

30 April 2018

Your ref

Our ref: (AG/RFNAC/CTG)

Council of Australian Governments (COAG)

By email: [REDACTED]

Dear Council

Closing the Gap Refresh: The Next Phase Public Discussion Paper

Thank you for the opportunity to provide comment on the *Closing the Gap Refresh The Next Phase Public Discussion Paper* (the Discussion Paper).

Introductory remarks

The Queensland Law Society (the Society) appreciates being consulted on this important national issue. In carrying out our central ethos of advocating for good law and good lawyers for the public good, the Society proffers views which are representative of over 12,000 strong member practitioners. This furthers the Society's profile as an honest, independent advisor delivering balanced, evidence-based comment on matters which impact not only our members, but also the broader Queensland community.

The Society promotes and follows culturally safe, inclusive, respectful and responsive practices. In keeping with this protocol, the Society would like to formally acknowledge the numerous traditional owners and custodians of this country and respectfully recognise them as the original inhabitants of these lands. They are the keepers of culture and strong traditional practices of law and governance. We pay our deep respects to the Elders past, present and future as we seek their guidance.

Queensland Law Society Reconciliation Action Plan

We launched our inaugural reconciliation action plan in July 2017 and have begun implementation.

Our commitment to developing and delivering on a plan where First Nations' people's views are valued and integrated into policy-making is evidenced by the establishment of a new member based Reconciliation and First Nations Advancement Committee (RFNAC). The RFNAC was established to undertake written advocacy on law reform issues. Some of these

key issues include addressing the over-representation of First Nations peoples in the criminal justice system and increasing the under-representation of First Nations professionals in the legal profession and judiciary. In our view, the inclusion on the committee of First Nations lawyers in the legal profession who are based across the State ensures that, where possible, First Nations' perspectives have been sufficiently and authoritatively observed.

Introductory remarks on the Discussion Paper

The Society acknowledges the substantial work done to date on the issues set out in the Discussion Paper. However, we note that there is more to be done to promote the rights and interests of First Nations' people in the criminal justice system.

This paper intends to provide functional insights from a legal perspective to improve the outlook on Closing the Gap (CTG) priorities as well as supporting new calls for criminal justice proposals. The Society is of the view that the current measures are not cogent or evidence based. The Society welcomes significant reforms required to change this trajectory.

The CTG campaign aims to improve the standards of living for Indigenous Australians through the introduction of measurable health, educational and employment targets. As the 2018 CTG report reveals, however, progress on most existing targets is not on track to meet the minimum standards by their deadlines.¹ There are heightened calls to reassess current targets and introduce new ones where necessary, to ensure that tangible progress is made to closing the gaps in all areas of inequality and removing the entrenched levels of disadvantage for First Nations' people and communities within the context of legal and justice outcomes.

A notable absence in the CTG framework relates to targets that address Indigenous people's experiences with the Australian criminal justice system: for example, high incarceration rates, deaths of and violence towards Indigenous people in custody, a lack of access to First Nations legal practitioners and professionals. Shorter life expectancy, a lack of school attendance and attainment, unemployment, poor health, mental health crises and criminal involvement pose the biggest threats to closing the gap.² While factors have been accounted for in the CTG framework, to date, no targets have been set to address these issues.

1. Better measures needed to close the gap

- 1.1. We understand that proposals to reduce incarceration rates are subject to State and Territory governments' control. In order to achieve change, it is necessary to develop public and specific program outcomes which are monitored and reported on. The outcomes need to be measured for authoritative and evidential effectiveness by First Nations professionals and subject matter experts. It would be sensible for the Federal government to establish robust and measurable targets to ensure there is an understanding across all levels of government with a common, bipartisan and national approach to reducing the current poor success rates. The Society supports the view that other closing the gap targets will fail to shift or change, if the reduction

¹ Department of the Prime Minister and Cabinet 2018: 8-9.

