

21 February 2019

Office for Women  
Department of the Prime Minister and Cabinet  
PO Box 6500  
CANBERRA ACT 2600

*Office of the President*

By email: [womensbranchinternational@pmc.gov.au](mailto:womensbranchinternational@pmc.gov.au)

Dear Sir/Madam

**Australia's national review of the Beijing Declaration and Platform for Action**

The Law Council welcomes the opportunity to submit to Australia's national review of the Beijing Declaration and Platform for Action (**Beijing Declaration**).

The Law Council is grateful for the assistance of its Family Law Section, the Law Society of New South Wales and the Law Society of South Australia in the preparation of this submission.

The Law Council takes this opportunity to outline some key priorities for government action, to assist in identifying areas of improvement, and to enable the full implementation of the Beijing Declaration. Where relevant, the Law Council draws upon its [Justice Project Final Report](#) findings. The Justice Project was a comprehensive national review into the state of access to justice in Australia focusing on groups experiencing significant disadvantage, released in August 2018. Relevant chapters include those on [People experiencing Family Violence](#), [Aboriginal and Torres Strait Islander Peoples](#) and [People experiencing Economic Disadvantage](#).

Please see attached a three page outline of the Law Council's key concerns regarding Australia's implementation of the Beijing Declaration.

Please contact Ms Leonie Campbell, Deputy Director of Policy, on (02) 6246 3711 or at [leonie.campbell@lawcouncil.asn.au](mailto:leonie.campbell@lawcouncil.asn.au) or Ms Sarah Sacher, Policy Lawyer, on (02) 6246 3724 or at [sarah.sacher@lawcouncil.asn.au](mailto:sarah.sacher@lawcouncil.asn.au) in the first instance, if you require further information or clarification. I note that the Law Council would also be happy to provide the Office for Women a separate briefing about the Justice Project and its findings, should this be of assistance.

Yours sincerely



**Arthur Moses SC**  
President

## Poverty Eradication, Social Protection and Social Services

### **Access to Legal Assistance**

The Beijing Declaration requires State action to ‘ensure access to free or low-cost legal services, including legal literacy, especially designed to reach women living in poverty’.<sup>i</sup> Unfortunately, legal assistance funding in Australia is inadequate, and as such, Australia does not meet this benchmark.

In 2014 the Productivity Commission recommended that an additional \$200 million per annum was needed to meet pressing gaps in civil legal assistance, to meet the needs of disadvantaged Australians.<sup>ii</sup> It recognised that the existing shortfalls in civil assistance meant that just eight per cent of Australians qualified for a grant of legal aid under restrictive means tests,<sup>iii</sup> while up to 14 per cent of Australians were living beneath the poverty line.<sup>iv</sup> Community Legal Centres (**CLCs**) are also under severe strain. CLCs reported turning away 169 513 people in 2015-16.<sup>v</sup> An ACOSS Survey of CLCs found that 72 per cent of CLCs reported being unable to meet demand.<sup>vi</sup>

The gap in civil legal assistance funding is felt acutely by women, who are more likely to experience economic disadvantage, with lone parents (who are primarily women) facing the highest poverty rates<sup>vii</sup> and certain groups, such as older, rural, Indigenous, migrant or women with disability more at risk. Women have a range of legal needs including those related to debt, fines, housing, child protection and family violence.<sup>viii</sup> Notably, the limited legal aid grants funding, which enables ongoing legal representation, is necessarily weighted towards criminal matters. This has resulted in more legal aid grants approvals provided to men than women overall in 2016-17 (47 745 legal aid grant applications were approved for women, versus 95 492 approved for men).<sup>ix</sup> This reinforces the necessity of increasing legal aid grant funding for civil and family law matters. At the same time, legal aid funding for criminal matters should also be increased, as this remains an urgent area of unmet need. The pressures in this area include alarming recent increases in the proportion of women who are imprisoned in Australia.<sup>x</sup> Similarly, Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) have stated that the amount of funding provided to ATSILS has declined since 2013 despite the cost of providing services having increased,<sup>xi</sup> and noting that the population of Aboriginal and Torres Strait Islander people has grown significantly (18.4 per cent between 2011 and 2016 censuses)<sup>xii</sup>.

