THE LAW SOCIETY
OF NEW SOUTH WALES

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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

Dear ~~Attorney General~~ Brad,

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]).

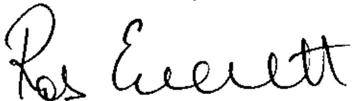
The Committee supports the ALS position.[13] As the Committee understands it, the ALS position is that an offender's status as an Aboriginal or Torres Strait Islander person should act as a flag to the sentencing court that it should consider the offender's particular background circumstances and when 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
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.