

# Redfern Legal Centre

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

23 April 2015

Attention: Committee Secretary

Please find attached our policy submission in response to the Senate Finance and public Administration References Committee inquiry into Access to Legal Services.

We would welcome the opportunity to appear before the Senate References Committee addressing this issue to further discuss our submission.

Yours faithfully,

Redfern Legal Centre

Joanna Shulman  
Chief Executive Officer

# Redfern Legal Centre

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SUBMISSION:

SENATE FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE  
INQUIRY

- ACCESS TO LEGAL SERVICES

AUTHOR: Elizabeth Clark

DATE: 23 April 2015

# Redfern Legal Centre

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## **1. Introduction: Redfern Legal Centre**

Redfern Legal Centre (RLC) is an independent, non-profit, community-based legal organisation.

RLC has a particular focus on human rights and social justice. Our specialist areas of work are domestic violence, tenancy, credit and debt, employment, discrimination and complaints about police and other governmental agencies. By working collaboratively with key partners, RLC specialist lawyers and advocates provide free advice, conduct case work, deliver community legal education and write publications and submissions. RLC works towards reforming our legal system for the benefit of the community.

## **2. RLC's work in Aboriginal and Torres Strait Islander Access to Legal Services**

As a provider of legal advice and representation in the Redfern area, RLC has firsthand experience in observing the difficulties faced by Aboriginal and Torres Strait Islander individuals in accessing legal services, and implementing strategies to address this.

## **3. RLC's view in summary**

RLC welcomes the opportunity to comment on Aboriginal and Torres Strait Islander Access to Legal Services. It is our position that these individuals do not currently have adequate access to legal services. This is caused by a range of factors, including inadequate funding of legal service providers and over-policing leading to an overrepresentation of ATSI individuals within the criminal justice system.

## **4. RLC's recommendations**

RLC advances 7 recommendations in response to this inquiry. These recommendations are discussed in response to the following Terms of Reference: A, B, D, E, F, G.

Term of Reference A

Recommendation 1: Funding for legal services be increased to allow for ATSI specific strategies to be implemented and for the development and expansion of outreach services

Term of Reference B

Recommendation 2: Commonwealth, state and territory governments increase funding for legal services to reduce shortfalls created by recent cuts and ensure vulnerable clients are able to continue accessing legal services.

Term of Reference D

Recommendation 3: NSW mandatory sentencing laws regarding alcohol fueled violence be reevaluated in light of the disproportionate impact this will have on ATSI individuals.

Term of Reference E

Recommendation 4: That the NSW Police's Suspect Target Management Plan be reevaluated to ensure that individuals convicted of minor offences are not overly targeted

Term of Reference F

Recommendation 5: That NSW Police regularly collect and make public information regarding the use of proactive police powers

#### Term of Reference G

Recommendation 6: That the NSW Police's Suspect Target Management Plan be reevaluated to ensure that individuals serving non-custodial sentences are given adequate opportunity to successfully complete these sentences

Recommendation 7: That social housing policies take into account the difficulties faced by individuals serving non-custodial sentences.

## 5. Responses to specific issues

### 5.1 Term of Reference A: The extent to which Aboriginal and Torres Strait Islander Australians have access to legal assistance services;

The unique challenges faced by Indigenous Australians in accessing legal services include: reluctance to access services due to distrust of the legal system formed by previous experience; a lack of awareness of legal rights and remedies; a lack of cultural sensitivity or understanding displayed by staff of legal services; and the lack of the scope of the law to adequately deal with complex matters involving both legal and cultural issues.<sup>1</sup> Each of these issues represents complex cultural challenges which must be remedied through ongoing community engagement, education and staff training and development.

However, there are also many practical barriers facing Indigenous clients which can be more easily remedied by CLCs provided they have sufficient funding and awareness of issues. For example, many CLCs have noted Indigenous people may experience difficulty adapting to an appointment-based system, and thus may not attend to receive advice at a specified time.<sup>2</sup> Noting this difficulty, RLC has an Aboriginal Access Scheme, whereby any Indigenous client who attends the centre requiring advice can be seen by a lawyer on the spot, rather than being required to attend at a later date. Additionally, outreach services can play a role in addressing issues surrounding location and accessibility of legal services.

