

Chapter 4

Imprisonment of Aboriginal and Torres Strait Islanders

Introduction

4.1 Aboriginal and Torres Strait Islander people are significantly overrepresented in the Australian prison system. This chapter gives a brief overview of the imprisonment rates for Aboriginal and Torres Strait Islander Australians and considers the adequacy of statistical information on Indigenous imprisonment rates. The chapter concludes with a discussion on the inclusion of justice targets in the Closing the Gap measures.

Imprisonment of adults

4.2 In 2015, Aboriginal and Torres Strait Islander people made up approximately two per cent of the total Australian population aged 18 years and over. However, at 30 June 2015, Aboriginal and Torres Strait Islander prisoners accounted for just over a quarter (27 per cent or 9,885 prisoners) of the total Australian prisoner population (36,134 prisoners).¹

4.3 The total number of Aboriginal and Torres Strait Islander prisoners at 30 June 2015 represented a seven per cent increase in numbers (or 620 prisoners) from 30 June 2013, when there were 9,265 Aboriginal and Torres Strait Islander prisoners.²

4.4 Of the total of 9,885 Aboriginal and Torres Strait Islander prisoners, 90 per cent (8,859 prisoners) were male.³ This is comparable to the overall Australian prisoner population, where males accounted for 93 per cent of all prisoners.⁴

Imprisonment rates

4.5 As at 30 June 2015, the imprisonment rate for Aboriginal and Torres Strait Islander people was 13 times greater than the imprisonment rate for non-Indigenous

1 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. The total prison population of 36,134 prisoners includes both sentenced and unsentenced prisoners. In all states and territories with the exception of Queensland, persons remanded or sentenced to adult custody are aged 18 years and over. Persons under 18 years are treated as juveniles in most Australian courts and are only remanded or sentenced to custody in adult prisons in exceptional circumstances. In Queensland, 'adult' refers to persons aged 17 years and over.

2 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

3 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

4 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

Australians.⁵ The Aboriginal and Torres Strait Islander imprisonment rate was 1,951 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population, compared with 153 prisoners per 100,000 adults for the non-Indigenous population.⁶

4.6 Appendix 3 of this report sets out a table of the annual ratio of Indigenous prisoners to non-Indigenous prisoners, by state and territories, for 2005-2015.⁷ The data shows that while the ratio of Indigenous prisoners might vary year on year, over the period 2005-2015, in the majority of states and territories there has been a general upward trend in the ratio of Indigenous prisoners.

4.7 Western Australia has the highest imprisonment rate for Aboriginal and Torres Strait Islander people, with 3,067.4 prisoners per 100,000 Aboriginal and Torres Strait Islander adult population, which is 17 times the imprisonment rate for non-Indigenous Australians in that state (180.8 prisoners per 100,000 adults for the non-Indigenous population).⁸

4.8 The Australian Capital Territory's imprisonment rate for Aboriginal and Torres Strait Islander people was 14.1 times the rate for the non-Indigenous population,⁹ and in the Northern Territory, the imprisonment rate for Aboriginal and Torres Strait Islander people was nearly 14 times the rate for the non-Indigenous population.¹⁰

4.9 The Northern Territory had the greatest proportion of prisoners identifying as Aboriginal and Torres Strait Islander, with 84.4 per cent (1,344 prisoners).¹¹ Western Australia had the second highest proportion of Aboriginal and Torres Strait Islander

5 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. The figures used in relation to imprisonment rates are the age standardised rates. Age standardisation adjusts the crude imprisonment rate to account for age differences between populations. The differing age profiles between Aboriginal and Torres Strait Islanders and the non-Indigenous population (the former having a much younger population) means that using crude rates may lead to erroneous conclusions being drawn about variables that are correlated with age, see Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

6 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

7 This data is extracted from the Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

8 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

9 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. In 2015, the imprisonment rate for Aboriginal and Torres Strait Islanders in the ACT was 1,473.9 prisoners per 100,000 adults and for the non-Indigenous population the imprisonment rate was 101.5 prisoners per 100,000 adults. However, as the table in Appendix 3 demonstrates, there is greater variability year to year in the ratio of Indigenous prisoners in the ACT than in other states and the NT.

10 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*. In 2015, the imprisonment rates in the NT were 2,471.1 prisoners per 100,000 Aboriginal and Torres Strait Islander population compared with 179.6 prisoners per 100,000 adults for the non-Indigenous population.

