

Expert Mechanism on the Rights of Indigenous Peoples  
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Item 5: Study on access to justice in the promotion and protection of the rights of Indigenous Peoples

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Joint Statement delivered by Shane Duffy on behalf of the National Aboriginal and Torres Strait Islander Legal Services and the National Congress of Australia's First Peoples.

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Thank you Mr Chairperson.

The National Aboriginal and Torres Strait Islander Legal Services and the National Congress of Australia's First Peoples (Congress) is pleased to present this statement on the *Study on access to justice in the promotion and protection of the rights of Indigenous Peoples*. Studies such as these provide a critical point of reference and authoritative guidance for States in their efforts to provide for and implement their obligations concerning the rights of Indigenous Peoples.

However, while we agree that the experience of Indigenous Peoples within the criminal justice system the world over requires urgent action, care needs to be taken not to confine States understanding of their responsibilities by limiting the expression or scope of these rights to one element or area of concern. For example, the Expert Group have re-affirmed the relevance of self-determination as being central to the realisation of all other rights; while the expression and relevance of cultural rights has been restricted in the Expert Groups Report to the application of the mainstream criminal justice system, access to courts, legal proceedings and sentencing. Cultural rights are central to the 'survival, dignity and well-being of Indigenous peoples' and access to justice more broadly, particularly as it relates to Indigenous governance.

Access to justice for Indigenous Peoples must be about how we can use both Indigenous and Western systems of justice to ensure the greatest possible quality of life for all Indigenous Peoples'.<sup>1</sup> This is highlighted at Article 5 of the Declaration on the Rights of Indigenous Peoples which affirms Indigenous Peoples right to maintain and strengthen our political, legal, economic, social and cultural institutions while retaining our right to also participate fully in the political, economic, social and cultural life of the State.

The Expert Mechanism Advice No. 5 also provides important guidance on the promotion and implementation of access to justice. It requires that common understandings of the best

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<sup>1</sup> National Congress of Australia's First Peoples, *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*, p 4. Available at: <http://nationalcongress.com.au/wp-content/uploads/2013/07/20130220CongressEMRIPSubmissionAccess-to-Justice.pdf> (accessed 1 July 2013).

means to attain access to justice be sought, in line with Indigenous Peoples rights to participate in decision-making processes. In Australia, Congress is working in partnership with the Australian Human Rights Commission to hold dialogues with Aboriginal and Torres Strait Islander communities, governments and industry stakeholders to raise awareness about the Declaration, and to develop common understandings about what the rights and principles contained within the Declaration mean in a practical sense and how they can be realised.

Developing these common understandings locally and internationally is essential to ensuring that mainstream systems of justice are accessible to and reliable mechanisms for Indigenous Peoples. Relying on mainstream Courts to uphold our rights becomes a high risk, particularly where there is no rigorous jurisprudence to rely upon in terms of adjudicating the rights of Indigenous peoples.

In this regard, further analysis is required on the relevance and interpretation of Articles 1 (4) and 2 (2) of the *Convention on the Elimination of All Forms of Racial Discrimination* and General Comment XXIII by the CERD. Particularly in interpreting the responsibility of States to provide special measures to address discrimination and achieve equality and access to justice for Indigenous Peoples. This analysis could also expand further on the *EMRIP Study on the right to participate in decision-making* and how this is practically applied to the development and implementation of special measures. This need is highlighted in the Australia context where the *Racial Discrimination Act 1975 (Cth)* lacks clarity on the implementation of special measures under CERD and the High Court have determined that while consultation (not free, prior and informed consent) is desirable it is not essential.<sup>2</sup>

The lack of clarity concerning the application of special measures has also impacted on the development of policy in Australia. While the Australian Government have reinstated the Racial Discrimination Act under its Stronger Futures Legislation in the Northern Territory, the potential for racial discrimination remains in its implementation, through a lack of involvement by Aboriginal and Torres Strait Islander Peoples in the design of policy and legislative responses, over policing, and a disproportionate impact on Aboriginal and Torres Strait Islander peoples.

Congress has engaged in policy dialogue with the Australian Government in addition to participating in strategic litigation to promote compliance with the standards under the human rights treaties that recognise and reinforce the rights of Aboriginal and Torres Strait Islander people, particularly those related to 'special measures' and free, prior and informed consent. We have also called on the Australian government to facilitate the restoration and strengthening of local governance and decision making structures to improve Aboriginal and Torres Strait Islander people's access to justice.

However, current State policies fail to recognise the complexity of issues including the historical context that has seen the law used as a tool of dispossession, oppression, family dislocation and racial discrimination.

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<sup>2</sup> *Aurukun* [80] (McMurdo P), [195]-[208] (Keane J), [249] (Phillipides J), *Morton* [31] (McMurdo P), [114] (Chesterman JA), [39] (Holmes JA agreeing).

