



**Law Council**  
OF AUSTRALIA

# The Justice Project

**Speech delivered by Fiona McLeod SC, President, Law Council of Australia at the National Indigenous Legal Conference, Adelaide.**

**17 November 2017**

## Introduction and Acknowledgment of Country

I would like to begin by acknowledging the traditional custodians, the Kurna people, whose ancestral lands we are meeting upon and pay my respects to Elders past, and present.

I acknowledge the deep feelings of attachment and relationships of Aboriginal peoples to country and pay my respects to the cultural authority of Aboriginal people attending from other areas of South Australia and Australia present here today.

Thank you to Watpa Meyunna, for organising the conference this year. I believe you had a terrific day yesterday.

## Overview – Reconciliation Council

Ours is a young nation, and like a young child she needs guidance to learn to see the world through the eyes of her ancestors, to learn what it means to be responsible. Sometimes that guidance needs to be a gentle reminder of consequences of action. Sometimes, where there is a risk of harm, there must be a sharp rebuke.

She is a slow learner, our country, but I believe she has a good heart open to the tradition of story and song passed down by her Elders over generations.

And she must learn, because the harm is already here.

## Overview – Indigenous imprisonment

The final report of the Royal Commission into the Protection and Detention of Children in the Northern Territory is being released as I speak. We are not expecting that document to be a glowing report.

Two lessons will be repeated today – that our children do not belong in jails; and that health, poverty, violence, substance abuse and unresponsive justice and child protection systems compound intergenerational trauma.

The Northern Territory has the highest rate of children and young people in detention in Australia, 94 per cent of detainees are Aboriginal.

Imprisonment of Aboriginal and Torres Strait Islander Peoples has increased by 88 per cent in the last decade.

The Aboriginal and Torres Strait Islander imprisonment rate nationwide is 13 times higher than the general Australian population.

While only 2.5 per cent of the Australian Population identifies as Aboriginal and Torres Strait Islander, they make up 27 per cent of the prison population.

Our Indigenous youth make up more than 50 per cent of juveniles in detention and women are the fastest growing cohort of people who are both victims of violence and imprisoned for violent offences.

They make up around 2.2 per cent of the Australian population, yet they represent 34 per cent of the adult female prison population, up 148 per cent since 1991.

Of those Aboriginal and Torres Strait Islander women in prison, 80 per cent are mothers. Speaking to a number of them in jails across the country this year, I have learnt that their

newborn babies are routinely taken from their arms within 24 hours of birth, with midwives inventing conditions to extend their precious hours together. Those new mothers then spend weeks and months of their sentence in anguish, hoping for news and the chance of reconnection.

And the cycle of broken lives and broken hope continues.

## The issue

There is something very wrong happening here and the issue demands our urgent attention.

We are facing a crisis in the way Aboriginal and Torres Strait Islander Peoples are affected by the justice system. The rate at which Aboriginal and Torres Strait Islander People are imprisoned is the highest rate of any cultural group in the Western World – more than 2,100 per 100,000.

Perhaps most troubling, is that this trend has continued to climb up and not down. It is now almost double the shocking revelation by the Royal Commission into Aboriginal Deaths in Custody in 1991, where it was disclosed Aboriginal people were being imprisoned at seven times the rate of the broader population.

The drivers of Indigenous imprisonment are complex and intertwined: high rates of cognitive impairment in the prison population and foetal alcohol syndrome is rife; hearing and other health challenges mean young people disengage from schooling early; socioeconomic disadvantage, high rates of depression, alcohol and drug abuse, family violence, homelessness, unemployment, and poor health – all play roles.

As undoubtedly does the history of dispossession and removal.

These factors are self-perpetuating – they form a cycle of disadvantage which is intergenerational and virtually impossible for many, who are caught within it, to escape.

Perhaps the most toxic of these factors is family violence.

Aboriginal and Torres Strait Islander Women are 10 times more likely to die of violent assault and 34 times more likely to be hospitalised as a result of violent assault. When women report domestic violence, a practice has developed where police take out AVOs against both the perpetrator and the survivor, breaching both parties even where women are clearly responding defensively and then involving child protection to remove children.

