

# Chapter 8

## Committee view and recommendations

8.1 The work of this committee and the evidence it has received has been preceded by many other inquiries. The committee acknowledges what one witness described as 'Aboriginal justice inquiry fatigue'.<sup>1</sup> However, in the committee's view, these inquiries do serve an important purpose. While there is, naturally, a focus on the lack of resources for legal services for Aboriginal and Torres Strait Islander people and the increasing incarceration rate, the committee has also heard evidence of programs helping to prevent contact with the criminal justice system, and efforts to divert and rehabilitate offenders from prison. There is certainly more work to do, but the committee believes that there is also positive work being done.

### Adequacy of resources for legal assistance services

8.2 Evidence to the committee reiterates what has been found in previous inquiries: the funding for legal assistance services is inadequate. This means not only is more funding needed for the Indigenous-specific services of Indigenous legal service providers and the Family Violence Prevention Legal Services, but also for Legal Aid and Community Legal Centres which also offer valuable assistance to Aboriginal and Torres Strait Islander people.

8.3 The current breadth and depth of unmet legal needs for Aboriginal and Torres Strait Islander people is completely unsatisfactory. As the committee heard, in large areas of Australia, Aboriginal and Torres Strait Islander people have no access to any legal assistance for civil and family law matters. The result is that simple legal matters 'remain unresolved until they escalate and multiply....legal problems can balloon into more significant issues...and ultimately to criminal behaviour and imprisonment'.<sup>2</sup>

8.4 The broad issue of unmet legal needs, not specific to Indigenous Australians, was recognised by the Productivity Commission in 2014 and it recommended additional funding to address pressing gaps in services.<sup>3</sup> The committee notes that this specific recommendation was not addressed in the government response. The committee agrees with the rationale expressed by the PC and believes it is particularly applicable to Indigenous Australians, that 'not providing legal assistance...can be a false economy as the costs of unresolved problems are often shifted to other areas of government spending...'<sup>4</sup>

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1 Mr Wes Morris, Coordinator; *Committee Hansard*, 23 September 2015, p. 37.

2 Law Council of Australia, *Submission 41*, p. 27.

3 Australian Government, Productivity Commission, *Access to Justice Arrangements, Inquiry Report No. 72*, 5 September 2014, p. 63.

4 Australian Government, Productivity Commission, *Access to Justice Arrangements, Inquiry Report No. 72*, 5 September 2014, pp 30-31.

8.5 The committee notes the call in the Redfern Statement for the Australian Government to adequately fund Aboriginal and Torres Strait Islander community controlled front-line legal services which would include reversing funding cuts to Aboriginal and Torres Strait Islander legal services funding due to occur in 2017 and investing in Family Violence Prevention Legal Services to ensure funding certainty,<sup>5</sup>

### ***Barriers to legal assistance***

8.6 The committee considered a number of barriers to accessing legal assistance services. As evidence to this committee demonstrated, a lack of awareness about legal problems can have significant effects for Aboriginal and Torres Strait Islander people.

8.7 The committee commends the work that is being done by legal service providers, such as Legal Aid New South Wales (NSW), in forming relationships with health services to assist in identifying legal problems. The committee also heard that outreach workers can play a significant role in breaking down those barriers to accessing legal services.

8.8 The committee was concerned by the evidence that it received regarding the lack of interpreters available to assist Aboriginal and Torres Strait Islander people to access legal assistance services. It is critical that interpreters be made available in order for clients to engage with, and for services to provide, legal advice. In particular, the committee notes the evidence of The Hon Wayne Martin AC, Chief Justice of Western Australian Supreme Court (WA), that criminal proceedings are invalid unless the accused person understands the language in which the process is being conducted.

8.9 While it is clear that more money is needed for legal assistance services generally, the committee is strongly of the view that there needs to be a focus on funding for community legal education, outreach workers and interpreters. A focus on more education and early intervention would help prevent people becoming involved in the criminal justice system.

### **Imprisonment of Indigenous people**

8.10 The committee is discouraged to see the continual upward trend in the incarceration rates of Indigenous people. The committee agrees with so much of the evidence that it received that the structural biases within the system are impacting heavily on Indigenous people. As has been borne out in previous inquiries, and was again highlighted in this inquiry, mandatory sentencing regimes, harsh bail laws and proactive policing impact on Indigenous incarceration rates.

8.11 However, the committee also acknowledges that this particular issue is complicated by the fact that the criminal justice system is the responsibility of states and territories, and so there are limited actions available to the Commonwealth Government to address increasing incarceration rates.

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5 Redfern Statement, p. 11.

