

THE UNIVERSITY OF
NEW SOUTH WALES

15 May 2015

Senate Finance and Public Administration Committee
PO Box 6100
Parliament House
Canberra ACT 2600



KINGSFORD
LEGAL CENTRE

By email: fpa.sen@aph.gov.au

Dear Madam/Sir,

Access to legal assistance services

Kingsford Legal Centre (KLC) welcomes the opportunity to make a submission on Aboriginal and Torres Strait Islanders experience of law enforcement and justice services.

Our submission focuses on the following terms of reference (TOR):

- a. the extent to which Aboriginal and Torres Strait Islander Australians have access to legal assistance services;
- b. the adequacy of resources provided to Aboriginal legal assistance services by state, territory and Commonwealth governments; and
- g. the cost, availability and effectiveness of alternatives to imprisonment for Aboriginal and Torres Strait Islander Australians, including prevention, early intervention, diversionary and rehabilitation measures.

We provide details about our own services for Aboriginal and Torres Strait Islander clients (TOR A & B). We present evidence of Aboriginal and Torres Strait Islander people's limited access to legal services (TOR A) and submit that major factors limiting access to services are:

- a lack of awareness about legal issues (TOR A & B);
- disenfranchisement with laws and the legal system (TOR A & B); and
- a lack of adequate and culturally appropriate services (TOR B).

Finally, we highlight the importance of justice reinvestment in addressing and preventing high rates of incarceration (TOR G).

In summary, we recommend that:

1. The Government should provide funding for Aboriginal and Torres Strait Islander identified positions within legal assistance services.
2. The Government should increase funding for ATSILS, FVPLS and community legal centres to undertake community legal education for community members and community workers.
3. The Parliament should enact an Equality Act that promotes substantive equality, shares the burden of proof and provides effective remedies, including against systemic and intersectional discrimination.
4. The Parliament should support proposed amendments to enshrine Aboriginal and Torres Strait Islander's right to non-discrimination and equality in the Australian Constitution.

5. The Government should ratify the *Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, and establish independent National Preventative Mechanisms to prevent torture, cruel, inhuman and degrading treatment in places of detention, including police detention.
6. Police complaints should be handled by an organisation that is culturally and institutionally independent of police, with powers to making binding decisions.
7. The Government should analyse and address the disproportionate impact of proposed and existing laws on Aboriginal and Torres Strait Islander people. Consistent with 1987 *Royal Commission into Aboriginal Deaths in Custody* recommendation 92, imprisonment should be used only as a sanction of last resort.
8. The Government should implement the Productivity Commission's recommendation for an additional \$200 million to the legal assistance sector, including funding for systemic advocacy work and additional funding to ATSILS to meet civil and family law unmet need.
9. The Government should implement the Senate Legal and Constitutional Affairs Committee's recommendations on justice reinvestment.
10. The Government should commit new funding to support and strengthen Aboriginal and Torres Strait Islander communities (including remote and regional) with an aim of addressing systemic disadvantage and human rights abuses in areas such as housing, health and education.

About Kingsford Legal Centre

KLC is a community legal centre that has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government Areas since 1981. KLC provides general advice on a wide range of legal issues, and undertakes casework for many clients who, without our assistance, would be unable to afford a lawyer.

In 2014 KLC gave 104 advices and opened 23 case files for Aboriginal clients, representing 7% of advice clients in the period. The largest single area of advice for these clients was race discrimination.

KLC also has a specialist employment law service, a specialist discrimination law service (NSW wide) and an Aboriginal Access Program. KLC undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

Our services for Aboriginal and Torres Strait Islander clients (TOR A & B)

KLC has always aimed to provide a flexible, respectful and responsive service to its Aboriginal and Torres Strait Islander clients. In keeping with this commitment, KLC launched its Aboriginal Access Program in 2009, which continues to this day. As part of the program, KLC created a new Aboriginal Access Worker position and established an Aboriginal Advisory Group to advise and guide the work of the worker and suggest areas of potential law reform.

