



12 March 2014

Expert Mechanism on the Rights of Indigenous Peoples
Office of the High Commissioner for Human Rights
Palais des Nations
CH-1211 Geneva 10
Switzerland

By email: expertmechanism@ohchr.org

Dear Madam/Sir

Contribution to the Expert Mechanism on the Rights of Indigenous Peoples study on access to justice

The Australian Human Rights Commission (the Commission) welcomes the Expert Mechanism on the Rights of Indigenous Peoples study on access to justice. The particular focus on Indigenous juridical systems and restorative justice highlights two areas of intervention that can greatly assist in access to justice for Aboriginal and Torres Strait Islander Australians. The Commission is also pleased to see the particular needs of Indigenous peoples with disability, women and young people recognized.

This contribution provides a snapshot of Aboriginal and Torres Strait Islander involvement with the justice system, current Indigenous juridical systems and restorative justice approaches in operation in Australia. It will also highlight specific work by the Commission around justice reinvestment and access to justice for Aboriginal and Torres Strait Islander people with disabilities.

1. Aboriginal and Torres Strait Islander peoples and access to justice

Aboriginal and Torres Strait Islander peoples are over represented as both victims and offenders in the justice system. Recent data shows:

- The national imprisonment rate for Aboriginal and Torres Strait Islander adults is 15 times higher than that for non-Indigenous adults.¹
- Aboriginal and Torres Strait Islander children are 25 times more likely to be in detention than their non-Indigenous counterparts.²

¹ Australian Bureau of Statistics, *Prisoners in Australia 2012* (2013), p 8. At

[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/24B61FAA213E5470CA257B3C000DCF8A/\\$File/45170_2012reissue.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/24B61FAA213E5470CA257B3C000DCF8A/$File/45170_2012reissue.pdf) (viewed 5 March 2014).

- The Aboriginal and Torres Strait Islander imprisonment rate has increased by 51.5% between 2000 and 2010. At the same time, the non-Aboriginal and Torres Strait Islander imprisonment rate has increased only marginally.³
- The rate of Aboriginal and Torres Strait Islander women in prison has grown by 58.6% between 2000 and 2010.⁴
- While criminal victimisation is difficult to measure, almost a quarter of Aboriginal and Torres Strait Islander people surveyed in the National Aboriginal and Torres Strait Islander Social Survey were victims of actual or threatened assault in the past 12 months.⁵

Aboriginal and Torres Strait Islander peoples face a number of barriers in access to justice arising from complex legal needs, issues around language, cross cultural barriers and social disadvantage.

Aboriginal and Torres Strait Islander Legal Services (ATSILS) are the cornerstone of access to justice services for Aboriginal and Torres Strait Islander peoples. ATSILS are funded by the Australian Government and provide culturally secure legal representation, legal education and advocacy for Aboriginal and Torres Strait Islander peoples.

Specialist legal support services for Aboriginal and Torres Strait Islander victims of family violence and abuse are provided by Family Violence Prevention Legal Services (FVLPS). The Australian Government also funds FVLPS.

Both ATSILS and FVLPS are well regarded in Aboriginal and Torres Strait Islander communities although they operate with limited funding. Proposed government funding cuts will further stretch the capacity of these services and may lead to greater unmet legal needs for Aboriginal and Torres Strait Islander peoples.

2. Indigenous juridical processes and restorative justice practices

Australian states and territories are primarily responsible for the administration of criminal justice. **Appendix A** provides a list of sentencing courts in each jurisdiction that have been adapted through the inclusion of Elders and Respected Persons, to be more culturally secure for Aboriginal and Torres Strait Islander peoples .

Evaluations of Indigenous sentencing courts have been limited but there is some evidence that Indigenous sentencing courts lead to a more culturally appropriate process and the role of Elders and Respected Persons has increased the participation of the community.⁶

² Australian Institute of Health and Welfare, *Youth Justice in Australia- An overview 2011-2012* (2013), p 10. At <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129543208> (viewed 5 March 2014).

