

10. Aboriginal Justice Agreements

Contents

Summary	177
Background	178
The ACT Partnership	179
The Victorian agreements	180
Related government strategies	181
Characteristics of Aboriginal Justice Agreements	181
The future of Aboriginal Justice Agreements	182
Criminal justice targets for ‘Closing the Gap’	184

Summary

10.1 There are numerous programs in place that aim to divert Aboriginal and Torres Strait Islander peoples from the criminal justice system, or to prevent re-entry following sentence. Some of these have been summarised or referred to in the previous chapters. The ALRC has been told, however, that many of these programs are run in isolation by particular individuals or groups; are not evaluated; and, in some cases, their development is not underpinned by the participation of Aboriginal and Torres Strait Islander community members. These issues can result in an unsystematic approach: programs can be difficult to track; outcomes or impacts are unknown; and programs that are doing well may be vulnerable to budget measures. It can also preserve a ‘top down’ approach which excludes or minimises Aboriginal and Torres Strait Islander community participation.

10.2 Aboriginal Justice Agreements (AJAs) were introduced in some states and territories as a way to preserve collaboration and accountability regarding the contact of Aboriginal and Torres Strait Islander peoples with the criminal justice system and consequent incarceration. AJAs have historically represented a coalition between peak Aboriginal and Torres Strait Islander organisations and state or territory governments to improve justice outcomes for Aboriginal and Torres Strait Islander peoples.

10.3 In this chapter, the ALRC identifies the various AJAs of the states and territories, with particular focus on the agreement developed in Victoria. The ALRC proposes the introduction and renewal of state and territory based AJAs. As most states and territories have had experience with AJAs, the ALRC seeks feedback on the value of AJAs, and any obstacles to renewing, developing or implementing such agreements.

10.4 The ALRC also asks whether justice targets should be introduced when the Commonwealth Government renews the ‘Closing the Gap’ policy.

Background

10.5 AJAs were first introduced following a summit of key Aboriginal and Torres Strait Islander organisations that were concerned about a gap in state and territory government accountability left after the requirement for state and territories to report on Aboriginal and Torres Strait Islander incarceration, as recommended by the Royal Commission into Aboriginal Deaths in Custody, concluded.¹

10.6 At their inception, AJAs were to be developed in all states and territories (excluding the NT) in partnership with Aboriginal and Torres Strait Islander groups. They were required to cover the ‘delivery, funding, and coordination of Indigenous programs and services’.² AJAs were to include, among other things, targets to reduce the rate of over-representation of Aboriginal and Torres Strait Islander persons in the criminal justice system and to decrease incarceration rates.

10.7 Not all jurisdictions adopted an AJA. The AJAs of states and territories are outlined in the table below.

Table 1: Aboriginal Justice Agreements in states and territories 2000–2016

State territory	Year	Agreement	Status
ACT	2010	ACT Government, <i>Aboriginal and Torres Strait Islander Agreement 2010–2013</i>	Expired
	2015	ACT Government, <i>Aboriginal and Torres Strait Islander Agreement 2015–2018</i>	Running
NSW	2003	Aboriginal Justice Advisory Council, <i>NSW Aboriginal Justice Agreement</i>	Expired
	2004	Aboriginal Justice Advisory Council, <i>Aboriginal Justice Plan: Beyond Justice 2004–2014</i>	Expired
NT	n/a	Not adopted	Under development
Qld	2000	The Queensland Government, <i>The Queensland Aboriginal and Torres Strait Islander Justice Agreement (2000–2011)</i>	Evaluated in 2006 Concluded in 2011
SA	n/a	Not adopted	
Tas	n/a	Not adopted	
Vic	2000	Department of Justice (Vic), <i>The Victorian Aboriginal Justice Agreement Phase 1</i>	Expired

1 Fiona Allison and Chris Cunneen, ‘The Role of Indigenous Justice Agreements in Improving Legal and Social Outcomes for Indigenous People’ (2010) 32 *Sydney Law Review* 645, 648–649.

2 Fiona Allison and Chris Cunneen, ‘Indigenous Justice Agreements’ (Current Initiatives No 4, Indigenous Justice Clearinghouse, June 2013) 1–2.

