

Submission on the ALRC inquiry into the incarceration rate of Indigenous Australians

Your details

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Your submission

Victorian Aboriginal Legal Service

Submission: Terms of Reference

Australian Law Reform Commission

Inquiry in Indigenous Incarceration

January 2017

Introduction

The Victorian Aboriginal Legal Service welcomes the opportunity to submit on the terms of reference for the Australian Law Reform Commission inquiry into the incarceration rate for Aboriginal and Torres Strait Islander Peoples. VALS has made a number of recommendations as outlined below.

Overall, VALS finds that the TOR of the inquiry are far too entrenched in the legal aspect of incarceration, and does not provide enough weight into the underlying causes of incarceration – such as family violence, inter-generational trauma and poverty – nor does it provide enough scope to examine solutions, such as pre- and post-release programs or access to culturally appropriate mental health services for incarcerated persons.

In effect, an examination of the judicial process – without the promise of drastic and major reform – is almost a pointless venture. By the time an Aboriginal or Torres Strait Islander person comes before a magistrate, generally speaking, the wheels of life are set in motion, continuing the cycle of incarceration and the social spin-offs – poor quality of education, drug and alcohol misuse and abuse, family violence, unemployment, low mental and physical health outcomes and premature death, 17 years younger than non-Indigenous counterparts.

As an example, the inquiry includes a point to determine whether ‘the laws that regulate the availability of alcohol, contribute to the rate of Indigenous offending and incarceration.’ This is both offensive in its stereotyping of Aboriginal and Torres Strait Islander people as drinkers, and quite frankly, asks the wrong question. Instead of questioning the legality of alcohol availability, the inquiry should be investigating ‘what are the impacts of colonisation and racism that lead to some Aboriginal and Torres Strait Islander people to abuse alcohol as a means of masking trauma? How can we address

the underlying causation and trauma that causes alcohol abuse and eventually leads to incarceration?’

This approach would be far more beneficial in finding solutions to the over-representation of Aboriginal and Torres Strait Islander peoples as opposed to a largely legal examination. Within this is also the need for governmental responses to be accepting of any findings and recommendations the inquiry might produce. Without a receptive Federal and State government and judicial system, such an inquiry will remain impotent.

Methodology

Evaluation of 339 Recommendations of Royal Commission into Aboriginal Deaths in Custody

As part of the ALRC Inquiry, an in-depth evaluation of the implementation of the 339 recommendations of the RCIADIC should be completed. 2016 marked 25 years since the release of the RCIADIC report, and as the ALRC will be well aware, incarceration rates have since soared. An in depth review of the recommendations and their implementation across all jurisdictions should be the starting point for any inquiry into the incarceration of Aboriginal and Torres Strait Islander Peoples.

Terminology

That the Inquiry use the term ‘Aboriginal and Torres Strait Islander peoples’ as opposed to ‘Indigenous Australians’ to refer to, and acknowledge, the distinct diversity of First Nations Peoples in this country.

Where localised content and research is applied, the local reference to people and/or language group should be used. For example, if research is specifically undertaken in the Western Desert, that the appropriate language group be referred to eg. Pitjantjatjara or Ngaanyatjarra; if in the Top End, for example, Yolngu or other appropriate language group be used. In Western Australia, Nyoongar and so on.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) should be engaged to assist with this as well as local knowledge and content.

Community Acknowledgement

Given that an understanding of the diversity of Aboriginal and Torres Strait Islander peoples underpins disadvantage and incarceration, every effort should be made by the

inquiry to comprehensive use localised, community driven and culturally appropriate references to the people represented.

The reporting should also be on a localised framework that recognises this diversity and contributes towards the decolonisation of the research and inquiry publication. Where possible, direct reference to the community and country being reported on should be included. For example, Yorta Yorta, Wiradjuri, Wongi, Arrente etc.

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) should be engaged to assist with this as well as local knowledge and content.

Community Consultation

The Victorian Aboriginal Legal Service expects the ALRC Inquiry to consult effectively and extensively with Aboriginal and Torres Strait communities. This includes not only community controlled organisation, community elders and workers, but also with the very people who are incarcerated. These consultations must be run in a culturally appropriate manner, with the advice of local communities. The diversity of Aboriginal and Torres Strait Islander communities must be acknowledged as also the experiences of individuals across all First Nations' countries.

