THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/IIC/JEvk:991669

7 May 2015

Mr Martyn Hagan
Secretary General
Law Council of Australia
DX 5719 Canberra

By email: simon.henderson@lawcouncil.asn.au

Dear Mr Hagan,

Australia's combined 18th, 19th and 20th Reports under the Convention on the Elimination of all forms of Racial Discrimination

Australia's combined 5th Report under the International Covenant on Economic, Social and Cultural Rights

I am writing to you on behalf of the Indigenous Issues Committee ("IIC") and the Human Rights Committee ("HRC") of the Law Society of NSW (together referred to as the "Committees"). The Committees respectively represent the Law Society on Indigenous issues and human rights as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committees thank you for the opportunity to provide comments on Australia's draft combined Reports under the Convention on the Elimination of all forms of Racial Discrimination ("CERD") and under the International Covenant on Economic, Social and Cultural Rights ("ICESCR").

The Committees agree with the proposed focus of the Law Council's comments set out in the Law Council's memoranda dated 16 April 2015. The Committees provide in the attached submission comments either to support those issues, or to provide information on additional issues.

Questions may be directed to Vicky Kuek, A/ Principal Policy Lawyer, on (02) 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,

John F Eades
President

AUSTRALIA'S DRAFT COMBINED REPORTS UNDER THE CERD

The Committees note that Australia's draft combined Report under the CERD ("draft CERD Report") does not acknowledge a number of important issues relevant to Australia's compliance with the CERD. In particular, the Committees note generally that there has been minimal progress on the majority of the Closing the Gap targets (which do not include justice specific targets)[1]. The Committees note also that the Productivity Commission's 2014 *Report on Overcoming Indigenous Disadvantage* confirms that while some indicators show an improvement, "justice outcomes continue to decline, with adult imprisonment rates worsening and no change in high rates of juvenile detention and family and community violence."[2]

The Committees provide below their more specific comments in detail below.

1. The Northern Territory intervention, now known as the Stronger Futures measures

The Committees have concerns about the application of certain aspects of the Stronger Futures legislation package, particularly as they might be relevant in New South Wales. These are set out in more detail below.

1.1. The *Racial Discrimination Act 1975* (Cth) and "special measures"

The Committees note that paragraph 26 of the draft CERD Report states that the *Racial Discrimination Act 1975* provides protection against racial vilification, and against discrimination on the grounds of race, colour, or national or ethnic origin, and provides for civil remedies. However, it is relevant to note that there remains no legislative prohibition on suspending the operation of the *Racial Discrimination Act* as occurred during the Northern Territory Intervention.

Further, the Committees suggest that the protection offered by the *Racial Discrimination Act* is further compromised by the way "special measures" operates in Australia.

In respect of the issue of "special measures", the HRC acknowledges that the CERD does not prohibit discrimination on the grounds of race entirely and allows discriminatory measures if they are "special measures" that have the effect of redressing past discriminatory policies.

The High Court considered the issue of special measures in 1998 in what is often referred to as the "Hindmarsh Island Bridge case" (*Kartinyeri v The Commonwealth*[3]). That case concerned a group of Indigenous women who exercised certain legal rights to persuade the Federal Court to prevent the building of a bridge to Hindmarsh Island, because it would impede the practice of attending to secret women's business there.

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[1] Department of Prime Minister and Cabinet, *Closing the Gap: Prime Minister's Report 2015* at 5, available online: https://www.dpmc.gov.au/sites/default/files/publications/Closing_the_Gap_2015_Report_0.pdf (accessed 5 May 2015)

[2] Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, available online: http://www.pc.gov.au/research/recurring/overcoming-indigenous-disadvantage/key-indicators-2014 (accessed 5 May 2015)

[3] [1998] HCA 22

The Parliament then passed the *Hindmarsh Island Bridge Act 1996* (Cth) to overturn that decision, and a challenge to this legislation was made on Constitutional grounds.

Three of the six High Court Justices sitting upheld that Act, and found that section 51(xxvi) does permit discrimination based on race which disadvantages particular groups. Two others did not offer a view on the issue and only one, Justice Michael Kirby, interpreted the section to exclude detrimental racial discrimination.

Since the *Kartinyeri*[4] decision, the *Racial Discrimination Act 1975* has been suspended a number of times to allow the Government to enact certain discriminatory measures.[5] This includes instances where the Government's assertions that these measures were "special measures" were not accepted by the CERD Committee,[6] or the UN Special Rapporteur[7], or the Parliamentary Joint Committee on Human Rights.[8]

The IIC further notes the decision of *Maloney v The Queen* [2013] HCA 28 where the Court held by a majority of 5-1 (Justice Kiefel dissenting) that the relevant provisions of the *Liquor Act 1992* (Qld) were discriminatory under s 10 of the *Racial Discrimination Act*. However, the Court unanimously dismissed the appeal on the basis that the relevant provisions were "special measures" within the meaning of s 8 of the *Racial Discrimination Act*. The IIC notes that these measures include the criminalisation of certain conduct.

The IIC endorses the view of the Parliamentary Joint Human Rights Committee, outlined in recommendations 1.112 to 1.115 in its Eleventh Report of 2013.[9] These recommendations are set out below:

> 1.112 The committee notes that the views of the High Court in *Maloney* are authoritative for the purposes of Australian domestic law in its current form.
>
> 1.113 The committee's mandate requires it to assess measures against the ICERD and the other human rights treaties.
>
> 1.114 The committee remains of the view that the automatic invocation of the special measures provision to justify every racially based measure does not reflect the accepted analytical framework adopted under international law.

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[4] [1998] HCA 22

[5] Such as the *Native Title Amendment Act 1998*, the Northern Territory Emergency Response ("NTER") legislation package and the Stronger Futures in the Northern Territory legislation package.

[6] In its Concluding Observations in 2010, the CERD Committee expressed its concerns about the NTER package. In stating its concerns, the CERD Committee expressed its concerns also in relation to "the use of so called "special measures" by the State party. The Committee regrets the discriminatory impact this intervention has had on affected communities including restrictions on Aboriginal rights to land, property, social security, adequate standards of living, cultural development, work, and remedies (arts. 1, 2, and 5).": UN Committee on the Elimination of Racial Discrimination (CERD), *UN Committee on the Elimination of Racial Discrimination: Concluding Observations, Australia*, 27 August 2010, CERD/C/AUS/CO/15-17 at [16], available at: www2.ohchr.org/english/bodies/cerd/.../CERD-C-AUS-CO-15_17.doc [accessed 24 October 2014]

[7] The UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, did not accept that the NTER constituted a special measure:
Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, *Preliminary note on the situation of indigenous peoples in Australia*, Human Rights Council, Twelfth Session, 28 October 2009, A/HRC/12/34/Add.10 at [8].

[8] See for example Parliamentary Joint Committee on Human Rights, *Eleventh Report of 2013*, June 2013, available online:
http://www.aph.gov.au/~/media/Committees/Senate/committee/humanrights_ctte/reports/2013/11_2013/report.pdf [accessed 14 October 2014]

[9] Ibid.

1.115 To the extent that the formulation of section 10 of the RDA contributes to the need to resort to the category of special measures to defend all racially based distinctions, the committee recommends that the provision be reviewed in light of the decision in *Maloney*, the international practice and the committee's comments.

The IIC is concerned that the effect of the *Maloney* decision has been to declare lawful a domestic legal regime intended to implement international law obligations, that does not in fact accord with the contemporary standards of international law.

The IIC is concerned also that the Government's contention in paragraph 76 of the draft CERD Report that all elements of the Stronger Futures package are consistent with the *Racial Discrimination Act* may be an over-statement as only one aspect of the Stronger Futures policies was tested in *Maloney*.