² Francis Mitrou et al, 'Gaps in Indigenous disadvantage not closing: a census cohort study of social determinants of health in Australia, Canada, and New Zealand from 1981- 2006' (2014) 14 *BMC Public Health* 1, 6-7.

of the current prolific rates of incarceration of women, men and children fails to be considered a priority.³

- 1.2. The Aboriginal and Torres Strait Islander Social Justice Commissioner June Oscar (2018) communicated this point, stating “*We want to see premiers, chief ministers, and health and Indigenous affairs ministers in every jurisdiction providing regular, public accountability on their efforts to address the inequality gaps in their state or territory – no more finger pointing between governments*”.
- 1.3. Of countries with a shared colonial history, it is widely recognised that Australia has made the least progress to close gaps in equality between Indigenous and non-Indigenous people.⁴ A practical way to improve this is to ensure that an increased number of qualified First Nation professionals are recruited into senior and Executive Government officer ranks.
- 1.4. The 2007 United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) provides a comprehensive base for the full participation of Indigenous peoples in the broader society in which they live or by which they may be governed, as well as a mandate for self-determination.⁵ The Declaration places the responsibility on Member States to ‘*provide effective mechanisms for prevention of, and redress for any action which has the aim or effect of depriving First Nations peoples of their integrity as distinct peoples or ethnic identities, or of their cultural values*’.⁶ Further, article 15 states ‘*Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.*’
- 1.5. Australia signed the Declaration in 2009. However, reports by the Special Rapporteur to Australia noted the ‘*extraordinary high rates of incarceration is a human rights concern*’.⁷ The report stated that imprisonment sits in the context of ‘*years of dispossession, discrimination and intergenerational trauma faced by Aboriginal and Torres Strait Islanders*’.⁸ Mention was made of a number of current laws and policies that result in increased incarceration rates for Indigenous Australians, such as paperless arrest laws in the Northern Territory, restrictive bail laws and mandatory sentencing laws.⁹ The Special Rapporteur recommended more effort be made to train and recruit Aboriginal and Torres Strait Islander police, legal professionals and prison personnel.¹⁰
- 1.6. Sustainable resourcing is urgently needed to build awareness and knowledge for culturally responsive, culturally safe and culturally intelligent programs that are

³ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2010) 53–4

⁴ (Mitrou et al 2014: 4-9) and Maddena, R., et al (2016) Statistics on indigenous peoples: International effort needed *Statistical Journal of the IAOS* 32 37–41

⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) Preamble.

⁶ *Ibid* article 8.

⁷ *Victoria Tauli-Corpuz, Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia* UN Doc A/HRC/36/46/Add.2 (8 August 2017), 12.

⁸ *Ibid*.

⁹ *Ibid*.

¹⁰ *Ibid* 14.

designed, developed and delivered by First Nations people and professionals across all levels of government (including courts, corrections and policing). The provision and implementation of self determined diversionary programs, rehabilitative programs as well as better application and implementation of justice reinvestment strategies is critical to the success of such programs.

- 1.7. Increased program offerings for Indigenous people are needed, including holistic healing and cultural practices to encourage returning to country initiatives for offenders as part of diversionary, preventative and rehabilitative measures for men, women and especially children.
- 1.8. The increase in incarceration of Indigenous women and the resulting intergenerational impacts upon children and the extended family unit needs to be better understood. Policy decision making should consider the ramifications of these impacts and should be designed to complement kinship and cultural law fundamentals.

2. Indicators for governments to focus on to best support closing the gap

As of June 2017, First Nations' people made up 28 percent of Australia's full-time adult prison population.¹¹ The Society notes the following matters require attention:

- 2.1. Review of income management and cashless welfare schemes. These schemes, such as those proposed in the Social Services Legislation Amendment (Drug Testing Trial) Bill 2018, have the potential to be discriminatory in effect against First Nations' peoples and also contribute to their overrepresentation in the criminal justice system.
- 2.2. The proper funding and placement of First Nations' specific legal services and resources in communities are critical in reducing overrepresentation of First Nations people in the criminal justice system. The primary barriers, include extremely limited funding for the sector and the inability of people to access these services. The inability to access legal services contributes to intergenerational trauma and stresses that impact people's mental health and wellbeing.
- 2.3. Further investigation is required to determine the First Nations people suffering from Foetal Alcohol Syndrome Disability (FASD) and disabilities in the criminal justice system. The prevalence of FASD has revealed to be inextricably linked to justice issues¹², evidenced through a study conducted at a youth justice facility.¹³ Clinical screening and medical assessments through court orders have been

¹¹ Human Rights Watch, *I needed help instead I was punished: Abuse and neglect of prisoners with disabilities in Australia*, February 2018, https://www.hrw.org/sites/default/files/report_pdf/australia0218_web.pdf,

¹² Human Rights Watch, *I needed help instead I was punished: Abuse and neglect of prisoners with disabilities in Australia*, February 2018, https://www.hrw.org/sites/default/files/report_pdf/australia0218_web.pdf,

¹³ Telethon Kids Institute, *Prevalence of FASD among youth under the care of Juvenile Justice in Western Australia: how shall we work together to close this gap?*, November 2017, <https://healthinonet.ecu.edu.au/uploads/docs/fasd-webinar-slides-dr-mutch-29-11-17.pdf>

encouraged to track and monitor and better support those who meet the FASD criteria.¹⁴

- 2.4. Ambassadors for CTG should profile First Nations' people across all industries and professions, including lawyers, doctors, lecturers, professors, scientists, mathematicians, entrepreneurs, and academics to promote programs that illustrate that you do not have to always be a sporting identity to be successful. First Nations business development, Science, technology, engineering and mathematics and entrepreneurialism also require increased levels of government support and promotion (including financial).