Supporting Aboriginal and Torres Strait Islander Legal Services

It is expected that the Inquiry consult directly and extensively with Aboriginal Legal Services in all states and territories. Each region faces unique, diverse and different challenges when reducing the incarceration of Aboriginal and Torres Strait Islander peoples. Each ATSIL has a wealth of knowledge and experience in how best to tackle such challenges. It is expected that the Inquiry work to further support the role of the ATSILS's as best-practice mentors on the incarceration of Aboriginal and Torres Strait Islander peoples and how best to address this. Funding should be offered to each ATSIL to employ an advisor to the Inquiry.

Solutions Based Inquiry

The Victorian Aboriginal Legal Service strongly recommends that the Inquiry be solutions-based. While it is of course sensible to examine the underlying causes of the high incarceration rates of Aboriginal and Torres Strait Islander peoples, it is also necessary to examine what solutions may be implemented, what works and what doesn't. To this end, it is vital that the inquiry work with local communities, respected

elders and experienced workers in order to gain an insight into programs and projects that have proved viable and successful.

International Context

International jurisdictions in which Indigenous peoples also face high incarceration rates such as Canada, the US and New Zealand, should also be examined not only for causation but also solutions. There are many initiatives in place in Canada, for example, which seek to mitigate the effects of trauma in seeking to reduce offending and incarceration in Aboriginal communities, which could prove useful in our understanding of the incarceration of Aboriginal and Torres Strait Islander peoples in Australia.

Themes for Consideration

Underlying Factors

The Victorian Aboriginal Legal Service contends it is vital to any inquiry into the incarceration of Aboriginal and Torres Strait Islander peoples that the underlying causes of incarceration are examined in depth. These include, but are not limited to, the effects of colonisation, past child removal policies, family violence, poor mental and physical health, the impacts of racism and other low socio-economic indicators as outlined in COAG's 'Closing the Gap' policy. Without a better understanding of such drivers for social exclusion and offending behaviour, any inquiry will be severely lacking.

Individual Case Studies

As part of the inquiry examining underlying factors, individual case studies should be thoroughly investigated to gain an in-depth understanding of Aboriginal and Torres Strait Islander peoples' experiences with the justice system. This should include a detailed examination of contributing factors such as social inequality, family history, experiences with colonisation, physical and mental health issues (such as ABI, depression, diabetes), family violence and their experiences within justice and social services systems from a young age. This information would build up a picture of the circumstances surrounding the incarcerated person and what other means – as opposed to legal – can be implemented to tackle the high rates of incarceration for Aboriginal and Torres Strait Islander persons.

Normalisation of Incarceration

In many Aboriginal and Torres Strait Islander communities the experience of incarceration is normalised. This may begin at a young age in residential care or youth justice, having family members and parents who are incarcerated, and the involvement of both social and youth justice services. As such, the experience of incarceration is normalised, and as a result, prison is often not a deterrent from offending.

In fact, for some, life on the outside is so punitive and difficult, with extreme homelessness, low employment, drug and alcohol misuse and a myriad of social and economic challenges, that prison sadly becomes a viable alternative. This is often the case, as prison provides security, access to food, health and education, the ability to detox and the simple fact of having a roof over one's head. For some young Aboriginal and Torres Strait Islander people, prison is a 'rite of passage', while for others, the fact of so many family members being incarcerated means that the prison experience may not be viewed as a deterrent at all. This normalisation must be thoroughly examined if high incarceration rates for Aboriginal and Torres Strait Islander people are to be comprehensively tackled.

Youth Justice

Youth Justice issues must be examined within the scope of the inquiry, as also the links of family violence, homelessness and child removal. The experience for many Aboriginal and Torres Strait Islander children is a normalisation of the justice system, whereby incarceration is no deterrent to offending. The reasons for the high rates of recidivism within Aboriginal and Torres Strait Islander youth must be examined, including the reasons for lack of bail or parole, or breaches of both, being related to poor home life and family violence.

Over-policing

Criminology studies demonstrate that Aboriginal and Torres Strait Islander communities are greatly over-policed relative to non-Indigenous communities, leading to an over-representation of charges, court appearances and subsequent incarceration. Often – especially with youth justice – relationships between police and community members are extremely poor, and the antagonism of which cause police encounters to escalate. For example, a simple caution can turn into a series of offenses such as resisting arrest or withholding information from police officers. Over-policing also exists in certain areas due to racial profiling, being the assumption that, for example, a young Aboriginal person walking the streets at night must be committing an offense, and therefore will be pulled

over and questioned, which can lead to an escalation of tension, mistrust and potentially lead to criminal charges.