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### ***Mandatory sentencing***

8.12 Noting the limitation of the Commonwealth, the committee received concerning evidence about the effect that state laws such as mandatory sentencing have on Indigenous incarceration rates. The committee notes the persuasive evidence on this issue from Chief Justice Martin who indicated that the mandatory sentencing legislation in WA 'will have a significant effect upon incarceration rates, particularly amongst juveniles'.<sup>6</sup>

### ***Data***

8.13 The data available on Indigenous incarceration rates lacks granularity. While broad trends are discernible, there is a lack of disaggregated data and the collection of data by states and territories is inconsistent. In particular, the committee agrees with the observations about the limitation of data in respect of the imprisonment of Indigenous women.

8.14 The committee notes that, pursuant to the current National Partnership Agreement on Legal Assistance Services there has been increased action by the Commonwealth Government, particularly within the Attorney-General's Department, regarding data on legal assistance services. However, the committee believes that more should be done regarding the collection of consistent and standardised data on incarceration rates for Indigenous people. While the committee received evidence that it is difficult to have a 'single, logical owner' of such a task,<sup>7</sup> it seems obvious to the committee that the Council of Australian Governments (COAG) Law, Crime and Community Safety Council is the body to drive policy and actions in this area. The committee therefore recommends that the Commonwealth Government take all necessary steps to have the development and implementation of a plan for the collection of consistent national data on all aspects of Indigenous incarceration placed on the agenda for the next meeting of the Law, Crime and Community Safety Council.

### ***Justice targets***

8.15 The committee notes the strong support for justice targets to form part of the Closing the Gap measures. The committee also notes the Coalition parties, despite supporting such targets prior to the last election, have, in government, backed away from that commitment.

8.16 The committee accepts the Minister for Indigenous Affairs' statement that the Commonwealth Government is going to work with states and territories, which have the responsibility in this area, to assist them to put in place justice targets and the measures to meet those targets. However, the committee notes that the communiqué from the most recent COAG meeting, does not demonstrate sufficient action or urgency by the Commonwealth Government to specifically address the development,

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6 *Committee Hansard*, 4 August 2015, p. 32.

7 Ms Elizabeth Quinn, Assistant Secretary, Legal Assistance Branch, Attorney-General's Department, *Committee Hansard*, 4 April 2016, p. 30.

implementation and meeting of justice targets by the states and territories.<sup>8</sup> The committee recommends that the Commonwealth Government outline the explicit steps that it is taking to assist the states and territories on justice targets.

### ***Fetal Alcohol Spectrum Disorders***

8.17 The committee notes the release of the Australian Guide to the diagnosis of FASD which includes the Australian FASD Diagnostic Instrument.<sup>9</sup> In the committee's view, the release of the Guide and Diagnostic Instrument should be accompanied by a communication plan to inform those in the criminal justice field working with offenders who may have FASD of its release.

8.18 The committee anticipates that the release of the Guide and Diagnostic Instrument will result in an increase in the diagnosis of FASD, particularly among those coming in contact with the criminal justice system. To this end, the committee recommends the Commonwealth Government to work with the states and territories to develop guidelines for the appropriate management of offenders with FASD.

8.19 Obviously, with FASD, prevention is better than cure. In this respect, the committee was disappointed that there appears to be limited ongoing promotion of the National Health and Medical Research Council's guidelines that for women who are pregnant, planning a pregnancy or breastfeeding, not drinking alcohol is the safest option. In the committee's view, the Commonwealth Government should continue to fund community-wide promotion and education of this message.

### ***Current programs***

8.20 The committee was impressed with two of the initiatives being carried out in NSW, namely the Work and Development Order (WDO) and the Custody Notification Service (CNS).

8.21 In the committee's view, the WDO operating in NSW offers a way in which to address minor indiscretions, without exacerbating poverty and disadvantage. While the committee acknowledges that the non-payment of a fine in NSW, in and of itself, does not lead to imprisonment, the WDO could still represent a workable alternative in other jurisdictions where unpaid fines can result in imprisonment.

8.22 With regards to the CNS, the committee understands that some form of CNS operates in all states and territories. In NSW, the committee notes that since its introduction in NSW in 2000, until July 2016, there had been no deaths of Aboriginal people in custody. The committee notes the tragic outcomes in July 2016 when the CNS was not notified and an Aboriginal woman died in police custody. An internal police investigation was launched and the matter will be examined by the NSW

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8 See COAG Communiqué, 1 April 2016, p. 3. Available at: [www.coag.gov.au/sites/default/files/COAG\\_Communique.pdf](http://www.coag.gov.au/sites/default/files/COAG_Communique.pdf).

9 Australian Government, Department of Health, Australian Guide to the diagnosis of Fetal Alcohol Spectrum Disorder (FASD), April 2016.

coroner.<sup>10</sup> The committee considers that this underscores the critical importance of this service.

### ***Diversion and rehabilitation***

8.23 Part of the committee's focus in this inquiry was to look at what is working – those projects demonstrating positive outcomes either in diverting Aboriginal and Torres Strait Islander people from prison or assisting them post-release so that they do not return to prison.