3. Incorporating Aboriginal and Torres Strait Islander culture in the Closing the Gap framework?

- 3.1. It is critical that First Nations people lead this process. "*The people most able or equipped to provide a culturally safe atmosphere are people from the same culture*"¹⁵, and therefore the framework must allow authority and remit to be placed with key First Nations people to implement programs that build awareness and knowledge for culturally responsive, culturally safe and culturally competent understandings designed, developed and delivered by First Nations people and professionals.
- 3.2. The Society supports the use and application of authentic Indigenous assessment tools and cultural practices with respect to sentencing, dispute resolution, facilitative mediation mechanisms and restorative justice measures. Appropriate and substantial levels of resourcing (financial and First Nations HR) are required to support the adoption and sustainability of these measures.

Uncertainty of the legislation and policies

- 3.3. Legislation, Handbooks and practice manuals play a major role in identifying principles, processes and practices. The development of legislation to date with respect to the treatment of First Nations people has resulted in uncertainty and a high level of distrust of government bodies by First Nations citizens particularly regarding legal and socio-economic affairs.
- 3.4. The Society recommends a statewide review of all existing legislation and its specific impact upon First Nations people. We consider that future policy and legislation formation should seek contribution from First Nations legal practitioners.
- 3.5. The Society suggests that the government propose a First Nations Legal Rights and Responsibilities community information campaign designed to meet the requirement of section 3(1) (c) of the *Legislative Standards Act 1992*. Policies associated with the legislation and government priorities rarely reflect or take into consideration the cultural perspectives or actual impacts on First Nations individuals and communities. The Society would support measures for the Office of the Parliamentary Counsel

¹⁴Telethon Kids Institute, *Prevalence of FASD among youth under the care of Juvenile Justice in Western Australia: how shall we work together to close this gap?*, November 2017, <https://healthinfolnet.ecu.edu.au/uploads/docs/fasd-webinar-slides-dr-mutch-29-11-17.pdf>

¹⁵ Robyn Williams, 'Cultural Safety – what does it mean for our work process?' (1999) 23 (2) *Australian and New Zealand Journal of Public Health* 213, 213.

Queensland to commit to appropriately qualified First Nations staff specifically involved in the drafting and policy associated with statute development.

First Nations people Legal Practitioners

3.6. There is an absence of First Nations legal representatives available across all legal areas within the legal profession. Across the criminal justice sector there are very few Indigenous justice staff occupying senior executives or director positions. The Aboriginal Legal Service continues to employ a majority of Non Indigenous legal practitioners.

4. What is needed to change the relationship between government and community to work more effectively together?

- 4.1. First Nations people have unique lived experiences and therefore need to be a part of the conceptualisation, design and leadership of community justice and support programs.
- 4.2. The Society would support the establishment of an Indigenous policy making advisory group within each respective State and Territory office of Parliament to contribute to reforms and ensure Indigenous views are adequately represented and reflected. These advisory groups would be staffed by appropriately qualified First Nations legal professionals.
- 4.3. Establishment of a nationally coordinated First Nations registry in all States and Territories to seek input and involve community conversations that warrant the views of regional and remote areas with respect to health justice concerns.
- 4.4. Queensland Aboriginal and Torres Strait Islander Community Justice Groups (modestly funded by Department of Justice and Attorney General) require appropriate recognition of their corporate/governance structures and higher levels of funding to reflect the work undertaken by them. Funding should be based on fair market value (including market value of professional services).

5. Key targets to be measured in a refreshed agenda?

- 5.1. The Society recommends the inclusion of justice targets.
- 5.2. In line with our Call to Parties Statement, the Society calls for meaningful and evidence based strategies to address the disparate imprisonment rates and the rates of violence against First Nations people. Specific strategies for women and children should be considered. The Australian Law Reform Commission (ALRC) identified two principal targets:
 - 5.2.1 **Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2040.** Whilst specific improvement metrics may be unrealistic, the Society is of the view that positive shifts in the measures are required every year (with an aspirational positive percentage aim of 5-

10% improvement being recognised as achievable if supported by self-determinative measures).

