

Memorandum

To: Morry Bailes, President, Law Council of Australia

From: Stuart Webb, President-Elect, Law Institute of Victoria

Subject: Closing the Gap Refresh

Date: 9 March 2018

The Law Institute of Victoria (**LIV**) welcomes the opportunity to provide input to the Law Council of Australia's submission to the Council of Australian Governments (**COAG**) on the Closing the Gap Refresh. This memorandum has been drafted in consultation with members of the LIV's Reconciliation and Advancement Committee.

The rates of Indigenous imprisonment in Australia have increased by 88 per cent over the last decade, with Indigenous Australians now 13 times more likely to be imprisoned than non-Indigenous people.¹ These rates of Indigenous imprisonment are among the worst in the developed world.

The LIV supports the Law Council's call for the Australian Government to introduce justice targets to end the disproportionately high imprisonment rate of Indigenous people. Urgent reforms are needed to change the laws that lead to the disproportionate rate of Indigenous imprisonment. The adoption of justice targets by COAG would ensure that all Australian government are held accountable, and that there are clear markers for efforts to reduce Indigenous imprisonment and violence against Indigenous people.

The LIV also supports a new justice target to address the disproportionate rates of violence, particularly against Indigenous women and children in circumstances of family violence, however this memorandum does not cover that issue.

Justice Targets

There have been numerous calls for the inclusion of justice targets over the past decade, for example:

- In 2009, the Aboriginal and Torres Strait Islander Social Justice Commissioner's Social Justice Report recommended the expansion of the Closing the Gap targets to include a criminal justice target to address the disproportionate representation of Indigenous people within the prison system, and as victims of crime;
- In 2013, the Senate Legal and Constitutional Affairs References Committee's report on the Value of a justice reinvestment approach to criminal justice in Australia recommended that the establishment of justice targets be referred to COAG;

¹ Change the Record Coalition, "Blueprint for Change" <https://www.reconciliation.org.au/wp-content/uploads/2017/11/Change-the-Record-Blueprint_web.pdf> (2017)

- In 2013, the then Minister for Indigenous Affairs, the Hon Jenny Macklin MP, announced that the Australian Labor Party was committed to developing a new justice target for inclusion in the Closing the Gap Strategy;
- In 2014, the Commissioner’s Social Justice and Native Title Report supported the implementation of justice targets;
- In 2015, a number of organisations, including the National Association of Community Legal Centres and Amnesty International, called for justice targets in its submission to the Senate Standing Committee on Finance and Public Administration’s inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Judicial Services; and
- In 2017, the Human Rights Law Centre and the Change the Record Coalition recommended that State and Territory governments develop and implement community led justice agreements, with a particular focus on Aboriginal and Torres Strait Islander women in the justice system in their report ‘*Over-represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women’s Growing Over-Imprisonment*’.

The Federal Minister for Indigenous Affairs, the Hon. Nigel Scullion, has commented that the Commonwealth government does not have jurisdiction over the criminal justice system, and therefore should not have a justice target.² However, any strategy to reduce the rates of Indigenous imprisonment must involve all Australian governments to ensure the delivery of a national, comprehensive and intergovernmental response.

The Closing the Gap targets determine the key issues that measures to reduce Indigenous disadvantaged are aimed towards addressing. A new justice target will ensure that policy-makers focus on reducing the proportion of Indigenous people that are imprisoned when they are developing policy and legislative reform in all areas, not just reforms to the criminal justice system. Further, justice targets provide a tangible means of measuring the impact and effectiveness of government strategies, including those at the Commonwealth level.

The LIV submits that COAG should agree to incorporate a series of new specific justice target into the Closing the Gap framework to ensure that all Australian Governments take urgent action on reducing the rates of Indigenous imprisonment.

Indigenous Imprisonment

The imprisonment rates of Indigenous Australians increase the levels of disadvantage experienced by both individuals and communities. The current Closing the Gap targets adopted by COAG are not on track, arguably because imprisonment rates of Indigenous Australians are compounding their disadvantage in other areas such as health, education and wellbeing. The disadvantage experienced by Indigenous people is multi-layered, and efforts to reduce disadvantage in the current target areas should not be considered in isolation of justice issues.