The aim of the program is to:

- develop, maintain and extend links between KLC and the local Aboriginal community, organisations and service providers;
- provide support to Aboriginal clients;
- provide legal information and referral to appropriate legal and non-legal services;
- advise and assist in the promotion of KLC to the Aboriginal Community; and
- provide cultural awareness training for KLC staff, students and volunteers.

The program was initially funded by a generous donation from the Berg Foundation and grants from Randwick City Council and the Community Legal Centres NSW Aboriginal Legal Access Program. It has been difficult to obtain ongoing external funding to support this project and since 2012 it has been funded by the University of New South Wales Law Faculty.

The program has had a significant impact on increasing our services to Aboriginal and Torres Strait Islander members of our community. The proportion of our clients that identify as Aboriginal or Torres Strait Islander has doubled since the project commenced. In 2008, the year before the commencement of the AAP, 3.5% of our clients identified themselves as Aboriginal or Torres Strait Islander. In 2014, this had increased to 7%. The presence of an Aboriginal Access Worker has been crucial to reaching these clients. The position was vacant for 4 months in 2012 and this period corresponded with a temporary drop in our proportion of Aboriginal clients.

KLC also has policies, services and resources that enhance our capacity to reach and provide services to Aboriginal and Torres Strait Islander clients. For example, we give priority to Aboriginal and Torres Strait Islander clients. If a client calls or attends the centre and identifies as Aboriginal or Torres Strait Islander they are asked if they would like the assistance of the KLC's Aboriginal Access Worker and are put through to a solicitor immediately. If a solicitor is not available at the time, we collect their contact details and let them know that one of our solicitors will be in touch with them as soon as possible.

On a fortnightly basis, KLC provides an outreach service to the local Aboriginal community in La Perouse. The service is conducted at the La Perouse Community Health Centre.

In 2013, KLC launched Working with Aboriginal Clients at Kingsford Legal Centre, a service provision manual aimed helping staff, students and volunteers at KLC to build strong, culturally appropriate relationships with Aboriginal Clients and communities. The manual was produced by KLC's Aboriginal Access Worker in consultation with the local Aboriginal community. The manual was originally funded by Randwick City Council with additional funding from the University of New South Wales Law Faculty.

Recommendation 1: The Government should provide funding for Aboriginal and Torres Strait Islander identified positions within legal assistance services.

Limited access to legal assistance services (TOR A)

Although there is no hard data on the extent of unmet legal need of Aboriginal and Torres Strait Islander people,¹ there is some evidence to suggest that the majority of Aboriginal and Torres Strait Islander people with a legal issue do not seek advice and seek advice less often than non-Indigenous people.²

The *Legal Australia-Wide Survey: Legal Need in Australia* found that Aboriginal and Torres Strait Islander respondents to the survey were:

- 30 per cent more likely than non-Indigenous respondents to have multiple legal problems;
- significantly more likely than non-Indigenous respondents to have legal needs in the areas of government, health and rights; and
- significantly less likely than non-Indigenous respondents to have their problem finalised (possibly reflecting the multiple nature of the problems).³

¹ Productivity Commission Inquiry Report, *Access to Justice Arrangements*, No 72, September 2014, p 770.

² Law and Justice Foundation, *Legal Australia-Wide Survey: Legal Need in Australia*, August 2012, p 35.

³ Productivity Commission Inquiry Report, above n 1, p 770.

Although the primary provider of legal service to Aboriginal and Torres Strait Islander Australians is the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Family Violence Prevention Legal Services (FVPLS), community legal centres are a significant provider, with around 6% of their casework clients 2012-2013 being identified as Aboriginal or Torres Strait Islander.⁴

With ATSILS and FVPLS focussing mainly on crime and violence prevention, family and other civil law needs often go unmet. Statistics provided to the Productivity Commission indicated that civil law casework and advice is dwarfed by criminal and family or domestic violence casework and advice.⁵ The findings of the Indigenous Legal Needs Project has also identified problems in accessing civil and family law advice.⁶

In NSW, Aboriginal communities have identified tenancy, racial discrimination, neighbourhood disputes, debt and social security as legal problems frequently experienced but without a satisfactory resolution. There also appears to be substantial unrecognised legal need in Aboriginal and Torres Strait Islander communities, particularly in the areas of victims' compensation and wills.⁷

