

Pacific Indigenous Peoples Preparatory meeting for the World Conference on Indigenous Peoples 19 - 21 March 2013, Sydney Australia

Agenda Item: Justice

Paper submitted by the Indigenous Peoples Organisation (IPO) Network of Australia, prepared by the National Congress of Australia's First Peoples.

Introduction

Access to justice for Indigenous peoples is about how we can use both Indigenous and Western systems of justice to ensure the greatest possible quality of life for all Indigenous peoples. As such, access to justice for Indigenous peoples must include procedural and substantive protections across social, cultural, economic, political and environmental areas; as well as the right to impartiality, non-discrimination and access to fair and just remedies to breaches of rights.¹

Access to justice is one of the critical issues facing Aboriginal and Torres Strait Islander peoples in Australia today, and is fundamental to our ability to access and exercise our human rights.

Interaction with the Western justice system impacts on many areas of life for Aboriginal and Torres Strait Islander peoples including:²

- recognition as First Peoples, including in the nation's Constitution
- self-determination and governance
- equality and non-discrimination
- access to remedies for stolen generations and stolen wages, including compensation
- access to our lands, territories and resources, including land rights, native title, cultural heritage, rights to water and other resources, and compensation
- customary law
- protection of intellectual property and knowledge
- access to services including housing, education, employment, social security and service delivery
- criminal justice including victims' compensation, policing and police complaints

¹ Human Rights Council, 'Panel Discussion on Access to Justice for Indigenous Peoples', Twenty First Session of the Human Rights Council, Palais des Nations, Geneva (18 September 2012).

² See Allison F, Cunneen C, Schwartz M and Behrendt L, *Indigenous Legal Needs Project: NT Report*, James Cook University, Cairns, 2012.

- access to natural justice
- family matters including child protection, family and domestic violence
- wills and intestacy
- accident and injury
- credit and debt
- consumer issues
- taxation.

While criminal justice issues are a major concern for Aboriginal and Torres Strait Islander peoples³, we are also concerned that access to justice has been heavily focused on aspects of criminal justice, with little attention paid to civil and family law issues, and the collective rights of Indigenous peoples to develop and maintain our own governance based on our own customs, traditions, procedures and juridical systems.

The National Congress of Australia's First Peoples recently attended the Expert Group Seminar on Access to Justice for Indigenous Peoples Including Truth and Reconciliation Processes. The paper submitted to this Seminar is attached at Appendix 1 of this Paper.

Recommendations

There are a number of opportunities for positive change regarding increasing Indigenous people's access to justice. We recommend that all United Nations Member States commit to:

1. using the United Nations Declaration on the Rights of Indigenous Peoples to guide all legislative and policy development and operations that affect Indigenous peoples, including issues related to access to justice; and comply with its provisions
2. promoting and enabling self-determination for Indigenous peoples through the development of constructive agreements with Indigenous peoples to advance self-determination and land rights, including development of their own lands, territories and resources
3. ensuring equality and non-discrimination, particularly based on race, in policies, legislation and operations affecting Indigenous peoples
4. reviewing their national constitutions and legislation at the national, state and territory levels with a view to appropriately recognising the unique status of Indigenous peoples as First Peoples; and reflecting the rights of Indigenous peoples, in particular freedom from discrimination
5. developing programs for specific groups including Indigenous men, women, young people and Indigenous communities collectively to improve access to justice across the broad range of issues involved

³ According to the Australian Bureau of Statistics and the Australian Institute of Health and Welfare, Aboriginal and Torres Strait Islander people are 14 times more likely to be incarcerated than non-Aboriginal and Torres Strait Islander adults; Aboriginal and Torres Strait Islander young people are up to 24 times more likely to be in youth detention than non-Aboriginal and Torres Strait Islander young people; and Aboriginal and Torres Strait Islander children are 10 times more likely to be wards of the state, making up 1% of the children in state care.

6. developing in conjunction with Indigenous peoples just and fair procedures for the resolution of conflicts and disputes between the Indigenous peoples and the State
7. taking a strategic approach to crime and justice with Indigenous peoples which is informed by standardised data collection and focused on prevention and diversion as well as protection and rehabilitation; and that States consider the adoption of Justice Reinvestment as a way of reducing incarceration of Indigenous peoples
8. providing financial and technical support for Indigenous organisations to provide legal services, including community legal education and policy and law reform advice; and ensure that non-Indigenous bodies and service providers respond appropriately to Indigenous justice needs.

Appendix 1

**Statement to the
Expert Mechanism on the Rights of Indigenous Peoples
Expert Seminar on Access to Justice for Indigenous Peoples
Including Truth and Reconciliation Processes**



NATIONAL CONGRESS
OF AUSTRALIA'S FIRST PEOPLES

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Introduction

The National Congress of Australia's First Peoples (Congress) supports the work of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) on this critical study, and welcomes the opportunity to participate and contribute to the Expert Seminar on Access to Justice for Indigenous Peoples Including Truth and Reconciliation Processes.

Congress is a national representative body for Aboriginal and Torres Strait Islander people. Congress is an independent national voice, with the purpose of ensuring the rights of Australia's First Peoples are promoted and protected, and to find solutions to the injustices, disadvantages and impediments that continue to obstruct the development of our peoples. Congress is a leader, an advocate, and a source of advice and expertise for Australia's First Peoples. Drawing strength from culture and history, Congress aims to bring equality, freedom, opportunity and empowerment to all First Peoples. Congress has almost 5000 individual members, and 150 organisational members collectively representing around 50,000 Aboriginal and Torres Strait Islander people.

As a result of our colonial history, the majority of Aboriginal and Torres Strait Islander people in Australia live each day between two worldviews: the Aboriginal and Torres Strait Islander worldview and the Western worldview. In managing this relationship, access to justice is one of the critical issues facing Aboriginal and Torres Strait Islander peoples in Australia today, and is fundamental to our ability to access and exercise our human rights.

Interaction with the Western justice system impacts on many areas of life for Aboriginal and Torres Strait Islander peoples including:⁴

- recognition as First Peoples, including in the nation's Constitution
- self-determination and governance
- equality and non-discrimination
- access to remedies for stolen generations and stolen wages, including compensation
- access to our lands, territories and resources, including land rights, native title, cultural heritage, rights to water and other resources, and compensation
- customary law
- protection of intellectual property and knowledge
- access to services including housing, education, employment, social security and service delivery
- criminal justice including victims' compensation, policing and police complaints
- access to natural justice

⁴ See Allison F, Cunneen C, Schwartz M and Behrendt L, *Indigenous Legal Needs Project: NT Report*, James Cook University, Cairns, 2012.

- family matters including child protection, family and domestic violence
- wills and intestacy
- accident and injury
- credit and debt
- consumer issues
- taxation.

While criminal justice issues are a major concern for Aboriginal and Torres Strait Islander peoples, we are also concerned that access to justice has been heavily focused on aspects of criminal justice, with little attention paid to civil and family law issues, and the collective rights of Indigenous peoples to develop and maintain our own governance based on our own customs, traditions, procedures and juridical systems.

Access to justice for Indigenous peoples is about how we can use both Indigenous and Western systems of justice to ensure the greatest possible quality of life for all Indigenous peoples. As such, access to justice for Indigenous people's must include procedural and substantive protections across social, cultural, economic, political and environmental areas; as well as the right to impartiality, non-discrimination and access to fair and just remedies to breaches of rights.⁵

Finally, while Aboriginal and Torres Strait Islander peoples have used the Western legal system and parliamentary inquiry processes to address specific issues, such as the *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) in 1987⁶ and the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* completed in 1997⁷, formal truth and reconciliation processes have not been conducted in Australia. Of the processes conducted in Australia to remedy impacts of policy and legislation and the injustice suffered by Aboriginal and Torres Strait Islander peoples as a consequence of colonisation, substantive positive change has been marginal and formal recommendations of parliamentary and other processes have often been ignored.

This submission will draw on the Congress Justice Policy,⁸ which was developed with input from expert advisors in our Justice Working Group, our Members and Delegates. The policy focuses predominantly on access to justice as it relates to the criminal justice system (See Appendix 1). This submission will also discuss Indigenous specific issues relevant to access to justice including self-determination, constitutional recognition, governance, native title, access to remedy in response to discriminatory policy and legislation, participation of

⁵ Human Rights Council, 'Panel Discussion on Access to Justice for Indigenous Peoples', Twenty First Session of the Human Rights Council, Palais des Nations, Geneva (18 September 2012).

⁶ Royal Commission into Aboriginal Deaths in Custody, at <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

⁷ Report of the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Australian Human Rights Commission, at http://humanrights.gov.au/social_justice/bth_report/report/index.html (accessed 20 February 2013).

⁸ National Congress of Australia's First Peoples, *National Justice Policy*, February 2013, <http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdfz> (accessed 7 February 2012).

Indigenous peoples in decision-making, and the design, development and implementation of policy and legislation affecting the rights of Indigenous peoples.

Aboriginal and Torres Strait Islander Peoples

Aboriginal and Torres Strait Islander people represent 2.5% of the Australian resident population.⁹

In 2011, there were 548,370 people identified as being of Aboriginal and/or Torres Strait Islander origin, of whom:

- 90% were of Aboriginal origin only
- 6% were of Torres Strait Islander origin only
- 4% identified as being of both Aboriginal and Torres Strait Islander origin.¹⁰

Young people make up a large proportion of all Aboriginal and Torres Strait Islander peoples, reflecting higher fertility and lower life expectancy than the non-Indigenous population. In 2011, 35.9% of the Aboriginal and Torres Strait Islander population was aged 0-14 years,¹¹ while 3.8% of the Aboriginal and Torres Strait Islander population were aged 65 years and over.¹²

The median age for Aboriginal and Torres Strait Islander peoples was 21 years compared with 37 years of age for non-Indigenous people.¹³

Aboriginal and Torres Strait Islander people live in every State and Territory (province) of Australia, ranging from 0.7% of the population in Victoria to 26.8% of the population in the Northern Territory.¹⁴ One-third (33%) of the total Aboriginal and Torres Strait Islander population live in capital city areas, however in the Northern Territory, 80% of people identified as being of Aboriginal and/or Torres Strait Islander origin lived outside the capital city, Darwin.¹⁵

⁹ Australian Bureau of Statistics (ABS), *2011 Census Counts — Aboriginal And Torres Strait Islander Peoples*, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2075.0main+features32011> (accessed 7 February 2013).

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

The International Human Rights Context

As acknowledged in the concept note for the Expert Seminar on Access to Justice for Indigenous Peoples Including Truth and Reconciliation Processes, the right to access to justice is affirmed in Article 8 of the *Universal Declaration of Human Rights*: ‘everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law’. However, all of the articles within the Universal Declaration of Human Rights provide guidance to states about securing access to justice for their citizens. These articles are reflected in binding international law including the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The treatment of Aboriginal and Torres Strait Islander people in the Australian justice system must also be considered within the broader context of Australia’s international human rights obligations.

The United Nations Declaration on the Rights of Indigenous Peoples

The overarching international human rights instrument for Aboriginal and Torres Strait Islander peoples is the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) as it constitutes the ‘minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’¹⁶; and it reflects international human rights law including those contained within the ICCPR related specifically to access to justice.

The Declaration provides extensive guidance to States on the implementation of their international legal obligations as they relate to Indigenous peoples. In particular, the Declaration must be used to guide the development of all policy and legislation that affects the rights of Indigenous peoples and to ensure the full and effective participation of Indigenous peoples in those processes; but also to promote and protect the collective rights of Indigenous peoples to develop and maintain our own customs, traditions, procedures and juridical systems and decision-making institutions.

The Declaration was endorsed by the Government of Australia in 2009. Unfortunately the Australian Government has since maintained that the Declaration is not legally binding on States because it does not hold the same legal status as an international covenant or treaty, and has not taken further steps to implement the Declaration. In relation to the legal status

¹⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, Article 43.

of the Declaration, we note that the United Nations General Assembly has recently provided the following clarification:

... even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal obligations that are related to the human rights provisions of the Charter of the United Nations, various multilateral human rights treaties and customary international law. The Declaration builds upon the general human rights obligations of States and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to connect to a consistent pattern of international and State practice, and hence, to that extent, they reflect customary international law.¹⁷

Congress sees the Declaration as a core document which guides all policy and operations. Congress believes that as the Declaration reflects internationally agreed human rights standards, States who have formally endorsed the Declaration have an obligation to comply with its provisions; and those who have not yet formally endorsed the Declaration should be strongly encouraged to do so.

