



ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-25169

Mr David Price
Chief Executive Officer
The Law Society of Western Australia
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Dear ~~Mr Price~~ *David*

LAW SOCIETY'S BRIEFING PAPERS 2016

I refer to correspondence from the former President of the Law Society of Western Australia, Ms Elizabeth Needham, inviting me to provide the Government's views on the recommendations contained within the Society's Briefing Papers 2016.

Please find attached comments in relation to each of the priority areas identified.

Yours sincerely

Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

14 FEB 2017

RESPONSE TO THE LAW SOCIETY OF WA – BRIEFING PAPERS 2016

Closing the Gap

The Premier, the Hon Colin Barnett MLA, made a commitment in October 2014 to reduce Aboriginal over-representation and Aboriginal deaths in custody. The Liberal-led Government's response, developed by the Justice Ministers Group, has included:

- Introduction of sentencing options as alternatives to a fine, in an effort to reduce imprisonment for fine default, through the *Sentencing Legislation Amendment Act 2016*;
- Examination of the processes leading to imprisonment for fine default, in particular, looking at ways of improving how Work and Development Orders (WDOs) are administered and managed;
- Consideration of the increased use of infringement notices in appropriate cases;
- Making the bail process more flexible through amendments to the *Bail Act 1982*; and
- Expansion of 'Open Days', where Aboriginal people can directly access services in relation to the payment of fines and obtaining, maintaining and regaining a motor driver's licence.

Death Penalty

The Liberal-led Government does not support the reintroduction of capital punishment.

Family Violence

The Liberal-led Government is strongly committed to addressing the problem of family violence in Western Australia and passed landmark legislation in November 2016, representing the biggest overhaul of family violence legislation in the State's history, the *Restraining Orders and Related Legislation Amendment (Family Violence) Act 2016* (WA) (ROAR Act), which formed the centrepiece of a comprehensive legal reform program in respect of family violence.

The ROAR Act is part of the Government's overarching family violence response plan, entitled *Freedom from Fear: Working towards the elimination of family and domestic violence in Western Australia – Action Plan 2015*. Both the Action Plan and the ROAR Act aim to increase safety for victims of family violence, and strengthen integrated, accountable and effective interventions targeting perpetrators of family violence and abuse.

The ROAR Act introduced a new Family Violence Restraining Order (FVRO) – supported by new definitions, objects and principles – all of which promote an evidence based, contemporary understanding of the dynamics of family violence within the justice system. Of particular importance are the following innovative changes:

- A new definition of 'family violence' modelled on the definition in the *Family Law Act 1975*, that refers to behaviour that coerces, controls or causes fear in the victim;
- Express inclusion of cyber-stalking and technology-facilitated abuse in the definition of family violence as behaviour that may form the basis for seeking an FVRO – a first for Australia;
- Narrowing the court's discretion to not make an FVRO where the grounds for an FVRO are met (that is, the court must make an order unless there are 'special circumstances');
- Relaxation of the rules of evidence in final order hearings, with procedural fairness safeguards for both parties, to minimise re-traumatisation of victims during court hearings; and

- Special provision for extended duration of an FVRO where the respondent is imprisoned to cover the period of imprisonment plus two years post-release.

The legislation also doubled the 10-year maximum sentence for the offence of unlawful assault causing death, which was introduced to deal with 'one-punch' homicides but had also been useful in family violence cases when murder or manslaughter could not be proven. The laws also offered protection to pregnant women and their unborn child, with a person who intentionally causes grievous bodily harm to a pregnant woman which results in the loss of her pregnancy, will face up to 20 years' imprisonment.

Importantly, perpetrator accountability is also a key focus of the ROAR Act. For the first time in Western Australia, a court will be able to make mandatory Behaviour Change Program orders as an adjunct to an FVRO.

To complement the ROAR Act, the Liberal-led Government has also introduced a new integrated court model, known as the Family Violence List, in metropolitan Magistrates Courts and has committed to introducing legislation to enable Western Australia to participate in the National Domestic Violence Order Scheme.

Diversity and Equality

The Department of the Attorney General coordinates an interagency response to the Gender Bias Review recommendations. Considerable progress has been made in implementing these, including:

- Updating the Equality Before the Law Benchbook;
- Supporting the appointment of capable, experienced women to judicial positions;
- Supporting flexible working arrangements within State Solicitor's Office; and
- New court facilities in Kalgoorlie, Kununurra and Carnarvon that better support the needs of child witnesses and victims.

Western Australian public sector legal agencies have already implemented policies that allow staff to meet family demands without sacrificing their career goals. The State Solicitor's Office (SSO) does support to the extent possible, flexible work arrangements, including working from home arrangements so that employees can more effectively balance home and work responsibilities. In 2016, the State Solicitor's Office (SSO) more than fifty percent of legal staff are women and a quarter of the legal staff work part time. In terms of salaries:

- 46 percent of practitioners are classified at Class 4 (currently attracting full time salary of \$229,435) – and of these roles, half are occupied by women;
- Half of the 60% of practitioners classified at Class 3 (currently attracting full time salary of \$193,945 to \$218,056) are women with the majority working part time; and
- Women comprise half of the new articulated clerks that started in 2016.