A 2008 report into the family and civil law needs of Aboriginal people in NSW, identified that few Aboriginal people sought legal advice when confronted with the following types of legal issues:

- family law and DOCS associated matters (14.9% sought advice)
- dispute with a land lord (15.4% sought advice)
- neighbourhood disputes (25% sought legal advice)
- employment (29 per cent sought legal advice)
- stolen wages (7.1% sought legal advice)
- discrimination (28.1% sought legal advice)⁸

Lack of awareness of legal issues (TOR A & B)

A major obstacle in accessing legal services is a lack of awareness that an issue has legal aspects and that legal advice may be of use. KLC regularly sees clients whose legal problems could more easily have been solved had they sought advice from us earlier. Our experience corresponds with the findings of the Indigenous Legal Needs Project, which identifies low levels of understanding of and engagement with civil and family law as a major barrier to Aboriginal and Torres Strait Islander people's access to justice.⁹

⁴ Above, p 779.

⁵ Above, pp 768-9.

⁶ Indigenous Legal Needs Project, *Submission to Productivity Commission Inquiry: Access to Justice Arrangements*, James Cook University, 2013 p 2.

⁷ Above, pp 2-3.

⁸ Cunneen and Schwartz, *The family and civil law needs of Aboriginal people in New South Wales: Final Report*, UNSW 2008, pp 64, 69, 72, 78-80.

⁹ Allison, Cunneen & Schwartz, *Indigenous Legal Needs Project submission to the Senate Inquiry into Access to Legal Assistance Services*, May 2015, p 5.

Case study: Elsa

Shortly after her brother died, Elsa saw a television ad for a funeral fund plan. She and her family had struggled to meet the costs of her brother's funeral and she was worried that her children would face the same burden when she died. She thought she had found the solution and signed up over the phone for \$10,000 of cover. Over the following 20 years, her monthly payments increased and once or twice she missed a payment. She had also spoken to the company to arrange for her payments to be capped to prevent further increases.

She came to KLC for advice because she didn't understand why her cover was now half of what it once was. She had also kept detailed notes of her payments and realised that she had already paid more than her total cover and was confused as to why she had to keep paying more money.

We assisted Elsa to call the company and explained to her the terms of her agreement and the changes that had been made to it over time. We also talked to Elsa about her options going forward.

After seeing us, Elsa was frustrated that she had not sought advice from us earlier, when she had first signed up to the plan and when she had agreed to changes to the plan. She felt that she would have made different decisions had she fully understood the agreement.

Raising awareness about legal rights and issues, as well as services that can assist in resolving legal problems, is essential to improving access to justice for Aboriginal and Torres Strait Islander Australians. In particular, training and education needs to be funded and provided to both community members and to community workers. Community workers are in close and regular contact with community members and are well placed to identify the legal nature of issues and put people in contact with appropriate services.

Recommendation 2: Increased funding should be provided to ATSILS, FVPLS and community legal centres to undertake community legal education for community members and community workers.

Disenfranchisement with laws and the legal system (TOR A & B)

Our Aboriginal Access Worker regularly talks to clients and community members who are disenfranchised with laws and the legal system, and who tell us that there is no point to seeking legal assistance. These perceptions stem from a long and difficult history of legalised dispossession, oppression and racial discrimination. These historical traumas are compounded by ongoing problems and frustration with policing practices and policy and legislative failures to reduce Aboriginal and Torres Strait Islander incarceration and child removal rates, both of which have never been higher.