11 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

prisoners with 38 per cent (2,113 prisoners), followed by Queensland (31.5 per cent, 2,306 prisoners) and then New South Wales (24.1 per cent, 2,864 prisoners).¹²

Nature of offences

4.10 The most common offence or charge for which Aboriginal and Torres Strait Islander prisoners were in custody were acts intended to cause injury (33 per cent or 3,309 prisoners) followed by unlawful entry with intent (15 per cent of 1,506 prisoners). The most common offence or charge for the non-Indigenous prisoner population was illicit drug offences (17 per cent or 4,453 prisoners) and acts intended to cause injury (17 per cent or 4,333 prisoners).¹³

4.11 Acts intended to cause injury was the most common offence or charge for both male and female Aboriginal and Torres Strait Islander prisoners (34 per cent for males and 31 per cent for females), followed by unlawful entry with intent (15 per cent for males and 14 per cent for females).¹⁴

4.12 In terms of reoffending behaviour, just over three quarters of Aboriginal and Torres Strait Islander prisoners (77 per cent) had been imprisoned under sentence previously, compared to half of non-Indigenous prisoners (50 per cent).¹⁵

Length of sentences

4.13 In terms of sentenced prisoners, at 30 June 2015, the median aggregate sentence length for Aboriginal and Torres Strait Islander prisoners was two years, compared with three and a half years for non-Indigenous prisoners. The median expected time to serve for Aboriginal and Torres Strait Islander prisoners was 1.2 years, compared with 2.1 years for non-Indigenous prisoners.¹⁶

4.14 For unsentenced prisoners, at 30 June 2015, the Australian Bureau of Statistics states:

The median time spent on remand by Aboriginal and Torres Strait Islander unsentenced prisoners was 2.2 months, compared to 3.0 months for non-Indigenous unsentenced prisoners.¹⁷

4.15 Mr Mick Gooda, the Aboriginal and Torres Strait Islander Social Justice Commissioner, made the following observations on the sentence lengths for Aboriginal and Torres Strait Islander people:

Aboriginal and Torres Strait Islander prisoners, particularly women, tend to be serving shorter sentences than non-Indigenous prisoners, indicating that

12 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

13 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

14 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

15 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

16 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

17 Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015*.

sentences of imprisonment are being imposed on Indigenous people for more minor offences.¹⁸

4.16 The UNSW Law Society also referred to some research on the sentences received by Indigenous women:

[I]ndigenous women are more likely to receive a custodial sentence for minor offences compared to other non-Indigenous women in prison. The types of offences committed by Indigenous women are generally associated with severe poverty relating to 'non payment of fines, shop lifting, driving and alcohol related offences.' [I]ndigenous women are twice as likely to be in custody than non-Indigenous women, with good order offences being their most serious crime accounting for 54 per cent.¹⁹

Young people

4.17 Aboriginal and Torres Strait Islander young people (aged 10-17) are also overrepresented in the juvenile justice system. The Australian Institute of Health and Welfare (AIHW) reported that on an average day in 2014-15, there were 5,600 young people aged 10 and older who were under supervision (either in their communities or in secure detention facilities) in Australia due to their involvement or alleged involvement in crime.²⁰

Although less than 6% of young people aged 10-17 in Australia are Indigenous, more than 2 in 5 (43%) young people under supervision on an average day in 2014-15 were Indigenous. This proportion was higher in detention, where more than half (54%) were Indigenous.²¹

4.18 In terms of the rate of Indigenous young people under supervision, the AIHW stated:

In 2014-15, the rate of Indigenous young people aged 10-17 under supervision on an average day was 180 per 10,000 compared with 12 per 10,000 for non-Indigenous young people. Indigenous young people were therefore about 15 times as likely as non-Indigenous young people to be under supervision on an average day.²²

18 *Submission 5*, p. 5. See also Law Council of Australia, *Submission 41*, p. 12.

19 *Submission 14*, p. 18.

20 Australian Institute of Health and Welfare (AIHW), *Youth justice in Australia 14-15*, Bulletin 133, April 2016, p. 1. Young people can be charged with a criminal offence if they are aged 10 and older. The upper age limit for treatment as a young person is 17 in all states and territories except Queensland, where the limit is 16. However, some young people aged 18 and older are also involved in the youth justice system. This may be due to the offence being committed when the young person was aged 17 or younger; the continuation of supervision once they turn 18; or their vulnerability or immaturity. Young people may be supervised either in their communities or in secure detention facilities. See AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 3.

21 AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 7. References to tables and figures have been removed from this quote.

22 AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 7.

4.19 In Western Australia, an Indigenous young person was 27 times as likely as a non-Indigenous young person to be under supervision on an average day. In the Northern Territory an Indigenous young person was 17 times as likely as a non-Indigenous young person to be under supervision on an average day and in Queensland an Indigenous young person was 16 times as likely.²³

4.20 Looking at the rates of imprisonment of youth in unsentenced and sentenced detention, the AIWH stated that Indigenous youth were 28 times more likely to be in sentenced detention, and 25 times more likely to be in unsentenced detention in the June 2015 quarter.²⁴

4.21 In terms of comparison by age and gender:

On average, Indigenous young people under supervision were younger than non-Indigenous people. This was the case for both males and females. In 2014-15, about half (49%) of all Indigenous young people under supervision on an average day were aged 10-15, compared with almost one-third (32%) of non-Indigenous young people.

