Community Legal Centres Association (WA) Inc

Policy Briefs 2017

Prepared for the WA Attorney General by the Community Legal Centres Association WA

ABOUT COMMUNITY LEGAL CENTRES ASSOCIATION WA

The Community Legal Centres Association (WA) is the peak organisation representing and supporting 28 Community Legal Centres (CLCs) operating in Western Australia. Located throughout the state, CLCs are independent, non-profit organisations which provide legal services to disadvantaged and vulnerable people or those on low incomes who are ineligible for legal aid.

The community legal sector supports Western Australians to access legal services in a number of areas in which unresolved legal problems commonly arise. These include:

- Family law
- Family and domestic violence
- Child protection
- Employment law
- Criminal injury compensation
- Consumer rights law
- Welfare law
- Housing and tenancy law
- Migration law
- Minor criminal law
- Fines and infringements.

As the Chief Justice observed when he spoke at the National CLC Conference held in Fremantle in 2016, there is a central connection between these areas of law, and fundamental human wellbeing. They relate closely to activities and characteristics that enable social wellbeing including our familial relationships, employment, the capacity to reside in the country of our choice, the dwelling in which we live and the capacity to afford fundamental rights and services as basic as food.

On behalf of our members, the Association is committed to the principles of human rights, social justice and equity, including the rights of Western Australians to equity in access to legal services. To do so, the Association also supports CLC's working together and with other organisations within the community.

INTRODUCTION

This paper has been prepared by the Community Legal Centres Association of Western Australia (CLCAWA) to provide advice to the new Western Australian Attorney General, the Honourable John Quigley MLA.

The purpose of this paper is to provide **the first in a set of policy briefs which we hope will lead to an ongoing dialogue between the CLCAWA and the Attorney General** about issues of central importance to the community legal sector and our clients across Western Australia, as well as developing policy to improve justice outcomes for the broader Western Australian community.

The paper includes briefs in three key areas:

1. Policy Issues;
2. Neighbourhood Justice Centre; and
3. Justice Reinvestment

Across Australia, there has been growing recognition of the need for our systems of justice to respond more effectively to community need. Recent research undertaken by *the Law and Justice Foundation of New South Wales* identified that:

- There is clear inequality in the experience of legal problems.
- Inequity links to social disadvantage.
- Social disadvantage is linked to lower capability.
- Legal problems don't exist in isolation.[1]

The community legal sector, like others across the human services sector, is seeking to be more client-focused in addressing these issues, and developing a more responsive, effective service system. There is a clear need to more efficiently and effectively assist those with the most significant legal need. Efforts to improve the client-focus seek to ensure that the legal services system is:

- Targeted to reach those with the highest legal need and lowest capability.
- Joined-up with other services to address complex life problems.
- Timely to minimise the impact of problems and maximise the utility of services.
- Appropriate to the needs and capabilities of users.[2]

It is also important to keep at the forefront of thinking about the future of the community legal system, the people who have the highest level of vulnerability and reliance on the service system. Indigenous people are most disproportionately represented in the justice system, and have the highest levels of vulnerability. Other vulnerable groups include women and children experiencing or escaping domestic and family violence.

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[1] Law and Justice Foundation of New South Wales. *Updating Justice*. No 43. October 2014 p1
[2] ibid

Part One - POLICY ISSUES

STOLEN WAGES

Stolen Wages generally refers to the common historical practice in WA, and other parts of Australia, of withholding wages earned by working Aboriginal people. In WA, laws in place until 1972 allowed employers to hold up to 75 per cent of the wages of Aboriginal people in a 'complex network of trust accounts' administered by government departments.[3] In many cases Aboriginal people report receiving only food and board and never receiving any of their income.

The WA Government established a Stolen Wages Taskforce in May 2007 to investigate activities relating to Stolen Wages in WA following the recommendation of the Australian Parliament's Standing Committee on Legal and Constitutional Affairs in 2006.

The Taskforce conducted 62 open community forums in 58 towns and communities across the State with approximately 920 attendees and received more than 500 submissions.[4] It found that there was 'little or no evidence that these wages were returned' to the people who earned them. It was also reported that the Taskforce found that the 'most extensive controls' over wages were experienced by people under guardianship at Carrolup, Moore River and Sister Kate's Children's Home.[5]

It wasn't until 2012, four years after the Taskforce that a Stolen Wages Reparation Scheme was introduced in WA. Some people accused the Government of intentionally delaying introduction of the scheme so that more Aboriginal people eligible for it would have passed on. The general response to the scheme was overwhelmingly negative, on the grounds of not being appropriately designed and agreed with Aboriginal people, and providing grossly inadequate reparation.

