



Our Ref: 2009/37

14 May 2010

Hon Brian Ellis
Chairman
Standing Committee on Environment and Public Affairs
Legislative Council
Parliament House
Perth WA 6000

Dear Mr Ellis

Inquiry into the Transportation of Detained Persons

I welcome this opportunity to follow up on the Australian Human Rights Commission's work in the inquest into the death of Mr Ward. Many of the Commission's submissions were accepted by the Coroner and reflected in his findings and recommendations.

In my view, the issues of particular importance to this inquiry are preventing Indigenous deaths in custody by reducing the rates of incarceration and recidivism; and establishing a formal system for the consideration and implementation of coronial recommendations by the Western Australian government.

Issue 3: The scope and efficacy of government action to reduce Indigenous incarceration and recidivism rates to prevent further Indigenous deaths in custody

At present, the incarceration rate of Indigenous people in Australia is rising rather than falling. The imprisonment rate has increased by 46% for Indigenous women and by 27% for Indigenous men between 2000 and 2008. Indigenous juveniles were 28 times as likely to be detained as non-Indigenous juveniles at 30 June 2007.¹ Western Australia is no exception. As of June 2008, Indigenous peoples in Western Australia

¹Indigenous Peoples' Organisations Network of Australia, *Submission to the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people – Australian mission*, (17 August 2009), par 14. At http://www.humanrights.gov.au/social_justice/publications/srip_2009/index.html (viewed 10 May 2010).

were 20 times more likely to be imprisoned than non-Indigenous people. This was the highest age standardised ratio of any State or Territory in Australia.²

These figures are alarming. In the Commission's view, the emphasis on incarceration of a means of dealing with criminal conduct needs to be replaced by a strategy which targets effectively the causes of crime.

(i) *Laws mandating minimum terms of imprisonment ('mandatory sentencing') and Indigenous people*

The retention of mandatory sentencing in respect of certain property offences appears to be a significant inhibitor to reducing the rates of Indigenous incarceration and recidivism in Western Australia. These mandatory sentencing provisions have increased the rate of Indigenous incarcerations in Western Australia, rather than reduced them. The Commission has expressed a number of concerns regarding the operation of mandatory sentencing provisions in Western Australia, including:

- that such provisions have a disproportionate impact on Indigenous people;
- many people receive an unfairly harsh sentence in respect of minor offences;
- the broad range of human rights violations inherent in the operation of the mandatory sentencing provisions; and
- the particularly concerning impact of the mandatory sentencing provisions on Indigenous young people.³

A number of the United Nations human rights bodies including the Human Rights Committee, the Committee on the Elimination of Racial Discrimination,⁴ and the Committee Against Torture⁵ have also highlighted their concern in respect of the mandatory sentencing laws in both Western Australia and the Northern Territory.

It is a matter of great concern that the scope of the mandatory sentencing provisions in Western Australia has recently been expanded to apply to an assault on a 'public officer', with a minimum prison term of six months for an adult and up to 3 months detention for a juvenile 16 years and over.

In the Commission's view, if the Western Australian government is committed to reducing the rate of incarceration and recidivism of Indigenous people, the mandatory sentencing provisions should be repealed. The mandatory sentencing

² Australian Bureau of Statistics, *Prisoners in Australia 2008*, ABS cat no 4517.0 (2008), p 6.

³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009*, Chapters 1 and 5. At www.humanrights.gov.au/social_justice/sj_report/sjreport09/index.html (viewed 10 May 2010).

⁴ Committee on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination 2005*, UN Doc. A/60/18(SUPP), par 40. At <http://ods-dds-ny.un.org/doc/UNDOC/GEN/G05/441/20/PDF/G0544120.pdf?OpenElement> (viewed 11 May 2010).

⁵ Committee Against Torture, *Concluding Observations of the Committee Against Torture: Australia*, UN Doc. CAT/C/AUS/CO/3, para 23(d). At <http://ods-dds-ny.un.org/doc/UNDOC/GEN/G08/421/66/PDF/G0842166.pdf?OpenElement> (viewed 11 May 2010).

provisions are ineffective at deterring crime and rehabilitating offenders, they are costly, and they can be manifestly unjust.⁶ Further, the manner in which the mandatory sentencing provisions can breach human rights obligations are so substantial that the provisions cannot be seen as socially useful or acceptable.

(ii) *How Justice Reinvestment could help reduce Indigenous incarceration and recidivism rates in Western Australia*

Justice reinvestment is a localised criminal justice policy approach from the United States that diverts the funds spent on imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested in programs and services that address the underlying causes of crime in these specific communities. Performance outcomes are measured against the amount of imprisonment money saved, reduction in imprisonment, reduction in recidivism, and indicators of community wellbeing and capacity.

Justice reinvestment also recognises the limitations of current individually-focused corrections policy. Even if an offender is put through a well-resourced rehabilitation program, if the offender returns to a community with few opportunities, their chances of staying out of prison are limited. Justice reinvestment still retains prison as a measure for dangerous and serious offenders, but actively shifts the culture away from imprisonment and starts providing community services that prevent offending.