Inadequate protections against discrimination

Aboriginal and Torres Strait Islander people experience high levels of racism and discrimination and, for many, this is their main interaction with the law and legal system. At Kingsford Legal Centre, 25% of our 2014 advices to Aboriginal and Torres Strait Islander people were about discrimination law. This is consistent with the high rates of discrimination reported in research in this area. A 2011 Lowitja Institute survey of 755 Aboriginal and Torres Strait Islander people in Victoria found that almost everyone who was surveyed had

experienced racism in the previous 12 months.¹⁰ The 2008 National Aboriginal and Torres Strait Islander Social Survey found that 27% of Aboriginal and Torres Strait Islander people aged 15 years and over had experienced discrimination in the past 12 months.¹¹

In our experience, clients are often unable to use discrimination law and processes to address the racism that they have experienced. The insidious nature of racism means that it can be difficult to prove that a person has been treated unfavourably *because* they are Aboriginal or Torres Strait Islander. We successfully represented one client at the Administrative Decisions Tribunal who was excluded from a guesthouse and told “sorry we don’t take Aboriginals here because they cause too much trouble”.¹² However, in most cases unfavourable treatment is not accompanied by such explicitly racist statements. Many Aboriginal and Torres Strait Islander clients seek advice from us about unfavourable treatment they have received at pubs, hotels and other services. While they feel strongly that the treatment they have experienced is because they are Aboriginal or Torres Strait Islander, it is often difficult for them to prove this with the evidence that they have available to them.

Many clients are understandably frustrated and disillusioned with the legal system after hearing that the legal system might not be able to help them to address the racism that they are regularly facing. This can impact on clients’ reluctance to seek legal assistance in areas where the legal system might be able to assist them, such as tenancy, debt and family law. Strengthening discrimination law protections would improve the legal response to racism, and consequently have a positive impact on Aboriginal and Torres Strait Islander people’s experience of the law and likelihood to access legal assistance in other areas of law.

Recommendation 3: The Parliament should enact an Equality Act that promotes substantive equality, shares the burden of proof and provides effective remedies, including against systemic and intersectional discrimination.

Recommendation 4: The Parliament should support proposed amendments to enshrine Aboriginal and Torres Strait Islander’s right to non-discrimination and equality in the Australian Constitution.

Experiences with police

Disenfranchisement with the legal system also arises from bad experiences with interactions with police and with subsequent complaint processes. Clients tell us of their experiences of discrimination and harassment by police officers. Such stories are common amongst the Aboriginal and Torres Strait Islander communities with which we work and are shared amongst community members. These shared experiences contribute to a general sense of distrust of and victimisation by the legal system.

¹⁰ Ferdinand, Paradies and Kelaher, *Mental Health Impacts of Racial Discrimination in Victorian Aboriginal Communities: The Localities Embracing and Accepting Diversity (LEAD) Experiences of Racism Survey*, Lowitja Institute, January 2013, p 1.

¹¹ Australian Bureau of Statistics, *The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander Peoples: ‘Social and Emotional Wellbeing: Discrimination’* (October 2010).

¹² *Smith v Jamsek* [2012] NSWADT 3

Case study: Codie

Codie was driving down a main street when he was pulled over by police officers for no apparent reason. The police officers breath tested him and searched his car, uncovering nothing. They then strip searched Codie in full view of the busy street and in front of female police officers. They did not give him a reason nor did they offer him any more private options. The police officers let him go without issuing any cautions, fines or charges.

Codie came to KLC for advice about holding the police accountable for their behaviour. We advised him about his options and offered to assist him further but, after talking to family and friends, he decided not to take any action. He feared that making a complaint would only make things worse and that the police would continue to harass him and his family.

As Codie's case illustrates, there is little faith that the internal police complaints system will provide any justice for clients and a fear that it may worsen harassment and victimisation. Consequently, clients are often unwilling to make formal complaints about the behaviour that they have experienced. We know from conversations with our local communities that many people don't seek advice about police behaviour because of a sense that nothing can be done about it.

In Michael's case (set out below), Michael was brave enough to make a formal complaint and meet with police officers to discuss it. It was especially concerning to us that, even with legal representation, his complaint was not treated seriously.

Case study: Michael

Michael is a local Aboriginal teenager. He was standing on a street when two plain clothed police officers approached him and accused him of swearing at them. Michael told the officers that he hadn't sworn at them. The police officers asked Michael for his ID, address and name, and said to him "You look like you've been in trouble before", to which Michael replied, "No I haven't".