Aboriginal and Torres Strait Islander children are seven times more likely to be in contact with the child protection system, or to be subject to abuse or neglect.

Australia's governments also contribute to the imprisonment crisis through a negatively self-reinforcing criminal justice response.

In the NT for example, mandatory minimum sentences and Paperless Arrest laws disproportionately impact Aboriginal and Torres Strait Islander Peoples – almost 80 per cent of those arrested are Aboriginal and Torres Strait Islander.

The Australian Government then withholds adequate funding for Aboriginal legal services, arguing responsibility should lie with the states who have effectively driven up demand.

States then fail to make that investment and social problems deepen, creating the impetus for more 'tough on crime' measures.

In addition, a shortage of Aboriginal language interpreters, means Aboriginal and Torres Strait Islander people within the justice system may not understand questions put to them by police, or in the courtroom and can lead to wrongful imprisonment.

Even with the assistance of interpreters, Bolland laws and processes are passively endured months and years after the commission of criminal offences with no role for Elders, no role for custom, no role for ceremony. Fines accumulate, jail time clocks up and convictions accrue requiring a huge investment in prisons, youth detention and corrections officers.

Meanwhile there are serious gaps in civil and family services.

Legal services and legal aid must prioritise criminal matters out of necessity, and do not have enough funding to cover other areas of need. In some remote areas the only type of legal service provided is criminal.

Mandatory sentencing, punitive bail and parole conditions, falling funding for justice services – all play a major role in exacerbating the problem.

The irony of course is that the highest proportion of people held in custody or corrections is comprised of those returning to prison, while virtually every person imprisoned has themselves been a victim of crime.

This is Australia's most pressing national social justice concern.

We, as lawyers, and as lawyers' associations have a responsibility to be proactive and drive a unified approach to this national problem.

While the problems are complex, there are several immediate measures which could significantly change Aboriginal and Torres Strait Islander Peoples' interactions with the justice system.

## Steps toward a solution

Changes to laws and practices will immediately yield outcomes and can reduce recidivism, save money, and prevent crime.

Justice reinvestment trials and specialist courts in consultation with Indigenous leaders are also having positive impacts on community empowerment and ownership of justice solutions.

Adequate funding for legal aid and legal assistance support is critical.

Aboriginal and Torres Strait Islander Legal Services were established in every state and territory some 40 years ago to provide culturally competent legal assistance services to Aboriginal and Torres Strait Islander Peoples. Unfortunately, after decades of inadequate and declining funding from the Commonwealth Government, these services are increasingly unavailable or inaccessible to many who need them most.

Further as need for these services has increased, but the funding not kept pace, the challenges faced by these services face are immense, and the pressures imposed on their hard-working staff enormous.

We need to take an honest critical look at the things that work and the things that do not.

## The Justice Project:

This year the Law Council of Australia announced a new national initiative with a strong relevance to Indigenous Australians, The Justice Project – a national blueprint for justice for all.

The Justice Project is the Law Council's own national review into the state of access to justice in Australia, concentrating on 13 groups experiencing significant social and economic disadvantage.

We recognise that such distinctions between 'groups' can be artificial. As you all will be aware, it is unfortunately the case that Aboriginal and Torres Strait Islander people are overrepresented in a number of these groups.

For several groups this is the first time we've closely analysed their experiences within the justice system. For others, the Justice Project has provided an opportunity to scour the available information and develop an understanding of what isn't working. And, just as importantly, to develop an understanding of what is working.

We are being led by an expert Steering Committee headed by former Chief Justice Robert French AC, and including Australian Human Rights Commissioner Rosalind Croucher AM and Wayne Muir and Cheryl Axelby, Co-Chairs of NATSILS.

The LCA has long promoted equality before the law and, along with its stakeholders, advocated for funding legal assistance services, as well as sustainable court funding.

The Justice Project is an extension of this work.