Outreach services can also play a significant role in addressing reluctance to access legal services or a lack of awareness of legal remedies. An example of such a program is the Medical Legal Partnership (MLP) set up in 2015 by Redfern Legal Centre at Royal Prince Alfred Hospital. This scheme sees a solicitor placed at RPA two days a week, available to Aboriginal patients who may be experiencing a range of legal issues. The aim of the MLP is to reduce the disproportional disadvantage of social determinants of health that impact on vulnerable populations, such as our Aboriginal population. Health professionals will be trained by the RLC solicitor to identify health harming legal issues, which are often the underlying causes of chronic health in vulnerable populations. Health harming legal issues include as inadequate housing, domestic violence, debt, discrimination and employment issues.

These Health professionals will screen their Aboriginal patients for legal needs whilst they are either in hospital, or attending an outpatient or community health service. The solicitor at the clinic, located in the hospital, will work to reduce these environmental causes of

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<sup>1</sup> Schetzer & Henderson, 2003, 'Access to Justice and Legal Needs' *Law and Justice Foundation*, pp.63-64

<sup>2</sup> Ibid.

poor health through legal remedies and assistance, thus providing overall improvement to the health of Aboriginal patients.

An MLP such as this is highly effective. Research has revealed that providing legal services in partnership with health care providers can have a significant impact on the health of disadvantaged people and potentially reduce overall public health costs.<sup>3</sup> Additionally, providing services directly at the hospital removes barriers to individuals proactively seeking out legal services, such as suspicion of legal services or lack of awareness of legal remedies.

However, innovative models such as this program require additional funding in order to be substantially effective,<sup>4</sup> as reliance on minimum level core funding cannot produce the desired effect. Indeed, the establishment of the MLP at RPA has only been possible through a generous private grant, rather than through core funding. Reliance on private benefactors is not a sustainable model for CLCs, and Commonwealth, state and territory governments should not use the existence of such grants to reduce funding across the sector. Similarly, ongoing community education programs in order to ensure Indigenous people are aware of their legal rights require additional funding in order to achieve desired outcomes.

Thus, reduction any funding will see a dramatic decrease in the accessibility of legal assistance services for Aboriginal and Torres Strait Islander Australians as these services are reduced or defunded entirely, and legal assistance services become reliant on individuals proactively seeking out legal advice and assistance.

**Recommendation 1:** Core funding for legal services be increased to allow for ATSI specific strategies to be implemented and for the development and expansion of outreach services

#### **5.2 Term of Reference B: The adequacy of resources provided to Aboriginal legal assistance services by state, territory and Commonwealth governments**

As it currently stands, RLC, along with numerous other CLCs across NSW, is facing a significant funding crisis as a result of cuts at both a state and federal level. Currently, we are facing a shortfall of approximately \$294,000 in the next financial year, resulting in a cut of approximately 50% of our legal services. At a practical level, these cuts will mean a loss of 2-3 solicitors, two to three of our practice areas, and a reduction in capacity of approximately 500 vulnerable clients. This is likely to disproportionately impact ATSI clients in particular, as this client group is one of the key beneficiaries of innovative models of service requiring additional funding.

More generally, despite welcome reversal of some cuts by the Attorney-General's department,<sup>5</sup> the CLC sector is still facing a substantial shortfall in its capacity to meet client needs. This was reflected in the Productivity Commission's report into Access to

<sup>3</sup> Cunneen & Schwartz, 2008, 'The Family and Civil Law Needs of Aboriginal People in New South Wales: Final Report' *The University of New South Wales*

<sup>4</sup> Forell & Gray, 2009, 'Outreach Legal Services to People With Complex Needs', *Law and Justice Foundation*, 2