Michael came to KLC for advice because he felt that the police officers had harassed him because he is a young Aboriginal man, and that they were trying to intimidate him and force him to retaliate. He told us that he was made to feel like a suspect in front of other people for no reason.

KLC assisted Michael in writing a formal letter of complaint to the local police station and attended a meeting between Michael and local police. At the meeting, the police were very defensive and said that the officers were "not the kind of officers" to do something like that. Michael left the meeting feeling that there was no point in making complaints because he would not be listened to or believed, even when he had a lawyer to help him through the system.

Recommendation 5: The Government should ratify the Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and establish independent National Preventative Mechanisms to prevent torture, cruel, inhuman and degrading treatment in places of detention, including police detention.

Recommendation 6: Police complaints should be handled by an organisation that is culturally and institutionally independent of police, with powers to making binding decisions.

Consorting offences

Aboriginal and Torres Strait Islander people's confidence in police and the legal system continues to be undermined by the introduction of new laws that have a disproportionate impact on their communities. For example, the NSW Government introduced a new consorting offence in 2012 that criminalises continued association with two people who have been convicted of an indictable offence following a police warning about their convictions and that continuing to associate with them (including by email, telephone or other electronic means) is an offence. In the first year of its operation, 40% of people who received a warning under the new law were Aboriginal.¹³ The disproportionate application of laws contributes to a sense of being targeted and victimised by police, and deters people from seeking assistance.

Recommendation 7: The Government should analyse and address the disproportionate impact of proposed and existing laws on Aboriginal and Torres Strait Islander people. Consistent with 1987 *Royal Commission into Aboriginal Deaths in Custody* recommendation 92, imprisonment should be used only as a sanction of last resort.

Need for adequate services (TOR B.)

Access to timely legal advice is crucial in preventing small legal problems from snowballing into larger problems with growing debts and potentially criminal law implications. For example, we commonly advise clients on penalty notice fines. If left unpaid, fines can increase, and result in licence and registration suspensions, further fines and criminal charges for driving without a licence or an unregistered vehicle. With early intervention, we can assist clients to have fines reviewed or to set up repayment plans that prevent further issues from arising.

Case study: Tyrone

Tyrone is a local Aboriginal man, with caring responsibilities for his nephews. He bought a car and, after paying for his compulsory third party insurance, he went to his local Roads and Maritimes Services (RMS) office to pay for his rego. Tyrone is on a pension, and so he did not need to pay for his rego. The RMS officer told him all was good and he proceeded to drive his car.

Shortly after he was pulled over by police for driving uninsured and given a substantial fine, which he could not afford to pay. Tyrone was shocked as he thought he had done all that he needed to do to get his car registered. He now had a massive fine, no car to transport his nephews to and from school, and a mess to sort out getting his car registered and insured.

Tyrone contacted KLC for advice. We applied for review of the fine, which was withdrawn, and negotiated for the RMS to reimburse the cost of registering his car again.

If Tyrone hadn't been able to access KLC it's possible his situation would have spiralled out of control. An unpaid fine can lead to license suspension. Due to his caring responsibilities there would be pressure on him to drive. Driving while suspended is a criminal offence which can lead to licence disqualification & very hefty fine. If there are repeat offences, a jail term is a possibility, along with a lengthy period of license disqualification. The impact on Tyrone and on his family would be huge.

¹³ NSW Ombudsman, *Consorting Issues Paper*, November 2013, p 9.

Legal assistance services in Australia are chronically underfunded and are not able to meet the current legal need, especially for civil law matters. The Productivity Commission found that “[a] lack of resources, combined with a focus on representation for criminal matters, has led to an under-provision of services for civil law matters”, and it recommended a \$200 million increase in government funding for legal assistance services.¹⁴ The Indigenous Legal Needs Project has also identified the urgent need for increased funding for ATSILS. It has found that ATSILS do not currently provide any sort of comprehensive service around the existing civil and family law need, and that additional funding is needed to meet that need.¹⁵ Both the Productivity Commission and the Indigenous Legal Needs Project have emphasised the importance of funding systemic responses to legal issues, including community education, and policy and law reform, as well as funding for advice and casework.¹⁶

Additional funding in this area is required to recognise the complex and multi-dimensional nature of legal issues that Aboriginal and Torres Strait Islander people face. As KLC’s Aboriginal Access Program has shown, providing quality legal services to Aboriginal and Torres Strait Islander people requires culturally appropriate services which have capacity to respond promptly to client’s needs. It must be recognised that due to the impact of economic and social disadvantage that some Aboriginal and Torres Strait Islander people will require ongoing support and help from a legal service provider for most of their life. Services are not currently adequately funded to address this need.

