



Law Council
OF AUSTRALIA

Opening of the Northern Territory Legal Year 2020

Speech delivered by Pauline Wright, President of the Law Council of Australia at the Northern Territory Opening of the Legal Year, Darwin.

6 February 2020

Her Honour the Honourable Vicki O'Halloran, Administrator of the Northern Territory, distinguished guests, ladies and gentlemen.

It's an honour to be here with you today in Darwin to mark the beginning of the Northern Territory Legal Year.

I humbly acknowledge the traditional custodians of the land on which we meet, and pay my respects to Elders past and present. I also acknowledge their youth, in whose hands is held our hope as a nation for a reconciled future. I also pay my respects to all Aboriginal and Torres Strait Islander peoples and Elders from visiting nations who are with us today.

Events like this are very important to me because they allow me to engage directly with members of our profession outside the formal structures of the Law Council's committees and sections.

By providing the legal profession the opportunity to contribute to the work of the Law Council, we ensure that our policy positions are authentic, reflecting the direct experience of legal practitioners. It is particularly important that this dialogue is with jurisdictions in the more remote parts of Australia, such as the Northern Territory, so that we have a truly national approach to issues.

That's an issue I will return to later.

But here we are, just a few short weeks into 2020 and it's already proving to be one of the most calamitous the nation has faced.

We've all borne witness to the terrible bushfires that have torn across our lands – already reeling from one of the worst droughts in living history.

There was one aspect of this tragedy that gave me heart.

That was the boundless capacity of people to unite and help their fellow Australians at their time of greatest need.

It is that compassion for our fellow Australians that I hope we will not lose sight of in the year ahead.

It is not often that I find myself taken by the front page of the NT News, whether it be UFO sightings or crocodile attacks.

But the frontpage in January, summed up for me one of the key messages of the summer: "Now is the time to unite".

The legal profession, like the rest of the community, has risen to the challenges presented. It has been playing an important role to assist in the recovery effort by co-ordinating and providing pro bono advice and assistance to those affected.

Of course, it is people living in regional and rural Australia who have borne the brunt.

If there is any silver lining to be salvaged from the situation it is that finally regional Australia is back in the national focus.

Because while bushfire recovery will dominate the national conversation, the challenges that need to be met in the regions extend far beyond this.

And maybe our summer of fires will give us a chance to refocus.

When I was given the honour of leading the Law Council of Australia this year, I said that a key priority would be to push the issues of regional Australia directly onto centre stage.

Because too often they are overlooked.

Yet regional communities are where some of our most challenging legal issues lie.

These challenges – like access to affordable justice and ballooning incarceration rates – are particularly relevant here in the Territory.

The glaring over-representation of Aboriginal and Torres Strait Islander peoples in our jails is one of the biggest social injustices in Australia. It should, frankly, be a source of shame for us all.

In the Northern Territory, Aboriginal and Torres Strait Islander peoples make up 84 per cent¹ of the adult prison population.

Across the country the statistics are just as disturbing, with Indigenous men almost 15 times² more likely to be imprisoned than non-Aboriginal men.

For women it's even worse, with First Nations women around 21 times³ more likely to be in jail than non-Aboriginal women.

Indigenous people are denied bail at higher rates than their fellow Australians.

And they are more likely to be charged and brought before the courts, more likely to receive a sentence of imprisonment (including a short sentence of imprisonment) and less likely to receive a community-based sentence than non-Indigenous people.

Aboriginal children are also bearing the brunt of a legal system which locks up kids when they are as young as 10 years old.

¹ <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics%20~13>

² <https://theconversation.com/as-indigenous-incarceration-rates-keep-rising-justice-reinvestment-offers-a-solution-107610>

³ <https://theconversation.com/as-indigenous-incarceration-rates-keep-rising-justice-reinvestment-offers-a-solution-107610>

Annually, there are 600 children in jail across Australia aged under 14 years. In the NT nearly all detainees in juvenile detention are Aboriginal and Torres Strait Islander children. It's not uncommon for them to make up 100 per cent of that statistic at any point in time.

Late last year the Council of Attorneys-General failed to raise the minimum age of criminal responsibility to 14.

My predecessor, Arthur Moses SC, made this an issue a focus of his presidency last year and I do not intend to ease up on this important issue.

The Northern Territory, in particular, has yet to meet its promise to increase the minimum age from 10 to 12 despite it being a key recommendation of the Royal Commission into the Protection and Detention of Children in the Northern Territory.