Of the 23 appointments this government has made to judicial positions, 7 have been women, including the first female State Coroner.

Imprisonment of Fine Defaulters

The Liberal-led Government is progressing a raft of changes to the fines enforcement process; including discussions with the Commonwealth on the potential garnishment of social security benefits. Whilst committed to imprisonment as an enforcement option of last resort, the Government is developing legislative initiatives around improving the way Work and Development Orders operate, permitting police officers to "stay" a Warrant of Commitment and more flexible time to pay arrangements.

In addition, amendments included in the *Sentencing Legislation Amendment Act 2016* will act to reduce the courts' reliance on fines up front. The amendments provide for an enhanced Conditional Release Order as an alternative to a fine and for the introduction of a suspended fine.

Royal Commission into Institutionalised Responses to Child Sexual Abuse

Civil litigation reform in the context of child sexual abuse claims was considered by a Cabinet Subcommittee. On 17 January 2017, the Premier announced that legislation will be drafted to remove the limitation period for victims of child abuse and that no cap would be placed on the maximum damages that can be awarded to survivors.

Judicial Resources

The Supreme Court of Western Australia has the second highest number of judicial officers per 100,000 people amongst comparable states. Appointments were made in July and November 2016, meaning that the Supreme Court has a full complement of 21 judges.

Legal Assistance Funding

The Government provided Legal Aid WA with an additional \$3 million in 2015-16 (over and above the expensive cases funding) to ensure that sufficient funding is available to provide representation to persons facing charges on indictable matters. Legal Aid WA also received a 14 percent increase in Commonwealth funding under the National Partnership Agreement for Legal Assistance Services. However, funding provided has had to reflect the general economic and financial position of the State.

The Government is continuing to monitor legal assistance arrangements, to manage the impact of the withdrawal of Aboriginal Legal Services WA from a number of outer metropolitan and regional court locations and to make representations to the Commonwealth regarding the funding cuts made to Community Legal Centres.

I have made a number of approaches to the Commonwealth Attorney General on the funding challenges faced by the legal assistance sector, including on the future funding and resourcing requirements of Community Legal Centres from 2017-18 onwards.

Legal Profession Uniform Law

The Liberal-led Government is awaiting a full evaluation by participating jurisdictions. It continues to support the development of a seamless legal profession across Australia through State legislation, provided the regulatory arrangements are in the interests of the WA public and all elements of the legal profession.

Mandatory Sentencing

The Liberal-led Government is in favour of providing flexible sentencing options for offenders as is evident from the recent new sentencing options introduced through the *Sentencing Legislation Amendment Act 2016*. However, the Government is also of the view that the current limited use of mandatory sentences is suitable for those offences to which they apply and proposals outlined in the recently announced methamphetamine strategy are in line with community expectations and concerns.

Presumption against Bail

The Liberal-led Government does not intend to amend the *Bail Act 1982 (WA)* to provide for a presumption against bail for repeat property offenders.

Deaths in Custody and Incarceration of Aboriginal and Torres Strait Islander Peoples

The Liberal-led Government has approved a raft of measures aimed at reducing Aboriginal deaths in custody and over-representation more generally in the justice system.

Reforms to sentencing legislation also aim to have a positive impact in reducing over-representation. A new sentencing option of a suspended fine will allow a court to suspend a fine that would ordinarily be imposed for a period of up to 24 months, provided the person does not re-offend during that time. Enhancements to Conditional Release Orders aim to give the court a genuine alternative to a fine, by allowing offenders to demonstrate good behaviour and take part in approved activities or unpaid community work. Conditional Release Orders have been developed in such a way so as to provide scope for Aboriginal organisations to become involved in providing activities or work for Aboriginal offenders.

The Government has a clear intent to deal with low-level offenders by means other than through the court and by means other than a fine. These reforms will have a positive impact in seeing fewer Aboriginal people entering and becoming entrenched in the justice system.

Mandatory Sentencing and How it Contributes to the Incarceration of Aboriginal and Torres Strait Islander peoples in Western Australia

The introduction of mandatory sentencing for offences such as home burglaries and assaults on public officers was in line with community expectations and concerns, and has limited application.

Issues that Contribute to the Incarceration of Aboriginal and Torres Strait Islander Women in Western Australia

The Department provides access for all staff to cultural awareness training and the issues relevant to cultural background and gender.

The Department operates the Barndimalgu Family Violence Court in Geraldton. An evaluation found the court to be particularly effective for dealing with indigenous offenders and this Court will continue to be resourced. However, an evaluation of the Kalgoorlie Community Court did not reach the same conclusion and was subsequently closed. There are no current plans to expand Indigenous Community Courts to other locations.