Kimberley Community Legal Services advised the Legislative Council Standing Committee on Environment and Public Affairs in 2014 that "The Government's response to the Taskforce Report was not negotiated with Aboriginal people. Neither the Government's response to the Taskforce Report or the Scheme itself - represents a settlement with Aboriginal people. The overwhelming reaction to the Scheme by Aboriginal people has been sadness, frustration and anger due to the gross inadequacy and injustice of the response."[6]

The scheme provided an ex-gratia reparation payment of up to $2000 for living Aboriginal people who:

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[3] https://www.findandconnect.gov.au/guide/wa/WE00788

[4] http://www.parliament.wa.gov.au/Parliament/petitionsdb.nsf/($all)/2060724E3EBF97EA48257D51002B65A8/$file/ev.040.140908.let.001.pc.pdf p1

[5] https://www.findandconnect.gov.au/guide/wa/WE00788

[6] http://www.parliament.wa.gov.au/Parliament/petitionsdb.nsf/($all)/D1681D7E7EAE6F7748257D4600089515/$file/ev.040.sub.001.pp.pdf p2

- *Were born prior to 1958;*
- *From the age of 14 years or older were resident at a Government Native Welfare Settlement in Western Australia; and*
- *While resident at one or more of the Government Native Welfare Settlements in Western Australia experienced direct Western Australian Government control over their income and all or part of their income was withheld from them; and*
- *Were never repaid the outstanding monies owed by the Western Australian Government.*[7]

The Minister for Aboriginal Affairs, Hon Peter Collier MLC advised that the reparation payment was only intended as *'an expression of regret on behalf of the Western Australian State Government'* and suggested that it was not possible to determine an actual amount of compensation owed, noting also that the Scheme did not "*affect the legal rights of any Applicant that may choose to pursue other courses of action.*"[8]

2,026 applications were received for the Scheme and 1,276 approved eligible for payments totalling $2,552,000.[9]

WA has been exposed to significant negative media attention focused on the inadequacy of the reparation scheme and its inconsistency with the modelling and advice on compensation received by the Stolen Wages Taskforce. Much of this information was leaked by the ABC in a Background Briefing report in 2015, and the leaked documents are still publicly available on the ABC website.[10] The taskforce received actuarial analysis that Moore River alone withheld wages at a value of over $63million. Aboriginal people consulted at the time recall a reparation figure being considered of $78 thousand.[11] A briefing note provided by the Department of Aboriginal Affairs advised that the amount should be $10thousand or $15thousand. There is no explanation for why the amount offered through the Scheme ended up at only $2thousand.[12]

A major flaw in this process was that it provided no opportunity for people to tell their story and/or record their story for their communities. In this respect it was missing a key element of other similar processes and historical redress schemes, in Australia and around the world. Furthermore, many of the original claimants are now deceased or elderly. Their descendants, of course, continue to suffer intergenerational harm and trauma as a result of their experiences. A truly just redress scheme would therefore include both direct payments to the

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[7] https://www.findandconnect.gov.au/guide/wa/WE00788

[8] http://www.parliament.wa.gov.au/Parliament/petitionsdb.nsf/($all)/2060724E3EBF97EA48257D51002B65A8/$file/ev.040.140908.let.001.pc.pdf p1

[9] http://www.parliament.wa.gov.au/Parliament/petitionsdb.nsf/($all)/2060724E3EBF97EA48257D51002B65A8/$file/ev.040.140908.let.001.pc.pdf p3

[10] http://www.abc.net.au/radionational/programs/backgroundbriefing/was-stolen-wages-shame/6740068