State territory	Year	Agreement	Status
	2006	Department of Justice (Vic), <i>The Victorian Aboriginal Justice Agreement Phase 2</i>	Evaluated in 2012
	2013	Department of Justice (Vic), <i>The Victorian Aboriginal Justice Agreement Phase 3</i>	Running Evaluation due 2018
WA	2004	Government of Western Australia, <i>Western Australian Aboriginal Justice Agreement 2004–2009</i>	Expired
	2009	State Aboriginal Justice Congress, <i>State Justice Plan: Aboriginal Community Solutions for Statewide Issues (2009–2014)</i> (A non-government strategy developed under the AJA)	Expired

10.8 AJAs generally involve numerous state and territory government departments, including: Premier and Cabinet; Aboriginal and Torres Strait Islander policy development; Justice and Attorney General; Police; Corrective Services; and Family Services.³

10.9 The ACT and Victoria have current AJAs. All other states and territories either did not adopt an agreement, or the AJA has lapsed.

The ACT Partnership

10.10 The ACT AJA—called ‘the Partnership’—was developed with the ACT Aboriginal and Torres Strait Islander Elected Body in 2015.⁴ The Partnership includes an action plan to reduce the average number of Aboriginal and Torres Straits Islander people in prison to less than 10% of the prison population. It aims to do this by ‘improving accessibility, utilisation and effectiveness of justice-related programs and services’, including diversionary programs.⁵

10.11 The ‘action plan’ outlines key initiatives, measures and delegates for each program. In the area of criminal justice, this includes: developing culturally appropriate corrective services programs; increasing participation in throughcare; creating outreach support to aid compliance with community-based orders; and maximising existing diversion options.⁶

10.12 The Partnership and its actions are to be monitored by the Elected Body and the Aboriginal and Torres Strait Islander Sub-committee of the ACT Public Service Strategic Board. Annual community forums seeking feedback from the community on

³ See, eg, parties to the Queensland and Victorian Aboriginal Justice Agreement.

⁴ As noted below, it was developed with reference to the *National Indigenous Law and Justice Framework 2009–2015*.

⁵ ACT Government, *ACT Aboriginal and Torres Strait Islander Justice Partnership 2015–2016* (2015) 3.

⁶ *Ibid* [1.1]–[1.8].

the effectiveness of service outcomes are to be held, and publicly available progress reports are to be submitted to the ACT Attorney-General annually.⁷

10.13 The ALRC welcomes comments and submissions on the operation of the Partnership in the ACT.

The Victorian agreements

10.14 Victoria has taken a long-term, staged approach to developing an AJA. The first phase began with AJA1 which, among other things, created infrastructure to facilitate ongoing collaboration with government and Aboriginal and Torres Strait Islander groups, including the creation of the Aboriginal Justice Forum and Regional and Local Aboriginal Justice Advisory Committees (RAJAC).⁸

10.15 The Aboriginal Justice Forum (AJF) meets three times per year and is constituted by Victorian justice government representatives and the Koori Caucus. The Caucus is comprised of representatives from the nine RAJACs and other peak Aboriginal and Torres Strait Islander organisations. The Caucus meets six weeks prior to the AJF for a minimum of two days to determine and discuss issues for the agenda, and again the day before the AJF.

10.16 AJA2 outlined a government action plan and set benchmarks for monitoring the success of the programs developed under the Agreement.⁹ Among other programs, it included the Local Justice Worker Program and the delivery of the Wulgunggo-Ngalu Learning Place residential diversion program for men (discussed in Chapter 7).

10.17 The Victorian AJAs were evaluated in 2012. The evaluation found that the Agreements delivered ‘significant improvements in justice outcomes for Koories in Victoria’, but that there was more to do.¹⁰ For example, it found that there had not been a proportionate focus on the needs of Koori women,¹¹ categorising this omission as a ‘key risk point in the system that could be strengthened to reduce over-representation’.¹²

10.18 The evaluation found that, while Aboriginal and Torres Strait Islander over-representation had increased, the increase was less than would have been expected without AJA2.¹³ The evaluation further found that AJA2 had delivered ‘gross benefits’ to Victoria of between \$22 and \$26 million, and it recommended the development of AJA3.¹⁴

7 Ibid 34.

8 Allison and Cunneen, above n 2, 4.

9 Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) 26–28.