³ SCRGSP (Steering Committee for the Review of Government Service Provision) 2011, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (2011), Productivity Commission, p 4.132

⁴ SCRGSP (Steering Committee for the Review of Government Service Provision) 2011, *Overcoming Indigenous Disadvantage: Key Indicators 2011* (2011), Productivity Commission, p 4.133

⁵ Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Social Survey 2008* (2010). At

<http://www.abs.gov.au/ausstats/abs@.nsf/Products/4720.0~2008~Main+Features~Safety,+crime+and+justice?OpenDocument> (viewed 5 March 2014).

⁶ E Marchetti, *Indigenous Sentencing Courts* (2009) Indigenous Justice Clearinghouse. At <http://www.indigenousjustice.gov.au/briefs/brief005.pdf> (viewed 5 March 2014)

Indigenous sentencing courts seem well established in some jurisdictions. However, it is disappointing that some courts have been recently abolished. For instance, Queensland abolished the Murri Court in 2012.

Restorative justice practices are used in all jurisdictions, predominantly as a diversionary measure for juvenile offenders through victim-offender conferences. **Appendix B** provides a list of current programs in all jurisdictions.

Most restorative justice practices in the criminal justice setting in Australia are not specifically targeted at Aboriginal and Torres Strait Islander peoples. There is scope for greater cultural security to be embedded in these practices to increase their accessibility for Aboriginal and Torres Strait Islander peoples.

3. *Justice reinvestment*

Since 2009, the Commission has led advocacy on justice reinvestment to address the over representation of Aboriginal and Torres Strait Islander people in the criminal justice system and related access to justice issues.

Justice reinvestment is a criminal justice policy approach that diverts a portion of the funds for imprisonment to local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested into services that address the underlying causes of crime in these communities.

Justice reinvestment was developed in the United States. Since 2006 the Council of State Governments Justice Centre has overseen implementation in 17 states.

While justice reinvestment approaches vary depending on the needs of communities, justice reinvestment does have a consistent methodology around analysis and mapping. This work is the basis for the justice reinvestment plan.⁷ Justice reinvestment approaches also require commitment to localism and budgetary devolution.⁸ Justice reinvestment is made possible by political bipartisan support.⁹

The success of justice reinvestment in the United States has been well documented.¹⁰ Moves to justice reinvestment are also underway in the United Kingdom.¹¹

The focus of the Commission's work on justice reinvestment has been around developing a research base to argue for justice reinvestment approaches for Aboriginal and Torres Strait Islander communities. Justice reinvestment has been the subject of recommendations in a number of government reports.¹² At a more local level, work is underway with the community

⁷ Council of State Governments Justice Center, <http://justicereinvestment.org/strategy> (viewed 14 February 2013).

⁸ D Brown, M Schwartz, L Boseley, 'The Promises of Justice Reinvestment,' *Alternative Law Journal* (2012) 37 (2) p 97.

⁹ D Brown, M Schwartz, L Boseley, 'The Promises of Justice Reinvestment,' *Alternative Law Journal* (2012) 37 (2) p 97.

¹⁰ Council of State Governments Justice Center, http://justicereinvestment.org/facts_and_trends (viewed 14 February 2013).

¹¹ D Brown, M Schwartz, L Boseley, 'The Promises of Justice Reinvestment,' *Alternative Law Journal* (2012) 37 (2) p 98.

¹² Senate Legal and Constitutional Affairs Committee, *Value of a justice reinvestment approach to criminal justice in Australia* (2013). At http://www.aph.gov.au/parliamentary_business/committees/senate_committees?url=legcon_ctte/completed_inquiries/2010-13/justice_reinvestment/report/index.htm (viewed 25 September 2013); House of

of Bourke, a remote community far western New South Wales, to develop options for a justice reinvestment trial.