As indicated previously, reforms to enhance sentencing options of a suspended fine will allow a court to suspend a fine that would ordinarily be imposed for a period of up to 24 months, provided the person does not re-offend during that time. Enhancements to Conditional Release Orders aim to give the court a genuine alternative to a fine, by allowing offenders to demonstrate good behaviour and take part in approved activities or unpaid community work. Conditional Release Orders have been developed in such a way so as to provide scope for Aboriginal organisations to become involved in providing activities or work for Aboriginal offenders.

Access to Justice Issues Faced by Aboriginal and Torres Strait Islander People of Western Australia

Funding for the Aboriginal Legal Service of Western Australia and other culturally appropriate legal assistance services is the responsibility of the Commonwealth Attorney General, while the WA Government provides funding to the Family Violence Prevention Legal Service through Legal Aid.

The State Government through individual courts, has, and will continue to, provide interpreters when requested and/or required. The Department of the Attorney General has established Aboriginal Liaison Officer (ALO) positions in a number of courts with a total of 7 positions currently classified under section 50D of the *Equal Opportunity Act 1984 (WA)* where Aboriginality is considered an essential requirement for the role.

The ALO role is to optimise Aboriginal peoples' access to, confidence in and use of the range of services provided by Courts and seeks to reduce over-representation of Aboriginal people as offenders in the criminal justice system.

Mentally Impaired Accused

Mental health and wellbeing are a cornerstone of maintaining a healthy life. However, almost half (45%) of all Australians will experience a mental health problem over the course of their lives; 1 in 5 will do so in any given year.

With the impacts of mental ill health and alcohol and other drug dependency being so widely felt, it is important that these issues are given prominence within Cabinet and Government.

Only the Liberal government has recognised this need, having undertaken significant reform to Western Australia's mental health system since 2008. This includes appointing Western Australia's first Minister for Mental Health and establishing our first Mental Health Commission; the appointment of the State's first Mental Health Advisory Council in 2011 and introducing a new Mental Health Act in 2014, which improves the rights and protections for involuntary patients and supports the active involvement of families and carers.

Since the Liberals formed government in 2008, the funding for mental health and alcohol and other drug services has increased by an unprecedented 83.9%, from \$470.8 million to \$865.8 million. This has enabled services and supports to expand across the state.

The Liberal-led Government has undertaken significant work to reform the way the justice system deals with people affected by mental ill health. This has included the implementation of Western Australia's first mental health court diversion and support project, as well as the opening of Western Australia's first Disability Justice Centre.

The Liberal-led Government is committed to introducing a Bill that will amend the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* (CLMIA Act) as informed by the report on the CLMIA Act Review tabled in Parliament in April 2016.

Issues Affecting Incarceration Rates of Aboriginal and Torres Strait Islander Children

The Liberal-led Government does not intend to amend the legislation in respect of the age of criminal responsibility.

The Department of Corrective Services has recently released a green paper to review the *Young Offenders Act 1994 (WA)*. The purpose of the review is to determine whether the Act is achieving its objectives within the context of critical issues and contemporary trends in youth justice.

The Government is always open to the expansion and improvement of justice related data collection and use. This Department also has a history of supporting criminological research either directly, or through organisations such as the Australian Institute of Criminology and the Telethon Kids Institute.

Justice Re-investment

The Liberal-led Government supports the development of evidence-based crime prevention strategies tailored to address the drivers of crime at the community level.

The Government is also committed to a tougher approach towards the small number of offenders who commit serious violent offences, particularly in relationships, while at the same time offering the courts alternative sentencing dispositions for persons convicted of lower level offences. To this end, the Government has introduced measures such as suspended fines and Conditional Release Orders as alternatives to a fine. In addition justice agencies are looking at alternatives to jailing serious fine defaulters, moving some low level offences from the courts to infringement notices and Western Australia Police is trialling a diversion initiative called "Operation Turning Point".

The Society's recommendations around improved crime data collections and analysis including geocoding and more robust, evidence-based policy development are accepted.

Bail

The Liberal-led Government supports initiatives to reduce unnecessary incarceration. Amendments proposed in the Bail Legislation Amendment Bill 2016 sought to allow greater flexibility to dispense with bail or to vary or revoke bail conditions when appropriate. This is intended to have a favourable effect in reducing the numbers of people in custody while on remand for minor offences.

The Bail Legislation Amendment Bill 2016 also introduced additional considerations which a bail decision-maker must take into account. In order to ensure that this does not cause delay in decision-making, the additional factors are qualified, for example, '*to the extent that it is practicable ... the physical and mental health of the accused*' and '*...in the case of a serious offence, the views of any victim ... (if available to the authorised officer or judicial officer) ...*'. In these instances there is no intention that the decision-making be delayed for an investigation into the additional factors.

Should the Liberal-led Government be re-elected, this Bill would be reintroduced.

Probate

The Government intends to progress amendments to the *Administration Act 1903 (WA)* during the course of 2017.