10 Ibid 3.

11 Ibid 79.

12 Ibid 52–4; Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the Justice System* (2013) 26.

13 Nous Group, *Evaluation of the Aboriginal Justice Agreement—Phase 2: Final Report* (2012) 4, 5, figure 1.

14 Ibid 57.

10.19 AJA3 was introduced in 2013. It expanded on the programs—including diversion programs for Aboriginal and Torres Strait Islander women—and targets of AJA2. It will undergo evaluation in 2018.

10.20 AJAs in Victoria have been well-received. In preliminary consultations with Victorian stakeholders, the ALRC heard that these agreements have facilitated partnerships and justice programs that would not have otherwise occurred.

Related government strategies

10.21 Other states and territories may not have specific AJAs, but they do have policies, frameworks and strategies related to Aboriginal and Torres Strait Islander incarceration rates. These are many, and include the adoption of Reconciliation Action Plans by government departments.

10.22 Some relevant policies may have been developed under the *National Indigenous Law and Justice Framework 2009–2015* (the Framework)—an initiative of the then Standing Committee of Attorneys-General—designed to guide states and territories on ‘good practice’ approaches to eliminate Aboriginal and Torres Strait Islander disadvantage in law and justice; and to close the gap in law and justice outcomes.¹⁵

10.23 One of the goals of the Framework was to reduce over-representation in the criminal justice system,¹⁶ and states and territories were encouraged to develop and trial innovative crime prevention initiatives in partnership with communities.¹⁷ It intended to provide an opportunity for government, NGOs and Aboriginal and Torres Strait Islander peoples ‘to build on existing partnerships and agreements to identify and develop the most appropriate response to law and justice issues’.¹⁸ The ACT AJA was developed under the Framework.¹⁹

10.24 The Framework noted its link with work undertaken by states and territories under the national ‘Closing the Gap’ commitments—particularly with work related to the commitment to build safe communities.²⁰ The Framework formed one of three national policy vehicles in that regard.²¹ Closing the Gap is further discussed below.

Characteristics of Aboriginal Justice Agreements

10.25 The Victorian and ACT AJAs share similar characteristics. The ALRC has identified four defining features: collaboration; governance; joint objectives; and evaluation.

15 Standing Committee of Attorneys-General, *National Indigenous Law and Justice Framework 2009–2015* (2010).

16 *Ibid* goal 2.

17 *Ibid* [2.1.1c].

18 *Ibid* 4.

19 ACT Government, above n 5, 24.

20 Standing Committee of Attorneys-General, above n 15, 6.

21 The two other policies were *The National Council’s Plan to Reduce Violence Against Women and their Children 2009–2021*, and the *National Framework for Protecting Australia’s Children 2009–2020*.

10.26 Collaboration: AJAs are not government-developed strategic plans that can appear to take a ‘top down’ approach. Collaborative processes are the defining feature of AJAs.²² Stakeholders in preliminary consultation to this Inquiry stressed the importance of participation by Aboriginal and Torres Strait Islander peoples in the development and implementation of criminal justice reforms aimed at decreasing Aboriginal and Torres Strait Islander incarceration rates. Participation can result in solutions that are community led and culturally safe and appropriate.

10.27 Governance: AJAs can facilitate participation through agreed systems of governance. Victoria spent time developing governance infrastructure and a representative process, which enables any group or body to participate in the Aboriginal Justice Forums.

10.28 Joint objectives and strategic directions: AJAs provide for the creation of joint justice objectives across government departments and agencies. Programs and initiatives to address incarceration rates can otherwise be siloed from other agencies and initiatives.

10.29 The ALRC has been told that, outside of the ACT and Victoria (and, perhaps, coordinated responses such as the Maranguka Justice Reinvestment Project in Bourke),²³ programs relating to prevention, diversion and rehabilitation appear to be developed and applied in isolation, without a clear strategic framework for governance or decision making. Many programs are personality driven and most remain unevaluated.²⁴ This may leave current programs in jurisdictions without AJAs more vulnerable to changes in government, policy or budget allocations.