4. Access to justice for Aboriginal and Torres Strait Islander peoples with disability

Aboriginal and Torres Strait Islander people with cognitive impairment,¹³ psychosocial disability, hearing impairment or other disability in the criminal justice system are by any measure some of the most vulnerable people in our community. The Commission has been active in advocating for access to justice for Aboriginal and Torres Strait Islander peoples with a disability.

Research has shown that Aboriginal and Torres Strait Islander young people with a cognitive impairment have earlier contact with police and progress more quickly to custody from this contact, compared to the non-Indigenous group.¹⁴

An area of significant concern is the use of indefinite detention. In some Australian jurisdictions,¹⁵ when people with cognitive impairment are found to be unfit to plead to criminal charges, they become subject to mental health legislation. The result for some Aboriginal and Torres Strait Islander people with cognitive impairment has been indefinite detention.

Recent research has noted that there are 20 Aboriginal and Torres Strait Islander people being held indefinitely in the Northern Territory and Western Australia.¹⁶

This indefinite detention of people with cognitive impairment is at the extreme end of the spectrum of barriers to access for justice for Aboriginal and Torres Strait Islander people with disabilities. More broadly we are seeing a criminalisation of care, where the criminal justice system is being used in the absence of adequate health and disability support services.

Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time, Time for Doing: Indigenous youth in the criminal justice system* (June 2011). At http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=atsia/sentencing/report.htm (viewed 25 September 2013); Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice* (April 2010). At <http://indigenousjustice.gov.au/db/publications/285011.html> (viewed 25 September 2013); Legal and Constitutional Affairs References Committee, *Access to Justice* (December 2009). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2008-10/access_to_justice/report/index.htm (viewed 25 September 2013).

¹³ In using the word 'cognitive impairment', I am referring to a 'range of disorders relating to mental processes of knowing, including awareness, attention, memory, perception, reasoning and judgement'. I include intellectual disabilities, learning disabilities, acquired brain injury, foetal alcohol spectrum disorders, dementia, neurological disorders and autism disorders.

¹⁴ E Baldry, L Dowse and M Clarence, *People with Intellectual and other Cognitive Disability in the Criminal Justice System*, NSW Family and Community Services, Ageing, Disability and Home Care (2012), p 4. At http://www.adhc.nsw.gov.au/_data/assets/file/0003/264054/Intellectual_and_cognitive_disability_in_criminal_justice_system.pdf (viewed 25 September 2013)

¹⁵ Detention can occur in prisons in Western Australia under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) and in the Northern Territory under the *Criminal Code Act 1983* (NT), Part IIA. Detention occurs in psychiatric hospitals in Queensland under the *Mental Health Act 2000* (Qld) and the *Forensic Disability Act 2011* (Qld) and in Tasmania under the *Tasmania Criminal Justice (Mental Impairment) Act 1999* (Tas).

¹⁶ M Sotiri, P McGee and E Baldry, *No End in Sight. The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment*, University of New South Wales (2012). At www.pwd.org.au/documents/project/2012ADJC-NoEndInSight.docx (viewed 11 March 2013).

The Commission recently released a report, *Equal Before the Law*, which addresses some of the barriers for access to justice for people with disabilities. It consulted with a range of Aboriginal and Torres Strait Islander people and organisations to capture their experiences, and possible solutions, to improve access to justice. This report is available at <http://www.humanrights.gov.au/publications/equal-law>.

The Commission has also established a database that will list services and programs to help people with disability to access the criminal justice system. The information will also be available to those who work with the criminal justice systems, so that they too can be aware of what options may be available to ensure people with disabilities can be assisted in seeking justice. The database is available at <http://www.humanrights.gov.au/our-work/disability-rights/current-projects/programs-and-services-assist-people-disability-criminal>

Thank you for the opportunity to contribute to the Expert Mechanism on the Rights of Indigenous Peoples study on access to justice.

If you require any further information, please contact Emilie Priday, Acting Principal Advisor in the Aboriginal and Torres Strait Islander Social Justice Team, Emilie.Priday@humanrights.gov.au

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a long horizontal flourish extending to the right.

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