



**Expert Mechanism on the Rights of Indigenous Peoples
6th Session Palais des Nations, Geneva 8 – 12th July, 2013.**

Study on Access to Justice for Indigenous Peoples including Truth and Reconciliation Processes

INTERVENTION by the New South Wales Aboriginal Land Council, delivered by Councillor Tina Williams, Councillor for the North Coast Region, and member of the Bundjalung Peoples

Thank you Mister Chairman.

The New South Wales Aboriginal Land Council welcomes the opportunity to contribute to the Expert Mechanism's study on Access to Justice for Indigenous Peoples, and we pay our respect to the Elders and Ancestors of these lands and of the world's Indigenous Peoples.

The New South Wales Aboriginal Land Council believes it is a responsibility of all member States to ensure that all individuals enjoy the rights to fairness and equality within the state justice system, a basic right outlined in a number of international instruments including the Universal Declaration of Human Rights (UDHR) and the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). The right to equal access to and equality before the law is fundamental for the protection of other human rights, and must guide government policy when dealing with matters of criminal justice.

We acknowledge the Expert Mechanism's implementation of the recommendation to appoint a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, to ensure accountability, serve justice, provide remedies to victims, and promote healing and reconciliation and we note the importance of the Declaration as the foundation for the promotion and protection of Indigenous Peoples' rights.

While the Declaration does not strictly have any legally binding force, it is a significant instrument that establishes a framework for the human rights that already exist in international law and their specific application to Indigenous Peoples. In this respect, the Declaration has significant moral force and represents an important standard for the treatment of Indigenous Peoples around the world.

Despite significant support, we note that a wide gap continues to exist between the promises of the Declaration and its application on the ground, noting specifically the lack of access to justice and the failure to ensure protection of Indigenous peoples' rights and to the appropriate remedies for those acts that have violated our fundamental rights.

The New South Wales Aboriginal Land Council is aware that the relationship between Aboriginal and Torres Strait Islander Peoples and the criminal justice system in Australia is a complex one that is

deeply impacted upon by historical circumstances, including past government policies of dispossession, child removal and explicitly racist actions of previous Australian Governments.

We further note that the over representation of Aboriginal and Torres Strait Islander Peoples in Australia's prison system has been well documented. This over-representation in the criminal justice system is a national shame that must be addressed. We are also mindful that there remains a legacy of inherent distrust between the Aboriginal community and police, welfare and other government agencies as a consequence of past practices.

As has been experienced in many colonised countries, Aboriginal and Torres Strait Islander Peoples in Australia have had a system of law imposed on them and were and continue to be effected by the lack of recognition of Aboriginal Customary Laws. Compounding on the impacts of invasion, Aboriginal and Torres Strait Islander Peoples faced decades of systemically entrenched disadvantage and racially perverse policies.

The imposed legal system and those empowered to enforce the system in the front line has created a legacy of distrust, a racial hierarchy and a relationship dynamic of discrimination and repression. It is therefore logical to understand Indigenous communities' resistance to the authority enacted by the police forces.

Barriers that exist for Aboriginal and Torres Strait Islander Peoples accessing appropriate legal assistance including long-term distrust of the legal system, lack of awareness and cultural insensitivity and lack of appropriate services particularly for women and children reinforces the need for a concerted, holistic approach to addressing the combined impacts of the underlying social, cultural and legal factors leading to Aboriginal and Torres Strait Islander Peoples contact with the criminal justice system.

In conclusion, the United Nations Human Rights Committee in 2009 urged Australia to establish a national compensation scheme to make adequate reparations to the generations of Aboriginal and Torres Strait Islander peoples separated from their families and their culture as a result of discriminatory and damaging policies of past Governments known as the Stolen Generation. However, despite this recommendation and the existence of inadequate schemes in most States and Territories, a National scheme has not been established.¹

In failing to provide a non-adversarial alternative through which the members Stolen Generations can seek compensation, the Australian Government is implicitly not complying with the spirit and practice of reconciliation that the Government espoused in the national apology delivered by the Prime Minister in 2008.

It is unacceptable with such extensive research and analysis that has led to sound and robust recommendations by Indigenous Peoples that consecutive Governments fail to implement and

1 Human Rights Committee (2009) Concluding Observations of the Human Rights Committee on Australia. <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>.

resource such advice. So much so, that we are now facing a crisis where imprisonment rates continue to increase decades later.

States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that the rights of Indigenous peoples are fully recognised.

RECOMMENDATIONS

Accordingly, the New South Wales Aboriginal Land Council respectfully makes the following recommendations to the Expert Mechanism on the Rights of Indigenous Peoples:

- Urge all states take, in consultation with Indigenous peoples, all steps within their capacity to comply with and enforce international human rights instruments to which they are a signatory with respect to the human rights and access to justice of Indigenous peoples. Special measures must be adopted to address the significant disadvantage of Indigenous women and youth,
- Urge all States to reform all laws and policies to improve and rapidly reduce the imprisonment rates of Indigenous peoples such as independent inspections of all places of detentions such as the model of National Preventative Mechanisms that are required to be established on ratification and implementation of the Optional Protocol to the Convention Against Torture (CAT – **Optional Protocol**),
- Urge all states to develop a broad agenda to reset the relationship with Indigenous and non-Indigenous Australia, in negotiation with Aboriginal and Torres Strait Islander Peoples. Negotiations should be based on the principles contained in the UN Declaration on the Rights of Indigenous Peoples
- Urge all states provide adequate funding to Legal Aid mechanisms and structures to enable them to provide appropriate services to Indigenous peoples and communities, to improve the quality and relevance of justice that Indigenous people receive,
- Urge all states to develop culturally based programs and program delivery models that address the criminal, behavioural, social and emotional needs of juveniles through Indigenous engagement and by exploring alternative to custody and remand to address the needs of Indigenous youth in detention.
- Urge all states to develop Indigenous diversion and intervention strategies to target specific offences and offending behaviours at each intervention point in the criminal process; developing options for Indigenous community-controlled alternatives to prison and juvenile detention to reduce offending the number of Indigenous peoples proceeding through the criminal justice system.

- Urge all states establish through appropriate remedial processes, reparations tribunals to provide redress to Indigenous peoples and communities affected by discriminatory government policies.