We aim to use the Justice Project to inform our ongoing work on access to justice and law reform, by providing a strong evidence base, and much greater context, for our arguments to governments.

The project will help us tell the stories of lives lost and lives restored through successful programs and communities. It will create urgency in the way we advocate for change.

## Consultation

Throughout August and September, consultations were conducted by the Law Council across Australia where we met with over 131 different organisations and experts.

We also received 128 submissions from the public and interested stakeholders.

## Key Messages and Overarching Themes

We are now preparing a Progress Report, which will focus on the key messages and overarching themes that have become clear throughout the consultation process.

For real change we need to build a common vision of what access to justice looks like within our community, and of our society as a just society.

## Kalgoorlie

When I met with Aboriginal Elders from Kalgoorlie they said to me that our justice system must be viewed as a 'barometer of society' – if the justice system is failing people, so is society.

We need to build a vision of a 'just' society beyond one that simply keeps 'law and order'.

Beyond formal institutions such as courts or tribunals or abstract notions and Latin phrases, justice is commonplace, concrete and embedded in everyday lives.

Ordinary problems such as:

- getting arrangements in place to resolve debts or fines;
- sorting out family disputes;
- getting access to benefits or the pension; or
- ensuring your child with disability can access local schools.

These often have simple yet critical legal dimensions which need resolving, but go unrecognised compounding the stress of the immediate problem. This must change.

## The Justice System is struggling to help people effectively

The justice system is under-resourced and under extreme pressure.

Many people in need cannot obtain legal aid – more than 13 per cent of the population live under the poverty line, yet legal aid is only available for 8 per cent of Australians – and barely at all for some matters.

People who are cash poor, but have some assets can expect not to receive help – including many older Australians, those in regional, rural and remote Australia, and mums seeking to leave violent relationships.

Last year, community legal centres turned away 170,000 people looking for help.

A resounding message from nearly all stakeholders is that lack of funding remains a central challenge, that people are missing out, and that short-term, uncertain funding frameworks are critical barriers to progress.

One Aboriginal Liaison Officer from Kalgoorlie estimated that he sees upwards of 1200 clients a year.

While a lawyer from a remote Aboriginal Legal Service office noted that, although he is doing the best he can, he is kept awake at night by the thought that because he is so overworked and lacking in resources, his clients may not be receiving the best outcome.

### Overly punitive laws and policies are counter-productive and serve to compound disadvantage

Overly punitive laws and policies are compounding resourcing issues and driving up pressure within the justice system.

We heard that overly punitive laws and policies disproportionately affect people experiencing disadvantage and compound their difficulties, especially Aboriginal and Torres Strait Islander Peoples and the law is too often being used as a blunt tool to manage complex social problems, in the absence of welfare-based measures which could more effectively address underlying needs and causes.

We heard of young people in New South Wales being sent to youth detention to detox from drugs or alcohol because no other facility exists for people under 16 years of age.

A Mission Australia social worker told us that he has been unable to find somewhere in New South Wales for young people to detox. He said: 'It is backwards that you can go to juvie at 10, but can't go somewhere to detox'.

We've heard concerns that the application of many laws and policies is often discriminatory or inappropriate. For example, over-policing of some groups and under-policing of others, punitive attitudes amongst some in the judiciary, and departmental decision-making regarding issues like child protection and tenancy.

In the family violence context, as I mentioned, we heard that police do not always make the distinction between the perpetrator and the victim when attending violent incidents, and they issue dual AVOs as a matter of course. This leads to women, many of whom are victims these orders were designed to protect, being arrested, charged for breach and imprisoned.

The Ms Dhu case, and others like it, are prime examples of how laws and policies can fail the people they are intended to protect.

Measured, evidence-based policy and law-making is necessary. New policies that help people to overcome disadvantage, rather than further entrench it, must be prioritised.

## We must do more to understand, embrace and respond to the diversity and strength of different communities and individuals

Those working across the justice system, the legal profession, governments and policymakers must do more to understand, embrace and respond to the diversity and strength of different communities and individuals.