Case study: Tabitha

Tabitha is an Aboriginal woman. Seven years ago she came to KLC for help in relation to some housing problems. KLC was able to help her. Since that time Tabitha has been a client of the Centre many times for a range of legal issues including domestic violence, making a complaint about the police and problems with her neighbours. Tabitha’s children have also accessed KLC for help.

KLC continues to help Tabitha and has an open file for her even though she has moved out of the area. The Centre recognises that due to a number of factors outside her control Tabitha will always need access to legal help and support. KLC recognises the importance of continuity of service to Tabitha is helping her address her legal issues.

Recommendation 8: The Government should implement the Productivity Commission’s recommendation for an additional \$200 million to the legal assistance sector, including funding for systemic advocacy work and additional funding to ATSILS to meet civil and family law unmet need.

Justice reinvestment (TOR G)

Considering the severe over-representation and increasing rates of Aboriginal and Torres Strait Islander people in Australian jails and youth detention facilities, it is important that successful, evidenced-based policy be employed to address this urgent crisis. KLC supports the development of justice reinvestment policies and trials as a potential way of addressing the over-imprisonment of Aboriginal and Torres Strait Islander people as well as preventing crime and strengthening communities.

¹⁴ Productivity Commission Inquiry Report, above n 1, p 38.

¹⁵ Allison, Cunneen & Schwartz, above n 9, p 8.

¹⁶ Productivity Commission Inquiry Report, above n 1, p 711-713, and Allison, Cunneen & Schwartz, above, p 8.

Justice reinvestment has developed in overseas contexts to address both the rising cost of imprisonment and to strengthen communities with high rates of incarceration by reducing imprisonment and preventing crime. In Australia it has been considered a potential way of addressing Aboriginal and Torres Strait Islander over-imprisonment and the dramatic impact this has on communities. The focus on reinvesting funds that would ordinarily be spent within the prison system is also seen as a way of better resourcing Aboriginal and Torres Strait Islander communities, which are often economically and socially disadvantaged. In 2013 the Senate Legal and Constitutional Affairs Committee comprehensively examined the potential value of justice reinvestment in this context.¹⁷ The Committee made recommendations about the development of strategies and data collection to facilitate justice reinvestment in Australia. We support the recommendations including recommendation 7 that the Government fund trials of justice reinvestment in Australia. We note that there are proposed trials in Bourke and would support the development of further trials in order to determine the effectiveness of justice reinvestment for Aboriginal communities and in reducing imprisonment and crime.

While KLC supports the exploration of justice reinvestment we also wish to stress the importance of not only diverting funds ordinarily spent within the prison system but also the need to invest new funding in addressing the systemic discrimination experienced by Aboriginal and Torres Strait Islander people. Justice reinvestment may be part of the solution but it also needs to be implemented in the context of government commitment to improving the lives of Aboriginal and Torres Strait Islander people and, in particular, improving the attainment of human rights for Aboriginal and Torres Strait Islander people, including the proper resourcing of services and communities.

Recommendation 9: The Government should implement the Senate Legal and Constitutional Affairs Committee's recommendations on justice reinvestment.

Recommendation 10: The Government should commit new funding to supporting and strengthening Aboriginal and Torres Strait Islander communities (including remote and regional) with an aim of addressing systemic disadvantage and human rights abuses in areas such as housing, health and education.

Yours sincerely,
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¹⁷ Commonwealth of Australia, *Value of a justice reinvestment approach to criminal justice in Australia*, Senate Committee (Legal and Constitutional Affairs Committee), 2013.