In the family violence context, the recent policy focus aimed at eliminating family violence and better protecting children, while commendable, has not extended to sufficient investment in courts and legal assistance services to manage the downstream impact, placing critical pressure on justice services. For example, in Victoria, this has involved an increase of 490 per cent in family violence cases amongst CLCs over the decade to 2016.<sup>xiii</sup> There have also been high rates of self-representation, which is often highly distressing and can lead to questionable outcomes for vulnerable litigants, many of whom are women.<sup>xiv</sup>

Indigenous women are among the most legally disadvantaged groups in the country.<sup>xv</sup> The Justice Project highlighted the crucial role of specialised Aboriginal legal services, such as Family Violence Prevention Legal Services (**FVPLS**), which provide holistic, culturally safe services for Aboriginal women. However, some FVPLS’s are so under-resourced that they must turn away 30-40 per cent of women seeking assistance.<sup>xvi</sup> Noting that the FVPLS funding model is currently under review, the Law Council urges an approach which recognises the importance of Aboriginal-led services through significantly increased funding over the long-term.

Only a small number of asylum seekers in Australia have access to government-funded legal assistance, noting the 2014 withdrawal of most Commonwealth funding for this purpose, and most rely on pro-bono services.<sup>xvii</sup> Legal assistance is particularly important for female asylum seekers, as they often experience heightened vulnerability, and uncertainty around visa status increases the risk of family violence.<sup>xviii</sup>

The consequences of a lack of legal assistance funding are severe and manifold. For example: a lack of legal representation may result in the continuation or escalation of family violence;<sup>xix</sup> failure to provide legal assistance in housing matters is a major contributing factor to the removal of Indigenous children;<sup>xx</sup> a lack of services in remote areas means women may be excluded from court processes that directly affect them;<sup>xxi</sup> and a lack of assistance for fines and debt can escalate to imprisonment.<sup>xxii</sup>

The Law Council has estimated that an additional \$390 million per annum in legal assistance funding is needed to meet civil and criminal needs, which would include returning the Commonwealth's share of relevant funding to 50 per cent for legal aid commissions with the states and territories.<sup>xxiii</sup>

### **The Human Rights of Women**

#### **Imprisonment rates of Aboriginal and Torres Strait Islander women**

In 2017 the Australian Human Rights Commission found that '[Indigenous] women are the most significantly over-represented population in Australian prisons and their rate of incarceration is increasing more rapidly than any other group'.<sup>xxiv</sup> The incarceration rate for Indigenous women is up 148 per cent since 1991,<sup>xxv</sup> and Indigenous women are incarcerated at more than 20 times the rate of non-Indigenous women.<sup>xxvi</sup> This reality is a national crisis that indicates a failure to address the Beijing Declaration's requirement to 'review and amend criminal laws and procedures, as necessary, to eliminate any discrimination against women'.<sup>xxvii</sup>

Imprisonment of Aboriginal women perpetuates cycles of disadvantage and intergenerational trauma.<sup>xxviii</sup> Many Aboriginal women in the prison system live with disability and mental health conditions. For example, a Victorian study showed that 92 per cent of Koori women in prison had a mental health condition and nearly half were suffering from post-traumatic stress disorder.<sup>xxix</sup> Further, up to 80 per cent of Aboriginal women in prison are mothers.<sup>xxx</sup> The imprisonment of a parent can be detrimental to the development of a child and also increases the likelihood that they will themselves have contact with the criminal justice system.<sup>xxxi</sup> The Justice Project found that underlying drivers of imprisonment such as family violence, disability, homelessness and poverty are currently poorly addressed due to limited investment by government in social support services and early intervention strategies, or in the Aboriginal controlled organisations that are best placed to deliver them.

The Justice Project also identified specific laws, policies and practices that contribute to over-incarceration of Indigenous women, including:

- bail laws have become more restrictive in most states and territories, leading to a nationwide increase in the amount of people held on remand. Aboriginal women are 'a fast-growing group' within the remand population.<sup>xxxii</sup> Many spend significant periods on remand for relatively minor offences;<sup>xxxiii</sup>
- Aboriginal women may be subject to problematic police practices in response to family violence, including police acting on outstanding warrants when responding to incidents of violence, or inappropriately issuing cross orders against both parties. The Justice Project noted the need to review police protocols and guidelines to prioritise the appropriate recognition and provision of support to Aboriginal women and children;<sup>xxxiv</sup> and
- imprisonment for fine default disproportionately impacts Aboriginal women in Western Australia.<sup>xxxv</sup>

Criminal justice policies and procedures must recognise the distinct criminogenic profile of women offenders. Priorities in this area include the adoption of diversionary responses; fine, bail and sentencing reform; investment in critical support services including interpreter services and mental health services; place-based prevention and early intervention strategies such as justice reinvestment; developing and resourcing specialist courts; and culturally safe, trauma informed programs for women in prison and exiting prison. Further, the Law Council strongly recommends the adoption of federal justice targets as part of the Closing the Gap framework.