International Human Rights Treaties and Mechanisms

Treaties and Conventions

Australia is a signatory to a number of human rights treaties that recognise and reinforce the rights of Aboriginal and Torres Strait Islander people outlined in the Declaration.

Australia is legally bound to the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, and has signed, ratified or endorsed a number of United Nations instruments relating to the rights of Aboriginal and Torres Strait Islander peoples, including the:

- *International Convention on the Elimination and all forms Against Racial Discrimination*
- *International Convention on the Elimination of all forms of Discrimination of Women*
- *International Convention Against Torture, and other cruel and degrading treatment or punishment*
- *International Convention on the Rights of the Child*
- *International Convention on the Rights of Persons with Disabilities.*

¹⁷ United Nations General Assembly, *Rights of indigenous peoples*, UN Doc A/66/288 (2011), para 68. At <http://www.un.org/Docs/journal/asp/ws.asp?m=A/66/288> (accessed 7 February 2013).

These conventions set the international benchmarks against which the operation of the Australian justice system should be judged. When considered against these benchmarks, it is clear that the legislative protections and institutional framework within Australia for ensuring compliance with international human rights obligations are inadequate.

For example, Australia is yet to ratify the International Labour Organisation (ILO) Convention 169 which affirms the specific rights of Indigenous peoples to property, in particular our lands, territories and resources. It also affirms Indigenous peoples' right to autonomy; and recognises that the cultures and identities of Indigenous peoples differ from the dominant population and form an integral part of our way of life.

Monitoring and human rights compliance

Universal Periodic Review (UPR)

The UPR provides an important mechanism for access to justice, as it creates a process where governments are held to account by their peers and the international community for their human rights situation.¹⁸

During Australia's appearance before the Human Rights Council in January 2011, 52 of the 192 United Nations Member States asked questions regarding Australia's human rights record. Of the 145 recommendations made by the Council, issues concerning the rights of Aboriginal and Torres Strait Islander peoples featured highly.

The Australian Government appeared before the Human Rights Council to deliver its formal response to the recommendations in June 2011. The Australian Government accepted in full or in part over 90 per cent of the recommendations. By doing so, it has agreed to take actions to progress these issues over the four year period from 2011–2015.

Australia has also committed to submitting a mid-term report which is due in 2013.

If the current gap in access to justice for Indigenous peoples is to be closed, the genuine commitment of states to address the recommendations made by the Human Rights Council is necessary.

- International Programmes of Action – 2nd Decade on the World's Indigenous Peoples and the Millennium Development Goals (MDGs)

The Australian Government have progressed components of international programmes of action including:

¹⁸ See generally the Office of the High Commissioner for Human Rights, Universal Periodic Review, <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx>, (viewed 2 November 2012).

- Goals 4-6 - the governments of Australia have committed to a long-term, measurable and targeted health campaign for Indigenous Australians through a National Partnership to Close the Gap for Indigenous Health Outcomes and a Statement of Intent for the Close the Gap Indigenous Health Equality Campaign. The Campaign is led by Indigenous and non-Indigenous national health peak organisations and includes six measureable targets for closing the gap between Indigenous and non-Indigenous Australians. The Statement of Intent also commits governments to seeking the full participation of Aboriginal and Torres Strait Islander peoples in addressing health needs. The Australian Government is currently working with Congress and Indigenous and non-Indigenous national health peak organisations to conduct consultations with Aboriginal and Torres Strait Islander community members to progress the development a national health plan.
- The establishment of Congress as a national Indigenous representative body aligns with the second goal of the 2nd Decade and is consistent with articles 18-24 of the Declaration. The establishment of Congress also included comprehensive consultation and control by Aboriginal and Torres Strait Islander peoples.

However, the Indigenous Peoples Organisations (IPO) Network of Australia has consistently raised concerns about the lack of commitment by the Australian Government to ensuring equality and non-discrimination particularly based on race in policies and legislation affecting Aboriginal and Torres Strait Islander peoples.¹⁹

International Programmes of Action are designed and agreed to by states to address significant human rights concerns. Unfortunately, many programmes of action go largely unacted due to the lack of genuine commitment and accountability by states to such processes. The programmes of action for the 1st and 2nd Decades on the World's Indigenous Peoples are clear examples where the response by states has been overwhelmingly inadequate.

United Nations Special Procedures

In addition to engagement with treaty bodies and the Human Rights Council through the Universal Periodic Review, the special procedures (also known as Special Rapporteurs) of the Human Rights Council provide an important mechanism in the promotion of access to justice for Indigenous peoples.

¹⁹ See for example, Indigenous Peoples Organisations Network of Australia, *Submission to the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people – Australian mission*, at http://humanrights.gov.au/social_justice/publications/srip_2009/index.html (accessed 20 February 2013); and the Statement made to the Permanent Forum on Indigenous Issues, Eighth Session, New York, 18 May – 29 May 2009 regarding the Second International Decade of the World's Indigenous People at http://humanrights.gov.au/social_justice/PFI18/internat_develop_PFI18.html (accessed 20 February 2013).

The ability of independent experts with a mandate to report and advise on human rights from a thematic or country-specific perspective assists in ensuring that all human rights related to access to justice, including that civil, cultural, economic, political and social elements are taken into account in advising States on the development of national juridical systems.

The ability for special procedures to undertake country visits; act on individual cases and concerns of a structural nature by sending communications to States; conduct thematic studies and convene expert consultations, contribute to the development of international human rights standards, engage in advocacy, raise public awareness, and provide advice for technical cooperation is particularly important for the protection and promotion of the access to justice for Indigenous peoples. Other than those rights affirmed in ILO Convention 169, the unique rights of Indigenous peoples have only recently been formally recognised within the international human rights system through the adoption of the Declaration by the General Assembly, and international jurisprudence on these rights is progressively developing.

The Australian Government extended a standing invitation to all special procedures in August 2008, and since then a number of Special Rapporteurs relevant to the rights of Aboriginal and Torres Strait Islander Peoples have made official visits including:

- the Special Rapporteur on the rights of indigenous peoples (Aug 2009)
- the Special Rapporteur on the right to health (Nov – Dec 2009)
- the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (July – Aug 2006).

The UN Special Rapporteur on violence against women, also visited Australia as part of a study tour in April 2012. The study tour had a specific, but not exclusive, focus on violence against women and Indigenous communities.

Congress encourages the Australian Government to formally respond to the reports of the rapporteurs who have already visited Australia, extend invitations to those who have not, and include a focus on Aboriginal and Torres Strait Islander people's rights in all future invitations.

The Australian Policy Environment

Historical and constitutional background

Justice issues for Aboriginal and Torres Strait Islander peoples in Australia must be understood within a historical context that has seen the law used as a tool of dispossession, oppression, assimilation, family dislocation and racial discrimination. Indeed, many of the

contemporary problems experienced by Aboriginal and Torres Strait Islander people in the justice system can be traced to the origins of the system.

The Australian legal system was inherited from the British and imposed upon Aboriginal and Torres Strait Islander peoples. Unlike other British colonies, a treaty was not negotiated between Aboriginal and Torres Strait Islander peoples and the colonising state. This ignored the sophisticated systems of customary law that existed prior to colonisation, as recognised in the landmark 1986 Australian Law Reform Commission (ALRC) report, *Recognition of Aboriginal Customary Laws*.²⁰ While the ALRC made a number of recommendations about the recognition of Aboriginal and Torres Strait Islander customary law across many areas of legislation and procedure, little has been done to implement these recommendations.

At its very foundation, the Australian Constitution, which established the Commonwealth of Australia in 1901, was drafted in the spirit of *terra nullius* and therefore without Aboriginal and Torres Strait Islander input. It fails to recognise the status of Aboriginal and Torres Strait Islander peoples as First Peoples and contains provisions that permit and anticipate racial discrimination. Section 51 (xxvi) for example, which was the result of the historic 1967 Constitutional Referendum, enables the Parliament to make ‘special laws’ with regard to people of a particular race. However, the Constitution does not stipulate that these ‘special laws’ or policies should benefit those affected, as opposed to discriminating against them.²¹ Section 25 of the Australian Constitution currently contemplates the exclusion of voters based on race. Despite the Constitution being in place for more than 100 years, and 44 attempts to change it through referendum, this provision has not been amended or remedied.

A particular complication of the system established by the Constitution is Australia’s federated system of government.²² Congress acknowledges that in this system, while the Commonwealth has responsibility under international law for the human rights of Aboriginal and Torres Strait Islander peoples, the areas of law that have the greatest impact on Aboriginal and Torres Strait Islander people—including most criminal, child protection and family violence laws, as well as policy and legislation concerning rights to lands, territories, resources and cultural heritage protection, health and education —are laws that are primarily the responsibility of State and Territory Governments. This means that national action on any issue requires the agreement and cooperation of nine separate governments.

A conversation is currently underway in Australia to recognise Aboriginal and Torres Strait Islander peoples in the nations Constitution. The Australian Constitution can only be changed by a referendum of the Australian people. In December 2010, an Expert Panel was

²⁰ Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, 12 June 1986, <http://www.alrc.gov.au/publications/report-31> (accessed 1 February 2013).

²¹ See *Kartinyeri v Commonwealth* (1998) 195 CLR 337.

²² Prior to the Australian Constitution in 1901, Australia was governed by six self-governing colonies.

appointed by the Prime Minister to examine options for constitutional reform. The Congress Co-Chairs participated as members on the Expert Panel. The Expert Panel advised that in addition to formally recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, that this is an opportunity to address the provisions of the Constitution that permit racial discrimination. The Expert Panel's recommendations included:

1. that section 25 of the Australian Constitution be repealed.
2. that section 51 (xxvi) be repealed.
3. that a new section 51A be inserted recognising that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples; acknowledging the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters; and respecting the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples.
4. that a new section 116A be inserted prohibiting racial discrimination.²³

In responding to the recommendations of the Expert Panel, the Australian Government have provided \$10m to conduct a community education campaign as the first step towards a national referendum. On 13 February 2013, the fifth anniversary of the National Apology to the Stolen Generations, the Australian Parliament passed the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2012* which will sunset in two years in line with the proposed timeframe for conducting the referendum. These are important steps towards reforming the national Constitution to recognise Aboriginal and Torres Strait Islander peoples as Australia's First Peoples.

Congress supports the recommendations of the Report of the Expert Panel and encourages its full adoption by the Australian Government. However, Congress also promotes the rights of Aboriginal and Torres Strait Islander peoples to self-determination and asserts that as sovereignty was never ceded by Aboriginal and Torres Strait Islander peoples, that constitutional recognition does not diminish that assertion.

National Human Rights Institutions

The Human Rights Council adopted a resolution at its twentieth session reaffirming the important role that National Human Rights Institutions (NHRI's) play in promoting and protecting human rights and fundamental freedoms, in strengthening participation and the rule of law, and in developing and enhancing public awareness of those rights and fundamental freedoms.

The role NHRI's can play in promoting and protecting the rights and fundamental freedoms of Indigenous peoples has also been noted by several international bodies and mechanisms

²³ For a full list of recommendations, see the Report of the Expert Panel, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution*, January 2012. At http://www.youmeunity.org.au/uploads/assets/3446%20FaHCSIA%20ICR%20report_text_Bookmarked%20PDF%2012%20Jan%20v4.pdf (accessed 1 February 2013).

in the United Nations including the Human Rights Council, the Permanent Forum on Indigenous Issues (UNPFII), and EMRIP.

