



## Factsheet: Criminal Justice System

### Background Information

Aboriginal and Torres Strait Islander adults and juveniles, as well as people with disabilities, are disproportionately represented in the Australian criminal justice system. This issue continues to present significant challenges including ensuring adequate funding of the Indigenous legal aid program.

### Key Issue – Aboriginal and Torres Strait Islander adults and juveniles

Aboriginal and Torres Strait Islander adults and juveniles, are significantly over-represented in Australia's prison population.<sup>1</sup> The overrepresentation of Aboriginal and Torres Strait Islander Australians as both victims and offenders remains one of the most glaring disparities between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians.

It has been recommended that justice targets be set to halve the gap in rates of incarceration for Aboriginal and Torres Strait Islander people. The justice targets could be included in the existing Close the Gap framework.<sup>2</sup> Justice reinvestment strategies have also been recommended by the Senate Legal and Constitutional Affairs Committee and successive Social Justice Commissioners.<sup>3</sup> Justice reinvestment involves diverting and reinvesting funds used for imprisonment to services that address underlying causes of crime in communities with high rates of offending.

The Australian Government has announced a \$13.4 million reduction in funding of the Indigenous Legal Aid and Policy Reform Program. The cuts will take effect from 1 July 2015. The reduction in funding may affect various services provided by the community controlled not-for-profits funded out of this program, including legal assistance, community legal education, prison, law reform and advocacy activities.<sup>4</sup>

### Recommendation

***The Commission recommends that Australian Governments adopt justice targets and introduce justice reinvestment trials to reduce Indigenous incarceration rates.***

***The Commission recommends that adequate funding be provided for Indigenous legal aid.***

### Key Issue – People with disabilities

Access to justice for people with disabilities continues to present significant challenges.

The Commission's report, *Equal Before the Law*,<sup>5</sup> concluded that people with disabilities have higher rates of interaction with the criminal justice system than other Australians. The Report cited 2012 statistics, which indicate that 38% of prison entrants reported they have ever been told by a doctor, psychiatrist, psychologist or nurse that they have a mental health disorder and 46% of prison discharges reported that they have ever been told they have a health condition – mental health, including drug and alcohol abuse. The report found that necessary supports and adjustments for people with disabilities were frequently not provided in the criminal justice system.

The indefinite detention of people with a cognitive impairment is also of concern. In 2014 the Commission inquired into complaints by four Aboriginal men with intellectual and cognitive disabilities who had been incarcerated for a number of years despite being found unfit to stand trial or not guilty by reason of insanity.<sup>6</sup> The Aboriginal Disability Justice Campaign advocates for progress in relation to the indefinite incarceration of Aboriginal people with intellectual and cognitive disabilities.<sup>7</sup>

## Recommendation

***The Commission recommends that Government adopt measures to improve access to justice for people with disabilities, develop alternative care arrangements where people are found unfit to plead for reasons including cognitive impairment or acquired brain injury.***

## Key Issue – Mandatory sentencing

Several Australian jurisdictions have expanded or introduced mandatory sentencing laws, which prevent appropriate non-custodial measures for certain offences and may lead to disproportionate and arbitrary detention.<sup>8</sup> Victoria has phased out the use of suspended sentences.<sup>9</sup> There is overcrowding in some prisons.<sup>10</sup>

## Recommendation

***The Commission recommends that Australian governments review mandatory sentencing and laws that limit judicial discretion, and expand the use of non-custodial measures where appropriate.***

## Key Issue – Child offenders in adult prisons

Child offenders have sometimes been held in the same correctional centres as adults. In particular, children have been held in adult detention facilities in Western Australia and Victoria. These transfers have been examined through litigation in which the Commission intervened.<sup>11</sup> The National Children Commissioner raised this concern in her inaugural Children's Rights Report 2013.<sup>12</sup> The Commission notes that some jurisdictions have progressed the use of non-custodial measures and strengthened diversionary programs.<sup>13</sup>

## Recommendation

***The Commission recommends that Australian governments expand the use of diversionary programs for juveniles, raise the minimum age of criminal responsibility and cease detention of children in adult facilities.***