#### **Gender based discrimination and sexual harassment**

Through the Beijing Declaration, governments committed to 'adopt and implement laws against discrimination based on sex in the labour market'<sup>xxxvi</sup> and 'enact and enforce laws... regarding discriminatory working conditions and sexual harassment'.<sup>xxxvii</sup> Australia addresses sex discrimination and sexual harassment through the *Sex Discrimination Act 1984* (Cth). Each state and territory also has its own legislation. However, significant gaps in coverage remain, along with a set of exclusions that hamper their efficacy. The Law Council is currently finalising its submission to the Sex Discrimination Commissioner regarding her important national inquiry into sexual harassment in Australian workplace. It will be essential for all levels of government to carefully consider, and respond to, the Commissioner's findings and recommendations when released.

## **Gender pay gap**

The Law Council supports laws and policies aimed at addressing the gender pay-gap.<sup>xxxviii</sup> It notes that while the gender pay gap in Australia has dropped from 24.7 per cent in 2013-2014, progress remains slow: at the present rate of change, Australia will not reach gender pay equity until the year 2060.<sup>xxxix</sup>

## **Freedom from violence, stigma and stereotypes**

Family violence is endemic and a major health and welfare issue in Australian society. On average, one woman is killed by her current or former partner each week in Australia.<sup>xi</sup> Women experiencing intersectional disadvantage are particularly at risk. In 2014-15, Aboriginal and Torres Strait Islander women were 32 times more likely to be hospitalised due to family violence than non-Indigenous women.<sup>xii</sup>

As noted above, the recent policy focus by governments on addressing family violence has not generally included a sufficient investment in courts and legal services to manage the downstream impact. In addition to legal assistance shortfalls, the funding of both the family courts and state/territory courts has failed to keep pace with the growth in the number of people who need access to it and the breadth and complexity of the issues, resulting in long and unsustainable court delays.<sup>xiii</sup> For example, due to delays, many face a wait time of about 17 months in the family court system.<sup>xliii</sup> These realities have serious consequences for victims, threatening their physical safety and emotional wellbeing, as well as the safety of their children. The Justice Project reinforced the need for increased funding of the Family Court of Australia, and the Federal Circuit Court, as well as relevant state and territory courts, to better respond to the demand.

A further pressing concern is the extent to which there remains an insufficient understanding of family violence among some personnel within the justice system. An informed view of the nature of family violence is fundamental to ensuring the safety of victims. The Justice Project therefore emphasised the importance of ongoing family violence education for relevant judicial officers and legal practitioners while acknowledging existing efforts in this area. It is similarly essential for those working with Aboriginal people within the justice, law enforcement and child protection systems to have sufficient cultural competence training, to eliminate instances of inappropriate and harmful responses to family violence.

Critical support services are a key element of an integrated response to family violence. In particular, Justice Project contributors overwhelmingly stressed the multiple ways in which lack of housing and crisis accommodation contributes to homelessness and prevents victims from escaping their situation. Family violence is a major cause of homelessness, and the biggest reason for people seeking homelessness assistance, as recognised by the Australian Government.<sup>xliv</sup> For Aboriginal women, lack of access to housing in the family violence context is also a major factor contributing to child protection intervention and child removal.<sup>xlv</sup> Notably, Aboriginal women access crisis accommodation at 15 times the rate of non-Indigenous women.<sup>xlvi</sup> As such, the Justice Project recommended that governments prioritise homelessness prevention, through investment in safe, secure housing, including inclusive crisis accommodation.

Tailored, evidence-based rehabilitative behaviour change programs for perpetrators have the potential to break the cycle of violence in families. Other evidence-based early intervention and prevention initiatives, such as holistic family support programs and educational campaigns are equally important. The Justice Project also reinforced the need to expand these initiatives, without diverting from frontline service funds.

For Aboriginal communities, a number of community-led approaches, including justice reinvestment models, were surveyed by the Justice Project as key to addressing family violence. The Justice Project also recommended national, specific Closing the Gap targets to reduce family violence and child removal.