Of course, this kind of reform takes courage when faced with the prospect of easy scare campaigns. But I know politicians on both sides of politics know that this is the right thing to do.

Because in 2020 locking children up is unacceptable.

We know the damage that's caused to the child and their family.

We know how badly it erodes the chances of finishing school and getting a job.

We know how likely those children are to end up in the adult jail system.

In many communities, it's almost seen as a rite of passage.

What makes this even more disturbing is that we are locking children up for minor crimes, mostly for low-level burglary and theft. More serious crimes are rarely carried out by children.

Children must of course be held accountable for their actions – but there are better ways than putting them through the criminal justice system. We need to look to examples, including those overseas, of health and welfare-based approaches which are both in the best interests of the child and keep communities safe.

So what can we do to address this justice gap and keep up the pressure on governments in the year ahead? Plenty, particularly when here in the Northern Territory an election is on the horizon.

This year we are looking to hold a national symposium on Indigenous incarceration rates drawing together the country's top legal experts and leaders from the community – including particularly Aboriginal and Torres Strait Islander leaders who know what works well in their own communities.

In consultation with our Constituent Bodies, we will also be working with the Commonwealth Government to ensure that through the COAG process, Indigenous justice agreements are considered for adoption across Australian jurisdictions.

Remarkably only Victoria and the ACT have active agreements.

There is no Commonwealth agreement. South Australia and Tasmania have never had an agreement. And they've expired in Western Australia, New South Wales and Queensland.

Here in the Territory you're in the process of delivering an agreement. On paper it sounds robust with some sound recommendations for expanding community-based sentencing and some non-financial alternatives to not paying fines.

But, I know there are concerns here in the Northern Territory – as there are in most places – about the capacity of government to evolve talk into real action.

So I am very interested in the development and subsequent rollout in terms of the lessons that it might offer for other jurisdictions, particularly in the Commonwealth itself.⁴

We'll also be exploring other options including justice reinvestment and a special focus on the incarceration rates of Aboriginal and Torres Strait Islander women, who are the fastest growing prison population in the country.⁵

What seems strikingly clear is that we will never be able to properly advocate for, and with Aboriginal people, unless we achieve a First Nations Voice in the Constitution.

In 1938 Aboriginal people held the very first Day of Mourning in Sydney.

Campaigner William Ferguson that day told the crowd: "*Surely the time has come at last for us to do something for ourselves and make ourselves heard.*"⁶

It's long overdue, but our duty is to ensure Mr Ferguson's message finally becomes a reality.

A First Nations Voice to Parliament would give Aboriginal and Torres Strait Islander people a say in the decisions that affect their lives by allowing them to propose bills and be consulted on bills before Parliament.

But more than that, it would have a direct impact on advancing equity and ultimately leading to fairer laws for us all.

And this is why the Law Council will continue to advocate for the Uluru Statement from the Heart.

The alternative that has been proposed – a voice to government, not to parliament – is hugely disappointing.

A voice to government would not be enshrined in law and could therefore be abolished at any point in the future. And because it's to government only, it excludes the broader scrutiny and understanding that would come from a voice to the whole parliament.

It is, in all honesty, an insult to the Aboriginal communities who worked so hard to produce this landmark statement that had widespread public support.

⁴ <https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/16-criminal-justice-targets-and-aboriginal-justice-agreements/aboriginal-justice-agreements/>

⁵ <https://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>

⁶ https://www.deadlystory.com/page/culture/history/Day_of_Mourning_protests_held_in_Sydney

So the Law Council is working closely with Minister Ken Wyatt and the highly regarded advisory team, Marcia Langton and Tom Calma, on the co-design of this alternate voice.

But, we will be stressing that the advisory group needs to be allowed to consult on an option that recognises the recommendations of the Uluru Statement – constitutional recognition.

There is simply no reason to be fearful of constitutional enshrinement – any concerns that it would be a “third chamber” in government have been rightly dismissed.

I want to now move onto an issue that affects many of you sitting here today – the gross under-resourcing of our justice system – particularly legal assistance services and the courts.

You know, and I know, many people who desperately require the expertise in this room - of our profession - are missing out.

The recent reports by the NT Legal Aid Commission and Director of Public Prosecutions make for horrifying reading.