5.2.2 Close the gap in the disproportionate rates of violence against Aboriginal and Torres Strait Islander people by 2040, with priority strategies for women and children.¹⁶ Whilst specific improvement metrics may be unrealistic, the Society is of the view that positive shifts in the measures are required every year (with an aspirational positive percentage aim of 5-10% improvement being recognised as achievable if supported by self-determinative measures).

5.3. There is also a need for context-specific targets to be formed under the justice target, such as a reduction in the number of Aboriginal deaths in custody as well as an overall reduction of occasions of excessive force being used by police toward Indigenous Australians.¹⁷ Noted are the recommendations of the RCIADIC in this context.

5.4. The Society supports additional investment to help build the human rights agenda. This includes targeted and organised efforts in providing legal knowledge to Indigenous communities so that people may better understand their rights.

6. Key Commitments: Self –determination and the rule of law

To achieve these proposed targets it is vital that the following commitments be predicated on the principles of self-determination and the rule of law:

6.1. A commitment by the Federal and State governments to allowing First Nations ontologies, epistemologies, and hermeneutics (ways of being, knowing and interpreting) to be understood and valued in the application of solutions is critical to developing a positive criminal justice framework.

6.2. Associate Professor Gregory Phillips in the *Our Way* report makes an unequivocal statement, “*For indigenous populations, the evidence that the single biggest factor in improving health and social outcomes is self-determination. For self-determination to be effective, two things must occur – Indigenous people assume leadership, governance, authority over their lives and communities using a balance of traditional methods and contemporary realities (Aboriginal terms of reference) and develop their own vision of their futures. Second, governments and non-governments agencies admit that ‘business as usual’, with them in power and control, is a major part of the problem. They must be willing to change and give up some of that power and control.*”¹⁸ The inclusion of appropriately qualified, First Nations people at senior executive and director levels is vital to ensure continuity and full coordination of services.

6.3. Recommendations from Royal commissions or commissions of inquiry should be tested with a view to being included in law reform. There are many reports,

¹⁶ Human Rights Law Centre and Change the Record Coalition, above n 28, rec 5–6.^[40]

¹⁷ Fleming et al. (2013) ‘The Status of Indigenous Women in Policing: A Queensland Case Study’ *Current Issues in Criminal Justice* Griffith University Online,

¹⁸ Department of Communities, Child Safety and Disability Services *Our Way: A generational strategy for Aboriginal and Torres Strait Islander children and families 2017-2037*, p13.

reviews and statements which require greater support and actioning in order to build trust with the First Nations community and facilitate progress toward healing and self-determination, these include:

- i. Royal Commission Report into Aboriginal Deaths in Custody
- ii. Bringing them Home Report
- iii. Change the Record
- iv. The Uluru Statement from the Heart
- v. The Redfern Statement
- vi. Indigenous Incarceration: Unlock the Facts
- vii. Justice Reinvestment trials in Bourke
- viii. The ALRC Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples.

It is important that Governments commit to both conducting inquiries and also to implementing the outcomes if real progress is to be made in closing the gap.

7. Rule of Law

7.1. The Law Council of Australia, and its constituent bodies including the Society promote the rule of law and the importance of upholding the key principles which include:

- The law must be both readily known and available, and certain and clear;
- The law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds;
- All people are entitled to the presumption of innocence and to a fair and public trial;
- Everyone should have access to competent and independent legal advice;
- The Judiciary should be independent of the Executive and Legislature;
- The Executive should be subject to the law and any action undertaken by the Executive should be authorised by law;
- No person should be subject to treatment or punishment which is inconsistent with respect for the inherent dignity of every human being; and
- States must comply with their international legal obligations whether created by treaty or arising under customary international law.

7.2. These principles are common sense. Without equality before the law, the rule of law has meaning only for the few. Slow and arbitrary application of the law means a breakdown of the rule of law. If the law is neither efficient nor predictable no one can trust its application nor abide by its rules. How can we expect certain sectors of our citizenry to abide by laws they know very little of and have had minimal if any contribution to?

The Society supports the inclusion of First Nations' perspectives in policy and law reform matters. The incorporation of these views is essential to ensure that the law is appropriately adapted to secure the individual rights and liberties of First Nations' peoples.

We look forward to receiving the final report.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Governance Executive/RAP Coordinator, Anita Goon, by phone on [REDACTED] or by email to [REDACTED] or our Advocacy team at advocacy@qls.com.au.

Yours faithfully



Ken Taylor
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