Further, the IIC notes that paragraph 77 of the draft CERD Report refers to "extensive consultations" taken with Aboriginal communities. The IIC notes that the adequacy of the consultation process was reviewed by Jumbunna Indigenous House of Learning, University of Technology Sydney. The report reviewed the consultation process against the applicable criteria for classification of governmental initiatives as 'special measures' and concluded that the criteria were not met.[10]

1.2. Customary law and cultural practice

The IIC notes the submission of the NATSILS made in February 2012[11] in relation to the amendment of the *Crimes Act 1914* (Cth) by the Stronger Futures legislation to remove the court's discretion to take into account as part of bail and sentencing discretion "any form of customary law or cultural practice as a reason for excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates."

The IIC endorses the NATSILS' view that the removal of the court's discretion in this respect offends the principle of equality as it prevents the equal application of the principle of proportionality in sentencing for Aboriginal and Torres Strait Islander offenders, particularly in light of the urgent need to address the incarceration rates of Indigenous peoples.

2. Legal assistance funding

The IIC attaches at "A" for the Law Council's information a submission made to the Commonwealth Attorney-General on 18 February 2015 on the issue of legal assistance funding. While some of the cuts to funding addressed in that submission have been reversed, the issues remain as the previous levels of funding available for legal assistance were already inadequate.

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[10] See Jumbunna Indigenous House of Learning, University of Technology Sydney, "Listening but not hearing: A response to the NTER Stronger Futures Consultations June to August 2011," March 2012, available online: http://www.jumbunna.uts.edu.au/researchareas/listeningbutnothearing.html (accessed 6 May 2015)

[11] Available online: http://www.natsils.org.au/portals/natsils/NATSILS%20Submission%20on%20Stronger%20Futures%20Bills%20and%20Proposed%20Changes%20to%20the%20Crimes%20Act%20Feb%202012.pdf (accessed 5 May 2015)

The IIC has also made submissions setting out its concerns in relation to the Indigenous Advancement Strategy ("IAS") tendering processes and notes in relation to paragraph 159 of the draft CERD Report that the information on successful bidders is now available on the Department of Prime Minister and Cabinet's website,[12] which identify that the majority of organisations funded under the IAS are not Aboriginal or Torres Strait Islander organisations. The IIC is very concerned that this outcome undermines community-based management structures, and is inconsistent with the human rights principles of self-determination. [13]

3. Incarceration of Indigenous peoples

The IIC attaches at "B" and "C" for the Law Council's information a submission made to the NSW Attorney General dated 6 November 2014, and a submission made to the NSW Minister for Aboriginal Affairs dated 26 March 2014 on the Ombudsman's review of police use of consorting provisions by way of example of some of the justice-related factors that have an impact on Indigenous incarceration rates. The IIC notes that there is no mention in the draft CERD Report of factors such as inadequate legal representation, the use of mandatory sentencing, the lack of support services available in respect of post-release support. For example, in NSW, ALS NSW/ACT's Prisoner ThroughCare program lost Government funding and ceased operations in June 2014.[14] This was a frontline service assisting Aboriginal men, women and children leaving gaol integrate back into daily life, and was a recommendation of the Royal Commission into Aboriginal Deaths in Custody in its eighth year of operation.

The IIC further notes that there is no mention of the fact that across Australia female imprisonment rates have doubled in the last decade and Indigenous women account for almost the entire increase.[15] The IIC notes that this has serious flow on implications for Aboriginal families, including for children moving into the care system.

The IIC notes also that the draft CERD Report does not include current statistics on deaths as a result of domestic violence, and does not acknowledge the impact of the Government defunding support for organisations that provide domestic violence support to women.[16]

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[12] Department of Prime Minister and Cabinet website: https://www.dpmc.gov.au/indigenous-affairs/grants-and-funding/funding-under-ias (accessed 23 April 2015).

[13] Articles 3 and 4, *Declaration on the Rights of Indigenous Peoples* and Article 1, *International Covenant on Civil and Political Rights*.

[14] ALS NSW/ACT, "ALS loses funding for frontline program despite Government assurance" Media release, 16 June 2014, available online: http://www.alsnswact.org.au/media_releases/33 (accessed 5 May 2015).

[15] See *The Age* Editorial, "Justice system failing indigenous women" 18 August 2014, available online: http://www.theage.com.au/comment/the-age-editorial/justice-system-failing-indigenous-women-20140817-3dubn.html (accessed 5 May 2015)

[16] See Esther Han, "Domestic violence funding in NSW: Rosie Batty as Australian of the Year raises profile of state 'epidemic'", *Sydney Morning Herald,* 26 January 2015, available online: http://www.smh.com.au/nsw/domestic-violence-funding-in-nsw-rosie-batty-as-australian-of-the-year-raises-profile-of-state-epidemic-20150126-12y3qu.html (accessed 5 May 2015)

4. Care and protection and Indigenous children

The IIC notes that the Law Council intends to focus on the issue of the care and protection of Indigenous children. The IIC is concerned about this issue as Indigenous children are disproportionately represented in the care system, particularly in NSW.

Aboriginal and Torres Strait Islander children were the subject of a child protection substantiation at eight times the rate of non-Indigenous children in 2012-2013.[17] According to the Australian Institute of Health and Welfare ("AIHW"), Aboriginal and Torres Strait Islander children are represented in out-of-home care at ten times the rate of non-Indigenous children across Australia.[18] According to the AIHW:

> At 30 June 2013, there were 13,952 Aboriginal and Torres Strait Islander children in out-of-home care, a rate of 57.1 per 1,000 children. These rates ranged from 22.2 per 1,000 in the Northern Territory to 85.5 per 1,000 in New South Wales (Table 5.4). Nationally, the rate of Indigenous children in out-of-home care was 10.6 times the rate for non-Indigenous children. In all jurisdictions, the rate of Indigenous children in out-of-home care was higher than for non-Indigenous children, with rate ratios ranging from 3.9 in Tasmania to 16.1 in Western Australia.[19]

Further, "The rate of Aboriginal and Torres Strait Islander children placed in out-of-home care has steadily increased since 2009, from 44.8 to 57.1 per 1,000 children."[20]

Given the statistics, the IIC notes in relation to paragraphs 68-73 of the draft CERD Report that it has concerns in relation to the removal of children in circumstances where removal was not necessarily warranted. Further, once removal has occurred, the IIC has concerns about the measures in place to provide for meaningful cultural connection. The IIC's view is that while the safety of the child is an integral part of the consideration of the best interests of the child, the child's right to enjoy their own culture and to use their own language (Article 27, *International Covenant on Civil and Political Rights,* Article 30, *Convention on the Rights of the Child*)[21] must be taken into account in this analysis.

Article 27 of the *International Covenant on Civil and Political Rights* states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 30 of the *Convention on the Rights of the Child* states:

> In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy

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[17] AIHW, *Child Protection Australia 2012-13,* at 25 available at: http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548164 (accessed on 22 October 2014)

[18] Cited in Judy Cashmore, 'Children in the out-of-home care system', in *Families, policy and the law: Selected essays on contemporary issues for Australia*, Alan Hayes and Daryl Higgins, (eds), AIFS http://www.aifs.gov.au/institute/pubs/fpl/fpl15.html

[19] Note 1 at 51.

[20] Note 1 at 53.