The Australian Government established the Australian Human Rights Commission (the Commission) in 1986 by an act of the Federal Parliament. The Commission is an independent statutory organisation that operates in accordance with the *Paris Principles relating to the status of national institutions*, and reports to the federal Parliament through the Attorney-General.²⁴

The Commission facilitates access to justice through:

- conducting education and public awareness about human rights including by developing human rights education programs and resources for schools, workplaces and the community.
- promoting human rights compliance by providing independent legal advice to assist courts in cases that involve human rights principles; providing advice and submissions to parliaments and governments to develop laws, policies and programs; and undertaking and coordinating research into human rights and discrimination issues.
- resolving complaints of discrimination or breaches of human rights under federal laws and holding public inquiries into human rights issues of national importance.

The Commission also has a dedicated Aboriginal and Torres Strait Islander Social Justice Commissioner whose mandate is to monitor and report on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples. The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was created by the Federal Parliament in December 1992 in response to the findings of the RCIADIC, the National Inquiry into Racist Violence, and the extreme social and economic disadvantage faced by Aboriginal and Torres Strait Islander people in Australia.²⁵ The UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has described the Office of the Social Justice Commissioner within the Commission as an ‘exceptional model for advancing the recognition and protection of rights of indigenous peoples’.

National Human Rights Framework

The Australian legal and policy framework does not adequately protect human rights set out in core human rights treaties including the ICCPR and ICESCR, and other human rights standards agreed to by the Australian Government. Further individuals or peoples who experience violations of their human rights have limited access to appropriate legal remedies in Australia.

²⁴ For information about the Australian Human Rights Commission, see <http://humanrights.gov.au/about/index.html> (accessed 14 February 2013).

²⁵ Australian Human Rights Commission, Aboriginal & Torres Strait Islander Social Justice, http://www.humanrights.gov.au/social_justice/index.html (accessed 20 February 2013).

As a result of a national consultation process, recommendations were put to the Federal Parliament in 2009 to adopt a Human Rights Act; however this was not supported by the Parliament. Instead, the Australian Government introduced a National Human Rights Framework²⁶ in April 2010. The Framework is informed by the seven core human rights treaties and commits to a range of measures aimed at strengthening human rights protections including:

- initiatives to promote human rights education across the community and within the public sector
- a National Action Plan on Human Rights
- the establishment of a Joint Parliamentary Committee on Human Rights to scrutinise existing and proposed legislation for human rights compliance with Australia's human rights obligations
- consolidating Australia's federal anti-discrimination law into one consolidated Act.

Congress welcomes the initiatives to strengthen Australia's human rights protections, in particular the Joint Parliamentary Scrutiny Committee. Although Congress notes that with regard to the National Action Plan on Human Rights (the development of plans was an outcome from the 1993 World Conference on Human Rights), this will be Australia's third plan and there has been limited impact or improvement in access to justice for Aboriginal and Torres Strait Islander peoples as a result. States who have committed to the development of National Action Plans must be committed to achieving the identified outcomes and work with the relevant community sectors in progressing action items.

Systemic challenges to Access to Justice

Self-Determination and Governance

Self-determination is concerned with the fundamental right of people to shape our own lives.²⁷

The right of self-determination is affirmed in international law under article 1 of both the ICCPR and ICESCR and underpins all of the rights contained within the Declaration.

The right of self-determination for Aboriginal and Torres Strait Islander peoples has long been contentious in Australia. In fact, since colonisation, Australia has experienced waves of policy that undermines Aboriginal and Torres Strait Islander people's right to self-determination.

²⁶ For information on the Australian Human Rights Framework, see Australian Government, *Australia's Human Rights Framework*, <http://www.ag.gov.au/RightsAndProtections/HumanRights/HumanRightsFramework/Pages/default.aspx> (viewed 14 February 2013).

²⁷ Fletcher C (ed), *Aboriginal Self-Determination in Australia* (1994), p xi.

In order for Aboriginal and Torres Strait Islander peoples to achieve access to justice, we must be able to exercise our right of self-determination. Fundamental to any concept of self-determination is the ability of Indigenous peoples the world over to form and develop their own distinct institutions and to fully participate in decisions that affect us as well as determine our own social, cultural, economic, political and environmental development priorities.

In 2009, a number of years after the governments' abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC), the Australian Government committed \$29.2 million for the period 2010 -2013, for the establishment and operation of Congress, Australia's new national Aboriginal and Torres Strait Islander peoples' representative body. This funding commitment is not ongoing and the Government has not yet committed to a further round of funding or funding for an Establishment Investment Fund, which is essential to securing the future sustainability and independence of Congress. Committing to the investment fund was the only recommendation from the 'Future is in Our Hands'²⁸ report about the new representative body that has not yet been adopted. Without this financial security, the Congress is vulnerable to subsequent governments withdrawing funding, particularly in its early years when it is still establishing itself. The Establishment Investment Fund is one way in which Government can support and enable Congress and in turn support and enable effective Aboriginal and Torres Strait Islander national governance and self-determination.

Aboriginal and Torres Strait Islander service providers, as well as national, State and Territory peak bodies also play an important role in the lives of Aboriginal and Torres Strait Islander peoples, and provide a means of self-management, communication with Government, policy advice and service delivery. However in order for Indigenous peoples to be truly self-determining and to engage effectively with the broader societal and political structures, economic independence and sustainability of these organisations is critical. Unfortunately, many Aboriginal and Torres Strait Islander organisations are underfunded, under-resourced and face great uncertainty with regards to their future.

While each State and Territory has some form of land rights, the federal native title system provides one avenue for securing economic development opportunities through native title agreements; and independent community governance through the establishment of Prescribed Bodies Corporate, set up to manage native title rights and interests.

In response to the High Court's *Mabo* decision in 1992²⁹, the Australian Government enacted the *Native Title Act 1993* (NTA). The NTA provides the federal legislative framework for recognising at common law, the effects of colonisation including dispossession, and the

²⁸ Australian Human Rights Commission, "Our future in our hands" - Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples, Report of the Steering Committee for the creation of a new National Representative Body, 2009. At http://humanrights.gov.au/social_justice/rebody/report2009/index.html (accessed 20 February 2013).

²⁹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

rights of Aboriginal and Torres Strait Islander peoples to our lands, territories and resources. While the original Act was developed with some input by Aboriginal and Torres Strait Islander people, the adversarial nature of the native title system and the decisions of successive governments has resulted in the significant watering down of the rights of Aboriginal and Torres Strait Islander peoples in the Act.

The Act currently provides that while Indigenous and non-Indigenous interests can 'co-exist' in some instances, and agreement making is possible, the rights and interests of Aboriginal and Torres Strait Islander peoples are subordinate to non-Indigenous rights and interests. The system has also created inequality amongst Aboriginal and Torres Strait Islander peoples whereby some acts on lands result in the extinguishment of native title, while others do not.

Congress acknowledges the current governments' efforts to increase the effectiveness and flexibility of the native title system. However, without addressing issues such as adequate access to resources, the current burden of proof, the operation of the law regarding extinguishment, and the future acts regime; the native title system does not effectively promote access to justice or self-determination for Aboriginal and Torres Strait Islander peoples.

The Racial Discrimination Act (Cth) 1975 (RDA) and Special Measures

As a signatory to the *International Convention on the Elimination and all forms Against Racial Discrimination*, the Australian Government enacted federal legislation, the *Racial Discrimination Act 1975*, to ensure equality of treatment of all people regardless of their race. Unfortunately, relying on parliament to protect the rights and interests of Aboriginal and Torres Strait Islander peoples has not provided adequate protection against racial discrimination. Nor has it been effective in ensuring that the policies and laws of the government concerning Aboriginal and Torres Strait Islander peoples comply with both international and domestic legal requirements.

Aboriginal lawyer, academic and current member of the United Nations Permanent Forum on Indigenous Issues, Megan Davis observes that:

In Australia, Indigenous interests have been accommodated in the most temporary way, by statute. What the state gives, the state can take away, as has happened with ATSIC, the Racial Discrimination Act and native title.³⁰

The RDA has been compromised on three occasions: each time it has involved Aboriginal and Torres Strait Islander issues.

³⁰ Davis M, 'A woman's place...' (2009) 24 Griffith Review 156, p 157. At <http://www.griffithreview.com/edition-24-participation-society/222-essay/643.html> (viewed 13 February 2013).

The most recent example is the Northern Territory Emergency Response (NTER) which commenced in 2007, affecting 73 remote Indigenous communities in the Northern Territory. The NTER has been a focus of Human Rights Treaty Bodies including the Committee on the Elimination of Racial Discrimination and the Human Rights Council.³¹

In its original application the NTER legislation was not subject to the RDA. This legislation ended in 2012. While the subsequent policy platform, Stronger Futures in the Northern Territory has reinstated the application of the RDA, elements of it, such as the School Enrolment and Attendance Measures (SEAM) may still be discriminatory in its application. In order for this to be tested, Aboriginal and Torres Strait Islander peoples must be able to access the complaints mechanisms included in the RDA, which are administered by the Australian Human Rights Commission. However, the Commission and the Government must ensure that such processes are conducted with integrity, are not naturally biased or culturally unsafe.

In order to increase awareness and action regarding the prevalence of racial discrimination, in 2011 the Australian Government in partnership with the Australian Human Rights Commission committed to develop and implement a National Anti-Racism Strategy for Australia. The aim of the National Anti-Racism Strategy is 'to promote a clear understanding in the Australian community of what racism is, and how it can be prevented and reduced' and will be implemented between July 2012 and June 2015.³²

The role of economic, social and cultural factors: social determinants

The RCIADIC acknowledged that there are many social drivers that lie outside the direct responsibility of the justice sector which impact on justice outcomes. Cross-sectoral research has consistently affirmed that 'social determinants', which include a person's social and economic position in society, their early life experiences, their exposure to stress, their educational attainment, their employment status, and their past exclusion from participation in society, can all influence their social and emotional wellbeing and interaction with society throughout life. The impact of social determinants on justice outcomes are highlighted by examples in recently published studies:

³¹ Anaya S J, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010). At <http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf> (accessed 20 February 2013).

³² Australian Human Rights Commission, 'Racism. It stops with me'. At <http://itstopswithme.humanrights.gov.au/strategy.html> (accessed 20 February 2013).

- There is a link between a failure to detect and treat oral language disorders in early childhood (i.e. relating to listening and talking skills) and an increased risk of delayed language and literacy skills, which in turn increases the risk of youth incarceration.³³
- A recent study of Aboriginal and Torres Strait Islander people in Queensland prisons found that 72.8% of men and 86.1% of women had at least one mental health disorder, compared to a prevalence rate in the general community estimated at 20%³⁴. The study concluded that the over-representation of Aboriginal and Torres Strait Islander people in prison, the high prevalence of mental disorder, and the frequent transitioning to and from prison, would inevitably affect Aboriginal and Torres Strait Islander communities.

Access to Justice is directly linked to social determinants, as well as people’s economic, social and cultural health and well-being. The drivers of justice, therefore, are inter-related with other factors which lie outside the direct responsibility of the justice sector. This therefore requires a collaborative, whole of government approach to reforming the legal system focused on achieving targets under the Closing the Gap Framework discussed further below.

Over-representation of Aboriginal and Torres Strait Islander People in the Justice System

Similar to other countries that inherited the British justice system through colonisation—including the United States, Canada and New Zealand— Australia has experienced challenges in achieving access to justice for its Indigenous peoples. This includes increasing prison populations, unsustainable growth in the cost of prison systems, high rates of recidivism and sustained, multi-generational harm to communities. In reality, the system of justice inherited from the United Kingdom has evolved very little, and very slowly over the past few centuries.

The unacceptable over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system is the most serious way in which the justice system is failing Aboriginal and Torres Strait Islander peoples.

³³ Snow P. and Powell M., ‘Youth (in) justice: Oral language competence in early life and risk for engagement on antisocial behaviour on adolescence’ *Trends and Issues*. No 435, Australian Institute of Criminology, 2012.

³⁴ Heffernan E.B., Anderson K.C., Dev A., and Kinner S., ‘Prevalence of mental illness among Aboriginal and Torres Strait Islander people in Queensland prisons’, *Medical Journal of Australia*, 2012, Vol. 197(1).