Similar proportions of Indigenous and non-Indigenous young people under supervision were male (80% and 83%, respectively).²⁵

The adequacy of statistical information

4.22 In relation to the adequacy of statistical information and data collected and made available by the various levels of government in relation to Aboriginal and Torres Strait Islander justice issues, Mr Gooda observed:

There is a substantial amount of data available which tells us that Aboriginal and Torres Strait Islander people are represented disproportionately as offenders and victims in the criminal justice system. However, the many gaps in research and data mean that we do not have all the information needed to know what works from a policy perspective.²⁶

4.23 Witnesses and submissions identified a range of data gaps in relation to the statistical information currently collected. For example, Mr Nick Parmeter, Executive Policy Lawyer, Law Council of Australia, commented:

Currently, we do not have reliable or consistent figures on the number of times unique individuals enter or leave the corrections system in a given year, or aggregate numbers of the receptions and releases. The absence of

23 See AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 8.

24 AIHW, *Youth detention population in Australia 2015*, Bulletin 131, December 2015, p. 12. Young people may be detained in secure detention facilities while they are unsentenced—that is, while awaiting the outcome of their court matter, or while awaiting sentencing after being found or pleading guilty. They may also be in sentenced detention when they have been proven guilty in court and have received a legal order to serve a period of detention, see AIHW, *Youth detention population in Australia 2015*, Bulletin 131, December 2015, p. 4.

25 AIHW, *Youth justice in Australia 2014-15*, Bulletin 133, April 2016, p. 9. References to tables and figures have been removed from this quote.

26 *Submission 5*, p. 7.

flow data means that the true state of imprisonment may be significantly worse than we currently believe to be the case.²⁷

4.24 Professor Julie Stubbs of the Australian Justice Reinvestment Project, noted:

Data on the involvement of Indigenous women in the criminal justice system is limited, since criminal justice sources typically report with respect to women or Indigenous people, but not Indigenous women per se. Data is particularly poor concerning police and prosecutorial practices, which underpin criminalisation.²⁸

4.25 Submissions identified the issue of determining Indigenous status as a fundamental flaw in data collection processes. Researchers from the Australian Institute of Criminology commented specifically on this issue in relation to collecting data on deaths in custody:

An ongoing issue in maintaining deaths in custody data, and other criminal justice data more generally, is the determination of an individual's Indigenous status. The manner in which Indigenous status is determined varies between different states and territories and sometimes between agencies within a state or territory. While most agencies use self-reporting of Indigenous status based on a standard question developed by the Australian Bureau of Statistics ('ABS'), others rely on an officer's educated, but still subjective judgment of physical appearance.²⁹

4.26 The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) also identified the recording of Indigenous status as an issue in relation to data collection:

NATSILS notes with concern that Victoria still records the ethnicity of offenders and victims by "racial appearance" which means the ethnic identification of a person in the subjective opinion of the attending police officer. In the offending statistics provided by Victoria, by far the greatest number of recorded ethnicities is 'unspecified'. For example, in 2013/2014 the total number of assaults proceeded against 'Aboriginal and Torres Strait Islander people' was 1,599.59 The total number of assaults proceeded against by people of 'unspecified' racial ethnicity was 6,732.60 It is submitted that this is likely to indicate that police find categorising people based on perceived ethnicity problematic, which indeed it is for very obvious reasons. It also means that Victoria's statistics are invalid in this regard.³⁰

4.27 NATSILS, among others, also highlighted the need for data to be disaggregated in other ways:

27 *Committee Hansard*, 4 April 2016, p. 16.

28 *Submission 12*, Attachment 1, p. 59.

29 *Submission 12*, Attachment 1, p. 76.

30 *Submission 13*, pp 18-19.