The region has the highest incarceration rates in Australia⁷ yet the NT Legal Aid Commission was forced to suspend its attendance at Bush Courts to reallocate funding to other areas of pressing need.⁸ Whilst that service has now been resumed, there is a risk of robbing Peter to pay Paul and other services will now be affected. What is really required is additional funding.

This is affecting already marginalised communities.

The only way we can fix this is through an urgent injection of funds.

This year is a critical year for the legal assistance sector.

The Federal Government is currently negotiating a new funding agreement with the states and territories that it hopes to finalise mid-year.

Late last year, it announced an additional \$23.8 million over three years from 2020-21 to secure agreement. Of course, this announcement was welcome but the additional funding pales in comparison to the amount needed to bring our legal assistance services up to scratch.

And the new funding is tied into the government’s agenda of a single funding mechanism for legal assistance services, which would see the standalone, targeted funding stream for Aboriginal and Torres Strait Islander Legal Services brought under a mainstream assistance funding agreement.

⁷ <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2018~Main%20Features~Northern%20Territory~27>

⁸ <https://www.abc.net.au/news/2020-01-22/northern-territory-prosecution-and-legal-aid-bodies-underfunded/11890238>

The proposed changes continue to risk damaging legal services for First Nations' people across Australia. The government must keep legal support for Aboriginal and Torres Strait Islander peoples as a standalone, independent and Commonwealth funding program, to allow them to continue their vital work effectively.

This is a matter of the utmost concern for the Law Council.

Ensuring access to justice for all is one of our key pillars.

Our Justice Project set out to examine why people are struggling to access legal help.

Many are isolated and disadvantaged but there is an increasing number of ordinary working people who are also struggling to have their everyday legal concerns met. We call them the "missing middle" and this year we will be shining a spotlight on their needs by undertaking a research project.

There's a myriad of reasons for these problems, but we found that there many were related to what we see throughout regional and rural Australia. Having to travel long distances, poverty and technological barriers are just some.

There's also the shortage of rural lawyers and paralegals. One recent study found that only 10 per cent of solicitors practise in regional or rural areas. But this is where nearly 30 per cent of Australians live.

We hope this will provide practical help to this community and enable you to better serve them. That's why late last year, the Law Council of Australia and Law Society Northern Territory announced a new pilot scheme to relieve pressure on lawyers at Northern Territory Legal Aid Commission and the North Australian Aboriginal Justice Agency.

This pilot, which will draw on the pro bono support of the legal profession across the country, seeks to relieve some of the pressure on lawyers in the Northern Territory, assist in ensuring more people can access the services that they need, provide lawyers with two-way learning and mentoring opportunities.

While the Relief Scheme will continue the profession's longstanding commitment to assisting the community through pro bono work, it is not a replacement for the substantial additional government funding which is required to address the critical justice gap in the Territory.

Trying to fix the bigger picture of getting more people to work in regional and rural Australia is harder.

In the past, the Law Council has supported policy measures such as tax incentives for regional law firms, but there is much work to be done in this regard.

And in the months ahead I want to work with governments and legal and professional bodies.

We need to get a better picture of what life is like for lawyers practising in rural and regional Australia.

What are the legal needs of your communities, what is affecting your ability to recruit and, most crucially, retain lawyers?

With all of these challenges, it's essential that our system retains its integrity.

Core to that is maintaining true impartiality when it comes to responding to the urgent legal needs of the most vulnerable in society.

We've all witnessed bias. Impartiality is a constant challenge. We are all human. We can often have strong emotions about the cases we work on.

But impartiality is what we have trained for and what our system is designed around.

That is why we need judges to rule on the evidence and not on gut feeling and if there are cases where we feel bias has come into play, there needs to be an independent and formal investigation.

That's why the Law Council in partnership with the Northern Territory Law Society welcomes moves by the Northern Territory government to introduce an judicial commission this year.

Similarly, we also need a Federal Judicial Commission which can independently assess and deal with any complaints concerning the alleged misbehaviour or incapacity of a judicial officer.

We are very fortunate in Australia that the overwhelming majority of our judiciary are highly skilled, impartial and courteous.

But the present situation is undesirable as it leaves it to a head of jurisdiction to deal with complaints concerning a judicial officer. That is not appropriate for transparency or accountability reasons.

It has the potential to undermine the public confidence in our courts and the administration of justice.

At a time where public confidence in the integrity in our public institutions appears to be declining, our profession should be at the vanguard of regaining the public's trust in our system of laws here in the Northern Territory, and beyond.

Thank you.

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