- Aboriginal and Torres Strait Islander adults are incarcerated at 14 times the rate of non-Aboriginal and Torres Strait Islander adults;³⁵ and Aboriginal and Torres Strait Islander young people are almost 24 times more likely to be in youth detention than non-Aboriginal and Torres Strait Islander young people.³⁶
- Aboriginal and Torres Strait Islander people are also more likely to be the victim of crimes (being 23 times more likely to be hospitalised for assault); are more likely to have their children removed under child protection policies; and face barriers in regards to family and civil law including problems with debt, tenancy, employment, discrimination, stolen wages and victims compensation.
- For Aboriginal and Torres Strait Islander people who find themselves in protective custody, police custody, youth detention or prison, the conditions of detention also often fail to comply with human rights obligations under international law.
- Aboriginal and Torres Strait Islander legal services and community led preventative, early intervention, diversionary and rehabilitative programs struggle to keep up with demand and are chronically under-resourced and underfunded.

The Royal Commission into Aboriginal Deaths in Custody

In August 1987, the Commonwealth Government established the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), in response to unacceptable rates of deaths of Aboriginal and Torres Strait Islander people in prison and police custody. The commitment to the Royal Commission involved Commonwealth, State and Territory Governments.³⁷

The final report, signed on 15 April 1991, made 339 recommendations including that incarceration must be used as a last resort.³⁸ In framing its findings and recommendations, the RCIADIC addressed a broad range of social determinants affecting Aboriginal and Torres Strait Islander people and the criminal justice system including health, housing, land rights, and education.

In response to the recommendations, many jurisdictions established Aboriginal and Torres Strait Islander Justice Agreements, which provided an opportunity for Aboriginal and Torres Strait Islander communities to have a say in government policy and in monitoring the implementation of the recommendations.

While Justice Agreements and Aboriginal and Torres Strait Islander justice advisory bodies still exist in some jurisdictions, the commitment to addressing Aboriginal and Torres Strait

³⁵ Australian Bureau of Statistics, Prisoners in Australia 2011, Cat no 4517.0, p 8, [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/7B05CD44A0E2FC8ACA25795F000DBD0F/\\$File/4517_0_2011.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/7B05CD44A0E2FC8ACA25795F000DBD0F/$File/4517_0_2011.pdf) (accessed 6 June 2012).

³⁶ Australian Institute of Health and Welfare, *Juvenile Justice in Australian 2010-11*, Juvenile Justice Series no. 10. Cat No JUV 10, p.7, <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=10737422614&libID=10737422614>> (accessed 15 August 2012).

³⁷ Each State and Territory issued letters patent authorising the establishment of the Royal Commission.

³⁸ Royal Commission into Aboriginal Deaths in Custody, <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>.

Islander over-representation in the criminal justice system has at best lost momentum, or at worst has been lost.

The commitment to one of the core recommendations of the RCIADIC—that imprisonment should be used only as a last resort—has not been met. Needless, preventable deaths of Aboriginal and Torres Strait Islander people in custody continue to occur, demonstrating a failure to recognise the heightened duty of care that applies when a person has been deprived of their liberty. This indicates that there are deep cultural problems within the criminal justice system that will not be addressed without strong political leadership.

High incarceration rates of Aboriginal and Torres Strait Islander Australians

Current rates of incarceration reflect the cumulative effect of two decades of criminal justice policies, practices and legislation that have been counter to the recommendations of the RCIADIC. This includes adverse changes in sentencing law and practice, restrictions on judicial discretion, changes to bail eligibility, changes in administrative practices, changes to parole and post-release surveillance, limited availability of non-custodial sentencing options, and judicial and political perception of a need for tougher penalties.³⁹

At the most extreme end of the spectrum, these approaches include mandatory sentencing laws such as those that exist in Western Australia and the Northern Territory.⁴⁰ In the state of Western Australia, mandatory sentencing applies to young people between 10-18 years of age, and the court must consider a custodial sentence for repeat offenders on their third serious conviction.⁴¹

The rate of incarceration of Aboriginal and Torres Strait Islander people is 14 times the rate for non-Aboriginal and Torres Strait Islander people, and as at June 2011, the national age standardised imprisonment rate for Aboriginal and Torres Strait Islander people was 1,868 per 100,000 adults.⁴²

Of even more concern is that this gap is growing. Whereas rates of incarceration for non-Aboriginal and Torres Strait Islander people are relatively stable, the rate of incarceration of Aboriginal and Torres Strait Islander people is increasing: between the years 2000 to 2010, the Aboriginal and Torres Strait Islander imprisonment rate increased by 51.5%.⁴³

³⁹ Cunneen C, 'Punishment: Two decades of penal expansionism and its effects on indigenous imprisonment', *Australian Indigenous Law Reporter*, 2011, Vol 15 No. 1, p.11.

⁴⁰ Mandatory sentencing laws involve mandatory minimum periods of imprisonment or detention for adults and juveniles found guilty of certain offences. Concerns have been raised that these laws disproportionately impact on Aboriginal and Torres Strait Islander Peoples as they are more likely to have criminal histories and inadequate access to diversionary programs.

⁴¹ *Young Offender Act 1994* (WA), ss 124-130.

⁴² Australian Bureau of Statistics 2011: *Prisoners in Australia 2011*, *op cit*, p.8.

⁴³ Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2011*, Productivity Commission, Canberra, 2011, p.4.132, http://www.pc.gov.au/data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf (accessed 4 June 2012).

A contributing factor to the high incarceration rates of Aboriginal and Torres Strait Islander people is that we are also more likely than non-Aboriginal and Torres Strait Islander people to be placed in custody for trivial offences, such as using offensive language, resisting arrest, breaching bail, and non-payment of fines.⁴⁴ Developing strategies to address these issues would go some way to reducing the rates of incarceration of Aboriginal and Torres Strait Islander people.

Incarceration of Aboriginal and Torres Strait Islander women

While the increase in the imprisonment rate has been overwhelmingly driven by increased imprisonment of Aboriginal and Torres Strait Islander men, it is important to note that the rate of imprisonment of Aboriginal and Torres Strait Islander women has been growing rapidly. Based on non-age standardised data, the imprisonment rate for Aboriginal and Torres Strait Islander women grew by 58.6% between the years 2000 to 2010, compared to 35.2% for Aboriginal and Torres Strait Islander men.⁴⁵

Incarceration of Aboriginal and Torres Strait Islander youth

The gap in incarceration rates for Aboriginal and Torres Strait Islander young people is also of significant concern. While the most recent data shows that the rate of over-representation of Aboriginal and Torres Strait Islander youth has decreased over the four years to 2010-11, the gap in incarceration rates is still alarming: in the year 2011, the Aboriginal and Torres Strait Islander youth detention rate was almost 24 times the non-Aboriginal and Torres Strait Islander youth detention rate.⁴⁶

Taking a long-term view, the numbers of Aboriginal and Torres Strait Islander young people in detention have been growing faster than the numbers of non-Aboriginal and Torres Strait Islander young people. Between the years 2001 to 2009, the number of Aboriginal and Torres Strait Islander young people in detention increased by 55.2%, compared to 14.4% for non-Aboriginal and Torres Strait Islander young people.⁴⁷

The age profile of the Aboriginal and Torres Strait Islander population⁴⁸ also suggests that the rate of growth in adult incarceration is likely to accelerate in the medium term. While population projections indicate that the age profile of the Aboriginal and Torres Strait Islander population will move closer to the age profile of the non-Aboriginal and Torres

⁴⁴ For information about the types of crime that Aboriginal and Torres Strait Islander peoples are being incarcerated for, see: the Australian Institute of Criminology at <http://www.aic.gov.au/publications/current%20series/rpp/100-120/rpp107/09.html> (accessed 11 February 2013) and Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, 12 June 1986.

⁴⁵ Productivity Commission, *op cit*, p4.133.

⁴⁶ Australian Institute of Health and Welfare, *op cit*, p7.

⁴⁷ Productivity Commission, *op cit*, p4.137.

⁴⁸ As noted above, in 2011, 35.9% of the Aboriginal and Torres Strait Islander population was aged 0-14 years and the median age for Aboriginal and Torres Strait Islander peoples was 21 years, compared with 37 years of age for non-Indigenous people.

Strait Islander population over time, as life expectancy improves and fertility rates decline, population trends will see a significant increase in the numbers of Aboriginal and Torres Strait Islander people aged 25-34, which by 2021 is expected to have increased by 60%, compared to 2006.⁴⁹

The looming impact of this population 'bubble' means that there is an urgent need to prevent young Aboriginal and Torres Strait Islander people who are currently in—or about to enter—their teens from having the same level of contact with the justice system as older generations. Unless the rate of increase in youth detention can be reduced, rates of incarceration across the Aboriginal and Torres Strait Islander population are likely to continue to increase into the future.

Incarceration rates in different States and Territories

Data also reveals enormous differences in the gaps in incarceration rates between States and Territories, which Congress attributes to the State and Territory Government's differing levels of commitment to working with Aboriginal and Torres Strait Islander people to reduce incarceration. In Victoria, successive governments have committed publicly to implementing the recommendations of the RCIADIC and other measures to reduce Aboriginal incarceration, through a long-term Aboriginal Justice Agreement (now in its third phase), with public reporting on progress.⁵⁰ Victoria has one of the lowest rates of Aboriginal and Torres Strait Islander incarceration, at 1,137 per 100,000 Aboriginal and Torres Strait Islander people in 2010. This compares to Western Australia, where the lack of a systemic commitment to reducing incarceration has led to a rate almost three times that of Victoria, at 3,343 per 100,000 Aboriginal and Torres Strait Islander people.⁵¹ Western Australia, despite having 12.7% of the Aboriginal and Torres Strait Islander population,⁵² has 24.5% of the country's Aboriginal and Torres Strait Islander prisoners.⁵³

Conditions in detention

Conditions in prisons

⁴⁹ Based on data presented in Australia Bureau of Statistics, *Experimental estimates and projections: Aboriginal and Torres Strait Islander Australians 1991-2021*, Cat no 3238.0, 2009, p.35, [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/27B5997509AF75AECA25762A001D0337/\\$File/32380_1991%20to%202021.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/27B5997509AF75AECA25762A001D0337/$File/32380_1991%20to%202021.pdf) (accessed 6 June 2012)

⁵⁰ See Victorian Aboriginal Justice Agreement, <http://www.justice.vic.gov.au/home/your+rights/indigenous+victorians/aboriginal+justice/victorian+aboriginal+justice+agreement> (accessed 7 February 2013).

⁵¹ Productivity Commission, *op cit*, Table 4A.12.3.

⁵² Australian Bureau of Statistics, *Census QuickStats* (online resource), 2012, http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/5 (accessed 26 June 2012)

⁵³ Based on figures in Productivity Commission, *op cit*, Table A.12.1.

Overcrowding is a significant problem in many Australian prisons. In a number of jurisdictions, correctional authorities have responded to this problem by refitting single cells, to allow for 'double bunking'. This practice has been linked to increased risk of assault (including sexual assault)⁵⁴ and contraction of communicable diseases.⁵⁵ Prisons with high densities have been shown to produce higher death rates including from violent deaths, suicides and natural deaths amongst elderly prisoners.⁵⁶ Sustained crowding in prisons has also shown to produce higher levels of violence and other non-compliant behaviour, as well as increased psychiatric commitment rates.⁵⁷

In addition to overcrowding, the conditions in many Australian prisons fail to comply with the *United Nations Standard Minimum Rules for the Treatment of Prisoners*. The standard of accommodation has been identified as a catalyst for critical incidents such as riots, self-harm and suicide.⁵⁸ In 24 coronial inquests by the Coroner's Court into 26 deaths in South Australian prisons between 1994 and 2008 the Court held that aspects of the prison environment played a part in the unnatural death of prisoners.⁵⁹

A further concern arises from the use by some correctional authorities of facilities outside prison to house prisoners. Since 2007 in South Australia for example, 40 cells at the City Watch house have been allocated for use by corrective services.⁶⁰ In addition, cells at other police stations and court holding cells are also used periodically for prisoner accommodation⁶¹, including juvenile offenders,⁶² and some adult offenders are held in juvenile detention facilities.⁶³

⁵⁴ Heilpern D 1998: *Fear or Favour - sexual assault of young prisoners*, Southern Cross University Press.