There are critical gaps in the cultural competence, knowledge and understanding of many people across the police, government, parliament, the legal profession, the judiciary, and more.

We heard that many in the system do not recognise disabilities such as acquired brain injury and thus failed to respond appropriately.

More can and should be done to understand, embrace and respond to the diversity and strength of different communities and individuals. This involves:

- greater cultural competence across the board;
- positive measures to increase diversity and leadership to engender a culture shift; and
- less top-down policy – with a focus instead on greater consultative mechanisms with people who have lived experience of the issues.

It is the system, not the people that need to change – one representative from Kimberley Community Legal Services noted that the real question should be whether the court needs an interpreter, not whether the person need an interpreter.

Burnawarra Elders from Maningrida told us that there are many barriers in the justice system that they want to see removed and for those barriers to be removed: "we need the bollanda legal system to help us build that bridge together ... so that our people can walk across into the other side"

## Many people feel the brunt of the law but not its protection

Significant resources are put into enforcing the criminal law – but far fewer resources are available to help people upholding rights or ensure the accountability of critical decisions made about their lives.

For many, experience of the law is lopsided.

This means that rights on paper often carry little weight and a sizeable portion of Australians are being alienated from our justice system.

A lawyer in rural Victoria, noted to me that every young client she sees would be entitled to victim compensation, but if it weren't for their own offending leading them to her, they would be unaware of that compensation is available to them.

Beyond this there is a legacy of trauma, distrust and fear that the law will work against you. This is often rooted in historic reality.

For many Aboriginal women reporting family violence can be a highly difficult decision to make due to a real fear that they will also be arrested, or their children will be taken from them.

A system in which people feel the brunt of the law, but not its protection, undermines people's engagement and further alienates them from the justice system. This has ramifications for the community as a whole and the rule of law.

## We are spending money on the justice system, but are we spending money ensuring that the system is just?

Money is being spent on the justice system, particularly on policing and places of detention – but less so on services whose role is to ensure that a just outcome is reached.

Last financial year, Australian Governments spent \$3.9 billion dollars on adult prisons and a further \$468 million on youth prisons. That's \$103,000 per adult per year, or \$521,000 per child per year.

Yet, there is insufficient funding for addressing underlying needs or causes, early intervention measures or rehabilitation – all of which are proven to prevent costs downstream.

The Central Aboriginal Legal Aid Service told us that the expense of building a giant prison in Darwin had consumed any funding that may have been put towards reducing crime, and therefore imprisonment.

This is clearly a backwards approach and the community needs to ask whether the best outcomes are being achieved for this outlay – we need more funding for the beginning of the cycle, with the focus on prevention, rather than at the end, where it is focused on locking people up to appear “tough on crime”.

## Profound consequences of a failure to access justice

One of my key goals for the Justice Project was to humanise the issues.

Often, we are dealing with big numbers or broad issues, without focusing on what real people are going through.

Throughout the process we have collected a number of case studies that demonstrate the very personal effects that failing to access justice can have.

Take, for example, Gene Gibson from the Kiwirrkurra Community in WA. Mr Gibson was wrongly convicted of manslaughter because of a failure to provide an adequate interpreter on several occasions.

Mr Gibson's first language is Pintupi. Kukatja is his second. He has a limited understanding of English and a cognitive impairment makes it difficult for him to comprehend complex information.

And because the system did not adapt to assist him, he spent time in prison for a crime he didn't commit. Observing bush courts, it struck me that a number of defendants faced the same issue, depending on their lawyers – if they had any – to explain the fast paced bewildering exchange between the bench, counsel and witnesses.

We also heard about problems escalating from family to criminal matters, and the flow-on costs to other portfolios when problems aren't dealt with – g health, homelessness, social security and prisons.

A common story was the cycle of homelessness and the significant force this can be in leading people to prison.