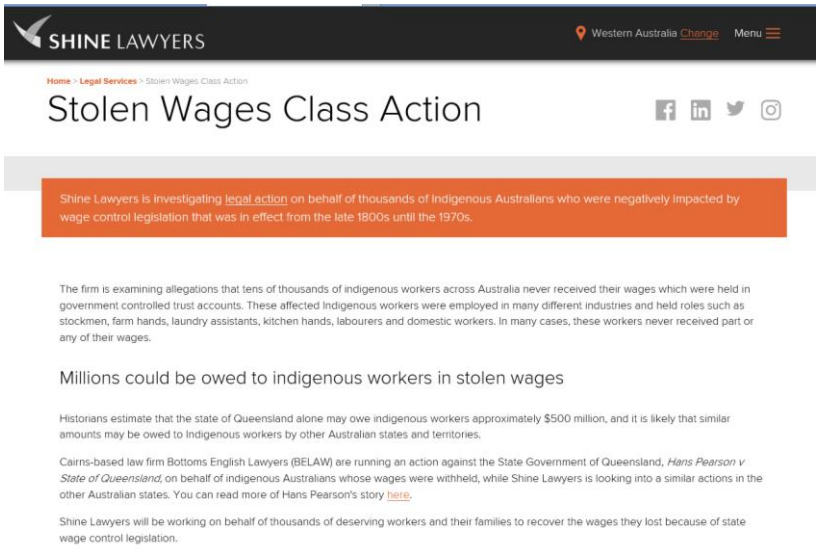
[11] ibid

[12] http://www.abc.net.au/cm/lb/6747892/data/wa-department-of-indigenous-affairs-memorandum-on-the-stolen-wa-data.pdf

remaining primary victims, as well as community payments / investments to those communities with significant numbers of secondary victims.

There has never been an adequate forensic accounting investigation into the financial pathways through which stolen wages passed, and the ultimate beneficiaries of those pathways. Regardless of whether individual primary victims can still be identified, money that was wrongly withheld by both government and private actors should be traced and returned to the families and communities from which the funds were taken. Private financial institutions, private trusts and other conduits through which these funds passed need to be fully investigated by professional forensic accountants.

Some Aboriginal people are considering a class action against the Government. This is also being encouraged by legal representatives, for example Shine Lawyers are currently using google advertising to promote their investigation into a possible class action.[13]



The Find and Connect Service offers history and information about orphanages, children's homes and other Australian institutions. It contains a useful set of relevant documents, reports and photographs relating to Stolen Wages inquiries and the Reparation Scheme in WA.[14]

CLCAWA suggests that the Attorney General ought to review the WA Stolen Wages Reparation Scheme with a view to deliver a more comprehensive response from the Government to this past practice, through a proper process of engagement and co-design with Aboriginal people.

[13] https://www.shine.com.au/service/class-actions/stolen-wages-class-action/?gclid=CN3FmfzY9dMCFZAHKgodrloEkg
[14] https://www.findandconnect.gov.au/ref/wa/biogs/WE00788b.htm

LAW REFORM COMMISSION

The Department of the Attorney General (DotAG) describes the role of the Law Reform Commission of Western Australia as responsible for helping to "keep the law up to date and relevant to the needs of society by making recommendations for the reform of areas of law."[15]

Issues of law reform considered by the Commission are generally referred to the Commission by the Attorney General, but this can also be a two-way process. The Commission may make proposals to the Attorney General, which are then subsequently referred to the Commission by the Attorney General. This enables law reform issues to be raised by the general public, with either the Commission and/or the Attorney General.[16]

The Commission's website advertises that it welcomes suggestions for law reform projects, though it is unclear how actively the public provides such advice.[17] The terms of reference for projects being undertaken by the Commission can also be found on its website. There appears to be only one current Reference - Project 107 – The Intersection of the Family Law and Caveat Systems.

The Report of Project 104 – Enhancing Family and Domestic Violence laws – sets out the process previously used by the Commission to undertake its work.

In August 2013, the Law Reform Commission received final terms of reference from the Attorney General, the Hon Michael Mischin MLC, to consider:

> *(a) the benefits of separate family and domestic violence legislation;*
>
> *(b) the utility and consequences of legislation for family and domestic violence restraining orders separate to their current location in the Restraining Orders Act 1997; and*
>
> *(c) the provisions which should be included in such legislation were it to be developed (whether in separate legislation or otherwise).*

In December 2013, the Commission published its Discussion Paper presenting 53 specific proposals for reform and raising 29 questions for discussion. That Paper followed consultation with more than 150 individuals concerned with family and domestic violence (both outside and within government); observations of courts in Midland, Joondalup, Perth and Geraldton; consultations in Broome and Kununurra; receipt of five written submissions; and considerable research and deliberation. The Commission also engaged Professor Donna Chung, Head of Social Work at Curtin University, to prepare a detailed report on the complex nature and dynamics of family and domestic violence, which it published as an annexure to the Discussion Paper.

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[15] http://www.department.dotag.wa.gov.au/L/law_reform_commission.aspx?uid=1746-7556-1584-5423
[16] http://www.lrc.justice.wa.gov.au/A/about_us.aspx?uid=3637-4988-2415-1249
[17] http://www.lrc.justice.wa.gov.au/a/about_us.aspx

The Discussion Paper sought submissions by the end of January 2014, and the Commission ultimately received 43 written submissions, and conducted a number of additional consultations to resolve matters arising from the submissions.