As a result Aboriginal and Torres Strait Islander peoples across Australia are overrepresented in all contact with the justice system:

- Aboriginal and Torres Strait Islander adults are incarcerated at 15 times the rate of non-Indigenous adults.<sup>3</sup>
- The imprisonment rate for Aboriginal and Torres Strait Islander women has grown by 58.6% between the years 2000 to 2010, compared to 35.2% for Aboriginal and Torres Strait Islander men.
- Aboriginal and Torres Strait Islander children are 24 times more likely to be in youth detention than non-Indigenous young people.<sup>4</sup>
- In 2011-12, Aboriginal and Torres Strait Islander children were subjected to child protection substantiations at a rate of 41.9 per 1000<sup>5</sup>, nearly eight times that of non-Indigenous children. They are also ten times more likely to be in out-of-home care (comprising 31% of all children in care)<sup>6</sup>, despite making up only 4.2% of the population of all children and young people.<sup>7</sup> In addition to the rising rates, our children are increasingly being placed with non-Indigenous foster carers.
- We are more likely to be victims<sup>8</sup>, more likely to have contact with police, more likely to be charged with offences, more likely to be convicted of offences, and more likely to receive harsher sentences for offences, including receiving higher fines.
- We are less likely to receive police cautions, less likely to be receive sentences which are alternatives to incarceration, less likely to be granted parole once incarcerated, and less likely to receive access to rehabilitative and through care programs. The cycle then continues, with our people more likely to repeat offend.

Aboriginal and Torres Strait Islander peoples engagement with the criminal justice system and the child protection system is at critical levels. This is further heightened when Indigenous children in care and protection come into contact with the juvenile justice system and then in turn, the adult criminal justice system.<sup>9</sup>

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3 Australian Bureau of Statistics, Prisoners in Australia 2012, Cat no 4517.0. At: <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0> (accessed 27 March 2013).

4 Australian Institute of Health and Welfare (AIHW). (2011). *Juvenile Justice in Australian 2010-11*, Juvenile Justice Series no. 10, Cat No JUV 10, p7.

5 Australian Institute of Health and Welfare (AIHW) (2013), *Child Protection Australia 2011-12*, in AIHW (Ed.), *Child Welfare Series no. 55*, Canberra: AIHW, p17.

6 Australian Institute of Health and Welfare 2011, Fact Sheet: 'Child protection and Aboriginal and Torres Strait Islander Children'. At <http://www.aifs.gov.au/cfca/pubs/factsheets/a142117/index.html> (viewed 01 March 2013).

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

8 Productivity Commission 2011: *Overcoming Indigenous Disadvantage: Key Indicators 2011*, Productivity Commission, Canberra. At: [http://www.pc.gov.au/data/assets/pdf\\_file/0018/111609/key-indicators-2011-report.pdf](http://www.pc.gov.au/data/assets/pdf_file/0018/111609/key-indicators-2011-report.pdf) (accessed 01 March 2013).

Where Aboriginal and Torres Strait Islander people 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. While Aboriginal and Torres Strait Islander people have access to legal services including those provided by the National Aboriginal and Torres Strait Islander Legal Services and state and territory based affiliates, these services are severely underfunded and limited in their capacity to respond to the diversity of needs.<sup>10</sup>

Innovative responses such as those based on restorative justice and justice reinvestment models developed in partnership with Indigenous Peoples and in accordance with the Declaration on the Rights of Indigenous Peoples are necessary to improve access to justice for Indigenous Peoples. Commitment by States to reduce the critical levels of Indigenous incarceration and engagement with the criminal justice system is also urgently required.

## RECOMMENDATIONS

In addition to the recommendations provided in our Submission to the Expert Seminar<sup>11</sup>, Congress recommends that:

1. The Human Rights Council continue to uphold the *United Nations Declaration on the Rights of Indigenous Peoples* as the foundational document for the development of all policies concerning Indigenous Peoples, including issues related to access to justice.
2. The Human Rights Council request the Expert Mechanism on the Rights of Indigenous Peoples to extend the *Study on access to justice in the promotion and protection of the rights of Indigenous Peoples* to include a practical analysis of Articles 1 (4) and 2 (2) of the *Convention on the Elimination of All Forms of Racial Discrimination* and General Comment XXIII by the CERD as it relates to special measures and the requirement to obtain free, prior and informed consent.
3. The Human Rights Council encourage States to take a strategic approach to crime and justice which is informed by standardised data collection and focused on

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<sup>9</sup> While no nationally collated data exists within Australia, in Queensland for example, it has been found that 54 per cent of Indigenous males, and 29 per cent of Indigenous females, involved in the child protection system go on to criminally offend both as juveniles and adults Anna Stewart, *Transitions and Turning Points: Examining the Links Between Child Maltreatment and Juvenile Offending* (2005) Office of Crime Statistics and Research. At: [www.ocsar.sa.gov.au/docs/other\\_publications/papers/AS.pdf](http://www.ocsar.sa.gov.au/docs/other_publications/papers/AS.pdf) (viewed 6 July 2013).

<sup>10</sup> National Congress of Australia's First Peoples, *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*, p 34. Available at: <http://nationalcongress.com.au/wp-content/uploads/2013/07/20130220CongressEMRIPSubmissionAccess-to-Justice.pdf> (accessed 1 July 2013).

<sup>11</sup> National Congress of Australia's First Peoples, *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*, p 43. Available at: <http://nationalcongress.com.au/wp-content/uploads/2013/07/20130220CongressEMRIPSubmissionAccess-to-Justice.pdf> (accessed 1 July 2013).

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.

4. The Human Rights Council encourage States to 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.