For example, we heard of young people:

- being driven out of home from fear of violence or other issues at home;
- becoming homeless;
- falling in with the wrong crowd;
- committing a series of escalating crimes;
- not being granted bail because they cannot return to a satisfactory home;
- receiving a custodial sentence for the same reasons;
- not being granted parole, again for the same reasons; and
- finally, being released back into the community, but without adequate support thus leading them to repeat this process.

**A preventative, early intervention approach to justice is essential, as is addressing underlying issues which lead to problems with the law**

A clear message we received was that effective and timely legal assistance plays an important preventative role in avoiding the types of issues I've been outlining.

Preventative models such as – justice reinvestment, which redirects resources into disadvantaged communities in order to address underlying issues and prevent crime; and health-justice partnerships, which ensure that emerging legal problems are addressed earlier.

We heard that measures to address the underlying issues, which manifest as legal problems, are essential – including poverty, intergenerational trauma; racism and prejudice; and poor housing, education, health and employment; substance abuse.

In Bourke we uncovered a number of small initiatives that were playing a big part in preventing big issues – particularly for kids. The kids were bored, hungry and thirsty. Their crimes were crimes of opportunity and impulse. The can of drink from the shop, the change from an unlocked car, the unlicensed driving when no one could supervise the driving lessons.

The solutions were as simple as providing a public drinking fountain, investing a small bus to help kids get home in the evening, providing mums with slow-cookers so that food is available for kids when they get home from school, running sports and other programs after school and on Friday and Saturday nights, and helping the kids to get there and supervise their time behind the wheel.

It is important that we not only look at the big issues, such as the \$300 million a year funding shortfall in the legal assistance sector, but at the smaller things that might prevent people from needing to seek assistance in the first place.

## The law needs a human face

Throughout consultations the critical importance of building trust and ongoing relationships with clients was emphasised – face-to-face relationships are essential especially for those who distrust the system.

Building these relationships takes time and effort.

Time was a valuable commodity frequently mentioned with respect to vulnerable clients.

Yet often the least available commodity, given short term and insufficient funding models.

These factors need to be carefully considered as increasingly, governments globally are looking to technology-based solutions to more efficiently deliver justice.

Our consultations suggest that while there are many scenarios in which technology can be used effectively, it also has the potential to leave many behind. Many people lack the skills, resources or capacity to take up these solutions effectively.

Before it is employed more widely, at the risk of further alienating people from the justice system, for example people in rural, regional or remote areas, or the elderly – careful consideration is needed of such solutions.

Technology can often support, but not replace, face-to-face delivery.

## What's working?

So what have we found that is working?

### Integrated, holistic, bridge-building solutions

There is often too much emphasis on devising innovative, short-term pilots, at the expense of long-term sustained commitment on what we know works well.

One thing we know works well from both the literature and our consultations is that integrated, holistic approaches which address both legal and non-legal needs.

These can involve:

- intensive, wrap-around approaches – including whole family-based interventions; or
- ongoing case management to follow a person through to a successful outcome.

Support for integration or collaboration requires a more whole-of-government approach to funding access to justice initiatives, overcoming existing silos.

We also heard that certain people play an essential bridging role between clients experiencing disadvantage and the justice system, by breaking down trust barriers and facilitating assistance. These include:

- aboriginal liaison officers;
- cultural and community liaison officers;
- youth engagement officers;
- disability advocates; and
- communications intermediaries.

We in the legal profession must work more closely with those in other fields and with other expertise.

Take for example, the Redfern Legal Centre Health Justice Partnership. They have established what they call “the Koori grapevine” which spreads word throughout the community of the help that they can provide. As result of this grapevine the Redfern Legal Centre has even had clients referred to them by the local hairdresser.

#### People-driven, community-driven, flexible and strength-based approaches

Giving choices to individuals is important – we need to be treating them with respect and dignity and empowering and supporting their choices and decisions.

Targeted education is important in empowering individuals to make their own decisions.

Similarly, we also heard that community-driven projects, tailored to local circumstances and priorities, are significantly more likely to have longer term engagement and success.

These approaches are particularly important for Aboriginal and Torres Strait Islander people.