Many of the submissions were detailed, thoughtful and extensive, and it was evident that the organisations and individuals preparing them had gone to considerable lengths to consider and respond to the questions and proposals put by the Commission in its Discussion Paper.

Since July 2014, responsibility for the Commission was transferred to the DotAG which is now tasked with providing all executive and project management support to the Commission from its own resources. Despite these changes, the Commission remains a statutory authority and retains its legal independence with respect to its findings.

As the Law Reform Commission's latest Annual Report notes however:

In the State Budget papers for 2015-16 there continues to be no allocation of new funds to support the functions of the Commission, nor has there been any allocation within the DotAG 2015-16 budget specifically to support the work of the Commission……Existing funds held in the Law Reform Commission Account will be retained and will continue to be available to provide for the honorarium due to Commission members and, upon approval, will be used to enable the Commission to use independent external resources, where appropriate, to assist it to discharge its core functions in relation to researching, consulting and reporting.

Final reports of the Commission are tabled in Parliament as required by the *Law Reform Commission Act 1972*.

The Governor is responsible for appointing up to five members to the Commission (two full-time and three part-time). "Of the part-time members, one is to be a private legal practitioner with not less than eight years' experience; one is to be a person engaged in the teaching of law at a university in the State; and one must be an officer of the State Solicitors Office."[18] Currently, there are only three part-time members of the Commission, with David Cox, as Chair , Dr Augusto Zimmermann from Murdoch University and Senior Assistant State Solicitor Fiona Seaward. [19]

CLCAWA is interested in the Attorney General's view regarding the future of the Law Reform Commission, particularly in the context of the Machinery of Government changes which will see the creation of a new Department of Justice.

[18] http://www.lrc.justice.wa.gov.au/C/current_members.aspx?uid=3401-3246-1137-2004
[19] According to the Law Reform Commission website current on 31 January 2017.

COMMISSIONERS

Currently a number of Commissioners report to the Attorney General, including the Commissioner for Children and Young People, the Equal Opportunity Commissioner and the Victims of Crime Commissioner.

CLCAWA is of the view that Commissioners can play a vitally important role in the justice system, which is currently not being used to its greatest advantage.

The powers exist for Commissioners to play an important and highly active oversight role, monitoring systemic issues, undertaking inquiries and making recommendations to improve policy, legislation and practice.

For example, Michelle Scott as the first Commissioner for Children and Young People undertook an inquiry into the mental health and wellbeing of children and young people in WA and made 54 recommendations to Parliament on systemic reforms that would improve quality and access for young people across the services system. The review of the implementation of the recommendations resulted in twelve more recommendations being issued to guide planning and delivery of better mental health programs and services.[20]

Yvonne Henderson as the Equal Opportunity Commissioner used her powers to undertake an inquiry into systemic discrimination against Aboriginal people in access to housing, which lead to significant reform and improvements in public housing tenancy regulation and the implementation of better regulation of private tenancies.[21]

In recent years, Commissioners have been appointed who operate more as another layer of bureaucratic activity, rather than as independent, proactive and publicly engaged oversight mechanisms.

There is an opportunity for the Attorney General to review the role and functions of Commissioners to optimize their contribution and impact across the sector.

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE: LIMITATIONS PERIOD – CHILD ABUSE

In 2016, a WA Cabinet Sub Committee on Civil Litigation for Child Sex Abuse considered the removal of the statutory limitation period on civil actions for victims of abuse. The removal of the limitations period is considered necessary to enable victims of historical abuse to bring about new civil action against perpetrators and institutions. The Cabinet Sub Committee was established in response to the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.[22]

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[20] https://www.ccyp.wa.gov.au/media/1463/report-our-children-cant-wait-december-2015.pdf
[21] http://www.eoc.wa.gov.au/community-projects/inquiry-into-public-housing-v
[22] See http://childabuseroyalcommission.gov.au/

The Royal Commission has made four key recommendations in relation to Limitation Periods, summarised as follows:

1. State and territory governments should introduce legislation to remove any Limitation Period.
2. The removal should have retrospective effect, regardless of whether any limitation period applied in the past.
3. Relevant courts' existing jurisdictions and powers should be expressly preserved.
4. Legislation should be introduced as quickly as possible, even before the Commissions activities are completed.[23]

The Association has a clear position on this issue, which it recommended to the WA Cabinet Sub Committee "*that limitation periods for civil actions based on child sexual abuse be removed; and further that this apply to all forms of child abuse*."[24]

In January 2017, the former Barnett Government announced its intention to introduce legislation to remove limitations for victims of sexual and other serious physical abuse.[25] Victoria and New South Wales are the only two other jurisdictions to have removed limitations so far.