[21] See also Articles 11, 12 and 31 of the UN Declaration of the Rights of Indigenous Peoples

his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

The IIC notes further that the 1997 *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families,*[22] (the "Bringing them Home Report") recommended that there be national standards set in state and territory legislation, which included the factors to be considered in determining the best interests of an Indigenous child. The Bringing them Home Report recommended that national standards legislation provide that the initial presumption is that the best interest of the child is to remain within his or her Indigenous family, community and culture (recommendation 46a). Further, recommendation 46b provided that in determining the best interests of an Indigenous child, the decision maker must also consider:

1. The need of the child to maintain contact with his or her Indigenous family, community and culture,
2. The significance of the child's Indigenous heritage for his or her future well-being,
3. The views of the child and his or her family, and
4. The advice of the appropriate accredited Indigenous organisation.

4.1. Prior to removal

The IIC acknowledges that there are children in unsafe situations where their removal is warranted. However, in the IIC's experience, children may be unnecessarily removed in processes that lack procedural fairness. This might include, for example, parents agreeing to care plans or parental responsibility contracts with little or no understanding of the legal consequences of any breach.

The IIC notes also that in NSW, on removal of their child, parents are served with an assumption of care notice. However, they are often not served with any information outlining the matters that the NSW Department of Family and Community Services intends to rely on to support the removal of the child. In the Committee's experience, these documents are often served with very little time in which to provide a considered response.

Further, in the IIC's experience, there is often inadequate access to legal representation for parents (particularly in regional and remote areas where there are not many private practitioners, and many of those practitioners may be conflicted out of acting for families). The IIC's view is that proper representation may prevent the unnecessary placement of children into out of home care, and for extended periods of time. Anecdotally, the IIC understands from practitioner feedback that most joinder applications made by grandparents are successful.[23]

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[22] National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997). "Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families" available online: http://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf (accessed 24 February 2015)

[23] The Committee understands that in addition to the lack of adequate representation available, other barriers to joining grandparents to proceedings exist, including a lack of awareness in Indigenous communities about the possibility of making these applications.

4.2. Post-removal

Once removal has occurred, there may be inadequate support for kinship placements, and inadequate support for maintaining cultural connection between children and their families and kinship of 'country'.

The IIC notes that a principle underpinning the Wood Inquiry was that:

> All Aboriginal children and young people in out-of-home care should be connected to their family and their community, while addressing their social, emotional and cultural needs.[24]

In the Committee's experience, cultural connection is vital for an Indigenous child's resilience. The Committee holds the strong view that cultural contact plans should be made as part of court-ordered arrangements, and children should have meaningful contact with their families, and families from their own Indigenous nations. The IIC notes that some out of home care providers recruit Indigenous people to run internal "cultural contact programs." In the IIC's view, this arrangement is neither appropriate, nor sufficient as culture is nurtured within a culturally appropriate, lived experience.

Cultural contact must be provided for a significant and substantial time with the purpose of establishing a meaningful relationship with parents and family; beyond the establishment of identification. The IIC notes that structured and positive engagement can assist to establish a positive cultural connection, and nurture the understanding in children that culture is a positive aspect of their lives. The IIC notes that alcoholism and domestic violence is not a part of Aboriginal culture.

5. Treatment of asylum seekers: suspension of processing of Afghan and Sri Lankan asylum seekers, and Australia's non-refoulement obligations

The HRC is concerned about the comments made by the Government in paragraphs 168 to 175 of the draft CERD Report. The HRC's views are that Australia's treatment of asylum seekers in these respects is likely to be inconsistent with its CERD obligations.

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[24] James Wood, 2009, *Report of the Special Commission of Inquiry into child protection services in NSW*, NSW Department of Premier and Cabinet, at v, available online: http://apo.org.au/node/2851 (accessed 5 November 2014).

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THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IndgIssuesJEvk:880032

18 February 2015

The Hon Senator George Brandis QC
Attorney-General
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Senate, Parliament House
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By email: senator.brandis@aph.gov.au

Dear Attorney-General,

Commonwealth Legal Assistance Funding

I am writing to you on behalf of the Indigenous Issues Committee of the Law Society of NSW ("Committee"). The Committee represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee writes to you to express its serious concerns about the under-resourcing of the legal assistance sector, particularly as it affects Indigenous people. For the reasons set out in more detail in this letter, the Committee writes to you prior to the funding rollover date for the Community Legal Services Program ("CLSP"), National Partnership Agreement for Legal Assistance Services and the Indigenous Legal Assistance program to urge the Government to:

(1) Reverse the funding cuts to the legal assistance sector, particularly in relation to the Aboriginal and Torres Strait Islander Legal Services ("ATSILS") and to the Family Violence Prevention Legal Services ("FVPLS"), announced under the 2013-14 Mid-Year Economic and Fiscal Outlook ("MYEFO") and the May 2014 Federal Budget; and

(2) Provide priority funding through the Legal Aid Commissions for private practitioners in the care and protection jurisdiction.

1. Legal assistance funding program cuts

The Committee understands that legal assistance funding is provided by the Commonwealth through a number of different streams, namely:

- The community legal sector receives funding through the CLSP;
- Legal Aid Commissions are funded through the National Partnership Agreement on Legal Assistance Services; and
- ATSILS receive funding through the Indigenous Legal Assistance program.

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The Committee understands that the FVPLS is now part of the portfolio of the Department of the Prime Minister and Cabinet, and funding for the FVPLS is no longer assured.[1]

The Committee understands further that these four legal assistance providers received approximately $730 million in combined intergovernmental funding in 2012-13 (for both criminal and civil matters) which represented around only 0.14 percent of all government spending.[2] The majority of this funding has been provided by State Governments and Public Purpose Fund grants.

However, Federal funding cuts announced in the December 2013 MYEFO affected all of these services, with $43.1 million to be cut over 4 years. The Committee notes that ATSILS will lose $13.4 million, with NATSILS totally defunded. Cuts of $15 million to Legal Aid were announced as part of the Federal Budget in May 2014, and the FVPLS will no longer be funded after June 2015.[3]

Prior to the recent Government announcements, the National Congress of Australia's First Peoples ("National Congress") had already identified that the total level of funding provided to ATSILS continues to be grossly inadequate. This includes funding for prevention, early intervention and diversion services and for community education, which all have a flow on impact on incarceration rates.[4]

The Committee notes that, from an access to civil justice perspective alone, without commenting on access to the criminal justice system, the Productivity Commission recently recommended that an additional $200 million in funding is needed from the Commonwealth and State and Territory governments for legal assistance provision.[5]

Further, the Committee notes the views of the Human Rights Committee of the Law Society of NSW ("HRC"). The HRC observes that international attention has been drawn to this issue. In its recent Concluding Observations in relation to Australia, the UN Committee Against Torture ("UNCAT"), while welcoming information concerning the availability of legal assistance services for Aboriginal and Torres Strait Islander people, expressed its concerns at reports that ATSILS are not adequately resourced. Among other recommendations addressing the issue of Indigenous people in the criminal justice system, the UNCAT recommended that Australia should "guarantee that adequately funded, specific, qualified and free-of-charge legal and interpretation services are provided from the outset of deprivation of liberty."[6] The HRC also notes that Article 14(3) of the *International Covenant on Civil and Political Rights* provides that, in the determination of criminal charges, it is a minimum guarantee that defendants have a right to legal assistance of their own choosing without payment if they do not have sufficient means to pay for it.

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[1] Pursuant to the Indigenous Advancement Strategy, all organisations seeking Commonwealth funding for programs for the advancement of Indigenous peoples must enter into a competitive tender process and ongoing funding will be subject to demonstrating results.