10.30 Accountability: AJAs have clear objectives and provide measurable action plans for government departments to meet. Government accountability is facilitated by processes which promote ongoing participation, discussion and review, and by conducting independent evaluations.

The future of Aboriginal Justice Agreements

Proposal 10–1 Where not currently operating, state and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to renew or develop Aboriginal Justice Agreements.

22 Allison and Cunneen, above n 2, 3.

23 See ch 13.

24 Allison and Cunneen, above n 2, 6.

10.31 AJAs have not featured in recent inquiries relevant to Aboriginal and Torres Strait Islander incarceration.²⁵ There is, however, momentum to introduce AJAs in some states and territories. For example:

- In 2015, the South Australian Council of Social Services called for an agreement to address rising Aboriginal and Torres Strait Islander incarceration rates.²⁶
- In 2016, the *Making Justice Work* coalition called on the NT Government to prioritise the creation of an Aboriginal Justice Agreement.²⁷ The ALRC has been told that an AJA is now under development as part of the government's policy platform.
- In 2017, the Human Rights Law Centre and the Change the Record Coalition recommended that state and territory governments develop and implement community led justice agreements, with a particular focus on Aboriginal and Torres Strait Islander women in the justice system.²⁸

10.32 The ALRC recognises that while AJAs are not a complete solution to the high rates of incarceration of Aboriginal and Torres Strait Islander peoples, AJAs are an important initiative that can assist in bringing about a reduction. It is not just the agreements themselves but the infrastructure which they create that plays a critical role in the facilitation of collaborative, culturally appropriate, and effective criminal justice responses.

10.33 The success of some of the proposals made in this Discussion Paper relies on the development of collaborative relationships between government and peak Aboriginal and Torres Strait Islander organisations.²⁹ AJAs could provide a foundation on which to facilitate, build and solidify these relationships.

10.34 The ALRC also recognises that AJAs may be challenging to develop. They rely heavily on government agencies working together, and the development, identification and engagement of peak Aboriginal and Torres Strait Islander organisations.³⁰ States and territories that seek to formalise Aboriginal and Torres Strait Islander participation in criminal justice decision making would need to develop suitable governance structures that reflect the diversity of Aboriginal and Torres Strait Islander communities and requirements in that jurisdiction. A strong governance structure is critical. For example, the evaluation of the AJA conducted in Queensland found that, although an increase in incarceration rates had slowed under the Agreement, the

25 Such as those reviews referred to in the Terms of Reference.

26 South Australian Council of Social Service, *SACOSS Calls for Indigenous Justice Agreement in Response to Increasing Rates of Over-Representation of Aboriginal Young People in SA Juvenile Justice System* <www.sacoss.org.au>.

27 *Making Justice Work, 2016 NT Election: Six Asks to Make Justice Work for Territorians* <<http://makingjusticework.wixsite.com/website>>.

28 Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-Imprisonment* (2017) rec 4.

29 See, eg, proposals in chs 2, 4 and 7.

30 Allison and Cunneen, above n 2, 3.

government's failure to train and properly resource Community Justice Groups had affected the effectiveness of the Agreement.³¹

10.35 The ALRC understands that justice policy and initiatives are constantly developing. It is likely that AJAs or similar initiatives may already be underway in the states and territories without current agreements. The ALRC also recognises that NSW, Queensland and Western Australia have implemented AJAs and have not renewed them in the same form.

10.36 The ALRC welcomes submissions on the proposal that, where not already operating, AJAs be developed in each state and territory. Particularly, the ALRC welcomes any comments regarding: experiences with current AJAs; potential obstacles to the implementation of AJAs; and whether other policy frameworks regarding Aboriginal and Torres Strait Islander incarceration rates are providing good outcomes.

Criminal justice targets for 'Closing the Gap'

Question 10-1 Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?