The key features of the model announced by the Barnett Government were:

- Civil action can be taken regardless of where the abuse occurred, either against individual perpetrators or institutions.
- There will be no barrier of limitations periods.
- Any out-of-court settlements which victims may have agreed can be set aside by the court.
- There will be no cap placed on the maximum damages that can be awarded.
- The court will determine the damages payable to a person who suffered child abuse.
- Victims who had previously received redress for sexual or serious physical abuse experienced as a child would not be prevented from commencing civil action (for example through Redress WA or the Country High Schools Hostels Ex Gratia Scheme).[26]

CLCAWA would like to see the Attorney General go further in the model introduced into legislation by the new McGowan Government, in particular by expanding the definition of abuse.

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[23] Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, *Redress and Civil Litigation Report p76-78*

[24] CLCAWA, December 2016, *Written Response To Consultation Questions – Cabinet Sub Committee On Civil Litigation For Child Sexual Abuse* p2

[25] https://www.mediastatements.wa.gov.au/Pages/Barnett/2017/01/Limitation-period-to-go-for-child-abuse-victims.aspx 17 January 2017

[26] ibid

In its submission to the Cabinet Sub Committee, CLCAWA argued that the definition of "child abuse" in the new legislation should include all forms of abuse, including:

- Physical abuse
- Sexual abuse
- Emotional abuse
- Psychological abuse
- Neglect

This is consistent with the WA Children and Community Services Act 2004.[27] Section 28 of that Act includes all forms of abuse listed above as grounds for the removal of a child from their parents, being placed in the care of the State. Sexual abuse in the Act is not treated as more or less serious than other forms of abuse. It is also an offence punishable by ten years imprisonment, for a person who has the care or control of a child and who engages in conduct knowing that the conduct may result in the child suffering harm, or reckless as to whether the conduct may have that result, of any one or more of the following:

- Physical abuse
- Sexual abuse
- Emotional abuse
- Psychological abuse
- Neglect.[28]

The Royal Commission itself suggested that governments should expand on the child abuse reforms to include acts such as criminal physical or psychological abuse that caused damage to a child.[29]

The United Nations Convention on the Rights of the Child also treats all forms of abuse with equal seriousness, requiring equal protection against. Article 19 refers to physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse while in care. [30]

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[27] Available at https://www.slp.wa.gov.au/legislation/statutes.nsf/main_mrtitle_132_homepage.html

[28] Section 101 *Children & Community Services Act 2004* (10 years imprisonment) *Child Welfare Act 1947* (repealed) s.31A punishments for misconduct or neglect causing a child to be in need of care and protection - $10,000 or imprisonment for 12 months or both.

[29] Royal Commission into Institutional Responses to Child Sexual Abuse, 2015, *Redress and Civil Litigation Report p*492

[30] United Nations Convention on the Rights of the Child *Article 19*

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

There is clear recognition in Western Australian law, that all forms of abuse against children require intervention and protection. CLCAWA argues that separating out one form of abuse experienced by a Survivor over another just because the Survivor's trauma is considered of longer term in which to deal with the issue is not justified.[31] Nor is it based on any research or evidence of comparison between traumas to justify the distinction.

CLCAWA further suggests that child sexual abuse can be so intricately linked to other forms of abuse that the two may be very difficult to separate. To impose a limitation period with regard to one form of abuse and not another could lead to lengthy disputes and litigation about definitions, causation and attribution; this has the potential to substantially defeat the purpose of the proposed amendments.[32]

It follows that the Attorney General should introduce legislation to remove limitation periods for all forms of child abuse.

ROYAL COMMISSION INTO INSTITUTIONAL RESPONSES TO CHILD SEXUAL ABUSE: NATIONAL REDRESS SCHEME

The Commonwealth Government announced on 4 November 2016 that it would establish a Commonwealth Redress Scheme (the CRS) to be operational in 2018 for victims of institutional child sexual abuse. Payments up to $150,000 can be made under the redress scheme, which will also allow for survivors to receive a 'direct, personal response' and ongoing access to counselling and support.

The establishment of the CRS is consistent with the recommendations made by the Royal Commission about redress; principally, that a national scheme was the best means of providing justice for survivors.

From March 2018 a dedicated telephone helpline and website will be available to provide information to survivors and their families. Applications for redress will be open from July 2018 to survivors of abuse in Commonwealth institutions.