<sup>5</sup> Attorney-General Department, 'Legal Aid Funding Assured to support the most vulnerable in our community', 26 March 2015, <http://www.attorneygeneral.gov.au/Mediareleases/Pages/2015/FirstQuarter/26-March-2015-Legal-aid-funding-assured-to-support-the-most-vulnerable-in-our-community.aspx>

Justice in which it was recommended that \$200 million be provided to civil legal assistance services in order to address the current “pressing gaps in services.”<sup>6</sup>

Resolving these resource deficits requires long-term commitment to funding by both Commonwealth, state and territory governments. Short-term or project-based funding is not adequate, as continual changes in service availability in response reduces community trust in CLCs and thus further entrenches reluctance to access services.

**Recommendation 2:** Commonwealth, state and territory governments increase core funding for legal services to reduce shortfalls created by recent cuts and ensure vulnerable clients are able to continue accessing legal services

### **5.3 Term of Reference D: The consequences of mandatory sentencing regimes on Aboriginal and Torres Strait Islander incarceration rates;**

We have concerns that the recent introduction of mandatory sentencing laws in NSW targeting alcohol related violence in the Sydney CBD will have an unintended disproportionate impact on the ATSI community due to the high rates of alcohol related violence within this community. In 2010, BOSCAR NSW noted that alcohol was a factor in a high proportion of assaults committed by Indigenous offenders.<sup>7</sup> The introduction of mandatory custodial sentences for assaults committed under the influence of alcohol is therefore highly likely to have a significant impact on rates of incarceration of Indigenous offenders. These concerns reflect many of the concerns put forward by Indigenous Legal Assistance schemes at the time the proposed laws were introduced, as well as forming part of the basis for the Law Society’s opposition to the scheme.<sup>8</sup>

**Recommendation 3:** NSW mandatory sentencing laws regarding alcohol fueled violence be reevaluated in light of the disproportionate impact this will have on ATSI individuals.

### **5.4 Term of Reference E: The reasons for the high incarceration rates for Aboriginal and Torres Strait Islander men, women and juveniles;**

#### **5.4.1. Over-Policing**

One of the key causes of the high incarceration of the ATSI community is an approach of over-policing. This approach is particularly detrimental to the effectiveness of alternatives to imprisonment, discussed below. Approaches which target individuals granted non-custodial sentences, such as good behaviour bonds, and the targeting of those on bail through frequent bail compliance checks, can result in higher levels of arrest, contributing to the high incarceration rates.

The implementation of the Suspect Target Management Plan (‘STMP’) by NSW police has substantially increased the impact of this issue. This plan encourages the targeting of previous offenders, including those on good behaviour bonds or other alternatives to imprisonment, as well as increasing bail compliance checks, in order to increase efficiency within the policing system. While we recognise that prioritising previous offenders improves the efficiency of police resources, it is our observation that there has been no

<sup>6</sup> Productivity Commission, 2014, Productivity Commission Inquiry Report Overview: ‘Access to Justice Arrangements’,

<sup>7</sup> Snowball & Weatherburn, 2006, ‘Indigenous over-representation in prison: The role of offender characteristics’ *Crime and Justice Bulletin*, No. 99, BOSCAR, 15

<sup>8</sup> Letter from Ros Everett, Law Society of New South Wales to The Hon Barry O’Farrell, 24 January 2014, 2

differentiation between those who have been convicted of minor offences, such as property or traffic offences, and those convicted of violent offences. This has led to individuals on good behaviour bonds for minor offences feeling harassed, negatively affects their relationship with police, and increases the risk of further offending and incarceration through breach of conditions.