⁵⁵ Charles C 2008: 'The Coroners Act 2003 (SA) and the Partial Implementation of RCIADIC: Consequences for Prison Reform', *Australian Indigenous Law Review*, Vol. 12, Special ed. 2, 2008, 75-89.

⁵⁶ Paulus, P, McCain, G & Cox, V, 'Death rates, psychiatric commitments, blood pressure and perceived crowding as a function of institutional crowding.' *Psychology and Nonverbal Behaviour*, (1978) Vol. 3, 107 - 116.

⁵⁷ McCain, G, Cox, V & Paulus, P 1980: *The Effect of Prison Crowding on Inmate Behaviour*. US Department of Justice, National Institute of Justice

⁵⁸ National Aboriginal and Torres Strait Islander Legal Services (NATSILS), *Submission on the National Human Rights Action Plan Baseline Study Consultation Draft*, 2011, p.31, <http://www.ag.gov.au/Documents/HRPB%20-%20NHRAP%20-%20Baseline%20Study%20-%20Submission%20-%20NATSILS.PDF> (accessed 13 August 2012)

⁵⁹ *ibid*, p32.

⁶⁰ Department for Correctional Services (South Australia) 2008, *Report on actions taken following the Coronal Inquiry into the Death in Custody of Robert Allen Johnson*.

⁶¹ See Australian Broadcasting Commission, 'Claims of overcrowding in SA Prisons', 10 March 2008,

<http://www.abc.net.au/news/stories/2008/03/10/2185116.htm> and Australian Broadcasting Commission, 'Police Station Holds Overflow', 6 November 2008, <http://www.abc.net.au/news/stories/2008/11/06/2411750.htm?site=adelaide>.

Conditions in police custody

There are significant problems with standards of care and treatment in police custody and when being transported by police or correctional authorities. Numerous inquests, reports and reviews have criticised the conditions in police watch houses and prisoner transport.

For example, the recent high profile deaths in custody of Kwementyaye Briscoe and Mulrunji Doomadgee reflect the tragic consequences of incarceration and over-policing in Aboriginal and Torres Strait Islander communities.

In 2012, Mr Briscoe was arrested for drunkenness and within hours was found dead in a Northern Territory Police Watch house. The Coroner concluded that systemic failure contributed to the death of Mr Briscoe.⁶⁴

Mr Doomadgee died on the floor of a cell at the Palm Island Police Watch house in Queensland in 2004 following his arrest for drunkenness. Mr Doomadgee had died with horrific injuries including broken ribs and a ruptured spleen and liver. The death in custody of Mr Doomadgee resulted in riots, further arrests, gag orders and jail sentences for the residents of Palm Island, while the officer in charge, was acquitted of a manslaughter charge over Mr Doomadgee's death, and has remained on full pay throughout the investigations.

With regard to prisoner transport, Mr Ward died of heatstroke while being transported from Laverton to Kalgoorlie, having been remanded in custody for drink driving. The Australian Human Rights Commission is of the view that this unnecessary and avoidable death in custody was the result of systemic human rights issues, including:

the impact of the practices of police and custodial officers on Mr Ward's right to humane and dignified treatment, his right to be free from arbitrary detention and his right to life. This included: the inappropriateness of the decision by police to arrest Mr Ward and refuse bail; the discharge of the duty of care to Mr Ward by the officers transporting him; the inappropriateness of the design and condition of the vehicle for prisoner transports across long distances in desert conditions; the inadequacies of relevant policies, procedures and training, including the failure of

⁶² See Queensland Crime and Misconduct Commission. (2009). *Restoring order: crime prevention, policing and local justice in Queensland's Indigenous communities*, November 2009, Chapter 3; and Commission for Children and Young People and Child Guardian, *Removing 17 year olds from Queensland's adult prisons and including them in the youth justice system*, Policy Position Paper, 15 November 2010, at <http://www.cypcg.qld.gov.au/pdf/publications/papers/17-year-olds-Policy-Position-Paper.pdf> (accessed 11 February 2013).

⁶³ See Kenton, G., 'Overcrowding pressures prisons', *The Advertiser*, 17 February 2008,

<http://www.news.com.au/adelaidenow/story/0,22606,23228823-2682,00.html>.

⁶⁴ Inquest into the death of Terrence Daniel Briscoe [2012] NTMC 032. At http://www.nt.gov.au/justice/courtsupp/coroner/documents/2012_findings/A00052012_Briscoe.pdf (accessed 11 February 2013).

the pre-departure vehicle checklist to include a check on air-conditioning; and the inadequacy of the police investigation into Mr Ward's death.⁶⁵

The Coroner found in June 2009 that Mr Ward's death was wholly avoidable and had been contributed to by the custodial officers, the custodial contractor, and the Western Australian Department of Corrective Services. The Coroner also found, consistent with the Commission's submissions, that the treatment of Mr Ward breached Australia's international legal obligations.⁶⁶

In a 2006 review of conditions for people in custody the Victorian Ombudsman and Office of Police Integrity identified concerns with overcrowding, non-compliance with duty of care and custodial standards, deficient physical and mental health care and poor internal mechanisms for monitoring conditions.⁶⁷

In 2011, the Western Australian Police Commissioner described conditions in police watch houses in that state as 'archaic and inadequate' and indicated that they had not improved significantly since the RCIADIC.⁶⁸

Coronial inquests into deaths of Aboriginal and Torres Strait Islander people in police custody demonstrate that the conditions in which people are detained continue to be the cause of unnecessary deaths.

Prisoner health

Aboriginal and Torres Strait Islander prisoners have been found to be at higher risk of a number of chronic diseases than non-Aboriginal and Torres Strait Islander prisoners—including cardiovascular disease, kidney disease, diabetes and obesity.⁶⁹

In a *Thematic Review of Offender Health Services* published in 2006, the Western Australian Inspector of Custodial Services published identified numerous barriers to health care, including lack of access to Medicare, understaffing, no on-call arrangements for general practitioners at many prisons, poor staff training, and poor coordination with services on

⁶⁵ Australian Human Rights Commission, Annual Report 2008-2009, Chapter 5. At: http://www.humanrights.gov.au/word/about/publications/annual_reports/2008_2009/chap5.doc (accessed 11 February 2013).

⁶⁶ *ibid.*

⁶⁷ Ombudsman Victoria and Office of Police Integrity, *Conditions for persons in custody*, Melbourne, 2006, p.7, http://www.ombudsman.vic.gov.au/resources/documents/Conditions_for_persons_in_custody.pdf (accessed 12 August 2012).

⁶⁸ See *Sydney Morning Herald*, "WA Watchhouses 'abominable': police chief", 13 December 2010, <http://news.smh.com.au/breaking-news-national/wa-watchhouses-abominable-police-chief-20101213-18uob.html>.

⁶⁹ Indig, D, McEntyre E, Page J & Ross B, *2009 NSW Inmate Health Survey: Aboriginal Health Report*, Justice Health, Sydney, 2009, p.9, http://www.justicehealth.nsw.gov.au/publications/Inmate_Health_Survey_Aboriginal_Health_Report.pdf (accessed 7 June 2012).

the outside—particularly Aboriginal Medical Services.⁷⁰ Similar observations would be accurate in many prisons across Australia.

Foetal Alcohol Spectrum Disorder (FASD) is another poorly understood and diagnosed issue that influences involvement in the criminal justice system and needs to be better addressed among people in custody. As noted in the *Doing Time – Time for Doing* report, there is evidence that one in 40 Aboriginal and Torres Strait Islander children may be affected by FASD and that in some regions, prevalence among Aboriginal and Torres Strait Islander children may be greater than 50%. One expert estimated that some 60% of young people with FASD have been in trouble with the law.⁷¹

Evidence on the experience of mental illness among Aboriginal and Torres Strait Islander prisoners is particularly alarming. A 2008 study of the prevalence of mental illness among Aboriginal and Torres Strait Islander people in the Queensland prison system found that:

- 73% of men and 86% of women suffered from at least one mental health disorder in the preceding 12 months
- two thirds had suffered from a substance misuse disorder
- a quarter had suffered from an anxiety disorder
- 14% had suffered from a depressive disorder
- 10% had suffered from a psychotic disorder in the previous 12 months.

The experience of mental health disorders was, in almost every area, significantly higher for women than for men.

Despite these risks to health, which are exacerbated by the conditions of imprisonment, Aboriginal and Torres Strait Islander prisoners frequently report that their health needs are ignored, and that they have difficulty obtaining treatment even when they request it.

In addition to mental health disorders, an emerging human rights issue for Aboriginal and Torres Strait Islander people's access to justice is the over-representation of people in the criminal justice system with a cognitive impairment. Cognitive impairment refers to a 'range of disorders relating to mental processes of knowing including awareness, attention, memory, perception, reasoning and judgement, intellectual disabilities, learning disabilities, acquired brain injury, foetal alcohol spectrum disorders, dementia, neurological disorders

⁷⁰ Office of the Inspector of Custodial Services, *Thematic Review of Offender Health Services*, Report no. 35, Perth, 2006, <http://www.custodialinspector.wa.gov.au/downloadpdf.cfm?objectid=9CCE672B-C29E-198E-8122CA7665600D07>

⁷¹ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, 20 June 2011, pp.96-97, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm.

and autism spectrum disorders'.⁷² Often cognitive impairment is accompanied by mental illness.⁷³

Aboriginal and Torres Strait Islander people with cognitive impairment in the criminal justice system are particularly vulnerable:

In some Australian jurisdictions, when people with cognitive impairment are found unfit to plead to criminal charges, they become subject to mental health legislation. In several jurisdictions, the result for some Aboriginal and Torres Strait Islander people with a cognitive impairment accused of crimes for which they are unable to plead and stand trial, has been indefinite detention. This indefinite detention generally occurs in prisons in Western Australia and the Northern Territory, and in psychiatric hospitals in Queensland and Tasmania.⁷⁴

For example, in 2001 Mr Marlon Noble in Western Australia was deemed unfit to plead to a charge of sexual assault on the basis of his cognitive impairment. He was imprisoned for ten years without conviction or trial and was released in 2012 under strict conditions. Similarly, Mr Christopher Leo of the Northern Territory who is thought to have FASD, was accused of assault in 2007 but was found unfit to plead on the basis of his cognitive impairment. Mr Leo was placed under a supervision order and has been detained indefinitely since.⁷⁵

A recent report by the Aboriginal Disability Justice Campaign (ADJC), *No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*, has confirmed that Aboriginal and Torres Strait Islander peoples with cognitive impairment are significantly over-represented in the criminal justice system. However they also found that quantifying numbers is made difficult due to:

- a lack of diagnosis prior to entering the criminal justice system
- a lack of relevant data collection
- non-disclosure of cognitive impairment because of the likelihood of indefinite detention.⁷⁶

⁷² Australian Human Rights Commission, *Preventing Crime and Protecting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, 2008, p 3. At http://www.humanrights.gov.au/social_justice/publications/preventing_crime/index.html (accessed 11 February 2013).

⁷³ See Baldry E, Dowse L, Clarence M, *People with mental and cognitive disabilities: pathways into prison*, Background Paper for the National Legal Aid Conference Darwin (2011), p 5. At <http://www.ntlac.nt.gov.au/doco/bpcpapers/People%20With%20Mental%20and%20Cognitive%20Disabilities%20-%20Pathways%20Into%20Prison.pdf> (viewed 11 February 2013).

⁷⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2012*, Australian Human Rights Commission (2012), p63. At: http://www.humanrights.gov.au/social_justice/sj_report/sjreport12/chap1.html (accessed 11 February 2013).

⁷⁵ Smith S, 'Mentally ill in jail "tantamount to torture"', *ABC Lateline*, 25 June 2012. At: <http://www.abc.net.au/lateline/content/2012/s3532797.htm> (viewed 11 February 2013).

⁷⁶ Sotiri M, Baldry E, McGee P, *No End in Sight: The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*, Aboriginal Disability Justice Campaign (September 2012).