8.24 In particular, the committee was interested in those programs being run by Aboriginal controlled or operated organisations. To this end, evidence about the Yiriman project in the Fitzroy Crossing region of WA and the work of the Wirrpanda Foundation through its Moorditj Ngoorndiak Program were certainly positive stories. However, the committee is also cognisant that one of the challenges for these programs is the uncertainty of funding, which in turn means that successful programs are ad hoc and can lose traction.

### ***Justice Reinvestment***

8.25 The committee is impressed by the work being done on the justice reinvestment project in Bourke. The Bourke project is clearly an example of the positive outcomes which can be achieved with a community-led process.

8.26 The committee believes, that following from the progress seen at Bourke, the Commonwealth Government should assist in the development of similar programs at trial sites in all states and territories. The committee is cognisant that there is no 'plan' from Bourke which can be used to model other sites, however, the process developed for Bourke can be rolled out to other trial sites. The committee understands that it would take some time to develop similar programs at other sites, as the community needs to be given sufficient time to consult, develop and implement a program.

8.27 While the committee understands that funding for the project at Bourke is predominantly from non-government sources, the committee also notes that the Commonwealth Government provided one-off additional funding of \$20,000 to support the Bourke justice reinvestment project.<sup>11</sup>

### **Recommendation 1**

**8.28 The committee recommends that the Commonwealth Government adequately support legal assistance services, and that specifically funding should focus on:**

- **community legal education for Aboriginal and Torres Strait Islander people;**

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10 Sarah Gerathy, 'Rebecca Maher: Family friend calls for answers about death in custody at Maitland', ABC News, 17 August 2016.

11 See Senate Legal and Constitutional Affairs Legislation Committee, Attorney-General's Department's answer to question on notice No. 63, Budget Estimates 2015.

- outreach workers to assist Aboriginal and Torres Strait Islander people; and
- interpreters for Aboriginal and Torres Strait Islander people in both civil and criminal matters to ensure that they receive effective legal assistance.

#### **Recommendation 2**

**8.29** The committee recommends that the Commonwealth Government take all necessary steps in the development and implementation of a plan for the collection of consistent national data on all aspects of Indigenous incarceration placed on the agenda for the next meeting of the Council of Australian Governments Law, Crime and Community Safety Council.

#### **Recommendation 3**

**8.30** The committee recommends that the Commonwealth Government, prior to the next Council of Australian Governments meeting, explicitly state the measures it is putting in place to assist states and territories to develop, implement and meet Indigenous justice targets.

#### **Recommendation 4**

**8.31** The committee recommends that the Department of Health prepare a communication plan for those working in areas such as the criminal justice field, to accompany the release of the National Fetal Alcohol Spectrum Disorders (FASD) Diagnostic Tool.

#### **Recommendation 5**

**8.32** The committee recommends that the Commonwealth Government, through the Council of Australian Governments, work with states and territories, to develop and implement guidelines for the appropriate management of offenders diagnosed with Fetal Alcohol Spectrum Disorders.

#### **Recommendation 6**

**8.33** The committee recommends that the Commonwealth Government continue to fund initiatives which promote the National Health and Medical Research Council's guidelines that for women who are pregnant, planning a pregnancy or breastfeeding, not drinking alcohol is the safest option.

#### **Recommendation 7**

**8.34** The committee recommends that the Commonwealth Government contribute to the development of justice reinvestment trials at sites in each state and territory.

#### **Recommendation 8**

**8.35** The committee recommends that much greater attention is given to Aboriginal led, managed and implemented justice reinvestment programs such as the Bourke Project and Yirriman, and that the Commonwealth Government support Aboriginal led justice reinvestment projects.

**Recommendation 9**

**8.36** The committee recommends that the Commonwealth Government work with the states and territories in supporting programs which strengthen families and communities through a focus on early intervention and support.

**Recommendation 10**

**8.37** The committee recommends that administrative responsibility for Family Violence Prevention Legal Services be returned to the Attorney-General's Department.

**Recommendation 11**

**8.38** The committee recommends that the Council of Australian Governments task the Council of Australian Governments Law, Crime and Community Safety Council to review state laws such as mandatory sentencing which have a disproportionate effect on Indigenous Australians in order to quantify the effects and report to the Council of Australian Governments.

8.39 Since the committee concluded the evidence gathering period of the inquiry, the committee notes that on 28 July 2016, the Prime Minister announced that there will be a Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory. The committee welcomes this decision and the appointment of two Royal Commissioners, The Honourable Margaret White AO and Mr Mick Gooda.<sup>12</sup>

**Senator Jenny McAllister**  
**Chair**

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12 The Hon Malcolm Turnbull MP, Prime Minister of Australia, 'Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory, Joint Press Release with Senator the Hon George Brandis QC, the Attorney-General, 28 July 2016.