The inclusion of specific justice targets into the Closing the Gap targets are urgently needed to reduce the rates of Indigenous imprisonment, and to improve the overall disadvantage

² Senate Finance and Public Administration References Committee, Aboriginal and Torres Strait Islander experience of law enforcement and justice services report
<https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Legalassistan ceservices/Report> (2016)

experienced by Indigenous Australians. These targets in themselves will not lead to change, however they will promote enhanced cooperation between Australian governments and will hopefully result in targeted increases in funding. They will also increase visibility of the overrepresentation of Indigenous Australians in the criminal justice system, as both victims and offenders.

The LIV has previously submitted to the Law Council on a number of measures that would reduce the rates of Indigenous imprisonment, including in response to the Australian Law Reform Commission's (**ALRC**) Discussion Paper on Incarceration Rates of Aboriginal and Torres Strait Islander Peoples. The Australian government received the ALRC's final report on 22 December 2017, and according to a media release from the Attorney-General and the Minister for Indigenous Affairs, will be tabled in Parliament and released publicly in 2018.

If the ALRC's recommendations reflect the LIV's position, the LIV submits that Australian Governments should urgently implement the ALRC's recommendations.

Women in prison

Victoria has a low rate of Indigenous women in prison compared to other jurisdictions in Australia.³ However, the rates of Indigenous imprisonment in Victoria are still disproportionate when compared to non-Indigenous Australians. The imprisonment rates of Indigenous women are increasing and they are more likely to be on remand.

The LIV identified this issue in its memorandum to the Law Council on the ALRC's Discussion Paper, and is concerned that the majority of women incarcerated have dependent children.⁴ The imprisonment of Indigenous women disproportionately affects children and results in the further marginalisation and disadvantage of an already vulnerable community. It also subjects Indigenous women to increased intersectional discrimination within the criminal justice system.

The LIV submits that the complex needs of Indigenous women require culturally appropriate and meaningful services. In order to meet a new justice target to reduce the rates of Indigenous imprisonment, governments should prioritise service delivery that is designed by Aboriginal controlled organisations, such as Djirra (formerly the Family Violence Prevention Legal Service Victoria).

Victoria's Aboriginal Justice Arrangements

The Victorian Aboriginal Justice Agreement (**AJA**) clearly demonstrates the effectiveness of implementing a justice target. In 2012 it was reported that the AJA resulted in 'significant improvements in justice outcomes for Koories'. The AJA delivered gross benefits to Victoria of between \$22-\$26 million, and facilitated partnerships and justice programs that would not have otherwise occurred. Further, the AJA has been effective in providing for ongoing Indigenous ownership and participation in strategic policy development.

Victoria's AJA meets the highest standards in terms of Aboriginal and Torres Strait Islander participation, implementation, monitoring and independent evaluation. As at 2016, detention

³ See e.g. Human Rights Law Centre *Report Addressing the skyrocketing Aboriginal and Torres Strait Islander women's imprisonment rates* (15 May 2017).

⁴ LIV submission to the Law Council of Australia, *Australian Law Reform Commission Discussion Paper – Incarceration Rates of Aboriginal and Torres Strait Islander People* (31 August 2017).

rates of Indigenous youth in Victoria was 1.5 per 1,000, well below the national average of 6.8 per 1,000.⁵ Substantial government funding has enabled the implementation of a key range of programs, services and initiatives aimed at improving justice outcomes.