[2] Productivity Commission, *Report on Access to Justice Arrangements: Overview*, No. 72, 5 September 2014, at 26, available online: http://www.pc.gov.au/__data/assets/pdf_file/0016/145402/access-justice-overview.pdf (accessed 9 February 2015) (referred to as the "Access to Justice report overview")

[3] Marie Sansom, "Closing the funding gap? Aboriginal services fear cutbacks," *Government News*, 1 December 2014, available online: http://www.governmentnews.com.au/2014/12/closing-funding-gap-aboriginal-services-fear-cutbacks/ (accessed 9 February 2015)

[4] National Congress of Australia's First Peoples, *National Justice Policy*, February 2013 at p 20, available online <http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf> (accessed 3 December 2013) (referred to as the "National Justice Policy") at 20-28.

[5] Access to Justice report overview, Note 1 at 30 and Recommendation 21.4

[6] UN Committee Against Torture (CAT), *Concluding observations of the Committee against Torture: Australia*, 23 December 2014, CAT/C/AUS/CO/4-5 at [12].

2. Ongoing unmet legal need

The Committee considers that the availability of legal assistance is critical for Aboriginal and Torres Strait Islander people, who are overrepresented in the criminal justice and care and protection jurisdictions. The adverse outcomes that result from this over-representation are well documented in the literature, including in the findings of the *Royal Commission into Aboriginal Deaths in Custody* ("RCIADIC").

The Committee notes that the 2012 *Legal Australia-Wide Survey: Legal Needs in Australia* found that Aboriginal and Torres Strait Islander peoples are still among the worst affected groups experiencing unmet legal needs. These include family law (particularly care and protection), housing, discrimination, employment and credit/debt problems.[7] The National Congress noted in its *National Justice Policy* the impact of civil law problems such as family law, debts, tenancy, employment, discrimination, stolen wages and victims compensation which can escalate and contribute to the risk of offending. The Congress noted also that the social determinants of criminal justice outcomes include a person's social and economic position in society, early life experiences, exposure to stress, educational attainment, employment status and past exclusion from participation in society throughout life. Victims and offenders are often closely related and many offenders have themselves been victims of crime, such as family violence.[8]

The Committee notes that the Productivity Commission found that there is a growing "justice gap" for the disadvantaged, and that:

> the nature of matters that fall in the gap is particularly concerning. Assistance with family law matters, including domestic violence and care and protection of children, is not comprehensive in its coverage.[9]

These findings are particularly concerning given that the rates of removal of Indigenous children have reached the point where they exceed previously recorded numbers at any time in the 20th century, including under previous government policies of removal of Indigenous children from their families – children now generally referred to as the Stolen Generations.[10] As at 2012-2013, in NSW, Aboriginal and Torres Strait Islander children are 11.8 times more likely to be removed than non-Indigenous children (at a rate of 68.3 per 1,000 children for Indigenous children, compared to a rate of 7.2 per 1,000 children for non-Indigenous children).[11]

While the Committee acknowledges that the issue of child care and protection is a State issue, the Committee notes that the RCIADIC found that 43 of the 99 Aboriginal deaths in custody involved a person who had been separated by welfare policies from their families when they were young.[12] Funding for the provision of legal assistance in this jurisdiction would assist with appropriate placement of children (for example, it would better facilitate

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[7] National Justice Policy, Note 2.
[8] Ibid.
[9] Access to Justice report overview, note 1 at 30. Further, the Committee understands that as a result of cuts announced in the 2013 MYEFO, Legal Aid NSW is no longer able to fund divorce, contravention or enforcement in family law matters. In NSW, legal aid is also only available for Hague Convention Matters in exceptional circumstances.
[10] See Australian Human Rights Commission, "Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families" August 1995, available online (https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf) (accessed 16 February 2015)
[11] Australian Institute of Family Studies, "Child protection and Aboriginal and Torres Strait Islander children," fact sheet available online: https://www3.aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-c (accessed 16 February 2015)
[12] The Hon Geoff Eames QC, "The Royal Commission into Aboriginal Deaths in Custody – 20 years on", *Exchanging Ideas II – conference sponsored by the Ngara Yura Committee, Judicial Commission of NSW* (September 2011) 14.

the making of joinder applications by grandparents in the Children's Court) and would better assist with creating realistic pathways for restoration where appropriate.

Further, family violence is an issue that particularly affects Indigenous people.[13] The Committee understands that nationally, Indigenous women are hospitalised for non-fatal family violence assaults at 31.4 times the rate of other women. In addition, family violence is the key contributor to the over-representation of Indigenous children in the child protection system, and to homelessness among Aboriginal and Torres Strait Islander women.[14] The incidence of family violence involves many complex interacting factors, can have many very adverse outcomes in the justice and care and protection areas and requires a suite of integrated responses in order to be effective.[15] Culturally appropriate, integrated legal and therapeutic support services are necessary in order to address this issue, and the Committee considers it critical that the FVPLS continue to be funded.

Finally on this point, the Committee notes that the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs ("House Committee") in its 2011 *Doing Time – Time for Doing* report acknowledged that ATSILS play a critical role in providing culturally appropriate services to victims, offenders and their families.[16] The House Committee noted that "ATSILS have been found to be more effective than mainstream legal services; the latter often avoided by Indigenous people".[17]

The Productivity Commission has recently recommended that:

> The Australian, State and Territory Governments should implement cost-effective strategies to proactively engage with at-risk Aboriginal and Torres Strait Islander Australians to reduce their likelihood of needing legal assistance to resolve disputes with government agencies, especially in areas such as child protection, housing and tenancy, and social security.[18]

Given this recommendation, the Committee submits that specialised Aboriginal and Torres Strait Islander legal assistance services remain justified.

The Committee notes also that the Productivity Commission said at recommendation 22.4:

> Given that the policies of State and Territory Governments have a significant impact on the demand for Aboriginal and Torres Strait Islander legal services and family violence prevention legal services, especially in relation to criminal matters, State and Territory Governments should contribute to the funding of these services as part of any future legal assistance funding agreement with the Australian Government.[19]

The Committee sees value in establishing a national intergovernmental agreement in relation to funding for ATSILS and FVPLS, which would include in its national objectives

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[13] Mick Gooda, "Social Justice – better outcomes for family violence prevention," speech delivered at the *Closing the Gap on Family Violence National Conference*, 4 May 2010, available online: https://www.humanrights.gov.au/news/speeches/family-violence-prevention-legal-services (accessed 27 January 2015)

[14] Australian Legal Assistance Forum, "ALAF statement of support — Continuation of direct funding for the National Family Violence Prevention Legal Services (FVPLS) program", media release, 21 August 2014, available online: http://www.naclc.org.au/cb_pages/files/Media%20Releases/ALAFMR-FVPLS-08-14.pdf (accessed 27 January 2015)

[15] Note 9.

[16] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, [7.63] at p 210, available online: <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=atsia/sentencing/report.htm> (accessed 23 May 2014)

[17] Note 11, [7.68] at p 211

[18] Recommendation 22.1, Access to Justice report overview, note 1 at 65.

[19] Access to Justice report overview, note 1 at 66.

addressing the rate of Indigenous incarceration. In this regard, the Committee notes the Law Society of NSW has consistently maintained that in the case of NSW, NSW Treasury should fund legal aid as a core priority of government.[20]

The Committee submits that reversing the funding cuts is consistent with the principles of evidence-based policy making and would be a first step in addressing the high levels of unmet legal need.

3. Advocacy as an extension of case work

The Committee notes the view of the Productivity Commission, which recommended that:

> Frontline service delivery should be prioritised, along with advocacy work where it efficiently and effectively solves systemic issues which would otherwise necessitate more extensive individualised service provision.[21]

The National Congress noted in its *National Justice Policy* that law reform and policy work is proven to act as a preventative measure and can contribute to reducing the rate of incarceration. The Committee echoes these views and submits that policy and advocacy should be considered an extension of case work, and is an efficient means by which unmet legal needs can be resolved. In the Committee's view, restricting the ability of legal assistance providers to undertake advocacy work informed by valuable case work experience fails to capture the full value of case work.