Systems Factors

Community Legal Engagement

That the involvement of community elders within the legal system – in particular, sentencing – be investigated as a means of reducing incarceration. This could include examining the role of Koorie Courts in Victoria, or the incorporation of traditional law in the Northern Territory. That models of incarceration reduction in other jurisdictions be examined, for example, with regard to Aboriginal peoples in Canada. This may include therapeutic sentencing options and Gladue reports as incorporated into Canadian legislation, which examine the life history of Aboriginal offenders coming before the courts.

Pre- and Post Release Support

To reduce recidivism, pre- and post- release programs that are community driven are essential. As such any pre- and post release programs must be investigated and evaluated. The Victorian Aboriginal Legal Service runs a pre- and post-release program and would be available for discussion around this.

Lack of access to housing should also be investigated. The lack of housing for those on bail, remand or release is one of the biggest contributors to recidivism. This needs to be investigated if the inquiry is serious in finding ways to reduce reoffending.

Culturally appropriate parole programs should also be investigated and evaluated. The Victorian Aboriginal Legal Service has researched the need for culturally appropriate and community led parole programs in prisons to assist inmates in preparing them for release.

Mistreatment in Prisons

The treatment of Aboriginal and Torres Strait Islander inmates should be investigated. The Victorian Aboriginal Legal Service has been made aware of treatment that is outside the grounds of good conduct with the Victorian prison system, in particular towards Aboriginal inmates.

Trauma and Therapeutic Sentencing

The Inquiry should examine and evaluate therapeutic sentencing options, especially in the realm of juvenile detention. The need for less punitive sentencing options – and options which promote rehabilitation, address trauma and provide education – should be investigated.

The links between social inequality, trauma from previous child removal policies, family violence, residential care and juvenile incarceration leading to adult incarceration should be investigated. This is to ensure that the root of the problem – frequent childhood contact with the justice and social services systems – can be avoided at all costs.

Flexibility in Sentencing

The current model of sentencing – which can only escalate the punishment – needs to be reviewed to seek out flexible sentencing options, in particular for Aboriginal and Torres Strait Islander children and young people. This includes finding diversionary and therapeutic sentencing options, as well as supporting education and return-to-work programs that significantly reduce recidivism.

Social Factors

Family Violence

One of the major drivers for offending is family violence. Any inquiry that seeks to understand the root causes needs to thoroughly investigate the drivers of family violence, and the impacts of family violence in offending and increased incarceration rates. It is well known that adult incarceration is driven by juvenile offending and out of home care substantiation. The catalyst for this life-long contact with the justice system is invariability family violence. For incarceration rates to change, the underlying drivers must be resolved, and family violence is of main concern.

Disability

The impacts of disabilities should be investigated in the inquiry. This can include Acquired Brain Injuries, Foetal Alcohol Spectral disorders and other mental and physical disabilities that may be causal factors in offending as well as conversely creating a barrier for access to justice. A better understanding of such disabilities and mental/physical health barriers that influence offending and create barriers in access to justice

would serve to further acknowledge underlying factors that lead to increased incarceration rates for Aboriginal and Torres Strait Islander peoples.

Impacts of Racism

Racism and prejudice are pervasive not only in the justice and policing systems but in Australian society. The impact of every-day racism towards Aboriginal and Torres Strait Islander peoples should be examined as a contributor to increased incarceration rates.

Compulsory cultural training for workers in the justice system as well as police and other associated workers within the corrections and justice and youth detention systems should be investigated. This should be more than a simple one-day training module, but a pervasive, community-led cultural immersion that includes language, cultural practice, and connections with local community services.

Physical and Mental Health

Mental health access in prisons must be investigated. The Victorian Aboriginal Legal Service is aware that there is a distinct lack of mental health care in the prison system, at both juvenile and adult corrections facilities. This is especially for culturally appropriate community mental health access of which there is none. Access to physical health services in prisons investigated, especially in women's prisons. Programs that incorporate and involve Aboriginal Community Controlled Health Services should be evaluated and encouraged.

FOR FURTHER INFORMATION AND CONSULTATION CONTACT:

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