Efforts to address prisoner health are exacerbated by a lack of nationally consistent data. While the Australian Institute of Health and Welfare has initiated an annual, national report on prisoner health, it is largely based on self-reported diagnoses at the point of admission to prison, which means that many conditions are likely to be underreported. It is based on a national census that commenced in 2009 and, as noted in section 4, New South Wales and Victoria failed to participate in the second census in 2010.

Although there are many improvements to be made, particularly in the collection of data from Aboriginal and Torres Strait Islander peoples, it is a move in the right direction and worthy of increased resourcing and State and Territory participation.

Effectiveness of the prison system

Evidence on rates of reoffending show that the prison system is particularly ineffective in preventing reoffending by Aboriginal and Torres Strait Islander prisoners.

Aboriginal and Torres Strait Islander prisoners are approximately 1.5 times more likely than non-Aboriginal and Torres Strait Islander prisoners to have previously been imprisoned as an adult. Among prisoners released between 1994 and 2007, 58% of Aboriginal and Torres Strait Islander prisoners were reimprisoned within ten years, compared to 35% of non-Aboriginal and Torres Strait Islander prisoners. Aboriginal and Torres Strait Islander young offenders have also been found to have higher rates of reoffending than non-Aboriginal and Torres Strait Islander young offenders.⁷⁷

There is clear evidence that services that are designed specifically to support Aboriginal and Torres Strait Islander people who have been imprisoned can reduce reoffending, through improving rehabilitation and contact with communities.⁷⁸ This requires a commitment to ‘throughcare’, involving individualised support from the point of reception into prison, through to beyond release into the community. The lack of support for former prisoners as they attempt to integrate themselves back into the community following release has been found to be a major factor contributing to recidivism.⁷⁹

Other reasons that the prison system is ineffective in preventing reoffending for Aboriginal and Torres Strait Islander prisoners include:

- rehabilitation programs (including education, training and health programs) are usually not available to prisoners on remand or short sentences
- programs are limited or non-existent in many regional and remote prisons
- many programs are mainstream in nature and lack a specific focus on the needs of Aboriginal and Torres Strait Islander prisoners.

⁷⁷ Productivity Commission, *op cit*, p.10.52.

⁷⁸ *ibid*, p 10.53.

⁷⁹ *ibid*.

Aboriginal and Torres Strait Islander Australians as victims of violence

Aboriginal and Torres Strait Islander people, and in particular women, are also over-represented as victims of violence. Aboriginal and Torres Strait Islander people are much more likely to report having been a victim of physical or threatened violence in the past 12 months (19.5% of Aboriginal and Torres Strait Islander people compared to 10.8% of non-Aboriginal and Torres Strait Islander people, and 19.2% of Aboriginal and Torres Strait Islander women compared to 8.2% of non-Aboriginal and Torres Strait Islander women).⁸⁰

Aboriginal and Torres Strait Islander people are hospitalised for family violence at 23 times the rate for non-Aboriginal and Torres Strait Islander people (4.6 per 1,000 Aboriginal and Torres Strait Islander people compared to 0.2 per 1,000 non-Aboriginal and Torres Strait Islander people, and 6.5 per 1,000 Aboriginal and Torres Strait Islander females compared to 0.2 per 1,000 non-Aboriginal and Torres Strait Islander females).⁸¹

The experience of violence is a risk factor for generational violence, and for Aboriginal women there is a strong correlation between the experience of family violence and incarceration.⁸²

There is currently no regular and consistent approach to national data collection on rates of family violence. Nationally consistent data on rates of assault for crime victims who report to police is not available.⁸³

The absence of a national strategy

In recent years there has been no coordinated national commitment, strategy or agreement to address the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system. By a 'national' commitment, Congress means a commitment that binds the Commonwealth as well as State and Territory Governments.

The issue remains an agenda item in numerous government forums, however action and progress on a national strategy or binding targets is non-existent.

The Coalition of Australian Governments (COAG) Closing the Gap framework

In November 2007, the Council of Australian Governments (COAG)⁸⁴ committed to closing the life expectancy gap between Aboriginal and Torres Strait Islander and non-Aboriginal

⁸⁰ *ibid*, p.4.122.

⁸¹ *ibid*, p.4.124-5.

⁸² Indig et al, *op cit*, p31 & 33.

⁸³ Productivity Commission, *op cit*, p.4.126.

⁸⁴ The Council of Australian Governments (COAG) is the peak intergovernmental forum in Australia. The members of COAG are the Prime Minister, State and Territory Premiers and Chief Ministers and the President of the Australian Local Government Association.

and Torres Strait Islander people. In October 2008, COAG adopted six targets to support this commitment, which was to:

- close the gap in life expectancy within a generation
- halve the gap in mortality rates for Aboriginal and Torres Strait Islander children under five within a decade
- ensure all Indigenous four years olds in remote communities have access to early childhood education within five years
- halve the gap in reading, writing and numeracy achievements for Indigenous children within a decade
- halve the gap for Indigenous students in year 12 attainment or equivalent attainment rates by 2020
- halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade.

In November 2008, COAG endorsed the National Indigenous Reform Agreement (NIRA), which committed all jurisdictions to achieving these targets. Performance indicators relevant to each target have been agreed and are reported annually. The NIRA also identified a number of 'Building Blocks' to support the achievement of the targets (Early Childhood, Schooling, Health, Economic Participation, Healthy Homes, Safe Communities, and Governance and Leadership).

The Safe Communities 'Building Block' says that "Indigenous people (men, women and children) need to be safe from violence, abuse and neglect. Fulfilling this need involves improving family and community safety through law and justice responses (including accessible and effective policing and an accessible justice system), victim support (including safe houses and counselling), child protection and also preventative approaches. Addressing related factors such as alcohol and substance abuse will be critical to improving community safety, along with the improved health benefits to be obtained."⁸⁵

However the Safe Communities 'Building Block' is not accompanied by an agreed target nor by explicit strategies and actions to achieve this target.

Consistent with the Closing the Gap framework, the Steering Committee for the Review of Government Service Provision has developed a series of "headline indicators", against which the Productivity Commission compiles data for the annual *Overcoming Indigenous Disadvantage* reports. These include indicators in relation to family and community violence, adult imprisonment, youth detention, youth diversions and repeat offending, but

⁸⁵ Coalition of Australian Governments (COAG), *National Indigenous Reform Agreement (Closing the Gap)*, 'COAG Framework', effective 2 November 2012, Box 1: Building Blocks, p.7, http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/national-agreement_sept_12.pdf (accessed 7 February 2013).

these are simply indicators and there is no national commitment to achieving any change in relation to these indicators.

The absence of a high level target has been recognised by the Standing Committee of Attorneys General (now the Standing Committee on Law and Justice), which recommended in July 2011 that COAG consider the adoption of “justice specific Indigenous closing the gap targets”.⁸⁶ Congress understands that this recommendation has been referred to the Working Group on Indigenous Reform and has not been further progressed.⁸⁷

The National Indigenous Law and Justice Framework

The stated aim of the National Indigenous Law and Justice Framework 2009-2015, developed by the Standing Committee of Attorneys-General⁸⁸ Working Group on Indigenous Justice, is to “to eliminate Indigenous disadvantage in law and justice”.⁸⁹

Unfortunately, in Congress’ view, the Framework was largely an aspirational document which imposed no particular obligations on governments. It prescribed little new action, provided no additional resources, included no system for monitoring the compliance of States and Territories and, as a result, has achieved no noticeable positive outcomes for Aboriginal and Torres Strait Islander peoples.

The absence of an effective national strategy or commitment defies the fact that there is a significant gap between the level of exposure and nature of interactions of Aboriginal and Torres Strait Islander peoples with justice system, in particular the criminal justice system as compared with non-Aboriginal and Torres Strait Islander people.

Justice Reinvestment

In addition to specific justice targets in the Closing the Gap policy, Congress is actively promoting Justice Reinvestment as a model to reduce the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.

⁸⁶ Standing Committee of Attorneys General, Communique, 21 & 22 July 2011, [http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_21-22_July_2011_FINAL.pdf/\\$file/SCAG_Communique_21-22_July_2011_FINAL.pdf](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/SCAG_Communique_21-22_July_2011_FINAL.pdf/$file/SCAG_Communique_21-22_July_2011_FINAL.pdf) (accessed 4 June 2012)

⁸⁷ The Working Group on Indigenous Reform (WGIR) WAS created by COAG in December 2007 to ensure the implementation of the Closing the Gap agenda. It is attended by the Commonwealth Minister for Indigenous Affairs and senior officials from the Commonwealth Departments of Families and Housing, Community Services and Indigenous Affairs, Treasury, Prime Minister and Cabinet and a range of State and Territory government agencies.

⁸⁸ The Standing Committee of Attorneys-General existed between the 1960s and 2011, providing a forum for Attorneys-General from the Commonwealth and State and Territory jurisdictions to discuss and progress matters of mutual interest. It transitioned into the Standing Council on Law and Justice in 2011.

⁸⁹ Standing Committee of Attorneys-General Working Group on Indigenous Justice, *National Indigenous Law and Justice Framework 2009–2015*, p.5, <http://www.ag.gov.au/LegalSystem/IndigenousLaw/Indigenousjusticepolicy/Documents/National%20Indigenous%20Law%20and%20Justice%20Framework.pdf>

Developed, tried and tested in the United States of America, Justice Reinvestment is designed to help reverse the high levels of Indigenous incarceration and to improve the lives and the well-being of communities by diverting people away from jails and from the criminal justice system to community-led development programs.

Justice Reinvestment is built on a foundation of effective participation and self-determination, and recognises that standardised data collection, prevention, early intervention and diversion are essential to building safe communities and reducing over-representation of Aboriginal people in the criminal justice system.

Under this approach, a portion of the public funds that would have been spent on covering the costs of imprisonment are diverted to local communities that have a high concentration of offenders. The money is invested in community programs, services and activities that are aimed at addressing the underlying causes of crime in those communities.

Over \$2.6 billion is spent on adult imprisonment in Australia every year.⁹⁰ As Aboriginal and Torres Strait Islander prisoners make up about a quarter of the prison population, approximately \$650 million is spent on Indigenous adult imprisonment a year. Justice Reinvestment diverts a portion of the financial resources that would have been spent on covering the costs of imprisonment from the criminal justice system to local communities that have a high concentration of offenders. The diverted funding is invested in community programs, services and activities that are aimed at addressing the underlying causes of crime in those communities.

The Australian Government are currently investigating Justice Reinvestment as an option for dealing with the substantial over-representation of Aboriginal and Torres Strait Islander people in the justice system through a Senate Inquiry.⁹¹ Models such as this are critical to reducing the high levels of incarceration, building strong families and communities and ensuring the participation and self-determination of Aboriginal and Torres Strait Islander communities to determine their own solutions.

Congress believes that Justice Reinvestment provides a solid future direction for justice policy in Australia and it is one of the key recommendations of our recently released justice policy (Appendix 1).

⁹⁰ Australian Institute of Criminology, Australian Crime: Facts and Figures 2008, p 110. At http://www.aic.gov.au/documents/E/4/0/%7BE4031E6F-031D-415C-B544-8CE865A3CA0C%7Dfacts_and_figures_2008.pdf (viewed 14 February 2013).

⁹¹ Senate Legal and Constitutional Affairs Committee, 'Value of a justice reinvestment approach to criminal justice in Australia', at http://www.apf.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/justice_reinveatment/index.htm (accessed 20 February 2013).

Processes and tools to provide fairness and equality in legal processes

Independent oversight

Only Western Australia has an independent statutory body responsible for overseeing the corrective services system—the Inspector of Custodial Services—although New South Wales is in the process of establishing a similar body. However, even where these bodies already exist, their powers are limited. In Western Australia, the Inspector does not have powers in relation to custodial facilities managed by police. The legislation establishing the Inspector General of Custodial Services in New South Wales includes similar limitations.

