking problems involving social, economic and structural disadvantage.

There are numerous links between criminal law and civil law legal issues for Aboriginal people. Focusing on civil law can increase opportunities for change, especially change brought about by Aboriginal people themselves. [17]

Civil law legal help should be seen as one of a range of interrelated strategies that can support and enable Aboriginal people to achieve improvements. From my involvement in civil law work in many contexts including with KCLS and with Aboriginal people in the Kimberley, examples of this are:

- Improving security, stability, health and wellbeing,
- Improving these things for children and others in their care,
- Working on obstacles they want to overcome,
- Gaining access to opportunities they are seeking,
- Reducing stress and impediments in their lives,
- Becoming more capable especially about managing their affairs, identifying pitfalls and understanding obligations,
- Having better chances of achieving their goals,

[16] Especially at 1.4, 2.1 and 2.4

[17] See for example: Allison F, Cunneen C, Schwartz M, 'Access to justice for Aboriginal People in the northern territory' (2014) 49(2) *Australian Journal of Social issues* 219; Allison F, Cunneen C, Schwartz M, submission No 105 to Productivity Commission, *Access to Justice Arrangements*, 19 November 2013;Comumarelos C, Macourt D, People J, et al. 'Legal Australia-Wide Survey' (2012) 7 *Law and Justice Foundation;* Schwartz M, Cunneen C, 'Civil and Family Law Needs of Indigenous People in NSW: The Priority Areas' (2009) 32(3) *UNSW Law Journal* 725; Golub, Stephen (ed), *Legal Empowerment: Practitioners' Perspectives* (International Development Law Organization, 2010); Dale, Ann and Lenore Newman, ''Social Capital: a necessary and sufficient condition for sustainable community development?'' (2008) 45(1) *Community Development Journal* 5; Imai, Shin, 'A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering' (2002) 9(1) *Clinical Law Review* 195; Burkey, Stan, 'Objectives and Principles of Self-Reliant Participatory Development' in *People First* (Zed Books, 1993) 205; White, Lucie E, 'Learn and To Teach: Lessons From Driefontein on Lawyering and Power ' (1988) 1 *Wisconsin Law Review* 699

- Becoming less isolated and more connected,
- Reducing exclusion and marginalisation, and
- Increasing individual and collective agency and voice.

My experience, having been a part of a community of practice with some non-profit civil lawyers in the Kimberley, is that civil and criminal law legal issues are often interrelated. This applies to all stages in criminal law process from occurrence and charging to outcomes and penalties.

Appendix A to the KCLS submission gives examples of civil law matters KCLS works on with Aboriginal people in the Kimberley. The list starts with basic needs like shelter, safety and food.

Further, people's lives are often complicated by many worries and issues, which apply:

- When they are under investigation,
- While on bail or remand,
- While preparing for court,
- While criminal matters are being dealt with,
- Once matters are finalised,
- When subject to penalty including imprisonment,
- When preparing for release, and
- When on parole.

Many of these worries have civil law implications or can be worked on as civil law legal problems.

Whilst this points to the importance of new programs and resources for civil law legal help for people going through the criminal justice system (remandees, detainees and prisoners as well as parolees and others post-release) it is also important to note that criminal and civil law issues are related not only to the person charged or convicted, but also to the victims, family members, friends and others.

Links between criminal and civil law should also be reflected in law and justice planning. This is needed to help coordinate and drive improvements, and when established it should include civil law. As such, there should be a Kimberley Criminal and Civil Law and Justice Plan. For the same reasons, plans at a state and federal level relating to criminal law should be enhanced to include civil law.

<u>Recommended positions and findings by the ALRC:</u>

4. In relation to Aboriginal people in the Kimberley, and in relation to Indigenous people in Australia, more emphasis should be placed on the fact that criminal and civil law legal issues are often interrelated. This applies to all stages in criminal law process from occurrence and charging to outcomes and penalties.

5. Due to the many ways civil law legal help can be used by Indigenous people to help improve their lives, the availability of civil law legal assistance for Indigenous people should be understood as a critical element in an overall approach to reducing Indigenous incarceration rates.

6. Resources should be increased to enable Aboriginal people in the Kimberley, and Indigenous people in Australia, to have full and ready access to civil law legal help.

7. The WA Department of Justice, other Departments and stakeholder should address the current lack of a law and justice plan for the Kimberley. Civil law should be incorporated to establish a Kimberley Criminal and Civil Law and Justice Plan. Plans for other jurisdictions and federally, should be revised to fully and appropriately incorporate civil law.

Attached: Judy Harrison, Conditions of Observability, ANU School of Legal Practice Blog, 15 Sept 2017.

Yours sincerely,

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