NATSILS is also concerned about the paucity of data of people with mental illnesses, disabilities and cognitive impairments in the justice system. Despite the high prevalence of disability it remains an untold story not only in justice, but in all other areas that determine social outcomes for Aboriginal and Torres Strait Islander people such as education, employment and housing. The absence of available data makes evaluation and policy on this very crucial issue difficult.³¹

4.28 NATSILS recommended:

Western Australia, Victoria, Tasmania and Australian Capital Territory record more consistent and detailed data relating to Aboriginal and Torres Strait Islander people. This will help to inform measured, evidenced based policy on criminal justice issues.³²

4.29 Mr Gooda also commented on the gaps in data collection in this area:

One of the critical gaps in our knowledge of the justice system is regarding people with cognitive impairment. We know that people with cognitive impairment are overrepresented in the criminal justice system, and Aboriginal and Torres Strait Islander people with such disabilities are particularly over-represented.' However, we do not know specifically how many people in Australian prisons have intellectual disabilities or cognitive impairments.³³

4.30 Aside from the issue of recording Indigenous status, submissions referred to other specific gaps in relation to the statistical information relating to Aboriginal and Torres Strait Islander justice issues. Mr Gooda identified deficiencies in data collection including:

- a need for culturally appropriate data collection;³⁴ and
- more reliable information on the effectiveness of diversion programs for Aboriginal and Torres Strait Islander offenders.³⁵

Data collection in Western Australia

4.31 Some submissions particularly criticised the collection of data in Western Australia. Western Australia Council of Social Services (WACOSS) and Amnesty International were both highly critical of the Western Australian Department of Corrective Services' data collection and provision of statistical information. In its submission Amnesty International provided the following summary of its concerns:

The Western Australian Government has failed to collect and make available relevant disaggregated statistical data to allow for such analysis

31 *Submission 13*, p. 19.

32 *Submission 13*, p. 19.

33 *Submission 5*, p. 8.

34 *Submission 5*, p. 7.

35 *Submission 5*, p. 8.

within the justice sector or by those who wish to monitor and offer potential solutions from outside government.

Amnesty International encountered considerable difficulties in obtaining disaggregated statistical data about the experience of Aboriginal young people in the Western Australian youth justice system. This is due to gaps in disaggregated data available publicly; standard data not having been provided to national studies on youth justice; and incomplete information being provided in response to Amnesty International's requests for data and information.

A representative of the Department of Corrective Services told Amnesty International that problems with data were currently affecting their own capacity to plan for programs. As the state with the highest rate of over-representation of Aboriginal young people in detention, Western Australian must improve its collection and dissemination of disaggregated data in order to adequately understand where the system is failing Aboriginal young people.³⁶

4.32 Amnesty International continued:

The situation has further deteriorated recently. Weekly statistics and monthly graphical reports about the number of young people in detention, previously published by the Department of Corrective Services, have not been provided since June 2014. The 2013–14 annual report of the Department of Corrective Services deviates from the format used in previous years and provides less information that is disaggregated by Indigenous status (for example relating to the referral to Juvenile Justice Teams).³⁷

4.33 The Aboriginal Family Law Services (WA) also commented on data collection in WA:

Data related to the prevalence and impact of any policy related to Aboriginal people in WA to date tends to be piecemeal and is not evidence based. This has resulted in unreliable data that does not clearly state the issues that impact on Aboriginal communities. Therefore, strategies being developed to address issues impacting on Aboriginal people at best can only be tentative and exploratory in nature. There is an urgent need for all organizations working in the Aboriginal arena, be they government or non-government to collect accurate data related to any programs and services provided in order to determine strategies to be employed.³⁸

36 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 19.

37 *Supplementary Submission 39*, Amnesty International Australia, *There is always a brighter future: Keeping Indigenous kids in the community and out of detention in Western Australia*, June 2015, p. 19. See also Western Australian Council of Social Services, *Submission 25*, Attachment 1, p. 50.

38 *Submission 15*, p. 16.

Deficiencies in the Juvenile Justice National Minimum Data Set

4.34 Amnesty International also commented on the deficiencies in the Juvenile Justice National Minimum Data Set (JJ NMDS). The JJ NMDS is a joint project between the Australian Juvenile Justice administrators and the Australian Institute of Health and Welfare (AIHW). The AIHW website explains further:

In Australia, the states and territories are responsible for juvenile justice and there is marked diversity in terms of legislation, policy and practices among jurisdictions. The JJ NMDS provides nationally consistent data on young people's experience of juvenile justice supervision, both in the community and in detention

...

The first report containing data from the JJ NMDS was released in February 2006 and covered 2000–01 to 2003–04. Annual reports have subsequently been published[.]³⁹

4.35 Amnesty International noted:

There are inconsistencies and gaps between states and territories in data relating to contact with the youth justice system. The Juvenile Justice National Minimum Data Set (JJ NMDS) is a valuable dataset but does not include state and territory data on police diversions, nor does it incorporate data on arrests or unsupervised court orders. The data is also not linked to information on adult contact with the justice system, so it is difficult to track rates of recidivism as a longer term trend through entry of young people into the adult system.

