



COMMISSION FOR CHILDREN AND YOUNG PEOPLE

16 January 2017
CCYPD/17/158

ALRC Incarceration Inquiry
Legal Assistance Branch
Attorney General's Department
35 National Circuit
BARTON ACT 2600.

Dear Sir / Madam

ALRC Inquiry into the incarceration rate of Indigenous Australians

The Victorian Commission for Children and Young People (the Commission) is an independent statutory body established to promote improvement and innovation in policies and practices affecting the safety and wellbeing of Victorian children and young people. We have a particular focus on vulnerable children and young people. It is in this context that we offer the following comments and recommendations for your consideration.

We note that the Australian Government is consulting on the draft terms of reference for the Australian Law Reform Commission (ALRC) inquiry into the incarceration rate of Indigenous Australians. This inquiry was announced by the Attorney General, Senator the Hon George Brandis QC, and Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, on 27 October 2016. The draft terms of reference request that the ALRC examine the factors leading to the overrepresentation of Indigenous Australians in our prison systems and consider what reforms to the law could address this.

Children and young people

The Commission recommends that the terms of reference be amended to clarify that, in conducting the Inquiry, the ALRC should have regard to the laws and legal frameworks that contribute to the incarceration rate of Aboriginal children and young people, as well as to the incarceration rate of Aboriginal adults.

This should include consideration of the impact of the minimum age of criminal responsibility and the impact of contact with the criminal justice system at the different stages of a child's development.

Family violence

The Commission commends the inclusion of broader contextual factors contributing to Indigenous incarceration in the draft terms of reference, particularly inter-generational trauma, loss of culture, experience of violence, child abuse and neglect and educational access and performance.

We recommend that the impact of family violence be included as a broader contextual factor for consideration, including the role that family violence plays in the incarceration of women and children.

In this context we note that the ALRC, in association with the New South Wales Law Reform Commission, undertook in 2010 a comprehensive review of specified family violence laws and legal frameworks to improve the safety of women and their children. One pertinent finding of this review was that 'a court is often forced to remand a young person in detention rather than release him or her



on bail if, because of family violence or other factors, the young person has no safe or stable home to go to, or if there is no appropriate adult guardian to provide supervision and support for the young person to meet their bail requirements.¹

Systemic bias and discrimination

The Commission commends the inclusion of discrimination as a broader contextual factor contributing to Indigenous incarceration in the draft terms of reference. In this context, we recommend that discrimination in the form of institutional racism and systemic bias, including in the use of police discretion, 'over-policing' in Aboriginal communities and racial profiling, be considered as factors within laws and legal frameworks that affect decisions to incarcerate Indigenous Australians.

A 2005 Victorian study found that the over-representation of Aboriginal people at every stage of the criminal justice system is not explained by criminogenic factors alone, and that 'Aboriginal people with intimate experience of the criminal justice system continue to perceive the system as fundamentally discriminatory.'²

Other reports, inquiries and action plans

In addition to the reports, inquiries and action plans already identified in the draft terms of reference, we suggest that the ALRC should also be invited to consider:

- National Framework for Protecting Australia's Children 2009-2020 and its action plans;
- Council of Australian Governments targets, with a view to developing jurisdictional targets to close the gap on incarceration rates
- "Doing Time - Time For Doing: Indigenous youth in the criminal justice system" report.³

In reviewing the Royal Commission into Aboriginal Deaths in Custody the ALRC should be requested to particularly review those recommendations that could reduce the incarceration rate of Aboriginal people that have not yet been implemented.

Consultation and community participation

The Commission recommends that in conducting its Inquiry the ALRC be required to engage with Aboriginal and/or Torres Strait Islander people and organisations, including children and young people.

This submission may be treated as a public submission and placed on the ALRC's website.

We look forward to contributing in due course to the Inquiry.

Yours sincerely



Liana Buchanan
Principal Commissioner



Andrew Jackomos PSM
Commissioner for Aboriginal Children and Young People

¹ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response* (ALRC Report 114 / NSWLRC Report 128) October 2010, p.974.

² Harry Blagg, Neil Morgan, Chris Cunneen, Anna Ferrante, *Systemic Racism as a Factor in the Overrepresentation of Aboriginal People in the Victorian Criminal Justice System* (September 2005) p.164.

³ Australian Parliament House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011)