At this stage the CRS will only be for people who have suffered childhood sexual abuse in Commonwealth institutional settings. The Commonwealth has taken the view that it cannot lawfully compel institutions to participate in the scheme. So unless state governments and other institutions (such as churches) 'opt in' to the CRS, survivors who suffered abuse in institutions administered by those bodies will not be eligible to claim redress under the CRS. If the states refer sufficient powers, church, charitable and other community based institutions will be able to 'opt in' to the CRS. This will mean that survivors who were sexually abused as children in those institutions would be eligible to claim redress.

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[31] CLCAWA, December 2016, *Written Response To Consultation Questions – Cabinet Sub Committee On Civil Litigation For Child Sexual Abuse* p5

[32] ibid

The CLCAWA understands that discussions are taking place between the Commonwealth Government, state and territory governments and non-government institutions and is also aware that there is a history of Western Australian Governments not referring powers to the Commonwealth - for example in relation to family law and industrial relations law and when the national quality agenda in early childhood was introduced.

CLCAWA is also very aware of the financial situation facing the Western Australian Government and that anything putting further financial pressure on the state government's budget is likely to gain little support.

CLCAWA urges the Attorney General to ensure that survivors of child sexual abuse in Western Australian institutions can access the benefits of the CRS.

Part Two - NEIGHBOURHOOD JUSTICE CENTRE

Community Justice Centres operate on the basis of deeply involving local communities in justice issues in their area, including the local factors contributing to offending behaviour, (be it housing, mental illness, drug or alcohol usage etc), experiences of victims of crime and their families. The common features of CJCs is their focus on finding local solutions by working in partnership with local community residents, businesses, service organisations, schools and community groups. Their purpose is to use this collaborative engagement to develop and test solutions to local problems, by taking a proactive approach. This can include developing crime prevention strategies, delivering therapeutic programs addressing the issues that are often the underlying cause of offending behaviour and designing alternative, community based access to justice for victims of crime.

A CJC is operating in Victoria under the model of a Neighbourhood Justice Centre (NJC). The NJC was set-up in Collingwood in 2007 as the only CJC operating in Australia, servicing the City of Yarra[33].

The NJC operates a multi-jurisdictional court which and acts as a venue for the Magistrates' Court of Victoria, the Victorian Civil and Administrative Tribunal (VCAT) and the Victims of Crime Assistance Tribunal (VOCAT). While the court deals mostly with criminal matters, it also does significant work on intervention orders, VOCAT applications, Children's Court matters, VCAT civil claims and guardianship and administration matters. It does not hear contested final hearings.[34]

The NJC in addition to operating an NJC Court, provides a range of services that a pro-active, early intervention approach to tackling justice issues in the City of Yarra. These include:

- victims' support

[33] http://www.neighbourhoodjustice.vic.gov.au/home/about+us/community+justice/
[34] Neighbourhood Justice Centre, *Reflections on Practice*, 2015 p33

- mediation
- specialised mental health, drug and alcohol treatment
- counselling
- housing support
- employment and training support
- Aboriginal and Torres Strait Islander support services, and
- legal advice.[35]

The focus on providing restorative justice to victims of crime is considered central to the NJC. It expresses a commitment in its Strategic Plan to "engaging with victims in ways that help them piece together a durable sense of emotional, psychological, physical and where appropriate, financial wellbeing in the wake of offences committed against them."[36]

Importantly, the evidence base for restorative justice is strong and NJC argues that it is "not simply a 'feel good' exercise," citing the research of Sherman and Strang who found that restorative justice:

- *substantially reduced repeat offending for some offenders, but not all*
- *doubled (or more) the offences brought to justice as diversion from conventional criminal justice*
- *reduced crime victims' post-traumatic stress symptoms and related costs*
- *provided both victims and offenders with more satisfaction with justice than criminal justice*
- *reduced crime victims' desire for violent revenge against their offenders*
- *reduced the costs of criminal justice, when used as diversion from criminal justice*
- *reduced recidivism more than prison (adults) or as well as prison (youths).* [37]

The process of bringing together a range of services, together with a multi-jurisdictional court, has been successful in both crime reduction and improved community safety. Ultimately this has created savings by reducing the number of cases in the justice system. [38]

The NJC is committed to reflecting and sharing its practice across other jurisdictions, to facilitate the uptake of this successful model in other courts and communities. It publishes its

[35] http://www.neighbourhoodjustice.vic.gov.au/home/about+us/community+justice/
[36] Neighbourhood Justice Centre, Reflections on Practice, 2015 p21
[37] Ibid p22
[38] http://www.neighbourhoodjustice.vic.gov.au/home/about+us/

'Reflections of Practice' along with a broad range of information about its activities and outcomes.[39]

Supported by the CLCAWA and AnglicareWA, the University of WA Law School is undertaking a feasibility study into the establishment of a Neighbourhood Justice Centre in Western Australia. The project is supported by a range of key stakeholders across the justice sector, including the Hon Wayne Martin AC Chief Justice of Western Australia.