10.37 In 2005, Tom Calma AO, the then Aboriginal and Torres Strait Islander Social Justice Commissioner, called the Australian Government to commit to achieving equality for Aboriginal and Torres Strait Islander peoples in the areas of health and life expectancy within 25 years.³² This led to the National Indigenous Health Equality Campaign in 2006 and to the adoption of the Close the Gap Campaign that demanded state, territory and federal governments commit to closing the health and life expectancy gap between Aboriginal and Torres Strait Islander peoples and other Australians within a generation. On 20 December 2007, the Council of Australian Governments (COAG) agreed to be accountable for reaching this goal within 10 years. This strategy has become known as 'Closing the Gap'.³³ It set six targets that are reported on annually by the incumbent government.

10.38 In the *Social Justice Report 2009*, it was argued that the expansion of the Closing the Gap targets to include a criminal justice target would address the disproportionate representation of Aboriginal and Torres Strait Islander peoples as both victims of crime and in the prison system itself:

Although it is a serious omission that no formal targets were set at that point to close the gap in imprisonment rates, the emphasis on health, education and employment all speak to a vision of strong Indigenous communities. The problem is, however, that you will not be able to meet these targets if you continue to have such a high proportion of the Indigenous population caught up in the criminal justice system

31 Chris Cunneen, 'Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement' (2006) 10(4) *Australian Indigenous Law Review* xvi.

32 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005* (2005).

33 Australian Indigenous HealthInfoNet, *History of Closing the Gap* < www.healthinonet.edu.au >.

because imprisonment compounds individual and community disadvantage. Over time we would hope that the Closing the Gap targets will lead to an improvement in life chances and therefore a reduction in imprisonment but this could take a generation at the very least. For this reason, specific justice targets are needed now.³⁴

10.39 In the *Social Justice and Native Title Report 2014*, support for justice targets that would address this over-representation was reiterated:

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 payers' money is being spent in a results-focused way.³⁵

10.40 The Social Justice Commissioner argued that targets have made the gap between Aboriginal and Torres Strait Islander Australians and non-Indigenous Australians 'visible' and that this is 'exactly what needs to happen on the issue of over-representation with the criminal justice system as victims and offenders'.³⁶

10.41 Despite bi-partisan support for the development and inclusion of criminal justice targets as part of Closing the Gap, no justice targets have been included to date. The 2016 Senate Finance and Public Administration References Committee report discussed the call for criminal justice targets to be added to COAG Closing the Gap targets and many submitters to that Inquiry supported the development of justice targets.³⁷ For example, the National Association of Community Legal Centres argued that justice targets are a vital tool in supporting justice reinvestment strategies and provide a way to measure the impact and effectiveness of government strategies.³⁸

10.42 Others questioned whether adding more targets to the Closing the Gap targets might both water down these original targets and distract from the work already being done in the other areas. The Australian Government has also argued that, as most of the levers to reduce incarceration are held at the state and territory level, it may not make sense to have a target for the Commonwealth.³⁹

10.43 The 2017 report, *Overrepresented and Overlooked: the Crisis of Aboriginal and Torres Strait Islander Women's Growing Over-imprisonment*, supported the development of criminal justice targets, calling on COAG to develop a fully resourced national plan of action or partnership agreement directed towards addressing Aboriginal and Torres Strait Islander over-imprisonment and violence rates. A second

34 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2009* (2010) 53–4.

35 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014* (2014) 118.

36 Ibid 119.

37 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 55–8.

38 National Association of Community Legal Centres, Submission No 42 to Senate Standing Committee on Finance and Public Administration, Parliament of Australia, *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (21 May 2015) 18–19.

39 Commonwealth, *Parliamentary Debates*, Senate, 12 February 2016 (Nigel Scullion) 61.

recommendation in the report advocated for the development of national justice targets in partnership with Aboriginal and Torres Strait Islander peak organisations, to:

- close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people and non-Indigenous people by 2040
- cut disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040, with priority strategies for women and children.⁴⁰

10.44 The Closing the Gap targets are currently under review. The conclusion of the *National Indigenous Law and Justice Framework 2009–2015* has meant that there is limited continuing national leadership on issues related to Aboriginal and Torres Strait Islander incarceration. Whether or not there should be justice targets included in any new policy initiative remains a question that the ALRC is seeking guidance on.

40 Human Rights Law Centre and Change the Record Coalition, above n 28, rec 5–6.