## **Forced sterilisation of women and girls with a disability**

The Law Society of New South Wales has noted that the Beijing Declaration affirms that forced sterilisation of women and girls is an act of violence which nullifies the enjoyment of human rights.<sup>xlvii</sup> Nonetheless, forced sterilisation of people with a disability, particularly women and girls, is an ongoing practice in Australia: in the 24 months to 30 June 2018, there were 13 adult sterilisation approvals across the country.<sup>xlviii</sup> In July 2018, the UN Committee on the Elimination of All Forms of Discrimination against Women, in its observations on Australia's progress in eliminating discrimination against women, recommended that Australia 'abolish... the sterilization of women with disabilities, and enforce strict guidelines on the sexual and reproductive health rights of women and girls with disabilities who cannot consent'.<sup>xlix</sup>

- <sup>i</sup> United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 16th plen mtg, (15 September 1995) 58(p).
- <sup>ii</sup> Productivity Commission, *Access to Justice Arrangements*, Inquiry Report No 72 (5 September 2014), 63.
- <sup>iii</sup> Ibid 1016.
- <sup>iv</sup> Ibid 1022.
- <sup>v</sup> National Association of Community Legal Centres, *National Census of Community Legal Centres: 2016 National Report* (2016) 10.
- <sup>vi</sup> Australian Council of Social Service, *Australian Community Sector Survey 2014* (2014) 2, 17, 20.
- <sup>vii</sup> Law Council of Australia, Justice Project: [People Experiencing Economic Disadvantage](#) (2018), 5-7, citing Ben Phillips and Cukoo Joseph, Australian National University Centre for Social Research and Methods, *Income Trends for Selected Single Parent Families* (November 2016) 37-8, Roger Wilkins, Melbourne Institute of Applied Economic and Social Research, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1-154* (2016) 35-42, and Australian Council of Social Services and the Social Policy Research Centre, *Poverty in Australia 2016*, 7, 11.
- <sup>viii</sup> See generally, Law Council of Australia, Justice Project: [People who Experience Family Violence](#) (2018); Law Council of Australia, Justice Project: [People Experiencing Economic Disadvantage](#) (2018).
- <sup>ix</sup> National Legal Aid, *National Legal Aid Statistics Report – Gender for Financial Year 2016-2017* (2018) <<http://laxextra.legalaid.nsw.gov.au/NLARReports/reportviewer.aspx?reportname=Gender>>.
- <sup>x</sup> Law Council of Australia, Justice Project: [Prisoners and Detainees](#) (2018), citing Australian Bureau of Statistics, 4517.0-Prisoners in Australia, 2017 (2017).
- <sup>xi</sup> Law Council of Australia, Justice Project: [Aboriginal and Torres Strait Islander People](#) (2018),37.
- <sup>xii</sup> Australian Bureau of Statistics, *Census of Population and Housing: Understanding the Increase in Aboriginal and Torres Strait Islander Counts, 2016* cat no 2077.0 <<http://www.abs.gov.au/ausstats/abs@.nsf/0/23B3C6294A37F088CA257BE80015056D?OpenDocument>>.
- <sup>xiii</sup> Law Council of Australia, Justice Project: [Family Violence](#) (2018), 41.
- <sup>xiv</sup> Federation of Community Legal Centres Victoria, Submission to the Victorian Government *Access to Justice Review*, March 2016, 13.
- <sup>xv</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, Submission to the Victorian Royal Commission into Family Violence, June 2015, 27 citing Aboriginal and Torres Strait Islander Commission, Submission to the Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice*, 13 November 2003, 4.
- <sup>xvi</sup> Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples, *End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia* (2017)
- <sup>xvii</sup> Kelly Newell, 'The latest hurdles for people seeking asylum in Australia' (Kaldor Centre for International Refugee Law, 22 March 2017),
- <sup>xviii</sup> Linda Bartolomei and Eileen Pittaway, "The international protection system is failing refugee women and girls" (17 November 2017), *Thomson Reuters Foundation*; State of Victoria, Royal Commission into Family Violence, Report and Recommendations (March 2016), Vol V, Parl Paper No 132, 110.
- <sup>xix</sup> See Productivity Commission, *Access to Justice Arrangements*, Appendix K, 1059.
- <sup>xx</sup> Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (2016) 7; Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients* (2012) 1.
- <sup>xxi</sup> See eg Law Council of Australia, Justice Project: [Aboriginal and Torres Strait Islander Peoples](#) (2018) 42.
- <sup>xxii</sup> Ibid 56.
- <sup>xxiii</sup> Advice from PriceWaterhouse Coopers to the Law Council of Australia, January 2018, cited in Law Council, *2018-19 Pre-Budget Submission: The Treasury* (31 January 2018) <<https://www.lawcouncil.asn.au/resources/submissions/2018-19-pre-budget-submission>>.
- <sup>xxiv</sup> Australian Human Rights Commission, *A Conversation in Gender Equality* (2017) 20 <[https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC\\_conversation\\_gender\\_equality\\_2017\\_2.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_conversation_gender_equality_2017_2.pdf)> .
- <sup>xxv</sup> Human Rights Law Centre and Change the Record Coalition, *Over-represented and Overlooked, the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment* (2017) 10.
- <sup>xxvi</sup> Australian Bureau of Statistics, *Prisoners in Australia*, December 2016, cat no 4517.0.
- <sup>xxvii</sup> United Nations, *Beijing Declaration and Platform of Action*, 232(l).
- <sup>xxviii</sup> National Congress of Australia's First Peoples, Submission to Law Council Justice Project (2017).
- <sup>xxix</sup> Human Rights Law Centre and Change the Record Coalition, *Over-represented and Overlooked Report*, 18
- <sup>xxx</sup> The Australian Law Reform Commission, *Pathways to Justice – An inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples: Final Report* (2017), 11.100.
- <sup>xxxi</sup> NATSILS, Submission to the National Children's Commissioner, *Examination of Children Affected by Family and Domestic Violence*, June 2015, 13 citing Rosemary Woodward, *Families of prisoners: Literature review on issues and difficulties* (Occasional Paper No. 10, Australian Government Department of Family and Community Services, 2002); Ryan Tomaino et al, Attorney General's Department of South Australia, *Children of Prisoners Project, Steering Committee's Report to the Justice Cabinet Committee* (2005).