On a related issue, the Committee notes that in announcing the funding cuts, the Government's view was that only the law reform and advocacy work undertaken by ATSILS would be affected, and not frontline legal services.[22] Despite this assurance, the Committee understands that a cut of $13.4 million represents approximately 20% of the ATSILS budget. Given this, the Committee respectfully submits that it seems unlikely that such a cut would have no effect on frontline services, particularly as the Committee understands that there was no consultation undertaken with any ATSILS about the quantum it spends on policy work and advocacy. Further, and by way of example, the Committee notes that the Prisoner ThroughCare program run by ALS (NSW/ACT) (a recommendation of the RCIADIC and in its eighth year of operation) has also lost its funding.[23]

4. Systematic allocation of funding

Finally, the Committee notes the view of the Productivity Commission that there should be a more systematic approach for allocating funding to the four legal assistance service providers. The Committee agrees with the Productivity Commission's view that that allocation should reflect the relative costs of service provision and indicators of need given their priority clients and areas of law. Funding allocation models currently used to determine funding for Legal Aid Commissions and ATSILS should be updated to reflect more contemporary measures of legal need.[24] The Committee echoes the Productivity Commission's view that in order to maximise the efficiency and effectiveness of services, Australian, state and territory governments should agree on priorities for legal assistance

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[20] See for example, Law Society of NSW, *2015 NSW State Election Policy Platform* at 9,available online: http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/909505.pdf

[21] Access to Justice report overview, note 1 at 31

[22] NATSILS, "Funding Cuts to Aboriginal and Torres Strait Islander Legal Services," Fact sheet, available online: http://www.natsils.org.au/portals/natsils/submission/Funding%20Cuts%20Factsheet%202%20April%202013.pdf (accessed 13 February 2015)

[23] Aboriginal Legal Service (NSW/ACT), "ALS loses funding for frontline program despite Government assurances", 16 June 2014, available online: <http://www.alsnswact.org.au/media_releases/33> (accessed 10 July 2014)

[24] Access to Justice report overview, note 1 at 28

services and should provide adequate funding so that priorities can be fully realised, and that such funding should be stable enough to enable longer term planning.[25]

5. Committee's submissions

The services provided by the stakeholders in the legal assistance sector are crucial for Aboriginal and Torres Strait Islander people. The funding restrictions experienced by this sector already severely curtail the services, leaving high levels of unmet legal need for Aboriginal and Torres Strait Islander communities. The Committee is concerned that further funding restrictions will render the legal assistance sector unable to properly carry out their functions.

Given the above, the Committee reiterates its submissions to the Government to:

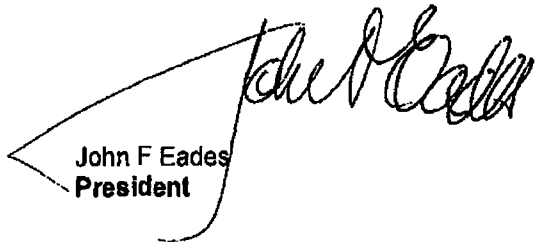
(1) Reverse the funding cuts to the legal assistance providers, particularly in relation to ATSILS and to the FVPLS.

(2) Provide priority funding through the Legal Aid Commissions for private practitioners in the care and protection jurisdiction.

While the Committee understands that the need to review these decisions is urgent, particularly in relation to the question of how the funding cuts will affect frontline services provided by ATSILS,[26] the Committee strongly urges that the Government take these significant issues into account when allocating funding in July 2015.

The Committee thanks you for your consideration of this submission. Questions may be directed to Vicky Kuek, policy lawyer for the Committee, at (02) 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



John F Eades
President

[25] Access to Justice report overview, note 1 at 29

[26] National Congress of Australia's First Peoples, "Plea for PM to step in and fix Indigenous Affairs policy and funding chaos," media release, 2 September 2014, available online: http://nationalcongress.com.au/plea-for-pm-to-step-in-and-fix-indigenous-affairs-policy-and-funding-chaos/ (accessed 27 January 2015)

B

THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IndgIssuesREvk:899121

6 November 2014

The Hon Brad Hazzard MP
Attorney General and Minister for Justice
Level 31 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

By email: office@hazzard.minister.nsw.gov.au

Brad

Dear Attorney General,

Indigenous incarceration rates

The Indigenous Issues Committee of the Law Society of NSW ("Committee") represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee writes to you on the issue of the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system and particularly the critical rates at which Indigenous peoples are incarcerated in NSW.

The Committee understands that the high rates of incarceration of Indigenous people in NSW are a product of many factors, and addressing this issue will likely require a coordinated response across both State and Federal government agencies. However, given the vexed and long-standing nature of this phenomenon, and its increasing severity, the Committee suggests that the NSW Government has the opportunity to take the lead on this issue by:

- Setting justice-specific targets, and
- Considering sentencing reform in NSW.

The Committee sets out these issues in more detail below.

1. Background

The Committee notes that this background summary is a brief overview of the plethora of information available on these rates, as well as the legal and non-legal factors affecting incarceration rates; the criminogenic effect of incarceration; outcomes for prisoners, their families and communities. The Committee merely provides this summary as a means to underscore the urgency of addressing this issue.

1.1. Royal Commission into Aboriginal Deaths in Custody

The issue of Aboriginal and Torres Strait Islander overrepresentation in the criminal justice system is not new. The Royal Commission into Aboriginal Deaths in Custody ("RCIADIC") was established in 1987 in response to the unacceptable rates of deaths of Indigenous peoples in prison and police custody. Judge Norrish commented that the RCIADIC identified "[m]any significant, widespread and surprisingly common underlying issues to offending by Aboriginal people across Australia"[1] and that "[t]he evidence available of the impact on offending behaviour of contextual socio-economic circumstances and other historical factors beyond the control of individual offenders is readily available and, I suggest undeniable."

Central to the 339 recommendations made by the RCIADIC were those to address the overrepresentation of Indigenous peoples in the criminal justice system, and to use imprisonment only as a last resort. However, the Committee echoes the view of the National Congress of Australia's First Peoples ("Congress") that there has been a loss of focus on these core commitments, and that "there are deep cultural problems within the criminal justice system that will not be addressed without strong political leadership."[2]

1.2. Incarceration statistics

The disproportionate incarceration rates of Aboriginal and Torres Strait Islander are well known. According to the Australian Bureau of Statistics ("ABS"), as at 2012, the Australia-wide rate of imprisonment of Aboriginal and Torres Strait Islander people is 15 times that of non-Indigenous people.

This ratio has increased since 2011, when the rate was 14 times that of non-Indigenous people. The age-standardised imprisonment rate as at 30 June 2012 was 1,914 Aboriginal and Torres Strait Islander prisoners per 100,000 adult Aboriginal and Torres Strait Islander population. The equivalent rate for non-Indigenous prisoners was 129 non-Indigenous prisoners per 100,000 adult non-Indigenous population.

According to the NSW Law Reform Commission ("NSWLRC") in its report on sentencing tabled in September 2013, the figures are comparable in NSW. In 2012, 15.2% of the defendants in NSW adult courts were Aboriginal and Torres Strait Islander peoples. 23% (1649 of 7169 sentenced prisoners) of the people managed by Corrective Services NSW identified as Aboriginal or Torres Strait Islander. This is a sentenced imprisonment rate of 1640 per 100,000 NSW Aboriginal or Torres Strait Islander adults, compared to the imprisonment rate of 127.3 per 100,000 non-Indigenous adults in NSW.