Disappointingly neither the Western Australian nor Northern Territory governments – with the highest rates of Indigenous youth over-representation in detention in the country – have provided standard data to the JJ NMDS since 2008–09.⁴⁰

4.36 In its submission, the AIHW noted that Western Australia recently committed to the provision of JJ NMDS in future collections. Further, in 2013-14, AIHW included non-standard data supplied by Western Australian and the Northern Territory in annual reporting, where possible.⁴¹

4.37 At the public hearing in Perth, Ms Tammy Solonec, Indigenous Rights Manager, Amnesty International, stated that the solution goes further than Western Australia and Northern Territory contributing to the JJ NMDS:

39 See Australian Institute of Health and Welfare website, *Juvenile Justice National Minimum Data Set (JJ NMDS) background*, available at: <http://www.aihw.gov.au/youth-justice/jj-nmds-background/>. The following information is collected for the JJ NMDS: Characteristics of young people under juvenile supervision: age, sex, Indigenous status, age at first supervision; Supervised orders: order start and end dates, end reason, order type; Detention periods: start and end dates, end reason and detention type.

40 *Submission 39*, p. 14.

41 *Submission 9*, p. 2.

But, even if they did contribute, that dataset only collects the data for children in custody—the corrective services data. What we really need is an integrated form of data that also brings in the police data so we can determine what type of offending they are doing and really address the underlying causal factors. That is our best recommendation to the government as to how to target diversion and give judges options: to really get the data right in the first place.⁴²

4.38 AIHW noted that information from the JJ NMDS may be enhanced through data linkage, which can be a cost-effective way of improving or developing new information:

Some linkage projects with the JJ NMDS data have been undertaken, allowing for analysis of young people who access multiple community services...

In addition to the JJ NMDS national and jurisdictional data sets, which contain data on service-provision programs and may be suitable for data linkage include child care, education, homelessness, housing, health services and disability services.⁴³

Role of the Commonwealth

4.39 Ms Solonec emphasised the importance of integrating corrective services data and police data and the role of the Commonwealth Government:

We actually need that integration to occur. That is something we are seeking. We have been working with the Department of Corrective Services and the WA police. It looks like the WA government, in particular, is quite far off having an integrated system of data. But we think that the federal government is in a fantastic position to exercise its leadership to ensure that the Northern Territory and Western Australia comply with these data requests and to actually push all of the states and territories to integrate their data so that, as well as collecting the data from corrective services, we are collecting the data from police. We think that if we were able to get that data, especially in a national standardised format, we could start to really get a good picture of what is happening and really address the underlying causal factors in a strategic way, which is not happening at the moment.⁴⁴

4.40 At the public hearing in Canberra, Ms Esther Bogaart, Director, Legal Assistance and Women's Safety Section, Attorney-General's Department (AGD), noted the Commonwealth has taken a role in developing a national data set manual for the legal assistance sector. Ms Bogaart confirmed that this manual only applied to the provision of legal services by legal assistance services.⁴⁵ In relation to the collection of data on incarceration rates, Ms Bogaart indicated that she was aware that the

42 *Committee Hansard*, 4 August 2015, p. 4.

43 *Submission 9*, p. 2.

44 *Committee Hansard*, 4 August 2015, p. 7.

45 *Committee Hansard*, 4 April 2016, p. 30.

Australian Bureau of Statistics 'has done some work on consistent data collection in the criminal justice space'.⁴⁶

4.41 The committee pressed officers from AGD to identify which department or government body should have ownership of this issue to ensure that there is consistent and standardised data about incarceration rates. Ms Elizabeth Quinn, Assistant Secretary, Legal Assistance Branch, AGD, stated:

I am unclear that there would be a single, logical owner. I understand that ideally you would look to the Commonwealth when eight jurisdictions are doing things differently. I am not sure in the space that we are talking about that there is a logical Commonwealth lead on it, but obviously the Commonwealth has an extremely strong vested interest in the ultimate outcome—which is justice as a whole and Indigenous justice as a key issue. I would think that where we are headed in the data standardisation work [in relation to the provision of legal services], that that becomes the obvious next step that we would be looking—I do not want to say 'leading' because the endgame that you are talking about may be beyond our grasp—but our liaison is with the departments of justice in each state and territory. I think that is an important link, and their being at the table for this sort of data standardisation[.]⁴⁷

4.42 Ms Quinn subsequently advised that the Council of Australian Governments (COAG) Law, Crime and Community Safety Council (LCCSC) would be an appropriate forum for the discussion and negotiation on the standardisation and collection of data.⁴⁸ AGD provided the following information about the LCCSC and its agenda:

The [LCCSC] agenda is comprised of issues identified and sponsored by members. The [LCCSC] consists of ministers with responsibility for law and justice, police and emergency management. Each Australian state and territory, the Australian Government and New Zealand Government is represented by a maximum of two ministers.