Given the considerable power imbalances experienced by prisoners in exercising their rights, advocating for health care and even gaining access to their legal representatives, independent bodies with the power to inspect facilities and investigate allegations of improper treatment are critical to the protection of human rights. While these bodies could form part of a National Preventative Mechanism under the *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*, it is important that they have broader authority to investigate issues across the full range of operations of corrective services systems. These bodies should, for example, have the power to conduct thematic reviews that examine the effectiveness of the prison system in improving the health and rehabilitation prospects of prisoners.

Legal Aid and Assistance

The Commonwealth Government funds State and Territory governments for mainstream legal aid services, provided by legal aid commissions. This funding is provided through the National Partnership Agreement on Legal Assistance Services (the NPA). Commonwealth funding for legal aid commissions through the NPA is \$194.8 million in 2011-12. The Commonwealth also directly funds legal assistance services for Aboriginal and Torres Strait Islander people—in particular:

- Aboriginal and Torres Strait Islander Legal Services (ATSILS) (\$63.6 million in 2011-12); and
- Family Violence Prevention Legal Services (FVPLS) (\$19.83 million in 2011-12).

The Commonwealth also funds mainstream community legal centres (\$34.3 million in 2011-12), via State and Territory governments.

Unmet legal needs

Despite the range of legal assistance programs funded by the Commonwealth Government (as well as State and Territory governments and other sources), Congress members, delegates and partner organisations have stated there are serious gaps in funding and service provision for Aboriginal and Torres Strait Islander peoples.

Research on the legal needs of Aboriginal and Torres Strait Islander people has identified that there are a number of areas of family and civil law, in particular, where Aboriginal and Torres Strait Islander people have high needs that are not met by the current system. High priority issues that have been identified include:

- family law (in particular child protection issues)
- housing (in particular tenancy issues)
- discrimination
- employment law
- credit and debt problems.

The same research found that there is also likely to be substantial need that is poorly recognised, as a result of limited community education, in relation to victim's compensation, stolen wages and wills.⁹²

Other research identified that Aboriginal and Torres Strait Islander respondents were more than twice as likely as non-Aboriginal and Torres Strait Islander respondents to have experienced family law problems, but much less likely to seek assistance.⁹³ The lack of accessible, culturally appropriate legal assistance services is likely to be a significant reason for this.⁹⁴

The sorts of legal issues identified above tend not to occur in isolation. Disadvantaged people often experience 'clusters' of legal problems. Family law problems, for example, are often accompanied by problems in relation to housing, family violence and child safety.⁹⁵ For this reason, it is important that the legal services they approach are able to provide an integrated response, which addresses the broad range of problems, rather than referring them to a range of different services.

⁹² Cunneen C & Schwarz M, *The family and civil law needs of Aboriginal people in NSW* Legal Aid NSW, Sydney, 2008, p.15, http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0016/5515/Family-and-Civil-Law-Needs-of-Aboriginal-People-in-New-South-Wales-report.pdf (accessed 4 June 2012)

⁹³ Coumarelos, C, Wei, Z and Zhou, A, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Sydney: NSW Law and Justice Foundation, 2006, p.100.

⁹⁴ See Family Law Council, *Indigenous and culturally diverse clients in the family law system*, Canberra: Family Law Council, 2012, pp.39-40, <http://www.ag.gov.au/FamilyLawCouncil/Publications/ReportstotheAttorneyGeneral/Documents/ATSI-clients-in-the-family-law-system.pdf> (accessed 8 June 2012)

⁹⁵ *ibid*, p38.

The over-representation of people of Aboriginal people in prison means that clients facing incarceration are prioritised for ATSILS Services. Under the current funding constraints, the capacity for ATSILS to take on family and civil law cases is curtailed.⁹⁶

While the national FVPLS program aims to address the broad range of legal issues with which clients may need assistance, there are only 14 of these services in Australia, covering only 31 regional and remote locations.

The Commonwealth Attorney-General's Department funding guidelines restrict the national FVPLS program from providing services in urban areas, limiting service delivery to selected rural and remote locations based on a flawed interpretation of higher need. This is a major concern with the guidelines, given that 33% of Aboriginal and Torres Strait Islander people now live in capital cities.⁹⁷ The policy of limiting the program to rural and remote locations fails to recognise the many barriers that Aboriginal women face with trying to access mainstream service providers, and FVPLS experience numerous cases where women who live in rural and remote locations who experience family violence often relocate to urban areas for safety. Specialist services provide a crucial alternative, and often the only option, for Aboriginal and Torres Strait Islander women who are or have experienced family violence.

The vast majority of clients assisted by the national FVPLS program are Aboriginal and Torres Strait Islander women and children who have experienced family violence. There is a complex interaction of family law matters with criminal matters which prevents many of the FVPLS clients from obtaining representation through ATSILS. The funding constraints force ATSILS to prioritise representing clients on criminal charges, including those accused of perpetrating violence. Representing the women and children affected by violence on a related custody or civil matters may present a conflict of interest for ATSILS. Further, the legal system and funding arrangements are such that Aboriginal and Torres Strait Islander women living in urban areas are at a particular disadvantage. The FVPLS aims to fill this void but are currently restricted by funding arrangements which requires them to remain in regional areas.

If left unresolved, family and civil law problems can affect a person's safety and ability to participate in education, training and employment. They can also make it difficult for a parent/s or carer/s to provide a safe and stable environment for school-aged children.

There appears to be an assumption in the current funding arrangements that family and civil law legal needs will be met by mainstream legal assistance service providers—in particular,

⁹⁶ Schwartz, M; Cuneen, C. (2009) "Working Cheaper, Working Harder: Inequity in Funding for Aboriginal and Torres Strait Islander Legal Services" [2009] *Indigenous Law Bulletin* 4; 7(10). At <http://www.worldlii.org/au/journals/ILB/2009/4.html> (accessed 20 February 2013).

⁹⁷ Australian Bureau of Statistics 2012(1), in section on Capital Cities and Rest of State.

legal aid commissions. While legal aid commissions should be required and expected to provide appropriate services to Aboriginal and Torres Strait Islander people who approach them for assistance, there are a range of problems with assuming that legal aid commissions will be the primary providers of these services:

- There are a number of regional and remote communities with high Aboriginal and Torres Strait Islander populations that are not serviced by legal aid commissions.
- Some Aboriginal and Torres Strait Islander people, particularly people in vulnerable situations, will feel safer approaching a service provided by an Aboriginal and Torres Strait Islander organisation than a mainstream service provided by a government agency.
- The process of applying for legal aid is daunting, often involving many steps. This deters many Aboriginal and Torres Strait Islander people from lodging an application or completing the process.
- The complex interaction of criminal, family and civil law matters which involves whole families may give rise to conflicts of interest which prevent one service provider from assisting victims of violent offences in their legal needs.
- The varying degree to which legal aid commissions see service provision for Aboriginal and Torres Strait Islander people as a core priority.
- The level of cooperation and respect between legal aid commissions and Aboriginal and Torres Strait Islander legal service providers varies significantly between States and Territories.

The reliance on mainstream services is a particular problem in relation to child protection matters, where Aboriginal and Torres Strait Islander families are significantly over-represented. Some 31% of children and young people in relation to whom court orders were in place in the child protection system in 2011 were Aboriginal or Torres Strait Islander children and young people.⁹⁸ There is evidence that Aboriginal and Torres Strait Islander people are reluctant to seek legal assistance in relation to these matters, which may be due to the lack of Aboriginal and Torres Strait Islander-specific services.⁹⁹ Lack of awareness and a general reluctance to engage with courts and the legal system generally, due to a mistrust of the system, are also contributing factors. This is a concern because where families are not represented, it may mean that the full range of relevant information about the family situation and, where the child is determined to be in need of protection, kinship placement options, may not be presented to the court.

The Family Law Council, in its recent report on *Indigenous and culturally diverse clients in the family law system*, expressed the view that while mainstream services should provide

⁹⁸ Australian Institute of Health and Welfare 2012(1), p28.

⁹⁹ Cunneen & Schwarz 2008, p64-65.

culturally appropriate services, so as to provide choice to Aboriginal and Torres Strait Islander clients, Aboriginal and Torres Strait Islander services should also be adequately resourced to address family law needs.¹⁰⁰

Funding for prevention, early intervention and diversion services

While the focus of the NPA for mainstream legal aid services was on increasing preventative and early intervention services, such as community legal education and legal advice, Aboriginal and Torres Strait Islander organisations received no funding under the NPA and the general funding provided to Aboriginal and Torres Strait Islander organisations is insufficient to meet the level of need for these services.

Community legal education is important because unless there is a good understanding of common legal problems and options for addressing them, particularly among community workers who may be able to refer people for legal assistance, many problems will go unrecognised and unresolved. Under current funding arrangements, however, ATSILS and FVPLS units have very limited capacity to provide community legal education. The capacity of FVPLS was further reduced by the decision in the 2012-13 Budget to cut the early intervention component of the national FVPLS program by \$4.5 million. This demonstrates a chronic failure to prevent violence against Aboriginal and Torres Strait Islander women.

Similarly, ATSILS and FVPLS are sometimes unable to provide legal advice services across all areas of law. The limited capacity of Aboriginal and Torres Strait Islander organisations to provide legal advice services is of concern because it leads to some key gaps in areas that may be contributing to Aboriginal and Torres Strait Islander incarceration and risk of victimisation. For example, as outlined in section 4, many Aboriginal and Torres Strait Islander people are imprisoned for offences against justice procedures, government security and operations. It is likely that many of these offences relate to breaches of court orders, such as domestic violence orders, yet there is very limited access to advice for either defendants or persons in need of protection at the point that these orders are made. Improving access to advice at this early stage could have the effect of ensuring that orders are appropriate and take full account of the circumstances of the defendant and person in need of protection, as well as ensuring that each party understands the order and the consequences for the defendant of breaching the order.

A similar gap exists in relation to provision of assistance with traffic offences in some places. Some ATSILS are unable, due to limited funds, to assist with less serious traffic offences, yet these offences can often be the first steps in a path that involves licence disqualification and escalating penalties, ultimately resulting in incarceration.¹⁰¹

¹⁰⁰ Family Law Council 2012, p42.

¹⁰¹ In 2011, 4.4% of sentenced Aboriginal and Torres Strait Islander prisoners in 2011 had a traffic offence as their most serious offence – see section 4.

The funding arrangements that commenced in 2010 did not allocate to Aboriginal and Torres Strait Islander organisations funds for preventative and early intervention services equivalent to the funds allocated to legal aid commissions. In May 2012 it was announced that funds from the early intervention grant component within the FVPLS Program were to be redirected to other programs removing critical holistic prevention and response work of Family Violence Prevention Legal Services nationally. The failure to direct funding and attention to early intervention and prevention services specifically for Aboriginal and Torres Strait Islander people is a significant flaw in these funding arrangements.

Funding for policy and law reform work

Current funding arrangements focus on direct service provision to clients. Despite heavy reliance by the Commonwealth Government and State and Territory governments, parliamentary committees and others on the policy and law reform work of ATSILS, this work is not separately or adequately funded in current funding agreements. Previously, most ATSILS received identified funding for policy, law reform and community legal education work. With the new funding arrangements introduced from 2010-11, this was rolled into the general pool of funding for organisations. While the pooling of funding was welcome, because it reduced the reporting burden for ATSILS, the significant unmet demand for legal assistance from Aboriginal and Torres Strait Islander people means that ATSILS have struggled to maintain adequate resources for policy and law reform work.

In recognition of the fact that Aboriginal and Torres Strait Islander organisations are in a unique position to understand how laws impact negatively on Aboriginal and Torres Strait Islander people, funding arrangements should recognise that law reform and policy work is an extension of case work. This type of work should also be considered preventative in that it can assist in preventing legal problems from escalating, and contribute to reducing the rate of incarceration.

The lack of funding for policy and law reform work is a particular concern for the national FVPLS program. While FVPLS units participate in policy and law reform, the national FVPLS program is not funded for these activities by the Commonwealth Attorney-General's Department. A national secretariat has recently been established but only for the purposes of the review of the NPA but funding has only been secured through to 2013.