Perhaps particular to NSW are the findings of the 2009 Bureau of Crime Statistics and Research ("BOCSAR") study that between 2001 and 2008 there was a rise of 48% in the incarceration rate of Indigenous peoples (compared to 7% in the general population). However, overall, the number of Indigenous peoples being found guilty in court had actually declined. The only offences which saw a rise in conviction rates were in relation to acts intended to cause injury, offences against justice procedures

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[1] Judge Stephen Norrish QC, "Sentencing Indigenous Offenders – Not enough 'judicial notice'?," *Judicial Conference of Australia Colloquium*, (October 2013) at p. 3 available online http://jca.asn.au/wp-content/uploads/2013/11/P01_13_02_29-Norrish-paper.pdf (accessed 6 January 2014)

[2] National Congress of Australia's First Peoples, *National Justice Policy*, February 2013 at p 4, available online http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdf (accessed 3 December 2013) (referred to as the "National Justice Policy").

and road/traffic offences. Offences against justice procedures experienced the most dramatic rise of 33%.[3] This study also concluded that "the substantial increase in the number of Indigenous people in prison is mainly due to changes in the criminal justice system's response to offending rather than changes in offending itself."[4]

Further to the point on the impact of law and order approaches, a different study conducted by the Australian Institute of Criminology on South Australia and New South Wales found that from 1998 to 2008, after controlling for other factors known to impact on sentencing:

- For each year, adjusting for social background, past and present criminality and court processing factors reduced the initial baseline differences between Indigenous and non-Indigenous defendants in both jurisdictions (New South Wales and South Australia).
- Overall, Indigenous defendants were more likely to receive a prison sentence, compared with non-Indigenous defendants in comparable circumstances in both jurisdictions (New South Wales and South Australia).
- The pattern of disparity over time varied between the two jurisdictions of New South Wales and South Australia. In South Australia, in the period pre-2001, there was evidence of parity and even leniency. However, in more recent years, Indigenous offenders were more likely to receive a prison sentence. By contrast, Indigenous offenders had higher odds of imprisonment throughout the entire period in New South Wales.[5]

2. Setting targets

The Committee submits that NSW has the opportunity to play a leadership role on the issue of setting justice-specific targets in respect of Indigenous incarceration rates.

The Committee submits that it will be useful for the NSW Government to set justice targets at a State level, given the State responsibility for the criminal justice system. This is particularly pertinent for NSW, given that NSW has the highest number of Indigenous prisoners of any State or Territory (2,139 people).[6]

The Committee notes that in its National Justice Policy, Congress attributes the enormous differences in incarceration rates between States and Territories to the differing levels of commitment to working with Indigenous peoples to reduce incarceration. In Victoria, successive governments have committed to implementing the recommendations of the RCIADIC and other measures to reduce Indigenous incarceration rates, including the long-term Aboriginal Justice Agreement, which requires public reporting on progress and is now in its third phase.[7] Victoria has one of the lowest rates of Indigenous incarceration (1,137 per 100,000 Indigenous

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[3] Jacqueline Fitzgerald, "Why are Indigenous Imprisonment Rates Rising?" *Crime and Justice Statistics Issue Paper no 41*, (2009, Sydney, BOCSAR), at p. 5, available online http://www.bocsar.nsw.gov.au/agdbasev7wr/bocsar/documents/pdf/bb41.pdf#xml=http://search.lawlink.nsw.gov.au/isysquery/03920069-55b0-42c2-a5d9-f12364acf789/7/hilite/ (accessed 2 January 2014).

[4] Fitzgerald, note 9 above at p.

[5] Samantha Jeffries and Christine Bond, "Indigenous disparity in lower court imprisonment decisions: A study of two Australian jurisdictions, 1998 to 2008" *Australian Institute of Criminology*, December 2012, available online http://www.aic.gov.au/publications/current%20series/tandi/441-460/tandi447.html (accessed 3 December 2013)

[6] Report of the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs entitled "Doing Time – Time for Doing" ("the Report") published in June 2011 at [2.11]

[7] National Justice Policy, note 2 above at pp. 13-14

peoples in 2010, compared to 3,343 per 100,000 in Western Australia where there is no systemic commitment).[8]

The Committee notes that at the federal level, the Law Council of Australia has advocated for setting justice-specific Closing the Gap targets.[9] The Committee notes further that Congress has also advocated for Commonwealth and State governments to set justice targets,[10] noting that there is no Closing the Gap target in relation to the justice system – either in relation to rates of incarceration or the experience of victims of crime.[11]

In its National Justice Policy, Congress put forward a number of recommendations in relation to that issue, including that:

> The Commonwealth Government and State and Territory Governments commit to Justice Targets included in a fully-funded Safe Communities National Partnership Agreement as part of the Closing the Gap strategy. This commitment should be incorporated into the National Indigenous Reform Agreement and supported by significant improvements to data collection regarding Aboriginal and Torres Strait Islander people within the justice system.[12]

The Committee agrees with this recommendation. For the sake of clarity, the Committee notes it is not contending that the adoption of justice targets should result in Aboriginal and Torres Strait Islander people receiving sentences that are inappropriate.

Rather, the Committee's view is that the purpose of setting justice targets would be to set benchmarks for measuring the effectiveness of programs aimed at reducing the incarceration rates of Indigenous peoples. Extracted from the National Justice Policy and enclosed for your information are Recommendations 1.1-1.4 of the National Justice Policy.

The Committee notes that improved data collection on the interaction between the Aboriginal and Torres Strait Islander people and the justice system will assist with evidence based policy making. The Committee also notes that if the NSW Government is proactive at setting and measuring against targets at a State level, the NSW Government will be in the position to lead on this issue at the COAG level.

3. NSW sentencing principles

The Committee understands that ALS NSW/ACT wrote to the Attorney General Mr Greg Smith SC on 9 December 2013 requesting that the Government amend the sentencing legislation in NSW to include reference to the need for courts to carefully scrutinize the background circumstances of Aboriginal and Torres Strait Islander offenders before passing sentence. The Committee further understands that the ALS also wrote to you on 21 July 2014 forwarding its earlier letter to Mr Greg Smith.

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[8] Ibid.
[9] See for example Law Council of Australia, "Law Council and Australian Bar Association welcome commitment to Indigenous justice targets" Media Release, 9 August 2013, available online http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1336-Law_Council_and_Australian_Bar_Association_welcome_commitment_to_Indigenous_justice_targets.pdf (accessed 2 September 2014)
[10] National Justice Policy, note 2 at p.4
[11] National Justice Policy, note 2 at 11.
[12] National Justice Policy, note 2 above at p.4. See also pp 11-12 and 14-17.

The ALS' request was made after the High Court's decision of *Bugmy v The Queen* [2013] HCA 37, which affirmed the need for careful and full attention to background factors in order to achieve proper individualised justice in sentencing. The High Court in *Bugmy* also found that the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending (at [44]).

The Committee supports the ALS position.[13] As the Committee understands it, the ALS position is that an offender's status as an Aboriginal or Torres Strait Islander person should act as a flag to the sentencing court that it should consider the offender's particular background circumstances and when appropriate, have regard to the effect of the offender's particular background circumstances. The Committee's view is that specific legislative direction would simply provide clearer direction to the courts to allow for individual circumstances in sentencing.