One potential site for such an initiative – Armadale- would complement the efforts of the Youth Partnership Project in the south east corridor, which has already made significant gains in bringing together multi-disciplinary teams to address the causes of offending behaviour of young people in that area.[40] Other sites and partners will be explored through this feasibility study, as will funding mechanisms, such as exploring the potential use of a Social Impact Bonds.

CLCAWA requests the Attorney General to consider formal support for this proposal.

Part Three – JUSTICE REINVESTMENT

INCARCERATION OF ABORIGINAL PEOPLE

WA has the highest rate of incarceration of Aboriginal people of any jurisdiction in the world.

In our state, despite making up only 3 percent of the population, nearly 40 percent of the adults, and 75 percent of the children we send to prison are Aboriginal. The issue of overrepresentation of Aboriginal people in the justice system is not new, and despite the serious moral imperative to address this gross inequity, we have consistently failed to reverse this reality.

In 2016 a new coalition of community leaders and justice service organisations launched an initiative to help raise community awareness about the incarceration of WA's first peoples and about how a Justice Reinvestment approach can create positive change. Known as Social Reinvestment WA (SRWA), the coalition makes a strong case for investing in culturally appropriate social services and justice system processes, to create "healthy families, smart justice and safe communities."[41]

[39] Neighbourhood Justice Centre, *Reflections on Practice,* 2015.
[40] Youth Partnership Project, *Change the Story Report*, 2017.
[41] For information on the coalition see http://socialreinvestmentwa.org.au/

CLCAWA suggests that the Attorney General has the greatest potential, in addition to the most serious responsibility, to build the support of the WA community for greater application of Justice Reinvestment theory and practice across the WA Justice system.

CLCAWA endorses the policy and recommendations of SRWA and urges the Attorney General to engage with the coalition and work collaboratively with the Aboriginal community to address the gross overrepresentation of Aboriginal people in prison, through a Justice Reinvestment approach.

THERAPEUTIC JURISPRUDENCE

A valuable strategy for applying the Justice Reinvestment approach in WA is to invest greater resources into the application and implementation of Therapeutic Jurisprudence into WA's justice system. The growing field of Therapeutic Jurisprudence (TJ) is concerned with the law's impact on emotional life and psychological well-being. Its study suggests that all elements of the law, including rules of law, legal procedures, and the roles performed by legal actors, themselves act as "a social force that often produces therapeutic or anti-therapeutic consequences."[42]

The field of study of Therapeutic Jurisprudence emerged in the 1980s out of the mental health law work of Professors David Wexler and Bruce Winick in the United States. It has grown in application across all areas of the law and cultures into a significant area of international study.

The Australian Institute for Justice Administration acknowledges that there has long been a general awareness amongst judges, lawyers and other justice system officials, of how their processes and behaviours can affect clients. They cite examples such as "where a judge allows a witness a short adjournment to collect herself after a difficult time in the witness box or where a lawyer settles a case on the client's instructions as he can no longer stand the stress of litigation."[43] These examples however, provide only a glimpse of the general theory of therapeutic jurisprudence – which is concerned with a more holistic awareness of the need to ensure that legal processes, and their effect upon participant wellbeing, do not impede access to justice.

> *Therapeutic jurisprudence says that the processes used by courts, judicial officers, lawyers and other justice system personnel can impede, promote or be neutral in relation to outcomes connected with participant wellbeing such as respect for the*

[42] Wexlar, David. International Network on Therapeutic Jurisprudence http://law2.arizona.edu/depts/upr-intj/
[43] https://www.aija.org.au/index.php/research/australasian-therapeutic-jurisprudence-clearinghouse/the-concept-of-therapeutic-jurisprudence

justice system and the law, offender rehabilitation and addressing issues underlying legal disputes.[44]

At the International Therapeutic Jurisprudence Conference in Perth, Ambelin Kwaymullina provided a highly insightful parallel between TJ and Indigenous Law which is worthy of reflection, that of the recognition of the power of relationships.