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- <sup>1</sup> Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage Key Indicators 2014* (2014), p 4.100 (Box 4.12.1). At <http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014#report> (viewed 22 June 2015): Between 2000 and 2013 the imprisonment rate for Aboriginal Torres Strait Islander adults increased by 57%. Most recent statistics show Aboriginal and Torres Strait Islander adults are imprisoned at 13 times the rate of non-Indigenous adults. Aboriginal children are imprisoned at 24 times the rate of non-Indigenous young people. Australian Institute of Health and Welfare, *Youth Justice in Australia 2012–13* (2014), p 13. At <http://www.aihw.gov.au/publication-detail/?id=60129546738> (viewed 22 June 2015): On an average day in 2012-13, Indigenous children aged 10–17 were 16 times as likely to be under community-based supervision as non-Indigenous young people and 28 times as likely to be in juvenile detention.
- <sup>2</sup> See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (2014), pp 117-123. At <https://www.humanrights.gov.au/publications/social-justice-and-native-title-report-2014> (viewed 22 June 2015).
- <sup>3</sup> Senate Legal and Constitutional Affairs Committee, *Value of a justice reinvestment approach to criminal justice in Australia* (2013), p 124. At [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Legal\\_and\\_Constitutional\\_Affairs/Completed\\_inquiries/2010-13/justicereinvestment/report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index) (viewed 21 March 2015); Australian Human Rights Commission, *Social Justice and Native Title Report 2014* (2014), p 12. At <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-nati-0> (viewed 5 March 2015).
- <sup>4</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (2014), p 24. At <https://www.humanrights.gov.au/publications/social-justice-and-native-title-report-2014> (viewed 22 June 2015).
- <sup>5</sup> Australian Human Rights Commission, *Equal Before the Law: Towards disability justice strategies* (2014) p 12. At <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law> (viewed 22 June 2015).
- <sup>6</sup> *KA, KB, KC and KD v Commonwealth of Australia* [2014] AusHRC 80. At <https://www.humanrights.gov.au/our-work/legal/publications/ka-kb-kc-and-kd-v-commonwealth-australia> (viewed 22 June 2015).
- <sup>7</sup> People with Disability Australia, *Aboriginal Disability Justice Campaign* (2015). At <http://www.pwd.org.au/adjc/about-us-adjc.html> (viewed 22 June 2015).
- <sup>8</sup> New mandatory sentencing laws for a range of offences have been introduced by the states of Queensland (2012 and 2013), Victoria (2013 and 2014) and New South Wales (2014). Existing mandatory sentencing regimes were expanded in Western Australia and the Northern Territory in 2013. See L Roth, 'Mandatory Sentencing Laws', *NSW Parliamentary Research Service e-brief*. At [http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/MandatorySentencingLaws/\\$File/mandatory+sentencing+laws.pdf](http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/key/MandatorySentencingLaws/$File/mandatory+sentencing+laws.pdf) (viewed 22 June 2015). For analysis of the human rights impact of mandatory sentencing laws, see the Commission's submissions as amicus curiae in *Magaming v The Queen* [2013] HCA 40 (11 October 2013). At <https://www.humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae> (viewed 22 June 2015).
- <sup>9</sup> Suspended sentences were abolished in the state of Victoria for offences committed on or after 1 September 2014 by the *Sentencing Amendment (Abolition of Suspended Sentences and Other Matters) Act 2013* (Vic).
- <sup>10</sup> Victorian Ombudsman, *Investigation into Deaths and Harm in Custody* (2014), p 27. At <https://www.ombudsman.vic.gov.au/getattachment/2998b6e6-491a-4dfe-b081-9d86fe4d4921> (viewed 22 June 2015); Information provided in relation to Australian Human Rights Commission submission to UN Committee Against Torture from ACT Human Rights Commission to Australian Human Rights Commission, August 2014.
- <sup>11</sup> *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* [2013] WASC 157 (3 May 2013), and a Victorian Ombudsman investigation, *Investigation into Children Transferred from the Youth Justice System to the Adult Prison System* (2013). At <https://www.ombudsman.vic.gov.au/getattachment/6a579e49-212e-42b0-9d3c-791e2d60e102/reports-publications/parliamentary-reports/investigation-into-children-transferred-from-the-y.aspx> (viewed 22 June 2015).
- <sup>12</sup> *Children's Rights Report 2013* (2013), p 33. At <https://www.humanrights.gov.au/publications/childrens-rights-report-2013> (viewed 22 June 2015).
- <sup>13</sup> The Australian Human Rights Commission's consultations in the lead up to the UPR identified successful diversionary initiatives in Victoria, the ACT and Tasmania.