The Committee notes that the NSW Law Reform Commission left this question open in its *Report on Sentencing* (No. 139), recommending that the Government should consider the issue of sentencing reform after the High Court decision on *Bugmy* became available. The Committee submits that given that *Bugmy* has now been handed down, it is an opportune time for the Government to give this issue careful consideration. The Committee agrees with the ALS' view that:

> [t]he pursuing of reasonable, orthodox and inexpensive policy responses such as the one proposed are in our view, crucial to the maintenance of the moral legitimacy of our institutions in light of the disastrous problems confronting our Aboriginal communities. It is in our view no longer possible for parliaments to not make such efforts to respond to the situation.[14]

The Committee thanks you for your attention to this letter. Questions can be directed to Vicky Kuek, policy lawyer for the Committee, on 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,

Ros Everett

Ros Everett
President

[13] The Committee notes also that in a joint communiqué of 26 July 2013, the Law Council of Australia and the Australian Bar Association advocated for (among other things) the Government to "reform bail and sentencing laws to reduce the disproportionately severe effect of those laws on Aboriginal and Torres Strait Islander peoples." Available online http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1337 -- Law Council of Australia and Australian Bar Association.pdf (accessed 2 September 2014).

[14] ALS Letter to Attorney General Greg Smith SC MP dated 9 December 2013.

Recommendations

1.1 Justice targets

Australia needs nationally agreed targets, to drive coordinated government action to address the over-representation of Aboriginal and Torres Strait Islander people in the justice system. There are three main reasons why this requires urgent national action:

a) The gap between Aboriginal and Torres Strait Islander and non-Aboriginal and Torres Strait Islander people in relation to incarceration is growing and in the absence of coordinated national action, it is likely to grow further.

b) Evidence to date recognises that incarceration has strong, intergenerational effects.

c) There are significant differences between States and Territories in relation to incarceration rates and their drivers, including the different jurisprudential approaches to law and order issues, such as mandatory sentencing. Poor performance by a few key States and Territories has the potential to undermine the entire Closing the Gap strategy.

In order to drive national action, COAG must adopt specific targets in relation to justice as part of the Closing the Gap strategy, in recognition of the fact that gaps between Aboriginal and Torres Strait Islander people and non-Aboriginal and Torres Strait Islander people in other areas cannot be closed without coordinated national progress in relation to justice.

1.2 The focus of targets

Any justice target proposed for adoption by the Australian Government could also be incorporated in Australia's National Human Rights Action Plan, which is part of Australia's Human Rights Framework. In identifying appropriate justice targets, it is critical to recognise the multiple forms of disadvantage that are associated with involvement in the criminal justice system as a defendant, victim or witness.

Congress recommends that the Australian Government, in agreement with State and Territory governments, adopt the following targets, to be achieved by 2020:

Closing the Gap target number seven:

To halve the gap in the rates of incarceration for Aboriginal and Torres Strait Islander people.

Closing the Gap target number eight:

To halve the rate at which Aboriginal and Torres Strait Islander people report having experienced physical or threatened violence with in the past 12 months.

The Closing the Gap targets should be complemented by targets for each of the key indicators which support achieving the justice targets:

1.2.1. To halve the gap in the rates of incarceration for young people, men and women.

1.2.2. To halve the number of Aboriginal and Torres Strait Islander people who have a drivers licence suspended or cancelled.

1.2.3. To halve the average level of accumulated fine debt for Aboriginal and Torres Strait Islander people.

1.2.4. to double the rate at which Aboriginal and Torres Strait Islander people participate in diversionary programs and options within the criminal and youth justice systems (including police warnings and cautions).

1.2.5. To halve the number of Aboriginal and Torres Strait Islander people on remand.

1.2.6. To double the number of Aboriginal and Torres Strait Islander people who receive legal assistance in family and civil law matters.

1.3 Implementation of targets

The National Indigenous Reform Agreement should be revised to incorporate the proposed justice targets. As other National Agreements and National Partnership Agreements are revised, they should also be reviewed, so as to incorporate actions and performance indicators that will contribute to the achievement of these targets. In doing so, the Commonwealth must commit additional funds in return for additional investment by State and Territory governments.

1.4 Consistent data collection

The Justice Closing the Gap strategies in relation to Aboriginal and Torres Strait Islander justice must be supported by a national framework for collection and dissemination of justice-related data, including collection by an independent agency, based on common definitions.

Some key priorities for improved data collection are:

- A nationally consistent approach to identification of Aboriginal and Torres Strait Islander people across all national justice data collection projects, based on identification by the individual rather than subjective assessment by criminal justice system personnel.
- Nationally consistent data on the length of time taken to finalise criminal matters in court.
- Nationally consistent data on rates of assault for crime victims who report to police.

- Nationally consistent data collection in relation to family violence, which is recognised as one of the foundations of the National Plan to Reduce Violence Against Women and Their Children.
- Nationally consistent evidence on the effectiveness of programs for perpetrators of family violence, to inform the development and delivery of these programs.
- A nationally consistent approach to measuring the effectiveness of diversionary programs, including warnings, cautions, conferences and treatment programs that seek to address drug, alcohol and mental health issues.
- National consistent data on the health and housing status of people released from prison and youth detention.
- A nationally consistent approach to Aboriginal and Torres Strait Islander inmate health data, as described in section 5.

To provide a more detailed picture of progress towards these targets, the Steering Committee for the Review of Government Service Provision should be asked to review the headline indicators that form the basis of the annual *Overcoming Indigenous Disadvantage Reports*, to incorporate a broader range of justice-related indicators. Some additional headline indicators that would help to measure progress across the justice system for Aboriginal and Torres Strait Islander people are:

- the number of Aboriginal and Torres Strait Islander people engaged in Aboriginal and Torres Strait Islander justice groups, in collaboration with government, at the local level;
- the numbers of Aboriginal and Torres Strait Islander young people who are subject to both child protection orders and youth justice orders;
- the number and proportion of sentenced Aboriginal and Torres Strait Islander prisoners whose most serious offence is:
    - a public order offence;
    - a traffic or vehicle regulator offence; and
    - an offence against justice procedures, government security and operations.
- the gap between the average age of Aboriginal and Torres Strait Islander young people and non-Aboriginal and Torres Strait Islander young people in youth detention;
- the rate of Aboriginal and Torres Strait Islander adults and young people who are granted bail, as compared to non-Aboriginal and Torres Strait Islander adults and young people;
- the rate of reoffending by Aboriginal and Torres Strait Islander young people; and

- a range of qualitative measures on the experiences and perceptions of Aboriginal and Torres Strait Islander people in accessing and utilising legal and justice systems, which will help explain movements in the justice targets.

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THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: IndgIssuesREvk826972

26 March 2014

The Hon Victor Dominello MP
Minister for Aboriginal Affairs
Level 37 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

By email: office@dominello.minister.nsw.gov.au

Dear Minister,

NSW Ombudsman Consorting Issues Paper – Review of the use of the consorting provisions by the NSW Police Force

I am writing to you on behalf of the Indigenous Issues Committee of the Law Society of NSW ("Committee"). The Committee represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee commends the Department of Aboriginal Affairs on the capacity building work carried out in relation to the Opportunity, Choice, Healing, Responsibility and Empowerment (OCHRE) initiative. The Committee notes the introduction of the Ombudsman Amendment (Aboriginal Programs) Bill 2014. In the Committee's view, a coordinated approach to capacity building is necessary and the Committee is pleased to see the Government adopt an approach that includes an evaluation and feedback system.