A LCCSC member would need to sponsor an item for it to be listed on the agenda.⁴⁹

Justice targets

4.43 In 2008, COAG agreed to six targets to address the disadvantage faced by Indigenous Australians. The targets were:

- close the gap in life expectancy within a generation (by 2031);
- halve the gap in mortality rates for Indigenous children under five by 2018;

46 *Committee Hansard*, 4 April 2016, p. 30.

47 *Committee Hansard*, 4 April 2016, p. 30.

48 *Committee Hansard*, 4 April 2016, pp 30-31.

49 Attorney-General's Department, answers to questions on notice, received 13 April 2016, p. 1.

- ensure access to early childhood education for all Indigenous four year olds in remote communities by 2013;
- halve the gap in reading, writing and numeracy achievements for children by 2018;
- halve the gap for Indigenous students in Year 12 (or equivalent) attainment rates by 2020; and
- halve the gap in employment outcomes between Indigenous and other Australians by 2018.⁵⁰

Background

4.44 Since the introduction of these Closing the Gap targets, there has been ongoing support to include a target to address the overrepresentation of Aboriginal and Torres Strait Islander peoples as both offenders and victims in the criminal justice system, referred to as a 'justice target', in these measures.⁵¹

4.45 In 2009, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Tom Calma AO, stated that the 'emphasis on health, education and employment all speak to a vision of strong Indigenous communities'.⁵² However, Dr Calma continued:

[I]t is a serious omission that no formal targets were set at that point to close the gap in imprisonment rates...

The problem is...that you will not be able to meet these [health, education and employment] targets if you continue to have such a high proportion of the Indigenous population caught up in the criminal justice system because imprisonment compounds individual and community disadvantage.⁵³

4.46 While Dr Calma was of the view that the Closing the Gap targets in themselves would lead to an improvement in life changes and, consequently, a reduction in imprisonment rates, he noted 'this could take a generation at the very least [and for] this reason, specific justice targets are needed now'.⁵⁴

4.47 In June 2011, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in its report *Doing Time – Time for Doing*, noted that the Standing Committee of Attorneys-General (SCAG) were working on justice targets for possible inclusion in the Closing the Gap strategy and recommended:

50 Council of Australian Governments website, Closing the Gap in Indigenous Disadvantage, available at: www.coag.gov.au/closing_the_gap_in_indigenous_disadvantage (accessed 26 November 2015).

51 Australian Human Rights Commission, *Social Justice and Native Title Report 2014*, pp 117-118.

52 Australian Human Rights Commission, *Social Justice Report 2009*, p. 53.

53 Australian Human Rights Commission, *Social Justice Report 2009*, pp 53-54.

54 Australian Human Rights Commission, *Social Justice Report 2009*, p. 54.

[T]hat the Commonwealth Government endorse justice targets developed by [SCAG] for inclusion in the Council of Australian Governments' Closing the Gap strategy. These targets should then be monitored and reported against.⁵⁵

4.48 In July 2011 SCAG met and Ministers discussed the unacceptable rates of incarceration of Indigenous Australians and referred to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Committee's report and recommendations. SCAG agreed to the following:

(a) to significantly reduce the gap in Indigenous offending and victimisation and to accurately track and review progress with a view to reviewing the level of effort required to achieve outcomes [and]

(b) to ask First Ministers to refer to COAG the possible adoption of justice specific Indigenous closing the gap targets, acknowledging that in many instances their relative occurrence are due to variable factors outside the justice system.⁵⁶

4.49 In June 2013, the Senate Legal and Constitutional Affairs References Committee, in its report on the *Value of a justice reinvestment approach to criminal justice in Australia*, noted SCAG's agreement of July 2011 and recommended:

[T]he Commonwealth Government refer to [COAG] the establishment of justice targets for Aboriginal and Torres Strait Islander people as part of the Closing the Gap initiative, directed to reducing the imprisonment rate of Aboriginal and Torres Strait Islander people.⁵⁷

4.50 In August 2013, the then Minister for Indigenous Affairs, the Hon Jenny Macklin MP, announced that the Australian Labor Party was committed to developing three new targets for inclusion in the Closing the Gap Strategy, including a justice target:

The new [justice] target will help to focus national effort to address high rates of offending and victimisation in Indigenous communities.

The target will be developed through a reference group of key Indigenous stakeholders, and in discussions with state and territory governments.⁵⁸

4.51 The then Shadow Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, indicated that the Coalition would provide bipartisan support for the

55 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, June 2011, pp 23-25, 40.

56 Standing Committee of Attorneys-General, *Communiqué*, 21 and 22 July 2011, p. 2 (accessed 1 December 2015).

57 Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, pp 122-123, 125.