The anecdotal evidence of clients reporting increased use, and overuse, of proactive police powers is reflected in statistics collected by NSW police. In records provided to the Industrial Relations Commission in *Crown Employees (Police Officers - 2009) Award* [2012] it was revealed:

- Between 2000 and 2010 the use of the 'move on' power increased from 22,531 to 77,391
- Between 2005 and 2010 the number of bail compliance checks grew from 3541 to 88,617
- Between 2000 and 2010 the number of person searches increased from 18,238 to 200,132<sup>9</sup>

## Case Study

*Derek\* is an Indigenous man who approached Redfern Legal Centre in 2012 alleging harassment by police officers. Derek had walked past two police officers in a marked police car. He was not engaged in any behaviour which could have been construed as unlawful or suspicious. The police officers exited their vehicle and approached Derek, questioning him regarding his destination. When Derek exercised his right to remain silent, he was verbally abused by the police officers using offensive language. The police officers then conducted a search on Derek's bag. When he questioned this, he was told he was being searched because he was in a 'high drug area'. This was approximately the **eighth time such a search had been conducted** on Derek within a few months, with no searches ever providing evidence of drug possession. Again, no unlawful items were found during the search. Derek was given a 'Move On' order, despite telling police officers he lived in the building nearby. An official complaint made to police regarding this incident was ultimately dismissed.*

*\*Not his real name*

Regrettably, Derek's situation is not an isolated one, and the prevalence of such practices among police is a significant factor in the high arrest and imprisonment rates of Aboriginal and Torres Strait Islander offenders for a number of reasons. Firstly, it increases the possibility of individuals being incarcerated as a result of breaching bail conditions or good behaviour bonds. Secondly, perceptions of targeting or apparent harassment can result in individuals reacting negatively when approached by police, leading to what has become colloquially referred to as the 'trifecta' of charges (offensive language, resist arrest, assault police).

Fortunately, as these powers are discretionary, there does not need to be substantial policy or procedural overhaul in order to address the issue of over-policing. Rather, a shift in attitude needs to develop that encourages police officers to use discretionary powers in a manner which is not oppressive, and, where the STMP is followed, to prioritise violent and more serious offenders for targeting, rather than a broad implementation that increases the rate of low-risk offenders being incarcerated.

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<sup>9</sup> Crown Employees (Police Officers - 2009) Award [2012] NSWIRComm 23. [170]



**Recommendation 4:** That the NSW Police's Suspect Target Management Plan be reevaluated to ensure that individuals convicted of minor offences are not overly targeted

#### 5.4.1. Approaches of the Judiciary

The *Fernando* principles, established in the matter of *R. v Fernando*<sup>10</sup>, demonstrate that factors including low socio-economic backgrounds and negative childhood experience can and should be taken into consideration when evaluating the sentencing of Indigenous offenders. This has been widely regarded as a positive step in recognising the causes of indigenous offending and ensuring that sentencing, as far as possible, does not further disadvantage indigenous individuals.

However, the judgment of Hoeben JA in the matter of *R v Bugmy*<sup>11</sup> suggests that understanding of this issue within the judiciary has not been consistently applied, with His Honour rejecting the significance of these factors in the defendants offending. While this decision was overturned on appeal,<sup>12</sup> it remains concerning that members of the judiciary have not applied an understanding of the impact of these factors on the high rates of imprisonment of the Aboriginal and Torres Strait Islander community, and suggests that the judiciary are not adequately considering defendant's backgrounds when considering imprisonment.

#### **5.5 Term of Reference F: The adequacy of statistical and other information currently collected and made available by state, territory and Commonwealth governments regarding issues in Aboriginal and Torres Strait Islander justice;**

Unlike many other states, NSW has an independent crimes statistics body, the Bureau of Crimes Statistics and Research ("BOCSAR"). BOCSAR is an invaluable body whose work has been significantly formative in shaping understanding of the criminal justice system in NSW, and, more significantly for this inquiry, the interactions of the Aboriginal and Torres Strait Islander Communities within this.

However, there remain significant limitations regarding BOCSAR which impact the degree to which it is able to make information available. Firstly, BOCSAR's information is broken down geographically by Local Council Areas, rather than Local Area Commands ("LACs"). For this reason, it is not possible to make a direct comparison between the information provided by BOCSAR, and the performance and practice of individual police LACs.