Funding for interpreters and other non-legal services

The ability of Aboriginal and Torres Strait Islander legal assistance services to assist Aboriginal and Torres Strait Islander people to understand, exercise and protect their legal rights is dependent on adequate funding for non-legal services relevant to clients needs. These include, in particular, interpreter services but also victim support, health and family support services.

While it is not known how many Aboriginal and Torres Strait Islander people who come into contact with the justice system require interpreting services, Australian Bureau of Statistics (ABS) data in 2011 – which found that 16.6% of Aboriginal and Torres Strait Islander language speakers reported that they do not speak English well or at all¹⁰² – suggests that there is certainly a need for interpreting services in this and other contexts.

Despite the Commonwealth House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs recommending in 1992 that a national interpreter service for Aboriginal and Torres Strait Islander languages should be established, Australia still does not have such a service.¹⁰³

This measure is important for not only the delivery of basic human services due to all citizens, but it is particularly necessary in the area of courts and justice, where specialised vocabulary is often required. As the 2011 *Doing Time – Time for Doing* report noted, ‘the misunderstandings and confusion that can occur in communicating with police or justice officials has the potential for serious consequences.’¹⁰⁴ The lack of effective interpreting and translation services may affect the ability of Aboriginal and Torres Strait Islander people to obtain a fair trial, and may lead to increased rates of incarceration.

Under the National Partnership Agreement on Remote Service Delivery associated with the Closing the Gap framework, COAG has agreed that the Commonwealth Government should develop ‘a national framework, working with the States and the Northern Territory, for the effective supply and use of Indigenous language interpreters and translators (both technical and non-technical), including protocols for the use of interpreters and translators’.¹⁰⁵ The Commonwealth Department of Families and Housing, Community Services and Indigenous Affairs are currently developing this Framework.

Funding for standardised notification services

The Victorian Aboriginal Legal Service is currently the only Aboriginal or Torres Strait Islander Legal Service to have access to a formal custody notification system, which notifies them when an Aboriginal or Torres Strait Islander person is arrested. Early notification was a

¹⁰² Australian Bureau of Statistics, *Census of Population and Housing*, *op cit*, para 6.1.

¹⁰³ The Commonwealth House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs again strongly recommended the development of a national interpreter service for Aboriginal and Torres Strait Islanders in its 2011 *Doing Time – Time for Doing* and 2012 *Our Land Our Languages: Learning Languages in Indigenous Communities* reports: House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing*, *op cit*, and House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Our Land Our Languages: Language Learning in Indigenous Communities*, 17 September 2012, http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/languages/report/index.htm

¹⁰⁴ *Doing Time – Time for Doing*, *op cit*, para 7.46.

¹⁰⁵ COAG, National Partnership Agreement on Remote Service Delivery, Clause 19(g), at http://www.federalfinancialrelations.gov.au/content/npa/other/remote_service_delivery/national_partnership.pdf, (accessed 20 February 2013).

recommendation of the RCIADIC and is crucial for ensuring that clients receive the best legal representation.

Recognition of women-specific legal services

The existence of legal services specifically for women has its precedent in mainstream community legal services, where Women's Legal Services are well accepted as a separate area of funding. However Aboriginal and Torres Strait Islander women's legal services have been chronically underfunded and are not generally recognised by governments as an area that requires separate resourcing.¹⁰⁶

Many Aboriginal and Torres Strait Islander women prefer a service which is specifically interested in their issues as women and where legal practitioners and support staff are attuned to issues of cultural competency and cultural safety, as well as the interests of Aboriginal and Torres Strait Islander women. It is also perceived as culturally appropriate to provide a service that caters to Aboriginal and Torres Strait Islander women in a gender specific way and where the pursuit of legal issues specific to Aboriginal and Torres Strait Islander women is encouraged and voiced in legal proceedings.

Truth and Reconciliation Processes

Truth and Reconciliation processes have been used around the world to address past human rights atrocities committed by the State against its citizens. Within these processes, survivors are invited to tell their stories and perpetrators are invited to face their victims and society to account for their actions, most often with immunity from both civil and criminal prosecution.

While Australia has had no formal truth and reconciliation processes, Parliamentary Inquiries and Royal Commissions play a similar role in addressing significant issues and mapping a pathway forward.

¹⁰⁶ At present the Commonwealth government funds a number of Aboriginal and Torres Strait Islander legal services including the Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services. However, due to the nature of the legal support provided and the conflict of interests that can arise, women are often excluded from these services.

Two key inquiries in regarding Aboriginal and Torres Strait Islander peoples in Australia included:

- The *Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) in 1987
- The *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* completed in 1997.

While these inquiries were significant for acknowledging the experiences of Aboriginal and Torres Strait Islander peoples and educating the broader Australian community, there were also significant limitations to the outcomes of these two processes.

With regard to the RCIADIC, this process was conducted by a Royal Commission which is enabled by the *Royal Commissions Act 1902*. As such it is not perceived to be an independent process as its terms of reference were established by the Government and its members appointed by Government. This Commission was also conducted in a courtroom style approach whereby those involved came to give their evidence on the circumstances of those who had died in custody. While the 339 recommendations of this Royal Commission were extensive and noteworthy, after 20 years since the Commission, many of the recommendations have not been implemented and no individuals or organisations (including government bodies) were held accountable for any of the deaths in custody. As with subsequent inquiries into Aboriginal and Torres Strait Islander deaths in custody, it is often police or those intimately linked with police services who are tasked with conducting the inquiries, resulting in a lack of impartiality.

With regard to the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* completed in 1997, this Inquiry was conducted by the Australian Human Rights Commission. Cultural sensitivity was taken into account throughout this process, however, as with the RCIADIC, while it was critical to exposing the forced removal of Aboriginal and Torres Strait Islander children from their families, homelands and communities to reserves, missions, orphanages and non-Aboriginal families, and recommendations were made to address the trauma experienced by those involved, there were no criminal charges laid or civil remedies offered for the victims including compensation or reparations. It was only in 2008 that then Australian Prime Minister Kevin Rudd gave a national apology to those who had been affected by the formal policies of removal and assimilation.

Congress notes however, that the present Prime Minister Julia Gillard recently announced a Royal Commission into Institutional Responses to Child Sexual Abuse. The intention of this Royal Commission is to provide an avenue for victims of past abuse to be heard, as well as investigating the systemic failures to prevent future abuse. It is expected that a significant number of Aboriginal and Torres Strait Islander people will participate in this Inquiry given the abuse suffered in church and state institutions.

In order to avoid similar circumstances whereby victims of abuse were to appear in formal public inquiry setting, amendments have been made to the *Royal Commissions Act 1902* to

enable the appointed Commissioners to be able to receive information from those affected by child abuse at 'less formal private sessions'.

Indigenous peoples all over the world have suffered great injustices at the hands of colonising states and truth and reconciliation processes are one way of addressing the past and finding a path forward. However, it is critical in accessing just responses, that such processes are developed with the full participation of Indigenous peoples, that recommendations are taken seriously and actioned within appropriate timeframes, and that Indigenous peoples feel that they have received justice as a result.

Congress' recommendations to Expert Seminar on Access to Justice for Indigenous Peoples

Congress recommends that:

1. The *United Nations Declaration on the Rights of Indigenous Peoples* should be the foundational document for the development of all policies concerning First Peoples, including issues related to access to justice.
2. States develop programs for specific groups including Indigenous men, Indigenous women, Indigenous young people and Indigenous communities collectively to improve access to justice across the broad range of issues involved.
3. States review their national constitutions and legislation at the national, state and territory levels with a view to reflecting the rights of Indigenous Peoples, in particular freedom from discrimination.
4. States establish constructive agreements with Indigenous Peoples to advance self-determination and land rights, including development of their own lands, territories and resources.
5. States develop in conjunction with Indigenous Peoples just and fair procedures (including where appropriate Truth and Reconciliation Commissions) for the resolution of conflicts and disputes between the First Peoples and the State.
6. States take a strategic approach to crime and justice which is informed by standardised data collection and focused on prevention and diversion as well as protection and rehabilitation; and that States consider the adoption of Justice Reinvestment as a way of reducing incarceration of Indigenous peoples.
7. States provide appropriate financial and technical support for Indigenous organisations to provide legal services, including community legal education and policy and law reform advice; and ensure that non-Indigenous bodies and service providers respond appropriately to Indigenous justice needs.

APPENDIX 1

Congress' Justice Policy

Congress' Justice Policy was released in February 2013. The principles underpinning the policy are listed below.

Principles

Congress adopts the following principles to guide its national policy work on justice issues:

1. Justice issues for Aboriginal and Torres Strait Islander peoples in Australia must be understood within a historical context that has seen the law used as a tool of dispossession, oppression, family dislocation and racial discrimination.
2. Access to justice is a human right, underpinned by Australia's commitment and obligations under international human rights law and recognised by Commonwealth, State and Territory Governments in the National Indigenous Law and Justice Framework.
3. The removal of all forms of racial discrimination in laws, policies and practices is a precondition to achieving justice for Aboriginal and Torres Strait Islander peoples.
4. Strategies to address inequality in the criminal justice system must address the socio-economic determinants of crime and the factors that can make communities safer, with a strong emphasis on prevention, early intervention and diversionary approaches.
5. Aboriginal and Torres Strait Islander organisations must be preferred and provided with adequate funding and resources to deliver the services and programs needed to achieve just outcomes, including legal representation for Aboriginal and Torres Strait Islander people as needed, as well as access to appropriate early intervention and prevention programs.
6. Governments must be held accountable for progress, through the development of and monitoring against justice targets around the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system, in conjunction with a broad range of indicators measuring the determinants of justice affecting Aboriginal and Torres Strait Islander people.
7. Within a sector of limited resources, prevention, early intervention and diversionary strategies must be prioritised. Such strategies are essential to achieving better outcomes for Aboriginal and Torres Strait Islander peoples and it is within this context, that culture should be understood as a preventative measure.

8. Aboriginal and Torres Strait Islander cultures must be acknowledged and respected in the development and implementation of legislation and policy. It is also imperative that people working in the sector are sufficiently trained to work in a culturally sensitive way.
9. Governments must also acknowledge the diversity of Aboriginal and Torres Strait Islander peoples and ensure that national strategies are built on a foundation of equal partnerships between governments and Aboriginal communities, demonstrated at the local level through tailored, community-based solutions, led by local community people.
10. Congress will take an active approach to advocacy on national justice issues, supporting the work of member organisations.

Recommendations

Congress' proposes five key evidenced-based recommendations for national reform of the justice system in the Australian context, to respond to the experiences of Aboriginal and Torres Strait Islander peoples who come into contact with the Australian justice system.

The key recommendations are:

1. The Commonwealth Government and State and Territory Governments commit to **Justice Targets** included in a fully-funded Safe Communities National Partnership Agreement as part of the **Closing the Gap strategy**. This commitment should be incorporated into the National Indigenous Reform Agreement and supported by significant improvements to data collection regarding Aboriginal and Torres Strait Islander people within the justice system.
2. Funding for Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services must be increased, to allow them to respond to the full range of legal needs experienced by Aboriginal and Torres Strait Islander peoples. This should be supported by a new **National Partnership Agreement on Aboriginal and Torres Strait Islander Legal Assistance Services**.
3. Strategies for **prevention, early intervention and diversion** of Aboriginal and Torres Strait Islander people in the criminal justice system must be implemented. This is to be supported by the Safe Communities National Partnership Agreement and include **standardised national data collection** and pilots of **Justice Reinvestment** strategies in a number of prioritised communities.

4. **Conditions for Aboriginal and Torres Strait Islander people in police custody and prison** must be improved. To ensure compliance with human rights obligations, Australia must ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as well as develop the required National Preventative Mechanism.

5. The **Safe Communities** building block of the Closing the Gap strategy should be addressed through a fully funded Safe Communities National Partnership Agreement that incorporates Justice Targets and strategies for prevention, early intervention and diversion. This NPA must take a broad approach to community safety and must recognise the importance of leadership by Aboriginal and Torres Strait Islander communities and organisations.

The full text of Congress' Justice Policy is available at: <http://nationalcongress.com.au/wp-content/uploads/2013/02/CongressJusticePolicy.pdfz>