58 The Hon Jenny Macklin MP, Minister for Indigenous Affairs, *Closing the Gap*, Media release, 9 August 2013 (accessed 1 December 2015).

proposed new Closing the Gap justice target. Despite offering support for the new target, Senator Scullion cautioned:

I am worried if we get too many targets they will lose their impact and then we could lose focus.⁵⁹

4.52 Despite this bipartisan commitment prior to the last federal election, there has been no progress in this policy area. In the *Social Justice and Native Title Report 2014*, Mr Mick Gooda, the current Aboriginal and Torres Strait Islander Social Justice Commissioner included the response from Senator Scullion, who is now the Minister for Indigenous Affairs, on the reasons why justice-related targets have not been developed:

- The Government considered the inclusion of additional targets in the Closing the Gap framework, including a justice-related target. The Council of Australian Governments agreed to a new target on school attendance at its meeting in May this year.
- The Government does not support the development of more targets than have already been agreed at this time. It considers that the adoption of too many targets may result in a loss of impact and focus for the existing targets.
- The Government is focused on making a practical difference on the ground to the lives of Indigenous Australians. Getting children to school and adults to work is the most effective approach to improving community safety and reducing incarceration.
- The Government will seek to engage with State and Territory governments, Indigenous communities and other stakeholders about what else can be done to achieve better justice-related outcomes.⁶⁰

4.53 At the Senate Finance and Public Administration Legislation Committee's estimates hearing in February 2016, Minister Scullion further explained the reasons that the Government does not support a justice target as part of the Closing the Gap targets:

I think there is a very valid reason for having a target in the justice area, and it is exemplified by the excellent work that the Northern Territory is doing. The Northern Territory government has a justice target—an incarceration justice target. It also has a victim target. I think it is quite a sophisticated way of having the approach. Why should it have that and not [the Commonwealth]? We have absolutely no control. We are not a part of the justice system. The courts are controlled at that level. All of those things are controlled at that level. We can have activities in that area.

Under COAG, I think the Northern Territory government's having the target is the place where those targets should be. It is foolish to say, 'Well, the Commonwealth should adopt a target. Let's have another target.' And then we would all have a bit of a lunch break. That is it. Everyone is happy.

59 Senator the Hon Nigel Scullion, Shadow Minister for Indigenous Affairs, *Labor's Indigenous Affairs plans short on results*, Media release, 9 August 2013 (accessed 1 December 2015).

60 Australian Human Rights Commission, *Social Justice and Native Title Report 2014*, p. 117.

They have called for a target. We have said we will have a target. But it is a nonsense if we are saying, 'We're going to go and do that,' yet we have absolutely no responsibility. We have no legislative process; we have nothing. That is not to say that we cannot do what we are doing now and have a much better working relationship with the states and territories to do whatever we can within our purview, such as ensure we are moving our employment processes towards the jails, and to ensure that we are using world-best practice, that franchised approach to what the states and territories are doing.

Certainly, through this COAG in the next round, as the Prime Minister indicates, we need to ensure that those people have the levers have the targets, but we need to be working very closely with them to ensure that whatever the Commonwealth can contribute in this regard we will. It is not about targets being a problem; it is about who owns the targets. We have no levers. The states and territories have them all. The Northern Territory government is an exemplar in this area, and we should ensure that the remainder of the jurisdictions who have these levers adopt the targets in the same way as their partner in COAG the Northern Territory has done.⁶¹

4.54 Minister Scullion concluded:

Wherever the Commonwealth government can assist, we will. But it is silly to start saying we will give ourselves a target. That undermines the credibility of Closing the Gap. It undermines the credibility of proper targets that we should be held to account for. Of course we will continue to work with the various jurisdictions to provide the very best outcomes in all areas of outcomes for our first Australians.⁶²

Support for justice targets

4.55 In his submission, Mr Gooda referred to the *Social Justice and Native Title Report 2014*, in which he had outlined the case for targets as a performance measurement tool in public policy:

Targets encourage policy makers to focus on outputs and outcomes, rather than just inputs. It is not enough for governments to continue to report on what they do and spend, especially if that appears to be making little positive difference. Targets move us towards accountability and ensure that tax payer's money is being spent in a results-focused way.⁶³

4.56 Mr Gooda explained that it is not targets in the Closing the Gap strategy in and of themselves which lead to changes:

[B]ut the enhanced level of cooperation at the Council of Australian Governments level and targeted increases in funding. However, without the

61 Senate Finance and Public Administration Legislation Committee, *Estimates Hansard*, 12 February 2016, p. 43.

62 Senate Finance and Public Administration Legislation Committee, *Estimates Hansard*, 12 February 2016, p. 43.

63 *Submission 5*, Appendix B, p. 31.