Secondly, BOCSAR's information is limited to situations where convictions are recorded, and, as such, fails to provide information about the use of discretionary police powers, such as move-on powers, bail compliance check, and person searches, which, as discussed above, arguably make up a majority of ATSI experience with the criminal justice system. Understanding how proactive police powers are being used is crucial for understanding how and why there is a dramatic over-representation of Aboriginal and Torres Strait Islanders within the criminal justice system.

However, there remains no comprehensive and publicly available information regarding the extent of the use of these discretionary police powers, such as 'stop and search' and 'move on' powers. Without such information, it is impossible to establish a comprehensive

<sup>10</sup> (1992) 76 ACR 58

<sup>11</sup> [2012] NSWCCA 223

<sup>12</sup> See *Bugmy v The Queen* [2013] HCA 37

understanding of the extent and nature of Aboriginal and Torres Strait Islander community interaction with law enforcement authorities. The inclusion of the information under paragraph 5.4.1. above is only possible through the disclosure of the information to the commission in the decision. It's publication in that decision indicates that such data is being collected, and it should therefore not be too onerous to require such information to be made publically available on a regular basis.

In order to fully evaluate the interaction between ATSI individuals and the criminal justice system, it is imperative that information of the use of discretionary proactive police powers be routinely collected and published.

**Recommendation 5:** That NSW Police regularly collect and make public information regarding the use of proactive police powers

**5.6 Term of Reference 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;**

Multiple alternatives to imprisonment have shown high levels of success regarding rehabilitation of Aboriginal and Torres Strait Islander people. The value of the Drug Court and the MERIT program has been well documented and is to be applauded. However, a number of other factors can have a significant impact on the effectiveness of alternatives to imprisonment, including over-policing and failure to address tenancy issues.

**5.6.1 Over-Policing**

As noted above, over-policing has a significant effect on rates of imprisonment, and can also be detrimental to the effectiveness of alternatives to imprisonment. For example, over-policing for the purposes of ensuring compliance with good behaviour bonds, as encouraged by the STMP, is a major cause of imprisonment for Aboriginal and Torres Strait Islander individuals, thus substantially reducing the effectiveness of these alternatives as a method of reducing rates of imprisonment.

Without a commitment by policing agencies to assist in allowing non-custodial sentences to be successful, this will remain a substantial impediment to the ongoing success of non-custodial sentences in reducing imprisonment rates.

**5.6.2 Tenancy Issues**

Tenancy issues being faced by offenders can also impact the success of alternatives to imprisonment, as a lack of secure accommodation can result in breaches of non-custodial conditions or create impetus for further offending. Unless policies and procedures creating levels of uncertainty surrounding tenancy are addressed, a significant factor in ensuring the success of non-custodial sentences is being ignored.

Tenancy rules surrounding illegal use of property put individuals at higher risk of eviction, homelessness and offending. Social housing tenancy agreements can be terminated for illegal use of property, regardless of whether the tenant themselves was responsible for the offending.<sup>13</sup> This can result in individuals' tenancies being terminated even where they are not responsible for, or have any knowledge of, the illegal use in question.

A failure to address uncertainty around tenancies will ultimately result in the ineffectiveness of alternatives to imprisonment, as offenders will face difficulties meeting

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<sup>13</sup> Residential Tenancies Act 2010 (NSW), s91

conditions of good behaviour bonds or other alternative mechanisms when facing housing obstacles. This should be considered by courts in awarding such sentences, and support mechanisms must be established in order to encourage individuals to successfully meet the requirements and conditions of their sentences.

Recommendation 6: That the NSW Police's Suspect Target Management Plan be reevaluated to ensure that individuals serving non-custodial sentences are given adequate opportunity to successfully complete these sentences

Recommendation 7: That social housing policies take into account the difficulties faced by individuals serving non-custodial sentences.

## **6 Conclusions**

Aboriginal and Torres Strait Islander people have, for many years, faced a number of obstacles in their engagement with the legal system in Australia. Ensuring disadvantaged individuals achieve access to justice requires not only increased support for legal assistance services, such as RLC, but also an overhaul of policing and other policies in order to reduce the causes of legal disadvantage at a more holistic level.