> *Indigenous law is about relationships. The Aboriginal kinship system recognises the connections, not just between humans, but between humans and all other life. Everyone has a place in this system, and by knowing this place, people know their rights and their responsibilities –to provide another with food, to care for a specific story or site, to punish a wrongdoer. And the rights and responsibilities that one person has with regard to another depend on their respective places in the system. It is not the right or responsibility that defines the relationship, it is the relationship that defines the right or responsibility. And because these relationships exist between all life, a transgression affects all life. Trespassing on a site associated with a specific animal damages the relationship between the trespasser and the person who has the responsibility of caring for that site, but it also damages the relationship between humans and the animal the site is associated with, and between humans and country. So when there has been a breach of law, the aim of Indigenous law is not simply to punish, but to restore the affected relationships, and in turn to restore the pattern of creation, to keep the balance of the world.*[45]

Ambelin Kwaymullina goes on to say:

> *If there are to be partnerships between therapeutic jurisprudence and Indigenous peoples, those partnerships must be equal ones. It must be asked, is this process for involving Indigenous peoples a process that empowers Indigenous peoples? Does it respect Indigenous culture and cultural protocols? Does it give Indigenous peoples control of their own knowledge and the power to protect that knowledge? For it is not possible to learn from Indigenous peoples, to understand Indigenous culture, without respecting and valuing the peoples and the culture. Any process that disempowers and dispossesses, no matter how lofty the aim, is an antitherapeutic one that can never lead to a therapeutic result.*[46]

There are a number of specialist courts that operate through the WA Magistrates Courts, with the express purpose of offering rehabilitative streams, reflecting principles of therapeutic jurisprudence. The courts encourage and enable people to access treatment

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[44] ibid

[45] Australian Institute of Justice Administration, *Transforming Legal Processes in Court and Beyond: A Collection of papers from the 3rd International Therapeutic Jurisprudence Conference*, Perth 2006 http://www.aija.org.au/online/Pub%20no83.pdf

[46] ibid

programs and support services intended to assist them to break cycles which contribute to offending behaviour, and lower recidivism rates.[47] WA's specialist courts include:

- Drug Court
- Courts Drug Diversion Program
- Family Violence Court
- Geraldton Family Violence Court - Barndimalgu
- Kalgoorlie-Boulder Community Court
- Intellectual Disability Diversion Program
- Start Court.[48]

The Perth Drug Court was established in recognition that many crimes are committed in association with drug related issues of offenders, and thus the health and other issues associated with drug use need to be taken into account in pursuit of just legal outcomes. The aims of the WA Drugs Court are to:

- *support participants in addressing their substance misuse and associated lifestyle*
- *reduce the imprisonment of those with substance misuse issues by addressing problems that are integral to offending behaviour*
- *reduce post-treatment supervision requirements for participants by having them address relevant requirements at an earlier stage in the process.*[49]

Referrals to the Drug Court are accepted from the District, Supreme and other Magistrates Courts, where an accused person experiencing drug related problems is facing criminal charges. To be eligible for the Drug Court, the accused must plead guilty participate in suitable treatment determined by the Court Magistrate. In addition to treatment benefits, the legal incentive for offenders is the deferral of final sentencing until the completion of the agreed treatment program and supervised case management. The currently available programs are:

- Supervised Treatment Intervention Regime (STIR) - a pre-sentence program for offenders facing sentencing for relatively less serious offences for which they would be unlikely to be imprisoned.
- Drug Court Regime (DCR) - a pre-sentence program for participants with significant histories of offending criminal records and drug related problems, who are facing current serious charges.
- Pre-Sentence Order (PSO) - a pre-sentence program for participants who otherwise would be facing an immediate and substantial prison sentence.
- Conditional Suspended Imprisonment Order (CSI) - a post-sentence program for offenders who committed the referral offences while on parole or a suspended sentence of imprisonment.[50]

[47] http://www.magistratescourt.wa.gov.au/S/specialist_courts.aspx?uid=1152-1596-2359-5684
[48] ibid
[49] http://www.magistratescourt.wa.gov.au/D/drug_court.aspx?uid=1020-2973-5279-5306

There is also a Children's Court Drug Court which operates in the Perth Children's Court.

CLCAWA recognises that legal processes impact on the wellbeing of people in the justice system, and can have a significant influence on the ultimate goal of access to justice. Further, we recognise that these processes often at odds with Aboriginal culture and lore, and thus disproportionately affect Australia's first peoples. CLCAWA argues that application of therapeutic jurisprudence should be a key feature of the WA system of justice.

In particular CLCAWA recommends that the Attorney General continue to apply and expand this approach through WA's specialist courts.

For Further Information Contact

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[50] http://www.courts.dotag.wa.gov.au/D/drug_court.aspx?uid=5227-1163-1055-5774