



National Legal Aid Secretariat
GPO Box 1422
Hobart TAS 7001

Executive Officer: Louise Smith

t: 03 6236 3813

f: 03 6236 3811

m: 0419 350 065

e: louise.smith@legalaid.tas.gov.au

13 January 2017

ALRC Incarceration Inquiry
Legal Assistance Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

alrcincarcerationinquiry@ag.gov.au

Dear Sir/Madam,

Re: Consultation on draft terms of reference for the Australian Law Reform Commission (ALRC) inquiry into the incarceration rates of Indigenous Australians

Introduction

Thank you for the opportunity to be consulted about the draft terms of reference for the Australian Law Reform Commission (ALRC) inquiry into the incarceration rates of Indigenous Australians.

As the Legal Assistance Branch is aware, legal assistance services, including legal aid commissions and the Aboriginal and Torres Strait Islander legal assistance services, work co-operatively to extend the reach of legal assistance service delivery as far as possible and to ensure that issues such as legal conflict are addressed.

In the 2015-2016 financial year legal aid commissions provided in excess of 18,700 grants of legal assistance for legal representation to Aboriginal and/or Torres Strait Islander people, mostly in the area of criminal law, with many other less intensive services also provided to Aboriginal and/or Torres Strait Islander people by legal aid commissions.

Draft terms of reference

We are generally supportive of the draft terms of reference. To the extent that we suggest amendment to them it is to widen and particularise them.

The approach we have taken is to include our suggested amendments marked up in the body of the draft terms of reference. Our suggestions follow:

“Scope of the reference

In developing its recommendations, the ALRC should have regard to laws and legal frameworks that contribute to the incarceration rate of Indigenous Australians, including:

- laws and legal frameworks that inform decisions to hold or keep Indigenous Australians in custody, including decisions in relation to:
 - cautioning
 - protective custody
 - arrest
 - remand and bail
 - diversion
 - sentencing, including mandatory sentencing
 - preventative detention
 - parole, parole conditions and community reintegration
- factors within laws and legal frameworks that affect decisions to hold or keep Indigenous Australians in custody, including:
 - consideration of community safety
 - the nature of the offences resulting in incarceration
 - the nature of penalties that result in incarceration (such as driving offences and the non-payment of fines)
 - availability of alternatives to incarceration
 - degree of discretion available to decision-makers, including police
 - consideration of incarceration as a last resort
 - consideration of incarceration as a deterrent and as a punishment
 - the availability of community based drug and alcohol rehabilitation programs and opportunities for assessment for such programs
- laws, legal frameworks, policies and practices that contribute to the incarceration rate of Indigenous young people, including:
 - pathways for Indigenous young people progressing into the criminal justice system, particularly young people in care
 - behaviour management tools in residential out of home care
 - availability of supports, cultural planning and provisions for young people both in care and when leaving care
 - the availability and use of diversionary options

- the availability of alternative culturally appropriate court frameworks in light of best practice models in Australia and internationally
 - the availability of culturally appropriate programs, planning and supports for Indigenous young people in detention to maintain connections to family, community and country
 - the availability of intensive pre-release and post-release support for Indigenous young people in custody
 - resourcing of legal services for Indigenous young people
 - implications of criminal convictions on Indigenous young peoples' access to education and employment
- whether certain laws and legal frameworks, for example laws that regulate the availability of alcohol, contribute to the rate of Indigenous offending and incarceration
 - legal institutions and law enforcement, including police, courts (including courts specialising in dealing with Indigenous offenders and other specialist courts), legal assistance services and prisons
 - differences in the application of laws in different local contexts.