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- xxxii Australian Law Reform Commission, *Pathways to Justice*, 27, 153.
- xxxiii Don Weatherburn, *Arresting Incarceration: Pathways Out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 96.
- xxxiv See also, Australian Law Reform Commission, *Pathways to Justice*, recommendation 14-1.
- xxxv Neil Morgan, 'Fine defaulters in the Western Australian prison system' (Office of the Inspector of Custodial Services, Government of Western Australia, 3 April 2016) v.
- xxxvi United Nations, *Beijing Declaration and Platform of Action*, 165(b).
- xxxvii United Nations, *Beijing Declaration and Platform of Action*, 178(c).
- xxxviii See eg, Law Council of Australia Submission to Senate Education and Employment Committee, *Fair Work Amendment (Gender Pay Gap) Bill*, 24 February 2016.
- xxxix Australian Government Workplace Gender Equality Agency, *Five years of Workplace Gender Equality Agency data: the key trends* (2018).
- xl Australia's National Research Organisation for Women's Safety, *Fast Facts: Impacts of Family, Domestic and Sexual Violence* (2018).
- xli Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia 2018* cat no FDV 2 (2018).
- xlii Law Council of Australia, Justice Project: [People who Experience Family Violence](#) (2018), 41-54.
- xliii Robyn Powell, 'Family Court underfunded, letting people down, chief justice says' *ABC News* (online) 1 May 2017
- xliv Pasanna Mutha-Merrennege, 'Insights into Inequality: Women's Access to Legal Aid in Victoria' in Asher Flynn and Jacqueline Hodgson (eds) *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury, 2017), 263 citing Australian Government, *The Road Home: A National Approach to Reducing Homelessness* (2008).
- xlv See Law Council of Australia, Justice Project: [Aboriginal and Torres Strait Islander People](#) (2018), 23.
- xlvi Human Rights Law Centre and Change the Record Coalition, *Over-represented and Overlooked*, 18.
- xlvii United Nations, *Beijing Declaration and Platform of Action*, 115.
- xlviii Australian Guardianship and Administration Council, *Australian Sterilisation Data Report 2018*; and Australian Guardianship and Administration Council, *Australian Sterilisation Data Report 2017*.
- xlix The Law Council has also recently raised concerns with ongoing medical interventions performed on intersex children: See Law Council of Australia, submission to the Australian Human Rights Commission Consultation Paper, *Protecting the Human Rights of People Born with Variations in Sex Characteristics in the Context of Medical Interventions*, 12 October 2018; UN Committee on the Elimination of Discrimination Against Women, *Concluding observations on the eighth periodic report of Australia* (20 July 2018), CEDAW/C/AUS/CO/8, 26(d).