Self-determination should be a major component of any projected intended to provide access to justice for Aboriginal and Torres Strait Islander people.

Approaches which build upon the existing strength and resilience that exists within communities and individuals are often the most successful.

This requires meaningful consultation and co-design of projects and policies, rather than ready-made solutions.

### Therapeutic, diversionary, specialist and rehabilitative approaches

Another aspect that attracted consensus was therapeutic, diversionary, specialist and rehabilitative approaches to delivering justice, underpinned by trauma-informed practice.

Examples of these approaches include:

- the START Court in the Magistrates Court, Perth – which suspends sentences while people complete a therapeutic program and have wraparound support eg with accommodation, training etc. People completing the program are congratulated by the Magistrate;
- the MERIT (Magistrates Early Referral into Treatment) program in NSW;
- the Youth Justice Specialist Court at the Magistrates Court in Victoria which provides a therapeutic justice approach driven by the magistrate;
- specialist family violence lists; and
- specialist legal assistance services, focusing on particular client groups and/or areas of law.

However, there were stark contrasts between the extent to which many of these approaches available in rural or remote versus urban areas:

- we consistently hear in from practitioners in rural areas that the lack of a specialist courts such as drug courts, meant that Magistrates were forced to provide less than optimal sentences;
- in NSW we were told that from the Murray up to Broken Hill and throughout the far-west, essentially a whole layer of sentencing options were missing; and
- in Perth, we were told that there is one Perth-based Mental Health Law Service for the entire state.

We must work tirelessly to expand our current systems and process to ensure that, on day, the full scope of the justice system is available to all.

### Investing in the evidence base is essential

More and more often, governments are requiring, but not resourcing, an evidence base regarding access to justice delivery.

There are also fundamental gaps in knowledge about the legal needs of certain groups and how they interact with the justice system.

Finally, there is not enough follow through by government on a multitude of reports and recommendations in this area, and too much handballing between jurisdictions.

Joint leadership and partnerships are needed – across governments, sectors and the community. A COAG-led Access to Justice Framework could be developed, prioritising long-term, sustainable frameworks which are built around responding to unmet legal need and whole-of-government commitment.

## Where to Next?

Following our interim report, we will be working towards a more detailed final report for release in early 2018.

This will include recommendations for governments, the profession, related sectors and for the Law Council's own role going forward.

An essential follow-on phase of the Justice Project will involve engaging at a whole-of-government level with Federal Ministers, MPs and a range of government agencies about the project – we will encourage our constituent bodies to do the same at the state and territory level.

We will engage sector-to sector with a range of stakeholders about the Justice Projects findings as we hope that they will also use the project to advocate on these issues.

We will use the Justice Project as an opportunity to build these relationships, including developing unlikely alliances. We also hope to encourage community buy-in and support for addressing access to justice.

At the same time, we will develop an implementation plan for how the Law Council will action Justice Project recommendations regarding the legal profession, for example, encouraging diversity, cultural competence and greater knowledge, and skills development.

## Conclusion

In order to begin to unravel and address the many complex issues facing access to justice for Aboriginal and Torres Strait Islander Peoples it is important that lawyers provide leadership on these matters, in consultation with civil society and with government.

We must continue to engage with service providers and consult with communities about what their needs are and continue to support and promote the programs and initiative which are working well.

At the other end of the spectrum lies the need for the constitutional recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution, the Voice, the Makaratta truth and reconciliation process and treaty negotiations.

This is a slow process, painfully slow, engaging many voices and considering any models.

The Law Council will continue to push for the adoption of the Referendum Council's recommendations by the Australian Parliament and a new process to bring this matter to a referendum of the Australian people.

**Disclaimer:**

This document remains the property of the Law Council of Australia and should not be reproduced without permission. Please contact the Law Council to arrange a copy of this speech.

Patrick Pantano

Director, Public Affairs

T. 02 6246 3715

E. [Patrick.Pantano@lawcouncil.asn.au](mailto:Patrick.Pantano@lawcouncil.asn.au)