In conducting its inquiry, the ALRC should have regard to existing data and research that demonstrates:

- best practice laws and legal frameworks both in Australia and internationally that reduce the rate of Indigenous incarceration
- the effects of laws and legal frameworks on the rate of Indigenous incarceration, including:
 - the paths of Indigenous Australians through the criminal justice system, including most frequent offences, relative rates of bail and diversion and progression from juvenile to adult offending
 - the availability of alternatives to custody in reducing Indigenous incarceration and/or Indigenous offending, including rehabilitation, therapeutic alternatives, justice reinvestment strategies and community reintegration supports
 - the availability of culturally appropriate programs, planning and supports for Indigenous prisoners to maintain connections to family, community and country
 - the availability of and access to legal assistance and Indigenous language and sign interpreters and witness intermediaries
- the availability of through case support to reduce re-offending for those in custody
- the experiences of the legal system and incarceration and its impacts for Indigenous Australians, including in relation to employment, housing, health, education and families

- the broader contextual factors contributing to Indigenous incarceration and any laws and legal frameworks with regard to these, including:
 - the characteristics of the Indigenous prison population
 - [the relationship between out of home care and incarceration](#)
 - [gender and incarceration rates with particular reference to the role of Aboriginal and /or Torres Strait Islander women as defendants and victims of crime and in the child protection system](#)
 - the relationships between Indigenous offending and incarceration and [mental health and cognitive impairment](#), alcohol and drug use, trauma including inter-generational trauma, loss of culture [and access and ownership of traditional country](#), poverty, [homelessness](#), discrimination, experience of violence, [Foetal Alcohol Spectrum Disorder](#), child abuse and neglect, educational access and performance, availability of disability supports, housing circumstances, [access to identification documents](#) and employment
 - availability and effectiveness of programs that intend to reduce Indigenous offending and incarceration.

In undertaking this reference, the ALRC should identify and consider other reports, inquiries and action plans that relate to this issue, including:

- the Royal Commission into Aboriginal Deaths in Custody
- the Royal Commission into the Protection and Detention of Children in the Northern Territory (due to report 31 March 2017)
- Senate Standing Committee on Finance and Public Administration’s inquiry into Aboriginal and Torres Strait Islander experience of law enforcement and justice services
- Senate Standing Committee on Community Affairs’ inquiry into Indefinite detention of people with cognitive and psychiatric impairment in Australia
- Senate Standing Committee on Indigenous Affairs inquiry into Harmful use of alcohol in Aboriginal and Torres Strait Islander communities
- reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner
- the ALRC’s inquiries into Family violence and Family violence and Commonwealth laws
- the National Plan to Reduce Violence against Women and their Children 2010-2022
- the Productivity Commission annual reports Overcoming Indigenous Disadvantage
- [the Australian Medical Associations’ 2015 Health Report Card on Indigenous Health](#)
- [the UNSW 2015 report A predictable and preventable path: Aboriginal people with mental and cognitive disabilities in the criminal justice system](#)
- [inquiries relating to the incarceration of Indigenous young people including:](#)

- o the NSW Inspector of Custodial Services Review of behaviour management practices undertaken by Juvenile Justice NSW (due to report March 2017)
- o The 2008 Wood Report of the Special Commission of Inquiry into Child Protection Services in NSW
- o Noetic Solutions' Strategic Review of the New South Wales Juvenile Justice System in NSW (2010)

In conducting its inquiry the ALRC should also have regard to relevant international human rights standards and instruments.

The ALRC should also consider the gaps in available data on Indigenous incarceration, and consider recommendations with regard to laws and legal frameworks that might improve data collection. Consideration should include gaps in data concerning Indigenous young people in detention who are in state care or have previously been subject to child removal policies.

Consultation

In undertaking this Inquiry, the ALRC should identify and consult with relevant stakeholders including and in particular with Aboriginal and Torres Strait Islander persons, ~~and~~ their representative organisations including Aboriginal and Torres Strait Islander legal assistance service providers, as well as state and territory governments, legal aid commissions, relevant policy and research organisations, law enforcement agencies ~~indigenous legal assistance services providers~~ and the broader legal profession, community service providers and the Australian Human Rights Commission.”

Conclusion

Please do not hesitate to contact us if you require any further information.

Yours sincerely,



Suzan Cox QC
Chair