[Closing the Gap] targets in place to guide this work, and a mechanism whereby the Prime Minister annually reports to Parliament against these targets, there is a real risk that our progress would stall.

[The Closing the Gap targets] have made the gap between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians visible. This is exactly what needs to happen on the issue of overrepresentation with the criminal justice system as victims and offenders. I would argue that most Australians know little about this problem, but many would be alarmed at the statistics. Raising the profile of the issue through targets can help build sustained pressure for improvement.⁶⁴

4.57 Mr Gooda strongly urged a return to the pre-election commitment to develop justice targets.⁶⁵ Other submissions also argued for the inclusion of a justice target in the Closing the Gap strategy. For example, Public Interest Advocacy Centre argued:

The current targets in the Closing the Gap framework relate to life expectancy, child mortality, education and employment. The exclusion of justice targets ignores an important indicator of improvement in the current target areas. It also ignores the fact that the disadvantage experienced by Aboriginal and Torres Strait Islander people is multi-layered. For example, for an Aboriginal or Torres Strait Islander young person, reaching a higher level of education, which will impact on whether that young person undertakes university studies and employment, both of which are factors which have been shown to reduce the likelihood he will end up in the criminal justice system. Excluding justice targets is to leave out a significant chunk of policy that must relate to and interact with other policies seeking to address Aboriginal disadvantage.⁶⁶

4.58 The National Association of Community Legal Centres (NACLC) stated:

NACLC considers that justice targets are a vital tool in attempts to address the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system and would facilitate measurement of government initiatives against clear targets. The inclusion of a justice target in the Closing the Gap would also strengthen and support the necessary commitment to justice reinvestment strategies.⁶⁷

4.59 The Indigenous Legal Needs Project submitted:

[J]ustice targets provide benefit by establishing a clear focus and a greater degree of accountability for governments and the work they are undertaking in a justice context. Developing specific justice targets provides measurable outcomes towards which government and others can work in attempting to reduce Indigenous contact with the justice system. Any system of targets

64 *Submission 5*, Appendix B, p. 32.

65 *Submission 5*, Appendix B, p. 37.

66 *Submission 17*, pp 18-19. See also Tenancy WA, *Submission 32*, p. 14; Amnesty International, *Submission 39*, pp 15-16.

67 *Submission 42*, p. 10.

must also, however, incorporate relevant civil and family law-related targets, including given the link the ILNP has identified between Indigenous over-representation and unmet need in these areas.⁶⁸

4.60 National Justice Coalition cautioned that '[j]ustice targets alone will not solve the problem of over-representation of Aboriginal and Torres Strait Islander people in the justice system'.⁶⁹ However:

[Justice targets] are a crucial starting point and tool to drive coordinated action and significant policy focus in this area. Additionally, the implementation of justice targets would provide an important accountability mechanism, raising the profile of the issue which in turn would lead to sustained pressure for improvement.⁷⁰

4.61 NATSILS indicated it had continuously advocated for the introduction of justice targets.⁷¹ In terms of the development of justice targets NATSILS noted:

In order for justice targets to be meaningful they will need broad-based buy in from key Aboriginal and Torres Strait Islander organisations. This should be accompanied by a detailed plan as to how such targets will be achieved. ...NATSILS believes that this plan should embrace the principles and initiatives of justice reinvestment. This approach should entail partnering closely with Aboriginal and Torres Strait Islander organisations (such as NATSILS), in order to incorporate Aboriginal and Torres Strait Islander people as part of the solution to their negative contact with the justice system.⁷²

4.62 The National Justice Coalition recommended that justice targets be aimed at reducing Aboriginal and Torres Strait Islander incarceration rates and creating safer communities, through reduced rates of violence against Aboriginal and Torres Strait Islander people. The National Justice Coalition recommended that justice targets be established which seek to both:

- Close the gap in rates of imprisonment by 2040; and
- Cut the disproportionate rates of violence to at least close the gap by 2040 with priority strategies for women and children.⁷³

4.63 Amnesty International supported these dual targets which include both reduced victimisation and reduced incarceration:

68 *Submission 19*, p. 11.

69 *Submission 40*, p. 18.

70 *Submission 40*, p. 18.

71 *Submission 13*, p. 23.

72 *Submission 13*, pp 23-24.

73 *Submission 40*, p. 18. See also Amnesty International, *Submission 39*, p. 15; Law Council of Australia, *Submission 41*, p. 28.

[Dual targets] would ensure a focus on outcomes that ultimately improve community safety while also recognising the reality that there is significant overlap between Indigenous offenders and victims of crime.⁷⁴

74 *Submission 39*, p. 15. See also Law Council of Australia, *Submission 41*, p. 28.