AJA infrastructures play a critical role in the facilitation of collaborative and effective criminal justice responses, and provide Aboriginal and Torres Strait Islander people an opportunity to provide input into strategic planning. The AJA provides government with a systematic and coherent strategy to address Aboriginal and Torres Strait Islander justice issues, including over-representation and victimisation.⁶

A direct relationship exists between the formulation of an AJA and the existence of an independent, community-based Aboriginal and Torres Strait Islander representative advisory body. Where advisory bodies do not exist, there is less chance that the AJA will be developed, and also less chance that government justice agencies will develop their own strategic policies and initiatives. Without independent Aboriginal and Torres Strait Islander representative bodies, there is likely to be insufficient commitment to develop and drive an AJA.⁷

The most effective AJA's provide for inclusive, ongoing engagement with Aboriginal and Torres Strait Islander communities throughout the entire 'life' of any relevant framework; that is, during the initial design, implementation, monitoring, and evaluation.⁸ Independent, ongoing monitoring and evaluation at a jurisdictional level, providing for maximum Indigenous input, will enhance the effectiveness of AJAs and strategic plans.⁹

AJA's are likely to have also led to increased whole-of-government planning directed towards addressing Aboriginal and Torres Strait Islander social disadvantage, relevant to addressing rates of incarceration.¹⁰ Further, three of the five jurisdictions which have developed an AJA since 2000 have also formulated whole-of-government 'overarching' Aboriginal and Torres Strait Islander strategic policy, covering a broader social and economic framework, with some emphasis upon justice issues.¹¹

There is an essential link between reducing Aboriginal and Torres Strait Islander over-representation in the criminal justice system, and broader socio-economic factors such as low employment rates, alcohol and drug misuse, poor health and educational attainment. AJA's recognise and acknowledge this.¹²

Without an AJA, programs and initiatives addressing incarceration rates become siloed from other agencies and initiatives, and miss out on the joint objectives. This results in lost opportunities and creates the potential for duplicated efforts addressing the same objective. Without an AJA, such programs become vulnerable to changes in government, policy and budget allocations.

There has already been progress towards establishing AJAs in a number of other State and Territory jurisdictions. In 2015, the South Australian Council of Social Services called for an

⁵ Fiona Allison and Chris Cunneen, *Indigenous Justice Agreements: Current Initiatives Paper 4* (June 2013).

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

agreement to address rising Aboriginal and Torres Strait Islander incarceration rates.¹³ In 2016, the Making Justice Work Coalition called on the Northern Territory government to prioritise the creation of an AJA. The creation of a new Aboriginal Justice Agreement for the Northern Territory was announced in July 2017.¹⁴

The LIV submits that State and Territory governments should commit to working with peak Aboriginal and Torres Strait Islander groups, as a matter of urgency, to renew or develop AJAs. This action needs to be supported by minimum standards being developed for the design, implementation, monitoring and development of AJAs.

Justice reinvestment

The LIV submits that the inclusion of justice targets within the Closing the Gap framework should be informed by the principles of justice reinvestment. Justice reinvestment is directed towards addressing systemic issues and the underlying causes of crime. Justice reinvestment can reduce the over-representation of Indigenous people in the criminal justice system. This approach would see funding diverted from punitive measures, such as imprisonment, and instead invested in local community organisations' work with offenders and other services that disrupt the cycle of disadvantage.

The LIV acknowledges the importance of prisons for serious criminal offenders. However, considering the higher rate of recidivism for Indigenous offenders, justice reinvestment may have a profound impact on reducing Indigenous engagement with the criminal justice system.¹⁵

If you would like to discuss any of these matters further, please contact Lara Freidin, Policy Lawyer for the Administrative Law and Human Rights Section at LFreidin@liv.asn.au or on 03 9607 9380.

Yours sincerely,



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¹³ South Australian Council of Social Services, *Justice or an Unjust System? Aboriginal Over-Representation in South Australia's Juvenile Justice System* (2015).

¹⁴ Natasha Fyles, Attorney-General and Minister for Justice, *Restoring Trust – Launch of the Territory's First Aboriginal Justice Unit*, Media Release (5 July 2017).

¹⁵ Sentencing Advisory Council, *Victoria Comparing Sentencing Outcomes for Koori and Non-Koori Adult Offenders in the Magistrates Court of Victoria* (April 2013).