The concept of justice reinvestment is discussed in detail in the 2009 Social Justice Report.⁷ Justice reinvestment acknowledges what Indigenous communities have known for a long time – taking people out of communities through imprisonment weakens the entire community.

I note that the Senate Legal and Constitutional Affairs References Committee recommended in 2009 that the federal, State and Territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system.⁸ The Commission supports this recommendation and encourages the Western Australian government to develop and fund a justice reinvestment pilot program for the criminal justice system.

Issue 4: Whether the Coroners Act 1996 (WA) should be amended to require the Government to respond to coronial recommendations within a set timeframe

The Commission strongly supports this proposed amendment of the *Coroners Act 1996* (WA). The amendment will help give greater effect to the protection of human rights in Western Australia. It will also be a step towards implementing those

⁶ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, Chapter 4, pp 118 – 125, 130. At

http://www.humanrights.gov.au/social_justice/sj_report/sjreport01/index.html (viewed 14 May 2010).

⁷ Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 3, Chapters 1 and 5.

⁸ Senate Legal and Constitutional Affairs References Committee, *Access to Justice* (8 December 2009), Recommendation 21. At

www.aph.gov.au/senate/committee/legcon_ctte/access_to_justice/report/b04.htm (viewed 11 May 2010).

recommendations of the 1991 Royal Commission in Aboriginal Deaths in Custody ('RCIADIC') report which call for a system of review and response by government departments and agencies.

(i) *Protection of human rights in Western Australia*

As indicated in the inquest into the death of Mr Ward, it is within the Coroner's power to inquire into and make findings and recommendations on violations of a person's human rights. The Australian Human Rights Commission has been granted leave to intervene in numerous coronial inquests, and has made submissions on a range of human rights issues connected with a person's death, including identifying required improvements in police training and practice to properly care for a person while in police custody, and identifying when a person has been subjected to arbitrary detention.⁹

The right to life engages a number of positive obligations on the State. These positive obligations arise out of the duty to both protect life and prevent death. Some of these positive obligations include a duty to:¹⁰

- conduct a thorough investigation into deaths where the person was in custody at the time of death, or where agents of the State may have caused the person's death;
- prevent and punish killings and deaths caused by negligence or recklessness in both the public and private spheres;
- carefully regulate and train personnel, such as police officers and prison guards, to minimise the chance of a violation of the right to life; and
- protect people held in any form of detention, including ensuring appropriate monitoring and supervision of detainees.

The conduct of an inquest and the issuing of coronial recommendations alone may not wholly satisfy the positive obligations engaged by the right to life. Where a Coroner has found that an agent of the State caused or contributed to the death of an individual, or that a death in custody could have been prevented, it is essential that accountability mechanisms are in place to prevent a death occurring in similar circumstances in the future. The proposed amendment to the *Coroners Act 1996* (WA) will help to ensure that these accountability processes are put in place.

⁹ A full list of the submissions that the Australian Human Rights Commission has made as an intervener in coronial inquests is available on the Commission's website. At http://www.humanrights.gov.au/legal/submissions_court/index.html (viewed 10 May 2010).

¹⁰ See S Joseph, J Schultz, M Castan, *The International Covenant on Civil and Political Rights: Cases, Commentary and Material* (2nd edition, 2004), Chapter 8, especially, [8.01], [8.09] – [8.18] and [8.39] – [8.49]. In respect of the obligation to conduct a thorough investigation in respect of the equivalent right to life under the *European Convention for the Protection of Fundamental Rights and Freedoms*, 1950, see eg *McCann v UK* (1996) 21 EHHR 97, 163 [161]; *Yasa v Turkey* (1998) 28 EHHR 408, 447-8 [98]; *R (Amin) v Secretary of State* [2003] 4 All ER 1264.

(ii) *Implementation of relevant RCIADIC recommendations*

The RCIADIC concluded that reform of the coronial inquest system in each State and Territory was essential in order to properly identify the reasons for Indigenous deaths in custody and to avoid preventable deaths in the future.

Recommendations 14 – 17 of the RCIADIC report outlined a system of mandatory reporting by government departments and agencies in respect of coronial recommendations. Despite the federal government and all State and Territory government almost unanimously supporting recommendations 14-17 of the RCIADIC report,¹¹ that scheme has still not been uniformly implemented into legislation. In particular, the recommendations have not been implemented in Western Australia.

I trust this submission is of assistance to the inquiry. If you require further information from the Commission, please contact me.

Yours sincerely



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¹¹ Recommendations 14, 15, 17 (and also 18) were unanimously supported by the federal government and all State and Territory governments. South Australia, Tasmania and the Northern Territory did not, however, endorse recommendation 16. See *Aboriginal Deaths in Custody: Response by Governments to the Royal Commission* (1992), p 59.

Recommendation 16 states that the relevant Ministers of the Crown provide copies of the government's response to the State Coroner's recommendations to each of the parties; and that the State Coroner be empowered to call for such further explanations or information as she or she considers necessary, including reports as to further action to be taken in relation to the recommendations.