The Committee notes however that a crucial factor relevant to the overall impact of community capacity building is the interaction that Aboriginal people have with the criminal justice system. In this context, the Committee writes to you in relation to the NSW Ombudsman's issues paper on the use of consorting provisions by the NSW Police Force ("Issues Paper").[1]

The Law Society of NSW provided a submission to the Ombudsman on the Issues Paper (attached). The Committee writes to you to draw your attention to the Ombudsman's findings that despite the consorting provisions being said to be directed towards "criminal

[1] By way of brief background, sections 93W – 93Y of the *Crimes Act 1900* (NSW) were inserted by the Crimes Amendment (Consorting and Organised Crime) Bill 2012 "to ensure that the provisions of the Act remain effective at combating criminal groups in NSW." It was also stated to be part of a number of amendments intended "to ensure that the NSW Police Force has adequate tools to deal with organised crime"[1]. They replaced existing provisions in relation to consorting in s 546A of the *Crimes Act 1900*, which was largely disused (Issues Paper p.5). Relevantly, s 546A was a summary offence, punishable by six months imprisonment or a fine of four penalty units. Section 93X is an offence punishable by imprisonment of up to three years and a fine of 150 penalty units.

groups" and "organised crime", it is apparent from the Issues Paper that the consorting provisions have had a disproportionate impact on Aboriginal people.

In particular, the Issues Paper notes:

- Aboriginal people comprise 2.5% of the total NSW population but make up 40% of the people subject to the provisions in the first year of use (Issues Paper, pp.9-10).

- Two thirds of the 83 children and young people aged between 13 and 17 years are Aboriginal comprising almost 85% of the children subject to the provision.

- Just over half of the 109 women are Aboriginal (Issues Paper, pp.9-30).

- A third of men who were given a warning for consorting were Aboriginal. 62% of women given warning were Aboriginal. Over half of the children given warnings were Aboriginal people. (Issues Paper, p.30).

It is clear that Local Area Commands ("LACs") are applying the provision directly to Aboriginal people. The Issues Paper (p.12) notes that for LACs located in the Western Region of NSW, 84% of people who were directly affected were Aboriginal. It also notes that in the remaining regions Aboriginal people subject to the consorting provisions accounted for:

- 57% in the Central Metropolitan Region
- 33% in the South West Metropolitan Region
- 33% in the North West Metropolitan Region.

In contrast Aboriginal people only accounted for 6% of people warned by specialist squads (Issues Paper, p.12). The Committee's view is that this is a telling statistic as one would expect specialist squads to have greater exposure to and involvement in the interdiction of organised crime than police performing general duties in LACs.

Aboriginal people are particularly vulnerable to this provision for a number of reasons.

First, as the Issues Paper (p.20 and 29) notes, 30.05% of Aboriginal people have been convicted of an indictable offence over the last 10 years compared to 3.53% of the general population. That means they are more likely to be capable of being the subject of a warning.

Second, because of the high incarceration rates of Aboriginal people, Aboriginal people are more likely to be the subject of offences which are not able to be "spent" (see s 7(1)(a), *Criminal Records Act 1991* (NSW) and are therefore more exposed to the operation of s 93X.

Third, Aboriginal social and kinship relations make them more likely to be in contact with other members of their community, which makes avoidance within their community more difficult.

Fourth, kinship and sharing customs (cultural reciprocity) also make ostracising members of their community more difficult.

Fifth, it is well documented that Aboriginal people are more likely to socialise and congregate in public spaces because of a range of cultural and socio-economic factors. The visibility of Aboriginal people makes them more likely to be targeted for this type of offence.

The Issues Paper identifies that the manner in which s 93X is being enforced exposes these vulnerabilities of Aboriginal people to its operation. The Issues Paper (p.38) notes that:

> The incidents of consorting often involved sitting in public places such as parks and drinking or talking with others. One man received a warning while packing up his sleeping bag near to where a group was sitting and drinking. All five men received warnings and were the subject of warnings to others. On occasion they were warned for spending time with each other.

The Issues Paper (p.24) also notes that:

> four of the 10 LACs advised they were targeting convicted offenders and others congregating in public places including shopping malls, outdoor seating areas and in cafes".

It also notes (p.28) that "use of the consorting provisions primarily involved police observing people in public places to determine if they were consorting."

These examples show that the enforcement of the provision has little to do with organised crime and more to do with regulating public places. Given the substantive penalty that attaches to the offence the Committee submits that it is an oppressive mechanism for that purpose.

The potential for the provision to be misused and to have an adverse effect on Aboriginal people is exacerbated by the fact that it can be used against a person who has never had a conviction, has never been engaged in criminal activity nor intends to be engaged in criminal activity. A conviction under this provision could nonetheless have a significant effect on the person, including their employment prospects. In this regard it is concerning that the Issues Paper (p.43) notes that 200 of the 1,260 people (16%) subject to the consorting provisions had either no criminal record at all or no indictable convictions.

It is the Committee's view that s 93X operates to force people to ostracise those who have been guilty of an indictable offence. There is no statutory limitation on when that indictable offence occurred. Although the police may as a matter of policy not give a warning unless the convicted person was convicted in the last 10 years (Issues Paper, p.23), there is no defence available to an offender if that policy is not followed. The fact that the effect of the provision is to force people to ostracise certain individuals by reason of their previous conviction is an outcome which potentially impairs their reintegration into society and undermines the objectives of rehabilitation.

The Committee is concerned that of the 14 matters where charges have been laid, three have been proven to be mistaken and one was innocent (Issues Paper, p.11). What is unknown is the extent to which the warnings have been mistakenly or inappropriately given. To the extent that has occurred, then people have been improperly told to cease associating with each other under threat of a three year gaol term.

In the context of the above, the Committee notes the following about the terms of ss 93W-X:

- It is inappropriate for people who have never been convicted of an offence, and for whom there is no reason to believe will commit an offence, to be exposed to being convicted of consorting. If the provision is to remain, it should be limited to people who have been previously convicted of an indictable offence.

- The provision should be limited to where the previous indictable offence occurred within 5 years of the consorting. If a person has not committed a further offence in

that time, then there is less reason to believe that an association will lead to any criminal conviction. It is not a matter which should be left to police policy.

- The provision casts far too wide a "net" and should not apply to all indictable offences. It should only apply to indictable offences with some nexus to organised crime.

- A police officer should only be able to give a warning if he or she has a reasonable basis to believe that the consequence of the consorting will be the commission of an offence.

- The defences set out in s 93Y are inadequate. As the Human Rights and Criminal Law committees of the Law Society have noted in the past, even if the consorting occurs for the purposes of obtaining legal advice, a defendant must show that it is "reasonable in the circumstances". These ought to be automatic defences. Consideration should be given to broadening the scope of the defence to include a broader range of legitimate associations.

The Issues Paper provides a concrete example of where criminal law provisions (enacted in response to popular sentiment) have been used in a way that departs from the original purpose of the legislation, and consequently has had significantly adverse consequences for Aboriginal people.

This outcome undermines efforts to reduce the disproportionate rate of incarceration of Aboriginal people. It is widely accepted that incarceration has a criminogenic effect, which in turn undermines community capacity building and "Closing the Gap" efforts. Imprisonment has a flow-on effect for individuals in respect of, for example, care and protection of children and employment prospects. The Committee submits that this approach is counter-productive from a justice as well as a fiscal perspective.

The Committee requests your support for the repeal of the consorting provisions. In the alternative, the Committee requests your support for amendment of the consorting provisions in ensure that they are in fact used in for the purpose of combatting organised crime. In addition to the observations and recommendations made above, the attached submission contains further recommendations in relation to the repeal or amendment of the consorting provisions made by three other Law Society policy committees.

Questions may be directed to Vicky Kuek, policy lawyer for the Committee, at 9926 0354 or victoria.kuek@lawsociety.com.au

Yours sincerely,

Ros Everett

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President